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Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family

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Reclaiming the "Creatures of the State":
Contracting for Child Custody
Decisionmaking in the
Best Interests of the Family

E. Gary Spitko*

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The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.¹

I. Introduction: The Utility of Child Custody and Visitation Arbitration

In May of 1855, the abolitionist and feminist Lucy Stone married fellow anti-slavery activist Henry B. Blackwell.² Lucy Stone long had been reluctant to assume the legal position of wife with its attendant legal disadvantages.³ Most notable among these disadvantages were the husband's right to ownership and control of the wife's property and his right to exclusive control and guardianship of the couple's children.⁴

³ See id. at 39-41 (reproducing letter of Lucy Stone to Henry Blackwell protesting that "[t]he rascally statement that a legitimate child belongs to the father in preference to its mother, is a simple fact of law to which a legal marriage degrades every such mother"); id. at 73-77 (providing letter of Henry Blackwell to Lucy Stone attempting to overcome Stone's opposition to marriage because of its subordination of wife); id. at 80-81 (presenting letter of Lucy Stone to Henry Blackwell stating that her "horror of being a legal wife" will prevent her from marrying him despite her love for him); id. at 108-11 (showing letter of Henry Blackwell to Lucy Stone acknowledging pain that she experiences "at the idea of being placed in the legal position of wife").
At the couple’s wedding ceremony, Henry Blackwell protested against “such of the present laws of marriage, as refuse to recognize the wife as an independent, rational being, while they confer upon the husband an injurious and unnatural superiority.” Blackwell further spoke of the couple’s desire to opt out of this subordinating law:

We believe that personal independence and equal human rights can never be forfeited, except for crime; that marriage should be an equal and permanent partnership, and so recognized by law; that until it is so recognized, married partners should provide against the radical injustice of present laws, by every means within their power.

We believe that where domestic difficulties arise, no appeal should be made to legal tribunals under existing laws, but that all difficulties should be submitted to the equitable adjustment of arbitrators mutually chosen.

In an effort to order their lives together according to their cherished egalitarian ideal, Stone and Blackwell agreed, prior to their marriage, that if they ever should separate after their marriage, they would submit any unresolved legal issues arising from their separation, including the question of custody of any children that they might have together, to a tripartite arbitration panel. This panel would consist of one arbitrator selected by Stone, one arbitrator selected by Blackwell, and a third arbitrator selected by the two party-appointed arbitrators. Stone and Blackwell further agreed that the

5. LOVING WARRIORS, supra note 2, at 135; see also PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 42-49 (1997) (relating stories of several nineteenth-century couples who included in their marriage ceremony express rejection of those laws governing married couple that subordinated wife).

6. LOVING WARRIORS, supra note 2, at 136.

7. See id. at 85 (reproducing letter of Henry Blackwell to Lucy Stone in which Blackwell states that their contract will be protest against laws currently favoring husbands over wives in marriages); id. at 109-10 (providing letter of Henry Blackwell to Lucy Stone discussing proposed contract to entrust issue of custody of any children in event of dissolution of marriage to arbitrators); id. at 123 (showing letter of Lucy Stone to Henry Blackwell in which Stone states her intention to prepare “a form” to protest current laws regarding women and marriage); id. at 136 (presenting copy of Stone-Blackwell wedding protest which states that, in case of marital difficulty, both Stone and Blackwell want their issues decided not by court of law, but by “arbitrators mutually chosen”).

8. See id. at 109 (providing letter of Henry Blackwell to Lucy Stone discussing manner of choosing three arbitrators).
arbitrators would resolve any such disputes in accordance with principles that equalized the legal position of husband and wife.9

The story of Lucy Stone and Henry B. Blackwell suggests the potential utility of arbitration for those who wish to avoid or to dismantle subordinating law that they feel does not well serve them.10 Arbitration might serve these functions in several ways. First, arbitration might provide a safe harbor from biased decisionmaking or dysfunctional law for those whose core religious, political, or social values or beliefs differ significantly and meaningfully from relevant majoritarian norms.11 Arbitration allows the parties to an adjudication to designate a decisionmaker who understands and accepts their relevant values and beliefs. Arbitration also allows the parties to tailor legal standards to reflect the realities of their lives. In this way, arbitration might serve as a bulwark against state standardization in matters of personal autonomy.

Second, arbitration might serve as a laboratory for the development of procedural and substantive reforms of dysfunctional laws.12 Through arbitration, the parties to a dispute might opt out of the public court systems’ default laws that they believe do not serve them well, and replace such dysfunctional laws with legal standards that they consider more appropriate. By demonstrat-

9. See id. at 109-10 (presenting letter of Henry Blackwell to Lucy Stone explaining that "the right to control children [is] to be decided by arbitrators — one each selected by you & me & one selected by them"); id. at 115-16 (showing letter of Henry Blackwell to Lucy Stone explaining Blackwell's pledge to refuse to accept and utilize privileges that law confers upon husband but refuses to confer upon wife); id. at 123 (reproducing letter of Lucy Stone to Henry Blackwell stating Stone's intention to have agreement for their marriage that covers all possible disagreements between them); id. at 135-36 (noting "protest" agreed upon by both Lucy Stone and Henry Blackwell to govern their marriage which stated that "all difficulties should be submitted to the equitable adjustment of arbitrators mutually chosen").


12. Spitko, supra note 10, at 1077-83; see also Ware, supra note 11, at 746-47 (commenting that arbitration allows for "a process of experimentation in which lawmakers learn from each other and copy laws which seem better").
ing the merit of such alternate standards for their particular circumstances, the parties provide a model for public reform of the dysfunctional default laws.

Third, and relatedly, arbitration might serve to lessen resistance in the general population to public reforms of dysfunctional laws by habituating the majority to the realities of the lives of cultural minorities and to the notion that alternative particularized laws are both practical and of great utility for cultural minorities. Professor Martha Ertman has advanced this general idea with respect to the enforcement of cohabitation contracts entered into by gay and lesbian domestic partners. She theorizes that cohabitation contracts might serve an habituating function leading to progressive reforms favoring gay and lesbian couples who are presently denied both the right to marry and the benefits that derive from the status of being married.

Professor Ertman points out that as long as a contract is not against public policy, judicial enforcement and interpretation of the contract generally is "informed by a hands-off rhetoric" that is not especially responsive to majoritarian morality. That is to say, a court is supposed to enforce the contract even if the court views the agreement as promoting immorality. Professor Ertman hypothesizes that as more and more gay and lesbian couples enter into cohabitation contracts and as courts more commonly enforce these contracts, society, which presently denies public rights to gay and lesbian couples, is likely to become habituated to the reality of the existence of gay and lesbian couples and to the notion that such couples have legal rights. This habituation, in turn, might lead society to grant public rights (perhaps including state-sanctioned marriage) to gay couples. Similarly, arbitration contracts that provide for the resolution of disputes between minority-culture


15. Id. at 1151; see also id. at 1144 (noting that "[a]s long as the contract is not against public policy, judges generally do not second-guess the contractual intentions of two or more consenting adults").

16. See id. at 1151, 1157 ("Contract rhetoric that a judge should enforce the parties' actual intent regardless of the judge's subjective view of the moral valence of their intent further protects gay people who seek to fill statutory gaps through contract.").

17. See id. at 1140 (noting that "society may get used to gay couples by increased exposure through courts enforcing gay cohabitation contracts").

18. See id. (arguing that use of cohabitation contracts by gays "may in turn lead society to grant gay people public rights"); id. at 1154 (noting that use of cohabitation contracts by gays may be "an essential step in the process of obtaining public rights"); id. at 1165 (explaining that enforcement of "gay-related contracts is an incremental move that . . . will ultimately benefit gay people because it contributes to the social construction of gay people as legal persons").
litigants according to legal standards that are responsive to the particular relevant circumstances of the minority-culture litigants' lives might habituate the majority to those circumstances and lessen resistance to public reforms of laws that are dysfunctional with respect to those outside of the majority.

Child custody and visitation disputes are one category of conflict for which arbitration would seem to be particularly useful in enabling the participants – here, the parents – to avoid and dismantle dysfunctional law in several ways. In our diverse society, reasonable people are certain to disagree as to the appropriate values that parents should instill in their children. Child custody and visitation arbitration has the virtue (some might say the vice) of allowing parents to choose the values that shall govern the decisionmaker's resolution of their custody dispute. Just as Lucy Stone and Henry B. Blackwell sought in 1855 to use arbitration to opt out of a law of custody that disadvantaged the wife and mother in a way that offended the couple's values, modern families also might use arbitration to opt out of custody laws that fail to reflect the values or beliefs of the family, or that otherwise fail to reflect the realities of their family structure.

Consider, for example, the situation of a lesbian couple who wish to begin to co-parent a child. They might together bring the child into the

19. See Stephen O. Gilles, Hey Christians, Leave Your Kids Alone!, 16 CONST. COMMENT. 149, 177 (1999) (commenting that "there is no consensus on which practices will maximize children's well-being over the course of their lifetimes"); Robert H. Mnookin, Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 230, 260-62 (noting lack of societal consensus as to values that serve best interests of child); see also Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998) (concluding that it is not in best interest of children to live with gay parent who is sexually active in home). The court concluded that activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material [pictures of "drag queens"] in the home and [the father's gay partner]'s taking the children out of the home without their father's knowledge of their whereabouts support the trial court's findings of "improper influences" which are "detrimental to the best interest and welfare of the two minor children."

Pulliam, 501 S.E.2d at 904.

20. Although this Article focuses on the example of a lesbian co-parented family to illustrate the utility of child custody and visitation arbitration for overcoming dysfunctional law and for the purpose of critiquing the present dominant judicial approaches to enforcement of arbitration agreements and awards for child custody and visitation, custody arbitration's utility for avoiding and overcoming dysfunctional law is not limited to "non-traditional" families. Indeed, a common fact pattern with which courts have been presented in cases testing the enforceability of arbitration agreements and awards for child custody involves a traditional
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world through artificial insemination of one of them, or they might adopt into their family a child unrelated by blood to either of them. Should this planned lesbian family fracture at some point during the minority of the child, the family might find itself entangled in a legal system ill-suited to resolve any custody or visitation disputes arising from the breakdown of their non-traditional family.

In many jurisdictions, the law will not recognize the claim that a child has two mothers or two fathers. The dominant approach to primary parental
rights derives such rights from a biological or adoptive relationship to the child or a legal marriage to a person who is legally recognized as the parent of the child.\textsuperscript{23} Especially in jurisdictions that refuse to allow same-sex co-parent adoptions,\textsuperscript{24} such an approach to parental rights is presumptively dysfunctional for a lesbian couple. Biological co-parentage of the child by the lesbian couple is, at present, a physical impossibility, and a state-recognized marriage of the biological mother and her same-sex partner is, to date, a legal impossibility.\textsuperscript{25} Under such a regime, therefore, only one of the co-parents

\textsuperscript{23} See Barbara J. Cox, Love Makes a Family — Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families, 8 J.L. & Pol. 5, 6-7 (1991) (noting that parental bonds within "alternative families" often do not receive legal recognition and that "[t]hose parental relationships within alternative families that have received limited recognition are either based on a biological connection with the child or a marital relationship with the biological parent"); Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev. 835, 882-84 (2000) (discussing law of parental status, including importance of biological parentage and marital presumption of legitimacy); see also Uniform Parentage Act § 4(a), 9B U.L.A. 298-99 (1987) (creating presumption that man is father of child if child is born during man’s marriage to child’s mother, or if man marries child’s mother and man has sufficiently acknowledged child to be his); id. at § 5 (providing that husband who consents to his wife’s artificial insemination with sperm of another man and under supervision of licensed physician, is legal father of child thereby conceived); Michael H. v. Gerald D., 491 U.S. 110, 125-30 (1989) (upholding against constitutional challenge California’s legislative preference granting paternity rights in favor of husband of child’s mother at time of child’s conception over putative biological father).

\textsuperscript{24} See In re Angel Lace M., 516 N.W.2d 678, 683 (Wis. 1994) (holding that proposed adoption by lesbian co-parent of her partner’s biological child was prohibited by Wisconsin’s adoption statute, even though trial court had found that adoption would be in best interests of child, because biological mother’s parental rights had not been terminated). But see Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993) (interpreting Massachusetts’s adoption statute as allowing lesbian couple to adopt natural child of one of them without termination of natural mother’s legal relationship with child); In re Jacob, 660 N.E.2d 397, 404-06 (N.Y. 1995) (interpreting New York’s adoption law as allowing natural mother’s lesbian partner to adopt her child without requiring termination of natural parent’s parental rights where natural parent has consented to adoption and has agreed to retain parental rights and to raise her child jointly with her lesbian partner); Adoption of B.L.V.B., 628 A.2d 1271, 1275 (Vt. 1993) (holding that Vermont’s adoption statute allows biological mother’s child to be adopted by mother’s lesbian partner even without termination of biological mother’s parental rights because, inter alia, "[t]o deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest"); see also Act of June 1, 2000, Pub. Act No. 00-228 (to be codified at Conn. Gen. Stat. Ann. §§ 45a-724(a)(3) & 45a-731(5)) (legislatively overruling In re Adoption of Baby Z., 724 A.2d 1035, 1055-56 (Conn. 1999), which had interpreted Connecticut’s adoption statute as not allowing lesbian co-parent to adopt her partner’s biological child unless biological mother first relinquished her parental rights); Vt. Stat. Ann. tit. 15A, § 1-102(b) (1989 & Supp. 2000) (codifying holding of Adoption of B.L.V.B. by allowing parent’s partner to adopt her or his child without termination of that legal parent’s parental rights).

\textsuperscript{25} See Ettelbrick, supra note 22, at 516-19 (making this point and urging that realities of lesbians’ lives be taken into account in developing family law system).
may enjoy the legal status of parent. This failure of the law to recognize both lesbian co-parents as legal parents of the child disserves the family in numerous ways, including denying the non-legal parent the legal authority to make important decisions for the child, denying the child the right to qualify for certain benefits through the non-legal parent,26 and denying both the child and the non-legal parent the right to inherit under intestacy statutes from or through each other.27

In the event of a fracture of the relationship between the co-parents, the law might continue to disserve greatly both the non-legal co-parent and the child. In many jurisdictions, the non-legal co-parent will be without standing to petition for custody or even visitation rights with respect to the child.28


28. See e.g., Guardianship of Z.C.W. and K.G.W., 84 Cal. Rptr. 2d 48, 50 (Ct. App. 1999) (concluding that "[t]he Legislature has not conferred upon . . . a nonparent in a same-sex bilateral relationship, any right of custody or visitation [with respect to the child she has co-parented with her lesbian partner] upon termination of the relationship"); Kazmierazak v. Query, 736 So. 2d 106, 106, 110 (Fla. Dist. Ct. App. 1999) (finding that lesbian co-parent, who alleged that she had become psychological parent of child whom she had jointly raised with her former partner, "lacks standing to seek custody or visitation of [her former partner]'s biological child against [the biological mother's] wishes"); Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991) (stating that lesbian co-parent lacked standing to petition for custody or visitation of child with whom she had developed "close and loving relationship"); Ronald FF. v. Cindy GG., 511 N.E.2d 75, 76-77 (N.Y. 1987) (explaining that court may not grant visitation rights with respect to child to man who, although he had acted as father to child, was not child's biological father, when child's mother had custody of child and no "compelling State purpose which furthers the child's best interests" had been shown); In re Custody of H.S.H.-K., 533 N.W.2d 419, 423 (Wis. 1995) (stating that person who is not biological or adoptive parent of child has no standing to bring action for custody of child unless child's biological or adoptive parent is unfit or there otherwise are compelling reasons for granting custody to non-parent); Unf. Marriage & Divorce Act § 401(d), 9A U.L.A. 550 (1987) (providing that non-parent may petition for custody of child only if child is not in physical custody of one of her parents). But see E.N.O. v. L.M.M., 711 N.E.2d 886, 889-93 (Mass. 1999) (stating that probate court has equity jurisdiction to grant visitation rights to lesbian co-parent who has acted as "de facto" parent to child — that is — to one who has "reside[d] with the child and, with the consent and encouragement of the legal parent, perform[ed] a share of the caretaking functions at least as great as the legal parent"); cert. denied, 120 S. Ct. 500 (1999); V.C. v. M.J.B., 748 A.2d 539,
Even in a jurisdiction that allows the non-legal parent to petition for custody or visitation rights, the non-legal parent might still be disadvantaged by substantive rules of custody and visitation decisionmaking that favor the legal parent in any contest with a non-parent. For example, the non-legal co-parent might have to demonstrate the unfitness of the legal co-parent or some

554 (N.J. 2000) (noting that lesbian co-parent who demonstrates that she has become psychological parent to child "stands in parity with the legal parent" with respect to child custody and visitation issues, although "[t]he legal parent’s status is a significant weight in the best interests balance"), cert. denied, 121 S. Ct. 302 (2000); A.C. v. C.B., 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (finding that child visitation provisions of co-parenting agreement between legal mother and non-legal co-parent are enforceable if such agreement is in best interests of child); Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 681-82 (App. Div. 1998) (distinguishing Ronald FF. and Alison D. and finding mother to be equitably estopped from denying her husband’s right to seek custody and visitation of her child where mother had held her husband out to be child’s father for seven years and where husband had developed strong parent/child relationship with child); In re Custody of H.S.H.-K., 533 N.W.2d 419, 434-47 (Wis. 1995) (explaining that court may exercise its equitable powers to grant lesbian co-parent visitation rights with respect to child whom she had jointly parented with her former lesbian partner if it concludes that co-parent had parent-like relationship with child and "significant triggering event justifies" state intervention in the child’s relationship with the biological or adoptive parent).

The American Law Institute’s Principles of the Law of Family Dissolution grant to a "parent by estoppel" and to a qualifying "de facto parent" the standing to bring an action for custodial or decisionmaking responsibility with respect to a child. A de facto parent qualifies only if she has lived with the child within the six-month period immediately preceding the filing of the action or consistently has maintained or attempted to maintain a parental relationship with the child since residing with the child. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.04(1)(b) & (c) (Tentative Draft No. 4, 2000). Under the Principles, a parent by estoppel is an individual who, though not a legal parent, has lived with the child since the child’s birth or for at least two years and, as part of an agreement with the child’s parent or parents, has held herself out as a parent and has accepted full and permanent parental responsibilities. In addition, the court must find that treating such a person as a parent by estoppel is in the child’s best interests. Id. at § 2.03(1)(b)(iii) and (iv). A de facto parent is an individual who, though not a legal parent or a parent by estoppel, for a period of at least two years has lived with the child and for primarily non-financial reasons has regularly performed either a majority of the caretaking functions for the child or at least as great a share of those functions as the parent with whom the child primarily lived performed. In addition, for an individual to qualify as a de facto parent, the individual must have so acted either with the agreement of the child’s legal parent or as a result of the legal parent’s complete failure or inability to perform caretaking functions for the child. Id. at § 2.03(1)(c).

29. See e.g., J.A.L. v. E.P.H., 682 A.2d 1314, 1318-19 (Pa. Super. Ct. 1996) (stating that custody contestant who is not legal parent of child she and her former partner had co-parented enjoys standing to petition for custody of child, but faces "increased burden of proof" as non-parent contesting custody against parent); see also Naomi R. Cahn, Reframing Child Custody Decisionmaking, 58 OHIO ST. L.J. 1, 14-17, 35-47 (1997) (discussing ways in which determination of who qualifies as parent influences child custody adjudication); John DeWitt Gregory, Blood Ties: A Rationale for Child Visitation by Legal Strangers, 55 WASH. & LEE L. REV. 351, 351-52 (1998) (reviewing state of law with respect to non-parental child visitation and concluding that "[m]ore often than not, natural parents successfully resist assertions of child visitation rights by legal strangers such as stepparents and so-called lesbian ‘coparents’").
likelihood of harm to the child before the court will consider awarding custody to the non-legal co-parent. These legal principles not only disadvantage the non-legal co-parent, but also risk harm to the child by denying the child the stability of a continuing relationship with both of her mothers without any justification related to the quality of the non-legal co-parent’s performance of her parental duties.

30. See e.g., Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216 (1991) (explaining that custody may be awarded to non-parent who qualifies as "de facto parent" only "if it is established by clear and convincing evidence that parental custody is detrimental to the children"); Teegarden v. Teegarden, 642 N.E.2d 1007, 1008 (Ind. Ct. App. 1994) ("While Indiana courts can award custody of a child to someone other than the parents, such awards are usually made only following a determination that the parents are either unfit or have all but abandoned the child to the care of that third person."); In re Marriage of Hruby, 748 P.2d 57, 58, 64-65 (Or. 1987) (en banc) (noting that aunt who had raised child for several years and since shortly after child’s birth had standing to petition for custody of child, but child’s father was entitled to custody absent showing of "compelling reasons" for granting custody to non-parent).


the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing to assume the majority of custodial responsibility unless... the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions... or... the available alternatives would cause harm to the child.

Id. § 2.21(1)(a). In such circumstances, a de facto parent still may obtain an allocation of custodial or decisionmaking authority, but such an allocation must not be greater than the allocation to the legal parent or parent by estoppel. Id. Also, the Principles call for a court to deny an allocation of custodial or decisionmaking authority to a de facto parent if, in light of the number of other adults to be allocated such authority, an allocation to the de facto parent would be "impractical." Id. § 2.21(1)(b). Finally, the Principles provide that a legal parent and a parent by estoppel, but not a de facto parent, ordinarily are entitled to a presumptive allocation of custodial responsibility. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 209(1)(a) (Tentative Draft No. 3, Part I, 1998).

31. See JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 28-42 (1979) (advocating principle of minimum state intervention in child/caretaker relationship, that should apply not only to legal parents but also to non-parent long-term caretakers, given "crucial bonds" that develop between child and her long-term caretaker and given harm likely to result from disruption of such bonds); Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879, 902 (1984) ("Vigorous debate rages over how a child develops, what is in a child’s best interests, and how to achieve certain objectives on behalf of a child. Near consensus does exist, however, for the principle that a child’s healthy growth depends in large..."
Arbitration might enable the lesbian couple to "provide against the radical injustice of present laws" that deny an equal opportunity for both co-parents to establish custody and visitation rights upon the fracture of their relationship. As early as prior to the birth or adoption of their child into their family, the co-parents might agree to be bound, in the event of a fracture of their relationship, by an arbitration agreement governing any potential custody or visitation dispute with respect to their child. Such an agreement might require the co-parents to arbitrate any such custody or visitation dispute before an arbitrator of their choice who shall use rules of standing and substantive standards that do not privilege a legal co-parent over a non-legal co-parent on the basis of her status as a legal parent.\(^\text{33}\)

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32. **LOVING WARRIORS**, supra note 2, at 136.

33. In circumstances where a parent who is not a party to the co-parenting agreement retains custody or visitation rights with respect to the child (for example, where a father of a child of one of the lesbian partners has retained his parental rights), the ability of the co-parents to contract for custody and visitation rights or for arbitration of such rights might be limited. The situation is similar to the case of a mother and legal step-father who wish to contract for custody rights in favor of the step-father with respect to his step-child, but where the father of the child has retained his parental rights. In each case, the contracting parties will not be able to contract in such a way that impairs the rights of the non-contracting parent. See, e.g., CAL. FAM. CODE § 3101(a) & (e) (West 1994 & Supp. 2000) (providing that court may grant reasonable visitation rights to stepparent, but not if such award of visitation to stepparent would conflict with visitation or custodial rights of "a birth parent who is not a party to the proceeding"); \(\text{In re A.R.A.}\), 919 P.2d 388, 391-92 (Mont. 1996) (holding that father is entitled to custody of his child, absent abuse or neglect by father, when custodial mother has passed away, even though mother had named stepfather as child’s guardian in her will); \(\text{Carr v. Prader}\), 725 A.2d 291, 295-96 (R.I. 1999) (holding that family court may grant permanent guardianship over child to non-parent nominated by child’s late mother, over objection of surviving father, only if father’s consent has been made unnecessary by termination of his parental rights). Indeed, even in a state that allows second-parent adoptions, the adoption might be precluded if the

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Peggy C. Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 354-62 (1996) (summarizing recent social science research on child attachment which supports conclusion that children attach strongly to both of their parents, that these bonds are important to child’s well-being, and that children of divorce fare better if they are allowed to maintain "positive contact" with both of their parents after fracture of family); John DeWitt Gregory, *Interdependency Theory—Old Sausage in a New Casing: A Response to Professor Czapanskiy*, 39 SANTA CLARA L. REV. 1037, 1042 (1999) (stating principle that children should have contact post-divorce with both parents because this provides stability and is "long accepted and generally recognized principle" of family law); Mnookin, supra note 19, at 265 (commenting that "a substantial and impressive consensus exists among psychologists and psychiatrists that disruption of the parent-child relationship carries significant risks"); \(\text{Recommendation of the Law Revision Commission to the 1985 Legislature Relating to Child Custody Decision-Making Process}\), 19 COLUM. J.L. & SOC. PROBS. 105, 119 (1985) (providing New York Law Review Commission’s report that "[t]he available evidence points almost without equivocation to the conclusion that children are better off if both parents are meaningfully involved in their lives after their separation").
Thus, just as Lucy Stone and Henry B. Blackwell sought to contract out of the rule that the father of a married couple's child was presumptively entitled to custody of the child, a lesbian couple might seek to contract out of the rule that the biological mother of a child co-parented by the lesbian couple is presumptively entitled to custody of the child. The couple would be able to choose from a variety of proposed alternate standards for standing and proposed alternate substantive standards for visitation and custody that better serve gay and lesbian families than does the dominant law because these alternate standards do not base parental rights on biology, adoption, or marriage but rather on a functional parental relationship with the child. Moreover, the couple would be able to guard against some anti-minority ignorance.

parent not in the same-sex partnership (for example, the father where the mother and her partner seek to adopt the child) will not consent. See Act of June 1, 2000, Pub. Act No. 00-228 (codified at CONN. GEN. STAT. ANN. §§ 45a-724(a)(3) & 45a-731(5)) (allowing for second parent adoptions "if the parental rights, if any, of any other person other than the parties to such agreement [for adoption between the legal parent and her partner] have been terminated"); VT. STAT. ANN. tit. 15A, § 2-401(a) & (b) (1989 & Supp. 2000) (requiring, except in narrow circumstances, consent of both of child's parents to child's adoption); see also Garrison, supra note 23, at 885-86, 895-96 (discussing line of Supreme Court cases protecting right of unmarried fathers to veto adoption of their children and noting that principle of parentage law is that "even an unmarried father can trump the claims of a prospective adoptive parent able to offer the child greater advantages"). See generally Nancy D. Polikoff, The Deliberate Construction of Families without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?, 36 SANTA CLARA L. REV. 375 (1996) (discussing need for legal reform with respect to voluntary termination of paternal rights in cases where lesbian couple or single woman wish to raise child without involvement of biological father as legal father).

34. See e.g., Bartlett, supra note 31, at 944-48 (calling for recognition of child's need for continuity in intimate relationships by permitting visitation and custody by persons who have established important familial relationship with child, provided that such relationship began with consent of legal parent or pursuant to court order and that nuclear family has been disrupted); Czapansky, supra note 26, at 963-64, 970-73, 985-86, 990 (proposing "interdependency" approach to custody and visitation rights that would accord parental rights to either co-parent in same sex relationship and would base such rights not on biology or legal parent status but rather on co-parent's history as caregiver); Polikoff, supra note 22, at 471 (arguing that parental status should derive not only from biology or adoption, but also "from proof of a parent-child relationship that has developed through the cooperation and consent of someone already possessing the status of a legal parent"); see also Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CAL. L. REV. 615, 617-19, 630-43 (1992) (arguing for "approximation" standard in child custody and visitation decisionmaking that would seek to approximate past patterns of care).

The American Law Institute's Principles of the Law of Family Dissolution provide for a judicial allocation of custodial responsibility that, unless a specified exception applies, approximates the proportion of caretaking that each parent, parent by estoppel, or de facto parent performed prior to fracture of the family. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 209 (Tentative Draft No. 3, Part I, 1998); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.21 (Tentative Draft No. 4, 2000).
and bias in the public court system by selecting an arbitrator who is familiar with lesbian co-parented families.\footnote{35. See Jeanne Louise Carriere, Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act, 79 IOWA L. REV. 585, 602-05 (1994) (noting that testimony in congressional hearings concerning Indian Child Welfare Act of 1978 "identified Euro-American cultural bias [on the part of persons applying parenting standards to Native American parents] as the underlying cause of the danger [of forced acculturation] to Native American families and culture"); Polikoff, supra note 22, at 544 (noting that "[m]any judges deciding lesbian-mother family dissolution cases do not have experience with or knowledge about life growing up with lesbian mothers").}

If each parent who is party to an arbitration agreement that seeks to avoid custody law that the parties disfavor or find dysfunctional could be certain that the other parent would abide by the arbitrator’s decision, then custody arbitration might be a most attractive solution to the problem of disfavored or dysfunctional law regardless of whether or not a court would enforce any resulting arbitration award for custody.\footnote{36. See Janet Maleson Spencer & Joseph P. Zammit, Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents, 1976 DUKE L.J. 911, 925 (noting ease of utilizing arbitration if all parties agree to it and agree to abide by decision of arbitrator).} One might reasonably expect, however, that the party who would enjoy the stronger legal position in the public courts would seek to have the public court system decide the custody issue in accordance with dominant legal standards.\footnote{37. See Ettelbrick, supra note 22, at 547 ("Naturally, when conflict arises, the biological mothers will rely on the advantage the law gives them, regardless of the 'lesbian ethic' that we honor our agreements with each other with regard to parenting.").} Moreover, one might reasonably fear that, regardless of any disparity in treatment of the custody claimants under the dominant law, a party who ultimately is unhappy with an arbitrator’s custody award might seek to litigate the custody issue in the public courts.\footnote{38. See, e.g., Kovacs v. Kovacs, 633 A.2d 425, 428-30 (Md. Ct. Spec. App. 1993) (noting that mother who had entered into post-fracture arbitration agreement and who had participated in several arbitration sessions argued after entry of arbitration award that court must exercise its "independent judgment" in any matter concerning best interests of children); Faherty v. Faherty, 477 A.2d 1257, 1259-61 (N.J. 1984) (noting that father who had successfully moved to compel arbitration of spousal and child support issues, but who was unhappy with resulting arbitration award, then argued that arbitration of such issues was against public policy); Lieberman v. Lieberman, 566 N.Y.S.2d 490, 492-95 (Sup. Ct. 1991) (discussing mother who had agreed to settle custody dispute before rabbinical court, had agreed that "any decision of the Rabbinical Court will be obeyed," had selected one of the arbitrators, and had participated in six arbitration sessions costing $1000 each, and then had moved to vacate resulting arbitration award on grounds, inter alia, that award was not in best interests of children).} One might reasonably expect, therefore, that upon the fracture of the family, the lesbian co-parent who is recognized by the dominant law as the child’s sole legal mother would be likely to repudiate the family that she

and her co-parent have formed and would be likely to seek refuge in the public court system which refuses to recognize the validity of that family.  

Thus, the utility of child custody and visitation arbitration, in many cases, will be a function of the extent to which the public courts will enforce arbitration agreements and awards for custody and visitation. Indeed, if such agreements are not enforceable, arbitration might lose much of its utility regardless of whether the parties to the agreement ultimately would respect the agreement and any resulting arbitration award. For example, in the case of a co-parented lesbian family, the knowledge on the part of the legally more vulnerable party (the non-legal parent) that she would be unable to enforce any future arbitration award concerning the custody of her child would mean that the more vulnerable party would have to decide whether and to what extent to invest emotionally and financially in a relationship with a child while knowing that the continuance of that relationship would be wholly dependent on the good will of her partner. Thus, the inability of the partners to create 

39. See Clark Freshman, Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation, 44 UCLAL. REV. 1687, 1748-49 (1997) (reporting decision of Los Angeles Gay and Lesbian Center to end referrals to lesbian attorney who, in representing biological mother in fractured co-parenting relationship, argued that non-biological co-parent in such relationship should have few, if any, custody or visitation rights with respect to couple's child); Polikoff, supra note 22, at 533-42, 537 (discussing several cases in which biological mother in lesbian co-parenting relationship "has asserted sole parenthood in a blatant repudiation of the family that both mothers fully participated in creating").

The Gay and Lesbian Advocates & Defenders (GLAD), in collaboration with several other gay and lesbian civil rights organizations, has authored a statement of principles that it urges same-sex families to follow in dealing with the breakup of their family. Gay & Lesbian Advocates & Defenders et al., Protecting Families: Standards for Child Custody in Same-Sex Relationships, at http://www.colage.org/parents/custody_rights.html (April 11, 2000). Among these is the principle of "treat[ing] homophobic law and sentiments as off limits." Id. GLAD argues that resort to such homophobic law threatens injury to the family members involved as well as to the collective interests of gay men and lesbians:

A focus solely on the legal rights of the biological or adoptive parent ignores the real relationships of many parents, significant adults, and children. It is extremely damaging to our community and our families when we disavow as insignificant the very relationships for which we are seeking legal and societal respect.

Id.

40. See Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 VA. L. REV. 2401, 2463 (1995) ("Legal protection of parental rights and authority serves as an important form of compensation for fulfillment of parental obligations and thus functions to serve the child's interest in receiving good care from her parents."); see also Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 980-84 (1979) (setting forth argument that "the inability to make enforceable promise [concerning child custody and visitation] may inhibit dispute settlement"); infra notes 264-73 and accompanying text (discussing how state deference to parental authority functions as incentive for good parental behavior).
a family in which both parents have equal and enforceable legal rights and responsibilities with respect to their child might influence their decision as to whether to raise a child jointly and, if they were to decide to do so, their decisions concerning the degree to which and the manner in which each co-parent would invest in her relationship with the child.

This Article considers the extent to which agreements for the arbitration of child custody and visitation issues and resulting arbitration awards should be enforceable in the public courts. Two principal competing interests enter into the calculus. The parents involved in the custody and visitation dispute have an interest in maintaining influence over the manner in which their child is reared, which includes, perhaps most critically, an interest in maintaining control over the values that their child is taught to respect. This interest in parental autonomy is furthered by respect for the finality of any custody or visitation arbitration award when the parents had agreed to submit their custody dispute to binding arbitration. The state has an interest, derivative of the child's interests, in protecting the welfare of the child who is at the center of the custody and visitation dispute. Conventional wisdom holds that this interest in child welfare is promoted by intrusive state review of any arbitration award for child custody or visitation.

In Part II, this Article reviews the approaches that courts presently take to the issue of enforcing arbitration agreements and awards for child custody and visitation. Generally, a court will not treat such an agreement or award as binding. Rather, in general, relying upon its parens patriae duties to protect the welfare of a child, a court will replace an arbitrator's award for child custody and visitation with a custody and visitation order of its own design whenever the court believes that to do so would serve the best interests of the child.41

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41. See Davis, supra note 5, at 248 ("The antislavery ideal of family autonomy is a necessary component in any design to permit individuals to affect their culture and to embrace, advocate, and act upon freely chosen values, because it is in families that people are socialized to varied values, rather than uniform ones.").

42. "Parens patriae" is Latin for "parent of his or her country" and connotes "the state in its capacity as provider of protection to those unable to care for themselves." Black's Law Dictionary 1137 (7th ed. 1999).

43. In another context, Judge Cardozo gave the classic description of the court fulfilling its parens patriae function with respect to a child:

[the court] acts as parens patriae to do what is best for the interest of the child. [The judge] is to put himself in the position of a "wise, affectionate, and careful parent," and make provision for the child accordingly... He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child," or as between one parent and another. He "interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as parens patriae."

Next, Part III of this Article considers how academic commentators have proposed to balance the parents' interest in the finality of a custody arbitration award with the state's interest in promoting the welfare of the child. These commentators share a common failure to focus their analysis on the constitutional principles and prudential considerations that generally have guided state deference to and intervention in the family. To the extent that these constitutional principles are applicable and these prudential policies are applicable, well-thought out, and well-grounded, it is important to ask whether the present dominant judicial approaches of intrusive state review of custody and visitation arbitration awards are in accord with these principles and policies or whether a more deferential approach to state review of custody and visitation arbitration awards would be more consistent with these principles and policies.

The state traditionally has shown a great reluctance to interfere with the autonomy of the parent-child relationship. This great deference is grounded on two principles: a constitutional and social norm respecting the "right" of parents to control the upbringing of their child and a prudential belief that extensive state intervention in the parent-child relationship would be unlikely to promote the state's desired outcome — that the child develop into a physically and psychologically healthy adult capable of contributing to the well-being of society.

Part IV of this Article addresses the constitutional and social norm of respecting parental autonomy and the prudential factors that militate against extensive state intervention in the family and considers how these policies relate to the issue of enforcement of custody and visitation arbitration awards. This Part concludes that the present approach of intrusive judicial review of custody and visitation arbitration awards contravenes the constitutional norm respecting parental autonomy and is inconsistent with the prudential policies governing state deference to and intervention in the family. A standard of review that gives "great deference" to an arbitrator's custody and visitation award, or that requires a showing of a likelihood of harm to the child flowing from the arbitrator's custody and visitation arbitration award, before a court would disregard that award, would be more consistent with the constitutional principles and prudential considerations that generally govern state intervention in the family.44

44. I use the term "parent" in this article in both legal and social senses, as is suggested by my use of the term "non-legal co-parent." The critique of the dominant approaches to enforcement of child custody arbitration agreements is simpler and arguably stronger with respect to an arbitration agreement entered into by two legal parents of a child, as contrasted with an agreement entered into by a legal parent and a social but non-legal co-parent. Such a critique is able to rely upon the concomitant rights that flow from the legal status of "parent" more clearly and directly. Nevertheless, I believe that the constitutional principles discussed below are applicable to an arbitration agreement entered into by a legal parent and a social but non-legal co-parent. See infra notes 238-55 and accompanying text (arguing that court's failure
II. The Judicial Treatment of Arbitration Agreements and Awards for Child Custody and Visitation

The large majority of courts that have considered whether child custody and visitation are arbitrable issues have refused to treat as binding on the court an arbitrator's award respecting child custody or visitation. Several features of custody arbitration especially concern these courts. Private arbitration provides no assurance that the arbitrators chosen by the parents will have a specialized competence to adjudicate a custody dispute. Moreover, even a competent arbitrator may choose to disregard the jurisdiction’s legal standards for custody adjudication, absent direction in the arbitration contract to apply such standards. Finally, courts subject arbitration awards generally to only a very limited judicial review, which, some fear, might fail to safeguard adequately a child's interests.

to enforce child custody agreement executed by lesbian family may infringe on constitutional rights of parties involved). I also believe that the prudential factors discussed below, which together militate in favor of a deferential standard of review for child custody arbitration awards, apply with equal or even greater force in the cases of families headed by a legal parent and a social but non-legal co-parent. See infra notes 316-19 and accompanying text (arguing for courts to be more deferential to family agreements of same-sex family).

45. See infra notes 54-84 and accompanying text (discussing void and voidable approaches to custody arbitration agreements and awards).

46. See, e.g., Agur v. Agur, 298 N.Y.S.2d 772, 777 (App. Div. 1969) (noting that arbitration provides no assurance that parents will nominate arbitrators "whose background or competence would certify a provident decision").

47. See, e.g., id. at 778 (invalidating arbitration agreement for custody, in part, because agreement called for arbitrators to apply Jewish law in making their custody decision); Michelman v. Michelman, 135 N.Y.S.2d 608, 608 (Sup. Ct. 1954) (noting that arbitrators "need not follow the law in their considerations and awards" and that courts have set aside such arbitration awards as against public policy); Crutchley v. Crutchley, 293 S.E.2d 793, 797 (N.C. 1982) (stating that "arbitrator is bound by neither substantive law nor rules of evidence").

48. For example, the Uniform Arbitration Act of 1955 (UAA), which has been adopted in thirty-five states and the District of Columbia, see 7 U.L.A. §1 (1997) (listing states that have adopted UAA), provides for confirmation of an arbitration award unless one who is opposing confirmation demonstrates that there was no arbitration agreement, there was fraud in procuring the award, there was arbitrator bias or corruption, the arbitrators exceeded their powers, or the arbitrators wrongfully refused to postpone a hearing or to hear material evidence. Id. § 12; see also Federal Arbitration Act, §§ 9-10 (providing for limited grounds for vacating arbitration award, which grounds are similar to those provided for by UAA). In August 2000, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment a revised Uniform Arbitration Act. Section 23 of the revised Uniform Arbitration Act, which sets forth the grounds for vacating an arbitration award, is substantially similar to Section 12 of the 1955 UAA cited above.

49. See, e.g., Glauber v. Glauber, 600 N.Y.S.2d 740, 743 (App. Div. 1993) (noting tension between "the expectation of finality of arbitration awards" and court’s concern with protecting interests of child); Agur, 298 N.Y.S.2d at 777 (noting that arbitration awards cannot be vacated because of mistake of fact and that judicial system "is more broadly gauged and
When these courts voice a distrust of child custody arbitration, and particularly of a limited judicial review of custody arbitration awards, their concern is more than merely the fear that a trial-level error will go uncorrected. Indeed, even child custody adjudications in the public courts are not subject to rigorous appellate review. This limited effective judicial review of trial court custody awards stems from the subjective and indeterminate nature of the custody decisionmaking process.

A determination that is person-oriented and requires predictions necessarily involves an evaluation of the parties who have appeared in court. This has important consequences for the roles of both precedent and appellate review in custody cases. The result of an earlier case involving different people has limited relevance to a subsequent case requiring individualized evaluations of a particular child and the litigants. Prior reported cases now provide little basis for controlling or predicting the outcome of a particular case. Moreover, the trial court in custody disputes is often not required to make specific findings of fact, much less write an opinion about the case or reconcile what has been done in this case with what has happened before.

It would seem, therefore, that the courts’ dominant concern with a scheme of limited judicial review of custody arbitration awards is that, under such an approach, no representative of the state would have the opportunity to correct the mistakes of a private decisionmaker.

The courts that refuse to treat arbitration agreements or awards respecting child custody as binding can be divided into two groups. First, some courts treat as void any contract to submit child custody or visitation issues to arbitration and any arbitrator’s award respecting child custody or visitation.

better suited to reach the ultimate objective* of protecting child’s interests); Crutchley, 293 S.E.2d at 793 (noting disadvantages of arbitration and that "parents cannot by agreement deprive the court of its inherent and statutory authority to protect the interests of their children"); Pulfer v. Pulfer, 673 N.E.2d 656, 659 (Ohio Ct. App. 1996) (citing limited judicial review of arbitration awards as reason why child custody should not be arbitrable).

50. See Julie Shapiro, Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children, 71 Ind. L.J. 623, 632, 642 (1996) (commenting that in custody cases, "trial courts have broad discretion both as finders of facts and as assessors of the character and needs of the individuals before the court[,] [...][t]he guiding precedents often state principles only in general terms, like the best interests of the child" and noting consequent limited nature of appellate review in custody cases); see also Pulliam v. Smith, 501 S.E.2d 898, 903 (N.C. 1998) ("Absent a total lack of substantial evidence to support the trial court’s findings [where the trial court is ruling in a custody case], such findings will not be disturbed on appeal.").

51. Mnookin, supra note 19, at 253-54.

52. See Lipsius v. Lipsius, 673 N.Y.S.2d 458, 458-59 (App. Div. 1998) (explaining that father did not waive his right to arbitrate issues concerning child support and attorney’s fees by litigating in court issues concerning child custody and visitation because such issues "are not
Second, some courts treat an arbitrator’s award respecting child custody or visitation as merely voidable if the award does not serve the best interests of the child.\footnote{53}
A. The Void Approach to Custody Arbitration Agreements and Awards

The case of *Glauber v. Glauber* typifies the position and analysis of those courts that have found all arbitration contracts and awards respecting child custody or visitation to be void. The *Glauber* court reviewed a trial court's ruling granting a father's motion to compel arbitration with his former wife of a matter respecting the custody of their son. At the time of their divorce, the father and mother had stipulated that any future disputes concerning the custody of their child would be brought before a named rabbi, whose decision would be final and binding on the parents. The parents' agreement further provided that the father would take custody of their son no later than at the time that the child reached the age of six years old. Shortly after the child's sixth birthday, the father demanded from the mother custody of their son. The mother, however, refused to allow the father to take physical custody of the boy and sought in court a grant of permanent custody. The father then moved to compel arbitration of the custody matter before the rabbi, pursuant to the parents' earlier stipulation, and the lower court granted his motion.

The appeals court reversed the lower court's decision. The appeals court first found that the broad arbitration agreement at issue would subject the custody dispute to arbitration, absent a strong public policy objection. The court concluded, however, that child custody and visitation disputes were "on [their] face . . . inappropriate for resolution by arbitration." The *Glauber* court relied upon the settled law with respect to marital separation agreements purporting to govern the custody and visitation rights with respect to a couple's minor child. The dominant judicial approach to the enforcement of such separation agreements provides that, although such agreements "are, in the usual case, to be given priority," the court's responsibility to safeguard the child's best interests supercedes any parental
agreement concerning child custody and visitation. Therefore, under the dominant approach, a separation agreement between parents of a minor child concerning the custody of that child is never enforceable per se. The Glau-

64. Id. at 742; see also Klipstein v. Zalewski, 553 A.2d 1384, 1389 (N.J. Super. Ct. Ch. Div. 1988) (explaining that agreement between parent and step-parent is "at best only a factor to be considered in determining the visitation rights of a step-parent" because "[a] court under its *parens patriae* authority always has the duty and power to disregard agreements made by parents relating to children"); Glauber v. Glauber, 600 N.Y.S.2d 740, 742-43 (App. Div. 1993) ("A court cannot be bound by an agreement as to . . . custody or visitation, and simultaneously act as *parens patriae* on behalf of the child."); Lee E. Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1156 (noting that as early as 1846, New York Court of Chancery refused to treat agreement between parents respecting custody of their child as binding on grounds that court was charged by statute with protecting child). For an argument that courts should enforce separation agreements for child custody as written except where the agreement is likely to cause harm to the child, see David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477, 565-66 & n.323 (1984) (arguing that because courts are "rarely in a better position" than are parents to determine what custody arrangement is best for child, courts should not have power to disallow joint custody when parents have agreed to it, and arguing more generally that "courts should stay out of decisions both parents make about their children except when a strong probability of serious harm to the child can be shown"); Mnookin, *supra* note 19, at 288 (arguing that parents’ superior knowledge about their child’s circumstances and desires, as compared to court’s knowledge of child, combined with "basic indeterminacy of anyone knowing what is best for the child" and benefits of adopting solution agreed to by those who will have to carry it out, all militate in favor of judicial enforcement of settlement agreements for child custody absent showing of likely harm to child); and Mnookin & Kornhauser, *supra* note 40, at 957-58 (same).

65. See Garrison, *supra* note 23, at 861-62 (stating that separation agreement concerning child custody is never enforceable per se). The American Law Institute’s *Principles of the Law of Family Dissolution* require greater judicial deference to parental separation agreements concerning child custody and visitation than does the dominant judicial approach to such agreements, which allows a court to disregard a parental agreement that it finds is not in the best interests of the child. Under the Principles, the court must adopt the parents’ agreement contained in a "parenting plan" unless the court finds that the agreement is not knowing or voluntary or that the agreement would be harmful to the child. *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 2.07 (Tentative Draft No. 3, Part I, 1998). Similarly, the Principles require that a court modify a parenting plan in accordance with a parental agreement unless the court finds that the agreed to modification is not knowing and voluntary or would be harmful to the child. Id. § 2.19. The drafters of the Principles reason that many courts do not have the time or resources to give meaningful review to all parental agreements with respect to child custody, that courts have difficulty obtaining information that will demonstrate that a particular parental agreement is not in the child’s best interests, and that it might be futile for the court to attempt to impose a custody arrangement that the parents do not want. Id. § 2.07, cmt. a.

The dominant judicial approach to enforcement of premarital agreements concerning child custody is the same as the dominant judicial approach concerning separation agreements concerning child custody. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148-49 n.12 (1998) (citing case law for proposition that "as a general rule, courts will not
ber court concluded that "an agreement to arbitrate the issue of custody is indistinguishable from an agreement to give custody," and, therefore, an agreement by parents to submit the custody issue to arbitration could not bind the court.

The Glauber court further expressed its disapproval of a two-step procedure whereby an arbitrator would first enter a child custody award, and a court would then review that arbitration award to ensure that it served the best interests of the child. The court opined that such a process would inevitably result in a "duplication of time, expense and effort" that would delay final resolution of the custody issue and, in so doing, harm the child. For these reasons, the court held that agreements between parents to arbitrate disputes concerning the custody of minor children may not be enforced.

enforce premarital agreements to the extent that they cover child custody, visitation, or child care payments). The American Law Institute's Principles of the Law of Family Dissolution provide that a court should give less deference to a premarital agreement concerning child custody than the court must give to a separation agreement respecting child custody. Compare PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(e) (Tentative Draft No. 3, Part I, 1998) (permitting court to deviate from Principles' presumptive allocation of custodial responsibility that approximates amount of time that each parent spent performing caretaking functions for child prior to fracture of family in light of pre-separation custody agreement when "under the circumstances as a whole including the reasonable expectations of the parties and interests of the child, [it] would be appropriate to consider" such a pre-separation agreement) with id. § 2.07(1) (requiring deference by court to separation agreement respecting child custody unless agreement is not knowing or voluntary, or agreement would be harmful to child). The drafters of the Principles reason that "[p]re-separation agreements are more remote in time, and circumstances are likely to have changed more substantially." Id. § 2.09, cmt. i.

In actuality, a court ordinarily will adopt a parental separation agreement respecting the custody of the parents' minor child as its own order. See Chambers, supra note 64, at 565 (noting that courts "nearly always acquiesce in single-custody arrangements to which parents agree"); Garrison, supra note 23, at 866 ("[C]ourts will seldom second-guess an agreement between parents dealing with custody or support unless one of the parents later questions the contract's capacity to meet the child's needs."); Mnookin & Kornhauser, supra note 40, at 954-55, 994-95 (noting that although parental separation agreement with respect to custody of minor children cannot bind court "available evidence" indicates that "[t]ypically, separation agreements are rubber stamped [by the court] even in cases involving children" and concluding that "[g]iven the resources devoted to the task of scrutinizing agreements, there is little reason to believe that the process operates as much of a safeguard when there is no parental dispute to catch the judge's attention"); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 207 cmt. d (Tentative Draft No. 3, Part I, 1998) ("Despite judicial rhetoric about the reviewability of [parenting] agreements, agreements are rarely rejected on any grounds, at least on appeal.").

67. Id.
68. Id. (quoting Agur v. Agur, 298 N.Y.S.2d 772, 778 (App. Div. 1969)).
69. Id.
B. The Voidable Approach to Custody Arbitration Agreements and Awards

A seminal and typical case finding arbitration agreements and awards with respect to child custody and visitation to be valid but voidable is Sheets v. Sheets, in which the court concluded that "there seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, i.e., choice of schools, summer camps, medical and surgical expenses, trips and vacations." The Sheets court, like the Glauber court, reasoned from the settled law with respect to separation agreements that address child custody, noting that a court will enforce such an agreement provided that the agreement is in the best interests of the child. The Sheets court, however, unlike the Glauber court, extended this rule, as is, to the custody arbitration context.

Indeed, in considering what level of deference a court should give to an arbitration agreement or award respecting child custody, many courts have reasoned from the law governing separation contracts respecting child custody. They have concluded that, like such separation contracts, arbitration contracts and awards for child custody should be given deference, but must be subject to review by the court functioning as parens patriae to ensure protection of the best interests of the child.

72. Id.
73. Id.

An agreement to arbitrate issues that concern the best interests of children, such as custody and support, is equivalent to an agreement on those matters. If parents cannot bind the court by an agreement affecting the interests of their children, they cannot bind the court by agreeing to let someone else, an arbitrator, make such a decision for them.

Id.; see also, e.g., Lieberman v. Lieberman, 566 N.Y.S.2d 490, 495 (Sup. Ct. 1991) (stating that "an agreement between a husband and wife will be upheld so long as the agreement is in the best interest of the children, however, the court retains supervisory power in its capacity as 'parens patriae'); Crutchley v. Crutchley, 293 S.E.2d 793, 798 (N.C. 1982) (reasoning that "as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration" and stating that "provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court"); Miller v. Miller, 620 A.2d 1161, 1164-66 (Pa. Super. Ct. 1993) (finding that "while agreements entered into between parties are binding as between the parties, they may not bind the court once its jurisdiction is invoked" and that court will function as parens patriae and determine best interests of child).
Balanced against the state's duty as *parens patriae* to protect the child are compelling reasons in support of the state's giving respect to parental autonomy. Courts commonly give several such reasons for the deference, albeit limited, that they accord to separation agreements reached by parents regarding the custody of their child. It is generally accepted that parents are likely to know a great deal more about their child than the court is able to learn through the adversarial process. Moreover, the parents' love for their child, it is thought, tends to produce agreements that are in the child's best interests. Further, amicable settlement of the custody issue promotes family harmony, which is a good in itself. Finally, settlement or arbitration of a custody dispute offers the opportunity for a speedy resolution of the matter.

The *Sheets* court held that when a court is presented with a challenge to an arbitration award respecting the custody of a child, the court must examine the ruling *de novo*. In doing so, the court, depending upon the circumstances of the case, might rely solely upon the evidence adduced at the arbitration hearing, might disregard that evidence entirely and call for new proof, or might rely both upon the evidence presented at the arbitration hearing as well as upon new evidence presented to the court. After review of the relevant evidence, the court then must determine whether or not the arbitration award conflicts with the best interests of the child.

The *Sheets* court conceded that, in some circumstances, its two-step approach—arbitration followed by *de novo* court review—might result in "duplication in effort." However the court also pointed to other circumstances in which an arbitrator's decision could not possibly adversely affect

75. See Miller, 620 A.2d at 1164 (citing Sally Burnett Sharp, *Modification of Agreement Based Custody Decrees: Unitary or Dual Standard?*, 68 Va. L. Rev. 1263, 1280 (1982)).

76. Id.

77. Id; see also Masters v. Masters, 513 A.2d 104, 113 (Conn. 1986) (commenting that arbitration of custody proceedings might offer disputants "a muted adversarial tone").

78. See Masters, 513 A.2d at 113 (noting that arbitration offers "a speedy resolution of the issues"); Spencer v. Spencer, 494 A.2d 1279, 1284 (D.C. Cir. 1985) (noting that both separation agreements and arbitration agreements allow parties "to settle their disputes without court intervention, with speed, economy, and substantial finality"); Crutchley, 293 S.E.2d at 796 (noting speed and finality as advantages of arbitration of domestic disputes).


80. Id. at 324.

81. Id. at 323, 325.

82. Id. at 325.
the best interests of the child and, therefore, could not be used to invoke *de novo* review by the court. The court listed as examples of such rulings that a parent visit with the child on one particular day of the week rather than another particular day, that the child be accompanied to school by a parent, and that the child attend a summer camp in the mountains rather than attend a summer camp at sea level.

### C. The Minority Judicial View That Child Custody Arbitration Agreements and Awards Bind the Court

A rare departure from the almost universal holding that an arbitration agreement or award respecting child custody or visitation does not bind the court is found in the Michigan Court of Appeals case of *Dick v. Dick*. Leslie Dick and Linda Dick had been married for two and one-half years and had had one child together, a son, when Mr. Dick filed for divorce. The Dicks then agreed to submit all issues relating to the fracture of their family, including their disputes relating to child custody and child support, to binding arbitration. At that time, the trial court entered an order providing for such binding arbitration and appointing an arbitrator to hear and resolve the case.

More than two years later, the arbitrator issued an opinion and award of custody to Mrs. Dick, which opinion included findings of fact regarding the "best interests of the child" factors as set out in Michigan law.

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83. *Id.* at 324.
84. *Id.*

> [i]f the parents have agreed in a parenting plan or by agreement thereafter to a binding resolution of their dispute by non-judicial means, a decision by such means is binding upon the parents and must be enforced by the court, unless it is shown to be manifestly harmful to the child’s interests, beyond the scope of the parents’ agreement, or the result of fraud, misconduct, corruption, or other serious irregularity.

*Id.* § 211(2). Thus, "[a] decision reached as a result of procedures agreed to by the parents is reviewable only on grounds that would have been sufficient to set the agreement aside, such as whether it is harmful to the child, or under the standard generally applied to third-party arbitration outcomes ..." *Id.* § 211, cmt. c.
87. *Id.*
88. *Id.*
89. *Id.*
the trial court entered a judgment of divorce that fully incorporated the arbitrator's rulings. Mr. Dick then filed an appeal attacking the validity of the arbitration agreement. He argued "that arbitration is not an acceptable procedure for resolving issues of child custody and support." Mr. Dick sought to start over again from scratch in the trial court.

The Michigan Court of Appeals began its analysis of the custody arbitrability issue by taking note of the case law that reflected the view that "custody decisions are the exclusive province of the circuit court." The court then "balance[d]" this case law against Michigan's version of the Uniform Arbitration Act, which provided that "all persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided." The court found that "[t]he language of the arbitration statute is broad and seemingly all inclusive. It permits all persons to submit any controversy to arbitration upon their agreement. It does not specifically exempt any civil action from binding arbitration. Thus, ... custody disputes are not exempted from arbitration." Further, the court found no other statute that prohibited child custody arbitration. In sum, the court held "we find no clear prohibition in case law, court rule, or statute against the use of binding arbitration in the resolution of custody disputes. Binding arbitration is an acceptable and appropriate method of dispute resolution in cases where the parties agree to it."

Notably, the *Dick* opinion focused almost exclusively on a statutory interpretation of Michigan's arbitration law. Moreover, the court's analysis was formulaic. The opinion is remarkable in that, in departing from the large body of case law that has held that a court's *parens patriae* duties supercede the right of parents to contract for arbitration of their custody dispute, the court failed to critique that case law meaningfully (indeed, at all), and did not discuss the state's *parens patriae* duties or how arbitration might or might not adequately protect the interests of the child. The *Dick* opinion, therefore,
Generally, a court will treat a contract for arbitration of property and spousal support issues as binding, absent grounds for invalidating the contract that might apply to any arbitration contract, and will enforce an arbitration award on such matters, absent grounds for overturning the award that might apply to any arbitration award. See Kovacs v. Kovacs, 633 A.2d 425, 432 (Md. Ct. Spec. App. 1993) (holding that arbitration award concerning custody is voidable but arbitration award concerning property issues and alimony is "appropriate to be adopted without further consideration"); Faherty v. Faherty, 477 A.2d 1257, 1262 (N.J. 1984) (holding that parties may bind themselves to arbitrate spousal support); Hirsch v. Hirsch, 333 N.E.2d 371, 374 (N.Y. 1975) (holding that agreement to allow arbitrator to determine spouse's spousal support obligations did not violate public policy); Glauber v. Glauber, 600 N.Y.S.2d 740, 743 (App. Div. 1993) (refusing to enforce arbitration agreement with respect to child custody while commenting, in dicta, that spousal support and child support are arbitrable issues); Crutchley v. Crutchley, 293 S.E.2d 793, 797-98 (N.C. 1982) (finding that arbitration may be binding on questions of spousal support, but is reviewable as to child custody and support); Elizabeth A. Jenkins, Annotation, Validation and Construction of Provisions for Arbitration of Disputes as to Alimony or Support Payments or Child Visitation or Custody Matters, 38 A.L.R. 5th 69, 69 (1996) ("Courts are willing to enforce arbitration agreements between spouses when the issues to be arbitrated concern alimony or spousal support."). Some courts have justified the difference in levels of judicial deference accorded to arbitration agreements respecting property division and spousal support as contrasted with arbitration agreements respecting child custody by reference to the view that an agreement to arbitrate custody, unlike an agreement to arbitrate property and spousal support issues, strongly implicates the interests of a child who is not party to the arbitration agreement. See Patin v. Patin, 45 Va. Cir. 519, 520 (Cir. Ct. 1998) ("Whereas an agreement to arbitrate disputes involving spousal support and property involve only the interests of the parties to such an agreement, the arbitration of child custody involves more than the interests of the parents. In custody decisions, the interest of the child is paramount.") Moreover, and somewhat relatedly, although spouses have the right upon divorce to settle conclusively by contract their property rights and support obligations to each other, divorcing parents generally do not have the right under present law to settle conclusively by contract the custody arrangements respecting their children. See Faherty, 477 A.2d at 1262-63 (noting that divorcing spouses have greater autonomy with respect to settlement of property and spousal support issues as contrasted with settlement of child support and custody issues and holding that arbitration agreements with respect to child support should be subject to greater level of judicial review than agreements to arbitrate property and spousal support issues); Crutchley, 293 S.E.2d at 797 (reasoning that "[s]ince the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration" with respect to spousal support).

Given that agreements to arbitrate child support issues also strongly and directly implicate the interests of a child who is not a party to the arbitration agreement, one might expect that courts would group arbitration agreements respecting child support with those respecting child custody, and subject such agreements to a higher level of review than arbitration agreements for property division and spousal support receive. Most courts that have addressed the issue have followed this reasoning and have held that arbitration awards of child support should be subject to a high level of judicial review. See Kovacs, 633 A.2d at 437 (holding that lower court erred in adopting decision of Beth Din concerning child support "without the exercise of independent discretion . . . that is required of rulings affecting the best interests of children"); Faherty, 477 A.2d at 1262-63 (finding that "courts have a nondelegable, special supervisory function in the area of child support that may be exercised upon review of an arbitrator's award"). The Faherty
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contributes little or nothing to a study of what the law should be with respect to the enforcement of child custody arbitration awards.

III. The Academic Commentary on Child Custody and Visitation Arbitration

Academic commentators long have asserted certain supposed virtues of child custody and visitation arbitration. These claimed benefits of custody arbitration generally relate to either savings of time and money for the custody

Court went on to hold that

whenever the validity of an arbitration award affecting child support is questioned on the grounds that it does not provide adequate protection for the child, the trial court... should conduct a de novo review unless it is clear on the face of the award that the award could not adversely affect the substantial best interests of the child.

*Id.*; *see also* Schneider v. Schneider, 216 N.E.2d 318, 320-21 (N.Y. 1966) (holding that arbitration award for child support is binding "only insofar as the award did not adversely affect the substantial interest of the child" (quoting Sheets v. Sheets, 254 N.Y.S.2d 320, 320-21 (App. Div. 1964))); Rakoszynski v. Rakoszynski, 663 N.Y.S.2d 957, 960-61 (Sup. Ct. 1997) (holding that child custody is never arbitrable, and refusing to confirm arbitration award of Beth Din for child support because Beth Din issuing award had failed to provide explanation as to how it had arrived at award and because award was not in best interests of children); Fence v. Fence, 314 N.Y.S.2d 1016, 1020-21 (N.Y. Fam. Ct. 1970) (noting precedent calling into question arbitrability of custody disputes and holding that, "in the instant case, the custody of the children, their welfare, and their support are so inextricably interrelated that the need for a judicial process to determine all issues seems clearly indicated under the doctrine of parens patriae"); Crutchley, 293 S.E.2d at 797 (applying to arbitration awards for child support reasoning that is used to justify court review of any separation agreement for child support); Kelm v. Kelm, 623 N.E.2d 39, 42-43 (Ohio 1993) (holding that parties may agree to arbitrate matters of temporary spousal support and child support but "if the arbitration process fails in any respect to protect the interest of a child or spouse, trial courts have the authority to use... their contempt powers to ensure that the process is accomplished in an expeditious, efficient, and reasonable manner").

Other courts, however, have held that arbitration awards for child support generally are not subject to heightened judicial review. *See, e.g.,* Masters v. Masters, 513 A.2d 104, 113 (Conn. 1986) (reasoning that child support determinations do not require "delicate balancing of the factors composing the best interests of the child" and therefore, may be resolved with finality through arbitration); Lieberman v. Lieberman, 566 N.Y.S.2d 490, 495 (Sup. Ct. 1991) (holding that "a dispute over child support is one between the custodial and non-custodial parent and can be agreed upon contractually or by arbitration")

99. *See, e.g.,* Joan F. Kessler et al., *Why Arbitrate Family Law Matters?,* 14 J. AM. ACAD. MATRIMONIAL LAW. 333, 336-40 (1997) (discussing benefits of matrimonial arbitration); Lawrence S. Kubie, *Provisions for the Care of Children of Divorced Parents: A New Legal Instrument,* 73 YALE L.J. 1197, 1198 (1964) (proposing that if parents cannot agree on question relating to their child, "they agree to submit the issue to a committee which they themselves choose at the time they make the agreement, and to accept unconditionally the committee's decision, and to be guided by it").
claimants, or "better" decisionmaking and increased participant satisfaction arising from expertise on the part of the decisionmaker.100

For example, commentators have claimed, generally without providing empirical support, that arbitration of custody matters would allow the parties to resolve their custody and visitation disputes more quickly and with less monetary expense as compared to resolution through the public courts.101 The purported speedy resolution of custody matters through arbitration itself, it has been asserted, would benefit the child who is at the center of the custody dispute by reducing the length of time she must live with heightened conflict and uncertainty concerning her future custody and visitation arrangements.102

Commentators also have theorized that the characteristics of the arbitration process might lessen conflict between the competing claimants for custody and visitation as compared to the litigation process in the public courts.103

100. Commentators generally have ignored the benefits that might arise from the disputants' ability to create or select their own law in custody arbitration. But see Stephen W. Schlissel, A Proposal for Final and Binding Arbitration of Initial Custody Determinations, 26 Fam. L.Q. 71, 72 (1992) (noting that contractual nature of arbitration allows divorcing couple to stipulate to arbitration procedures, rules of evidence and applicable law).

101. See Kessler et al., supra note 99, at 333, 337 (asserting that "[b]ecause a matter submitted to arbitration usually results in a quick hearing and award, the costs of the decision-making process are greatly reduced"); Frank L. McGuane, Jr., Model Marital Arbitration Act: A Proposal, 14 J. Am. Acad. Matrimonial Law 393, 395 (1997) (deeming arbitration "ideal alternative" to cost and complexity of courts); Melissa Douthart Philbrick, Agreements to Arbitrate Post-Divorce Custody Disputes, 18 Colum. J.L. & Soc. Probs. 419, 442-43 (1985) (noting arbitration's "reduced costs, informality, and speedy resolutions"); Schlissel, supra note 100, at 72, 75, 77 (noting contrast in cost and speed between litigation and arbitration); Note, Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests," 73 Yale L.J. 1201, 1201 (1964) (noting "probable saving to courts of time, money, and resources and the similar savings gained by parents" as "one of the more obvious merits" of arbitration); see also Spencer & Zamnit, supra note 36, at 924-25 n.53 (providing empirical evidence of speed with which domestic relations arbitrations are resolved).

102. See Kessler et al., supra note 99, at 337 ("The swiftness of the process may also reduce the time in which children are victims of the stress and tension occasioned by lack of certainty as to the outcome."); Philbrick, supra note 101, at 424-25, 443 (asserting that "[t]he prolonged conflict that a long delay between filing for custody modification and final judgment engenders, in and of itself, runs contrary to the best interests of the children"); Spencer & Zammit, supra note 36, at 919 (claiming that quick resolution of custody dispute through alternative dispute resolution can remove uncertainty harmful to child).

103. See Richard A. Gardner, Family Evaluation in Child Custody Mediation, Arbitration, and Litigation 31 (1989) (arguing that his proposed mediation/arbitration procedure for resolving custody disputes "would protect clients from the polarization and spiraling of animosity that frequently accompanies the utilization of adversarial procedures and contributes to the development and perpetuation of psychopathology"); Thomas E. Carboneau, A Consideration of Alternatives to Divorce Litigation, 1986 U. Ill. L. Rev. 1119, 1165-65 (hypothesizing that "[p]rocedural and substantive flexibility and privacy of divorce arbitration] should lessen overt animosity, allowing for a quicker and less costly resolution of the disputes");
The hypothesis is generally that "[p]rocedurally, an arbitration proceeding's adversarial tone is muted by the informal setting and short timetables, thereby minimizing the potential for increased antagonism and escalated conflict."

Numerous commentators have pointed out that arbitration allows the parties to the custody and visitation dispute to select a decisionmaker with expertise that the parties themselves find relevant and believe to be beneficial. This expertise might relate to several categories of knowledge. First, the parties might choose an arbitrator because of her interest in, and knowledge of, the field of the law relating to the break-up of the family. In addition, the parties might select a child custody and visitation decisionmaker because of her general expertise in child psychology or family counseling. The parties also might select a decisionmaker because of her familiarity with the particular family that is experiencing the custody dispute. Finally, the

Schlissel, supra note 100, at 72, 74-75, 77 (hypothesizing that arbitration's informality leads to "increased acceptance of results, which in turn is conducive to a spirit of future goodwill between the parties").

104. Phillbrick, supra note 101, at 443.

105. See, e.g., Kessler et al., supra note 99, at 336-37 (identifying ability to choose judge as "a principal benefit of the arbitration alternative"); Mary Kay Kisthardt, The Use of Mediation and Arbitration for Resolving Family Conflicts: What Lawyers Think About Them, 14 J. AM. ACAD. MATRIMONIAL LAW. 353, 354, 391 (1997) (reporting on 1996 survey of members of American Academy of Matrimonial Lawyers in which respondents "cited the ability to choose the decisionmaker as the greatest advantage of arbitration [of family disputes]" and characterized arbitrators who were chosen as "more specialized and sensitive to the needs of the case" and "more experienced and better than some judges"); Schlissel, supra note 100, at 76 (noting advantage of choosing decisionmaker experienced on matter); Daniel J. Guttman, Note, For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation, 12 OHIO ST. J. ON DISP. RESOL. 175, 183 (1996) (noting enhanced likelihood of acceptance and compliance, as well as optimal qualifications of mutually elected decisionmaker).

106. See Kessler et al., supra note 99, at 337 (commenting that "matrimonial arbitration permits the parties to select someone who has chosen to be intensely involved in the field of divorce and has developed both an interest and expertise in that area"); Schlissel, supra note 100, at 77 (noting that "arbitration permits the parties to select someone who has chosen to be intensely involved in the field of child custody determinations and who has developed an expertise in that area").

107. See Carbonneau, supra note 103, at 1166 (noting potential benefit to parties from psychological training and expertise of arbitrators); Kubic, supra note 99, at 1198 (suggesting that parents choose for their child dispute resolution committee "a pediatrician, a child psychiatrist or child analyst, an educator and/or an impartial lawyer or clergyman").

108. See Mnookin, supra note 19, at 289 (hypothesizing that "[i]f the disputing parents could agree on the choice of a 'judge' and the 'judge' knew the family, the custody decision might better reflect an intuitive appreciation of the parties' values, psychology, and goals"); Note, supra note 101, at 1201 (suggesting that arbitrator's personal knowledge of parents and child involved in custody dispute might make her more competent to adjudicate custody dispute).
parties might select a particular arbitrator because she is knowledgeable about and respectful of the values that the parties hold dear or the culture that the parties have lived in.109

Commentators have argued that allowing the parties to select the decision-maker for their custody dispute would increase the likelihood that the parties will respect and comply with the decisionmaker’s judgments.110 "If [the parties to the custody dispute] have some choice in selecting the arbitrator, then each party will have endorsed the adjudicator from the outset and will be less likely to criticize the decision."111

Much of the academic commentary in the area of custody and visitation arbitration has focused on the relationship between: (1) the purported virtues of custody arbitration, and relatedly, the interests promoted by according finality to a custody arbitration award, and (2) the asserted need for the state to protect the interests of the child who is the focus of such an arbitration award. The need to serve the dual goals of finality and child protection has seemed to some to present a classic catch-22.112 On the one hand, commentators have noted that the de novo review standard dominant in the case law undermines many of the virtues of custody arbitration.113 Absent some

109. See Anne E. Meroney, Mediation and Arbitration of Separation and Divorce Agreements, 15 Wake Forest L. Rev. 467, 469 (1979) (asserting that parties to domestic dispute might wish to utilize mediation or arbitration to avoid "a judge [who] may be unable to relate to litigants who have life styles different from the middle class American norm"); Janet Maleson Spencer & Joseph P. Zammit, Reflections on Arbitration Under the Family Dispute Services, 32 ARB. J. 111, 119 (1977) (noting that arbitration "permits the parties to choose an arbitrator who shares their values, a parent surrogate who attempts to make the decision that they would make absent their present hostility"); see also Spitko, supra note 11, at 294-97 (asserting that "[a]rbitration can empower cultural minorities by providing a forum for adjudication in which the decision-maker is selected because she understands and appreciates the minority culture at issue").

110. See Mnookin, supra note 19, at 289 (hypothesizing that with agreed upon judge, "[t]he decision might also be more acceptable to the parents"); Philbrick, supra note 101, at 434 (noting that "participation in the selection of the arbitrator-adjudicator may increase the likelihood that the parties will respect his or her findings and lessens the coercive nature of the judgement"); Schlissel, supra note 100, at 77 (hypothesizing that "[c]onfidence in the trier of facts can go a long way towards reducing the anger of the participants").

111. Philbrick, supra note 101, at 444.

112. See Guttman, supra note 105, at 183 (arguing that "[e]xcessive [judicial] review would jeopardize the reasons arbitration was sought in the first place [but] too little review may lead to unjust decisions being upheld when, in the interests of justice and persons not directly involved in the process (i.e., children of the failed marriage), they should not be upheld").

113. See Carbonneau, supra note 103, at 1157 (commenting that "[e]xcessive review would jeopardize the viability and autonomy of the arbitral process"); Kessler et al., supra note 99, at 338, 344 (noting argument that custody arbitration becomes less attractive alternative to parties to extent that parties face prospect of litigating custody dispute twice); Joseph T. McLaughlin,
significant degree of finality, custody arbitration awards are less likely to save time and resources.\textsuperscript{114} Moreover, the arbitrator's much desired expertise would seem to be of little utility if the reviewing court is free to disregard the arbitrator's opinion.

On the other hand, some commentators have echoed the concerns dominant in the case law that arbitration agreements entered into by the parents of a fractured family might not adequately protect the interests of the children of that family.\textsuperscript{115} Of particular concern is the fear that an arbitrator in a child custody and visitation dispute is not obligated to follow the law and might well not follow the law.\textsuperscript{116} From these concerns has arisen the view that the state may not ensure that it properly carries out its parens patriae function of safeguarding the child's welfare unless it subjects all arbitration awards respecting child custody and visitation to heightened judicial review. To some, therefore, it has seemed that in order to save custody arbitration, we must destroy it, or at least severely impair its utility.\textsuperscript{117}

\textit{Arbitrability: Current Trends in the United States}, 59 \textit{ALB. L. REV.} 905, 930 (1996) ("The general rule prohibiting binding arbitration in child custody and support disputes has prompted some legal commentators to question the advantage of arbitration in this context. In their view, the perceived speed, economy, and substantial justice of arbitration will remain illusory unless courts give the arbitrator's decision binding effect."); Schlissel, \textit{supra} note 100, at 79 ("If the arbitration of a custody dispute is not final and binding, but is subject to \textit{de novo} review by a court, then such arbitration loses much of its attractiveness."); Christine Albano, Comment, Binding Arbitration: A Proper Forum for Child Custody?, 14 J. AM. ACAD. MATRIMONIAL LAW. 419, 428-29 (1997) ("The purpose of reaching a quicker and less expensive resolution through arbitration is seriously undermined if the judge ultimately refuses to sign off on the arbitration decision.").

114. \textit{See} McGuane, \textit{supra} note 101, at 402 ("If a party has the option . . . of a complete new trial before a judge, it is hard to imagine why parties would select [the option of arbitration]."); Philbrick, \textit{supra} note 101, at 446 ("The more eager a court is to reconsider arbitrated issues, the more arbitration becomes merely an additional, perfunctory step in the dispute resolution process — lengthening and complicating the procedure.").


116. \textit{See} Kessler et al., \textit{supra} note 99, at 339-40 (noting also, however, that parties "can agree that an arbitrator will be bound by the substantive law of the state").

117. \textit{See}, e.g., Kenneth J. Rigby, \textit{Alternate Dispute Resolution}, 44 I.A. L. REV. 1725, 1751-52 (1984) (concluding that appropriate balancing of competing interests involved requires that "all third-party decisions respecting the welfare of the child" must be subject to judicial review to ensure that they are not detrimental to the child's best interests (footnote omitted)); Sterk, \textit{supra} note 115, at 484, 486 (suggesting that objections he raises to custody arbitration could be obviated by requiring that arbitrators be bound by law, be required to state reasons for their
Professor Stewart Sterk has set forth a thoughtful argument against binding child custody arbitration.\(^{118}\) Professor Sterk's critique is grounded on the broad principle that "[p]ublic policy should be invoked to prevent arbitration when at issue is a legislative expression or a basic case law principle designed for some purpose other than to foster justice between the parties to the dispute."\(^{119}\) He cites antitrust law, which he notes is "designed to produce economic effects that often have little to do with the immediate needs of the contracting parties," as an example of such a legislative expression.\(^{120}\) Professor Sterk asserts that an arbitrator who is contractually bound to work justice between the parties "cannot be expected to sacrifice the most equitable resolution of the dispute between the parties in favor of the economic needs of society as expressed in the antitrust laws."\(^{121}\) Therefore, Professor Sterk argues, contracts to arbitrate future disputes arising out of antitrust law should not be enforceable.\(^{122}\)

Subsequent to the publication of Professor Sterk's article, the United States Supreme Court held that, pursuant to the Federal Arbitration Act, antitrust claims arising in the international context are arbitrable, notwithstanding the public interest in enforcement of federal antitrust laws. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985). Although the Supreme Court has not addressed the arbitrability of antitrust claims arising in the domestic context, the lower courts that have addressed the issue consistently have held that such domestic antitrust claims are arbitrable. See N.Y. Cross Harbor R.R. Terminal Corp. v. Consol. Rail Corp., 72 F. Supp. 2d 70, 80 (E.D.N.Y. 1998) (noting that lower courts "have consistently interpreted the Mitsubishi holding expansively and have consequently subjected anti-trust claims arising from domestic transactions to arbitration"); see also Kotam Elec., Inc. v. JBL Consumer Prods., Inc., 93 F.3d 724, 728 (11th Cir. 1996) (en banc) (holding that "arbitration agreements concerning domestic antitrust claims are enforceable"); Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1441-42 (9th Cir. 1994) (same); Hough v. Merrill Lynch, 757 F. Supp. 283, 286 (S.D.N.Y. 1991), aff'd without op., 946 F.2d 883 (2d Cir. 1991) (holding that reasoning of Mitsubishi "should apply with equal force to domestic claims").

\(^{118}\) Sterk, supra note 115, at 483.

\(^{119}\) Id. at 483.

\(^{120}\) Id.

\(^{121}\) Id. at 503-04.

\(^{122}\) Id. at 503, 511 (commenting that most convincing rationale for then "well established" rule that public policy prohibits enforcement of agreements to arbitrate future disputes concerning antitrust laws "is simply that the antitrust laws are designed not to protect either of the contracting parties from overreaching by the other, but instead to promote competition in the economic system").
Professor Sterk concludes, however, that agreements to arbitrate existing antitrust disputes should be enforceable. He notes that Congress permits the private settlement of existing antitrust disputes without state intervention and, in so doing, consents to the subordination of antitrust public policy to the promotion of justice between the parties. Professor Sterk argues that in light of this there would seem to be little reason not to permit the parties to submit to private arbitrators those disputes that they could settle by private agreement.

Professor Sterk analyzes custody arbitration under this framework. First, he points out that the principal focus of child custody statutes is the promotion of the welfare of children rather than the satisfaction of parental needs. Professor Sterk argues that "the mechanism of arbitration" is "at cross purposes" with this principal focus on the welfare of a child. The principal focus of a custody arbitration, Professor Sterk asserts, is likely to be justice between the parties to the arbitration agreement. The child, however, is not a party to the arbitration agreement. Therefore, Professor Sterk concludes,

123. Sterk, supra note 115, at 507-08.
124. Id. at 508.
125. Id; see also Ware, supra note 11, at 727-29 (arguing that post-dispute arbitration agreements concerning rights arising out of mandatory rules should be enforced but pre-dispute arbitration agreements concerning such rights either should not be enforced or arbitration awards arising from such agreements should be subject to de novo judicial review of arbitrator's legal claims).
126. Sterk, supra note 115, at 483.
127. Id. at 483, 499-502.
128. Id. at 503 ("The arbitration process is designed not to further the child's best interest, but rather to resolve the dispute between the parents.").
129. Id. at 499-500. Professor Sterk asserts that, because the child is not a party to the arbitration agreement, she "can no more be bound by the agreement or a subsequent arbitration award than any third party can be bound by an agreement between two others." Id. The proposition that a parent may not bind her child to an arbitration agreement is questionable. There is authority for the view that, in her role as guardian of the unemancipated child, a parent has the authority to grant her child's consent to arbitration, thereby binding the child to the arbitration agreement. See Doyle v. Giuliani, 401 P.2d 1, 3 (Cal. 1965) (holding that "the power to enter into a contract for medical care that binds the child to arbitrate any dispute arising thereunder is implicit in a parent's right and duty to provide for the care of his child"); Pietrelli v. Peacock, 16 Cal. Rptr. 2d 688, 690-91 (Ct. App. 1993) (holding that parent had authority, arising from her rights as her child's guardian, to bind her child and did bind her child to arbitrate claims arising from child's health care treatment even though child had not yet been conceived at time that parent signed arbitration agreement).

More importantly, this line of attack on custody arbitration misunderstands the nature of child custody adjudication and, relatedly, overlooks the inherent inequality of the parent-child relationship. A child generally is not a party to a custody determination concerning her in public court, nor generally is she represented by counsel in such proceedings. See In re Marriage of
the arbitration may do justice between the parties while failing to protect the child's welfare. Indeed, Professor Sterk points out, not only is the arbitrator free to ignore the best interests of the child, but the arbitrator may lack the contractual power to promote the best interests of the child in cases in which neither parent is a suitable custodian: Even if the arbitrator were to conclude that a third party would be the best custodian for the child, the arbitrator is likely to lack the power to award custody or visitation rights to a third party who is not a party to the arbitration agreement entered into by the parents.

Finally, Professor Sterk points out that, unlike the parties to an agreement to arbitrate an existing antitrust dispute, the parents involved in a custody dispute are not free to settle the dispute conclusively. Professor Sterk argues that this state of the law strongly militates against the enforceability of custody arbitration agreements and awards. Echoing the case law, Professor Sterk writes:

The principal issue involved is whether public policy prohibits arbitrators from conclusively resolving support and custody disputes. If parents could conclusively resolve disputes over custody and child support by private agreement, there would be no reason to prohibit resolution of such disputes by arbitrators; a matter which society is content to leave entirely to private agreement is one that may be referred by private agreement to arbitration. The principle is basic whenever public policy forms the basis of an objection to enforcing an arbitration agreement.

Hartley, 886 P.2d 665, 670-76 (Colo. 1994) (en banc) (holding that although child has statutory right to have determination of her custody be based upon her best interests, child has no right to participate through chosen counsel in proceeding concerning her custody); Miller v. Miller, 677 A.2d 64, 66-68 (Me. 1996) (holding that children have no common law or constitutional right to intervene in divorce action of their parents as parties with attorney of their choice); Schneider v. Schneider, 216 N.E.2d 318, 320 (N.Y. 1966) (holding that statute precluding any "[a]rbitration of controversy involving [an] infant" not applicable to arbitration for child support because "[a]ll the authorities seem to say that a cause of action for payments like these for a child belongs not to the child but to the mother"); Mnookin, supra note 19, at 254-55 (pointing out that while child is person most affected by custody adjudication, she is not participant in proceeding). The custody proceeding determines the obligations and rights of a child's parents who, in their role as parents, have authority over the child necessary to implement the custody award — that is, to "bind" the child to the award. In choosing not to make the child a necessary party in the custody adjudication concerning her, the state recognizes that a child generally has a limited (and inferior) capacity for making certain judgments, even though those judgments might profoundly affect her welfare. See Martha Albertson Fineman, What Place for Family Privacy?, 67 GEO. WASH. L. REV. 1207, 1222 (1999) (arguing that given child's incapacity to make certain judgments, parent-child relationship inherently is not one of equality but one of responsibility of parent for child and "should be considered outside of the equality paradigm").

130. Sterk, supra note 115, at 500 ("Justice between the parties thus may not be in the best interests of the child.").

131. Id.
However, parents cannot by private agreement place the level of a minor child’s support beyond the reviewing power of courts. The rule regarding parents’ custody agreements is even stronger. Such agreements are not binding on the courts. Instead, the court as *parens patriae* must make support and custody decisions in the best interest of the children involved, despite any contrary agreement of the parents.\footnote{132. \textit{Id.} at 494.}

In sum, Professor Sterk concludes that:\footnote{133. \textit{Id.} at 502.}

\begin{quotation}
[It] is the inability to represent properly the interests of the child, who, of course, never consented to arbitration in the first place, that makes arbitration an inappropriate forum for resolution of custody disputes. Because justice between the parties to the arbitration agreement is an insignificant factor in making a custody award, arbitrators should not be permitted to make such determinations.\footnote{134. \textit{See generally} McGuane, \textit{supra} note 101; Philbrick, \textit{supra} note 101.}
\end{quotation}

Other academic commentators have been less willing entirely to abandon custody arbitration at the altar of the child’s "best interests." Instead, they have struggled to devise an approach that would provide a way out of the catch-22 and would accord some finality to an arbitrator’s child custody award while also safeguarding the interests of the child who is at the center of the custody dispute.

Some commentators have argued that procedural safeguards can ensure that the interests of the child who is at the center of a custody arbitration are adequately protected to the extent that \textit{de novo} review is not necessary to protect those interests.\footnote{135. Philbrick, \textit{supra} note 101, at 452-61.} Melissa Douthart Philbrick, for example, has called for "child-centered arbitration" that would avoid \textit{de novo} review.\footnote{136. \textit{Id.} at 451.} She explains the general idea: "If the parents agree to a procedurally fair arbitration process, these courts could be assured that their *parens patriae* oversight was unnecessary. There would then be no need for de novo review and no fear of the attendant potential for the abuse of arbitration as a tactic for delay."\footnote{137. \textit{Id.} at 453-54; \textit{see also} Kessler et al., \textit{supra} note 99, at 339-40 (noting that parties contracting for custody arbitration have power to bind arbitrator to follow substantive law of state); Albano, \textit{supra} note 113, at 443 (arguing that to ensure protection of child’s interests, arbitration custody award must comply with state and local law).}

Philbrick proposes arbitration in which the arbitrator is contractually required to decide custody and visitation matters based on the child’s best interests.\footnote{138. \textit{Id.} at 503.} The contract also would direct the arbitrator to conduct independent fact finding to ascertain the child’s interests and to disclose those find-
Finally, the contract would permit the arbitrator to appoint counsel to represent the child's interests where the arbitrator found that the child's interests were adverse to the interests of the parents. Philbrick asserts that "[t]he attorney for the child will also help focus the inquiry on what would be beneficial to that child, rather than on what each parent would prefer. Independent representation would thus ensure that the child's best interests are fully explored and advocated." Philbrick proposes that a court reviewing an arbitrator's custody award should first determine if the arbitration agreement provided for "child-centered" arbitration as she has outlined it. If the court determines that the arbitration agreed to is procedurally satisfactory, the court would then review the arbitration custody award under the extremely deferential standard that it would apply to any other arbitration award. As Philbrick explains her standard, however, the court would still have the ability to set aside any award that fails to protect the child's best interests.

Philbrick explains that an arbitrator's award can be set aside on the grounds that the arbitrator exceeded her power. A "child-centered" arbitration contract must direct the arbitrator to base her custody decision on the best interests of the child. Philbrick concludes, therefore, that where the arbitrator has failed to issue a custody ruling based on the child's best interests, the court may vacate the award. Philbrick argues that her standard is not equivalent to de novo review, however, because the court need not take any new evidence and "[o]nce the threshold question of the quality of the [arbitration] process – whether the arbitration clause on its face is sufficiently child protective – is resolved, the party challenging the award should bear a heavy burden of proving that the decision is unfair.

138. Philbrick, supra note 101, at 455; see also McGuane, supra note 101, at 402-17 (proposing model custody arbitration act that would require procedural safeguards, such as detailed findings of fact and conclusions of law by arbitrator, that would allow for appellate review based solely on arbitration record and that would protect best interests of child without trial de novo); Albano, supra note 113, at 444 (proposing that custody arbitrator be required to issue written findings of fact and conclusions of law along with her award that would help reviewing court determine whether arbitrator correctly applied governing law).

139. Philbrick, supra note 101, at 455-59.

140. Id. at 457.

141. Id. at 459-60.

142. Id. at 460.

143. Id. at 460-61.

144. Id.

145. Id. at 461.

146. Id.

147. Id.
Similarly, several other commentators have recommended the use of a presumption that the arbitrator's award promotes the child's best interests as a means to achieve the proper balance between the interests that are promoted by according finality to an arbitrator's custody award and the state's interest in child welfare. Under such an approach, the court would retain the right, indeed the responsibility, to review any arbitration custody award to ensure that the award serves the best interests of the child. The court would begin its review, however, with a presumption that the arbitrator's custody award is appropriate. A challenger could overcome the presumption "only if the award is clearly contrary to the best interests of the child." As one student commentator has explained this approach, although "the court would still retain the power to modify or reject the [arbitration award for custody] if it found that the best interests of the child so required," this type of review differs from a strict de novo review:

Because of the highly subjective nature of the "best interests" test and the inherent lack of certainty that any given decision is better than many of its alternatives, a judge could easily find that, although the committee's decision was not the one he would have made de novo, he cannot be certain that his choice is more likely to serve the child's best interests than is the committee's. Only where he can be certain of this is the committee's decision contrary to public policy.

Finally, not all commentators have worked within a framework that accepts the conventional wisdom (and dominant case law) that the state must ensure that any child custody arbitration award comports with the state's view of the child's best interests. For example, Professors Janet Spencer and Joseph Zammit have argued that a court should enforce an arbitration custody award in the same manner that the court would enforce a commercial arbitration award, provided that the custody award does not constitute or make possible abuse or neglect of the child. Professors Spencer and Zammit

148. Kessler et al., supra note 99, at 342; Note, supra note 101, at 1210 n.57; cf. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415-17 (1971) (holding that even when administrative agency's decision is "entitled to a presumption of regularity," federal court must subject such decision to "a thorough, probing, in-depth review").

149. Kessler et al., supra note 99, at 342.


151. Id. at 1210 n.57. North Carolina and Texas have codified this type of review for child custody arbitrations by placing the burden of proof on the party seeking to vacate an arbitration award to demonstrate that the award is contrary to the best interests of the child. See N.C. GEN. STAT. §§ 50-41, 42, 54 (1999); TEX. FAM. CODE ANN. § 153.0071(b) (Vernon 1996 & Supp. 2000).

152. Spencer & Zammit, supra note 36, at 936-37; see also Schlissel, supra note 100, at
expressly state that their argument is premised not on the notion that parents are best able to make decisions concerning their child, but rather on the principle that parental autonomy includes the "freedom to decide wrongly" and that fracture of the family should not be cause for the state to infringe this freedom.\footnote{153}

Despite the breakdown in the marital relationship, the preservation of family autonomy demands that parents retain the right to make decisions affecting the upbringing of their children. To the extent that parents, even after a good faith effort, cannot agree between themselves on what is best for their children, they should at least have the right to choose the decision-maker and should not be compelled to accept an individual or committee chosen by the state whose values may significantly differ from their own. The only limitation on this parental right should be that imposed upon all parents, namely, that their conduct not constitute neglect.\footnote{155}

Given that Professors Spencer and Zammitt ground their approach to judicial review of custody arbitration awards on the principle of preservation of family autonomy, one might expect that their argument would focus on the nature and sources of family autonomy and on the principles and policies that support state deference to the family generally, and are used to justify state intervention in the family only in certain limited circumstances. Professors Spencer and Zammitt, however, fail to offer this analysis.\footnote{156} Rather, they justify their approach by reference to arbitration's principal merits (which

\footnote{83 (arguing that heightened review of arbitration custody award is inconsistent with Uniform Arbitration Act).}

\footnote{153. Spencer & Zammitt, supra note 36, at 913.}

\footnote{154. Id.}

\footnote{155. Id. at 918-19; see also N.M. STAT. ANN. § 40-4-7.2(A) & (T) (Michie 1999) (discussing when court may vacate arbitration award). The statute states: The court may vacate an award of custody, time-sharing or visitation made in binding arbitration if the court finds that circumstances have changed since issuance of the award that are adverse to the best interests of the child, [or] upon a finding that the award will cause harm or be detrimental to a child. Id.}

\footnote{156. Professors Spencer and Zammitt's discussion of family autonomy is largely limited to a single paragraph, in which they assert that judges are not inherently more qualified to make decisions concerning a child's custody. They argue that because the parents gave birth to the child, have the primary responsibility for the child's financial and emotional needs, and have superior knowledge of those needs and of the child's desires, and out of respect for diversity, the judgment of the parents concerning their child's interests ought to be presumed acceptable. Spencer & Zammitt, supra note 36, at 918; see also id. at 937-38 (offering in support of their standard of limited judicial review of arbitration custody awards notion that "state paternalism is inconsistent with our historical and constitutional traditions," but failing to elaborate on this point).}
they list as respect for parent-centered decisionmaking and the allowance of private and quick resolution of the family dispute) and the extent to which de novo review of a custody arbitration award would undermine these merits. Professors Spencer and Zammit provide a thoughtful discussion of the merits of alternative dispute resolution in resolving family disputes, but they fail to expound an argument for state deference to a custody arbitral process beyond the utility of the process itself.

Indeed, notably absent from all of the case law and the academic commentary on the appropriate level of judicial review to be given arbitration custody and visitation awards is any serious discussion of the principles and policies that generally are thought to support state deference to family autonomy as the default approach to family regulation or of the principles and policies that generally are thought to justify state intervention in the family under certain circumstances. The remainder of this Article examines these principles and policies and explores their relationship to the question of the appropriate level of judicial review for a parent-sponsored arbitration award for child custody.

IV. Policies That Guide State Deference to and Intervention in the Family

In considering whether courts should enforce arbitration agreements and awards that purport to govern custody and visitation rights relating to a minor child, a good place to start is a consideration of why the state generally intervenes or refrains from intervening in the parent-child relationship. The state's principal goal in regulating the parent-child relationship is to promote the likelihood that the child will develop into a physically and emotionally healthy adult capable of contributing to the well-being of society.

One approach that the state might take in furtherance of this goal is to prescribe in great detail what it views as the optimal parental behavior. Under such an approach, the state would need to set out and enforce punishments for parents who fail to conform to the optimal behavior. Thus, the state could regulate the child's sleeping schedule, her diet, her play-time activities and companions, the content of her education, her television viewing habits, and so on.

157. Id. at 918-19, 929-38; see also id. at 937 ("Unless the courts are willing to refrain from interfering in the model of dispute resolution proposed in this Article, the value of that model may be largely negated; parents will know that if they 'lose' in arbitration they can still resort to the courts.").

158. See Scott & Scott, supra note 40, at 2415, 2417, 2431 (discussing societal goals at stake in regulation of parent-child relationship).
The state has not seen fit, however, to require that parents conform to its view of optimal parental behavior. Rather, the general approach of the state is to allow parents in an intact family the freedom to raise their children as the parents see best, subject only to proscriptions against parenting that the state sees as abusive, neglectful, or seriously threatening the welfare of the child. The state intervenes more readily in the parent-child relationship when the family is fractured, such as with the divorce of a father and mother, than when the family is intact. Still, such state intervention falls far short of a general prescription of optimal behavior.

The state's great reluctance to interfere with the parent-child relationship, especially in the intact family, is grounded on two bases. First, our society has developed a respect for the parental "right" against the state to raise one's child as one thinks best. In this view, extensive state intervention is inconsistent with the social and constitutional norm favoring family autonomy. Pursuant to this view, state intervention is not appropriate even if it could be shown that state intervention would optimize outcomes.

A second basis for state deference to the intact family is the belief that extensive state intervention generally would not be effective at optimizing outcomes. Several prudential considerations, discussed below, inform this judgment that the state is likely to fail to optimize outcomes by widely replacing parental judgment with state judgment in matters concerning the welfare of a child. Other prudential considerations, also discussed below, support

159. See Fineman, supra note 129, at 1215 ("Parental conduct, be it discipline or decision-making, is generally protected unless it constitutes abuse or neglect of the child."); Scott, supra note 34, at 669 ("Except for defining the outer limits of acceptable behavior (definitions that also track social norms), the law seldom attempts to regulate relationships, dictate functions, enforce obligations, or resolve conflicts within the intact family.").

160. See Frances Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Reform 835, 841 (1985) ("Divorce or legal separation may also be considered a sufficient trigger to justify state intervention that would otherwise not be allowed."); Scott, supra note 34, at 669-70 (pointing to visitation and child support court orders as examples of how "[t]he curtain of family privacy is lifted upon divorce").

161. See Teitelbaum, supra note 64, at 1145-46 (commenting that notion of family privacy includes two situations — those situations in which state declines to intervene in family disputes for prudential reasons, and those situations in which state may not intervene because family matter at hand is outside scope of permissible government regulation).

162. See Fineman, supra note 129, at 1207 ("For the modern private family, protection from public interference remains the publicly stated norm — state intervention continues to be cast as exceptional, requiring some justification.").

163. See id. at 1214 ("This ideology of state non-intervention is rooted in idealization, but also references the perceived pragmatics of family relationships and the acknowledged limitations of legal, particularly judicial, systems as substitutes for family decision-making.").
greater state intervention in the family, however, when the family has become fractured.

This Article next discusses, in turn, both the constitutional and prudential bases for non-intervention in the parent-child relationship, as well as the prudential considerations that have been advanced to justify somewhat greater state intervention in the fractured family. Further, the Article considers how these bases governing state deference to and intervention in the family relate to the arbitrability of custody disputes.

A. The Constitutional Norm Respecting Parental Autonomy and Its Application to the Arbitrability of Custody Disputes

1. Constitutional Deference to the Parent-Child Relationship

A principal reason given for state deference to the intact family is our nation's purported respect for freedom of choice in family matters generally and, more specifically, respect for the privacy right of parents to raise their children as they see fit. The notion of parental autonomy has come to be seen as both an important social norm and a constitutional right.

164. See Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (stating that judicial deference to legislature is not appropriate when state undertakes intrusive regulation of family as freedom of choice in family matters is fundamental liberty interest protected by Fourteenth Amendment's Due Process Clause); Mnookin, supra note 19, at 266 (remarking that family autonomy has been "the traditional American assumption" and state paternalism is "inconsistent with our historical and constitutional traditions").

165. See James G. Dwyer, Children's Interests in a Family Context—A Cautionary Note, 39 SANTA CLARA L. REV. 1053, 1059 (1999) (stating that parental right to privacy is well-recognized). Specifically, Dwyer states that:

[It] is fair to say that the belief that parents have a presumptive entitlement to be left alone, which is forfeited only when their conduct is truly egregious or their judgment in child-rearing is way outside the bounds of reasonableness (itself a very permissive and amorphous standard), generally has a strong hold on the judiciary, just as it does on the public.

Id.

166. See Scott, supra note 34, at 669 ("The idea of a court directing parents to reallocate their child care and occupational responsibilities in an intact family has an Orwellian flavor that would be highly offensive to most people . . . .").

167. See Fineman, supra note 129, at 1212 (noting that idea of family as "private" "predates, and is analytically separate from, the constitutional idea of individual privacy"); see also in re J.P., 648 P.2d 1364, 1373 (Utah 1982) ("This parental right . . . is rooted not in state or federal statutory or constitutional law, to which it is logically and chronologically prior, but in nature and human instinct."). For an argument that anti-slavery and Reconstruction history and the human rights traditions that drove the anti-slavery and Reconstruction movements lend strong support to a constitutional right of parental autonomy, see Davis, supra note 5, at 108-07.
The Supreme Court first elaborated on the constitutional right respecting parental autonomy in a pair of 1920s cases implicating the right of parents to control the education of their children. In *Meyer v. Nebraska*, the Court struck down a Nebraska statute that criminalized the teaching of any modern language other than English to any pupil who had not yet passed the eighth grade. In overturning the conviction of a teacher who had taught German to a child not yet a graduate of the eighth grade, the Court considered the purpose of the legislation: "[T]o promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals." The Court expressed its understanding of "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters." Nevertheless, the Court concluded that the state's means to achieve this goal violated the Fourteenth Amendment's Due Process Clause, the protections of which included the teacher's "right thus to teach [German] and the right of parents to engage him so to instruct their children.

Two years after it decided *Meyer*, the Supreme Court again spoke on parental autonomy. In *Pierce v. Society of Sisters*, the Court struck down an Oregon statute that required every parent to send her child between the ages of seven to ten to barracks where the state set out to "submerge the individual and develop ideal citizens." The Court remarked that:

> [a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

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169. 262 U.S. 390 (1923).
171. *Id.* at 401; see also *Teitelbaum, supra* note 64, at 1151-52 (describing how, by middle 1800s, public education was being used as vehicle for promoting good citizenship and instilling American ideals in children who might not be exposed to preferred values at home); Barbara Bennett Woodhouse, "Who Owns The Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1007-12 (1992) (describing how Americans, in half century before Supreme Court decided *Meyer*, had come to view common schools and English only laws as means of acculturating immigrant and poor children).
173. *Id.* at 400, 403. The Court also noted the Spartan practice of removing children at age seven to barracks where the state set out to "submerge the individual and develop ideal citizens." *Id.* at 402. The Court remarked that:

> [a]lthough such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

ages of eight and sixteen to a public school. The Court held that "[u]nder the doctrine of Meyer v. Nebraska ... we think it entirely plain that the [act at issue] unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." The Court spoke more generally on the relation between parent, child and state:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

It is clear after Meyer and Pierce that the federal due process clauses limit state and federal power to intrude on parental decisionmaking authority respecting the welfare of a child. The Constitution requires a considered balancing between parental autonomy interests and the state's parens patriae duties. Although parental autonomy is a principal value, the state remains free to act to ensure "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed [persons] and citizens."

In Prince v. Massachusetts, the Court struck this balance in favor of state intervention. In Prince, the Court was confronted with a claim that certain of Massachusetts's child labor laws violated Ms. Prince's right to free exercise of her religion as well as her right to parental autonomy. Ms. Prince had been convicted of furnishing a minor child for whom she served as guardian with magazines with the knowledge that the child would unlawfully sell those magazines on the street. In her defense, Ms. Prince claimed that she had the right to instruct the child in the tenets of their faith, which tenets included the public distribution of certain religious literature.

176. Id. at 534-35.
177. Id. at 535.
178. See Mnookin, supra note 19, at 267 (concluding that Pierce "may be viewed as a constitutionally-based limitation on state power to intrude into family decision-making" and that "[t]he high value placed upon family autonomy reflected in that decision suggests a consensus that government may act coercively only when good cause is shown").
182. Id. at 159, 164.
183. Id. at 159-61.
184. Id. at 164.
The Supreme Court acknowledged that the liberties claimed by Ms. Prince were "sacred" and "basic in a democracy." But, the Court also observed that in "[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control." The Court further remarked: "A democratic society rests, for its continuance, upon healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." The Court provided examples of appropriate state intervention in the parent-child relationship, including regulations requiring school attendance, compelling vaccinations, and prohibiting child labor. The Court concluded, therefore, that the state's parens patriae powers included the right to proscribe street preaching by a child, even against a claim of parental autonomy or religious freedom.

The Court itself, in the later case of Wisconsin v. Yoder, extracted from Prince the principle that the state is free to infringe parental autonomy whenever "harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred." In Yoder, the Court addressed a challenge to a statute that required a parent to send her child to public or private school until the child reached the age of sixteen. The parents in Yoder refused to send their children, ages fourteen and fifteen, to school after the children had completed the eighth grade. When charged with violating the compulsory school attendance statute, the parents asserted their belief that their children's attendance at high school would be contrary to the Amish religion and would endanger their own salvation and the salvation of their children. Thus, the parents argued that the compulsory school-attendance law violated their right and the right of their children to free exercise of their religion.

185. Id. at 165; see also id. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").
186. Id. at 166.
187. Id. at 168.
188. Id. at 166.
189. Id. at 168-70.
191. Wisconsin v. Yoder, 406 U.S. 205, 229-30 (1972) (distinguishing instant case from Prince on ground that Prince, unlike instant case, presented case of likely harm to child); see also id. at 233-34 (stating that, under Prince, state may infringe parental autonomy "if it appears that parental decisions will jeopardize the health or safety of the child").
192. Id. at 207.
193. Id.
194. Id. at 209.
195. Id. at 215.
In overturning the parents’ convictions for violation of the compulsory school-attendance statute, the Court first stated that under Prince, "the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." The Court concluded, however, that the record did not demonstrate that accommodating the religious objections of the Amish by waiving for Amish children two additional years of compulsory education would so harm a child or society.

It is important to note that Yoder did not involve a claim of parental autonomy apart from the free exercise claim. Therefore, although Yoder's discussion of Prince is helpful in suggesting the outer limits of parental autonomy - specifically that the state may act to prevent "harm to the physical or mental health of the child or to the public . . . welfare" - the decision is less helpful in calibrating the outer limits of state authority to infringe parental authority in the absence of a free exercise claim.

Recently, in Troxel v. Granville, the Supreme Court gave more definition to the outer limits of state authority to interfere in the parent-child relationship. Troxel involved the question of when the state permissibly may grant a grandparent visitation rights with her grandchild over the objections of the grandchild's custodial parent. The Washington non-parental visitation statute at issue had been drafted broadly to allow "any person" to petition for visitation rights with respect to a child "at any time" and to allow a court to grant such visitation rights provided only that the court first find that such "visitation may serve the best interest of the child."

The Supreme Court held that the Washington non-parental visitation statute, as applied to the facts of the Troxel case, unconstitutionally infringed upon a parent's fundamental right to make decisions concerning the care and custody of her child. Although six Justices authored separate opinions in the Troxel case, and no opinion garnered more than four votes, the plurality and two concurring opinions read together do suggest outer limits on the state's authority to override a parent's decisions concerning the best interests of her child.

In Troxel, the superior court had granted visitation rights to the paternal grandparents of the two children of the grandparents' late son and a mother who wished to allow the grandparents less extensive visitation than the grand-

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196. Id. at 233-34.
197. Id. at 234.
198. See id. at 215 (suggesting that secular claim, if asserted separate from free exercise claim, would not prove successful in challenging "reasonable state regulation of education").
199. Id. at 230.
200. 120 S. Ct. 2054 (2000).
parents desired. Nevertheless, the superior court granted visitation rights to the grandparents because it found that such visitation rights would serve the best interests of the children involved.

Upon the mother’s appeal of the superior court’s order granting the grandparents visitation rights, the Washington Supreme Court held that the non-parental visitation statute unconstitutionally infringed upon a parent’s right to rear her children. The court held that the Fourteenth Amendment’s Due Process Clause permits the state to interfere with a parent’s right to rear her child only to prevent a present or threatened harm to the child. The court further reasoned that, as the Washington statute authorized the state to grant visitation rights whenever a court found that such visitation would serve the best interests of the child, but did not require any showing of present or threatened harm absent such visitation, the statute ran afoul of the federal Constitution. In sum, the Washington Supreme Court held that “[i]t is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a ‘better’ decision.

The United States Supreme Court affirmed the judgment of the Washington Supreme Court. The plurality opinion, however, declined to decide whether the Washington Supreme Court was correct in holding that the Fourteenth Amendment’s Due Process Clause requires a showing of present or threatened harm before the state may grant non-parental visitation rights over the objection of a parent.

202. Id. at 2057-58.
203. See id. at 2051 (noting that "there is a presumption that fit parents act in the best interests of their children").
204. Id. at 2058.
206. Id. at 28-29.
207. Id. at 30.
208. Id. at 31.
210. Id. at 2064. Several state supreme courts have reached this issue. Some have held that under the federal Due Process Clause a state may grant grandparent visitation rights over the objection of a fit parent only if the denial of such rights would jeopardize the health or safety of the child. See Brooks v. Parkerson, 454 S.E.2d 769, 773-74 (Ga. 1995) (holding that statute granting grandparents right to visitation award if court found such visitation to be in best interests of child violates both Georgia and federal Constitutions in "fail[ing] to require a showing of harm before visitation can be ordered"); In re Custody of Smith, 969 P.2d 21, 29-30 (Wash. 1998) (en bane), aff’d on other grounds sub nom. Troxel v. Granville, 120 S. Ct. 2054 (2000) (holding that Supreme Court cases which support constitutional right to rear one’s child and right to family privacy indicate that state may interfere only “if it appears that parental
Justice O'Connor, joined by three other Justices, authored an opinion grounded on the principle that the Fourteenth Amendment's Due Process Clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." In sum, the plurality concluded that the Washington statute, as applied in the Troxel case, ran afoul of this fundamental right. The superior court had erred because it had failed to give any special deference to a parent’s view as to whether certain visitation arrangements would be in the child’s best interests.

The plurality noted that, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.

The plurality further asserted that a state’s custody and visitation framework must respect, to some undefined degree, the presumption that a parent will act in her child’s best interests: "If a fit parent’s decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent’s own determination." Finally, applying this principle decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens and, therefore, "state intervention to better a child’s quality of life through third party visitation is not justified where the child’s circumstances are otherwise satisfactory"; see also Williams v. Williams, 501 S.E.2d 417, 417-18 (Va. 1998) (affirming court of appeals’ holding that Virginia’s non-parental visitation statute did not violate Fourteenth Amendment’s Due Process Clause because statute first requires finding of "actual harm to the child’s health or welfare without such visitation”); Kathleen S. Bean, Grandparent Visitation: Can the Parent Refuse?, 24 J. Fam. L. 393, 441 (1985-86) ("Intervention based solely on a best interest of the child standard, with no showing of harm, is an unconstitutional infringement upon and deprivation of the right of parents to raise their child in accord with their own values."); Gregory, supra note 29, at 402 (arguing on both constitutional and prudential grounds that courts should not overrule parent’s decision concerning third-party visitation with her child absent showing of "demonstrable harm or danger to the child"). Other state supreme courts, however, have upheld grandparent visitation statutes that allow an award of visitation if in the best interests of the child, against challenges based on the federal Due Process Clause’s protection of parent autonomy. See King v. King, 828 S.W.2d 630, 632-33 (Ky. 1992) (upholding constitutionality of grandparent visitation statute that allows court to order visitation if it finds that such visitation would be in best interest of child); Herndon v. Tuhey, 857 S.W.2d 203, 208 (Mo. 1993) (en banc) (upholding constitutionality of grandparent visitation statute that allows court to order visitation if it finds that grandparent has been unreasonably denied visitation for period exceeding ninety days and such visitation would be in best interests of child).

211. Troxel, 120 S. Ct. at 2060 (O’Connor, J., plurality opinion); see also id. at 2076 (Kennedy, J., dissenting) (noting that separate opinions in Troxel generally agreed that "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child").

212. Id. at 2061-62 (O'Connor, J., plurality opinion).

213. Id. at 2061.

214. Id. at 2062. The plurality continued:
to the facts at hand, the plurality concluded that the Washington non-parental visitation statute was unconstitutional as applied.\textsuperscript{215} In this case, the superior court failed to give special weight to the mother’s decision on the visitation matter.\textsuperscript{216} Instead, the court based its visitation award on only its findings that the children would benefit from visitation with their paternal grandparents.\textsuperscript{217}

Justices Thomas and Souter authored separate opinions concurring in the judgment in \textit{Troxel}. Justice Thomas agreed with the plurality that the Court’s prior cases had held that parents have "a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them."\textsuperscript{218} Given this fundamental right, Justice Thomas argued that the Court should apply strict scrutiny to any infringement of the right.\textsuperscript{219} Finally, Justice Thomas concluded that "the State of Washington lacks even a legitimate government interest -- to say nothing of a compelling one -- in second guessing a fit parent’s decision regarding visitation with third parties."\textsuperscript{220}

Justice Souter, in his concurring opinion, agreed with the Washington Supreme Court’s holding that the non-parental visitation statute was invalid on its face because the statute allowed a court to grant visitation rights to any person at any time subject only to a best interests standard.\textsuperscript{221} For Justice Souter, the problem was not that the superior court improperly exercised its discretion in awarding visitation rights to the grandparents, but rather that the statute gave the superior court judge too much discretion.\textsuperscript{222} Justice Souter reasoned that "Meyer's repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent had done."\textsuperscript{223}

The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. In that respect, the court’s presumption [in favor of grandparent visitation] failed to provide any protection for [the mother’s] fundamental constitutional right to make decisions concerning the rearing of her own daughters.

\textit{Id.}
\textsuperscript{215} \textit{Id.} at 2063.
\textsuperscript{216} \textit{Id.} at 2063-64.
\textsuperscript{217} \textit{Id.} at 2063.
\textsuperscript{218} \textit{Id.} at 2068 (Thomas, J., concurring opinion). Justice Thomas noted that neither party to the litigation had argued that the court’s substantive due process cases had been wrongly decided, and so, he left "resolution of that issue for another day." \textit{Id.} at 2067.
\textsuperscript{219} \textit{Id.} at 2068.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.} at 2066 (Souter, J., concurring opinion).
\textsuperscript{222} \textit{See id.} at 2066-67 & n.3 (explaining that "if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications" (quoting Chicago v. Morales, 527 U.S. 41, 71 (1999))).
\textsuperscript{223} \textit{Id.} at 2066-67.
Thus, although the plurality and concurring opinions in *Troxel* failed to precisely define the scope of the parental due process right to decide visitation issues, the three opinions do suggest that a state court violates the Fourteenth Amendment's Due Process Clause when it disregards a fit parent's decision as to the custody or visitation arrangements regarding her child merely because the court disagrees with the parent as to what is best for the child. Moreover, given Justice Thomas's call for a compelling state interest before a court may properly disregard a fit parent's decisions regarding visitation by third parties, it seems reasonable to conclude that a majority of the Court's justices adhere to the *Troxel* plurality's lesser requirement that a court give "special weight" to a parent's custody or visitation decision.\(^{224}\)

2. Application of the Constitutional Norm Respecting Parental Autonomy to the Arbitrability of Custody Disputes

Given that the federal Constitution's due process clauses require that a court give "special weight" to a parent's custody and visitation decisions, the presently dominant approaches to judicial enforcement of custody arbitration agreements and awards are likely unconstitutional. The dominant approaches reason that an agreement to arbitrate custody "is indistinguishable from an agreement to give custody."\(^{225}\) If one accepts that a child's parents' agreement to arbitrate their dispute with respect to her custody is itself a species of parental decisionmaking with respect to her custody, it follows that, under

\(^{224}\) The constitutions of certain states might provide greater protection against state intervention in the parent-child relationship than the federal constitution provides under the *Troxel* decision. See *Von Eiff v. Azicri*, 720 So. 2d 510, 514-16 (Fla. 1998) (striking down child visitation award to grandparents as offensive to guarantee of privacy in Florida constitution and holding that because of privacy rights guaranteed to parents by Florida constitution, "[n]either the legislature nor the courts may properly intervene in parental decision-making absent significant harm to the child threatened by or resulting from those decisions"); *Brooks v. Parkerson*, 454 S.E.2d 769, 773-74 (Ga. 1995) (holding that statute granting grandparents right to visitation award if court deems such visitation to be in best interests of child violates Georgia constitution in "failing to require a showing of harm before visitation can be ordered"); *Hawk v. Hawk*, 855 S.W.2d 573, 577-79 (Tenn. 1993) (concluding that statute allowing court to award grandparents visitation when it was merely in best interests of child violated Tennessee constitution's right to privacy as applied to "married couple, whose fitness as parents is unchallenged"); *see also Hoff v. Berg*, 595 N.W.2d 285, 291-92 (N.D. 1999) (holding that, pursuant to federal and North Dakota constitutions, "only compelling circumstances should justify governmental intervention to override parental choices for their children's associations beyond the immediate household" and finding that state had not demonstrated "compelling interest in presuming visitation rights of grandparents to an unmarried minor are in the child's best interests and forcing parents to accede to court-ordered grandparental visitation unless the parents are first able to prove such visitation is not in the best interests of their minor child").

Troxel, a court should give "special weight" to an arbitrator's custody decision, and should not replace the arbitrator's judgment with its own "simply because [the] judge believes a 'better' decision could be made.\textsuperscript{226} Nevertheless, neither the courts that follow the void approach to the enforcement of custody arbitration agreements and awards, nor those courts that follow the voidable approach to the enforcement of such agreements and awards, give the constitutionally mandated "special weight" to the decisions of parents who have chosen custody arbitration to resolve their custody dispute or to the custody decisions of the parents' chosen arbitrator.

Under the void approach, the parents' wishes concerning the resolution of their custody dispute through arbitration are wholly irrelevant. A court that employs the void approach will not give any weight under any circumstances to any custody arbitration agreement or award. Rather, the court will act as though no such agreement or award ever existed.

Thus, one could not design an approach to the enforcement of arbitration agreements for custody more intrusive on a parent's right to make important decisions concerning the welfare of her child. The void approach seems irreconcilably in conflict with Troxel's mandate that a court give special weight to a parent's decisions with respect to the custody and visitation of her child. Therefore, if Troxel has any force whatsoever in the context of custody arbitration agreements, the void approach to enforcement of custody arbitration agreements and awards is an unconstitutional infringement of the parents' due process right of parental autonomy.

Under the voidable approach, a court will enforce an arbitration agreement or award provided that the agreement or award is in the best interests of the child.\textsuperscript{227} One might argue that there is little real difference between the void approach, in which the court disregards any custody arbitration award and proceeds to enter a custody award based on its own determination of what is in the best interests of the child, and the voidable approach, in which the court will enforce the arbitrator's custody award only if that award comports with the court's own determination of what is in the best interests of the child. In some circumstances, however, important practical differences arise from the applications of the two different approaches.

Under the voidable approach, parents enjoy the freedom to design a custody dispute resolution proceeding that ultimately might produce an enforce-

\textsuperscript{226} Troxel v. Granville, 120 S. Ct. 2054, 2062, 2063-64 (O'Connor, J., plurality opinion). This Article's arguments, set forth below with respect to the enforceability under Troxel of custody arbitration agreements and awards, also apply with full force to the enforceability of separation agreements for custody. The present dominant approach to judicial enforcement of such a separation custody agreement, under which a court will enforce the agreement only if it finds that the agreement comports with the court's view of the child's best interests, is unconstitutional. \textit{See supra} note 214 and accompanying text.

\textsuperscript{227} \textit{See supra} notes 70-84 and accompanying text (discussing voidable approach).
ABLE custody and visitation arrangement that could not have been arrived at as an initial matter in the public court system. For example, as discussed supra, in the case of lesbian co-parents, the co-parents might design a dispute resolution proceeding that alters the dominant rules for standing and substantive custody decisionmaking so that the co-parent who is not a legal parent of her child is not disadvantaged relative to the legal parent. This dispute resolution proceeding ultimately might produce an award of custody to the co-parent who is not the legal parent of the child.

If, upon review in the public court applying the voidable approach, the court determines that the custody award to the "non-parent" is in the best interests of the child, the court should enforce the award of custody to the co-parent who is not a legal parent. Had the custody determination been made as an initial matter in a public court, however, under the law of many jurisdictions, the co-parent who is not a legal parent to the child would not have had standing to compete for custody. Similarly, in a jurisdiction that applies a void approach to custody arbitration awards, the co-parent who is not a legal parent might not have had an opportunity to assert her claim for custody. Thus, in a jurisdiction with a voidable approach, custody arbitration provides parents with a greater degree of autonomy to resolve their custody dispute as they see fit as compared with custody litigation in a public court or custody arbitration in a jurisdiction with a void approach.

Nevertheless, even the voidable approach to judicial review of arbitration awards falls short of the constitutional standard set forth in Troxel. Any review of a parent-sponsored arbitration award for custody to ensure that the award comports with the court's view of the best interests of the child intrudes upon parental autonomy.228 The intrusiveness results from the nature of the "best interests of the child" standard, which places a great deal of discretion in the hands of the decisionmaker.229

228. See Bean, supra note 210, at 441 ("For the state to delegate to the parents the authority to raise the child as the parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all."); Scott, supra note 34, at 616 (noting that under best interests of child standard, "anything a judge finds important to the child’s welfare may decide custody, from parental religious practices to lifestyle preferences").

229. Commentators have long attacked the best interests standard for the broad discretion it places in the hands of the decisionmaker. See Chambers, supra note 64, at 487-89 (arguing that best interests of child standard is both too broad, because of lack of guidance it provides to judges as to how to decide what is best for child, and too narrow in failing to consider interests of parents in certain circumstances); Andrea Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, 5 YALE L. & Pol'y Rev. 267, 269-73, 281-83 (1987) (attacking broad grant of discretion in best interests standard and suggesting alternate custody standard favoring parent who is best able to place child’s interest above her own in order to avoid conflict); Gregory, supra note 29, at 387 (concluding that best interests test "provides to judges the invitation, which they frequently accept with alacrity, to engage in virtually untrammeled exercises of discretion in deciding issues of child custody and visitation"); Mnookin,
In deciding which outcome is in the best interests of a child, the court must assign values to the competing outcomes. In doing so under the best interests of the child standard, the court is able to substitute its values, or those of the state, for those of the family. As the Supreme Court of Florida has stated:

[T]here is an inherent problem with utilizing a best interest analysis as the basis for government interference in the private lives of a family, rather than requiring a showing of demonstrated harm to the child. It permits the State to substitute its own views regarding how a child should be raised for those of the parent. It involves the judiciary in second-guessing parental decisions. It allows a court to impose "its own notion of the children's best interests over the shared opinion of these parents, stripping them of their right to control in parenting decisions."

For example, two individuals might differently value an outcome that produces a child who is an independent thinker. Therefore, two decision-makers applying the best interests standard might evaluate differently the merits of a parent whom the decisionmakers believe will encourage independent thinking in a child. In this way, the decisionmaker's private beliefs and

supra note 19, at 227 (noting in 1975 that "[i]n the last decade . . . some commentators have attacked the breadth of discretion granted judges in resolving custody disputes"). For a summary of the leading academic criticisms of the best interests of the child standard, see Carl E. Schneider, Discretion, Rules, and Law: Child Custody and the Uniform Child Custody Act's Best-Interest Standard, 89 Mich. L. Rev. 2215, 2219-25 (1991) (reviewing critiques of several prominent academics and concluding that "there is a weighty body of opinion . . . that argues in various ways and for various reasons that the best-interest standard confides too much to the discretion of judges and that rules of some description should supplement or supplant it").

230. See Teitelbaum, supra note 64, at 1156 (discussing conduct and circumstances relevant to best interest of child standard). Teitelbaum stated:

To make custody turn on the 'best interests' of the child means that a court must decide what conduct and circumstances are desirable and what are not. The criteria for this decision, if not supplied by the parents themselves, must derive from the judge's views of good child rearing and good citizenship.

Id.; see also Davis, supra note 5, at 244 ("It sometimes happens . . . that a state's intervention [in the family] seems motivated by concern as much for the child's life-defining moral or value choices as for the child's physical or emotional well-being."); Nan D. Hunter & Nancy D. Polikoff, Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy, 25 Buff. L. Rev. 691, 693-715 (1976) (discussing custody cases that involve lesbian mother and that illustrate culturally biased nature of best interests of child standard).


232. See Mnookin, supra note 19, at 251 (noting that application of best interests standard requires that custody decisionmaker evaluate competing claimants as "social being[s]" by examining their "attitudes, dispositions, capacities, and shortcomings"). The subjectivity of this initial valuing of a claimant's attributes produces uncertainty in predicting child placements. The forward-looking nature of child custody determinations compounds this uncertainty. Id. at 229-30, 261. Although most adjudications center on the occurrence or meaning of completed
mores concerning a wide range of factors might affect the custody decision-making process.233

Moreover, the best interests standard of judicial review for parental decisionmaking would be intrusive of family autonomy even if there were some way to ensure that judges did not inject their private mores or biases into their custody decisionmaking.234 Were a judge's discretion in making a "best interests" determination to be effectively cabined by legislative or common law guidelines, those guidelines themselves surely would reflect a societal consensus as to the attributes or conditions that are likely to serve the best

acts, custody determinations require additional predictions concerning the effects that alternate environments will produce in the child. Id. at 251. Thus, even if all rational persons could agree that independent thinking is an evil that should be discouraged, one might still lack the ability to predict which custody and visitation arrangements would best extinguish such tendencies. See id. at 261 ("An inquiry about what is best for a child often yields indeterminate results because of the problems of having adequate information, making the necessary predictions, and finding an integrated set of values by which to choose.").

233. SeeMary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 183 (1992) (asserting that "[b]ecause the best interest standard is so open ended, a judge may reach virtually any result in a case as long as he does not base his decision explicitly on impermissible criteria" and noting that judges tend to apply best interests standard in ways that are biased in favor of remarried fathers and biased against working women, poor women, lesbians, sexually active women who are not married to their partners, and women in interracial marriages); Mnookin, supra note 19, at 269 ("An examination of available cases dramatically illustrates how a judge's attitude toward child rearing, sexual mores, religion, or cleanliness can affect the result of court proceedings."); Scott, supra note 34, at 622 (commenting that best interests "determination can be speculative and value-laden, as the standard encourages courts to assess the character of the contestants and the potential capacity of each to assume the child's future care"); Id. at 638 (noting that wide-ranging inquiry of best interests standard affords opportunity for judge's personal values and biases to influence decision); see also Carle v. Carle, 503 P.2d 1050, 1054-55 (Alaska 1972) (finding, based on trial court's statements, that trial court might have acted on its cultural bias against Native Alaskan way of life in awarding custody to parent who lived in urban Juneau over parent who maintained rural Native lifestyle and remarking that "w[we] think it is not permissible, in a bicultural context, to decide a child's custody on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture"), In re Petition of C.M.A. and L.A.W., 715 N.E.2d 674, 679 (Ill. App. Ct. 1999) (concluding that judge who was responsible for considering adoption petitions of two lesbian couples "had a predetermined bias against lesbians" which influenced her actions in case); In re Marriage of Cabalquinto, 669 P.2d 886, 890 (Wash. 1983) (en banc) (Stafford, J., concurring in part and dissenting in part) (reporting comments of trial judge who denied gay father home visitation with his eight-year-old son: "Well, in my view a child should be led in the way of heterosexual preference, not be tolerant of this thing [homosexuality]").

234. One might reasonably fear that a court with such private value-laden reasons for a child-placement decision might keep its reasons to itself but still rely upon them. See Mnookin, supra note 19, at 270 (explaining that "juvenile court judges can often disguise a decision based on an 'improper' factor by vague recitation of general language: the real reasons may be very different from the stated ones"); see also Charlow, supra note 229, at 272 (using the infamous custody case of Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966) to illustrate how "subconscious values affect the process judges use to decide contested custody cases even if it is impossible to measure this influence precisely").
interests of the child. A parent’s decision with respect to the upbringing of her child is infringed as much when it is overturned as a result of societal consensus as when it is overturned due to the private bias of a single judge.

In sum, when a court employs a voidable approach to overturn a parent-sponsored arbitration award for custody merely because the court believes that the arbitrator’s decision does not serve the best interests of the child, the court impermissibly infringes upon the parents’ constitutional right to raise their child as they see fit. Under the voidable approach, a custody arbitration award may stand only if the award comports with the court’s notion of what is best for the child, that is, if the award comports with the values of the court or the values of the state or both. Troxel teaches, however, that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a ‘better’ decision could be made.”

Moreover, it seems wholly inconsistent with the Constitution’s parental right of autonomy for a reviewing court to

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235. See Chambers, supra note 64, at 481-82 (arguing that "to the extent that judges are applying the wrong values [in applying the best interests standard], it is in part because legislatures have failed to convey a collective social judgment about the right values"); Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 770 (1988) (arguing that standard that "avoids moralizing in making choices between parents" yet will "have at its core an appreciation of what we as a society agree will be in the ‘best interests’ of children” should replace best interests of child standard); Schneider, supra note 229, at 2266-67 (suggesting that custody cases that demonstrate bias against, for example, lesbian mothers or “religious fanaticism,” may not reflect judges substituting personal for public standards, but might actually reflect judges’ consideration of community viewpoint); Note, Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests," 73 Yale L.J. 1201, 1202-03 (1964) (noting that best interests standard "may demand a community consensus, expressed through the courts, as to the values which the community desires to maximize in child custody dispositions"); see also In re Marriage of Diehl, 582 N.E.2d 281, 292 (Ill. App. Ct. 1991) (holding that trial court may properly consider mother’s cohabitation with her lesbian partner as relevant factor affecting child’s best interests); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982) (noting testimony "that it is in a child’s best interests to be taught the prevailing morals of society, and that it is generally considered immoral for two women to engage in a homosexual life-style" and holding that trial court was justified in modifying custody from lesbian mother to father based on mother’s same-sex relationship); Jacobson v. Jacobson, 314 N.W.2d 78, 82 (N.D. 1981). The Jacobson court stated: [W]e believe that because of the mores of today’s society, because [the mother] is engaged in a homosexual relationship in the home in which she resides with the children, and because of the lack of legal recognition of the status of a homosexual relationship, the best interests of the children will be better served by placing custody of the children with [the father].

Id.

236. Troxel v. Granville, 120 S. Ct. 2054, 2064 (2000) (O’Connor, J., plurality opinion); see also Charlow, supra note 229, at 269 (concluding that best interests of child standard is “a euphemism for unbridled judicial discretion”).

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replace an arbitrator's custody award merely because the court believes the
award is likely to cause harm to the values or belief system of the child.²³⁷

Rather, the Constitution requires that judicial review of a parent-sponsored arbitration award for custody, at a minimum, must give "special weight" to the arbitrator's decision.²³⁸ Absent some evidence that such a presumption is not warranted in the instant case, the court's decisional framework must respect the "presumption that a fit parent[']s arbitrator] will act in the [child's] best interest."²³⁹ As long as the arbitration award for custody is likely to result in the child receiving "adequate care" from her parents, the reviewing court generally should allow the arbitration award to stand.²⁴⁰

The constitutional analysis respecting the enforcement of custody arbitration awards becomes more complicated in situations involving a non-legal co-parent. For example, a legal parent may seek to avoid complying with a custody arbitration agreement that she entered into with a non-legal co-parent, or she may seek to have declared void a custody arbitration award resulting from such an agreement with a non-legal co-parent. Thus, the legal parent may seek to turn her constitutional shield from state interference with her parental autonomy into a sword wielded to defeat the asserted parental rights of her co-parent.

Recent litigation in Florida between lesbian co-parents illustrates the above point. In Kazmierazak v. Query,²⁴¹ two former domestic partners fought over custody of the child they had jointly raised since birth.²⁴² The non-legal mother alleged that the two co-parents executed an agreement shortly after the child's birth giving the non-legal mother "an indefinite grant of custody."²⁴³ The non-legal mother argued that she was entitled to a hearing to establish that she was the "psychological parent" of the child.²⁴⁴ On the other side of the

²³⁷. See Shapiro, supra note 50, at 658 (endorsing strong view of parental rights). Shapiro argues that

a parent’s entitlement to teach the parent’s own child right and wrong as the parent sees fit lies at the core of the parental right to raise a child. The mere fact that a parent raises a child to believe in a particular set of values cannot be the basis for state interference with parental rights, unless it can further be shown that some real harm – harm apart from the assertedly injurious belief system – will follow.

²³⁸. Troxel, 120 S. Ct. at 2062 (O'Connor, J., plurality opinion).
²³⁹. Id.
²⁴⁰. Id. at 2061.
²⁴³. Initial Brief of Appellant at 2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (No. 98-02854). For the purposes of the motion to dismiss for failure to state a claim that was before the court, the court was obligated to treat this allegation as true. Reply Brief of Appellant at 2 n.2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (No. 98-02854).
²⁴⁴. Kazmierazak, 736 So. 2d at 106.
dispute, the legal mother sought to deny her former lesbian partner custody or visitation rights with respect to the child they had raised together; she argued that the non-legal mother lacked standing to petition for such rights.

The district court of appeals affirmed the trial court’s ruling in favor of the legal mother on this ground. The district court of appeals went further, however, and held that Florida’s constitutional right of privacy precluded the court from granting the non-legal mother visitation or custody rights over the objection of the legal parent "absent a showing of demonstrable harm to the child." Applying Von Eiff v. Azicri, in which the Florida Supreme Court struck down an award of child visitation to grandparents over the objection of a natural parent as a violation of the Florida Constitution’s guarantee of privacy, the district court of appeal held that biological and adoptive parents have a "fundamental and constitutional right of privacy . . . to make decisions about their children’s welfare without interference by third parties." The district court of appeal further held that "the state cannot intervene into a parent’s fundamental or constitutionally protected right of privacy, either via the judicial system or legislation, absent a showing of demonstrate harm to the child." The Kazmierazak court held, therefore, that it could not grant to a "psychological parent" rights equivalent to those of a biological parent.

The Kazmierazak court’s holding, in the face of the lesbian couple’s agreement that the non-biological mother would have custody rights, suggests that Florida’s constitutional right to privacy may preclude a court from enforcing a pre-dissolution arbitration agreement purporting to govern custody disputes between a parent and a non-legal co-parent. The Kazmierazak holding, however, disregards the legal parent’s agreement and actions which sought to enact a limited waiver of her parental right of autonomy. In a similar case, the Wisconsin Supreme Court recognized that "[t]hrough consent, a biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child." It is no infringement of a citizen’s constitutional right for the state merely to

246. Kazmierazak, 736 So. 2d at 110.
247. Id. at 109.
248. 720 So. 2d 510 (Fla. 1988).
251. Id.
252. Id.
253. In re Custody of H.S.H.-K., 533 N.W.2d 419, 436 n.40 (Wis. 1995); see also id. at 436 (holding that parent’s constitutional right to rear her child as she sees fit is not infringed by award of visitation to another person "when a parent consents to and fosters another person’s establishing a parent-like relationship with a child and then substantially interferes with that relationship").
enforce that citizen's knowing and volunteering contractual waiver of her constitutional right.

Moreover, by failing to enforce the legal parent's agreement to arbitrate custody disputes with her co-parent on terms that equalize the rights of the co-parents, the court itself arguably infringes upon the biological mother's right of privacy to make decisions about her child's welfare. The Kazmierak rationale would preclude a lesbian mother from creating a family in which she and her partner are jointly responsible for the development of their child and share equally in the burdens and privileges that fulfillment of those obligations ordinarily brings. It would be more in keeping with the spirit of the right to parental autonomy to allow a legal parent to prospectively waive standing objections and the advantages that substantive custody standards give to legal parents, so that the legal parent could create a family in which her co-parent can invest fully in her relationship with their child secure in the knowledge that her investment in the relationship could not be terminated at the will of the legal parent.

B. Prudential Concerns Governing State Intervention in the Family and Their Application to the Arbitrability of Custody Disputes

Aside from the issue of the extent to which the state may infringe upon a parent's right to raise her child as the parent sees fit, to what extent should the state interfere with the parent-child relationship? Several prudential considerations militate against extensive state regulation of the family, and especially of the intact family. In most cases, extensive state regulation is not necessary, will not be effective, and may be counterproductive by de-motivating parents who otherwise would attempt to act in their child's best interests. When the relationship between a child's parents fractures, however, more extensive state intervention in the parent-child relationship generally is thought to be appropriate.

254. See Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 VA. L. REV. 1225, 1232, 1246-47 (1998) (noting that "autonomous individuals frequently will pursue their own ends by voluntarily restricting their future freedom through enforceable legal commitments to others" and explaining how "[a] legal regime that constrains the freedom to commit actually limits individual freedom").

255. See V.C. v. MJ3., 748 A.2d 539, 552 (N.J. 2000), cert. denied, 121 S. Ct. 302 (2000) (holding that legal parent waives to some extent zone of autonomous privacy for herself and her child when she cedes to third party parental authority over the child, "the exercise of which may create a profound bond with the child"); see also Olsen, supra note 160, at 842-44, 854 (arguing that state "non-intervention" in family is false ideal because state defines family and, in that way, chooses whom to empower with respect to child).

256. See Mnookin, supra note 19, at 267 ("The responsibility and opportunity of custody is assigned to a child's natural parents, and for the overwhelming majority of children, this simple rule suffices.").
1. State Deference to the Intact Family

State deference to the intact family is grounded principally on the belief that, in most cases, state intervention is not needed to ensure that parents fulfill their roles in guiding the child to healthy adulthood. Even if the state imposed no sanctions for inadequate parenting, most parents would seek to be good parents to their children. This result is thought to be the product of natural parental affection and social norms that reward good parenting and sanction bad parenting.

The biological and affective bonds between parents and children together with informal social norms encourage parents to identify their interests with those of their children and to approach their performance as parents with a sense of moral obligation. In such an environment, parents would expect to experience the rewards of social approval and self-fulfillment for good parenting, and would expect both guilt and social opprobrium to follow default.

Parental autonomy is grounded also in the view that the state generally functions poorly as a parent and, in most cases, would function less ably than

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257. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1253, 1262 (1999) (conceding that "[a]s a general rule, what is good for mothers is good for children and mothers are generally good . . . to their children," but cautioning that "[i]f improperly deployed, privacy as a principle of self government allows injustice within the caretaker-dependent unit to fester, supported and subsidized by the larger society, without the protection of legal norms or external controls").


In light of the likelihood that intrusive state oversight of family life would on balance reduce children’s welfare, our society’s enforcement strategy relies primarily on parent’s love for their children, on the child’s voice within the family, and on persuasion by public and expert opinion . . . and only secondarily on courts and child welfare agencies.

*Id.*; Scott, *supra* note 34, at 668-69 (discussing theory that social norms effectively regulate behavior within family while avoiding high monitoring and enforcement costs that legal regulation would require); Scott & Scott, *supra* note 40, at 2433-37, 2452 (commenting that in intact family, "bonding through psychological attachment and informal social norms is an efficient substitute for invasive restraints on discretion and family privacy"); see also Troxel v. Granville, 120 S. Ct. 2054, 2061 (2000) (O’Connor, J., plurality opinion) (explaining that "[t]he law’s concept of family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions [and] historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children" (quoting Parham v. J.R., 422 U.S. 584, 602 (1979))).

259. Scott & Scott, *supra* note 40, at 2433; see also Mnookin, *supra* note 19, at 266 (concluding that parental autonomy to make decisions affecting child is supported by fact that "[a]ffection for the child and mutual self-interest of family members are more likely to inform decisions").
would a child’s biological or adoptive parents. Most parents know their child better and understand her particular needs and wishes better than the state is capable of doing. Moreover, parents generally are better able than the state to apply this knowledge for the benefit of their child and, relatedly, to give the child the individual attention that she needs. This individual attention is regarded as necessary to the development of the psychological parent-child relationship that is thought to be critical to the child’s healthy development.

Finally, some have argued that state deference to the intact family itself plays an instrumental role in promoting good parental behavior. It might seem, on the surface, that respect for the parental right of privacy comes at the cost of consideration of the child’s interests and, therefore, does not advance the state’s goal of promoting the physical and emotional well-being of the developing child. Indeed, many commentators have explored this alleged parental rights/children’s interests dichotomy and have decried the emphasis on parental rights.

260. See Goldstein et al., supra note 31, at 11-12 (arguing that state’s inability to function as adequate parent justifies policy of minimal state intervention in family); Czapskiy, supra note 26, at 962 ("Society entrusts children to caregivers because we believe that society cannot raise children as well as individuals can."); Mnookin, supra note 19, at 267-68 ("[W]hat has happened to children in the foster-care system – where the state has primary responsibility for the care of some children – should give pause to those seeking broader state authority."); Scott & Scott, supra note 40, at 2415 (commenting that "as a general matter, the state is not well suited to substitute for parents in the job of child rearing").

261. See Gilles, supra note 19, at 165 ("A moment’s reflection will show that courts are neither as well-placed as parents to discern the child’s best interests nor as interested in ensuring that the child’s welfare is in fact advanced."); Mnookin, supra note 19, at 266 (pointing out that family members are more likely than state to have direct knowledge about child family member).

262. See Goldstein et al., supra note 31, at 12 (discussing parents’ ability to focus on individual needs of children). Goldstein and others stated:

The legal system has neither the resources nor the sensitivity to respond to a growing child’s ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decisions, or to act with the deliberate speed that is required by a child’s sense of time.

Id.

263. See id. at 9-12 (arguing that parental autonomy is necessary for establishment and maintenance of psychological parent-child relationship "critical to every child’s healthy growth and development"); see also id. at 28-29, 40-42 (arguing that state intrusion on bonds between child and long-time caretaker should be minimized regardless of whether long-time caretaker is legal parent to child).

264. Scott & Scott, supra note 40, at 2463.

265. See id. at 2456 (citing to several commentators who "assume that this deference to parental authority would be greatly diminished were the law to focus instead on children’s welfare"); Woodhouse, supra note 171, at 1001 (arguing that "[s]tamped on the reverse side of the coinage of family privacy and parental rights are the child’s voicelessness, objectification, and isolation from the community"); Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parental Rights," 14 CARDOZO L. REV. 1747, 1752-54, 1844-58
But parental rights and children’s interests are not necessarily a zero sum game in inextricable opposition to each other. Professors Elizabeth Scott and Robert Scott have set forth a relational model of state regulation of the parent-child relationship that takes up this point. This model, which the Scotts have labeled the "fiduciary heuristic," centers on a reciprocal relationship between the interests of children and the rights of parents to raise their children largely free from government intrusion. The Scotts view parental autonomy as compensation from the state for the parents' satisfactory performance in meeting the needs of their children. Moreover, the Scotts argue that state deference to the intact family in most cases, although couched in terms of "parents’ rights," is the best means to motivate parents to fulfill their parental obligations and to meet their children’s needs.

Central to the Scotts’ argument is the assumption that a strong motivation for a parent to become a parent and to sacrifice for and invest in her child is the expectation that the parent will be allowed to raise the child within the family unit as she sees fit. State regulation of the family must therefore take into consideration how parental role satisfaction promotes good parenting behavior and consider whether interference with parental autonomy will decrease that role satisfaction and, thus, discourage good parenting.

The absence of pecuniary compensation to parents for capably performing parental tasks necessarily increases the value of nonpecuniary substitutes such as reputation and role satisfaction. On this dimension, parental authority over the relationship with children is offered as the quid pro quo for satisfactory performance. It is unlikely that, in a hypothetical bargain over the terms of their performance, parents would agree to undertake the respon-

(1993) (decriying family law’s privileging of legal parents over functional parents and proposing that law confer parental authority on those who nurture child).

266. See Susan L. Brooks, A Family Systems Paradigm for Legal Decision Making Affecting Child Custody, 6 CORNELL J. L. & PUB. POL’Y 1, 10 (1996) (arguing that "the rights, as well as the needs and interests of children and parents, are inextricably intertwined" and for that reason it is error "to speak of them as dichotomous, or worse, as opposed to each other"); Cahn, supra note 29, at 49 ("Instead of reinforcing a dichotomy between the interests of parents and the interests of children, we should recognize that in most cases, they overlap significantly."); Gilles, supra note 19, at 158 ("Parental rights are a means to the end of protecting the best interests of children, not a license for parents arbitrarily to control their children’s lives.").

267. See generally Scott & Scott, supra note 40.

268. Id. at 2474.

269. Id. at 2418, 2456, 2474.

270. See id. at 2456 (arguing that although grants of parental authority are frequently justified in terms of parental rights, parental authority and discretion are actually "the necessary quid pro quos for parents undertaking the responsibilities of parenthood").

271. Id. at 2431, 2440, 2463, 2474.

272. See id. at 2418, 2431, 2440, 2463 (discussing importance of parental role satisfaction and state’s interest in promoting and protecting that satisfaction).
sibilities desired by the state without assurance that their investment would receive legal protection. Recognition of these parental claims in some form is an important inducement to encourage investment in children’s welfare.273

In sum, because of the widely accepted view that extensive state regulation of the intact family is not necessary, would not be likely to optimize outcomes in the run of cases, and might function as a disincentive to good parenting, the state generally will infringe the intact family’s parental autonomy only to guard against abuse or neglect of the child or to protect the child from a likelihood of some specified harm.274

2. State Intervention in the Fractured Family

The state intervenes to a much greater extent in the fractured family than it does in the intact family.275 Several rationales are thought to support this increased state intrusion. These rationales generally fit within the categories of child protection and dispute resolution.276

Upon fracture of the intact family, the unity of interests between family members – between parent and parent, and between parent and child – also fractures.277 At the same time, some of the social norms and bonds promoting good parenting also break down, making it more likely that the parents in a fractured family – particularly the non-custodial parent – will act selfishly in prioritizing the newly antagonistic interests of family members.278 Moreover, the parents in the fractured family are more likely to have new family ties that compete with the interests of the children of the fractured family.279 Finally, the consensus that could be counted on to resolve disputes in the intact family no longer can be counted on to resolve disputes in the fractured family.280 For

273.  Id. at 2440; see also Czapanskiy, supra note 26, at 980 n.38 (arguing that Scotts' relational model should be presumed also to apply to single parents and other committed caregivers, and that unpredictability introduced by legal intervention might serve as incentive to such caregivers to abandon their caregiving role).

274.  See Scott & Scott, supra note 40, at 2452 ("Legal directives that function as supplemental precommitments are appropriately limited [when dealing with an intact family] to issues where a strong societal consensus dictates mandatory behavior.").

275.  See id. at 2455 ("In general, parents who are divorced, and to a far greater extent, those whose children are in state custody, are subject to a degree of judicial and state agency supervision that would be deemed violative of family privacy if applied to intact families.").

276.  See Mnookin, supra note 19, at 229 (identifying dispute resolution and child protection as two distinct functions performed by court in child custody adjudications).


278.  Id. at 2446.

279.  Id. at 2447.

280.  See id. at 2448-49 (observing that fracture of family increases risk that parents will disagree on best means to promote their children’s best interests, necessitating creation of legal rules to settle disagreements that normally would be handled informally within family).
all of these reasons, our society accepts that state intervention is more ap-
propriate in the fractured family than it is in the intact family.

The principal justification for state intervention in the fractured family
is the disunity of interests that appears at fracture. It is thought that, prior to
fracture, the mutual affection and mutual dependence of family members will
tend to ensure that the needs of all family members are considered in arriving
at family decisions.281 These bonds of affection and dependence weaken at
fracture of the family to the point that they no longer are dependable safe-
guards of each family member’s interests.282 Indeed, a hostility of the parents
toward each other, often found incident to divorce, gives rise to the danger
that one or both of the parents might act principally out of a desire to harm the
other parent rather than principally out of a desire to do what is best for the
child.283

The prototypical example of the disunity of interests appearing at fracture
of the family arises from the maintenance of two separate households: The
non-custodial parent no longer shares the same principal residence with her
child and former spouse and thus no longer personally experiences any short-
comings in the child’s primary home setting.284 For example, in circumstances
in which the custodial parent’s financial resources, independent of the non-
custodial parent’s resources, coupled with his or her family obligations, dic-
tate that the child’s principal residence is unsafe and pest-infested, the non-
custodial parent does not experience these discomforts directly. It is thought
that, in the intact family, the parents’ direct experience of these discomforts
ordinarily will serve as an incentive for the parents to take appropriate, feasible

281. GOLDSTEIN ET AL., supra note 31, at 22 n.* (quoting GOLDSTEIN ET AL., BEYOND THE
BEST INTERESTS OF THE CHILD 66 n.* (1973)); see also Woodhouse, supra note 257, at 1253
("[I]n the vast majority of cases, the interests of the dominant and dependent members in a
caretaking relationship are closely intertwined.").

282. See Robert H. Mnookin, Divorce Bargaining: The Limits on Private Ordering, 18
U. MICH. JL. REFORM 1015, 1031-34 (1985) (acknowledging that divorcing spouses given legal
right to settle their post-dissolution rights and responsibilities might reach settlement that
reflects their own selfish interests to detriment of their children’s needs, but nevertheless
arguing that divorcing parents should have such right subject to standards that protect their
children from abuse and neglect).

283. See Charlow, supra note 229, at 276 (commenting that in contested custody cases
"[o]ften the parties are motivated more by anger against the other party than by feelings of love
and concern for the child"); Mnookin & Kornhauser, supra note 40, at 968, 974 (hypothesizing
that bargaining preferences of divorcing parents might "reflect spite and envy [and] . . . a strong
wish to punish the other spouse, regardless of the detriment to himself or to the children");
Scott, supra note 34, at 636 (arguing that parent’s divorce litigation positions might not reflect
that parent’s true desires for two reasons: first, what parent truly desires might not be obtain-
able option and, second, that parent might be trying to spite other parent).

284. See Scott & Scott, supra note 40, at 2448 (arguing that parents not living with their
children are less likely to give priority to their children’s financial needs).
ameliorative actions. To the contrary, in a fractured family, the non-custodial parent’s voluntary efforts to mitigate the child’s unfortunate home setting would result in the non-custodial parent’s having fewer resources to devote to the maintenance of her own principal residence. This disunity of interests is the primary rationale for imposing child support obligations on the non-custodial parent.

Factors arising from the dissolution of the parent-parent relationship also contribute to the disunity of interests between the child and her non-custodial parent. These factors might cause the non-custodial parent to resolve conflicts of interest without due regard for the interests of the child. For example, the non-custodial parent’s post-fracture relationship with her child commonly is subject to new stresses that might cause the non-custodial parent to pull away from the relationship. One new stress in many cases is that the non-custodial parent’s post-fracture contact with the child is less frequent as compared to the level of contact before the fracture. A second stress is that post-fracture contact might also bring unpleasant interactions with a custodial parent with whom the non-custodial parent is in chronic conflict. Moreover, dissolution of the parents’ relationship might greatly diminish the non-custodial parent’s authority over the child. Finally, it is thought that informal social norms encouraging good parenting weaken at fracture of the family.

These factors might combine so that the non-custodial parent experiences diminished satisfaction from her relationship with her child. Detachment may then follow. The likelihood of detachment would seem greater if the non-custodial parent is able to find personal fulfillment in new family ties that have supplemented those from the fractured family. Such detachment from the fractured family, especially if detachment is coupled with attachment to

285. See id. ("Parents in family units share their children’s standard of living and, through informal influences, can usually be trusted collectively to take their children’s needs into account in allocating family resources.").
286. Id.
287. See id. at 2446 (discussing effects of family fracture on parent-child relationship).
288. Id.
289. Id. at 2447.
290. Id.
291. Id.
292. If the parents enjoy joint legal custody with respect to their child after fracture, this is not necessarily the case.
293. See Scott, supra note 34, at 669 ("Legal oversight also serves to reinforce informal social norms, weakened in the context of divorce, by directing parents to fulfill their prescribed responsibilities despite the breakdown of the marriage.").
294. Scott & Scott, supra note 40, at 2447.
295. Id.
a new source of familial fulfillment, makes it more likely that the non-custodial parent will neglect the needs of the child of the fractured family or otherwise discount the child's interests.296

A final factor thought to justify state intervention in the fractured family is the simple fact that someone must resolve intractable disputes that arise in the fractured family. The intact family is presumed to govern itself by consensus.297 The parties to a fractured family relationship, however, are less likely to reach such a consensus.298 Therefore, the state might have to intervene to resolve intractable disputes or to invest authority in one parent to do so.299 Indeed, in the case of parents who are unable to agree on a custody matter and who then ask the court to decide the matter for them, the parents have waived their parental autonomy with respect to the disputed matter.300

3. Application of Prudential Policies Governing State Deference to and Intervention in the Family to the Arbitrability of Custody Disputes

In evaluating how the prudential factors discussed above should impact the enforceability of custody arbitration agreements and awards, it is helpful to keep in mind the two distinct categories of purpose that state intervention in the fractured family serves. State intervention at dissolution serves a dispute resolution function and a child protective function.301 The state serves a dispute resolution function whenever competing claimants seek a court determination of the proper custodial and visitation arrangements for a child.302 Custody proceedings serve a child protective function only when the state evaluates whether one of the persons who seeks custody or visitation privileges with respect to a child presents a danger to that child.303 As Professor Robert Mnookin has observed:

[C]ourts perform two very different functions in the resolution of custody disputes: private-dispute-settlement and child-protection. The private-dispute-settlement function is involved when the court must choose between two or more private individuals, each of whom claims an associa-

296. See id. (stating that new attachments formed by non-custodial parents makes "fulfillment of previously established parental responsibilities more burdensome").
297. Id. at 2448-49.
298. Id. at 2449.
299. Id.
300. GOLDSTEIN ET AL., supra note 31, at 24; see also id. at 32 (discussing import of waivers of parental authority).
301. Mnookin, supra note 19, at 229; see also id. at 232 (discussing role of dispute resolution function); id. at 248 (discussing interrelation of dispute resolution function and child protection function).
302. Id. at 232.
303. Id. at 229, 232, 248.
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By providing a judicial forum, the state protects the substantial public interest in resolving such disputes without resort to private force or violence and also protects the expectations and interests of the individuals directly affected, including the child. The second function, child-protection, involves the judicial enforcement of standards of parental behavior believed necessary to protect the child. This function is consistent with the well established principle that the parens patriae power of the state empowers courts to remove children from parental custody if that is necessary for their protection.

When the separating parents reach a final accord concerning child custody and visitation matters, the state need not perform a dispute resolution function at all with respect to child custody. Similarly, when the parents have agreed to a private alternate dispute resolution method, such as the adjudication of their custody dispute by a private arbitrator, the state has no dispute resolution function to perform with respect to child custody. Therefore, although state intervention at fracture generally is thought appropriate to resolve intractable disputes between the separating parents, this rationale cannot justify state intervention in the parent-child relationship so as to determine custody rights when the parents have contracted for a private determination as to the proper custodial and visitation arrangements for their child.

Parents ought not to have the right, however, to contract out of the state's child protective function. The state's child protective function justifies state intervention in the parent-child relationship to protect a child from abuse or neglect or a likelihood of harm. This "abuse or neglect" standard proscribes physical, sexual, and psychological abuse and mandates minimum standards for physical nourishment, clothing and shelter. The state also is justified in infringing upon parental autonomy pursuant to the child protective function to ensure that parents meet certain other standards on which there is an undeniable social consensus. Restrictions on child labor, and requirements for compulsory education and mandatory immunizations fall into this category.

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304. Id. at 229.
305. See GOLDSTEIN ET AL., supra note 31, at 31-33 (arguing that separation of child's parents alone should not serve as grounds for state intervention in family, rather, parents who are able to agree on custody and visitation matters should be free to do so without state interference).
306. See Von Eiff v. Azicri, 720 So. 2d 510, 515 (Fla. 1998) (listing as types of harm to children that have warranted government intervention in parental decisionmaking "clear threat of abuse, neglect and death," including sexual abuse and withholding of "reasonable medical treatment that is necessary for the preservation of life," but not "potential harm to a child flowing from the death of a parent").
308. Id.
The state's child protective function is not understood, however, to allow the state to intervene solely to provide the child with an optimal experience—however "optimal" might be defined. This is because "[i]mplicitly, we have a shared assumption that the court's child-protection function is to enforce minimum social standards, not to intervene coercively in an attempt to do what is best or least detrimental." As Professor Stephen Gilles has explained more fully:

[A]ny choice that is not in a child's best interests must, by hypothesis, be harmful to the child as compared to whatever choice is in the child's best interests. But in everyday life we do not normally equate harm to children with "everything other than what is best for children." Rather, in light of the difficulties of reaching consensus on what is best for children, most people reserve the word "harmful" for choices that seem drastically inferior to what they perceive to be the best choice . . . . We do something similar in the law of childrearing: as a very rough approximation, state family law and federal constitutional law let parents decide where their children's best interests lie, subject to the state's power to override parental choices that are harmful in some strong sense—that are "destructive" or "abusive" and therefore warrant legal intervention, not just raised eyebrows.

Professor Mnookin illustrates this point well with two hypothetical families—the Smiths and the Joneses. In short, the Smiths, who wish to adopt a newborn baby, are healthy, wealthy and wise. The Joneses, who have a four-day old baby, are most certainly less so. Even if all could agree that the Smiths would function as "better" parents for the Joneses' baby, the state will not, without more justification, transfer custody of the child from the Joneses to the Smiths.

The example of the Smiths and the Joneses suggests that the "best interests of the child" standard should be utilized, if at all, only as a dispute resolu-

309. Mnookin, supra note 19, at 268.
310. Gilles, supra note 19, at 167; see also Troxel v. Granville, 120 S. Ct. 2054, 2076 (2000) (Kennedy, J., dissenting) (discussing behavior that is considered harmful to child). Justice Kennedy stated:

While it might be argued as an abstract matter that in some sense the child is always harmed if his or her best interests are not considered, the law of domestic relations, as it has evolved to this point, treats as distinct the two standards, one harm to the child and the other the best interests of the child.

Id.
311. See Mnookin, supra note 19, at 268-69 (illustrating principle that court's role is to enforce minimal societal standards of child welfare, and not to intervene and make judgments about what would be best for child).
312. Id.; see also In re Knott, 197 S.W. 1097, 1098 (Tenn. 1917) ("The mere fact that the petitioners desire to adopt the child and that they are in better financial condition than its natural parents will never authorize a decree of adoption.").
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tion standard. When two parties ask the state to adjudicate their custody dispute, the state must utilize some standard for selecting between the competing claimants. In such circumstances, state intrusion into the parent-child relationship is a given. While many have questioned whether the "best interests of the child" standard is the best dispute resolution standard,313 the state reasonably might adopt such a standard in carrying out the intervention that the parties have requested.314

The "best interests of the child" standard, however, generally is overly broad as a child protective standard.315 In carrying out its child protective function, the state need not, and should not, replace parental values with its own values or supersede parental judgment with its own judgment merely because it believes that by doing so it will optimize the child's welfare. The state goes beyond "child protection" when it overrules a parental decision merely because it believes that the parents could have made a "better" decision.

In sum, when the parties to a custody dispute have contracted out of public adjudication of their dispute and have opted for private arbitration of their dispute, the state cannot justify the use of the best interests standard of review of any resulting custody arbitration award on the grounds that the state must resolve intractable disputes that arise at fracture of the family. Moreover, the state may not justify the use of the best interests standard of review on grounds that the state must carry out its child protective function. Instead, the state may adequately carry out its child protective function by reviewing any custody arbitration award to ensure that the award does not promote abuse or neglect of the child or subject the child to a likelihood of harm.316 Examination of the Hague Convention on the Civil Aspects of International Child Abduction and its American implementing legislation, 42 U.S.C. §§ 11601-11610 (1998), provides a model for comparison.

313. See supra notes 228-35 and accompanying text (discussing how application of "best interest" standard allows courts to impose their value systems on parents).

314. See Matter of Marriage of Hruby, 748 P.2d 57, 62-63 (Or. 1987) (explaining that in custody dispute between two legal parents, court utilizes best interests of child standard because "the competing custodial rights tend to cancel each other, leaving only the interests of children as relevant considerations").

315. See id. (explaining that in custody dispute between legal parent and third party, use of best interests of child standard is not appropriate means for state to carry out its parens patriae duty to protect child from present or future threat to her well-being).

316. See Scott, supra note 34, at 639 & n.74 (arguing that, absent parental abuse or neglect of child, mere circumstance that parents are before court to obtain divorce is not sufficient justification for court to disregard past parental roles and to restructure family responsibilities). The Hague Convention on the Civil Aspects of International Child Abduction and its American implementing legislation, 42 U.S.C. §§ 11601-11610 (1998), provide a model for comparison. Convention on the Civil Aspects of International Child Abduction, opened for signature October 10, 1980, T.L.S. No. 11,670, 1343 U.N.T.S. 98 [hereinafter Hague Convention]. The Hague Convention requires the state, in certain circumstances, to decline jurisdiction over a child custody matter so that the matter may be decided in an alternate foreign forum that may well provide a very different law of child custody and may well reflect a distinct cultural sensibility as contrasted with the law and sensibility of the state court. That removal of the case to a foreign

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nation of the remaining prudential factors discussed above further supports the conclusion that it would be appropriate for the state to adopt a standard of review of custody arbitration awards that is more deferential to parental autonomy than is the "best interests of the child" standard.

Recall that among the reasons given for deference to the intact family is the belief that deference itself is an incentive to good parenting. In connection with this factor, and in considering the effect that the enforcement of custody arbitration agreements will have on the child's development, one must also consider the effect that the non-arbitrability of custody disputes will have on the intact family. In some cases, this lack of deference to parental autonomy is likely to have profound effects.

Consider, for example, the family headed by a same-sex couple. The effect of non-arbitrability of custody disputes is that the couple would be left upon dissolution of their partnership with only the public court system and the dominant rules of standing and substantive custody standards to govern and resolve their custody dispute. Assuming that the same-sex couple resides in one of the majority of states that does not allow for two legally-recognized mothers or two legally-recognized fathers, one of the partners in the same-sex couple would likely stand in an inferior position in relation to the other concerning custody and visitation rights pertaining to the child upon dissolution of the legal parent/non-legal parent relationship. The non-legal parent might have no chance of defeating the legal parent in a custody dispute (absent a showing that the legal parent is unfit) and might not even have standing to petition for visitation.317

The instrumental function of deference to family autonomy should be considered against the background of this legal landscape. Recall the hypoth-
thesis advanced by Professors Elizabeth Scott and Robert Scott that parental authority is nonpecuniary compensation for the parents’ performance of their parental duties. Thus, the non-legal parent’s knowledge that she serves as parent at the pleasure of her partner might have a profound effect on the extent to which the non-legal parent is willing to invest in the child’s development.

It is a great deal to expect of a parent that she invest in a relationship with her child, give her emotional and physical energy to the child, devote her financial resources to the child, and subordinate her career development for the child, with the knowledge that at any moment she may be denied further contact with her child without legal recourse to challenge this turn of events. For this reason, the non-arbitrability of custody disputes might have a profound negative impact on a gay or lesbian co-parenting family even if the family never dissolves during the child’s minority. Even absent fracture, the disincentive of non-arbitrability might result in the child’s being raised with one of her two co-parents never fully committing her emotions, skills, and resources to the child’s development.

More generally, the liberal enforcement of custody arbitration agreements and awards would allow parents the autonomy to create the type of family that comports with the parents’ central values. To the extent that this autonomy increases parental satisfaction and commitment to the family, the enforcement of custody arbitration agreements and awards should serve as an incentive to good parenting. Thus, this prudential factor weighs in favor of the deferential enforcement of arbitration agreements and awards for child custody.

A second reason given for deference to the intact family is the belief that the state is likely to function less ably as a parent than a child’s biological or adoptive parents are likely to function. This belief is based, in part, on the understanding that parents know their child’s wants and needs better than the state is capable of knowing them. This factor would seem to hold true even after fracture of the family. A child’s parents still are likely to have far superior knowledge of the child’s circumstances than a court is likely to gain through litigation.

318. See supra notes 264-73 and accompanying text (reviewing arguments that parental authority is compensation granted by state to parents for performance of parenting duties).

319. See Scott, supra note 34, at 628-29 (arguing that primary caretaker preference in custody decisionmaking "discourages a ‘secondary’ parent from investing in his relationship with the child because a secondary relationship, however, significant, will not get much legal protection"); see also id. at 672 (arguing that courts, in structuring child custody and visitation awards, should attempt to approximate patterns of parental conduct during pre-fracture period as means to encourage investment in parenting).

320. See Czapanskiy, supra note 26, at 974-75, 993 (setting forth approach for custody and visitation decisionmaking grounded in deference to caregiver’s choices and premised on belief that "it would be exceptional for a child’s caregivers not to know better than outsiders, including courts and court-appointed experts, what is best for the child in their care").
Moreover, arbitration allows for child custody decisionmaking that capitalizes on this parental knowledge. Arbitration allows the parents the opportunity to choose an arbitrator for their custody dispute on the basis of her familiarity with the family or her understanding of the values that the parents hold dear and have tried to follow in raising their child. In such cases, one might reasonably anticipate that the arbitrator will reach a decision that is more in accord with the family's true needs, wants, and values than would a judge deciding the case in public custody litigation.

A final reason given for deference to the intact family is the belief that, in general, state intervention is not necessary because parents tend to have their child's best interests at heart. It is this prudential reason for deference that generally is thought most to break down at fracture of the family. Conventional wisdom holds that because of the disunity of interests arising at fracture of the family coupled with the increased possibility of parental detachment from the members of the fractured family, less deference should be paid to parental decisionmaking in the fractured family.

Consider, for example, the case of the lesbian who plans her pregnancy with her partner with whom she has shared a long-term committed relationship. The partners choose to become parents together, choose the sperm-donor together, and execute a written agreement providing that the non-biological mother shall have "an indefinite grant of custody" with respect to the child. Upon the child's birth, the non-biological mother is listed in the child's medical records as a parent. During their child's early childhood, the co-parents live together with their child and jointly perform the duties of parenthood. Upon dissolution of the parent-parent relationship, however, the biological mother cuts off all contact between the non-biological mother and the child. The biological mother then asserts "the right of a parent to be free from interference by one [un]related, [ ]either by blood [ ]or marriage, to her child . . . " She seeks to deny the non-biological mother custody and visitation rights, not on the merits, but on the ground that such a "stranger to [the] child" lacks standing to seek such rights.

One might reasonably suspect that the biological mother has put aside the best interests of her child in the effort to win the custody battle. As Professor Nancy Polikoff has commented:

The children born to the families whose cases are discussed [in Professor Polikoff's article on planned lesbian families] have two mothers who


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The fear that many parents in a custody dispute will act from selfish motives without proper regard for their child’s best interests is not without some support. This arguably well-grounded fear gives rise to the argument that the specter of selfish behavior on the part of one or both parents upon dissolution of their relationship militates against leaving the child’s fate in the hands of an arbitrator selected by the squabbling parents.

This rationale for intervention has little force, however, with respect to a pre-fracture agreement to arbitrate custody issues. Indeed, one might turn this argument on its head. An agreement concerning resolution of any future custody dispute reached by the two co-parents while the family is intact, prior to the disunity of interests and the other destabilizing factors that dissolution brings, is far more likely to reflect the parents’ true and most sound feelings as to what is in the best interests of their child than is the post-fracture litigation position of either parent.

This factor alone is sufficient justification for subjecting a pre-fracture arbitration agreement regarding custody and a resulting custody arbitration award to a less intrusive standard of judicial review than is imposed on a post-fracture separation agreement for custody. As such, it undermines the reasoning of the courts that refuse to treat an arbitration award for custody as binding and instead look to the settled law on separation agreements regarding custody.

323. Polikoff, supra note 22, at 542.
324. See Philbrick, supra note 101, at 434 (concluding that desire for judicial oversight of separation agreements concerning child custody is motivated in large part by fear that custody disputants will put their own interests before those of their child).
325. See Fineman, supra note 129, at 1223 n.92 (arguing that initial custody decisions should be made under primary caretaker standard because such standard validates autonomy and decisions of prior intact family, and that modification of such initial custody decision should be made only upon finding of abuse or neglect); Scott, supra note 34, at 617, 630 (arguing that custody decisionmakers should seek to approximate roles that parents played prior to fracture of family because, inter alia, such prior roles are likely to be best indication of parents’ true preferences); Scott & Scott, supra note 254, at 1323 (arguing that interests of future parents negotiating premarital agreement “can generally be assumed to be aligned with those of their future children, an assumption that probably cannot be made ex post in the context of divorce itself”).
V. Conclusion

Arbitration has great potential utility for promoting family autonomy. Parents in a fracturing family might utilize arbitration to select both the decisionmaker and the legal standards to guide that decisionmaker in resolving their child custody and visitation dispute. In this way, the parents can seek to ensure that the resolution of their child custody and visitation dispute is governed by the values that the family has cherished and lived by.

The present dominant judicial approaches to the enforcement of arbitration agreements and awards with respect to child custody, however, greatly undermine arbitration’s utility for promoting family autonomy. Pursuant to the void approach to judicial review of such arbitration agreements and awards, the court entirely disregards the custody arbitration agreement or award. Such an approach retards the ability of parents, including those parents in an intact family, to use an arbitration agreement to structure their family responsibilities and rights as they desire and think most appropriate. Pursuant to the voidable approach to judicial review of custody arbitration agreements and awards, the court replaces an arbitration award for child custody entered by a decisionmaker selected by the child’s parents whenever the court feels that its own custody order would better serve the "best interests" of the child. Thus, when the court’s values conflict with the parents’ values, the court’s values will control the custody decision.

The courts that utilize the void and voidable approaches to judicial review of custody arbitration agreements and awards should reexamine their approach in light of the general principles that govern state deference to, and intervention in, the family. The prudential considerations that militate against extensive state intervention in the family support the conclusion that the state is likely to optimize outcomes in the run of custody disputes by giving great deference to parent-sponsored arbitration awards for custody. Moreover, the Supreme Court’s recent discussion of parental autonomy in *Troxel v. Granville* strongly supports the conclusion that the dominant approaches impermissibly infringe upon the constitutional right of parental autonomy by failing to give the requisite special weight to a parent’s views regarding custody and visitation arrangements concerning her child.