Frank McCourt

Frank McCourt, the writer who died in New York on Sunday aged 78, was blamed for starting an epidemic of "misery memoirs" with Angela's Ashes (1996), his desperate chronicle of grinding poverty in 1930s Ireland.

Frank McCourt died at a Manhattan hospice in New York City at age 78. Photo: AP

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The book, published when he was 66, won a Pulitzer prize, sold millions of copies, was turned into a Hollywood film (directed by Alan Parker and starring Robert Carlyle and Emily Watson), and caused bitter controversy among those whose lives it depicted.

McCourt's heart-rending account of his early life, from his days as an infant in New York to his squalid, poverty-wracked childhood in the slums of Limerick in the 1930s and 1940s, made for harrowing reading. But it struck a chord with readers around the world as much for its unsentimental style, told from a child's point of view, as for its compelling grimness.

But many locals in Limerick did not take kindly to having their city's reputation besmirched by stories of the scabby-eyed McCourt children reduced to living on bread dipped in tea and feeding the fire in their damp-sodden home with wooden furnishings and coal picked off the street. His account of his mother Angela's struggle to bring up her family while enduring the vicissitudes of a drunken husband, the deaths of three children, and rejection by mean-spirited neighbours and an unsympathetic and repressive Roman Catholic church, was described as a travesty. At one point in the chronicle she even resorts to sleeping with her own cousin to keep a roof over their heads.

A former school mate confronted McCourt at a book signing and ripped a copy of his book in half. Threats against the author forced Limerick University to step up security when he visited the college. The actor Richard Harris wrote a letter denouncing McCourt to *The Times*. The writer Kevin Myers published a parody, *Cyril's Cinders*, part of which read: "And at school – well, when I say school I mean an upturned bucket, because that was school in those days – the Christian Brothers would wait for us to get through the Specials' ambush and then when the survivors staggered in, they would take down our trousers and beat us with iron rods until it was time to go home again. That was our education, pretty much."

Even Angela McCourt had challenged her son's recollections before her death in 1981. Frank and his brother Malachy had persuaded her to attend *A Couple of Blackguards*, their stand-up memoirs, in a Manhattan theatre. Angela interrupted the tearful renditions of their childhood, standing up and shouting at the stage: "It didn't happen that way. It's all a pack of lies."

But McCourt could afford to brush aside such attacks; he had pulled his punches, he claimed. *Angela's Ashes* ends happily when the 19-year old Frank escapes Ireland for New York and whether or not it was as untruthful as its critics suggested the book was a huge success in America, spawning a McCourt industry and making the author a millionaire. "When I look back on my childhood, I wonder how I survived at all," *Angela's Ashes* begins. "It was, of course, a miserable childhood: the happy childhood is hardly worth your while."

Frank McCourt claimed to have been conceived up against a wall in Brooklyn, New York, and born on August 19 1930, the eldest of seven children. His father, Malachy, was an ex-IRA man from Antrim; his mother a young girl from Limerick. After a shotgun wedding, there followed, in quick succession, another son, then twins, then a daughter who died after two months. It was the height of the Depression and when Frank was four the family returned, destitute, to Ireland.

There was no work to be had in Belfast or Dublin, so the family washed up in Limerick, where they lived in a cramped rain-soaked room in a tenement slum. Parents and children slept in one bed and shared a stinking, bug-infested lavatory with their neighbours. Any spare money was squandered by Malachy on alcohol.

After the deaths of the twins and the births of two more sons, Malachy abandoned his family, leaving them to struggle on the edge of starvation. They wore rags and went barefoot; his mother begged for scraps of food – a boiled egg was a luxury – and the children suffered from the ailments of poverty. Frank's eyes dripped with pus. His teeth were black. He suffered from rickets. Life *chez* the McCourts, as one critic observed, "makes *Bleak House* look like a Marx Brothers movie".

Or so it seemed from Frank's memoir. A rather different version of his upbringing, however, emerged from local sources. After the publication of *Angela's Ashes*, the local newspaper, the *Limerick Leader*,

published a photograph showing the youthful McCourt and his younger brother Malachy, smiling and smartly dressed in their scout uniforms - and not just of any scout uniforms, but those of the St Joseph's Boy Scouts, the elite of Limerick. Another picture showed their mother Angela, whose plump figure would appear to belie McCourt's claims of his family having suffered constant hunger.

Yet for all the factual inaccuracies that were unearthed, part of McCourt's account was undoubtedly accurate. He did lose three siblings. His father was a notorious alcoholic and Frank himself did suffer a number of eye infections, ultimately resulting in the loss of his eyelashes.

McCourt left school at 13, and at 19, as *Angela's Ashes* records, he left the poverty of Limerick and his family behind, after saving enough money for a ticket to New York from a job with the Post Office. His brothers, Malachy and Michael, followed him soon after, as, eventually, did Angela.

In *'Tis*,(1998) the sequel to *Angela's Ashes*, McCourt described his early adult years in New York, as a bellhop and lavatory cleaner at the Biltmore hotel, drinking in Irish bars and moving from one rooming-house to another – the antithesis of the American dream that he had been fed by parents. His salvation came with the Korean War (for which he expressed his eternal gratitude to Chairman Mao) and an opportunity to enlist with the US military. On his return to America he was an early beneficiary of the GI Bill. With government paying the tuition fees, he enrolled on a literature course at New York University, working nights in a warehouse to make ends meet.

In *Teacher Man* (2005) McCourt chronicled the subsequent three decades he spent trying to win the attention and respect of hard-bitten teenagers in New York City schools. At the tough McKee Technical and Vocational School on Staten Island, he improvised madly, teaching his students to sing *Finnegan's Wake* and telling them some of the stories of his childhood that would later reappear in *Angela's Ashes*. He kept a drawerful of excuse notes that he knew his students had forged in order to play truant, so for one exercise he challenged them to write the most inventive and convincing excuse they could think of. Another assignment was to "write an excuse note from Adam or Eve to God".

Moving up the social scale to Stuyvesant High School he got his students to write their own obituaries and an account of "how you would tell your parents you were gay". Though often threatened with the sack for his unorthodox methods, he was a popular teacher with a natural empathy for the young and the urban immigrant poor.

Until *Angela's Ashes*, it was Frank's younger brother Malachy, an occasional Irish character actor and owner of a bar on the Upper East Side, who was the best-known McCourt. In the 1980s Frank joined Malachy in a two-man revue about their lives called *A Couple of Blackguards*. They also had an irreverent double act on Irish Radio in New York.

In 1961 Frank McCourt married Alberta Small, a Rhode Island Episcopalian. Their wedding day set the pattern for their marriage: the best man dropped the cake, McCourt drank too much and got into a fight, and Alberta flounced off in a cab leaving her husband to drown his sorrows on their wedding night. They had a daughter but the union was tumultuous and ended after 18 years of almost constant warfare.

The row over *Angela's Ashes* was reignited by the publication of *'Tis*, which completely ignored his second marriage to psychotherapist Cheryl Floyd. When challenged about this, McCourt retorted: "But we were only together for about 10 minutes." In fact, it was 10 years.

In 1995 McCourt married Ellen Frey, a former television public-relations executive, with whom, following the success of *Angela's Ashes*, he bought a luxury apartment on New York's Upper West Side and a converted 18th-century farmhouse in Connecticut.

In 2007 McCourt made a foray into children's writing with *Angela and the Baby Jesus*, which drew on a story his mother told her children about how, as a child, she had worried that the life-size baby Jesus in the Christmas crib at St Joseph's church might be cold at night. "You know what they'll say", McCourt reflected, "the old bastard, he knows the end is near and he's trying to redeem himself, so he writes this sweet little religious book... Maybe I should write a saint's biography quickly, just to make sure.'

Frank McCourt is survived by his wife and his daughter by his first marriage.

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A Short History of Child Protection in America

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I. Introduction

The history of child protection in America is divisible into three eras.[1] The first era extends from colonial times to 1875 and may be referred to as the era before organized child protection. The second era spans 1875 to 1962 and witnessed the creation and growth of organized child protection through nongovernmental child protection societies. The year 1962 marks the beginning of the third or modern era: the era of government-sponsored child protective services.

II. Child Protection Prior to 1875

It was not until 1875 that the world's first organization devoted entirely to child protection came into existence—the New York Society for the Prevention of Cruelty to Children. Prior to 1875, many children went without protection, although there has never been a time when children were completely bereft of assistance. Criminal prosecution has long been used to punish egregious abuse. In 1809, for example, a New York shopkeeper was convicted of sadistically assaulting his slave and her three-

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1. For those interested in in-depth treatment of the history of child protection, I have written three overlapping books on the subject: CHILD PROTECTION IN AMERICA: PAST, PRESENT AND FUTURE (2006); A HISTORY OF CHILD PROTECTION IN AMERICA (2004) [hereinafter A HISTORY]; and CHILD PROTECTION IN AMERICA: A HISTORY (manuscript available from the author; jmyers @pacific.edu).

See also Marvin Ventrell, *The History of Child Welfare Law*, *in* CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 113–42 (Marvin Ventrell & Donald N. Duquette eds., 2005).

year-old daughter.[2] In 1810, a woman was prosecuted in Schenectady for murdering her newborn child.[3] Although the woman admitted to several people that she killed the baby, the jury found her not guilty, probably because she was insane. In 1869, an Illinois father was prosecuted for confining his blind son in a cold cellar in the middle of winter.[4] Defense counsel argued that parents have the right to raise their children as they see fit, but the Illinois Supreme Court disagreed, writing that parental "authority must be exercised within the bounds of reason and humanity. If the parent commits wanton and needless cruelty upon his child, either by imprisonment of this character or by inhuman beating, the law will punish him."[5] In 1856, the first rape conviction in California history reached the state supreme court.[6] The victim was thirteen years old. From 1856 to 1940, the majority of rape appeals in California involved child victims.[7]

Prosecution was not the only remedy before 1875. As early as 1642, Massachusetts had a law that gave magistrates the authority to remove children from parents who did not "train up" their children properly. In 1735, an orphan girl in Georgia was rescued from a home where she was sexually abused.[8] In 1866, Massachusetts passed a law authorizing judges to intervene in the family when "by reason of orphanage or of the neglect, crime, drunkenness or other vice of parents," a child was "growing up without education or salutary control, and in circumstances exposing said child to an idle and dissolute life."[9] Whether or not a statute authorized intervention, judges had inherent authority to stop abuse. Justice Joseph

2. The case against the shopkeeper was sold to the public as a pamphlet. *See* HENRY C. SOUTHWICK, THE TRIAL OF AMOS BROAD AND HIS WIFE, ON THREE SEVERAL INDICTMENTS FOR ASSAULTING AND BEATING BETTY, A SLAVE, AND HER LITTLE FEMALE CHILD SARAH, AGED THREE YEARS (1809), *reprinted in* FREE BLACKS, SLAVES, AND SLAVE OWNERS IN CIVIL AND CRIMINAL COURTS: THE PAMPHLET LITERATURE, at 179–209 (Paul Finkelman ed., 1988) [hereinafter FREE BLACKS, SLAVES, AND SLAVEOWNERS]. The original pamphlet was published in 1809 in New York and covered pages 1–31. For details of this case of horrendous physical abuse, see A HISTORY, *supra* note 1, at 126–27.

3. This was another pamphlet. *See* RYER SCHERMERORN, REPORT OF THE TRIAL OF SUSANNA (1810), *reprinted in* FREE BLACKS, SLAVES, AND SLAVEOWNERS, *supra* note 2, at 211–60. The original pamphlet was published in 1810 in Troy, N.Y., and covered pages 1–50.

4. *See* Fletcher v. People, 52 Ill. 395 (1869).

5. *Id.* at 395.

6. *See* People v. Benson, 6 Cal. 221 (1856). The *Benson* case is discussed in detail in A HISTORY, *supra* note 1, at 126–27.

7. I read every reported rape case in the California Supreme Court and the California Courts of Appeal from 1856 to 1940. Most victims were children, not adult women.

8. Clyde E. Buckingham, *Early American Orphanages: Ebenezer and Bethesda*, 26 SOC. FORCES 311, 311–21 (1948).

9. An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts ch. 283.

Story wrote in 1886:

> For although in general parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of . . . . But whenever this presumption is removed, whenever (for example) it is found that a father is guilty of gross ill treatment or cruelty towards his infant children, . . . in every such case the Court of Chancery will interfere and deprive him of the custody of his children . . . .[10]

Before the spread of nongovernmental child-protection societies beginning in 1875, intervention to protect children was sporadic, but intervention occurred. Children were not protected on the scale they are today, but adults were aware of maltreatment and tried to help.

III. Child Protection from 1875 to 1962

Organized child protection emerged from the rescue in 1874 of nine-year-old Mary Ellen Wilson, who lived with her guardians in one of New York City's worst tenements, Hell's Kitchen.[11] Mary Ellen was routinely beaten and neglected. A religious missionary to the poor named Etta Wheeler learned of the child's plight and determined to rescue her. Wheeler consulted the police, but they declined to investigate. Next, Wheeler sought assistance from child helping charities, but they lacked authority to intervene in the family. At that time, of course, there was no such thing as child protective services, and the juvenile court did not come into existence for a quarter century. Eventually, Wheeler sought advice from Henry Bergh, the influential founder of the American Society for the Prevention of Cruelty to Animals. Bergh asked his lawyer, Elbridge Gerry, to find a legal mechanism to rescue the child. Gerry employed a variant of the writ of habeas corpus to remove Mary Ellen from her guardians.[12]

Following the rescue of Mary Ellen, animal protection advocate Henry Bergh and his attorney Elbridge Gerry lamented the fact that no government agency or nongovernmental organization was responsible for child

10. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1341 (13th ed. 1886).

11. The case of Mary Ellen is discussed at length in my books on the history of child protection. *See supra* note 1.

12. Mary Ellen's father died in the Civil War, and her mother disappeared. After the judge removed Mary Ellen from her guardians' custody, Etta Wheeler asked the judge to allow the child to live with Wheeler's own mother in upstate New York. The judge agreed, and Mary Ellen was sent to live with Wheeler's mother. Wheeler's mother died soon after Mary Ellen arrived, but one of Wheeler's sisters stepped in and raised Mary Ellen as a daughter. At the age of twenty-four, Mary Ellen married. She had two daughters of her own, both of whom went to college and became teachers. Mary Ellen lived well into the twentieth century.

protection. Bergh and Gerry decided to create a nongovernmental charitable society devoted to child protection, and thus was born the New York Society for the Prevention of Cruelty to Children (NYSPCC), the world's first entity devoted entirely to child protection. Gerry became president of NYSPCC and served in that capacity into the twentieth century.

News of the NYSPCC spread and by 1922, some 300 nongovernmental child protection societies were scattered across America. Although 300 is an impressive number, for much of the twentieth century, many cities and nearly all rural areas had little or no access to formal child-protective services. For most abused and neglected children help came—if it came—from family and neighbors willing to get involved, from police, and from courts.

As nongovernmental child-protection societies popped up across the country, another important innovation appeared: the juvenile court. The world's first juvenile court was established at Chicago in 1899. Juvenile courts spread quickly, and by 1919, all states but three had juvenile courts. Before long, the remaining states fell in line. Although the reformers who created the juvenile court were concerned primarily with delinquent children, juvenile courts from the outset had jurisdiction to intervene in cases of abuse and neglect. Today, of course, the juvenile court is a central player in the child protection system.

As noted above, in the nineteenth and early twentieth centuries, child protection agencies were nongovernmental. The first few decades of the twentieth century witnessed increasing calls to shift child protection from nongovernmental Societies for the Prevention of Cruelty to Children (SPCCs) to government agencies. Douglas Falconer wrote in 1935:

> For many years responsibility for child protection was left almost entirely to private agencies . . . . Great sections of child population were untouched by them and in many other places the service rendered was perfunctory and of poor standard . . . . The belief has become increasingly accepted that if children are to be protected from neglect the service must be performed by public agencies.[13]

The call for government child protection coincided with the increasing role of state and federal governments in social services. Prior to the twentieth century, there were relatively few state-level departments of social services. What government services there were were the province of local government. During the early twentieth century, states created or strengthened state departments of welfare, social services, health, and labor.

As for the federal government, prior to 1935, Washington, D.C., played

13. Douglas P. Falconer, *Child and Youth Protection*, *in* 3 SOCIAL WORK YEARBOOK 63, 65 (Fred S. Hall ed., 1935).

an insignificant role in child welfare policy and funding. Creation of the federal Children's Bureau in 1912 broke the ice, followed by the Sheppard-Towner Act, which provided federal money from 1921 to 1929 for health services for mothers and babies. It was the Great Depression of the 1930s, however, that stimulated the sea change in the federal government's role in social welfare. In 1935, as part of President Roosevelt's New Deal to save the nation from economic ruin, Congress passed the Social Security Act. In addition to old-age pensions, unemployment insurance, and vocational services, the Social Security Act created Aid to Dependent Children, which provided millions of dollars to states to support poor families. Tucked away in the Social Security Act was an obscure provision that authorized the Children's Bureau "to cooperate with state public-welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, [child welfare services] for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent."[14] This provision was an important shot in the arm for the nascent social work specialty of child welfare, and a modest step toward what in the 1970s became a central role for the federal government in efforts to protect children from abuse and neglect.

The Great Depression of the 1930s hastened the demise of nongovernmental SPCCs. The charitable contributions that were the lifeblood of SPCCs withered with the economy, and only the heartiest SPCCs weathered the economic drought. In the 1930s and 1940s, many SPCCs merged with other organizations or closed. In some communities, child protection was assumed by the juvenile court or the police, whereas in other communities, organized protective work ceased.

In 1956, Vincent De Francis, director of the Children's Division of the American Humane Association, conducted a national inventory of child protective services.[15] De Francis found eighty-four nongovernmental SPCCs, down from the high of 300 early in the century. Thirty-two states had no nongovernmental child-protective services. In these states, and in states with SPCCs, government agencies were slowly assuming responsibility. At midcentury, many communities had no agency clearly in charge of this vital service.

A decade after his 1956 survey, De Francis again took the pulse of child protection.[16] By 1967, the number of nongovernmental SPCCs was

14. Social Security Act of 1935, § 521, 49 Stat. 620, 633.

15. *See* VINCENT DE FRANCIS, CHILD PROTECTIVE SERVICES IN THE UNITED STATES: REPORTING A NATIONWIDE SURVEY (1956).

16. *See* VINCENT DE FRANCIS, CHILDREN'S DIV., AM. HUMANE ASS'N, CHILD PROTECTIVE SERVICES: A NATIONAL SURVEY (1967).

down to ten. De Francis wrote, "Responsibility for provision of Child Protective Services under voluntary auspices, like the old soldier it is, is slowly fading away."[17] By 1967, nearly all states had laws placing responsibility for child protection in government hands. Yet, De Francis complained, "No state and no community has developed a Child Protective Service program adequate in size to meet the service needs of all reported cases of child neglect, abuse and exploitation."[18] A few years earlier, Elizabeth Glover and Joseph Reid wrote in a similar vein: "In hundreds of counties in the United States, there is no protective service for children, other than police services, and in many of the nation's largest cities, the only protective service is provided by voluntary agencies that are not sufficiently financed to give total community coverage."[19] In 1965, California had no county system of child protective services. In most states, protective services were not available statewide. Most communities lacked twenty-four hour coverage. Thus, for the first six decades of the twentieth century, protective services in most communities were inadequate and in some places nonexistent.

IV. The Modern Era of Child Protection

A. 1962 to the Present

The first two sections of this article describe child protection before 1962. The next section discusses the post-1962 development of the child protection system. By the late 1970s, government-sponsored child protective services spanned the nation, settling into urban and rural areas alike.

B. Child Abuse Becomes a National Issue

The 1960s witnessed an explosion of interest in child abuse, and physicians played a key role in this awakening. Prior to the 1960s, medical schools provided little or no training on child abuse, and medical texts were largely silent on the issue. Even pediatricians were largely uninformed. The spark that eventually ignited medical interest in abuse was an article published in 1946 by pediatric radiologist John Caffey.[20] Caffey described six young children with subdural hematoma and fractures of the legs or arms. Although Caffey did not state that any of the children were

17. *Id.* at 11.

18. *Id.*

19. E. Elizabeth Glover & Joseph H. Reid, *Unmet and Future Needs*, 355 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 14 (1964).

20. *See* John Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946).

abused, he hinted at it. Following Caffey's classic paper, a small but steady stream of physicians drew attention to the abusive origin of some childhood injuries. This trend culminated in the 1962 publication of the blockbuster article *The Battered Child Syndrome* by pediatrician Henry Kempe and his colleagues.[21] Kempe played a leading role in bringing child abuse to national attention during the 1960s and 1970s.

As the medical profession became interested in child abuse, so did the media. Local media had always covered noteworthy cases, as when a child was beaten to death, but coverage by national media was uncommon prior to the 1960s. Following publication of *The Battered Child Syndrome*, national news outlets like *Newsweek, Saturday Evening Post, Parents Magazine, Time, Good Housekeeping,* and *Life* published emotional stories of abuse, often citing *The Battered Child Syndrome* and Henry Kempe. A *Newsweek* story from April 1962, for example, was titled *When They're Angry*[22] and quoted Kempe:

> One day last November, we had four battered children in our pediatrics ward. Two died in the hospital and one died at home four weeks later. For every child who enters the hospital this badly beaten, there must be hundreds treated by unsuspecting doctors. The battered child syndrome isn't a reportable disease, but it damn well ought to be.[23]

Prior to 1962, there was little professional research and writing about abuse. Elizabeth Elmer noted, "The amount of systematic research on the problem of abuse and neglect is conspicuously scant."[24] Following publication of *The Battered Child Syndrome*, a trickle of writing became a torrent that continues to this day.

News stories and journal articles captured public and professional attention. Behind the scenes, Congress placed new emphasis on child protection with amendments to the Social Security Act in 1962.[25] Vincent De Francis remarked that the 1962 amendments "for the first time, identified Child Protective Services as part of all public child welfare."[26] In addition to sharpening the focus on child protection, the 1962 amendments required states to pledge that by July 1, 1975, they would make child welfare services available statewide. This requirement fueled expansion of government child-welfare services, including protective services.

The year 1962 was momentous not only for publication of *The Battered*

21. *See* C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

22. *When They're Angry*, NEWSWEEK, Apr. 16, 1962, at 74.

23. *Id.* (quoting Kempe et al., *supra* note 21).

24. Elizabeth Elmer, *Identification of Abused Children*, 10 CHILD. 180, 180 (1963).

25. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 528, 76 Stat. 172, 172.

26. DE FRANCIS, *supra* note 16, at 4.

Child Syndrome and amendments to the Social Security Act. In the same year, the federal Children's Bureau convened two meetings to determine how the Bureau could more effectively help states respond to child abuse. Attendees at the meetings, including Henry Kempe and Vincent De Francis, recommended state legislation requiring doctors to report suspicions of abuse to police or child welfare. These meetings were the genesis of child abuse reporting laws, the first four of which were enacted in 1963. By 1967, all states had reporting laws.

As reporting laws went into affect, the prevalence of child abuse and neglect came into focus. By 1974, some 60,000 cases were reported. In 1980, the number exceeded one million. By 1990, reports topped two million, and in 2000, reports hovered around three million. In the early twenty-first century, reports declined but remained high.

Turning from reporting laws to another critical component of child protection, foster care, during the nineteenth century, children who could not live safely at home ended up in orphanages or almshouses. Nineteenth century reformers like Charles Loring Brace struggled to remove children from institutions and place them in foster homes. Debate over the merits of foster care versus orphanage care raged from the 1850s to the early decades of the twentieth century. Eventually, proponents of foster care prevailed, and almshouses and orphanages disappeared.

In the early days, foster care was viewed as a major advance and as the best solution for many dependent children. In the last quarter of the twentieth century, however, some came to view foster care as a problem rather than as a solution. Critics lamented that nearly half a million children are in foster care at any point in time and that too many children get "stuck" in out-of-home care. What's more, children of color, particularly African-American children, are sadly overrepresented among foster children.[27] Yet, despite problems, foster care remains a safe haven for many abused and neglected children.

V. The Federal Government Assumes a Leadership Role

Prior to 1974, the federal government played a useful but minor role in child protection. The Children's Bureau was founded in 1912, but the Bureau paid little attention to maltreatment until the 1960s. The Social Security Act of 1935, as amended in 1962, provided money to expand child welfare services. Yet, as late as 1973, U.S. Senator Walter Mondale wrote, "Nowhere in the Federal Government could we find one official

27. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE (2007).

assigned full time to the prevention, identification and treatment of child abuse and neglect."[28]

Due in substantial measure to Mondale's efforts, Congress assumed a leadership role with passage of the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).[29] CAPTA authorized federal funds to improve the state response to physical abuse, neglect, and sexual abuse. CAPTA focused particular attention on improved investigation and reporting. In addition, CAPTA provided funds for training, for regional multidisciplinary centers focused on child abuse and neglect, and for demonstration projects. Responsibility for administering CAPTA was placed in a new agency, the National Center on Child Abuse and Neglect. The Center funded important research on maltreatment. CAPTA played a major role in shaping the nationwide system of governmental child protective services in place today. In addition, CAPTA marked the final passing of privately funded, nongovernmental child protection societies. Congress periodically renewed CAPTA, and this important legislation remains in force today.

Prior to 1978, as many as twenty-five to thirty-five percent of Native American children were removed from their parents for alleged neglect or abuse. The majority of these children were placed in non-Indian foster homes, adoptive homes, and institutions. In 1978, Congress enacted the Indian Child Welfare Act (ICWA)[30] to reduce the number of Native American children removed from their homes. Congress recognized, "There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children," and "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."[31] To reduce inappropriate removal of Indian children from their homes, ICWA provides that only tribal courts can decide abuse and neglect cases involving children whose permanent residence is a reservation. For Indian children who do not live on a reservation, state juvenile courts can make decisions about removal, but the child's tribe must be notified, and the tribe has the right to intervene in the case.

Before the civil rights movement of the 1960s, interracial adoption was uncommon. Several states, including Louisiana and Texas, had outright bans on interracial adoption. Social workers generally believed it was

28. Letter of Transmittal from Walter F. Mondale to Harrison A. Williams (Mar. 15, 1974), *in Questions and Answers on Children and Youth of the Committee on Labor and Public Welfare*, Child Abuse Prevention and Treatment Act, S. 1191, 93rd Cong. pt. VII (1974).

29. Pub. L. No. 93–247, 88 Stat. 4 (1974); *see also* SANFORD N. KATZ, FAMILY LAW IN AMERICA 139–47 (2003).

30. Pub. L. No. 95-608, 92 Stat. 3069 (1978).

31. *Id.* at § 2(3)-(4).

important to place children with adoptive parents of the same ethnic background. During the 1960s, however, courts struck down laws against interracial adoption, and increasing numbers of white parents adopted children of color.

During the 1970s, critics of interracial adoption mounted a spirited campaign against the practice, led by the National Association of Black Social Workers. In 1972, the association issued a position paper stating:

> Black children should be placed only with Black families in foster care or for adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from their healthy development of themselves as Black people.[32]

Elizabeth Bartholet wrote that the association's position "found a receptive audience. The establishment forces readily conceded that the black and Native American communities had a right to hold onto 'their own.' . . . The new orthodoxy was quickly established, making the 1960s period of transracial placements seem a brief anomaly in the larger picture."[33] Cynthia Hawkins-Leon and Carla Bradley added, "In an attempt to adhere to the tenets of the [association's] position paper, adoption agencies began to enact and enforce same-race placement policies. As a result, the number of transracial adoptions dropped drastically nationwide."[34]

Unfortunately, as mentioned above, children of color, particularly African-American children, are overrepresented in foster care, and African-American foster children tend to wait longer for adoption than white children. The antagonism of the 1970s toward interracial adoption exacerbated the problem by dissuading whites from adopting African-American children. During the 1980s and 1990s, pressure mounted to lower racial barriers to adoption, and in 1994, Congress passed the Multiethnic Placement Act (MEPA).[35] The 1994 MEPA prohibited child welfare agencies from delaying or denying adoptive placements on the basis of race. Yet, MEPA allowed race as a factor in placement decisions. Critics argued that allowing race as a factor perpetuated the status quo

32. Nat'l Ass'n of Black Social Workers, Position Paper (Apr. 4-9, 1972) (on file with author). The position paper was developed at a conference of the National Association of Black Social Workers in Nashville, Tennessee, on April 4–9, 1972.

33. ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 124–25 (1999).

34. Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer Is Neither Simply Black or White nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1239 (2002).

35. 42 U.S.C. §§ 671(18), 1996b (2006).

against interracial adoption. In 1996, Congress amended MEPA to narrow the circumstances in which race may be considered. Under the 1996 amendment, a child's race must normally be considered irrelevant in determining the best placement for the child. Only in narrow circumstances where the needs of a specific child make race important can social workers consider race as a factor.

Child abuse reporting laws and enhanced awareness of child abuse produced an increase in intervention. By the late 1970s, the rising number of children in long-term foster care set off alarm bells in Congress, resulting in passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[36] AACWA required states to make "reasonable efforts" to avoid removing children from maltreating parents. When removal was necessary, reasonable efforts were required to reunite families. Every child in foster care had to have a "permanency plan" to return the child home or move toward termination of parental rights. For children who could not go home, Congress provided financial incentives for adoption. Finally, AACWA provided financial support for adoptive parents who adopted children with special needs.

The effort to preserve families—called family preservation—was a key component of AACWA, and the dominant paradigm of child protection in the 1980s. In the 1990s, however, critics argued that over-reliance on family preservation sometimes led to tragedy. One of the most forceful critics of family preservation was Richard Gelles, who challenged the effectiveness of family preservation in his 1996 book, *The Book of David: How Preserving Families Can Cost Children's Lives*.[37] Gelles wrote:

> The essential first step in creating a safe world for children is to abandon the fantasy that child welfare agencies can balance the goals of protecting children and preserving families, adopting instead a child-centered policy of family services. This is not a new policy, but rather a return to the policy of the early 1960s that established child safety as the overriding goal of the child protection system. It is time to abandon the myth that "the best foster family is not as good as a marginal biological family." The ability to make a baby does not ensure that a couple have, or ever will have, the ability to be adequate parents. The policy of family reunification and family preservation fails because it assumes that *all* biological parents can become fit and acceptable parents if only appropriate and sufficient support is provided.[38]

Although AACWA, with its emphasis on keeping families together, helped many children and parents, the number of children living in foster

36. Pub. L. No. 96-272, 94 Stat. 500 (1980).

37. RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996).

38. *Id.* at 148–50.

care did not decline. Moreover, Richard Gelles and others charged that reasonable efforts and family preservation caused social workers and judges to leave children in dangerous homes. Congress responded in 1997 with the Adoption and Safe Families Act (ASFA).[39] Although ASFA did not abandon family preservation, it made child safety the top priority. When children are placed in foster care, ASFA establishes strict time lines for returning them to their parents or terminating parental rights to free the children for adoption. In cases of sexual abuse and chronic physical abuse, ASFA authorizes states to dispense with efforts to reunify the family, and to move directly to termination of parental rights.

VI. Child Sexual Abuse Takes Center Stage

Prior to the late 1970s, many sexually abused children were protected. Yet, recognition of sexual abuse lagged behind recognition of physical abuse. In 1969, Vincent De Francis wrote that social work "literature seems devoid of reference to or content on this subject."[40] In 1975, David Walters wrote, "Virtually no literature exists on the sexual abuse of children."[41] Also in 1975, Suzanne Sgroi wrote, "Although the pioneering efforts of many distinguished professionals and dedicated lay people over the past decade have made child abuse a national issue, the problem of sexual molestation of children remains a taboo topic in many areas."[42] In 1977, Henry Kempe gave a lecture in which he described "sexual abuse of children and adolescents as another hidden pediatric problem and a neglected area."[43]

In the early 1970s, sexual abuse was still largely invisible, but that was about to change. Two related factors launched sexual abuse onto the national stage. First, the child protection system—including reporting laws—expanded significantly in the 1970s. Second, new research shed light on the prevalence and harmful effects of sexual abuse.

By the end of the 1970s, the United States enjoyed for the first time a nationwide system of government-sponsored child protection. The influential CAPTA included sexual abuse in its definition of maltreatment. By

39. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

40. VINCENT DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS 5 (1969).

41. DAVID R. WALTERS, PHYSICAL AND SEXUAL ABUSE OF CHILDREN: CAUSES AND TREATMENT (1975).

42. Suzanne M. Sgroi, *Molestation of Children: The Last Frontier in Child Abuse*, CHILD. TODAY, May–June 1975, at 18.

43. C. Henry Kempe, *Sexual Abuse, Another Hidden Pediatric Problem: The 1977 C. Anderson Aldrich Lecture*, 62 PEDIATRICS 382, 382 (1978). Kempe wrote, "Often, pediatricians will simply not even consider the diagnosis of incest in making an assessment of an emotionally disturbed child or adolescent of either sex." *Id.* at 383.

1976, all states had reporting laws requiring professionals to report sexual abuse. The expanded child protection system, particularly the reporting laws, wrenched sexual abuse from obscurity.

Prior to the 1970s, there was a paucity of research on the prevalence and effects of sexual abuse.[44] Vincent De Francis was one of the first to break new ground. In 1969, De Francis published the results of his study of 250 sexual abuse cases from Brooklyn.[45] De Francis wrote, "The problem of sexual abuse of children is of unknown national dimensions, but the findings strongly point to the probability of an enormous national incidence many times larger than the reported incidence of physical abuse of children."[46] Two thirds of the children in De Francis's study were emotionally damaged by the abuse. De Francis concluded, "Child victims of adult sex offenders are a community's least protected children. Frequent victims of parental neglect, they are, almost always, also neglected by the community which has consistently failed to recognize the existence of this as a substantial problem."[47]

A decade after De Francis's groundbreaking research, David Finkelhor published *Sexually Victimized Children*.[48] Much had changed since 1969, when De Francis complained that society ignored sexual abuse. In 1979, Finkelhor wrote:

> Child protection workers from all over the country say they are inundated with cases of sexual abuse . . . . Public outrage, which has for several years focused on stories of bruised and tortured children, is shifting to a concern with sexual exploitation. Between 1977 and 1978 almost every national magazine had run a story highlighting the horrors of children's sexual abuse.[49]

Finkelhor surveyed 796 college students and found that "19.2 percent of the women and 8.6 percent of the men had been sexually victimized as children."[50] Most of the sexual abuse was committed by someone the child knew, and most was not reported.

As Finkelhor was finishing his research, Diana Russell was working toward similar findings.[51] Russell studied 930 women and found that 16%

44. What writing there was prior to the 1970s tended to be highly skeptical of women and children who claimed to have been sexually assaulted. For analysis of the pre-1970s literature, see generally A HISTORY, *supra* note 1.

45. *See* DE FRANCIS, PROTECTING THE CHILD VICTIM, *supra* note 40.

46. *Id.* at vii.

47. *Id.* at 1.

48. DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN (1979).

49. *Id.* at 1.

50. *Id.* at 53.

51. Diana E.H. Russell, *Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT (SPECIAL ISSUE) 2, 133–46 (1983).

were sexually abused during childhood by a family member.[52] Thirty-one percent of the women reported sexual abuse by a nonrelative.[53] The path-finding research of Vincent De Francis, David Finkelhor, Diana Russell, and others exploded any idea that sexual abuse was rare or benign.

VII. Summary of Post-1962 Developments

Remarkable progress has been made in the period after 1962. For the first time, child protective services were available across the country—in small towns, rural areas, and cities. The growth of child protection was a boon to thousands of children. Ironically, however, the expansion of the child protection system, particularly the rapid deployment of laws requiring professionals to report suspected abuse and neglect, carried the seeds of crisis. The reporting laws unleashed a flood of cases that overwhelmed the child protection system, and by the 1980s, the system was struggling to keep its head above water.

VIII. Conclusion

Forty years ago, child protection pioneer Vincent De Francis lamented, "No state and no community has developed a Child Protective Service program adequate in size to meet the service needs of all reported cases of child neglect, abuse and exploitation."[54] What would De Francis say today? I believe he would say that although today's child protection system has many problems, the contemporary system is a vast improvement over the incomplete patchwork that existed in the 1960s. Today, child protective services are available across America, billions of dollars are devoted to child welfare, and thousands of professionals do their best to help struggling parents and vulnerable children.

The child protection system protects children every hour of the day. Unfortunately, the public seldom hears about child protection's successes. Indeed, the only time child protection makes the front page or the evening news is when something goes terribly wrong: social workers fail to remove an endangered child who ends up dead, or social workers remove children when they should not. Both scenarios—over- and under-intervention—are inevitable in the difficult work of child protection. Yet, the fact that the public hears only about child protection's failings undermines confidence in the system. The truth is that the system saves lives and futures. As you read this sentence, a social worker somewhere is making a decision that will protect a child. As we look back across history, it

52. *See id.*
53. *See id.*
54. DE FRANCIS, *supra* note 16, at 11.

is clear that the effort to protect children is not a story of failure, but a story of progress and hope. The child protection system is far from perfect, and much remains to be done, but, at the same time, much has been accomplished.

WHEN DID LAWYERS FOR CHILDREN STOP READING GOLDSTEIN, FREUD AND SOLNIT? LESSONS FROM THE TWENTIETH CENTURY ON BEST INTERESTS AND THE ROLE OF THE CHILD ADVOCATE

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When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate

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Lawyers for children are faced with a difficult dilemma each time they meet a new client. Unlike lawyers for adults, who begin most initial meetings with their clients figuring out the kind of legal problem that the client presents, lawyers for children begin with trying to determine what professional relationship the lawyer and client will have. The answer—which may even vary over the course of the representation—requires the lawyer to consider a multitude of factors, including how many of these factors are for the lawyer to determine on her own and how many are for the client to determine. The factors can be organized into four categories: the type of legal situation the client faces, the state law governing representation for children, the professional codes and standards in effect, and the nature of the client. Diffused through these categories is the complexity of societal values about family life, individual and familial liberty and autonomy, and governmental power and responsibility. Overlaying this complexity is a concept that has now gained international status: the best interest of the child (*BIOC*). A recent symposium, *The Child and the Nation-State: France, Sweden, and the US, 1900-2000*, asked participants to consider

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children's rights and the nation state during the twentieth century, providing an opportunity to reconsider how the concept of *BIOC* has been incorporated into American child advocacy and deeply affected the way in which lawyers for children think about representing children's rights.[1] The last quarter of the twentieth century saw an explosion of child advocacy and, during the same period, a significant investigation into the meaning of *BIOC* in the United States. Lawyers for children were challenged to reconcile the meaning of children's rights with the concept of *BIOC:* was the child an autonomous decision maker able to direct his or her representation or was the child in need of a representative who would "discover" and then advocate for what was best for the child? After almost forty years of lawyering for children in the United States, this question remains unresolved. To help explain why reaching a resolution has been so difficult, I would like to employ a central set of texts about *BIOC:* the trilogy written by Joseph Goldstein, Anna Freud, and Albert Solnit between 1973 and 1986 and republished in one volume as *The Best Interests of the Child* in 1996.[2] These texts had an enormous impact on child welfare policy in the United States, Canada, England and in translation, far beyond. Yet, their influence on resolving the nature of the role of lawyers for children is surprisingly limited. I hope in reexamining these key texts, written during the gestational period of lawyering for children, to unearth some useful lessons for twenty-first century children's lawyers still struggling to define their responsibilities to their young clients.

Nearly forty years have passed since the United States Supreme Court determined that children at risk of losing their liberty in delinquency proceedings had a Sixth Amendment right to counsel. The Court's decision highlights the parallels between adult and child criminal proceedings, and recognizes the limitations of a *parens patriae* role for a court when the consequences for a child include a significant period of time in state custody.[3] While the Supreme Court has never held that children subject to state intervention as victims of child maltreatment are similarly entitled to counsel, only seven years after the *Gault* decision, in 1974, the federal government began requiring states to provide children with some form of

1. The Conference was held at Columbia University in New York City on May 26–28, 2006. Participants included academics and policymakers from Sweden, France and the United States, along with representatives of UNICEF and Save the Children, Sweden. An earlier version of this paper was presented by the author.

2. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973), BEFORE THE BEST INTERESTS OF THE CHILD (1979), and IN THE BEST INTERESTS OF THE CHILD (with Sonja Goldstein, 1986). The compendium volume, THE BEST INTERESTS OF THE CHILD, will be cited as GOLDSTEIN, ET AL. in the footnotes.

3. *In re* Gault, 387 U.S. 1 (1967).

representation of their interests in child protective proceedings as one of the conditions of drawing down federal foster care funding.[4] The type of representation in those proceedings continues to vary tremendously from state to state but includes attorneys, guardians *ad litem* (GAL), volunteer advocates, and hybrid models of these alternatives.[5] Some states, such as New York, had established a system of representation by lawyers for children in delinquency and child protective proceedings prior to *Gault;* others quickly established systems to ensure compliance with federal mandates. Within a very short period of time, children were receiving some form of representation throughout the country. At a much slower pace states also began to permit, and in a few states require, lawyers for children in private custody matters, especially in highly contested divorce proceedings. When attorneys—rather than other adult advocates—were authorized to represent children, they began to examine the scope and meaning of representing a person who was considered an "infant" under the law, subject to the care and custody of an adult, usually a parent, and often with less than full capacity to direct the lawyer's representation because of age, cognitive, intellectual or emotional development, or other disability.

Some states supplied a specific definition of the lawyer's role by statute; other states enacted more general language that was subsequently interpreted through case law. Lawyers sought direction in professional ethics codes, newly developing standards of practice for child advocates, and the evolving legal definitions that courts provided.[6] They came face to face repeatedly with the concept of "best interests of the child," either within the definition of their role or as part of the ultimate decision that the court was being asked to make.[7] Given that the divorce rate in the United States was still reaching its peak, and the numbers of children subject to reports of neglect and abuse had skyrocketed after the passage of Child Abuse Prevention and Treatment Act in 1974 (CAPTA), it is not

4. Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247; 42 U.S.C. § 5106 (West 2000)(CAPTA). CAPTA provides federal funding to states in support of prevention, assessment, investigation, prosecution, and treatment activities and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects. CAPTA established, among other child protective policies, requirements for each state to establish a child maltreatment reporting system.

5. Katherine Hunt Federle, *Children's Rights and the Need for Protection,* 34 FAM. L.Q. 421, 424 (2000).

6. *See* ABA *Model Rules of Professional Conduct;* IJA-ABA JUVENILE JUSTICE STANDARDS (1973); Federle, *supra* note 5, at 426.

7. "Regardless of who acts as the child's representative, most states require that that representative (including, in some instances, the child's attorney) act in the child's best interests." Federle, *supra* note 5, at 427.

surprising that professionals involved in decisions concerning intervention in the family—social workers, mental health professionals, lawyers and judges—were struggling to understand the standards for making decisions about children and the role that these professionals should play in that decision making.[8]

Before turning to the Goldstein, Freud and Solnit (Goldstein et al.) trilogy, I would like to distinguish what kind of *BIOC* these professionals are facing.[9] Many of the participants in *The Child and the Nation-State* symposium addressed *BIOC* by considering how sweeping social welfare, education and child-care policies affected issues of individual autonomy, family structure, and national demographics. When we discussed these issues, we were not speaking of *BIOC* as a legal definition but as a social aspiration captured most effectively in the culminating event of the so-called "Century of the Child": adoption of the Convention on the Rights of the Child (CRC) by virtually the entire global community at the end of the twentieth century.[10] This compendium of positive and protective rights for children worldwide represents a remarkable recognition by nation states individually, and as part of the international community, of the centrality of the child in all aspects of life. Moreover, Article 3 of the CRC explicitly creates a core decision-making principle for any public or private body affecting children:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Even with the qualification of best interests being "a primary consideration" rather than "the primary consideration," the essence of considering what is best for the child is not dislodged.[11] The Convention specifically recognizes that the family should be protected as the fundamental and nat-

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8. The divorce rate peaked in the late 1970s. *See The First Measured Century* at http://www.pbs.org/fmc/book/4family6.htm (last visited Jan. 7, 2007). From 1974–80 child neglect and abuse reports rose from 60,000 to 1.1 million per year. *See* DOUGLAS ABRAMS & SARAH RAMSEY, CHILDREN AND THE LAW, at 288 (2003).

9. I would like to thank Johanna Schiratzki for highlighting the need for this distinction to me in her commentary on this paper at the symposium.

10. The United States and Somalia, which lacks a recognized government, are the exceptions. *See*, Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations and Areas for Further Study*, 6 NEV. L.J. 966 (2006).

11. Philip Alston, *The Bests Interests Principle: Towards a Reconciliation of Culture and Human Rights, in* THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS, 11–13 (Philip Alston ed., 1994). Alston points out that during the CRC drafting process, *BIOC* was a familiar enough term for the drafters who appeared to pay little attention to the domestic wars over the concept.

ural environment in which children flourish and that separation of children from their parents against their will should only occur when it is in the child's best interests.[12] While the definition of the concept may remain contested—and subject to cultural and societal norms and beliefs—it is fair to say that the global community has enshrined the idea that decision-makers must consider whether a policy is best for children even in the context of intervening in family life.[13] By contrast, how *BIOC* is interpreted in the framework of a legal proceeding is more limited by statutory definition, precedent, and court interpretation (though equally fraught with personal and societal beliefs). This legal concept of *BIOC* is the one Goldstein et al. sought to define for professionals making determinations in custody and child welfare proceedings about where a child should live.

Beyond the Best Interests of the Child (1973), the first volume of the Goldstein et al. trilogy, proposed specific legal and psychological guidelines to give meaning, in particular, to the overarching concept of best interests of the child when the child's placement is at issue.[14] The guidelines were remarkably simple: once the state has intervened in the autonomy of the family unit, the child's needs become paramount and decision-making must be shaped by the child's sense of time and need for continuity in relationships. The authors warned decision makers in child protection proceedings that they lacked the ability to make long-term predictions on what is best for the child and, to the contrary, were really only determining the least detrimental alternative for the child. What was best from their perspective—a stable family free from state intervention—had already been lost.[15] Goldstein et al. recommended that the legislature set a time limit for determining whether a child remained with a new caretaker or returned to the original caretaker (usually the biological parent) to highlight their psychological theory of continuity and stability of relationships and to give judges a rule to follow in determining what is best—or least bad—for a child separated from her initial caretaker.[16] In private

12. CRC Preamble and Article 9.

13. Of course, there are numerous examples of how nations have failed children, despite our international declarations, during the "Century of the Child." *See, e.g.*, Michael Freeman, *The End of the Century of the Child?* 53 CURRENT LEGAL PROBLEMS (2000).

14. For GOLDSTEIN ET AL., placement of a child is disputed when the state has intervened to remove a child from parents or when parents cannot agree on custody and the court is asked to resolve the custody dispute and determine where the child should live.

15. *See* discussion starting at page 399 of BEFORE THE BEST INTERESTS OF THE CHILD, GOLDSTEIN ET AL.'s second book, for a fuller description of their understanding of family autonomy.

16. GOLDSTEIN ET AL., *supra* note 2 at 20–21; While framed in more affirmative and general terms, the CRC Preamble would soon similarly note, "[the] child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmos-

custody matters, Goldstein et al. recommended that once a custodian had been chosen, continuity and stability would only be achieved by restricting any change in custody and giving the custodian full decision-making authority over the child, including whether the child would visit the noncustodial parent.[17] While some of their specific recommendations—especially concerning the power of the custodial parent—were highly controversial, the centrality of continuity and stability for children and the need for content in custodial decisions struck a responsive chord for professionals hungry to give definition to a concept that relied so heavily on personal values and case-by-case decision making. A conversation of sorts began in response to *Beyond's* proposals that sought to give further definition to *BIOC*.

Robert Mnookin's *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy* can be seen as a representative example of how this conversation proceeded. Mnookin shares Goldstein et al.'s fundamental concerns about the indeterminacy of *BIOC* as a legal standard in child placement decisions and, like them, proposes a more determinate approach.[18] Mnookin utilizes three assumptions to make the standard more determinate. The first two—deference to family autonomy and continuity and stability in children's relationships—he shares with Goldstein et al. The third, that a legal standard must not contradict deeply held and widely shared social values, he finds missing from the Goldstein et al. analysis.[19] Mnookin warns that the Goldstein et al. creation of a singular set of psychologically based guidelines for all types of child placement proceedings fails to distinguish between private ordering inherent in most custody proceedings between parents or other caretakers and the presence of enormous state power in child protective proceedings. In the United States, state paternalism has traditionally been limited not only by a strong preference for family autonomy but also by a political consensus that "government may act coercively only when good cause is shown."[20]

Mnookin identifies two points in time that are essential for child-protection decision making: at the point of intervening in the family's life and, if that intervention results in the child being removed from the family, at the point when a decision must be made to reunify the family or

phere of happiness, love and understanding."

17. GOLDSTEIN ET AL., *supra* note 2 at 23–25.

18. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 L. & CONTEMP. PROBS. 226 (1975). Mnookin provides many examples of cases in which the court is clearly relying on personal values about race, sexual intimacy, middle class values, etc., *Id.* at 269–70.

19. *Id.* at 248, 265.

20. *Id.* at 267.

create an alternative family for the child. When Mnookin is writing in 1976—two years after CAPTA required some form of representation for children in child protective proceedings—he finds that states have failed to define clearly the circumstances to justify initial intervention or to define the appropriate bases for planning for the child once removed. Fearing the power of the state to intervene in family autonomy for reasons more related to racial, cultural, or economic biases, Mnookin would limit child protection intervention to issues of physical health that can be clearly determined to present immediate or substantial risk to the child. Mnookin warns that using the Goldstein et al. psychological parenting theory alone to define *BIOC* in a more determinate way fails to answer fundamental policy questions about the state's obligation to the family when the state removes children from their parents' care and has the power, ultimately, to terminate parental rights and give the child to a new family.

One way to read *Before the Best Interest of the Child*, the second volume of the trilogy published in 1979, is as an answer to Mnookin's concerns. Goldstein et al. offer guidelines for the provision of reunification services for separated families and a specific time frame for when the state should stop attempting reunification and support the creation of another family for a child.[21] More fundamentally, *Before* is a powerful portrayal of family and of the power of the state to destroy family. Highlighting their beliefs about the psychological, historical, and philosophical underpinnings of the family, *Before* categorizes three overlapping elements of families with children: parental autonomy, children's right to have autonomous parents, and privacy. These elements form a core of family integrity that cannot be breached by state authorities except under two conditions. The first is when society, as a whole, has expectations for all children that individual families must obey, such as mandatory education, labor restrictions for minors, or vaccination policies. As the symposium discussed, these types of protective policies for children, became widely accepted in the United States and Western Europe in the twentieth century. The second is when the state intervenes in the parenting decisions of individual families because they fail to meet basic health and safety standards for children.[22] This idea too has become widespread, incorporated into Article 9 of the CRC:

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination

21. GOLDSTEIN ET AL., at 104–05.
22. GOLDSTEIN ET AL., at 93–94.

> may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

The CRC uses the overarching *BIOC* language in Article 9 to identify when children may be separated from their parents, leaving to nation states the responsibility to define its legal meaning. Goldstein et al., on the other hand, prophetically warn of the difficulty in defining such an indeterminate standard as *BIOC* to intervene in families. Their fear of state overreaching narrows their bases for intervention considerably. Like Mnookin, Goldstein et al. would require a child's physical health to be at risk of impairment or impaired, whether through physical or sexual abuse or by neglect, before the state can intervene to protect the child. Grounds that rely on concepts of emotional neglect, actions of parents that can be interpreted through cultural biases, and conditions that spring predominantly from poverty, do not fall within the state's power to intervene except through the provision of public benefits or voluntarily accepted services.[23] Nor does any notion of child autonomy within the family form a basis for this intervention. Goldstein et al. would certainly reject the Swedish model of making the family more egalitarian, and the child less dependent on parental authority, especially if the state were then to take a more affirmative role in supporting a child's autonomy within the family.[24] Rather, Goldstein et al. would keep the state at bay for all but the clearest provable examples of child maltreatment. Nevertheless, once the intervention occurs and a child's placement is disturbed, Goldstein et al. remain committed to the psychological theory developed in *Beyond*: the child's best interests are served by supporting whatever psychological parent-child relationship ensues, including a new parental relationship if the previous, usually biologically based, psychological parent-child relationship is irrevocably broken. Together *Before* and *Beyond* provide a legal and psychological template—albeit a controversial one—for narrowing the indeterminacy of a best interests analysis.

And the conversation about *BIOC* continued. Five years after the publication of *Before*, a conference was held at Rutgers Law School to address the impact of *Beyond* and *Before* on child welfare policy in the United States. As the overview to the Rutgers conference confirms, in a mere ten years, these two volumes changed the way in which law and policymakers thought about child placement decisions and termination of

23. GOLDSTEIN ET AL., *supra* note 2, at 111–13.

24. *See*, e.g., Bengt Sandin, *From Differences to Likeness: The Organization of Welfare and Conceptualization of Childhood in Sweden, Looking for Points of Comparison* (paper presented to symposium on file with the author).

parental rights. By invoking the psychological parent theory, statutes and case decisions had incorporated Goldstein et al.'s recommendations, including specific time frames for termination of parental rights and a reliance on psychological parent theory for determining case outcomes.[25] Conference participants voiced grave (and angry) concerns, some presciently foreseen earlier by Mnookin, that the theory was being applied simplistically and parents who lacked any political power—particularly poor parents of color—were losing their children in large numbers.[26] While participants acknowledged that Goldstein et al.'s psychological parent theory did not inevitably lead to termination of parental rights, they overall feared and reported that result.[27] Moreover, Goldstein et al.'s powerful argument to reject the vague concept of best interests as the driving force for intervening in families was not being similarly embraced in practice. The child's need for continuity and stability once removed from parents was not being applied *prior* to removal from parents.[28] Multiple participants warned that decisions to disrupt intact families were being driven by bias against poor, uneducated, culturally and racially different communities.[29] Both Solnit and Goldstein vehemently responded to these concerns.[30] Solnit reaffirmed their psychological parent theory as the basis for not intervening in autonomous families initially as well as for not disturbing new psychological bonds once formed. He did not retreat from the centrality of their argument of the essential nature of this bond, even as other participants questioned the underlying basis of the theory and the

25. Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. REV. L. & SOC. CHANGE 485, 488 (1983).

26. David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care,* 12 N.Y.U. REV. L. & SOC. CHANGE 504 (1983); Solnit/Fanshel Discussion 12 N.Y.U. REV. L. & SOC. CHANGE at 521 (1983); Everett Waters & Donna Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons,* 12 N.Y.U. REV. L. & SOC. CHANGE 505, 512 (1983); Carol B. Stack, *Cultural Perspectives on Child Welfare,* 12 N.Y.U. REV. L. & SOC. PROB. 539, 541 (1983); Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory,* 12 N.Y.U. REV. L. & SOC. CHANGE 549, 551; Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds,* 12 N.Y.U. REV. L. & SOC. CHANGE 557 (1983).

27. Taub, *supra* note 25, at 492; The participants raised many other concerns not addressed in this article, including the sufficiency of the underlying psychological evidence (Davis, *supra* note 26, at 557; Waters & Noyes, *supra* note 26, at 505); the historical underpinnings of family integrity (Gordon at 523); and the variations on family construction (Davis, *id.*; Stack, *supra* note 26, at 539).

28. Davis, *supra* note 26, at 562.

29. Fanshel, *supra* note 26, at 504; Davis, *supra* note 26, at 561; Stack, *supra* note 26, at 541.

30. Solnit participated in the conference, Albert Solnit, *Psychological Dimensions in Child Placement Conflicts,* 12 N.Y.U. REV. L. & SOC. CHANGE 495 (1983); and Goldstein was interviewed following the conference, *Interview with Joseph Goldstein,* 12 N.Y.U. REV. L. & SOC. CHANGE 575 (1983).

lack of cultural context in its application.[31] Goldstein responded more holistically to the concerns, recognizing the actual impact the theory was having on children entering foster care. He urged child welfare systems to create effective measures to maintain contact between parents and children in order to support the biological relationship while the child is temporarily in care, to have foster parents raise children in ways that closely mirror the habits of their biological parents, and to develop time frames for decision making that balance the child's needs with a recognition that state systems work poorly to reach determinations.[32] He reiterated that one of the core purposes of their work is to diminish the indeterminacy of the *BIOC* standard by providing guidelines for decision making to replace the value laden, personal biases of the professionals involved with these families. Finally, he previewed the content of the third volume of the trilogy, an attempt to define more clearly the roles of professionals making decisions about children's placements.[33]

This third book, *In the Best Interests of the Child,* applies Goldstein et al.'s proposed limitations on indeterminacy outlined in the first two books to the way in which professionals actually intervene in families' lives. The warnings that issued from the Rutgers Conference reflected more than concern about the meaning and use of *BIOC* as a standard. They also addressed the burgeoning business of child welfare proceedings and how professionals—judges, lawyers, social workers and psychologists, to name the most obvious examples—used this standard in their actions on behalf of the families or family members they served. If Goldstein et al.'s theories were being applied only to maintain relationships that children build after they have been removed from their biological parent's care, who was doing this, and why? For the purposes of this examination, what were lawyers for children doing? How did they understand and apply their role almost twenty years after *Gault*? What did this third book have to say to them?

By the time *In the Best Interests* was written, children were receiving some form of advocacy in child welfare proceedings across the country.[34] The variation in roles for lawyers, GALs and lay advocates has been documented repeatedly as one of the bases for the failure to create a definitive role for a child advocate.[35] Yet, even faced with ambiguous legal defi-

31. Davis, *supra* note 26; Stack, *supra* note 26.

32. GOLDSTEIN ET. AL., *supra* note 2.

33. While *Before* had concluded with a chapter on the role of the lawyer for a child, this discussion of role is better incorporated into an analysis of the third volume, IN THE BEST INTERESTS OF THE CHILD.

34. *See* Federle, *supra* note 5.

35. *Id.*; Emily Buss, *"You're My What?" The Problem of Child's Misperceptions of Their Lawyers' Roles,* 64 FORDHAM L. REV. 1699 (1996).

nitions of their role, advocates who are lawyers are governed by professional codes that limit their discretion from the outset.[36] In recent years, practice standards promulgated by preeminent legal and child advocacy organizations have provided lawyers with far more guidance in understanding and implementing their role.[37] And consensus has been growing toward lawyers rejecting a role that does not presume child-directed representation, which significantly limits lawyer discretion when advocating on behalf of their client.[38] Nevertheless, *BIOC* continues to infuse the role of a lawyer for a child. The symbolic power of being able to represent what is best for a child, rather than to represent what is constrained by client wishes and needs in the context of professional and legal boundaries cannot be underestimated. Even strong proponents of child-directed advocacy rationalize *BIOC* as a component of the lawyer's role.[39]

In the Best Interest of the Child helps the lawyer to recognize the reasons for this rationalization and provides guidance for resisting its lure. The book purposefully distinguishes between substantive outcomes in proceedings and procedural practices that are used by professionals to reach those outcomes in order to highlight that right practices by professionals (even on behalf of positions that Goldstein et al. oppose) are essential in proceedings that impact on children and families.[40] These right practices include four essential elements to limit both the indeterminacy of standards applied to child placement decisions and any unnecessary intervention in parent-child relationships: identifying personal values, distinguishing personal and professional knowledge, recognizing the impact of personal knowledge and values on professional decision-making, and acknowledging the limits of each type of professional role.[41]

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36. *See supra* note 5.

37. *American Bar Association Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases*, http://www.abanet.org/child/childrep.html; National Association of Counsel for Children Standards, http://www.naccchildlaw.org/training/standards.html; New York State Bar Association Law Guardian Representation Standards, http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/NYSBA_Reports/Guide_to_Representing_Children/Guide_to_Representing_Children.htm.

38. *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children,* 64 FORDHAM L. REV. 1301 (1996); *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham,* 6 NEV. L.J. 592 (2006). Both sets of recommendations affirm client-directed representation for child clients.

39. Jean Koh Peters, *The Role and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings,* 64 FORDHAM L. REV. 1505, 1513 (1996).

40. GOLDSTEIN ET AL., *supra* note 2, at 158.

41. *Id.* at 157–61; GOLDSTEIN ET AL. are equally concerned that each professional keep to his or her appropriate role, even as they come to understand the knowledge of the other disciplines or roles.

Long before child welfare professionals began to hear about concepts of "cultural competence" in their practices, Goldstein et al. were warning them not only to be aware of their personal biases but to understand that those biases have a habit of substituting for professional knowledge when peoples' lives—especially children's—are at the center of the controversy. For lawyers representing children, these right practices should limit the lawyer's almost overwhelming desire to decide what is best for the client by providing clearer boundaries for decision making. An underlying element of these right practices is the presumption that, "Professional persons know that the ultimate goal of the placement process is to provide children with parents who will be free from further state intrusion: free to use or refuse their help, free to accept or reject their interventions."[42] While this presumption is fully consistent with United States constitutional law—which limits the state intervention in family integrity—it is more aspirational than actual.[43] Limiting the impact of personal knowledge and values and distinguishing personal from professional knowledge in order to constrain one's professional role is extremely difficult for the very reasons that Goldstein et al. identify:

> Yet the tragic situations that they often confront in child placement cases tend to blur professionals' awareness of their own limitations and the limits of their assignments. Their personal experiences and sympathies sometimes interfere with their professional judgment. And their effort to maintain a purely professional stance carries with it the risk that they may become too distant and lose the empathy that is essential to good work with children and their families.[44]

When *In the Best Interests* was written, Goldstein et al. rejected a model of child advocacy that was substantially child-directed. Concerned that lawyers have insufficient knowledge and experience to understand the complexity of either their child-client's stage of development or the parent-child relationship in order to counsel the child effectively about the representation, Goldstein et al. recommended instead that "the task of counsel for children is to discover and to represent the interests of the specific child who is their client," while immediately acknowledging that there is no consensus on what that really means.[45] They knew, at a minimum, that providing a recommendation or taking a position based on personal values or knowledge beyond their professional expertise was not the right role. And they urged child advocates to partner with experts in other

42. *Id.* at 154.

43. Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts,* 2002 WIS. L. REV. 331, 340 (2002).

44. GOLDSTEIN ET AL., *supra* note 2, at 154.

45. *Id.* at 171.

fields in order to "discover" the child's true interests. In essence, to learn enough about child development, health, and behavior to know what questions are important to ask. This model of discovering the client's interests is most akin to the model of "substituting judgment" that has been adopted by client-directed lawyers for children who, after determining that their client does not have the capacity to direct his or her representation, take steps to determine what position the client would want taken if the client had the capacity to direct the representation. But for a child-client capable of directing representation on some or all of the issues being litigated, substituting judgment or "discovering the child's interests" risks looking a lot like deciding what is best for the child. For that reason, I think now Goldstein et al. would embrace the child-directed role for lawyers as the only paradigm for which it is possible for the lawyer to engage in the *right* practices they proscribe: distinguishing between personal values and professional knowledge; remaining true to their assigned role as counsel; and resisting taking on the roles of other professionals in the case.

At the time Goldstein et al. were writing, the question of when a representative for a child should be appointed in child welfare proceedings was not settled. Consistent with their belief in family autonomy, Goldstein et al. believed children should not be represented by separate counsel until after the court determined that they had been maltreated. At the point, that is, when the court formally determined by law that their interests diverged. In the succeeding decades that position did not prevail. Children are generally represented (whether by an attorney or another type of advocate) from the commencement of the court proceedings. As a result, from the very beginning of the case, lawyers are tempted to see their clients in opposition to their parents. This temptation, combined with the concerns Goldstein et al. identified about failing to use right practices, leads me to conclude that today Goldstein et al. would agree that only a client-directed model of representation has the potential to limit the indeterminacy of *BIOC* by limiting the freedom of the lawyer to decide what is "best." The New York child advocacy experience provides significant support for my belief.

Unlike in many states, New York law does not explicitly require lawyers for children—called *law guardians* in New York—to represent the client's best interests. Yet the underlying substantive law, the case law interpreting the law guardian's role, and the difficulty lawyers have in limiting the scope of their responsibilities all reinforce the totemic power of *BIOC* to shape the lawyer's role. New York statutory law broadly defines the lawyer's role:

> This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented

> by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.[46]

Lawyers are barely constrained by this definition. The statute simply recognizes that a lawyer is the right professional to help "protect their interests" and "express their wishes to the court." Nowhere is the lawyer being asked to assume a role that protects the child's best interests. New York has provided children with lawyers in child welfare proceedings for nearly forty years through institutional organizations, assigned counsel systems, and private practice. There is a tradition of regular training, local as well as statewide standards of law guardian practice, and periodic reporting on the role of the law guardian.[47] The New York system has been analyzed repeatedly in academic and practice articles that have consistently portrayed New York lawyers as being (at least theoretically) independent advocates on behalf of their clients.[48] Neither the lack of statutory definitional constraint nor the tradition of independence, however, has resulted in the children's bar fully embracing a system of representation that reflects the right practices that Goldstein et al. outline in *In the Best Interests of the Child,* which foster a noninterventionist family policy for their clients or strive to limit the indeterminacy of a *BIOC* approach. This is because lawyers do not work in a vacuum. The multiple factors that have shaped law guardian practice in New York during the last forty years have, in fact, either rejected or ignored the lessons of Goldstein et al. No factor in that process may have had more influence than the way New York courts interpreted the underlying substantive child welfare law. Goldstein et al. believed that the state should intervene in families when the detriment of not intervening was greater than the detriment of intervening. Fearful, especially, that state foster care systems routinely fail children, Goldstein et al. further recommended that state intervention take place only when specific acts of harm could be established. Until recently, however, New York courts routinely rejected this construction of child protective policies for a more open-ended, indeterminate *BIOC* analysis despite statutory language to the contrary. This rejection had a fundamental impact on the role

46. New York Family Court Act § 241.

47. Jane M. Spinak, *The Role of Strategic Management Planning in Improving the Representation of Clients: A Child Advocacy Example*, 34 FAM. L.Q. 497 (2000); Martin Guggenheim, *How Children's Lawyers Serve State Interests,* 6 NEV. L.J. 805 (2006).

48. Spinak, *supra* note 47, at 503; Guggenheim, *supra* note 47, at 807.

of lawyers for children and the child welfare decisions made by courts.

In October 2004, the New York Court of Appeals issued a landmark decision in *Nicholson v. Scopetta,* clarifying the meaning of two definitions in child welfare law in New York: what places a child at "imminent risk" for removal from parental care prior to any determination of maltreatment and what constitutes less than a "minimum degree of care" to satisfy an allegation of neglect.[49] For the first time since the current child maltreatment statutes were enacted in 1969, the highest judicial authority of the state interpreted the statutory definitions of these two terms. In doing so, the court finally rejected what had come to be called the "safer course" doctrine of removing a child from parents alleged to have neglected them as being less harmful to the child than leaving the child with the parents until a factual determination of harm could be made (except in clear emergency situations). Instead, pursuant to *Nicholson,* a family court judge now must determine whether the trauma to the child of removal is greater than the risk to the child's health and safety of being allowed to remain at home pending a determination of whether the parent has neglected the child. Only by balancing the harm of removal with the harm of allowing the child to remain at home can the court satisfy the statutory best interests requirement:

> The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.

BIOC is given a definition and meaning that limits the court's authority to intervene in the family without recognizing the impact of such intervention on the child's well-being. When the family court then reaches the stage of the proceeding that determines whether the child has been neglected, the state must prove actual harm to the child by the specific actions or omissions of the parent or caretaker. The *Nicholson* court noted both the historical concern of the legislature of unwarranted intervention in family life when the statute was written and the need to guard against finding neglect based solely on undesirable parental conduct.[50] *Nicholson* recognizes the deep bonds between parents and children and the looming destructive power of state intervention that Goldstein et al. earlier identified as key elements in child-welfare placement policies. If *Nicholson* had been decided twenty-five years ago, at about the time of *Before's* pub-

49. Nicholson v. Scopetta, 787 N.Y.S.2d 196 (2004).
50. *Id.* at 201.

lication, law guardian practice would have been shaped by this far more cautious approach to family intervention.[51] Instead, it was shaped by the repeated application of the "safer course" doctrine as substantive law.

Martin Guggenheim recently reflected on the impact of a more broadly defined "safer course" doctrine on law guardian practice.[52] While the *Nicholson* decision addressed the legal standards that now must be applied to reduce unnecessary intervention in families, Guggenheim exposes the reasons why many law guardians embraced the pre-*Nicholson* interventionist approach. He believes lawyers for children are under enormous pressure in child welfare proceedings to follow a "safer course," that contains three elements: a presumption that a conflict between parent and child exists; an assumption that a parent charged in a neglect or abuse proceeding is unfit; and a form of risk aversion that assumes separating a child from a parent is more likely to keep the child safe.[53] He traces this "safer course" presumption to an appellate court ruling from the early 1980s. The appellate court, *In the Matter of Jennifer G.*, removed the child's lawyer before remanding the case back to the family court for rehearing. The lawyer had taken the position during the earlier family court proceeding that it was an appropriate "risk" to permit the child to return home.[54] While the choice of words may have been unfortunate, the lawyer was advocating for a position consistent with the substantive law of the state and with his clients wishes and interests, as he was obliged to do. Guggenheim believes that if the lawyer's office—the most prominent legal office for children in the state—had challenged the lawyer's removal, the children's bar would have been fortified in rejecting the safer-course approach to their advocacy, an approach that allows lawyers to advocate for what they think is best for their clients. Lawyers for children would have been able to incorporate into their advocacy what Goldstein et al. point out in *Beyond* and *Nicholson* much later acknowledges: that all decisions concerning children's placements contain risk, but decisions circumscribed by the most current professional knowledge are better decisions.

The impact of the decision in *Jennifer G.* on lawyers for children was

51. At a recent panel discussion held at Cardozo Law School concerning the role of lawyers for children in New York child protective proceedings, Gary Solomon, one of the preeminent lawyers and legal interpreters of the role of the law guardian in New York, stated that lawyers had to be bound by the interpretation in *Nicholson* to see that these standards were met prior to taking the position that their client should be removed from parental care.

52. Guggenheim, *supra* note 47.

53. *Id.* These three elements are, of course, in total contrast to Goldstein *et al.*'s requirement that professionals be shaped by the boundaries of substantive law that limits intervention into family life and presumes family autonomy prior to any finding of unfitness.

54. *In re* Jennifer G., 487 N.Y.S.2d 864, 865 (App. Div. 1985).

compounded by two personal values that Guggenheim believes suffuses child advocacy: lawyers like to win and lawyers for children like to be heroes. Prior to *Nicholson*, following the safer-course approach was more likely to secure a winning result. And winning gave lawyers a sense that they were protecting their clients:

> In addition, children's lawyers also get to perform a special role in our culture: that of "hero." Charged with a special duty to protect their "clients" from danger, children's lawyers are rewarded professionally and emotionally when they step forward and argue for intervention to prevent possible future harm. We have not designed or conceived of the children's bar as having been erected to prevent state overreaching. Quite the opposite. The children's bar exists to ensure that all children who need state protection receive it. And sometimes the children's lawyer gets to be the protecting hero.[55]

Goldstein et al. foreshadowed Guggenheim's hero role when they cautioned that child welfare professionals, ladened with a "multitude of personal beliefs and ordinary knowledge about what is good and bad for children and about what makes a satisfactory or unsatisfactory parent," will want to rescue children rather than, in the case of the lawyer, represent them.[56]

One further aspect of New York appellate case law reinforces Guggenheim's theory. Even recent cases addressing the law guardian role have split in their analysis of whether the law guardian should be representing the client's wishes or best interests.[57] While there has been a greater acceptance of the law guardian's independent advocacy role in the last few years—especially rejecting the practice of law guardians providing the court with *ex parte* reports as if they were court advisors and not advocates for a client—these same courts continue to use best interests language to define the law guardian's role, even though the word "best" never appears in FCA § 241:

> [The] law guardian has the statutorily directed responsibility to represent the child's wishes as well as to advocate the child's best interest. Because the result desired by the child and the result that is in the child's best interest may diverge, law guardians sometimes face a conflict in such advocacy.[58]

As the official commentary for the Family Court Act notes about this case, "The [court], like most, uses the phrase "best interests" instead of the

55. Guggenheim, *supra* note 47, at 830.

56. GOLDSTEIN ET AL., *supra* note 2, at 160.

57. In the 2003 commentaries to FCA § 241, Merrill Sobie notes that four recent cases in three appellate departments reach seemingly contradictory results about the law guardian role. (Sobie, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 29A, Family Ct. Act § 241.

58. Carballeira v. Shumway, 710 N.Y.S.2d 149, 152 (2000).

statutory word "interests," although the adjective "best" modifies the word "interests," arguably changing the meaning."[59] Arguably indeed. Why do courts persist in misstating the law guardian's responsibilities and why do law guardians persist in letting them? Beyond succumbing to the safer-course strategy and enjoying the hero role, lawyers cling to wanting to do what's "best" for the very reasons that Goldstein et al. wrote in *In the Best Interests:*

> We believe that [professionals] would agree that they *ought not* to exceed their authority and *ought not* to go beyond or counter to their special knowledge or training. But we do not take for granted that they always recognize when they go or are asked to go beyond these limits. Sometimes they do not recognize that they are doing what they "know" they ought not to do. This may be because the law gives them vague and ambiguous assignments; because they have a strong desire to help people in trouble; because they feel a need to justify their work; because they desire to avoid the embarrassment of acknowledging that they do not know something; because they do not pause to consider whether they are being asked to exceed their professional qualifications; or because of a combination of these and other less obvious (or perhaps, less understandable) reasons.[60]

Knowing the limits of authority and training requires lawyers for children to mistrust themselves. The fallibility of professionals of good will that Goldstein et al. describe is the most important lesson that their last book imparts for all child advocates. When they provide examples of lawyers for children acting appropriately or inappropriately in their role, they are harbingers for the standards of practice that have been developed, especially during the last ten years, and the complementary analysis of the lawyer's role that has been generated. Goldstein et al. would be encouraged, I believe, with the care and seriousness that lawyers for children have recently devoted to scrutinizing their role and to developing standards of practice that purposefully limit their discretion. Moreover, many lawyers for children have embraced a multidisciplinary model of representation that draws on the expertise of their colleagues in social work and psychology, especially to inform their representation with the expertise they lack. That is why I believe Goldstein et al. would prefer—or at least find "least detrimental"—a child-directed model of representation. For the reasons I have described, child-directed advocacy is the only paradigm that embraces Goldstein et al.'s right practices, allows lawyers to remain true to their assigned role, and to resist taking on the roles of other professionals in the case. At the time they were writing, Goldstein et al. also

59. Sobie, *supra* note 57, referring to the decision in Carballeira v. Shumway.

60. GOLDSTEIN ET AL., *supra* note 2, at 155; emphasis in original.

believed that a function of the family court was to advise lawyers about the parameters of their role by invoking the statutory limits of child placement regimes.[61] What we have learned from the *Nicholson* and *Jennifer G.* examples, however, is that courts cannot be relied on to provide those limits. Lawyers must establish those limits themselves. The current child-directed model is far more nuanced and limited than the "child wishes" representation they rejected in their books. These client-directed models draw on the rich experience of the past twenty-five years to train lawyers with multidisciplinary knowledge about children and families; to draw on lawyer's ethical codes to understand the limits of their role; to develop methods of representation that are child-centered and child-friendly in order to maximize the child's understanding of the lawyer's role and the proceedings; to learn and appreciate alternative forms of dispute resolution that may diminish the impact of state intervention in the family's life; and to be bound by the substantive law that recognizes the centrality of family integrity. Goldstein et al. called on legislators and courts to ask continuously: "Does the law reflect the current state of knowledge," to minimize the harm when the state intervenes in the lives of families? I believe they would recognize today that the current state of knowledge about lawyers for children indicates that only child-directed representation is most likely to achieve that result.

Most nations have failed to nurture and support children so they can grow to be the happy, healthy and productive adults, which was the hope of the *Century of the Child.* That is, they have failed to follow the overarching principle of securing the child's best interests that the Convention establishes as a primary consideration for all nations. This is certainly a profound defeat for any movement of children's rights. Within the profession of child advocacy in the United States, there is an additional and paradoxical failure to understand the limits of a *BIOC* standard as an organizing principle for representing children's rights. Rather, when we look back at forty years of child advocacy in child welfare proceedings, we can see how the indeterminate *BIOC* standard helped to enable lawyers to fashion a system of representation that substituted the lawyer's understanding of what is best for a rigorous client-centered exploration of the child's interests within strict legal boundaries. Goldstein et al. identified the perils of indeterminacy and provided a template for resisting their allure. The time has come for lawyers to reread their books and revive their lessons in the service of twenty-first century client-centered child advocacy.

61. *Id.* at 144.

BOOKS

BEYOND THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud and Albert J. Solnit. New York: The Free Press (MacMillan Publishing Co.), 1973. Pp. xiv, 170. $7.95 hardcover; $1.95 paperback.

Identifying just principles for minimizing and resolving disputes over child custody remains one of the law's knots. King Solomon's renowned gambit for resolving the claims of two women to a newborn child[1] was in fact the easy case: only one of the two contenders had a just claim; only one of the two contenders was prepared to be responsible; and in that first of reported cases, the judge had the advantage of surprise. Yet where each potential custodian has a claim, where each is equally prepared (or unprepared) to sacrifice his interests for the child, and where the rules of decision are known in advance and thus susceptible to manipulation, justice for adult and child is much harder to achieve. Only with difficulty has the law advanced the rules regarding child-possession beyond the law of land-possession or slave-possession. Even in acknowledging that the "best interests of the child" are its central concern, the law has made false promises, both beyond its capacity and camouflage for rules that most strongly respond to the presumed interests of the competing adults.

In *Beyond the Best Interests of the Child*, three distinguished social science professionals have crafted out of evident compassion for the child a brief yet subtle program for the law's resolution of these difficult cases. Anna Freud and Albert J. Solnit are pre-eminent figures in child psychoanalysis and psychiatry, respectively, who insist that law recognize both what is known about child development and, as importantly, what is not known and cannot be predicted with certainty. Joseph Goldstein, a distinguished professor of law who has also acquired professional psychoanalytic training, seems ideally placed for the arduous task of smelting sound legal policy from the social science ore. Their book, warmly hailed by an impressive array of judges, child welfare professionals and others concerned with children, insists that the child's perspective must be controlling in any judicial proceedings to decide custody issues.

Even if the full force of their recommendations does not prevail, the symbolic importance of their commitment to the child's side and the fresh view that they give of the law's impact and failings are sufficient to require that their book be read. Yet their commitment carries with it possibly unavoidable overstatement. The book views child development from a questionably narrow

1. I KINGS 3:16-28.

stance. As a plan for concrete action, it is compromised by partisanship and apparent failure to relate its insights to the realities of an operating legal system; it fails to consider the way in which radically new rules may shape parental behavior and the incidence of litigation, and takes insufficient account of the limited capacity of a legal system staffed by fallible humans to administer them.

The beginning chapters describe with elegant brevity the existing psychiatric understanding regarding child-parent relationships and child development, and define a variety of concepts important to the authors' themes. The central thoughts are that the child's development depends upon the continuity and character of his relationship with the adult he perceives as his parent, *and that this perception rather than the fact of biological parenthood is the basis of their relationship*. This adult is described by the authors as the child's "psychological parent"—one who wants a relationship of enduring character with the child, and who through a course of continuing care and concern for the child comes to be regarded by him as "parent" and thus serves as the touchstone for his maturation and development.

> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be. (P. 19.)

Once such a relationship is formed, it ought not to be disturbed absent the most serious provocation.[2]

From this conjunction of need for continuity and importance of perceived relationships, the authors develop guidelines of major force for all child placement decisions. First, such decisions must safeguard the child's need for continuity of existing relationships. This need varies in character as the child grows but is always present in an intensity unlikely to be appreciated by adults; adults' formal relationships are not ordinarily subject to severance by others, their dependence on those relationships is not usually pervasive, and their capacity for rational manipulation of the environment and postponement of gratification is usually high. That prior relationships should be given significant force is no doubt unsurprising, but in the authors' view such a relationship once established must be made controlling. As importantly, they view the

2. Thus, when a child of divorce has been placed with one parent and, over time, is integrated into a new home, death of the custodial parent ought not entitle the surviving biological parent automatically to assume custody of the child as against the surviving step-parent. The potential for harm to the child (and the family in which it has been living) is transparent. Students of Professor Goldstein developed this aspect of the idea some years ago in a widely cited note, *Alternatives to "Parental Right" in Child Custody Disputes Including Third Parties*, 73 YALE L.J. 151 (1963), but it is still far from universally accepted. *See, e.g.*, Quaresmo v. Schwab, 44 App. Div. 2d 568, 353 N.Y.S. 2d 48 (1974).

anxiety engendered by the prospect of legal interference as equally objectionable; "each child placement [must] be final and unconditional and . . . pending final placement a child must not be shifted to accord with each tentative decision." (P. 35.) And, consequently, the child should not be subjected to legal regimes, such as enforcible rights of visitation, which increase the likelihood of future legal actions. Placement orders must be absolute, subject neither to modification nor to conditions enforcible by courts. For a divorcing couple, this would require sole custody to be given one of the two parents, with the other retaining no legal right to the child's company nor voice in his upbringing.

Second, placement decisions must reflect the child's, not the adult's, sense of time. Unlike adults, children can not readily manage delay; a delay of one month for a two-year-old corresponds in relative terms to perhaps a year's time for a young adult. The younger the child, the quicker the process by which memory of prior relationships is suppressed in favor of replacement relationships—whose loss, in turn, would compound the emotional harm uprooting has caused. "[T]o avoid irreparable psychological injury, placement, whenever in dispute, must be treated as the emergency that it is for the child." (P. 43). The consequences: limited time for the hearing of disputes; sharply limited and expedited appeals; and the suggestion that success on appeal should entitle the appellant to no more than an opportunity to show that intervention in the child's *current* placement is required at the time of rehearing.[3]

Finally, the authors strike a cautionary note: child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and social science's incapacity to make behavior predictions. Law "may be able to destroy human relationships, but it does not have the power to compel them to develop" (p. 50); psychoanalysis can identify existing capacities for parenthood, assess existing relationships, and demonstrate the harm often wrought by interruptions in continuity or extended uncertainty, but it cannot predict the future of any particular relationship. Consequently, the law should take an openly modest stance in resolving child placement disputes, letting well enough alone unless the need or inevitability of change is made clear and then—for such a child is "already a victim of his environmental circumstances [and] . . . greatly at risk" (p. 54)—selecting "that placement which is the least detrimental among available alternatives for the child." (P. 62.) Rather than make the unattainable false promise of "best interests," the authors choose to focus our attention on "the need to salvage as much as possible out of an unsatisfactory situation," our limited capacity to make valid predictions, and the limited choices generally open to us for achieving our goals. (p. 63).

These guidelines (if not all the conclusions drawn from them) are the

3. *Cf.* State *ex rel.* Lewis v. Lutheran Social Services, 405 U.S. 1051 (1972).

work's contribution. They have not previously been stated, at least with such cogent force. And they warrant the most careful attention by legislators, judges and lawyers. Modesty in intervention, speed and finality are all qualities presently lacking from the law's endeavors in child placement.[4] There is ample demonstration here of the need and basis for each in the learnings of psychoanalytic science. Limited and controversial as some of the propositions made in the name of behavioral science may be, the findings relied upon here are bedrock, not seriously disputed among the contending schools and camps, or by skeptical outsiders.[5]

The emphasis on psychological rather than biological relationships in disputed cases seems equally sound, provided that the importance of environment and the possible psychological advantages of biological relationships are not overlooked. The losses that a child faces through removal from his accustomed home are imperfectly accounted for if only the "parent" is looked to; the change may equally involve siblings, friends, community, house, toys, clothes—every aspect of his existence—and a change in parent figure that did not also involve these changes would not present as intense a threat. So, too, biological ties, if not interfered with, encourage the development of psychological relationships. A mother's hormonal response to childbirth may foster attachment; mother and father both are prepared for attachment by the unfolding of pregnancy, and may be aided by their realization that the child is their biological continuation. This sense of continuity and heritage is valuable from the child's perspective, if it strengthens parental ties.

We doubt the authors would disagree with these observations, although their stress on cases in which biological cues have failed tends to submerge them.[6] Similarly, the success of adoption—prime evidence for the "psychological parent" notion—ought not be permitted to obscure the greater risk faced by any child whose psychological and biological parents are not identical. Such a child will seek (or ignore, or reject) roots in more than one family. Even well-adjusted adopted children yearn to know their natural parents as part of their developing sense of identity. And their adoptive parents may experience attachment to them somewhat differently than to a natural child. For instance, emotional problems frequently arise when parents adopt a child and subsequently succeed in having one of their own; often they try to maintain an

4. While the book and this review are chiefly directed to legal roles, the point has equal bearing on child welfare workers. Speed and urgency are radical notions for a placement bureaucracy. *Cf.* N.Y. State Assembly Committee on Social Services, Report of the Temporary Sub-Committee on Adoption Practices (1970).

5. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167 (1969).

6. To return for a moment to the Solomonic judgment: on reflection it seems irrelevant to the justice of the result whether the woman who volunteered to give up the child to avoid its dismemberment was its biological mother or the competitor; common sense acquaintance with human behavior prepares us to believe that she was its mother, but the important point lay in her present and probable future relationship with the child, shown by her willingness to sacrifice herself for it.

identity of feeling towards each child which is not possible or realistic to have. Obviously, these considerations are not arguments against adoption. The differences are subtle, vary from person to person in unpredictable ways, and in any event are not susceptible of management by law. But they do suggest that the basis for recognition of the natural parent's claim to initial custody of his child is stronger than mere convenience, as the authors at times appear to suggest.

To take the argument one step further, we think that the authors introduce political premises which receive no support from the findings of psychoanalysis or psychiatry when they insist that the natural parent has no claim independent of his child's interests, that he has no "right." The point is strikingly made by repetitive characterization of the birth certificate as an "allocation," as if it were more than an (optional) record-keeping device and as if placement at birth involved a social judgment that *could* be made in any way. This characterization is effective only as a rhetorical device. The parents' claim is honored, not only out of concern for the child or even diffidence regarding present ability to determine its interests, but also in recognition of interests that the biological parents enjoy, which must somehow be compromised before any intervention can be justified. The failure to acknowledge this independent parental, perhaps more properly custodial, claim flaws the analysis.

Anticipating this criticism, the authors assert a value preference for abstention, "to safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect[7] and abandonment"

7. The concept of neglect is central to the authors' thesis, since it defines one of the few circumstances in which state intervention into family life is authorized. Perhaps the most regrettable of the omissions of this book is its failure to bring the authors' perceptions and knowledge to bear on defining this most troublesome term. Although in some respects they seem to believe that wide ranges of "parental" behavior disserve the developing child (pp. 15-21), they contribute no more toward a definition of neglect than the observation that the present definition is unsatisfactorily diffuse. (P. 105). It is hard to imagine a question for which the risk of judicial misadventure is as high. *See* Burt, *Forcing Protection on Children and Their Parents*, 69 MICH. L. REV. 1274-81 (1971); *cf. In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967). Portraying the child as they do—a fragile creature, particularly subject to parental influence in determining his future for good or for ill—the authors risk encouraging such misadventures.

For example, suppose a state agency exercising both child protection and adoption placement functions brings a neglect proceeding against the impoverished, unwed mother of a recently born child, proposing to place the child for adoption in a suburban, childless, two-adult home. Under the authors' scheme, the state need establish only that the child is "unwanted" and that its current placement is not the least detrimental available. "Unwanted" is not defined, but a wanted child is one who receives continuous affection and nourishment and "feels . . . valued . . ." (p. 10); the least detrimental alternative is the one that maximizes the opportunity for being wanted and maintaining on a continuous and permanent basis a relationship with an adult who will "through interaction, companionship, interplay and mutuality fulfill the child's psychological need for a parent as well as the child's physical needs." (P. 10.) The authors are emphatically for nonintervention; but picture this language as the subject of litigation, or in the hands of any ordinary judge. Its indefiniteness requires the most excruciating inquiry in every case and risks decision on the basis of prejudice rather than rational judgment; precise rules, at cost to *some* children, would at least make clear the cases in which intervention was not to be sought.

(pp. 7, 105 ff.), but purport to found this preference upon the child's need for continuity rather than any independent claim that the parent may have. That does not suffice. The point is a subtle, but important one. The authors assert the primacy of the state and its planning function, which for them is hedged by "preferences" for privacy and recognition of limitations on our present capacity to plan. But government is more effectively limited by recognizing that the parents' claim is not a mere derivation of what the interests of the child require or what is least detrimental to the child. Rather, the parents' claim reflects an independent assertion of personal rights and instinct, of a liberty which a state subject to constitutional restraint is required to recognize.[8] While we agree with the authors' view that children's claims are to be preferred to adults' in situations of balanced conflict, it does not follow that the adults have no respectable, independent legal claim. To substitute blind adherence to "children's right" for blind adherence to "natural parents' right" would mark little improvement, and in hands less sophisticated or self-effacing than the authors' could easily unloose rather than contain the floods of state intervention.[9] Indeed, children have an interest in their parents' claims. For parents truly to give to an infant or small child, they must also be given to; emphasizing only the child's interests or rights may lead in the end to poorer care. That the children have claims is indisputable, and the importance and nature of those claims is forcefully revealed by the analysis; that the adults concerned have none involves different judgments, unrelated to behavioral science analysis and not at all necessary to this work.

For the child who has two existing or probable future relationships, the child of divorcing parents, the case for rejecting parental claims seems especially weak. Referring to asserted Japanese practice,[10] the authors propose that the courts act only choose the single parent who will have entire control over the child's life, finally and without possibility of modification save in cases of established abuse or neglect. (P. 38 and note). In legal perspective,

8. Stanley v. Illinois, 405 U.S. 645 (1972). *See also* Wisconsin v. Yoder, 405 U.S. 205 (1971).

9. *See* note 7 *supra*.

10. The reference is an example of legal documentation which too often seems slight. The authors quote a Japanese custody statute that limits judicial authority in contested cases to assigning custodial authority to one or the other parent. The statute is presented, however, without an explication of development or context that would help to understand its full meaning. Thus, no indication is given of the effect, if any, of parental *agreement* on visitation or other custodial matters of joint interest. Professor Michiko Ariga, a respected authority on Japanese law, has stated to one of us conversationally that although such agreements are not directly enforced, they are available for defensive use—for example, to resist enforcement of a claim to child support payments withheld because visitation has been denied, or to resist prosecution for asserted "trespass" in exercising visitation privileges. Such recognition of contractually-established visitation rights would be an incentive to agreement, but would apparently be unacceptable to the authors.

Further, even if our understanding of the legal rules were complete, we could hardly believe those rules importable without change unless we first understood the cultural and social context within which they operate. Japanese attitudes towards family relations and the importance of conciliation in interpersonal dispute are probably different enough from our own to make transplantation risky.

the other parent would become a stranger to his child, save, perhaps, for an obligation of support the nature or justice of which is nowhere examined.

We are entirely unpersuaded, both for parent and for child, that the law must turn its face from one of the divorcing parents. Even assuming the child's interests should control, the social science data to support the proposition that a single official parent is preferable to two seems remarkably weak. The authors simply observe:

> Unlike adults, children lack the capacity to [maintain positive emotional ties with unrelated or hostile adults]. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children may become prey to severe and crippling loyalty conflicts. (P. 12.)

To be the child of a mother and father who dislike one another is, to be sure, an unfortunate life experience; and parents who would subject their children to conflicting loyalties, whether or not they remain married, are less than adequate to their task. Nonetheless, given a child with existing relationships to *both*, we know of no studies which show that the legal death of one parent, the complete subordination of the child to the other's possibly distorted view, is invariably the preferable step for its future development.

Undoubtedly, the particular facts of some cases make it unwise to provide for visitation rights.[11] A judge who has read this book will be aided in identifying those cases. But there are also cases in which such factors as the child's age, the non-custodial parent's other strengths, the importance of providing an opportunity for tempering the distortions likely in the custodial parent's household, or the custodial parent's demand for occasional "time off," may counsel provision for regular visitation despite the risks. In an era of increasing incidence of divorce, the child has many models available to him for coping with the strains. The non-custodial parent, and the child's relationship with him, cannot be wished away by the law,[12] particularly with respect to the increasing number of families in which both parents have been actively involved in day-to-day child care; the risks in permitting one parent the power to impose that wish may be at least as severe for the child as the risks in legal recognition of the continuing relationship.[13]

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11. *Cf.* Kesseler v. Kesseler, 10 N.Y. 2d 445, 180 N.E. 2d 402, 225 N.Y.S. 2d 1 (1962).

12. The difficulty of "banishing" a natural parent has long been recognized. *E.g.*, J. BOWLBY, CHILD CARE AND THE GROWTH OF LOVE (1965 ed.). An example encountered by one of us in practice was Tony, a bright but disturbed twelve-year-old who had lived in several foster homes. Although his current foster parents cared deeply for him, he could not tolerate separation from his mother—even though she openly resisted the agency's efforts to maintain a thread of contact between them. (Tony's father had completely disappeared.) He often ran away from his foster parents and found his way to her; she returned him within a day or two each time. No court order could have kept Tony from his mother, as long as he could hope to find her.

13. A child of divorce deserves the chance to build on whatever strengths exist in his relationships with both parents. Even in cases in which a child can salvage little or nothing positive for his development from the non-custodial parent, direct coping with the

The authors state that their proposition is simply one of legal controls—a preference that legal process not be invoked more than the bare minimum necessary to resolve the initial dispute. Where neither parent is clearly more qualified, they suggest, the choice should be made by lot or any other impartially arbitrary means. The point is to keep the uncertainties and strains of litigation to a minimum; and the underlying belief is that parents otherwise disposed to be civilized will work these matters out privately, without need for judicial determination or enforcement. As a technique for selection, the proposal is striking in its originality, and if limited to the cases of actual litigation out of which the authors' concerns arise would merit serious consideration. How better to dramatize to the contending parents the disfavor with which such disputes are viewed and law's limited tools for resolving them?

At just this point, unfortunately, the authors commit compound failures of analysis. They take multi-hearing litigation about custody and visitation as paradigmatic, although such trouble cases are clearly exceptional; and they do not consider the impact of their proposals beyond those cases, on the future shape of planning and litigation in matters which do not presently rise to contest. Their reliance on agreement is unquestionably sound; many lawyers insist that their first duty in any case in which custody might become an issue is to keep their clients out of court. But what would the effect of an agreement be under the authors' scheme? Would it confer a private right of visitation, as it apparently does in Japan, unenforceable by injunction but available as a defense against trespass actions or against claims for support when visitation has been withheld?[14] Or, as seems likely, do they envision an entirely precatory document?

Our guess is that litigation about custody is more likely to rise than fall with the adoption of rules favoring an either/or regime. The emotional hurts attending divorce have not disappeared with the wide-spread acceptance of no-fault divorce laws; and there is some basis for belief that the wounded spouse and his lawyer-champion, deprived of the direct if unedifying revenge of a fault divorce contest, are repairing to child custody as the remaining

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reality of his parent may serve him better than the unrealistic fantasies he might otherwise substitute. Kapit, *Help for Child of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE 214 (I. STUART & L. ABT eds. 1972). Moreover, the parent who would deny the non-custodial parent visitation privileges may not be as strong or well-qualified as he imagines; the relief that visitation provides can as easily forestall serious difficulty as its strains can engender it. A good example is Mrs. B, whose husband was treated by one of us. According to her husband, she was disinterested in making arrangements for him to visit their children. Her psychological strength to cope with them, however, was limited. On occasion she felt overwhelmed, and would then call him and ask for a few days relief, lest she harm them. However, she would not accept regular visitation privileges for him without a court order. *See also*, C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 866-895 (1965).

14. *See* note 10 *supra*.

"fault" battlefield.[15] The temptation for viciousness is surely increased when the odds are heightened by narrow restriction of the possible outcomes; it strains human capacities to trust a spouse accorded custody in such a context voluntarily to permit her former spouse's relationship with their child to continue. Law may not influence human behavior much; but when it places an efficient instrument for revenge at hand, it is hard to believe that the instrument will not be both used and feared, with unfortunately predictable impact on litigation incidence and character.

One case of which we are aware provides a concrete example. Mrs. C's first husband was a devout and orthodox practitioner of their mutual religion who agreed to their divorce and Mrs. C's custody of their children only on the conditions that he could exercise frequent visitation rights (including all important religious holidays) and that she would rear them in strict adherence to religious precepts. Mrs. C would not herself have chosen such an upbringing, which included a parochial education for her children, but she agreed, and both she and her former husband have honored that agreement, which is enforcible in its major parts. Especially now that she is remarried to someone who shares her beliefs, she would prefer to change these arrangements; she finds them inconvenient and fears that her children's view of the world is being restricted. At the same time, however, she acknowledges that the children are fundamentally healthy, and have strong and apparently successful relationships with both their parents, and with their new step-father as well. And since litigation to change the conditions of custody might be more disturbing to the children and their present relationships, even if success were assured, she and her new husband have permitted matters to remain as they are. The reader of domestic relations cases will recognize in this situation the scenario for a bitter and destructive custody dispute. Mrs. C and her first husband avoided that outcome, we are persuaded, *only* because compromise of the deeply held feelings of both was available and enforceable. Were Mrs. C now free to abandon her undertaking, she would do so; and Mr. C, aware of that, would never have accepted her custody voluntarily. Whichever parent had received sole custody in a contest under the authors' scheme,[16]

15. Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 S. DAK. L. REV. 629, 650, 652 (1973) (Questions 4 & 5).

16. Not to be overlooked is the possibility that the more responsible parent, faced with an either/or situation most likely to be resolved by bitter dispute, will "responsibly" attempt to prolong the marriage or withdraw from litigating custody rather than impose that harm. Prolongation of the marriage could be more damaging to the children's well-being than a divorce; "almost every serious researcher in American family behavior has suggested that the effects of continued home conflict might be more serious for the children than the divorce itself." W. GOODE, WOMEN IN DIVORCE 309 (1956, paperback ed.). Nor is withdrawal from conflict clearly for the best; the modern-day parent, eschewing litigation, would be acting as the victor in King Solomon's court did, but without the advantage of having the judge present to reward his self-sacrifice. Even a parent unprepared to take custody may forward his children's interests by asserting his presently recognized claim to visitation. For example, Mr. A, seen in therapy by one of us, considered his wife to be psychotic and believed that he stayed with her as long as

and putting aside the destruction done by its searing if momentary bitterness, their children would have lost a strong relationship, one which has benefited them despite their parents' differences. Legal recognition of the claim may be more important for such parents and their children than the gains to be achieved by curbing that fringe of parents willing to tear their children apart in public feuding.

All the foregoing is wholly apart from the claim each parent has, unless somehow forfeited or overcome, to continued association with his child. Where both parents meet the (quite properly) limited standard for fitness for their parental role, and the child has an existing relationship with both at the time of divorce, nothing the authors suggest comes close to establishing a basis for disregarding that claim. The child cannot be cut in half; it must go to one parent at a time and for a variety of reasons that usually means more time with one than the other. But that the second parent has no claim for time does not at all follow. One must know the incidence of abuse of visitation rights before the judgment can be confidently made that they must be abolished.

This criticism, we should stress, does not impair other conclusions bearing on the custody process—in particular, that custody proceedings be treated as emergency matters, independent of the underlying divorce; that any decree or agreement be made final, subject to modification only by the voluntary action of the parties or on a showing of facts which would warrant intervention as an original matter; and that the principal determinant of the custody award be the least detrimental alternative, stressing strength and continuity in the psychological relationships the child enjoys.[17] While not forbidding judicial enforcement of visitation rights or other rights of control conferred upon the second parent, the law might with less harmful effect discourage judicial recourse, as by penalties for obvious harassment or inhibitions upon repetitive suits. Perhaps, in truth, these remedies would not be very effective; few invoke them even now, whether out of respect for their children or for the expense involved one cannot say. Yet the analysis to support casting them aside simply has not been made.

If one turns to settings, like King Solomon's, in which only one of the contending adults makes a claim characterized by an existing or probably future psychological relationship, the work's insights become more successful.

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he did to protect their son's life. Although he stated that she was negligent in caring for the boy, whose school reported that he seemed extremely fearful of her, Mr. A feared court action and even withdrew from visitation when his wife made that difficult during their initial separation. He looked forward to divorce as an occasion that would define his visitation rights and permit him to resume his protective role. While Mr. A had neither the desire, the strength, or the resources for custody, his child faced greater risk to his emotional health without some input from his father. Mr. A felt he needed court support to enable him to continue his involvement with his son against his wife's opposition, and she needed to know that visitation was his *right* in order to be able to tolerate it.

17. Detriment inheres in food supply and living conditions, too; in close cases, a decision for economy might be the most appropriate.

Painful as the conclusion may be for his prior caretakers, a child who has established himself in a new and "fit" household, and signals his wish to remain, will often be disserved by removal from that setting. The time taken for this establishment varies with age, a few months for an infant, longer for a school age child; but every child will reach a point at which he regards his present environment as "his," from which he can be separated only at a severe cost. The authors bite the bullet on this one: even where the child's placement is entirely involuntary, the product of wartime coercion, hospital error—or, one surmises, sale of a kidnapped child on the "black market"[18]—they deem it impermissible for the law to interfere with the existing custodial relationship. And more: to foster psychological parenthood, the law must insist upon speed and finality in such matters as adoption, so that adults concerned are not tempted to regard custody decisions as provisional and so withhold from the child the emotional commitment that will best foster his growth.

Here, too, we believe that substantial risks are created to legitimate interests of children and adults by concentration on the fringe case, and by disregard for the impact of new rules on adult conduct. For instance, the authors devote considerable space to a poignant series of decisions involving Stacey Rothman, whose mother gave her up to foster care at the age of one and then, when the child was eight, sought to reclaim her. The court at first ordered Stacey's return, although it noted that her mother agreed to a program of gradual transition; after the transition provided for did not take hold, the court, in a second decision, restored the right of custody to Stacey's foster mother. The authors insist that the right of the foster mother ought never to have been questioned. Granted the mother had the best of reasons for initially severing her relationship with her child—a mental illness that required hospital care—clearly the result is the right one. It requires no great psychological insight to see that after spending seven-eighths of her life in another family, Stacey would view the woman of that household as her mother and removal to Mrs. Rothman's care as a terrible threat; particularly so if her foster mother, encouraged by the passage of time and a darling "daughter," had promoted those views.[19]

18. *Cf.* PEOPLE MAGAZINE, March 18, 1974, at 38.

19. Rothman v. Jewish Child Care Ass'n., 1 N.Y.L.J. Nov. 5, 1971, and Nov. 1, 1972 (N.Y. Sup. Ct.). This effect is unavoidable and essential for the emotional health of a child in long term foster care. Removal of a child in long term foster care from her foster parents because they are acquiring emotional ties is indeed barbaric, as the authors state (pp. 24, 39 & nn.); *see also* Note, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI-KENT L. REV. 86 (1973). We note, however, that in cases which do not now get litigated in courts—say, long term care by uncles and grandmothers in cultures typified by family relationships more extended than common for middle class whites, or care by boarding schools and nannies—children seem able to maintain relationships with usually absent parents and to return comfortably to their care when the occasion arises. To what extent these seemingly healthy adaptations are supported by a legal regime in which the child is the parent's by "right" is, again, a question the authors do not address.

More to the point from our perspective are cases like *Painter v. Bannister*.[20] There, Harold Painter, overcome for the moment by the sudden death of his wife, asked her parents to look after their five-year-old son Mark for a time. In some respects the Bannisters may not have been the best choice—they disapproved of Mr. Painter and his way of living, and were themselves upset by their daughter's death, as they had been by her marriage. But they were nonetheless family, and it is to family that people are accustomed to turn in such moments. Professional foster care, Mr. Painter knew from personal experience, was likely to be more traumatic for Mark. With his grandparents, Mark would not suffer a *complete* change of environment; Mark knew them and what their part of the world was like. Just as children find babysitting in their own home less threatening than a night without their own parents in a strange house, Mark could adjust to a painful situation more easily with the Bannisters than in any other substitute home.

Unlike Mrs. Rothman, Mr. Painter kept in contact with Mark; unlike Stacey, Mark was five, when placement was made; and "only" a year-and-a-half intervened before Mr. Painter returned to reclaim Mark for his home. As is well known, the Bannisters resisted; they produced credible psychiatric testimony that Mark now regarded Mr. Bannister as his psychological father and would be set back by removal "at this time"; and whether because it believed that testimony or preferred Midwestern solidity to West Coast bohemianism, the Iowa Supreme Court directed that Mark remain.

To our view, this victory for the psychological parent theory is problematic. Two years after this litigation was begun, Mark returned to his father at his own wish, with his grandparents' acquiescence, if not agreement.[21] Mark's relationship with his father was not dead and, indeed, it would have been a sign of mental illness, not health, had Mark regarded Mr. Bannister as his *real* father, however much strength he drew from their relationship. Had the Iowa Supreme Court purported finally to sever Mark's legal relationship with his father by decreeing an adoption, as it did not, it would have been taking a course that was *not* the "least detrimental" to the child.[22]

The authors make their problem too simple, indeed almost a caricature, by the unstated assumption that their proposed rules would have no influence either on the conduct of parents placing their children in foster care or on the conduct of foster parents in carrying out that high responsibility. Determining the "least detrimental alternative" for the child is in fact a highly

20. 258 Iowa 1390, 140 N.W.2d 152 (1966), *cert. denied*, 385 U.S. 949 (1967). The authors discuss the case briefly in a footnote.

21. C. Foote, R. Levy & F. Sander, Supplement to Cases And Materials on Family Law 59 (1971).

22. In *Rothman*, too, the court did not sever the child-parent tie, but merely awarded the present right of custody to the foster parents. Query the justice *to the child* of the further step, once her present custody is safeguarded from involuntary change. *See* note 12 and accompanying text, *supra*.

complex matter. On the one hand, the present rules may make it too easy for parents to initiate separations from their dependent children: Harold Painter's separation from Mark may have been unnecessary. The introduction of some measure of insecurity for the parent could be defended on the ground that that would give him pause before acting, and thus force him to examine more closely his resources for coping and the possible harms of separation.[23] On the other hand, this book's recommendations seem to make that insecurity complete.

If Harold Painter had known in advance that he would be unable to protect his relationship with Mark, even after the most agonizing appraisal of the need for interim separation, we fear the outcome would have been poorer care for Mark. One result might have been to force him to keep Mark, although virtually disabled as a father. Or, concluding that Mark's placement was unavoidable, he might have felt forced to look elsewhere than to the Bannisters for aid. He could no longer have put his trust in an agreement for return, even one which responsibly set a time limit for return and specified contacts to be maintained in the interim; he would fear that if psychological relationships developed between Mark and his foster parents the "conditions" on the agreement would become unenforceable. That rule strikes us as an invitation to ugly litigation, if not to deliberate choice for placement of homes where psychological relationships are unlikely to develop. We wonder whether other grandparents or temporary custodians who now work to maintain their charges' real or imagined relationship with absent parents, and promptly return the children when the parents reappear, would be tempted by the "psychological parent" rule to impose themselves upon the children and to resist returning the children when that demand was made. Tempted not only because the rule promises that often seductive result, but more importantly, because it makes full emotional commitment to the child—the effort to adopt him in the psychological sense—seem the only moral course to take.[24]

23. This argument was suggested to us by our friend Professor Robert A. Burt of the University of Michigan. Letter of May 16, 1974. We owe thanks, too, to Professor David Rothman of Columbia University and his wife Sheila for their many helpful comments.

24. The authors view as encouraging, and a welcome link to the past, Chapsky v. Woods, 26 Kan. 650 (1889), a decision written by Mr. Justice Brewer while he was still sitting on the Kansas Supreme Court (pp. 82-85). The case sustained a child's surrogate parents against her father's claim for custody many years after he had placed her with them. Putting aside the aura of indenture surrounding the father's action and the court's general disapproval of his conduct and character, the case might be read—as the authors read it—to support a psychological parenthood theory. Tracing the decision down through the pages of Sheppard's, however, one is struck by the vehemence with which this reading of Kansas law has been rejected; and, more, by the impression, which would be interesting to try to confirm, that in the years since this decision Kansas has seen more, and more bitter, child custody litigation than other states whose rules are more clearly protective of parental right. *See, e.g., Re* Vallimont, 182 Kan. 334, 321 P. 2d 190 (1958); *In re* Jackson, 164 Kan. 391, 190 P.2d 426 (1948); Jones v. Jones, 155 Kan. 213, 124 P.2d 457 (1942); *but see* Hodson v. Shaw, 128 Kan. 787, 280 P. 761 (1929) (ten

At the least, one would expect an assessment of these possibilities. And the trouble cases generated by the present rules are not the place one would look for that data. Psychoanalytic science has often been criticized for the skewed character of its data base. Such criticisms probably do not apply to the very basic developmental propositions put forward in this book, and in many respects the authors seem commendably aware of the limitations on knowledge in this area. But the criticisms do apply to the legal data base the authors have chosen. The trouble cases are indeed extreme, and with lawyers' craft can be met without impairing the smooth flow of transactions which now never reach litigation and would not so disturb us if they did. How much of an incursion on parental right can be sustained without harming children who, as a consequence of the authors' proposed rules, will not be placed, or who will be placed (as Mark Painter might have been) into inferior settings, requires more subtle analysis than this work sustains.

It would have been interesting, in this light, to know the authors' views of some recent changes in New York law regarding adoption and foster care, changes which they must regard as pointing in a welcome direction.[25] For the preceding several decades, New York had been an extraordinarily strong adherent of the "natural parent's right" theory of child placement. Unless proved unfit, a difficult showing to make, a parent was entitled to the custody of his child against all comers. Even after seven years of foster care, as the first decision in the *Rothman* series held, a fit parent was entitled to the return of her child upon demand. The second *Rothman* case arose, indeed, only because Mrs. Rothman was willing—foolishly or wisely—to undertake gradual change; at law, she might have demanded, and would have received, immediate custody of her child. Similarly, under New York's prior law, foster parents had no interest in the custody of their foster child; their relationship with the child was subject to summary termination by the agency (or themselves), and they would be afforded no standing to participate in any judicial proceedings concerning placement. Adoption rules were equally one-sided; the natural parent's right to retract her consent before final entry of the decree was virtually unfettered. To be sure—again, a point very easy to miss in one's horror at the few cases in which the option *was* exercised—these rights were rarely availed of. Still, under pressure of the belief that the parent's interest rises to important constitutional status, the New York courts

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years in custody; father a former felon). This withdrawal from Justice Brewer's sweeping words might be explained by the hypothesis that his successors were less sensitive to children's claims than he; but if the pace and bitterness of litigation did increase, his successors may equally have been responding to that.

25. It is unrealistic to expect much attention to the detail of the law in a brief and Olympian work such as this, but the omission is a regrettable one. These changes were occurring just as the *Rothman* case was proceeding through the courts and seem a direct response to the authors' concerns. *Compare* note 10 *supra*.

had invariably held for the natural parent or against the foster parent in those few cases in which the issue was presented.[26]

The past few years have seen the emergence of a complex network of statutes all apparently intended to increase the likelihood that a child placed for adoption or foster care will remain in that setting despite its parents' subsequent change of heart. The new laws provide mechanisms by which consent to adoption may be made irrevocable and, in addition, sharply limit the circumstances in which consent may be revoked when those mechanisms are not used. Consent becomes final thirty days after the child is placed for adoption (in the case of a private placement) or with an agency; even during that period, the law now requires, attempted revocation merely raises the question of what custody arrangement will be in the child's best interests. The statute explicitly states that no preference is to be given the natural parent in that determination. If he is able to establish fraud, coercion, or duress, however, these rules do not apply.[27] The overall impact is certain to reduce still further the already limited incidence of attempted revocation; while not fully satisfying the authors' tests, the laws surely tend in that direction and, in practical terms, may well suffice.

The New York law regarding foster care has been steadily moving in the direction of recognizing parental interests in foster parents and facilitating severance of formal connections with absent natural parents. Thus, while New York still does not permit severance of child-parent relationships immediately upon a finding of neglect or abuse,[28] a subsequent action to terminate the relationship no longer requires a showing that the responsible child-care agency worked diligently but unsuccessfully with the parents to repair the relationship; a sound reason for determining not to work with them toward that end now suffices as an alternate ground.[29] More importantly, once a

26. *See, e.g.*, People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465 (1953) (custody); People *ex rel.* Scarpetta v. Spence-Chapin Adoption Serv., 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971) (adoption consent); *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (foster care).

27. N.Y. DOM. REL. LAW § 115-b (McKinney 1964); N.Y. SOC. SERV. LAW § 384 (McKinney Supp. 1973).

28. N.Y. FAM. CT. ACT § 1051. The authors appear to believe that this relief should be available, and invoked, whenever removal is the "least detrimental alternative." They appear to consider that termination would almost invariably be *less* detrimental than temporary removal during which the parents undergo some form of rehabilitation. To be sure, their view is that removal should rarely if ever occur at all; and it is probably true that family therapy will work best for a family that remains together, rather than one from which the source of stress has been removed. Yet, it seems to us, this is another situation in which disregarding the parental interests is simply too brutal. More important, the situation is one in which the risks of unchecked arbitrariness run very high. In a human world, decisions regarding neglect and abuse too often threaten to reflect class prejudices or personal background rather than assessment of a child's needs. *See* note 7 *supra*. Permitting parents a last clear chance to reform is, in the circumstances, a wise legislative judgment. It both respects the parent's interests, reduces somewhat the consequences of an erroneous finding of neglect, and, so far as the law can, denies the court the simple solution of "capital" punishment.

29. N.Y. FAMILY CT. ACT § 614 (McKinney 1963); *see* note 25 *supra*.

child has been with the same foster parents for two years, they acquire a quasi-parental interest that grants them priority in adoption, standing in any proceedings concerning the child's custody, and the right to seek initiation of proceedings to terminate the natural parents' custody.[30]

One suspects the authors would find these latter provisions insufficient, a compromise sacrificial of children's interests and hence unacceptable. The uniform time period the legislature has provided, two years, is too long for young children; perhaps, in their view, for all. They would object to the suspense in which foster parents must wait while the initial period runs, and the resulting harm to the developing child. And they would surely protest the possibility that children might be returned, even after that period had elapsed.

Yet even this mild statutory change should permit studies of the sort we find lacking in this work, and subsequent assessment of the impact of its proposals. One area for study should be the statutes' impact on parents' use of foster care: as the risks to the parent of putting his child in foster care increase, will resort to foster placement diminish? That would not in itself be a regrettable effect, if less detrimental alternatives are chosen; but some parents, still unable to avoid giving their child up for a time, might be expected instead to seek congregate care, usually inferior for the child. Informal (non-agency) foster care, to which the New York statutes do not presently apply, might also be expected to increase.

A second area of research should be the effect of the change on foster parents. The authors distinguish between foster care anticipated from the outset to be long-term, and foster care for brief, emergency periods and apparently feel, as we do, that the latter serves valuable functions that should be preserved. The two-year period under the New York laws seems intended to mark the line between the functions, however crudely; the authors suggest no similar test. Rather, they seem to ask individually, and after-the-fact, whether the particular child in question formed a psychological attachment to its foster parents before return was sought. If the cut-and-dry New York provision encourages foster parents to promote formation of psychological relationships even during the initial period,[31] thus interfering with the emergency rationale, we would suppose the authors' proposal to have an even stronger effect. It then seems important to know (1) whether the New York provisions are seen by foster parents as a back road to adoption, (2) what impact their view of possible future adoption has on the progress of their relationship with the foster child, and (3) what, if any, techniques can successfully be used to protect the designedly emergency placement. Again, this inquiry must be undertaken not only for the natural parents but for their

30. N.Y. Soc. Serv. Law § 392 (McKinney Supp. 1973).

31. The authors would agree that while psychological relationships inevitably form at *some* time for the child, manipulation by adults can delay or promote their growth.

child, who might be placed at serious risk if they concluded that the dangers of placing him in foster care were too high.

A related question is the impact of the new laws on child welfare agencies, which for some populations are encountering severe difficulties in securing children to meet the demand for adoption. Do they now more freely encourage would-be adoptive parents to undertake foster care, the reverse of the earlier practice of insisting that foster placement forbid eventual adoption of the child placed? In their dealings with parents seeking foster care, are they able to expose and handle adequately what are now possibly conflicting interests? Finally, down the road a little, is the effect of the change to quiet or to exacerbate the problems of transfer? The prior rule against adoption by foster parents, misguided as its application may have been to relationships long-term in fact, was defensible as an inhibition to destructive litigation. The new statutes encourage foster parents and natural parents to fight, and the authors' proposals—pregnant with expert dispute regarding the existence and quality of asserted "psychological parenthood"—offer an even stronger incentive. Is it clear, in King Solomon's sense, who will be acting for the child in this case? We fear that it will be the responsible parents who are tempted to withdraw; when they do not, the want of clarity in the outcome will encourage litigation.

The problem is compounded, in our view, by failure of an unarticulated premise that long and short term foster care can be reliably distinguished at the outset. Regrettably, that is not the case. The major cause of child placement is poverty or some condition related to it; and the intention of the placing parent is frequently only to seek temporary relief from the (often unshared) burdens of child-rearing in the face of some emergency. These parents cannot afford the wages of a housekeeper who might maintain the children in their familiar environment and thus reduce the risk of psychological harm or major new attachments, even in the parents' absence. Provision of in-home services to avoid the necessity of foster care would be a more satisfactory step than termination of parental rights in many cases where foster care is now sought, and would avoid the risk of unconscious discrimination against the poor that seems to us inherent in the authors' prescriptions. Nor is it enough to make homemaker services available at low or no charge; ways must be found to bring them to the attention of the community and to make use of these services realistic for one-adult or two-worker families, whose schedules may appear too inflexible for the demands of the welfare bureaucracy.

One possible response to some of these questions lies in counsel for the child, a procedural measure that the authors strongly (and rightly, in our

view) favor. The child has an indisputable interest in the outcome of the proceedings: since his liberty is at stake, in a significant sense, our traditions command that he be represented, independently of others whose interests may conflict with his. It would be a mistake, however, to put too much hope in this measure. In the first instance, it will not prevent litigation. It may tend to aggravate it, since counsel, in order to justify himself, will feel called upon to make his own contribution to the proceedings, enlarging the issues and hence the opportunity for crossfire and delay. Most important, how will counsel inform himself of his role? Counsel qualified for such delicate proceedings are scarce and expensive. The proposal seems to require that counsel in effect duplicate the entire inquiry to determine the "least detrimental alternative"—his litigating position. And counsel will encounter difficulty in taking any kind of instructions from his "incompetent" client.[32] Perhaps the most appropriate form of assistance would be provided by a social agency associated with the court—a measure many courts already employ, but without consistent success given the development over the long term of inevitable resource deficiencies and closer relationships between court and reporting agency than between the agency and its "clients." Uncomfortable as we are in the role of nay-sayers to the authors' high-minded arguments, something is to be said for the simplifying virtues of presumptions and of legislative categories for avoiding destructive litigation *in the large*. We grant, however, that unfortunate spill-over may occasionally occur, and that some flexibility must remain to account for it.

One other measure strikes us as central: steps must be taken at the moment children enter another's care to assure that the consequences of that transition are known, and the bargain must then be enforced. Assume that temporary foster care is to remain available, but that parental vacillation or long-term commitment to another's care will not be tolerated; that neglectful parents whose child is removed from their home may be given a chance at rehabilitation, but only that, at which they must succeed. It then becomes essential to identify at the outset of foster care what conditions parents must meet if their children are to be returned to them, by what time they must be reclaimed, *and* that return is a matter of right if these conditions are met. The authors, coming to the trouble cases long after foster care began, never really focus on the transactions with which it begins. They seem to assume that a case will cleanly identify itself as long-term or emergent at the outset, after which solution is simple. But that identification will not occur without

32. In the juvenile delinquency setting, serious commentators have been so impressed by the potential conflicts between determination of a client's best interest and representation of them as to suggest that each child must have *two* representatives, a guardian as well as a litigating counsel. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 IND. L.J. 527, 536-540 (1968).

procedures, and with the risks of overreaching and undercomprehension that inhere in agency and court relationships with the poor and ill who are the usual clients of foster care services, those procedures must be straight-forward and certain. A system that creates a reasonable plan for continuing parental contact and hinges the custody outcome upon the parents' adherence to that plan is, in our view, far more acceptable than one that only asks, at a later time, whether dependency relationships have in fact been formed.

All of the foregoing, like the book under review, assumes that willing foster parents, interested in adoption or its equivalent and fully qualified for child rearing, are in the wings. Regrettably, this is infrequently the case. The proportion of foster parents who fail to behave responsibly towards their wards is substantial; nor are they legally obliged to continue their relationship with a child even after it has matured into psychological dependency. Agency supervision of the quality of foster care is too often deficient. When foster parents have been unavailable or unsuccessful, return of a child to his biological parents who want him will be the least detrimental for him. The authors seem to suggest imposing responsibility as well as opportunity on foster parents; the idea warrants the most serious consideration. Again, the process of identifying foster parents who will accept this expectation of them underscores the importance of early and rigorous definition of the circumstances in which a child may be returned to his original home. One would wish neither to waste such a resource, nor to condemn these adults to the hurt of removal from their homes of a child they had expected to keep.

In sum, we view much of what the authors say as extraordinarily helpful. The exhortation that courts would ordinarily do best to leave well enough alone—to distrust their capacities for bettering even apparently harmful family situations, and consequently to follow a policy of repose—is forcefully grounded and long overdue. But lawyers who understand and accept the authors' imperative concerns, whose highest value now in custody matters is keeping their clients out of court, may come to question this book for its failures to consider both the values—values *to children* as well as to their parents—of planning and compromise, and the impact of changed law upon behavior that does not presently come to court or find reflection in trouble cases.[33] The book takes only the first, creative step towards important legal growth. So understood, its insights may mark the spot from which further analysis will occur. But initial creativity, the bold shift of perspective, must

33. These failures are sharply reflected in the proposed model child placement code, said to embody the "concepts, guidelines, and conclusions" of the work, and which forms its penultimate chapter. The authors themselves seem to acknowledge its difficulties by their failure to refer to it or illustrate its workings, even once in any other part of the book. It is hard to imagine that others will take it seriously if they do not.

be channeled and refined before effective legal regimes can be shaped from it. That job remains to be done.

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HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM. By Paul M. Bator, Paul J. Mishkin, David L. Shapiro and Herbert Wechsler. Mineola, New York: The Foundation Press, Inc., 1973. Pp. lxxvi, 1657. $22.00.

In one of the uniformly laudatory reviews that greeted this unique assemblage of legal materials when it first appeared 20 years ago, Professor Philip Kurland called attention to the standards for judging a law book that had earlier been articulated by one of its authors:

> To work out hard answers, what you want is a book which deals with the reasons for rules—with the materials of thought and argument. You want a persistent search for the rationale of statutory provisions, court rules, and judicial decisions alike, and persistent efforts to lay bare competing considerations.[1]

What gave peculiar distinction to the efforts of Professor Hart and his talented colleague, Herbert Wechsler, to provide for others these materials—historical background, constitutional texts, statutes, cases, penetrating analyses, and, above all, searching questions—was their faithful adherence to these exacting criteria. Consequently, the result of their labors was more than a mere teaching instrument for law students encountering for the first time the challenging problems generated by the co-existence of dual court systems exercising judicial power derived from different sovereignties.

The veteran practitioner, the perplexed judge, the conscientious legislator —all have been able to turn to this book for help in overcoming their diverse difficulties. They have not found pat answers; the innate complexities of a federalist form of government infrequently admit of that. Instead, they have found the relevant information conveniently brought together, and, more importantly, the right questions to ask themselves and to answer as best they can. Whether or not the readers of the first edition have arrived at answers

1. Hart, Book Review, 27 IND. L.J. 145, 149 (1951), *quoted in* Kurland, Book Review, 67 HARV. L. REV. 906, 917 (1954).

Reviewed Work: Beyond the Best Interests of the Child by Joseph Goldstein, Anna Freud, Albert J. Solnit

Peter Strauss; Joanna B. Strauss

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Abstract:
In Beyond the Best Interests of the Child, three distinguished social science professionals have crafted out of evident compassion for the child a brief yet subtle program for the law's resolution of these difficult cases. Anna Freud and Albert J. Solnit are pre-eminent figures in child psychoanalysis and psychiatry, respectively, who insist that law recognize both what is known about child development and, as importantly, what is not known and cannot be predicted with certainty. Joseph Goldstein, a distinguished professor of law who has also acquired professional psychoanalytic training, seems ideally placed for the arduous task of smelting sound legal policy from the social science ore. Their book, warmly hailed by an impressive array of judges, child welfare professionals and others concerned with children, insists that the child's perspective must be controlling in any judicial proceedings to decide custody issues. In sum, we view much of what the authors say as extraordinarily helpful. The exhortation that courts would ordinarily do best to leave well enough alone -- to distrust their capacities for bettering even apparently harmful family situations, and consequently to follow a policy of repose -- is forcefully grounded and long overdue. But lawyers who understand and accept the authors' imperative concerns, whose highest value now in custody matters is keeping their clients out of court, may come to question this book for its failures to consider both the values -- values to children as well as to their parents -- of planning and compromise, and the impact of changed law upon behavior that does not presently come to court or find reflection in trouble cases. The book takes

only the first, creative step towards important legal growth. So understood, its insights may mark the spot from which further analysis will occur. But initial creativity, the bold shift of perspective, must be channeled and refined before effective legal regimes can be shaped from it. That job remains to be done.

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Abstract

Reviews the books, *Beyond the Best Interests of the Child* by Joseph Goldstein, Anna Freud, and Albert Solnit (1979) and *Before the Best Interests of the Child* by Joseph Goldstein, Anna Freud, and Albert Solnit (1979). These two books comprise the authors' proposals regarding a consistent approach to state intervention in child custody or placement decisions of all kinds. Their guidelines derive from a recognition of the importance for a child's development of stability and continuity of psychological ties between children and the adults who take care of them. These books, read together, provide a comprehensive, child-oriented policy regarding child placement. If one accepts for the most part these authors' views regarding the current limited degree of helpfulness of state intervention, as does this reviewer, then the books make sensible suggestions. If one thinks of the state's activities in these areas as largely proper and helpful, then the reader may react negatively and conclude that the authors are abandoning children to their families. The authors have reviewed the law of child placement, find it seriously flawed, and make important suggestions for more realistic and less potentially destructive laws and agency practices. These books are unique in offering the reader interested in the area of child placement a brief, integrated approach which encompasses the breadth of the field. (PsycINFO Database Record (c) 2017 APA, all rights reserved)

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The New York Times

U.S.

Joseph Goldstein, Authority On Family Law, Is Dead at 76

By ERIC PACE MARCH 15, 2000

Joseph Goldstein, a longtime law professor at Yale who was widely known for his interdisciplinary approach to family law and other legal fields, died on Sunday at a hospital in New Haven. He was 76 and lived in Woodbridge, Conn.

The cause was a heart attack, the Yale Law School's director of public affairs, Elizabeth Stauderman, said.

Dr. Goldstein, who was also a psychoanalyst, was a co-author of three books that, as Martin Guggenheim, a professor of law at New York University, put it, became "required reading for judges and practitioners in the field of child custody and other legal issues relating to judicial decisions concerning a child's future."

The books are "Beyond the Best Interests of the Child" (1973), "Before the Best Interests of the Child" (1979) and "In the Best Interests of the Child" (1986). Dr. Goldstein wrote them with Anna Freud, the psychoanalyst and daughter of Sigmund Freud, and Albert J. Solnit, the director of the Yale Child Study Center. The 1986 book was also written with Dr. Goldstein's wife, Sonja.

Dr. Goldstein joined the law school's faculty in 1956 and retired in 1993. Then he became a professorial lecturer at the law school, and held that post at his death.

Alan M. Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School

legal world in general." His influence was widely felt, Professor Dershowitz said, through both his writing and his influential students.

Central to Dr. Goldstein's and his co-authors' thinking, Dr. Guggenheim said, was the idea "that courts should choose the alternative that was the least detrimental to the interest of the child."

That principle, in the authors' view, followed from an even more basic one: They were highly distrustful of the capacity of judges to make intelligent decisions about custody arrangements. And so, Dr. Guggenheim said, "they wanted courts to have very limited authority to intervene in a family."

The books also expressed the view that custody disputes should be looked at from the point of view of children, especially their perspective on time. For example, for very young children, six months might be 100 percent of their life, not six months in the life a 40-year-old.

In the foster-care side of family law, Dr. Guggenheim said, Dr. Goldstein's and his co-authors' views encouraged the acceleration of termination of parents rights in cases where children were in foster care.

"As a result of their work," Dr. Guggenheim said, "statutes were rewritten to shorten the length of time children should be in foster care before courts would terminate the right of the natural parents, freeing the children to become eligible to be adopted."

Dr. Goldstein's work involving family law, Professor Dershowitz said, was an application of his thinking about the interface between psychiatry and the law. Early in his career he began studying issues related to the insanity defense.

Dr. Goldstein went on to write "The Family and the Law" (1965) with Jay Katz, a Yale Law School professor and psychiatrist, and "Psychoanalysis, Psychiatry and the Law" (1966) with Professors Katz and Dershowitz. He finished his own psychoanalytic training in 1968 at the Western New England Psychoanalytic

"He changed both law and psychoanalysis" by bringing them together, Professor Dershowitz said. "In the world of law, he made us all think about the role of law as superego, how we internalize law, how we make it part of our personality. And then, I think, he used the concept of law to help broaden and make more meaningful concepts like the superego and psychoanalysis."

Joseph Goldstein was born in Springfield, Mass. He received a bachelor's degree from Dartmouth, a doctorate from the London School of Economics and a law degree from Yale. He was a law clerk for Judge David L. Bazelon of the United States Court of Appeals in Washington and taught briefly at Stanford Law School before returning to Yale as an associate professor of law.

He also was an author, co-author or editor of books on criminal law, on the My Lai massacre and on constitutional law.

He was an Army code-breaker in World War II.

Dr. Goldstein is survived by his wife and co-author, the former Sonja Lambek; three sons, Joshua, of Cambridge, Mass., Jeremiah, of Philadelphia, and Daniel, of Davis, Calif.; a daughter, Anne Goldstein of Hartford, Conn.; eight grandchildren; a brother, E. Ernest Goldstein, who lives in Texas, and a sister, Mariam Sommer of New Haven.
