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Symposium
Children, Families and the Law

Foreword

In the spring of 1991, the Executive Board of the *Nova Law Review* decided to produce a symposium dealing with the rights and relationships of children and families under the law. This topic was chosen, in part, because of a humanistic interest in the laws affecting the areas of personal life and privacy closest to where most of us live: within the family setting. The authors and students who have contributed to this issue of the *Review* offer an eclectic mix of issues ranging from child custody concerns to the psychological effects of divorce; from the tragic issue of child abuse to concerns about the children who kill; and also whether society is now ready to accept the same-gender marriage and family situation.

Professor John Batt of the University of Kentucky examines the contemporary rationale behind child custody determinations and provides a thorough and insightful commentary of the theories which drive these types of determinations by the courts. Professor Batt explains and critiques the best interests of the child model—or paradigm—which was articulated by Joseph Goldstein, Anna Freud, and Albert Solnit and has found widespread favor among a great many jurists, attorneys, and other professionals involved in the arena of child custody and placement. Professor Batt also addresses a more recent model based on the work of Erik Erikson, the psychoanalytic humanist, whose ideas have gained favor among some commentators and others. Professor Batt's analysis melds the critical commentary regarding these influential paradigms with his own practical perspectives and suggests continuing critical review of the way we, as a society, approach the issues of child custody.

Josephine A. Bulkley, of the American Bar Association's Center

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on Children and the Law, offers a current perspective on the sensitive issues involving child abuse prosecutions. Bulkley, one of the better-known commentators in this area of the law, examines recent decisions by the United States Supreme Court which continue to reinforce alternatives to the in-court and confrontational testimony of a child who has been abused. Ms. Bulkley's article addresses the use of closed circuit television and other exceptions which allow a child's testimony to be used as evidence, without a face-to-face confrontation in the courtroom setting.

As the Director of The Children's Law Project at Nova University's Shepard Broad Law Center, Nancy Schleifer also provides commentary on child abuse cases and the Confrontation Clause. Her article addresses the child's perspective in the family court setting, as opposed to a criminal proceeding. It also provides guidance and recommendations for the development of a child protection case to practitioners who may represent the interests of abused children.

Gerald P. Koocher, an associate professor at Harvard Medical School and Chief Psychologist at Boston's Children's Hospital, offers a different perspective on children's rights and the role of the legal system in evaluating those rights. In essence, he exhorts the legal scholar, jurist, or practitioner to "step into the shoes," as it were, of the health care professional in order to see the effect of legal or governmental proceedings on children. His article focuses on matters which relate to decision-making for, and by, children.

Memphis State University's Janet Leach Richards provides a thoughtful commentary on the need to balance the scales in child custody determinations between a natural parent and an interested third party holding a significant relationship with the child. Her article examines the natural parent preference, its underpinnings, and continued viability; it suggests recognition of a third party who has acted in a parental role and seeks a balancing of the competing interests so that,

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ultimately, the best interests of the child are served.

Three lawyer-activists connected with Hofstra University—Andrew Schepard, Joan Atwood, and Stephen W. Schlissel—contribute an article which draws attention to the problems created for children when parents divorce, and urges measures to ease the potential trauma.6 Using an educational program they developed as an example, the authors encourage the adoption of programs which would counsel divorcing parents on the problems encountered by their children, reduce the use of the children as a weapon or pawn in the break-up, and help to provide positive assurance to children of their place in the family setting. The recommendations of the authors further extend to professionals practicing in the field of matrimonial law and seek new standards of ethics to govern conduct in the field.

Ruth-Arlene W. Howe, of Boston College's School of Law, writes regarding the societal problems of children who kill others.7 Her essay reviews Charles Patrick Ewing's *When Children Kill: The Dynamics of Juvenile Homicide*. It explores the response of the judicial system in treating children as adults or as minors and goes on to suggest several courses of action in dealing with this serious and emerging problem.

On a much different slant, authors Michael L. Closen and Carol R. Heise suggest that it may be time for American society, through its legislative and judicial units, to recognize same-sex marriages.8 These unions have found acceptance in other parts of the word, explain the authors, and a public policy of reducing the spread of AIDS combined with a more rational and accepting attitude towards same gender relationships is sought. Employing an analysis which draws heavily on historical perspective and the evolution of American marriage laws, the authors argue that, much in the same way as society and the law have evolved in matters concerning women's rights and slaves' emancipation, the law will come to recognize same-sex marriages.

The symposium also contains four student works. Kelly Bennison examines the problems occurring when adopting parents discover the

adopted child is not as represented and seek redress.9 David L. Ferguson evaluates a recent decision of the Florida Supreme Court in which one divorced mother’s First Amendment rights were burdened in order to reinforce the relationship between her children and the father.10 Susan Yoffe Slaton addresses a children-related immigration issue, the availability of asylum protection for aliens, like the Chinese, who oppose population control policies.11 Finally, Camille L. Worsnop writes of the unconstitutionality of the Florida statute which prohibits adoption by homosexuals.12 Her comment is written in light of a recent decision of the circuit court in Monroe County, Florida in which the court struck down the statute on privacy and equal protection grounds.

Each of the student works is reflective of emerging modern problems in the law as affecting family life. As we continue to find new and innovative ways to consider, and deal with, these types of problems, no one should lose track of the common strain of humanity and care that sounds in issues involving children or the family.

The Review staff is most grateful to the authors and contributors to this edition for their enthusiasm and support throughout the writing and production process.


John Batt*

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I. INTRODUCTION

A jurisprudential paradigm functions ideally as a guide to research, policy creation, norm construction, proof presentation, and deci-

* Professor of Law, University of Kentucky, B.A., Johns Hopkins University, J.D., William and Mary; LL.M, Yale University. The author is a Professor of Law at the University of Kentucky College of Law and a member of the Association for Applied Psychoanalysis.
cision-making in specific cases. More often than not, such a paradigm is an amalgam which is the product of observation, conceptualization, and imagination. Of course, no such paradigm is ever free of value permeation. Furthermore, such a jurisprudential paradigm is a model which provides us with a vision of a particular reality. It is my purpose to explicate, in some detail, two specific jurisprudential paradigms. It is stressed that both are relevant to the everyday court handling of child custody disputes. These are models directed at lawyer action, and not simply at scholarly interaction.

Child custody decision-making focuses on the best interests of the child. The best interests test is a general proposition which articulates a fundamental value position - a preference for the child's well-being. Best interests analysis can focus on economic well-being, physical health, family setting, or on a great number of things. But under the law, the aspirational position of our legal system is that the child's welfare is always paramount. Within the context of marital dissolution or separation, it is the judge's duty to promote the well-being position of the child. In this article, we deal with a very critical dimension of the child's best interests, that is, the child's psychological well-being. Our goal is to see how the abstract best interest legal standard can be implemented to produce more appropriate outcomes in child custody cases. It is my contention that better decisions can be produced through the use of models which give sufficient guidance in concrete cases to lawyers, judges and expert witnesses. The two decision-making paradigms discussed in this article have been created to assist those persons who participate in the process of deciding child custody cases. Addi-

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1. The classic example of a comprehensive, imaginatively conceived and most useful jurisprudential paradigm is the law, science and policy "decision process" focused "quantum intellectual physics" of Myers S. McDougal and Harold D. Laswell. See generally, Myers S. McDougal et al., Human Rights and World Public Order (1980) (for the best introduction to their paradigm-in-action); see also Fritsof Capra, The Turning Point: Science Society And The Rising Culture (1982) (for useful material on the role of paradigms in decision-making); Thomas S. Kuhn, The Structure of Scientific Revolutions (2nd ed. 1970, 6th Impress. 1975) (for informative background reading focusing on the role of paradigms in scientific revolutions).


3. The term "value position" refers to one's stand on a preference for a particular value. Examples of fundamental values critical in decision-making are security, wealth, respect, enlightenment, well-being, affection and skill. See generally, Myers S. McDougal, Studies in World Public Order 15-36 (1960).
tionally, it is anticipated that a discussion of the two models will be of value to professors, scholars and law students.

The first model we will examine is known as the beyond the best interest of the child theory. This paradigm has been widely disseminated and has had a very substantial impact on family law decision-making. Created by Joseph Goldstein, Anna Freud and Albert Solnit, this model has helped to revolutionize thinking and action regarding child placement decisions, and it has sensitized a great number of judges, practitioners, law professors, mental health providers and laymen to the important psychological dimensions of child custody cases. The other model discussed is the psycho-social developmental best interests model. This model is based on, but is not limited by, the work of the psychoanalytic humanist, Erik Erikson. Erikson is a very well regarded clinician, theorist and social commentator. This model has been examined in several law journal articles and the model has attracted the attention of a number of persons interested in child custody issues.


5. Their interdisciplinary effort draws upon the materials of law, psychoanalysis and psychiatry.

6. Although all do not agree with Goldstein, Freud and Solnit, no one ignores their views. They surely have forced others to re-think the whole child custody matter. See, e.g., Krause, supra note 2, at 752-55. Law Professor Louise Graham and Judge James Keller describe the Goldstein/Freud/Solnit work as seminal and of influence on the national level. Louise Graham & James Keller, Kentucky Domestic Relations, 404 (1988). In addition they discuss this author's criticism of the Goldstein/Freud/Solnit paradigm. Id.


The first model, articulated by Goldstein, Freud and Solnit, provides guidelines for legal decision-making. Yet only an artless examiner could fail to perceive the paradigmatic nature of this jurisprudential effort. It is no exaggeration to say that they have created a truly influential paradigm. Their work has had an extraordinary impact on the thinking and action of those who concern themselves with issues of child placement, such as, the resolution of private child custody disputes. Through their publications and appearances testifying as ex-


Over the years, this author has worked at creating a paradigm useful in making child-custody decisions. This work has received attention from others seriously concerned about how we decide child custody cases. See, e.g., N. Repucci, The Wisdom of Solomon: Issues in Child Custody Determination, in Children, Mental Health and the Law (N. Repucci, et al., eds. 1984). In this work Dr. Repucci, of the University of Virginia’s Institute of Law, Psychiatry and Public Policy, after discussing the work of The Colorado Children’s Diagnostic Center writes:

The C.C.C.’s philosophical basis for criteria is essentially derived from Goldstein et.al.’s (1973) proposed criteria. ... In contrast John Batt ... advocates a procedure that focuses on the child’s developmental stage, assessing his or her relevant needs. Then the parents are evaluated in terms of practical and theoretical considerations - time, devotion, attitudes toward the child as well as intentions, objectives and goals. On the basis of these criteria, the goal is to determine who will best serve the child’s needs and interests relative to his or her development stage.

Id. at 70-71.


In the present article, the author has refined and added to the developmental paradigm referred to in the above works. A large number of circuit judges and Master Commissioners dealing with custody cases in various parts of the State of Kentucky have made extensive use of this work.


10. See Richard E. Crouch, An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child, 13 Fam. L. Q. 49 (1979-80) (in this work, Crouch skillfully summarizes representative reactions from lawyers, psychiatrists, policy scientists, law professors, social workers and judges and gives one a “feel” for the impact of Goldstein, Freud and Solnit’s work); see also Joseph Goldstein & Albert Solnit, Divorce and Your Child (1984) (providing a basic description of the model). The language used by the authors of this publication makes the BBI Model intelligible to experts and laymen alike. Essentially, the work is a popularization of the BBI model. See id.
pert witnesses, they have widely circulated their model. Judges, lawyers, law professors, law students, mental health professionals, social scientists and concerned laymen have been very affected by their message.

In this article, I shall describe the Goldstein, Freud, Solnit model, de-code it, analyze it and provide an assessment of it. The model will be referred to as the BBI paradigm. This language derives from the title of Goldstein, Freud and Solnit's best selling book, Beyond the Best Interests of the Child. In performing the above outlined intellectual tasks, we will limit ourselves to the evaluation of their model and to its everyday use in deciding private child custody disputes. Placement decisions arising out of cases involving physical child abuse, sexual abuse, physical neglect of children, emotional neglect of children, etc. occur under institutional, psychological, social and legal conditions that are different from private child custody disputes. An attempt to assess the BBI model in relation to these other child placement decisions


12. In my home city of Lexington, Kentucky, law clerks are urged by a number of judges and lawyers to attend to the wisdom of Goldstein, Freud and Solnit. A number of psychiatrists, psychologists, sociologists and social workers in the community rely on the wisdom of these three researchers. Many of the behavioral professionals appear as expert witnesses in child custody disputes, and other child focused cases, and rely heavily on the BBI canon. It should be kept in mind that I reside in a relatively isolated southern metropolitan area with a population of approximately 200,000. We are not Atlanta, Baltimore, Miami, Nashville or Richmond and surely we are not Chicago, San Francisco, Boston or New York. Reasoning from our local experiences and the substantial attention given to their work in the legal literature, I am compelled to conclude that the influence of Goldstein, Freud and Solnit is extremely widespread.


15. Limiting the scope of the paper so as to cover only such cases serves to increase the intensity of focus and permits us to produce a complete critique which will be of true functional utility.

16. It is my contention that other paradigms must be developed to deal with these cases. See, e.g., Areen, supra note 11, at 959-1126.
would not produce a clearly focused evaluation of the BBI model. Analysis of the model within the private child custody dispute situation will enhance our understanding of this critical model. It is my opinion that a comprehensive analysis of the BBI paradigm has not been provided for those persons working in the private child custody field. This article seeks to overcome that failure of scholarship.

As already stated, two jurisprudential paradigms will be examined in this paper. The bulk of my effort will be devoted to an assessment of the BBI paradigm; however, I shall also offer my thoughts on an alternative model. Before beginning my assessment of the BBI paradigm, I add one final introductory comment. In assessing the BBI model, my first task will be to articulate its major sustaining ideas and elements, make reference to practical considerations, provide comments on particular implications and fully elaborate my critique. The reader should keep in mind that my essential position is that the creation and study of legal reality directed decision-making models is the first step toward intelligent decision-making in concrete cases. Without models of utility to guide us, real world decision-making is devoid of enlightened intelligence.

II. THE BEYOND THE BEST INTERESTS PARADIGM REVEALED

It is important to recognize that the Goldstein-Freud-Solnit model is firmly rooted in psychoanalysis. This means that their work is derivative of a psychoanalytic view of existence. Understanding the paradigm is enhanced if one remembers that Goldstein, Freud and Solnit's work is the product of the institutional ties established between the Yale Law School and the Hampstead Child-Therapy Clinic. This relationship began in 1962. Psychoanalysis has been a part of Yale Law School's interdisciplinary program of legal studies for decades.

17. See supra note 8 and accompanying text.
20. Id.
21. See J. Katz, et al., Psychoanalysis, Psychiatry and Law (1967) (an early classic demonstrating the high quality of the work produced by the Yale program). The more recent publications of the BBI group are evidence of the continued
The first fundamental idea in this model is that the psychological well-being of the child is a paramount interest which must be promoted in the child custody decision-making process. Both judicial and legislative decision-makers have failed to understand the fundamental importance of the child's emotional needs. Goldstein, Freud and Solnit's model of psychoanalytic perspective allows them to comprehend the importance of the child's psychological needs.

The model establishes that in order to protect the child's psychological best interests, the law must assure that each child will be a member of a family. Specifically, the family environment is an essential zone of privacy which serves as the protective surrounding, making possible a positive developmental experience. Further, the model establishes that the law must act to maximize the child's opportunity to be in a family where he or she is wanted, receives affection on a continuing basis, learns how to give affection and is taught to cope with his or her aggressive impulses. The BBI decision-making paradigm places great emphasis on the child's need for continuity of relationship with people who act to humanize the child. Disruptions of continuity of relationships are perceived as being very detrimental to the child's psychological development. The damage done by these disruptions of continuity of relationships vary according to the age of the child. The younger the child, the more the child is at risk. Goldstein, Freud and Solnit contend that the young child who suffers from some substantial disruption of continuity of relationship will grow up to be less than psychologically normal. The authors of the paradigm stress the significance of disturbances of continuity; even periodic court-ordered visitation is detrimental to continuity of relationship which exists between child and custodian. This position is grounded in a particular psychological reason: "Children have difficulty in relating to, profiting from and maintaining contact with two psychological parents who are not in

success of the Yale based interdisciplinary effort.

22. BBI (1973), supra note 4, at 4.
23. Id.
24. Id. at 7.
25. Id. at 5.
26. Id. at 31-32.
27. BBI (1973), supra note 4, at 32-33.
28. Id. at 32.
29. Id. at 34.
30. Id. at 38.
positive contact with each other."\(^{31}\)

Goldstein, Freud and Solnit concluded that the law must evaluate the importance of this psychological reality. They believed that the law should act to insure that a custodian determined visitation, as the custodian saw fit. The visiting parent, according to the creators of the BBI paradigm, has "little chance to serve as a true object for love, trust and identification since this role is based on being available on an uninterrupted day-to-day basis."\(^{32}\) The day-to-day custodian is the person who promotes the child's psychological development. Goldstein, Freud and Solnit call the day-to-day facilitator of emotional development the "psychological parent."\(^{33}\) Testifying as an expert witness for the defendant father in a custody case, Professor Goldstein provided us with an interesting introduction to the BBI paradigm in action.\(^{34}\) In explaining "psychological parent" to the court, he stated:

> By 'psychological parent,' we're talking about a person who has assumed responsibility and continuity of care on a daily basis. That doesn't mean on an hour-to-hour or minute-by-minute basis, but it means someone to whom the child can turn in times of need and frustration, someone whom the child can find a source of affection and a source of control.\(^{35}\)

This concept of "psychological parent" is fundamental to the BBI system. It is a concept which stresses attachment presence.\(^{36}\) Attachment is viewed as essential to normal psychological development.\(^{37}\) One may have the status of biological parent, but if physically absent, one cannot be a psychological parent. Instead, this person tends to fall into the logical, psychological, and legal class of stranger.\(^{38}\) For Goldstein,

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31. Compare id. at 38 (joint or shared court decreed custody is not discussed in any detail in this work) with Joseph Goldstein, In Whose Interests, in JOINT CUSTODY AND SHARED PARENTING 47 (Jay Folberg ed. 1984)(joint court decreed custody is discussed at length in this work). Professor Goldstein’s application of the BBI paradigm to joint legal custody will be discussed fully in a later section of this paper. For now, it is adequate information to know that Goldstein believes that under certain specific conditions joint custody can be highly disruptive in terms of the continuity of relationship.

32. BBI (1973), supra note 4, at 38.
33. Id. at 17.
34. See AREEN, supra note 11, at 511-23.
35. Id. at 514.
36. See BBI (1973), supra note 4, at 17.
37. Id.
38. Id.
Freud and Solnit, the relationship between child and "psychological parent" is paramount, and its integrity should be preserved by law. Ruptures in the relationship between the "psychological parent" and the child are viewed as producing failures in emotional development and resulting psychological symptoms. The results of such ruptures are people who become mentally ill, dependent on society or engage in criminal conduct. Like the continuity concept, the "psychological parent" concept has been widely accepted by the courts.

Ellenwood and Ellenwood is a representative opinion which analyzed the "continuity" and "psychological parent" principles. Factually, Ellenwood is fairly typical: the parties had a stormy marriage, gave birth to children, associated with paramours, displayed instability, separated and then sought dissolution. The trial judge awarded custody of the minor daughters to the mother. The husband appealed; however, the trial judge's decision was affirmed. The appellate court quotes heavily from Goldstein, Freud and Solnit's Beyond the Best Interests. It is clear that the appellate court relied primarily on the BBI paradigm in reaching its decision.

The appellate court placed great importance on the continuity of relationship of the children with the psychological parent. The court, with the BBI model substantially influencing the logic of its analysis, stated:

It [the trial court] gave substantial weight to the fact that the children always have been in the wife's care. Their psychological attachment to her as the only continuous parent figure they have known is a strong reason for the trial court's decision, and after balancing the applicable factors, we come to the same conclusion the trial court did. . . . What registers in [children's] minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.

39. This is clearly the ultimate juridical point made by the BBI group.
40. Id. at 18.
41. See Crouch, supra note 10, at 80-103.
43. Id. at 260.
44. The appellate court's opinion would be improved by a change in the ratio of original language of analysis to the language of approved authority.
45. BBI (1973), supra note 4, at 262. In many of the cases in which the courts adhere to the BBI approach, decisions appear to be almost decisions by paraphrase or quotation.
Another concept fundamental to the BBI model is the idea that custody decisions should reflect the child's sense of time. This sense of time depends upon where the child is in the process of psychological development.

Children, according to Goldstein, Freud and Solnit, do not experience time as adults experience it. Instead, they experience time in relationship to "subjective feelings of impatience and frustration." The child's sense of time is viewed by the creators of the model as an "integral part of the continuity concept," even though it is treated separately. However, any ruptures of continuity must be viewed from the vantage of the child's sense of time. The BBI model makes it clear that those who work in law must recognize the seriousness of the separation of a child from a parent, and must see breaks in continuity from the child's subjective perspective. It is believed that once they achieve this view, they will realize that the law's delay in deciding cases is not in the child's best psychological interests.

The child's sense-of-time guidelines would require decision makers to act with 'all deliberate speed' to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships to 'replace' old ones.

Under this view, the decision process should never extend beyond "the time that the child-to-be-placed can endure loss and uncertainty." Court decisions must be made in line with the urgency which is derivative of the child's subjective sense of time. Thus, whenever there is a dispute as to who is to be the custodian, placement must be considered an emergency matter. Decision makers are urged to act quickly so as to prevent "irreparable psychological injury." Courts, for this reason, should give child custody cases priority, and appellate review should be greatly accelerated so that the child's interest is promoted.

46. See BBI (1973), supra note 4, at 40.
47. Id. at 40-41.
48. Id. at 41.
49. Id. at 40.
50. Id. at 41.
51. BBI (1973), supra note 4, at 41.
52. Id. at 43.
53. Id.
54. Even the most vigorous critics of the work of the BBI group would agree with this position.
55. BBI (1973), supra note 4, at 45.
Goldstein, Freud and Solnit state that the child's sense of time "guideline" requires that particular action be taken in child custody disputes derivative of divorce or separation proceedings. The custody question should be decided in a separate proceeding. Custody decisions must be made as quickly as possible. These decisions should not have to await the court's decision on divorce, separation, maintenance, property division or any other matter. The creators of the BBI paradigm vigorously propound the idea that time is a critical element in the making of final custody decisions. Informed by the findings of classical clinical psychoanalysis, they argue that not to be sensitive to the time issue is to act with disregard for the psychological needs of the child.

A third component in what Goldstein, Freud and Solnit have termed their "guidelines" for legal decision-making relates to the inherent limitations of the law. The authors of the paradigm contend that the law is functionally unable to supervise interpersonal relationships and is, in addition, unable to make long-range predictions in regard to many person to person situations. The law must take these things into account. Goldstein, Freud and Solnit state that experience with child placement cases makes it clear that the law can do little more than recognize or destructure relationships. The law is not able to control the on-going interaction between child and parent. Moreover, as psychoanalytically informed professionals, they have come to the conclusion that the law does not have the "capacity to predict future events and needs, which would justify or make workable over the long run any specific conditions it might impose concerning, for example, education, visitation, health care, or religious up-bringing." However, Goldstein, Freud and Solnit allow for the making of certain predictions, based on the elements of their paradigm "[a]s the continuity and child's-sense-of-time guideline suggest, placement decisions can be based on certain generally applicable and useful predictions." They state that it is possible to identify the adult individual involved in the custody dispute who is the "psychological parent" or who has the capacity to become a successful psychological parent. Further, they state that it can be pre-

56. Id. at 47.
58. BBI (1973), supra note 4, at 49.
59. Id. at 49-50.
60. Id. at 50.
61. Id. at 51.
62. Id.
dicted that the person most suited to the role of the custodian is the one with whom the child has already had continuing affectionate attachment. This person should be preferred over the person who has not had such a continuing relationship, even though the other person has equal or a greater potential for being successful as a "psychological parent." The authors also believe that greater damage can be predicted to the child's psychological well-being when the child is young and the period of separation is protracted or uncertain. Many future events and experiences are beyond the reach of the legal and psychoanalytic "sciences". Moreover, Goldstein, Freud and Solnit state that no one can "predict in detail how the unfolding development of the child and his family will be reflected in the long run in the child's personality and character formation." As a consequence of the preceding limitations, the law does not act to promote the child's interest when it attempts to predict the future and sets special conditions for the care of the child. Goldstein, Freud and Solnit reason that the imposition of conditions only leads to uncertainty, and this uncertainty creates a threat of discontinuity because the placement decision is subject to modification due to changing conditions. If one accepts the BBI view, non-custodial visitation and modification based on change of circumstances are disallowed. To many scholars, law practitioners and judges, this position is astounding. Visitation and modification are traditionally viewed as vehicles for promoting the child's best interests.

The most important element of the model is a substitute for the traditional "best interests of the child" test. Goldstein, Freud and Solnit created a replacement for the traditional legal test: an over-arching standard to be used in the child custody decision-making process. This standard is "the least detrimental alternative for safeguarding the child's growth and development test." This standard encompasses

63. BBI (1973), supra note 4, at 51.
64. Id.
65. Id.
66. Id. at 52.
67. Id.
69. See generally, supra note 3 and accompanying text; see also Homer H. Clark, supra note 68, at 584-589 (for additional material relevant to an understanding of the best interests test); Morris Plessowe, et al., Family Law: Cases and Materials 879-932 (2d. ed. 1972).
70. BBI (1973), supra note 4, at 53-64.
continuity, including the "psychological parent" concept, the child's sense of time, and the "prediction" element. Goldstein, Freud and Solnit explain this standard as

[t]he least detrimental alternative, then, is that specific placement and procedure for placement which maximizes in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent.\textsuperscript{71}

The architects of this model prefer this standard for several reasons. First, the new standard is more realistic and less "grandiose."\textsuperscript{72} Child custody decisions are simply "making do" under a very bad set of circumstances. The child's "best interests" cannot be served, given the reality of family break-up. Second, the traditional "best interests" standard does not emphasize the fact that the children of separation and dissolution-disrupted families are "victims," and are at psychological risk.\textsuperscript{73} Third, the "best interests" of the child standard has been overused by courts: often undercutting the child's interests and elevating those of involved adults.\textsuperscript{74} Goldstein, Freud and Solnit state that the "least detrimental alternative" standard will remind those who make custody and other placement decisions that all these types of decisions are inherently unsatisfactory.\textsuperscript{75} Finally, the "least detrimental alternative" standard makes everyone face the fact that dispositional choices in custody cases are limited.\textsuperscript{76}

If the choice, as it may often be in separation and divorce proceedings, is between two psychological parents and if each parent is equally suitable in terms of the child's most immediate predictable developmental needs, the least detrimental standard would dictate a quick, final, and unconditional disposition to either of the competing parents.\textsuperscript{77}

\textsuperscript{71.} \textit{Id.} at 53.
\textsuperscript{72.} \textit{Id.} at 63.
\textsuperscript{73.} \textit{Id.} at 54.
\textsuperscript{74.} \textit{Id.}
\textsuperscript{75.} \textit{BBI (1973), supra} note 4, at 63.
\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id.}
Having performed the basic intellectual task of depiction,\(^{78}\) we are ready to involve ourselves in the systematic assessment of the BBI model. Let us begin in a traditional manner. We shall initiate our assessment by analyzing a particular case. Our specimen for evaluation is that heartland classic of custody law *Painter v. Bannister*.\(^{79}\) This case will be viewed first from the BBI perspective and then scrutinized from a second, alternative, vantage point.\(^{80}\) In examining the *Painter* case,\(^{81}\) we will focus intensively on the “continuity” and “psychological parent” elements of the BBI paradigm. We approach the paradigm through the medium of the particular because it is my belief that a phenomenologically\(^{82}\) significant actual custody case will orient us to the paradigm “in-action.”\(^{83}\) Such an approach is necessary if we are to talk meaningfully about the reality of decision-making in child custody cases. To maximize our intellectual gain, *Painter v. Bannister*\(^{84}\) will be treated in some significant depth.\(^{85}\)

### III. *PAINTER V. BANNISTER: SPECIMEN FOR ANALYSIS*

The *Painter* case involved a custody dispute between a thirty year old father, Harold Painter, and the child’s maternal grandparents,
Margaret and Dwight Bannister, both in their sixties. The child, Mark Painter, was seven years old at the time of the appellate decision by the Supreme Court of Iowa. In December of 1962, Mark's mother and his young sister were killed in a car accident. Harold Painter, severely depressed by the family tragedy, placed Mark with non-relatives. The arrangement was not successful and Mark went to Iowa to stay with the maternal grandparents. Harold Painter did not relinquish his parental rights. Moreover, in her will, Mark's mother had named Harold as the child’s legal guardian. When Mark arrived at the Bannister home, he seemed to be very affected by his mother's and sister's deaths, and by the separation from his father. In November, 1964, Harold Painter remarried. He contacted the Bannisters and informed them that he wanted Mark to live with him and his new wife. The Bannisters refused to return Mark to his father. In June 1965, Harold Painter brought a habeas corpus action. After a hearing on the custody issue, the trial judge awarded custody to Harold Painter. From July, 1965 until the time of the Supreme Court of Iowa decision in 1966, Mark remained in the custody of the Bannisters under a Supreme Court order. This order stayed the execution of the judgment of the trial court until the appellate court decided the appeal. In 1966, the Iowa Supreme Court reversed the trial court. The court discusses several societal factors, including the fact that American family life styles were in transition. It is clear from the court's opinion that the Bannisters and the Painters have vastly different life-styles. The court profiles the Bannister's home as traditional. Specifically, the court states

86. See generally Harold Painter, Mark I Love You 85 (1969) (for background information concerning Harold Painter's depression).
87. Painter, apparently under the burden of a depression, derived from the family tragedy and apparently realizing that his condition impaired his parenting capacity did what he perceived to be in his son's best interest.
88. Painter, 140 N.W.2d at 156.
89. Id. (the court's description of his problem is consistent with a child's reaction to such a tragedy). In regard to the matter of depression, see J. Bowlby, 3 Attachment and Loss, Loss Sadness and Depression 7-37 (1980).
91. In fact, a "new nation" was beginning to emerge. See generally A. Toffler, The Third Wave (1979) for an analysis of what happened while suggesting where we might be going.
His [the child's] mother was born, raised and educated in rural Iowa. Her parents are college graduates. Her father is agricultural information editor for the Iowa State University Extension Service. The Bannister home is in the Gilbert community and is well kept, roomy and comfortable. The Bannisters are highly respected members of the community. Mr. Bannister has served on the school board and regularly teaches a Sunday school class at the Gilbert Congregational Church. Mark's mother graduated from Grinnell College. She then went to work for a newspaper in Anchorage, Alaska where she met Harold Painter.92

Further, the court states that the Bannister home "provides Mark with a stable, dependable, conventional, middleclass, middlewest background. . . .[;] It provides a solid foundation and secure atmosphere."93

In discussing Mark's father, the court paints a different picture.94 Mark's father was born in California. His parents were divorced, and he went into a foster home. Harold Painter viewed the foster parents as his family. He was not successful academically, and flunked out of school because of lack of interest. After service in the navy, he obtained a high school diploma by examination and then attended college for two and one-half years under the G.I. bill. He left college and took a job on a newspaper in the state of Washington. Within less than a year, he went to work for an Alaskan newspaper which employed Jeanne Bannister, Mark's mother.

The court's description of the father's life clearly illustrated that it considers it to be a non-traditional life style. Harold Painter is depicted as one who has a Bohemian approach to life and money. Moreover, he is a political liberal.95 He is not interested in traditional employment, but prefers life as a free lance artistic type.96 He writes and has published, but does not make a great deal of money. He is described as changing jobs frequently and is a reader of Zen Buddhism.97 It is pointed out that at the time of the trial, Mr. Painter was considering a move to Berkeley, California.98

92. Painter, 140 N.W.2d at 153-54.
93. Id. at 154.
94. Id.
95. Id. at 154-55.
96. Id. at 155.
97. Painter, 140 N.W.2d at 155.
98. Id.
The court admits that the child, Mark, would be allowed more freedom of thought and action in the Painter home environment. The court, however, emphasized that although life would be more exciting and challenging with Harold Painter, it would also be impractical, unstable and romantic. 99

The court also considered expert testimony. It gave great weight to the testimony of Dr. Glenn Hawks, a child psychologist who testified at the trial. 100 Dr. Hawks, who did not examine Harold Painter, testified that Dwight Bannister was the “father figure.” 101 It is clear from Dr. Hawks’ testimony that he saw Mr. Bannister as the child’s “psychological parent.” 102 Dr. Hawks described Mrs. Bannister as the “mother figure” 103 and a “psychological parent.” 104 In his testimony, Dr. Hawks told the trial court that his concern was with the welfare of the child. He made it clear that he believed that Mark was at a very critical development point in his life, but that if he were four or five years younger, he would not be as much at risk. 105 He further testified that if custody were not continued with the Bannisters, there was a high probability that Mark would become anti-social. 106 The doctor hinted at juvenile delinquency and aggressive acts against others. As an alternative, Dr. Hawks suggested that there might be significant “withdrawal” 107 by Mark, such as a schizoid or schizophrenic reaction. 108

A careful reading of Dr. Hawks’ testimony makes it clear that he is talking about what Goldstein, Freud and Solnit refer to as “con-
continuity of relationship” with the “psychological parent(s).” Dr. Hawks, like Goldstein, Freud and Solnit, believed that disruptions in continuity are very likely to produce extraordinarily, undesirable psychological outcomes, either severe mental disorder or criminal and anti-social conduct. It is beyond question that the Iowa Supreme Court reacted favorably to the ideas and conclusions put forth by Dr. Hawks. The court viewed continuity of relationship between Mark and the Bannisters as being in the seven year old boy’s best interests.

The Iowa Supreme Court, reversing the trial judge, took the position that Mark and Mr. Bannister had a relationship which Mark had not had with his natural father. This relationship was an important psychological one. The court stated that it was in Mark’s best interest to be in the stable situation provided by the Bannister home. The court concluded that Mark should not be shifted to his father “in the face of the dire warnings from an eminent child psychologist. . .”

Goldstein approves of the decision in Painter v. Bannister. He characterizes the case as one in which a court was asked to disrupt a “satisfactory on-going ‘parent-figure’ - child relationship and make an abrupt change without any plan for transition to allow for the gradual re-establishment of a relationship between natural father and son.” In his article, he outlines the court’s adjective-oriented comparison of the contending parties but, he offers no critique of this comparison. Goldstein applauds the court for its decision to avoid making judgments based on the choice of competing life styles. He asserts that the choice in this case was between parties who were all fit custodians. Goldstein indicates that the court’s unwillingness to simply support the preference in law for the biological parent was proper. Finally, he states “[e]valuated in the light of Anna Freud’s need-for-continuity formulation, the decision can be understood as a determination made in accord with the overall mandate of the state - the child’s best interests.”

A careful reading of Goldstein’s article makes it clear that he supports the Iowa Supreme Court’s decision because it stresses the importance of the “continuity of relationship” and “psychological parent”

109. Painter, 140 N.W.2d at 158.
110. Id.
111. 140 N.W.2d 152 (1966).
112. BBI (1973), supra note 4, at 475-76.
113. Id. at 476.
114. Id.
The language in his article relating to a planned transition so that custody could be transferred to the father is of no relevance to the Painter case. The basic question for decision in Painter was which of the contending parties was entitled to here-and-now "full" legal custody. Goldstein's opinion would be that the court made the right decision in protecting the child's continuity.

At the time of the appellate court decision, Mark was seven years old and functioning well. He was at a psychological state of development which is termed "latency." Latency is generally viewed as "existing" between approximately ages six and thirteen. According to psychoanalysts, by the time the child reaches the latency phase of psychological development, the executive psychological apparatus, the ego, is well-evolved and the aggressive and affectional - erotic urges (instincts) are controlled by the child. By the latency phase of psychological development, the child has achieved substantial psychological maturity.

As Anna Freud, one of the creators of the BBI placement paradigm writes:

> In the course of a few years the situation alters. The latency period sets in, with a physiologically conditioned decline in the strength of the instincts and a truce is called in the defensive warfare waged by the ego. It now has leisure to devote itself to other tasks and it acquires fresh contents, knowledge and capacities. At the same time it becomes stronger in relation to the outside world; it is less helpless and submissive and does not regard the world as quite so omnipotent as heretofore. Its whole attitude to external objects [people] gradually changes as it surmounts the Oedipus situation. Complete dependence on the parents cease. . . .

115. Id.
116. Id. at 475-76.
117. Painter, 140 N.W.2d at 153.
118. See Erik Erikson, Childhood and Society 86 (2d. ed. 1963).
120. The ego is in actuality a brain system network (neurochemical, etc.) which acts to balance the interests of the desiring self, one's moral conscience and social reality. See Jean LaPlanche & Jean-Bertrand Pontalis, The Language of Psychoanalysis 130-43 (1973) for a condensed discussion of the ego and its operation.
121. Id. at 214-16. Those who prefer an orthodox psychoanalytic approach view instincts as pressures which create tensions. Normally it is stated that human beings seek to reduce these tensions via interactions with other persons.
122. Anna Freud, The Ego and the Mechanisms of Defense 157 (1946); see
Ms. Freud makes the following points in her statement: first, by the latency phase, the child's psychological life has settled down to a very significant extent; second, the executive apparatus of the psyche, the ego, has things relatively well in hand; third, a state of stability has been achieved; fourth, the child is ready for an extensive real world education; and fifth, the parents are no longer as psychologically as important as they were in the past. The well-established fact is that the latency child, called middle years child by some, "characteristically turns his attention away from family involvements and outward to the world at large." Our culture, though its system of education, promotes this development.

Mark, at age seven, is capable of significant self control. In addition, he has attained substantial cognitive capacity. He has become more naturalistic, more objective, has developed the ability to classify, and is becoming versed in the use of numbers. Further, he is acquiring a fund of general knowledge and is learning to think and reason in a manner similar to adults. In addition, the psychologically normal child is capable of making age appropriate moral judgments. All in all, the child is quite different from the being he or she was three or four years earlier. A latency stage child is, in sum, a competent human being.

For these reasons, it was improper for the Court to fail to return Mark to the custody of his father. This return would not have put Mark at risk. At age seven and functioning well within the normal range, Mark cannot be seen as extremely vulnerable. Furthermore, Harold Painter was examined by a psychiatrist and was found to be psychiatrically fit. There was no evidence which indicated that Harold Painter was legally unfit in any way. The normal seven year old is psychologically capable of handling the shift from the grandparents to the father. His adaptive capacity is significant. This does not mean that there will not be problems; however, problems can be solved.

also Anna Freud, Psychoanalysis for Teachers and Parents (Beacon Press ed. 7th prtg 1971).


124. In a complex modern society, this is a matter of necessity. The family simply cannot prepare one for life in the broader environment of modern existence. Educational specialists must perform the task of preparation.

125. See Stone & Church, supra note 123, at 388-400.

126. Painter, 140 N.W.2d at 154-55.

Goldstein and those who adhere to the BBI paradigm are overly apprehensive. For them, the custody conflict is an event which is a jeopardy situation of the highest order. This position cannot be supported; and in fact, there exists significant findings which cast doubt on it. For example, the Berkeley, California study conducted by Joan MacFarlane and her associates\textsuperscript{128} contains findings which support this position. The study covers a period of thirty years; thus, it is a long range study with findings that are directly relevant to our discussion.

The study illustrates that those who place a great emphasis on the link between trauma in childhood and resulting psychopathology in later years may well be in error. Arlene Skolnick, reporting on the Berkeley study, wrote:

Foremost, the researchers tended to over-estimate the damaging effects of early troubles of various kinds. Most personality theory has been derived from observations of troubled people in therapy. The pathology of adult neurotics and psychotics was traced back to disturbances in childhood-poor parent-child relations, chronic school difficulties, and so forth. Consequently, theories of personality based on clinical observation tended to define adult psychological problems as socialization failures. But the psychiatrist sees only disturbed people, he does not encounter 'normal' individuals who may experience childhood difficulties, but who do not grow into troubled adults. The Berkeley method, however, called for studying such people. Data on the experience of these subjects demonstrated the error of assuming that similar childhood conditions affect every child the same way.\textsuperscript{129}

All of this applies to many psychoanalytic clinicians, psychoanalytic researchers, and makers of psychoanalytic jurisprudence.\textsuperscript{130} One must keep in mind that psychoanalytic theory derives from very special clinical circumstances. Sigmund Freud worked almost exclusively with adults - including himself as analysand.\textsuperscript{131} He built his theory by recon-

\textsuperscript{128}. Joan MacFarlane, et al., A Developmental Study of the Behavior Problems of Normal Children Between Twenty-One Months and Fourteen Years (1954).


\textsuperscript{130}. E.g., J. Katz, et al., Psychoanalysis, Psychiatry and Law (1967) (an interesting work of this sort which is an important early contribution to psychoanalytic jurisprudence).

\textsuperscript{131}. Freud's self-analysis was certainly essential to the building of his theoretical
structing the psychological lines of those who sought treatment. Anna Freud, one of the creators of the BBI model, spent much of her career working within the model constructed by her father.\textsuperscript{132} She is the first lady of orthodox psychoanalysis, and the BBI paradigm is definitely rooted in orthodox psychoanalysis. Orthodox psychoanalysis, because its theory is primarily a product of the historical reconstruction of the lives of the psychological dysfunctional and because it over-predicts psychological dysfunction, does not produce a model which has the appropriate level of judicial decision-making reliability. Other workers in psychology, especially non-orthodox psychoanalysts, have suggested more appropriate models for use in the legal system. The theory, the clinical practice, and the isolation of orthodox psychoanalysis from the current of social, historical, political, economic and cultural aspects of existence all combine to lead orthodox psychoanalytic observers and practitioners to overreact when confronted with the phenomenon of the child custody dispute.\textsuperscript{133}

However, for those who are less focused on clinical psychoanalysis and classical, orthodox, psychoanalytic theory, things are viewed differently.\textsuperscript{134} Not every child of divorce or of a custody dispute is a victim proximate to his or her psychic undoing. Life is as it is. Existential realities are within the coping capacity of many, children and adults.\textsuperscript{135} Divorce has become commonplace in our society. Parents are often separated from their children; they fall ill, they die, they go off to serve in the military, they hire surrogate caretakers, or they go through significant personal changes. Children lose their friends, they leave behind their favorite teacher, they move to a new community.\textsuperscript{136} Loss is a basic experience in life - things do not stay the same. How a child fares, psychologically, ethically, and morally, depends to a very significant ex-

\textsuperscript{132} Id. at 436-60.

\textsuperscript{133} See generally M. Eagle, Recent Developments in Psychoanalysis (1984) (for alternatives to orthodox psychoanalysis).

\textsuperscript{134} See e.g., Jerome Skolnick, The Limits of Childhood: Conceptions of Child Development and Social Context, 39 Law & Contemp. Probs. 38 (1975) (for an outstanding article on this point).

\textsuperscript{135} See e.g., Kurt Vonnegut, Welcome to the Monkey House (1968); Willard Gaylin, Feelings: Our Vital Signs (1979); Karl Menninger et al., The Vital Balance (1963).

\textsuperscript{136} This is the reality of existence. See Herman Hesse, Siddartha (New Directions ed. 1957) (perhaps the best text on the "true" conditions of existence).
tent on what happens to the child after the loss or trauma. For example, some children may lose someone who was a satisfactory custodian, but gain another who is even more life-enhancing. Other children may lose a parent who was, in fact, a negative force - that child is liberated by the separation. The life outcome depends on the people one meets and attaches to outside of the family. The shape of our life depends upon the vicissitudes of social history. Children need psychological attachment; however, not every disruption of continuity of relationship is going to cause serious long term damage to a child. Children are resilient. Judges and lawyers must understand this reality.

The Painter case did not involve an adoption. Further, the case is not a termination of parental rights case; Mark's father was never charged with parental neglect. Harold Painter was the biological father of Mark. Mark did not begin living with the Bannisters until he was five years old. The bulk of Mark's first five years of life were spent with his father, Harold Painter. Consequently, Harold was not a psychological stranger to his son. Thus, it is clear that, during Mark's early formative years, Harold was a "psychological parent" and his interactions with Mark were very important in building Mark's personality and intellectual capacity. It is well known that psychological structure and intellectual, or cognitive, development in these formative years is very dependent on mimetic operations within the context of the child-parent interaction. The child learns by imitating the parents. Finally, psychological attachment, in these especially formative years, is the foundation of developmental progress. The Iowa Supreme Court overlooked this reality of this basic process and its significance in its decision. The Court accepted the fact that Mark was psychologically healthy and intelligent. Dr. Hawks had testified to this fact.

137. See generally H. DeRossis & V. Pellogrino, The Book of Hope (1976) (for an interesting work on this matter).
139. Painter, 140 N.W.2d 152.
140. Id. at 156.
141. See Stone & Church, supra note 123, at 72-73; see also S. Fraiberg, The Magic Years (1959).
143. Painter, 140 N.W.2d at 156.
144. In Re Painter, No. 24981, at 17-18 (trial transcript containing the testimony of Dr. Hawks).
Since the Iowa Supreme Court portrayed Harold Painter as a fit father, it is reasonable to infer that he had been involved with his son and had played an important role in the child's early psychological and cognitive development.\textsuperscript{145}

Despite the fact that Harold Painter had been physically out of Mark's life as a parent, during Harold's life crisis time-out, he was still Mark's "psychological parent" and was therefore psychically engraved in Mark's mind. Psychological parents are encoded in a child's brain system.\textsuperscript{146} A "psychological parent" exists within the mind and influences thought, emotion and behavior. Furthermore, Freud's work on the parent-derived super-ego makes this abundantly clear.\textsuperscript{147} Moral conscience is derived from interaction with the parents. The BBI theory does not instruct child custody decision makers on this most important psychological fact. Even Professor Goldstein fails to discuss this psychic reality when he comments on the decision in the Painter case.

The psychological situation in the Painter case was that between the ages of five and seven, Mark's image of Harold, a "psychological parent," was not expunged. Memories, emotions, images, ideas and fantasies relating to his father continued to exist in Mark's mind. In a psychological and brain-content sense, his father lived within him. This basic fact makes the Painter case quite different from one involving adoption by a stranger or custody to a third party who has not been in psychological attachment to the child. The Iowa Supreme Court failed to see these differences. Harold Painter was not without attachments to his son. A very strong attachment between Mark and Harold already existed. Harold Painter had been a "psychological parent" in Mark's critical first five years of development. This intense psychological attachment still existed in the minds of Mark and Harold. Because of Mark's internalized image of Harold as his "psychological parent," a shift in custody from the Bannisters to Harold Painter did not present

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\textsuperscript{145} The designation of a parent's fitness is a result of the court's evaluation of the "relevant factors" which, of course, relate to the individual's capacity to parent. "Relevant factors" would include mental health, physical health, moral character, intelligence, economic position, etc.

\textsuperscript{146} The most accessible material on this reality can be found in the following works: see \textsc{Eric Berne}, \textit{Games People Play} 23-28 (1964); \textsc{Jonathan Winson}, \textit{Brain and Psyche: The Biology of the Unconscious} (1985) (a much more complex, but very enlightening discussion of the relationship between/among life experience, brain function and psychic contents).

\textsuperscript{147} \textit{See} 21 \textsc{Standard Edition of Complete Psychological Works of Sigmund Freud} 62 (James Strachey ed. 1964).
the at-risk situation the Iowa Supreme Court and Professor Goldstein found to exist. The psychological relationship was a pre-existing infrastructure which could "smooth" the transition of custody from the Ban- nister's to Harold. Certainly, there would be a period of adjustment; however, given the existence of the earlier attachment, the opportunity for a successful change of custody would be much enhanced.

Due to the existence of an antecedent attachment, and the fact that Mark was of school age and relatively resilient, it can be concluded that Professor Goldstein's support for the Painter decision is open to criticism. Professor Goldstein placed too much emphasis on the utility of the pure continuity approach. Specifically, a psychosocial "best interest" approach to the Painter case should be preferred to the orthodox psychoanalytic approach. The term "psychosocial" is used to emphasize the relationship between the psychological structure of the individual and his or her surrounding social world. The crux of this approach is to examine how the individual exists within the social es- sphere of his historical time.

It is inherent in the positions of the Iowa Supreme Court and Pro- fessor Goldstein that Mark Painter needed continuity of relationship with his maternal grandparents. This emphasis on continuity does not do justice to the human complexity which is the true context of the custody decision. To determine the best interests position of the child in the Painter case, and in many other cases, the limited approach required by a guideline as basic as the continuity concept must be es- chewed. The child's needs must be analyzed by looking to the totality of relevant psychosocial circumstances. This approach requires the de- cision-makers to scrutinize the child's best interests situation by deter- mining where the child stands developmentally, assessing what her or his needs are in relationship to developmental status, and determining who out of those seeking custody has the capacity to best promote the child's interests. In the simplest terms, the court must determine who is most fit.

Erikson's model contains eight life stages. Three of the stages relate to adulthood and are not relevant to child custody disputes. The five stages relevant to the child custody matters are: 149

148. See MacFarlane et al., supra note 128; DeMause, supra note 138.
149. On this matter of psychosocial emphasis I am greatly influenced by the work of Erik Erikson. See supra, note 7.
150. See Erikson, supra note 118.
151. Id.
(1) Stage I - (approximately the first year of life). During this developmental phase, the child has the opportunity to achieve a positive life view called basic trust. Basic trust develops when the child is well cared for, psychologically and physically, by an adult or adults of attachment. An appropriate experience in attachment during this stage of development prepares one for human intimacy and social interaction in later stages.

(2) Stage II - (about the second and third year of life). The child seeks to develop personal autonomy and begins to explore the home environment.

(3) Stage III - (about age four and five). The child starts to take a serious interest in life outside of the home. The child is learning through play. Attachments to people outside of the home are made.

(4) Stage IV - (approximately the sixth through the eleventh year). The child becomes immersed in the outside culture. The acquisition of culturally approved skills and knowledge is the major task of this stage. This is the stage of essential learning.

(5) Stage V - (about the twelfth through eighteenth year). The child is in the process of consolidating the emerging self. Cultural and gender identities are worked out.

Evaluating the Erikson model in light of the Painter case, it is clear that Mark was in Stage IV at the time of the trial and appellate decisions. He was seven years of age. Mark had already become actively involved outside of the home. Trial testimony illustrated that he was relating to children and adults outside of the family setting. During this phase of active learning, the child is interested in imitating the behavior of adults in the outside world. The male child becomes interested in the social role activities of firemen, truck drivers, musicians, athletes, sales people, policemen and other grown-ups engaged in vocation and avocation. Further, school is a focal point of the child during this stage of psychosocial development, and learning from the electronic media is also an important experience. The school experience is instrumental in the development of a child. Culture makes itself known to the child in the form of the school and its teachers. The teacher, the transmitters of the cognitive technology and the values of culture, inhabits the school environment and passes on the culture fund to the child. Moreover, the child is surrounded by a large number of peers who come from "other" homes - homes with norms, values and

152. In Re Painter, No. 24981, at 17.
ways of doing things that differ from those of her or his own parents. In addition, older students will also influence the child. At this stage of psychosocial development, the child will go through the process of adjusting to a great variety of personality types and will experience a diversity of folkways. Very significant cognitive, social, aesthetic and moral - ethical development is occurring during this developmental stage.

At school, the child is being prepared to function in a complex society which holds organization to be an important value. Our educational institutions make the child aware of the fact that our culture requires that people learn to structure time. In addition, the child discovers that the formal curriculum is structured. Planning, as a socially approved behavior, is also modeled by the teachers. The school places great emphasis on culturally valued work and citizenship values. The child has left the world of play behind, and is learning fundamentals which will prepare the child to take his or her place in the material economy. There is an emphasis on productivity. The child is learning to work cognitively on his or her own and to work socially with other people. The child has moved from the “womb” of the family into the surroundings of school and the larger world.

Through the school experience, the child learns to take pride in culturally approved production. This ability to be productive is important in helping the child ward off feelings of incapacity and inadequacy. Doing becomes an important part of being. If things go well, the child begins to feel that he or she can succeed in the world outside of the family. This experience is critical to the process of becoming fully “grown-up.” However, not all learning goes on in school: it occurs on the playground after school, in the neighborhood, on trips around town, city, county, region, country and the world. Children learn out of school from peers, older children, adults and electronic media. This learning is cognitive, affective and social.

The child is also going through a phase of moral/ethical evolution. The swirl of life outside of the home provides standards, models and examples which impact heavily on the moral/ethical development of the child. The ethical and moral standards of the child’s particular

154. Id. at 87-93. The author acknowledges the possibility that all school, including homework, and no play may endanger the child. A programmed compulsive work ethic will not benefit the child. A sense of proportion is critical in promoting healthy development.

family are compared to those available in the environs of the non-familial world. Freedom, equality, justice, injustice, law, order, authority, power, prestige, privilege, oppression, license, loyalty, treachery, and pride are matters on the existential agenda of the learning stage child.

During this stage of psychosocial development, the child is moving along cognitive, social, moral and ethical lines of development. However, another critical line of development is called the affectional and erotic line of development. This line of development is essential to the acquisition of psychological health. Professor Goldstein, the BBI group, and the Iowa Supreme Court have failed to appropriately treat the fundamental aspects of the child's learning stage. They have also failed to emphasize the best interests importance of the affectional and erotic development stage in the "latency" child (Stage IV). Professor Goldstein makes this mistake because of his preference for orthodox psychoanalysis. This preference causes him to ignore the affectional and erotic development in the child's latency age. L. Joseph Stone and Joseph Church agree with this theory:

Freud's original notion of latency as an asexual time out has had to be modified in the light of what we now know about sexuality in the middle years (Stage IV). Sexual interest and play are not snuffed out. . . . It is worth noting that whereas Freud had to combat the popular belief that there was no infantile sexuality to become latent, the post-Freudians have to combat Freud's idea that there is a gap in the chain of overt psychosexual development. 156

Prior to the 1960's, when the Painter case was decided, 157 the latency theory of psychosexuality had been greatly criticized. Stage IV children are very interested in sexuality and these children form affectional and erotic attachments. Affectional and erotic issues do not simply appear out of the blue in adolescence. A failure to focus attention on this line of development makes a best interests analysis incomplete. An appropriate custodian can deal affectively with affectional and erotic matters, and Judges must be aware of this reality.

In Painter, the Iowa Supreme Court made reference to the topic of college education. The Bannisters were described as "college graduates". 158 Jeanne Painter, Mark's mother, was described as a graduate of Grinnell College, and Jeanne's three sisters received college educa-

156. Stone & Church, supra note 123, at 381.
157. Painter, 140 N.W.2d 152.
158. Id.
tions and married college men. The Court stated that "if placed in the
custody of the Bannisters, Mark would have an opportunity for a col-
lege education and a profession . . . ." 159 On the other hand, Harold
Painter was described as having gone to college on the G.I. Bill for two
and one half years, and quit college to take a job on a small newspaper.
It is clear from this comparison that the court placed great value on
education. The court stressed the fact that higher learning had played a
great role in Bannister family history. Further, the court suggested that
Harold, as drop-out and potential custodian, did not have the "correct"
view of the matter of higher learning.

When the Painter court discussed college education, it was not
evaluating the experience or quality of cognitive, aesthetic, social,
moral and ethical learning. It was simply accepting that certain classes
required steps to gain traditional social status. The court's inquiry into
the social levels of each of the parties revealed that the court was more
interested in status than the quality of the mind. The court's emphasis
on the conventional, the middle class, and the stable, demonstrated that
"traditional" social status, represented by the Barristers, was a value
which the court emphasized. Education was viewed by the court as a
way one took his or her place in a social/economic hierarchy. The al-
ternative view, that education is an experience which can maximize the
growth of the cognitive, social, aesthetic and moral/ethical self, was
not addressed by the court. The court's failure to address these issues
flaws the Painter decision.

In Painter, the Iowa Supreme Court stated that if Mark were to
be placed in the custody of his father, he would have more "freedom of
conduct and thought." 160 Moreover, the court admitted that life in the
Painter household would be more "intellectually stimulating." 161 How-
ever, the court failed to give the proper weight to this information or
facts. From a psychosocial developmental perspective, the Painter home
was the intellectually stimulating environment of choice. This home
setting would promote the development of Mark's cognitive processes,
and these processes are critical to Mark's future state of being.

From a best interests perspective Harold Painter would have been
a great custodian for Mark's learning stage (Stage IV). Harold Painter
was a widely travelled man, who had met people from all walks of life.
He had served in the U.S. Navy and had experienced life within the

159. Id. at 154.
160. Painter, 140 N.W.2d at 154.
161. Id. at 156.
structure of the military. He had flunked out of high school because "of a lack of interest in academic subjects, rather than any lack of ability." He had attended a trade school and had spent two and one half years in college. Furthermore, he had worked as a newspaperman in the states of Washington and Alaska. In addition, he had held a number of other kinds of jobs. Overall, Harold Painter had done and experienced a great deal and had a life perspective. He had proved himself to be a skilled writer, one who could effectively use the language of his culture, and a serious photographer. At the time of the custody hearing, Harold Painter was planning a move to Berkeley, California.

Berkeley, home of a major university center, has been known as a community devoted to arts, humanities, sciences, politics and moral and ethical issues of human history. A large number of creative, intelligent and concerned people are always members of the Berkeley community, and Berkeley has historically been an ideal environment for those interested in focused learning.

At the time of the original custody hearing, Mark's father was a young, energetic individual with a self-actualizing attitude toward learning. He sought to learn, not simply to earn a living, but also to enrich his self and his interactions with others in society. On the other hand, the Bannisters were over sixty years old at the time of the custody dispute. They were educated in the World War I era, and before the Great Depression. Their cognitive styles and value sets were more congruent with a culture on the wane than with the emerging modern culture. The gap between the Bannisters and the new culture was just too great, and they could not have maximized Mark's developmental position. Moreover, Harold Painter's age was a factor which supported his custody claim. All in all, a father in his thirties would possess more psychic and physical energy than the grandparents in their sixties. These varieties of energy are vital in the parent's task of promoting best interests psycho-social development of the child. Further, Harold Painter's new young wife was also capable of substantially supporting Mark's intellectual, social, and aesthetic experience. She was an intelligent, well educated woman, with a masters degree from the University of California. Her specialty field was cinema design, an area of work which surely requires cognitive and aesthetic capacity.

According to the Court, Marilyn Painter liked children and had been in a position to

162. *Id.* at 154.
163. *Painter*, 140 N.W.2d at 155.
have "considerable contact" with them. Harold and his new wife clearly formed a dyad which was possessed of those capacities which would promote Mark's development best interests.

In its opinion, the Iowa Supreme Court made it clear that stability and security were more important for Mark than intellectual stimulation. This position, of course, meant that custody be awarded to the grandparents. However, the court stated that Harold Painter was a fit father, and it is clear that the case involved a learning age ("latency") child. The court did not understand the process of child development in our culture. It was not informed to what cognitive, aesthetic, moral/ethical and social learning "in culture" meant in the process of self formation. The court was unable to conceptualize the particular psychosocial needs of the learning stage child in our modernized culture.

Placement with Harold and his new wife, Marilyn, would have been the appropriate best interests disposition. The intellectually and aesthetically stimulating environment which they were able to provide was exactly what Mark needed in order to prepare him for life in a Toffleresque world. In such a world the ability to continue to learn was extremely important. By 1965, the "old" approach to learning and the "old" curriculum - the one that the Bannisters had experienced - was clearly of diminished applicability. With the advent of the age of information, communications and high technology, it should be clear that Harold Painter was a fit parent and would provide a learning environment for Mark that would favor optimal best interests psycho-social development. Harold Painter had pursued a life of learning, free expression and creativity. He had mastered the craft of writing and like many aspiring writers had worked as a newspaperman. He had developed a "sense of purpose;" he had intentions, objectives and life goals. He operated as an open, expanding self system, preferring the study of Zen Buddhism to less demanding activities. He was a Western man who was willing to search the wisdom of the East for insights into being. Today it is not uncommon for seasoned corporate managers to seek to learn from the philosophers of the Orient. Harold Painter, a man in his thirties, was deeply involved in learning relevant to the emerging new American culture, and he was a man of development.

As indicated earlier, the learning age child is undergoing moral and ethical development, as well as cognitive, social, emotional, and

164. Id.
aesthetic development. Harold Painter, as portrayed in the Iowa Supreme Court's opinion, is a politically involved person. He is described as a political liberal and a supporter of the activities of the American Civil Liberties Union.\textsuperscript{166} He engaged in the political debates of his time, and he had long been concerned about matters of right and wrong, justice and injustice, the legitimacy of authority and the distribution of values among the citizens of his country. Harold Painter was an appropriate model of moral and ethical values for a learning age child in a nation which keeps alive the ideology of democratic values. Of course, the Bannisters' moral and ethical perspective was typical of those of their age and life stage. However, their vision of moral and ethical life was such that they were not the persons who should have received custody. Generationally and psychosocially, they appear to have been too far removed from the moral and ethical milieu of Mark's present and future.

Further, the court and Professor Goldstein failed to discuss age appropriate sexuality (affectional/erotic behavior) and gender identity.\textsuperscript{167} Viewed from a psycho-social vantage point, this promotes an incomplete best interests analysis. Mark would be entering adolescence in the near future.\textsuperscript{168} Sexuality and gender identity are critical issues at that time, and had already become important issues in the learning stage.

Dr. Hawks, the Bannister's expert witness, testified:

He is sensitive about sex, which one would expect of a seven year old. Again, he has some questions and some anxieties about maleness. And the anxieties do show up. Mark is not free in his own mind to discuss some of these anxieties about this, but he is concerned about maleness, femaleness at this time.\textsuperscript{169}

Learning age children are existentially engaged in an effort to orient themselves on the issue of gender identity. They are attempting to de-

\textsuperscript{166} Id.

\textsuperscript{167} See generally Alice Miller, For Your Own Good (Hildegard Hannun & Hunter Hannun trans. 1983); Alice Miller, Thou Shalt Not Be Aware (Hildegard Hannun & Hunter Hannun trans. 1984); Alice Miller, Prisoners of Childhood (Ruth Ward trans. 1981) (these works provide one with real insight into the psychology of the self).

\textsuperscript{168} See Stone & Church, supra note 156, at 421-25.

\textsuperscript{169} In Re Painter, No. 24921, at 21 (Dr. Hawks, amazingly, goes on to state that this material is dangerous and should not be discussed).
termine what the gender standards of being and action are in our culture. Moreover, there is an age appropriate interest in sexuality. Dr. Hawks testified that Mark was involved in the process of dealing with these very fundamental matters. It can be inferred that Mark's difficulties in regard to communicating his feelings about these matters stemmed from his experience with the Bannisters. Their views on sexuality and gender identity were old fashioned and, given that fact, it was highly likely that they did not deal in "modern style" with questions of sexuality and gender identity. Their personal ethic dictated that Mark be shielded from direct, age appropriate handling of these fundamental issues. In addition, it would be reasonable to surmise that they were overly repressive in regard to the sexual interest and action of children. Mark's father, on the other hand, was a free thinker and free spirit: a person open to the process of cultural change. It is unlikely that he would be responsible for the creation of Mark's anxiety and sensitivity.

Harold Painter, and his wife Marilyn, appeared to have been a young, energetic couple. Harold had been able to achieve affectional and erotic intimacy during his life.\(^\text{170}\) He had formed a family and had fathered children. His life history indicated that he was attuned to contemporary models of masculinity and femininity.\(^\text{171}\) Both he and Marilyn are capable of providing the appropriate environment for Mark's development of culture-acceptable gender identity and sexual behavior orientation. Parents, and custodians, who provide such a developmental setting during the learning stage are normally capable of coping well with gender identity and sexuality issues which are presented during adolescence.\(^\text{172}\) Speaking comparatively, Mark's self development along gender identity and sexuality lines would have been most effectively enhanced by placement with his father and his father's new wife.

Further, Mark would be moving into adolescence. In our culture, adolescence is a very special phase of psycho-social development.\(^\text{173}\) To appropriately decide a child custody case involving a learning stage child, one must think not only about the parents, but must engage in a

\(^\text{170}\) See Erickson, supra note 7, at 70-72.

\(^\text{171}\) See generally Ivan Illich, Gender (1982) (an excellent work on gender identity); see also P. Slater, Footholds (1977) (also containing valuable information on gender identity).

\(^\text{172}\) See generally E. Fried, The Ego In Love and Sexuality (1966) (on the importance of love and sexuality in the adult years).

\(^\text{173}\) See Stone & Church, supra note 156, at 425-32.
prospective analysis which considers the psycho-social situation of the child in adolescence. Both the court and Professor Goldstein fail to focus on this best interest consideration.

Adolescence is a time of biological maturation, rite of passage, strong sexual emphasis and finding one's way. There is certainly a great deal going on in this phase of development (Erikson's Stage V). However, the complexity of legal decision-making in regard to this stage of development can be dealt with if we organize our thinking around a very fundamental idea. Developmentally, adolescence is characterized by the young person's search for an authentic "sense of identity." Identity, as used here, refers to one's sense of individual continuity. Consolidating a sense of identity at this stage means integrating the self so that one is prepared to move into young adulthood.

Lawyers and judges must keep in mind that the quest for identity is an essential task of adolescence. Identity cannot be assigned to the adolescent by parents, court, or society. The "sense of identity" must be acquired over protracted time through individual interaction with others in our culture who are available as identity models. Experimentation and choice are critical in the acquisition of this fundamental sense of self. The very way in which a young person acquires her or his identity gives adolescence a variable, protean quality. Out of psychological necessity, adolescents are shape shifters, they appear in different forms at different times. Self experimentation is the science of adolescent identity research. Ideologies, styles, behaviors, and perspectives are donned and doffed. Revisionism is the rule and the process of revision is critical to psycho-social development. In our culture, this process is essential in developing a "sense of identity." The adolescent may develop an authentic "sense of identity," drift on the sea of "identity confusion" or develop a "negative identity." The preferred result is the construction of an authentic "sense of identity." "Identity confusion" is not a positive outcome because it leaves one prey to anxiety and insecurity. A "negative identity," for example, that of "delinquent," "addict" or "criminal," jeopardizes one's opportunity for a life free of legal stigma and social and psychological deprivation. Both the Iowa Su-

174. Id. at 419-77.
175. ERIK ERICKSON, IDENTITY: YOUTH AND CRISIS (1968).
176. See ERICKSON, supra note 163 and accompanying text. "Identity confusion" and "negative identity" are not positive outcomes. One's life will not be enhanced by one's achieving one or the other.
The Iowa Supreme Court and Professor Goldstein failed to consider the relationship between a best interest decision and the task of adolescence.

Recall that the Bannisters were in their sixties at the time of the appellate decision. By the time Mark graduated from high school they would have been past age seventy. Given their ages, their philosophy of life, and their life style, it was not in Mark's best interests for the Bannisters to be awarded custody. The Bannisters were not best suited to deal with the vicissitudes of adolescence. In comparison to Harold Painter, they had much less of the flexibility required to deal with the emerging adolescent identity models of the 1960's and early 1970's. The "fit" required between Mark, the culture and the grandparents did not exist. Harold Painter's life history indicated that he had worked hard at achieving a culture-appropriate authentic "sense of identity." It is a fair inference from the facts, that he searched, revised, experimented and achieved identity continuity. Moreover, given his openness and vitality, he appeared to be a person who would be able to accept the shape shifting and revisionism of Mark's adolescent stage of development. Further, his adolescence would be historically "closer" to Mark's than the adolescent periods of Mr. and Mrs. Bannister. In addition, his wife Marilyn's age and social experience also made her well-equipped to participate in Mark's coming of age.

The Iowa Supreme Court's and Professor Goldstein's emphasis on continuity of relationship does not make it possible to arrive at a true best interests decision. There is no room for the complexities of adolescence within the monism of the continuity concept. A best interests decision can be reached only if psychosocial reality is comprehensively considered.

The preceding particularized discussion of Painter v. Bannister,177 from the psychosocial best interests perspective, clearly demonstrates that the zealous judicial application of the continuity concept, and the psychological parent model, may well result in child custody decisions which are more reflexive than wise.

IV. THE CRITIQUE EXTENDED

As indicated, the BBI approach may produce decision outcomes which do not meet the child's psycho-social best interests, however, the strict application of the model may beget monsters of jurisprudential injustice. Consider the following question and testimony from Hoy v.

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177. 140 N.W.2d 152.
Willis. On cross-examination the testifying expert, Dr. Hollander, a proponent of continuity was asked:

If a couple kidnapped an infant, kept it for four years and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interests of the child to continue custody with the kidnappers?179

The expert said “yes.”180 Such a decision would surely be wild justice. The application of the continuity and psychological parent concepts to such a fact pattern could only be the product of a professional scotoma which impairs one's capacity to see the full array of values our culture apply to such a case.

How Goldstein or Solnit would evaluate the preceding case is unknown.181 However, on cross-examination in a custody case, Goldstein was asked to assume that a non-custodial parent had kidnapped a child from the custodial parent. It was hypothesized that several months had passed before the child was located. Goldstein was then asked to assume that the child had developed a real psychological attachment to the “kidnapping” parent. Goldstein was asked whether the court ought to leave the child with the parent who abducted the child. In offering his opinion, Professor Goldstein characterized the act as kidnapping but went on to say:

If a new and meaningful relationship had developed over a sufficient period of time, I would be very reluctant, from the child's point of view, to move that child, and I think I am responding to your question, because to move that child in order to protect the State's policy with regard to kidnapping is to use the child as a chattel, which is what we are moving away from . . . . My answer is if the child is thriving, and a substantial period of time has gone by where the old ties have begun to dissolve or break down, and new meaningful ties have developed, that I would, from the child's vantage point, I would leave him there.182

179. Id. at 111.
180. Id.
181. I omit Ms. Freud from the matter as she died approximately five years ago.
182. SeeJudith Areen, Cases & Materials on Family Law 518-19 (1982). This quote is taken from the case styled, Rose v. Rose, however, the parties names have been changed by Professor Areen to protect their privacy.
Certainly, a "kidnapping" by a parent differs from kidnapping by a stranger. In the case of the abduction by the parent, there normally exists a prior affectional and psycho-social relationship. Thus, the taking is certainly not as reprehensible as the taking by the stranger. It is highly unlikely that a stranger who abducts a child would be a fit psycho-social parent. However, it seems that to ignore community ideas about justice and the law and to adhere strictly to the BBI paradigm view of the case is to accept a jurisprudential vision which inhibits our ability to do substantial justice in complex cases.

It must be kept in mind that the family law perspective is only one of many perspectives. We must recognize that there are a number of interests, values, and systems perspectives which ought to be considered in decisions at an interface. Children's psychological interests are very important but there are other rights and interests to be considered. Certainly when we are confronted with unusual cases such as the kidnapping cases, we must remember that they are not examples of the custody cases we normally encounter. Such unusual cases exist as a special class of cases which are best examined from the vantage points of constitutional law, criminal justice policy-making, the policy underpinnings of family law jurisprudence, and our moral/ethical vision. The kidnapping cases are hybrids which analytically cannot be contained by a model constructed for application in child placement disputes. Dr. Hollander and Professor Goldstein are consistent given their theoretical starting point, however, the complexity of reality calls for outcomes which do not reward the wrongdoers and deprive the custodians.

We turn now to a consideration of the BBI paradigm in relation to the time-honored practice of courts granting visitation rights. In Pierce v. Yerkovich,184 Professor Solnit testified as an expert witness. The case involved an effort by the acknowledged father of a five-year old child to have his right of visitation recognized and enforced against a mother who denied him access to the child. The Court, in deciding Pierce, summarized Professor Solnit's basic position in these words:

In short, the professor's thesis, although variously stated is that it serves the best interests of the child with the least detriment to have his custodial parent, the one with whom the child lives, rather than a court, make the determination as to when and under what

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circumstance, if at all, the noncustodial parent should be permitted visitation with their child.\textsuperscript{188}

The Court then made the following comment:

This is indeed, a novel and startling doctrine, and if accepted literally as Professor Solnit and his co-authors Goldstein and Freud seriously urge, would leave the court shorn of much of its traditional role as parens patriae and guardian of the child's best interest. Quite frankly, I do not believe that the law of this state would tolerate this court, charged as it is with a responsibility for the welfare of children so supinely and abjectly abdicating its function to any parent, however well intentioned.\textsuperscript{186}

Rejecting the BBI approach, the court held that the custodian mother did not have the right to determine whether or not the noncustodial father should be permitted visitation. That decision belonged to the court. The court pointed out that a child has two parents and the fact that the parents do not live together cannot negate the existence of the two parent situation. The court concluded that it was in the child's best interests to have contact with the father. The \textit{Pierce} case demonstrates the reality of the advocacy of the BBI paradigm in the arena of everyday decision-making.

The basic BBI position on \textit{court ordered} visitation is that it may in fact be a "source of discontinuity."\textsuperscript{187} The non-custodian, visiting parent is perceived as being a potential threat to the continuity of relationship which exists between the child and custodian. The emphasis is again on continuity. Goldstein, Solnit and Freud reason that the child has a difficult time relating to "two psychological parents who are not in positive contact with each other."\textsuperscript{188} They state that conflicts in regard to loyalty can destroy the child's relationship with both of the parents. Further, they argue that the non-custodial parent will have little opportunity to promote the child's psychological position, because that can only be done by one who is available on a continual and uninterrupted basis. Goldstein, Freud and Solnit assert a child traumatized by separation or divorce is appropriately protected only if the child is permitted to "settle down in the privacy of their reorganized family

\textsuperscript{185} \textit{Id.} at 411 (emphasis added).
\textsuperscript{186} \textit{Id.}
\textsuperscript{187} BBI (1979), \textit{supra} note 4.
\textsuperscript{188} \textit{Id.} at 209.
with one person in *authority* upon whom they can rely for answers to their questions and for protection from external influence." The BBI group’s belief is that by ordering visitation, a court undercuts the child’s trust in the parent, the parent’s authority and the capacity of the custodian to parent.

I dissent strongly from this view. Granting the custodial parent the authority to determine visitation rights is not in the child’s best interests. On the contrary, it promotes the child’s best interests for decision-makers to act in accord with a checks and balances “philosophy.” A decision-maker approach which emphasizes feedback carries with it the opportunity to prevent runaway. A valid best interests model must fit the reality of human life. The truth is that custodians are not always perfect people. The best of them have their ups and downs. All too often they can manifest very real psychopathology which can cause them to do emotional and/or physical harm to the child. Alice Miller, a Swiss “non-orthodox” psychoanalyst has made this clear in her recent landmark publications. Miller’s clinical work demonstrates that parents often use their children to fulfill their egoistic wishes. The results for the child are confusion, depression, alienation, pathological grandiosity, contempt for self and/or others and the inability to achieve intimacy. No one parent should be permitted to wall off a child from concerned others. What we have learned about the physical and sexual abuse of children in our culture should make us wary of totalistic authority systems from which concerned adults are excluded.

The psychoanalyst, Bruno Bettelheim, who has written on children growing up in the multiple caretaker environment, a kibbutz in Israel, stated: “[i]n the kibbutz, things can never get as bad as they may between a lone mother [or father] and her infant, because there is more than one person taking care of the infant.” The preceding requires us to oppose the BBI group’s stand on court ordered visitation. Single parent totalism is not in the best interests of the young.

The BBI approach is objectionable for other important reasons. After divorce the psychological ties between the child and the non-cus-

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189. *Id.* at 117.
191. *See Miller, supra* note 167.
194. *Id.* at 137.
Both the child and the non-custodian have important relational interests which deserve protection. It is obvious that people need not live together in order to have on-going relationships. Furthermore, it may be quite important for both child and non-custodial parent to continue to have contact. For example, a young male child may have his psychological best interests served by maintaining contact with a non-custodian father who has been serving as a gender identity model. To disrupt this relationship might well be an act against the child’s best interests. The BBI group errs when they state that a child cannot relate affirmatively to two parents who have made the decision to end the marriage. There is evidence to the contrary. One can use counselling, mediation and the power of the court to promote rational interaction.

Parents can learn to grow beyond the old domestic conflicts and come to terms with a new way of co-existence which benefits the child. After divorce, life need not be an eternal cold war between the parents.

Turning to modification of custody decrees, the law is that custody orders can be modified if a change of circumstances can be demonstrated to the court. The kind of change of circumstances contemplated by the law is that which substantially effects the child’s best interests. Historically, it has been our collective public policy preference that cases can be reviewed to determine whether or not a child’s best interests are being protected.

The BBI group rejects the traditional rule of law. They argue that the law of modification invites judicial challenge by non-custodian and consequently is a threat to continuity of relationship. For this reason, they contend that custody decrees should be final and not subject to modification. Again, their emphasis on continuity stands in the way of a true best interests analysis.

Let us consider a simple illustrative example. A custodian mother

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196. See Susan Steinman, What We Know, What We Have Yet To Learn, and the Judicial and Legislative Implications, 16 U.C. Davis L. Rev. 739, 743 (1983) (refuting this BBI position).

197. See Ciji Ware, Sharing Parenthood After Divorce 11-13 (Bantam ed. 1984).

198. See Clark, supra note 68, at 598.

199. Id. at 600.

200. BBI (1973), supra note 4, at 37.
may have done a satisfactory job of raising a boy up to age eight. However, the facts may indicate that at the learning stage of development, the mother is failing to do a best interests job of optimizing his cognitive, social, and moral and ethical development. In fact, to a neutral observer it appears that she has lost interest in the boy. This is not an uncommon situation. Custodian parents, fathers or mothers, can grow psychologically distant from their children. Assume that the facts demonstrate that the father is highly motivated and well qualified to promote the boy's best interests development. Given such a case, it is wise public policy to maintain a legal standard which authorizes the court to modify the custody arrangement. Substantial changes in circumstances will often impact on the best interests situation. Children's lives are important and must have the protection of the law. A policy preference which places the child at the total mercy of one parent until the end of adolescence can do very little to insure justice for the young.

Given the preceding and the BBI group position, it should come as no surprise that the creators of the paradigm view court ordered joint custody201 as another significant threat to continuity of relationship. Professor Goldstein made this clear202 when he stated that the authority of the law should not be used to require an objecting parent to participate in a joint custody arrangement.203 Court ordered joint custody, according to Professor Goldstein, undermines the process of psychological bonding between the child and parent because the parents in such cases are in conflict.204 He holds that this state of conflict will produce discontinuity.

It is the BBI position that if the parents cannot reach an agreement on joint custody, they reveal themselves as "unfit to decide custody."205 Professor Goldstein declares that the court should quickly award custody to the parent of attachment.206 Mediation, negotiation, counselling, and arbitration are not perceived as being as applicable

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202. See Goldstein, supra note 31, at 47.
203. Id. at 46. Professor Goldstein indicates that joint custody determined by agreement of the parties is satisfactory; however, if agreement cannot be reached initially or maintained once reached then there can be no joint custody because the matter must be submitted to the court and according to Professor Goldstein the above situation serves to place continuity of relationship in jeopardy.
204. Id. at 48.
205. Id. at 51.
206. Id.
alternative approaches. A failure to agree on joint custody is held to be a crisis situation. The child is seen as being in jeopardy. The BBI judgment is that the child’s psychological interest can be protected only if the child is placed immediately in the custody of one person with full authority. 207

A close reading of Professor Goldstein’s 1984 article reveals that he is, in truth, no friend of any type of agreed or ordered joint custody. He writes “[w]hen the fad for joint custody agreements fades, we will begin to realize how costly it, like other magic formulas, has been to children.” 208

Note that he refers to joint custody agreements as a “fad” and as “magic formulas.” This is certainly strong labelling. The implication is that those who support joint custody have not truly engaged in the requisite reflection and analysis. Although the BBI group favors contact between the non-custodian and the child, Professor Goldstein states “[e]ven if requested by both parents we would object to courts making a visitation or joint custody agreement a part of a decree.” 209

Note that an acceptance of this notion in regard to joint custody would mean that the agreement would in reality have no authoritative significance. People are invited to act capriciously. Under this approach, no one has any legally protected rights. 210

In discussing joint custody, Professor Goldstein states that he and his co-workers “reasoned from the child’s point of view . . . .” 211 This position is not supportable. Judith Wallerstein, a psychologist trained in psychoanalysis, who conducted a long-term psychosocial study of one hundred and ninety-one children from families of divorce wrote “[t]here is considerable evidence that the relationship between the

207. GOLDSTEIN, supra note 31, at 52.
208. Id. at 54.
209. Id. at 53.
210. Further, it should be noted that the footnotes to Professor Goldstein’s article contain not one source from the legal, and sociological literature on joint custody. And, in fact, his only citation to the psychological literature is to a paper published in 1926 by Sigmund Freud. 20 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 87-174 (James Strachey ed. 1959). Freud, of course, never evaluated joint custody from a clinical or a theoretical psychoanalytic perspective. There was no joint custody phenomenon to be studied during Freud’s time. Moreover, orthodox psychoanalysts practicing in the years since Freud’s death have not systematically studied joint custody. Further, it is clear that there is an unwillingness to directly counter the findings of those whose work indicates that joint custody can at times well serve the best interests of the child.
211. See GOLDSTEIN, supra note 31, at 52.
child in the divorced family and both of his or her parents does not diminish in emotional importance within the post-divorce family.\textsuperscript{212}

Wallerstein's work is important because it is, in a very real sense, "in context" field work. Wallerstein evaluated the children at home and in the school setting, not simply in an office clinical setting. Her research leads her to believe that in many cases joint custody can, under certain situations, promote the emotional best interests of the child. She is aware that a child under the sole control of a lonely, post-divorce emotionally dysfunctional parent is likely to suffer.\textsuperscript{213} Wallerstein knows that joint custody can act to neutralize the negative effects of interaction with a psychologically dysfunctional parent. The results of Wallerstein's work indicate that, in some cases, people are not able to overcome their hostility.\textsuperscript{214} As a consequence they may not able to act responsibly, and joint custody will not work in these cases. It is clear that her work demonstrates that joint custody in a number of cases is a viable alternative to sole custody.

Susan Steinman, another social science researcher writing for a law journal audience, in referring to a group of joint custody children she studied stated:

These children clearly had two psychological parents to whom they were positively attached and loyal, despite the marital split. This does not support the assumption in Freud, Solnit and Goldstein's,\textit{Beyond the Best Interests of the Child} that children cannot relate well to two separated parents who are not in positive relation to one another.\textsuperscript{215}

Steinman's view is strikingly different from the position put forward by the BBI group. As Steinman perceives it, the Goldstein, Freud and Solnit view is no more than an assumption. It is not the product of solid in-the-environment research. My participant/observer experience and my reading of the relevant research work causes me to support the

\begin{itemize}
\item \textsuperscript{212} Judith Wallerstein, \textit{The Child In The Divorcing Family}, in \textit{The Rights of Children: Legal and Psychological Perspectives} 106 (J. Henning ed. 1982). Dr. Wallerstein and Sandra Blakeslee state that the custody arrangement itself does not determine the child's future. It is the experience with people which is crucial. JUDITH S. WALLERSTEIN & SANDRA S. BLAKESLEE, \textit{Second Chances: Men, Women, and Children A Decade After Divorce} 271 (1989).
\item \textsuperscript{213} See WALLERSTEIN, supra note 212, at 108.
\item \textsuperscript{214} Id. at 109.
\item \textsuperscript{215} See Steinman, supra note 196, at 747.
\end{itemize}
Steinman view.

Psychologist Joan B. Kelly points out that parents who divorce usually have not been in conflict about the approach to child rearing. This is an important finding. The non-existence of a conflict in regard to parenting smooths the way to workable joint custody. In addition, Kelly's research indicates that children do better psychologically when there is contact with both parents. Once again, the research results refute the BBI position.

The BBI group has failed to recognize certain realities which limits their understanding in joint custody matters. The juridical and social situation is that, in approximately ninety percent of all cases, it is the mother who becomes the custodian. About eighty percent of divorced mothers with custody work outside the home and their incomes are notoriously low. In addition, child support is all too often not paid by obligors. The majority of mothers in our culture are not able to remain at home and perform the "traditional" mother's role. Today's mothers must rely on babysitters, relatives, day care, kindergarten, and the schools to support them in parenthood.

It is only at the end of a long day of work that most mothers come home to act as parent. One could forcefully argue that a sole custodian mother is the victim of Kafkaesque form of punishment. Her second stint of "compulsory" labor for the day begins when she arrives home. Often she returns to the domestic scene physically fatigued and emotionally overloaded or drained. Quite often while a mother-in-custody is trying to cope with employment and the task of child care, she is endeavoring to restructure her own life line. The woman finds that, in addition to working and taking care of the parenting task, she must chart and navigate the new culture of divorce. The reality is that very few mothers are able to sit at home all day in continuity of relationship with their children. In the evening, after a full day on the job, these women often are unable to put forth a psychological best interests ef-
fort. These women need and deserve all the help they can get. Responsibility ought to be shared. Joint (shared) custody can do much to relieve the mother (or father) custodian of an excessive psychological (and physical) burden which derives from social and economic realities. The sharing of responsibility and contact with the child will reduce the stress on any one parent and can dramatically enrich the child's life. Furthermore, in today's world of accelerated social and psychological change, a shared custody arrangement can greatly increase the child's exposure to evolving forms of human attachment and relationships. The greater the number of fit and concerned caretakers, including significant others available, and the more diverse the child's social contacts, the more likely it is that the child's psychological and social development will be enhanced. The continuity concept is simply not comprehensive enough to be useful in dealing with the dynamics of legal and human reality.

In order to fully understand the BBI position on joint custody, it is necessary to examine the concept of "family" and "authority". Beneath the verbal structure of the BBI paradigm exists a psychological and social commitment to a particular concept of the "family". This family of preference might well be labelled the family-of-privacy. It is most often known as the traditional or nuclear family. This type of family is rooted in the Western middle class family structure which came into prominence in the sixteenth and seventeenth centuries. The context of its creation was the culture of the industrializing nations of Western Europe. This family-of-privacy was the product of particular social, economic and historical forces. This new family structure was a "created" form; it did not derive from biological compulsion. It is virtually a law of history that cultural ideology in large measure determines the idealized family form of a particular period of history. However, it is here pointed out that not everyone in the Western world has grown up in a family-of-privacy. The poor generally have not been able to afford to live in this manner. And, in fact, those children who have lived in this "traditional" family have been subjected to isolation, instruction in individualization and competition, and split off from life in the broader

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223. See Bettelheim, supra note 193, at 137.
224. BBI (1979) supra note 204, at 7.
225. See Philippe Aries, Centuries of Childhood, 365-404 (1962).
226. Id.
community.\textsuperscript{228} This family-of-privacy does much to make the child exceedingly dependent on the parents. Further, it is arguable that the family-of-privacy and its social alienation inducing tendencies have contributed to the absence of genuine community in our time.\textsuperscript{229} Psychoanalysts and other therapists have treated enormous numbers of people who were victims of this family structure.\textsuperscript{230} This is not to say that privacy-in-itself is valueless. Traditional families are as important as any other form of family. However, privacy has been overstressed in Western culture. The truth is that in our time the family-of-privacy is simply one living style among many. Our culture has changed dramatically and will continue to change.

The perfect traditional family of today is an experience most people will not have. It is clear that the nuclear family with strictly assigned “traditional” sex roles is on the wane. It is well known that single-parent families and blended families are common. Certainly the line between the family and the broader culture of day care center, school, media, and recreational life, has been blurred and new forms of relationships between family members and “outsiders” have come into being.\textsuperscript{231} The family-of-privacy is not the only reality which one sees in the world. Reality is other than the proponents of orthodox psychoanalysis would have us believe, and a theory-determined preference for the family-of-privacy, or traditional family, can do little to help us fashion sound legal policy to produce realistic court custody decisions. We are best advised to study things as they truly are. Continuity of relationship with a psychological parent in a family-of-privacy is an image too removed from contemporary realities to guide legal decision-making.

According to the BBI originators, the family-of-privacy has “one person in authority.”\textsuperscript{232} This person protects the child from outsiders and acts as the fount of all wisdom. This monotheism is a hangover from older patriarchal times.\textsuperscript{233} The patriarchal era is coming to an end, but the predeliction of some for mono-authority survives. One should not be concerned that in the BBI post-divorce and post-separation family, the new single authority is most frequently the mother.

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\textsuperscript{228} \textit{Id.}

\textsuperscript{229} See Bruno Bettelheim, \textit{Some Comments on Privacy, in Surviving and Other Essays} 399-411 (1979).

\textsuperscript{230} See R. Laing, \textit{The Divided Self: A Study in Sanity and Madness} (1960).

\textsuperscript{231} See Ware, supra note 197.

\textsuperscript{232} BBI (1979), supra note 204, at 117.

\textsuperscript{233} \textit{See generally Erik Fromm, The Crisis in Psychoanalysis} 110-35 (1976).
The determinative logic is not of gender, but structural form. The “placing” of authority in one pre-eminent being is what is important. This position on authority and the family is directly derivative of the patriarchal cultural origins and the mono-authority bias of psychoanalysis. It is certainly fair to state that Freud was a very powerful mono-authority who dominated orthodox psychoanalysis. In addition, psychoanalytic treatment with the analyst in charge and the analysand (“patient”) in Transference is a very “private” little dyadic “family” situation. The person receiving analysis is the child and the analyst is the parent (authority figure). The preference for authority and privacy displayed in the work of the BBI group appears to be rooted in the history and method of psychoanalysis. We cannot, however, allow ideas which fit the history of psychoanalysis and the treatment of people in analysis to be implemented in legal reality if they do not “fit.” In our time, authority for the child comes from many sources, in many forms. It comes from two parents, one parent, a grandmother, uncles, aunts, other relatives, day care workers, babysitters, television, peers, older children, teachers, and other unrelated adults. The elements of authority can be combined into a multiplicity of possible configurations. Television, by itself, has radically reworked the topography of authority. Today norms and values are electronically projected. Authority, to a very great extent, is imaged up on the 525 “lines” of the television screen.

In passing judgment on the sharing of responsibility for the child through joint custody and visitation, we are best advised to accept social reality and avoid the BBI preference for mono-authority. Joint custody can, in many cases, do much to promote the child’s psychological best interests. Outdated views on authority can serve as no significant support for the continuity of relationship concept.

To this point, a great deal of attention has been devoted to the continuity concept (and the related idea of the psychological parent) because it is the quintessence of the legal and psychological BBI paradigm. It is clear that Goldstein, Freud and Solnit’s views on custody dispute outcomes, visitation, modification of custody and joint custody

234. See O. Mannoni, Freud 108 (Vintage 1st ed. 1974). My basic contention is that Freud, as the leader of an “outcast” movement, felt it necessary to set himself up as the authority. He, like Moses, became the “law-giver.”

235. In transference the analysand-driven by the unconscious is psychologically deeply involved with the analyst. See Andrew Watson, supra note 119, at 2-8 (discussing transference).
are overwhelmingly determined by their penchant for the continuity concept. In fact, a dedicated reductionist might argue that beyond the continuity concept, all is but tautology. Logic supports such a view. The truth is that all other formal elements of the BBI paradigm are derivative of the continuity concept. The paradigm is, in fact, a logic loop. This is, of course, why this article has devoted so much effort to an extensive explication of this central concept. All other BBI paradigm ideas are simply secondary. For this reason only a relatively small part of this article will now be devoted to a discussion of "the child's sense of time,"236 the law's inability to make predictions,"237 and "the least detrimental alternative"238 test.

The BBI group has stated that "the child's sense of time" is an integral part of the continuity concept.239 They argue that custody cases are potentially quite destructive of continuity, and therefore, must be heard quickly and decided with dispatch, keeping the continuity concept in mind. Because a rapid movement to finality of decision is necessary to protect the child's psychological interests, the appellate process must also be accelerated. Basically, the task of the court is to determine quickly with whom the child is in continuity.240 The fundamental issue, put another way, is: who is the psychological parent? This person, if fit, becomes the sole legal custodian. While I agree that final decisions in these cases are too often needlessly delayed, I cannot fully accept this position. It is clear that the sense of time concept is inextricably tied to the continuity concept. "[T]he child's sense of time" idea, can rise intellectually no higher than the whole continuity concept. The continuity concept clearly does not take into account such fundamental matters as the child's particular needs, the adult's fitness in regard to these needs, and the benefit of contact with both parents, etc. In the abstract, most would agree that it is important to decide custody cases as quickly as is reasonably possible. It is best to decide on arrangements, work out the necessary plans and get people going in a new life pattern. However, the BBI approach would appear to be a rush to custody. To rush to finality is to commit judicial errors. It takes a significant period of time to gather the relevant best interest facts, analyze them and place them before the judge. Further, the court should al-

236. BBI (1973), supra note 4, at 40-49.
237. Id. at 49-52.
238. Id. at 53-64.
239. Id. at 40.
240. Id. at 42-43.
ways carefully evaluate the material presented by counsel, parties, witnesses, etc. Mediation, counseling and negotiation, all recognized aspects of our system, take time if we are truly to further the child's best interests. In addition, appropriate appellate review takes time. We can expedite, but a bullet train process will not serve the child's best interests.

In summary, the "child's sense of time" idea is of very limited utility for two reasons: first, because it is bound to the flawed continuity concept; second, because it does not take into account the time realities of gathering and fairly evaluating the information necessary to the court's making of best interests decisions.

Goldstein, Freud and Solnit believe that the law is but a crude "instrument" for dealing with that legal problem which we call the child custody case. The BBI group argues that the law can recognize relationships and allow them to evolve. In addition, Goldstein, Freud and Solnit stress their belief that the law does not have the resources to monitor relationships on a day to day basis. It is their view that the law cannot predict a child's future needs and future events which impact upon that child. Because of this perceived defect in the legal process, the BBI group states that no conditions should be imposed on the custodian. Private ordering should prevail. However, Goldstein, Freud and Solnit do believe that there is enough knowledge available to judges so that a limited number of things can be done with some assurance. It is possible, according to the BBI proponents, for the judge to identify which person among those contending for custody is a psychological parent or has the capacity to be such a parent. They state that it is possible to predict that the person most suited to be custodian is the person with whom the child has had a relatively long term, continuous psychological attachment. Finally, we are told that separation from the psychological parent and uncertainty in regard to placement will do significant psychological damage to the child.

Admittedly, the law cannot determine life on a day-to-day basis. This is self evident. Furthermore, it is not possible for decision-makers

241. BBI (1973), supra note 4, at 49-50.
242. Id. at 50.
243. Id.
244. Id. at 52.
245. Id. at 50.
246. Id. at 51.
247. BBI (1973), supra note 4, at 51.
248. Id.
to predict exactly what the future has in store for a child. The great majority of judges do not strive to act as supervisors who seek to meddle in the on-going everyday life of the family. Professor Goldstein has the impression that the judiciary is overly concerned with the control of family life.249 My view is that in the bulk of the cases, judges make a sincere effort to insure that best interests decisions are implemented.250 Intervention is relatively limited. Questions of visitation and support do come to court, but there is no day-to-day "supervision," and most judges are not interested in performing such monitoring. As to the law's capacity to predict and impose conditions, visitation is the condition which most concerns the BBI group.251 Generally, they oppose it. Although visitation is a "condition," in a sense, a visitation decision is not an attempt to "predict" the future. A visitation decision is primarily an "in the present" effort to adjudicate rights in the best interests of the child. The same is true of a decision regarding shared custody. I doubt that the judicial assumption is that scientific forecasts of the future are being made. However, the law does make special provisions for the future. Under prevailing norms, the courts have the power to modify decrees in order to protect the child's best interests.252 Every experienced judge is aware that things can change and that it may be necessary, in the future, to change arrangements regarding custody, visitation, etc.

The fundamental position the courts take is: "Let us try to make the best decision we can now, hopefully it will hold up in the future." The law's view is that if things change substantially, the new situation will be dealt with through a change in custody or some other appropriate remedy.

The BBI position on prediction and conditions is in large part an extension of their preference for a private ordering.253 This preference would appear to derive from their positions on familial mono-authority. As a result of this orientation it is arguable that they wish to limit the law's jurisdiction. The BBI group leaves to the judge the task of determining who is the psychological parent in continuity. This, of course, is

249. See Goldstein, supra note 31, at 52.
251. See BBI (1973), supra note 4, at 37-38.
253. See BBI (1973), supra note 4, at 50.
a rather simple task. It comes down to who cares for the child most of the time? Note that the judge is not to concern herself or himself with the child’s full range of best interests needs. The BBI group desires not only to prevent the courts from making decisions pointed at the future, but wishes to deny the courts the right to impose any conditions, such as visitation, which undercut the authority of the parent-in-custody. The BBI group undoubtedly takes this stand because they wish to support the continuity concept from all conceivable directions.

Finally, the BBI idea that we can predict that children will be harmed by separation from the psychological parent and damaged by uncertainty produced in cases which are not disposed of rapidly, does not take us far enough. It, at first glance, engages our sympathy, but it seems evident that a rush to judgment is not in the child’s long term best interests. Substantial justice only can be done by a comprehensive best interests, psychosocial, analysis.

At this juncture, we turn to the ultimate element in the BBI paradigm: the least detrimental alternative.\textsuperscript{254} It is the BBI’s groups substitution for the time-honored best interest test. This element, when carefully analyzed, turns out to be a specific custody placement and procedure for placement which is made in accordance with the BBI groups views on continuity, the child’s sense of time, and the law’s limitation in regard to prediction. The fact is that the least detrimental alternative idea is but the final “legal test” element in the great logic loop which makes up the paradigm. Aptly translated, least detrimental alternative means that cases are to be decided in accordance with the three preceding main elements of the Goldstein, Freud and Solnit model. Reduced to operational reality it means that all decisions must be based on the continuity concept.

The BBI group states that the least detrimental alternative standard is to be preferred because it emphasizes the fact that the children of divorce and custody disputes are victims who are at risk.\textsuperscript{255} From their point of view, a custody decision is just a matter of making the best of a bad bargain.\textsuperscript{256} I cannot share this extraordinarily pessimistic outlook. Divorce, separation, and the necessity of making custody determinations are cultural and historical realities. Life changes and loss of relationships are something human beings learn to deal with.\textsuperscript{257} If

\begin{itemize}
  \item 254. \textit{Id.} at 53-64.
  \item 255. \textit{Id.} at 54.
  \item 256. \textit{Id.} at 63.
  \item 257. \textit{See Bowlby, supra} note 89.
\end{itemize}
things are done in the right spirit and with social support, things can work out. It is certainly possible that, in many cases, the child's post-divorce life can turn out to be better than the child's pre-divorce life. The BBI "legal test" seems to be the product of Goldstein, Freud and Solnit's inability to see family break-up in the light of modern reality. The rearrangement of the life configuration over time is part of the normal passage through existence in our era. We need not see things so "darkly." What we must do is develop institutions, programs and procedures which promote the child's best interests under contemporary conditions. Keep in mind that divorce and conflict over custody does not condemn all involved to life in a depressing Ingmar Bergman film. Perhaps the orthodox psychoanalytic view inclines its followers toward the Bergmanesque. A theory built on ideas such as the death instinct, the repetition compulsion, sadomasochism etc. certainly might dispose one to the "tragic sense of life." My opinion is that the least detrimental alternative standard is a manifestation of the impulse to overreact to perceived crises. The traditional best interests test is more in keeping with an active, life-affirming approach to the custody issue.

Having completed my explanation and critical evaluation of each element of the paradigm, I now offer some miscellaneous, but relevant, thoughts on the work of the BBI group.

In his 1968 essay "Psychoanalysis and Jurisprudence" Professor Goldstein announced something which should be of great interest to us. He stated that "[s]ince dispositions are frequently rendered in divorce proceedings without presenting the decision makers with adequate data about the child and the available alternative custodians, a presumption should be established to favor relatively long-standing and continuous relationships." This pronouncement has escaped the attention of those who have criticized the work of Goldstein, Freud and Solnit. This statement does much to undercut the authoritative nature of the BBI paradigm. Keep in mind that the paradigm is essentially the continuity concept. The general rule is that custody goes to the person who has spent the most time with the child. Professor Goldstein's words indicate

258. The orthodox psychoanalytic perspective appears to isolate the BBI advocates from the interpersonal process dimensions of modern culture.
259. See, e.g., DANIEL LEVINSON, THE SEASONS OF A MAN'S LIFE. (Ballantine paperback 1979).
260. See SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (W. W. Norton paperback ed. 1961)(detailing this "tragic sense of life").
261. See GOLDSTEIN, supra note 19.
262. Id. at 475.
that the continuity concept is in essence a makeshift. The professor's statement indicates that what is truly needed in all cases is adequate data. This author agrees. Further, our discussion of Painter makes it clear that there exists a useful basic model which can guide us in gathering and evaluating the important facts. It is a great mistake to raise a stopgap formula to the level of decision-making paradigm. This is simply not the way to promote the psychological best interests of the child. The way to produce appropriate decisions is to conscientiously apply ourselves to the acquisition and evaluation of the relevant facts.

The psychoanalytic infrastructure of the BBI paradigm makes it clear that the type of psychoanalysis embraced by the BBI group is the orthodox psychoanalysis long-championed by Anna Freud. As Paul Roazen, a scholarly commentator on psychoanalysis, wrote in 1975, "Anna Freud remains today one of the most outspoken defenders of psychoanalysis." It is clear from the context of Roazen's statement that he was referring to orthodox psychoanalysis. However, it must be stated that the orthodox theory is simply outdated. The classical theory is too much of a product of Freud's immersion in the "work-machinery image of his time." His psychodynamic model was in large measure determined by the concepts current in the nineteenth century world of physical science. Freud's language and preferred metaphors plainly reveal his affinity for the concepts of mechanics, work and energies. For example, the "ego" of Freud's psychoanalysis acts as a machine which converts the energy of the "id," the reservoir of sexuality and

263. Painter, 140 N.W.2d 152 at 156.
264. In order to do this most effectively, those of us in legal education must continue to make law students aware of the models useful in advocating and deciding such cases, expose them to appropriate fact gathering processes, teach them how to evaluate the facts, demonstrate how the facts should be presented to the trier and sensitize them to the human dimensions of child custody cases. Over the last decade legal education has done much to prepare students to operate in the modern custody milieu. We surely must do more. Moreover, continuing legal education programs have enlightened many who did not have the benefit of the new curriculum. Many individual social workers, psychologists, human development specialists, legal scholars and psychiatrists have done a great deal to educate judges, law professors and practitioners. Creative and concerned law practitioners have instructed many of us on this matter of deciding best interests custody cases. All of us must continue to raise the collective level of the law's best interests awareness. We should not allow ourselves to be enthralled by the skill of those who have mastered the art of Occam's razor.
267. Id. at 59.
aggression, into a force which can be used in socially acceptable ways. Drive, cathexis and libido are all concepts derived from energetics. Repression is a concept derived from hydraulics. The orthodox psychoanalytic model has very definite bio-mechanical qualities. It is this model which has so greatly influenced Anna Freud and her BBI colleagues. Anna Freud, in fact, has discussed the possibility of refining ego functions so that they become "more and more objective and independent of the emotions until they become as accurate and reliable as a mechanical apparatus."

Today, other models are available for those who are working in family law which will prove to be far more useful than the nineteenth century rooted paradigm of orthodox psychoanalysis which has very definite bio-mechanical qualities. The following models, briefly discussed, are firmly rooted in the twentieth century experience of human beings. Erik Erikson's model introduced in the context of the analysis of Painter, is one which has great potential utility. Erikson's theoretical model which is soundly rooted in clinical observation has been built over the last thirty years. He certainly owes a very real debt to Freud, but his work is substantially informed by modern anthropology, history, developmental psychology, ethics/morals, politics, literature, etc. Erikson's model is far less reductionistic, closed and negativistic than that of orthodox psychoanalysis. Robert J. Lifton, a psychiatrist, has certainly drawn on Freud's pioneering work but he too offers a new paradigm. He has created a new model by mending a revisionist psychoanalysis and the lessons of modern history. Lloyd DeMause has also joined history and psychoanalysis to teach about the psychology of children and adults. Gregory Bateson, an eclectic scholar, has combined communications systems theory, ecology and psychoanalysis to

268. Id.
269. Id.
270. Id.
272. See ERIKSON, supra note 7.
273. See LASWELL, supra note 78 and accompanying text.
276. See DeMAUSE, supra note 138.
give a new perspective on family life. Heinz Kohut, a psychoanalyst, has authored a new self-psychology which emphasizes interpersonal phenomenon and the development of the individual's narcissistic life line. Finally, Alice Miller, a Swiss psychoanalyst, has created a revisionist psychoanalytic model focusing on failures in parental empathy and the resulting impact on the child's psychological development.

In summary, there is much modern work available to us which incorporates certain psychoanalytic ideas of current utility and brings us a great deal of the relevant wisdom of our time. Ultimately, we live in our own historical era. The legal problems of our time are best understood when we employ models relevant to our condition. The Victorian era is dead. It is simply fact that orthodox psychoanalysis was not formulated by people who understood the contemporary "culture of divorce." Further, we live in a new, electronic, information, economic, political and social environment - we are "new" people. We must turn to the "new" psychology and other up-dated disciplines to aid our quest for human justice. Thus, the BBI paradigm takes parents, children and the law out of the context of modern relevancy. There is more to parent-child life in these days than the family-of-privacy. Day care, baby sitters, single parent life styles, single parent family structure, the unwed mother phenomenon, latch-key life, joint (shared) custody, blended family existence, media impact on children and parents etc. have worked enormous changes in the way children and their parents live. We cannot deny the existence of a recently evolved and complex reality.

Anna Freud's orthodox psychoanalysis is objectionable for another fundamental reason. The theory is essentially a psychology of social adjustment. This theory assumes that the child is primarily a being of impulse which must be tamed. Ms. Freud, in commenting negatively on freedom-oriented progressive schools, stated "[i]nstead of forcing the child to fit into the environment, they aim at fitting a flexible environment to the needs of the individual child, so as to give the pupil's abilities the widest possible scope for expression." She opposes such

279. See MILLER, supra note 167.
281. Id. at 84.
progressive schooling because "the result is a lack of adjustment to current reality."282 This preference for social adjustment is made manifest in the academic and expert witness work of the BBI group.283

Certainly, one must be able to act in an adaptive manner. An individual must understand the social context in which he or she lives and be able to take this context into consideration when making private or public decisions. That flexibility is desirable. Social reality is always a process of change. By forcing an "adjustment" from the child we, in fact, deprive her or him of not only autonomy but the capacity to adapt to social change.

If a child is to have a full measure of individual best interests opportunity, something else is needed. To succeed over the life span the child must be permitted to become protean enough to adapt to cultural change.284 In other words, we should seek to give children the power to self-actualize. One must "adapt" to his or her personal self and loved ones as well as to society. To know only the norms current as injunctions and exhortations during one's childhood is not in one's best interests. There is no overall social advantage in such a situation because it does not prepare the young to meet the future.

Edgar A. Levenson, in discussing the move to a new psychoanalytic paradigm, wrote that "[f]amilies in our present society, although in rapid flux, are quite differently organized [from the family of privacy]. They tend to be nonauthoritarian, matriarchal, relatively unstructured. . . ."285 The psychoanalytic model which underlies the BBI paradigm is the product of a social order which no longer exists. Adjustment, authoritarian structure, patriarchal control and "traditional" family life styles are no longer "dominant" phenomena. A new "best interests test" focused decision-making model built on a contemporary human science, is required in order to have informed child custody adjudication in a culture of change.

V. Coda

This coda is affixed to the criticism of the BBI paradigm in order to suggest that there is an alternative approach to the resolution of

282. Id.
283. See BBI (1979), supra note 4, at 16 (using the term "social adaptation").
284. See Lifton, supra note 275 (the body of Lifton's works both describe and analyze this "protean quality").
child custody disputes. Although the construction of a critique has been my primary endeavor, I believe that an obligation exists to describe, in short form, a manner in which lawyers, judges and psychological experts might better approach the matter of the child's psychological best interests.\footnote{286}

It is emphasized that a true best interests approach must emphasize the child's psycho-social needs rather than a developmental perspective. Any serious best interests analysis must be retrospective, focused in the present, and at the same time, prospective. The essence of the best interests paradigm, presented here, derives from the work of Erik Erikson a non-medical psychoanalyst, field researcher, and developmental theorist.\footnote{287} I have taken certain necessary terminological liberties with Erikson's model so that his work is more easily understood; however, the essential integrity of Erikson's vision is preserved. Keep in mind that the elements of Erikson's model presented at this point serve to enhance our best interests perspective as it relates to the resolution of child custody disputes.

For those working in the child custody arena, the first five stages of Erikson's model are relevant. These five stages cover the child's psychosocial development from birth through adolescence\footnote{288} and will be discussed in some detail.\footnote{289} In order to provide additional data which sheds light on the best interests decision in Painter, I further elaborate on the brief outline of the Erikson model.

A. \textit{Stage I: The Age of Attachment, Reciprocity, and the Formation of Basic Trust during the first year of life}

In this first phase of psycho-social development, the child needs very significant physical and emotional input. The child needs attention and stimulation. This is a time period during which the child seeks very close attachment to a custodian who will provide nurturing. Any custo-

\footnote{286. An earlier version of this alternative paradigm has been discussed in a prior publication. See John Batt, \textit{Child Custody Disputes: A Developmental-Psychological Approach to Proof and Decision-Making}, 12 \textsc{Willamette L. Rev.} 491 (1976).}
\footnote{287. Erikson is a Pulitzer Prize winner and a leading American humanist as well as a clinician/theoretician. For a most personal and readable perspective on the man and his work, see R. Evans, \textit{Dialogue with Erik Erikson} (1964).}
\footnote{288. See Erikson, supra note 7.}
\footnote{289. For the most accessible detailed account of the five stages, see Erikson, supra note 118.}
dian must be capable of giving a responsive human reaction and a best interests legal analysis must focus on this development reality. It is requisite for appropriate development that the custodian and child must form a relatively close personal bond. The child's psychosocial development requires a relationship based on close reciprocal interaction. In order for the child's best interests to be promoted there must be a commitment by the custodian to adapt to the child's need for attachment and psychological and physical stimulation. The custodian must learn to adjust to the child's internal bio-psychological clock. Time-scheduled mechanical parenting will not meet the child's needs. Moreover, the child's best interests require that any person acting in a custodial capacity must share substantial periods of time with the child concerned. Close human contact with the child is absolutely essential for appropriate development.

The psychological consequences of appropriate child and custodian interaction during this period are significant. A positive first phase experience produces "a sense of basic trust." This "sense of basic trust" allows a child to feel confidence in those who nurture and in the child's immediate environment. Over time, this form of trust generalizes to other persons and other environmental settings. This feeling of basic trust allows children to bond with and show concern for people outside of the family. In addition, it promotes communal combinations and social interaction. A just society based on equality before the law must draw on a social structure derivative of this "sense of basic trust." Further, the development of this condition of trust gives rise to a sense of hope. This sense of hope gives one faith in a future of possibilities. All this serves as a defense against the inevitable set-backs, disappointments and tragedies of real life. Only a custodian who can be deeply engaged with the child during this stage of development can give the child what she or he needs. Finally, a best interests custody court disposition will be one which favors a potential custodian who can meet the very special needs of the Stage I child.

290. See Erik Erikson, Identity and the Life Cycle, in PSYCHOLOGICAL ISSUES 63 (1959) (for a discussion of this requisite).
291. See ERIKSON, supra note 153, at 96-97.
292. See ERIKSON, supra note 7, at 79.
B. Stage II: The Quest for Autonomy during the second and third years of life

During this stage of development the child is much less dependent than he or she was in the first phase of development. There is a significant increase in motor behavior. There is also a concomitant need to assert the self. The child is actively exploring the world in which he or she lives. The “I”, often in the form of “me”, begins to assert itself. The child is initiating the development of an independent existence. Of course, the child still needs the custodian, but the relationship is in the process of changing. The child seeks an age appropriate sense of liberation, a feeling of autonomy. She or he starts to manifest a personal sense of will.

In this developmental phase the child insists on doing things for himself/herself. Furthermore, the phase two child can be rebellious and “no” saying. Negation becomes a way of asserting the burgeoning self. This kind of self expression can frustrate the custodian, but an appropriate custodian is one who is able to accept this situation as a natural part of the child’s psychological development. Too much “law and order” will break the child’s spirit and undercut his or her authentic autonomy. The proper custodian for the child in this stage of development is the person who can accept the fact that the child is no longer as dependent as he or she was in stage one. The best custodian for the child, in this time of the child’s life, is one who is not disturbed by the child’s movement along the autonomy line. A custodian who institutes repressive measures during this developmental phase does no act in the child’s best interests. A best interests custodian must be tolerant and capable of using reasonable restraints in a manner suited to the child’s development.

C. Stage III: The Phase of Expansion between ages of four and five

At this time, the child ventures away from the family and enters the greater social realm. Play with children from other homes gives the child new experiences. Additionally, the child begins to see that grown-ups work in stores, as police officers, truck drivers, office workers, and

293. See ERIKSON, supra note 153, at 107.
294. Id. at 109.
295. Id. at 113.
other jobs. The child’s social awareness increases dramatically. Through play, the child explores some of our culture’s available socio-economic roles. Phase III is one of energetic activity. Aggressively curious, physically active, and verbally invasive, the child is at times approaching a “run-away” state.\(^{296}\) However, the custodian must understand that this is normal from the child’s perspective. Again a best-interests stance dictates that the custodian act in a manner which provides reasonable protection for and restraint of the child. On the other hand, there must be a reasonable opportunity for self expression in deed, thought, and word.

A successful phase three child has learned to exercise initiative.\(^{297}\) However, during this period of development the child also begins to learn that one’s personal initiative must be channeled. Culture requires the child to become concerned about intention, objective and result. Our culture expects the child to develop a “sense of purpose.”\(^{298}\) In addition, the child must learn to relate to social groups made up of non-family as well as family members. The child must come to learn that life requires harmonious social interaction with those beyond the family enclave. Finally, it is well documented that phase three is a time when sexual identity is beginning to become strongly established.\(^{299}\) A gender style is being derived from the child’s experience in family and culture. Given this information, it is certain that this phase of development is a lively one.

The best interests custodian under law for the phase three child will have the following orientation:

1. prefer age-appropriate, independent behavior, not tether the child to the family
2. be encouraging of and supportive of purposeful activity
3. be able to model and support culture appropriate gender identity development
4. will not be threatened by the child’s movement away from the custodian and into the world of others

\(^{296}\) Id. at 115.

\(^{297}\) See Erik Erikson, Childhood and Society, 255-58 (2d ed. 1983).

\(^{298}\) See Erik Erikson, Insight and Responsibility 120-22 (1964).

\(^{299}\) For a well-written explanation of the gender making process, see H. Nunberg, Principles of Psychoanalysis 69-70 (1955).
D. Stage IV: The Learning Age from approximately the sixth through the eleventh year

In discussing Painter, much information about this phase has been put forth. Thus, a short description is presented here. In this phase of psycho-social development the child is transported by culture into the environment of school. The child is now engaged in learning fundamentals which are relevant to taking a place in the society and economy of his generation. This is a time of rapid intellectual growth promoted by adults situated outside of the home. This does not mean that parents have no role to play. They can play a significant part in introducing the child to the broader culture and its fund of knowledge and values. However, at this time, the adult agents of culture operating in the school environment will play a major role in the child’s development. The child is now caught up in the task of working to master the operations and values deemed important by our culture. Mastery and competency are fundamental matters. Given this psycho-social reality, the preferred best interests custodian under law is one who can act to support the child in the educational setting.

E. Stage V: Adolescence and the Struggle for Identity between age twelve through age eighteen

The crucial task of adolescence is to fashion an individual sense of self. Erikson uses the term “existential identity.” Earlier psychosocial experiences are integrated and the young person is prepared to move into adulthood. Acquiring an authentic “sense of identity” is no simple matter. The process of identity acquisition is, at times, quite chaotic. The adolescent changes styles, ideologies, roles and behavior with great frequency. She is a revisionist-in-action. To the adult, it may appear that the adolescent is adrift on the sea of existence. But the adolescent’s efforts are purposeful. The process has its own validity. The adolescent is trying to answer the question: “Who am I?”

Viewed from an outcome perspective, adolescence holds three post-
sible fates. The adolescent can develop an authentic, sustaining self, flounder in "identity confusion," or accept a "negative identity." Of course, the coming into being of an authentic identity is the desired result. "Identity confusion" means that the person will be psychosocially impaired and, if things are not corrected, will experience vitality eroding psychological symptoms throughout his or her lifetime. If the outcome is a "negative identity" one suffers throughout life as an outcast, beyond integration into our culture. Delinquency, crime and severe mental illness may become the lifeline of such a person. The best interests custodian for a young person on this identity quest is the adult who can be empathically involved in the journey, but still keep in mind that, as an adult, one is in a different phase of the life cycle. The competent custodian will not be a person who returns to adolescence. The best interests custodian must be one who can act out of adult wisdom to facilitate best interests development. Further, it is important that the custodian not be authoritarian, negativistic or highly punitive. An effective custodian will be one who understands that adolescent experimentation is necessary. However, the effective custodian is able to recognize when the young person is in real trouble and intervene, if necessary. The best interests caretaker is the person who can accept the protean style of adolescence, avoid promoting negative identity or identity confusion, provide wise counsel and act to promote a positive identity.

Thus, the Eriksonian paradigm has very significant potential for use in the child-custody decision process. The use of the paradigm by attorneys, psychological experts and judges can do much to produce an appropriate best interests result. The above discussed paradigm is of more use to those involved in the child custody arena than that model put forth by the BBI group.

Used by itself, the Erikson derived paradigm has great utility. However, certain rather recent developments in modern psychoanalysis have provided us with important concepts which ought to be affixed to the Eriksonian paradigm. For example, non-orthodox psychoanalytic clinicians and theoreticians, Heinz Kohut and Alice Miller have developed empathy-centered approaches to psychotherapy. Both of

304. For a discussion of identity confusion, see ERIKSON, supra note 153, at 131.
305. For a discussion of the concept of negative identity, see ERIKSON, supra note 7, at 73.
306. See KOHUT, supra note 278.
307. See MILLER, supra note 167.
these psychoanalysts focus on so-called object relations and the self. The technical term “object relations” refers to relationships between people. Kohut and Miller stress empathic interpersonal attachments and their relationship to the child’s development of a positive sense of self. Both of these free-thinking psychoanalysts eschew the nineteenth century vocabulary and models of orthodox psychoanalysis. Alice Miller’s work is especially accessible to those who have little experience with psychoanalytic or psychological concepts.

Heinz Kohut stresses the importance of the empathic situation. The custodian must be psychologically in tune with the child’s needs. In order for successful parenting to occur the adult, through identification with the child must be able to “experience” the feelings, thoughts, wishes, anxieties, etc. of the child. Empathy allows the custodian to “read” and then respond in line with the “information” received through the empathic experience. Kohut who is certainly the pioneer of the “science of empathy”, states:

Empathy is, I am convinced not just a poor relation of those other forms of cognition that we hold in high esteem because we consider them functions of our prized intellect. Empathic modes of perceiving ourselves and our surroundings exist from the beginning of our lives side by side with other, nonempathic, modes of perception.

Kohut’s clinical work indicates that the lack of an empathic response from the parent weakens the child’s sense of self and undermines psychological stability. Such a result is, of course, not in the psychological best interests of the child. On the other hand, an empathic response called mirroring, which shows the child that in the parent’s eyes she or he is a valuable person, is the key to the development of a stable sense of self and a basic sense of security.

Alice Miller also stresses the need for an empathic relationship between custodian and child. Miller’s clinical work has persuaded her that empathic nurturing is necessary for successful psychological development. The empathic custodian is one who can allow the child to

310. See Kohut, supra note 308, at 77-79.
have or express his or her real emotions. The child is free to be happy, sad, angry as well as other emotions. The empathic parent does not teach the child to make a social impression. Moreover, the child is not used to satisfy the needs and the ambitions of the parent. Like Kohut, Miller concludes that the empathic parent is one who is capable of giving adequate “mirroring.” In mirroring, a custodian looks upon the child with a fundamental sense of approval. Mirroring is a manifestation of a healthy parental pride directed toward the being of the child. Miller also holds that the empathic parent gives respect and attention as well as providing mirroring. Such a parent does not humiliate, ridicule, deceive or manipulate the child. Miller states that it is only through a satisfactory relationship with a relatively empathic parent that a child comes to have a true self. The true self allows one to connect honestly with his or her emotions and with a life which promotes the well-being of the self.

My opinion is that Alice Miller and Heinz Kohut provide us with clinically based insights important in the making of best interests child custody determinations. Although Erikson’s psycho-social paradigm is the core of a very useful approach to child custody dispute resolution, I would contend that Kohut and Miller’s findings in regard to empathy and mirroring can be used to “perfect” the decision-making process. Miller and Kohut’s emphasis on the empathy-mirroring role of the parent serves to complement Erikson’s focus on the vital matter of psychosocial needs. The empathy-mirroring response is most critical in the earlier years of childhood; however, a best interests custodian must provide empathy and mirroring at all stages of development. How the parent provides empathy and mirroring should be a function of what the child requires at particular Eriksonian stages of development. The needs of adolescents, of course, differ from the needs of children in earlier stages.

Combining the approaches of Miller, Kohut and Erikson the proposed decision-making perspective can be summarized in the following way. Custody under the law should be awarded to the person who is

313. See Alice Miller, Prisoners of Childhood 16 (1981).
314. Id. at 34.
315. See Alice Miller, Prisoners of Childhood 16 (1981); see also Alice Miller, The Untouched Keys 47-68 (1990); Heinz Kohut, How Does Analysis Cure 143 (1984).
316. See Alice Miller, Prisoners of Childhood 16 (1981).
317. Id. at 14-21.
comparatively the most capable of providing appropriate empathy/mirroring and the most capable of meeting the psycho-social developmental needs of the child. In a sense what is required is a totality of psycho-social circumstances best interests analysis. The term psychosocial is here expanded to encompass the empathy/mirroring relationship between child and custodian. In addition, lawyers, psychological experts and judges must keep in mind that any informed custody decision requires that there be a retrospective analysis of the relevant material, an "in the present" analysis and a prospective analysis. A future projection is required. It cannot be avoided. Past and present data are fundamental in making future-casts. In particular cases, it might be appropriate to modify the custody decree as the child moves from one stage to another stage. Realistically speaking, given our current orientation, this would seldom be done. But courts should not hesitate to change custody, at any time, if a shift would maximize the best interests position of the child. It should be emphasized that the above stated approach involves in part an evaluation of the comparative "parenting" fitness of the contesting custodians. Comparative fitness is certainly a general concept familiar to those who focus on the resolution of child custody disputes.

Finally, it is a fundamental contention of this writer that the BBI "presumption" with its focus on continuity can only serve to blur our best interests focus of attention. Reality is far too complex to be evaluated from the continuity position. True best interests decisions require that we evolve a decision centered paradigm of relevance - one which allows insight into the complexities of a best interests existence. The reader is, of course, reminded that a paradigm expresses an ideal and it must be used with that knowledge in mind. However, the suggested paradigm is a guide to practice. Our practice work can be benefitted by its use.
Recent Supreme Court Decisions Ease Child Abuse Prosecutions: Use of Closed-Circuit Television and Children's Statements of Abuse Under the Confrontation Clause

Josephine A. Bulkley*

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I. INTRODUCTION

Over the last decade, many state legislatures and courts have changed their laws and procedures to improve prosecution of child sexual abuse cases, eliminate evidentiary barriers, and reduce trauma to child victims in the legal system. These innovative or reform laws have been in response to two major problems in the criminal justice system's handling of child sexual abuse cases. First, many cases of child sexual abuse were not prosecuted due to a lack of physical evidence or eyewitnesses and because the sole witness was a child, often considered to be incompetent or lacking credibility. Second, many began to observe that

* J.D., Antioch School of Law; B.A., University of Michigan. Member of the Professional Staff of the Center on Children and the Law, American Bar Association, Washington, D.C.
children were traumatized by the criminal justice system.

Legal reforms and innovative approaches adopted in the 1980s include: 1) interdisciplinary teams; 2) a special advocate for the child; 3) special child abuse prosecution units; 4) elimination of mandatory competency requirements for children; 5) closed-circuit television or videotaping of a child's testimony; 6) expert testimony on the typical behaviors of child sexual abuse victims; and 7) special child abuse hearsay exceptions.

As this law reform movement swept the country, however, some questioned their basic need or efficacy, citing a lack of empirical research given the drastic changes in basic trial and legal rights. Perhaps the major challenge has been that these innovations, particularly those involving rules of evidence and trial procedure, violated various constitutional guarantees, particularly the Sixth Amendment rights of defendants in criminal trials.

Most critical analysis and court decisions have addressed whether the defendant's Sixth Amendment "right to be confronted with the witnesses against him" (including the right to cross-examination and physical confrontation at trial) has been violated by the prosecution's use of closed-circuit television of a child's testimony outside the defendant's presence and a child's hearsay statements when the child is not a witness at trial. Several of these state court decisions have reached the United States Supreme Court. This article discusses recent Supreme


Court decisions dealing with the constitutionality of admitting children's hearsay statements of abuse and closed-circuit television of a child's testimony under the Confrontation Clause.

II. ADMISSION OF CHILDREN'S OUT-OF-COURT STATEMENTS OF ABUSE UNDER THE CONFRONTATION CLAUSE

A child's out-of-court statement of abuse often is the most compelling evidence of sexual abuse besides the child's story on the witness stand. Such statements often contain more detail than in-court testimony because they were made closer to the abuse experience, are more spontaneous and have an unrehearsed quality. Because such statements are hearsay, prosecutors routinely seek to admit children's statements of abuse under various hearsay exceptions to the hearsay rule.

The rule against hearsay is intended to prevent admission of out-of-court statements where: 1) there is no opportunity to cross-examine the declarant whose statement is offered by a witness; 2) the statement was not made under oath; and 3) there was no opportunity for the trier of fact to observe the declarant's demeanor. States have adopted numerous hearsay exceptions, however, for admitting statements deemed to be especially reliable because the declarant is considered to be likely to be telling the truth.

Hearsay exceptions commonly used in child abuse cases include the excited utterances or spontaneous declarations exception, exception for statements made for purposes of medical diagnosis and treatment, the residual exception, and the special child abuse exceptions. Approximately half of the states have adopted a special statutory hearsay exception for children's out-of-court statements of abuse. The provisions of most statutes are similar because they were drafted to comply with the confrontation requirements set forth in Ohio v. Roberts and the constitutionality of statutes with these requirements have been upheld by state appellate courts.

The original purpose of the child abuse exceptions was to provide a means of admitting a child's statement of abuse that did not fit the strict or narrow requirements of existing hearsay exceptions. A number of state courts have broadly interpreted the excited utterances exception beyond its purpose by allowing, for example, statements to be


Several state supreme courts have held that their statutory child abuse exceptions violate the doctrine of separation of powers in that the legislature has adopted a rule of evidence that, under the state constitution, is a power delegated to the judiciary. See, e.g., Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990); Hall v. State, 539 So. 2d 1338 (Miss. 1989); State v. Robinson, 735 P.2d 801 (Ariz. 1987) (en banc). For example, this was the holding in Drumm v. Commonwealth in which the Kentucky Supreme Court found that because the Kentucky Constitution vests the judiciary with the power to adopt rules of practice and procedure for the courts, the statute creating a child abuse hearsay exception is "an unconstitutional exercise of rule-making power by the General Assembly." 783 S.W.2d at 382. The court further held that,

we will not extend comity to this statute because it fails the test of a 'statutorily acceptable' substitute for current judicially mandated procedures. Fundamental guarantees to the criminally accused of due process and confrontation, established by both the United States and Kentucky Constitutions, are transgressed by a statute purporting to permit conviction based on hearsay where no traditionally acceptable and applicable reasons for exceptions apply.

Id.

Most child abuse hearsay exceptions provide that a statement may be admitted if the child testifies, or in cases where the child does not testify, the prosecution has demonstrated that the child is "unavailable to testify," and the statement possesses particularized guarantees of trustworthiness (some require trustworthiness only if the child does not testify, while others require it both when the child testifies and does not testify). Whitcomb, supra note 6, cites Arizona, Arkansas, Colorado, Florida, Idaho, Kansas and New York in a chart with statutory citations as not requiring an unavailability showing if the child is not produced to testify, however.

Some statutes require an additional showing of corroborative evidence of the abuse when the child does not testify. Whitcomb cites ten states that require corroboration. Some legislation sets out factors the court may consider in deciding whether a statement is trustworthy. According to Whitcomb, supra note 6, at least three states list reliability factors.

At least one state statute requires that expert testimony support an unavailability finding based upon emotional trauma to the child. See, e.g., IND. CODE § 35-37-4-6 (1984) (as cited in Bulkley, Evidentiary and Procedural Trends, supra note 2, at 649-57).

admitted that had been made days, weeks, or even months after the sexually abusive event.\textsuperscript{10} Other courts, however, have excluded reliable statements of children because more than a few minutes or hours had elapsed since the statement had been made.\textsuperscript{11}

The medical diagnosis and treatment exception is also available and has been liberally interpreted by some courts to encompass children's statements of sexual abuse to mental health professionals as well as medical doctors.\textsuperscript{12} Too often, however, courts have found that its requirements are not satisfied, thus preventing admission into evidence many statements children make to doctors or mental health professionals.\textsuperscript{13}

Some states have adopted the "residual exception," an exception also included in the Federal Rules of Evidence.\textsuperscript{14} Considered a "catch-all" exception, it permits statements to be admitted that do not fit the requirements of a traditional exception, but nonetheless possess circumstantial guarantees of trustworthiness equivalent to traditional exceptions. Other requirements must also be met.

The residual exception serves the same purpose as the child abuse exceptions by permitting admission of statements that do not fit the strict requirements of traditional hearsay exceptions. Some have argued that as a legal policy matter, the residual exception is preferable to the child abuse exceptions, because it has broader application and does not carve out an exception for a narrow class of statements while including virtually the same requirements as the residual exception.\textsuperscript{15} A number of courts have admitted child abuse statements under this exception, although some courts, including the United States Supreme Court in \textit{Idaho v. Wright},\textsuperscript{16} have found that the child's statement did not possess such guarantees of trustworthiness.

\textsuperscript{10} \textit{Id.; Myers, supra} note 3, John E.B. Myers, \textit{Hearsay Statements by the Child Abuse Victim}, 38 \textit{Baylor L. Rev.} 776, 863-65 (1986).
\textsuperscript{11} \textit{Id.}
\textsuperscript{13} \textit{Id.}
\textsuperscript{14} \textit{Myers, supra} note 3, at 360-62. \textit{See generally} Bulkley, \textit{supra} note 9; Whitcomb, \textit{supra} note 6.
\textsuperscript{15} \textit{See} Bulkley, \textit{Evidentiary Theories supra} note 9.
\textsuperscript{16} 110 S. Ct. at 3141.
III. ADMISSION OF STATEMENTS WHEN THE CHILD DOES NOT TESTIFY AT TRIAL

The Confrontation Clause of the Sixth Amendment has been interpreted as a rule of preference for "face-to-face confrontation at trial," requiring the "personal presence of the witness at trial, enabling the trier to observe his demeanor as an aid in evaluating his credibility and making false accusations more unlikely because of the presence of the accused and the solemnity of the occasion."

When a prosecutor offers into evidence a child's statement and the child testifies, no confrontation problem is presented, since the defendant has an opportunity to confront and cross-examine the child about his or her out-of-court statements. When the child is not a witness, however, admission of the child's out-of-court statement has been challenged as a violation of the defendant's Sixth Amendment confrontation rights.

Under Supreme Court decisions prior to 1986, if the child was not a witness at trial, even if his or her out-of-court statement of abuse satisfied the requirements of a hearsay exception, its admissibility under the Confrontation Clause was not certain. Under recent Supreme Court decisions dealing with the admission of hearsay and the Confrontation Clause, however, it appears that if a statement satisfies a firmly rooted hearsay exception, it also satisfies the Confrontation Clause. There are five relevant Supreme Court decisions since 1980 dealing with hearsay and the Confrontation Clause: White v. Illinois, Idaho v. Wright, Bourjaily v. United States, Inadi v. United States, and Ohio v. Roberts.

Idaho v. Wright was a 1990 decision dealing with a young child's statements of sexual abuse to a physician under the residual exception. The Court summarized the relationship it long has described between the hearsay rule and Confrontation Clause, as well as two requirements many believed were constitutional prerequisites to the admission of any hearsay:

Although we have recognized that hearsay rules and the Con-
frontation Clause are generally designed to protect similar values, we have also been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. The Confrontation Clause, in other words, bars the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule.

In *Ohio v. Roberts*, we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule meet the requirements of the Confrontation Clause . . . . First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . , the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly-rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

A. The Unavailability Requirement

In 1980, the United States Supreme Court in *Ohio v. Roberts*, which involved an absent witness' preliminary hearing testimony, held: "In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate indicia of reliability."24

Despite this language which was reiterated by the Court ten years later in *Idaho v. Wright*, it was not certain that the Court intended to require a showing of unavailability for all exceptions, since most do not expressly include such a requirement.25 Indeed, in 1986 *United States

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23. 110 S. Ct. at 3146 (citations omitted).
24. 448 U.S. at 66 (emphasis added).
25. Graham, *Indicia of Reliability*, supra note 2, at 53-55. Graham states that after *Roberts*, [t]aken literally, almost every hearsay statement that meets an exception in Rule 803 . . . would seem to require either production of the declarant, or a showing of unavailability before the statement can be received in evidence against the accused.
v. Inadi was decided, in which the Supreme Court held that the general requirement of unavailability does not apply to out-of-court statements made by a non-testifying co-conspirator. Although Idaho v. Wright indicated the Court has "applied the general approach articulated in Roberts to subsequent cases raising Confrontation and hearsay issues," Inadi (as well as a footnote in Roberts itself) makes it clear that the Supreme Court did not mean to impose an unavailability requirement for all hearsay exceptions.

Inadi noted that if the Roberts requirements applied to all hearsay, "no out-of-court statement would be admissible without a showing of unavailability . . . . Roberts, however, does not stand for such a wholesale revision of the law of evidence . . . ." The Court further stated:

Roberts must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that Roberts simply reaffirmed a longstanding rule . . . . that applies [an] unavailability analysis to prior testimony. Roberts cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Because state courts were unsure after Inadi whether unavailability applied to other exceptions, decisions went both ways. The effect

Several factors, however, indicate that the Supreme Court did not contemplate such radical change in practice.

Id. at 45 (citations omitted).

26. 475 U.S. at 393-94.
27. Wright, 110 S. Ct. at 3146.
28. Roberts, 448 U.S. at 65 n.7.
29. 475 U.S. at 392.
30. Id. at 394.


In some child abuse cases, courts holding that unavailability is not required have focused on the first Inadi factor with little or no attention to the other factors. These
of *Inadi* was articulated by the concurring opinion in *Nelson v. Farrey*, which indicated:

The *Inadi* decision has created an unfortunate vacuum in the Confrontation Clause realm, for at present it is not clear if a showing of unavailability is required for most types of hearsay statements. Given its broadest construction, *Inadi* stands for the proposition that the unavailability of the declarant is a relevant constitutional factor only when the hearsay statements involve testimony given at a preliminary hearing. In my view, however, *Inadi* does not represent a repudiation of *Roberts*’ unavailability discussion. Rather, . . . *Inadi* merely reaffirms and applies the *Roberts* principle that a showing of unavailability is not required in all situations (citations omitted). Thus, . . . *Inadi* represents a directive to lower courts to carefully analyze the facts of a given situation before concluding that a showing of unavailability is constitutionally required.89

After *Inadi*, Professor Graham noted that just as *Roberts* does not mean that an unavailability showing is required for all hearsay exceptions, *Inadi* probably does not mean that an unavailability showing is never required.89 Citing the Supreme Court's decision in *California v. Green*,84 Graham states: “If the right of confrontation never compels the prosecution to provide available witnesses, it cannot serve its historical function of preventing ‘flagrant abuses, trials by anonymous accusers, and absentee witnesses.’”85

Nevertheless, in January, 1992, the Supreme Court decided *White v. Illinois*,86 holding that the Confrontation Clause was not violated by admission of a four-year old’s statements of sexual abuse, although the child did not testify at trial. The defendant was convicted based solely on testimony from the child’s mother, babysitter, a doctor, a nurse and decisions reasoned that the child’s out-of-court statements, like a co-conspirator’s out-of-court statement, are likely to be very different from the child’s trial testimony, and the statement therefore constitutes irreplaceable evidence. For example, *Johnson v. State* involved admission of a child’s statement of sexual abuse under a child abuse exception that does not contain an unavailability requirement. 732 S.W.2d 817 (Ark. 1987). The Arkansas Supreme Court noted that a child sexual abuse victim may later recant, indicating a strong possibility that a child’s earlier statement will be different from her trial testimony. *Id.* at 823.

32. 874 F.2d at 1231.
34. 399 U.S. 149, 179 (1970).
a police officer who described what the child told them about the abuse. The statements were admitted under the state’s spontaneous declarations and medical diagnosis and treatment exceptions. Although it is not known why, the prosecution did not offer the child as a witness, and the court did not hold a hearing or make a finding that she was unavailable to testify (and the child apparently was in the courtroom).

In White, the Court essentially followed its reasoning in Inadi. The Court reiterated three major reasons for not imposing an unavailability requirement for the spontaneous declarations and medical diagnosis exceptions. First, unlike former testimony, which is a weaker form of live testimony, statements under these exceptions have independent evidentiary significance, are made in a context very different from trial, and like co-conspirator statements, “are usually irreplaceable as substantive evidence.” Moreover, in White, the Court indicated that spontaneous declarations and medical diagnosis statements are made in “contexts that provide substantial guarantees of their trustworthiness.”

Second, the Court indicated in Inadi and White that there is little benefit to the unavailability rule, since the statements are admissible whether the declarant is unavailable, or available and produced by the prosecution. Inadi stated that nothing is excluded “unless the prosecution makes the mistake of not producing an otherwise available witness.” Inadi further noted that the unavailability rule is not particularly useful because it is not likely to produce much testimony that adds to the truth-determining process, “[since] presumably only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses.” Both White and Inadi stated that the defendant can subpoena those witnesses not called by the state. Third, White and Inadi found that the unavailability rule places significant and additional burdens on the criminal justice system and fact-finding process.

Most importantly, the White opinion indicated: “[W]here proffered hearsay has sufficient guarantees of trustworthiness to come within a firmly rooted hearsay exception to the hearsay rule, the Con-
frontation Clause is satisfied.” 44 This statement is significant, because as noted above, the Court has previously refused to equate the Confrontation Clause with the hearsay rule, indicating that some evidence admissible under a hearsay exception is excluded by the Confrontation Clause. Yet White signifies the end of this principle for firmly rooted exceptions. Idaho v. Wright made it clear that if a statement satisfies a firmly rooted exception, the reliability requirement is satisfied; after White, if a statement satisfies a firmly rooted exception, the Confrontation Clause is satisfied. For exceptions that are not firmly rooted, however, such as the residual and child abuse exceptions, White leaves open whether unavailability would be required by the Confrontation Clause. As noted above, some child abuse exceptions do not require unavailability 44 and the residual exception does not have an unavailability requirement.

Although the White case settles an uncertain constitutional issue, its practical impact may not be great. First, there are few cases in which the prosecution would not want a child to testify unless she was in fact “unavailable” (for example due to severe trauma, absolute refusal to testify, or incompetency). Most prosecutors believe that a child’s live testimony is critical to obtaining a conviction. Indeed, in the past, courts’ failure to find children competent as witnesses frequently resulted in cases that were dismissed or not prosecuted.

Second, even in cases where a child may be traumatized or refuse to testify, prosecutors are likely to attempt options such as closed-circuit television or excluding the public from the courtroom to enable the child to testify outside the presence of the defendant or public. The Supreme Court has indicated such approaches are not unconstitutional if necessity for their use (for example, due to emotional distress of the child) is shown on a case-by-case basis. 45 The use of these innovations is preferred to having no witness at all.

The effect of White generally will be to relieve the state from proving that a child who is unable to testify is “unavailable.” There also may be occasions where prosecutors seek to admit a child’s out-of-court statements without having the child testify, but be unable to prove the child is “unavailable to testify.” It is in these situations that the unavailability rule would prevent admission of a child’s out-of-court state-

43. White, 112 S. Ct. at 743.
44. See supra note 8.
ments unless the child is called by the prosecution to testify. Without either the child as a witness or his or her out-of-court statements, the prosecution would likely fail.

One such situation is where parents do not allow their child to testify because of fear of causing the child emotional distress, although there would be insufficient evidence of emotional trauma to satisfy the unavailability requirement. A recent California case allowed the admission of a child's hearsay statements without requiring a showing of unavailability, where the child was not a witness because his father would not allow him to testify.46

A second situation is where a prosecutor has a case with excellent testimony from several adults as to what the child told them (as in White v. Illinois) and perhaps other evidence of sexual abuse. The child witness, although competent and not likely to be severely traumatized by testifying, may not be a credible or sympathetic witness, particularly if the case involves a very young child and a good defense attorney likely to impeach the child's credibility because of his or her young age. The prosecution may prefer not to have the child testify for fear of hurting its case.

Lastly, although in most jurisdictions it may not be difficult to establish emotional trauma to satisfy the unavailability requirement, some courts may require very high thresholds for demonstrating emotional distress. For example, on remand to the Maryland Court of Appeals from the United States Supreme Court's decision in Maryland v. Craig, the Maryland court reaffirmed its first holding in Craig v. Maryland establishing a strict standard for a finding of emotional distress.

It should be emphasized that White does not mean that the prosecution can prevent an available child from testifying, since the defendant can call the child for cross-examination. If the child is truly available, the state should be required to produce the child; if the child is not produced, the prosecution then should be required to show that the child was unavailable (e.g., due to incompetency, trauma or refusal to communicate). Whether defendants will exercise their right to call the child to testify remains to be seen. Defendants may hesitate for fear of alienating the jury by forcing the child to testify and causing him or her distress and creating hostility toward the defendant.

Indeed, in some states, under a statute allowing admission of a child's videotaped statement, prosecutors routinely have offered a
child's videotaped statement in lieu of the child's direct testimony, making the child available for cross-examination. Most courts have held that this procedure does not violate the defendant's confrontation rights as long as the child is made available for cross-examination (although others have held that the Confrontation Clause is violated by failing to allow cross-examination at the time the statement was taken). Often, defendants have not called the child to testify for fear of creating sympathy for the child.

Indeed, in Justice Marshall's dissenting opinion in United States v. Inadi, he noted that the defendant's right to call the declarant himself does not satisfy confrontation since "the Confrontation Clause gives a defendant a right to be confronted with the witnesses against him, not merely an opportunity to seek out witnesses on his own." Justic
Marshall further stated that requiring the defendant to call declarants as his witnesses “may deny the defendant certain tactical advantages vouchsafed him by the Confrontation Clause.”

Graham noted that *Inadi* represented a departure from the Supreme Court’s earlier decisions (including *Dutton v. Evans* and *Ohio v. Roberts*) that indicate confrontation requires the prosecution to call an available witness whose testimony is crucial or devastating at trial for examination and cross-examination by the defense. *White* appears to represent an even further erosion of this confrontation requirement. Because the child victim’s testimony is so important, it seems hard to imagine that the prosecution constitutionally may present the accusatory hearsay statements of an available yet non-testifying child declarant, leaving it to the defendant to call the child for cross-examination.

In conclusion, hopefully *White* will not create the specter of prosecutors routinely deciding not to call a child, the primary accusatory witness, despite his or her ability to testify, instead relying on other evidence of the abuse, and defendants not calling the child for fear of alienating the jury. On the other hand, lack of an unavailability rule may benefit children by permitting some prosecutions that otherwise could not go forward, without significantly abridging defendant’s confrontation rights. It is hoped that *White* simply makes it unnecessary for the state to prove a child is unavailable when he or she is actually unable to testify, since prosecutors generally need the child as a witness. In those few cases where the prosecutor fails to produce a child who may be available to testify, defendants hopefully will exercise their right to call the child.

### B. The Reliability Requirement

The Court held in *Bourjaily v. United States* that because the co-conspirator exception is firmly rooted, an independent inquiry into the reliability of a co-conspirator’s statement is not required. Affirming its holding in *Roberts* and *Bourjaily*, *Idaho v. Wright* in 1990 stated: “Admission under a firmly rooted hearsay exception satisfies the
constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." 55

If a statement does not fall within a firmly rooted exception, however, the Court has found that it is presumptively unreliable, but nevertheless may be admitted if supported by a showing of “particularized guarantees of trustworthiness.” 56 In Idaho v. Wright, the Supreme Court held that the residual exception is not firmly rooted. Moreover, the child abuse exceptions also would not be considered firmly rooted. Therefore, under the residual and child abuse exceptions, the prosecution must demonstrate a statement’s trustworthiness.

In assessing the trustworthiness of the statements in Wright, the United States Supreme Court rejected the Idaho Supreme Court’s “apparently dispositive weight . . . on the lack of procedural safeguards at the interview,” 57 which included the doctor’s failure to videotape the interview, use of leading questions and preconceived idea of the child’s disclosures. The Court refused to “read into the Confrontation Clause a preconceived and artificial litmus test for the procedural propriety of professional interviews in which children make hearsay statements against a defendant.” 58

Numerous courts have found that a child’s statement of abuse was sufficiently trustworthy to meet the requirements of both the particular hearsay exception involved as well as the Confrontation Clause. 59 Wright cited a number of federal and state cases which the Court indicated identify factors that “properly relate to whether hearsay statements made by a child witness in child sexual abuse cases are reliable.” 60 Wright indicated that it would not “endorse a mechanical test for determining ‘particularized guarantees of trustworthiness.’ Rather, the unifying principle is that these factors relate to whether the child was particularly likely to be telling the truth when the statement was made.” 61 The Court upheld the approach of determining the trustworthiness of a particular statement by examining “the totality of the cir-

55. 110 S. Ct. 3139, 3147.
56. Id. at 3152.
57. Id. at 3148.
58. Id.
59. See the cases cited in Idaho v. Wright, 110 S. Ct. at 3150. See also Myers, supra note 3, at 362-71 (1987), 207-14 (Supp. 1991), for a list of factors and cases regarding reliability.
60. 110 S. Ct. at 3150 (citations omitted).
61. Id.
circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." 62

Nevertheless, *Idaho v. Wright* found that the two and half year old's statements to a physician did not possess particularized guarantees of trustworthiness to satisfy the Confrontation Clause. The Court noted: "Viewing the totality of the circumstances surrounding the younger daughter's responses to Dr. Jambura's questions, we find no special reason for supposing that the incriminating statements were particularly trustworthy." 63 Concerned with the suggestive manner of the doctor's interview, the Court also indicated that the statement was not made in circumstances of reliability similar to those required for excited utterances or statements for purposes of medical diagnosis. The Court held:

Given the presumption of inadmissibility accorded accusatory hearsay statements not admitted pursuant to a firmly rooted hearsay exception, we agree with the court below that the state failed to show that the younger daughter's incriminating statements to the pediatrician possessed sufficient 'particularized guarantees of trustworthiness under the Confrontation Clause to overcome that presumption.' 64

In conclusion, after *Wright*, a statement that falls within a firmly rooted exception is presumed reliable for confrontation purposes. For exceptions that are not firmly rooted, a statement's trustworthiness must be proven. While many statements may satisfy a hearsay exception or the Confrontation Clause trustworthiness requirement, some, as in *Wright*, may not.

**IV. CLOSED-CIRCUIT TELEVISION OR VIDEOTAPING OF A CHILD'S TESTIMONY OUTSIDE THE DEFENDANT'S PRESENCE**

As noted earlier, over the last decade, more than half the states have adopted legislation permitting alternative testimonial procedures, primarily in criminal proceedings for child abuse victims. 65 Most stat-

62. *Id.*

63. *Id.* at 3152.

64. *Id.* at 3152-53.

utes permit a child to testify in another room outside the presence of the defendant, judge, jury and public, and to have her testimony either televised into the courtroom during trial or videotaped prior to trial.66 Since the mid-1980s, however, numerous court decisions have addressed the question of whether the use of "one-way" television or videotaping, in which the child testifies outside the physical presence of the defendant, violates the defendant's Sixth Amendment right of confrontation.67 These laws also have been challenged as violating other constitutional guarantees, including the defendant's right to a public and a jury trial, Sixth Amendment right to be present at trial and right to self-representation, and due process rights.68

It was not until 1990, in a case called Maryland v. Craig,69 that the United States Supreme Court finally decided that the Confrontation Clause does not preclude the elimination of a face-to-face meeting between the child and defendant as long as it is necessary to achieve an important public policy such as protecting a child witness from the trauma of testifying in the defendant's presence. In 1988, in an earlier case that reached the Supreme Court, Coy v. Iowa, the Supreme Court declined to decide whether face-to-face confrontation could give way to protecting a child witness in a case involving use of a screen in the courtroom to prevent the child from having to view the defendant during her testimony.70

In Coy, the Court did not reach the face-to-face confrontation issue because it found the defendant's confrontation right had been violated by an Iowa statute that failed to require a threshold finding that the screen was "necessary to further an important public policy."71


66. See supra note 65.

67. MYERS, supra note 3.


71. Like the Iowa statute, some state statutes do not require a finding of necessity. Although some courts have found such statutes unconstitutional, see, e.g., State v. Murphy, 542 So.2d 1373 (La. 1989), others have made a determination that use of such procedures may be permitted as long as the court finds it necessary to protect a particular child witness. See, e.g., Commonwealth v. Willis, 716 S.W.2d 224 (Ky.
Nevertheless, the Court emphasized that face-to-face confrontation constituted the irreducible, literal meaning of the clause, and that if it could be abridged, it could only be done after individualized findings by the Court that a particular witness needs protection.

Following the Coy decision, state courts were still left with the unanswered question of whether physical confrontation could be eliminated if a showing of necessity were made. Many state appellate courts followed the O'Connor and White concurring opinion in Coy,72 (later adopted by the Craig majority), indicating that protection of child witnesses is an important public policy, and procedures for protecting a child from the trauma of testifying in court or the defendant’s presence may be used if the trial court makes a case-specific finding of necessity. Even before Coy, this was the holding of most state court decisions.73

In Maryland v. Craig, a majority of the U.S. Supreme Court justices, led by Justice O'Connor, held that protection of a child witness constitutes an important public policy which, upon a proper showing of necessity, justifies an exception to face-to-face confrontation. The United States Supreme Court agreed with the Maryland Court of Appeals that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”74 The Court held:

[I]f the State makes an adequate showing of necessity, the state interest in protecting child witnesses from the trauma of testifying in a child abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face con-

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74. 110 S. Ct. at 3167.
frontation with the defendant. 75

Furthermore, the Craig case set forth broad guidelines for a showing of necessity. Coy did not elaborate on "individualized findings of necessity." Before Craig, some decisions required a finding of trauma to the child specifically caused by the defendant's presence, 76 although many state court decisions suggested that a finding of trauma to the child from testifying in open court was sufficient. Many decisions prior to Craig also held that expert testimony or testimony from lay witnesses, such as parents, regarding trauma to the child satisfied the necessity requirement. 77 Some courts indicated that the judge should observe or question the child to determine whether she would be traumatized.

In many cases, the child may begin testifying in the usual manner but "freeze up" or break down on the witness stand, which courts have cited as justification for use of videotaping or closed-circuit television. Some courts specifically have required questioning of the child in the defendant's presence in order to determine whether the accused's presence intimidated or traumatized the child. 78 One of these cases was Craig v. State, 79 in which the Maryland Court of Appeals held that while there are valid exceptions to face-to-face confrontation,

a statutory inquiry which looks generally to a child's inability to testify in open court [is] . . . too broad to satisfy the necessity re-

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75. Id. at 3169.
78. Craig, 560 A.2d at 1122; Commonwealth v. Dockham, 542 N.E.2d 591 (Mass. 1989); State v. Thomas, 442 N.W.2d 10 (Wis.), cert. denied, 493 U.S. 867 (1989); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986).
quirement [and] whether a child is unavailable to testify in the
Roberts sense should not be asked in terms of inability to testify in
the ordinary courtroom setting, but in the much narrower terms of
the witness' inability to testify in the presence of the accused.80

The court indicated the child must be questioned by the judge (either
in or out of the courtroom) in the defendant's presence to determine if
she is unable to reasonably communicate because of serious emotional
distress produced by the defendant's presence. The court also required
that two-way television, a less restrictive alternative, must be attempted
prior to use of a one-way procedure.

The Supreme Court imposed three minimal requirements to satisfy
the necessity showing: 1) there must be a case-specific finding of neces-
sity; 2) the trauma to the child must be caused by the defendant's pres-
ence, not just courtroom trauma; and 3) the emotional distress must be
"more than de minimis, i.e., more than mere nervousness or excitement
or some reluctance to testify . . . ."81 The Supreme Court found that
the Maryland statute, which requires a finding that the child will suffer
"serious emotional distress such that the child could not reasonably
communicate," met constitutional standards.

The Supreme Court, in addressing how necessity must be estab-
lished, disagreed with the Maryland Court of Appeals' requirements
that the child must be questioned in the defendant's presence and two-
way television must first be attempted. The Supreme Court refused "to
establish, as a matter of federal constitutional law, any such categorical
evidentiary prerequisites for the use of one-way television procedure."82
The Court indicated that the trial court could have found that expert
testimony was sufficient to establish that the children's testimony in the
defendant's presence would result in serious emotional distress.

Craig made it clear that preserving safeguards of adverseness and
reliability, including the oath, cross-examination, and observation of
the witness' demeanor by the jury, judge and defendant, renders use of
a one-way procedure "functionally equivalent to . . . live, in-person
testimony."83 Craig noted that such assurances of reliability and ad-
verseness "are far greater than those required for admission of hearsay

80. Id. at 1126.
81. Craig, 110 S. Ct. at 3169 (emphasis added).
82. Id. at 3171.
83. Id. at 3166.
testimony under the Confrontation Clause." 84

The effect of Craig should be to affirm the status quo, since most state appellate courts prior to Craig had permitted use of one-way procedures for children found to be traumatized by testifying at trial. Indeed, during the past year since Craig was decided, a number of decisions have allowed one-way closed-circuit television or videotaped depositions based on the Craig decision where the requirements were met. 85 Some courts, however, have held that the defendant’s right of confrontation was violated where specific findings of necessity were not made or other similar requirements were not satisfied. 86 In deciding whether to request protective procedures in future cases, prosecutors should consider carefully whether trauma to the child would be caused specifically by the defendant’s presence as opposed to testifying in court. If it appears a child may suffer distress from testifying in the courtroom, other alternatives where the defendant remains physically present could be considered, such as closing the courtroom to the general public (although other constitutional guarantees must be examined when considering such approaches, too) or using a videotaped deposition prior to trial in which the defendant is present.

Moreover, some courts may establish stricter requirements than Maryland v. Craig such as requiring two-way closed-circuit television or the child to be questioned in the defendant’s presence to determine if

84. Id. at 3167.

Some state courts also have held that the right of confrontation is not violated when a child’s testimony is videotaped by deposition before trial where the defendant is present during the deposition. Although obvious, courts indicate that the defendant's face-to-face confrontation right has not been abrogated, and they also hold that the Confrontation Clause is not violated although the jury is unable to observe the child’s demeanor at the time she testifies. Hardy v. Wigginton, 922 F.2d 294 (6th Cir. 1990); Vigil v. Tansy, 917 F.2d 1277 (10th Cir. 1990), cert. denied, 111 S. Ct. 995 (1991); People v. Schmitt, 562 N.E.2d 377 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 154 (1991).

she would be traumatized. In fact, some state statutes permit only "two-way" closed-circuit television, 87 in which the child is able to see the defendant on a monitor in the room where he or she is testifying and another monitor telecasts the child's testimony in the courtroom. The Supreme Court merely established minimum, threshold requirements for allowing one-way television below which state courts may not go.

Indeed, after the Supreme Court remanded Craig to the Maryland Court of Appeals, the Court of Appeals affirmed its earlier holding establishing a strict standard for a finding of emotional distress. 88 The Supreme Court remanded the case because it wanted to give the Maryland court an opportunity to reconsider its earlier ruling, since its first decision was made before the Supreme Court had addressed the confrontation issue. The first Maryland Court of Appeals Craig decision interpreted the Supreme Court's 1988 decision in Coy v. Iowa (which did not decide whether face-to-face confrontation was required) as establishing a "high threshold" for a finding of necessity, which the Maryland appeals court indicated the trial court had not met.

The Supreme Court stated in Maryland v. Craig that "we cannot be certain whether the Court of Appeals would reach the same conclusion in light of the legal standard we establish today." 89 Nevertheless, in the second Craig v. Maryland decision, the Court of Appeals again held that the judge should question the child personally, preferably in the defendant's presence, although indicating such an approach was discretionary rather than mandatory. Additionally, in direct contrast to the United States Supreme Court, the Maryland court stated that expert testimony, while permissible, was generally not sufficient to establish emotional trauma. 90

Some state courts also may decide that one-way television violates a defendant's right of confrontation under their state constitution giving defendants the right to a "face-to-face" meeting with witnesses against them. 92 The Pennsylvania Supreme Court indicated that it was unnecessary to decide the federal confrontation question because its de-

87. Whitcomb, supra note 1.
89. 110 S. Ct. at 3171.
90. 588 A.2d 328 (Md. 1991).
91. Id. at 332.
cision was based on the state constitution. The court further indicated that it never has been bound by the Supreme Court's interpretation of similar federal constitutional provisions.

Both the Indiana and Pennsylvania courts stated that the words “face-to-face” distinguish their state's Confrontation Clause from the federal Constitution (which requires the defendant to “be confronted with the witnesses against him”93). The Pennsylvania Supreme Court held that because the child was not unavailable or had not been subject to cross-examination in the presence of the accused during prior testimony, the defendant's state confrontation right was violated.94

V. CONCLUSION

From Globe Newspaper in 1981 to White v. Illinois in 1992, prosecutors have received favorable treatment in child sexual abuse cases. The Craig and White decisions clearly indicate the Court is willing to make exceptions to the defendant’s confrontation rights in cases involving sexual abuse of a child. Yet these decisions are not merely indicative of the Court’s view of child victims, but illustrate their preference in general for the prosecution’s position in criminal cases. Moreover, although the Court has allowed exceptions in child abuse cases, it has not meant that defendants’ confrontation rights completely have been abrogated.

In practice, most cases of child sexual abuse never reach the trial stage. More importantly, in such cases of abuse that go to trial, prosecutors want and need a live child witness. It is only in the exceptional case when a particular child cannot testify at all or cannot testify in open court or in front of the accused—because he or she would be too traumatized or refuses to communicate—that evidentiary methods such as closed-circuit television or admission of the child’s out-of-court statements make it possible for prosecutors to initiate or win prosecutions that otherwise would fail.

93. U.S. Const. amend. VI.
94. Ludwig, 594 A.2d at 284-85.
Different Lenses: Psycho-Legal Perspectives on Children's Rights

Gerald P. Koocher*

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* Associate Professor, Harvard Medical School; Chief Psychologist, Boston Children's Hospital.
I. INTRODUCTION

Lawyers and child mental health professionals tend to have quite different perspectives on the rights of children. These viewpoints result from filtering facts and issues through lenses colored by dramatic differences in training, scholarly traditions, and practice arenas. The attorney is taught that truth and justice are to be sought via rigorous cross-examination of facts in a crucible defined by centuries of legal traditions, case law, statutes, and regulations. Reliance on well-founded rules (i.e., the law), the wisdom of common sense (i.e., embodied in the trier-of-fact), and fairness are supposed to yield the best decisions.

These same principles are alien to most mental health professionals, who are taught that principles of child development, behavioral research, and the study of human interactions hold the keys to determining what is in a child’s best interests. Psychology, psychiatry, and sociology are inexact sciences, seldom yielding the clear answers or absolute determinations that courts of law prefer. One cannot easily predict the long-term outcome for any given child based on a particular custody decision, juvenile court sentence, or psychiatric hospital admission. At the same time, mental health “experts” are routinely called upon to present evidence in the legal system so that clear decisions with important implications for children’s futures can be made. One means of narrowing this problematic disparity is for each profession to occasionally don the other’s lenses. This paper presents a discussion of some constitutional issues for consideration along those lines.

II. HISTORICAL CONSIDERATIONS

Children have long been treated by the courts as valuable property of their parents. In many societies, children have represented a means of establishing a labor force or to provide parental support during old age. In our own legal system, parents have been held to possess a “right of control” over their children. 1 Parents’ rights of control over their children, however, are limited by a prohibition against making “martyrs of their children.” 2 This restriction was advanced not because of an enlightened view of children’s rights, but rather as an assertion of society’s interest in the socialization of children. It was actually not clear

until the mid-1960s that children were deemed "persons" within the meaning of the Fourteenth Amendment which applies the Bill of Rights to all of the states. ¹³

This treatment had its roots in the recognition that children are often not as competent as adults to make important life decisions, especially those decisions with financial consequences. Under common law, children up to the age of seven were generally considered doli incapax; i.e., the defense of infancy, and, therefore, could not be held responsible for their actions. Older children, under the age of majority, were also considered incompetent unless they were proved doli incapax. ¹⁴ Although one could question the validity of this doctrine based on arbitrary age levels, such matters were not significant in a legal sense before the Supreme Court's decision in Gault.¹⁵ Prior to that decision, juvenile courts were deemed to be acting in the best interests of the children before them under the doctrine of parens patriae. ¹⁶ In the Gault decision authored by Justice Fortas, the Supreme Court criticized the juvenile court as a "kangaroo court" and concluded that, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹⁷

This and subsequent decisions, combined with the increasing recognition of the prevalence of social problems such as child neglect and abuse, runaway youth, and changing child custody practices, contribute to an increasing involvement of children in the legal system. Similarly, the involvement and roles of mental health professionals who work with children have changed. Such clinicians are increasingly called upon to advise or testify on such matters, and in so doing expose themselves to new duties and responsibilities with special obligations for which many are not fully prepared. Such professionals tend to think of children's rights in terms of enabling self-actualization or natural entitlements, rather than as constitutional guarantees to be addressed in the legal arena.

³. See GARY B. MELTON, CHILD ADVOCACY: PSYCHOLOGICAL ISSUES AND INTERVENTION (1983); Gary B. Melton, Children's Competence to Consent: A problem in Law and Social Science, in CHILDREN'S COMPETENCE TO CONSENT 1-18 (Gary B. Melton et al. eds. 1983).
⁴. Melton, Children's Competence to Consent, supra note 3, at 1-18.
III. CHILDREN'S ABILITY TO MAKE COMPETENT DECISIONS

This paper focuses on matters of decision-making with respect to children's rights. The ability of children to make well-informed decisions about their lives and their exercise of that ability, directly or through proxies, is the core issue. The law, society, and many mental health professionals generally presume that children are not able to make major life decisions on their own. This presumption is often correct, and the rules that exist to deny children independent decision-making authority generally serve to protect them in the long run. At the same time, the relative dependency, vulnerability, and immaturity of children often interact with complex family roles to create complicated conflicts of interest. Courts are generally unwilling to intrude on intra-familial conflicts unless significant thresholds are crossed, for example when a child's welfare is clearly at risk.

Assessment of specific competency, in the case of children, or incompetency, in the case of adults, revolves around four basic elements which involve psychological aspects of comprehension, assertiveness and autonomy, rational reasoning, anticipation of future events, and judgments in the face of uncertainty or contingencies. In the following pages, relevant developmental trends are discussed in relationship to these basic elements of competent decision making, and hence the ability to claim one's own civil rights. The points discussed here represent an overview of the various approaches to determining competence. The matter of whether any single circumstance represents a valid exercise of competence is linked closely to context and subjective interpretation.

There are five key elements in fully informed decision-making. These include: information, understanding, competency, voluntariness, and decision-making ability (i.e., reasoning). Although the concepts

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8. First, the person's ability to understand information that is offered about the nature and potential consequences of the decision to be made; second, the ability to manifest a decision; third, the manner in which the decision is made; and, fourth, the nature of the resulting decision.


10. In this context information refers to access to all data which might reasonably be expected to influence a person's willingness to participate. Information includes...
of competency and informed consent are different, it is clear that there are many overlapping elements. Competency is a prerequisite for informed consent. An offer to provide a person with informed consent is not meaningful unless the individual in question is fully competent to make use of it. Across the developmental trajectory between infancy and adulthood, there are many aspects of human development which act to inhibit or enhance competency and the ability to give consent.

IV. HOW ARE CHILDREN SPECIAL IN THIS REGARD?

A. Socialization

It is no secret that we begin life as egocentric beings, largely unaware of our own capabilities and without verbally based interpersonal relationships. We progress through developmental stages which focus successively on interaction in the family, peer group, and ultimately in society as a whole. Along the way we are "socialized" or taught about various societal roles by our families and social institutions, chiefly our schools.¹¹

There is a substantial body of data to suggest that even after children become capable of understanding that they have certain rights or societal entitlements, their exercise or assertions of those rights is often a function of their social ecology.¹² Many children literally regard their rights as those entitlements that adults permit them to exercise.¹³ Adults' interactions with children are often framed as requests, yet children are seldom fooled into thinking that they have a real option to decline.¹⁴

only what is offered or made available to the person. Competency includes the capacity to understand, the ability to weigh potential outcomes, and also the foresight to anticipate the future consequences of the decision. Voluntariness is the freedom to choose to participate or to refuse. Decision-making ability refers to the ability to render a reasoned choice and express it clearly. See Charles W. Lidz et al., Informed Consent: A Study of Decision Making in Psychiatry (1984).

¹¹. That is to say, as children we are taught to do what authority figures tell us to do.

¹². Melton, Children's Competence to Consent, supra note 3, at 1-18.


¹⁴. Although a parent may say to a child, "Please pick up your toys," children as young as three are well aware that adverse consequences will follow a failure to re-
The "terrible twos" and "rebellious adolescent years" are well known cliches which present the adult perspective that it is difficult to deal with children who challenge or question authority. The point to be made here is that the process of socialization presents considerable pressure for children to acquiesce to adults' wishes. As a result of these pressures, it is quite likely that offers to exercise various rights will not be recognized or acted on by many children. Likewise, oppositional responses may sometimes occur more as a function of developmental stage than reasoned choice.

B. Time Perspective

Ask a child, "Do you want a little candy bar today, or a big one next week?" To the four year old for whom "next week" may seem a decade away, immediate gratification is the obvious choice. A child's ability to go beyond the present and conceptualize the future, including hypothetical or potential outcomes, is closely linked to stages of cognitive development. One must be mindful of this when asking children to participate in decisions involving recognition and assessment of potential or future outcomes.

Time perspective becomes critically important whenever a decision involves being able to weigh short versus long-term consequences. It is also an important consideration when the developmental level predisposes children to choose immediate gratification, while ignoring or failing to weigh their longer-term interests. The impact of developmental levels has been especially well documented as an issue in health-related decision making, both with respect to pregnancy decisions and more general health attitudes. The classic paradigm is the adult patient facing major surgery who asks, "Well, doctor, what are the odds?" The ability to weigh probabilities and to make some kind of long-term risk-benefit analysis is crucial to making an informed decision.

C. Concept Manipulation

The ability to manipulate concepts using a developmental model of

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consent has been well described elsewhere. The work of Jean Piaget demonstrated basic reasoning shifts which occur between so-called pre-operational, concrete-operational, and formal-operational stages of mental development. The key point is that the ability to integrate information to make reasoned decisions is limited by the developmental stage. This is especially true when the concepts to be manipulated and integrated are complex or numerous.

D. Consent, Permission and Assent

With respect to the interaction of developmental stages with competence to consent, a clear distinction is often made among the terms "consent," "permission," and "assent." To give consent, a person should be able to understand the facts and consequences relative to a


19. In the pre-operational stage (approximately ages 2-6) children are limited to their own experiences as a primary data base for decision-making. Fantasy and magical thinking are very powerful at this stage and may carry equal weight with more valid or reality-based data in a child's reasoning. While such children are very interested in their environment and interpersonal relations, their perspective is self-centered. Their understanding of other's behavior and their own experiences are interpreted chiefly in terms of how these happenings affect them personally. When they ask questions or observe event happening to others, such children interpret the events chiefly via projection and identification.

During the concrete-operational stage (approximately ages 7-11) the child for the first time becomes capable of truly taking the perspective of another person and using that data in decision-making. While observational learning and asking questions are obvious in much younger children, the concrete-operational child is able to integrate and reason with these data in a more logical and effective manner than was possible at an earlier developmental level. In addition, this is the stage at which children first become able to explore their motivation from the standpoint of another person.

With the arrival of formal operations (early adolescence onward) the child becomes able to use hypothetical reasoning. The way things are now is recognized as a subset of the way things might be for the first time. Cause and effect reasoning becomes generalized in a manner which permits the child to extrapolate and theorize about future events and outcomes. Likewise, the ability to understand contingencies and consider probabilities (e.g., "there is a fifty percent chance that you will get well without treatment . . .") will generally require the cognitive talents which do not arrive prior to formal-operational thought. Such thinking is obviously critical if a child is to make a decision regarding his or her long-term best interests.
decision and manifest that decision voluntarily. Usually the adjective "informed" precedes consent, implying that all of the data needed to reach a reasoned decision have been offered in a manner that has been understood. Often the person must have attained legal majority for the decision to be considered binding.

Increasingly, consent is being defined as a decision that one can make only for oneself. Thus, the term "proxy consent" is decreasingly used in favor of the term "permission." Parents are usually those from whom permission must be sought as both a legal and ethical requirement prior to intervening in the lives of their minor children.

Assent, a relatively new concept in this context, recognizes that minors may not, as a function of their developmental level, be capable of giving fully reasoned consent, but may still be capable of reaching and expressing a preference. Assent recognizes the involvement of the child in the decision-making process, while also indicating that the child's level of participation is less than fully competent.

Granting assent power is essentially the same as authorizing a veto. Obviously, veto power should not be offered to a child or other "incompetent" when the consequences of a poorly chosen option could be disastrous to the child in question. This is often the case when some high-risk medical procedure offers the only hope of long term survival or when the person in question is pre-verbal, mute on the matter, or comatose. In such situations, a substitute or proxy is needed.

The degree to which children ought to be permitted to make binding decisions on matters involving their own welfare is a matter of much controversy. Although the law has seldom been guided by psychological principles, a growing body of psychological studies are shedding new light on how children's decision-making capacities, as a function of development, interact with legal concepts.

V. PROXY DECISION-MAKING

Since the law generally regards children as incompetent per se, who is to speak for them? When a decision is to be made on their behalf, it is usually exercised by a parent, guardian, or other responsible party acting in loco parentis. The general assumption of the legal

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A. Are Parents Always the Best Decision-Makers?

The concept of substituted judgment presumes a great deal. Most notably, it assumes that the persons making the decision are willing and able to act in this capacity on the child’s best interests without a conflict of interests. Even within the loving, intact, family unit not all parental decisions regarding children are without conflicts of interest. Although parents often subordinate their needs and preferences to what they believe are the best interests of their children, this is not a universal phenomenon.

The courts have traditionally respected the sanctity of the family unit, and are quite reluctant to become involved without clear evidence of abuse, neglect, or similar dramatic turns of events. In the vast majority of situations, such deference to parental authority is appropriate. Unfortunately, the threshold for intervention is often set beyond the level where psychological problems are precipitated. That is to say, errors or decisions that are not in the child’s best interests often do not come to the attention of the legal system despite the fact that significant psychological harm may be occurring.

In some cases courts have recognized parental conflicts-of-interest and have ruled that the child’s rights are to be held paramount when parents’ and children’s rights conflict. In other cases involving substantive conflicts, courts have been willing to terminate parental rights. Such cases, however, are generally extreme exceptions. Recent Supreme Court decisions have belied a rather naive “parents know best” attitude. When such conflicts exist, children’s needs and rights are often lost in the struggle as adults contend with each other as advocates on one side or the other.

VI. PSYCHIATRIC HOSPITAL ADMISSIONS

One important aspect of children's constitutional rights involves the matter of psychiatric hospital admissions. Except for brief emergency commitments, adults cannot be hospitalized against their will without a formal judicial hearing at which they are represented by counsel. Those seeking civil involuntary commitment must show that such persons are dangerous to themselves or others, or are unable to care for themselves in the community. Because a parent may legally consent to a minor child's admission to a psychiatric facility on a "voluntary" basis, the child who objects to such treatment generally has no legal recourse. Such children have been called "reluctant volunteers."[27]

The Supreme Court has ruled on such matters in the Parham decisions.[28] The Parham case was a class action which revolved around the issue of whether minors can be involuntarily hospitalized in a psychiatric facility without a court finding that such confinement is warranted when "voluntarily" hospitalized by their parents.[29] This Georgia case brought the issue to the Supreme Court in the context of a "least restrictive alternative" argument. The suit was brought on behalf of several children who had been hospitalized at state psychiatric facilities on the basis on the basis of their parents' or guardians' consent, and sought their release or placement in less restrictive settings. In the Parham case, the key legal question was whether a hearing is necessary prior to involuntarily committing a minor to an inpatient psychiatric facility as would be required with an adult.[30]

The majority opinion authored by Chief Justice Burger noted that judges are ill-equipped to make such decisions, and that parents ought to be given considerable latitude in making decisions of this sort.[31] In addition, the opinion expressed the belief that the child actually gets a non-judicial hearing of sorts by the admitting psychiatrist who was

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26. Most states and the federal jurisdiction require a clear and convincing level of proof. Some, such as Massachusetts, require proof beyond a reasonable doubt. Mass. Gen. L. Ann. ch. 123, § 5, n.6 (1986).
29. Id.
30. Id.
31. Parham, 442 U.S. at 584.
deemed a kind of neutral fact finding expert who acted in place of a judicial one. The Chief Justice noted: "Although we acknowledge the fallibility of medical and psychiatric diagnosis, we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision . . . to an untrained judge." The Burger court assumed somewhat idealistically that the parent will inevitably act to promote the child's welfare. In addition, the court suggested that the medical officer at the hospital who authorizes the admission is actually providing the child with a kind of due process hearing obviating the need or even the wisdom of additional formal court proceedings.

In this romanticized view of the American family, the Burger Court asserted that "parents know best" and that they, in concert with the hospital's admitting officer, were adequate proxies for the child. The adolescent patients were deemed incompetent to request a hearing or otherwise assert any legal right to make a decision regarding the hospital admission consented to by their parents.

Although there is general agreement that the "least restrictive alternative" is the most desirable, the questions "How restrictive is necessary?" and "Who is best able to provide it?" remain difficult to answer. This type of situation has three problematic parts, which were not well considered in the Parham decision. First is the issue of the circumstances under which parents ought to be able to commit their child to a psychiatric hospital without extra-familial legal review. Another involves interpreting the meaning of the phrase "least restrictive alternative," and who ought to decide on such issues. The third part of the problem involves potential conflicts of interest when the for-profit sector of the mental health industry is involved.

The issue of hospitalizing children at profit making facilities has never been examined by the Supreme Court because all of the cases brought to its attention have involved public psychiatric facilities. Perhaps the Chief Justice was correct in suggesting that this is a matter best left to mental health experts. On the other hand, given the diversity of professional opinion which may exist, it is not unreasonable to permit opposing experts to be heard and evaluated when objections to the necessity of hospital admission are raised. This is especially true in light of the increasing number of proprietary psychiatric facilities oper-

32. Id. at 609.
33. Id.
34. Id. at 618.
35. Id. at 584.
This is not to imply that good psychiatric care is not possible at facilities which are operated for a profit. Rather, it is suggested that the admitting officer at such facilities may well have a conflict of interest when a potential patient arrives and an empty bed exists. Physicians at such proprietary hospitals are not infrequently stock-holders or participants in incentive compensation plans intended to maximize institutional profits and minimize costs. It may well be easier for the admitting officer at one of these hospitals to admit a patient now and worry about the necessity for hospitalization over the next several days. In this case one could argue that it is “better to be safe than sorry.” At the same time, it is not unusual to find that understaffed and cost-conscious public sector psychiatric hospitals will decline to admit a given patient on clinical grounds, although a private-sector proprietary hospital will admit the same patient so long as the family has sufficient financial resources to pay the bill. All too often the children’s length of stay at a private hospitals seems to coincide with the coverage limits of their parents’ insurance policy.

In addition, some health insurance plans provide much more extensive payment for in-patient treatment than for out-patient care. In such circumstances, a family of limited means might well have a strong reason to prefer in-patient over out-patient care for their child.36 Regrettably, no arguments on the economic, conflict of interest, or social policy data were presented to the Supreme Court when Parham was argued.37

The potential adverse side-effects of psychiatric hospitalization of children are many. Aside from the stresses of confinement and potential abuses of children that may occur in residential facilities, even a brief in-patient stay can result in lingering problems for patients. The message the child may believe is being communicated by the hospitalization itself; e.g., you are too sick or too bad to be cared for in our family, can damage a child’s self-esteem. Separation from the family and disruption of the parent-child relationship during a crisis may not

36. For example, a typical policy may provide up to $500 per year in out-patient treatment benefits, but offer 30-60 days of in-patient coverage. Even well intentioned parents might think that 30 days of “intensive treatment” might be better care for their child than the few out-patient visits covered by their policy.
37. 442 U.S. at 584.
be constructive. The psychiatric hospital can also be a place to learn some previously unconsidered behaviors, such as suicide attempts. Long term adverse effects of psychiatric hospital admission are also possible.  

VII. CONSISTENCY IN COURTS' APPROACH TO CHILDREN'S COMPETENCE  

Courts' views of children's competence are determined more by specific legal context than by psychological data. This is well illustrated by the juxtaposition of two Supreme Court decisions handed down on the very same day in 1979. One was Parham and the other decision was Fare v. Michael C. Michael C. was sixteen-years-old, the same age as some of the patients in the Parham case, and had been on probation to the juvenile court in Van Nuys, California since age twelve. He became a suspect in a murder case and was apprehended by the police who “read him his rights” using the standard Miranda warnings. Tape recordings of the interview tell us exactly what transpired at about 6:30 p.m. on February 4, 1976:

Police: “Do you understand all of these rights as I have explained them to you?”

Michael: “Yeah.”

Police: “Okay, do you wish to give up your right to remain silent and talk to us about this murder?”

Michael: “What murder? I don’t know about no murder.”

Police: “I’ll explain to you which one it is if you want to talk to us about it.”

Michael: “Yeah, I might talk to you.”

Police: “Do you want to give up your right to have an attorney

39. In Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), an adolescent was signed into a Pennsylvania psychiatric facility by his mother against his will. He was subsequently released on per order of the Federal District Court, and the case was never appealed further because Pennsylvania changed its law to permit judicial review of such cases. In a personal communication from Kevin Bartley's attorney, David Ferleger, I learned that subsequent to his release Kevin was turned down for at least one job on the basis of his "history of psychiatric hospitalization."

40. Parham, 442 U.S. at 584.


42. Id.


present here while we talk about it?"

Michael: "Can I have my probation officer here?"

Police: "Well, I can't get a hold of your probation officer right now. You have the right to an attorney."

Michael: "How I know you guys won't pull no police officer in and tell me he's an attorney?"

Police: "Your probation officer is Mr. Christiansen."

Michael: "Yeah."

Police: "Well I'm not going to call Mr. Christiansen tonight. . . . If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something you can, and if you don't want to say something you don't have to. That's your right. You understand that right?"

Michael: "Yeah."

Police: "Okay, will you talk to us without an attorney present?"

Michael: "Yeah I want to talk to you."

Michael then answered questions incriminating himself in the murder of Robert Yeager. Michael's attorney attempted to suppress the evidence gleaned through this interrogation, asserting that the request for the probation officer constituted an invocation of Fifth Amendment rights. A divided California Supreme Court agreed and reversed the juvenile court adjudication interpreting Michael's request as equivalent to a request to see his parents during interrogation. 45 The United States Supreme Court disagreed in a five to four decision. 46 Although the taped interview strongly suggests that Michael did not fully understand his civil rights, the Court's majority nonetheless expressed the belief that Michael, as a young man "experienced with the criminal justice system," was competent to waive his rights and confess to murder without consulting an attorney. The court was apparently not persuaded by Michael's apparent belief that the police would be allowed to trick him into confessing. 47

Contrasting the decisions in Parham and Michael C., the Court apparently has ruled teenagers are not competent to object to psychiatric hospitalization against their will, but are competent to confess to murder and potentially face a transfer from juvenile to criminal court and the death penalty without first consulting a lawyer. Both of these

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45. Id. at 10.
46. Fare, 442 U.S. at 707 (Marshall, Brennan, Stevens & Powell, JJ., dissenting).
47. Id.
opinions were rendered without benefit of psychological data. Furthermore, it is not at all clear that the court would have attended to pertinent psychological data had it been available. The "common knowledge" available to the justices seems their most relied upon source in such situations.

Through the lenses of the mental health professional these cases might seem linked by the common feature of adolescents’ competence to make decisions, a situation in which psychological research and input demands consideration. On the other hand, the lenses of the attorney might suggest that the case contexts are not at all similar. One involves civil commitment and the other a criminal prosecution.

VIII. CHILD CUSTODY

A. Background Information

Survey data suggests that ninety percent of custody decisions are made by divorcing spouses either through bargaining or mediation. In addition, fifty-five percent of judges who hear such cases reported that opinions from mental health experts are presented in less than ten percent of the cases they hear. A quarter of these judges indicated that such testimony is presented in the majority of contested custody cases in their courts. Unfortunately, most mental health professionals have little expertise which is directly relevant to custody disputes. Many of the issues to be resolved in such cases, such as, “parental responsibility,” are more appropriately within the purview of the judicial fact finder, rather than the mental health clinician. There is simply no hard scientific basis for addressing most of the questions that courts must decide in such cases; for example, there are no rigorous studies of the effects of various custody and visitation arrangements on children and families.

48. For example, the research on children’s understanding of such rights by as published in THOMAS GRISSE, JUVENILES’ WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE (1981); Thomas Grisso, Juveniles’ Consent in Delinquency Proceedings, in CHILDREN’S COMPETENCE TO CONSENT 131-48 (Gary B. Melton et al. eds. 1983).

B. What are the Proper Roles for Mental Health Professionals?

With nearly a third of marriages in the United States ending in divorce, it is no surprise that the number of child custody disputes being brought to probate and family courts around the country has increased significantly in the past few decades. There is general agreement that the two most appropriate roles for mental health professionals in the context of child custody decision-making are those of evaluator/investigator and mediator. Functioning as a skilled investigator or evaluator, the clinician is especially valuable to the courts when abuse or neglect has been charged. Mental health professionals can also assist the court by pointing out what is known or not known about psychological factors and their the effects of various custody arrangements. The clinician can also perform assessments of the parties, the home environment, extended family, etc., and report on these and other important variables to the court. Mental health professionals are split on the matter of whether testifying to the “legal issue” is acceptable.80

Clinicians with specialized training in dispute resolution can assist families in the negotiation process as mediators, while helping them to understand the needs and best interests of the child, at least to the degree that such interests can be reasonably determined. Care must be taken, however, to avoid switching among the roles of evaluator and mediator. In addition, the role of psychotherapist to one of the parties would conflict with functioning as either a mediator or evaluator.

50. An important area of controversy for clinicians who function as evaluators in child custody disputes is the matter of whether or not they should address or testify to “the ultimate legal issue” in their work. That is to say, whether or not the psychologist ought to make an actual custody recommendation to the judicial decision maker. Many psychologists think not, believing that such opinions are moral or legal matters beyond the expertise of the mental health professional. Child custody cases rarely involve questions of actual “parental fitness” in the sense that one or more is grossly unsuited to care for the child. Rather, the more usual issue is that of which parenting arrangement will serve the best interests of the developing child. In such instances the term “best interests” is a moral or legal concept, as defined by state law, not a psychological concept. For a full discussion of these issues, see generally MELTON, supra note 3, and LOIS A. WEITHORN, PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE (Univ. of Neb. Press 1987).
C. Constitutional Issues: Race

Few child custody disputes reach the appellate level by raising constitutional issues. One of the most dramatic of these cases involved issues of both racism and poorly framed psychological testimony.\textsuperscript{51} When Linda Sidoti Palmore and Anthony J. Sidoti, both Caucasians, were divorced in Florida during the spring of 1980, custody of their three year old daughter, Melanie, was awarded to the mother by mutual agreement.\textsuperscript{52} A year and a half later Mr. Sidoti sought custody because his ex-wife was cohabiting with a man of African-American descent, Clarence Palmore, Jr., to whom she was married two months later. Among the various claims at trial were psychological arguments that little Melanie Sidoti would be vulnerable to adverse peer pressures and social stigmatization as the result of living in a bi-racial home. The Florida courts then awarded custody to the father, much to the public's distress as seen in the national news broadcasts.\textsuperscript{53}

Psychological testimony had been introduced at the trial in support of the father's position, and was apparently heeded by the judge to some degree, even though it was not supported by any meaningful body of clinical or empirical data. Fortunately, the Supreme Court saw the issue as one of broader significance. Chief Justice Burger, writing for a unanimous Court noted, "Whatever problems racially-mixed households may pose for children in 1984 cannot support a denial of constitutional rights. . ."\textsuperscript{54} The case was sent back to be reheard, but by that time Mr. Sidoti had moved from Florida to Texas in violation of a Florida court order. Nonetheless, the Florida Court of Appeals ruled that they lacked further jurisdiction in the case, because of the change in residence, and the matter was left to the Texas courts to decide.\textsuperscript{55}

D. Constitutional Issues: Religion

Another interesting case addressed the issue of religious beliefs and child custody.\textsuperscript{56} Linnea and Edward Quiner were married in Los Angeles in 1961, had a child in 1962, and separated in 1963. Edward was awarded custody of their son at least in part on the basis of Lin-
nea's religious practices. She belonged to the Plymouth Brethren, also known as the "Exclusive Brethren." There were approximately 220 members of this group in greater Los Angeles at the time and their beliefs dictated that they keep "separate" from all those outside of their church. This separation included prohibitions against eating in public, secluding oneself from schoolmates, not affiliating with any social organizations, disavowing all forms of entertainment, proscription of all reading material except the Bible, and opposition to medical insurance.57

Although this would seem to be a case involving a custody decision based on religion, it is more properly regarded as based on an assessment of the more global adverse impact on a child's development which such a lifestyle could exert. This is the sort of case in which specialists on child development might be called upon to offer expert opinions regarding the long-term impact of specific child-rearing practices on the psychological well-being of the child. Although the local court granted custody to the father, the California Court of Appeals reversed the decision.58 It was in turn nullified by the California Supreme Court at which time the parties made an out of court settlement with the child going to reside with the mother in exchange for certain financial considerations to the father.59 So much for relying on the courts to protect the best interests of the child!

E. Constitutional Issues: Equal Access to Health Care

Another important series of cases involving child custody dealt with consent to medical procedures, rather than divorce.60 Phillip Becker was born on October 16, 1966, with Down's Syndrome.61 His parents, Warren and Patricia Becker placed him in institutional care shortly thereafter, and initially visited him frequently. As time went on their visits became less frequent, and they appeared to become more detached from him. When Phillip was three years old, a pediatrician advised his parents that he suffered from a congenital heart problem, ventricular septal defect, which affects significant numbers of children...

57. Id.
58. Id.
59. JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW (2d ed. 1985).
61. Phillip B., 188 Cal. Rptr. at 781.
with Down's Syndrome. The defect consisted of an opening between the lower chambers of the heart resulting in progressive vascular dysfunction and ultimately death by age thirty. Corrective open-heart surgery was suggested when Phillip was six, however his family took no action to investigate or remedy the problem. In 1972, Patsy and Herbert H. began working with Phillip as volunteers through the licensed residential facility where he lived. Phillip was visited and tutored by them frequently, and was ultimately able to attend a school for the trainable mentally retarded. As his parents became less frequent visitors, Phillip became increasingly attached to Patsy and Herbert H., visiting in their home with his parents' consent. Phillip began to refer to the Patsy and Herbert as "Mama Pat and Dada Bert." Faced with the need for medical and surgical treatment of the cardiac defect in mid-1977, Mr. and Mrs. Becker decided against it. They expressed the belief that they would be unable to care for Phillip in his later years and did not wish him to outlive them. This began a series of legal actions, including an unsuccessful effort to force surgical consent from them. Ultimately, limited guardianship was granted to Patsy and Herbert H., who authorized medical care for Phillip.

F. Unifying Themes

In each of the custody cases presented here a variety of psychological factors were significant elements. In Palmore v. Sidoti the psychological testimony was incompetent, in Quiner v. Quiner, psychological issues were ignored in light of the parents' settlement, and in In re Phillip B., the psychological issues were trivial compared to the medical risks the child faced. These constitutional matters were resolved chiefly by the jockeying of adult advocates, rather than on their merits considering the rights of the children involved.

IX. Corporal Punishment

Although most states ban corporal punishment in public schools, this is not universal. Many states, including Florida, still permit teachers to administer physical punishments as a means to promote disci-
Discipline. Although psychologists tend to view this practice as little more than officially sanctioned abuse of children, the United States Supreme Court has refused to consider school administered corporal punishments as “cruel and unusual,” even when the result is significant physical injury to the child.

James Ingraham and Roosevelt Andrews had the misfortune to run afoul of an assistant principal at Drew Junior High School in Dade County, Florida, during October, 1970. Because they were slow to respond to teacher’s instructions, James was subjected to 20 “licks” with a half-inch thick wooden paddle across his buttocks. He suffered a hematoma and was out of school for several days. Roosevelt was paddled several times and on one occasion was without the full use of his arm for a week.

Although a federal appeals court found the punishment, “so severe and oppressive as to violate the Eighth and Fourteenth Amendments . . . ,” the Supreme Court opinion66 expressed the belief that common law remedies, rather than Constitutional ones were sufficient in this case. That is to say, the routine local oversight of the schools by the school board and local court action should have resolved the matter. The reasoning in the opinion reflected no awareness of, or interest in, the significant body of psychological literature in both interpersonal relationships and learning theory which shows that aggression tends to breed aggressive behavior. A common rationale cited by supporters of official corporal punishment tends to be, “It taught me a lesson when I was their age.” Of course, all that is truly taught with such techniques is how to pass on the tradition of abuse.

X. Final Observations

Legal battles over children’s rights are probably more accurately conceptualized as adults advocating their own civil liberty viewpoints using children as surrogates. This is not necessarily inappropriate, but, unfortunately, seldom helps specific children in the short-run. The legal system and appellate process are ponderously slow when compared with the more rapid pace of normal child development. For example, a custody battle that plays out over two years has taken up half the life of a four-year-old. Similarly, by the time decisions were rendered on important cases involving freedom of speech67 or search and seizure abuses68

67. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); Tinker v. Des
the issues were long since cold ones for children at the heart of the matter. School suspensions, a botched graduation ceremony, and a strip search in the school nurse's office are psychological indignities that cannot be righted with a court decision years later. In the end, it remains important for both mental health professionals and attorneys to peer through each other's lenses every once and a while.

The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent

Janet Leach Richards*

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* Professor, Cecil C. Humphreys School of Law, Memphis State University. B.A. 1969, J.D. 1976, Memphis State University; LL.M. 1987, Yale. The author gratefully acknowledges the contributions of research assistants Christina Burdette, Elizabeth Cashman, Stacy Mojica, and John Penton. Research for this article was supported by a summer grant from Memphis State University.
I. INTRODUCTION

In custody disputes between two natural parents, usually arising in the course of divorce proceedings, the standard applied by the courts to determine custody is “the best interest of the child” test. The court awards custody to one or both parents based on the court’s determination as to what is in the child’s best interest. Neither parent’s interest is superior to the other in determining custody and the child’s interest is superior to either parent’s interest.

A different scenario may result if one of the parties to the custody dispute is not a natural parent. In custody disputes between a natural parent and a third party, most courts apply a natural parent preference or presumption to some degree. If strictly applied, this standard results in custody automatically being awarded to the natural parent, absent a showing of parental unfitness sufficient to overcome the presumption. However, such a result may not be in the child’s best interest. This is particularly true where the child has been in a stable environment in the custody of the third party over a period of years and has had virtually no contact with the natural parent. This situation is becoming more common as the number of divorces increase, resulting in increasing numbers of children who are being reared by stepparents or grandparents.

On the other hand, there is a need to protect the sanctity of the parent-child relationship. The natural parent preference serves that purpose, especially where the state is seeking custody of the child. This is also generally true where the third party has not had de facto physical custody of the child. Often, grandparents will object to their children’s lifestyles or parenting styles, particularly when the couple is involved in a divorce, and will seek custody of their grandchild. Courts should guard against attempts by a third party to obtain custody of a child where the third party has not established a parental relationship with the child and where the only basis for the change in custody is the natural parent’s “non-traditional” parenting or life style. The best interest test does not adequately protect young parents in this situation. As the Supreme Court of Wisconsin observed in *Barstad v. Frazier:* 2

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1. The scope of this article is limited to cases dealing with the issue of physical custody as opposed to visitation rights (in which the test is more liberal) or termination of parental rights (in which the test is more strict).
2. 348 N.W.2d 479 (Wis. 1984).
When a parent is young, the physical, financial and even emotional factors may often appear to favor the grandparents. One cannot expect young parents to compete on an equal level with their established older relatives. So the “best interest” standard cannot be the test. If it were we would be forced to conclude that only the more affluent in our society should raise children. To state the proposition is to demonstrate its absurdity.

Not only is the older relative likely to be more established financially, but they are likely to have more free time to devote to the child and will probably reflect more closely the same values held by the members of the bench. Parents should not lose custody of their children simply because someone exists who wants the child, or can be a “better parent” to the child, and can offer the child greater material opportunities.

This article addresses the need to balance the competing interests in a way that will keep the best interest of the child paramount. In doing so, the article reviews the standards applied by various courts. It also looks at the expanding definition of parent and suggests a new approach for resolving custody disputes that preserves the judicial economy of the natural parent preference, but only to the extent that it is consistent with the child’s best interest. This result is achieved by retaining the parental preference presumption and expanding the definition of parent to include those persons who have established a parental relationship with the child.

This recommended approach involves a balancing of interests. Society's interest in judicial economy and predictability and the parent's interest in protecting and exercising parental rights must give way to society's and the child's interest in having the most circumspect decision making process available in this all important judgment which dramatically affects the child's future.

Applying this approach, if a third party has functioned as a parent toward the child, that third party would also enjoy the protection of the natural parent preference and the standard for determining custody as between the “third party parent” and the natural parent would be the best interest of the child.

The parental presumption would not apply to a third party who had not functioned as a parent toward the child but, nevertheless, sought custody as against a natural parent. In such a case, the parent-child relationship would be protected by the natural parent preference,

3. *Id.* at 483 (citation omitted).
absent proof of parental unfitness sufficient to overcome the preference. This approach protects a parent against well-intentioned but interfering grandparents or other third parties, including a state, which disapproves of the parent’s life style or parenting practices, where it cannot be shown that the parent is unfit. At the same time, it would protect a child from being uprooted from a stable, loving relationship with a third party who has been acting as a parent, simply because a natural parent, who is not unfit, decides to claim custody. The approach seeks to preserve the benefits of the natural parent preference, but only to the extent that it is consistent with the best interests of the child.

II. THE NATURAL PARENT PREFERENCE

A. Background

In all custody disputes, the standard applied is the best interest of the child. In custody disputes between natural parents and third parties, courts often employ a rebuttable presumption in favor of the natural parents. This is based on the assumption that the best interest of the child will be served by granting custody to the natural parent over the third party. As noted by a Pennsylvania court:

This rule is based logically upon the experience of mankind that blood is thicker than water and that a natural parent will normally expend greater effort and sacrifice on behalf of a child than will a stranger or a third party, especially when the going gets rough in times of economic, medical or other difficulty. 4

Sometimes the parent’s interest and the child’s interest are not compatible. When that occurs, courts are called upon to decide whether the parental preference is grounded in the parent’s rights or the child’s interests. As early as 1824, Judge Story recognized that the parental preference should be grounded in the best interest of the child and not “on account of any absolute right of the father.” 5

5. United States v. Green, 3 Mason 482 (Cir. R.I. 1824). The issue of a constitutional right to custody has been explored and discounted by other scholars and is outside the scope of this article. See HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.6, at 527-29 (1987); Eric Salthe, Note, Would
Most states still recognize the natural parent preference in some form. In most instances, the presumption in favor of the natural parent is based on a common law presumption, but some states have passed legislation codifying the natural parent preference.

One advantage of the presumption is judicial economy in that it provides consistency and predictability in custody decisions and stream-
lines the proof to be considered by the court. The presumption also protects the sanctity of the parent-child relationship, promotes family unity and discourages third party interference.

The natural parent preference is not conclusive. It is a rebuttable presumption. The strength of the presumption and the grounds for its rebuttal vary from state to state. The various grounds for overcoming the natural parent presumption will be discussed below.

B. Rebutting The Natural Parent Preference

1. Parental Unfitness

Traditionally, the presumption in favor of the natural parent could be overcome only by finding the natural parent unfit. This view is still followed in a number of states, and is based on a recognition of parental rights rather than child rights. The Supreme Court of Arkansas, in Schuh v. Roberson, reaffirmed this priority:

The law recognizes the preferential rights of parents to their chil-

8. Schuh, 788 S.W.2d at 741; Peterson, 491 N.E.2d at 1152.
10. Durkin, 442 N.W.2d at 152-53.
Richards

dren over relatives and strangers, and where not detrimental to the
welfare of the children, they are paramount, and will be respected,
unless special circumstances demand that such rights be ignored.
Courts are very reluctant to take from the natural parents the cus-
tody of their child, and will not do so unless the parents have mani-
fested such indifference to its welfare as indicates a lack of inten-
tion to discharge the duties imposed by the laws of nature and of
the state to their offspring suitable to their station in life.\textsuperscript{12}

This subordination of child rights to parental rights is repugnant to the
underlying rationale of custody determinations, the best interest of the
child. Where the presumption in favor of natural parents is not
grounded in the best interest of the child, it should fail.

In an earlier Arkansas Supreme Court decision\textsuperscript{13} involving a step-
parent, the Chancellor granted joint custody to the mother and steppar-
ent father upon a finding that both were fit parents. The parties had
married when the child, now five, was only three months old. The par-
ties shared custody of two children of their own. The Arkansas Su-
preme Court reversed, holding that custody could be awarded to a step-
parent only where the natural parent was shown to be unfit. The court
cited the only statutory authority on point as requiring that custody
decisions be made “solely on the basis of the welfare and best interest
of the child . . . ”\textsuperscript{14} Obviously, where the chancellor found both par-
ties to be fit and where the parties shared joint custody of their two
children, it is at least plausible that it might be in the child’s best inter-
est to share custody with his natural mother and his stepfather, “the
only father that [the child] had ever known . . . .”\textsuperscript{15}

The lower court’s determination that joint custody with the natu-
ral mother and stepfather was in the child’s best interest was ignored
and rendered moot by the Arkansas Supreme Court’s insistence on the
blind application of the natural parent preference in the absence of pa-
rental unfitness. This decision was made in the face of a statute specifi-
cally requiring custody decisions to be made based on the best interests
of the child.

The Arizona Supreme Court, in Clifford v. Woodford,\textsuperscript{16} was
presented with similar facts and law, yet reached the opposite result,

\begin{itemize}
    \item \textsuperscript{12} Schuh, 788 S.W.2d. at 741.
    \item \textsuperscript{13} Stamps v. Rawlins, 761 S.W.2d 933 (Ark. 1988).
    \item \textsuperscript{14} \textit{Id.} at 935 (quoting \textsc{Ark. Code Ann.} § 9-13-101 (Michie 1987)).
    \item \textsuperscript{15} \textit{Id.}
    \item \textsuperscript{16} 320 P.2d 452 (Ariz. 1957).
\end{itemize}
affirming custody in the stepparent. The court in *Clifford* affirmed the rule that the natural parent preference could be overcome only by showing the parent to be unfit, but held that "[t]he children have rights that we have consistently held to be superior to even the parents, in that, the court will always look to their best interest in determining their custody." The court found that the father's conduct showed "little, if any, love or affection for . . . [or] interest in" the children over a twelve year period, and yet the court also stated that, "[n]othing herein in any way reflects adversely upon the character, the morals or the fine home and family of [the father]." The court clearly applied a best interest test while articulating a parental unfitness standard:

[W]e are of the view that Clifford's lack of interest in his children, his indifference toward them and neglect of them, was such as to justify the trial court in finding that to tear the children away from the only genuine father they have ever really known and from [step-siblings] whom they love as much as they love each other and place them in the home of Clifford in an entirely strange environment would not be for their best interest and welfare, and we agree that it might well produce scars upon their minds and hearts which time could never efface.

At least one state, Georgia, not only requires a showing of present parental unfitness to overcome the natural parent preference, but also requires that the proof of present unfitness be shown by clear and convincing evidence. This standard prevents a court from awarding cus-

17. *Id.* at 455.
18. *Id.* at 458.
19. *Id.* at 460.
20. *Id.* at 458. This was a 3-2 decision in the Supreme Court of Arizona. The dissent argued:

[T]he right of a parent to the care and custody of a child cannot be taken away merely because the court . . . may believe that some third person can give the child better care and greater protection. One of the natural rights incident to parenthood, a right supported by law and sound public policy, is the right to care and custody of a minor child, and this right can only be taken away from or denied a parent upon proof that the parent is unfit to have such care and custody.

*Id.* at 460 (Johnson, J., dissenting).
custody to a third party, even when it is shown that to do so would be in
the overwhelming best interest of the child. The “clear and convincing”
standard has been applied in Georgia even in the face of a statute
that expressly states that the proper test is “the best interest of the
child” where a third party petitions the court upon the death of one
parent. The Georgia Supreme Court has justified the higher standard
based on the “[s]tate's legitimate interest in protecting the child, yet
forestall[ing] arbitrary state interference with the integrity of the fam-
ily unit” as well as the need to protect against judicial arbitrariness
that might deny parental custody based on “a few isolated instances of
unusual conduct [or] . . . idiosyncratic behavior.” Delaware has gone
even farther in the direction of favoring parental rights. Delaware's
statute provides that custody shall not be granted to a third party with-
out first finding that the child is dependent or neglected and that the
child should not be placed in the custody of one of the parents.

The above justification is reasonable when parental custody is
challenged by the state or even a non-custodial third party, such as
well intentioned grandparents. Absent divorce or a related proceeding,
the court cannot deprive a parent of custody of a child without first
finding the parent to be unfit or to have neglected or abandoned the
child. It would be repugnant if courts were able to remove children
from the custody of their fit parents simply because someone who
wanted custody could prove themselves “more fit” than the parents.
The natural parent preference serves a useful purpose when applied in
contests between parents and third parties who have not “parented” the
child. The test fails, however, to adequately protect the child's best in-
terest when the custody dispute is between the natural parent and a
third party who has acted as the functional equivalent of a parent to
the child.

23. GA. CODE ANN. § 19-9-2 (Michie 1991) provides: “[U]pon the death of ei-
ther parent, the survivor is entitled to custody of the child; provided, however, that the
court, upon petition, may exercise discretion as to the custody of the child, looking
solely to the child’s interest and welfare.”
24. Blackburn, 292 S.E.2d at 825.
25. Id. (quoting Santosky v. Kramer, 455 U.S. 745, 764 (1982)).
26. DEL. CODE ANN. tit. 13, § 721(e) (Supp. 1990); Martin v. Sand, 444 A.2d
27. In re Baby Girl Eason, 358 S.E.2d 459, 463 (Ga. 1987) (unwed father
sought custody of his child as against strangers seeking to adopt with mother's ap-
proval). The court stated, “[I]f he is fit he must prevail.” Id.
2. Abandonment

Abandonment of a child can result in loss of the natural parent preference. Absent clear proof, courts are generally reluctant to find abandonment. In *Milligan v. English*, the New York Supreme Court, Appellate Division, found insufficient evidence of abandonment even though the mother had consented to a transfer of guardianship to the third party, because the mother was "young, unmarried and immature at the time her daughter was born . . . ." The third party assured the mother that the guardianship was revocable at any time and the mother continued to have almost daily contact with her child. Custody in the mother was affirmed.

The *Milligan* opinion does not indicate the age of the child or the length of time spent in the home of the third party. However, this was clearly an important consideration in *Bennett v. Jeffreys*, where a fifteen-year-old unwed mother, under pressure from her family, transferred custody of her newborn to a family friend. Eight years later, now twenty-three years old and about to graduate from college, the mother sought custody of the child. The New York Court of Appeals held that, although there was no abandonment, the extended disruption of custody created an extraordinary circumstance sufficient to overcome the parental preference. The focus should be on what is best for the child rather than whether the parent has been guilty of sufficiently culpable behavior to deprive him or her of a right to custody.

3. Positive Detriment to the Child

Some states provide that the presumption in favor of the natural

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30. Id. at 498.
31. Id.
32. Id.
34. Id. at 280.
35. Id. at 283.
parent can be overcome by showing that parental custody would be
detrimental to the child. Louisiana, by statute requires a showing that
parental custody would be detrimental to the child and that an award
of custody to the third party would serve the child's best interests.
Although the language of the statute applies only to custody disputes
incidental to divorce or judicial separation, the appellate courts of Lou-
isiana have both used the statute as a guideline, and found it to be
applicable in other custody disputes as well.

In Hughes v. McKenzie, the Louisiana Court of Appeals af-
irmed an award of custody of a four-year-old child to third parties who
had cared for her all her life. The child had been voluntarily placed
with the third party, a cousin to the natural mother, at a time when the
natural mother and her husband were experiencing marital difficul-
ties. The child had a stable home with the third parties. The court
chose to apply the two-pronged statutory test even though the custody
dispute was not incidental to a divorce proceeding. In so doing, the

§ 752 (West Supp. 1991) (no parental preference where parental custody would place
the child in jeopardy as defined in tit. 22, § 4002(6)); TEX. FAM. CODE ANN. §
14.01(b)(1) (West Supp. 1991); In re Guardianship of D.A.McW., 460 So. 2d 368
(Fla. 1984); In re Custody of Stell, 783 P.2d 615 (Wash. Ct. App. 1989).

37. LA. CIV. CODE ANN. art. 131 (West 1991).
38. The term "detrimental to the child" has been defined as including "parental
unfitness, neglect, abuse, abandonment, and forfeiture of parental rights, and is broad
enough to include any other circumstances, such as prolonged separation of the child
from its natural parents, that would cause the child to suffer substantial harm."
& Chin-Chin Ho, Child Custody Awards to NonParents Under article 146(B), 33 LOY.
L. REV. 51, 59 (1987)).
40. Hughes, 539 So. 2d at 969-70 (citing McManus v. McManus, 528 So. 2d
Pounders v. Rouse, 528 So. 2d 672 (La. Ct. App. 1988); In re Bourg, 501 So. 2d 862
(La. Ct. App. 1987); In re Custody of Reed, 497 So. 2d 1084 (La. Ct. App. 1986);
42. Id. at 966. The natural mother and her husband both believed that the hus-
band was not the biological father of the child although the mother and her husband
were married when the child was conceived and born.
43. Id. at 966-67. The cousin was married to her second husband at the time she
received custody of the child, then three days old. The cousin later married her third
husband. The child had lived with the cousin and her third and current husband for
most of her life.
44. Id. at 970.
court found that an award of custody to the parents would be detrimental to the child based on "the significant trauma that Sophie would suffer upon being abruptly and permanently removed from the McKenzie home, coupled with the real danger of being placed in a home of doubtful stability with parents who had not demonstrated a significant commitment . . . ."45 Although custody was given to the third parties, the natural parents were awarded liberal visitation and the court’s order specifically provided that the natural parents were not precluded from seeking custody in the future.46

Alaska also recognizes "clear detriment" to the child’s welfare as a basis for overcoming the natural parent preference. The Alaska courts have read the requirement broadly to focus on the child’s needs rather than the parent’s shortcomings. In Buness v. Gillen,47 the Supreme Court of Alaska noted that "severing the bond between the psychological parent and the child may well be clearly detrimental to the child’s welfare."48 This approach represented a shift in focus from earlier cases as evidenced by the court’s quoting approvingly from the dissent in a 1982 appellate opinion:

[H]ere, stability itself may be the most salient consideration. To remove Shannon from the only stable home environment she has known would sever her bond to her “psychological parent”, and to her “siblings.” Such considerations are sufficient, in my view, to establish a showing of clear detriment.49

This is the proper direction for the court to take. It recognizes the parental preference, but not at the expense of the child’s interests.

The Texas legislature has been moving in the opposite direction. The relevant statute previously provided that the natural parent preference could be overcome by a showing that parental custody would not be in the child’s best interest.50 The statute was amended in 1987 to provide that the natural parent presumption could be rebutted by showing that parental custody would not be in the child’s best interest “because the appointment would significantly impair the child’s physical

45. Id. at 971.
46. Id.
47. 781 P.2d 985 (Alaska 1989).
48. Id. at 989 n.8.
50. TEX. FAM. CODE ANN. § 14.01(b) (West 1986).
health or emotional development." The Supreme Court of Texas interpreted this amendment as "a significant change greatly strengthening the parental presumption . . . ." As the court stated, there may be a number of reasons why parental custody might not be in the child's best interest, but now only a showing of significant impairment of the child's physical health or emotional development is sufficient to rebut the parental presumption.

The Texas Supreme Court reversed both lower courts in *Lewelling v. Lewelling*, and ordered the trial court to grant custody to the mother. The lower courts had been persuaded by the following facts: the mother was unemployed, lived in a small house with her mother and other family members, had previously visited the state hospital for alleged mental problems, failed to see her child for two months after her husband beat her and took their child to his parents' house, and had continued to see her husband following the abuse and testified that she might consider reconciliation if he sought counseling. The supreme court found no evidence that parental custody would impair the child emotionally or physically. This obviously is not the same as finding that parental custody would be in the child's best interest.

The Supreme Court of Florida has also interpreted the natural parent preference narrowly to protect parental rights on the theory that, "[t]o hold otherwise would permit improper governmental interference with the rights of natural parents who are found fit to have custody of and raise their children." In *In re Guardianship of D.A. McW.*, the unwed father petitioned the court for custody of his child after the mother's death. The mother and child had been living with the maternal grandmother who also sought custody of the child. The trial court found the father to be fit but also found that the best interest of the child would be served by giving custody to the grandmother who had cared for the child and in whose home the child had always lived. The Supreme Court of Florida affirmed custody in the

53. *Id.* at 168-69.
54. *Id.* at 165.
55. *Id.* at 167.
56. *Id.* at 369.
57. *In re Guardianship of D.A. McW.*, 460 So. 2d at 370.
58. 460 So. 2d 368 (Fla. 1984).
59. *Id.* at 369.
60. *Id.*
father, citing the natural parent preference rule which the court said
was "older than the common law itself."61 Having "parented" the
child, the grandmother should have received the protection of the pa-
rental preference. If the court had adopted this rationale, it would have
determined custody according to the child's best interest, just as it
would have done had the dispute been between two natural parents.

The Florida Fourth District Court of Appeals did find sufficient
evidence of detriment to the child in the case of a fourteen-year-old girl
who had lived with a woman for thirteen years after her father killed
her mother.62 The father sought custody upon his release from prison,
having cut all ties with the child while incarcerated.63 The third party
was awarded custody and the father received reasonable visitation priv-
ileges.64 Obviously, this was not a proper case for parental custody, yet
cases should not have to be this extreme for the court to award custody
to a third party.

4. Absence of Stable and Wholesome Home

Hawaii recognizes the natural parent presumption but extends its
protection to "any person who has had de facto custody of the child."65
The statute further provides that the presumption may be overcome by
a showing of unfitness or by proof that the home "is not stable and
wholesome."66 Hawaii comes closest to applying the approach advo-
cated in this article.

5. Best Interest of the Child

Other states67 provide that the parental presumption can be over-

61. Id. at 370.
63. Id. at 523.
64. Id. at 524-25.
HAW. REV. STAT. § 571-46(1) (1990)).
if it seems expedient or for the benefit of the children); Mich. Comp. Laws Ann. §
722.25 (Supp. 1991) (clear and convincing proof required); Mo. Rev. Stat. §
(Supp. 1992); Durkin, 442 N.W.2d at 152-53; In re B.W.D., 725 S.W.2d 138, 139
(Mo. Ct. App. 1987); In re Grover, 681 P.2d 81 (Okla. 1984); Commonwealth ex rel.
come by a showing that parental custody is not in the child’s best interests. The Supreme Court of Colorado in *Root v. Allen*\(^{68}\) recognized a presumption in favor of the natural parent but found that the presumption could be overcome by a determination that the child’s best interests would not be served by placing custody with the natural parent. There was no requirement that the parent be shown to be unfit. In fact, the father had been determined to be a fit and proper person to have custody.\(^{69}\) The court determined, however, that the best interests of the child would be served by allowing her to remain with her stepfather and his new wife. The court’s determination was based on the fact that the child had lived with the stepfather most of her life and that she, “for all practical purposes, was the true daughter of [the stepfather].”\(^{70}\)

Iowa recognizes a natural parent preference that is statutorily mandated but which can be overcome by a showing that such placement is not in the child’s best interest.\(^ {71}\) In *Painter v. Bannister*,\(^ {72}\) the father left his five-year-old son with the maternal grandparents following the death of the mother. Sixteen months later, after remarrying, the father sought the return of his son. The grandparents were found to provide “a stable, dependable, conventional, middle-class, middle-west background and an opportunity for a college education and profession, if [the child] desires it.”\(^ {73}\) The father, on the other hand, was found to offer “more freedom of conduct and thought with an opportunity to develop his individual talents. It would be more exciting and challeng-

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\(^{69}\) 377 P.2d. 117 (Co. 1962). The natural father brought this habeas corpus proceeding to obtain custody of his daughter following the death of the natural mother. *Id.* at 118.

\(^{69}\) *Id.* at 119. The trial court found that the father had faithfully paid child support as ordered by the court, had remarried and had “an adequate and desirable home in California”. *Id.* On the other hand, he did not write or send birthday or Christmas gifts and visited his daughter only once for an hour and a half, introducing himself as a family friend. The trial court found that the father “abandoned his obligations as father . . . [e]ven if he did so in the belief that it was for the best interest of the child”. *Id.*

\(^{70}\) *Id.* at 121. The holding of *Root v. Allen* was reaffirmed by the Supreme Court of Colorado recently in *Abrams v. Connolly*, 781 P.2d 651 (Colo. 1989).


\(^{73}\) *Id.* at 154.
ing in many respects, but romantic, impractical and unstable." More-
over, the court concluded that the father's home would be "unstable,
unconventional, arty, Bohemian, and probably intellectually stimulat-
ing." The father was found to be fit, but the Supreme Court of Iowa,
nevertheless, awarded custody to the maternal grandparents upon a
finding that return of custody to the father was "likely to have a seri-
ously disrupting and disturbing effect upon the child's development." Although the court articulated a fairly strict standard for overcoming
the natural parent preference, the case can be criticized as one in
which the court applied its own value system and engaged in social
engineering at the expense of the nuclear family. The case also illus-
trates the dilemma of young parents who are forced by circumstances
to call upon third parties for temporary custodial services but who do
so at the risk of losing custody of their children to those very persons
the parents turned to for help.

Later opinions from the Supreme Court of Iowa are more respon-
sive to this criticism regarding the plight of parents who need help in
caring for their children but who face possible loss of custody by ac-
cepting that help. In 1985, \textit{In re Guardianship of Stewart}, the court
stated:

\begin{quote}
Our cases have emphasized that parents should be encouraged in
time of need to look for help in caring for their children without
risking loss of custody. The presumption preferring parental cus-
tody is not overcome by a mere showing that such assistance was
obtained. Nor is it overcome by showing that those who provided
the assistance love the children and would provide them with a
good home. These circumstances are not alone sufficient to over-
come the preference \ldots.
\end{quote}

This stricter standard was easily met in \textit{Smith v. Holt}, where the
parent was denied custody. In this case, the father was found to be an
alcoholic and never to have shown a real interest in the child. He was
twenty-nine and single at the time of trial, living with his parents after

\begin{footnotes}
74. Id.
75. Id. at 156.
76. Id.
77. 369 N.W.2d 820 (Iowa 1985).
78. Id. at 823 (quoting \textit{In re Guardianship of Sams}, 256 N.W.2d 570, 573
(Iowa 1977)); \textit{accord In re Burney}, 259 N.W. 2d 322, 324 (Iowa 1977).
79. 225 N.W.2d 906 (Iowa 1975).
\end{footnotes}
three marriages, publishing a “swinger” magazine and working as a night watchman, despite having a college degree and a teaching certificate. 80

The Iowa Supreme Court in Painter and Smith seems to be applying a more stringent test for overcoming the natural parent preference than that set forth by the Supreme Court of Colorado in Root. It was sufficient to overcome the presumption in Root simply by showing that the welfare of the child would not be promoted by custody with the natural parent. In contrast, the Iowa court stated that the best interest test would prevail over the natural parent preference “if the return of custody to the father is likely to have a seriously disrupting and disturbing effect upon the child’s development . . . .” 81 Conversely, the court in Root went on to state that returning custody to the natural parent “would be extremely detrimental to the child and would likely result in permanent damage to her personality and development.” 82 As a practical matter, the courts in Iowa and Colorado may be applying very similar tests, although the rhetoric is different.

A Michigan statute 83 provides that custody disputes will be decided by the best interest standard and presumes that the best interests of the child are served by parental custody unless the contrary is shown by clear and convincing evidence. That burden was met in Prawdzik v. Hiner, 84 where custody was awarded to the grandparents with whom the five-year-old child had lived since he was three months old.

6. Finding the Welfare of the Child so Requires

Although the Alaska Supreme Court recognizes a common law preference in favor of the natural parent, it has allowed the courts to consider the child’s interests over the parents’ rights in cases involving third parties. The natural parent preference can be overcome by showing that “the welfare of the child requires that a non-parent receive custody.” 85

In Buness v. Gillen, the third party had lived with the child and

80. Id. at 909.
81. Painter, 140 N.W.2d at 156.
82. Root, 377 P.2d at 121.
his mother and had fathered the child's stepsister. The third party had been the primary custodian of the child for most of his life and had developed a close bond with the child over a ten year period. The Alaska Supreme Court, in reversing a summary judgment in favor of the mother and remanding for further proceedings, commented as follows:

We conclude that there exists a genuine issue of material fact as to whether the welfare of the child requires that Tim receive custody. There is evidence in the record in the form of a report by a school psychologist as to a highly emotional response by Tucker upon learning that he was to be taken out of Tim's home. This points to the strong emotional bond that may have developed between Tim and Tucker over the past ten years. During this period Tim has been Tucker's primary care-giver and father figure.

The court concluded that the foregoing facts raised a genuine issue of material fact such that the case should not have been resolved on summary judgment.

7. Voluntary Forfeiture

Some states recognize voluntary forfeiture as one of the limited grounds for overcoming the natural parent preference. Nebraska has read a forfeiture provision into a statute that purports only to apply a best interest standard. The Nebraska statute dealing with custody of minors in divorce actions states that the appropriate test to be applied is the best interest of the child. The Supreme Court of Nebraska, however, has interpreted the best interest test to include "due regard

86. Buness, 781 P.2d at 986.
87. Id. at 989. The third party also contributed 99% of the financial support for both children. Id. at 986.
88. Id.
89. Id.
90. Tex. Fam. Code Ann. § 14.01(b)(2)(A) (Supp. 1992); Ex parte Mathews, 428 So. 2d 58 (Ala. 1983); Glass v. Bailey, 118 N.E.2d 800 (Ind. 1954); Peterson v. Peterson, 399 N.W.2d 792 (Neb. 1987); Merritt v. Way, 446 N.E.2d 776 (N.Y. 1983); Bailes v. Sours, 340 S.E.2d 824 (Va. 1986); Ford v. Ford, 303 S.E.2d 253, 255 (W. Va. 1983) (where parent has "waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody").
for superior rights of a fit, proper and suitable parent." The Supreme Court of Nebraska has determined that proper recognition of the superior rights of parents prohibits courts from depriving the natural parent of custody absent a showing of unfitness or forfeiture of parental rights. Such interpretation is certainly not mandated by the statute which mentions only a best interest standard. In fact, the requirement that a court must give custody to the parent absent a showing of unfitness or forfeiture, might prevent the court from acting in the child's best interest in a given case. For example, as was pointed out in the dissent in Nielsen v. Nielsen, it is conceivable that it would be in the child's best interest not to be placed in the custody of a terminally ill parent who is unable fully to parent. Yet, under the court's test, custody could not be denied without first finding the dying parent to be "unfit."

8. Absence of Parental Characteristics

In Utah, the natural parent preference is based on:

[t]he common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.

The presumption cannot be rebutted merely by showing that the third party would be a better custodian. Instead, the third party must show that the parent presently lacks all three characteristics which form the basis of the presumption, i.e., "that no strong mutual bond exists, that the parent has not demonstrated a willingness to sacrifice his or her own interest and welfare for the child's and that the parent lacks the sympathy for and understanding of the child that is charac-

92. Peterson, 399 N.W.2d at 797 (quoting Nielsen v. Nielsen, 296 N.W.2d at 488).
93. Peterson, 399 N.W. 2d at 797; see also Ex parte Mathews, 428 So. 2d 58 (Ala. 1983) (unfitness or voluntary forfeiture).
94. 296 N.W.2d 483, 489 (Neb. 1980) (Krivosha, C.J., concurring in part, and dissenting in part).
95. Hutchinson, 649 P.2d 38, 40 (Utah 1982) (quoting Walton v. Coffman, 169 P.2d 97, 103 (Utah 1946)).
characteristic of parents generally." If the presumption is rebutted, the standard to be applied to the custody determination is the best interest test.

9. Inability to Care For Child

Wisconsin statutes provide that the natural parent is entitled to custody unless the parent is unable to care for the child. In Barstad v. Frazier, the mother was sixteen-years-old and living with her father when the child was born. The trial court awarded custody to the grandmother, based in part on several periods of separation between mother and child. The supreme court reversed finding that the periods of separation reflected not neglect of parental responsibilities or lack of interest in the child's welfare, but rather "the efforts of a very young mother to establish her own home which included her son."

10. Loss of Physical Custody in Parent

The natural parent preference may be lost by surrendering physical custody to a non-parent in those jurisdictions that have adopted

96. Hutchinson, 649 P.2d at 41; see also Barstad v. Frazier, 348 N.W.2d 479 (Wis. 1984) (persistent neglect of parental responsibilities).
97. Hutchinson, 649 P.2d at 41.
99. 348 N.W. 2d 479 (Wis. 1984).
100. Barstad, 348 N.W.2d at 489, n.10.
101. Id. at 489.
102. Id.
103. Ariz. Rev. Stat. Ann. § 25-331(B)(2) (1991); Colo. Rev. Stat. § 14-10-123(1)(b) (1992); Ill. Ann. Stat. ch. 40, para. 601(b)(2) (Smith-Hurd 1991); Ky. Rev. Stat. Ann. § 403.420(4)(b) (Michie/Bobbs-Merrill 1984); Mont. Code Ann. § 40-4-211(4)(b) (1991); Wash. Rev. Code § 26.10.030(1) (Supp. 1991) (Although statute mandates application of the best interest test where the child is not in the physical custody of a parent or where there is an allegation of parental unfitness, the court interpreted this to mean that the parent has a right to custody of the child unless the parent is shown to be unfit or it is shown that placement with the parent would be detrimental to the child's growth and development. Stell, 783 P.2d at 619). See also Stockwell, 775 P.2d at 614 (child had been in custody of a third party for an appreciable period of time and thereby developed a bond with that person); Barstad, 348 N.W.2d at 489 (extended disruption of parental custody).
section 401(d)(2) the Uniform Marriage and Divorce Act (UMDA). 104 The UMDA at section 402 provides that all determinations of custody under the act will be made pursuant to the best interest of the child standard. 105 The natural parent preference is preserved in divorce actions under the UMDA by virtue of section 401 which provides that only parents have standing to bring a custody petition, unless the child "is not in the physical custody of one of his parents." 106 Thus, the court must give custody to a parent under the best interest analysis, so long as the child is in the physical custody of a fit parent.

The Supreme Court of Illinois has narrowly construed the definition of "physical custody" in order to protect the natural parent preference. In In re Custody of Peterson, 107 the parents and their child had lived with the maternal grandparents prior to their divorce. Thereafter, the mother and the child returned to the home of the maternal grandparents where the child remained until the mother’s death. 108 The maternal grandparents refused to release the child to the father who lived on the same block, regularly exercised visitation and was found to be a fit parent in the divorce proceedings. 109 The Illinois Supreme Court held that the standing requirement "should not turn on who is in physical possession, so to speak, of the child at the moment of filing the petition for custody. To hold differently would be to encourage abduction of minors in order to satisfy the literal terms of the standing requirement . . . ." 110 In Peterson, the mother had legal custody of the child and remained with the child in the grandparents’ home until her death and, thus, the court held, never lost physical custody of the child. 111 Consequently, there was not a loss of physical custody sufficient to overcome the natural parent preference. The father thus prevailed in the custody dispute against the maternal grandparents and the court never reached the question of what would be in the child’s best interests.

Arizona’s Supreme Court has also construed the UMDA to protect the natural parent preference by holding that where the child is in

107. 491 N.E.2d 1150 (Ill. 1986).
108. Id. at 1151.
109. Id.
110. Id. at 1152-53.
111. Id. at 1153.
the physical custody of a parent, the court may not grant custody to a third party, even where the petition for a change in custody is properly brought by the other parent. In *Marshall v. Superior Court*, the divorce decree gave custody to the mother. When the mother later filed for permission to leave the jurisdiction, the father sought a change in custody. The trial court gave custody to the paternal grandmother on the theory that a third party could be granted custody under the best interest test if the petition was initially filed by a parent. The Supreme Court of Arizona reversed, noting the difference between the custody provisions contained in the domestic relations laws and those found in the juvenile code, stating that:

> [t]he domestic relations provisions are concerned primarily with custody disputes between parents, or disputes involving other persons where there is no longer a custodial parent. The juvenile code, however, deals with the narrower issues of neglect and abuse and involves the interests of the state in the well being and welfare of children.

The court thus concluded that while the petition for change of custody was properly brought by one parent, the court was not free to determine custody on a best interest basis between the mother and the third party, so long as the mother had custody of the child.

The UMDA standard addresses most situations in which a third party has acted as a parent toward the child because generally the parent will have surrendered physical custody. This would not be true, however, in the case of a stepparent third party, living with the child and parent, prior to divorce from or death of the custodial parent. The UMDA standard has an additional weakness in that the "loss of physical custody" in the natural parent required by the act, can be narrowly construed by the court to preserve the natural parent preference in cases where the child has been in the actual physical care of a third person but the court finds that physical custody remains in the parent.

### 11. Extraordinary Circumstances or Omnibus Clauses

Some states have a catch all phrase for rebutting the parental

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113. *Id.* at 570.
114. *Id.* at 569.
preference that gives the court a great deal more latitude. New York uses the phrase, "other extraordinary circumstance." An extraordinary circumstance was found to exist in Bennett v. Jeffreys, based on disrupted custody over the eight year life of the child. The court emphasized, however, that a finding of extraordinary circumstance did not, alone, justify awarding custody to the third party; it merely rebutted the parental preference. The court must now determine what custody arrangement would best serve the child’s interests.

North Dakota’s statute concerning custody determination declares the best interest test to be applicable in all cases. The supreme court, however, has construed best interests to include a presumption in favor of the natural parent, absent a showing of exceptional circumstances. The court cannot award custody to a third party under the best interest test unless the court first finds "exceptional circumstances" sufficient to trigger the best interest test. In Worden, the trial court awarded the stepfather custody of his child and the wife’s daughter, who was not his natural child. Exceptional circumstances were found to exist based on the mother’s unstable lifestyle in that she:

[i]s currently unemployed and relies primarily on public assistance for her source of income. She has had four separate residences since the separation; an apartment that was condemned, a mobile home from which she was evicted for failure to pay rent, and a residence which she shared with eleven other persons, including her children and a boyfriend. [The mother] now resides alone with her

make such custody detrimental to the best interest of the child); Merritt, 446 N.E. at 777 (extraordinary circumstance); Worden v. Worden, 434 N.W.2d 341 (N.D. 1989) (extraordinary circumstance); Hruby v. Hruby, 748 P.2d 57 (Or. 1987) (en banc) (compelling or cogent reasons to the contrary); Langerman v. Langerman, 336 N.W.2d at 670 (extraordinary circumstances affecting the welfare of the child); Bailes v. Sours, 340 S.E.2d 824 (Va. 1986) (special facts and circumstances [that] constitute extraordinary reasons to take the child from the parents); Paquette, 499 A.2d at 30 ("[I]f a stepparent stands in loco parentis to a child . . . custody . . . may be awarded to the stepparent if it is shown by clear and convincing evidence that extraordinary circumstances exist to warrant such . . . and that it is in the best interests of the child.")

116. Merritt, 446 N.E.2d at 777.
118. Id. at 283.
119. Id.
122. Id. at 342.
123. Id.
two children in a one-bedroom apartment. 124

The stepfather, on the other hand, "has a more stable lifestyle . . . and he has the facilities and resources, such as a home, a motor vehicle, and employment, suitable for providing care for minor children." 125

In reversing the trial court and awarding custody to the mother, the supreme court noted that, "[a]bsent exceptional circumstances the natural parent is entitled to custody of the child even though the third party may be able to offer more amenities." 126 The real issue, however, was whether exceptional circumstances existed here.

The supreme court opined that it had not tried to define "exceptional circumstances" narrowly in prior cases, but that in those cases where such were found, there had also existed a psychological parent relationship between the child and the third party. 127 None was found to exist here in that the child was four-years-old when the parties married and she was not yet six when they separated. 128 She had, with minor exceptions, always been in the care and custody of her mother. 129 Whether there were sufficient circumstances present to warrant a juvenile court proceeding regarding the mother’s fitness, the court held was an issue not properly before the court. 130

A review of the foregoing eleven bases for overcoming the natural parent preference in custody disputes involving third parties illustrates the difficulties faced by the courts, litigants, attorneys and legislatures. Some state legislatures have passed best interests standards, only to have those interpreted as strict parental preference standards. Other courts have articulated a strict parental standard, only to find it rebutted by a minimal showing of unfitness. These manipulations are often attempts to protect the best interests of the child, but this is not universally true. It would better serve the interests of the child and of society if the courts and legislatures would address the issue directly and allow the court to make a custody determination based on the child’s best interest where the third party has acted as a parent to the child.

124. Id.
125. Id.
126. Worden, 434 N.W.2d at 342.
127. Id. at 342-43.
128. Id. at 342.
129. Id. at 343.
130. Id.
III. The Standing Issue

A decision that the third party lacks standing precludes consideration of the proper standard to be applied in custody disputes between natural parents and third parties. The lack of standing argument seems to have found the most success in cases involving lesbian partners and third parties who have not had physical custody of the child.

Some courts have held that the third party lacks standing to petition the court for custody because he or she does not meet the statutory definition of parent. Some courts have recognized standing in grandparents and stepparents, based on their status as stepparents and their statutory duty of support. Other courts allow third parties to bring custody petitions, but only where the child is not in the physical custody of a parent, or where the parent has been found unfit. Still other courts allow suit to be brought by any non-parent who has a significant connection with the child, and some states recognize standing in any third party.

The Uniform Marriage and Divorce Act (UMDA) advocates allowing third parties to bring custody petitions only where the child is

133. Curiale, 272 Cal. Rptr. 520.
135. NEV. REV. STAT. § 159.044(1) (1986); Fisher v. Fisher, 670 P.2d 572 (Nev. 1983); In re J.W.F., 799 P.2d 710, 716 (Utah 1990) (holding the stepparent is not entitled to the benefit of the natural parent presumption).
137. MO. REV. STAT. § 452.375(4)(3)(b) (1991). See Knight v. Fulton, 773 S.W.2d 142 (Mo. Ct. App. 1989) (Grandmother had no standing to intervene absent finding that both parents were unfit, unsuitable or unable to be a custodian, or that the welfare of the child required placement with third party, relying on MO. REV. STAT. § 452.375(4)(3)(a) (1991)); WASH. REV. CODE § 26.10.030(1) (Supp. 1991) (requires only an allegation that neither parent is a suitable custodian).
not in the physical custody of a parent. This approach preserves the natural parent preference where the child is in the physical custody of a parent. Any third party attempting to obtain custody would have to overcome the presumption in favor of the natural parent. If the child is not in the physical custody of a parent, a third party may be considered for custody as against the parent under the best interest standard. Otherwise, the Act suggests that third party "must commence proceedings under the far more stringent standards for intervention provided in the typical Juvenile Court Act." The approach advocated in this article modifies the UMDA position by adding a definition of parent that includes, in addition to the biological parents, any person who, without pay, becomes a psychological parent to the child. This approach excludes paid caretakers, but includes all others who have developed a strong parental bond with a child.

Recognizing standing in third parties serves the interests of judicial economy, since the third parties would otherwise have to bring a separate proceeding in those cases where the parental skills fall below legal standards for retaining custody of one's child.

IV. THE BEST INTEREST TEST

It has been argued that "courts should not favor one prospective custodian solely because that person is the biological parent of the child . . . [but should] . . . resolve the question of custody in every case with a determination of the child's best interests." Courts and legislators have resisted that advice for good reason. In fact, every state recognizes a natural parent presumption to some degree. The problem

142. Uniform Marriage and Divorce Act, § 401 cmt., 9A U.L.A. 550 (1991); see also Marshall v. Superior Court, 701 P.2d. 567, 570 (Ariz. 1985) (en banc) (Even though petition for change of custody was properly commenced by the father, court could not then award custody to third party under the best interest standard. Third party seeking custody would have to petition the juvenile court for custody and meet its more stringent tests.); In re Custody of Peterson, 491 N.E.2d 1150 (Ill. 1986) (grandparents' assistance in caring for child in their home while the mother was ill did not constitute loss of physical custody in the mother).
is one of balancing the presumption against the best interest test in a way that truly will best serve the child’s interest.

Some statutes mandate application of a best interest standard in custody disputes between third parties and natural parents. Some courts, however, have continued to apply the natural parent preference under the guise of interpreting the best interest standard. The Washington legislature recently passed a comprehensive statute dealing with custody actions between natural parents and third parties. The statute provides that petitions may be brought by third parties “if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.” The statute clearly states that “[t]he court shall determine custody in accordance with the best interests of the child.” The appellate court interpreted “best interest of the child” to mean that the parent has a right to custody of the child unless the parent is shown to be unfit or it is shown that placement with the parent would be detrimental to the child’s growth and development.

The Tennessee statute provides that in a divorce or related proceeding, the court may award custody to either or both of the parties or to “some suitable person, as the welfare and interest of the child or children may demand.” The statute appears on its face to adopt the best interest test in lieu of the natural parent preference. The Tennessee Court of Appeal, however, has held, despite the statutory language, that a grant of custody to a third party is improper, absent a showing that neither parent is a suitable custodian.

Although the natural parent preference has its shortcomings, it does have some advantages that are lost by eliminating it altogether and simply adopting the best interest test. Among the advantages are judicial economy and judicial restraint.

150. Stell, 783 P.2d at 619.
The best interest approach lacks the advantages of judicial economy, predictability, and consistency that result from the use of a presumption. A wide open best interest test would allow petitions by third parties who have not parented the child but who simply disapprove of the parent's lifestyle or parenting skills or who think they can better provide for the child. Under a best interest test, no attorney can predict with any accuracy what the outcome will be in any given case. Every case must be given a full hearing on the merits with no presumption in favor of any party. Such a rule would make settlements almost impossible and would likely overwhelm the courts with litigation, a result that is, itself, probably not in the child's best interest.

No two custody cases are alike. Courts can and must exercise a great deal of discretion in making custody decisions. The natural parent preference serves to curtail that discretion to some extent. That can run counter to the child's interests as has already been demonstrated. But, the presumption can also serve to protect the child's interest by restraining the court from making social policy decisions that deprive a parent of custody based only on the court's disapproval of a parent's nontraditional life style or values or based on a misguided attempt to place a child in a "better home" provided by third parties.

The best interest test and the natural parent preference both purport to protect the child's interests. Yet, each may, in some circumstances, fail to do so by being overly broad as in the case of the best interest test, and by being overly restrictive as in the case of the natural parent preference. The approach suggested below attempts to combine the advantages of both the best interest test and the natural parent preference, to the extent that each is consistent with the child's best interest.

V. A NEW APPROACH

The natural parent preference is not without its advantages. As noted earlier, it protects the sanctity of the parent-child relationship, and, like all presumptions, promotes judicial economy. Generally, the natural parent preference and the best interest of the child test coincide. Problems arise when someone, not a biological parent, establishes a parental relationship with the child. A strict application of the natural parent preference in such a case might run counter to the child's best interests. The approach suggested here simply expands the definition of parent and, thus, the application of the parental preference to anyone who has a parental relationship with the child. Each "parent"
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would enjoy a rebuttable presumption that granting custody to them would be in the best interest of the child. If more than one person meets the definition of parent, the preference would not be determinative, and the court would then award custody based on the best interest of the child, as between the two or more "parents".

To date, only one court has adopted this approach. The Superior Court of New Jersey, in Zack v. Fiebert, involved a dispute between the maternal grandparents and the stepfather who had adopted the children while married to their mother, who later died. The court first determined that the supreme court had not yet "enunciated a standard to be applied in custody actions other than those involving both natural parents." Faced with a case of first impression, the appellate court reviewed other decisions in the state and determined that "the standard to be applied depends upon the status of the third party vis à vis the natural parent and the child." Usually a custody petition brought by a third party is more like a termination proceeding in that it "destroys any pretense of a normal parent-child relationship and eliminates nearly all of the natural incidents of parenthood including the everyday care and nurturing which are part and parcel of the bond between a parent and child." Thus, the standard to be applied should be one of unfitness. The court held, however, that where the third party "stands in the shoes of a parent to the child . . . he or she should be accorded the status of a natural parent." In such case the standard would be a best interest test.

It could be argued that the natural parent preference is necessary to protect and preserve the sanctity of the parent-child relationship and to prevent court abuses such as denying custody to a parent with an alternate life style or nontraditional parenting ideas. In fact, the natural parent preference, arguably, has not served this purpose, even in those states that strongly adhere to the preference, rebutted only by proof of abandonment or parental unfitness.

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154. Id. at 61.
155. Id. at 63.
156. Id.
157. Id.
158. Zack, 563 A.2d at 63.
159. Id. The grandparents did not have a parent-child relationship with the children and so were subject to the unfitness standard. The father was awarded custody.
160. White v. Thompson, 569 So. 2d 1181 (Miss. 1990). Trial court found lesbian mother unfit. Mississippi Supreme Court avoided the issue of whether mother's

https://nsuworks.nova.edu/nlr/vol16/iss2/1
Absent some justification for terminating parental rights, the court in awarding physical custody to the third party should consider awarding liberal visitation to the natural parent in order to allow the parent-child bond to develop and grow. An award of custody to a third party does not preclude a later change of custody to the natural parent. Such award simply allows the court to make a determination that is consistent with the child’s best interests, at present.161

By retaining jurisdiction to review the custody determination consistent with the child’s best interest, rather than first requiring changed circumstances, the court is better able to serve the child’s need to have both present stability in the home of a third party and an ongoing relationship with one’s natural parent. Custody could then be changed to the natural parent in the future when circumstances warrant. This approach is particularly helpful where the parent has to call on others to care for a child because of temporary conditions that cause the parent to be unable to fulfill their parental duties. It may not be in the child’s best interest to change custody back to the parent simply because the parent is now fit and wants the child. The child’s best interests may be served by continuing custody in the third party with liberal visitation to the parent and a later review by the court. The child’s welfare may be promoted by changing custody to the natural parent at a later point when the parent-child bond has developed and the parent has demon-

sexual preference alone supported a finding of unfitness by holding that evidence of her neglect of the children was sufficient to show unfitness. Id. The dissent argued that there was evidence of neglect but no more than would be expected. Id. at 1185.

Where a twenty-four year old mother with but a high school diploma and no independent means has been in effect deserted by a drunken husband who has provided not a penny in support. The poor are much with us, and sadly many of these are young women with children and without support. I had not thought heretofore we regarded this grounds for taking these children from their mothers. If the neglect found here is to become the standard, I dare say few of our economically disadvantaged citizens will find their children secure from grandparents who engage skilled counsel.

In point of fact [the mother’s] “neglect” played little, if any, part in motivating [the grandparents] to bring this action. Their concern was their objection to [mother’s] lesbian relationship. Id. at 1185 (Robertson, J. dissenting) (citation omitted).

161. The trial court in Hughes v. McKenzie indicated in the decree that “the judgment . . . does not preclude the [natural parents] from later gaining custody of [the child].” 539 So. 2d 965, 971 (La. Ct. App. 1989). “The custody plan developed by the judge provides for continuing contact between [the child] and her parents, to allow bonds to develop between them.” Id.
The emphasis always should be on the child's needs - for both stability and strong bonds to the natural parents. The court should not be forced or allowed to choose between these goals.

The Supreme Court of South Carolina articulated four factors to be considered in making custody determinations when a natural parent seeks to reclaim custody of his child:

1) The parent must prove that he is a fit parent, able to properly care for the child and provide a good home.
2) The amount of contact, in the form of visits, financial support or both, which the parent had with the child while it was in the care of a third party.
3) The circumstances under which temporary relinquishment occurred.
4) The degree of attachment between the child and the temporary custodian.

These factors attempt to balance the competing interests discussed above in a way that continues to protect the child's needs.

VI. WHO PARENTS?

Perhaps the most difficult issue in articulating this new approach is deciding where and how to draw the line between third parties who are entitled to the parental preference and those that are not. Persons who are paid custodians, clearly, should be eliminated. It is conceivable that a paid caretaker could have such complete responsibility for a child that a parental relationship could develop. The caretaker should not, however, be considered for custody on that basis alone. Otherwise, parents would risk loss of custody if their child developed a close relationship with the caretaker. Likewise, parties who are not custodians should not qualify. These parties have not developed a parental relationship with the child. This will eliminate claims by relatives of a deceased spouse who have not had custody of the child but who seek custody in order to protect their access to the child or because of their disapproval of the surviving spouse. These non-custodial third parties would have to rebut the natural parent preference by some showing of parental unfitness of the surviving spouse in order to obtain custody.

162. Moore, 386 S.E.2d at 459.
163. Id. at 458 (citations omitted).
Third parties who have had physical custody of the child pursuant to a court order should qualify for the parental preference. Kansas has long held that the natural parent preference can be overcome only by a showing of unfitness. This rule has been codified as well. Yet, the parental preference had been held inapplicable where the third party obtained custody of the children pursuant to a court order. In *In re Criqui*, the Kansas Court of Appeal held that the parental preference doctrine “entitles a fit parent, who is willing and able to care for his or her child, to custody of the child as against others who have no permanent or legal right to custody.” Thus, the doctrine was not controlling in a suit brought by the mother to regain custody of her children who had been voluntarily placed in the custody of third parties, pursuant to a court order. Instead the standard to be applied by the court was whether a change of custody would materially promote the child’s welfare.

A more difficult question arises as to custodians who lack parental permission or may even act in direct defiance of a court order. Certainly this type of behavior should not be encouraged or condoned. However, if the critical question to be resolved is the child’s best interest, then the court should not be unduly hampered by restrictions that work at cross purposes with that goal. For that reason, the court should be free to give custody to a party who has illegally retained custody of a child, if the circumstances are such that the court determines that such order serves the child’s best interests. The court would, of course, be free to and should grant liberal visitation rights to the party legally entitled to custody with a view toward changing custody when doing so would be consistent with the child’s best interest, if at all.

Wisconsin, by statute, limits third party custody to relatives of the child. Relative is defined broadly to include stepparents which gives the court greater latitude to protect the child’s best interests. The court would be precluded, however, from granting custody to a family friend in the rare case where it might be appropriate to do so. The class of third parties eligible for custody should be limited not by their status

167. Id. at 71.
168. Id. at 73.
vis-a-vis the child but by their relationship vis a' vis the child. Only those parties who have established an ongoing parental relationship with the child should be considered for custody on a par with the natural parents under the best interest analysis. Of course, other relatives and family friends should be considered next if a proper custodian cannot be found in the first group.

Hawaii, without defining the person as a parent, extends the natural parent preference to “any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person.” This is a much better test, but should be broadened at least to include anyone who has shared de facto custody.

VII. PROPOSED LEGISLATION

The following proposed legislation incorporates the approach described above. Legislators are urged to consider adoption of this or a similar statute in order to protect more fully the interests and rights of their minor constituents and to empower the courts with the flexibility needed to arrive at decisions that are based solely on the best interests of the person most directly affected by that decision—the child.

Child Custody Standards

In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or at any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

A. Custody should be awarded to either parent or to both parents according to the best interests of the child;

B. For purposes of determining custody, “parent” includes natural parents, adoptive parents and other persons who have acted as a parent to the child and who have established a parent-child bond. Persons receiving money for their services to the child may not be considered parents.


C. If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court;

D. Where custody is contested, the court must make detailed findings of the factors considered by the court and how the factors led to its conclusions and to the determination of the best interests of the child.\footnote{173}

E. Reasonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child;

F. If a child is placed in the physical custody of a person other than a natural parent, the court will order reasonable visitation and a further review of the custody decision with the goal of reuniting the child and natural parent, unless the court determines that such goal would not be in the child's best interest.

\section{VIII. Conclusion}

This approach involves a balancing of interests. Society's interest in judicial economy, predictability and the parent's interest in protecting and exercising parental rights must give way to society's and the child's interest in having the most circumspect decision making possible in this all important judgment that cannot help but dramatically affect the child's future. Mr. Justice Black recognized the custody determination as "vital to a child's happiness and well-being."\footnote{174} A decision of this magnitude should not be determined by concerns for judicial economy and parental rights where these interests are in conflict with a determination of the child's best interests.

\footnotesize{173. Adapted from Minn. Stat. § 518.17 (1991).}

Preventing Trauma for the Children of Divorce
Through Education and Professional Responsibility

Andrew Schepard*
Joan Atwood**
Stephen W. Schlissel***

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* Andrew Schepard is an Associate Professor of Law at Hofstra University, a former Consultant to the New York State Law Revision Commission on child custody law and procedure, and practices matrimonial law in New York City.
** Dr. Joan Atwood is Coordinator of the Marriage and Family Counseling Graduate Programs at Hofstra University. She is the President-Elect of the New York State Chapter of the American Association for Marriage and Family Therapists.
*** Stephen W. Schlissel is a Special Professor of Law at Hofstra University and a member of the American Academy of Matrimonial Lawyers practicing in Mineola, Long Island, New York.

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I. INTRODUCTION

Divorce is one of the greatest challenges that American children face. The numbers affected are enormous. In 1951, a rate of 6.1 children per thousand were involved in a divorce. In 1981, the rate reached 18.7 children per thousand. Since then, the rate has fallen back somewhat to 16.8 children per thousand in 1986, the last year for which statistics are available. This number translates to about 1.2 million children each year who experience the divorce of their parents. If current rates of divorce continue, we can expect that a significant percentage of all American children will become children of divorce by age eighteen.

All children of divorce experience difficult transitions: dissolution of the image of a "normal" family; absence of one parent and, in many cases, grandparents and other extended family; loss of traditions; loss of socio-economic status; divided loyalties; and the emotions associated with these losses.

For some percentage of the children of divorce, however, the risks are greater. Prolonged sadness and deep depression are relatively common. So is serious educational decline. There is also evidence of in-
creased risk of teenage suicide,\textsuperscript{9} drug use and criminal involvement.\textsuperscript{10} It has been suggested that some percentage of these children of divorce have difficulty forming long-term relationships and attachments with the opposite sex.\textsuperscript{11} Overall, children of divorce tend to be much less optimistic about their capacities to master life's opportunities and problems, a state of mind that tends to reduce their capacities for achievement and physical and mental health.\textsuperscript{18}

Divorce is not, however, inevitably an insurmountable crisis of childhood. In fact, some percentage of children may emerge stronger after divorce than before it.\textsuperscript{18} Research is accumulating that indicates depression was sometimes associated with a decreased capacity to function in school, difficulties in social adjustment, and involvement in delinquent behaviors. \textit{Id.} at 177. Anger, apparently related to underlying depression, was reflected in drug involvement and delinquent behavior, including arson, stealing, and breaking and entering. \textit{Id.} at 232-33.

8. \textit{Id.} at 177. A 1980 study conducted by the National Association of Elementary School Principals (NAESP) compared the academic achievement of children in one- and two-parent households. NAESP Staff Report, \textit{One-Parent Families and their Children}, 60 \textit{Principal} 31 (1980). In the surveyed elementary schools, 23 percent of two-parent children and 38 percent of one-parent children were classified as low achievers. Only 17 percent of the children from one-parent households were classified as high achievers, while 30 percent of the children from two-parent households held that distinction. These patterns were similarly reflected in the secondary schools. \textit{Id.} at 33. A national study of children in the schools, conducted by Guidubaldi et al., reports that children from divorced families scored more poorly than those from intact families in reading and math test scores and class grades. Children from divorced families tended to be absent from school more often, and were more likely to be placed in special reading classes. Judith S. Wallerstein, \textit{The Long-Term Effects of Divorce on Children: A Review}, in 30:3 \textit{J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY} 349, 356 (1991).

9. Divorce has been reported to be a seemingly major factor in youth suicide, "the second leading cause of death in the 15-to-24 year old age group." Nicholas Davidson, \textit{Life Without Father}, 51 \textit{POL'Y REV.} 40, 41 (1990).

10. \textit{WALLERSTEIN and KELLY, supra} note 5 at 232-33. A UCLA study published in 1987 reports that children of an inadequate family structure are more likely to resort to drug use as a means of coping with their depression and anxiety. Davidson, \textit{supra} note 9, at 43.

11. Ten years after their parents' divorce, a significant number of young adults studied by Wallerstein and Kelly confronted issues of love, marriage, and commitment with anxiety. In response, many young men were likely to avoid relationships with the opposite sex, and young women were likely to engage in short-lived sexual relationships. Wallerstein, \textit{supra} note 8, at 353.


13. Some children are fortunate in that after the initial period of instability, the post-divorce family provides the same supports as those of the intact family. Children
that responsible parenting, a sensitive court system, family therapy and school-based intervention programs can significantly help children to deal with divorce-related problems.14

II. PREVENTIVE PUBLIC HEALTH AND THE LEGAL SYSTEM

Experience suggests that divorce-related risks to children are increased if parents engage in a protracted custody dispute. Normal divorce-related adjustment problems are magnified by ongoing parental conflict.18 Divorce alone for children is traumatic; a custody dispute is potentially devastating.

Adversarial courtroom combat and the indeterminate, unpredictable legal standard of the “best interests of the child,” however, encourage custody fights.16 Warring goes on endlessly, with final resolution often emotionally elusive and expensive (it is not unknown for a parent to spend several years of potential college tuition on a custody lawyer).17 The adversarial process encourages parents to degrade each other rather than cooperate around the essential tasks of childrearing.

of such families are able to forge “ahead under these conditions, strengthened by their ordeal during the separation and their pride in their own capacity to weather the acute crisis.” WALLERSTEIN AND KELLY, supra note 5, at 217. Evidence shows that children exposed to open conflict are less well adjusted than children from divorced families, because “[a] divorce undertaken thoughtfully and realistically can teach children how to confront serious life problems with compassion, wisdom, and appropriate action.” JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 305 (1989). Many children are able to master their fears of repeating their parents’ mistakes, “to choose better and to resolve the unresolved issues of a childhood that included the trauma of divorce.” Id. at 14-15.

14. See Pedro-Carroll & Cowen, supra note 3, at 286-87, 300-03.
15. WALLERSTEIN & KELLY, supra note 5, at 37.
16. The adversarial process works against the best interests of the child by encouraging delay in settlement, increasing antagonism between parents, and stressing the child’s loyalties to each parent. The present system encourages settlement negotiations to link custody and money issues, and encourages parents to put their financial interests ahead of the child’s interest in a healthy relationship with both parents. The antagonism generated tends to decrease the degree of parental cooperation in the child’s post-divorce future. The process is in the hands of the parents’ lawyers, who are trained in adversarial combat, and may have a questionable commitment to the welfare of the child. See Andrew Schepard, Taking Children Seriously: Promoting Cooperative Custody After Divorce, 64 TEX. L. REV. 726-28, 736-39 (1985).
17. The authors have not done a survey of custody case fees. The statement is based on the experience of the lawyer-authors in years of matrimonial practice and teaching.
Embattled parents demand, and sometimes seek to buy, the loyalty of their hopelessly torn children. 18

Efforts to improve the legal standards by which custody disputes are decided and the procedures for adversarial combat are important, but to some extent represent misplaced priorities. They can intensify the negative impact of divorce on children, not contain it. A principle aim of reform should be to prevent as many child custody cases from reaching the courtroom as possible by promoting voluntary parental settlements and responsible parenting. Reform pointed towards promoting parental settlement has an additional salutary benefit. It reinforces the truly basic value that parents, not the state, are responsible for making important decisions about their children, 19 even after divorce. The less state intrusion in family life that divorce causes, the better and the more functional the reorganized, post-divorce family will be in parenting children.

Reams of law review articles have been written about how adversarial court procedures can be reformed to encourage parental settlement for custody cases already filed. 20 That debate is important and

18. Parents are aware the child's views may be important in the custody determination and may attempt to influence what the child says to the judge. The general rule is that the child's preference may be considered by the judge, but is not dispositive. See Friederwitzer v. Friederwitzer, 432 N.E.2d 765 (1982). For an empirical study of judicial attitudes in interviewing children in custody cases, see Fredericka K. Lombard, Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study 17 U.C. Davis L. Rev. 807 (1984).

19. In an intact family, parental decisions regarding child-rearing are given a large measure of autonomy from state interference. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (holding that Amish parents have a right under the First Amendment to keep their children out of the public schools after the eighth grade, despite the state's interest in universal compulsory education); see, e.g., Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (holding that the Fourteenth Amendment protects the right of parents to choose schools where their children will be educated); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the Fourteenth Amendment protects the right of parents and teachers to instruct children in a foreign language).

should continue. The purpose of this article, however, is to suggest three relatively cost-free measures that the lawyers and legal system of each state can take that might help custody disputes from becoming a judicially cognizable “dispute” requiring resolution by adversarial procedure. They are: (1) creating a mandatory program of education for parents involved in a custody dispute; (2) supporting school-based intervention programs for children experiencing parental divorce and custody problems; and (3) amending the Code of Professional Responsibility or Model Rules of Professional Conduct to require lawyers to advise parents in a custody dispute of the harm they are doing to their children and of conflict resolution methods to reduce that harm.

III. THE MANDATORY PRE-DIVORCE PARENTAL EDUCATION PROGRAM

It is possible for parents to mitigate the effects of divorce on their children by assuring them that the divorce is a rational response to conflict between the spouses for which the children are not to blame. Children need to be assured that a relationship with both parents will continue after one physically leaves the house. Loyalty battles can be avoided. Parents need not bad mouth each other. Parents can cooperate in decision making about their children. Visits with the parent with whom the child does not primarily reside can be non-conflicted and provide the foundation for a meaningful parent-child relationship. Therapy and support groups can help the child of divorce adjust, as can sympathetic teachers and adult figures. Child support can be paid regularly. In short, parents can create a post-divorce environment which holds out hope for better outcomes for children. What they need to be advised of is how and why.

Research and common sense suggests that early intervention to reduce conflict and educate parents is essential to prevent harm to children. The earlier in the divorce process that the parents understand the harm that a protracted custody dispute can do to their children and them, and steps they can take to reduce that harm, the more likely it is that they will minimize conflict and coexist as parents.

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(1978) (advocating the need for separate legal representation for children).
21. WALLERSTEIN & BLAKESLEE, supra note 13, at 286.
22. See Carol Lawson, Requiring Classes in Divorce, N.Y. TIMES, January 23, 1992, at C1; see also Recommendation, supra note 20, at 123-28 (mediation as an effective process for the resolution of child custody disputes).
Several states (California, Connecticut, Georgia, Minnesota and Texas are examples) have supported this proposition by instituting educational programs for divorcing parents. By alerting parents to the negative consequences their children will face as the result of a spiteful custody fight and how the child's post-divorce environment can be strengthened, these programs attempt to educate parents so that their children need not become one of the casualties of a failed marriage.

It might be helpful to describe a parental educational program to provide a concrete idea about its content and functioning. Based on the models of other states, Hofstra University Law School, the Marriage and Family Counseling Program of the Hofstra School of Education and the Interdisciplinary Forum on Mental Health and Family Law, an umbrella organization of representatives from leading legal and mental health organizations, have designed a three-part educational program for divorcing parents in New York State given the acronym PEACE—Parent Education And Custody Effectiveness.

The PEACE program consists of three sessions, all of which include an educational component and group discussion for processing the information. The first session, led by a judge, a lawyer, or both, informs parents about what process (e.g., preliminary hearings, forensic evaluations, possible appointment of a lawyer for the child) the legal system will use to decide their dispute if they do not settle the problems themselves and how long the process may take. The first session also describes the substantive standards which will be applied by the judges to determine contested custody disputes. The second session, led by a mental health professional, focuses on the emotional aspects of the divorce experience for parents. The final session, also led by a mental health professional, looks at the problems of divorce from the perspective of the child and describes methods of parental interaction that facilitate positive outcomes for children.

PEACE is entirely an educational program; no discussion is allowed of how the participants' individual cases can be settled. PEACE is thus distinguishable from a mediation or arbitration program. In addition, PEACE is not therapy; common emotional patterns and problems are presented, not explored in individual cases.


The content of the PEACE program is determined by an advisory board of lawyers and mental health professionals to ensure that the material presented is neutral and based on the best research available. Presenters receive a detailed PEACE curriculum and training sessions. All presenters are unpaid volunteers. Professionals who lead PEACE sessions cannot take referrals from participants. Participation is confidential.

PEACE participants are referred by judges from court dockets, and by lawyers and mental health professionals knowledgeable about the program. At present, participation is voluntary. However, in other states, such as Georgia, participation is mandatory for custody litigants. Court rules authorize and implement the educational program, as well as require litigant participation. In such mandatory programs, participants pay an affordable fee graded on ability to pay to cover program costs.

A strong case can be made for a mandatory parent educational program on both philosophical and practical levels. If a driver violates speeding laws too often, he or she can be required to take a mandatory driver's education course as a condition of maintaining the privilege of a license to drive. Like the license to drive a car, divorce is not a constitutional right. Liberal divorce laws give parents with children the privilege of divorce and the legislature can restrict that privilege reasonably. Indeed, some commentators have even proposed that parents with children not be permitted to divorce during the children's minor-

25. A strong case can be made that parents thinking about divorce should attend a program like PEACE before any filings are made with a divorce court. By the time pleadings are filed, parental positions have hardened and child-oriented compromise is more difficult to promote. Educational programs for mental health professionals, educators and lawyers should promote such pre-filing parent participation.


28. Id. (Participants pay a $30.00 fee, which is waived if the party meets indigency criteria).

29. See N.Y. Veh. & Traffic Law § 530(1) (McKinney Supp. 1992) (allowing Commissioner of Motor Vehicles to require a driver whose license has been suspended or reduced to “attend a driver rehabilitation program specified by the Commissioner”).

30. “The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.” Sosna v. Iowa, 419 U.S. 393, 404 (1975) (quoting Penoyer v. Neff, 95 U.S. 714, 734-35 (1878)).
ity. 31 Certainly, the best interests of children, the fundamental aim of state intervention in the post-divorce family, can support the requirement that parents, at this most stressful and emotional time of their lives, learn about ways to minimize harm to their children as a condition to divorce.

In this sense, a required educational program for divorcing parents is a moral statement to parents about the state’s priorities in resolving their family problems. Just as the driver who drinks or speeds puts lives at risk, parents who divorce put their children at emotional risk. Both should learn how to prevent harm to others from reoccurring before being granted a privilege by the state.

On a more practical level, a mandatory parent education program is justified to reduce the tension that often exists between divorce lawyers and parent clients. Every sensible lawyer who has participated in or witnessed a custody dispute knows that in the great percentage of cases parental settlement is far preferable to a court-imposed solution (excepting those cases involving child or spousal abuse or neglect). 32 Yet the lawyer for the parents must often accommodate his or her client’s desire to punish the other parent by using the children as a pawn in a custody dispute at the risk of losing the client. In addition, the lawyer for one spouse may be worried in counseling restraint that the lawyer for the other spouse is not providing the same sort of advice.

Making an education program mandatory will thus reduce the conflicting messages parents receive from lawyers, therapists and others whose opinion they value. The educational program will simply reinforce the advice a sensible lawyer should give a client anyway. Clients who do not receive such advice, and instead are advised to contest custody vigorously, will be reminded by a mandatory parental educational

31. See Judith Younger, Marital Regimes: A Story of Compromise and Demoralization, Together With Criticisms and Suggestions for Reform, 67 Cornell L. Rev. 45, 90 (1981); cf. Davidson, supra note 9, at 44 (advocating return to fault divorce for children’s benefit). The rationale of a “marriage for minor children” is that the difficulty of obtaining divorce may encourage parents to reconcile. However, the children may not benefit if their parents are forced to remain married. The child’s best interests may be better served if parents divorce quickly, rather than prolong parental conflict in the household. Furthermore, the problems of collusion and evasion that plague fault divorce laws would also plague the “marriage for minor children” concept. Schepard, supra note 16, at 744-45.

32. A custody plan resulting from self-determination may be more creative, flexible, and enduring than a plan imposed by the court. Costs are reduced to the extent that lengthy custody litigation is avoided. Recommendation, supra note 20, at 124.
program of the childhood that may be lost as a result.

Despite its attractions, parental education is not a panacea. It will not transform deeply embittered parents into models of cooperation, nor will it cure severe psychological problems which may be the cause of some custodial disputes. More intensive, structured, programs are needed for these purposes. An education program can, however, help such troubled parents by advising them of the availability of more intensive programs and encouraging participation. Nor will an education program clear crowded court dockets of custody cases. It can, however, be an efficient beginning to a coordinated program that could funnel custody disputes into appropriate forms of alternate dispute resolution that diverts these cases from adversarial combat.

Mandatory parental education, then, is a modest but important beginning toward setting the proper tone for a custodial dispute, which should always be focused on the needs of the children rather than the “rights” or “grievances” of the parents. It encourages some parents to settle their differences through presentation of accurate information. For those who do not settle, mandatory education is a moral statement of the importance of responsible parenting, a value in and of itself. Furthermore, like an introductory lecture at the beginning of a college course, parental education can serve as the foundation for more intensive interventions and referrals to community services for the divorcing family.

IV. CHILDREN OF DIVORCE INTERVENTION PROGRAMS

Educational programs such as PEACE are directed at parents. The problem is that children caught in the emotional maelstrom of parental divorce and custody problems need a program sensitive to their needs as well.

Many primary schools have appropriately recognized this need. This is not surprising, since parental divorce and separation is often associated with serious educational decline in children. The children’s educational progress often deteriorates in proportion to their emotional

34. See Schepard, supra note 16, at 753-80 (describing a system of judicial administration that maximizes cooperative parenting after divorce); see generally Recommendation, supra note 20. (New York State Law Revision Commission Report with proposed Legislation).
35. See supra note 8.
condition. Parents in crisis have difficulty providing support for their children's educational efforts.

A number of school-based intervention programs have been developed to help children of divorce cope with their time of turmoil. An example is the twelve-session Children of Divorce Intervention Project, whose curriculum was created at the University of Rochester. The curriculum addresses common issues and concerns of children of divorce in early adolescence and uses a variety of innovative teaching techniques such as journals and children-produced simulated television programs. Empirical research has demonstrated the effectiveness of such programs in helping children cope with the divorcing process.

These programs need to be made more widely available. Lawyers who represent parents have a special responsibility to become knowledgeable about them, and to encourage parent/clients to refer their children to them. Also, lawyers—especially the family law bar organizations—must take some responsibility for lobbying education officials to promote these programs and fund them.

If children of divorce intervention programs exist in a community, a mandatory parent education program would be an excellent opportunity to advise parents of that fact and to encourage them to let their children participate. Assuming wide-spread availability of divorce intervention programs, one could, conceivably, envision a day when parents must certify that their children have been enrolled in a school-based intervention program and that they have attended educational seminars like PEACE before a divorce is granted. This educational approach is consistent with society's desire to give adults the power to terminate an unhappy marriage while still insuring that they give appropriate consideration to the needs of the child. It promotes parental autonomy and responsibility and is preferable to an approach which would make parental divorce more difficult to obtain.

V. Amending the Code of Professional Responsibility to Promote Sensitivity to Children

Requiring parents to be educated about the effects of divorce on their children is not, however, enough. As mentioned above, parents often do not want to hear sensible advice to reduce conflict over their

37. See id. at 286-87.
38. See supra note 30.
children from their lawyers. And some lawyers do not provide such advice. Even a small number of "bomber" lawyers who use children as a weapon to extract financial concessions could undermine the message which the mandatory education program tries to promote. So can lawyers who advise clients that the parent education program is simply a formality to be endured and completed as quickly as possible, rather than an important learning experience to be participated in seriously for the benefit of children.

To combat these problems, the requirement that lawyers advise parents of the effects prolonged custody conflict can have on their children should be made a requirement of professional responsibility. Lawyers who give child-sensitive advice to parents who do not wish to hear it will find their inclinations reinforced by specific provisions of the lawyer's code; lawyers who do not give such advice will face appropriate professional censure if they do not.

The American Academy of Matrimonial Lawyers (AAML) has already adopted such child-oriented provisions in their recently approved *Bounds of Advocacy*, a supplementary code of aspirational standards for divorce law specialists. The Academy is to be commended for its recognition of the harm that custody litigation can do to children. The inclusion of these provisions in the AAML *Bounds* is the first institutional recognition by the family law bar of this inescapable fact.

However, the general rules regulating professional responsibility of all lawyers should be expanded to include the concepts in the AAML *Bounds*. First, many lawyers who handle custody disputes do not belong to the AAML (a voluntary and selective national organization of divorce specialists) and are not bound by its aspirational guidelines. In most jurisdictions any lawyer, without any special training or experience, can represent a parent in a divorce. The same child-protective ethical standards should be applicable to all lawyers who represent parents in child custody disputes. More importantly, the AAML ethical

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39. See American Academy of Matrimonial Lawyers Standards of Conduct 2.23 (1991) (an attorney should consider the welfare of the children in his representation of the parent); American Academy of Matrimonial Lawyers Standards of Conduct 2.14 cmt. (1991) (the attorney should advise the client of the effects of a meritless custody claim to the child and should withdraw if the client persists in asserting the claim).

standards do not carry the force of the state-created machinery (such as continuing education requirements, disciplinary sanctions and potential malpractice liability) to enforce the professional responsibility obligations of counsel. If lawyers are to make money from representing parents, the lawyer's ethical code and its enforcement mechanisms should recognize the unique interests the children have in the lawyer's advice.

Thus, a state where lawyer conduct is regulated by the Code of Professional Responsibility might add the following ethical considerations under Canon 7 (Zealous Representation) under a subheading "Duty of the Lawyer in A Child Custody Action." The proposed new ethical considerations would supplement Disciplinary Rule 7-102(A)(1), which prohibits a lawyer from "assert[ing] a position, conduct[ing] a defense, delay[ing] a trial, or tak[ing] other action on behalf of the client when the lawyer knows or it is obvious that such action will serve merely to harass or to maliciously injure another." The commentary is provided for states which follow the Model Rules format for their regulation of a lawyer's professional responsibility. (Other minor adaptations of these proposals will no doubt be required for Model Rules states).

A. Proposed EC 7-40

An attorney representing a client in an action against the other parent concerning their child shall advise the client of the potential harm a protracted custody battle will have on the client's child.

B. Comment

Divorce is a traumatic situation for the involved spouses. Evidence, however, has mounted in recent years that children are the most significant casualties of divorce and custody battles. Parental separation and divorce is traumatic in and of itself, but when accompanied by an acrimonious and prolonged custody dispute the damage to the children is especially severe. The evidence shows that children who experience such events can suffer developmental problems, serious emotional distress and scholastic setbacks. Any attorney involved in a custody pro-

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ceeding has an ethical obligation to inform the client as to how such a proceeding will affect the client’s children. The attorney must keep the children’s best interests in mind while advising the client how to proceed.

C. Proposed EC 7-41

An attorney representing a client in an action against the other parent concerning the children shall not contest child custody for purposes of financial leverage or vindictiveness.

D. Comment

Ethical Consideration 7-41 goes hand in hand with Ethical Consideration 7-40. Initiating a custody contest to hurt the other party invariably hurts the children more by placing them in the middle of the conflict like pawns on a chessboard. Genuine issues of custody should, of course, be resolved, but custody contests begun for malicious reasons must be discouraged. The attorney has an ethical obligation to attempt to dissuade the client from pursuing such a course of action, and if the client is unpersuaded, may withdraw from representation.

E. Proposed EC 7-42

An attorney representing a client in an action against the other parent concerning their children should encourage settlement of custody disputes through referrals for mental health therapy, negotiation, mediation or arbitration,42 except where domestic violence or child abuse is involved. In those instances, an attorney should seek consulta-
tion with appropriate experts in the area as to how to proceed.

F. Comment

In divorce and custody matters, prolonged litigation is financially and emotionally draining for the parties. The highly charged atmosphere and potential for emotional harm makes efficient resolution that encourages parental post-divorce cooperation concerning children a priority. Children placed in the middle of an acrimonious divorce are at risk of serious emotional, developmental and scholastic damage which may be alleviated by alternative dispute resolution methods as opposed to litigation. Additionally, there is evidence that parties to a voluntary, mutually arrived at agreement are more willing to abide by such an agreement than an agreement imposed by a court following litigation. It is the responsibility of the attorney involved to make the client aware of all options available in addition to, or in lieu of, litigation.

Domestic violence and child abuse present special circumstances which may make alternative dispute resolution inappropriate, because such processes may encourage continued interaction with the abusive spouse. In cases involving these elements, the attorney should seek advice from appropriate experts as to how best to protect the child’s interests.

VI. Conclusion

Mandating parental education, expanding school-based children of divorce intervention programs, and amending the lawyers’ rules of professional responsibility are part of an overall preventive services program that recognizes the effects of divorce and parental separation for what it is—a major public health problem facing many of our children. This is not to say that parents should not divorce, or that divorce is inevitably a catastrophic event for children. What is important, however, is that parents recognize that divorce and separation put their children at risk and that the state create procedures and a social climate to help parents define responsible behavior and to conduct themselves accordingly.

Millions of children are affected by divorce in this country annually. The effects of divorce on them are well documented. Mandatory parental divorce education, school-based intervention programs for the children of divorce and changes in the lawyers’ rules of professional conduct are appropriate and socially symbolic recognitions of the po-
tential harm parents do to children when they divorce. Creating such a coordinated program of preventive services can be the beginning of a large-scale effort—among judges, lawyers, mental health professionals and others concerned with the welfare of children—to redefine the responsibilities of parents and to reassert the authority and competence of the family in the modern era.
Might Versus Fright: The Confrontation Clause and the Search for "Truth" in the Child Abuse Family Court Case

Nancy Schleifer*

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I. FACE TO FACE: ABUSED CHILDREN AND THE CONFRONTATION CLAUSE

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him.¹

* J.D., University of Miami; B.A., Florida International University. Director, The Children's Law Project, Nova Civil Law Clinic, Nova University School of Law.
1. U.S. CONST. amend VI (The Confrontation Clause of the Sixth Amendment.).
This article is about finding the “truth” in a child abuse case in a non-criminal forum. Throughout the ages, Anglo-American law has been based upon the theory that the right of confrontation is “the greatest legal engine ever invented for the discovery of the truth.” Our entire system of jurisprudence is based upon that principle. The presence of the accused in the courtroom, the face to face presentation of witnesses, and the exclusion of hearsay have emerged from the theory that a defendant has a right to confront the accuser.

What happens, however, when eye-to-eye confrontation fails to achieve this noble purpose? What happens when eye-to-eye confrontation actually prevents the trier of fact from hearing the truth? What happens when the Confrontation Clause falls apart?

Contrary to the venerable Anglo-American legal notion that the Confrontation Clause leads to the discovery of truth, the Confrontation Clause more often prevents the truth when a child has been abused by a parent or custodian. Child advocates know in their hearts, and from their court experiences, that children—especially in domestic situations—will rarely tell the truth about their abuse when they are forced to confront their abuser face to face.

Imagine being one of these children (the names are imaginary, the cases are real):

#1 Nelly:

Nelly’s mother frequently abandoned Nelly and left her with relatives, but for about two years, when Nelly was under the age of six, Nelly lived with her mother. During this period, a number of her mother’s boyfriends sexually abused Nelly in her mother’s presence. Nelly’s mother occasionally laughed at or participated in this activity. Nelly’s mother threatened to cut off Nelly’s head if she ever told anybody about these activities.

Months and years later, Nelly was able to disclose some of her

nightmare to interviewers, her guardian ad litem, and her relative custodians, although her chronology was not always consistent and her details were often somewhat confused. The rape treatment center reports corroborated the probability of sexual abuse. Nelly also drew a picture of an object that was used upon her—unmistakably a vibrator. She vividly wrote in a few misspelled childlike words how she was sodomized by this instrument, which she called an "electric knife."

While the dependency action was pending, her mother left Nelly a vivid reminder of her former threats. Nelly's mother decapitated Nelly's pet rabbit.

#2 Donna:
Donna had been taken into custody when she was four because her mother committed lewd and lascivious acts with the child. At the time she was taken into custody with her younger sister, the house was neglected to the point that it was a significant health hazard.

Donna's mother participated in some of the programs the state offered her. Donna and her sister were returned to the mother under state supervision. During this time the state provided housekeeping services two times a week to the mother, and all seemed well. The state then terminated its supervision over this family.

Within a month of the date that the mother was free of state supervision, Donna came to school with a black eye. Her child protection team examination revealed recent evidence of severe and continuous abuse—old and new loop marks and lash marks too numerous to count all over Donna's body. Her sister also wore the signs of old and new whipping. Her baby sister was severely neglected. Donna stated to the doctors and counselors to whom she talked informally, that her mother beat her and her sisters with an extension cord. The most recent beating occurred because Donna (now aged seven) "used too much soap powder when washing her baby sister."

Donna was placed with relatives. During one psychological evaluation, Donna revealed that her mother had telephoned that week and told Donna to lie to the court about the incidents of physical abuse.

Donna always stated that she loved her mother. Donna also revealed that she had been severely beaten while in foster care when she was taken from her mother the first time.

Now imagine that you (Nelly or Donna) are required to go into a court with a judge in a black robe, a big policeman-like bailiff, a clerk of the court, two or three attorneys, and your mother who stares intently and
meaningfully at you. You are being asked questions about situations which make you very uncomfortable. Some of these questions are asked by an attorney you have either never met or who you met in a very unpleasant deposition where you feel you were threatened, disbelieved, and accused. Your mother's stare is invariably either a threatening or an imploring non-verbal statement. Would you (an eight or nine year old child) tell the truth?

The child who is a victim of abuse within the family, faces special problems. The abuser has had absolute control over the child during the abuse. The abuser may have significant control over the child during the proceedings unless visitation and contact has been eliminated or severely restricted. Most often, the abuser has verbally threatened the child with some form of retaliation if the child discloses the abuse. Even without the verbal threat, ongoing physical abuse is a non-verbal threat of retaliation. Typically, abused children also carry the burden of an incredible array of emotional hardware which prevents them from disclosure or forces them into recantation. As discussed in an excellent sexual-abuse survivor's manual:

The first time you tried to talk about your abuse, you may still have been a child. Under ideal circumstances, you would have been believed, protected, and assured that the abuse wasn't your fault. You would have been given age-appropriate counseling, and placed in a support group with other children. If the abuser was a family member, he would have been sent away, not you. Unfortunately, this was probably not the response you got. More likely, you were threatened, blamed, or called a liar. You were accused of "asking for it" or were called "a little whore." You may have been warned not to tell during the abuse itself: "It would kill your mother if she knew," or "I'll kill you if you tell."

If your case was taken to court, you may have been subjected to brutal testimony procedures, grilled by insensitive defense attorneys, or repeatedly forced to face your abuser. If your mother divorced your father because he was abusing you, you may have felt guilty for breaking up the marriage, for separating your family, or for ruining a "happy home."

Children not slapped with an actively cruel response are often met with devastating silence or told never to speak of it again. Families often go on as if nothing happened, never mentioning it. In that case, children get the message that their experience is too horrible for words. And, by implication, that they are too horrible.

In this way, children learn there is no one they can trust, that shar-
ing leads not to help but to harm or neglect, that it's not safe to tell the truth. In other words, they learn shame, secrecy, and silence.\(^4\)

Although research in the area of child sexual abuse and child victim witnesses is still in its infancy, studies reveal that most children are very cautious about revealing their sexual abuse and that children who do reveal their abuse will often recant. As the United States District Court for the Fourth Circuit noted, “[i]n two-thirds of child abuse cases, the incident is never even reported. Even when the incident is reported, prosecution is difficult, and convictions few.”\(^5\) According to a recent article in CHILD WELFARE:

Although there are few statistics on the frequency of recantation in child sexual abuse cases, the phenomenon is not uncommon. In one review of 630 cases of alleged sexual abuse, recantation occurred in 22% of the cases [Sorensen and Snow 1991] Russell [1986] conducted a study in which a random sample of more than 900 women were questioned regarding sexual abuse experiences. She found that 16% of the women had been incestuously abused as children. Two percent of those cases were reported to the police; what happened in the other 98% of the incest cases? Russell’s subjects reported numerous reasons they never told anyone about the abuse: they were afraid, they didn’t think anybody would believe them, they didn’t want the abuser to go to jail. Stories were recounted in which the child did tell someone, and that person, or a person in a position of responsibility did not believe the child.\(^6\)

It is no wonder that children who are sexually abused or seriously physically abused are most likely to refuse to talk about abuse until they are in a situation where they feel that; 1) they are safe, 2) they are with someone they can trust, and 3) they will be protected from future retaliation by their abuser. Thus, children are more likely to reveal abuse to teachers, counsellors, foster parents, and other adults who will listen and not blame. Children are least likely to talk when they feel threatened and when they feel they are speaking to a person who will not believe what they say. Few children will reveal their sexual abuse in a timely fashion. The common delay in telling anyone about

the sexual abuse ranges from days to years. Is it any wonder that few children will make any disclosures when facing their abusers and being confounded, confused, attacked, and disbelieved by a person who is utilizing customary techniques of cross-examination? The central premise of the Confrontation Clause fails miserably when applied to children who are subjected to domestic abuse.

II. PROTECTING THE CHILD FROM ABUSE BY THE "JUSTICE" SYSTEM

The child faces many perils in the court as a victim or witness. First there are multiple interviews by the police, medical doctors, rape treatment centers, child protection teams, state attorney's offices, detectives, social service counsellors, guardians, and psychologists. "It is not uncommon for child victims of sexual assault to be interviewed numerous (e.g. 20) times during their involvement in the legal process."8 Second, there may be multiple depositions especially where the child is placed in the dependency system and the parent or custodian is being simultaneously prosecuted in a criminal case. After this often unpleasant introduction to the court system, the child may be subjected to testifying—either in camera, before the abuser, or by a videotaped deposition or closed circuit television, or facing the abuser eye-to-eye.

Attorneys advocating for children must try to shield children from unnecessary exposure to traditional face-to-face confrontation. The child advocate must attempt to utilize the method of child testimony that is the least damaging to the child, while still assuring that the testimony will be admitted to establish the guilt of the abuser. Such protections include:

1. Limiting the number of interviews and assuring that the interviewers are appropriately trained at using non-leading questions in language that the child can understand.
3. Requesting in camera hearings where the child talks to the court with or without the presence of attorneys.

4. Videotaping interviews between the child and a competent child victim interviewer.
5. Using videotaped depositions in lieu of live testimony.
6. Having the child testify by means of two-way cameras or televised testimony.
7. Protecting the child with a screen to keep the child from seeing the abuser during courtroom testimony.

Many states have passed child victim and witness protection statutes and many courts have passed local rules for dealing more humanely with the child. Nevertheless, these laws may not protect the child when attacked by a Confrontation Clause analysis. The right to confrontation is the most difficult and heavily litigated issue facing child victims and witnesses today. The ability to protect child witnesses through the use of in camera proceedings, two way mirror or televised testimony, video deposition testimony, and hearsay testimony have been challenged successfully in criminal cases by the accused based upon Confrontation Clause analysis.

The child advocate must know the law concerning child testimony and must be able to navigate through the narrow channels of that law to protect the child from unnecessary face-to-face testimony against the abuser, and to thoroughly prepare the child if the child is required to face the abuser. In the family court, the child advocate must be able to successfully distinguish the rigorous criminal case construction that often bars the use of the child witness protection laws in criminal cases.

III. THE CRIMINALLY ACCUSED VERSUS PROTECTION OF THE CHILD ABUSED: CRIMINAL CASE LAW ANALYSIS

Issues concerning any constitutional protection have normally been raised in criminal settings by a person accused of a crime. Constitutional analysis has rarely been applied to victims. Where children are victims, especially in a family situation, the child may be continuously suffering a deprivation of safety, happiness, well-being, and even liberty at the hands of the abuser. Yet because the wrongdoer is the subject of a proceeding which threatens incarceration (loss of freedom in a criminal case) or loss of the child (the parent’s property in a dependency case), it is the wrongdoer, not the child, who has traditionally been accorded constitutional protections.

Because traditional constitutional analysis focuses upon the right of the accused criminal and has traditionally ignored the victim, children are often deprived of their constitutional rights of happiness, se-
curity, and freedom from abuse. The right of "confrontation" often means the right of "intimidation" in child abuse cases. "Court rules are adult rules which protect adults, not children." 9

In the last several years the United States Supreme Court has issued several decisions analyzing the child’s right to protection from face-to-face confrontation. Most of these cases arose in a criminal context. In *Coy v. Iowa* 10 the Supreme Court analyzed the validity of a statute which permitted the court to confine a defendant to an adjacent room or behind a screen or mirror that would permit the defendant to see and hear a child’s testimony, but would not permit the child to see or hear the defendant. The Supreme Court opinion in *Coy* is opulent with memorable quotations. The Supreme Court states that the right to confrontation “comes to us on faded parchment.” 11 The majority opinion cites Roman law, and English kings. It waxes poetic, citing Shakespeare’s lines from Richard the Second: “Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.” 12 The majority opinion also tenders a brief, harsh, and somewhat insipid comment about children:

> That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs. 13

While constitutional protections do have their costs, it is somewhat unsettling that the highest court of the land failed to even pay lip-service to minimizing the trauma endured by children in the court system. In *Coy*, the children victim/witnesses were allegedly accosted by the defendant, who, garbed with a stocking over his head, entered their tent while they were camping out in the back yard and sexually assaulted them.

Interestingly, the authored “majority” opinion was a very narrow majority consisting of Justices Scalia, Brennan, Marshall, and Stevens.

11. *Id.* at 2800.
12. *Id.*
13. *Id.* at 2802.
Justice O'Connor wrote a concurring opinion in which Justice White joined, stating: "While I agree with the Court that the Confrontation Clause was violated in this case, I wish to make clear that nothing in today's decision necessarily dooms such efforts by state legislatures to protect child witnesses."  

Justice Blackmun issued the dissenting opinion, in which Chief Justice Rehnquist joined. The dissenting opinion focused upon the needs of the child:

The prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must testify about the sexual assaults they have suffered . . . . Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioral disturbance in children."  

Thus, the fear and trauma associated with a child's testimony in front of the defendant has two serious identifiable consequences: It may cause psychological injury to the child, and it may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.

Two years after deciding the Coy case, the Supreme Court analyzed a similar child witness protection statute in Maryland v. Craig. The United States Supreme Court scrutinized a Maryland statute that permits a judge to receive, by one-way closed circuit television, the testimony of a child witness who is alleged to be a victim of child abuse. Prior to utilizing the one-way closed circuit television technique, the Maryland statute requires the trial court to determine whether the child victim would suffer "serious emotional distress such that the child cannot reasonably communicate" if the child was forced to testify in open court. In the trial court proceeding, the children did not testify in the preliminary hearing and the trial court judge did not personally

14. Id. at 2804.
16. Coy, 110 S. Ct. at 2809 (emphasis added).
have an opportunity to observe the children undergoing "trauma." The state's experts predicted that the children would not be able to communicate if forced to testify in open court. The experts testified that one child "would probably stop talking and she would curl up," and that another child would "become highly agitated."

The Court of Appeals of Maryland reversed the trial court's decision to permit the children to testify by use of the closed circuit television. The appellate court felt that the state's showing of threatened harm to the children "was insufficient to reach the high threshold" required by Coy. The Supreme Court of the United States vacated and reversed the Maryland appellate court. Not surprisingly, the dissenting and concurring panel in the Coy case became the majority in the Maryland case, joined by Justice Kennedy, who had not taken part in the Coy decision.

In its initial discussion, Maryland departed from the absolutist position taken by Coy: "We have never held, however, that the Confrontation Clause guarantees criminal defendants the absolute right to face-to-face meeting with witnesses against them at trial." Maryland noted, "our precedents establish that 'the Confrontation Clause reflects a preference for face to face confrontation at trial' . . . a preference that 'must occasionally give way to considerations of public policy and the necessities of the case.'"

The Supreme Court in Maryland also engaged in an analysis that was sorely lacking in the Coy case. The Court discussed public policy justifications for abused child witness protection statutes. The Maryland case acknowledged the growing body of literature and law substantiating the necessity for such protections:

We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court. That a significant majority of States has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such public policy.

The Maryland court identified 37 states which permit the use of video-
taped testimony of sexually abused children; 24 states which authorize the use of one-way closed circuit television testimony in court; and eight states which authorize the use of a two-way system. The Court acknowledged and discussed the "growing body of academic literature documenting the psychological trauma suffered by child abuse victims who must testify in court." 

On the same day that the Supreme Court decided Maryland, it also decided Idaho v. Wright. The Wright case involved an alleged sexual abuse of two little girls. The oldest child told her father's girlfriend that a co-defendant had sexual intercourse with her while her father held her down. The youngest child was found to be incompetent to testify in court because of her age and verbal skills. Nevertheless, the youngest child had volunteered some statements to the examining physician, which were admitted as hearsay under a residual hearsay exception, and the co-defendants were convicted. The father argued that admission of the hearsay statements violated his Sixth Amendment right of confrontation.

The facts of the Wright case are exceedingly important. The statements which were admitted into evidence in Wright were responses given by the younger child to the examining physician's questions. The examining physician asked these questions in an extremely leading and suggestive fashion. None of the conversations between the doctor and

21. Id. at 3168.
22. Maryland, 110 S. Ct. at 3168.
24. Interestingly, this case did not involve a specific child-abuse hearsay exception, but a garden variety residual hearsay exception. This distinction is important because the residual hearsay exception is generic, accommodating "ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." Id. at 3147. On the other hand, if the statement had been brought in under a special legislatively enacted hearsay exception for children who are the victims or witnesses of sexual or physical abuse, the Supreme Court would have had a much more difficult job of departing from the analysis in Maryland that a specialized hearsay exception "was specifically intended to 'safeguard the physical and psychological well-being of child victims by avoiding, or at least minimizing, the emotional trauma produced by testifying.'" See Maryland, 110 S. Ct. at 3168.
25. Several studies have focused upon the suggestibility of children at different ages, and the results of such studies are in conflict. See Jeffrey Haugaard & N. Dickon Reppucci, The Sexual Abuse of Children 349-51 (1989). Each of the studies cited in that chapter utilized different situations and children of different ages. None of the studies concentrated on sexually and physically abused children or child witnesses. One study conducted by Goodman and Reed examined children's testimony
the younger child had been videotaped. The Idaho appellate court also made a factual finding that the doctor had a preconceived notion of what the child should be disclosing.

When reviewing the facts, it is not surprising that the final outcome was a reversal of the conviction. The Supreme Court outlined a two-prong showing necessary for the admission of hearsay: 1) the prosecutor must either produce the child or demonstrate the unavailability of the declarant, and 2) the statement is admissible only if it bears adequate indicia of reliability. Not surprisingly, the Supreme Court felt that the State did not carry its burden of proving that the younger daughter's incriminating statements bore sufficient indicia of reliability. Although the decision was correct based upon the facts, the nature of the Supreme Court's analysis presents the child advocate with some very difficult hurdles.

The Supreme Court noted that the Iowa residual hearsay exception was not a firmly rooted hearsay exception for Confrontation Clause purposes. Therefore, there must be particularized guarantees of trustworthiness. The State had argued that physical evidence of the children's sexual abuse corroborated the children's statements, and thus, the requirement for a particularized guarantee of trustworthiness was fulfilled. The Supreme Court disagreed. The Supreme Court held that adequate indicia of reliability must be found in reference to the circumstances surrounding the making of the out-of-court statements, and not from subsequent corroboration of the criminal act. Physical corroboration of the sexual abuse was not admissible for the purpose of showing trustworthiness of the statements, because, according to the Supreme Court, physical corroboration "sheds no light on the reliability of the child's allegations regarding the abuser." (One would wonder if that would be true if the physical corroboration was gonorrhea in a five year old child's throat.)

The Supreme Court recited some factors that other courts had utilized to demonstrate trustworthiness: Spontaneity, consistent repetition, in a situation that mimicked victimization (children in the study had undergone inoculation which required that the children be restrained and given shots by a nurse). The finding in the Goodman study was that older children showed greater resistance to misleading information than did younger children, but that suggestibility was greater for peripheral acts than for the specific actions that took place or the physical attributes of the culprit.

27. *Id.*
28. *Id.* at 3151.
use of terminology unexpected of a child of similar age, and lack of motive to fabricate. However, the Supreme Court refused to approve or disapprove such factors as sufficient to demonstrate that the child’s statements bear the particularized guarantees of trustworthiness. In short, the child advocate is left to wonder how to prove trustworthiness and the courts are left to ponder how much proof is enough.

The most recent United States Supreme Court case on child testimony is White v. Illinois. In White, the trial court admitted the testimony of an allegedly sexually abused child under the “spontaneous declaration,” and “medical examination” exceptions of the hearsay rule. The child did not testify at trial. The appellant claimed that before testimony could be admitted under the “spontaneous declaration” and “medical examination” exceptions, the child must be shown to be unavailable. The Supreme Court rejected the appellant’s arguments, noting that statements made under the “spontaneous declaration” exception and the “medical treatment and diagnosis” exception provide substantial guarantees of trustworthiness. “Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.” White simply reiterated that statements which come within firmly rooted hearsay exceptions can be admitted without additional qualifications. White also eliminates the argument that the prosecution is required to show unavailability of the child for the admission of hearsay statements.

IV. BLEAK HOUSE: PROTECTING THE CHILD IN A FAMILY COURT

Although this article focuses upon the Confrontation Clause and the use of child witness protection techniques in a non-criminal proceeding, the previous section zeroed-in on the confrontation analysis in criminal proceedings. The practitioner must understand the line of Confrontation Clause cases in criminal proceedings before being able to distinguish those key Supreme Court cases in a non-criminal case.

29. Id. at 3149-50.
31. Id. at 738.
A. Is the Confrontation Clause Available to the Alleged Perpetrator in a Child Protection Case?

The starting point for this discussion is the Confrontation Clause itself. The Confrontation Clause, by its own terms, is a criminal protection enjoyed by the accused. The Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him." 32

As stated in a Washington dependency case, the Confrontation Clauses of the United States (and the Confrontation Clause of the State of Washington) do not apply to a dependency proceeding "since by their terms they . . . apply only in criminal cases." 33

Although the United States Supreme Court has not analyzed the Confrontation Clause in a child custody or non-criminal child abuse case, the United States Supreme Court has analyzed the defendant's Fifth Amendment right when raised in a dependency proceeding. Both the Fifth Amendment right against self-incrimination and the Sixth Amendment right of confrontation are limited to criminal prosecutions. The Fifth Amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself." 34

In Baltimore City Department of Social Services v. Bouknight, 35 a child had been adjudicated a child in need of assistance and placed back in his mother's care under the supervisory powers of the state. Eight months later the state feared for the child's safety and petitioned the court to remove the child from his mother's control and place him in foster care. The mother refused to reveal the location of the child, and the court held the mother in contempt for failure to produce the child as ordered. The mother contended that the contempt order violated her constitutional right against self-incrimination. The United States Supreme Court rejected her argument, and held that the Fifth Amendment could not be invoked in a non-criminal juvenile child protection proceeding. 36 The Supreme Court characterized a juvenile child protection proceeding as a "non-criminal regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its

32. U.S. Const. amend. VI (The Confrontation Clause of the Sixth Amend- ment.) (emphasis added).
34. U.S. Const. amend. V (emphasis added).
36. Id. at 905.
criminal laws," and held:

Once Maurice was adjudicated a child in need of assistance, his care and safety became the particular object of the state's regulatory interests . . . . By accepting care of Maurice subject to the custodial order's conditions . . . Bouknight submitted to the routine operation of the regulatory system and agreed to hold Maurice in a manner consistent with the State's regulatory interests.38

The Supreme Court did note, however, that the information which was appropriately compelled for the purposes of the juvenile child protection case might be excluded from any criminal prosecution over the same acts consistent with Fifth Amendment principles. The Supreme Court decision in Bouknight is important to our Confrontation Clause analysis because it recognizes boundaries of constitutional criminal protections, and acknowledges the non-criminal regulatory nature of the child dependency case. It also emphasizes the propriety of enforcing child protection statutes.

The holding in Bouknight does not offer carte blanche admissibility for all child hearsay, nor does it mean that child witness protections will obtain the "nod" of every family court judge. The two-prong test of "emotional harm" and "trustworthiness" may still be required if the child is to testify by less traumatic means than face-to-face confrontation.

The distinction between the right to confrontation in a criminal case, and due process rights to confront and cross-examine in a dependency case was also analyzed in the California dependency case of In re Kerry O.39 In that case, after a mistrial, parents counsel stipulated that the trial judge could read the transcripts of the initial trial. The trial transcripts contained testimony of the minor in the judge's chamber in the presence of the parents' attorneys but outside of the presence of the parents. The parents argued that their right to confrontation was violated because they were not properly advised that they were waiving a fundamental constitutional right. The California court noted that the federal and state constitutional right of confrontation "are confined by their terms to criminal cases,"40 and reiterated that "not all formalities of a criminal trial are required in, or applicable to, a dependency pro-

37. Id.
38. Id. at 907.
40. Id. at 453.
ceeding.” As in Bouknight, Kerry noted that dependency proceedings are designed to protect the child rather than to prosecute the parent. The parents’ counsel had an opportunity to cross-examine the child in the in camera hearing, thus meeting the due process requirements for civil cases.

Most child-witness protection statutes do not discriminate between criminal and civil cases. The child-witness protection statutes often require a showing that the child will suffer at least moderate mental or emotional trauma before the child can testify through the use of videotaped deposition, two-way camera, or two-way mirror or screen devices. Hearsay statutes which protect children require a showing of unavailability, of mental or emotional trauma, and of “trustworthiness.” The statutes do not specifically soften the standard when the child is in a family court. Perhaps such statutes should differentiate between child protection cases and criminal proceedings. Perhaps some day a model act will fashion child witness courtroom protections which recognize the developing research concerning the child victim’s needs.

B. State Case Law

1. Hearsay and the “Corroboration” Requirement

New York, of course, is a leader in child protection laws. Contrary to the national trend which blurs the distinction between family court and criminal court child-witness laws, New York has developed special family court child victim/witness protections. These protections include a specific hearsay exception which permits the child’s out-of-court statements into evidence in a family court proceeding. Although uncorroborated statements alone are not sufficient to make a finding of abuse or neglect, the statute flexibly defines corroborating evidence so that the burden of corroboration may be easily met in an appropriate case. In addition the statute specifically provides that the testimony of the child is not necessary in a dependency case in order to make a finding of abuse and neglect.42

In In re Nicole V.,43 a New York appellate division stated:

Because due process requirements must vary with the subject mat-

41. Id.
42. N.Y. FAMILY LAW § 1046(a)(vi) (Consol. 1992).
ter and necessities of the situation . . . and these Family court pro-
ceedings are designed to protect victims from further harm, not
punish the offenders or even terminate their parental rights perma-
nently, we conclude that due process requirements are met by per-
mitting a finding of abuse to be made on the basis of a child's out-
of-court statement which is corroborated by any competent non-
hearsay, relevant evidence which confirms that the child has been
sexually abused and enhances the credibility of the child's state-
ment as to its material elements.44

In re Nicole V. suggests that corroboration may consist of medical
proof; proof of abuse of other children; the child's in camera interview;
a validation interview confirming the existence of intrafamilial child sex
abuse syndrome, and the consistency of the child's statements to other
witnesses. Furthermore, corroboration may include such behavioral in-
dicators as age-inappropriate knowledge of sexual behavior, enuresis in
a toilet trained child, regressive behavior and withdrawal, sleep distur-
bances, or other emotional behavior inappropriate for children of that
age. In In re Nicole V., virtually every one of these factors were
demonstrated, the child's out-of-court statements to several witnesses
were admitted, and the appellate court upheld the trial court's finding
that the child was sexually abused. In In re Francis Charles W., Jr.,45
statements of other children were held to be sufficient corroboration of
the child's statements which were admitted into evidence through affi-
davits of a Sheriff's Department investigator.

offers another liberal interpretation of the corroboration standard and
the use of hearsay. M.R.F. involved an expungement proceeding insti-
tuted by an alleged child sexual abuser. The contested testimony in-
cluded statements by a qualified social worker who interviewed the
child on three occasions. On each occasion, the child indicated clearly
and consistently that she had been sexually abused and demonstrated
specific incidents of abuse with anatomically correct dolls. The child
demonstrated inappropriate knowledge of sexual matters. Psychological
evaluations concluded that the child's behavior and verbalization
demonstrated sexual abuse. The Pennsylvania court held that although
the caseworker's testimony was hearsay, a hearsay exception existed to
permit the introduction of statements by a child describing sexually

44. Id. at 572-73.
 abusive conduct. The hearsay exception required that the time, content, and circumstances surrounding the statements indicated sufficient indicia of reliability. The Pennsylvania court determined that there was adequate indicia of reliability because the caseworker accurately recorded the child's words shortly after the incident was first reported, and the caseworker was a disinterested professional. Certainly, this is a very liberal application of the trustworthiness doctrine.

Illinois, on the other hand, has a most oppressive and hard-line definition of "corroboration." In Brunken v. Brunken a7 an Illinois appellate court rejected the notion that almost identical statements made by the abused child to several witnesses were sufficient "corroboration." The appellate court likewise rejected testimony that the child's behavioral problems, consistent with the behavioral problems of sexually abused children, adequately corroborated the child's out-of-court statements. The allegations and testimony concerning the child's sexual abuse in Brunken certainly would have met the New York standards. The child had allegedly stated, "Mother be gentle with me," when her mother was drying her off with a towel, and stated "Daddy sticks his finger in my bottom," when her mother was diapering the child. One day the mother stated she observed the child poking items in and around her vaginal area when she was in the bath, and when her mother told her not to do that, the child stated, "Well, Daddy does like that." The mother also reported the child "passionately" kissing her, and the child reported she had learned this "from Daddy." The child stated to the mother that her daddy hurt her with puzzle pieces. The mother testified that the child's vaginal area was very red, the child complained of her bottom hurting, and the child had increased enuresis until the father's visitations were stopped by the abuse proceeding. Another witness stated that when she was diapering the child, the child recited a variation of the nursery rhyme "Hickory Dickory Dock," as follows: "The clock struck one and Daddy put his hands in my pants." The second witness also reported that during bath time, the child stated, "I take baths with Daddy in the shower and Daddy hurts me." A social worker testified that when she interviewed the child, the child stated that "Daddy stuck his fingers and put wooden puzzle pieces into where she pee pees and poo poos." The child demonstrated where her father touched her with anatomical dolls—she also demonstrated, using dolls, sexual situations with her father. The child's therapist testified

that the child made similar consistent statements to her and identified a bad touch by her daddy on a stick figure drawing. A psychotherapist testified as to the signs of a sexually abused child—all of which were consistent with the testimony of the other witnesses. There was, however, no physical evidence of sexual abuse. The Illinois court systematically rejected all of this evidence as sufficient to corroborate any of the child’s out-of-court statements. Not only did the court find that the father had a right to cross-examine the child, the court reversed the adjudication in its entirety and dismissed the petition outright. This child was no doubt visiting with her father the next week. The state was not even given an opportunity to call the child to corroborate her own out-of-court statements. Given the facts of the case, the only acceptable corroboration for an adjudication of dependency in Illinois appears to be positive physical findings, such as a positive test for venereal disease, or the testimony of the child or of an eye-witness who observed the sexual abuse. Pity the poor child in Illinois.

2. Creative Use of Hearsay Exceptions

Skillful use of the hearsay rules will also permit the introduction of the child’s statements and non-verbal acts. In Re Dependency of Penelope B., 48 notes that many of the child’s statements and much of the child’s non-verbal conduct will not be hearsay, as it is not intended to be an assertion for the purpose of its truth. 49 For instance, the Washington appellate court pointed out that the child’s act of running, hiding, screaming, or crying out “I hate you,” when the accused’s name is mentioned or when the accused walks into a room would be non-verbal acts and not hearsay. The child’s statements during play with anatomically correct dolls showing the child’s inappropriate knowledge of sexual situations was also not hearsay according to that court. 50

Another very important portal for the admission of admissible “hearsay” is the medical diagnosis. When a sexual assault medical doctor makes a diagnosis of sexual abuse, or when a psychologist or therapist is treating the child for psychological problems secondary to sexual abuse, the medical diagnosis exception to the hearsay rule applies, and the child’s statements made during diagnosis or treatment (therapy)
are admissible.\footnote{Id. at 1193.}

Children's hearsay statements may also come in as excited utterances. The classic factors to be considered in determining whether statements are excited utterances include: “(1) the lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements.”\footnote{Morgan, 846 F.2d at 947.} Most of the cases which have analyzed whether child victim statements qualify as excited utterances focus almost exclusively on the time frame between the event and the declaration. This analysis presumes that a victim will speak at the first opportunity—a presumption that proves fallacious in most child abuse cases. As noted earlier in this article, most children will not reveal sexual abuse for long periods of time—days, weeks, months or years, if ever. In \textit{Morgan v. Foretich},\footnote{846 F.2d at 947.} the United States Circuit Court for the Fourth Circuit criticized undue emphasis on the spontaneity requirement, since children do not necessarily understand that sexual contact by adults is considered to be shocking, and since children may delay reporting because of confusion, guilt, or fear. Acknowledging studies which show that children are reluctant to report abuse immediately, some courts consider statements as “spontaneous” if the statements occur at the child's first opportunity to report the abuse.\footnote{Id.} Spontaneity may also be measured by other factors, such as whether the child was upset at the time the statement was made or whether the child described that act in sexually explicit terms that exceed a normal child's age-appropriate understanding of the sexual act.

3. In Camera Proceedings

Child protection courts and family courts have also approved of in camera proceedings where the child appears before the judge without the presence of the parents. In \textit{Castellanos v. Department of Health and Rehabilitative Services},\footnote{545 So. 2d 455 (Fla. 3d Dist. Ct. App. 1989).} a Florida court upheld the use of an in camera hearing where neither the parents nor the parents' attorney were present. The Florida rules of procedure provided that “the child may be examined by the court outside the presence of other parties
and the child protection statute stated that "the child and the parents or legal custodians may be examined separately and apart from each other." The appellate court noted that there was no statutory requirement on the part of the social service agency to prove that the child would suffer mental or emotional harm prior to utilizing an in camera procedure and stated:

This is hardly surprising as the legislature has obviously determined that such a procedure is particularly suited to all juvenile dependency cases, that the effort to obtain the truth from the minor child is unlikely to be successful if conducted in the presence of his parent or guardian whose care of the child is being questioned, and that the child necessarily requires a special exemption from the rigors of cross examination by the parent or guardian. 66

A Louisiana appellate court espoused a similar rationale, upholding an in camera interview of child where the child had a genuine and justifiable fear of her father and where the parents were informed of the child's statements and given ample opportunity to introduce contradictory evidence. 67 In New Jersey Div. of Youth and Family Services v. S.S., 68 a New Jersey court came to the same conclusion regarding an in camera procedure that was simultaneously transmitted by electronic means into the courtroom where the parents and their counsel were present.

In camera procedures have also been upheld in divorce proceedings. For instance, in Okum v. Okum, 69 a California appellate court upheld a trial court's decision to interview the children in chambers with only a court reporter and the parents' attorneys present. During the interview the trial court refused to allow either attorney to propound any questions to the children. The Okum case relied on California Evidence Code 765 which requires the court to protect children under fourteen from undue harassment or embarrassment, requires the court to insure that questions are stated in an age appropriate fashion, and permits the court to forbid questions which are not likely to be understood by children. The Okum court held: "We find no error in the court's restriction of the children's testimony. This litigation was par-

56. Id. at 456.
particularly acrimonious. . . . The court was obviously concerned that certain testimony by the children in this highly charged proceeding might later affect their relationship with their parents."

4. Summary of Non-Criminal Child Witness Protections

There is still a very small body of case law pertaining to child witness testimony in non-criminal settings. However, there is a trend in the emerging case law to apply child witness protection statutes and special hearsay provisions liberally. The dependency and family courts tend to reduce the "trustworthiness" obstacles which preclude admission of children's hearsay statements. Courts have uniformly admitted evidence under time-honored hearsay exceptions. Finally, child protection and family courts are permitting special techniques, such as in camera proceedings, with liberality. The essence of these decisions is that the family court proceedings exist for the protection of the child and not for the punishment of the alleged abuser.

V. Development of the Child Protection Case

Traditionally, the courts have failed to accord children a full spectrum of constitutional rights because children are not little adults: They do need guidance, care, supervision, and discipline. If children are not little adults when it comes to enjoying all constitutional rights, they certainly should not be treated as little adults when they are forced to be witnesses. Yet, Confrontation Clause analysis has in fact treated the child abuse victim just like any witness.

The failure of the courts to fully protect children from the harmful continued abuse applied by the justice system has two basic causes. First, trial and appellate court judges and justices are not specialists in child development and child psychology. Thus, the courts tend to follow a traditional Confrontation Clause analysis without accounting for the differences between the way a child and an adult remembers and communicates and without accounting for the fact that children have much greater fear and far less control over situations than adults have. Since the judges do not have an innate knowledge of child development and psychology, and child development and psychology are not a part of the body of law which may be cited to as stare decisis, judges and justices need a record replete with testimony as to child development, child psy-

60. *Id.* at 463.
Schleifer

psychology, and actual facts about a particular child in order to determine that the child's need for protection overrides the accused's right to confrontation.

Secondly, attorneys are not fully developing their cases at the trial level to insure that the courts have all the data that they need to justify child witness protections from face-to-face confrontations.

Appropriate development of the case includes:

1. Competent child psychologists, child interviewers, and child development specialists who will testify concerning child development and child psychology, setting the groundwork for exploring the child's mental and emotional state and for explaining any inconsistencies of the child's out-of-court statements. It is not always necessary for such experts to have a connection with the particular child. Their purpose is to instruct the court.

2. The attorney, in conjunction with the other child experts, should teach adult "factual" witnesses to be aware of behavioral patterns which identify the abused child. Foster parents or temporary custodians are especially valuable for this purpose, but other witnesses prior to the child coming into custody may reveal valuable information if the attorney takes the time to make the witness understand the process of child abuse. Adult factual witnesses should record such behavioral indicia and recount the child's behavioral patterns to the court.

3. By sheer number and repetition, a child's consistent re-telling of the abuse through numerous witnesses tends to corroborate the child's out-of-court statements. Most courts accept "consistency" of the child's statements as independent corroboration of the trustworthiness of the child's statements. This is especially useful during a preliminary hearing where non-admissible hearsay should be permitted.

4. Videotapes of child testimony often capture the child's fear, anger, and behavioral idiosyncrasies, in addition to recording the child's statements concerning the abuse. Whether an interview is videotaped or not, it is important for the attorney to caution the interviewer to use non-leading forms of questions, and it is important that the interviewer be skilled in the processes of interviewing child abuse witnesses. Finally, the interviewer must have adequate credentials to withstand expert qualification voir dire.

5. Medical doctors, psychological examiners, and treating therapists should be able to relate the child's statements made to them both for the purpose of demonstrating the child's mental state and for the purpose of the truth under the medical diagnosis and treatment exception.
6. Medical information may or may not be admissible as corroborative information for the purpose of demonstrating the trustworthiness of the child's out-of-court statements. Positive medical findings, of course, should be utilized as proof of the sexual and physical abuse. Obviously, showing a positive test for venereal disease in a child under ten is very useful in demonstrating that the child is not simply dreaming up a sexual encounter with the accused. It is also useful to show medical information of physical abuse even in a sexual abuse case, since this bolsters the theory that the child will suffer mental duress.

7. Attorneys should be on the lookout for less obvious witnesses. Teachers and foster care parents make valuable witnesses. Teachers and school principals see things and hear things that others may not. Even when a case worker or investigator may not have included the teacher or foster care parent on a preliminary witness list, the attorney should call up these folks and talk to them. School records may also be very revealing. The child may have serious behavioral disturbances that have been recorded by school personnel. Teachers, principals, and school counselors may have seen suspicious bruises too often for comfort, but not often enough for an abuse report. Children often tell their teachers and school counselors information which they hide from others. Sometimes, teachers or school counselors even go to the home to help young students who appear to have problems. If a child has been in the hospital, or where babies are involved, nurses and medical professionals may also have revealing information. Public health nurses often know incredible information concerning the family dynamics.

In order to permit the use of testimony other than face-to-face testimony, the court must often entertain a preliminary hearing to show that the child is “unavailable” to testify because the child may suffer severe or moderate mental or emotional harm if forced to face the accuser in court. The preliminary hearing is also used to determine the trustworthiness of the child’s out-of-court statements. Competent mental health professionals and child-advocate attorneys should be able to make the court understand that mental distress is almost inevitable where the abuse has taken place in a family situation.

There must be a beneficial exchange between the fields of psychology and law to demonstrate to the court that:

1. Children have selective memories and remember differently than adults and that just because children’s memory and recitation differs from adults does not make them untrustworthy. Young children are actually more trustworthy than adults when dealing with issues of abuse because they traditionally lack a motive to lie about the abuse.
2. Children have a different way of communicating their thoughts and fears than adults.

3. Spontaneous statements and excited utterances are different for a child than an adult. In particular, most children do not reveal their abuse immediately because of their fears.

4. Testifying is difficult even as an adult. Children will have even greater difficulty understanding the legal process itself.

5. Recantation is almost the norm after a child has been sexually or physically abused due to threats, family pressures, and the child's dependency on the family unit.

VI. CONCLUSION

We have put men on the moon, listened to the stars, traveled to London in less than three hours, laser-beamed music in our cars, and computerized our homes. It is time to shed our medieval legal approach to dealing with children in the courtroom. It may not be possible to make all homes safe for kids, but we should put an end to child abuse by the courts. The truth will not suffer from making it easier for a child to testify, and children should not be made to suffer in order to tell the truth. Special laws should protect children in family courts to minimize the child's trauma of telling the tale of child abuse, and child advocates and family courts should be well versed in using the emerging research and the appropriate legal reasoning to justify the use of the least traumatic means to achieve the end.
HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages

Michael L. Closen*
Carol R. Helse**

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I. OVERVIEW

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.¹

Today, most Americans find proposals to allow same-sex marriages to be either unacceptable or unthinkable,² yet the consensus of

* Professor of Law, The John Marshall Law School; Adjunct Professor of Law, St. Thomas University. B.S., M.A., Bradley University; J.D., University of Illinois. Instructor of AIDS law courses at three law schools.

** Associated with the Law Offices of H. Candace Gorman, Chicago. B.S.N., St. Xavier College; M.A., Roosevelt University; R.N., Oak Park Hospital School of Nursing; J.D., The John Marshall Law School, 1992. Formerly, staff nurse in psychiatric and alcohol treatment units for Illinois Department of Mental Health and Instructor of Psychiatric Nursing at Ravenswood Hospital and DePaul Hospital.

¹ Chief Justice Earl Warren writing the opinion in Loving v. Virginia, 388 U.S. 1, 12 (1967).

the settlers in the colonies of New England accepted the fact that married women enjoyed almost no separate legal existence apart from their husbands. Before the Civil War, not many people seemed to object to the laws which prohibited marriages among slaves. Even into the 1960s many states had statutes on the books which outlawed a marriage between a white person and a person of color. Looking back, thoughtful and compassionate people find embarrassment about the role of our society in adopting and fostering such notions. Perhaps, obstacles to same-sex marriages will soon become archaic as well.

Some signs of erosion of opposition to same-sex marriages have appeared in recent years. Moreover, there are sound public policy reasons not only to allow same-sex marriages, but also to encourage them. After all, we are now faced with the deadly and incurable HIV-AIDS disease.3 It is of epidemic proportions in the United States and has

3. "AIDS" means the Acquired Immunodeficiency Syndrome, as defined by the Centers for Disease Control or the National Institute of Health. Ill. Rev. Stat. ch. 56 1/2, § 12-16.2(b) (1989). See infra notes 11-15 and accompanying text for a discussion of the relationship between AIDS and its causative agent, the Human Immunodeficiency Virus (HIV). "HIV" refers to the human immunodeficiency virus. The HIV virus is identified by isolation of the virus. However, these techniques are not generally available to the public and are as yet not sensitive to detection of the infection. Cohen, Safe Sex, Safer Sex, and Prevention of HIV Infection, in The AIDS Knowledge Base § 11.1.1 (1990). There is a close correlation between the persons with clinical manifestations of AIDS and the presence of HIV antibody. Id. See generally Centers for Disease Control, Human Immunodeficiency Virus Infection in the United States: A Review of Current Knowledge, 36 Morbidity & Mortality Wkly. Rep. Supp. 6 (1987). For a list of additional sources of classification of HIV and AIDS, see Scott H. Isaacman, The Other Side of the Coin: HIV-Infected Health Care Workers, 9 St. Louis U. Pub. L. Rev. 439, n.1 (1990). The term "AIDS" is regarded by public health authorities to be obsolete. Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic xvii (June 24, 1988) [hereinafter Presidential Commission]. "HIV infection" better defines the complexity of the problem. Id. The focus of the medical and public health community has mistakenly been on AIDS rather than on the full scope of the disease, including the initial state of infection with the HIV virus. Accordingly, this comment will use the term "HIV/AIDS" when referring to the disease, AIDS, caused by infection with the HIV virus.

4. For a discussion of the urgency and breadth of the HIV epidemic in the United States, see generally the Presidential Commission, supra note 3. The American Public Health Association (APHA) is considering replacing the threat of nuclear war as the number one health problem in the United States with the HIV-AIDS crisis. Michael L. Closen et al., AIDS: Cases and Materials, 1989 [hereinafter Closen, AIDS: Cases and Materials]. See also Centers For Disease Control, The Second 100,000 Cases of Acquired Immunodeficiency Syndrome - United States, 267 JAMA 788 (February 12, 1992).
sexual intercourse as one of its two most common modes of transmis-
sion. Hence, encouragement of long-term monogamous relationships is
in our best interest. Perhaps, legislation recently enacted in Denmark
will serve as the vehicle by which approval of same-sex marriages can
be more effectively urged in the United States.

The Danish Registered Partnership Act (Danish Act), enacted by
the Danish Parliament in 1989, is the first legislation in the world to
allow two members of the same sex to enter into a “partnership” and
legally cohabit as a married couple. The statute requires that one of

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5. The relative risk of becoming infected with HIV depends on whether a sexual
partner is likely to be at high risk as determined by the following criteria:
High-risk groups include anyone who within the past ten years has engaged in male
homosexual activity or intravenous drug use, has resided in Haiti or central Africa, has
a history of multiple blood transfusions, . . . is a hemophiliac . . . or has had a regular
sexual partner who is a member of any of these groups.

“Norman Hearst, MD, MPH & Stephen B. Hulley, MD, MPH, Preventing the Heter-
osexual Spread of AIDS, 259 JAMA 2428, 2431, (1988) [hereinafter Hearst & Hul-
ley]. However, there is an increasingly popular view that we should no longer refer to
risk groups, but only to risk behavior.

6. THE DANISH REGISTERED PARTNERSHIP ACT, No. 372 (Denmark 1989) [here-
inafter DANISH ACT]. On May 24, 1984, the Danish Parliament passed a Bill calling
for the establishment of a commission “to elucidate the position of homosexuals in
Danish society.” M. Elmer & M. Larsen, Explanatory Article on the Legal Conse-
quences of the Danish Law on Registered Partnership, 3 JURISTEN 1 (1990) [hereinafter
Elmer & Larsen]. Accordingly, the Minister of Justice set up a commission on
November 21, 1984 to investigate the “legal, social and cultural circumstances of
homosexuals.” Id. The commission was also directed to make proposals for the removal
of existing discrimination against homosexual persons in Danish society, for the im-
provement of the situation of homosexual persons and for the establishment of “perma-
nent forms of cohabitation.” Id. Based on a February 1986 provisional report from the
commission, the Danish parliament amended the inheritance and gift taxes provisions
of the Danish Taxation Act. FOLKETING ACT No. 339 (Denmark 1986) (alleviating
inheritance tax under certain circumstances for persons of the same sex sharing a
home).

Just before the final report of the commission was published in January 1988, the
Social Democratic Party, the Socialist People’s Party and the Social Liberal Party in-
troduced their registered partnership bill, L 182. Elmer & Larsen, supra note 6. This
bill was passed with minor changes on June 7, 1989. Id. A companion bill was passed
at the same time to amend the Danish Marriage Act, the Inheritance Act, the Inheri-
tance and Gifts (Taxation) Act and the Civil Penal Code due to changes brought about
by the Registered Partnership Act. Id.

The CHICAGO TRIBUNE reported that members of the Danish Parliament passed
the law by a vote of 71-47. CHICAGO TRIBUNE, Oct. 2, 1989, at p. 3. See also Danish
Parliament Legalized Gay Marriages, CHICAGO TRIBUNE, May 27, 1989, at 3, Clar-
ence Page, A Non-traditional Way to Say ‘I Do’, CHICAGO TRIBUNE October 8, 1989,
the two partners be either a permanent resident of Denmark or of Danish nationality, and there is no restriction on residence or citizenship of the other person. With limited exceptions, the Danish Act grants such a partnership the same rights and responsibilities as heterosexual marriage partners.

7. The Danish Act requires that at least one of the partners have either permanent residence in Denmark or be of Danish nationality. DANISH ACT, supra note 6, § 2½. at 1. Thus, an American citizen could enter into a registered partnership in Denmark with a Danish national or a person whose permanent residence is Denmark. See Elmer & Larsen, supra, note 6. The potential number of persons affected by the Danish Act could be very small. Nevertheless, the recognition of even one same sex marriage could be precedent setting.

8. There are four exceptions to the provision that the registration of a partnership will have the same legal effect as the contracting of marriage. DANISH ACT, supra note 3. The first exception is that the Provisions of the Danish Adoption Act regarding spouses does not apply to registered partners. Id. § 4.1, at 1. The legal consequence of this provision is that persons in a registered partnership have no possibility of adopting jointly. Elmer & Larsen, supra note 6.

The second exception is that the regulations of Danish law on child custody that apply to married couples are not applicable to registered partnerships. DANISH ACT, supra note 6, § 4.2, at 1. The legal consequence is that a registered couple cannot obtain common custody of the child from a previous marriage of one of them. Elmer & Larsen supra note 6, at 3. A person in a registered partnership is, however, permitted to obtain custody of a child under regulations that apply to other single or married persons. Id.

The third exception is that the rule in the Danish law that a husband is responsible for "his wife's ordinary contracts . . . (for) her own special needs," does not apply to registered partnerships. Id. at 4. The last exception is that "[p]rovisions of international treaties shall not apply to registered partnership unless the other contracting parties agree to such application." DANISH ACT, supra note 6, § 4.4, at 1.

The provisions of Danish law that apply to marriage and to marital spouses apply similarly to registered partnerships and to registered partners. DANISH ACT, supra note 6, § 3.2, at 1. The act permits a couple consisting of two persons of the same sex to

at 3; Incidental (Sexual) Intelligence, MEDICAL ASPECTS OF HUMAN SEXUALITY, November 1, 1989, at 19; Telephone interview with Lisa Powers, General Secretary of the International Lesbian and Gay Association (Aug. 30, 1990).

In 1987, the Swedish government amended the national marriage code to expand the property rights of unmarried cohabitants, including same sex couples. SVENSK FORFATTNINGSSAMLING (SFS) § 14 (Sweden). However, the Swedish law provides far more limited rights than does the Danish Act. See DANISH ACT, supra note 6. The new law specifically extends these limited property rights to homosexual persons who live together in a marriage-like relationship for a minimum five-year period. Id. These property rights includes items acquired during the relationship, such as a home and its furnishings. Id. at § 5. See also Mathew Fawcett, Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants, 24 FAM. L.Q. 179 (1990).
While courts in the United States generally recognize marriages validly contracted in another country, the courts have not yet faced

enter into a "registered partnership" with the same legal consequences as marriage, subject to certain exceptions. The legal consequences are that the rules governing property in a marriage and the right of married persons to social welfare payments have corresponding application to registered partnerships. Elmer & Larsen, supra note 6, at 3. The death of one of the partners dissolves the registered partnership. Id. The surviving partner "may retain undivided possession of the estate in accordance with section 9 of the Inheritance Act," and will receive the other benefits which would be accorded to a married spouse, subject to the exception regarding common heirs. Id.

The consequences of the Danish Act are that registered partners are bound by the same rules as are married spouses concerning mutual maintenance obligations, taxation, and the possibility that upon dissolution of a registered partnership, one of the partners may be ordered to pay alimony to the other. Id.

9. State marriage statutes generally contain provisions which grant validity to the marriage of residents whose marriage was celebrated in a foreign country. UNIF. MARRIAGE AND DIVORCE ACT § 210 (1974). See, e.g., Wyo. Stat. § 20 (1977) (granting validity to marriage contracts which are valid under the laws of the country in which a marriage was contracted). Such provisions merely declare the common law rule. Bowers v. Wyoming State, 593 P.2d 182 (Wyo. 1979); see also K. v. K., 393 N.Y.S.2d 534 (1977) (giving effect to law of Poland which did not recognize religious solemnization of marriage).

The validity of a marriage is determined by the local law of the state which has the most significant relationship to the spouses and the marriage. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1969). Section 284 states that "[a] state usually gives the same incidents to a foreign marriage, which is valid . . . that it gives to a marriage contracted within its territory." Id. at § 284. In assessing the validity of a foreign marriage, the first consideration is whether the marriage complied with the legal requirements where the marriage took place. E. SCOLES & P. HAY, CONFLICT OF LAWS § 13.6 (1986). The usual view in the United States, that a marriage valid where entered into is valid everywhere, is based on the strong public policy for upholding the validity of marriage wherever possible. Id. § 13.8. However, a number of cases have denied validity to foreign marriages where persons were forbidden to marry by the law of their domicile. Id. If a particular union is explicitly forbidden by the law of the domicile, a conflict arises between the strong public policy for upholding marriage and the common domicile's notions of "propriety and good morals" that are contained in statutory prohibitions, such as polygamy, incest, or non-age. Id.

Some states have passed Marriage Evasion Acts to prevent their marriage laws from being circumvented by couples who marry in a jurisdiction outside their common domicile, which permits their marriage, and who subsequently return to their common domicile, which prohibits the union. For example, if residents of Maine "with intent to evade subchapter II and to return and reside here, go into another state or country and there have their marriage solemnized and afterwards return and reside here," such marriage is void in Maine. ME. REV. STAT. ANN. tit. 18-A § 91 (1964). Although the Commissioners on Uniform State Laws "withdrew" the Uniform Marriage Evasion Act in 1943, Maine is one of thirteen jurisdictions which have enacted one form or
the question of whether a marriage performed pursuant to the Danish Act would be valid in the United States. A state or federal court could uphold the validity of a marriage contracted under the Danish Act if a legitimate public interest exists and if case law and statutes impose no insurmountable legal obstacles.

The spread of HIV-AIDS has created a national health crisis. An estimated two million Americans are either infected with, or have suffered from, HIV-AIDS. For this reason, each state and the federal government have an interest in finding ways to stop the transmission of HIV-AIDS. There is no immunization to prevent HIV-AIDS and more importantly there is no cure for it. Additionally, there is no evidence that any one has recovered from the disease. Although many things about this disease are unknown, there is no doubt that HIV can be transmitted during sexual intercourse. In fact, sexual transmission of HIV accounts for more cases of HIV-AIDS in the United States since 1981 than any other cause. Worldwide, sexual transmission of HIV accounts for the overwhelming number of all cases of HIV-AIDS (undoubtedly, more than all other causes combined). The gay community has borne the brunt of the scourge of sexually transmitted HIV-AIDS in this country.

Research clearly indicates that having multiple sexual partners in-

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10. See supra note 3.

11. "The actual number of people carrying the HIV in the United States, as of the end of 1987, was not the 900,000 to 1.4 million the official sources estimate, but probably more than twice that number . . . between two and three million . . . with the most likely total of infections probably close to 2.4 million. Hopkins & Johnston, Incidence of HIV Infection in the United States, 114 Atlantic Info. Serv.'s Inc. 7 (1988).


13. This conclusion follows from the fact that the United States accounts for about 48 percent of all reported cases of AIDS (and that sexual transmission is the major cause of HIV transmission in the U.S.) and that about 35 percent of the other AIDS cases have been reported in Africa and Latin America (low income areas where sexual transmission, rather than intravenous drug transmission, predominates overwhelmingly). See Positively Aware, August 1991, at 4; Legal Aspects of AIDS (1991), Donald Hermann and William Schurgin (eds.) at 1:25 ("heterosexual transmission is probably the leading route of HIV infection worldwide").
Increases the risk of becoming infected with HIV-AIDS. Conversely, the encouragement of permanent, exclusive relationships between people, including same-sex partners, will undoubtedly reduce the transmission of the disease. In fact, it appears that many people have already embarked upon non-marital, monogamous unions in reaction to their fears about the risk of contracting HIV-AIDS.

The Danish Act comes at a time of unprecedented need for sexually active people to form monogamous partnerships to reduce the likelihood of their exposure to HIV-AIDS. By removing the legal barriers to same-sex marriage in Denmark, the Danish Act offers a reasoned approach to assist in limiting the spread of HIV-AIDS and to assist in lifting the burden of unsupportable discriminatory views. State and federal recognition of marriages contracted under the Danish Act would amount to a major step towards encouraging monogamy between same-gender partners, thereby reducing the spread of HIV-AIDS in this country and moving us in a more tolerant direction.

While there are barriers that may discourage some state and federal courts from recognizing the validity of same-sex marriages under the Danish Act, much support is available to advocate the legality of such marriages. Certainly, there is social stigma against marriages between persons of the same sex in many quarters at the present time. A few statutes prohibit such marriages, while other laws appear to erect obstacles to same-sex marriage. Additionally, many court decisions have rejected the validity of same-sex marriages or have refused to extend to same-sex couples the incidents which attend traditional matrimony. However, the courts should evaluate the larger issues, overcome these impediments and further the more important public interest of reducing the advance of HIV-AIDS. Significantly, in only a very few states are there clearly expressed statutory prohibitions against same-sex marriage. Therefore, most state and federal courts could distinguish, disregard, or reverse precedent which may seem to oppose same-sex marriage.

This article argues that state and federal courts should recognize

14. CENTERS FOR DISEASE CONTROL, Number of Sex Partners and Potential Risk of Sexual Exposure to Human Immunodeficiency Virus, 37 MORBIDITY AND MORTALITY WkLY. REP. 565 (1988) [hereinafter NUMBER OF SEX PARTNERS].

15. ROBERT JARVIS, ET AL., AIDS LAW IN A NUTSHELL 99 (West 1990) [hereinafter AIDS LAW] (AIDS has contributed to a trend in the gay community for people to remain in monogamous sexual unions); CLOSEN, AIDS: CASES AND MATERIALS, supra note 4, at 397 (one of the side effects of the HIV/AIDS emergency is the increase in monogamous relationships).
the validity of a Danish marriage between two persons of the same gender. The public policy of reducing the spread of HIV-AIDS and the advancement of rational and non-discriminatory attitudes towards people, their sexual orientations, and their lifestyles demand such a view. This paper begins with an examination of a portion of the historical development of American marriage laws together with the social policies that those laws embodied. In particular, the paper will review changes in the legal rights granted to married women, to former slaves, and to persons of different races wishing to marry. The historical review shall be followed by a discussion of the current legal status of same-sex marriages, including the barriers or apparent barriers to such unions that exist in the statutes and case law. Finally, the paper concludes that recognition of same-sex marriages contracted under the Danish Act would serve the public health of the citizens of the United States and at the same time would remove unjustifiable objections to marriage between same-sex partners.

II. EARLY AMERICAN MARRIAGE LAWS

American marriage law has its origin in the canon law of the Catholic Church, which consisted of decrees of various Popes. In England, canon law was established as the basis of matrimonial law with the arrival of Christianity in the year 605. The early canon law did not require any marriage ceremony until the Catholic Church decreed in 1563 that any marriage not solemnized by a parish priest was void. This decree was not accepted as part of England's law for nearly two hundred years. Consequently, common law rather than canon law was in force until 1753. However, even the performance of a formal ceremony and a valid marriage did not result in extending to the female spouse the same rights as were enjoyed by the male spouse, where statutes or common law decisions provided to the contrary.

At common law, a married woman had no independent legal status of her own. She simply did not exist as a separate legal person. In

16. Reaves v. Reaves, 82 P. 490, 494 (Okla. 1905) (marriage laws in America can be traced to ancient canon law consisting of decrees of various Popes).
17. Id.
18. Id.
19. Canon law again became part of the marriage law of England with the passage of Lord Hardwicke's 1753 act that regulated the form and validity of marriage. Id.
20. 1 WILLIAM BLACKSTONE, COMMENTARIES 430-33 (1765). "The very being or
order to "protect" the married woman, as Blackstone explained in his Commentaries, a husband and wife were "one person in law."21 The one person was the husband under English law.22

British marriage law was generally adopted as the law of this country.23 Until the end of the last century, the doctrine of the unity of husband and wife stripped married women of their legal existence and left them and their property subject to their husbands' almost absolute will.24 Despite the social attitudes favoring the denial of legal rights for married women, state legislatures began to amend the common law with statutes that put married women on a more equal footing with unmarried women.25 By the end of the century, these statutes, called Married Women's Property Acts, were enacted in every state.26 These laws granted married women the rights to own and transfer property,

legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything . . . " Id. (emphasis in original). Blackstone comments that once married, a woman had no control of her real property or her chattels and was unable to contract in her own name with anyone (all deeds executed by a married woman during her coverture were void or voidable except for certain fines). Id. The single identity of both spouses rendered it impossible for them to contract between themselves during their marriage. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS 229 (1968). See also RADIN, The Common Law of the Family, in 6 NATIONAL LAW LIBRARY LEGAL RELATIONS 79, 175 (1939) [hereinafter RADIN].

21. Blackstone wrote that the law requiring a married woman to lose her legal rights were "for her protection and benefit" because of the special, favorite place held by the women in the laws of England. BLACKSTONE, supra note 20, at 443, 430-33.

22. Id. at 430-33.

23. State ex rel. Fowler v. Moore, 207 P. 75, 76 (Nev. 1922) (common law of England is part of common law of this country except as altered by statute).

24. Id. See also RADIN, supra note 20, at 177. Professor Radin points out that the common law deals only with persons and relations between them; it does not recognize the family as a unit of any kind at all. Id. Consequently, a contradiction exists between American legal theory that assumes that family issues are between individuals, but still uses the term "family" in its discussions. By contrast, at least one common law country, Ireland, does recognize the family. BUNREACHT NAHEIREANN (Constitution) art. 41 (Ireland). "The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and inscriptable rights, antecedent and superior to all positive law". Id.


to make contracts, and to sue (and be sued).27

Some courts resisted these reforms, however, and interpreted the laws in restrictive manners.28 Courts have looked to traditional social policies, the protection of the married woman, and the preservation of the family institution to frustrate the clear intent of these statutes.29 As a result, state legislatures have repeatedly passed specific amendments to the Married Women's Property Acts to override the courts' decisions.30 In this manner, state legislatures eventually succeeded in removing most of the legal disabilities which had beset women throughout British and American history.31

27. Id. at 175-76.
28. CLARK, supra note 20, at § 7.2.
29. Id.
30. Id.
31. Id. at n.4 (listing the Married Women's Property Acts of all fifty states and the District of Columbia as of 1968). Ironically, by 1882 Married Women's Property Acts had also become law in England, the country whose laws had been the source of women's inferior legal position. Weitzmann, supra note 26, at 1169, 1172 n.14.

One of the remnants of the doctrine of marital unity which survived in the United States was the prohibition against interspousal tort actions. BLACKSTONE, supra note 20, at 430-33. Although the unity doctrine was discredited by the Married Women's Property Acts, it remained the basis for the social policy that barred tort actions between spouses because of the belief that such actions would destroy marital peace and harmony. Dean Prosser vigorously attacked this social policy with the following statements:

This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 122, at 863 (4th ed. 1971).

In many states, the legislatures intervened to end interspousal immunity, thus permitting married persons to bring tort actions against each other. See S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986) (abolishing the spousal immunity in tort action where wife claimed husband willfully or negligently infected her with herpes). But see Hill v. Hill, 415 So. 2d 20, 22 (Fla. 1982) (reaffirming doctrine of interspousal immunity doctrine for intentional torts in action brought against the husband of wife involuntarily committed for mental illness for one day).

Likewise, the fiction of marital unity has been the basis for the inability of a married woman to sue for loss of her husband's consortium. D. DAVIDSON ET AL., SEX BASED DISCRIMINATION 171-73 (1974). While this has changed only recently, a husband has always been able to sue for loss of his wife's consortium. See also Karczewski
In the last century, the legal status of married women has changed profoundly. Changes in state laws have aided in overcoming the social stigmas against recognizing the legal rights of married women. Whereas the doctrine of marital unity formerly required married women to yield virtually all of their legal rights to their husbands, the Married Women's Property Acts and other marriage laws now protect the legal rights of married women. Under modern law, the status of marriage actually bestows upon the married woman, equally with their male spouses, numerous additional legal benefits, such as joint property rights, intestate succession, and favorable tax consequences.

Tradition, notions of morality, and social policy operated upon state legislatures and courts, not only to limit the legal rights of married women, but also to control who had the right to marry. Before emancipation, marriages between slaves in the South were without legal effect. Although slave masters generally permitted and even en-
couraged slave marriages, the masters regarded such marriages as animal breeding, having as its purpose increasing the master's "stock." One historian has noted that no state legislature ever seriously considered encroaching upon the master's property rights over slaves by giving legal status to slave marriages. Tragically, slave masters could take sexual advantage of any slave woman. As the Attorney General of Maryland once proclaimed, "a slave has never maintained an action against the violator of his bed."

Not only were slave marriages without legal effect, but slave marriages could be dissolved by the sale of one or both of the spouses, depending upon the "caprice or necessity of the owners." Indeed, in Virginia, even a marriage between a free black and a slave was prohibited, and children born of such an unrecognized union were regarded as slaves or as bastards. Although the slave family had no legal foundation, family life existed widely among slaves. It provided the traditional functions of the family, and it was among the most important survival mechanisms for the slave.

The following cases illustrate that marriages between slaves produced no civil effect unless and until ratified by the parties by cohabitation after their emancipation. Succession of Blackburn, 98 So. 43 (La. 1923); Succession of Walker, 46 So. 890 (La. 1908); Johnson v. Raphael, 42 So. 470 (La. 1906). Because slave marriages had no legal effect, the law did not recognize fornication or adultery between slaves.

36. S. Feldstein, Once A Slave 52 (1971). One former slave stated the following:

Legally, there is no such relation as husband and wife among slaves, because the law adjudges them to be things, and not men and women . . . .

The whole affair is in the hand of the master as a means of the increase and improvement of stock . . . . The slave being "property to all intents," is subject of course, to the laws relating to "things" and not to "persons."

Id. at 54.

37. Stampp, infra note 42, at 198.


39. Stampp, infra note 42, at 198. When slaves unions existed, they were frequently and callously broken by their masters. H. Blasingame, The Slave Community 91 (1972). Records of 2,888 slave unions compiled by the Union army and the Freedmen's Bureaus in four southern states indicate that 32.4 per cent of the unions were dissolved by masters. Id. at 90 n.29, 91.

40. Higginbotham, supra note 38, at 54.

41. Blasingame, supra note 39, at 78-79.
After emancipation, states that had denied legal status to marriages between slaves enacted or amended their marriage laws to validate marriages between former slaves. In spite of hostile social attitudes, the amended laws automatically recognized former slaves, who had cohabited as husband and wife, as being legally married. These newly enacted marriage laws also provided that "freed Negroes" and "mullatatos" could marry each other. Such laws represented radical changes in the legal status of marriages between former slaves in America. Moreover, changes in such laws were followed by, and influenced changes in, societal attitudes that had approved slavery but opposed slave marriages.

Even after emancipated slaves were permitted to marry, anti-miscegenation laws prohibited marriages between whites and blacks, and between whites and persons from other non-white races. In some states, such as Mississippi, the law prohibited intermarriage between whites and those persons descended from blacks "to the third genera-
tion." The penalty for this felony in Mississippi was life imprisonment.49

Courts cited decency, morality and patriotic pride as the bases for condemning interracial marriage.50 For example, in 1890 in State v. Tutty,61 the United States Circuit Court62 for the Southern District of Georgia considered whether a white man and a black woman could be indicted for the crime of fornication in Georgia after marrying in the District of Columbia.63 In language that harkened back to Blackstone's explanation that the loss of a married woman's legal existence was for her "protection and benefit,"64 the Tutty court explained that the defendants must face the charges of fornication because Georgia's miscegenation law is absolutely necessary for the "amelioration" of the Negro condition and for the "permanent advancement" of the race.65 In callous and cruel fashion, consistent with the often prevailing public attitudes about people of color, court opinions in miscegenation cases spoke of the inferiority of blacks and the impropriety of mixing the races.66

Laws prohibiting and punishing miscegenation still existed in sixteen states as of 1967 when the United States Supreme Court, in Loving v. Virginia,67 struck down Virginia's miscegenation statute as repugnant to the Fourteenth Amendment.68 In doing so, the Supreme Court rejected the State's argument that because the statute punished both whites and blacks equally for participating in an interracial mar-

49. Id.
50. State v. Tutty, 41 F. 753, 762 (1890); Pennegar v. State, 10 S.W. 305, 309 (Tenn. 1889) (demoralization and debauchery is involved in such an alliance).
51. 41 F. 753 (1890).
52. United States Circuit Courts were abolished in 1912. A Uniform System of Citation 165 (15th ed. 1991).
53. Tutty, 41 F. at 756. A Georgia anti-miscegenation law prohibited such marriages and declared that a marriage between a white person and a black person was null and void. Id. at 755.
54. Blackstone, supra note 20, at 433.
55. Tutty, 41 F. at 762-63. The Tutty court further stated that nullifying the laws made to prevent miscegenation would be as cruel to the Negro race as it would be "injurious to society, destructive to social order, and ruinous to the future of a large portion of the country." Id.
56. See supra note 42.
57. 388 U.S. 1 (1967).
58. Id. at 4 n.11.
riage, the legislation was not violative of equal protection. In Loving, the Court held that the Virginia law criminalizing only those interracial marriages involving "white" persons was akin to the state's history of adopting policies of white supremacy. This decision put an end to the official policy of white superiority that had been used by state legislatures to erect legal obstacles to marriage between persons of different races. Today, no state law prohibits interracial marriage and it appears that such marriages are socially acceptable.

This brief review of developments in marriage laws concerning the legal rights of married women, slaves, and persons of different races illustrates that preexisting social biases can and should yield when more important social concerns are at stake. Though initially thought to be radical, the described changes in the rights granted through marital laws to women, to slaves, and to persons of different races have subsequently appeared reasonable and grounded in the need to shed archaic policies regarding morality and tradition. Although social biases against same-sex relationships, often expressed in moral and religious terms, appear deeply rooted, times are changing. As societal attitudes toward homosexuality slowly improve and as more and more people come to appreciate the severity and extent of the HIV-AIDS health crisis, decisions with regard to the acceptability of same-sex marriages must evolve to reflect the changing times. Clearly, it is

59. Id. at 10-11. The State of Virginia found support for its "equal application" argument in Pace v. Alabama, in which the United States Supreme Court let stand a conviction under Alabama law that imposed a greater penalty for fornication between a white person and a Negro than between members of the same race. Id. (citing Pace v. Alabama, 106 U.S. 583 (1882)). The Court in Loving rejected the Pace Court's reasoning as not having withstood subsequent Supreme Court analysis under the Equal Protection Clause. Loving, 388 U.S. at 4 n.11.

60. Id. at 7.


For a typical view of the rationale for denying the validity of a same sex marriage, see N.Y. DOMESTIC RELATIONS LAW § 4 (1988) (General Commentary on Article 2).
once again time to discard outdated and irrational barriers to monogamy among same-sex partners that do not serve the common good.

III. THE NEED FOR JUDICIAL RECOGNITION

This paper will focus upon the argument for judicial recognition of Danish same-sex marriages because the authors share the view that legislative action in favor of such marriages is much further away than possible court approval. Legislatures seem generally to lag behind many societal changes and to react to those changes rather than to lead the way. That seems to be the politically safe and expedient course of action (or inaction). While legislatures do not have to act at all, judges cannot dodge issues quite so readily once they have been presented in the form of a litigation. Moreover, while courts show due respect for precedent in the common law, countless opinions note the obligation of the common law to remain flexible and to adapt appropriately in light of changing mores and the needs of society.63

A few recent legislative initiatives with regard to pre-marital HIV testing and restrictions of marriage in the context of the HIV-AIDS epidemic have provided further evidence that our doubts about the willingness of legislatures to enact same-sex marriage laws in the near fu-

The commentary to section four explains that “marriage has been traditionally defined as the union of one man and one woman for life as husband and wife.” Id. New York statutes do not expressly prohibit same sex marriage, however, the statutes do not authorize issuance of marriage licenses to persons of the same sex. Id. Furthermore, New York courts have consistently refused to recognize the validity of same sex marriages. See B. v. B., 255 N.Y.S.2d 712 (1974) (no valid marriage where female to male transsexual person was unable to procreate and lacked male sex organs); Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971) (marriage between two biological males a legal nullity). See generally Phyllis W. Beck, Non-traditional Lifestyles, 17 J. Fam. L. 685 (1978); Case Comment, Homosexuals Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193 (1979); Homosexual Challenge, supra this note, at 41; Note, Legality of Homosexual Marriage, 82 Yale L.J. 573 (1973). Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (marriage was a custom long before the state began to issue marriage licenses); Immerman v. Immerman, 1 Cal. Rptr. 298 (Cal. Ct. App. 1959) (moral character of lesbian mother who seeks custody of a child is relevant to issue of custody). For a review of virtually every civil case dealing with homosexuality prior to 1979, see Rivera, supra note 34, at 799-47. The author concludes that a systematic and pervasive discrimination exists against homosexual persons in the courts. Id. at 947.

63. See, e.g., Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); see also Lawrence Tribe, American Constitutional Law 156-62 (2d ed. 1988) [hereinafter Tribe].
Closen

...ture are well founded. For example, Illinois and Louisiana adopted mandatory pre-marital HIV testing statutes, and Texas enacted a unique version of such a law. Additionally, Utah adopted a law which declares a marriage to someone with AIDS to be invalid. In reality, those acts represent backward policy, based upon lack of knowledge and compassion about HIV-AIDS and the people affected. Fortunately, both Illinois and Louisiana repealed their pre-marital HIV testing requirements because those laws were such dismal failures. Additionally, numerous other statutory enactments indicate that legislatures are not well-informed about HIV-AIDS matters and, accordingly, cannot be expected to take the initiative to recognize that same-sex marriages are valid.

We are not naively optimistic about the courage and wisdom of judges as compared to legislators. We are aware of substantial evidence derived from cases such as Bowers v. Hardwick, In Re Estate of Cooper, and others to be addressed more fully below which suggest that courts are not eagerly awaiting test cases by same-sex couples asserting entitlement to treatment as spouses. Nevertheless, we are generally optimistic that there has been more erosion of the opposition to same-sex marriages in the judiciary than in the legislatures. The time may be ripe for judicial recognition of those marriages.


65. Tex. Health & Safety Code Ann., § 81.102 (West 1991) (authorizing mandatory premarital HIV testing when the HIV prevalence rate is at least 83 percent).

66. Utah Code Ann., § 30-1-2 (1987) ("The following marriages are prohibited and declared void: (1) with a person afflicted with [AIDS] . . .; (6) between persons of the same sex").

67. Closen, Family Law, supra note 64; Turnock, supra note 64.


71. See cases cited at note 80 and accompanying text. See also such sodomy cases as Baker v. Wade, 774 F.2d 1285 (5th Cir. 1985); State v. Walsh, 713 S.W.2d 508 (Mo. 1986) (en banc); State v. Gary, 413 N.W.2d 107 (Minn. 1987).
IV. THE PRESENT LEGAL STATUS OF SAME-SEX MARRIAGES

All fifty state legislatures, the District of Columbia, and the United States territories have enacted statutes that regulate marriage. The marriage law of each jurisdiction is somewhat unique, and consequently, many variations exist between state marriage laws. Among other things, these state laws define who shall be eligible to marry. Ordinarily, the formats of the statutes include central provisions defining the concept of marriage and announcing the authority of the government to solemnize a marriage. Other corollary provisions of the statutes typically set out procedures, fees, and similar details.

Some of these marriage statutes contain provisions or references that seem to erect obstacles for same-sex partners to seek recognition of their Danish marriage. One apparent obstacle arises from those statutes that include gender references in their language, and an even greater obstacle is created by those few laws which contain express prohibitions against same-sex marriages.

The first type of statutory obstacle is the use of gender-related terms, such as "male" and "female," or "husband" and "wife," in the text of the law without an explicit requirement that the marriage partners be of the opposite sex. The Alaska marriage law is fairly typical. It prohibits marriage if either party has a living husband or wife. However, the section defining marriage contains no reference to the terms "husband" or "wife," and no other requirement provides that marriage partners be of the opposite sex. This problem is widespread. Gender related terms appear variously in the texts of the marriage statutes of at least forty-three jurisdictions. The statutes in four of those

72. See infra notes 77-79 for citations to marriage statutes in the fifty states and the District of Columbia.
75. ALASKA STAT. § 25.05.021 (1989).
76. Id. at § 25.05.011.
77. The state marriage statutes that use gender-related terms are the following: ALASKA STAT. § 25.05.021 (1989); ARK. CODE. ANN. § 9.11.102 (1987); CAL. CIV. CODE § 4100 (West Supp. 1990); FLA. STAT. ANN. § 10 (West 1979); GA. CODE ANN. § 53.104 (Harrison Supp. 1989); HAW. REV. STAT. § 572.1 (1985); IDAHO CODE § 32.202 (1989); ILL. REV. STAT. ch. 40, para. 201 (1989); IND. CODE ANN. § 31.7.1.2 (Burns 1987); IOWA CODE ANN. § 595.2 (West Supp. 1990); KAN. STAT. ANN. § 23.104(a) (Supp.1989); KY. REV. STAT. ANN. § 402.020 (Michie Supp. 1988); LA. CIV. CODE ANN. art. 86 (West Supp. 1990); MD. FAM. LAW CODE ANN. § 2.201 (Supp. 1989); MINN. STAT. ANN. § 517.01 (West Supp. 1990); MISS. CODE ANN. § 77-79 for citations to marriage statutes in the fifty states and the District of Columbia.
jurisdictions, Colorado, Connecticut, Delaware and South Dakota, contain an especially incidental, quite nominal reference to gender that is not part of either the essential definition of who may marry or any other provision of significance. By contrast, the marriage laws of eight other jurisdictions do not use gender specific terms, but instead use gender neutral terms such as "persons" or "applicants." 

Although some courts have noted the existence of gender references in marriage laws to support judicial rejection of same-sex marriages, there are some persuasive reasons why statutes containing gen-


78. For example, the marriage law of Colorado requires proof of immunity against the disease rubella from each "female applicant" under the age of forty-five years of age, although the designation "female" does not otherwise appear in the statute. Colo. Rev. Stat. § 14.2.106 (1987) (proof of rubella immunity required for female marriage applicants under forty-five years of age). Rubella, also known as German measles, is "an acute infectious disease, resembling both scarlet fever and measles, but differing from these in its short course, slight fever and freedom from sequelae." C. Taber, Taber's Cyclopedic Medical Dictionary 1038 (11th ed. 1970). See also Conn. Gen. Stat. Ann. § 46b.36 (1986) (property rights of husband and wife not affected by marriage); Del. Code Ann. tit. 13, § 123 (1981) (no male under the age of 18 nor any female under the age of 16 shall marry); S.D. Codified Laws Ann. § 25.2.1 (1984) (rights and obligations of marriage include that husband and wife contract toward each other mutual respect and support).


80. It should be noted that courts in four states have held that same sex marriages were impermissible even though the statutes in those states did not specifically prohibit such marriages. Singer v. Hara, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (apparent from plain reading of marriage statutes that legislature has not authorized same sex marriages); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (two women
nder references should not be regarded as signaling a policy against same-sex marriages. First, these gender references sometimes appear in incidental provisions of the laws, rather than in those central sections that define matrimony. This fact suggests that gender references might not be of key concern. Second, almost all of the laws containing gender references fail to include express prohibitions against same-sex marriages. Hence, the failure of a legislature to act to prohibit same-sex marriages might be interpreted to suggest a number of things. Two possibilities are that the state did not regard the matter of expressly prohibiting same-sex marriage to be important public policy or that the state did not intend to definitively prohibit same-sex marriages. This might suggest that legislatures intended to leave the question open.

Third, and most importantly, most of the original marriage statutes with gender references were drafted many years ago, at a time when no realistic consideration had been given to the thought that people of the same sex might want to be married. As a consequence, perhaps such statutes should be regarded as not addressing the issue of same-sex marriage at all.

More formidable obstacles to judicial recognition of same-sex marriage are those statutes which expressly provide that only a man and a woman may marry. Interestingly however, there are only a few such laws. The Maryland and Ohio marriage statutes state that a marriage between a man and a woman is valid. 8 The Indiana, Utah, and Virginia statutes prohibit and/or declare void a marriage between individ-

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uals of the same sex.\textsuperscript{82} Remedial legislation is probably the only real hope for same-sex marriage in those states.

Another statutory obstacle to same-sex marriage might be inferred from the existence of state sodomy laws that criminalize homosexual behavior.\textsuperscript{83} Prior to 1961, every state criminalized anal and oral sexual conduct between persons of the same sex.\textsuperscript{84} Although few men, and even fewer women, have ever been punished under these laws,\textsuperscript{85} these

\begin{itemize}
\item \textsuperscript{82} IND. CODE ANN. § 31.7.1.2 (Burns 1987); UTAH CODE ANN. § 30.1.2 (1989); VA. CODE ANN. § 20.14 (1990).
\item \textsuperscript{83} The “crime against nature” statutes originated in the early Christian writings and were codified in an English statute in 1553. Ralph Slovenko, \textit{The Homosexual and Society: A Historical Perspective}, 10 U. DAYTON L. REV. 445, 446 (1985). Legal codes in the American colonies that called for the death penalty for sodomy continued in force until they were abolished by most of the states in 1825. \textit{Id.} at 446, n.5. \textit{See infra} note 88 and accompanying text for a listing of citations to the present 24 state anti-sodomy statutes.
\item \textsuperscript{85} “[T]here had been no reported decisions involving prosecution for private homosexual sodomy under this statute for several decades.” Bowers v. Hardwick, 478 U.S. 186, 198 n.2 (1986) (quoting the state referring to Georgia’s anti-sodomy law). The same issues that the United States Supreme Court considered in \textit{Hardwick} the European Court of Human Rights considered two years later in \textit{Norris v. Ireland}. \textit{Hardwick}, 478 U.S. at 186; Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988). Norris, a senator in the Irish Parliament, challenged Irish laws that make homosexual practices between consenting adult men criminal offenses. \textit{Id.} at 3. Unlike the United States Supreme Court, the European Court of Human Rights saw as critical the fact that “the authorities [had] refrained in recent years from enforcing the law in respect of private homosexual acts between consenting [adult] males . . . capable of valid consent.” \textit{Id.} at 15. Since there was no evidence that this had been injurious to the moral standards of the people of Ireland, the European Court held that there was no “pressing social need” to make such acts criminal offenses. \textit{Id.} at 15-16. The European Court concluded that although some members of the public would regard homosexuality as immoral or be shocked, offended or disturbed by private homosexual conduct, these considerations alone were insufficient, under Article 8 of the European Convention on Human Rights, to warrant government intrusion on individual privacy. \textit{Id.} at 16.

Under Article 52 and Article 53 of the European Convention on Human Rights, the Irish law at issue in \textit{Norris} must be brought into conformity with the European Court’s decision. European Convention on Human Rights, Nov. 4, 1953, art. 52, 53. The European Court’s decision also has precedential authority with all twenty-one member states of the Council of Europe. The member states are Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Lichtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom. \textit{Id.} at 3 & n.2. \textit{See also} “Report Warns of Conflict Between EC Law and Constitution,” \textit{Irish Times}, July 21,
laws carry the unfortunate stigma of criminality that attaches to every same-sex partnership. In 1962, the Model Penal Code incorporated the recommendations of the American Law Institute and decriminalized private, consensual, adult homosexual sexual acts. By 1989, twenty-four states had either adopted the Model Penal Code or had repealed criminal penalties for such conduct. Moreover, the highest courts of both New York and Pennsylvania held that their state statutes prohibiting voluntary, adult "deviate" sexual intercourse between

1990, at 2, col. 1 (discussing conflict between the Irish Constitution and the European Convention on Human Rights); Glain, Hong Kong: Debate on Gays, INTERNATIONAL HERALD TRIBUNE, June 29, 1990, at 2. (discussing decriminalization of homosexuality in Hong Kong noting that law has been largely ignored). See also Tielman & de Jong, A Worldwide Inventory of the Legal and Social Situation of Lesbians and Gay Men, in 12 UTRECHT SERIES ON GAY AND LESBIAN STUDIES 183 (1988) (providing data on 124 countries' laws on sexual contacts between men and between women).

86. "People think that homosexuals are criminals by their definition because of the sodomy charges. So the statute creates a stigma of criminality that attaches to every gay person." N.Y. TIMES, Dec. 19, 1980, at B-2. (quoting the legislative counsel of the New York Civil Liberties Union, commenting on New York's anti-sodomy law). For an excellent analysis of the argument that homosexual persons' private intimacies offend no one and should be protected from governmental intrusion, see LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 943 (1978). See also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 220 (1890) (since the common law always recognized a man's house as his castle the courts ought not close the front entrance to constituted authority and open the back door to prurient curiosity); Born or Bred: The Origins of Homosexuality, NEWSWEEK, February 24, 1992, at 46 (reporting research suggesting that homosexuality may be a matter of genetics).

87. MODEL PENAL CODE § 213.2 (1962). In Bowers v. Hardwick, the United States Supreme Court upheld a Georgia anti-sodomy statute as it applied to consenting adults of the same sex. 478 U.S. 186 (1986). The Court found that there is no constitutional right to engage in consensual sodomy, but limited its holding to homosexual sodomy. Id. at 188 n.2. See also Rivera, supra note 34, at 942 for a discussion of criminal issues regarding homosexual behavior.

88. For a listing of the twenty-six state statutes and the District of Columbia statute that currently criminalize private, consensual, adult homosexual sexual acts, see J. Drew Page, Cruel and Unusual Punishment and Sodomy Statutes, 56 U. CHI. L. REV. 367, 379 n.67 (1989). For a listing of the text of the statutes which still prohibit consensual sodomy, see Debra McCloskey Barnhart, Note, Commonwealth v. Bonadio: Voluntary Deviate Sexual Intercourse-A Comparative Analysis, 43 U. PITT. L. REV. 253, 278-84 (1981) [hereinafter Comparative Analysis]. The crime that is prohibited is usually called " sodomy." The acts which are prohibited range from nearly every type of sexual activity that is not penile-vaginal intercourse, to sexual relations between people of the same sex, to oral sexual acts. Id. See also Rivera, supra note 34, at 952-53 for a listing of the most recent court decisions on the constitutionality of state statutes prohibiting private, consensual, adult homosexual sexual acts.
unmarried persons violated their respective state constitutions.\textsuperscript{89} There continues to be a series of legal attacks upon the sodomy laws, as well as efforts to repeal them.\textsuperscript{90} Sodomy laws are unnecessary, antiquated, discriminatory, and counterproductive. As the revelation of one of the now-retired members of the Supreme Court's five-to-four majority in \textit{Bowers} recently revealed, sodomy statutes should have been declared unconstitutional some time ago and enjoy dwindling support.\textsuperscript{91}

Nevertheless, because sodomy laws exist in about half of the states, some people will rely upon them to oppose same-sex marriage. This reliance is misplaced because there is not necessarily a connection between the two issues. Many marriages do not involve sexual relations because of the advanced age, physical incapacity, unwillingness of one or both spouses, or mutual agreement not to engage in intercourse. Many marriages are entered into for purposes exclusive of sexual relations, such as financial, legal, religious, and other reasons.\textsuperscript{92}

\section*{V. RECENT JUDICIAL DECISIONS}

In addition to analysis of the legislative context for possible judicial recognition of a Danish same-sex marriage, there must be a review of the relevant case law. Courts in the United States have uniformly held that unions between persons of the same sex are without legal

\begin{itemize}
\item \textsuperscript{89} People v. Onofre, 415 N.E.2d 936 (N.Y. 1980), \textit{cert. denied}, 451 U.S. 987 (1981) (as a matter of constitutional law the state may not prosecute as criminal the acts of consensual sodomy between consenting adults in private noncommercial setting); Commonwealth v. Bonadio, 415 A.2d 47, 50 (Pa. 1980) (statutory prohibition of consensual sodomy forces majority morality on persons whose conduct does not harm others). \textit{See also Comparative Analysis, supra} note 88, at 253 for a discussion concluding that state courts retain extensive authority to act through their own constitutions to afford greater protection than has the United States Supreme Court.
\item \textsuperscript{91} Retired Justice Lewis Powell has publicly said that he thinks he was wrong in making the majority in \textit{Bowers v. Hardwick} which upheld the Georgia sodomy law, and conservative former United States Solicitor General Charles Fried (President Reagan's last Solicitor General) also has recently disapproved of the result in \textit{Bowers}. Ronald Dworkin, \textit{The Reagan Revolution and the Supreme Court}, N.Y. REV., July 18, 1991, at 23-24.
\item \textsuperscript{92} John Dwight Ingram, \textit{A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the same time?}, 10 J. CONTEMP. L. 33, 48 (1984).
\end{itemize}
effect. In support of their decisions restricting marriage to opposite sex partners, courts cite traditional definitional, religious, moral, or procreative considerations that are grounded in social policy that courts argue "is and always has been."

93. See the cases cited in notes 99-117 and accompanying text.

94. Singer v. Hara, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974) (denying right of two homosexual men to marriage license because by definition, marriage can only be entered into by persons of opposing sex); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY, and other dictionaries to deny constitutional rights of two women to marry because of their incapability to enter into marriage as that term is defined).


97. Adams v. Howerton, 673 F.2d 1036, 1043 (9th Cir. 1982) (Congress denied preferential immigration status to spouses in same-sex marriages because homosexual marriages never produce offspring.).

In 1971, in *Baker v. Nelson*, the first United States case to challenge the prohibition against same-sex marriage, two men filed suit on statutory and constitutional grounds after the state of Minnesota refused to grant them a marriage license. The Minnesota Supreme Court held that, even though the state statute did not contain an explicit prohibition against same-sex marriage, the legislature did not intend to permit such marriages. The court emphasized the fact that the statute included frequent references to "bride and groom" and "husband and wife." The court also cited Webster's Third New International Dictionary and Black's Law Dictionary to support its ruling that the institution of marriage was defined as a union of persons of the opposite sex. In addition, the court noted that marriage was a union of man and woman uniquely involving procreation that was "as old as the book of Genesis." The court then rejected the petitioners' constitutional challenges, holding that unlike the impermissible marital restriction in *Loving* based "merely upon race," the restriction in *Baker* was based on a "fundamental difference in sex" and was therefore constitutionally permissible.

In rather quick succession, three other cases, the New York decision in *Anonymous v. Anonymous* in 1971, the Kentucky decision in *Jones v. Hallahan* in 1973, and the Washington decision in *Singer v.*
Hara\textsuperscript{108} in 1974, refused to give state approval to same-sex marriages.

The facts of \textit{Anonymous} were bizarre. In that case, the male plaintiff had been tricked into a marriage ceremony with a transvestite who was actually another male. The New York court concluded, “Marriage is and always has been a contract between a man and a woman.”\textsuperscript{109} In \textit{Jones}, the Kentucky court held that two women were not entitled to a marriage license because “[m]arriage has always been considered as the union of a man and a woman.”\textsuperscript{110} Suprisingly, the Court observed that no constitutional issues were even implicated in such a case.\textsuperscript{111} Similarly, the \textit{Singer} court relied heavily upon the “recognized definition” of marriage as a relationship to be entered into only by persons of the opposite sex.\textsuperscript{112}

In \textit{Adams v. Howerton} in 1980, the United States District Court for the Central District of California ruled that a “marriage” between Sullivan and Adams did not qualify Sullivan, an alien, as Adams’s spouse for immigration purposes.\textsuperscript{113} The court noted that for centuries canon law and scriptures of both Judaism and Christianity vehemently condemned all homosexual relationships.\textsuperscript{114} Thus, the court concluded that it could not sanction any marriage between persons of the same sex. Like the \textit{Baker} court, the \textit{Adams} court relied on Black’s Law Dictionary and Webster’s Third New International Dictionary to support its decision that a marriage is a relationship between a man and a wo-

\begin{itemize}
\item \textsuperscript{108} 522 P.2d 1187, 1192 (Wash. Ct. App. 1974).
\item \textsuperscript{109} \textit{Anonymous}, 325 N.Y.S.2d at 500.
\item \textsuperscript{110} \textit{Jones}, 501 S.W.2d at 589.
\item \textsuperscript{111} Id. at 590.
\item \textsuperscript{112} 522 P.2d at 1192.
\item \textsuperscript{114} \textit{Adams}, 486 F. Supp. at 1123. For a detailed description of the early aversion to homosexuality in the Torah, the Talmudic law codes, and the Christian church, see Note, \textit{The Legality of Homosexual Marriage}, 82 \textit{Yale L.J.} 573, 577 n.17 (1973). \textit{See also} Lincoln C. Oliphant, \textit{What Churches Can Expect from “Gay Rights” Laws}, 33 \textit{CATH. L. W.} 87, 107 (1990) (arguing that churches and the moral authority they carry will be harmed by civil rights bills that forbid discrimination based on sexual orientation); William Orbach, \textit{Homosexuality and Jewish Law}, 14 \textit{J. Fam. L.} 353 (1975) (providing a detailed tracing of the history of the Jewish view of homosexuality and reasons for strong condemnation of homosexual practices in Jewish law).
\end{itemize}
man. Consequently, the court concluded that Sullivan was not Adams’ spouse. The court stated that Congress probably denied preferential immigration status to spouses in same-sex marriages because homosexual marriages never produce offspring, are not recognized in most of the states, and violate traditional “societal mores.” The trial court’s decision was affirmed on appeal in 1982.

The notion that marriage must be between opposite sex persons because marriage is and has always been between men and women involves circular judicial reasoning. Courts, such as the one in Adams in 1980, cite the dictionary definition of marriage as authority for finding that marriage is a union between a man and a woman. One of the dictionaries which the Adams court used, Black’s Law Dictionary, cites the 1974 Washington case of Singer v. Hara as support for the proposition that marriage is a relationship between a man and a woman. Singer relied on the 1971 Baker decision as authority for the “proper definition” of marriage, but Baker had relied on the definition in Black’s Law Dictionary.

Definitions should change to meet the usages of society unless reasoning is to be replaced by recalcitrism. It has often been observed that if the longevity of a doctrine were determinative of its legitimacy, changing public opinion and societal mores would operate within an antiquated framework of technical law that would hinder the evolution of real justice. Indeed, had this historical argument prevailed at earlier times, we would still have married women who would enjoy few rights.

115. Adams v. Howerton, 673 F.2d 1036, 1040 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1384 (3rd ed. 1971) and BLACK’S LAW DICTIONARY 876 (5th ed. 1979)).
116. Id. at 1042-43.
117. Id. at 1038.
118. See supra notes 103 and 115 and accompanying text for references to the Baker and Adams courts’ citations to the dictionary as authority for the definition of marriage.
120. Singer, 522 P.2d at 1192 (Wash. Ct. App. 1974). In Singer, the Washington Court of Appeals denied two women the right to enter into marriage because of the “recognized definition of that relationship” as one which may be entered into only by opposite sex persons. Id. Moreover, the Singer court cited favorably the other courts which it knew to have considered the issue of same sex marriage, noting their reliance also on the “proper definition” of marriage. Id. (citing Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); and Anonymous v. Anonymous, 325 N.Y.S.2d 499 (1971)).
slaves who could not marry at all, and people of color who would be restricted as to the race of their spouses. 121

To date, reported decisions of courts in California, Kentucky, Minnesota, New York, and Washington have refused to grant the right to marry to same-sex couples, and there are opinions of the Attorney Generals of Colorado and Texas to the same effect. 122 One of the latest judicial rejections of the concept of same-sex marriage came in Matter of Estate of Cooper. 123 The surviving lover of a long-term gay relationship, where the decedent had died of HIV-AIDS, sought to challenge the decedent's will on the ground that the surviving lover was a spouse entitled to inherit. In lofty language, the trial judge proclaimed:

[T]he state has a compelling interest in fostering the traditional institution of marriage (whether based on self-preservation, procreation, or in nurturing and keeping alive the concept of marriage and family as a basic fabric of our society), as old and as fundamental as our entire civilization, which institution is deeply rooted and long established in firm and rich societal values. 124

It should be noted that there is no case decision which addresses the question of what effect, if any, would result to a marriage in the event one spouse underwent sex-change surgery after the parties had consummated their marriage. Under such facts many questions would arise. Would one spouse's subsequent transsexualism void the marriage? Would it merely serve as a ground for divorce if the other spouse objected? If neither party objected to the marital status, should

121. See supra notes 20-61 and accompanying text.


124. Id. at 688.
a different result obtain? The better position is that sex-reassignment surgery subsequent to a marriage should not nullify the marriage. However, it should certainly serve as a ground for annulment or divorce if the other spouse objected.126

Interestingly, there is a split of authority in this country on the issue of whether a valid marriage may be entered into by a man and a male-to-female postoperative transsexual. The 1976 New Jersey case of _M.T. v. J.T._ 126 held that a valid marriage can occur between two such parties,127 while the 1987 Ohio case of _In re Ladrach_,128 and the 1970 English case of _Corbett v. Corbett_129 determined otherwise. Each of these cases focused upon the need for a marriage to be between opposite sex persons, and therefore, each is further support for the traditional concept of matrimony. However, the issue of the right of consenting adults to marry should not depend upon their sexes at all, so that whether one or both of them have undergone sex-change surgery should be irrelevant to the validity of their marriage.

A review of the marriage statutes, sodomy statutes, and case law suggests that there are five states where a test of the validity of a Danish same-sex marriage would meet with the greatest likelihood of success. Those states are Connecticut, Delaware, Maine, New Mexico and South Dakota. None of those jurisdictions have marriage laws that expressly prohibit same-sex marriage, none of those jurisdictions have a sodomy statute and none of those jurisdictions have case decisions or Attorney General opinions opposing same-sex marriages. While the marriage laws in Connecticut, Delaware and South Dakota, contain gender references,130 the statutes in both Maine and New Mexico em-

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125. The post-marriage sex reassignment surgery of one spouse should be a basis for an annulment or a divorce if the other spouse objects. This is so for a number of reasons. It might prevent the parties from consummating the marriage through sexual intercourse. It might cause the other spouse severe mental cruelty. If the sex-change had been planned prior to the marriage but not disclosed to the other spouse, the marriage might have been fraudulently induced. These are standard bases for annulment and divorce set out in the various state statutes on marriage and dissolution of marriage. See, e.g., Closen, Family Law, _supra_ note 64, at 43-44.
130. _See supra_ note 77 for citations to the relevant marriage statutes in these states.
ploy neutral terms such as persons or applicants. Thus, Maine or New Mexico might be the very best site for a test of the legal validity in the United States of a Danish same-sex marriage.

VI. EROSION OF OPPOSITION TO SAME-SEX MARRIAGE

Several developments signal a gradual trend of willingness among Americans to grant some degree of formal approval to same-sex relationships, or at least to remain open-minded about the issue. These signs include: 1) the continuity and intensity of the public debate about the issue of same-sex marriage, 2) the successes of several plaintiffs in palimony cases involving same-sex couples, 3) the granting of employment benefits to same-sex partners of employees by several major public and private employers, 4) the enactment of several local ordinances dealing with same-sex domestic partnerships, and 5) most importantly, the small number of court decisions extending to same-sex partners rights previously thought restricted to spouses in traditional marriages.

A great deal of public attention has been directed toward the subject of same-sex marriages in recent years. The debate about the topic has been treated widely in the media, including publications in the professions. Of course, the publicity generated by the several claims of individuals to have cohabited in same-sex relationships with people of notoriety, such as Rock Hudson, Martina Navratolova, Liberace, Billy Jean King and Merv Griffin, has helped to keep the subject in the headlines. Familiarity with a subject like this one tends to diminish surprise, fear, and opposition. Hence, the continuous presence of the

134. See, e.g., Christian, Advice From Rock's Ex to Merv and Merv's Ex, ADvOc., May 21, 1991, at 60 (article about Rock Hudson and Merv Griffin); Whine, Women, and Wimbledon, NEWSWEEK, July 15, 1991, at 49 (article about Martina Navratilova); The Way It Was, PEOPLE, March 5, 1984, at 98 (article about Liberace and Billie Jean King); A Disputed Love Match, TIME, May 11, 1981, at 77 (article about Billie Jean King).
subject of same-sex relationships in the public spotlight contributes to a measure of acceptance of such relationships.

The palimony cases have also contributed to the erosion of opposition to same-sex relationships and to same-sex marriage. The line of cases, beginning especially with *Marvin v. Marvin*\(^\text{135}\) in 1976, has attracted a great deal of attention nationwide. Indeed, nearly all of the states have encountered litigation on the palimony issue, and virtually every state has approved some cause of action by one of the unmarried co-habitants against the other to enforce an agreement between them regarding the ownership and distribution of their property.\(^\text{136}\)

Hence, the palimony cases evidence an erosion of Victorian style reverence for the institution of marriage. The *Marvin* opinion actually began with the observation that in "the past 15 years, there has been a substantial increase in the number of couples living together without marrying."\(^\text{137}\) Moreover, in several palimony cases in several states, courts have applied the palimony doctrine to settings in which the unmarried co-habitants were same-sex partners.\(^\text{138}\) These cases stand as symbols of judicial recognition and, to some degree, of judicial sanctioning of same-sex relationships. Put simply, justice requires recognition of the realities of life, and in the case of same-sex couples, the acceptance of the good faith wishes of consenting adults.

Some public and private employers have voluntarily extended employment benefits to the same-sex partners of employees.\(^\text{139}\) Also, some

\(^{135}\) Marvin, 557 P.2d 106 (Cal. 1976).


\(^{137}\) Marvin, 557 P.2d at 109.


insurance companies underwrite policies for same-sex partners of employees equal to the coverage granted to spouses of employees.\textsuperscript{140} Public and private employers are beginning to include same-sex partners within the coverage of other benefits ordinarily provided only to spouses and children of employees.\textsuperscript{141} Of course, the argument might be advanced that there is no need to endorse the doctrine of marriage for same-sex couples if such couples are, or can be, protected through such devices as the palimony concept and voluntary employer programs. Yet, such an argument is unpersuasive because the extent of these protections is relatively minimal at present and because each case of application to a same-sex couple requires an ad hoc determination that the couple qualifies for the special treatment.\textsuperscript{142} Married people are not burdened with such a requirement. One is either married or not. One who is married need not establish the existence of other facts to prove the genuineness of the marriage.

To establish the entitlement to protection as a same-sex couple, absent coverage of a statute allowing them to marry or to register as a domestic partnership, the people involved must present satisfactory proof of several factors, such as the longevity and exclusiveness of their relationship, the interdependence of each on the finances and domestic services of the other, the manner in which the parties have held themselves out to the world, and other factors set forth in \textit{Braschi v. Stahl Associates}.\textsuperscript{143}

Obviously, a marriage between insincere heterosexual people who engage in extramarital sexual affairs, who do not share any dependence on one another, and who do not live together, nevertheless constitutes a marriage which triggers all applicable benefits and protections from the moment of marriage. In contrast, same-sex partners cannot qualify for benefits and protections until such time as the couple can convince an employer or a court of the sincerity of their relationship. That might take years.\textsuperscript{144} Furthermore, the same-sex partners might be called upon to establish the genuineness of the relationship time after time, while
heterosexual spouses can rely upon the technicality of their marital status for so long as they remain married.

Significantly, several local communities in several states have defied state-wide populist views regarding gay and lesbian rights and same-sex relationships and have adopted gay rights ordinances or domestic partnership ordinances. While gay rights ordinances do not expressly speak of same-sex unions, a natural consequence of those local laws should be some degree of protection against discrimination directed at individuals discovered to be cohabiting in same-sex relationships. While domestic partnership ordinances do also protect heterosexual couples, those local laws also apply with equal effect to same-sex couples unless the ordinances were to expressly except same-sex relationships.

American tradition suggests that the right of local governments to enact ordinances reflecting the wishes of their citizens is fundamental and important although such ordinances cannot supercede state or federal law. Advocates of recognition of same-sex marriage can point to the local provisions on domestic partnerships as having the force of law and as showing that same-sex unions are no longer unthinkable. Indeed, not only is there Danish precedent for same-sex marriage, but there is also American precedent.

Although no court has yet allowed a same-sex couple to engage in a state-sanctioned marriage, a few court decisions have extended to same-sex couples incidents previously thought appropriate only to heterosexual spouses. The first was Donovan v. Workers' Compensation Appeals Board, where the California court remanded the case to a review board for further proceedings including consideration of whether the petitioner, as the gay lover of the deceased employee, was a dependent covered by the Workers' Compensation Act. The following year, 1983, the Board found that the surviving gay lover was entitled to recover death benefits under the Act. The Board observed that out-

145. See Domestic Partnership, supra note 139; Domestic Partnership Recognition, supra note 139.
146. Id.
147. See, e.g., U.S. CONST. art. VI, sect. 2. See also Tribe, supra note 63, at 479-81.
149. 73 LA 385 (1983) (Cal. Workers' Comp. Appeals Bd.); see also Cal. Labor Code § 3503 (Deering 1976). For a discussion of the considerations courts should employ in deciding workers' compensation cases, see Note, Donovan v. County of Los Angeles and State Compensation Insurance Fund: California's Recognition of Homo-
dated views about such non-marital relationships result in inequitable property distributions, whose harm outweighs the policy of promoting the institution of marriage.\textsuperscript{150}

The second important case in this group of decisions was \textit{Braschi v. Stahl Associates}\textsuperscript{151} in which it was held that a surviving lover of a long-term same-sex relationship qualifies as a member of the decedent's family under the anti-eviction provisions of the New York rent control law.\textsuperscript{152} The apartment lease in issue in the case named only the deceased gay lover as tenant. After the decedent died due to complications from AIDS, the landlord served notice upon the surviving lover to quit the premises. The survivor refused, asserting that he was part of the deceased tenant's family. The thoughts articulated by the plurality opinion are well put:

[W]e conclude that the term family . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of "family" and with the expectations of individuals who live in such nuclear units.\textsuperscript{153}

In objectively assessing the relationship of the non-marital partners, the plurality reiterated four factors employed by the lower New York courts:

[1] the exclusivity and longevity of the relationship,
[2] the level of emotional and financial commitment of the parties,
[3] the manner in which the parties have conducted their everyday lives and held themselves out to society, and

\textit{sexuales' Dependency Status in Actions for Worker's Compensation Death Benefits}, 12 J. CONTEMP. L. 151, 161 (1986) [hereinafter \textit{Homosexuals' Dependency}].

150. 73 L.A. 385.
152. \textit{Id.} at 54.
153. \textit{Id.} at 53-54.
[4]the reliance placed upon one another for daily family services.\textsuperscript{184} Nevertheless, the opinion cautioned that "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control."\textsuperscript{186}

The third case in this short line of decisions was \textit{State v. Hadinger},\textsuperscript{186} holding that a member of a same-sex couple was protected under the state's Domestic Violence Act which applied to persons living together in a spousal relationship. That statute expressly and broadly defined "person living as a spouse" to include a person "who otherwise is cohabiting with the offender."\textsuperscript{157} Although the trial court had concluded that the statute was intended to protect only opposite sex couples who had the ability to marry, the Ohio appeals court disagreed and opined that the trial court's reading of the statute "would eviscerate the efforts of the legislature to safeguard, regardless of gender, the rights of victims of domestic violence."\textsuperscript{158}

The fourth and last case is \textit{In re Guardianship of Kowalski},\textsuperscript{159} the widely-publicized case involving Sharon Kowalski, who sustained serious brain damage in an automobile accident, and involving the efforts of her lesbian lover to obtain guardianship over her. The Minnesota Court of Appeals held that same-sex families are families of affinity and should be accorded respect. Thus, due to the opportunities presented by determined litigants, the courts have begun to whittle away at the institution of heterosexual-only marriage. The significance of these cases, decided since 1983, is not in their number; it is in their very existence. We have passed that monumental hurdle of having a court somewhere declare that a same-sex couple can be a family.

\textbf{VII. Conclusion}

There is no question about the seriousness of the HIV-AIDS epidemic in the world, and in this country in particular. We cannot afford the staggering financial costs of the disease, nor can we tolerate the staggering human costs. Although some other illnesses annually ac-

\begin{itemize}
\item 154. \textit{Id.} at 55.
\item 155. \textit{Id.}
\item 156. \textit{Id.} at 573 N.E.2d 1191 (Ohio Ct. App. 1991).
\item 157. \textit{Id.} at 1192.
\item 158. \textit{Id.} at 1193.
\item 159. 478 N.W.2d 790 (Minn. App. 1991).
\end{itemize}
count for as much loss of life, unlike these other ailments, HIV-AIDS is transmissible by way of voluntarily entered into conduct. Thus, HIV-AIDS is far more readily subject to containment and prevention than those other life threatening conditions. Moreover, those other ailments develop over periods of many years, whereas HIV can be transmitted by a single episode of conduct that could take only a few minutes.

Unfortunately, the world and this country have been unable to curb the spread of HIV-AIDS. Statistical projections suggest that the rate of new HIV infections will increase, rather than decline, for years to come. In the United States, the evidence of our failure to contain the spread of sexually transmitted HIV is especially compelling. In 1988, for example, more than 40,000 cases of syphilis and more than 719,000 cases of gonorrhea were reported in this country, and this epidemic of sexually transmitted diseases has continued. As is well known, cases of sexually transmitted diseases are always underreported, and cases of syphilis, gonorrhea, and HIV-AIDS are particularly subject to such underreporting. For each of the more than 759,000 times in 1988 that sexual contact occurred and led to the transmission of syphilis and gonorrhea, the parties involved were also engaging in conduct having the potential to transmit HIV-AIDS. Certainly, a large number of Americans continue to engage in unprotected sexual intercourse with multiple partners.

Our public health efforts obviously have not succeeded in dealing adequately with sexually transmitted HIV-AIDS. One of the simplest, least expensive, and most effective means to reduce the spread of sexually transmitted HIV-AIDS is to encourage long-term monogamous relationships. The public interest of assisting in containment of HIV-AIDS.

160. See, e.g., AIDS: The Next Ten Years, NEWSWEEK, June 25, 1990, at 20-21 (stating: "The AIDS epidemic is far from over. It's not even under control.") [hereinafter Next Ten Years].

161. See, e.g., C.D.C., Notifiable Diseases-Summary of Reported Cases, By Age Group, United States, 1988, 37 M.M.W.R. 10 (October 6, 1989). See also Next Ten Years, supra note 160, at 21.


163. See, e.g., Next Ten Years, supra note 160, at 21 (stating: "Syphilis and gonorrhea—diseases that not only indicate unsafe sexual practices but facilitate the spread of the AIDS virus—have skyrocketed in recent years." Of course HIV would not be transmitted to an uninfected partner if both parties already had HIV).
AIDS should serve as sufficient justification for approval of same-sex marriages, even for those who otherwise oppose such marriages.

Approval of same-sex marriages is needed. It would not only foster the public health, but also foster a more tolerant attitude about our fellow citizens. Judicial recognition of Danish same-sex unions can serve as the next step in the process, so that barriers to same-sex marriages will suffer the same fate as barriers to the rights of married women, to marriages of slaves, and to marriages between people of different races.
A Wake-Up Call for American Society or Have "The Chickens Just Come Home to Roost?"—Essay Review of Charles Patrick Ewing's *When Children Kill: The Dynamics of Juvenile Homicide*

* Ruth-Arlene W. Howe**

**Copyright © 1992 Ruth-Arlene W. Howe. The author is an Associate Professor at Boston College Law School. J.D., Boston College Law School, 1974; S.M., Simmons College School of Social Work, 1957; A.B., Wellesley College, 1955.

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**Boy, 11, is held in Hyde Park slaying.**

An 11-year-old boy fatally stabbed a 16-year-old with a steak knife yesterday outside a Hyde Park home, police said. Children in the quiet residential neighborhood said the stabbing resulted from an argument over music cassette tapes.


**Teen: Beverly suspect plotted murder.**

The ex-girlfriend of the Beverly teenager charged in the killing of a 14-year-old cheerleader said yesterday he outlined a plot eerily similar to the murder a year ago. Diane M. Wagner, 15 of Broughton Drive, Beverly, said Jamie P. Fuller, 16, detailed a plan to kill Amy Carnevale during a phone conversation last summer.

"He said, 'I've been thinking about some way to kill Amy.' ‘He wanted to take her on a long walk to the woods. He was going to give her flowers, and then he was going to kill her and then throw her into a pond," she told the Herald.


**A Sunday Boston Globe Magazine Cover:**

A stark, despondent photograph, in shades of gray, shows from the rear, a White attorney, walking down a corridor in a Westborough, Massachusetts juvenile lockup, with his right arm across the back of his 15-year-old Black client, and his right hand resting on his
client's right shoulder, in what appears to be quiet, supportive consultation. The youth is being held for the April 20, 1991 double shooting of two youths, aged 15 and 11. Across the bottom of the page, in bold white print, is the feature article title: "When Children Kill: Crime, Punishment, and the Debate Over Juvenile Justice."


### I. Introduction

The above 1991 excerpts from Boston newspapers, available FBI arrest data,¹ and U.S. Census Bureau statistics² all sadly affirm the validity of Charles Patrick Ewing's closing predictions in *When Children Kill: The Dynamics of Juvenile Homicide*. Namely, "the rate of juvenile homicide is almost certain to continue growing over the next ten years . . . and the 1990s will probably witness the highest annual number of juvenile homicides in American history."³

Since 1984, the annual number of juvenile arrests for murder and non-negligent manslaughter has steadily increased.⁴ While 1,004 persons under the age of eighteen were arrested for homicide in 1984, 7.3 percent of the total 13,676 arrests that year; by 1990 the number of arrests of those below eighteen had more than doubled, rising to 2,555, 15.6 percent of all 1990 arrests for murder and non-negligent man-

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4. *Id.* at 1 ("based upon calculations using data from *FBI Uniform Crime Reports 1979 through 1988*" *Id.* at 138 n.3).
slaughter. These figures become even more disturbing when other things are considered. During the 1980s there was "a steady, annual decrease in the number of juveniles in the United States." Yet, the 1990 figures for those under 18, when compared to 1988 (the final year reported upon by Ewing), show an alarming 45 percent increase, or 790 more homicides. Still more alarming, in terms of percentages, although the actual numbers remain few, is the 1990 increase, over 1988, in the under 15 age group. In 1990 there were 283 reported arrests of juveniles under the age of 15—a 41 percent increase over the 201 reported arrests in 1988.

Building on earlier joint research on juvenile justice and juvenile homicide, done with sociologist Simon Singer and research assistant John Rowley, Ewing, a clinical and forensic psychologist, attorney and professor of law and clinical associate professor of psychology at the State University of New York at Buffalo, looks behind the headlines, in When Children Kill, to describe who these children are. Some kill parents, siblings or other family members; some kill during the course of committing other crimes, most often rape and robbery; some participate in gang killings; a very few are girls and children under 10 years of age; and then there are "the bizarre homicides, including 'thrill' killings, cult-related killings, and killings committed by disturbed juveniles." A tightly written volume, When Children Kill is intended to be a useful resource for legal and mental health professionals who represent or work with violent juvenile offenders.

Part I of this Essay recounts, in some detail, Ewing’s findings about juveniles who kill—the incidence and prevalence of juvenile homicide, the law’s current response and his projections for the future. The book’s strengths and weaknesses are discussed in part II. Because this book forced the reviewer to ponder the horrendous societal conse-

5. See FBI Uniform Crime Reports (1990), supra note 1.
7. See id. at 2 (Table 1-1: Murder and Non-Negligent Manslaughter Arrests by Age Group 1979-1988); and FBI Uniform Crime Reports (1988), supra note 1.
9. See supra note 8.
quences and costs, if this growing phenomenon of juvenile homicide is not accurately understood and comprehensively addressed as a serious public health issue, an attempt is made in part III to delineate what the challenges are for society and the law—both the juvenile justice system and the criminal justice system. Finally, in part IV, an urgent prescriptive plea is made regarding how the phenomenon of juvenile homicide ought to be understood and addressed.

II. A TROUBLING PHENOMENON: DESCRIPTION OR EXPLANATION?

A. Summary of Contents

Just as this Essay began with headlines taken from local Boston newspapers, Ewing begins his examination of the growing incidence of juvenile homicide with terse, graphic summaries of twenty-three homicides, committed in fifteen states and reported by the news media, between January 1986 and January 1989. After these introductory vignettes, Ewing begins his work with two chapters: first a statistical description of the incidence and prevalence of juvenile homicide, pri-

12. See generally Deborah Prothrow-Stith & Michaele Weissman, Deadly Consequences: How Violence Is Destroying Our Teenage Population and A Plan To Begin Solving The Problem (1991) [hereinafter Deadly Consequences]; infra part IIIA (for further discussion); see also C. Everett Koop, Introduction, in Deadly Consequences xvii, xviii ("that the discipline of public health possesses the solution to the mounting toll of violence in this country. The public health approach seeks to prevent tragedy; it seeks to identify and treat young males who are at risk for violence before their lives and the lives of those around them are ruined. The discipline of public health provides strategies to stop violence before it mains and kills.").

Public health can be defined in broad terms, even though its more specific focuses alter with time and place . . . . [T]he Milbank Memorial Fund for Higher Education for Public Health [defines] public health [as] encompass[ing] those activities that organized societal entities (both governmental and non-governmental) deliberately conduct to protect, promote, and restore the health and quality of life of the people on a broad community or population basis.


13. When Children Kill, supra note 3, at xiii-xv. The reported homicides had occurred in Alabama, California, Colorado, Florida (2), Georgia (3), Indiana (2), Louisiana, Massachusetts (3), Missouri, New Jersey, New York (2), Oregon (2), Pennsylvania, South Carolina and Wisconsin.
marily drawn from analysis of U.S. Census Bureau population data and *FBI Uniform Crime Reports*; and a longer chapter 2, critically reviewing published research studies on juveniles who kill.

Ewing then devotes six chapters to discussion of specific types of juvenile homicides. Chapter 3's focus is “intra-familial homicides: juveniles who kill their parents and/or siblings.”14 “[H]omicides committed by juveniles in the course of perpetrating other crimes, primarily theft crimes (such as robbery and burglary) and sex crimes (such as rape and sexual abuse)”15 are examined in chapter 4. In chapter 5, Ewing looks at “unusual, highly deviant or bizarre juvenile homicides, as well as those perpetrated by juveniles who appear to be psychotic or suffering from some other form of serious mental illness.”16 Two shorter chapters follow: chapter 6 on gang killings, “one of the most visible and troubling forms of juvenile homicide in America: killings committed by groups or gangs of youths, acting together—killings that are almost always senseless and often related to drug trafficking;”17 and, chapter 7 reviewing “homicides committed by very young children, essentially those under the age of ten.”18 In chapter 8 data is presented on “a minority group among juveniles who kill: girls” who “account for less than 10 percent of all homicides committed by American juveniles annually.”19

Ewing concludes *When Children Kill* with two final chapters: a review of the law’s response to juvenile homicide (Chapter 9) and a predictive look at the future of juvenile homicide between now and the year 2000 (Chapter 10). In these closing chapters, Ewing “examines the general legal structure for dealing with juveniles who kill,” especially the state statutory provisions “that allow some juvenile killers to be tried as adults, sent to prison, and, in some cases, even executed.”20 To support his assertion that the annual incidence and rate of juvenile homicide in the United States of America will increase, he points to the confluence of five forces, currently operative in American society: “(1) increasingly serious substance abuse among juveniles and adults; (2) apparently rising rates of child maltreatment; (3) expanding access to

14. *Id.* at xv (pp. 31-47).
15. *Id.* (pp. 50-62).
16. *Id.* (pp. 63-80).
17. *Id.* (pp. 81-90).
18. *When Children Kill*, *supra* note 3, at xv (pp. 91-100).
19. *Id.* at xvi (pp. 101-111).
20. *Id.*
grows . . .; (4) the growing number of juveniles living in poverty; and (5) the anticipated resurgence in the juvenile population."\(^{21}\)

B. **Juveniles Who Kill: A Statistical Overview**

Salient facts about the incidence and prevalence of juvenile homicide that can be drawn from analyzing available FBI arrest records, U.S. Census Bureau data, and various writings of others\(^{22}\) are presented in chapter 1. First, the most striking aspect is age. Eighty-five percent or more of those juveniles who kill are fifteen, sixteen or seventeen; less than one percent arrested for murder or non-negligent manslaughter are under fifteen.\(^{23}\) Ewing notes that “[a]s age levels rise, so do the annual number of arrests for murder and non-negligent manslaughter. Interestingly, other crimes committed by juveniles do not show nearly so clear a positive connection between incidence and age.”\(^{24}\)

Second, “[j]ust as younger juveniles rarely kill, girls of any age are extremely unlikely to commit homicide.”\(^{25}\)

Third, with respect to race, Ewing observes that:

> Black youth are vastly overrepresented among those juveniles arrested for murder or non-negligent manslaughter. Only about one sixth of all Americans under the age of eighteen are Black, yet in recent years roughly half the juveniles arrested for these homicide crimes have been Black. Indeed, . . . in recent years, Black youth have constituted the majority of those arrested for murder and non-negligent manslaughter in the under-eighteen age bracket.\(^{26}\)

While recognizing the existence of racial discrimination in the criminal justice system, Ewing yet states, “there also seems to be no question that Black youths are disproportionately involved in the com-

\(^{21}\) Id. at 127.


\(^{23}\) *When Children Kill*, supra note 3, at 3.

\(^{24}\) Id. (table 1-3—Murder and Non-Negligent Man-Slaughter Arrests of Juveniles By Age Group 1984-1988).

\(^{25}\) Id. at 4.

\(^{26}\) Id.
mission of criminal homicide. In short, Black youths are much more likely than White youths to kill.”

Next, if the ethnicity of juvenile homicide arrestees is reviewed, it is striking that Hispanics constitute only about 8 percent of the population, but “Hispanic youths account for almost a quarter of all under-eighteen arrests for murder and non-negligent manslaughter.” Ewing comments:

Hispanics, like Blacks, are undoubtedly the victims of discrimination in the criminal justice system, and so these figures must also be interpreted with caution. Like Blacks, Hispanics are probably somewhat more likely than Whites to be arrested for homicide crimes they commit. Yet, even allowing for such discrimination, there can be little doubt that, like Black youngsters, Hispanic youths account for a disproportionate share of homicides committed by persons under the age of eighteen.

The fifth statistical category examined by Ewing was the relationship between perpetrator and victim. Contrary to what might be inferred from much of the research to date, “the fact is that only a rather small percentage of juvenile killers kill their parents or stepparents, and only a slightly larger percentage kill other family members.” The vast majority of juvenile killers kill either acquaintances or strangers. Ewing’s analysis of available data “demonstrate two clear and statistically significant associations: (1) between victim-offender relationship and whether the homicide was incidental to a theft offense (such as larceny, burglary, or robbery) and (2) between victim-offender relationship and whether the homicide was committed individually or by a group.”

Utilizing a series of four tables, Ewing shows that intrafamilial homicides almost never are incidental to a theft offense, but six percent of acquaintance homicides and fifty-eight percent of stranger homicides occur in the course of a theft offense. The majority (fifty-three per-

27. Id.
28. WHEN CHILDREN KILL, supra note 3, at 6.
29. Id. This overrepresentation of Hispanic youth is particularly striking and far exceeds the roughly 16 percent of Hispanic adults arrested for murder or non-negligent manslaughter. Id.
30. Id. at 7.
31. See supra note 10.
32. WHEN CHILDREN KILL, supra note 3, at 7.
33. Id.
cent) of juvenile homicides involving acquaintance or stranger victims are perpetrated by multiple offenders acting in concert. In contrast, "when the victim was a family member, less than twenty percent of the homicides were committed by more than a single perpetrator." Another interesting victim-offender association was that found between the gender of the killer and the relationship to the homicide victim. Girls almost always killed family members or acquaintances; boys more likely killed acquaintances or strangers. "[Y]ounger juveniles were somewhat more likely than older juveniles to have killed family members. Also Whites were somewhat more likely than non-Whites to have killed family members."

Ewing ends his statistical overview chapter with an analysis of the circumstances under which juvenile killings occur, namely (1) during the commission of other crimes, specifically robbery; (2) by groups as opposed to individuals acting alone; and (3) with utilization of weapons such as guns and knives. As previously noted, "a substantial percentage of nonfamilial juvenile homicides are committed incident to (i.e., in the course of accomplishing) some sort of theft crime." As the age of the youngest perpetrator of a theft crime increases, so does the likelihood that a robbery victim could be killed. While "multiple-perpetrator juvenile homicides are rather rare when the homicide victim is related to the perpetrator," group killings "constitute a substantial portion (42.1 percent) of juvenile acquaintance homicides . . . and make up the majority (68.6 percent) of juvenile stranger homicides." Younger perpetrators are more likely to act in concert with others.

Finally, consistent with national data on all arrests for murder and non-negligent manslaughter revealing a use of firearms in almost 60 percent of these killings, a majority, though a slightly lower percentage, of juvenile homicides also are perpetrated with firearms. "[N]ot surprisingly, gun use in juvenile homicides is lower in younger age groups and seems to increase steadily with increasing age."

34. Id. at 8.
35. Id.
36. Id. at 9.
37. When Children Kill, supra note 3, at 10. Ewing asserts that review of arrest data from New York City for the years 1973-1980 [see Zimring, supra note 22] and for all of New York State for 1987 [see Office of Justice Systems Analysis, New York State Division of Criminal Justice Services, New York State Homicide 1987 (1988)] reveal a close correlation between the age of an offender and whether a homicide is committed individually or by a group.
38. Id. at 11.
C. Review of the Research

1. General Assessment

In Ewing’s opinion, the professional and scientific literature of children and adolescents who kill, beginning with two published studies from the 1940s, is “surprisingly sparse—both in quantity and in quality. Most publications on the subject share a number of common but significant methodological shortcomings.”

First, most of the literature deals with juveniles who kill family members, primarily parents, even though “juveniles who kill parents or other family members represent only a small proportion—less than 20 percent—of homicidal youth.” Second, many study samples, with few exceptions, have been extremely small. “The bulk of empirical data on juvenile homicide comes from anecdotal case studies—reports on extremely small samples of homicidal youngsters: commonly fewer than ten, often under four, and sometimes just a single case.” A third limitation is that frequently “subjects have been selected on the basis of their availability to the investigators,” often psychologists and psychiatrists to whom the juveniles who killed within the family “were referred for psychological/psychiatric evaluation/treatment.” Ewing further decryes other problems:

Moreover, for the most part, those few studies that did involve greater sample sizes and more sound sampling procedures have been plagued with methodological limitations, flaws that significantly limit any generalizations that might be drawn from their results. Virtually none of these studies have employed control or even comparison groups, and most researchers have relied upon their own, sometimes idiosyncratic, interests and theories in deciding what data to collect, how to collect it, and how to report it.

Nevertheless, Ewing concludes that while “it is difficult to draw relia-

39. See R. M. Patterson, Psychiatric Study of Juveniles Involved in Homicide, in 13 AM. J. ORTHOPSYCHIATRY 125 (1943); Thom, Juvenile Delinquency and Criminal Homicide, in 40 J. MAINE MED. Ass’n 176 (1949).
40. WHEN CHILDREN KILL, supra note 3, at 13.
41. Id. at 14.
42. Id.
43. Id.
44. Id.
ble generalizations from these studies, still, some data, limited though they may be, are better than no data." Then, drawing from the reviewed literature, he proceeds in the rest of chapter 2 to describe salient characteristics of both youngsters who kill and their families, frequently noted prehomicidal behavior and adjustment problems, and the types of homicides committed.

2. Individual Characteristics of Juvenile Killers

In response to the questions: "Who are the juveniles who kill? Are they emotionally disturbed, mentally ill, mentally retarded, learning disabled, neurologically impaired, or simply 'normal' youngsters who commit extremely abnormal acts?" Ewing draws these findings from the literature. First, most juvenile killers are not psychotic and do not suffer from major mental disorders. Most of those "studied by researchers to date have fallen into the diagnostic category of personality disorder, sometimes referred to as character disorder. Personality (or character) disorders are characterized by inflexible, maladaptive 'patterns of perceiving, relating to, and thinking about the environment and oneself.'"

Though studies suggest that juveniles who kill may tend to be below normal in intellect, they generally are not mentally retarded. Some may even have IQs above 100. What is striking is the strong evidence

45. When Children Kill, supra note 3, at 14.
46. Id. at 15.
47. Id. at 16 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987); see also notes 28-41 and accompanying text.
48. Id. at 18 & nn. 46-49 (citing studies by Bender, Children and Adolescents Who Have Killed, in 16 AM. J. PSYCHIATRY 510 (1959); Patterson, supra note 39; King, The Ego and the Integration of Violence in Homicidal Youth, in 45 AM. J. ORTHOPSYCHIATRY 134 (1975); Brandtader-Palmer, Children Who Kill, paper presented at Annual Convention of the American Psychological Association (Toronto August 1984)). But see id. at nn. 42-43, 45 (citing studies suggesting "that juveniles who kill tend to be below normal in intellect, although generally not mentally retarded"); Hays et al., Intellectual Characteristics of Juvenile Murders Versus Status Offenders, in 43 PSYCHOLOGICAL REPORTS 80 (1978) (a sample of 35 juvenile killers had significantly lower IQs than a similar sample of 39 juvenile status offenders); Petti & Davidman, Homicidal School-Age Children: Cognitive Style and Demographic Features, in 12 CHILD PSYCHIATRY & HUMAN DEV. 82, 85 (1981); Solway et al., Adolescent Murders: Literature Review and Preliminary Findings, in Violence and the Violent Individual 193 (J. Hays et al., eds. 1981); Lewis et al., Neuropsychiatric Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in
of a correlation between cognitive and language deficits and juvenile homicide. Early studies, by Patterson and Bender, as well as later studies, in the 1970s and 1980s, all report that juvenile killers experienced major learning problems, had drastically stunted language skills, poor academic performance, or may have quit school. Ten of the fourteen juveniles on death row, in the 1988 study by Lewis et al., were found to have major learning problems; only three read at grade level; and three had never learned to read until incarcerated.

Among the general juvenile population, it is unclear whether mental retardation and learning difficulties are associated with or caused by neurological impairment. But, "it has long been acknowledged that juveniles who kill often do suffer from neurological defects. For example, three decades ago Bender reported that among fifteen juvenile killers tested, ten had abnormal electroencephalogram (EEG) tracings." During the 1980s, Lewis and her colleagues found a similarly striking prevalence of neurological impairment in two studied groups of juvenile killers, one general in nature and the other all given death sentences.

Among the death row group . . . Lewis and her associates found that all fourteen of these subjects had histories and/or symptoms consistent with brain damage. In fact, eight had experienced head injuries 'severe enough to result in hospitalization and/or indention of the cranium' and nine had 'serious' documented neurological abnormalities, including focal brain injury, abnormal head circumference, abnormal reflexes, seizure disorders, and abnormal EEG

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49. Ewing states: "Many of the juvenile killers described in case studies were reported to have been experiencing significant academic problems at the time they killed, despite their generally average or better intellectual capacities." Id.; see, e.g., nn. 50-51 citing D.J. Scherl & J.E. Mack, A Study of Adolescent Matricide, in 5 J. ACADEMY OF CHILD PSYCHIATRY 559 (1966); I.B. Sendi & P.G. Blomgren, A Comparative Study of Predictive Criteria in the Predisposition of Homicidal Adolescents, in 132 AM. J. PSYCHIATRY 423, 425 (1975); and J. Bernstein, Premeditated Murder by an Eight-Year-Old Boy, 22 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 47 (1978).

50. See supra note 39.
51. See supra note 48.
52. When Children Kill, supra note 3, at 19 & nn. 55-57 (citing studies by Sendi & Blomgren, supra note 49 and by King and Brandstadter-Palmer, supra note 48).
53. Id. at 18-19.
54. Id. at 19.
Ewing stresses, however, that "whether or not a given juvenile killer suffers from neurological dysfunction may not be ascertainable from published clinical accounts of his or her case."\textsuperscript{56}

3. Family Characteristics

The families of juvenile killers are typically described as being broken, disturbed, neglectful and abusive. For nearly half a century, reported studies have shown that the percentage of juvenile killers who come from homes broken by parental separation, desertion and/or divorce is very high.\textsuperscript{57}

Ewing notes that probably the most consistent finding from the reviewed research is "that children and adolescents who kill, especially those who kill family members, have generally witnessed and/or been directly victimized by domestic violence."\textsuperscript{58} Many juvenile killers have witnessed spousal abuse. The more common occurrence is personally being victimized by child abuse, mostly physical, but "several accounts also suggest that many juveniles who kill also have been abused sexually."\textsuperscript{59}

\textsuperscript{55} \textit{Id.} at 19-20 (quoting from Lewis et al., \textit{supra} note 48) (citations omitted).
\textsuperscript{56} \textit{Id.} at 20.
\textsuperscript{57} \textit{Id.} at 20-21 & nn. 71-79 (referring to Patterson's early 1942 study [see \textit{supra} note 38] in which "five out of six juveniles [that] he studied came from broken homes marked by serious marital disturbances." \textit{Id.} at 21; more than four decades later, "Brandstadder-Palmer [\textit{supra} note 48] found that among the twelve juveniles murder defendants in her study, only one was living in an intact family." \textit{Id.}; Lewis et al., [\textit{supra} note 48] found that of the fourteen youth on death row studied, nine "had at least one parent who was an alcoholic, was mentally ill, and/or had been hospitalized for psychiatric treatment." \textit{Id.})
\textsuperscript{58} \textit{When Children Kill}, \textit{supra} note 3, at 22.
\textsuperscript{59} \textit{Id.} at 23 & nn. 98-100. Ewing notes:

For example, in the recent death row study by Lewis and associates [\textit{supra} note 48], five of fourteen juveniles who killed had been previously sodomized by older family members. Earlier, Sendi and Blomgren [\textit{supra} note 49] found that while four of ten adolescents killers had been "seduced" by a parent, none of the ten youngsters in a control group had experienced such abuse.

The findings of Corder and colleagues [Corder et al., \textit{Adolescent Paricide: A Comparison with Other Adolescent Murder}, in 133 AM. J. PSYCHIATRY 957, 959 (1976)] suggest that sexual victimization by a parent may also be more likely found in cases where the child-victim has killed
4. Prehomicidal Behavior and Adjustment

While most juveniles who kill are neither psychotic nor suffer from any major mental disorder, the research data reviewed by Ewing did suggest that many, if not all, juvenile killers exhibit "some form of noticeably deviant behavior prior to committing homicide. The most common forms of such behavior . . . are antisocial conduct, substance abuse, truancy, running away from home, enuresis, and problems relating to peers." Many studies found a prehomicidal history of antisocial behavior documented by prior records of arrests and criminal convictions. A few cited studies found no clear history of prior anti-social acts. Other researchers found major differences in the incidence of prior antisocial behavior depending upon the nature of the youthful homicide perpetrator or the relationship between the perpetrator and homicide victim. For example:

Zenoff and Zients divided their youthful homicidal subjects into three subtypes: sexual-identity conflict killers (relatively normal youngsters with sexual identity problems that seemed related to the homicide); nonempathic killers (essentially self-centered, impulsive youngsters with cognitive deficits, and innocent killers (juveniles who killed accidentally or in self-defense). Of the six juvenile killers in the sexual-identity conflict group, none had prior court records for violent offenses and only two had referrals for property offenses. Only one of the innocent killers had any history of assaultive behavior. But all seven youthful killers in the nonempathic group had histories of both assaultive behavior and numerous property offenses.

Corder and associates, who grouped their subjects according to victim-offender relationships, "found histories of aggressive behaviors in all ten juveniles who killed strangers, in six of ten who killed acquaint-

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60. *Id.* at 23-24.
ances or relatives, but in only three of ten who killed parents." Similarly, with respect to prior institutionalization for criminal acts, Corder et al. found that nine of the ten who killed strangers, five of the ten who killed acquaintances or relatives, but only one of the ten who killed parents had such a history.

Although general criminological research indicates "a significant if not causal relationship between substance abuse and criminal activity, especially violent crime," Ewing's research review found that "[s]urprisingly few studies of juvenile killers have examined this relationship." Cornell and associates recently "reported that thirty-eight of the seventy-two homicidal youth they studied had killed while intoxicated." Of this group, twenty-four were deemed regular or heavy alcoholic users, and twenty-nine regular or heavy drug users. "Similarly noteworthy data have also been reported by Brandstadtner-Palmer, who recently found that two thirds of the dozen juvenile murder defendants in her sample had histories of substance abuse."

Two other phenomena often appearing in the profiles of juvenile killers are truancy and running away from home. The frequent incidence of school and learning problems has been noted earlier in this essay. Ewing comments that "[n]ot surprisingly . . . running away from home has been reported almost exclusively as a behavior engaged in by juveniles who eventually killed one of their parents."

Many clinicians and researchers have recognized an interesting correlation between juvenile homicide and "childhood enuresis." Ewing credits an early 1961 article by Michaels, entitled "Enuresis in Murderous Aggressive Children and Adolescents," as having set the

63. WHEN CHILDREN KILL, supra note 3, at 25 (referring to Corder et al., supra note 59).
64. Id.
65. Id. at 26 (citing Dewey G. Cornell et al., Characteristics of Adolescents Charged With Homicide: Review of 72 Cases, in 5 BEHAVIORAL SCIENCES & L. 11 (1987) (a study of a comparatively large sample of youth referred for pretrial evaluation in the State of Michigan over a nine-year period, compared with a control group of 35 adolescents charged with nonviolent larceny offenses)).
66. Id. (citing Brandstadder-Palmer, supra note 48).
67. Id. & n. 126 (citing R.L. Sadoff, Clinical Observation on Parricide, in 45 PSYCHIATRY 65-69 (1971); Scherl & Mack, supra note 49; and E. Tanay, Reactive Parricide, in 21 J. FORENSIC SCIENCES 76-82 (1976)).
68. Childhood enuresis is "the repeated involuntary or intentional voiding of urine during the day or at night into bed or clothes, after an age at which continence is expected." Id. (quoting American Psychiatric Ass'n, supra note 47).
stage for this interest. Ewing notes that two other behaviors, fire setting and cruelty to animals, often appear conjointly with enuresis, in juveniles who kill; but the literature has not given them as much attention as enuresis.

Lastly, many juveniles who kill are considered to have had problems relating to their peers. Those “who commit parricide may be more likely than other juvenile killers to have demonstrated difficulties relating to their peers. Corder and his colleagues found an absence of peer relations among seven of ten juveniles who killed their parents, three who killed a relative or close acquaintance, and three who killed a stranger.”

5. Types of Homicides

Ewing reports that researchers have categorized and compared juveniles who kill either on the basis of the type of homicide committed or “the following factors: victim-offender relationship; means of homicide; motivation for the killing; and the presence or absence of accomplices.”

As noted earlier, while the literature is heavily devoted to intrafamilial homicides, “most juvenile killers kill acquaintances or strangers, not members of their own families.” Often studies or reports on juvenile killings are silent with respect to the means. When descriptions are given, “[m]ost of the killings . . . were perpetrated with guns, knives, or the killer’s bare hands, although occasionally other objects have reportedly been used. Perhaps the most consistent and striking finding with regard to means of homicide is the extent to which juveniles who kill do so with guns.

Ewing concludes that “[m]any juvenile homicides appear motiveless . . . . In other cases, however, the juvenile killer’s motive seemed

69. Ewing states: “‘[P]ersistently enuretic’ individuals, Michaels suggests, cannot hold their tensions, are impatient, and are impelled to act. They feel the urgency of the moment psychologically, as at an earlier date they could not hold their urine.”

70. Id. at 28 (citing Corder et al., supra note 59).

71. Id.

72. Id.

73. Id. at 29.
reasonably apparent, though not always understandable.”’74 Often a parricide seems to be “rooted in the juvenile’s desire for revenge against and/or escape from a parent who is (or at least is perceived by the youth to be) abusive.” Some parricides seem to be motivated also “by a desire to protect and/or please a parent.”’75 The studies do not indicate any similar clear motive for the killing of other family members. “Killings of acquaintances seem most commonly to be related to some immediate interpersonal conflict or to be incidental to the commission of other crimes, such as burglary or rape. Killings of strangers generally seem to occur in the course of committing other crimes, such as burglary, robbery, and rape, but often have no apparent motive.”’76

D. The Law’s Response to Juvenile Homicide

After presenting descriptive profiles for juvenile perpetrators of various types of homicidal acts, in chapter 9, Ewing provides his reader with an overview of the current options, mandated by the laws of different American jurisdictions, for dealing with juvenile killers.

1. Trial in Adult Criminal Court

Formerly, “it was legally presumed that all juveniles below a certain age (usually eighteen but sometimes sixteen) were not sufficiently sophisticated and mature to be held criminally responsible for their antisocial acts. Youth below this age were automatically treated as juveniles.”’77 Today, all American jurisdictions have laws, “variously known as transfer, waiver, or certification provisions, [whereby] older juveniles (generally those older than twelve) who commit the most serious personal crimes (e.g., homicide, rape, kidnapping, armed robbery, arson, sodomy, aggravated assault) may be prosecuted and, if convicted, punished as adult criminals.”’78 The minimum age at which a

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74. When Children Kill, supra note 3, at 29-30.
75. Id. at 30 & nn. 163-68 (citing studies by Patterson, supra note 39; J.W. Duncan & G.M. Duncan, Murder in the Family: A Study of Some Homicidal Adolescents, in 127 AM. J. PSYCHIATRY 74-78 (1971); Sadoff, supra note 67; Cornell et al., supra note 65, at 2-21; and Malmquist, supra note 61, at 464)).
76. Id. nn. 175-76 (referring to study by Rowley et al, supra note 10, at 3).
77. Id. at 117 & n.23 (citing Levine et al., Juvenile and Family Mental Health Law in Sociohistorical Context, in 10 INT’L J.L. & PSYCHIATRY 91 (1987)).
78. Id. at 114; see, e.g., IND. CODE ANN § 31-6-2-3 (West 1991); MASS. ANN. LAWS ch. 119, § 1, 53 (Law. Co-op. 1991); 1991 La. Sess. Law Serv., Ch. C. Ann. art.
juvenile killer may be prosecuted as an adult varies greatly. Generally, to be tried as an adult, “a juvenile must, in addition to meeting age and crime requirements, be found by the court not suitable for treatment as a juvenile.” Ewing explains that in most states judges are directed by statute to consider specific factors such as “(1) the danger or threat posed to the community by the juvenile; (2) the degree of sophistication and maturity exhibited by the juvenile; and (3) the likelihood that the juvenile can be rehabilitated through the services available to — and prior to expiration of the jurisdiction of — the juvenile court.”

Ewing aptly comments as follows:

Given the clear relationship between these factors and the juvenile's psychological makeup and functioning, it is not surprising that forensic mental health professionals (primarily psychologists and psychiatrists) have come to play a major role in helping courts to determine whether or not a given juvenile should be tried as a juvenile or as an adult. Juveniles charged with serious crimes and eligible for transfer, waiver, or certification are now routinely subjected to forensic mental health evaluations, and the courts routinely give great weight to these evaluations in determining


79. When Children Kill, supra note 3, at 114-15. Ewing lists fifteen states as setting no minimum age: Alaska, Arizona, Florida, Kentucky, Maine, Maryland, Nebraska, Nevada, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Washington, West Virginia, and Wyoming. A juvenile as young as 10 years old may be prosecuted as an adult in three states: Indiana, South Dakota and Virginia. Three states have a minimum age of 13 years: George, Illinois, and Mississippi. The minimum age is 14 in eleven states: Alabama, Colorado, Connecticut, Iowa, Kansas, Massachusetts, Minnesota, Missouri, New Jersey, North Carolina, and Utah. Ten other jurisdictions: Arkansas, District of Columbia, Idaho, Louisiana, Michigan, New Mexico, Ohio, Tennessee, Texas and Virginia, have a minimum age of 15 years; and in eight states: California, Delaware, Hawaii, Montana, North Dakota, Oregon, Rhode Island and Wisconsin a youth must be 16 years old. See also Richard J. Bonnie, Juvenile Homicide: A Study in Legal Ambivalence, in Juvenile Homicide 194 (Elissa P. Benedek & Dewey G. Cornell eds. 1989) (Table 3, presenting the minimum ages for exercise of criminal court jurisdiction in murder cases, adds New York to the group of eleven states listed by Ewing as having 14 as a minimum age; and in the footnote explains that in both New York and North Dakota, criminal court jurisdiction is mandatory at 14).


81. When Children Kill, supra note 3, at 116.
whether to try a youngster as a juvenile or as an adult.82

In discussing these factors, Ewing identifies certain underlying assumptions and societal concerns. First, concern about the danger a juvenile may pose to society is “a reflection of incapacitation as a justification for criminal punishment. [This assumes] that juveniles who pose no danger or only minimal danger to society may safely be treated as juveniles, while those who are more dangerous require longer and more secure incarceration for the protection of the public.”83 Second, underlying “concern over maturity and sophistication is society’s long-standing notion that adult penal sanctions should be reserved for those mature enough to be held fully responsible for their crimes.”84 As previously noted, youths, seventeen and younger, were not deemed criminally responsible. “Under modern waiver, transfer, or certification laws, the presumption remains but is rebuttable.”85 Third, Ewing asserts that two questions are critical in determining a given youth’s amenability to treatment: “(1) Are the dispositions available to the juvenile court likely to rehabilitate the juvenile before that court’s jurisdiction ends? (2) Are the services available to the juvenile in the criminal justice system appropriate to his/her needs?”86

From his study of the research literature, Ewing concludes that certain factors are particularly predictive of adult prosecution of juveniles who kill, as illustrated by Eigen’s study of 154 juveniles arrested for homicide in Philadelphia in one year.87 Factors predictive of waiver for trial as an adult were: (1) a killing during the commission of a felony; (2) by one seventeen year old at a time; (3) acting as the principle assailant; and (4) having a prior criminal record.

2. Punishment of Juveniles Who Kill

The law’s response to juvenile homicide is different depending on whether an alleged juvenile killer is tried in juvenile court as a juvenile

82. Id. (citations omitted).
83. Id.
84. Id. at 116-17.
85. Id. at 117.
86. WHEN CHILDREN KILL, supra note 3, at 117.
87. Id. at 117 n.28 (citing J. Eigen, Punishing Youth Homicide Offenders in Philadelphia, in 72 J. CRIM. L. & CRIMINOLOGY 1072 (1981) (51 percent of these youths were retained and tried in the juvenile court; 49 percent were waived for trial as adults)).
or in criminal court as an adult. If dealt with in the juvenile justice system, most state laws limit the duration of a sentence to the offender’s minority or a relatively short period thereafter. In contrast, a youth who is “tried and convicted of murder or manslaughter in adult court may be sentenced to prison, detention in a juvenile facility, or both.” In states imposing the death penalty for certain murders, juveniles, unless expressly exempted, upon conviction of murder or non-negligent manslaughter in adult court, are eligible for capital punishment. Thus, as Ewing poignantly notes, “in some cases the transfer or waiver decision may mean the difference between life and death for a juvenile killer.”

3. Incarceration of Juveniles Who Kill

Ewing reports that “juveniles convicted of homicide crimes in adult court are treated much more harshly than those found guilty of such crimes in juvenile court.” Eigen’s study of 154 Philadelphia juveniles revealed sharp differences in outcomes. Ninety percent of those tried as adults were given prison sentences, while fewer than fifty percent of those tried in juvenile court were incarcerated. No youth tried in juvenile court was confined to a state institution beyond his or her twenty-first birthday. “In those cases tried in criminal court, however, all . . . convicted of felony-related murder and 84 percent of those convicted of murder not related to another felony were sentenced to terms of imprisonment ranging from one to two years to life in prison. One youth convicted in adult court was sentenced to die.”

88. Id. at 121; see, e.g., Ky. Rev. Stat. Ann. § 640.10 (Baldwin 1991) (considering the seriousness of the offense, whether the offense was against persons or property, with greater weight being given to offenses against persons; the maturity of the child as determined by the environment; the child’s prior record; the best interest of the child and community; the prospects of adequate protection of the public; and the likelihood of reasonable rehabilitation of the child by the use of procedures, services and facilities currently available to the juvenile justice system).
89. When Children Kill, supra note 3, at 121; see, e.g., Mass. Ann. Laws ch. 119, § 58 (Law. Co-op. 1991) (providing for a probationary or commitment period for a child that shall not be for a period longer than until such child becomes eighteen or age nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday).
90. When Children Kill, supra note 3, at 121; see also infra part ID4.
91. Id.
92. Id.
93. Id.
4. Capital Punishment for Juveniles Who Kill

Ewing finishes his summary of the American legal system's response to juvenile homicide, with the sobering observation that "while rarely imposed, the death penalty remains a viable option for punishing juveniles who kill." Very few nations in the world today execute persons for crimes committed while they were juveniles. Yet, three of the eight executions of juveniles, documented by Amnesty International as occurring since 1979, "took place in the United States. The remaining five occurred in Pakistan, Bangladesh, Rwanda, and Barbados."95

Drawing from the review of state statutes in the 1989 Supreme Court opinion for two juvenile capital punishment cases decided together, Stanford v. Kentucky and Wilkins v. Missouri,96 Ewing states that of the thirty-seven states permitting capital punishment, "twenty-two of these states (Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and Wyoming) allow the execution of juveniles convicted of murder committed before they were seventeen years old."97 Three more states (Georgia, North Carolina, and

94. Id. at 126.
95. WHEN CHILDREN KILL, supra note 3, at 123. It is to be noted that, [m]ore than 90 juveniles have been sentenced to death in the USA since the death penalty was reinstated in the 1970's; all were aged between 15 and 17 at the time of the offense. Although many have had their sentences vacated on appeal, four were executed between 1985 and 1990 and 31 remained on death row as of 1 July 1991. Although they represent only a small proportion of the more than 2,400 prisoners under sentence of death in the USA, there are more juvenile offenders on death row in the USA than in any other country known to Amnesty International. Amnesty International, United States of America: The Death Penalty and Juvenile Offenders, Summary (AI Index: AMR 51/23/91) (issued 9 October 1991).
97. WHEN CHILDREN KILL, supra note 3, at 123 & n.57 (though not explicitly listed in Justice Scalia's opinion for the majority in Stanford, Ewing apparently compiles this list of states from those enumerated in footnote two and the accompanying text. 109 S. Ct. at 2975.). Conversely, Justice Brennan points out in his dissent: The 15th State to have rejected capital punishment altogether is Vermont. Vermont repealed a statute that had allowed capital punishment for some murders. See Vt. Stat. Ann., Tit. 13, § 2303 (1974 and Supp. 1988). The State now provides for the death penalty only for kidnapping with intent to extort money. Id., §2403. Insofar as it permits a sentence of death, § 2403 was rendered unconstitutional by our decision in Furman v. Georgia, 408
Texas) allow execution of a juvenile who was seventeen years at the time the killing occurred.

During the 1980s, the United States Supreme Court heard several cases raising constitutional challenges to state death penalty laws as applied to juveniles. In 1982, in *Eddings v. Oklahoma*, the Court vacated the death sentence of sixteen-year-old runaway, Monty Lee Eddings, who had been abused by his father. While acknowledging that Monty's youth was a substantial factor, the sentencing judge "refused, as a matter of law, to consider Monty's disturbed family life and emotional problems as mitigating evidence." The Court rejected Monty's claim of a violation of the Eighth Amendment's ban against cruel and unusual punishment and instead decided the case on the narrower grounds "that in a capital sentencing proceeding, sentencing authorities may not 'refuse to consider, as a matter of law, any relevant mitigating evidence.' Youth, the Court concluded, 'is itself a relevant mitigating factor of great weight.'"

Six years later, in *Thompson v. Oklahoma*, the Court was confronted with the question whether or not a person could be executed for a crime committed while under the age of sixteen. William Wayne Thompson's death sentence was vacated, but the Court "failed to resolve the controversy over the age at which capital punishment becomes a constitutionality valid penalty." Four justices held that execution of a person under the age of sixteen at the time of the offense was prohibited by the Eighth Amendment. A fifth justice, Justice O'Connor, concluding that there very likely was a national consensus forbidding such execution, nevertheless stated her unwillingness "to adopt this conclusion as a matter of constitutional law without better evidence than we now possess.'" She provided the fifth concurring

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98. 455 U.S. 105 (1982).
100. *Id.* at 124 (quoting Justice Powell in *Eddings*, 455 U.S. at 877).
103. *Id.* (quoting Justice O'Connor concurring in the judgment in *Thompson*, 108 S. Ct. at 2983 n.1 (Brennan, J., dissenting).
vote, but on the narrower ground "that those 'below the age of 16 at the time of their offense may not be executed under the authority of a capital punishment statute [such as the Oklahoma law under which Thompson was sentenced] that specified no minimum age at which the commission of a capital crime can lead to the offender's execution.'" 104

One year later in 1989, the Court again was confronted with the question of at what age is capital punishment a constitutionally valid penalty. In the jointly decided cases, Stanford v. Kentucky and Wilkins v. Missouri, the Court upheld death sentences imposed upon Kevin Stanford (seventeen years and four months at the time he and an accomplice, during a robbery, raped and sodomized a female gas station attendant whom later he shot in the head) and Heath Wilkins (sixteen years and six months old, when robbing a convenience store with an accomplice, repeatedly stabbed the store clerk). "Justice Scalia, joined by four other justices, concluded that there is no national consensus against executing sixteen- and seventeen-year olds convicted of murder . . . ." 106 This time, only Justice Brennan, in dissent, referred to "psychological and psychiatric data indicating that juveniles lack the judgment and moral maturity necessary to hold them fully responsible for their crimes." 107 Thus, Ewing asserts "that there is no constitutional bar to imposing the death penalty upon juveniles who were at least sixteen years old at the time of their capital crimes." 108

E. The Future of Juvenile Homicide

In chapter 10, Ewing concludes his book with a brief discussion of the "forces currently operating in American society" that lead him to forecast "that the number and rate of juvenile homicide will continue to increase and may reach record proportions by the turn of the

104 Id.
105 Id. at 2969 (1989).
106 When Children Kill, supra note 3, at 125.
107 Id. at 125-26 (citing Stanford, 109 S. Ct. at 2988-92 (1989) (Brennan, J., dissenting)).
108 Id. at 126. Thus, while Eddings requires that, whatever the age of the juvenile, all mitigating evidence including the offender's youth must be considered by the sentencing authority, judge or jury; under Thompson, a youth may be given the death sentence so long as the statutory provisions under which the youth is sentenced explicitly set a minimum age for capital sentencing. Id.
1. Substance Abuse

Ewing claims that substance abuse affects juvenile homicides in three ways: "(1) most directly by altering the psychological functioning of juveniles in ways which make them more likely to kill; (2) less directly by creating an environment in which some juveniles have economic incentives to kill; and (3) indirectly, by contributing to the likelihood of child maltreatment."\(^\text{109}\)

Although Ewing found "no definitive data regarding how many juvenile homicides are committed by youths under the influence of drugs,"\(^\text{110}\) he mentions disturbing statistics about New York City:

In 1988, the overall estimated number of drug abusers under seventeen in New York City alone reached an all-time high of 140,000. As juvenile drug abuse was reaching record highs, so too was juvenile homicide. In 1988, the number of murders in New York City reached an all-time annual high of 1,896, and the number of murders committed by juveniles went from twenty-four in 1987 to fifty-seven in 1988, a 138 percent increase in a single year.\(^\text{111}\)

Secondly, Ewing notes that some juvenile homicides may result from the behavioral changes, lowered inhibitions or impaired judgment flowing from drug use and abuse. Other killings occur "not because the perpetrators are necessarily under the influence of drugs when they kill, but rather because these homicides [are] committed as part of the juvenile perpetrators’ efforts to make or protect drug profits."\(^\text{112}\) Ewing predicts that juvenile killings will increase "[a]s drug trafficking increases and/or becomes more competitive."\(^\text{113}\)

Lastly, Ewing states that the serious growing problem of parental...

\(^{109}\) Id. at 127.

\(^{110}\) Id. at 128.

\(^{111}\) WHEN CHILDREN KILL, supra note 3, at 128.

\(^{112}\) Id. (citations omitted).

\(^{113}\) Id. at 129.

drug abuse "has had and will continue to have an indirect and long-term but significant impact upon the incidence of juvenile homicide by contributing to the incidence of child abuse and neglect." The number of child abuse and neglect cases involving parents who are drug abusers and/or addicts is growing rapidly.

2. Child Maltreatment

Ewing asserts that "[t]he correlation between child abuse and juvenile homicide, though not well researched, makes sense intuitively . . . . [Thus,] increases in the incidence and/or severity of child abuse are likely to be followed by corresponding increases in the number and rate of juvenile homicides." To substantiate the contention that "the United States is experiencing an 'epidemic' of child abuse" which "will undoubtedly affect the incidence of juvenile homicide for some time to come," Ewing refers to "testimony given before the United States Senate Judiciary Committee in May of 1989 indicating that there was a 64-percent increase in the number of confirmed child abuse cases in the United States between 1980 and 1986."

3. Guns

"Most homicides, including those perpetrated by juveniles, involve the use of firearms." From Ewing's discussion of various juvenile killings—shooting a parent, sibling or playmate with a parent's handgun, using a handgun during a robbery to kill the victim, or firing a semiautomatic assault rifle out of a car window in a drive-by gang-related killing of a rival, one thing stands out. All these perpetrators had ready access to guns. Hard data on gun ownership in the United States may not readily be available. Yet, "several points seem beyond dispute: millions of guns ranging from small handguns to semiautomatic assault rifles are owned by Americans; and many of these weapons are either

115. When Children Kill, supra note 3, at 129.
116. Id. at 130.
118. When Children Kill, supra note 3, at 132.
in the hands of or readily available to juveniles . . . ."119 Some large urban school districts have installed metal detectors in an effort to keep guns out of their schools. Three states, Florida, Connecticut and Virginia, reacting to a 1989 "rash of accidental shootings of children by other children . . . " have enacted legislation "making it a crime to leave loaded guns where they are accessible to children."120 Ewing notes "[e]ven the National Rifle Association (NRA), which vehemently opposes virtually any legal controls on gun ownership, has acknowledged the growing problem of juveniles' access to guns."121

Ewing is not hopeful that any of these efforts will make any immediate difference. Rather, he maintains that "juvenile access to guns will likely continue to grow, and thus continue to contribute to the growing problem of juvenile homicide."122

4. Poverty

First, Ewing states that "[t]he link between poverty and crime in American society, including violent crime, is complex and not entirely understood, but almost universally recognized."123 In Table 10-2 he provides figures for the years 1978 through 1987, showing a steady rise in the percentage of youths under the age of 18 in families below the "official" poverty level.124 Acknowledging a lack of hard data about the percentage of juvenile homicides committed by economically impoverished youths, Ewing nevertheless asserts the following:

Youngsters living in poverty are more likely to become involved in juvenile gangs, more likely to commit economically motivated crimes such as robbery, and more likely to be exposed to the temptations of involvement in the drug trade flourishing in their com-

119. Id.
120. Id. at 133.
121. Id. Ewing notes, "[r]ecently, the NRA began producing and distributing a children's coloring book. The booklet, My Gun Safety Book, is designed for children from kindergarten through first grade and tells them that if they find a gun, they should leave it alone, leave the area, and tell an adult." Id.
122. Id.
123. WHEN CHILDREN KILL, supra note 3, at 133.
124. The "official" poverty threshold rises each year by the same percentage as the annual average Consumer Price Index. See Bureau of the Census, U.S. Dep't of Commerce, POVERTY IN THE UNITED STATES: 1990 195 Current Population Reports, Consumer Income, Series P-60, No. 175, (Table A-2, Poverty Thresholds in 1990, by Size of Family and Number of Related Children Under 18 Years) (1991).
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5. Resurgence of the Juvenile Population

Recent United States Census Bureau estimates and projections indicate that “the United States is beginning to undergo a demographic shift in which the population of juveniles at risk for committing homicides will no longer be decreasing but instead will be increasing.”

Between 1990 and 2000, the five to seventeen year old age group is expected to increase by 7 percent. However, given the “described confluence of the forces now at work in American society . . . that is, increasing drug abuse, child abuse, access to guns and childhood poverty,” Ewing solemnly predicts a rise in the rate of juvenile homicide over the next ten years which will result in annual record numbers of juvenile homicides far in excess of the anticipated 7 percent growth in this age group.

III. An Assessment of Ewing’s Treatment of the Phenomenon of Juvenile Homicide

When Children Kill: The Dynamics of Juvenile Homicide is described on the back flap of its book jacket, as being “a valuable resource for mental health care professionals, lawyers, and those who work with violent juvenile offenders.” In the Introduction, Ewing declares his intent to examine “the phenomenon of juvenile homicide from a variety of perspectives.” He then provides a descriptive summary of the book’s ten chapters—the critical questions to be answered and the type of information to be presented. In this section, consideration is given first to determining whether When Children Kill, in fact, addresses all of the issues raised by Ewing in his Introduction. Second, an assessment is made regarding the overall adequacy of Ewing’s discussion of the phenomenon of juvenile homicide.

125. WHEN CHILDREN KILL, supra note 3, at 133.
126. Id. at 135.
127. Id. at 135.
128. Id. at xv.
A. Coverage

Chapter 1's statistical overview, as discussed above in section IB, is the most complete and successful part of *When Children Kill*. From a series of ten tables and accompanying text, a reader readily learns about all aspects of juvenile homicide. Namely, the number of juveniles who kill each year, the comparison between the numbers of juvenile homicides and the numbers of adult homicides each year; the numbers of boys, as opposed to girls who kill; the ages of those who kill; the types of relationships between victims and juvenile offenders; and the circumstances under which juvenile killings occur. Ewing also presents data on the recorded racial and ethnic group membership of juvenile murder and non-negligent manslaughter arrestees.

In contrast, chapter 2's review of the published research on juvenile homicide does not answer fully the questions raised by Ewing in his descriptive summary. Namely: What has been discovered to date about this phenomenon? What remains to be discovered? What are the limitations of existing research approaches, and how can these limitations be overcome?129

The bulk of chapter 2 is a presentation of the findings from various studies conducted over the past 50 years. As noted above in section ICI, Ewing deems the existing literature to be "surprisingly sparse—both in quantity and in quality."130 He complains about various methodological flaws, such as very small study samples or anecdotal case studies by professionals to whom youths have been referred for evaluation or treatment, and the virtual lack of control or comparison groups. Moreover, while intrafamilial homicides account for less than one-fifth of all juvenile homicides, most of the research literature focuses on youth who have killed family members. This means that, as Ewing asserts, "to date, precious little has been learned"131 about the other more than 80 per cent who kill non-family. Ewing devotes very little space to identifying what remains to be discovered, or how to overcome the limitations of existing research approaches. By not addressing these two questions more completely, Ewing misses an opportunity to encourage or shape the design and direction of needed future research. For some reason, Ewing does not repeat the closing statement of his earlier study, co-authored with Rowley and Singer, that explic-

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129. *See id.*
130. *See supra* text accompanying note 40.
itly calls for “not only greater methodological sophistication but a broader, interdisciplinary conceptual approach [to juvenile homicide] which emphasizes and examines sociological as well as psychological and psychiatric variables.”

This is not to say that Ewing does not make several very general observations. He does note the need for more solid empirical data, especially on those youngsters who kill acquaintances and strangers, given the strong indication that there are some clear differences between these youth and those who kill family members. And, he makes the point that empirical data is needed from studies with larger samples and control or contrast groups, conducted by investigators other than those providing “psychological/psychiatric evaluation/treatment services.”

Ewing, however, does not articulate any clear agenda for future research or make any suggestions about how to overcome the methodological flaws that he decries. While chapter 2’s literature review is a close replica of Cornell’s first chapter in the 1989 co-edited work, Juvenile Homicide (to which Ewing frequently cites), for some reason, Ewing does not mention any of Cornell’s very specific observations about “[w]hat can be learned from the literature that would benefit future researchers and future users of juvenile homicide research.”

132. See Rowley, supra note 10, at 9. Nor does Ewing refer to another co-authored work with Murray Levine et al. See supra note 77 (tracing the development of juvenile and family mental health law and policy in the United States and concluding that “the evolution of child and family mental health law and policy has been, is, and undoubtedly will continue to be a reflection of a variety of changing social needs and concerns . . . ”).

133. See supra text accompanying note 43.

134. See Cornell, supra note 22 and accompanying text.

135. Id. at 28. For instance, Cornell states: “publication of further case reports outside the context of empirical study (emphasis original) is unnecessary.” He calls for more attention to be paid to sampling issues, and particularly cautions authors of studies using samples from hospital settings to be more conservative in their generalizations. Research on court-referred samples should be examined for representativeness and efforts should be made to replicate findings on a broader sample if possible.

Second, given the smallness of many study samples, Cornell urges adherence to well-accepted methodological standards. Care should be taken to support claims of group differences by running appropriate tests of statistical significance. “When researchers rely on chart reviews, interviews, ratings, or similar methods, evidence for the interrater reliability of the measures must be presented.” Id. Of special importance is whether or not raters are blind to group membership of the subjects they rate.

Third, Cornell urges that studies that attempt to characterize the juvenile murderer should be rejected automatically as naive. Case studies have documented consid-
Instead, Ewing merely reports on the conflicting results from some of the research, but he does not flag any areas as meriting additional study.

For example, he reports on a number of studies that have found some correlation between the cognitive and language deficits of mental retardation and learning disabilities and/or neurological impairment and juvenile homicide. He notes also that "other studies have been more equivocal. Numerous case studies have documented juvenile killers with no apparent neurological impairment." Yet, he does not urge any further inquiry.

With respect to the characteristics of the families of juveniles who kill, he again refers generally to the need to correct the bias resulting from heavy use of samples just of intrafamilial killers. He cites certain conflicting study results about whether the family was broken or intact at the time of the killing. This, along with a closer look at the affect of sexual abuse, might well have been flagged as matters deserving further study.

Next, with respect to patterns of prehomicidal behavior, Ewing mentions studies reporting conflicting references to the presence and

crable heterogeneity of youth committing homicidal acts; recent studies demonstrate important differences within homicide groups. Hence, future research, Cornell states, should focus on identifying etiological factors associated with relatively homogenous subgroups of violent youths.

And fourth, Cornell demands that attempts to subgroup violent youth should follow standards procedures for proposing any diagnostic entity. Criteria should be clear and reliable. The means by which youths are classified should be distinguished from findings used to support the validity of the classification. Id. at 28-29.

136. See supra notes 49-56 and accompanying text.


138. See id. at 20-21; supra notes 48-58 and accompanying text (citing studies that found a high percentage of homicidal youth came from broken homes; two studies with contrary findings, cited by Ewing are: (1) King's study, supra note 48, (most of the sample of 9 youths were living in intact families when they killed) and (2) Fiddes, A Survey of Adolescent Murder in Scotland, in 4 J. ADOLESCENCE 47, 58 (1981) (twenty-two of thirty-seven homicidal youngsters studied were from intact families)).
absence of certain behaviors from prehomicidal histories; possibly, another area for further investigation. Similarly, he comments how few studies have examined substance abuse among juveniles who kill, although “[c]riminological research in general indicates that there is a significant if not causal relationship between substance abuse and criminal activity, especially violent crime.” Ewing, however, calls for no further investigation. Another inquiry area, not specifically flagged by Ewing, is the extent to which fire setting and cruelty to animals, two behaviors frequently found along with enuresis, actually appear in the prehomicidal histories of juvenile killers.

At the beginning of chapter 2, Ewing states:

Ultimately, deciding how society and law should deal with homicidal youth will require answers to a number of difficult questions: Who are these youngsters who kill? Why do they kill? To what extent, if any, do they pose a continuing threat to society? And, what, if anything, can be done to rehabilitate them and reduce the magnitude of that threat?

Ewing’s middle chapters, 3 through 8, provide very graphic, descriptive profiles for seven different types of juvenile homicide. These chapters are replete with references to all types of juvenile killings committed in various parts of the United States and reported in the media during the 1980s. This is a strength of the book and indeed, sets it apart from the frequently cited chapters in Juvenile Homicide, a work whose organizational approach to subgroup classification Ewing follows in When Children Kill. From the many media accounts that Ewing includes, one gets a clear sense of the variety of youngsters who kill.

What these middle chapters do not answer, in any comprehensive way, is why these juveniles kill. Implicit, in Ewing’s closing prediction

139. When Children Kill, supra note 3, at 23-28; supra notes 60-63 and accompanying text.
140. When Children Kill, supra note 3, at 35.
141. Id. at 13.
142. Namely, intrafamilial homicides; homicides committed in the course of other crimes; senseless killings; gang killings, killings by children under 10 years; and homicides by girls. See supra notes 14-18 and accompanying text.
of an anticipated growth in juvenile homicide during the 1990s, is the affirmative acknowledgement that these youngsters do pose a threat to society. There is, however, no exploration of what, if anything, can be done either to rehabilitate them or to reduce the magnitude of the societal threat they pose. These omissions constitute major shortcomings and seriously undercut the usefulness of this book.

Chapter 9, as discussed part in II.D., 144 introduces the reader to the existing structure of state statutory provisions under which some juvenile killers remain under the jurisdiction of the juvenile justice system and others are prosecuted in adult criminal courts, sometimes receiving lengthy or life prison sentences or the death penalty. Again, by limiting himself strictly to reporting the status quo, Ewing adds nothing to the continuing debate 145 over how our legal system should respond to and deal with youngsters who kill. So, although he refers to several chapters 146 in Juvenile Homicide, he completely ignores Bonnie's suggestions 147 for a more coherent sentencing system for juvenile offenders.

As promised in the Introduction, chapter 10 concludes with a specific prediction about the likely incidence of juvenile homicide in America between now and the turn of the century. Ewing presents statistical data on each of five forces, 148 currently operating in society, and deemed to have a close relationship to juvenile homicide. The real strength of this final chapter, as can be said about the entire book, is the clarity with which Ewing describes who these youngsters are. Perhaps this is enough to make the work "a valuable resource" for professionals, but this reviewer found Ewing's failure to answer or grapple comprehensively with all of the difficult questions, 149 so precisely posed at the beginning of chapter 2, very frustrating.

144. See supra notes 77-108 and accompanying text.
145. See discussions infra part III.B.
147. See discussion infra part III.B.
148. When Children Kill, supra note 3, at 127-135 (table 10-1 relating National Estimates of the Number and Rate per 1,000 of Child Abuse and Neglect and table 10-2 relating Percentage of Americans under Age 18 in Families below the Poverty Level 1978-1987).
149. See supra text accompanying note 141.
B. Is the Phenomenon Adequately Explained?

Having assessed the extent to which Ewing accomplishes his stated aims in writing *When Children Kill*, the sufficiency and accuracy of Ewing's treatment of the phenomenon of juvenile homicide is next considered. Has he fully and properly explained the "dynamics" of juvenile homicide?

The term "dynamics" has various meanings. It is presumed, however, that its use in the subtitle of *When Children Kill* indicates that the book attempts to explain and/or define what "forces, physical or moral," contribute to the phenomenon of juvenile homicide or, what kind of "psychological aspects or conduct of interpersonal relationships" are associated with juvenile homicide.

Perhaps, because Ewing is a forensic, clinical psychologist, his discussion of the phenomenon of juvenile homicide primarily focuses on individual psychological aspects and conduct of interpersonal relationships of juveniles who kill. Surprisingly, he makes no reference to any overarching or unifying theory to explain why some youngsters commit homicidal acts and most others do not. Of course, Ewing did not have the opportunity to consider the applicability of the theory advanced by Gottfredson and Hirschi in their 1990 book, *A General Theory of Crime*. They assert that the essential element of criminality is the absence of self-control and identify ineffective child-rearing as "[t]he major 'cause' of low self-control."

Another limitation in Ewing's treatment of juvenile homicide is that he acknowledges an important array of societal forces that predictably may increase the incidence of juvenile homicide, but he does not exhaustively explore the broader underlying societal dynamics that make juvenile homicide a serious public health issue—indeed a threat to society, yet a problem with very identifiable historical antecedents.

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150. The term "dynamics" has various meanings. See *The American Heritage Dictionary of the English Language* 407 (1973). When used in reference to the physical sciences, the term may indicate "a study of the relationship between motion and the forces affecting motion." Or more generally, "dynamics may mean "the physical or moral forces that produce motion and change in any field." When used in the context of psychoanalysis, "dynamics" may mean "(a) the action of psychic forces or mechanisms; (b) the psychological aspect or conduct of an interpersonal relationship."


152. See supra text accompanying notes 109-127.

153. See supra note 12.
dent roots.

Many years ago, an observation by Dr. Luther Halsey Gulick, in the first chapter of *The Metropolitan Problem and American Ideas* made a profound impression on this reviewer. Dr. Gulick declared: "Once an indivisible problem is divided, nothing effective can be done about it." Generally regarded to be the dean of American public administration, Dr. Gulick was speaking about problems confronting mid-twentieth century American urban cities. The same truism, however, can be said today about the phenomenon of juvenile homicide. If effective strategies are to be mounted to reduce the threat of a steadily growing incidence of juvenile homicide, there first must be full recognition of the complex, underlying interrelatedness of individual and societal factors.

In order not to divide an indivisible problem, such as the phenomenon of juvenile homicide, social policy makers and professionals who work with juvenile killers need to understand clearly both who these youngsters are and why they kill. It is not enough to present statistical data, as Ewing does in his closing chapter 10, on certain critical societal forces deemed to contribute to the incidence of juvenile homicide, without some further historical discussion of broad transformations in American society or the structure of its families.

What is the relationship between the developmental deficits in a juvenile killer and the way in which society may default on its responsibility to ensure that parents and families successfully rear their children to be law-abiding citizens? Is juvenile homicide an inevitable consequence of a violent society—one in which violence is portrayed resoundingly and repetitively in all forms of popular culture? Does significant breakdown in the family mean that an alarming proportion of our child population no longer is reared to be "WAPs"—well-adjusted persons with positive self-esteem, capable of respecting other human life, and possessing sufficient self-control to abstain from violent behavior such as murder or non-negligent manslaughter? Hence, the reference in the title of this essay to Malcolm X's metaphoric characterization of President Kennedy's assassination as "a case of 'the chickens coming home to roost.'" Is our society merely reaping what has

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155. See MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 301 (Ballantine Books 1973) (authored with the assistance of Alex Haley). Shortly after President Kennedy's assassination, Malcolm X spoke in New York City at the Manhattan...
been sowed?

To be a truly useful resource, generally more is required than just a straightforward description of the present and a prediction about the future. Knowledge of the etiology and past historical evolution of a situation informs development of an effective response. In this respect, Ewing’s treatment of juvenile homicide is incomplete. He implicitly approaches the phenomenon as though it were a freestanding, extraordinary occurrence and provides no general discussion of man’s age-old tendencies and urges to attack.156 No explicit references are made in When Children Kill to certain significant historical developments that some assert have undermined the authority of parents and undercut their ability to rear and civilize their children. Such background information can be found in two recently published scholarly works on the American family.157

Historian Steven Mintz and anthropologist Susan Kellogg, a husband and wife research team, in Domestic Revolutions: A Social History of American Family Life effectively make the point that domestic

Center. He recounts:

It was on the theme, familiar to me, of ‘as you sow, so shall you reap,’ or how the hypocritical American white man was reaping what he had sowed . . . . Without a second thought, I said what I honestly felt—that it was, as I saw it, a case of ‘the chickens coming home to roost.’ I said that the hate in white men had not stopped with the killing of defenseless black people, but that hate, allowed to spread unchecked, finally had struck down this country’s Chief of State. I said it was the same thing as had happened with Medgar Evers, with Patrice Lumumba, with Madame Nhu’s husband.

Id.

156. See, e.g., DesmonD MorRis, The naked age (1969) (explaining the nature of man’s aggressive urges as understood against the background of his animal origins); see also Gottfredson & Hirschi, supra note 151, at 31, 34 asserting that:

Despite popular and scholarly opinion to the contrary, homicide is perhaps the most mundane and, in our view, most easily explainable crime; and further that: “[H]omicide may be prevented by eliminating interaction between victims and offenders, by removing lethal weapons from offenders, by increasing the availability of by-standers and the probability of their interventions by decreasing the resistance of victims of lesser crimes, and by decreasing the use of alcohol and drugs. Homicide can also be prevented by reducing the number of people who tend toward criminality.

violence is nothing new. This work systematically traces how the American family of today has changed from early colonial days when it "was the fundamental economic, educational, political, and religious unit of society." Mintz and Kellogg believe that the most striking differences that set the seventeenth-century family apart from its present-day counterpart involve the social experiences of children. Formerly, many children died in infancy or before attaining their majority. Young children of the well-to-do might be "put-out" to wet nurses. Since many New Englanders, unlike Europeans of the time, did not swaddle their young, "carelessly supervised children sometimes crawled into fires or fell into wells." In contrast:

The moral upbringing of Puritan children was never treated casually... [B]elief in infant depravity and original sin exerted a powerful influence on methods of child rearing. In their view, the primary task of child rearing was to break down a child's sinful will and internalize respect for divinely instituted authority through weekly catechisms, repeated admonitions, physical beatings, and intense psychological pressure. "Better whipt, than damned," was Cotton Mather's advice to parents.

Mintz and Kellogg describe how "[d]uring the early years of the twentieth century, a host of educators, legal scholars, social workers, and academic social scientists created a new ideal of family life that they termed the 'companionate family'." In this new ideal family, relations formerly based on authority now depend on affection and mutual interest. Spouses are to be friends and lovers and parents and children are to be pals. "To achieve this ideal, influential groups recommended liberalized divorce laws; programs of marriage counseling, domestic science, and sex education; and permissive child-rearing practices stressing freedom and self-expression over impulse-control." As a result, Mintz and Kellogg assert that "[s]ince the 1960's America

158. See MINTZ & KELLOGG, supra note 157, at 11-13 (Massachusetts Bay Colony Puritan court records reveal: "Between 1630 and 1699, at least 128 men were tried for abusing their wives." But the punishments imposed on the men were mild, in contrast to the harsh punishments given Puritan women brought to court for heaping abuse on their husbands.)
159. Id. at xiv.
160. Id. at 14.
161. Id. at 14-15.
162. MINTZ & KELLOGG, supra note 157, at xvi.
163. Id.
has become a permissive society, not merely in the superficial sense of becoming more open and tolerant, but in the more profound sense of becoming reluctant to accept responsibility for the economic and social consequences of social change . . . .”

To the phenomena of increasing numbers of divorces, working mothers, and teen-age pregnancies, that Mintz and Kellogg cite, one could add juvenile homicide.

Dizard and Gadlin also thoughtfully examine how the American family has changed. Some of their insights help to explain the post-industrial social environment in which children who kill today are being reared. To describe today's American family—a consequence of embracing the "companionate family" ideal promoted early in the twentieth century, they use the term "minimal family." They assert that traditional family values and the very base of familism have been destroyed by "the interplay between a growing economy that seeks to stimulate steadily expanding consumption and individuals whose personal lives are increasingly predicated upon egalitarian and democratic forms of interaction."

As industrialism gained momentum, it necessarily had to undermine the bases of familial mutual aid. In order to produce the autonomy that a full-fledged market economy requires, both the public and private sectors had to adopt policies that would make it possible for people to reduce their embeddedness in kin networks, allowing them to be geographically and socially mobile and more

164. Id. at xvii. Mintz & Kellogg further assert that:
Individuals, families and society as a whole have been hesitant to accept full responsibility for the care of the young, the elderly, the poor, the handicapped, or the mentally ill or for sex education or questions of birth control. Responsibility has been splintered, and as a result many family-related problems are dealt with in a piecemeal or makeshift manner. Unable to decide whether further to encourage the transfer of traditional family functions to public institutions or to help families to become more capable of handling these problems on their own, Americans have responded with a pervasive sense of uncertainty.

165. See Dizard & Gadlin, supra note 157.

166. Dizard & Gadlin use the term "familism" to "mean a reciprocal sense of commitment, sharing, cooperation, and intimacy that is taken as defining the bonds between family members. These bonds represent the more or less unconstrained acknowledgment of both material and emotional dependency and obligation . . . Familism embraces solicitude, unconditional love, personal loyalty, and willingness to sacrifice for others." Id. at 6-7.

167. Id. at 35.
receptive to the idea of meeting needs through markets rather than through intrafamilial exchanges . . . 168

When Dizard and Gadlin shift from considering broad economic changes to focusing on changes within individual families, they claim that the status of parents in today's minimal family is dramatically different than that of parents in the traditional family of our agrarian past.

Parents were [once] the principal and authoritative interpreters of the world for their children and generally possessed the skills, aptitudes, and know-how that children knew they needed to get on in the world . . . . Parents' skills were undeniable, even if they were resented. Traditional societies offered the young few, if any, alternatives to parental guidance. Whatever the style of parent-child interaction, whether parents were authoritarian or permissive, stern and distant or gentle and warm, they were authoritative.169

As industrialism and its accompanying “shift in the basis of wealth from the land to the ownership of capital” made “whole new repertoires of skills” necessary, “[s]lowly at first, but with steadily accelerating momentum, parents ceased being the authoritative interpreters of the world for their children.”170 Parents rooted in an agrarian society did not possess the skills to prepare their children for the factory or city. “Quickly, children become more knowledgeable about the new social order than their parents.”171

To illustrate the erosion of parental authoritativeness, Dizard and Gadlin refer to the immigrant experience—with children often teaching their parents the English they need or serving as translators for interactions with police, social workers and other agents of the mainstream culture. They claim that:

The intense chauvinistic Americanization campaign begun in the late nineteenth century and sustained through the early decades of the twentieth century altered to the point of inverting the customary relationship between parents and children. In manifold ways, the systematic discrediting of ethnic cultures and languages drove a wedge between parents and children. The fact that this went on

168. Id. at 23.
169. Id. at 67-68.
170. Id. at 68-69.
171. DIZARD & GADLIN, supra note 157, at 69.
under official auspices and thus carried the full weight and blessing of the society as a whole clearly certified the children as culturally superior to their parents. 172

As Dizard and Gadlin point out, "[i]f parents insisted on their children's obedience and respect, they flirted with disabling their children for the world in which they would live. The combined effects of immigration and rapid industrialization undercut the substantive basis on which parental authority rested." 173

As the authority of all parents, not just immigrant parents, declined, emotional bonds with children expanded and became the basis for intensified parental influence on children. Dizard and Gadlin note that "emotional intensity and intimacy replaced authoritativeness not only as the primary force behind parents' power over children but also as the primary base for familial interdependence." 174 Overtime, various interdependencies 175 between parents and children have been eroded just as traditional skills and authority have waned.

In the modern family, according to Dizard and Gadlin, the primary aim of childrearing has shifted from discipline directed toward obedience to socialization that encourages flexibility and choice. 176

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172. Id. at 70. The same can be said today for Hispanics, South East Asian and other newer immigrant families. Dizard & Gadlin note that:

The current dispute over bilingualism in our schools and in public facilities is a dispute that, similarly, has considerable implications for family life. To reject bilingualism is to insist that Hispanic children learn to derogate the language of their parents. That this will reduce the authority of parents can scarcely be doubted. In this sense, the controversy is not only about language and assimilation; it is also about the integrity of a certain kind of relationship between parents and children.

Id. at 234-35 n.6.

173. Id. at 71.

174. Id. at 74-75.

175. See id. at 73-74. Not only were children once dependent on their parents for sustenance, but they also were expected to make a contribution to the family in the form of chores and/or labor outside the home. Parents were reciprocally dependent upon their offspring to care for them in their old age. Dizard and Gadlin state:

[T]he interdependencies between adults and their elderly parents [have] changed—the elderly [can] no longer count on their adult children to attend adequately to their needs. By the same token, as social security and private pension plans were put in place, many of the elderly quickly came to prefer being independent of their children.

Id. at 74.

176. DIZARD & GADLIN, supra note 157, at 73.
Many parents, however, do not know how to accomplish this.

When parents are unable to instill in their children appropriate standards and values; when knowing their own location in society does not tell them how to treat their children; when the inappropriateness of prevailing adult roles makes traditional modes of childrearing obsolete, then they must look elsewhere for childrearing advice . . . 177

Some parents, frequently those of the middle and upper classes, seek the help of child guidance and family therapy professionals. 178 Many other parents, frequently those of the lower classes, residing in troubled and distressed communities, either have no access to help or lack the capability to utilize it.

Dizard and Gadlin see a real “catch-22” type dynamic as now operating in the minimal family that poses some serious obstacles to the development of solid self-esteem in children. “[L]ove, intimacy, and emotional dependency—the principal if not the only bases of parent-child interaction—have been made increasingly conditional.” 179 Given the lack of any true economic role in the family, the child is very vulnerable to the withdrawal of love; and “[p]arents need love and affirmation from their children almost as much as children need these from their parents.” 180

Indeed, Dizard and Gadlin’s analysis of the minimal family sug-

[1] In traditional society, a parent could simply demand that a child do something because that was the parent’s will. This approach was fine for teaching obedience and is well suited to shaping an adult who can follow orders or rules within clearly structured situations. However, it is not well suited to creating persons who can respond adaptively to situations in which one needs to understand the requirements and preferences of others and know how to act in constantly shifting circumstances. Toward this end, a disciplinary procedure in which the parent points out to the child the consequence of his or her actions for the parent’s feelings is much more likely to create a person attuned to the subtleties of interpersonal interaction . . . . In traditional societies, the parent says to the child, “If you do X, I will hurt you.” By contrast, a contemporary parent is much more likely to say “If you do X, you will hurt me.” The child learns about undesirable behavior in terms of its consequences for others.

Id. at 75-76.
177. Id. at 78.
178. Id.
179. Id. at 81.
180. DIZARD & GADLIN, supra note 157, at 80.
gests that a close examination of certain factors might provide more complete responses to Ewing's questions about why juveniles kill, the nature of the threat to society, and whether anything can be done to reduce it. For example, their following comments suggest some underlying casual factors involved in the increasing incidence of juvenile homicides occurring during the commission of theft-related felonies.

As the satisfactions of family life grow more and more problematic and uncertain, the array of satisfactions offered via consumption has expanded exponentially. Though people still ritually acknowledge that "you can't buy happiness," it is clear that getting and spending have become major sources of gratification for Americans . . . . [T]he accumulation of things has become a significant measure of self-worth . . . . The impersonality of the marketplace increasingly appears as a refuge from emotional entanglements that diminish autonomy.181

And, there are at least two other professional fields, criminology and public health, that Ewing does not consider.182 Both offer clearer understandings about why some young people kill, the nature of the threat these juveniles pose for society, and what, if anything, can be done for them or to protect society than articulated by Ewing in When Children Kill.

IV. DEFINING THE CHALLENGES

The urgent need, in this writer's opinion, to view juvenile homicide as a public health issue was noted in the Introduction of this Essay.183 Ewing's failure to do this in When Children Kill was recognized in the preceding part II.B.184 Now, in this section, fuller attention is given, first, to spelling out the broad societal challenges that this phenomenon poses and, second, to summarizing the specific dilemmas that confront our legal systems.

181. Id. at 98.
182. See supra notes 151 and 154 and discussion infra part III.A. (regarding the relationship between ineffective child-rearing and criminal acts) and note 12 and discussion infra part III.A. (regarding the public health approach).
183. See supra note 12 and accompanying text.
184. See supra note 153 and accompanying text.
A. Will Society Heed This "Wake-Up" Call?

The growing phenomenon of juvenile homicide is not the only ba-
rometer of the high price many consider American children to be pay-
ing "for the social transformations of the 1960s and 1970s—spiraling
divorce rates, the rapid influx of mothers into the work force, a more
relaxed attitude toward sex, and the widespread use of television as a
form of child care." Mintz and Kellogg list a variety of social indica-
tors to support their assertion that the well-being of American children
has declined.

Since 1960 the high-school drop out rate has increased until
roughly one student in four drops out before graduation; juvenile
delinquency rates have jumped 130 percent; the suicide rate for
young people fifteen to nineteen years old has more than tripled;
illegitimate births among white adolescent females have more than
doubled; and the death rate from accidents and homicides has
grown sixteenfold. Half a million adolescent females suffer from
such eating disorders as anorexia nervosa or bulimia. American
teenagers have the highest pregnancy rate of any industrialized na-
don, a high abortion rate and a high incidence of such venereal
diseases as syphilis, gonorrhea, and genital herpes.

Various social commentators believe that American society "has
largely failed to come to grips with the major issues facing children,
such as the need for quality care while parents work and the need for a
stable emotional environment in which to grow up." Reference was
made, supra part II.B., to the major causal role ineffective child-rear-
ing plays in explaining the low self-control that is a common character-
istic of those who commit criminal acts. Gottfredson and Hirschi claim
that:

[L]ow self-control is not produced by training, tutelage or sociali-
ization. As a matter of fact, all of the characteristics associated
with low self-control tend to show themselves in the absence of nur-

185. MINTZ & KELLOGG, supra note 157, at 218.
186. Id. at 219 (citing Peter Uhlenberg & David Eggebeen, The Declining Well-
Being of American Adolescents, in 86 PUBLIC INTEREST 25-38 (Winter 1986)).
187. Id. at 228 & n.83 (citing DAVID ELKIND, THE HURRIED CHILD: GROWING
UP TOO SOON (1981); VANCE PACKARD, OUR ENDANGERED CHILDREN: GROWING UP
IN A CHANGING WORLD (1983); MARIE WINN, CHILDREN WITHOUT CHILDHOOD
(1983).
Turance, discipline, or training. The causes of low self-control are negative rather than positive; self-control is unlikely, in the absence of effort, intended or unintended, to create it.\(^{188}\)

To teach a child self-control, Gottfredson and Hirschi identify three minimum conditions: "some one must (1) monitor the child's behavior; (2) recognize deviant behavior when it occurs; and (3) punish such behavior."\(^{189}\) They simply maintain:

All that is required to activate the system is affection for or investment in the child. The person who cares for the child will watch his behavior, see him doing things he should not do, and correct him. The result may be a child more capable of delaying gratification, more sensitive to the interests and desires of others, more independent, more willing to accept restraints on his activity, and more unlikely to use force or violence to attain his ends.\(^{190}\)

Rejecting the notion that any parent or societal subgroup positively socializes their youth to be uncivilized, Gottfredson and Hirschi, yet, recognize how easily things can go wrong:

First, the parents may not care for the child (in which case none of the other conditions would be met); second, the parents, even if they care, may not have the time or energy to monitor the child's behavior; third, the parents, even if they care and monitor may not see anything wrong with the child's behavior; finally, even if everything else is in place, the parents may not have the inclination or the means to punish the child.\(^{191}\)

Some worry about the use of television as a form of child care and "believe that violence on TV provokes children to emulate aggressive behavior and acquire distorted views of adult relationships and communication."\(^{192}\) Regarding the research into television's impact, Mintz and Kellogg conclude:

\(^{188}\) Gottfredson & Hirschi, supra note 151, at 94-95.
\(^{189}\) Id. at 97.
\(^{190}\) Id.
\(^{191}\) Id. at 98. To illustrate the need for a child supervisor to recognize and take actions to have an impact on self-control, Gottfredson & Hirschi state: "Extensive television-viewing is one modern example, as is the failure to require completion of homework, to prohibit smoking, to curtail the use of physical force, or to see to it that the child actually attends school." Id. at 99.
\(^{192}\) Mintz & Kellogg, supra note 157, at 221.
Television does appear to be a cause of cognitive and behavioral disturbances. Heavy television viewing is associated with reduced reading skills, less verbal fluency, and lower academic efforts. Exposure to violence on television tends to make children more willing to hurt people and more aggressive in their play and in their methods of resolving conflicts . . . . However, television also introduces children to new experiences . . . . For many disadvantaged children, it provides a form of intellectual enhancement that deprived homes lacking books and newspapers could not afford . . . . While some television shows, such as Sesame Street and Mr. Roger's Neighborhood, do appear to improve children's vocabularies, teach them basic concepts, and help them verbalize their feelings, overwhelming evidence suggests that most television programs convey racial and sexual stereotypes, desensitize children to violence, and discourage the kinds of sustained concentration necessary for reading comprehension. On balance, it seems clear that television cannot adequately take the place of parental or adult involvement and supervision of children and that the tendency for it to do so is a justifiable reason for increased public concern.

Mintz and Kellogg view the United States today as "a society without a clear unitary set of family ideals and values . . . in which a profound sense of confusion and ambivalence reigns. One consequence of this confusion has been deep social division over which responsibilities the individual family should shoulder and which should be assumed by other, nonfamilial institutions." They cite the 1978 White House Conference on Families, convened by President Jimmy Carter to develop coherent policies to assist and strengthen American families, as a dramatic illustration. Following the Conference, the White House issued a report. "Among the proposals were calls for ratification of the Equal Rights Amendment, the right to abortion, and sex education in the schools, but, because of the opposition spearheaded by the pro-family movement, implementation of these measures proved impossible."

It seems, thus, only practical to question whether American society will reach any meaningful consensus about ways to help families deal with contemporary problems in time to avert a disintegration of our society as a result of a collective failure of families and society to

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193. Id. at 221-22.  
194. Id. at xvii.  
195. Id. at 235 & n.108 (citing GILBERT Y. STEINER, THE FUTILITY OF FAMILY POLICY (1981)).
rear children to be "well-adjusted," productive, contributing members of society. Mintz and Kellogg call for "new social arrangements to help moderate the effects of women's entry into the work force, of divorce, and of women's increasing need for autonomy." But, "the ultimate question is whether the nation has the political will to create conditions that will foster stronger families." 196

Dizard and Gadlin also recognize a deep division within our society that may prevent us from achieving any meaningful solutions to problems such as juvenile homicide. In the final chapter of The Minimal Family, they restate their belief that the American family has been robbed "of its sources of stability: parental authoritativeness, self-sufficiency of the family unit, and reciprocal bonds of dependency . . . . Familism will continue to decline, . . . [and a] sense of crisis will become endemic." 197 They further assert:

This crisis, which appears as a crisis of the family, is better understood as a crisis of the public realm. The contemporary resurgence of conservatism affirms this view, though conservatives respond to this crisis perversely—they attack one source of the public realm, government, as if reducing its power will restore power to families. But such is not the case. Indeed, the opposite is more nearly true . . . . 198

Dizard and Gadlin then end by postulating a scenario in which the public realm is made to reflect the values of familism. If this occurred, they believe that "families may well find themselves more able to meet the emotional needs of their members; [and thus] it is also likely that more of our families will produce individuals who will not be content to be passive recipients of a benevolent bureaucracy, whether public or private." 199 But, such a scenario includes some very big and uncertain "ifs;" and merely reinforces this reviewer's worry that American society may lack the capacity to heed the "wake-up" call to make correc-

196. Mintz & Kellogg, supra note 157, at 237. Mintz & Kellogg suggest such policy changes as flexible working arrangements to enable employees to be effective parents—maternity and paternity leaves, adequate supplies of affordable quality substitute care when parents work, revision of welfare policies that encourage fathers to desert, and custody and visitation agreements that facilitate continuing contact between divorced parents and their children.


198. Id. at 224.

199. Id.
tive adjustments.

Fortunately, some within the field of public health are responding to the "wake-up" call that juvenile homicide can be viewed as giving society. In 1984, Dr. C. Everett Koop, "while serving as the Surgeon General of this nation . . . startled a great number of Americans, including health professionals, when [he] declared that violence is as much a public health issue for physicians today as small pox, tuberculosis, and syphilis were for [his] predecessors in the last two centuries."\footnote{200} Seven years later, Dr. Deborah Prothrow-Stith, a former Massachusetts Commissioner of Public Health, now an Assistant Dean at the Harvard School of Public Health, states in her book, \textit{Deadly Consequences}, that this statement by the Surgeon General "gave credence, support and legitimacy to the fledgling efforts of a small band of physicians and public health experts who were redefining violence as a problem that needs to be studied and addressed as a gross assault on the public health."\footnote{201}

Working within the discipline of public health—"the area of medicine most concerned with education and prevention,"\footnote{202} Dr. Prothrow-Stith is convinced that "public health strategies such as health education in the classroom; health education via the mass media; community awareness; hospital-based screening for risk determination"\footnote{203} can be employed to change public attitudes toward violence and reduce violent adolescent behavior. She notes a string of successful public health approaches and interventions that have resulted in: a 30 percent decrease in the incidence of smoking after a twenty year campaign; public refusal to accord a right to drive while intoxicated; increased awareness about the problems of lead poisoning; child abuse; and the importance of exercise and diet in reducing the risk of heart disease and stroke.\footnote{204}

From a Harvard Medical School senior project attempt to design a public health intervention to combat adolescent violence, over the years, Dr. Prothrow-Stith has developed, refined and marketed a vio-
lence prevention curriculum "directed at 10th graders [that] is being used in schools in 400 cities in 45 states," as well as in Canada, England, Israel, and America Samoa. This curriculum offers youngsters concrete alternative strategies for coping with life and resolving interpersonal conflicts without resort to violence.

Just as this reviewer intuitively has questioned the efficacy of Ewing's understanding of the phenomenon of juvenile homicide and has wondered whether an "indivisible problem" is being divided, Dr. Prothrow-Stith in Deadly Consequences writes of how she reviewed three separate disciplines—criminal justice, mental health, and the biological sciences to learn more about the nature of violence and violence prevention. While acknowledging that she learned a great deal from each, she notes:

For me, however, each of these professions left two many questions unanswered—questions about the social context in which violence occurs. The more I learned, the more I was convinced that a new multi-disciplinary approach to violence, one beginning with the perception that violence is an assault on the public health, was required to save the endangered lives of our young.

In Deadly Consequences, Dr. Prothrow-Stith and her co-author Michaele Weissman offer a way to respond to the epidemic of violence that is decimating a generation of young men, especially Black men living in poverty stricken urban areas. By recognizing the importance


207. Id. at 10.

208. See id. at 13-17. Utilizing statistics from the FBI Uniform Crime Reports and a comparative study by L.A. Fingerhut & J.C. Kleinman, International and Interstate Comparison of Homicide Among Young, in 263 J. AM. MED. ASS'N 24 (June 27, 1990), Dr. Prothrow-Stith states:

In the United States in 1986, 4,223 young men between the ages of 15 and 24 died in homicides. That worked out to a homicide rate of 21.9 per 100,000 for young males in this age bracket was a staggering 85.6 per 100,000—making homicide the leading cause of death for young men of color. Young blacks die in homicides seven times more frequently than young whites, and there us reason to believe that the percentage of black victims is increasing.

Deadly Consequences, supra note 12, at 13-14.
of the social context, they are able to discern the destructive interrelationships between societal failures to provide adequate housing, education and employment to a rapidly increasing percentage of our population and the inability of many individual parents to protect their children from becoming either victims or perpetrators of violence. There exists today, as their first chapter so rightly recognizes, much "free-floating anger." "What is required, is a broad array of strategies; strategies that teach new ways of coping with anger and aggressive feelings."

Some, like Dr. Prothrow-Stith, are "convinced that more police will not solve the problem of homicide in America. More police in patrol cars, more street lights, stiffer sentences, and new prisons will not . . . prevent two young people from settling their differences with a

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209. Housing, education and employment are three important variables that can determine and explain where, how and why certain American families succeed and others fail. Where a family lives will greatly determine the educational opportunities available to the children of the family. The level of educational achievement will either expand or delimit the employment options open to those children upon reaching adulthood. One's earning capacity then will determine the range and quality of housing/community neighborhood in which the family's next generation can afford to live.


This generalized anger, accompanied by feelings of frustration and helplessness, results from a feeling that the deck is stacked against them—that the double whammy of class and race places them so far outside the economic and social mainstream that they can never find a place inside. Disenfranchised, they are perpetually irritable, like a person who wakes up on the wrong side of the bed day after day. Their free-floating non-specific feelings of anger are easy to ignite. Any small provocation can cause an explosion . . .

*Id.* at 6-7.

In the economic downturn of the 1990s, it is not just the poor who may experience "free-floating anger," but many formerly secure middle class workers and managers are experiencing grave losses and disruptions as they are laid off or furloughed from jobs, as businesses fail and bankruptcy filings dramatically increase. Some people experiencing such uncertainties and trials for the first time, have no coping skills. Those with strong dependency needs are apt to self-medicate themselves with either alcohol or drugs. In other cases, frustrations turn into uncontrolled outbursts of verbal or physical abuse in the home.

211. *Id.* at 28.
firearm.” And thus, she advocates vigorous use of a variety of public health interventions to reduce the incidence of violence. She focuses on the large societal picture and how our society glamorizes violence and asserts that this must change.

Dr. Prothrow-Stith, however, clearly recognizes that:

Public health is not a substitute for criminal justice. Criminal justice is after the event; it looks for blame and tries to punish. Public health is before the event; it looks for risk factors and tries to reduce those risk factors. In combination there is some hope that we will have an impact on a problem that is overwhelming our society.

And so, the efforts of public health educators, like Dr. Prothrow-Stith, are to be applauded. Perhaps, through their efforts, “schools, the media, industry, government, churches, community organizations, and every organized unit within our society [can be mobilized] to deliver the message [(and show by example)] that anger can be managed and aggressive impulses controlled.”

B. Efficacy of Current Legal Responses

At the beginning of chapter 2, Ewing states: “Juveniles who kill challenge long-standing and widely held conceptions of childhood and adolescence and create a serious dilemma for the criminal and juvenile justice systems.” Which system should have dispositional jurisdiction? For what purpose—rehabilitation or punishment? How should the interests and fears of the public be balanced and weighed against the interests and rights of the accused juvenile homicidal offender?

In response to the epidemic spread of juvenile homicides, especially teens killing teens on the “mean streets” of our cities and even in the quiet of suburban areas such as Beverly, Massachusetts, or inside our schools, some today call for prosecuting these youngsters as adults in criminal court and giving them long prison sentences, in some cases

212. Id. at 27.
214. DEADLY CONSEQUENCES, supra note 12, at 28.
215. WHEN CHILDREN KILL, supra note 3, at 13.
imposing the death penalty. This approach focuses on the conduct of individual offenders and its threat to society. It has rekindled a "simmering controversy regarding the mission and performance of the juvenile justice system. Doubts about the capacity of the juvenile system to protect the public from the 'violent juvenile' have led to widespread efforts to shift jurisdiction of these cases entirely to the criminal courts."216

Just as Gulick in the 1960s when considering the problems then confronting American metropolitan areas was forced to say: "Many of the heralded 'solutions' have only made matters worse. In fact, conditions, are generally deteriorating and deteriorating fast...",17 so the same today can be said about the failing responses to crime in general, and to juvenile homicide in particular.

The tension that juvenile homicide today creates for the juvenile and criminal justice systems, is closely related to historical shifts between two paradigmatic conceptions of the goals of the sentencing process—one classical, one positivistic,218 as well as the fact that certain very serious offenses committed by older teens, traditionally were exempted from the exclusive jurisdiction of the juvenile court.219

The classical approach, as described by Bonnie:

Emphasizes the nature and seriousness of the offense as the predominant consideration in criminal sentencing; under this view, an explicit connection between the severity of punishment and the seriousness of the offense is necessary to achieve the retributive and deterrent goals of the penal law. In its most pronounced form, this view is reflected in the imposition of mandatory sentences on all persons convicted of a particular type of offense.220

In contrast, the positivistic philosophy of individualized sentencing assumes that "the social goal of preventing crime is thought to be served best by choosing the sentence most likely to minimize further criminality, either by facilitating rehabilitation or by incapacitating the

216. Bonnie, supra note 146, at 188.
217. GULICK, supra note 154, at 3.
218. See Bonnie, Juvenile Homicide, supra note 146, at 185-86; see also GOTTFREDSOHN & HIRSCHI, supra note 151, at 3-14 (describing and contrasting the classical and positivist conceptions of crime and appropriate sanctions).
220. Bonnie, Juvenile Homicide, supra note 146, at 185.
According to Gottfredson and Hirschi, positivistic assumptions shaped the criminal system's pursuit of rehabilitation as its major goal throughout most of the twentieth century. It was thought that offenders could be changed into law-abiding citizens if they received proper therapeutic treatment. Justice Black, speaking for the U.S. Supreme Court, in the 1949 decision of *Williams v. New York*, succinctly articulated this individualized paradigm, when he declared:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender . . . . Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by non-judicial agencies, have to a large extent taken the place of the old rigidly fixed punishments . . . . Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

Under this approach, judges were accorded wide discretion "to base the length of the sentence on the amount of treatment thought to be required . . . as well as on the seriousness of the offense and the danger posed by the offender to the community." Not only did this approach provide justification for probation, parole and creation of a separate justice system for juveniles, it also opened the door to expanded roles for mental health experts (psychologists, psychiatrists and social workers) in the criminal justice system.

But, prevailing sentiments change. During the mid-1970s, rehabilitation fell into disfavor. Gottfredson and Hirschi state that "the link between positivism and rehabilitation was so strong that the 'failure' of rehabilitation led to a search for a new justification for sentencing decisions." Hence, during the late 1970s, the deterrence school rose to prominence. Sentencing legislation reflecting this "marked shift toward the classical paradigm, now commonly characterized as a philosophy of

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221. Id.
224. GOTTFREDSON & HIRSHI, supra note 151, at 257.
225. Id.
'just desserts,'” is well illustrated by the preamble to the California Penal Code which states in part: “[T]he purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provisions for uniformity in the sentences of offenders committing the same offense under similar circumstances.”226 Gottfredson and Hirschi note that “[s]ince the early 1980s, incapacitation has been a major . . . policy . . . based on the obvious conclusion that an offender in prison is not committing crimes in the community.”227

At its founding a century ago, the juvenile court was welcomed as a promising social experiment. “It would treat children as different from adults. Children would be removed from contact with adult offenders. The Court was to discover and meet the needs of each neglected or dependent child. It was to discover why a child was moving down a delinquent path and redirect him.”228 But, alas, this “image of the juvenile court as a great benevolent child guidance clinic has lost all credibility in the last 20 years.”229

The tension between the juvenile justice system, still ostensibly tilted toward the individualized paradigm, and the adult criminal sentencing system, that has shifted toward a classical paradigm, has given rise to a number of legislative enactments and amendments both to state transfer and waiver statutes and to state death penalty laws. Public outcry is forcing a round of amendments to either permit or require the transfer of younger offenders to be tried in adult criminal court. Some legislation, like that recently enacted in Massachusetts,230 by em-

227. GOTTFREDSON & HIRSCHI, supra note 151, at 258.
229. W. Lawrence Fitch, Competency to Stand Trial and Criminal Responsibility in the Juvenile Court, in JUVENILE HOMICIDE, supra note 22, at 159.
230. See MASS. ANN. LAWS ch. 119, § 61 (Law. Co-op. 1991). Under this provision, last amended in 1990, the request for a transfer hearing to determine whether a 14-year or older juvenile is to be tried as an adult is discretionary with the commonwealth, except, “the court shall order a transfer hearing, in every case in which the offense alleged is murder in the first or second degree, manslaughter, rape, kidnapping or armed robbery that has resulted in serious bodily injury.” Id.

In all cases except those involving murder in the first or second degree, the court at the transfer hearing:

shall find whether probable cause exists to believe that the child has committed the offense or violation charged. If probable cause is found, the court shall then determine whether the child presents a danger to the pub-
phasizing consideration of the seriousness of the offense and the danger the juvenile poses to the community, may seem to reflect positivistic assumptions, but in fact, by introducing the use of either age and/or the seriousness of the offense, create a presumption that the juvenile is not amenable to treatment in the juvenile justice system which ultimately subverts the individualized rehabilitative aims and goals of the juvenile justice system. Of grave concern, is the reality, in Ewing’s words, that “to date precious little has been learned” about most of the juveniles who commit homicide. Yet,

judicial determination regarding the juvenile’s “amenability” to treatment (or “dangerousness”) . . . [often] turn as much on the judges’ values and intuitions as on any objectifiable criteria. To the extent that judges defer to the supposed clinical judgments of psychiatrists and other mental health professionals, the outcome turns largely on the clinician’s own intuitions and values rather than any proven expertise.

lic and whether the child is amenable to rehabilitation within the juvenile system. In making this determination the court shall consider but is not limited to evidence of the following factors: The nature, circumstances and seriousness of the alleged offense; the child’s court and delinquency record; the child’s age and maturity; the family, school and social history of the child; the success or lack of success of any past treatment efforts for the child; the nature of services available through the juvenile justice system; the adequate protection of the public; and the likelihood of rehabilitation of the child.

If . . . the court enters a written finding based upon clear and convincing evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued . . .

If the child is charged with murder in the first or second degree, and a finding of probable cause has been made, there shall exist a rebuttable presumption that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system. If, at the hearing, the court enters a written finding based upon a preponderance of the evidence that the child presents a significant danger to the public and that the child is not amenable to rehabilitation within the juvenile justice system, the court shall dismiss the delinquency complaint and cause a criminal complaint to be issued . . .

Id. (emphasis added).

231. See supra part IC1, IIA, notes 130-131 and accompanying text.

232. Bonnie, Juvenile Homicide, supra note 146, at 205-06.
In this reviewer's opinion, both approaches are bankrupt. The concept of rehabilitation is seriously flawed, especially when applied to conduct such as juvenile homicide. The concept of "rehabilitation" assumes that something once whole, has been fractured and now can be healed or put back together. It simply is not appropriate to expect the juvenile justice system, after a horrendous event as a homicide, to "rehabilitate" the perpetrator when the true causal factors contributing to the conduct indicate that the offender is not a fully formed, "well-adjusted" person with sound self-control, but rather is an incompletely formed individual with low self-esteem and little or no self-control.\footnote{See supra text accompanying notes 188-91.} It is as though the glass vessel were half-full from the outset; not that it was full, then shattered, and by some miracle, all the liquid can now be recaptured and put back in place.

The policies of deterrence and incapacitation are also flawed for they assume a degree of rationality and self-control that does not exist in those who commit homicidal acts. Gottfredson and Hirschi claim:

\begin{quote}
[M]any homicides in fact seem to have little to do with "pleasure" and much to do with the reduction of "pain." The pain suffered by the offender is . . . often . . . the removal of a temporary source of irritation or an obstacle to the achievement of some immediate end, such as a successful burglary. In other words, the benefits of homicide are not large, profound, or serious. They are, on the contrary, benefits of the moment, and the effect of alcohol or drugs may be found precisely in their tendency to reduce the time-horizon of the offender to the here and now.\footnote{GOTTFREDSON \& HIRSCHI, supra note 151, at 33.}
\end{quote}

Thus, Gottfredson and Hirschi's thesis is "that high self-control effectively reduces the possibility of crime—that is, those possessing it will be substantially less likely at all periods of life to engage in criminal acts."\footnote{Id. at 89.} They further note that:

\begin{quote}
[P]eople with low self-control tend to be self-centered, indifferent, or insensitive to the suffering and needs others . . . .

. . .

[P]eople with low-self control tend to have minimal tolerance for frustration and little ability to respond to conflict through verbal rather than physical means.
\end{quote}
In sum, people who lack self-control will tend to be impulsive, insensitive, physical (as opposed to mental), risk-taking, short-sighted, nonverbal, and they will tend therefore to engage in criminal and analogous acts. 

In other words, these are all the traits that Ewing describes in the profiles of various types of juvenile killers. As discussed supra III.A., Gottfredson and Hirschi attribute low self-control to ineffective child rearing and believe that these traits tend to persist through life. They are very, very pessimistic about the effectiveness of current policies. They, like Dr. Prothrow-Stith, urge intervention that "would normally be regarded as prevention rather than treatment. They assume that trouble is likely unless something is done to train the child to forego immediate gratification in the interest of long-term benefits. Such training must come from adults who watch for and recognize signs of low self-control and take immediate corrective action. "Effective and efficient crime prevention that produces enduring consequences would thus focus on parents or adults with responsibilities for child-rearing;" they maintain that "[s]uch intervention does not suffer from coming too soon or too late in relation to when crime is committed; it does not suffer from potential illegality; and few serious objections can be raised to it on justice grounds." 

V. PRESCRIPTION FOR FUTURE ACTION

A. What Society Should Do

On the broad societal front, the following needs to happen. Violence must be recognized as a threat to the public health and the very future of our society. Ways must be found and programs supported, whereby all segments of our society, i.e., all ethnic groups, at every socioeconomic class level, are given meaningful opportunities to be gainfully employed. People must have meaningful roles from which they derive self-esteem and the means to acquire decent housing in neighborhoods that afford their children sound educational opportunities to acquire the requisite skills to be competitive in a technologically sophisticated workplace.

236. Id. at 89-90.
237. Id. at 269.
Immediate attention needs to be given to according greater status to those who are parents and teachers. All those responsible for socializing our young must be rewarded with greater respect and the resources needed to successfully parent and educate our young.

B. Legal Reform

Careful, thoughtful attention should be given to the suggestion of those who call for a more coherent sentencing system for juvenile offenders, such as Richard J. Bonnie. He maintains that “[i]t is impossible to justify the marked discontinuity between the dispositional consequences of juvenile and criminal court adjudication, a discontinuity that is especially pronounced in homicide cases.” In Bonnie’s view, “[t]he choice between delinquency adjudication in the juvenile court and criminal prosecution should be explicitly characterized as a decision about grade or severity of punishment, not as a choice between therapeutic and punitive intervention.”

In 1967 the President’s Commission on Law Enforcement and Administration of Justice recognized that “juvenile justice is a system of social control, not a system of mental hygiene. Its separate existence is warranted not because of proven rehabilitative success but because leniency toward the young is morally justified and because the risk of failure is worth taking.” In 1978, the Twentieth Century Fund Task Force stated that:

No single age during mid-adolescence should be used as a sharp dividing line for sentencing policies. [Policy makers must consider] sentencing policy toward young offenders in both juvenile and criminal courts and [must coordinate] the policies of these two institutions so that public policy toward young offenders is based on consistent and coherent premises. (p.5)

Thus, Bonnie asserts, no “[o]ne birthday should . . . bring on the full force of the criminal law . . . .” Age, of course plays a role. But, “[t]here must be some point below which the moral basis for punitive intervention is so much in doubt that even delinquency adjudication

238. See Bonnie, Juvenile Homicide, supra note 146, at 206-14.
239. Id. at 206.
240. Id.
241. Id.
242. Id. at 207.
Bonnie suggests two alternatives. The dispositional jurisdiction of juvenile courts could be extended "for some designated period beyond the adjudication (say three or four years) or... a distinct sentencing for 'youthful offenders' in criminal courts [could be developed']. The primary effects of 'youthful offender' statutes should be to authorize placement in separate facilities and to exempt the young offender from the imposition of mandatory sentences otherwise prescribed by the penal law."  

Next, Bonnie would significantly restrict the class of transferable cases and require that jurisdictional choice be "governed by objective criteria relating to age, offense, and prior record, not by individualized predictive judgments. With one exception... clinical opinion should play no role in the transfer decision and should be confined instead to dispositional recommendations."  

Bonnie justifies his suggestions by arguing the following:

[I]t is unwise to require transfer of the entire class of murder cases involving offenders over a designated age. A generic exception for murder or intentional homicide is overinclusive because it would fail to take into account the clinically and morally significant variations among juveniles offenders. Many, if not most, of these cases belong in the juvenile court because the interventions available to the juvenile court are adequate to effect the social purposes of punishment. As Cornell et al. have shown, offenders who commit "conflict" homicides are distinguishable in prior adjustment and history from those who commit homicides in the context of other criminal activity. In many of these situations, the punishments available to the juvenile court are sufficiently severe to serve the retributive aims of the penal law and the risk of recidivism is so remote that the incapacitating functions of penal intervention are not implicated.

243. Bonnie, Juvenile Homicide, supra note 146, at 207.
244. Id.
245. Id. at 207-08.
246. Id. at 208.
247. Id. at 210 (citations omitted); see also Juvenile Justice, Not Vengeance, Boston Globe, Dec. 26, 1991, at 16 (editorial claiming that Massachusetts' State Department of Youth Services (DYS) "has a record of success in treating teenage
And finally, with respect to the death penalty, Bonnie observes that the current Supreme Court is unlikely to endorse the admittedly arbitrary proposition that 18-year old juveniles may be executed even though 17-year-olds are constitutionally exempt.248 Bonnie acknowledges that line drawing is a legitimate legislative function and some states have statutes clearly permitting the death penalty for youngsters below 18.249 But Bonnie’s argument against the execution of juveniles “proceeds not from premises about the moral legitimacy and social value of the death penalty but rather from [his] premises about continuity in sentencing . . . .”250 To avoid the horror of exaggerated disparity between dispositional outcomes available in juvenile and criminal court which distort “the process of jurisdictional choice in all cases for which the death penalty is potentially available[, and to promote the graded approach to juvenile sentencing outlined above, the death penalty must be unavailable in any case initially within the jurisdiction of the juvenile court.”251

Clearly, state legislatures need to make a definitive judgment whether juveniles otherwise within the jurisdiction of the juvenile court should be put to death. “Even the American Bar Association which has refused to take a position on the death penalty, has urged legislatures to preclude the death penalty for offenders under 18.”252

Some, like “Amnesty International [do] not argue that juveniles should not be held criminally liable or subject to severe penalties when appropriate.”253 This reviewer, however, is deeply perturbed that “there are more juvenile offenders [(disproportionately poor and minority)] on death row in the USA than in any other country known to Amnesty International.”254 Especially, since imposition of the death sentence is in clear contravention of international human rights standards,255 “de-

249. Id. at 213; see also supra text accompanying note 97.
250. Bonnie, Juvenile Homicide, supra note 146, at 213.
251. Id.
252. Id. at 214.
254. Id.
255. Justice Brennan, dissenting in Stanford, stated that “three leading human
veloped in recognition of the fact that the death penalty—which denies any possibility of rehabilitation or reform—is a wholly inappropriate penalty for individuals who have not attained full physical or emotional maturity at the time of their actions.”

Also disturbing is the fact that only 12 of the 36 states which impose the death penalty have expressly prohibited its imposition on persons below 18 at the time of the crime. Most of these states introduced the 18-year minimum age limit during the 1980s. The last state to do so was Maryland in 1987, according to Amnesty International, bringing it into line with both international standards against the execution of juveniles and standards recommended by criminal justice organization in the USA.

Rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties. In footnote ten, he then cites:


Id. at 2985-86.


257. Id. at 65 (California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, Tennessee).


259. Id. The American Law Institute’s 1962 Model Penal Code recommended that the death penalty not be imposed on persons under 18. This position was reaffirmed by the 1980 Code revisers. Since 1971 the National Commission on Reform of Federal Criminal Laws has opposed imposition of the death penalty on those under 18. In 1983, in response to the American Bar Association (ABA) Section on Criminal
“However, there has been a retreat from what was an emerging legislative trend toward eliminating the death penalty for minors. Since 1986 several states have rejected attempts to introduce an age limit of 18 or have introduced minimum ages below 18.”260 Also, Part II of Amnesty International’s 1991 report describes how U.S. capital punishment laws contain safeguards intended to ensure that the death penalty is applied fairly and imposed only for the worst crimes and most culpable offenders, but that evidence in the cases examined revealed that these safeguards have not been met in practice.261

Clearly, the increasing phenomenon of juvenile homicide is undisputedly of critical importance. The question remains whether our society has the capacity to answer the “wake-up” call and institute the kinds of preventive programs and supports for families so that they can perform their essential role of socializing our children. What is sorely needed, as Justice Wise Polier, states in her book, Juvenile Justice in Double Jeopardy: The Distanced Community and Vengeful Retribution, is “serious leadership [which] can prevent yielding to the current demands for retribution, vengeance, and reincarceration as the answer to delinquent youth [and] search out the causes of maladjustment, delinquency, alienation, and violence practiced by youth.”262 Judge Polier, speaking out of her 37-year tenure as the first woman appointed to the New York Family Court, would have Americans “end the meanness of current programs for youth and reject as unworthy the cruel and futile recriminalization of younger and younger children.”263

It seems only fitting, thus, to end this essay as Dr. Prothrow-Stith concludes her book Deadly Consequences, with the poignant plea of Clementine Barfield, Detroit founder of SOSAD—Save Our Sons and Daughters:

Justice’s Report with Recommendations to the House of Delegates, Report No. 117A (August 1973), the ABA House of Delegates adopted a resolution opposing in principle “the imposition of capital punishment upon any person for an offense committed while under the age of 18.” Id. at 74.

260. Id. at 65. (Kentucky’s 1980 revised juvenile code exempting juveniles under 18 from the death penalty was repealed in 1984; Kentucky and Indiana established 16 as the minimum age in their death penalty statutes in 1986; Georgia rejected a measure to raise the age from 17 to 18 in 1987; Wyoming introduced a minimum age of 16, and bills to introduce to raise the minimum age failed in Georgia, Mississippi and Virginia in 1989).

261. Id. at Summary & 71-4.

262. POLIER, supra note 228, at 164.

263. Id.
The children who are dying are real kids . . . They are real kids, from real families. Some were doing foolish things. Some were just caught in the wrong place at the wrong time. But all kids have a right to make mistakes. All kids have the right to live. Somebody has to wake up and see that our children are dying. My child is dead. Your child could be next.264

264. DEATHLY CONSEQUENCES, supra note 12, at 203 (as spoken by Clementine Barfield to Dr. Prothrow-Stith during an interview in December of 1990) (SOSAD can be contacted at 453 Martin Luther King Blvd., Detroit, MI 48201. Telephone: (313) 833-3030).
I. INTRODUCTION

This comment discusses the recourse available to adoptive parents whose child develops a physical or mental defect which was intentionally or negligently misrepresented or undisclosed to the parents at the time of adoption.

Adoption is the legal process by which the parent-child relationship is created by persons not so related by blood. Adoption of children was unknown to the common law, but was a recognized practice under the civil law from which our modern statutes of adoption are derived. The procedure is entirely statutory. The adoption process terminates a child's ties with his natural parents and creates a new familial relationship with the adoptive parents. This statutorily created "legal fiction" enables the adopted child to become the natural child of...
the adoptive parents for all legal and familial purposes. Generally, people adopt a child through a consensual arrangement, much like a contract, and a subsequent judgment of a court.

An important issue raised in *Burr v. Board of County Commissioners* and the issue of this comment is the recourse available to adoptive parents whose child develops a physical or mental defect which the parents were unaware of at the time of adoption. It is true that undetectable health problems are a risk assumed by both adoptive parents and natural parents when they decide to become parents. However, the situation changes when the adopted child's condition has been intentionally or negligently misrepresented or undisclosed. Previously, adoptive parents in this type of situation could petition the court for an annulment of the adoption which voids the adoptive relationship, or keep their child and meet the expenses themselves.

The issue of annulment of adoption was recently heard in Florida before the Third District Court of Appeal in *M.L.B & J.B. v. Department of Health and Rehabilitative Services*, where the court permitted the adoptive parents to annul the adoption because the Department

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6. *In re Anonymous*, 352 N.Y.S.2d 743, 745 (Sur. Ct. 1968). Under contract law consensual arrangements may usually be rescinded on equitable principles, such as mutual mistake of fact. *Id.* at 745. A contract is a promise or set of promises the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1 (3d ed. 1957); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981); RESTATEMENT OF CONTRACTS § 1 (1932). The Uniform Commercial Code in essence defines a contract as the total legal obligation created by a bargain. U.C.C. § 1-201(3), (11) (1987). It is this writer's opinion that a contract analysis applying the principle of mutual mistake of fact is inappropriate when applied to annulment of adoption, because such an analysis implies that the child is an item to be bought and sold: one which is returnable when later found defective or unwanted.
7. 491 N.E.2d 1101, 1108 (Ohio 1986).
8. *Id.*
10. The annulment of an adoption decree deprives it of all force and operation, either ab initio or prospectively as to future relationships. BLACK'S LAW DICTIONARY 47 (6th ed. 1989).
12. 559 So. 2d 87 (Fla. 3d Dist. Ct. App.), review denied, 574 So. 2d 140 (1990).
of Health and Rehabilitative Services ("HRS") had perpetrated a fraud upon the parents.\textsuperscript{13}

This comment takes the position, for policy and practical reasons, that allowing financial recovery to adoptive parents who have been victims of fraud or misrepresentation is legally sound and superior to the remedy of annulment of adoption. Part two discusses wrongful adoption as an alternative remedy to adoption annulment and why annulment does not promote the child's best interests in light of M.L.B. Part three discusses other states' treatment of annulment of adoption and statutory authority for annulment of adoption. Part four discusses wrongful adoption as a remedy. Part five suggests recommendations that may prevent future annulments of adoption.

\section*{II. ANNULMENT AS A REMEDY}

Most states are attempting to promote the child's best interests and stability in the family relationship by limiting the circumstances in which annulment actions are permitted.\textsuperscript{14} Most states have recognized that permitting the annulment of an adoption after family bonds have been formed is rarely in the child's best interests and are hesitant to annul a completed adoption.\textsuperscript{15} In fact, the remedy of annulment is gen-

\begin{itemize}
\item \textsuperscript{13} \textit{Id.} at 88. According to M.L.B., on remand the trial court found that HRS had committed fraud and the child was therefore returned to HRS. Telephone interview with M.L.B. (May 28, 1991).
\item \textsuperscript{14} \textit{See generally In re Welfare of Alle, 230 N.W.2d 574, 577 (Minn. 1975)} ("[T]here is great policy concern in making adoptions conclusive and final."); \textit{In re Leach, 128 N.W.2d 475, 476 (Mich. 1964)} (setting aside the adoption will not serve the child's best interests); \textit{McDuffee v. Rehm, 352 S.W.2d 23 (Mo. 1961)} (en banc) (the adoptive parents were not entitled to have the adoption decree annulled merely because the child was mentally disturbed and needed institutional care); Howard, Note, \textit{supra} note 4, at app. A (a statutory survey reflects the general national trend toward discouraging the annulment of final adoption decrees).
\item \textsuperscript{15} \textit{See, e.g., Leach, 128 N.W.2d at 476; McDuffee, 352 S.W.2d at 23; In re Adoption of Children By O., 359 A.2d 513, 514 (N.J. Super. Ct. Ch. Div. 1976)} ("Public policy dictates that there be very unusual facts and circumstances which would compel a court to set aside or revoke a judgment for adoption."); \textit{In re Anonymous, 213 N.Y.S.2d 10, 13 (Sur. Ct. 1961)} (holding since the court originally determined that the adoption was for the best interest of the child, there was no justification to upset the formal adjudication); \textit{In re Adoption of L., 151 A.2d 435, 437 (N.J. County Ct. 1959)} (the parents were not permitted to annul the adoption because the best interests of the child and society would not be served by such an action); Howard, Note, \textit{supra} note 4, at app. A.
\end{itemize}
erally frowned upon by the courts. The purpose of adoption is to place the adoptive parent and child in the same position as the parent and child in a natural family. Annulling the adoption destroys the family unit, causing the child to experience rejection, doubt and instability, and conflicts with the court’s policy of promoting the best interests of the child. A parent should not be permitted to set aside an adoption,


18. In re Welfare of K.T., 327 N.W.2d 13, 18 (Minn. 1982) (“Some serious and compelling reason must exist in order to once again uproot the child and dramatically change his living environment.”).

19. County Dep't of Pub. Welfare v. Morningstar, 151 N.E.2d 150, 156 (Ind. 1958) (en banc). According to Florida Statute section 39.467, in determining the best interests of the child, the court should consider and evaluate all relevant factors, such as:

(a) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under state law in lieu of medical care, or other material needs.
(b) The capacity of the parent or parents to care for the child to the extent that the child’s health and well-being will not be endangered upon the child’s return home.
(c) The present mental and physical health needs of the child and the future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
(d) The love, affection, and other emotional ties existing between the child and the child’s present parent or parents, siblings, and other relatives and the degree of harm to the child arising from the termination of parental rights and duties.
(e) The likelihood of an older child remaining in long-term foster care upon termination of parental rights due to emotional or behavioral problems or any special needs of the child.
(f) The child’s ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.
(g) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
(h) The depth of the relationship existing between the child and the present custodian.
(i) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
previously found to be in the child's best interests, simply because the parent has changed her mind or feels that she has received a bad bargain.

In *M.L.B.*, the plaintiffs, the adoptive parents, approached HRS seeking to adopt a troubled child. The adoptive parents were aware that the child they subsequently adopted had psychological problems. However, according to the parents, HRS misrepresented the extent and the severity of these problems by concealing the reports which were the basis of the adoptive parents' allegations of fraud. The adoptive parents alleged that during the adoption, and for the following year, HRS concealed reports that indicated the child had severe psychological problems which made it impossible for her to function in a traditional home environment. Furthermore, by withholding the medical reports, HRS violated Florida Statute section 63.08(3).

Because of the severity of the psychological problems, the adoptive parents wished to have the adoption set aside so that they could return the child. However, the adoptive parents brought the annulment action after the

(j) The recommendations for the child provided by the child's guardian ad litem or legal representative.

(k) Any suitable permanent custody arrangement with a relative of the child.


The Supreme Court of Alaska in *Turner v. Pannick* set forth a best interest test where the court is to consider and evaluate several factors, such as:

[T]he moral fitness of the two parties; the home environments offered by the parties; the emotional ties to the parties by the child; the emotional ties to the child by the parties; the age, sex or health of the child; the desirability of continuing an existing child-third party relationship; and the preference of the child.


24. *Id.*


26. *Id.*

27. *Id.* at 88; see also **FLA. STAT.** § 63.082(3) (1985) (requiring HRS to attach a copy of the child's medical history to the form providing consent to the adoption; however, HRS failed to do so).

one year statutory period allowed for curing procedural defects in an adoption decree.\textsuperscript{29}

The Florida Third District Court of Appeal held that the alleged fraud of HRS was not a procedural irregularity encompassed within the statute barring attacks on the validity of an adoption after a period of one year.\textsuperscript{30} Consequently, the adoptive parents' motion to annul the adoption decree was not time barred.\textsuperscript{31} The case was subsequently remanded to the trial court to determine whether HRS' conduct had been fraudulent. On remand, it was determined that HRS' conduct was in fact fraudulent.\textsuperscript{32} Subsequently, the adoption was annulled and the adoptive parents returned the child to HRS.\textsuperscript{33}

In dicta, the Third District Court of Appeal mentioned that the best interest of the child is the state's primary concern\textsuperscript{34} and that in an attempt to promote the child's best interests, the state provides a limited period in which to bring attacks on the validity of a judgment of adoption.\textsuperscript{35} Although the court was aware that the best interest of the child is the determining standard in the adoption setting, it failed to apply this standard when reaching its decision.\textsuperscript{36} The court failed to consider that after one year, it is generally not in the best interest of a child to remove her from the adoptive family unit.\textsuperscript{37}

By choosing to annul the adoption, rather than sue HRS for damages, the adoptive parents focused on the wrong party. The adoptive parents in \textit{M.L.B.} had essentially articulated a "bad child" case.\textsuperscript{38} By petitioning for adoption, they established a legal parent-child relation-

\textsuperscript{29} \textit{Id.} at 88. The purpose of Florida Adoption Act section 63.022(1) is "to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life." \textsc{Fla. Stat.} § 63.022(1) (1985). In an effort to provide finality in adoptions, the statute provides a limited time for any attack on the validity of a judgment of adoption. \textit{M.L.B.}, 559 So. 2d at 87. Under Florida law, after one year from the entry of a judgment of adoption, any irregularity or procedural defect in the proceedings is cured, and the validity of the judgment should not be subject to attack. \textsc{Fla. Stat.} § 63.182 (1985).

\textsuperscript{30} \textit{M.L.B.}, 559 So. 2d at 88.

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} \textit{Id.} at 89.

\textsuperscript{33} Telephone interview with M.L.B. (May 28, 1991).

\textsuperscript{34} \textit{M.L.B.}, 559 So. 2d at 87.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.} at 89.

\textsuperscript{38} \textit{Id.}
ship, but when petitioning for annulment the parents claimed this relationship never existed because the child turned out to be less than perfect. Nonetheless, as far as the child was concerned, these adoptive parents were her family.

Judge Nesbitt in *M.L.B.* makes an important point in his concurring opinion: a finding that HRS committed a fraud upon the adoptive parents should not automatically terminate the adoption, because the trial court must still determine the child's best interests. Furthermore, severing the parent-child relationship is usually not in the child's best interest, especially if the fraud goes unnoticed for a substantial period and the child has assimilated into the family unit.

By finding that fraud, such as that practiced in *M.L.B.*, was not a procedural irregularity encompassed within the Florida adoption statute, the Florida Third District Court of Appeal did adoptive children a great disservice. Parents should never be permitted to return a child once they have established a legal parent-child relationship and the child has become part of the family. This court's decision basically gives adoptive parents the green light to return their children whenever they become dissatisfied. What happens to the child's mental and emotional health if he is returned after he has become a part of the family? What happens to the child after he is returned to HRS? Is he placed in a foster home or is he placed with another family for adoption? The Florida Third District Court of Appeal ignored these questions by focusing on a procedural defect when instead it should have focused on the best interests of the child, as Judge Nesbitt suggested. The court also ignored modern adoption trends which are intended to promote the best interests of the child. However, even though some case law recognizes annulment as a remedy, states which do promote the child's

40. *M.L.B.*, 559 So. 2d at 87.
41. *Id.* at 89 (Nesbitt, J., concurring).
42. *Id.*
43. *Id.*
44. *Id.* at 89 (Nesbitt, J., concurring).
45. *E.g., In re* Leach, 128 N.W.2d 475, 476 (Mich. 1964) (the best interests of the child will not be served by setting aside the adoption); McDuffee v. Rehm, 352 S.W.2d 23 (Mo. 1961) (en banc) (the primary concern in adoption annulment is the child's best interest); Eggleston v. Landrum, 50 So. 2d 364, 366 (Miss. 1951) (citing 1 *AM. JUR. Adoption of Children* § 4 (1951) (the welfare of the child is the main consideration)).
46. *E.g., M.L.B.*, 559 So. 2d at 87 (the parents were allowed to return the child

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best interests should deny annulment of adoption.

III. STATES' TREATMENT OF ANNULMENT OF ADOPTION

A. Case Law

Although in the past there have been cases in which the adoptive parents' petitions for annulment based on fraud have been granted," courts today generally frown upon setting aside an adoption decree. The courts' hesitancy to annul adoptions is based on the policy of promoting stability in family relationships and the emphasis on the best interests of the child.  

The best interests view was used in In re Leach, where the Leaches alleged that at the time of the adoption of a seven year old child, inquiry was made to the caseworker as to whether the child, (HRS); In re Anonymous, 352 N.Y.S.2d 743 (Sur. Ct. 1968) (the child had psychiatric problems so the adoptive parents' petition for annulment was granted); County Dept' of Pub. Welfare v. Morningstar, 151 N.E.2d 150 (Ind. 1958) (en banc) (the Department of Public Welfare perpetrated a fraud on the adoptive parents by misrepresenting the child's background, which resulted in the court granting the parents' action to set aside the adoption).

47. In County Department of Public Welfare v. Morningstar, an Indiana Appellate Court found that the public welfare department had perpetrated a fraud upon the adoptive parents by not disclosing that the child was mentally retarded, possibly feeble minded, and that the natural parents were "immoral and depraved." 151 N.E.2d at 155. The court concluded that the adoptive parents had relied upon the department's misrepresentations and were, therefore, fraudulently induced to adopt the child. Id. The court stated that the primary concern was the best interests of the child and the child's needs could more "efficiently" met by placing her with the children's Aid Society. Id. at 156. It is hard to justify the court's rationalization that severing the parent-child relationship and institutionalizing the child served her best interests.


49. See generally Howard, Note, supra note 4, at app. A.
Nancy, had any history of mental illness. The parents were informed that nothing of consequence existed. In fact, a report of the adoption supervisor showed that Nancy had trouble adjusting to her new home and was antagonistic towards the family. When Nancy had a nervous breakdown and was adjudicated mentally incompetent, the Leaches sought an annulment of the adoption. Because Nancy's mental illness had been kept from them at the time of the final adoption, the Leaches requested that the adoption be set aside for the best interests of all parties.

The Michigan Supreme Court affirmed the appellate court and denied the annulment by summarily stating that an annulment would not be in the child's best interests. The court found that the fraud committed by the county caseworker upon the Leaches was insufficient to overturn the adoption, especially in light of the fact that the Leaches had the child in their home for eleven years. Furthermore, the court found that they had ample opportunity to withdraw prior to the finalization of the adoption if they felt it was necessary within the statutory period.

Another case in which the adoptive parents wished to annul the adoption was *McDuffee v. Rehm*. The adoptive parents claimed that an annulment would be in the child's best interests because the child was mentally disturbed and required institutional care. The child's mental illness had begun at an early age prior to her placement with the McDuffees. The Missouri Supreme Court denied the decree because it would not be in the child's best interests. The court stated that, in the absence of some compelling reason, an adoption should never be annulled solely at the insistence of the adoptive parents where the child would be cast aside to become a public charge: thus, freeing

50. 128 N.W.2d 475 (Mich. 1964).
51. Id. at 476. The Leaches contended that the adoption should have been set aside because there was active concealment of facts concerning the child by the caseworker at the time of the adoption. Id.
52. Id. at 477 (only when the child became institutionalized did the parents seek revocation).
53. Id.
54. 352 S.W.2d 23 (Mo. 1961) (en banc).
55. Id.
56. Id. at 28. The court was reluctant to annul the adoption simply because the child needed treatment, and opined that many parents in similar situations manage to get the treatment their children require. Id.
the adoptive parents of an obligation they voluntarily assumed.\textsuperscript{57} Finally, the court concluded: "[T]he natural parents abandoned their child. It cannot now be in the best interest of that child that a court of equity, on petition of its adoptive parents, decree it a similar fate."\textsuperscript{58}

A third case in which annulment of adoption was not permitted because it was not in the child's best interests was the New Jersey case of \textit{In re Adoption of G.}, in which a young couple wished to adopt a baby girl.\textsuperscript{59} A little girl was placed in the couple's home for a trial period. During the trial period the adoptive parents became concerned over the child's slow development. The baby was taken to a physician and the physician found the baby to be normal, except for her slow development. After the child had been in the care of the couple for the one year trial period, the adoption was finalized. Since the baby's development did not improve, the child was taken to a specialist who determined that the baby was retarded to such an extent that she would eventually require commitment to an institution. The adoptive parents subsequently commenced a motion to annul the adoption.\textsuperscript{60}

The New Jersey Superior Court denied the annulment, finding it would not be in the child's best interests to annul the adoption.\textsuperscript{61} Noting that the child would be returned to the adoption agency, which did not have facilities to deal with the problem, the court concluded that the parents would do "the right thing by their child."\textsuperscript{62}

The previous cases illustrate the general direction courts are taking in deciding adoption annulment cases. Courts are now placing great weight on what is truly in the child's best interest. Generally, an annulment should never be granted when it is not in the child's best interests.\textsuperscript{63} Since the adoptive relationship was initially found to promote the child's best interests; this relationship should not be ended simply because the parents have changed their minds.

Also, as a matter of public policy, a child should not be treated as a piece of defective merchandise, returnable by the adoptive parents if

\begin{enumerate}
\item Id. at 27.
\item Id. at 28.
\item 214 A.2d 549 (N.J. County Ct. 1965).
\item Id.
\item Id. at 551. The court also stated that the adoption was meant to be final, and that there was no legal distinction between the adoptive parent-child relationship and the natural parent-child relationship. Id. at 552.
\item Id. at 552.
\item See generally \textit{In re Leach}, 128 N.W.2d 475 (Mich. 1964); McDuffee v. Rehm, 352 S.W.2d 23 (Mo. 1961) (en banc).
\end{enumerate}
not worthy of the price paid. To allow annulment of a final judgment of adoption after the child has been assimilated into the family, for any reason, would open a Pandora's box, and would result in chaos and instability in the child's life and development. Just as the adoptive parent stands in the place of the natural parent after an adoption becomes final, the adoptive child has every right of a natural child to continuation of the parent-child relationship.

In addition, the family unit is further traumatized by granting an annulment. Unfortunately children facing an annulment of adoption have often been abandoned or neglected by their natural parents. Consequently, they experience the annulment of adoption proceeding as yet another abandonment. The annulment of an adoption is drastic; it breaks up the family unit, and has dramatic effects upon the adopted child. When the adoptive parents are victims of fraud, it is unlikely that they will learn of the misrepresentations until well after the time for annulment has passed and long after the parent-child relationship has developed into a relationship similar to a natural parent and child's. Consequently, annulment of adoption has only a limited deterrent effect upon those who perpetrated the fraud but harms the family unit and the child, contrary to the child's best interests.


68. Id.

69. The adoptive parents are also affected by the annulment process. The parent is left with immense guilt and feelings of doubt concerning his or her parenting abilities. However, the responsibility rests with the parents alone just as it would if the child was born to them naturally.

70. *See In re* Adoption of Male Minor Child, 619 P.2d 1092, 1096 (Haw. Ct. App. 1980) (the natural mother attempted to have the adoption decree set aside on the grounds that her consent was obtained by fraud, duress and undue influence). In *Burr*, the adoptive parents learned of the fraud after 18 years. Burr v. Board of County Comm'rs, 491 N.E.2d 1101 (Ohio 1986). In *Morningstar*, the adoptive parents learned of the fraud after two years. County Dep't of Pub. Welfare v. Morningstar, 151 N.E.2d 150 (Ind. 1958) (en banc).
Adoption procedures in each state are governed by numerous statutes. These statutes cover the basic procedures to be followed in applying for an adoption: the investigation of the qualifications of the adoptive parents; the inheritance rights of the adopted child; the confidential hearings and records in an adoption proceeding; and the rights of the parties. These statutes attempt to cover the procedural aspect of adoption, while serving the best interests of the child, as well as protecting the rights and interests of all parties involved. However, when an adoptive parent seeks to annul an adoption, the various state statutes pertaining to annulment reveal a variety of approaches.

The first category is composed of states that have specific statutes authorizing the treatment of annulment cases the same as any other civil case. States in the second category rely on the court's implied equitable power to grant annulments in other types of cases, like marriage. The justification is that the courts' broad equitable powers authorize them to vacate any decree on proper grounds. In these first
two groups, the courts do not have the benefit of specific adoption annulment statutes, which results in the application of several different standards, often not in the best interests of the child.

The third category of states have specific abrogation statutes that deal only with procedural defects and irregularities such as lack of notice or consent. Although procedural statutes are better than having no statutory guidelines, they have two basic problems: their limited scope and their time constraints. The typical statute reads: "No final decree of adoption shall be attacked by reason of any jurisdictional or procedural defect after the expiration of two years following the entry of the final decree." If annulment of the adoption is sought on any other ground, the statute is inapplicable. Because annulments based on these statutes are procedural, any action brought within the applicable time frame should be granted. However, when the time the child spent with the family before the adoption is added to the time the child spent with the family after the final decree, the cumulative time may have been long enough for parent-child bonds to have formed. Thus, separation while within the limitations period could still be harmful to the child. If parent-child bonds have formed and separation would be harmful to the child, an annulment of the adoption should not be per-

It is often asserted that the adoption of children was unknown at common law and the subject is generally said to be governed and limited by the statutes. But we entertain no doubt that the broad equitable powers vested in our courts of general jurisdiction (and which are also vested with jurisdiction of the laws of this state relating to adoption) empower them to vacate a decree of adoption upon any of the classical grounds that entitle such courts to vacate any other decree, such as judgments procured by fraud or to prevent injustice where such final judgments were the result of unavoidable accident or excusable mistake.

McDuffee v. Rehm, 352 S.W.2d 23, 26 (Mo. 1961) (en banc); see also Pierce v. Pierce, 522 S.W.2d 435 (Ky. Ct. App. 1975); In re Adoption of G., 214 A.2d 549 (N.J. County Ct. 1965). See generally Annotation, Annulment or Vaction of Adoption Decree by Adopting Parent or Natural Parent Consenting of Adoptions, 2 A.L.R.2d 887 (1948).


83. Id.

84. See Goldstein, supra note 65, at 31-37. See generally Handbook, supra note 65.
mitted even if within the limitations period.

The fourth category consists of states which have specific annulment statutes not solely limited to procedural defects. These statutes are based on deficiencies in the child which may later be grounds for annulment. It must be noted that these states are in the minority. For example, the California statute allows adoptive parents to seek annulment within five years after the final decree if the child develops a mental illness as a result of conditions prior to the adoption. The Kentucky statute allows parents to annul an adoption within five years of the decree if the child exhibits traits of a different ethnological ancestry than that of the adoptive parents, and the parents had no knowledge of such ancestry. Both California's and Kentucky's statutes focus on the child's deficiency, not his best interests.

The states in the final category have adopted the Uniform Adoption Act which comprehensively covers the grounds upon which an annulment may be based. The Uniform Adoption Act is the only current statute which addresses the best interests of the child. Although currently enacted in five states, enactment of this statute should be the trend in the future if states intend to promote the child's best interests.

The commissioner's note following the Act explains that: "The policy of stability in a family relationship, particularly when a young minor is involved, outweighs the possible loss to a person whose rights are cut off through fraud or ignorance." States at the forefront of adoption law have demonstrated that the trend is to place the best interests of the child above those of the adoptive parents when the adoptive par-

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85. [Legal citation]
86. [Legal citation]
87. [Legal citation]
88. [Legal citation]
89. [Legal citation]
90. [Legal citation]
ents attempt annulment as a remedy because they have been the vic-
tims of fraud or misrepresentation of the child's health or mental con-
dition. While annulment is recognized as a remedy, the Uniform Adoption Act bars any attack on the adoption decree after the one year statute of limitations has passed. It is assumed that if an adoption is annulled within the one year time period, it will be before parent-child bonds have formed. This insures that an adopted child cannot be treated any differently than a natural child solely by virtue of his adoptive status. Although a minority of jurisdictions have adopted the Uniform Adoption Act, Florida should adopt this approach because it is the most consistent with the best interests of the child. A preferable alternative to statutory annulment that is also consistent with the best interests of the child is a cause of action for damages based on wrongful adoption.

IV. WRONGFUL ADOPTION AS A REMEDY

The denial of the opportunity to make an informed decision is the
essence of the tort of wrongful adoption. Likewise adoptive parents
should be permitted to recover damages for any misrepresentation or fraud that denies them the opportunity to make an informed decision. This remedy provides compensatory damages to adoptive parents who have been fraudulently induced into an adoption. Because the wrongful adoption remedy does not alter the family unit, it is more suitable than annulment. It is likely that the wrongful adoption remedy also would deter future acts of adoption fraud because the wrongdoers would be subject to monetary liability for the harm they inflict. Liability was found in the case of *Burr v. Board of County Commissioners.*

91. E.g., *In re Leach,* 128 N.W.2d 475 (Mich. 1964); McDuffee v. Rehm, 352 S.W.2d 23 (Mo. 1961) (en banc); *In re Adoption of G.*, 214 A.2d 549 (N.J. County Ct. 1965).
93. Id.
94. Burr v. Board of County Comm'rs, 491 N.E.2d 1101, 1109 (Ohio 1986).
95. See id. at 1109; Wallerstein v. Hospital Corp. of America, 573 So. 2d 9 (Fla. 4th Dist. Ct. App. 1991); Michael J. v. County of Los Angeles, 247 Cal. Rptr. 504 (Ct. App. 1988)
96. While annulment may be appropriate in cases where the fraud is immediately discovered, it is contrary to the policy of making adoptions conclusive and final. *In re Welfare of Alle,* 230 N.W.2d 574, 577 (Minn. 1975). However, in cases like *Burr,* the child will remain a part of an established family. 491 N.E.2d at 1101.
97. 491 N.E.2d at 1101.
The Supreme Court of Ohio found an adoption agency liable in tort for making material misrepresentations of a child’s background and physical condition to the adoptive parents. The adoptive parents alleged that the adoption was fraudulently induced by the agency, and that because of this wrongful adoption, they had incurred general and special damages.

In 1964, the Burrs contacted the adoption division of the Stark County Welfare Department hoping to adopt a male child up to six months old. A few days later the Burrs were informed that a seventeen month old boy was available for adoption. The Burrs met the county caseworker and were informed that the infant had an eighteen year old mother who was living with her parents and was trying to work and take care of the child. The mother decided to go to Texas for better employment and surrendered the child for adoption. Russell Burr testified that the case worker represented that the child “was a nice big, healthy, baby boy.” The Burrs proceeded with the adoption and Patrick became a legal member of the family. During the following years, Patrick suffered from many physical and mental problems. Eventually, he was diagnosed as having Huntington’s Disease, a genetically inherited disease which destroys the central nervous system. During his treatment, the Burrs obtained a court order to open the sealed record of Patrick’s background. In 1982, the Burrs discovered that the representations made to them by the case worker in 1964 were false.

The records revealed that Patrick’s biological mother was a thirty-one year old mental patient who shared some of Patrick’s problems. In fact, Patrick had been born at the state mental institution, not at the hospital. The father’s identity was unknown, but it was presumed that he, too, was a mental patient. All information regarding Patrick, except his age and sex, had been fabricated. In fact, he had been placed in two foster homes before the adoption. Prior to the adoption, the agency was aware that the baby was developing slowly, and a series of psychological assessments that had been conducted indicated he was functioning at a low intellectual level for his age. Future assessments were recom-

98. Id.
99. Id. at 1103.
100. Id.
101. Patrick’s symptoms included twitching, speech impediment, poor motor skills and learning disabilities. He was classified as educable, mentally retarded and attended special education classes. Id.
102. Burr, 491 N.E.2d at 1104.
mended for evidence of deviant social and emotional development. Expert testimony established that Patrick's background put him at risk of disease.\footnote{Id.}

The Burrs commenced a wrongful adoption action against the agency to recoup Patrick's excessive medical expenses.\footnote{Id.} The Burrs testified that they would have never adopted Patrick if they had known the truth.\footnote{Id.} The jury returned a verdict in favor of the Burrs in the amount of $125,000.\footnote{Id.} The Ohio Supreme Court affirmed, holding that where adoptive parents allege that they have been fraudulently misled to their detriment by material misrepresentation concerning a child's background, they may recover if each element of fraud is proven.\footnote{Burr, 491 N.E.2d at 1104-05.}

The court found that fraud was proven since the adoption agency had made several untrue statements with knowledge of their falsity; the representations were material in the Burr's decision to adopt, and were obviously made with the intention of misleading the Burrs into relying upon them as fact.\footnote{Id. at 1105.} The court opined that justice required a public agency charged with the duty and authority to place children through adoption to be held accountable for injuries resulting from their deceitful and material misrepresentations.\footnote{Id.}

The Ohio Supreme Court's decision was not intended to make adoption agencies guarantors of their placements, insuring that each

\begin{itemize}
\item\footnote{Id.} The elements of fraud were listed as: (a) a representation, or where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance. \footnote{Id., 491 N.E.2d at 1102-03 (citing Cohen v. Lamko, Inc., 462 N.E.2d 407 (Ohio 1984))}.
\item\footnote{Id. at 1105.} The Ohio Supreme Court also found that the Burr's reliance on the representations were justifiable and that their injuries resulted therefrom. \footnote{Id. at 1106.} "It would be a travesty of justice and a distortion of the truth to conclude that deceitful placement of this infant, known by [the agency] . . . to be at risk, was not actionable when the tragic but hidden realities of the child's infirmities finally came to light." \footnote{Id. at 1107.}
\item\footnote{Burr, 491 N.E.2d at 1107.}
\end{itemize}
child adopted will remain healthy and happy.\textsuperscript{110} Couples must weigh the risks of becoming natural parents, and so too should adoptive parents have the opportunity to make an informed decision.\textsuperscript{111} The mere failure of the agency to disclose the risks inherent in the child’s background was not held to be actionable, it was the agency’s deliberate act of misinforming the couple that deprived them of their right to make a sound decision.\textsuperscript{112}

In contrast, in an earlier case, \emph{Richard P. v. Vista Del Mar Child Care Service}, a California Appellate Court affirmed the dismissal of a suit brought against an adoption agency, Vista, for failing to warn the adoptive parents that the infant's premature birth might lead to future health problems.\textsuperscript{113} Vista had placed an infant male child, Gregory, in the home of the adoptive parents at their request. Vista informed them that Gregory was premature and had large earlobes, but otherwise he was a healthy child. Before the adoption, the adoptive parents consulted their pediatrician, Dr. K., who found Gregory to be in good health. However, three years later, Gregory began experiencing neurological problems, and six years after the adoption Dr. K informed them that Gregory's emotional and physical problems were predictable at birth. The adoptive parents then brought suit against the agency and Dr. K.\textsuperscript{114}

The court stated that the gravamen of the adoptive parents' complaint was fraud and to constitute a ground for relief, the fraudulent representations must pertain to existing and material facts.\textsuperscript{115} Even though Vista had informed the adoptive parents prior to their adoption of Gregory that he was premature, the adoptive parents claimed that Vista's statement that Gregory was healthy and "'a proper subject for adoption' " was a factual representation of Gregory's health and constituted a representation that he would enjoy good health in the future.\textsuperscript{116} Furthermore, the parents claimed that Vista's representations were false because after placement in their home, Gregory began exhibiting severe emotional problems.\textsuperscript{117} The court found the statement to be

\begin{enumerate}
  \item \textsuperscript{110} \textit{Id.} at 1109.
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} 165 Cal. Rptr. 370 (Ct. App. 1980).
  \item \textsuperscript{114} \textit{Id.} at 372.
  \item \textsuperscript{115} \textit{Id.} Predictions of future events or expressions of opinion are usually not actionable.
  \item \textsuperscript{116} \textit{Id.} at 373 (quoting the complaint).
  \item \textsuperscript{117} \textit{Id.}
\end{enumerate}
opinion, or prediction, and not actionable because Vista had made a full disclosure of the facts within its knowledge as they existed at the time of Gregory's placement.\footnote{Richard P., 165 Cal. Rptr. at 373.}

The decision did acknowledge that if the party stating the opinion or prediction had knowledge of facts not warranting the opinion, or if the other party reasonably relied upon the opinion or prediction as fact, there would be a basis for liability in fraud.\footnote{Id.} Since the adoptive parents consulted their own physician and did not rely on the agency's representations of Gregory's health, the requisite element of reliance was lacking for a cause of action based on fraud or misrepresentation.\footnote{Id. at 374.}

Arguably, public policy also influenced the California appellate court's decision that no cause of action should be recognized against Vista for its opinion or prediction.\footnote{Id.} The policy inherent in the court's decision was that "to impose liability in a case such as this would in effect make the adoption agency a guarantor of the infant's future good health."\footnote{Id. at 374.} However, natural parents that are fortunate enough to have a healthy child, have no guarantee that the child will continue to remain healthy.\footnote{Richard P., 165 Cal. Rptr. at 370.} Thus, since Vista made a full disclosure of Gregory's health, they should not be held liable for the continuation of Gregory's good health in the future.

Although the Richard P. court dismissed the wrongful adoption suit, the facts are distinguishable from Burr which allowed recovery.\footnote{Burr, 491 N.E.2d at 1109.} In Burr, the agency had engaged in a deliberate act of misinforming by making false statements about the child's background.\footnote{Richard P., 165 Cal. Rptr. at 370.} In Richard P., the agency truthfully disclosed the child's history, but stopped short of informing the parents of the potential health problems that might have occurred as a result of a premature birth.\footnote{Richard P., 165 Cal. Rptr. at 370.} However, if the agency had withheld known information about the child's health, it is likely fraud would have existed.\footnote{See, e.g., McMahon v. Meredith Corp., 595 F.2d 433, 438 (8th Cir. 1979). The question then becomes whether
a duty to disclose arises in adoption proceedings. A duty to disclose should be found in adoption proceedings because full disclosure is the most effective way of eliminating adoption annulment and suits for wrongful adoption.

In cases like Burr, there is little doubt that a duty exists, since the adoptive parents place their trust in the adoption agency as the agency usually has superior knowledge of the child's condition and background. In this situation where "one party has superior knowledge not within the fair and reasonable reach of the other party," a duty to disclose is found. An adoption agency that fails to inform adoptive parents of known risks concerning their prospective child is not acting in the child's best interests. Additionally, the best interests of the child, which is the primary concern in any adoption, would be best served when the adoptive parents are fully informed of the child's condition and background. Fully informed, the adoptive parents will be better able to confront and deal with the situation when the risks become reality. Therefore, the victims of such nondisclosure should be provided for in the form of compensatory damages, and possibly punitive damages, where the party placing the child fails to disclose known risks and injury subsequently results.

However, recognition of the wrongful adoption theory and allowing recovery in such situations will not make agencies the "guarantors of their placements." Adoptive parents will only be allowed to recover when they prove an intentional false representation or a failure

128. "The classic illustration of fraud is where one party having superior knowledge intentionally fails to disclose a material fact . . . which is not discoverable by ordinary observation . . . ." Nessim v. DeLoache, 384 So. 2d 1341, 1344 (Fla. 3d Dist. Ct. App. 1980) (citations omitted).

129. McMahon, 595 F.2d at 439.

130. Parents can choose not to adopt the child at all. Thus, saving the parents and the child the anguish of having to file suit to correct the agency's wrong.

131. Burr v. Board of County Comm'rs, 491 N.E.2d 1101, 1109 (Ohio 1986); Michael J. v. County of Los Angeles, 247 Cal. Rptr. 504 (Ct. App. 1988).
to disclose known material facts about the child or her background.\textsuperscript{132} Further it will place a much needed check on the system.

Also, public policy cannot condone concealment or intentional misrepresentation that misleads potential adoptive parents.

The adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social, and financial obligations. Accordingly, a trustworthy process benefits society, as well as the child and parent. As keepers of the conscious of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwarly. As trustees of the child’s destiny the agency was obligated to act with morals greater than those found in a purveyor’s common marketplace.\textsuperscript{133}

Thus, concealment or misrepresentation of a child’s background by individuals or agencies involved in the adoption proceeding is against public policy. Similarly, this reasoning can be extended to include anyone that the parents rely on in making their decision to adopt, includ-

\textsuperscript{132} See Wallerstein v. Hospital Corp. of Am., 573 So. 2d 9 (Fla. 4th Dist. Ct. App. 1990); Burr, 491 N.E.2d 1101. The following case further illustrates the need for disclosure. In Michael J. v. County of Los Angeles, 247 Cal. Rptr. 504 (Ct. App. 1988), recovery of damages was allowed because the adoptive parent proved the agency’s failure to disclose a known material fact about the child. Michael was born on March 30, 1970. Since birth he had a port wine stain on his upper torso and face. Based upon medical knowledge and information available in 1970, the county knew or should have known that this was a manifestation of Sturge-Weber Syndrome. The county concealed this fact from Mary Trout, who inquired about the stain when she was considering adopting Michael. Mary did not know that the stain was a manifestation or symptom of a disorder and would not have adopted Michael if she had known. The California Appellate Court opined that an adoption agency cannot be made the guarantor of an infant’s future good health and should not be held liable for mere negligence in providing information concerning the prospective adoptee’s health. Id. at 513. However, the court found that the agency’s failure to disclose a material fact within its possession, and that the examining physician would not render a prognosis for Michael, suggested that the nondisclosure was fraudulent and a cause of action for fraud existed. Id. Although the court recognized an action for intentional misrepresentation or fraudulent concealment, this was not an attempt to place upon the agency a duty to guarantee the future good health of prospective adoptees. Id. The court stated that: “[T]here must be a good faith full disclosure of material facts concerning existing or past conditions of the child’s health.” Id.

\textsuperscript{133} Michael J., 247 Cal. Rptr. at 513.
ing treating physicians.\textsuperscript{134}

Florida also recognizes wrongful adoption as a remedy. In \textit{Wallerstein v. Hospital Corporation of America}, the Florida Fourth District Court of Appeal applied the theory of wrongful adoption to physicians who attended a child after his birth.\textsuperscript{135} The allegations were based on the doctors' assurance to the adoptive parents that the child was healthy and suitable for adoption.\textsuperscript{136} The child, Shawn, was born in Plantation General Hospital on July 1, 1983 and was placed under the care of the doctors of Plantation General. The Wallersteins employed the doctors and the hospital to examine and diagnose Shawn's health to determine his suitability for adoption. Even though the doctors had assured the Wallersteins that the child was healthy and suitable for adoption, they presumably failed to properly examine and diagnose the condition of the child.\textsuperscript{137}

The Wallersteins adopted Shawn and subsequently discovered, one year after the adoption, that he had chronic, fixed, non-progressive encephalopathy (brain dysfunction) with spastic quadriparesis (paralysis), and had been tentatively diagnosed as having cerebral palsy.\textsuperscript{138} The Wallersteins contended that these conditions, and the child's unsuitability for adoption, were known or should have been known to the doctors, and if they had known of the child's condition, they would not have adopted Shawn.

The Florida Fourth District Court of Appeal found the Wallerstein's suit for negligent misrepresentation actionable since in a suit for negligent misrepresentation, "[a]ll that must be alleged . . . is not that the representor intended to make a false statement, but rather that the representation was made under circumstances in which its falsity should have been known."\textsuperscript{139} The Wallersteins were permitted to recover for economic loss resulting from the doctors' conduct in misrepresenting or negligently failing to determine the medical condition of the adopted child.\textsuperscript{140} Thus, when a physician informs potential adoptive

\begin{itemize}
  \item \textsuperscript{134} Richard P. v. Vista Del Mar Child Care Servs., 165 Cal. Rptr. 370 (Ct. App. 1980) (parents sued the physician as well as agency for wrongful adoption).
  \item \textsuperscript{135} 573 So. 2d 9 (Fla. 4th Dist. Ct. App. 1990) (this was a private adoption as opposed to an agency adoption).
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.} at 10.
  \item \textsuperscript{138} \textit{Id.} at 9.
  \item \textsuperscript{139} \textit{Id.} at 10.
  \item \textsuperscript{140} \textit{Wallerstein}, 573 So. 2d at 10.
\end{itemize}
parents that the child is healthy and suitable for adoption, it is foreseeable that if that information is wrong, the parents will suffer some economic harm. Obviously, if the parents adopt the child, they will be legally responsible for the medical costs and should be allowed to recover damages commensurate with the child's medical expenses. This remedy is preferable to annulment of adoption as it keeps the child within the family unit while compensating the adoptive parents for damages incurred.

As previously discussed, an adoptive parent's motion to annul an adoption based on fraud should not be granted, because unlike wrongful adoption, it does not promote the child's best interests and other remedies are available. The preferable solution in cases where adoptive parents are fraudulently induced into an adoption is a damage suit for the tort of wrongful adoption. The adoptive parents' right to be free from being victimized by fraud is recognized without forcing them to end their relationship with the child they have come to know as their own. In fact, one of the main beneficiaries of the wrongful adoption theory is the adoptive parents since full disclosure would enable the agencies to find suitable parents that may want to raise handicapped or other types of special children. Although the best interests of the child is the primary concern, "the protection of . . . the adopting parents should [also] be considered along with that of the child."\footnote{141} Permitting adoptive parents to seek compensatory damages when they have been the victims of fraud or misrepresentation promotes both the child's and adoptive parents' best interests.

Specifically, the adopted child benefits from the wrongful adoption theory since the child remains with the family. When an adoption is annulled, the child is removed from the family unit and returned to the agency. This is a drastic measure. The child is removed from his caring family unit and is again alone and parentless. While annulment of adoption may be appropriate when the fraud or misrepresentation is immediately discovered and before significant parent-child bonds are formed, it is otherwise contrary to the child's best interests and the policy of making adoptions final.\footnote{142}

An additional benefit of the wrongful adoption theory is that it will deter others from future fraudulent conduct or misrepresentation, because perpetrators of adoption fraud will be required to redress their

\footnotetext{141}{\textit{In re Adoption of Children} by O., 359 A.2d 513, 514 (N.J. Super. Ct. Ch. Div. 1976).} \footnotetext{142}{\textit{In re Welfare of Alle}, 230 N.W.2d 574, 577 (Minn. 1975).}
wrongs through the payment of civil damages. Although the main purpose of compensatory damages in actions of wrongful adoption is to redress the victim's injuries, these damages also serve the purpose of reducing future fraudulent conduct. Unfortunately, most state statutes do not clearly designate what information must be disclosed to adopting parents thus allowing the agency to omit select facts concerning the child’s background. This is demonstrated in *M.L.B.* where the court granted the adoptive parents’ petition to annul the adoption. This was the wrong remedy; wrongful adoption would have been a more appropriate remedy.

**IV. RECOMMENDATIONS**

One factor contributing to adoption fraud is that the records of the adoptee's condition and background are sealed when the adoption is finalized and can be seen by the adoptive parents only by court order. These sealed records may give the individuals placing the child a false sense of security that their fraudulent conduct will never be discovered. The rationale behind keeping records confidential serves several purposes. “It shields the adopted child from possibly disturbing facts surrounding his or her birth and parentage, it permits the adoptive parents to develop a close relationship with the child free from interference or distraction, and it provides the natural parents with an anonymity that they may consider vital.” These expressed concerns are valid. However, the sealed records have the tendency of allowing material information about the adoptive child’s condition or background to be kept from the adoptive parents, which does not promote the child’s best interest when considering placement of the child.

A few states have enacted statutes that provide the potential adoptive parents with access to vital medical records without interfering with the natural parents’ wishes to remain anonymous. However,

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146. *In re* Linda F.M. v. Department of Health, 418 N.E.2d 1302, 1303 (N.Y. 1981) (citations omitted) (Linda was an adopted child who was denied access to her adoption records).
147. *Id.* at 1303.
none of the state's provisions provide sanctions for failure to disclose this vital information.\textsuperscript{149} In most cases, it can be presumed that counsel for the adoptive parents would be aware of the disclosure requirements and would insist upon compliance. To insure that this information is provided, the legislatures should provide financial sanctions for failure to disclose this information.

Florida Statute section 63.162 mandates that upon the request of the adoptive parent, all non-identifying information obtained prior to, or subsequent to, the adoption shall be furnished to the adoptive parent.\textsuperscript{150} This section contributes to the problem of non-disclosure by putting the burden of discovery on the adoptive parent. In order to receive any information concerning the child, the adoptive parents must request the information.\textsuperscript{181} Some parents might not realize that the information is available upon request. If the agency is trying to hide information that would affect an adoption, they are not likely to bring this to the parents' attention. Even though full disclosure may slow the placement process in some instances, when the parents, agency, child and the court are all aware of the relevant information about the child, chances are that once the adoption is finalized, it will remain so.

These mandatory disclosure laws are beneficial to all parties involved in the adoption proceedings. The natural parents' confidentiality is protected while the adoptive parents are able to make an informed intelligent decision.\textsuperscript{182} Even though every family which adopts a child takes certain risks as to the future progress of the child,\textsuperscript{183} full disclosure of information will help prepare the adoptive parents for any special needs the child may develop. Even those placing children for adopt-

\begin{thebibliography}{9}
\bibitem{151} \textit{Id.}
\bibitem{152} Burr v. Board of County Comm'rs, 491 N.E.2d 1101, 1109 (Ohio 1986).
\bibitem{153} \textit{Id.} at 1101.
\end{thebibliography}
tion benefit from the law. They would no longer fear annulment suits if full disclosure is made. Although mandatory disclosure laws cannot prevent adoption fraud or misrepresentation, they can lessen the past security derived from sealed records.

VI. CONCLUSION

The adoptive parent-child relationship should mirror the natural parent-child relationship. This was the intent in the creation of the adoption statutes.\(^{154}\)

It is difficult to justify the annulment of an adoption by the adoptive parents. A finalization of an adoption creates a new status, that of natural parent and child. Natural parents do not have the alternative of annulment because they are dissatisfied or wish to rid themselves of a bad bargain.\(^{155}\) "If the status attained is what it purports to be, the parent should meet all situations with the same attitude of mind that he naturally would have, had the child been his by birth."\(^{156}\) Since adoption grants the adoptive parents the same rights as natural parents, the adoptive parents should also be subject to the same constraints.

The best alternative for adoptive parents, who have been injured because of misrepresentations or fraud concerning their child’s background or condition, is the tort recovery of wrongful adoption. The law should recognize the right of potential adoptive parents to make an informed decision, based on all the available information regarding the adoptive child’s background and condition that would reasonably influence their decision.

The remedy of wrongful adoption is superior to annulment of adoption because it recognizes the rights of the adoptive parents, while it protects and promotes the best interest of the adoptive child, and deters future cases of adoption fraud. The remedy of wrongful adoption should apply to both active fraud and non-disclosure where the party placing the child controls the adoptive parent’s access to material information about the child’s background or condition. The adoptive parents

154. See generally Howard, Note, supra note 4, at 549.
155. But see L.A.M. v. State, 547 P.2d 827 (Alaska 1976) (enlisting state assistance to deal with disobedient or stubborn children); In re Wallace & Snyder, 532 P.2d 278 (Wash. 1975) (en banc) (defining an incorrigible child as one who is beyond the control or power of his parents, guardian, or custodian by reason of the child’s conduct).
156. Snider, Note, supra note 66, at 705.
should not be permitted to annul the adoption because they are no longer satisfied with the child. Furthermore, a child should not be treated as an item that can be bought and sold. Since during the initial placement, the adoption was found to be in the best interests of the child, it should not be changed simply on the whim of the parents. If the parents are allowed any complaints whatsoever, they should be against the parties placing the child in the form of wrongful adoption. In this way the child’s best interests will be protected.

Kelly Bennison
Schutz v. Schutz: More Than a Mere “Incidental” Burden on First Amendment Rights

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I. Introduction

“I don’t care if he is my real dad. I hate his guts and I always will.”

Those icy words were spoken by an eleven year old girl during a hearing upon motions to modify custody, support and visitation, as she tried to convince the trial judge that she did not want to visit her father. Even though the judge attempted to persuade the young girl to concede to visitation, she could not comprehend why she had to see her father if she hated him. She did not know that the courts had determined that it is in a child's best interest to maintain a positive relationship with the non-custodial natural parent. All that mattered to her was that her father had walked out on her mother and abandoned his two daughters when she was three. Now, seven years later, the

1. Brief for Respondent at 9, Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991) (No. 72-471) [hereinafter Father's Brief].
2. Id.
3. Id. at 10.
4. See Frazier v. Frazier, 147 So. 464, 466 (Fla. 1933) (stating “[n]o . . . inherent right of an individual [should] be esteemed more highly, than that which arises out of the natural relationship of love and affection which normally exists between parent and child . . . .”); see also Schutz v. Schutz, 581 So. 2d 1290, 1293 (Fla. 1991) (quoting Fla. Stat. § 61.13(3)(a) (1989) “‘frequent and continuing contact with the non-residential parent’ is generally considered to be in best interest of child.”)).
5. Father's Brief, supra note 1, at 9.
thought of visiting this man gave her nightmares. 6

During the custody modification hearing, the trial judge found that Laurel Schutz ("Mother"), the custodial parent, had instilled great animosity in her two daughters towards her former spouse, Richard Schutz ("Father"), the noncustodial parent. 7 The trial court determined that the Mother had done far more than neglect her "affirmative obligation" 8 to encourage her daughters to visit their Father. 9 In fact, the trial court found that the Mother had intentionally poisoned the daughters' hearts and minds against their Father. 10 To remedy the situation, the trial court issued an order ("Order") enjoining the Mother to "create in the minds of . . . [the daughters] a loving, caring feeling toward the Father . . . [and] convince the children that it is [her] desire that they see . . . and love their father." 11

The Mother challenged the Order claiming that it was an infringement upon her constitutional rights to freedom of speech and expression, because it required her to express opinions she did not have. 12 The Order was upheld by the Third District Court of Appeal as constitutional. 13

Subsequently, on appeal to the Florida Supreme Court, the appellate court's decision was affirmed. The supreme court found that the Order was consistent with the custodial parent's "affirmative obligation" under Florida law; 14 did not require the Mother to express opinions she did not have; and was constitutional. 15

Schutz v. Schutz is significant because it exceeds the "affirmative

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6. Id. at 11 (referencing the testimony of Dr. Epstein, the court appointed psychologist who, interviewed the daughters).
7. Schutz, 581 So. 2d at 1292.
8. See Gardner v. Gardner, 494 So. 2d 500, 502 (Fla. 4th Dist. Ct. App. 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987); In re Adoption of Braithwaite, 409 So. 2d 1178, 1180 (Fla. 5th Dist. Ct. App. 1982) (custodial parent of a child owes an obligation to the noncustodial parent to encourage and nurture the parent-child relationship).
9. Schutz, 581 So. 2d at 1292.
10. Id.
13. Schutz, 522 So. 2d 874.
14. Schutz, 581 So. 2d at 1292 (citing Gardner v. Gardner, 494 So. 2d 500, 502 (Fla. 4th Dist. Ct. App. 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987)).
15. Id.
obligation" placed on primary residential parents under Florida law. However, the Supreme Court of Florida failed to acknowledge the significance of Schutz. The court's finding that the Order did not infringe upon the Mother's freedom of speech and expression rights was unsupported by the facts. The Florida Supreme Court should not have affirmed the Order.

This comment discusses why the Florida Supreme Court should not have affirmed the Schutz Order, as well as demonstrate that the Order exceeded the "affirmative obligation" of residential parents under Florida law and is unconstitutional. The first section of this article gives the detailed factual background of Schutz that led to the issuance of the Order. The second section deals with the review of the Order by the Third District Court of Appeal and the Florida Supreme Court.

The remainder of this comment discusses the flaws in the Florida Supreme Court's analysis, which led to the erroneous decision to affirm the Order. Primarily, this section will focus on the court's unsupported conclusions, beginning with the finding that the Order is consistent with the custodial parent's affirmative obligation. A comparison between the actual requirements of the Order and the affirmative obligation as set forth by the Schutz court demonstrates that the Order is inconsistent with Florida law. Next, this section will examine the court's finding, contrary to the plain meaning of the Order, that the Mother was not compelled to express opinions she did not have. This section will conclude by demonstrating that the court failed to properly review the constitutionality of the Order.

II. FACTUAL BACKGROUND OF SCHUTZ

The Father and the Mother were married in 1972. Two daughters were born to the parties: the first in 1973 and the second in 1975.

16. See Schutz, 522 So. 2d at 877 (Hendry, J., dissenting) (stating that "[t]he order . . . produces an impermissible result in that it compels the wife to exceed the legal duty to encourage visitation which she, as a custodial parent, owes the noncustodial parent").
17. Id. at 874.
18. Schutz, 581 So. 2d at 1290.
19. Id.
20. See Schutz, 522 So. 2d at 877 (Hendry, J., dissenting).
21. See Schutz, 581 So. 2d at 1292.
22. Mother's Brief, supra note 12, at 2.
In 1977, the Mother filed for dissolution of marriage and the Father filed a counter-petition. A final judgment dissolving the six year marriage was entered by the trial court on November 13, 1978. At that time, physical custody of the two daughters, ages three and five, was awarded to the Father because he was found to be the primary caretaker. The facts subsequent to the dissolution order were in dispute.

The Mother claimed that the Father never assumed custody of the children, preferring instead to make her "wait" for him to decide if and when he would take custody. The Mother stated that the Father's actions caused her and the children a great deal of stress and emotional anguish. To the contrary, the Father contended that his decision not to expedite custody of the children was in accordance with the custody order, because the parties had agreed to gradually transfer custody of the children from the Mother to the Father. Because the Father refused to assume custody of the girls, the Mother filed for modification and the trial court awarded her sole custody of the children in October, 1979.

After the modification of custody, there was ongoing "acrimony and animosity" between the parents. The Mother claimed that the Father continually harassed her by returning the children late from visitation, taunting her by keeping the children in his car outside her home for extended periods, and cursing her in the presence of the girls. In February, 1981, the Mother moved with the children from Miami, Florida to Milledgeville, Georgia without notifying the

23. Schutz, 581 So. 2d at 1291.
24. Father's Brief, supra note 1, at 3. The primary caretaker is one of the factors that courts consider when determining which parent will get custody. See Fla. Stat. § 61.13(3)(c) (1989) ("[F]or purposes of . . . primary residence, the best interest of the child shall include an evaluation of all factors affecting the welfare and interests of the child, including . . . [t]he capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care . . . ").
26. Id.
27. Father's Brief, supra note 1, at 3. The transfer was supposed to be gradual because the Mother had been awarded the house and the parties wanted to minimize the stress of the move upon the young girls. Id.
28. Schutz, 581 So. 2d at 1291.
29. Id.
30. Id.
31. Mother's Brief, supra note 12, at 3.
A few weeks later, the Father received a letter from the Mother in which she revealed the recent move to Georgia and disclosed her phone number. Upon learning of the move to Georgia, the Father ceased making child support payments. The Father claimed that on three separate occasions he called the Mother and told her he intended to drive to Georgia and exercise his visitation rights. However, every time he drove to Georgia he found an empty house. The Mother stated that the Father only told her of one planned visit to Georgia, and that after waiting six hours for him she took her daughters shopping. Also, the Father sent airline tickets to his daughters for a flight from Atlanta to Miami, but they were never used. For seven months, the only contact the father had with his daughters was one letter from his oldest girl and several brief phone conversations with both children.

In September, 1981, unbeknownst to the Father, the Mother and the daughters moved back to Miami. Several months later, the Father happened to see his former wife and his daughters at a shopping plaza. At that time, the Mother gave him her phone number, but when he dialed the number he discovered that it had been disconnected. The Father finally located the Mother again in February, 1985. In May,
the Father went to the Mother’s house to tell her and the daughters that he wished to exercise his visitation rights. After a brief meeting on the front lawn with his daughters and his former wife, the Father left unsatisfied.

The next day, the Father filed a motion with the trial court to hold the Mother in contempt for violating his visitation rights, because of the Mother’s lack of cooperation and continual efforts to destroy his relationship with the children. The Father also moved to determine his liability for the child support payments he had not made since 1981. Subsequently, the Mother moved to modify visitation and for an order awarding the child support arrearages.

III. PROCEDURAL HISTORY OF SCHUTZ

During the final hearing upon the parties’ motions, the couple’s thirteen year old daughter was the first to testify. She told the court that she was afraid of her father and that she did not want to visit with him. Next, Dr. Michael Epstein, the court-appointed psychologist, testified that the Mother’s actions contributed to the daughters’ strong negative feelings about their father. Dr. Epstein stated that the daughters’ animosity toward their Father could be characterized as a mild form of “Parental Alienation Syndrome.” The Mother then tes-

Father found the Mother through a real estate listing in the newspaper. Id.
38. Id. at 8.
39. Id.
40. Mother’s Brief, supra note 12, at 5.
41. Id.
42. Id.
43. Id.
44. Father’s Brief, supra note 1, at 12. Dr. Epstein discussed the negative effects of certain actions by the Mother, such as the move to Georgia, telling the daughters that “if your [F]ather wanted to see you he could find you”, and reading the pleadings to the daughters. Id.
45. See id. (“Parental Alienation Syndrome” is used to describe a disturbance in which children become obsessed with deprecation and criticism of one parent partially as a result of conscious and unconscious efforts by the other parent. Richard A. Gardner, Recent Trends in Divorce and Custody Litigation, ACADEMY FORUM, 29(2), 3-7 (1985)). But see Petitioner’s Reply Brief at 2, Schutz v. Schutz, 581 So. 2d 1290 (Fla. 1991) (No. 72-471) (where the Mother claimed that Dr. Epstein only testified that he agreed with portions of the theory regarding this syndrome and that he found some “milder form” of this syndrome in the present case); cf. In re T.M.W., 553 So. 2d 260, 262 n.3 (Fla. 1st Dist. Ct. App. 1989) (the court specifically rejected a claim that “Parental Alienation Syndrome” was the subject of Schutz, pointing out that it was
Ferguson

stified that the reason she moved to Georgia and neglected to keep in contact with the Father was because she was afraid of him. However, the court was not satisfied with the Mother's testimony.

At the conclusion of the two day hearing, the trial judge held the Mother responsible for the daughters' hostility towards their Father. The judge found that "the cause of the blind, brainwashed, bigoted belligerence of the children toward the [F]ather grew from the soil nurtured, watered and tilled by the [M]other." Further, the judge found that "the [M]other breached every duty she owed as the custodial parent to the noncustodial parent of instilling love, respect and feeling in the children for their [F]ather." Accordingly, the circuit judge ordered that:

It shall be the obligation of the Mother to do everything in her power to create in the minds of [the daughters] a loving, caring feeling toward the Father. It shall be the Mother's obligation to convince the children that it is the Mother's desire that they see their Father and love their Father. Breach of this Paragraph either in words, actions, demeanor, implication or otherwise, will call for the severest penalties this Court can impose, including Contempt, Imprisonment, Loss of residential custody or any combination thereof.

The Mother appealed, claiming that the Order violated her First Amendment right to freedom of speech and expression because it required her to express opinions she did not have.

On appeal, the Third District Court of Appeal affirmed the Order by concluding that even though the Order required the Mother to "instruct the children to love and respect their father," her free speech claim was baseless. The appellate court held that the primary consideration in this case was the best interests of the children. The court instead "the subject of a footnote to a footnote.

46. Mother's Brief, supra note 12, at 8.
47. Id. at 10.
48. Schutz, 581 So. 2d at 1292 (Fla. 1991).
49. Id. (emphasis added) (quoting Schutz, 522 So. 2d at 874 n.1).
50. Id. (quoting Schutz, 522 So. 2d at 874 n.1).
51. Schutz, 522 So. 2d at 875 n.2 (emphasis added).
52. Id. at 875.
53. Id.
54. Id.; see Fla. Stat. § 61.13(2)(b)1 (1989) ("The court shall determine all matters relating to custody of each minor child of the parties in accordance with the
stated that a custodial parent has an "‘affirmative obligation’ to encourage and nurture the relationship between the children and the non-custodial parent," because "children are entitled to a warm and loving affinity with both their parents." Further, the majority noted that the Mother's free speech rights were subject to reasonable regulation. The court found that the custodial parent's affirmative obligation set forth in *Gardner* could be extended in *Schutz* to require the Mother "to raise her daughters' opinion of their father to one she herself does not hold" because the Mother had "poison[ed] their hearts and minds against him." Therefore, the majority held that the First Amendment did not protect the Mother from having to express opinions she did not have in order "to undo the harm she had already caused." While the appellate court correctly recognized the infringement upon the Mother's First Amendment rights, the court's conclusion improperly trivialized these rights.

The dissent rejected the majority's erroneous conclusion and found merit in the Mother's free speech claim. The dissent conceded that under Florida law a custodial parent is obligated to encourage visitation between the children and the noncustodial parent. This obligation requires that the custodial parent not do anything that would "‘undermine or starve the noncustodial parent’s contacts and relationship with the child.’" However, the dissent stated that by requiring the Mother to lessen the hostility she instilled in the children toward the Father, the Order "compels the [Mother] . . . to exceed the legal duty to encourage visitation which she, as a custodial parent, owes the noncustodial parent." Accordingly, the dissent correctly argued that the Or-

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55. *Schutz*, 874 So. 2d at 875 (quoting *Gardner v. Gardner*, 494 So. 2d 500, 502 (Fla. 4th Dist. Ct. App. 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987)).
56. Id.
57. *Schutz*, 522 So. 2d at 875-76 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), for the proposition that certain communication can be subject to regulation or preclusion if it runs afoul of established principles of law or policy).
58. Id. at 875.
59. Id. at 874.
60. Id. at 875.
61. Id. at 876 (Hendry, J., dissenting).
62. Id. at 877.
63. *Schutz*, 522 So. 2d at 877 (Hendry, J., dissenting) (quoting *In re Adoption of Braithwaite*, 409 So. 2d 1178, 1180 n.4 (Fla. 5th Dist. Ct. App. 1982)).
64. Id.
der was an impermissible infringement on the Mother's first amendment rights of freedom of speech and expression.\textsuperscript{66}

The Mother appealed and, upon review by the Florida Supreme Court, the Order was again affirmed.\textsuperscript{68} The court agreed with the result reached by the appellate court, but rejected the lower court's analysis.\textsuperscript{67} Specifically, the court did not accept the lower court's finding that the Order required the Mother to express opinions she did not have.\textsuperscript{68} Instead, the court found that the Order was consistent with the Mother's affirmative obligation to encourage and nurture the relationship between the children and the Father.\textsuperscript{69} Classifying the burden on the Mother's First Amendment rights as merely incidental, the Florida Supreme Court found the Order constitutional.\textsuperscript{70}

Examination of the Schutz decision reveals that the court employed very little analysis, and its conclusions were essentially unsubstantiated.

IV. Schutz: Expanding the Affirmative Obligation

The Florida Supreme Court began its analysis by noting that the challenged portion of the Order was consistent with the custodial parent's affirmative obligation under Florida law.\textsuperscript{71} However, a careful inspection of the affirmative obligation, as articulated in the cases cited by the court, reveals that the Schutz Order expands the custodial parent's legal duty.\textsuperscript{72} The court opined that pursuant to Florida law the

\begin{itemize}
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Schutz, 581 So. 2d at 1290 (Grimes, J., dissenting purely on jurisdictional grounds).
\item \textsuperscript{67} Id. at 1291.
\item \textsuperscript{68} Id. at 1292.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id. at 1293.
\item \textsuperscript{71} See Schutz, 522 So. 2d at 877 (Hendry, J., dissenting) (stating that "the trial court order in this case does more than direct the custodial parent to encourage visitation and nurture the relationship between the noncustodial parent and the child[ren]" and thereby "compels the wife to exceed the legal duty . . . she, as a custodial parent, owes the noncustodial parent."). \textit{But see Schutz, 581 So. 2d at 1292 (citing Gardner v. Gardner, 494 So. 2d 500, 502 (Fla. 4th Dist. Ct. App. 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987)); In re Adoption of Braithwaite, 409 So. 2d 1178, 1180 (Fla. 5th Dist. Ct. App. 1982)). In \textit{Schutz} the majority found the Order consistent with the affirmative obligation in spite of the requirement that the Mother "do everything in her power to create in the [children's] minds . . . loving, caring feeling[s] toward the father. . . ." Id.}
\end{itemize}
custodial parent’s affirmative obligation could be met by “encouraging the child to interact with the noncustodial parent, taking good faith measures to ensure that the child visit and ... have ... continuing contact with the noncustodial parent, and refraining from doing anything likely to undermine the relationship naturally fostered by such interaction.”73

In Gardner, the appellate court held that a custodial parent cannot remain neutral regarding visitation.74 In that case, the mother was awarded custody of the parties two children and the father was granted visitation rights. Significantly, unlike Schutz, in Gardner the mother did not discourage the children’s relationship with the noncustodial father. Rather, the mother took the position that the exercise of visitation rights was a matter between the children and their father. The appellate court found this position unacceptable and held that the mother’s affirmative obligation required her to “encourage the parties’ minor daughter to visit the husband and to take steps to ensure that the daughter ... [did] so.”75 The Schutz court ignored the vital distinctions in Gardner, and erroneously concluded that the Order was consistent with the Gardner rationale.

However, Gardner is distinguishable from Schutz. While the custodial parent’s affirmative obligation in Gardner related exclusively to the furtherance of visitation,76 Schutz had another agenda. For example, in Gardner the mother was required to encourage her daughter to visit the father.77 In contrast, the Schutz Order compelled the Mother to convince her daughters that she wanted them to visit with and love their Father.78 Further, where Gardner required the mother to help ensure that her daughter visited the father, Schutz ordered the Mother to do everything in her power to make her daughters love their father.79

If the differences in the above requirements seem purely semantical, contemplation of the underlying goal in Schutz reveals the fundamental distinction. Unlike Gardner, the goal in Schutz was to compel

73. Schutz, 581 So. 2d at 1292.
74. Gardner, 494 So. 2d at 502 (holding that a custodial parent’s affirmative obligation can not be satisfied by remaining neutral and instead the custodial parent must encourage visitation and help ensure that visitation takes place).
75. Id. at 502.
77. Id.
79. Id.
the Mother to undo the damage she had intentionally caused to the relationship between the two daughters and the Father.\textsuperscript{80} While the goal of remedi \ing the past animosity instilled in the daughters by the Mother is undeniably noble, \textit{Schutz} signifies a novel expansion of the custodial parent's affirmative obligation as previously defined in \textit{Gardner}.\textsuperscript{81}

Never before in a Florida decision has the custodial parent's affirmative obligation been construed to contain a requirement as nebulous as creating "in the children's minds loving, caring feelings toward" the noncustodial parent.\textsuperscript{82} Accordingly, the \textit{Schutz} court's finding that the Order was "[c]onsistent with this obligation"\textsuperscript{83} is unsupported by the facts or case law. If the Florida Supreme Court wanted to enlarge the custodial parent's affirmative obligation to address the egregious facts in \textit{Schutz}, then the court should have began its analysis by acknowledging its intent to do so. However, this would have required the court to address the Mother's First Amendment claim head on.

\textbf{V. \textit{Schutz}: Prescribing Opinions}

Instead, the Florida Supreme Court avoided the Mother's First Amendment claim by simply concluding that she was not required to express opinions she did not hold.\textsuperscript{84} Mysteriously, the court read the challenged portion of the Order to require nothing more of the Mother than to "take those measures necessary to restore and promote the frequent and continuing positive interaction; e.g., visitation, phone calls, and letters, between the children and their [F]ather, and to refrain from doing or saying anything likely to defeat that end."\textsuperscript{85} However, such a reading denies the plain meaning of the Order. The Order mandated that the Mother "convince the children that it is [her] desire that they see . . . and love their father."\textsuperscript{86} Contrary to the court's under-

\begin{itemize}
\item \textsuperscript{80} \textit{See id. at} 875 (stating that the Mother was not "'protected' by the [F]irst [A]mendment from a requirement that she fulfill her legal obligation to undo the harm she had already caused . . . "') (emphasis added).
\item \textsuperscript{81} \textit{See id. at} 877 (Hendry, J., dissenting) (\textit{Schutz} is the first case in which a custodial parent has been ordered to instill love for the noncustodial parent in the children's minds).
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Schutz}, 581 So. 2d at 1292.
\item \textsuperscript{84} \textit{See id.}
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{See id.} (the Florida Supreme Court chose to ignore this language).
\end{itemize}
standing of this language, the Order required the Mother to do far more than promote phone calls and visitation. This portion of the Order forced the Mother to express a "desire" that she did not have. Therefore, in spite of the Florida Supreme Court's finding, the Order did compel the Mother to express opinions she did not hold. 87

Given the fact that the Mother was forced to express opinions she did not hold, the Order was necessarily unconstitutional in light of past United States Supreme Court decisions. 88 In *West Virginia State Board of Education v. Barnette*, the Court held that the government can not prescribe what opinions an individual may hold under any circumstances. 89 In *Barnette*, the Court held that the state could not require children in public schools to salute the American flag, and stated that:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. 90

Furthermore, the Florida Supreme Court, relying on *Barnette*, held that "the state may never force one to adopt or express a particular opinion." 91

In light of *Barnette*, it is apparent that the *Schutz* court chose to deny the fact that the Order required the Mother to express opinions she did not have, because to do so would have invalidated the Order. The *Schutz* court, satisfied with the manner in which the Order redressed the damage the Mother had caused to the relationship between the children and their Father, 92 chose to overlook the unconstitutional shortcomings of the Order. There is no ambiguity in the *Barnette* hold-

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88. See, e.g., *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that the government cannot force citizens to confess, by word, matters of opinion); see also *Coca-Cola Co. v. State Dep't of Citrus*, 406 So. 2d 1079, 1087 (Fla. 1981) ("[T]he state may never force one to adopt or express a particular opinion.") (emphasis added).
89. 319 U.S. at 624.
90. *Id.* at 642 (citation omitted) (emphasis added).
91. *Coca-Cola Co.*, 406 So. 2d at 1087.
92. *Schutz*, 581 So. 2d at 1290.
ing; the court cannot force the Mother to represent a matter of opinion as her “desire,” even if the government’s interest is the children’s welfare.98

Rather than erroneously concluding that the Mother was not compelled to express opinions she did not have and affirming the Order, the Florida Supreme Court should have remanded the case with specific instructions that the lower court strike the unconstitutional language and tailor the Order to accurately reflect the custodial parent’s affirmative obligation as set forth in Gardner.94 In this way, the Court could have served the best interests of the children in a constitutionally permissible manner. If the court had done this, then it could have avoided its unsound application of constitutional scrutiny employed to justify the Schutz Order.

VI. SCHUTZ AND THE O’BRIEN TEST

Finally, the Florida Supreme Court in Schutz determined that the test developed in United States v. O’Brien was the appropriate level of scrutiny for the Schutz Order.96 In O’Brien, the United States Supreme Court held that the government could regulate certain expressive conduct otherwise protected by the First Amendment if the three following requirements were satisfied: (1) The regulation furthers an “important or substantial government interest;” (2) the interest is “unrelated to the suppression of free expression;” and (3) the incidental restriction on First Amendment freedoms is “no greater than is essential to the furtherance of that interest.”98 While the Florida Supreme Court concluded that all the requirements set forth in O’Brien were satisfied,97 a careful examination of Schutz reveals that the Court misapplied the

93. See Barnette, 319 U.S. at 642. It is doubtful that the “best interest of the child” is an exception that did not occur to the Court when it stated that “[i]f there are any circumstances which permit exception, they do not now occur to us.” Id.


95. Schutz, 581 So. 2d at 1292 (citing United States v. O’Brien, 391 U.S. 367, 377 (1968), where the United States Supreme Court held that draft card burning was “symbolic speech” protected by the First Amendment and could be regulated by the government).

96. 391 U.S. at 377.

97. Schutz, 581 So. 2d at 1293 (the court’s application of the O’Brien test consisted of a restatement of the test’s requirements followed by an analysis of step one only).
Step one of the O'Brien test, requiring that the Order's intended goal be an "important or substantial government interest," seems to have been satisfied. In Schutz, the government's interest was the children's welfare. When a marriage is dissolved, the court, acting in accordance with the child's "best interests" has the power to determine all matters relating to custody of minor children of that marriage. Further, "frequent and continuing contact with the nonresidential parent" is generally considered to be in the best interest of [the] child. The Florida trial court found that the negative messages the Mother gave her daughters about their Father were contrary to the daughters' best interests. Therefore, the trial court issued the Order to "resolve the dispute between the parties in accordance with the best interests of their children by attempting to restore a meaningful relationship between the children and their [F]ather . . ." Accordingly, the Schutz Order satisfies the first step of the O'Brien test. However, the Order fails steps two and three.

The Schutz court did not adequately address the vital second step of the O'Brien test, which requires that the government's interest must be "unrelated to the suppression of free expression." When considering this step, the United States Supreme Court has followed a "two-track" analysis.
The “two-track” analysis states that step two of the O'Brien test is a crossroads, the outcome of which determines whether the regulation will be subjected to strict scrutiny or a less stringent balancing test.\textsuperscript{106} If the regulation prohibits certain expression because the government objects to its communicative content then the regulation will be sent down “track one” bound for strict scrutiny.\textsuperscript{107} However, if the government’s interest in regulating the conduct is unconcerned with the content of the message then the regulation follows “track two” where it is subjected to a more easily satisfied balancing test.\textsuperscript{108} The Schutz court erroneously sent the Order down “track two.”\textsuperscript{109}

When determining whether the restriction is related to the suppression of free speech, the proper consideration is not the ultimate interest to which the state points, for that will always be unrelated to suppression, but rather the causal connection the state asserts.\textsuperscript{110} Accordingly, while the court’s ultimate interest in Schutz was the children’s welfare, the proper question is why that interest was implicated in that particular case.\textsuperscript{111} Since the answer is that the Mother’s expression of negative feelings regarding the Father threatened the children’s welfare, then the interest was related to the suppression of free expression.\textsuperscript{112} Thus, the Order actually failed step two of the O'Brien test and warranted the rigorous requirements of strict scrutiny. However, the Florida Supreme Court followed “track two” and upheld the order.

Nevertheless, the question of which “track” was proper is not dispositive, because the infringement upon the Mother’s First Amendment

\textsuperscript{106} See Tribe, supra note 105, § 12-2, at 791-92.
\textsuperscript{107} Id. at 791.
\textsuperscript{108} Id. at 792.
\textsuperscript{109} See 16 Fla. L. Weekly at S381.
\textsuperscript{110} Ely, supra note 105 at 1496.
\textsuperscript{111} See id.
\textsuperscript{112} Id.; see also Tinker v. Des Moines School District, 393 U.S. 503 (1969) (the Court found that a prohibition against public school students wearing black armbands to protest the Vietnam War was related to the suppression of free speech, because it was prompted by a fear of the possible violent reactions to the content of the students’ message).
rights was overburdensome. Therefore, the Order would fail under either "track two" or the more stringent "track one," because the infringement on the Mother's first amendment rights in Schutz was both "greater than essential" and not "necessary."

Finally, the Schutz court concluded that the "incidental" burden on the Mother's right of free expression was essential to the state's interest in the welfare of the children, thus satisfying the final step of the O'Brien test." However, a practical look at the requirement that the Mother convince her daughters that it was her "desire" that they love their father reveals that the Order was overburdensome. The Mother communicated to her daughters her animosity for their Father for seven years. When the Order was issued in 1986, the daughters were fifteen and thirteen years old. Even if the court had the authority to compel the Mother to profess a change of heart regarding her disdain for the Father, it is highly unlikely that either teenager would be convinced.

Furthermore, two reasons illustrate that it would be impossible to actually enforce the Schutz Order. First, the court would have to determine if the Mother has done everything in her power to create in her daughter's minds "a loving, caring feeling toward the Father." The Order is unenforceable because there is no way for the court to measure this. However, it would be possible to determine if the Mother had encouraged the girls to visit their Father or if she had actually made them do so. Second, what if a daughter says she knows that deep inside, her Mother still hates the Father and wishes the daughters did not have to visit him, despite the Mother's outwardly successful efforts to encourage visitation? According to the Order, the Mother would

113. See Schutz, 581 So. 2d at 1292.
114. Father's Brief, supra note 1, at 3, 14. The period of time from the dissolution, in late 1978, until the trial court issued the Order, in 1986, was approximately seven years.
115. See id. at 3.
117. See Mother's Brief, supra note 12, at 21 (citing National Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 154 So. 2d 843 (Fla. 3d Dist. Ct. App. 1963), where the court stated that an injunction requiring that National Airlines should "exercise reasonable diligence" in effectuating the injunction was unenforceable because of the vague standard of conduct imposed; see also Pizio v. Babcock, 76 So. 2d 654, 655 (Fla. 1954) (holding that "[i]njunctive orders . . . should be confined within reasonable limitations and cast in such terms as they can, with certainty, be complied with").
then be subjected to contempt charges, imprisonment, loss of custody or any combination thereof. While this scenario seems to push the issue to the absurd, it is a possible outcome of the Order which illustrates its immeasurable, unenforceable and thereby unnecessary requirements.

In order for the infringement upon the Mother's rights to have been "no greater than essential," the Order should have accurately reflected the affirmative obligation as previously defined under Florida law. For example, the Order should have mandated that the Mother encourage the daughters to establish positive interaction such as letters, phone calls, and visitation with the Father; and the Mother refrain from doing or saying anything likely to defeat that end. If the above requirements sound familiar, that is because they are what the Florida Supreme Court read the Schutz Order to mandate. Either the court received a copy of the wrong order or it strained to read between the lines trying to reconcile the Order with the Constitution and Florida law. At the very least, the Court should have acknowledged that the Order went too far and then expressly modified it to the above requirements.

VII. CONCLUSION

The Florida Supreme Court in Schutz failed to recognize the Order was an unconstitutional infringement upon the Mother's First Amendment rights of free speech and expression. The court upheld the Order because it misconstrued the Order's requirements and incorrectly applied constitutional scrutiny. Had the court addressed the actual language of the Order, rather than what it read the Order to require, then the court could not have affirmed the Order.

While there was no excuse for the Mother's conduct in Schutz, this did not justify the Order. The court denied the Mother her constitutional rights, because it was outraged by her behavior. The extension

118. See Schutz, 522 So. 2d at 875 n.2.
119. See Gardner v. Gardner, 494 So. 2d 500, 502 (Fla. 4th Dist. Ct. App. 1986), appeal dismissed, 504 So. 2d 767 (Fla. 1987) (holding that a custodial parent's affirmative obligation cannot be satisfied by remaining neutral and the custodial parent must encourage visitation); see also In re Adoption of Braithwaite, 409 So. 2d 1178, 1180 (Fla. 5th Dist. Ct. App. 1982) (custodial parent of a child owes an obligation to the noncustodial parent to encourage and nurture the parent-child relationship).
120. Schutz, 581 So. 2d at 1292.
121. See id.
of the affirmative obligation in this manner was improper and unnecessary. The children's best interests could have been served if the Order had accurately reflected Florida's affirmative obligation by requiring the Mother to encourage visitation and refrain from interfering with the Father's relationship with the daughters. With time and maturity, through visitation, the daughters would eventually be able to make their own judgements about their Father. Accordingly, the Schutz court should have expressly modified the Order to reconcile it with Florida law and the Constitution.

David L. Ferguson

122. See Gardner, 494 So. 2d at 502.
I. INTRODUCTION

In recent years, population growth has emerged as a major public issue. With world population now over 5.3 billion people, one fifth of whom live in poverty, governments around the world recognize that uncontrolled population growth can have devastating consequences.


2. State of World Population 1990: Choices for a New Century, 16 U.N.F.P.A. NEWSL., No. 6, at 1 (June 1990), [hereinafter State of World Population]. World population is expected to increase by over a billion people during the 1990s and will probably double or triple during the next century. Id.

3. The threat of uncontrolled population growth has been theorized for over twenty years now. See, e.g., Anne H. Ehrlich, Population, Resources, Environment: Issues in Human Ecology 41-42 (1970) (speculating that if population contin-
Some of these consequences are too rapid a depletion of global resources, housing and food shortages and irreversible environmental damage. More than ever, governments are aware that the quality of human life, as derivative of the quality of the environment, cannot be separated either ideologically or practically, from the issue of human population control.

In several developing countries where the effects of uncontrolled population expansion are even more evident, governments have begun to initiate explicit population policies and laws. While most of these measures consist largely of innocuous family planning guidelines, in some countries, such as The Peoples Republic of China ("China"), reports have surfaced concerning the use of extreme coercive measures to achieve population targets. Recently, in the United States, Chinese nationals seeking political asylum are pursuing claims based upon personal opposition to their native country's population control policies. Though the United States Congress has condemned the Chinese policies as crimes against humanity, the issue of whether to grant asylum on this basis is quite troubling. In the first place, Congress has imposed strict, statutory requirements on granting asylum applications, and as

4. Lewis, We are Five Billion Now, N.Y. TIMES, May 18, 1987, at A19, col. 4.
5. Note, supra note 1, at 83; see also State of World Population 1990, supra note 2, at 1 (emphasizing that already the impact of population growth has been sufficient to degrade the soil, threaten the rain forests, thin the ozone layer and initiate a global warming whose full consequences cannot yet be calculated).
6. Harrison, Pushing the Limits, 16 U.N.F.P.A. NEWSL. No. 6, at 3 (June 1990).
7. World population growth continues to be grossly out of balance, with more than 90 percent of the growth coming in the developing regions. State of World Population 1990, supra note 2, at 1.
further illustrated, not all claims of suffering and abuse, no matter how devastating, will satisfy present standards. Also, as population control policies are evaluated in the context of United States' asylum law, two important considerations pervade the analysis.

First, the United States' commitment to protecting victims of persecution, as embodied in the asylum laws, must be balanced against a realistic awareness of the country's own limited national resources. Regardless of world economic political and social conditions, the United States in all practicality cannot admit everyone who wishes to immigrate. Second, when the pervasive violence and suffering throughout the world is reflected upon and priorities are established for selecting individuals for asylum relief, the legitimacy of coercive population policies must be considered in the universal scheme of human preservation. In the final analysis, fairness and equality in the treatment of all asylum applicants must prevail. To address the issue of granting asylum protection to aliens opposing population control policies, this comment examines the current federal statutory asylum standards and considers the validity of these asylum claims as independently sufficient grounds for relief. In doing so, the Comment focuses specifically on the judicially refined definition of the term “well-founded fear of persecution” as set forth in section 101(a)(42)(A) of the Immigration and Nationality Act (“INA”). The legislative history, statutory construction and judicial interpretations of these standards are examined. Next, this comment considers whether the present asylum standards should be statutorily expanded by the United States legislature to provide relief for aliens opposing population control policies.

Finally, the comment determines that asylum seekers, who base their claims exclusively on opposition to population control policies, do

13. See, e.g., infra text accompanying note 135.
14. Asylum law is ideologically based on the notion that the United States, itself a nation of immigrants many of whom fled oppression in their homelands, has a deeply rooted commitment to the protection of victims of persecution. This interest is especially strong when the threatened alien is in the United States, seeking our protection, for if the government compels such a person to return to his native country, it will bear a direct responsibility for facilitating an act of persecution. Douglas Gross, Note, The Right of Asylum Under United States Law, 80 COLUM. L. REV. 1125 (1980).
16. Id. at xvi (discussing worldwide limitation on immigration).
not meet the current statutory standards as delineated in existing asylum law. Also, any administrative remedy, which seeks to categorically extend protection to these specific individuals, is unjust and only serves to manipulate current standards of review. A statutory expansion of asylum protection to include aliens opposing population control policies should not be initiated, in light of the acknowledged validity of population control measures and in recognition of even more deserving asylum applicants who currently are being denied our protection.

II. THE CHINESE PLAN

In China, a country already supporting over 1.1 billion people, concern over population growth is intense. Holding only seven percent of the world's farmland and already supporting approximately one quarter of the world's people, China's population has roughly doubled in the past forty years, seriously complicating the country's ability to feed its people and develop its economy.

As a result, the central government of China has adopted a comprehensive population control policy aimed at reaching zero population growth by the year 2000, and thus limiting total population to a projected 1.2 billion. Success in achieving this goal, however, is dependent on seventy percent of married Chinese couples having only one child. To this effect, the present Chinese policy advocating one child

19. Id.; see also Epstein, China Has Humane and Fair Birth Policy, N.Y. TIMES, Sept. 15, 1988, at A34, col. 4 (letter to the editor); L.A. TIMES, Sept. 14, 1987, § 1, at 6, col. 3.
21. Id.
22. China will most likely miss their official population goals. Recent projections estimate that China will break the 1.2 billion barrier by 1995 and approach 1.3 billion by the year 2000. Lewis, supra note 4.
per couple was established. In promotion of Chinese population control policies, the Chinese central government primarily relies on education and propaganda. Besides offering birth control services on a massive scale, the Chinese family planning program also emphasizes delayed marriage and promotes equal rights and responsibilities for women.

In addition, a sophisticated incentive system is in place that rewards couples who observe the policy and constrains those who do not. Couples with only one child are given a “one-child certificate” entitling them to such benefits as cash bonuses, longer maternity leave, better child care and preferential housing assignments. In return, these couples are required to pledge that they will not have more children. If a couple violates this pledge, however, corrective action is taken which may include stiff fines, withholding of social services, demotion and other administrative measures.

Enforcement of the Chinese family planning system is linked to an efficient monitoring system which includes about thirteen million volunteers. These volunteers, often organized into street committees, keep track of the status of each local family and collect information on con-

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25. *China: A Country Study*, supra note 9, at 76. Numerous exceptions are allowed for ethnic minorities, couples who are themselves only children, couples whose first child is handicapped and rural couples whose first child is a daughter. *Id.; see also Epstein, supra note 19, at A34; Note, supra note 1, at 100.*


27. Note, supra note 1, at 102. Delayed or “late marriage age” in the countryside is 25 years for a man and 23 years for a woman, however, in the cities, it is 27 years and 25 years respectively. *Id.* (citing UNITED NATIONS FUND FOR POPULATION ACTIVITIES, ANNUAL REVIEW OF POPULATION LAW 10 (1980)).

28. *See id.* at 102-03.

29. *Id.* at 102.

30. *Id.* Couples who have a second child must return the certificate and any other benefits received. *Id.*

31. 1990 COUNTRY REPORTS, supra note 20, at 853. In at least a few cases, people have been fired from their jobs for refusing to adhere to family planning policies. *Id.* This is a very serious penalty in China, affecting housing, pension and other social benefits. *Id.* Breach of this pledge renders enforcement of family-planning policies a question of contract law and contract enforcement, rather than a question of ideological education, persuasion or discipline. *Id.*

traceptive use, contraceptive methods employed and local pregnancies.\footnote{33}

The Chinese family planning system and its enforcement techniques have received allegations that it consists of extreme coercive measures used to achieve the desired results of the one-child policy, including reports of intense psychological pressure to the use of force.\footnote{34} In some areas, accounts of forced abortions and involuntary sterilizations have appeared.\footnote{35} While Chinese officials admit and condemn these isolated uncondoned abuses of the program, they insist that the family planning program is administered on a voluntary basis using persuasion and economic pressure only.\footnote{36}

III. \textit{Matter of Chang} and Beyond

The only reported case to address the issue of population control policies as grounds for asylum was \textit{Matter of Chang}.\footnote{37} In this decision, the Board of Immigration Appeals ("BIA")\footnote{38} dismissed an appeal of a thirty-three year old alien—a native and citizen of China who entered the United States without inspection.\footnote{39} In deportation proceedings, the respondent applied for asylum, withholding of deportation and volun-

\begin{footnotesize}
\begin{enumerate}
\item CHINA: A COUNTRY STUDY, supra note 9, at 76. Street committees, having quasi-governmental authority, usually employ local elderly women, sometimes referred to as "granny police." \textit{See China Pushes for Small Families, supra} note 24, at 4. These street committees even keep track of women's menstrual cycles. \textit{Id.}
\item CHINA: A COUNTRY STUDY, supra note 9, at 77; \textit{see also} 1990 COUNTRY REPORTS, supra note 20, at 845.
\item 1990 COUNTRY REPORTS, supra note 20, at 854.
\item \textit{Id.; see also} XINHUA GENERAL OVERSEAS NEWS SERVICE, March 23, 1989 (quoting Zhao Xixin, minister of the Chinese Embassy in Washington who stated that "[F]orced abortion and sterilization is nothing but rumor . . . [and] sheer fabrication").
\item Matter of Chang, Int. Dec. 3107 (BIA 1989).
\item The BIA is a five-member appellate court which adjudicates a wide variety of immigration matters, although mostly exclusion and deportation cases. \textit{See DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW} 7-9 (1987). The immigration judges and the BIA are appointed by the attorney general. \textit{Id.}
\item \textit{Id.} at 57. Entry without inspection, under the Immigration and Nationality Act [hereinafter INA] section 241(a)(2) (1982) is the most frequently used grounds of deportation. \textit{Id.} Protecting the integrity of the basic system for the screening and initial admission of aliens, this provision generally applies to aliens who pass through a border post by displaying false documents. \textit{Id.; see also} Reid v. INS, 420 U.S. 619, 624 (1975) (fraud is deemed to vitiate any ostensible inspection).
\end{enumerate}
\end{footnotesize}
tary departure. At the deportation hearing, the respondent testified that he and his wife were forced to flee from their commune because they had two children and they would not agree to stop having more children. The respondent also indicated that the "government" wanted him to go to a clinic to be sterilized and that he thought the operation would harm his body.

The issue of coerced sterilization formed the basis of the respondent's asylum application; however, the immigration court denied his asylum claim. In response to respondent's appeal of the immigration court's decision, the BIA found that China's population control policy did not constitute persecution within the meaning of the asylum statutes even if involuntary sterilization may occur.

[W]e do not find that the 'one couple, one child' policy of the Chinese Government is on its face persecutive . . . . For China to fail to take steps to prevent births might well mean that many millions of people would be condemned to, at best, the most marginal existence . . . . There is no evidence that the goal of China's policy, [to control population growth], is other than as stated, or that it is a subterfuge for persecuting any portion of the Chinese citizenry on account of one of the reasons enumerated in section 101(a)(42)(A) of the Act.

Voluntary departure, under INA section 244(e), may be granted during proceedings at the discretion of the immigration judge. Martin, supra note 38, at 73. Such a grant usually comes in the form of an alternate order of deportation. Id. If the alien leaves by the deadline set by the immigration judge, he or she is not considered to have departed under a formal deportation order. Id. Voluntary departure not only gives the alien greater flexibility in arranging his or her departure time, but also provides certain legal advantages over deportation, such as a greater possibility of being admitted at a later date. Id.

In this case, the BIA allowed Chang to depart voluntarily within 30 days from the date of the order. Chang, Int. Dec. 3107, at 16.

41. Chang, Int. Dec. 3107, at 3. Mr. Chang also stated that he disagreed with China's family planning policies because "in the countryside, especially in the farming areas, we need more children." Id.

42. Id. Mr. Chang also testified that his wife was supposed to go to the clinic to be sterilized but did not do so because of illness. Id.

43. Id. at 2. The immigration judge denied Chang's applications for asylum, withholding of deportation and voluntary departure in a decision dated December 18, 1986. Id.

44. Id. at 10.

45. Chang, Int. Dec. 3107, at 10. An alien establishes statutory eligibility for asylum under section 208 by showing that he or she meets the definition of refugee set forth in INA section 101(a)(42)(A): a well-founded fear of persecution on account of
Several months after the Chang decision, Attorney General Dick Thornburgh in response to growing popular concern over China’s human rights abuses issued an executive directive instructing the Immigration and Naturalization Service (“INS”) to give “[c]areful consideration . . . to such an applicant who expresses a fear of persecution upon return to their country, related to that country’s family planning policy of forced abortion or sterilization . . . .” In response to this directive, the INS promulgated interim rules which amended existing asylum regulations and articulated new standards applicable to persecution claims based on alleged coercive population control policies.

The interim rules stated that an “[a]lien fleeing coercive population control policies . . . may be considered to have a clear probability or well-founded fear of persecution . . . .” The INS then summarily

race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.13(a) (1991); see also infra text accompanying notes 81-84.

46. The attorney general’s action was an “executive directive,” which does not have the power of law and can be revoked or amended without public notice; an executive order, by contrast, must be printed in the Federal Register and carries more legal validity. See N.Y. TIMES, Apr. 7, 1990, at A19, col. 1.


49. For a general discussion of the standards of review including “clear probability” and “well-founded fear,” see infra text accompanying notes 81 to 94.

50. 55 Fed. Reg. 2804 (1990) (citation added). On April 11, 1990, President Bush issued a formal executive order which, among other things, directed the Secretary of State and the Attorney General to provide “[e]nhanced consideration for individuals . . . who express a fear of persecution . . . related to that country’s policy of forced abortion or coerced sterilization . . . .” Exec. Order No. 12,711, 55 Fed. Reg. 13,896 (1990). Since interim rules, having full legal effect, were already in place when this order was issued, the President’s actions can be seen as a politically motivated effort to pacify supporters of H.R. 2712, The Emergency Chinese Relief Act of 1989. H.R. 2712, 101st Cong., 1st Sess. (1989) (President Bush pocket vetoed H.R. 2712, which would have provided statutory protection from deportation for several groups of Chinese nationals, including those fleeing coercive population control policies).

Although President Bush argued that these administrative measures were equivalent to the protections provided under H.R. 2712, many Chinese students and congressional supporters of the bill accused President Bush of yielding to pressure from the Beijing government. See WASH. TIMES, Dec. 1, 1989, at A4. They complained that the executive directive could be revoked or challenged in court and that only legislation could guarantee protection. Id.; WASH. POST, Jan. 26, 1990, at A1, col. 4; see also 136 CONG. REC. S335-S382, H44-H66 (1990). A majority of senators voted to override the President’s veto, but the total was four votes short of the two-thirds majority needed to
categorized these claims as "persecution on account of political opinion." As a result, the BIA's decision in Chang was negated by the interim rules to the extent that it did not advance a determination of persecution under China's population control policies.

On July 27, 1990, Attorney General Thornburgh issued final asylum regulations which went into effect on October 1, 1990. The final regulations made no mention of either the January interim rules or the Chinese population control measures. Since these new asylum regulations supersede and negate all interim rules, it appears that the Chang decision has been technically restored as the government's official word on the Chinese population control policies. As a result, there is some question as to whether Chinese nationals can continue to rely on asylum protection in this area. To date, the July asylum regulations have not been further amended or replaced, and while the INS is apparently in the process of drafting new regulations, which should address the issue, there is no definitive statement as to what Chinese nationals may expect.

This discrepancy in official policy has further complicated an already confusing and disjointed area of law. It has also created incon-

pass the bill over the president's opposition. Id. However, the House of Representatives voted overwhelmingly to override the veto. Id.

51. 55 Fed. Reg. 2804 (1990) (The INS did not explain why it classified the family planning policy as persecution on the basis of political opinion, as opposed to, for example, persecution on the basis of membership in a particular social group).


53. The Code of Federal Regulations dealing with immigration matters is periodically amended through the use of Interim Rules, but had not been officially re-codified since 1980.

54. 67 INTERPRETER RELEASES 751, 754 (July 30, 1990).


56. The new regulations completely replace the Justice Department's existing asylum regulations. 67 INTERPRETER RELEASES 1222 (Oct. 29, 1990).

57. See id.

58. Id.

59. Although the omission of this issue from the final regulations was presumably an oversight. Id.

60. See 67 INTERPRETER RELEASES 1222 (Oct. 29, 1990).

61. See Sophie H. Pirie, Comment, The Need for a Codified Definition of "Persecution" in United States Refugee Law, 39 STAN. L. REV., 186 (1986). Confusion over eligibility requirements has caused the INS and the courts to treat aliens facing similar persecution threats disparately. Id. Some of the disparity reflects varying interpretations of vague statutory language, while other disparity reflects discrimination among aliens on the basis of political considerations. Id.
consistency in asylum adjudications. While Chang may still be considered the technical law, immigration judges, with significant flexibility and discretion in asylum review, may interpret existing policy differently. One immigration judge may circumvent precedential rulings which he considers unconscionable by emphasizing other legitimate avenues of statutory relief. Another immigration judge may, in his discretion, look to the interim rules and presidential executive order as an illustration of executive intention, regardless of existing "technical law." Still another immigration judge may adhere strictly to Chang's precedential declaration and deny asylum on this basis alone. Since Chang, no other appellate courts have addressed the prospect of granting asylum relief on the basis of opposition to population control policies. Therefore, this issue with all its complexities, seems open and ripe for legal challenge and analysis.

IV. ASYLUM RELIEF UNDER STATUTORY LAW—AN HISTORICAL PERSPECTIVE

Provisions protecting aliens who would face persecution if deported to their homelands have existed in various forms since the advent of federal immigration laws. In earlier years, however, the law of asylum was a somewhat haphazard collection of statutes and informal administrative procedures. Then, in 1968, the United States became a party

62. All references to varying interpretations of the validity of Chang and the interim rules are based on my personal observations, as a Judicial Law Clerk, United States Department of Justice, Office of Immigration Review, Miami, Fl.

63. Immigration law has always been characterized as an area where judicial discretion in frequently employed which often creates confusion and controversy. See generally Comment, supra note 61, at 187; see also Arthur C. Helton, The Proper Role of Discretion in Political Asylum Determinations, 22 SAN DIEGO L. REV. 999 (1985) (discussing discretionary denials in asylum adjudication).

64. For example, additional weight may be given to Chinese nationals fearing persecution based upon participation in pro-democracy activities. See supra note 62.

65. MARTIN, supra note 38, at 78.

66. Derek Smith, Note, A Refugee by Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases, 75 VA. L. REV., 681 (1989). One provision, however, in the 1952 version of the INA, served as a partial statutory authorization for the practice of asylum. INA 243(h) (1952), Pub. L. No. 82-414, 243(h). INA section 243(h) as originally enacted, authorized the attorney general, in his discretion, to "withhold deportation" of aliens who would be subject to persecution in their homelands; MARTIN, supra note 38, at 78. But See infra notes 91-93 and accompanying text (withholding of deportation would later become the mandatory
to an important international treaty affecting political asylum, the 1968 United Nations Protocol Relating to the Status of Refugees ("Protocol"). The Protocol, opened for signature in 1967, mandated protection to any refugee, defined as a person who:

\[
\text{[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country . . . .}^{70}
\]

While Congress ratified the Protocol in 1967 and thus became derivatively bound to the treaty’s provisions, no statutory protection was granted until thirteen years later with the enactment of the Refugee Act of 1980 ("Refugee Act"). The Refugee Act, which now governs form of relief).


68. The Protocol was designed as a reaffirmation and extension of the 1951 Convention Relating to the Status of Refugees. 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter Convention]. The Convention was designed to define refugees using the “well-founded fear of persecution” language now in INA section 101(a)(42)(A), but only afforded protection to aliens who had become refugees as a result of events occurring before 1951. Id. (the United States never did adhere to the Convention).

69. Both the Convention and the Protocol include non-refoulement provisions which establish an alien’s right not to be returned to his home country. See Martin supra note 38, at 79. The Convention provides that “[n]o Contracting State shall expel or return [refouler] a refugee . . . . to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.” Convention, supra note 68, at art. 33.

70. Convention, supra note 68, at art. 1 (as adopted by Protocol, art. 1).

71. Protocol is undeniably part of the supreme law of the land, and its provisions must control in any case of conflict with prior acts of Congress or administrative practice. Douglas Gross, Note, Right of Asylum Under United States Law, 80 COLUM. L. REV. 1125 (1980); see also U.S. CONST. art. VI (stating that together with the Constitution and laws of the United States, all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land).

72. See Martin, supra note 38, at 79 (Congress relied instead on the Attorney General to exercise discretion consistently with the treaty). But see Matter of Dunar, 14 I&N Dec. 310, 314-19 (BIA 1973) (the BIA maintains that the intent of Congress in ratifying the Protocol was not to change existing domestic law).

asylum procedures in the United States, was grounded in the legal principles articulated in the Protocol and demonstrates the United States' commitment to humanitarian concerns.\(^4\) Passage of the Refugee Act also reflects a desire to liberalize United States asylum law and to give fuller effect to the purposes, as well as the language, of the Protocol.\(^7\) The Refugee Act was to become the uniform statutory eligibility standard, established by Congress in an effort to achieve uniformity, fairness and neutrality in the determination of asylum claims.\(^8\) With its passage, Congress sought to make asylum procedures available to all applicants on a uniform basis, to ensure that each applicant would have a full opportunity to be heard and present his or her claim and to ensure that each claim would be evaluated evenhandedly under a neutral international standard adopted by the Act.\(^7\)

Although the Refugee Act contained several major provisions relating to relief from deportation, the most significant reformations are found in INA sections 208 and 243(h).\(^7\) Section 208, which was first added by the Refugee Act, created a new immigration status for its beneficiaries, called "asylee," which was later incorporated into various sections of the Code of Federal Regulations.\(^7\) Acquiring asylee status not only facilitates an alien's entitlement to work authorization and

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74. Senator Kennedy argued to President Carter when sponsoring the Refugee Act that it "gives statutory meaning to our national commitment to human rights and humanitarian concerns-which are now reflected in our immigration law." Senate Comm. on the Judiciary, 96th Cong., 2d Sess. (1980).

75. For example, the Refugee Act makes the protections of the Protocol available at exclusion hearings, for aliens who have not technically "entered" the country, and deportation hearings. See Note, supra note 71, at 1132.


77. Id.

78. INA section 208 was added by section 201(b) of the Refugee Act, enacted March 17, 1980 and INA section 243(h) was extensively revised. See INA §§ 208, 243, codified at 8 U.S.C. §§ 1158, 1253(h) (1980); Pub L. 96-212, 94 Stat 103. The distinction between relief under section 208, (asylum) and under section 243(h), (withholding of deportation) is significant for the purposes of determining "the probability of harm." See infra text accompanying notes 108-119. Therefore, in this context, the two forms of relief will be carefully distinguished with all references made to either asylum under section 208, or withholding under section 243. However, most applicants submit simultaneous claims for both withholding of deportation and asylum, and therefore, all other references to statutory relief under the Refugee Act will use the word "asylum" to refer to both forms of relief since it is the broader form of protection.

public assistance, but also provides for a routine procedure for the asylee's eventual adjustment to lawful permanent resident status. Statutory eligibility for obtaining the status of "asylee" is also provided for in the Refugee Act. Thus, asylee status is established if an alien can show that he meets the definition of "refugee" as set forth in the INA. This definition, also a product of the Refugee Act's legislation, is specifically drawn from the definition of "refugee" appearing in the Protocol and provides statutory eligibility for asylee status to a person outside his or her homeland:

[W]ho is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution, or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .

Meeting this definition of "refugee" is only the first step in the process of securing relief under the Refugee Act. Since INA section 208 was enacted as a discretionary form of relief, the alien must also demonstrate that he merits a favorable exercise of discretion on his application.
This is usually a fairly routine procedure, unless the alien has either opportunities for resettlement in a third country or displays adverse factors such as misuse of the immigration laws or criminal activity.

The other significant provision of the Refugee Act concerns relief in the form of withholding of deportation. The Refugee Act substantially amended this provision, changing it from a discretionary form of relief to a mandatory form of protection. This provision also utilizes a different standard of review, providing mandatory relief to an individual only if his "life or freedom would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion." Unlike asylum relief, withholding of deportation

86. The "[a]lien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee . . . ." INA § 208(a); U.S.C. § 1158(a) (1980).

87. See Matter of Soleimani, Int. Dec. 3118 (BIA 1989) (Firm resettlement in another country does not bar an applicant from qualifying for asylum. Instead, it is just one of the factors to be taken into consideration in the discretionary aspect of this form of relief). But see 8 C.F.R. §§ 208.14(c)(2), 208.15 (1990) (providing for mandatory denial of asylum for aliens who have been firmly resettled in another country).

88. "In the absence of any adverse factors, asylum should be granted in the exercise of discretion. However, when adverse factors are present, asylum may be denied in the exercise of discretion if the applicant fails to demonstrate sufficient positive equities to overcome the adverse factors." Matter of Pula, Int. Dec. 3033 (BIA 1987).

89. See Matter of Shirdel, Int. Dec. 2958 (BIA 1984); Matter of Salim, 18 I&N Dec. 311 (BIA 1982). However, since most asylum seekers, in deportation and exclusion proceedings are not in compliance with the usual provisions of the immigration laws, the BIA has itself begun to relax this standard. See Matter of Gharadaghi, Int. Dec. 3001 (BIA 1985) (emphasizing that an alien's prior misuse of the immigration laws (fraud) should not lead automatically to a discretionary denial of asylum).

90. An applicant is mandatorily denied asylum if he has been convicted by a final judgment of a particularly serious crime in the United States. 8 C.F.R. § 208.14(c)(1) (1990).


92. INA § 243(h); see also MARTIN, supra note 38, at 81. (The discretionary form of relief is now provided by INA section 208).

93. INA § 243(h); 8 U.S.C. § 1253(h) (1980).

94. INA § 243(h)(1), 8 U.S.C. § 1253(h)(1) (1980) (emphasis added). The language of section 243(h) is similar to the refugee definition used in section 208(a) for asylum, especially in its stipulation that the threat be based on one of the same five factors. Id.; INA § 208(a) (1980). The standards of review used in these two provisions, however, are different. For a more complete discussion, see infra text accompanying notes 104-115.
does not provide for permanent resettlement in the United States, work authorization or public assistance.

Though it is clear that Congress maintained humanitarian intentions in its adoption of the Protocol as a guiding principal in enacting the Refugee Act, the statutes which comprise this effort provide no comprehensive explanation of the term “persecution” or of the categorical distinctions which qualify the grant of asylum. Consequently, the Refugee Act, while symbolically significant, comes no closer to the true and useful interpretation of the asylum standards that are absolutely necessary for maintaining consistent and impartial asylum adjudication. The terms “well-founded fear” and “persecution” remain nebulous and manipulable. Absolute acceptance of any sweeping assertion that opposition to China’s family planning policies constitutes a well-founded fear of persecution on account of “political opinion” is only one more example of such manipulation.

V. DEFINING THE STANDARDS

The Refugee Act for the first time created statutory asylum procedures for aliens within the United States or at its borders who feared persecution in their home countries and sought United States’ protec-

95. As a result, beneficiaries of withholding relief under section 243(h) become deportable when the threat of persecution ends. See Note, supra note 66, at 687. They may also be deported to another country. Id.

96. MARTIN, supra note 38, at 81.

97. In 1979, the United Nations published the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status, which was offered to give guidance in determining refugee status to the governments that signed the Convention or Protocol. U.N. Doc. HCR/PRO/4 (1979) [hereinafter Handbook]. The Handbook specifically states that “[t]here is no universally accepted definition of persecution and [that] various attempts to formulate such a definition have met with little success.” Id.

98. See Anker, supra note 76.


100. A Government Accounting Office study, focusing on the Executive Office for Immigration Review procedures concluded that the “[c]urrent adjudicatory system remains one of ad hoc rules and standards. Despite Congress’ goals in creating statutory asylum procedures, factors rejected by Congress-including ideological preferences and unreasoned and uninvestigated political judgments continue to influence the decision-making process.” Anker, supra note 76, at 3 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, BRIEFING REPORT TO THE HONORABLE ARLEN SPECTER, UNITED STATES SENATE, ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN-Few Denied Applicants Deported (1987)).
tion.\textsuperscript{101} However, the Refugee Act was not meant to declare a general right of relocation for all citizens of a nation whenever its government abuses human rights.\textsuperscript{102} Determining exactly what types of abuses qualify asylum applicants for relief under the Refugee Act is a difficult task and has led to inconsistent judicial interpretations of the statute.\textsuperscript{103} This analysis interprets and clarifies the statute, focusing specifically on the "probability of harm," the "content of harm," the "motivation in inflicting harm" and the "basis of harm."

A. Probability of Harm—Well-Founded Fear/Clear Probability

From the onset, the courts struggled to identify the degree of risk or probability of harm necessary to qualify for a grant of statutory relief.\textsuperscript{104} In this effort, the courts examined and compared the standards of review used for both asylum, under INA section 208, and withholding of deportation, under INA section 243(h).\textsuperscript{105}

In \textit{INS v. Stevic},\textsuperscript{106} the first United States Supreme Court case to address this issue, the Court distinguished between the wording of the refugee definition, "well-founded fear of persecution," required for asylum under INA section 208, and the wording of the withholding statute in INA section 243(h), "life or freedom would be threatened."\textsuperscript{107} The Court determined that, for relief under the withholding standard, the alien must show a "[c]lear probability of persecution on account of one of the five reasons listed in the Act."\textsuperscript{108} The Court further refined this

\textsuperscript{101. Id.}
\textsuperscript{102. MARTIN, supra note 38, at 88.}
\textsuperscript{103. See Comment, supra note 61, at 188 (disparity in asylum adjudication includes random disparity, which reflects varying interpretations of statutory language, and political disparity, reflecting discrimination among aliens on the basis of political considerations).}
\textsuperscript{104. See, e.g., Sankar v. INS, 767 F.2d 1448 (9th Cir. 1985); Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1984); Matter of Acosta, Int. Dec. 2986 (BIA 1985).}
\textsuperscript{106. 467 U.S. 407 (1984).}
\textsuperscript{107. Id.}
\textsuperscript{108. Id. Before 1980, the courts generally followed the "clear probability of persecution" standard for withholding relief. Blum, supra note 105, at 334. However, when INA section 243(h) was amended under the Refugee Act to become a mandatory
standard to require proof that the applicant would “more likely than not” be subject to persecution on account of one of the specified grounds. 109

The standard of proof which governed asylum applications, “well-founded fear of persecution,” 110 was not addressed by the Court in Stevic and remained a source of controversy for three more years. 111 Then, in 1987, the United States Supreme Court in INS v. Cardoza-Fonseca 112 held that this “well-founded fear” standard is different from, and more generous than, the “clear probability” standard governing applications for withholding of deportation under section 243(h). 113 This Court, however, did not attempt to resolve the ambiguity present in the “well-founded fear” terminology or even how this standard should be applied. 114 Instead, the Court left this standard to be given concrete meaning on a case-by-case basis. 115

Although the Court in Stevic 116 and Cardoza-Fonseca 117 focused primarily on the asylum/withholding standards in terms of probability of harm, rather than addressing the content of harm, 118 these decisions are meaningful to an evaluation of Chinese population policies for evidentiary reasons. To begin, the sweeping language of the interim rules, 119 with their general assertions of applicability, fails to actually utilize the standards of review so thoroughly discussed by the Supreme Court. 120 In addition, this language fails to consider the important sub-

110. INA § 101(a)(42)(A); 8 U.S.C. § 1101(a)(42)(A) (1980); see also INA § 208(a); 8 U.S.C. § 208(a) (1980).
111. The courts were split over which standard to apply for asylum relief. See Martin, supra note 38, at 90 (referring to the diversity of case law regarding this issue). See, e.g., Guevara Flores v. INS, 786 F.2d 1242, 1249-50 (5th Cir. 1986); Youkanna v. INS, 749 F.2d 360, 362 (6th Cir. 1984); Carvajal-Munoz v. INS, 743 F.2d 562, 574-75 (7th Cir. 1984)
113. Id.
114. Id. at 444.
115. Id. at 448.
118. See infra text accompanying notes 125-36.
120. For example, “aliens [who express a fear of coercive population control policies] in their homeland . . . can establish a well-founded fear, in the case of an asylum
stantive distinctions in the standard of review for these two forms of relief, before summarily declaring that upon violation of China’s population control policy, both standards will be satisfied.121

This becomes significant when we consider that Chinese population control policies are enforced by different methods and to different extents throughout China.122 To proclaim that resistance to, or violation of, China’s population control policies necessarily forms a basis of relief, for asylum and withholding alike, is to make factual determinations before hearing the evidence.123 In addition, this over-generalized application of the standards goes against the proposition in Cardoza-Fonseca that ambiguity in terminology be given concrete meaning on a case-by-case basis.124

B. Content of Harm—Persecution

In their application of asylum statutes to a variety of situations, the courts have de-emphasized the subtle distinctions in “probability of harm” and focused more precisely on the content of the harm feared and whether such harm amounts to “persecution” as stated in the Refugee Act.125 In this haphazard effort to give the term “persecution” practical meaning, the courts have met with considerable challenge.126 While the commonly used definition of “persecution” is “to oppress or harass with ill-treatment,”127 no statutory definition of this term has ever existed.128 As a result, the courts, by simply analyzing and comparing actual threats on an individual basis have endeavored to develop applicant, or a clear probability, in the case of an applicant for withholding... if evidence exists that they will be persecuted if returned to his or her homeland.” Id. at 2804 (emphasis added); see also INS v. Stevic, 467 U.S. 407 (1984); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

123. For a general discussion of the evidentiary problems associated with asylum review, see MARTIN, supra note 38, at 84-86.
125. See generally Note, supra note 66, at 694-705; see also infra notes 131, 132, 134, 138 and 155.
126. See generally Comment, supra note 61, at 188-91.
functional standards that can be uniformly applied. However, despite their efforts considerable disparity remains. 129

In Kovac v. INS, 130 the first case to address this issue, the court defined “persecution” as “[t]he infliction of suffering or harm upon those who differ . . . in a way regarded as offensive.” 131 More recent courts have refined and narrowed this definition by focusing on the type of harm, whether economic or physical, its specificity, whether directed at individuals, groups or entire populations, and its severity. 132 Only by negative implication have any meaningful standards emerged. To this effect, the courts have generally agreed that “[p]ersecution cannot be established by allegations of widespread violence, anarchy, or unrest which equally affects all citizens of the applicant's homeland . . . [or by] general economic disadvantage, decline in . . . fortunes . . . loss of . . . family land . . . [or] confinement to . . . quarters . . . .” 133

While only rough and tentative generalizations can be made from the context of these disjointed holdings, it does appear, though inconclusively, that in the determination of asylum relief the courts have sought to distinguish and exclude claims based upon general violence and pervasive oppression. 134 In Matter of Sanchez and Escobar, 135 the BIA went even further to require that “[a]n individual [must] show he would be singled out or treated differently from others in his country because he possessed a characteristic a persecutor sought to punish.” 136

129. Disparity in the application of these statutes is largely the result of political motivations. See Helton, Political Asylum under the 1980 Refugee Act: An unfulfilled Promise, 17 U. Mich. J.L. Ref. 243 (1984); see also Comment, supra note 61, at 202-07.

130. 407 F.2d 102 (9th Cir. 1969).

131. Id. at 107.

132. See Comment, supra note 61, at 202-07.

133. Blum, supra note 105, at 345 (citing Maroufi v. INS, 772 F.2d 597, 599 (9th Cir. 1985); Raass v. INS, 692 F.2d 596 (9th Cir. 1982); Shoaee v. INS, 704 F.2d 1079, 1084 (9th Cir. 1983); Espinosa-Martinez v. INS, 754 F.2d 1536, 1540 (9th Cir. 1985)); see also Zalega v. INS, 916 F.2d 1257 (7th Cir. 1990) (economic persecution not enough for asylum); Khalaf v. INS, 909 F.2d 589 (1st Cir. 1990) (punishment for failure to comply with a country's compulsory military service is prosecution not persecution).

134. See Matter of Sibrun, Int. Dec. 2932 (BIA 1983) (generalized oppression by a government of virtually the entire populace is not persecution per se).


136. Id. at 11. But see Bolanos-Hernandez v. INS, 767 F.2d 1277 (9th Cir. 1985) (holding that a general level of violence does not make a specific threat insufficient).
This holding becomes even more significant in the context of these Chinese asylum claims because China’s family planning policies are being applied to all members of its population.\textsuperscript{137}

For that matter, it is inappropriate to specifically and resolutely categorize the “harm feared” for purposes of establishing claims of persecution as either a general “fear of coercive population control policies” or as “a fear of being forced to submit to abortion or sterilization.”\textsuperscript{138} This classification effectively ignores the actual consequences of violating the population control policies and not submitting to abortion or sterilization. As a result, it provides asylum relief to applicants who actually fear a type of harm that under other circumstances would not be protected.

For example, a Chinese woman who has recently given birth to a second child may be pressured or even ordered to submit to sterilization procedures. However, if she refuses to obey this mandate the routine practice in her locality may only be to withhold a state-given benefit or to impose on her a monetary fine or surcharge.\textsuperscript{139} In this case, the actual harm feared is economic, not physical, and may not be sufficient to sustain a claim of asylum based upon a well-founded fear of persecution.\textsuperscript{140} For that reason, any determination of “persecution” in terms of “content of harm” must include a complete factual analysis performed on a case-by-case basis. To pigeonhole the Chinese policies into any specific category of harm would be improper.

C. Motivation for Imposing Harm—Punishment and Legitimacy

Another important element to consider in the statutory interpreta-

\textsuperscript{137} See China: A Country Study, supra note 9, at 77.


\textsuperscript{139} See China: A Country Study, supra note 9, at 76.

\textsuperscript{140} This example only suggests that the actual consequences be considered in the persecution analysis, rather than the general “population control policy.” It does not assert that the economic consequences would necessarily be inadequate to satisfy the persecution standard. Although the courts tend to deny claims based on general economic conditions, there are circumstances where purely economic harm will suffice. See, e.g., Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969) ("[I]mposition of substantial economic disadvantage . . . constitutes persecution."); In re Acosta, I&N. Dec. 2986 (1985) (persecution "could consist of economic deprivation so severe that [it] constitute[s] a threat to an individual’s life or freedom").
tion of the term “persecution” concerns the home country’s motivation in performing the harmful actions.\textsuperscript{141} In \textit{Matter of Mogharrabi},\textsuperscript{142} the BIA adopted a four step test\textsuperscript{143} to determine whether the asylum applicant has satisfied the “well-founded fear of persecution” standard.\textsuperscript{144} The alien was required to demonstrate that:

1. She possessed a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
2. the persecutor was already aware, or could become aware, that she possessed this belief or characteristic;
3. the persecutor had the capability of punishing her;
4. the persecutor had the inclination to punish her.\textsuperscript{145}

The \textit{Mogharabbi} test is significant because of its standard use of the word “punishment,”\textsuperscript{146} which illustrates an important consideration in the application of asylum statutes to the Chinese population control policies. That is, the home country’s performance of a feared action must be motivated by an ultimate desire to impose on the individual some form of discipline or punishment.\textsuperscript{147} In \textit{Hernandez-Ortiz v. INS},\textsuperscript{148} the Ninth Circuit Court of Appeals expanded on this concept by considering a possible “[l]egitimate basis for governmental action . . . .”\textsuperscript{149} To this effect, the court suggests that in determining whether

\begin{itemize}
\item \textsuperscript{141} See generally Note, supra note 71, at 1140 (discussing situations where a government’s punishment is based on valid interest in law enforcement); Blum, supra note 105, at 345 (distinguishing between the scope and nature of persecution and prosecution).
\item \textsuperscript{142} \textit{Id.} at 3028 (BIA 1987).
\item \textsuperscript{143} \textit{Id.} at 439. The BIA, in \textit{Mogharrabi} also expanded on \textit{Cardoza-Fonseca}’s analysis, holding that for asylum “a well founded fear of persecution [exists] if a reasonable person in her circumstances would fear persecution if she were to be returned . . . .” \textit{Id.} (quoting Guevara Flores v. INS. 786 F.2d 1242, 1249 (5th Cir. 1986)).
\item \textsuperscript{144} \textit{Id.} at 448.
\item \textsuperscript{145} \textit{Id.} The \textit{Mogharabbi} analysis is actually a modification of the test developed by the BIA in \textit{Matter of Acosta}, \textit{Int. Dec.} 2986 (BIA 1985).
\item \textsuperscript{146} See \textit{Acosta}, \textit{Int. Dec.} 2986, at 211. (“The term persecution in the definition of a refugee under the Act means harm or suffering that is inflicted upon an individual in order to punish him . . . .”) (emphasis added).
\item \textsuperscript{147} Punishment is defined as the act of subjecting someone to a penalty for a crime, fault or misbehavior to inflict a penalty on a criminal or wrongdoer for an offense. \textsc{The American Heritage Dictionary of the English Language} 1060 (New College Edition 1976).
\item \textsuperscript{148} 777 F.2d 509 (9th Cir. 1985).
\item \textsuperscript{149} \textit{Id.} at 516.
\end{itemize}
the harm feared amounts to persecution required for granting asylum relief, "[i]t is permissible to examine the motivation of the persecutor, [and] . . . look to the political view and actions of the entity or individual responsible for the threats or violence . . . ."

China's population control measures are enforced for the genuine purpose of containing population expansion to a manageable level for the ultimate welfare and survival of the Chinese citizens. Consequently, their application to the general population could hardly be considered a form of punishment. Likewise, the government's motivation in imposing these policies on the Chinese people could scarcely be considered illegitimate. The BIA, in Chang, correctly recognized and highlighted this distinction, stating that "[t]o the extent . . . that such a policy is solely tied to controlling population, rather than as a guise for acting against people for reasons protected by the Act, we cannot find that persons who do not wish to have the policy applied to them are victims of persecution . . . ."

D. Basis of Harm—Race, Religion, Nationality, Political Opinion, Membership in a Particular Social Group

As a final requirement, the Refugee Act limits the grant of asylum protection to those individuals who can demonstrate that their fear of persecution is based on one of five grounds enumerated in the Act's definition of a refugee: race, religion, nationality, membership in a particular social group or political opinion. To this extent, even applicants who can establish proof of severe physical abuse may not qualify for asylum relief.
The first and third categories, race and nationality, can be summarily dismissed as bases for asylum relief since China's population control policies are imparted upon the entire nation regardless of race or nationality and afford even greater allowances to ethnic minorities.\(^\text{158}\) Religion, as well, is a tentative argument because the Chinese policy is itself religiously neutral.\(^\text{159}\) Even if an applicant claimed that religious beliefs precluded him from submitting to sterilization or abortion, he must also establish evidence showing that the government was actually persecuting him for the purpose of overcoming these religious convictions.\(^\text{160}\) Once again, the motivation behind the government's action becomes an important issue.\(^\text{161}\)

To be considered for asylum on the basis of membership in a particular social group, the fourth category, the applicant must establish that the persecution is "[d]irected toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . [such as] sex, color or kinship ties . . . [or] shared past experience."\(^\text{162}\) In Del Valle v. INS,\(^\text{163}\) this definition was further expanded to require "[s]ome evidence that the applicant or those similarly-situated are at a greater risk than the general population."\(^\text{164}\) In contrast, the Chinese policies are applied to the general population, and although severity in enforcement may vary from region to region, there is no link between this geographically based disparate treatment and an applicant's status as a member of a particular social group. Even if one suggests that those in opposition to the policy share the common characteristic of belief or conviction, there is still no evidence to suggest that petitioner had been raped for personal reasons, not for political opinions, despite the fact that the rapist shouted political slogans, opposed the agricultural cooperative that her uncle administered, murdered her uncle before raping her and threatened to kill her if she exposed him. Other courts, however, have reached unpredictable conclusions in this respect. See generally Linda Dale Bevis, Note, Political Opinions of Refugees: Interpreting International Sources, 63, WASH. L. REV., 395 (1988) (commenting on inconsistent judicial interpretations of political opinion in asylum requests).

158. Epstein, supra note 19, at A34; see also supra, note 25.
159. Epstein, supra note 19, at A34.
160. In Chang, the BIA compares China's population policy to the United States' imposition of Social Security taxes against Amish persons whose religious beliefs forbade payment of the taxes or receipt of the benefits. Chang, Int. Dec. 3107 at 13 (citing United States v. Lee, 455 U.S. 252 (1982)).
161. See supra text accompanying notes 142 to 151.
163. 776 F.2d 1407 (9th Cir. 1985).
164. Id. at 1411.
that Chinese officials are singling out these resisters for retribution.

The final category, political opinion, is the most commonly used basis for claims of asylum.\textsuperscript{165} It has also become the most controversial.\textsuperscript{166} While adjudicators differ over what activities or opinions are properly defined as political, most have accepted as “political” such activities as membership in a political organization, expression of a political opinion through party membership or political demonstrations and propaganda distribution.\textsuperscript{167} Many Chinese asylum applicants claim that violation of the Chinese population control policies is an expression of political opinion.\textsuperscript{168} Assuming an applicant could establish that his refusal to observe the Chinese policy was itself an expression of his political conviction, any asylum analysis would be incomplete without also considering the content and motivation of the Chinese government’s actions.

In this respect, two important distinctions must be addressed. First, in terms of content, the Chinese population control policies were initiated as administrative family planning practices designed to improve the physical and economic welfare of the nation; they were not conceived as manifestations of communist political doctrine or as efforts to quell the population into political conformity.\textsuperscript{169} Second, and most important, there is again no evidence to suggest that violators of the policy, regardless of their political associations, are being harmed in any effort to punish them for maintaining such beliefs.\textsuperscript{170} Consequently, the statutorily categorized “basis of harm” standards have not been adequately satisfied and therefore, do not form sufficient grounds for asylum.

\begin{footnotesize}
\begin{enumerate}
\item[165.] Blum, supra note 105, at 348.
\item[166.] See Note, supra note 157, at 401.
\item[167.] Id.
\item[169.] See generally Note, supra note 122, at 1069-72 (discussing the jurisprudence of Quan (“Rights”) in the People’s Republic of China).
\item[170.] The government’s motive must first be to punish. See supra text accompanying notes 142-151. Now we see that, for the “political opinion” basis of asylum relief, the punishment must also be for the purpose of suppressing a political belief or expression. See Note, supra note 157, at 403 (discussing political reasons for persecution).
\end{enumerate}
\end{footnotesize}
VI. GRANTING ASYLUM ON THE BASIS OF POPULATION CONTROL POLICIES

Asylum applicants who base their claims on opposition to or violation of China’s population control policies do not satisfy the current legislative standards for asylum relief. First, although the Chinese policies apply to the entire Chinese population, there are many exceptions to the one-child guidelines, and the consequences for violating these guidelines are not always severe. Therefore, any sweeping assertions, such as those made in the interim regulations, regarding the probability of harm, or the content of the harm, are at best over-generalizations. The INS, in promulgating interim rules which contain such classifications, make improper pre-hearing factual determinations before factual evidence has been presented, ignoring the discretionary case-by-case adjudication process and defying the ultimate purpose of maintaining asylum standards.

Second, judicial interpretations of the statutory term “persecution” uniformly agree that the home country’s government must be motivated by a desire to punish an individual for illegitimate reasons. In China, this is simply not the case. All evidence indicates that the Chinese policies were enacted exclusively for the purpose of controlling population growth: not as a subterfuge for any illicit or unlawful designs.

Finally, the Chinese population control policies are imparted on all citizens for the benefit of the entire nation. The policies do not discriminate against any particular group, and they do not seek to punish any individual who opposes the policy for religious, political or social reasons. Therefore, asylum claims based exclusively on opposition to China’s population control policies would likely fail. Also, any attempt to administratively categorize such claims as expressions of political opinion, as in the interim rules, manipulates the standards already established in asylum law.

Family planning was first recognized as a basic human right on Human Rights Day, December 10, 1966, in the Declaration on Population by World Leaders. Two years later, it was officially recognized

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171. See supra text accompanying notes 26 to 32.
172. See supra text accompanying notes 151 to 155.
173. See supra, text accompanying notes 17 to 25.
174. See supra text accompanying notes 151 to 155.
by the United Nations. Nonetheless, even if China's population control policies are considered to be gross violations of human rights, one question remains: Should the United States, in good conscience, expand the asylum doctrine to afford these individuals statutory relief, while other victims fleeing far more outrageous human rights abuses such as terrorism and guerrilla warfare remain unprotected?

Underlying the issue of providing asylum protection to individuals opposing population control policies is an even more universal conflict between the individual's right of choice in family planning and the state's need to limit the size of its population in the interest of all. The conflict reaches extreme proportions in those countries where the needs of a rapidly growing population exceed the resources available to fulfill those needs.

Even in the United States, concerned humanitarians have grappled with the challenge of controlling population growth and the ethical dilemmas which accompany coercive family planning. Increasing recognition of the causal link between unrestricted, irresponsible procreation and its devastating effects on urban social conditions has led some to question whether parenthood itself should not be considered a privilege extended to society rather than an inherent right of the individual.

Brother Becomes Big Daddy, 10 BROOKLYN J. INT'L L. 83 (1984) (citing POPULATION DIVISION OF THE DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION NEWSLETTER No. 1, 44 n.25 (1968)).

176. Id. However, the United Nations' Universal Declaration of Human Rights also contains a clause which authorizes states, in the exercise of their police power, to place restrictions upon human rights in order to preserve public order, health, safety and morals. Id. In response to extreme situations, states are permitted to impose certain restrictions which might otherwise be considered illegal, unconstitutional or violative of human rights. Id. at 96 (citing the Universal Declaration of Human Rights, G.A. Res. 217 U.N. Doc. A/810 (1948)).


178. See Note, supra note 175, at 90.

179. Id.

180. For a comprehensive discussion on the competing schools of thought regarding coercive population control policies, see generally, Comment, Legal Analysis and Population Control: The Problem of Coercion, 84 HARV. L. REV. 1856 (1971).

181. Note, supra note 175, at 96. Excessive population growth might well threaten substantive constitutional rights by diluting their practical value. Comment, supra note 180, at 1906. For example, a steadily increasing population might undermine individual interests in access to public facilities for communicative purposes and
As our state governments continue to regulate a wide variety of activities in ways which impinge on reproductive freedom, including compulsory eugenic sterilization statutes for confirmed criminals and mental incompetents, the next question may well be: Should the United States, with all of its skeletons, be judging China?

To give up some freedom for the survival of a nation is not an unreasonable notion. With so many other deserving applicants currently being denied United States protection, the prospect of affording additional relief to individuals on the basis of opposition to population control policies seems grossly unfair.

VII. CONCLUSION

In a perfect world, the United States could offer comfort, protection and economic sustenance to all individuals requesting such relief. Of course, in a perfect world, we would not have to. However, with over 2.3 million active registrants awaiting immigrant visas, and almost 200,000 applications filed for refugee status, this country is left with the task of establishing priorities and making hard decisions.

Asylum legislation was enacted for the purpose of protecting victims of violence, abuse and other human rights violations. However, for practical purposes, adjudicators must discriminate among these victims and select only individuals who fear the type of harm which Congress intended to protect. Individuals in opposition to, or in violation of, China's population control policies unfortunately do not meet the appropriate standards of review to qualify for this protection. In addition, any effort designed to administratively categorize these individuals as deserving asylum protection under the Act only works to manipulate the current standards and ultimately disregards the purpose of the Act. Of course, Congress could statutorily expand asylum standards to pro-

in a zone of personal and physical privacy. Id.

182. See Annotation, Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives, 53 A.L.R.3d 960 (1990).

183. While the determination of which aliens are more or less deserving of asylum relief is purely subjective, the denial of asylum to victims of internal civil unrest is frequently mentioned by commentators. See generally Heyman, supra note 175 (examining the predicament of victims of civil strife in El Salvador).


185. Id. at 26.

186. See supra note 14 and accompanying text.

187. See supra notes 14-16 and accompanying text.
vide protection for these individuals. However, such legislation would create an unfair and inequitable advantage over other asylum seekers presenting equally desperate claims. China’s population control policies, while no doubt controversial, were established for a legitimate purpose under extreme and severe conditions. Perhaps as we sit back and watch our fragile environment decay, our natural resources dwindle and our fellow citizens cry out in hunger and pain, we will one day ask ourselves whether China’s plan was not actually the humane solution.

Susan Yoffe Slaton
The Florida Statute Prohibiting Adoption by Homosexuals in View of Seebol v. Farie: Expressly Unconstitutional

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I. INTRODUCTION

According to Florida law, an able and willing person may not adopt a child, and is not even eligible for review as a potential adoptive parent by the Department of Health and Rehabilitative Services, if that person is homosexual. Florida is one of only two states in the nation which expressly bars gays and lesbians from adopting children solely on the basis of their sexual orientation. Whether the Florida adoption statute is unconstitutional because it establishes a per se bar against adoption by homosexuals based solely on their sexual orientation, regardless of the applicant's parental ability to care and nurture an adoptive child, was recently brought before the Florida Circuit

Court of Monroe County in the case of *Seebol v. Farie.*

Edward Seebol, a businessman and resident of Key West, Florida, applied to the state to adopt a special needs child. He filled out the application for adoption candidly, and answered “yes” to the question as to whether he was a homosexual. The Department of Health and Rehabilitative Services denied his application since he was an admitted homosexual.

Seebol decided to challenge the constitutionality of the Florida adoption statute which states “[no] person eligible to adopt under this statute may adopt if that person is a homosexual.” The Florida Circuit Court of Monroe County agreed with Seebol and eventually held that the Florida adoption statute was unconstitutional because it prohibited homosexuals from adopting a child solely on the basis of their sexual orientation.

This comment discusses the unconstitutionality of Florida’s adoption statute which creates an irrebuttable presumption against homosexuals adopting children, in view of *Seebol v. Farie.* First, it focuses on the factual background and the legislative intent of the Florida adoption statute. Second, it discusses the determination of the children’s best interest, the essential issue in child custody proceedings. Third, it examines the reasons why the Florida adoption statute violates the right to privacy under the Florida Constitution. Fourth, it discusses the statute’s violation of the Equal Protection Clause of the Florida and United States Constitutions, and examines the level of scrutiny employed in the analysis of equal protection. Fifth, it focuses on the irrebuttable presumption contained in the Florida adoption statute which bars homosexuals from adopting and which violates both

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4. Id. at C53-54. Mr. Seebol participated in various community services such as: state sponsored guardianship and guardian ad litem programs, AIDS education and assistance programs, and is currently the executive director of AIDS Help Inc. Id. at C54.
5. Id. at C54.
7. Seebol, 16 Fla. L. Weekly at C57. Seebol’s motion for judgment on the pleadings was granted March 15, 1991. Id. at C52.
8. Id. at C57.
11. Seebol, 16 Fla. L. Weekly at C54.
13. Seebol, 16 Fla. L. Weekly at C56 (construing Fla. Stat. § 63.042(3)
procedural and substantive due process. Finally, the comment concludes by discussing the discrimination that homosexuals deal with on a daily basis and the potential future abolishment of existing irrational prejudice in light of the Florida Circuit Court of Monroe County ruling.

II. FACTUAL BACKGROUND

A. The Florida Adoption Statute, section 63.042(3)

Prior to addressing the constitutional violations of the Florida adoption statute asserted by Seebol, the Circuit Court of Monroe County discussed the definition of adoption, the court’s duties in adoption proceedings, and the legislative intent of the Florida adoption statute. The court’s discussion concluded by indicating that certain societal events have evolved since the enactment of the statute which reflect that expressly prohibiting homosexuals from adopting is no longer acceptable in Florida. The circuit court began its analysis by defining adoption “as a personal relationship created by one capable of adopting and one capable of being adopted.” Furthermore, adoption can only be “decreed” by Florida statute. The effect of a decree of adoption is to create a relationship between the adoptive parent and adopted child similar in all respects to a relationship were the adopted child is a “legitimate blood descendant” of the adoptive parent. Next, the circuit court looked to a Florida Supreme Court case, In re Adoption of H.Y.T., to define its duties in adoption proceedings. H.Y.T held that the primary concern of a court in adoption proceedings is for the wel-

(1989)).
14. Id. at C53.
15. Id.
19. 458 So. 2d 1127 (Fla. 1984). The potential adoptive child's attorney asked the court to grant his motion and close the adoption proceedings in accordance with Florida statute section 63.162(1)(a), and the media protested. Id. at 1128 (citing Fla. Stat. § 63.162(1)(a) (1991) which states that all adoption proceedings shall be held in a closed court, meaning that only people who are considered essential to the proceedings are allowed admittance in the courtroom). The Florida Supreme Court held that Florida statute section 63.162(1)(a) was constitutional. Id. at 1129.
fare of the child whose custody is at issue.\textsuperscript{20} The Circuit Court of Monroe County also looked at the legislative intent of the Florida adoption statute the primary focus of which is to protect the best interests of the child by providing a "permanent family life," as well as to protect the interest of the natural and adoptive parents.\textsuperscript{21} However, the Circuit Court of Monroe County, agreeing with the holding of \textit{H. Y. T}, emphasized that the paramount duty of the court is to protect the welfare of the adoptive child.\textsuperscript{22} In its pursuit to protect the best interests of the child, the court then examined the suitability of a person to adopt. Past case law of what constitutes a suitable adoptive parent is important in order to determine what type of factors the court considers in such disputes. Unfortunately, Florida case law challenging the suitability of potential adoptive parents is sparse.\textsuperscript{23}

Age was an issue in \textit{In re Adoption of Christian},\textsuperscript{24} where the petitioner for adoption was a sixty-eight-year-old grandmother who wanted to adopt her granddaughter.\textsuperscript{25} The Fourth District Court of Appeal determined that the grandmother was in good health and had a modest income, and approved the petition for adoption.\textsuperscript{26} The grandmother's love and commitment to provide a stable and loving home overshadowed her age or financial limitations. Therefore, advanced age alone does not disqualify a perspective adoptive parent.\textsuperscript{27} Likewise, in \textit{In re Duke},\textsuperscript{28} the Florida Supreme Court held that age and a very modest

\textsuperscript{20} \textit{Id.} at 1128. The Florida Supreme Court also recognized that in adoption proceedings the public policy of the legislature is to protect both the adoptee and the prospective adoptive parents from unwanted publicity. \textit{Id.}

\textsuperscript{21} \textit{Fla. Stat.} § 63.022(1) (1991) (stating "[i]t is the intent of the Legislature to protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide to all children who can benefit by it a permanent family life ... ").

\textsuperscript{22} § 63.022(2)(1) (stating "[i]n all matters coming before the court pursuant to this act, the court shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted."); \textit{see also} Sulman v. Sulman, 510 So. 2d 908, 909 (Fla. 4th Dist. Ct. App. 1987) (emphasizing that the judicial system must protect the child’s best interest); Bernstein v. Bernstein, 498 So. 2d 1270, 1272 (Fla. 4th Dist. Ct. App. 1986) (child’s best interest is paramount in custody proceedings and is to be protected by the state and the court).


\textsuperscript{24} 184 So. 2d 657 (Fla. 4th Dist. Ct. App. 1966).

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.} at 658.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} 95 So. 2d 909 (Fla. 1957) (en banc).
income are not a "per se" bar in the adoption process.\(^29\) The petitioners in *In re Duke* were a forty-eight year old man and a sixty-three year old woman who wanted to adopt a child.\(^30\) In approving the adoption, the Florida Supreme Court determined that in light of the petitioners' good health and moral character, their advanced age and modest income were not grounds for denial.\(^31\) The holdings in these two cases indicate that a single factor in and of itself, or even a combination of factors, is not determinative of a person's parental suitability. Therefore, the single fact that a person is a homosexual should not be determinative of parental unfitness.

The circuit court in *Seebol v. Farie* concluded its examination of the factual background of the Florida adoption statute by stating that since its enactment in 1977, societal circumstances have changed.\(^32\) Namely, the right of privacy amendment was added to the Florida Constitution in 1980.\(^33\) Additionally, the court determined that society has become more "knowledgeable" and more "tolerant" of homosexuality.\(^34\) Finally, the court recognized a substantial increase in the births of special needs children,\(^35\) and the extreme difficulty that the Department of Health and Rehabilitative Services has experienced in attempting to find "permanent" families for these special needs children.\(^36\)

Even though society may be inching forward in its understanding of homosexuality, no one should have the right to declare that a person

\(^{29}\) Id. at 910.
\(^{30}\) Id. at 909.
\(^{31}\) Id. at 910; see also *In re Adoption of M.A.H.*, 411 So. 2d 1380 (Fla. 4th Dist. Ct. App. 1982) (52 year old grandparents petitioned to adopt their granddaughter; it was found that they provided the child with a caring and a "warm and loving" relationship).
\(^{32}\) *Seebol*, 16 Fla. L. Weekly at C53.
\(^{33}\) Id. (citing Fla. Const. art. I, § 23).
\(^{34}\) Id.
\(^{35}\) A special needs child is defined by Florida as "a child whose permanent custody has been awarded to the department or to a licensed child-placing agency and . . . has established emotional ties with his or her foster parent; or [i]s not likely to be adopted. . . . *Fla. Stat.* § 409.166(2)(a)1-2 (1991). A child is considered "not likely to be adopted" if the child meets one of the following five criteria:

1. The child has attained the age of eight; (2) the child is mentally retarded; (3) the child is physically or emotionally handicapped; (4) the child is of black or racially mixed parentage or; (5) the child belongs to a sibling group in which two or more of the siblings must remain together in a potential adoption.

\(^{36}\) *Seebol*, 16 Fla. L. Weekly at C53.
is incapable of caring and loving a child simply on the basis of his or her sexual orientation. The state of Florida has blindly invented the proposition that there is some connection between who a person wakes up next to in the morning, and his or her ability to discipline and care for a child.\textsuperscript{37} The circuit court in \textit{Seebol} finally shoved the state of Florida into the twentieth century by advocating that there is no causal connection between a person's sexual orientation and their parental ability.\textsuperscript{38}

\section*{B. Homosexual Parents and the Best Interests of the Child}

In child custody cases involving a homosexual parent, the modern judicial trend is that the sexual orientation of the parent is only a factor in determining custody if there is evidence that the parent's homosexuality has adversely affected the welfare of the child.\textsuperscript{39} However, a minority of jurisdictions view a parent’s homosexuality as an automatic “disqualifying factor” in child custody proceedings.\textsuperscript{40} These courts arbitrarily oppose homosexual parenting strictly because it is “a violation of society's mores.”\textsuperscript{41}

Rather than spending the time to educate themselves about the concept of homosexuality so that they can make informed decisions in custody proceedings, these courts blindly promote discrimination against homosexuals solely because homosexuals’ sexual orientation is different than the societal “norm.” While an idealistic society would be one without private biases, the reality is that prejudice exists in society today. However, that does not mean that the people who compose society should stop trying to eradicate prejudice, and it certainly does not mean that the judiciary, as well as the legislature,\textsuperscript{42} should encourage such discrimination through factually incorrect decisions and statutes.

While custody law has taken strides to overcome the prejudice

\begin{itemize}
  \item For example, a person's sexual orientation does not measure his or her ability to attend a little league game and cheer for their child.
  \item Seebov v. Farie, 16 Fla. L. Weekly C52 (16th Cir. Ct. 1991).
  \item Id. The minority jurisdictions include North Carolina and Tennessee. \textit{Id. at n.4}.
  \item Nancy D. Polikoff, \textit{This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families}, 78 Geo. L.J. 459, 553 (1990).
  \item \textit{E.g.}, Fla. Stat. § 63.042(3) (1991).
\end{itemize}
Worsnop faced by homosexual parents, adoption law is just beginning to eradicate societal misconceptions about homosexual parenting. The Florida Circuit Court of Monroe County in Seebol v. Farie recognized, in examining case law of several states, that homosexuality of a parent is not a "per se" bar to child custody in numerous jurisdictions, and thus, should not be a bar to child custody in adoption proceedings.

After denouncing the "per se" bar against homosexuals in child custody cases, the Florida circuit court advocated the use of the nexus approach to determine the child's best interest, as applied in Bezio v. Patenaude. In Bezio v. Patenaude, the Supreme Judicial Court of Massachusetts, applying the nexus approach, held that homosexuality does not bar an award of child custody in the absence of evidence demonstrating a correlation between the parent's homosexuality and any adverse effect on the welfare of the child. This nexus approach should be the standard used to determine the best interests of the child in custody proceedings involving a biological or an adoptive family because a parent's custody of a biological child is legally identical to an adoptive parent's custody of an adopted child.

The court in Seebol provided studies which have proven that children raised by homosexual parents go through the same process of child development as children raised by heterosexual parents. In fact, a computation of studies indicated that children whose primary care-

43. Comment, supra note 2, at 1025.
44. Seebol, 16 Fla. L. Weekly at C53 (citing In re Marriage of Cabalquinto, 669 P.2d 886 (Wash. 1983)) (holding that homosexuality, in this case the father's, standing alone is not an automatic disqualification in child custody proceedings, and that this holding is consistent with other jurisdictions); see also S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (the fact that the mother is a lesbian is not a factor in the custody dispute, unless the child has been adversely affected).
45. The nexus approach used in determining the best interests of the child in custody proceedings states that a parent's homosexuality can only be a factor for the court to consider if there is evidence that the homosexuality of the parent has adversely affected the child, whose custody is in dispute. Smart, supra note 39, at 355.
46. 410 N.E.2d 1207 (Mass. 1980).
47. Id. at 1216; see also Stroman v. Williams, 353 S.E.2d 704, 706 (S.C. 1987) (denying a father's claim to change child custody solely because of the mother's homosexuality, since no adverse effects were established); Robert A. Beargie, Note, Custody Determinations Involving the Homosexual Parent, 22 Fam. L.Q. 71, 76 (1988) (parent's sexual orientation only a factor in custody disputes when it has adversely affected the child).
48. See Fla. Stat. § 63.172(1)(c) (1991); see also Abrams, supra note 18, at 91-97.
taker was homosexual exhibited "typical" psychosexual development. Additionally, the number of children of homosexual parents who develop same-sex orientation do so as randomly and in the same proportion as children of the general population. Furthermore, in support of the nexus standard for child custody, the circuit court of Monroe County noted that mental health professionals have concluded that homosexuals do not "learn" sexual preference from the sexual identity of their parents. Since the development of a child in a homosexual household is the same as a heterosexual household, it appears that there is no difference in parental ability between a homosexual parent and a heterosexual parent. Furthermore, it is in the child's best interest to be raised in a loving and stable home by a homosexual parent, than a sterile heterosexual environment filled with turmoil.

This issue of homosexual adoption has never been addressed by an appellate court in Florida. However, the circuit court in In re Pearlman determined that numerous jurisdictions had adopted the nexus standard in child custody proceedings involving a homosexual parent, and held that the nexus approach would be the proper standard for adoption where a homosexual parent was involved. Since there were no adverse effects on the child, the court awarded custody of the child to the deceased mother's lesbian companion, who had been become the child's primary caretaker over the past five years.

51. Seebol, 16 Fla. L. Weekly at C53 (citing Steve Susoeff, Comment, Assessing Children's Best Interests when a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 882 (1985)).
52. Id. (citing Marilyn Riley, Note, The Avowed Lesbian Mother and her Right to Child Custody: A Constitutional Challenge that can no Longer be Denied, 12 SAN DIEGO L. REV. 799, 861 (1975)); see also Steve Susoeff, Comment, Assessing Children's Best Interests when a Parent is Gay or Lesbian: Toward a Rational Custody Standard, 32 UCLA L. REV. 852, 882 (1985).
53. Riley, supra note 52, at 860.
54. Seebol, 16 Fla. L. Weekly at C53.
56. Id. at 1356; see also Rowsey v. Rowsey, 329 S.E.2d 57, 61 (W. Va. 1985) (to remove custody of the child from the lesbian mother based on a "speculative notion of potential harm" is an abuse of discretion). Contra Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (the father's "immoral" and "illicit" homosexual relationship classifies him as an unfit parent as a matter of law); cf. J.P. v. P.W., 772 S.W.2d 786, 793 (Mo. Ct. App. 1989) (court can not discount the future effect of the father's homosexual relationship on the child's moral development).
57. 15 FLA. L. REP at 1355.
The issue in *Seebol* was raised in *In re Adoption of Charles B.*, a 1990 case in which the Supreme Court of Ohio sanctioned the adoption of a special needs child by his psychological counselor, who was a homosexual. The child, Charles, was classified as a special needs child because he was suffering from leukemia. Furthermore, Charles had a low I.Q., a speech disorder and possible brain damage as a result of fetal alcohol syndrome. Charles had been in the permanent custody of the County Department of Human Services since he was three years old because his family had neglected and abused him.

The Ohio Supreme Court relied on the opinion of mental health professionals, who testified that it would be in the best interest of Charles to approve the adoption. The adoptive parent needed to be “stable” and “flexible,” but more importantly, the parent would have to provide Charles with the special services he needed to sustain his life. The court also determined that a child is better off living with an adoptive parent in a permanent home than just existing in an institution or foster home. Finally, the Supreme Court of Ohio, in approving the adoption, held that the determination of whether to approve a petition for adoption should be made on a case-by-case basis, and that the court should examine all essential factors before concluding what is in the child’s best interests.

Similarly, both *Seebol* and *In re Adoption of Charles B.* involve the adoption of a special needs child by a homosexual parent. The circuit court in *Seebol*, guided by the court’s reasoning in *In re Adoption of Charles B.*, concluded that it would be in the best interests of the increasing number of adoptive children to allow homosexuals to adopt. The Florida Circuit Court of Monroe County saved these special needs child from being condemned to grow up in a sterile government institution, and for some with more serious ailments, the court may possibly have saved them from being relegated to a life sentence in a state sponsored foster home.

58. 552 N.E.2d 884 (Ohio 1990).
59. Id. at 889-90.
60. Id. at 884.
61. Id. at 889.
62. Id.
63. *In re Adoption of Charles B.*, 552 N.E.2d at 889.
64. Id.
66. 552 N.E.2d at 884.
III. THE RIGHT TO PRIVACY IN FLORIDA

The Florida Circuit Court of Monroe County in Seebol v. Farie, also held that the Florida adoption statute is unconstitutional because it violates the plaintiff's right of privacy under the Florida Constitution. The right of privacy explicitly states that people are protected against governmental interference into their private life. Therefore, the right of privacy under the Florida Constitution protects citizens of Florida from governmental inquiries to determine a person's sexual orientation. The issue of whether the right to privacy in Florida encompasses a person's sexual orientation was addressed by the circuit court in Seebol, who entered into a discussion of the evolution of the right of privacy under the Florida Constitution. The court began the discussion by addressing a Florida Supreme Court case, Rasmussen v. South Florida Blood Service. In Rasmussen, the Florida Supreme Court characterized the right of privacy under the Florida Constitution as "the most comprehensive of rights and the right most valued by civilized man." The circuit court in Seebol recognized that this right of privacy is considered to be the most fundamental right afforded a person and includes a person's sexual orientation. The Circuit Court of Monroe County also addressed the United States Supreme Court case of Roe v. Wade in determining Florida's privacy right. In Roe, the constitutionality of the Texas abortion statute, which made it a criminal offense to obtain or attempt to obtain an abortion for reasons other than to save the mother's life, was challenged by a class action brought

72. Id.
73. 500 So. 2d 533 (Fla. 1987).
74. Id. at 535 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)). In Rasmussen, the court held that an AIDS victim was not permitted to subpoena the names and addresses of blood donors to prove the source of the disease because the right of privacy of the donors, and maintaining a blood donation system, was paramount. Id. at 537.
76. 410 U.S. 113 (1973).
by a pregnant single woman. The Court held that the Texas statute was unconstitutional because it violated the right to privacy of the Constitution, and determined that the right to privacy has an “extension” which includes matters dealing with marriage, procreation, contraception, family relationships, child rearing, and education. Since the right of privacy had been expanded to include matters concerning sexual intimacies, it should be only logical to include under this category matters concerning sexual orientation.

In furtherance of the discussion of the evolution of the right to privacy under the Florida Constitution, the circuit court also looked to Winfield v. Division of Pari-Mutuel Wagering. The court determined that the citizens of Florida had adopted an expressed right to privacy amendment in order to further protect personal privacy, and that the Florida right to privacy was “stronger” and “broader” than the right to privacy under the United States Constitution. Although Seebol is factually distinguishable from Winfield, it is logical that a person’s sexual orientation is protected under the Florida right of privacy because Florida citizens have demanded greater protection by approving the privacy amendment, than the United States Constitution, thus expanding the categories afforded protection by Roe v. Wade.

Although the court in Seebol admitted that the Supreme Court of Florida has never decided whether the Florida right of privacy includes

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77. Id.
78. Id. at 164.
79. Id. at 152-53; see also Shevin v. Byron, Harless, Schaffer, Reid & Assoc., 379 So. 2d 633, 636 (Fla. 1980) (person has a right to be free from “unjustified government interference concerning personal decisions.”). Contra Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (holding that the right to privacy did not encompass a constitutional right to engage in consensual homosexual sodomy).
80. 477 So. 2d 544 (Fla. 1985). In Winfield, the Department of Business Regulation and the Division of Pari-Mutuel Wagering subpoenaed, without notice, the financial institutions of the people who were under investigation, in order to obtain their bank records. Id. at 546.
81. Id at 548. The issue of a person’s fundamental right of privacy was also addressed in Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989). In Public Health Trust, a hospital patient refused to accept a “life-saving” blood transfusion because it was against her religion so the hospital requested a court order to allow the transfusion. Id. at 97. Once again, the Supreme Court of Florida held that people have the right to be free from government intrusion into their private life, and emphasized that the right to privacy is a “deeply embedded belief” which is “rooted” in “constitutional traditions.” Id. at 98.
matters concerning sexual orientation, In re Florida Board of Bar Examiners supports that it does. This Florida Supreme Court case was decided two years before the enactment of the Florida right of privacy amendment. The Board of Bar Examiners requested that the Florida Supreme Court advise them as to whether an applicant to the Florida Bar could be admitted, considering the fact that he admitted to a homosexual orientation. The Supreme Court of Florida held that where an applicant for the Bar fulfills all the requirements, and is qualified for admission, the mere fact that the applicant has a homosexual orientation is an impermissible reason to deny the applicant admission. Presumably, the Supreme Court of Florida was declaring to the citizens of the state that they may not discriminate against an individual solely because of his or her sexual orientation. The importance of In re Florida Board of Bar Examiners, as noted in Seebol, was that sexual orientation was afforded protection under the Florida Constitution. The citizens of Florida, two years hence, determined that the federally implicit constitutional protection of the right to privacy was inadequate, and amended the Florida Constitution to include an express right to privacy that was "broader" and "stronger" than the United States Constitution.

In Seebol, the Department of Health and Rehabilitative Services' application asked the sexual orientation of the prospective adoptive parent, plaintiff Edward Seebol. If the applicant gives a truthful response indicating a homosexual orientation, that applicant is considered "per se" ineligible to be an adoptive parent under the Florida adoption statute. Thus, the state of Florida automatically disqualifies applicants based solely on their private sexual behavior. Furthermore, the statute disqualifies applicants who state that they have a homosexual orientation without any consideration given as to whether the orientation is

82. Seebol, 16 Fla. L. Weekly at C54.
83. 358 So. 2d 7 (Fla. 1978).
84. Id.
85. Id. at 8.
86. Id. at 10.
88. Id.
89. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985).
90. Seebol, 16 Fla. L. Weekly at C54.
91. Id.; FLA. STAT. § 63.042(3) (1991).
92. Seebol, 16 Fla. L. Weekly at C54.
accompanied by sexual behavior. A person's homosexual orientation is a personal matter concerning a person's private life; therefore, the information requested by the Department of Health and Rehabilitative Services violated Mr. Seebol's right to privacy under the Florida Constitution. Furthermore, why should anyone have the right to demand answers to questions about the very intimate area of a person's sexuality, and then to discriminate against that person because he answered truthfully? The Florida Circuit Court of Monroe County determined that the right to privacy encompasses the sexual orientation of a person, and therefore, protects a person from being arbitrarily "penalized" solely on the basis of his or her sexual orientation.

In sum, the court in Seebol determined that the state's inquiry as to the sexual orientation of the plaintiff, and the subsequent denial of his adoption application because he truthfully admitted to a homosexual orientation, was an impermissible exercise which infringed on the applicant's right of privacy under the Florida Constitution. The effect of the state's actions was to punish Mr. Seebol for exercising his right to privacy.

Since, the Florida adoption statute, section 63.042(3), infringed on the plaintiff's right to privacy, it had to pass a strict scrutiny analysis. The right to privacy is so fundamental that in order for the government to intrude into a person's private life, the government must show: a compelling interest; the means used to accomplish the end result is narrowly tailored; and that the means is the least intrusive way in which to fulfill the desired result. The circuit court in Seebol emphatically

93. Id.
94. Id.
95. Id.
96. Id. In support of this holding the circuit court then compared Seebol with the United States Supreme Court case of Harris v. McRae, 448 U.S. 297 (1980). In Harris, the Supreme Court held that it was constitutional for the government to refuse to allocate federal funds to subsidize abortions. Id. at 326. However, the Supreme Court in Sherbert v. Verner emphasized that there is a difference between not subsidizing constitutional rights and infringing on the exercise of constitutional rights. 374 U.S. 398, 410 (1963) (state may not deny total unemployment compensation to worker who was fired because she missed one day of work in order to observe her Sabbath). The court in Seebol, concluded that the Florida adoption statute infringes on the prospective adoptive parent's right because it prohibits a qualified applicant from adopting solely on the basis of his sexual orientation. Seebol, 16 Fla. L. Weekly at C54.

97. In re Guardianship of Browning, 568 So. 2d 4, 14 (Fla. 1990) (surrogate may exercise right of privacy for incompetent person, if while competent the person expressed his wishes); see also In re T.W., 551 So. 2d 1186, 1192-93 (Fla. 1989) (con-
stated that "the state has asserted no compelling interest, or for that matter, any substantial or even rational interest." However, had the state of Florida asserted an interest, presumably it would have been the best interests of the child. The court recognized that the best interests of the child is a compelling interest; however, it determined that the means chosen by the state to accomplish the goal was not the least intrusive. The exclusion of homosexuals as potential adoptive parents infringes on their privacy interests, and does not advance the state's goal of providing a permanent family life for adoptive children.

Finally, the Florida Circuit Court of Monroe County in Seebol concluded its analysis of the Florida adoption statute, in light of the right of privacy amendment of the Florida Constitution, by pointing out other defects of the statute. The statute's exclusion of homosexuals as prospective adoptive parents is based on fear and ignorance of the legislature without any factual basis. Additionally, this statute promotes, and even encourages, the discrimination of homosexuals through "archaic stereotypes." Therefore, it was correct for the court to conclude, that the Florida adoption statute, section 63.042(3), which prohibits homosexuals from becoming adoptive parents, infringes on

98. Seebo , 16 Fla. L. Weekly at C54. The Department of Health and Rehabilitative Services denied the unconstitutionality of the Florida adoption statute, but decided not to put forth a defense. Telephone interview with Lynn Waxman, Attorney for the plaintiff, Seebol, (June 28, 1991). The Attorney General for the state of Florida acknowledged the suit brought by the plaintiff and stated that his office would not be a party to any of the proceedings to decide the issue. Id.


100. Seebol, 16 Fla. L. Weekly at C54.

101. Id. at C53-54.

102. FLA. STAT. § 63.042(3) (1991).

103. FLA. CONST. art. I, § 23.

104. Seebol, 16 Fla. L. Weekly at C55.


106. Seebol, 16 Fla. L. Weekly at C55 (citing Note, supra note 105, at 821). The Florida adoption statute is a legislative vehicle used to discriminate against homosexuals. There is no connection between sexual orientation and parental ability, and therefore, the only reason to inquire as to one's sexuality is to further promote the discrimination. However, in this case, the more the legislature gives into its fears and ignorance the more innocent children it victimizes.
the right to privacy afforded under the Florida Constitution, and is therefore unconstitutional.\textsuperscript{107}

IV. **EQUAL PROTECTION: ARE HOMOSEXUALS A "SUSPECT CLASS?"**

The second legal issue the court in *Seebol* had to decide, was whether the Florida adoption statute violates the Equal Protection Clause of the Florida and United States Constitutions.\textsuperscript{108} The Equal Protection Clause contained in the Florida and United States Constitutions states "that all persons similarly situated be treated alike."\textsuperscript{109} Before the court could begin the analysis of whether the statute was violative of the Equal Protection Clause, it first had to determine which level of scrutiny to apply.\textsuperscript{110}

It has been stated that homosexuals do in fact constitute a "suspect class,"\textsuperscript{111} and therefore, the Florida adoption statute should be subjected to a strict scrutiny analysis.\textsuperscript{112} The court in *Seebol* entered into an evidentiary discussion of the four factors which enable a group of individuals to obtain suspect classification.\textsuperscript{113} The first factor is whether the group in question has been the subject of past "purposeful" discrimination.\textsuperscript{114} Courts throughout the nation agree that "homosexuals have historically been the object of pernicious and sustained hostility."\textsuperscript{115} The discrimination homosexuals face on a daily ba-

\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} U.S. CONST. amend. XIV, § 1.; FLA. CONST. art. I, § 2.
\textsuperscript{112} Seebol, 16 Fla. L. Weekly at C55.
\textsuperscript{113} Id.
\textsuperscript{114} Watkins, 875 F.2d at 724 (Norris, J., concurring).
sis penetrates all aspects of their private and public lives.\textsuperscript{116}

Second, the class in question must be defined by a characteristic which "bears no relation" to an individual's capability to perform in society.\textsuperscript{117} In support of homosexuals meeting this qualification, there is overwhelming evidence that homosexuals are in fact "fit" parents, and that children of homosexual parents adopt a sexual orientation independent from their parents.\textsuperscript{118} The irrational stereotypes which people use to discriminate against homosexuals have been proven to have no factual basis.\textsuperscript{119} Furthermore, the idea that homosexuals are mentally or emotional ill has been eradicated, along with the ignorant stereotype that homosexuals were more likely to be child molesters than heterosexuals.\textsuperscript{120} Therefore, homosexual discrimination is based on their sexual orientation, which has no correlation to their ability to function in society.

Additionally, the circuit court in \textit{Seebol} dispelled with the antiquated "stigma" stereotype\textsuperscript{121} as a reason of parental unfitness, citing to the United States Supreme Court case of \textit{Palmore v. Sidoti}.\textsuperscript{122} In \textit{Palmore}, the father of a young girl petitioned the court to divest the mother of custody of his daughter because she was "co-habitating" with a Negro, fearing the daughter would be harassed by the outside community.\textsuperscript{123} The Supreme Court of the United States held that private biases and any potential future harm they may cause are an impermissible consideration in child custody proceedings. Thus, the mother retained custody of her daughter.\textsuperscript{124} Adhering to \textit{Palmore}, the circuit court in \textit{Seebol} determined the argument that children of homosexual parents will be subjected to harassment due to the stigma of homosexuality was not a permissible consideration.\textsuperscript{125}

\begin{thebibliography}{99}
\bibitem{117} \textit{Frontiero v. Richardson}, 411 U.S. 677, 686 (1973); \textit{see also Watkins}, 875 F.2d at 724 (Norris, J., concurring).
\bibitem{118} \textit{See Green}, \textit{supra} note 50, at 696; \textit{Comment}, \textit{supra} note 52, at 882; Marilyn Riley, Note, \textit{The Avowed Lesbian Mother and her Right to Child Custody: A Constitutional Challenge that can no Longer be Denied}, 12 \textit{SAN DIEGO L. REV.} 799, 861 (1975).
\bibitem{119} \textit{Comment}, \textit{supra} note 52, at 870-72.
\bibitem{120} \textit{Note}, \textit{supra} note 105, at 822-24.
\bibitem{121} \textit{Seebol}, 16 Fla. L. Weekly at C55.
\bibitem{122} 466 U.S. 429 (1984).
\bibitem{123} \textit{Id.} at 430.
\bibitem{124} \textit{Id.} at 433-34.
\bibitem{125} \textit{Seebol}, 16 Fla. L. Weekly at C55.
\end{thebibliography}
Children in society are exposed to many different types of discrimination, whether it be: the color of one's skin; a parent's sexual orientation; the weight of a child; or even judging people by the amount of money their clothes cost. Society, including the judiciary, must deal directly with these prejudices to eradicate them, and not send the message to our children to look the other way when they are faced with such prejudice. The court's final note was to emphasize the fact that "[d]iscrimination against homosexuals . . . bears deep-seated prejudice rather than reality."126

The third factor under suspect classification analysis is whether the group in question is a politically powerless minority.127 Due to the fact that homosexuality is associated with unfounded stereotypes, the majority of homosexuals, in order to avoid discrimination, do not actively participate in the political arena in support of gay rights.128Ironically, the homosexuals who do venture out to increase gay awareness by advocating equal protection under the Constitution are not endorsed by legislators.129 In conclusion, the laws which discriminate against homosexuals, which are presently being enforced by the judiciary, along with the legislature's refusal to effectuate any changes, is evidence in and of itself that homosexuals are politically powerless.130

The final factor for consideration in the suspect classification analysis is whether homosexuals are defined by immutable traits.131 In Watkins v. United States Army, the United States Court of Appeals stated that a trait is immutable if in order to effectuate a change would entail "great difficulties."132 The court in Seebol asserted that "'[s]cientific research indicates that we have little control over our sexual orientation and that once acquired, our sexual orientation is largely impervious to change.'"133 Since homosexuals as a group satisfy all four factors, the

126. Id. (citing Watkins v. United States Army, 875 F.2d 699, 725 (9th Cir. 1989)).
128. Note, supra note 105, at 826; see also Watkins, 875 F.2d at 727 (coming out of the closet exposes homosexuals to discrimination).
129. Watkins, 875 F.2d at 727 (Norris, J., concurring).
130. Id.
131. Cleburne, 473 U.S. at 441; see also Watkins, 875 F.2d at 725-26 (Norris, J., concurring).
132. 875 F.2d at 726.
133. Seebol, 16 Fla. L. Weekly at C55 (quoting Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring)); see also Note, supra note
Florida Circuit Court of Monroe County concluded that homosexuals are in fact a “suspect class.”

When the constitutionality of a state statute is challenged, the court may apply three different levels of scrutiny: strict scrutiny; intermediate scrutiny; or rational basis. The appropriate level of scrutiny applied to the analysis is determined by the people who compose the class challenging the validity of the statute. The “general rule,” i.e., the rational basis test, is that state statutes are presumed constitutional if the statute furthers a legitimate state interest and the means chosen are rationally related to the goal of the state. The exception to the general rule is when the state legislation interferes with the rights of a “suspect class” or infringes on fundamental rights under the Constitution. In such cases, “strict” scrutiny is applied.

In recognition of homosexuals suspect class status, a strict scrutiny analysis must be used to determine the validity of the Florida adoption statute. The circuit court in Seebol had to establish whether: the state had a compelling interest; the means-ends relationship was narrowly tailored; and if the means chosen advanced this interest in the least intrusive manner. As previously mentioned in the discussion of the child’s best interest, the court in Seebol decided that Florida’s desire to protect and to procure a permanent family life for adoptive chil-

105, at 817-21.
136. Id.
138. Cleburne, 473 U.S. at 440. Legislation subjected to strict scrutiny will only be declared to be valid if there is a compelling state interest; the means-ends relationship is narrowly tailored; and there is no less burdensome alternative in which the state can accomplish its goal. Id.
139. See Watkins, 875 F.2d at 728 (Norris, J., concurring). Affording suspect class status to homosexuals is long overdue. Florida, as well as the whole United States, was just sitting back and watching an entire class of people being freely discriminated against. The discrimination is still being promoted by certain legislation which sends the message that it is “O.K.” to discriminate against homosexuals because they are “weird” or what they do is “unnatural.” The bottom line is that the legislators look to tradition, noting that society has discriminated against homosexuals in the past, so it must be permissible to discriminate against them today, right? Wrong. Suspect classification, and the subsequent strict scrutiny analysis, will force the legislators, as well as society in general, to stop the arbitrary discrimination against homosexuals.
dren was a compelling state interest.\textsuperscript{141}

However, the court concluded that the means chosen to advance the stated interest, excluding homosexuals as prospective adoptive parents, was not the least intrusive way to accomplish the state's goal.\textsuperscript{148} The court asserted that the statute which bars homosexuals from adopting without considering their parental abilities effectively sublimes the state's interest to place adoptive children in a permanent family environment because it denies potentially fit parents from even applying to adopt.\textsuperscript{148} Thus, the Florida adoption statute failed the strict scrutiny analysis.

Furthermore, the court in \textit{Seebol} determined that even if homosexuals were not afforded suspect class status, the statute would still be unconstitutional because it fails the rational basis test as not being rationally related to a legitimate state interest.\textsuperscript{144} The child's best interest is definitely a legitimate state interest; however, it is not advanced by a statute "which is clearly irrelevant to the promotion of any legitimate state goal."\textsuperscript{148} In sum, the court in \textit{Seebol} held that any statute which "spites its own articulated purpose" will not be able to overcome even the lowest level of scrutiny, and therefore, the Florida adoption statute, is "blatantly unconstitutional and must be stricken."\textsuperscript{148}

V. DUE PROCESS: "PER SE" BAR AGAINST HOMOSEXUAL PARENTS

The final issue examined in \textit{Seebol} was whether the Florida adoption statute violates the Due Process Clause under the Florida and United States Constitution.\textsuperscript{147} The United States and Florida Due Process Clauses state all people have a right to life, liberty and property,
which is free from unwarranted governmental intrusion.¹⁴⁸ In order for
the Due Process Clause to apply, there must be a right to life, liberty,
or property. A liberty right includes matters concerning family deci-
sions as noted in Smith v. Organization of Foster Families.¹⁴⁹ In
Smith, a foster parent and the foster parents’ organization challenged
the New York procedures for removal of a child from its foster home.¹⁵⁰ The Court concluded that personal decisions concerning one’s
family are in fact a liberty interest granted protection under due pro-
cess.¹⁵¹

Traditionally, the “family” has been thought of as a relationship
between a “parent and child,” but a family can be defined by means
other than a biological relationship.¹⁵² The emotional bonding between
adults and the children they care for develops a symbiotic relationship
absent any biological connection.¹⁵³

In Seebol, the court recognized that an adoptive family is legally
identical to a biological family.¹⁵⁴ The Florida adoption statute specifi-
cally states that adoption creates a relationship between the adoptive
parent and the adopted child, as if both the petitioner and the child
were “blood descendant[s].”¹⁵⁵ Therefore, adoptive parents have a lib-
erty interest when making decisions concerning family matters which
are afforded protection under due process.¹⁵⁶ Additionally, the prospec-
tive adoptive parents have a liberty interest based on the potential of
adopting a child, which would create a “permanent adoptive
relationship.”¹⁵⁷

Although the circuit court in Seebol recognized that an adoptive
parent has a liberty interest in matters concerning his adoptive family,
it also stated that this interest may be limited by the state.\textsuperscript{158} When the adoptive relationship and the subsequent liberty interest are created through an agreement with the state, the rights afforded the parent may be defined by state law.\textsuperscript{159} The Florida adoption statute specifically states that any person, married or unmarried, has the right to apply to adopt a child.\textsuperscript{160} The court in \textit{Seebol} held that this right created "a legitimate expectation and entitlement to all citizens."\textsuperscript{161} Thus, the court held that in this specific instance the liberty interest conferred on homosexuals to adopt was created, as opposed to limited, by the Florida legislature.\textsuperscript{162}

Since homosexuals do in fact have a liberty interest, the Florida Circuit Court of Monroe County addressed whether the Florida adoption statute violated procedural due process under the Florida and Federal Constitutions.\textsuperscript{163} The specific procedure necessary to ensure that homosexuals are afforded due process is determined by examining the government's actions in facilitating its interest in relation to the private interest of the prospective homosexual adoptive parents.\textsuperscript{164} The state's intent is to "promote" and "protect" interests of adoptive children and the adoptive parents, by procuring the children a "permanent family life."\textsuperscript{165} The state outlines a procedure by which to protect the adoptees and prospective adoptive parents within the statute.\textsuperscript{166} Therefore, the court in \textit{Seebol} held that the state's interest to protect both parties by effectuating the statute was legitimate.\textsuperscript{167} However, the circuit court stated that if the state's interest is to protect the welfare of the child, its actions do not advance this interest.\textsuperscript{168} Quite the contrary, the state's actions deny adoptees a potential permanent family life by prohibiting "an entire group of individuals historically shown to be fit

\begin{thebibliography}{9}
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\item 158. \textit{Seebol}, 16 Fla. L. Weekly at C56 (citing Speilman, 873 F.2d at 1384); \textit{see also Smith v. Organization of Foster Families}, 431 U.S. 816, 845-46 (1977).
\item 159. \textit{Smith}, 431 U.S. at 845-46. As in \textit{Seebol v. Farie}, where the state is considered a "partner" in the adoption relationship, then the state has the authority to define the party's "expectations" and "entitlements." \textit{See id.}
\item 160. \textit{FLA. STAT.} § 63.042(2)(a)-(d) (1991).
\item 162. \textit{Id.}
\item 163. \textit{Id.}; \textit{U.S. CONST. amend. XIV}, § 1; \textit{FLA. CONST. art. I}, § 9.
\item 165. \textit{FLA. STAT.} § 63.022 (1991).
\item 166. \textit{Id.}
\item 167. \textit{Seebol}, 16 Fla. L. Weekly at C56 (citing \textit{Stanley}, 405 U.S. at 650).
\item 168. \textit{Id.}
\end{thebibliography}
and capable parents" from participating in the evaluation procedure to determine their "suitability" as prospective adoptive parents.\textsuperscript{169}

Since the Florida adoption statute incorporates this "irrebuttable" presumption against homosexuals from participating in any evaluation procedure of parental suitability, it violates procedural due process.\textsuperscript{170}

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.\textsuperscript{171}

The Florida adoption statute which bars homosexuals solely on the basis of their sexual orientation sacrifices their rights under the Constitution for the sake of the state's own "convenience."\textsuperscript{172} The state purposefully denies adoptees acceptable permanent family life, and by doing so "spites its own articulated goals."\textsuperscript{173} Florida has the ability to use a procedure to determine parental suitability, therefore the presumption certainly cannot withstand constitutional analysis because the state has a "reasonable alternative" to determine if the applicant is suitable.\textsuperscript{174} When considering the best interests of the child in adoption proceedings, the prospective adoptive "parent's sexual orientation should be one of many factors considered" if it is shown to have adverse effects on the child.\textsuperscript{175} The Florida adoption statute irrebuttably presumes that homosexuals are unfit to be adoptive parents, for the

\textsuperscript{169} Id. (citing Green, supra note 50, at 696; Comment, supra note 52, at 882; Note, supra note 118, at 860).

\textsuperscript{170} See Stanley v. Illinois, 405 U.S. 645, 656-58 (1972); see also Vlandis v. Kline, 412 U.S. 441, 446 (1973) (Connecticut statute violated due process because of an irrebuttable presumption that students whose address was outside the state at the time of application to college were considered out of state students for the duration of their academic career, and were required to pay higher fees than those who resided in the state); Carrington v. Rash, 380 U.S. 89, 96 (1965) (Texas statute imposing per se bar against servicemen stationed in Texas to vote, who at the time of enlistment in the army were living outside the state).

\textsuperscript{171} Seebol, 16 Fla. L. Weekly at C56 (quoting Stanley, 405 U.S. at 657-58).

\textsuperscript{172} Id.

\textsuperscript{173} Id. (quoting Stanley v. Illinois, 405 U.S. 645, 653 (1972)).


\textsuperscript{175} Seebol, 16 Fla. L. Weekly at C56 (citing In re Adoption of Charles B., 552 N.E.2d 884 (Ohio 1990)).
mere fact that it is easier to presume rather than prove an irrational conclusion which has no factual basis.\textsuperscript{176}

Furthermore, there is an additional hardship on the Department of Health and Rehabilitative Services in placing "special needs child[ren]."\textsuperscript{177} Special needs children may never be fortunate enough to be adopted and, therefore, would spend most of their lives in state institutions.\textsuperscript{176} The state would actually be protecting the welfare of the child by placing the adoptee with a homosexual parent, instead of "confining" the child to a sterile institution.\textsuperscript{178} The government procedure involved does not advance the state's interest to protect the welfare of the child. Thus, the Florida adoption statute is unconstitutional because it violates the Due Process Clause of the Florida and United States Constitutions.\textsuperscript{180} Finally, the court in \textit{Seebol} held that the substantive and procedural due process rights of the homosexual parents were violated, and declared the Florida adoption statute's irrebuttable presumption against homosexuals unconstitutional.\textsuperscript{181}

\section*{VI. Future Implications}

Homophobia is defined as "unreasoning fear of or antipathy toward homosexuals and homosexuality."\textsuperscript{182} The Florida adoption statute expressly states that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual."\textsuperscript{183} This legislation prohibits an entire class of people from adopting not because they have been shown to be unfit parents, but simply because they find it appropriate to seek companionship with someone of the same sex. Unfortunately, this legislation is a classic case of homophobia.

Obviously, the Florida legislature and society are adverse to change, which is evidenced by existing presumptions that homosexuality is "bad" or "unnatural." The court in \textit{Seebol v. Farie} stood up to society's prejudices, and stated as a matter of law that this type of

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\textsuperscript{176} \textit{Seebol}, 16 Fla. L. Weekly at C56 (citing Stanley v. Illinois 405 U.S. 645, 658 (1972)).
\textsuperscript{177} \textit{Id}.
\textsuperscript{178} \textit{In re Adoption of Charles B.}, 552 N.E.2d 884, 884-85 (Ohio 1990).
\textsuperscript{179} \textit{Id}.
\textsuperscript{180} \textit{Seebol}, 16 Fla. L. Weekly at C56.
\textsuperscript{181} \textit{Id}.
\textsuperscript{182} \textit{THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE} 916 (2d ed. 1987).
\textsuperscript{183} \textit{FLA. STAT.} § 63.042(3) (1991).
\end{tabular}
discrimination, based solely on fear and ignorance, will no longer be tolerated. The most important decision the court made was to award suspect class status to homosexuals, thereby subjecting the statute to strict scrutiny.

To discriminate against an entire class for absolutely no apparent reason is intolerable, but when that discrimination hinders the life of an adoptive child, it is reprehensible. Homosexuals have been proven to be fit parents. The reality is that placing adoptees in loving “permanent” families is difficult, but attempting to place a special needs child is almost an impossible task.

The Florida adoption statute explicitly states that its intent is to protect the welfare of the child as well as the prospective adoptive parents. If this is actually the case, then the Florida legislature should heed the advice of Seebol v. Farie and its own agency, the Department of Health and Rehabilitative Services, to strike the per se bar against adoption by homosexuals. In determining the suitability of homosexuals as prospective adoptive parents it is essential to remember that “[t]he proper focus of judicial inquiry lies not with ‘who loves whom’ but with whether there is any love at all” for the child.

Because the state of Florida did not appeal the decision in Seebol v. Farie, the decision is not binding on any other jurisdiction in the state other than Monroe County. Therefore, every homosexual who wants to adopt a child outside of Monroe County will have to relitigate this exact issue. This is already occurring within the state of Florida, and the volume of such cases will only increase in the immediate future. Sooner or later, hopefully sooner, the Florida legislature will

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185. Id. at C55.
186. Green, supra note 50, at 696. In a study of thirty-seven children whose primary caretaker was a homosexual or transsexual, thirty-six of the children exhibited typical “psychosexual development.” Id.
189. Seebol, 16 Fla. L. Weekly at C53-57. After the holding in Seebol, the Department of Health and Rehabilitative Services requested the legislature to abolish the prohibition against adoption by homosexuals. The legislature however, decided to keep the unconstitutional provision within the Florida statute. Telephone interview with Lynn Waxman, Attorney for plaintiff, Seebol (June 28, 1991).
have to recognize that the prohibition against homosexuals adopting is unconstitutional, and it is in the child's best interest to eradicate this provision.

VII. Conclusion

The Florida adoption statute which prohibits homosexuals from adopting is unconstitutional because it violates the right of privacy under the Florida Constitution, the Equal Protection Clause, and Due Process Clauses under the Florida and United States Constitutions. Although the State of Florida does have a compelling state interest to protect the welfare of the child, this provision does not, in any way, facilitate the state achieving its goal. This legislative regulation gives a governmental "stamp of approval" to the discrimination of homosexuals, and entirely neglects the best interests of the child because it declares homosexuals immediately ineligible based on the application, without examining their parental ability. Ultimately, it victimizes the very people the state is supposed to be protecting, the children and their potential adoptive parents. The Florida adoption statute should be amended by obliterating the section which arbitrarily prohibits homosexuals from adopting, following the lead of the Florida Circuit Court of Monroe County by declaring the statute unconstitutional. The result will be a much-needed affirmative step towards eradicating discrimination against homosexuals and at the same time advancing the child's best interest.

Camille L. Worsnop