

Michigan Law Review

Volume 97 | Issue 6

1999

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Recommended Citation

Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488 (1999).

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COUNSELING COUNSEL FOR CHILDREN

*Martin Guggenheim**

REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS. By *Jean Koh Peters*. Miamisburg, Ohio: LEXIS. 1997. Pp. 917. \$85.

INTRODUCTION

You are a lawyer working in juvenile court, representing children in proceedings in which their parents are accused of being unfit. Your clients range in age from newborns to seventeen-year-olds. At any one time you have 125 active cases on your docket. You work hard at your job, and you believe deeply in the rights of the children you represent. Occasionally, it occurs to you that you don't really have as good a sense as perhaps you should of your precise role and how you ought to discharge your responsibilities to your clients. But you don't ever seem to have the time to work through such theoretical issues. You are too practical to consider more than the need to get through your daily docket.

Even though lawyers (and other representatives such as guardians *ad litem*) have been representing children in child protective proceedings for more than twenty-five years and are currently serving that function in every jurisdiction in the United States,¹ there is no uniform definition of a lawyer's role and responsibilities in this context. As a result, lawyers have been remarkably free — or remarkably burdened — to figure this out for themselves. Even worse, "in almost any state . . . one will encounter within the state a deep disagreement about [one's] role" (p. 33).

Few topics are in greater need of a book clarifying the law than the role of counsel in child protective proceedings. Lawyers representing children in child protective proceedings are entitled to clear answers about their role and the tasks they should undertake in the discharge of their duties. One of the virtues of Jean Koh Peters's

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1. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 5105-5107 (1994), which created the first nationwide incentive for appointing representatives for children in all child protective proceedings. The statutes of every jurisdiction in the United States requiring the appointment of a representative for children in child protective proceedings are set forth in REPRESENTING CHILDREN, pp. 253-479.

book is to free lawyers from doubts about their role and to liberate them to discharge their responsibilities appropriately.

Peters is an extraordinarily knowledgeable and thoughtful child advocate with substantial experience in representing children in a broad range of legal proceedings. She is also a gifted and reflective teacher of advocacy. As a scholar of children's rights who has trained students at Columbia and Yale in representing children under her supervision, Peters is perhaps better equipped to answer the profoundly difficult questions of role and responsibility than any other writer in the field. No one before her has come close to writing a book for the child advocacy audience that is as sophisticated or wise as this one.

Representing Children does many things. It establishes and defines the role of counsel for children in child protective proceedings. It tells lawyers what steps they should take in the course of their representation and why they should take them. It explains when lawyers ought to empower their clients and treat them as principals (as is the norm for lawyers and clients in other contexts). It also tells lawyers how they should determine what outcome to seek when a client is unable to express a preference for a particular outcome, or when a client's disability or immaturity makes it impossible or inappropriate to follow the client's instruction.

This book is, in my opinion, the definitive text of what lawyers should do in the role of a court-appointed lawyer for a child in a child protection proceeding. For this reason, it is required reading for all lawyers who represent children. But many others related to the field of child advocacy — including social workers, lawyers for child care agencies, prosecutors, and judges — would also profit enormously by reading it. Moreover, lawyers in other fields would be well-advised to read it for the nuggets of advice about what constitutes effective advocacy and what steps a lawyer ought to take to secure a result for a client whenever the outcome is likely to be obtained, as is the case in child advocacy-related proceedings, through means other than a contested courtroom trial.

Representing Children is fundamentally a book about strategic lawyering. Peters offers truly outstanding practical suggestions about how to represent a child effectively in a world in which the crucial decisions about the lives of children are made at meetings, not in the courtroom. Identifying interdisciplinary meetings as representing our current best ideas about coordinating client needs, Peters hopes "that lawyers will eventually consider meeting practice more important than trial practice in the work of representing their clients" (p. 190). The chapter on the interdisciplinary meeting should be read by all advocates in all kinds of cases. It will, I pre-

dict, become a valued treasure for clinicians teaching informal advocacy.²

As far as addressing the challenges of representation, a small criticism is that Peters pays little attention to practical problems such as caseload management. In many offices, such as the Office of the Public Defender in Chicago, lawyers routinely have active caseloads exceeding 300, sometimes reaching 600 cases.³ Surely lawyers with these choking caseloads will be unable to do most of what Peters advises they do. But this criticism is perhaps unfair. In *Representing Children*, Peters establishes a standard of practice by offering a complete vision of the tasks lawyers perform for children. There will be plenty of time, in the wake of her groundbreaking work, to address strategies for making it possible to undertake the appropriate tasks given the overwhelming reality. All advocates for children should be indebted to Peters for establishing the gold standard, even if few of us are ever actually able to achieve it.

In this review, I plan to address only some of the many outstanding ideas Peters sets forth in the book. Part I explores the core concepts involved in representing children and discusses Peters's views of when and why to empower children to control the advocacy of their representatives. Because lawyers for children are invariably compelled to decide what kind of lawyer they are to be — for instance, whether they will take their instructions about what outcomes to seek from their clients, whether they will decide for themselves what outcomes to try to achieve, or whether they will do neither — Peters devotes an appropriately substantial amount of time to the role of counsel for children. Part II analyzes the implications of Peters's advocacy proposals from a practical perspective and examines the likely impact of these proposals on her target audience. Finally, Part III addresses problems with Peters's views on the role of counsel from a theoretical perspective.

As will soon be apparent, I agree with Peters's views of what lawyers for children should do when representing their clients in

2. Peters sees informal advocacy as crucial to successful lawyering in this field, and she offers sophisticated advice about how to become involved in meetings. Peters cautions against lawyers dominating discussions and makes two crucial points about listening. See p. 174. First, in her experience when lawyers and nonlawyer professionals meet, "[i]t is often disarming and a relief to other attendees when a lawyer spends the first part of a meeting listening to and absorbing both the substantive and procedural aspects of the meeting." P. 180. Disarming others in the same case makes good strategic sense. What makes even greater sense is paying sufficient attention to the expressed needs and interests of others so that the advocate is poised to make proposals that the others are likely to accept. Peters wants lawyers to learn about the other professionals in the case and to try to determine what is driving them and what they are most concerned with. Once this is known, the lawyer is ready to go into action and make proposals that factor in the needs and interests of these professionals and of the client.

3. See Interview with Patrick Murphy, Public Guardian of Cook County, Chicago, Illinois (Apr. 11, 1997).

child protective proceedings. Indeed, in my opinion, this book offers better advice on this subject than any other book ever written. But the theories that underlie Peters's practical advice are another matter. In the course of this review, and particularly in Part III, I will identify several problematic aspects of Peters's theories, all the while agreeing with the endpoint to which these ideas lead her. In particular, Peters's methodology leads her to recommend what lawyers representing children ought to do by first undertaking the task of deciding what is best for children who are enmeshed in the foster care system. Then she directs that lawyers representing children pursue actions consistent with Peters's views about child development. Though this methodology apparently has much to offer, I hope to demonstrate the hidden dangers lurking behind it.

I. JUST WHAT ARE CHILDREN'S LAWYERS ANYWAY?
MOUTHPIECES FOR THEIR CLIENTS OR INDEPENDENT
GUARDIANS ASSIGNED TO PROTECT THEIR
CLIENTS' BEST INTERESTS?

Lawyers who represent children are in desperate need of guidance to help them articulate and understand their role. The most basic questions need answering. When are lawyers supposed to treat their child clients as the principals in the attorney-client relationship? When are lawyers free to disregard their clients' expressed instructions as to the objectives sought in the case? And when lawyers are free to decide for themselves what objectives to seek, how should they go about deciding what to do? Peters has answers to all of these questions, and more.

Peters is sensitive to the problem of an undefined role for a child's representative, which would permit the lawyer to do what the lawyer wants.⁴ Peters believes, as I do, that it is crucial to establish parameters for lawyers assigned to represent children that maximize the probability that different lawyers will do approximately identical things in the course of representing like children in like cases and that, at the least, lawyers will be advocating for like results in like cases.

Peters is particularly insistent to avoid proposing a set of rules that frees lawyers to do whatever they want. As Peters has explained:

This extreme form of best interests representation omits several of the most fundamental characteristics of lawyering. The lawyer-client partnership and dialogue is reduced to a one-person monologue wholly unchecked by the client. The client becomes an object, rather

4. Throughout this review, I shall use the term "lawyer" or "counsel" to include any representative for a child, including a guardian *ad litem* who may not be a member of the Bar.

than the subject, of the representation. The lawyer, usually agent, acts as the principal in the relationship.⁵

For this reason, her avowed goal is to constrain the degree of discretion lawyers for young children have to decide for themselves which positions to advocate on behalf of their clients.

A. *Empowering Children to Set the Objectives in Their Cases*

Perhaps the easiest way to ensure uniformity is to require that lawyers presume their clients have a sufficient degree of knowledge and maturity to set the objectives in the case. After all, what makes representing children so different from representing adults is "that the child's lawyer . . . is 'adrift without the anchor of a principal.'"⁶ By defining the child as the principal, most of the difficult ethical issues are eliminated.

For Peters, as for many other writers in the field,⁷ the wisest way to accomplish this is to advocate for the child's preferences.⁸ Thus, Peters instructs that lawyers for children operate under two "defaults" that are relevant to this issue. The first is a "competency default," and the second is an "advocacy default." Under the former, a lawyer should regard his or her client as unable

to act in her best interests only where evidence *independent of the representation* demonstrates clear and specific limitations on the child's ability to understand information and make judgments. . . . [T]he decision that the child cannot adequately act in her own interests cannot be made until the child's maximum competence is fully explored by the lawyer. [p. 130; footnote omitted]

5. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1526 (1996).

6. P. 34 (quoting Peters's conversation with Geoffrey Hazard on June 5, 1992).

7. See, e.g., Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 *FORDHAM L. REV.* 1655 (1996); see also Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of their Lawyers' Roles*, 64 *FORDHAM L. REV.* 1699 (1996); Robert E. Shepherd, Jr. & Sharon S. England, "I Know the Child Is My Client, but Who Am I?", 64 *FORDHAM L. REV.* 1917 (1996).

8. Although Peters does not discuss this point, it is important to recognize that there is a prominent counterpoint to empowering children. Some scholars have recognized the difficulties posed by making the child's preference in a custody-related case a focus of attention. See, e.g., Kim J. Landsman & Martha L. Minow, Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 *YALE L.J.* 1126, 1165 (1978).

Psychology and moral theory both warn the attorney not to force participation on the child. If a client is entitled to participate and to be informed, he is also entitled to do neither. Studies of children of divorce indicate that there may be very good reasons for a child's decision not to become directly involved in the dispute over his custody, particularly where the parents have already framed any choice the child makes in terms of loyalty or treason. In certain situations and at certain stages of development, the child may wish to resolve a loyalty conflict by choosing, and that choice may serve important inner needs, but in other situations and stages the child may risk emotional turmoil and parental retribution by taking sides.

Under the "advocacy default," lawyers are generally expected to represent "*the child's counseled wish, regardless of the lawyer's personal feeling about whether or not those wishes are prudent . . .*" (p. 72). According to Peters, all children who can be counseled ought to be empowered to set the objectives for the case (p. 72). Moreover, there is no minimum age for making this category.⁹

For Peters, whenever a child can express an opinion and can be "effectively counseled," the child is to control the lawyer's advocacy. As Peters said in an earlier law review article:

The only time the child's lawyer may advocate for a position other than that stated by the client, is after the lawyer, based upon independent evidence arising outside of the representation, has determined that the client's development or circumstances preclude the client from either expressing a position or being effectively counseled as to the viability of the position.¹⁰

Peters, of course, does not envision that lawyers will automatically yield to the child's initially articulated position. Instead, she expects lawyers to exercise skills as a counselor to advise the child of all of the options and the advantages and disadvantages of each. At the same time, however, she exhorts lawyers to avoid any attempt to overly influence children in reaching the positions they want. She warns lawyers to resist their understandable temptation "to impose her own belief upon the client."¹¹ In her words, although

[i]t may be easier . . . for a lawyer to seek to manipulate her client into accepting the lawyer's position instead of disciplining herself to advocate zealously for the client's position . . . [b]ecause children are even more likely than adults to be cowed by a lawyer's strong recommendation, the lawyer must approach a child client's choice with particular restraint.¹²

B. *When Children Cannot Set the Objectives*

Peters recognizes that there are circumstances when lawyers will not be able or, if able, not be required to advocate an outcome based on their clients' wishes. These are the many cases in which

9. Peters, describing the concept of a minimum age, says:

Sometimes a child will not have a clear position. This could be a non-verbal child or a child who could contribute a real but relatively small amount to their representation. Many people consider children under the age of four to be in this category. Children with particular disabilities may also fall into this category.

P. 130.

10. Peters, *supra* note 5, at 1565.

11. *See id.* at 1521.

12. *Id.* (footnote omitted); *see also* Martha Matthews, *Ten Thousand Tiny Clients: The Ethical Duty of Representation in Children's Class-Action Cases*, 64 *FORDHAM L. REV.* 1435, 1458 (1996) ("The child's lawyer has an ethical duty to avoid using her superior skills and social position to silence the child's voice, or coerce the child into passive compliance with the lawyer's views.").

children are too young to speak or, though old enough to express a preference, not old enough for an adult to want to give substantial weight to their expressed desires. She even recognizes that a very large number of cases fall into this category. Nonetheless, most of the book is written as if the lawyer will be representing a client old enough to set the objectives for the case in a manner that binds the lawyer to seek that result. For the most part, the book advises lawyers in the particulars of how to achieve the goals they seek and does somewhat less than expected in telling lawyers how to determine what goals they should seek.

Peters has previously written very thoughtfully on the subject of precisely what lawyers should do when representing children too young to set the case's objectives. Instead of elaborating in the main volume of the book on this subject, however, Peters refers the reader to other articles — especially her own important *Fordham Law Review* article entitled *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*,¹³ which appears in the book's appendices.¹⁴

The *Fordham Law Review* piece is largely devoted to the subject of representing very young children in child protective proceedings. In Peters's words, when lawyers are representing "clients who cannot be counseled," they "are called upon to do the biggest job of all: to determine the objectives of the client representation."¹⁵ Peters appreciates both the uniqueness and extraordinary difficulty of empowering lawyers to set the agendas for their clients: "[C]alling upon a lawyer to determine the goal of her own representation of a client, largely independent of that client's direct input and largely independent of the client's wishes, is an anomalous and deeply

13. Peters, *supra* note 5. In December 1995, Fordham University Law School hosted a national conference on representing children that resulted in the publication of a special issue of the *Fordham Law Review*. See Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1281 (1996). The conference was sponsored by thirteen organizations that constitute virtually the entire organized bar representing children. See Bruce A. Green & Bernardine Dohrn, *Foreword: Children and the Ethical Practice of Law*, 64 *FORDHAM L. REV.* 1281, 1283 & n.7 (1996).

14. Peters's product is an unconventional compromise in that the book is comprised of some 225 pages of text and an additional 670 pages of appendices. The core text contains only seven chapters. The appendices include a historical study of the development of child protective schemes and a listing and summary of statutes from all jurisdictions in the United States. Other appendices form an amalgam of materials, including some of Peters's prior writings and a synopsis of what other writers of child advocacy have said. A reader will not gain the full understanding of the role and tasks of lawyers representing very young children without a careful reading of Peters's *Fordham Law Review* article. I question, however, whether many readers will bother to read the appendices. I think both Peters and the publisher erred by dividing the book in this way, thus expecting somewhat more of the typical reader than is reasonable.

15. Peters, *supra* note 5, at 1519.

complicated divergence from the usual path of legal representation."¹⁶

Roughly speaking, there are two categories of cases in which special advice needs to be given to lawyers when representing young children. First, lawyers are unable to advocate for the client's expressed preference when clients are too young to express any wish. Second, lawyers are not required to do their client's bidding even when the client is old enough to speak if the client is not sufficiently mature for his or her wishes to be given controlling weight. The first category is mostly objective, involving newborns, infants, and young toddlers. Though its uppermost boundaries are indefinite, it is relatively easy to agree about which children are too young to express themselves. The second category is quite different. Here we are talking about verbal children, and, consequently, there will be less agreement among lawyers representing children about which children are mature enough to deserve to have their views control a lawyer's advocacy.

Unfortunately, it is impossible to know precisely when a client's views ought not to be binding on the lawyer. Peters does little to tell lawyers how to demarcate between verbal children whom lawyers must heed and those whom they may not. But it is clear she prefers that lawyers err by deeming children mature enough to set the objectives. Although Peters fails to provide a definitive statement, she instructs lawyers not to be bound by the stated wishes of their counseled clients *only* when the lawyer concludes that the client "cannot adequately act in her own interests" (p. 130). But, it should be emphasized, Peters believes children at four years of age can often act in their own interests and, thus, should be permitted to set the objectives of the case (p. 72). Thus, under Peters's rule, it would seem that lawyers are obliged to allow their child clients to set the case's objectives in the vast majority of cases.

This is a field, however, where the exception may actually be greater than the rule. This is so for two reasons. First, many children in child protective proceedings are very young. Although it is difficult to obtain national data on the age of children who are the subjects of child protective proceedings, it appears that most children are under eight years of age when the petition is first filed, and a high percentage are under three.¹⁷ Second, apart from the fact that many children in these proceedings are very young, in many jurisdictions the lawyer's role when representing children in child protective proceedings seems to require that the lawyer advocate the child's best interests, rather than the child's preferences, even

16. *Id.* at 1522.

17. See Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 327 & n.129 (1998).

when the children are not young. By Peters's count, thirty-one jurisdictions require lawyers in child protective proceedings to represent the child's best interests (app. B). If lawyers in those jurisdictions are required to advocate on the basis of the child's best interests, then the majority of children in the United States will not be empowered to set the objectives of their child protective case even when they are as old as fourteen or fifteen.¹⁸

For these reasons, it is crucial to explain the role of counsel for children when the attorney is not expected to advocate the client's preferred outcome. In her *Fordham* article, Peters identifies, critiques, and ultimately rejects the four commonly used models lawyers for children use when forced to choose what outcome to advocate: (1) The Total Lawyer Discretion Model; (2) The Expert Deference Model; (3) The Psychological Parent Model; and (4) The Family Network Model.¹⁹ The Total Lawyer Discretion Model is, as its name makes clear, the most open-ended of the four. The Expert Deference Model "defers the best interests decision to one of three kinds of experts in the case: one already involved with the child or family, one appointed by the court, or one retained by the attorney."²⁰

Peters rather quickly (and, in my view, appropriately) rejects the Total Lawyer Discretion Model as giving lawyers unbridled power they are untrained to exercise, because she is unwilling to empower randomly assigned members of the bar who are too likely to rely on their own values and biases when deciding what to advocate.²¹ She rejects the Expert Deference Model for the opposite reason — it prevents independent judgment by the lawyer. Nonetheless, Peters supports a close working relationship with experts, such as social workers who may be on the staff in the office of the child's lawyer. She acknowledges, however, that this is an extremely expensive option that most lawyers are unable to use.²²

18. "If a lawyer's obligation is to represent the child's best interests, it appears that the child's counseled wish alone cannot be the sole input into the decision-making process." P. 130.

19. See Peters, *supra* note 5, at 1525-53.

20. *Id.* at 1524.

21.

I believe that this level of discretion makes it inevitable that the lawyer will sometimes resort to personal value choices, including references to his own childhood, stereotypical views of clients whose backgrounds differ from his, and his own lay understanding of child development and children's needs, in assessing a client's best interests. Especially for practitioners who must take cases in high volume, the temptation to rely on gut instinct, stereotype, or even bias is overwhelming. This jeopardizes the child client even more, as her unique circumstances are quickly distorted by a stranger through his own lens of experience and preconception.

Id. at 1526.

22. See *id.* at 1534.

Having rejected giving lawyers total discretion, and recognizing that few lawyers can afford the luxury of working with a team of experts who will assist them in determining the appropriate outcome to pursue, Peters devotes most of her analysis to Models Three and Four. The Psychological Parent Model, in Peters's words, "relies upon principles enunciated by an eminent trio of scholars who have focused upon continuity of care, the perspective of the child, and the psychological parent as crucial principles guiding all determinations of 'best interests.'"²³ The Family Network Model "proposes instead a child welfare analysis focusing on preserving the child's family network."²⁴

The developers of the Psychological Parent Model — Joseph Goldstein, Anna Freud, and Albert J. Solnit — posit a child's need to develop an "unbroken continuity of affectionate and stimulating relationships" with *an* adult.²⁵ Accordingly, these writers argue that courts deciding child placements should award sole and exclusive custody to the psychological parent: the adult who "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."²⁶ Further, to strengthen and protect the psychological child-parent relationship, courts must divest themselves and others of all power over the child and the child's rearing.

Adherents of the Psychological Parent Model also suggest that courts should terminate the parental rights of any adult outside the psychological child-parent relationship.²⁷ Courts should do this when termination means banishing a biological parent in favor of the psychological parent who also happens to be a biological parent, and courts should also do this when termination means banishing a biological parent in favor of a foster parent.²⁸

23. *Id.* at 1524. She is referring to the work of Joseph Goldstein, Anna Freud, and Albert J. Solnit. *See id.* at 1537-38 & n.63.

24. *Id.* at 1524. This model has been developed by the work of Peggy Davis, among others. *See infra* text accompanying notes 30-33.

25. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 6 (1973) [hereinafter GOLDSTEIN, *BEYOND THE BEST INTERESTS*]; *see also* JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996) [hereinafter GOLDSTEIN ET AL., *THE BEST INTERESTS*].

26. GOLDSTEIN ET AL., *THE BEST INTERESTS*, *supra* note 26, at 98. The psychological parent could be the biological, adoptive, or foster parent, but the interests of the child dictate that the State must award custody of the child to the parent who has demonstrated the highest likelihood of developing the psychological child-parent relationship. Generally, this is defined by ascertaining which adult currently fills this role in the child's life.

27. *See id.* at 35-36.

28. *See infra* note 61.

In contrast, Peggy Cooper Davis, a proponent of the "family systems" perspective, aggressively challenges the core message of the Psychological Parent Model.²⁹ In Davis's words:

In contrast to the "out of sight, out of mind" theory that seems to underlie the recommendations of psychological parent theorists, clinicians responsive to multiple bonds have worked to develop ways for children in care to "mourn" or otherwise come to terms in explicit ways with feelings about their families of origin.³⁰

The Family Network Model challenges the "image of the psychological parent [who invariably] is the mother whose familiar patterns of feeding, handling, and comforting the child cannot, without cost, be interrupted, even by the use of a baby-sitter."³¹ It comes at child development from the other end of the spectrum of the psychological parent theorists. In Davis's view, the ideal child nurturing role involves encouraging children to experience separation from important caregivers. She recommends that parents view "everyday separations . . . as constructive learning experiences rather than as inflictions of inevitable damage."³² In thorough contrast with psychological parent theorists, family network theorists conclude that terminating the parental rights of foster children and banishing their families from them is a terrible harm inflicted on children. Rather, they would insist that "*adults must transcend differences of class, race, history, and parenting capacity to provide for each foster child as cooperative a network of care as the child's decidedly disadvantageous circumstances will allow.*"³³

Peters does not recommend that lawyers representing children faithfully adhere to either of these models. In her opinion, neither model does full justice to the complexities of choices facing courts obliged to decide such weighty matters as termination of parental rights. She very wisely warns lawyers for children not to "assume that all determinations of best interests can ultimately be delegated to others," even experts.³⁴ She adds that lawyers "need to develop principled ways of determining best interests for themselves in circumstances where these experts are not available to them."³⁵ Peters's important point is that even experts involved in making recommendations about children start with certain assumptions about child development theory, whether or not these are stated, and "[i]n order to work effectively with medical, psychological,

29. See Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996).

30. *Id.* at 363.

31. *Id.* at 365.

32. *Id.* at 368.

33. *Id.* at 370.

34. Peters, *supra* note 5, at 1534.

35. *Id.*

mental health, and social work professionals, the child's attorney must understand the various best interests standards applied by professionals in these fields."³⁶

When removal of the child from home is likely, Peters recommends that the child's lawyer "consider the child's current predicament not in isolation, but in comparison to the *actual alternative options* that foster care provides."³⁷ Peters wants lawyers to appreciate the limitations of the state's beneficence. In jurisdictions where the foster care system lacks good homes in the vicinity, she warns that children's lawyers who only focus on what is inadequate about the parent's home may fail to consider that the state's proposed alternative may be, in different respects, even more inadequate.

Peters further advises that the child's lawyer should evaluate all of the alternatives available by considering the child's "family system," the family's history, and the child's ordinary, daily life.³⁸ In some cases, the child's family history will clearly justify reliance on the Psychological Parent Model, thereby assisting the lawyer in eliminating some options from consideration.³⁹ In other cases, the Family Network Model will be obviously appropriate, again helping the lawyer identify the correct options.⁴⁰

Peters's ultimate contribution is her effort to 'blend' these divergent theories, thus creating an "integrated model [that] attempts to preserve the best of each paradigm while discarding the historically outdated or the unintentionally harmful."⁴¹ Peters subsequently gives lawyers advice about when to rely on which developmental theory and for what purposes. Peters especially likes the Psychological Parent Model because it "requires the lawyer to strive constantly to see the past, present, and future options from the *child's*

36. *Id.* at 1565.

37. *Id.* at 1555.

38. *See id.* at 1566.

39. Peters gives an example:

For instance, a child who clearly had one primary caretaker from whom she has experienced a separation, and who is clearly in crisis, may also have no family network to speak of. Available alternatives which would place the child in a network of care with no single caregiver would appear to be inappropriate.

Id. at 1555-56.

40. Peters gives a different illustration for this proposition:

[A] child clearly may be living in the midst of an inner city family network, with a beleaguered potential psychological parent figure in crisis. If the network can support the child adequately, there may be no need to move the child to a foster home. It may also aid the child to shore up the psychological parent with supportive services, to afford the child the security of that special relationship.

Id. at 1556. Peters elaborates on these different theories, explaining what distinguishes them from each other and how they are similar. I shall return to her analysis of these theories in somewhat greater detail in Part III.

41. *Id.* at 1554.

point of view and to coax others constantly to do the same."⁴² In cases in which there is a psychological parent who is able to care for the child, Peters argues that lawyers for children should seriously consider this person as the child's primary resource.⁴³ In seeking to 'blend' the Psychological Parent theory with Davis's Family Network Model, Peters advises lawyers for children to "look beyond the traditional mother-child dyad to alternative family arrangements which provide children with the stability needed for their development through an integrated family network."⁴⁴

I am somewhat less confident than Peters in the applied utility of this analysis, at least insofar as it purports to provide lawyers with meaningful guidance as to what results to advocate in a given case. But Peters herself acknowledges that no paradigm will answer all questions.⁴⁵ Partly because of this, she proposes that when lawyers unavoidably are left to decide things for themselves, they be deliberately constrained by two additional concepts. First, lawyers should "err on the side of seeking to keep the current family structure intact, while advocating aggressively for state interventions that ameliorate the worrisome conditions in the home."⁴⁶ Second, the child's lawyer should always compare the result the lawyer is considering with the child's own desires.⁴⁷ This latter constraint does not make a great deal of sense to me when it is applied to infants and toddlers. Peters seems to believe that lawyers for

42. *Id.*

43. *See id.*

44. *Id.*

[R]esearch indicates that children develop multiple attachments to caregivers who can help them cope with separation anxiety and stress. The idea of "one psychological parent" or "the primary parent" is a concept often emphasized by custody evaluators and within legal circles. This notion is controversial and has very little empirical support. There is usually a hierarchy of attachment figures, each of whom may have qualitatively different types of relationships with the child . . .

James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAV. SCI. & L. 419, 423 (1991) (citations omitted), *quoted in* Davis, *supra* note 29, at 361-62.

45. *See* Peters, *supra* note 5, at 1558.

46. *Id.* (footnote omitted).

This default implements a view that Goldstein, Freud, Solnit, and Goldstein, as well as Davis, and many concerned experts clearly share: the value of minimal state intervention, the harm of precipitous removal of children, and the importance of seeking in every instance the least detrimental alternative. This default also acknowledges the trauma that the child will experience when she separates precipitously from her family.

Id. at 1558 (footnote omitted).

47. In Peters's words:

Thus, in the end, the best interests determination must end where it began: with the attorney trying to see the decision to be made from the child's subjective perspective, with a focus on the child's uniqueness and individuality. This structure of decision making, starting and ending with the child, considering the child's circumstances in light of the two paradigms, and seeking the input of experts when needed, reduces the range of lawyer discretion to acceptable levels.

Id. at 1558-59.

extremely young children are capable of discerning the subjective desires of their clients. I do not. She also apparently believes that these children's desires are important guideposts for the lawyer's actions. Again, I do not. Finally, Peters advises that when the lawyer concludes that more than one acceptable option exists, the lawyer's job is to "present evidence and argument describing all these options to the court while also presenting evidence and argument opposing all rejected options."⁴⁸

Peters recognizes that lawyers will have very wide latitude to make choices for their clients, even if they faithfully adhere to her ways. As an antidote, Peters also proposes that lawyers always ask themselves "seven questions to keep us honest" (p. 65). Whenever a lawyer is about to make a choice in a case, Peters advises the lawyer to test herself with a series of questions. These questions are:

1. In making decisions about the representation, am I making the best effort to assess the case, from my client's subjective point of view, rather than from an adult's point of view? (p. 65)
2. Does the child understand as much as I can explain about what is happening in his case? (p. 66)
3. If my client were an adult, would I be taking the same actions, making the same decisions, and treating her in the same way? (p. 66)
4. If I decide to treat my client differently from the way I would treat an adult in a similar situation, in what ways will my client concretely benefit from that deviation? Is that benefit one which I can explain to my client? (p. 67)
5. Is it possible that I am making decisions in the case for the gratification of the adults in the case, and not for that of the child? (p. 68)
6. Is it possible that I am making decisions in the case for my own gratification, and not for that of my client? (p. 68)
7. Does the representation, seen as a whole, reflect what is unique and idiosyncratically characteristic of this child? (p. 69)

These questions will not, of course, tell lawyers what steps they should take at any given moment. But they are Peters's way of reminding lawyers that their clients are, after all, at the center of the case, and that the lawyer's chief task is to keep the client there at all times.

II. THE PRACTICAL IMPACT OF HER PROPOSAL

A. *When Representing Children Who Set the Objectives*

Thus far, this review has briefly looked at the question of how lawyers should determine what result to seek when representing children in child protective proceedings. In this section, I will con-

48. *Id.* at 1558.

sider the likely impact on practice that Peters's book will have if the bar assiduously follows her advice.

One effect of her work may be to help reduce the unreasonable caseloads with which many lawyers are now saddled. One possible explanation for these absurdly high caseload levels is that administrators have not understood what lawyers for children could and should be doing to discharge their responsibilities. The administrators may have believed it was sufficient to provide a child with a lawyer even if the lawyer could do nothing more than appear in court, in part because they could not imagine what the lawyer could or should be doing outside of court. Peters's book will make it easier to insist upon maximum caseloads for children's lawyers so that they can do what we should start expecting of them outside the courtroom.

Although this book will be — and should be — of interest to judges, agency attorneys, lawyers for parents, law professors (especially clinical law teachers), and scholars, it is likely that the book's primary audience will be lawyers who represent children. This segment of the bar needs and deserves a clearly written text that tells them what to do when representing children and why they ought to do it. I expect that the book will have its greatest impact on what lawyers actually do.

If that is right, it is important to begin with Peters's powerful preference for insisting that lawyers take their instruction from their "counseled client"⁴⁹ and to try to assess what impact this preference will have on lawyering. If Peters is successful in persuading lawyers to follow her advice, lawyers in an overwhelming number of cases will be advocating for results their clients want, even when the lawyers are unsure such advocacy is well advised.

The question that naturally arises is: What are the preferences of children in most cases? Regrettably, there is no empirical study of which I am aware that reports the desires of children who are the subject of child protective proceedings. Based on my experience in twenty-five years of practice and my informal polling of lawyers in these proceedings, I conclude that most children most of the time want to stay with their families, or be returned as quickly as possible to their families if they have been removed. If I am right, lawyers who follow Peters's advice will be doing what they can either to reunite children with families from which they have been re-

49. Peters is one of many significant voices who advocate the necessity of empowering children in the attorney-client relationship. But, as in all matters of lawyering, Peters is extremely thoughtful and reasonable. She does not advocate that lawyers merely ask their clients what they want and then expect lawyers to go out and try to accomplish that outcome. Only after a client has been counseled, and the lawyer actively participates in a conversation with the client about the range of available options and the pros and cons of each, would Peters expect the lawyer to be ready to do the client's bidding. *See id.* at 1521, 1565.

moved or to prevent removal in the first place. In my experience, many lawyers for children are exceedingly uncomfortable doing this. This discomfort may stem from a fear that a child will be harmed as a result of the lawyer's successful advocacy. Or it may derive from a belief that the child protective agency is an unworthy adversary that has not protected the child adequately or made an adequate case for separation. It may even come from a fear that the media or an administrator in the office will blame or rebuke the lawyer for taking a chance with the child's well-being.⁵⁰

In my experience, many adults connected with child protective cases treat children's expressed preferences quite differently, depending on what the child says. When children say they want to go home, that wish is often received by adults the same way editors treat a story about a dog biting a man — they aren't going to run with it. On the other hand, when children say they do not want to go home, adults frequently will invoke the child's preference as a crucial factor to take into account. In this sense, children are empowered in an odd ratchet-like manner. When, but only when, they do not want to go home, adults pay serious attention to their preferences. Peters is trying to change this. She really wants lawyers to take a child's preferences seriously, even when those preferences do not jibe with the lawyer's sense of a good outcome.

B. *When Representing Children Too Young to Set the Objectives*

Peters never quite provides definitive instructions to lawyers representing very young children regarding exactly what they should seek for their clients. I do not mean to criticize Peters for this failure. One cannot do more than provide a general prescription of values and goals. Each case will necessarily contain its peculiar characteristics requiring the exercise of sound judgment by well-meaning professionals.

Even more interestingly, Peters's book raises questions of how much lawyers will continue to seek results based on the child's best interests, rather than the child's preferences, even in those jurisdictions that expect lawyers to do so. Judges and legislators should recognize that Peters's preference for empowering children may

50. Lost in this way of thinking is that *all* actions contain elements of risk and that children may be harmed to a far greater extent by removing them from their families than by keeping them at home. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995). Frequently, these points are lost because lawyers for children fail to obey one of Peters's principles: Always make decisions from the client's perspective. The reason these harms are not recognized, in other words, is that these harms do not directly impact the lawyer. When children are harmed by removal, lawyers for children are never blamed. When children are harmed by the failure to remove, the arguments made by the child's lawyer commonly are carefully scrutinized and blame frequently follows. It is understandable, but lamentable, that these factors affect the professional role of a child's representative.

well mean that lawyers following Peters's model will choose to permit their clients to set the objectives, even where statutes explicitly instruct lawyers to adhere to a best interests standard. The determined desire to empower children to direct their lawyers' choices may lead lawyers (a) to advocate objectives of children who are younger than courts would want to be so empowered and (b) to ignore rules instructing lawyers to represent a child's best interests. This second point may be troublesome to some.

The troublesome quality is that it may be impossible for a judge ever to be sure whether the lawyer's arguments or recommendations are actually the product of the lawyer's independent views or merely reflect the preferences of the client. Even a direct order by a judge to an attorney instructing the lawyer to disregard his or her client's instructions regarding the objectives of the representation may be problematic.⁵¹ Of course, the problem disappears when the lawyer chooses to comply with the court's instructions. But the question remains how and when judges can ever detect whether lawyers who claim to be complying with their orders actually are not doing so. There are, after all, *some* limits on a court's capacity to interfere with the attorney-client relationship, even when the client is a young child.

In two ways, lawyers who are unsympathetic to a rule that binds them to disregard their clients' instructions regarding the objectives of the case may be able to thwart a court's attempt to oblige them to advocate an outcome based on the lawyer's independent assessment of the case. First, it would appear lawyers would have a rather easy time ignoring such an instruction and invoking the attorney-client privilege when asked about the process by which they chose to advocate the particular position they took in a case. Alternatively, and shrewdly, lawyers may follow Peters's advice about how to frame arguments on their client's behalf when appearing before judges who are disinclined to give great weight to the child's preferences. Good lawyers will mask reliance on their client's preferences when arguing before courts known not to give much weight to a child's preferences. As Peters advises children's advocates, once lawyers know what results their clients want, it will commonly be strategically sound for the lawyers to "translate" the legal argument into the language of "best interests," so that judges

51. The key question becomes: When does an attorney-client relationship commence — when an attorney says so, or when a court does? If it commences only when a court says so, then arguably the court may attach any conditions it sees fit (regardless of the rules controlling the conduct of lawyers) when it assigns a member of the bar to serve a purpose other than as an attorney in an attorney-client relationship. If, however, an attorney-client relationship commences whenever an attorney is representing a client, then the rules governing attorney conduct — including the powerful one that attorneys must take their instruction from their unimpaired clients — may trump a court order restricting the duties of counsel.

will be more likely to decide the matter in accordance with the child's wishes.⁵²

III. THEORETICAL ISSUES CONCERNING HOW TO DETERMINE THE ROLE OF COUNSEL FOR YOUNG CHILDREN

Concealed in all discussions of the role of counsel for children are two distinct concepts that I will simply call "process" and "substance." By "process," I mean the formula by which the role of counsel is to be determined. "Substance" refers to the actual role of counsel for children in a particular setting. I have long been intrigued about the process of representing children.⁵³ Peters has chosen in this book to emphasize the substance: what lawyers ought to do when representing children in child protective proceedings.

But Peters does more than tell lawyers what they should do when representing children too young to determine the objectives the lawyer should seek. She also *justifies* the reasons lawyers are to do those things. In doing so, Peters has stepped precisely into my specialized focus of studying how to determine the role of counsel. And here, I believe, Peters has erred in her analysis. It is not that I challenge Peters's goal to cabin the discretion lawyers exercise when representing children. Nor do I question her advice about what lawyers for children should actually be doing in child protective proceedings — at least with regard to very young children. Rather, I challenge the *method* by which she recommends that lawyers determine what they should advocate when representing very young children in child protective proceedings.

I want to emphasize right away that this error has no bearing at all on the substance of her argument, which is not merely correct but wonderfully developed. Nonetheless, I want to try to demonstrate that Peters is wrong about *why* lawyers should represent very young children in the manner she prescribes. One might wonder why I would want to do this when I think so highly of her book. The answer is precisely because I so strongly believe her book is correct about what lawyers for young children should do that I want to justify why they must do it in a way that is inarguable. I believe that Peters's analysis opens the door to advocates who disagree with her prescription, and who want to argue that lawyers for children should do the opposite from what Peters would require.

52. See Peters, *supra* note 5, at 1515.

53. See generally Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399 (1996); Martin Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76 (1984).

It is, of course, presumptive to call something "inarguable." By this term, I merely mean that what Peters has prescribed for lawyers representing children too young to set the case objectives comes very close to being the corollary of the law as it is written in every state. Thus, advocates who wish to argue that Peters is wrong should be required to argue that the law of child protection is wrong. I believe, and have developed the argument elsewhere,⁵⁴ that the role of counsel for young children in child protective cases is to seek outcomes based on the substantive law defining children's rights. Lawyers simply are not free to define for themselves what children's lawyers should do. This is no less true when the lawyer doing this defining is as perceptive as Peters.

In the long run, it is essential to obtain agreement on determining the process by which the role of counsel is established. If I am right, this requires little more than studying substantive law. Once we know the controlling legal principles in any particular setting, we will be able to identify what lawyers representing young children should do.

As discussed earlier in this review, the need to develop an argument of any kind for a particular role of counsel for very young children stems from a shared understanding of the desirability that lawyers for children not be free to impose their own values when advocating an outcome.⁵⁵ The goal, in the words of Robyn-Marie Lyon, is to create a means by which lawyers are "guided by established procedures and explicit factors to determine the child's position."⁵⁶

What is Peters's method that I am questioning? Peters recommends that lawyers read for themselves various literature on child development theory.⁵⁷ She believes it is important that lawyers educate themselves by carefully reading theoretical and empirical work by scholars in the child developmental field (p. 132). After this critical reading, she recommends that a lawyer for children "draw on the hard work of other disciplines and bring the best of what those disciplines offer to his decision-making for his client" (p. 132).

54. See Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, *supra* note 53.

55. See *supra* notes 4-6 and accompanying text.

56. Robyn-Marie Lyon, Comment, *Speaking for a Child: The Role of Independent Counsel for Minors*, 75 CAL. L. REV. 681, 691 (1987). Ann Haralambie and Deborah Glaser agree with this suggestion. See Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J. AM. ACAD. MATRIMONIAL L. 57, 76-77 (1995).

57. See p. 132 (advising lawyers to read the important literature in nonlegal fields).

Such an undertaking commonly means that lawyers will be expected to choose between diametrically opposed theories or, if they are as gifted a theorist as Peters is, to reconcile such theories (as Peters attempts to do as discussed in Part II). Once lawyers have made this choice, or have reconciled competing theories, the duties imposed on counsel are supposed to follow accordingly. The crucial question for purposes of reviewing Peters's book is: Who should be encouraged to synthesize these sharply contrasting ideas about the well-being of children? For Peters, the answer is lawyers assigned the delicate task of representing the children whose lives are directly impacted by judicial decisions.⁵⁸ I do not agree.

An important goal in defining the role of counsel — indeed, as Peters herself acknowledges, perhaps *the* most important objective — is to restrict the discretion of randomly chosen members of the bar. Peters is committed (as I am) to defining the role of counsel in a way that ensures lawyers will perform like tasks and make like arguments in similarly situated cases.⁵⁹ But her very method of argument is structured to fail in the long run to create a uniform role for lawyers for young children. By arguing that lawyers should adopt a particular way of thinking about childrearing and the needs of children, and then use that way of thinking to guide them through the myriad choices lawyers need to make to advance the interests of their clients, Peters will succeed in creating uniformity of role performance only for those lawyers who are persuaded by her reasoning. Without realizing it, Peters has delivered a danger-

58. See p. 132. Peters is not the first writer to rely on her own views of what is good for children when intending to influence how lawyers representing children should behave. Indeed, a good example of such is the effort of two other clinicians at Yale. Professors Stephen Wizner and Miriam Berkman, who train law students to represent young children in custody proceedings, wrote an article in 1989 calculated both to explain how they decide what positions to advocate and to encourage other lawyers to follow their ideas. See Stephen Wizner & Miriam Berkman, *Being a Lawyer for a Child Too Young to be a Client: A Clinical Study*, 68 NEB. L. REV. 330 (1989). In the article, these authors delineate factors they recommend lawyers use when representing young children in custody proceedings. Specifically, they produce nine "presumptions" they recommend lawyers use when deciding what position to advocate on behalf of children too young to set the objectives of the litigation. Among these "presumptions" is their

principal presumption[] that children ought to be in the custody of that parent who has, most consistently during the child's life, been the child's primary caregiver. Except in the most extreme circumstances, involving the actual inability of the primary caregiver to care for the child, a child should not be removed from the custody of the primary caregiver.

Id. at 345. But their "presumptions" do not invariably comport with substantive law. According to Eleanor Maccoby and Robert Mnookin, for example, California law "does not embody any presumption in favor of primary caretakers, though in practice in disputed cases, some weight is undoubtedly given to maintaining continuity in the caretaker role." ELEANOR E. MACCUBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 81 (1992); see also Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On DIVIDING THE CHILD*, 92 MICH. L. REV. 1808, 1809-10 (1994) (reviewing *DIVIDING THE CHILD*, *supra*). But see *Burchard v. Garay*, 724 P.2d 486 (Cal. 1986).

59. See Peters, *supra* note 5, at 1526.

ous concealed message: lawyers are free to disagree with her theory about the needs of children and are even free to develop theories for themselves. Once lawyers have developed the theories they believe in, they may then implement them by representing young children in a manner that advances these theories.

However persuasive her reasoning is (and I, for one, am quite persuaded by it), it is unimaginable that all members of the Bar will agree with her. Those who do not agree are no longer tethered by any particular guiding principle that would restrain the choices they need to make. Because Peters cannot hope to convince all practitioners of her theory, nonbelievers will use a different method of representation based on their own theory of child development. Encouraging lawyers to decide which social scientists to credit invites lawyers for young children to ignore the purposes and intentions of the substantive law and substitute it with their own judgments. Theories of child development can be complicated, and the creation of substantive laws about children's rights can be extraordinarily difficult. That is why, among other reasons, it is so important that these judgments be made by judges and legislators and not by randomly chosen members of the Bar acting as self-appointed private lawmakers. Thus, even in the short run, Peters cannot possibly expect that everyone will follow her advice about what is good for children.

Paradoxically, the greater Peters's contribution is in reconciling substantively competing child development theories, the less we should encourage individual members of the bar to choose one theory over the other. The more controversial the substantive ideas that buttress the argument in favor of lawyers preferring a certain outcome, the less these ideas should be permitted to form the basis for deciding the role of counsel for young children. Ideally, the principles underpinning a child advocate's position should enjoy the support of most scholars and judges and legislators. When writers such as Peters examine the literature and recommend particular ideas as controlling principles for deciding cases about children, they are making an important contribution. But it is misguided to make this argument to the practicing bar. The proper role of young children's lawyers should simply be to enforce their clients' rights. Those rights derive from substantive law. For this reason, we should be encouraging lawyers to study the substantive law that defines the rights of children and instructing lawyers to enforce those rights assiduously.⁶⁰

As I noted at the beginning of this Part, it turns out that the recommendations Peters makes to lawyers about what presump-

60. See Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, *supra* note 53, at 1420-21.

tions they should be making and what outcomes they should be seeking are consistent with current law and policy. For example, lawyers who carefully follow Peters's advice when representing children too young to set the objectives in their cases can be expected to fight aggressively to avoid the trauma of removing children from their families. Indeed, they will insist that removal be limited to compelling reasons of safety.⁶¹ When removal is required to protect a child from serious harm, the child's lawyer will insist that (a) the child be placed in the least restrictive, most family-like setting close to the child's community (ideally in a relative's home)⁶² and (b) that regular, frequent visitation be provided for the child and his or her parents and other important figures in the child's life.⁶³ These lawyers will also pay careful attention to the development of the case plan so that everyone has an early, clear idea of the obstacles to returning the child to his or her family.⁶⁴ They will also make certain that the parents be provided with assistance to help them regain their children's custody promptly,⁶⁵ and when children have been living away from their parents for a significant period of time, that serious consideration be given to formally recognizing the now developed parent-child relationship that has resulted from the out-of-home placement.⁶⁶

But these principles will sound thoroughly familiar to readers who know the substantive law of child protection and foster care since 1980, when Congress passed the landmark Adoption Assistance and Child Welfare Act of 1980.⁶⁷ Many state statutes have codified the federal preference for keeping children with their families. The introductory purpose clauses of the statutes commonly contain language similar to New York's, setting out the state's pur-

61. This is so because child developmentalists believe that children should not have their primary parental relationship disrupted unless there are compelling reasons to do so.

62. See *infra* note 69.

63. See *infra* note 69.

64. See *infra* note 69.

65. See *infra* note 69.

66. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §103, 111 Stat. 2115, 2118-20.

67. See 42 U.S.C. §§ 620-629e, 670-679a (1994). Under this Act, Congress mandated that states receiving federal money must comply with specifications designed to prevent unnecessary separation of children from their parents, to assure a careful monitoring of children who are separated, and to provide an infusion of services into the family to speed the ultimate return of children to their parents. Under current law, whenever a state removes a child from the custody of his or her parent, the state must develop an individualized case plan, 42 U.S.C. § 671(a)(16) (1994), which is required to provide for the child's placement "in the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." 42 U.S.C. § 675(5)(A) (1994). To implement these principles and reduce the dangers to children associated with a child's separation from loved ones, a foster care placement based upon extended family relationships is preferable to a placement outside the family.

poses in language quite consistent with Peters's view of what is best for children.⁶⁸

To the extent that Peters's views about what is best for children reflects substantive law — and they do to a remarkable extent — she is on the firmest possible ground for arguing what lawyers for children should be trying to achieve on behalf of their young clients. But lawyers should be acting for reasons radically different from those proposed by Peters. The lawyers' role should not be justified because current social science theory supports it or because a particular scholar is persuaded of its correctness. Instead, their role is to behave in a particular manner because the legislature or courts have decided that these principles are correct. Though the lawyers' role is not immutable, its changeability depends not on members of the practicing bar changing their minds, nor on scholars changing theirs, but on lawmakers changing theirs. That is how it should be.

CONCLUSION

Part of Peters's book is written to the wrong audience and says the wrong things to the audience of practicing lawyers. When Peters attempts to blend competing child developmental theories, the audience she should be addressing is policymakers. This undertaking allows her to make an extremely valuable contribution to our understanding of the needs of children. But other scholars making similar contributions do not conceive of their work as being directed to lawyers for children.⁶⁹ Instead, the principal audience is judges, legislators, policymakers, and other scholars who are writing about what children need to thrive. But Peters's audience, at least as I understand it, is primarily meant to be lawyers who will be representing children. These lawyers ought not be encouraged to become policymakers when representing children, or even to think

68. New York's statute declares that:

- (i) it is desirable for children to grow up with a normal family life in a permanent home and that such circumstance offers the best opportunity for children to develop and thrive;
- (ii) it is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered;
- (iii) the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home

N.Y. Soc. SERV. LAW § 384-b(1)(a)(i)-(iii) (McKinney 1992).

69. The works of prominent theorists such as Joseph Goldstein and Peggy Davis, for example, are not aimed at how lawyers should act when representing children, but rather at the principles upon which trial judges should decide cases, appellate judges should make law, or legislators should enact law. Obviously, scholars such as Goldstein and Davis recognize that their work ultimately will impact the things lawyers representing children should do. But their goals are to influence the substantive rules by which cases are decided. Once that has been accomplished, these scholars would expect lawyers representing children to conform their behavior to the law.

in terms of liberating themselves to answer weighty questions such as what substantive rules best serve their client's needs.

All law about child custody, including even child protection, must be grounded in theory. This theory is not immutable — far from it. When the law changes in accordance with these theories, there is a full and fair opportunity to challenge the theories and amend them over time. But when we allow — and even encourage — private members of the bar to advocate on behalf of a young child in accordance with a child developmental theory that has not been incorporated into law, two serious problems arise. First, child advocates will be free to disagree about which theory to endorse. This will create chaos in differential representation. Second, child advocates will in effect have become private lawmakers. This may not appear to be much of a problem at first glance. Advancing the law in a progressive direction is a good to be supported. But let's look at this phenomenon slightly differently. Instead of calling this "advancing" the law, we might more accurately call it undermining the law (much as a civil disobedient does).

Children's advocates who want the substantive law to change should not try to persuade lawyers of such a need. Even if successful in the short run, their contribution to the subject of what lawyers should do will not survive the next wave of social science theory, unless their arguments move from the relatively obscure world of principles on which lawyers for children ought to operate, to the highly visible one of principles on which judges are to decide cases. In other words, Peters should be telling lawyers not what good theory is, but what good practice is. Good practice for lawyers is not to take the law into their own hands, nor to figure out for themselves which competing child developmental theory is correct. It should be only to determine what the law says is a child's right.

None of this is to say that the readers of Peters's book should refrain from following carefully Peters's brilliant advice about how to be strategic advocates for their clients. I, for one, would be extremely pleased if lawyers representing children became faithful adherents to Peters's prescriptions for practice. My disagreement is solely over how Peters comes to her conclusions. I only hope lawyers pay more attention to what Peters says about what they should be doing on behalf of their clients and less attention to the reasoning that leads Peters to her conclusions.