Denver Law Review

Volume 69
Issue 3 *Symposium - Children's Law*

Article 22

February 2021

Vol. 69, no. 3: Full Issue

Denver University Law Review

DENVER UNIVERSITY LAW REVIEW

VOLUME 69

1992

Published by the
University of Denver
College of Law

1992 Volume 69 Issue 3

DENVER UNIVERSITY LAW REVIEW

TABLE OF CONTENTS

FOREWORD

All of us bring to our adult lives different memories of childhood. Many readers of this Symposium undoubtedly had the advantages of a supportive family and a good education. Others may not have been so fortunate. Whatever our childhood experiences, we should use them to benefit today's and tomorrow's children.

It would be inappropriate to suggest that today's children face problems greater than those faced by children in the past. We may have forgotten that yesterday's children confronted death caused by diseases now preventable by vaccines and debilitating injuries now treatable by modern medical expertise. In the past, children also suffered inhumane working conditions and often early deaths of siblings and parents. As quickly as these problems were solved, they were replaced with new problems. Today's children confront threats of fetal addiction to drugs, alcohol and exposure to AIDS. They face ever-increasing early exposure to drugs and alcohol, danger from their classmates' lethal weapons and the realities of one-parent homes or both parents working outside the home. In addition, many children have long braved neglect, abuse, poverty, hunger and homelessness.

The problems today's and tomorrow's children face are not so much greater or lesser than those of yesterday's children, rather they are different. Today's problems present new challenges for the adults who attempt to make childhood fulfilling, carefree and a solid preparation for adulthood, as childhood should be. Children need supportive home environments and intellectual challenges to develop their bodies and minds in preparation for the rest of their lives. These goals can hardly be achieved when children must struggle daily merely to survive. We must look closely at children's current realities and needs and adjust our perceptions and support of those who raise the new generation.

This Symposium consists of two parts. The first part is a compilation of articles and student-written pieces on topics that touch children's lives. Congresswoman Schroeder's article introduces this part and the entire Symposium. In it, she outlines the challenges encountered by children and families in the United States and suggests means by which the Congress and other representative bodies can help meet those challenges.

The second part is a compilation of pieces written by scholars, practitioners and judges who attended the American Bar Association's April 1991 conference, "Family Law and the 'Best Interest of the Child.' " Judge Marianne E. Becker's article explains the genesis and goals of the conference. Conference attendees' contributions address how we can better serve children's developmental needs, especially when children come into contact with the legal system.

It is my hope that today's children will someday reflect on this Sym-

posium and observe the progress forged through the recognition of problems and the suggested solutions set forth in these pages.

I thank Mary Zuchegno, University of Denver College of Law Class of 1991, for suggesting children as the topic for this Symposium and Professor Timothy B. Walker, University of Denver College of Law, for referring me to Judge Becker. I would also like to thank the contributing authors and the members of the *Review* for the considerable efforts that went into this Symposium. The conference pieces were particularly challenging as we and the authors strived to reach a middle ground between the multi-disciplinary and traditional law review writing and citation conventions. Finally, I extend a special thanks to the members of the *Review* who continued to work on this Issue after final examinations and graduation.

Diane G. Cluxton-Kremer
Symposium Editor

TOWARD EFFECTIVE AND FAMILY FRIENDLY NATIONAL POLICIES FOR U.S. CHILDREN AND THEIR FAMILIES

CONGRESSWOMAN PATRICIA SCHROEDER*

Over the last decade, the well-being of America's families has become a popular topic of discussion. Research studies and news accounts have documented profound changes affecting children and families and how circumstances for many have spiraled downward. Moreover, consumer confidence has fallen to record lows and many believe that their own government and other institutions do not help and may even thwart efforts of individuals and families to help themselves.

In 1983, The House of Representatives created the Select Committee on Children, Youth, and Families (the Committee) to provide an ongoing assessment of the conditions of American children and families and to make recommendations to Congress and the public to improve public and private sector policies. This special Committee serves as the only forum in Congress exclusively dedicated to making federal policies more attentive to the needs of the nation's families and children. Thirty-five members of the House of Representatives serve on the Select Committee. Two-thirds of the members are Democratic and one-third are Republican, reflecting the composition of the House of Representatives as a whole.

The priority of the Committee, under my stewardship since February 1991, is to reshape the national agenda and to compel actions that benefit families rather than ignore or actually harm them. This Article begins with a description of the profound impact of economic, demographic and social changes on the well-being of families and children. Then follows a section that describes the need for more substantial national debate and strategies for response. The Article also details the work of the Committee to support new priorities on behalf of children and families. It also addresses the contributions and responsibilities of others in the public and private sector to respond to children's and families' needs.

CIRCUMSTANCES OF CHILDREN AND FAMILIES WORSEN

Numerous recent reports affirm the findings of the Select Committee and point out that the status of young Americans remains dismal, with high rates of child poverty, violent deaths, child abuse, infant mor-

* United States Representative for the First Congressional District of Colorado since 1972; Chairwoman of the House Select Committee on Children, Youth, and Famiiies since February, 1991; University of Minnesota (B.A., 1961); Harvard Law School (J.D., 1964).

tality and low birth-weight births. Many of these conditions should sound loud alarms. Among our youngest children, one in four is poor. More than one out of every five children lives in a single-parent family. More than nine million children have no health insurance. Nearly 40,000 babies die each year before their first birthday, millions of children are exposed to the toxic effects of lead, and more than 350,000 babies a year are born exposed to drugs. It is estimated that one in seven preschoolers is at risk of dropping out of school.[1]

When young people reach their teens, the threats mount and become even more grave.[2] This year, one in four students will not graduate from high school with his or her peers. Another one of those four will graduate, but will be as deficient in basic skills and work habits as those who have dropped out. By 1995, some 14 million Americans will be unprepared for the jobs that are available. Last year the United States Office of Technology Assessment reported that one out of five of today's 31 million adolescents has at least one serious health problem. Teen pregnancy, HIV infection and AIDS, sexually transmitted diseases (STDs), substance abuse, dropping out of school and homelessness among youth continue to rise. Approximately 1.1 million teenage girls become pregnant every year; the total number of AIDS cases reported among persons ages thirteen to twenty-four increased by seventy-five percent between 1989 and 1990; some three million teens are infected with a sexually transmitted disease annually.[3]

ECONOMIC CONDITIONS BUFFET FAMILIES

During the last decade, while family income increased for many families, the economic base of millions of America's families eroded.[4] At the same time, the costs of raising a child have continued to climb. The Department of Agriculture estimates the cost of raising a child (food, housing, transportation, clothing, health care, education, child care and miscellaneous expenses) born in 1990 through age seventeen at $151,170 for low-income families, $210,070 for middle-income families and $293,400 for upper-income families.[5] Because their incomes

1. *See* COMMITTEE FOR ECONOMIC DEVELOPMENT, CHILDREN IN NEED: INVESTMENT STRATEGIES FOR THE EDUCATIONALLY DISADVANTAGED 3 (1987) [hereinafter COMMITTEE FOR ECONOMIC DEVELOPMENT]; NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 25 (1991) [hereinafter NATIONAL COMMISSION]; *see generally* CHAIRWOMAN OF SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 102D CONG., 1ST SESS., REPORT ON A PLAN OF ACTION FOR FAMILIES: RESPONSE TO A NATIONAL EMERGENCY (Comm. Print 1991) (Chairwoman Patricia Schroeder) [hereinafter CHAIRWOMAN'S REPORT]; SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 101ST CONG., 1ST SESS., REPORT ON U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS, 1989 (Comm. Print 1989).

2. *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONG., ADOLESCENT HEALTH: SUMMARY AND POLICY OPTIONS (1991).

3. *Id.*

4. *See generally* CENTER ON BUDGET AND POLICY PRIORITIES, SELECTIVE PROSPERITY: INCREASING INCOME DISPARITIES SINCE 1977 (1991) [hereinafter SELECTIVE PROSPERITY]; *Reclaiming the Tax Code for American Families: Hearing Before the House Select Committee on Children, Youth, and Families*, 102d Cong., 1st Sess. (1991) [hereinafter *Reclaiming the Tax Code*].

5. FAMILY ECONOMICS RESEARCH GROUP, U.S. DEPARTMENT OF AGRICULTURE, EX-

have not kept pace with these costs, families are having much more difficulty ensuring their children's healthy development, economic security and preparation for productive participation in society.

Few families have gone untouched by these changes. The ranks of the middle class have shrunk[6] as the ranks of those living in poverty or living on the edge and fearing poverty have swelled.[7] In recent months, budget shortfalls, plant closings, other employment downturns and a burgeoning health care crisis have increased the challenges confronting families and children across the nation. The recession that officially began in August 1990, but which was being felt in regions of the country long before then, has compounded the economic insecurity that American families live with on a daily basis.[8]

America's families have been hit with a double economic whammy over the past ten years. A combination of federal, state, and local taxes, along with social security taxes, is taking an even bigger bite out of family income.[9] At the same time, net incomes have stagnated or declined, despite families' efforts to keep up by sending a second wage-earner into the labor force.[10] The economic entrapment of American families is in part due to changes in the national economy. These changes have created millions of new jobs in the service sector, but these jobs pay less than the jobs they replaced in the manufacturing sector of the economy and lack the long-term security and benefits, such as health insurance and pensions, that in the past have been considered standard.[11]

The impact of this economic squeeze is far reaching. Real wages have not grown since 1973. As a result, between 1977 and 1990, middle-income families saw their real income decline by six percent. For moderate-income families, the drop was nine percent. After-tax declines were even steeper, averaging an additional percentage point for each income group.[12]

Changes in federal tax policy added to the growing income disparity between the very rich and the rest of Americans. According to a recent study, the percentage of income paid in federal taxes by the richest one percent of Americans will decline eighteen percent between 1977 and 1992, while the percentage of income that middle-income households will pay will remain unchanged.[13] In 1988, the level of household debt

---

PENDITURES ON A CHILD BY HUSBAND-WIFE FAMILIES: 1990 8 (1991). The estimate includes the costs of food, housing, transportation, clothing, health care, education, child care and miscellaneous expenses. *Id.*

6. *America's Families: Conditions, Trends, Hopes and Fears: Hearing Before the House Select Committee on Children, Youth, and Families*, 102d Cong., 1st Sess. (1991) (testimony of Greg J. Duncan, Survey Research Center, University of Michigan).

7. *See, e.g.*, William E. Schmidt, *Hard Work Can't Stop Hard Times*, N.Y. TIMES, Nov. 25, 1990, at 1; Leonard Silk, *Bleak Job Picture Darkens the Mood*, N.Y. TIMES, Nov. 1, 1991, at 2.

8. *See generally* CHAIRWOMAN'S REPORT, *supra* note 1.

9. *See generally Reclaiming the Tax Code*, *supra* note 4.

10. *See generally* LAWRENCE MISHEL & DAVID M. FRANKEL, ECONOMIC POLICY INSTITUTE, THE STATE OF WORKING AMERICA (1991).

11. *Id.*; *see also* BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN (1988).

12. *Reclaiming the Tax Code*, *supra* note 4.

13. *See generally* SELECTIVE PROSPERITY, *supra* note 4.

relative to disposable income reached a post-World War II high of ninety-four percent.[14] Skyrocketing prices for child care, housing, medical care and college education also have contributed to the economic squeeze on families. For example:

- Families spend more than $15 billion a year for child care, not counting any subsidies that they might be receiving;[15]
- The median sales price for existing single-family homes nationwide rose from $23,000 in 1970 to $100,000 in December, 1991;[16]
- Absent a major overhaul of the health care system, out-of-pocket health care expenses for families are expected to increase by 512% between 1980 and 2000, from $63 billion to $386 billion, excluding the cost of health insurance premiums;[17] and
- The cost of a college education is rapidly becoming so expensive that families are having to go even deeper in debt to pay for it. In 1976/77, the average annual cost of post-secondary education ranged from $1,935 at a public institution to $3,977 at a private one. The comparable costs in 1989/90 were $4,979 and $12,348.[18]

The increasing tax burden carried by American families has further tightened the squeeze. Rising prices for necessities and stagnating income levels triggered an economic crisis for many families, and the increasing tax burden on families exacerbated the problem. For too long, America's families—especially middle-income families—have been footing more than their fair share of the nation's tax bill.

The shift in the tax burden away from corporations and the wealthiest of Americans to middle America, and particularly to families, is clear. In 1967, federal revenues raised from corporate taxes were four percent of the Gross National Product (GNP). About twenty years later, they were half of that. During that same time period, social security payroll taxes went up and personal income taxes took a bigger bite out of families' take-home pay. As a result, even though the 1986 tax reform law was supposed to lower taxes for all families, the effective tax rate for low and middle-income families was higher in 1990 than it was in 1980.[19]

The current tax burden on families goes far beyond the original federal income tax structure. In 1913, when the first federal income tax act was passed, there was a $3,000 personal exemption for each taxpayer

14. *See generally* ROBERT POLLIN, ECONOMIC POLICY INSTITUTE, DEEPER IN DEBT: THE CHANGING FINANCIAL CONDITIONS OF U.S. HOUSEHOLDS (1990).

15. MARTIN O'CONNELL & AMARA BACHU, U.S. DEP'T OF COMMERCE, WHO'S MINDING THE KIDS? (1990).

16. GLENN E. CRELLIN, NATIONAL ASSOCIATION OF REALTORS, HOME SALES YEARBOOK (1992).

17. *See generally* FAMILIES USA FOUNDATION, EMERGENCY!: RISING HEALTH COSTS IN AMERICA 1980-1990-2000 (1990).

18. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEP'T OF EDUCATION, DIGEST OF EDUCATION STATISTICS 1991 (1992).

19. *See Reclaiming the Tax Code*, *supra* note 4.

and a $1,000 exemption for his or her spouse. There was no dependent exemption, but the standard tax rate was just one percent and accompanied by a surtax of one to five percent. The high personal exemption played the role of today's personal exemption and standard deduction and it was large enough that only a small portion of citizens owed any tax at all.[20]

By 1948, the personal exemption was $600 for single taxpayers and dependents and $1,200 for couples and heads-of-households. More importantly, this per person $600 exemption equalled forty percent of per capita personal income, resulting in a significant reduction in taxes for families with dependent children.[21]

Since that time, the value of these exemptions has eroded due to inflation. Although the 1986 tax reform law doubled the personal and dependent exemptions to $2,000 and indexed them for inflation (they were $2,150 in 1991),[22] they represent only eleven percent of per capita personal income. Clearly, this modest increment was not enough to make up for nearly forty years of erosion in the value of these exemptions to families. In fact, the current equivalent of the 1948 $600 personal exemption would be nearly $7,800.[23]

Tax rates have also increased significantly. In 1948, median family income for a family of four was $3,187, and families paid just three-tenths of one percent of their income in federal income taxes. Social security taxes were two percent of wages. By 1989, the median income for a family of four had risen to $40,763, but families were paying more than seven percent of their wages in social security taxes alone. All in all, families were paying twenty-five percent of their incomes for federal, state, local and social security taxes. This is nearly double the fourteen percent tax burden of thirty years ago.[24]

DEMOGRAPHIC SHIFTS FURTHER COMPROMISE FAMILIES' CAPACITY TO RESPOND

In 1990, there were 65 million children under age eighteen and 66.3 million families living in the United States.[25] Today, families with children comprise only thirty-five percent of all American households, compared with forty-five percent in 1970 and thirty-eight percent in 1980.[26] Children continue to decrease as a share of the entire population, and that proportion is expected to continue to decline. However,

20. *Id.*
21. *Id.*
22. *Id.*
23. *See id.* at 23 (statement of C. Eugene Steuerle, Senior Fellow, The Urban Institute).
24. *See generally* HOUSE COMM. ON WAYS AND MEANS, OVERVIEW OF ENTITLEMENT PROGRAMS, H.R. DOC. 29, 101st Cong., 2d Sess. (1990); ELAINE C. KAMARCK & WILLIAM A. GALSTON, PROGRESSIVE POLICY INSTITUTE, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S (1990).
25. *See generally* O'CONNELL & BACHU, *supra* note 15.
26. *Id.*

between 1980 and 1986, the number of preschool children increased by nearly eleven percent and will continue to grow.[27] Minorities will constitute an increasing proportion of all children, comprising nearly one in four by the year 2010.[28]

Further, during the last decade, the proportion of children under age eighteen whose mothers work outside the home increased from fifty-three percent in 1980 to sixty-one percent in 1991. Fifty-four percent of children under six have mothers in the labor force, and women with infants make up the fastest growing group in the labor force. Two-thirds of working fathers with children under the age of eighteen have wives in the labor force. While the vast majority of single-parent families are maintained by mothers only, just over one million families were maintained by single fathers.[29]

NATIONAL RESPONSE IS LONG OVERDUE

While national debate about issues affecting children and families is decades old, it has rightfully assumed a new urgency. The conditions of America's children and their families have serious implications for the health and well-being of the nation and its work force in the twenty-first century.

The United States still has a higher percentage of children living in poverty than either Western Europe or Canada.[30] Unlike most other developed nations, the United States does not have a national health program that provides medical care to virtually all of its population, yet it spends a greater proportion of its wealth on health care than any other country.[31]

In comparison with our Western industrial neighbors and competitors, the United States has fallen short time and again by failing to enact a floor of support for families and children. A prime example of this inaction is the Family and Medical Leave Act. It passed the House of Representatives and the Senate in 1990, only to be vetoed by President Bush. Both Houses have once again passed family leave legislation, and now it awaits conference committee action to iron out differences. It faces, however, the threat of another presidential veto.

Our nation's leadership and ability to compete in an increasingly global economic system and the very survival of our democratic institutions demand a thriving, healthy, educated and trained population. This population must be ready and able to enter the labor market, remain

27. *See Reclaiming the Tax Code*, *supra* note 4.

28. *Id.*

29. U.S. Department of Labor, Bureau of Labor Statistics (unpublished personal communication) (Mar., 1992).

30. HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, CHILDREN'S WELL-BEING: AN INTERNATIONAL COMPARISON, H.R. REP. No. 628, 101st Cong., 2d Sess. 37 (1990).

31. *See* Sheila B. Kamerman & Alfred J. Kahn, *Government Expenditures for Children and Their Families in Advanced Industrialized Countries, 1960-85*, Innocenti Occasional Papers, Economic Policy Series, No. 20 (Florence, Italy) (Sept., 1991); CHAIRWOMAN'S REPORT, *supra* note 1.

there productively, participate in community life and function responsibly. Leaders in all sectors of society—from the classrooms to the boardrooms to the halls of national and state governments around the country—are calling attention to the critical conditions discussed above, their costs and their serious implications for the future.

In 1991, the bipartisan National Commission on Children underscored its findings and recommendations saying that "at every age, among all races and income groups and in communities nationwide, many children are in jeopardy."[32] Several other eminent national commissions, including one headed by former Presidents Carter and Ford, have echoed this alarm and called for placing children as high on the list of national priorities as our national defense.[33]

REALIGNMENT OF NATIONAL PRIORITIES REQUIRED

Notwithstanding the increased attention to children and families, the nation's priorities for resources and development have far to go to become aligned with the needs of the nation's families. Over the last decade, the nation's priorities have fallen more out of sync with families. Not only has the federal government failed to make needed investments in successful and cost-saving interventions, but the implementation of many policies and programs has proven distinctly unfriendly to families. For example, the Select Committee has documented, in scores of hearings and special reports, that families must often fill out numerous forms and otherwise battle bureaucracies to obtain services or benefits to which they are entitled.[34] Service agencies are likewise besieged due to overwhelming caseloads, lack of clear and family friendly policies, uncoordinated efforts and inadequate resources. In the face of a changed world order, we have opportunities to reshape our nation's agenda and redirect its resources.

SUCCESSFUL AND COST-EFFECTIVE PREVENTION PROGRAMS MAKE SOUND INVESTMENTS

In recent years, researchers have turned more attention to the problems facing America's children and families, and to possible solutions. Research findings provide increasing evidence of effective prevention and intervention strategies. Three federally supported efforts—childhood immunization, Head Start and the Special Supplemental Food Program for Women, Infants, and Children (WIC program)[35]—have shown marked success and cost-savings and have garnered wide bipartisan support in Congress and executive agencies, yet still cannot

32. *See* NATIONAL COMMISSION, *supra* note 1.

33. *See* FORD FOUNDATION, THE COMMON GOOD: SOCIAL WELFARE AND THE AMERICAN FUTURE (1989); COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 1.

34. *See generally The Risky Business of Adolescence: How to Help Teens Stay Safe, Hearing Before the House Select Comm. on Children, Youth, and Families*, 102d Cong., 1st Sess. (1992).

35. Head Start Act, 42 U.S.C. §§ 9831-9852 (1988); *see also* 42 U.S.C. §§ 247b, 1786 (1988).

serve many who are eligible.[36]

Childhood Immunization

Eradication of the major childhood illnesses is among the most significant medical breakthroughs of this century. Yet, large numbers of non-immunized preschoolers threaten a return of communicable disease outbreaks, which may seriously affect children's health as well as the health of the general public. In 1985 (the latest year for which data are available), at least twenty-five percent of children ages one to four were not immunized against most childhood diseases. From a 1990 Centers for Disease Control survey of first and fifth grade students in selected cities, the percentage of children vaccinated by age two against measles ranged from only fifty-one percent in Jersey City to seventy-nine percent in Pittsburgh. As a result, the incidence of purely preventable childhood diseases, such as measles, is on the rise—some 30,000 children fell victim to measles in 1990, with the highest incidence in the unvaccinated preschool population. More children died of measles last year than in any other year since 1971.[37]

Other countries manage to do much better. Immunization rates for preschool children against diphtheria, tetanus and pertussis average forty-one percent higher in many Western European nations than in the United States, and mean polio immunization rates are sixty-seven percent above those in the United States.[38]

From the 1960s through the 1980s, assessments of the immunization program for children against the major diseases of rubella, mumps, measles, polio, diphtheria, tetanus, pertussis and meningitis showed dramatic declines in the incidence of most of these childhood illnesses because of widespread immunization. More than 23,000 cases of mental retardation were prevented and 7,100 children's lives saved from 1963 to 1989 because of measles immunizations alone.[39] More than fourteen dollars is saved for every one dollar invested in the measles, mumps and rubella vaccine. The cost-benefit ratio for polio immunization is more than ten to one. The Centers for Disease Control estimates that savings are approximately $1 billion per year for polio and $500 million per year for measles.[40]

Head Start

Experts agree that investing in early intervention and prevention programs improves academic and social achievement and is cost effec-

36. HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, OPPORTUNITIES FOR SUCCESS: COST-EFFECTIVE PROGRAMS FOR CHILDREN, UPDATE 1990, 101st Cong., 2d Sess. (1990) [hereinafter OPPORTUNITIES FOR SUCCESS].

37. *See* NATIONAL VACCINE ADVISORY COMMITTEE, THE MEASLES EPIDEMIC: THE PROBLEMS, BARRIERS AND RECOMMENDATIONS 1 (1991).

38. HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, CHILD HEALTH: LESSONS FROM DEVELOPED NATIONS, 101st Cong., 2d Sess. (1990).

39. OPPORTUNITIES FOR SUCCESS, *supra* note 36, at 47-59.

40. *Id.*

tive.[41] For the past twenty-five years, Head Start has topped the list of successful federal programs and has provided an invaluable service to millions of low-income children and their families. Head Start, established in 1965 as a nationwide program, provides enriched early childhood education as well as a range of other health, nutrition and social services to primarily low-income children before they enter school. Head Start aims to reduce the differences in preparedness for formal education between economically disadvantaged children and their more advantaged peers.[42] Today, 596,000 low-income children are served by more than 1,300 schools and other designated community organizations.[43]

The benefits of Head Start are well documented.[44] Studies are virtually unanimous that children show significant immediate gains in cognitive ability, self-esteem, achievement motivation and social behavior as a result of Head Start participation. Children who attended Head Start are less likely to fail a grade in school or to be assigned to special education than children never enrolled in Head Start. In addition, because Head Start provides not only early childhood education, but comprehensive and intensive health and social support as well, children's health and motor development are also improved. Head Start parents are also engaged in their children's preschool education in a unique way through the establishment of parent advisory councils and employment training and job opportunities.

Given that only the most severely disadvantaged children can be served by the program currently (in 1988, seventy-five percent of all Head Start families had incomes below $9,000), the gains Head Start children receive are even more impressive. Report after report from government, universities, medical schools, business groups and think tanks demonstrate that investments in prevention for our youngest, most vulnerable children can save both lives and billions of dollars. The Select Committee highlighted that every dollar invested in quality preschool education can return six dollars in savings because of lower costs of special education, public assistance and crime.[45]

Nevertheless, millions of children who could benefit most still fail to receive these services. Recent expansions in Head Start authorize full funding to ensure that all eligible preschoolers are served by fiscal year 1994, but such assurances are dependent on continued federal appropriations. Despite the $250 million increase Congress voted for Head Start last year, at least seventy-five percent of eligible, low-income children ages three to five are still excluded from the program. President

41. *Id.* at 61-72.

42. *See* HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, FEDERAL PROGRAMS AFFECTING CHILDREN AND THEIR FAMILIES, 101st Cong., 2d Sess. 86 (1990) [hereinafter FEDERAL PROGRAMS].

43. ANNE STEWART, U.S. CONG. RESEARCH SERVICE, HEAD START: PERCENTAGE OF ELIGIBLE CHILDREN SERVED AND RECENT EXPANSIONS 2 (1991).

44. OPPORTUNITIES FOR SUCCESS, *supra* note 36, at 61-72.

45. *Id.*

Bush's fiscal year 1993 budget proposal to increase Head Start by $600 million will not allow all eligible four-year-olds to be served. Other proposals currently under consideration, although more generous, also fall far short of keeping on track for full support by 1994, much less 1996.[46]

Special Supplemental Food Program for Women, Infants and Children (WIC)

WIC, first authorized in 1972 by amendment to the Child Nutrition Act of 1966,[47] provides nutritious supplemental foods to low-income pregnant and postpartum women, infants and children up to age five, who are determined to be at nutritional risk.[48] In 1986, after much delay, the Department of Agriculture released a five-year, $5 million, five-volume study—the most comprehensive review ever undertaken of WIC—that unmistakably documented significant effects of participation in WIC.[49] The study reported that WIC participation reduces fetal deaths by one-third; reduces by up to twenty-five percent the number of premature births among high risk and minority mothers; improves the diets of pregnant women and children; brings more women into prenatal care earlier and improves the likelihood that children will have a regular source of medical care and be better immunized. The study also showed evidence of improved cognitive development among infants of participating WIC mothers and among preschoolers who became WIC participants as infants. In addition, one of the four studies in the evaluation, a historical study, found an increase in birth-weight of twenty-three to forty-seven grams.[50]

A five-state study based on 105,000 Medicaid births conducted by the United States Department of Agriculture found that for every dollar spent on the prenatal component of WIC, the associated savings in Medicaid costs during the first sixty days after birth ranged from $1.77 to $3.13 for newborns and mothers, and from $2.84 to $3.90 for newborns alone.[51] In April 1992, the United States General Accounting Office (GAO) reported additional evidence of WIC benefits. The GAO study concluded that "prenatal WIC services reduced the rate of low birthweight births by twenty-five percent," and further found that the cost of the prenatal component is more than offset within the year following the appropriations of funds. Underscoring earlier findings, the GAO estimated that the $296 million spent on prenatal WIC benefits in 1990 averted $853 million in health-related expenditures during the first year of life and will avert $1.0 billion in these costs over an eight-

46. Unpublished Memorandum, Children's Defense Fund (1992) (on file with author).

47. 42 U.S.C. §§ 1771-1788 (1988).

48. *See* FEDERAL PROGRAMS, *supra* note 42, at 77.

49. *See generally* FOOD AND NUTRITION SERVICE, U.S. DEP'T OF AGRICULTURE, THE NATIONAL WIC EVALUATION: AN EVALUATION OF THE SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (1986).

50. *Id.*

51. *See generally* FOOD AND NUTRITION SERVICE, U.S. DEP'T OF AGRICULTURE, THE SAVINGS IN MEDICAID COSTS FOR NEWBORNS AND THEIR MOTHERS FROM PRENATAL PARTICIPATION IN THE WIC PROGRAM, VOL. 1 (1990).

een-year period.[52]

The Congressional Budget Office estimated that in fiscal year 1991, 4.7 million pregnant and postpartum women, infants and children up to age five would receive WIC benefits.[53] Despite the demonstrated success of the WIC program, forty-five percent of all low-income, nutritionally at-risk women, infants and children cannot receive benefits because the program is not fully funded.

COST OF INACTION DWARFS COST OF EARLY INVESTMENT

Keeping the commitment to fund these core interventions fully by fiscal year 1996 would cost far less than the estimated fiscal costs of neglect. Those costs are estimated at:

- In one year, functionally illiterate adults cost $224 billion in welfare payments, crime, poor job performance and remedial education;[54]
- Each year's class of high school dropouts will cost the nation $240 billion in lost earnings and foregone taxes over their lifetimes;[55]
- Lost economic productivity attendant to illness and early death compounds the impact of rising health care expenditures. In 1980, the total costs of illness equalled nearly eighteen percent of GNP;[56]
- According to an unpublished report of the White House Task Force on Infant Mortality, each of the nearly 40,000 infant deaths each year represents an estimated $380,000 in lost productivity;[57]
- Low birth-weight in newborns costs federal, state and local governments at least $370 million a year for special education;[58]
- As childhood communicable diseases escalate among preschoolers who are not immunized, so do the costs. The cost of treating congenital rubella syndrome alone is $354,000 over a lifetime.[59]

---

52. *See generally* U.S. GENERAL ACCOUNTING OFFICE, EARLY INTERVENTION: FEDERAL INVESTMENTS LIKE WIC CAN PRODUCE SAVINGS (Apr., 1992).

53. Letters from Congressional Budget Office to Representative Patricia Schroeder, Chairwoman, Select Committee on Children, Youth, and Families (July 26, 1991 and July 30, 1991) (on file with author).

54. *See Literacy in the United States: The Overview*, YOUTH POLICY INSTITUTE NEWSLETTER 33 (Nov./Dec. 1990) (Youth Policy Institute, Washington, D.C.).

55. OPPORTUNITIES FOR SUCCESS, *supra* note 36, at 80; COMMITTEE FOR ECONOMIC DEVELOPMENT, *supra* note 1, at 3.

56. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTHY PEOPLE 2000 5 (1990) [hereinafter HEALTHY PEOPLE 2000].

57. WHITE HOUSE TASK FORCE ON INFANT MORTALITY IN THE UNITED STATES 21 (Nov. 30, 1989).

58. *See* STEPHEN CHAIKIND & HOPE CORMAN, THE SPECIAL EDUCATION COSTS OF LOW BIRTHWEIGHT (National Bureau of Economic Research, Inc., Working Paper No. 3461, 1990).

59. HEALTHY PEOPLE 2000, *supra* note 56, at 5.

PUBLIC PROGRAMS AND POLICIES REQUIRE BETTER ENFORCEMENT AND RESPONSIVENESS TO FAMILIES

Resetting priorities and investing in young children and families are needed strategies to improve the circumstances of the nation's children and their families. However, further action is needed to make sure that commitments are kept. The Select Committee has increased its efforts to ensure that government and other consumer services fulfill their promises and responsibilities to America's children, youth and families and that they are safe and friendly to the families who depend on them. We want to know whether programs designed to work for families actually work for them or work them over. If policies or programs come up short, are they really being implemented properly, or should they be redesigned or eliminated? For example, Congress enacted landmark child care legislation in 1990,[60] establishing two new child care programs that will send new federal dollars to the states to help subsidize child care for low and moderate-income families, keep families who are in danger of becoming welfare-dependent employed and improve the quality of child care. However, implementing regulations proposed by the Administration severely limit the ability of the states to ensure that families who receive child care subsidies under the programs will have access to safe child care.[61]

For example, the legislation for the At-Risk Child Care Program expressly prohibits states from imposing health and safety protections for child care funded under this program that do not apply to similar, unsubsidized care.[62] Since all states allow some unregulated care (e.g., a provider who cares for a small number of children is not required to be licensed), states will not be able to ensure that children in subsidized care are in safe environments. In another recent effort, the Select Committee propelled the National Highway Traffic Safety Administration (NHTSA) to act on a truck underride safety regulation to provide greater safety to children and families on the road. The NHTSA had let the regulation languish for nearly two dozen years.[63]

There is no question that much remains to be done. The Select Committee pursues this agenda of reshaping national priorities, investing in proven programs and making public policies and programs really work for children and families by engaging all sectors of society. Families, their government, employers and the independent sector all must contribute to and, ultimately, be held accountable for solutions.

60. 42 U.S.C. §§ 602-603, 9801, 9858 (1988).

61. U.S. CONGRESSIONAL RESEARCH SERVICE, CHILD CARE: IMPLEMENTING REGULATIONS FOR NEW FEDERAL PROGRAMS (1991).

62. 56 Fed. Reg. 29,054 (1991) (to be codified at 45 C.F.R. pts. 255 and 257) (proposed June 25, 1991).

63. *Automotive Safety: Are We Doing Enough to Protect America's Families?: Hearing before the House Select Comm. on Children, Youth, and Families*, 102d Cong., 1st Sess. (1991).

AIDS AND "AFRAIDS" IN OUR SCHOOLS: WHITHER OUR CHILDREN?

FRANK D. AQUILA*

INTRODUCTION

The disease now threatening our society is almost unprecedented in human history. It does not discriminate and is so widespread that it affects all countries and all people. If you think that it is Acquired Immune Deficiency Syndrome (AIDS),[1] you are wrong. AIDS is a terrible threat, but it can be controlled. Unfortunately, however, nothing prevents the spread of the Acute FeaR of AIDS, or AFRAIDS. It is this AIDS hysteria that is the truly great danger to society.

Americans are more fearful today than they were in the early twentieth century when polio crippled so many. At that time, the fear had some basis. Polio spread from child to child, and for a long time no one knew how. AIDS is incurable,[2] but its means of transmission is well understood. It spreads from person to person only when bodily fluids, blood or sexual secretions are shared.[3]

The cure for AIDS hysteria, and for AIDS itself, is the understanding, enlightenment and modification of behavior that will come with learning the truth about the disease. We can reduce the fear of AIDS by educating people about how to prevent the spread of the disease—most transmissions are preventable[4]—and by dispelling the myth that AIDS is

---

* Associate Professor, College of Education, Cleveland State University.

1. AIDS is a disease of the immune system. It destroys the body's ability to combat certain opportunistic infections and cancers. For a more complete description of the disease, see AMERICAN BAR ASS'N, LEGAL, MEDICAL AND GOVERNMENTAL PERSPECTIVE ON AIDS AS A DISABILITY (David Rapoport et al. eds., 1987) [hereinafter PERSPECTIVE ON AIDS].

2. AIDS fatality figures are often presented in an inadvertently misleading manner. At any given moment, the total number of reported cases of AIDS is much larger than the total number of people who have died from the disease. Thus, if a report states that 9,000 deaths have occurred out of 18,000 reported cases, the inference is that only half of those who develop AIDS will die as a result of the disease. Yet, the truth is that the 9,000 victims who are still alive are simply the more recent cases. Eventually they too will die. Robert Roden, Note, *Educating Through the Law: The Los Angeles AIDS Discrimination Ordinance*, 33 UCLA L. REV. 1410, 1416 n.48 (1986).

By 1986, 25,000 known AIDS victims had died. By November 10, 1991, 202,843 cases of AIDS had been reported, resulting in 130,687 deaths. CENTERS FOR DISEASE CONTROL, AIDS WEEKLY SURVEILLANCE REPORT (November 30, 1991). Statistics are available from the Centers for Disease Control by telephone at (404) 330-3020. These numbers undoubtedly will continue to increase. AIDS is the most severe disease that has ever affected mankind.

3. ROBERTA WEINER, AIDS: IMPACT ON THE SCHOOLS 10 (1986). The virus is easily killed outside the body, since it is more fragile than bacteria, and can be destroyed by common disinfectants such as bleach and Lysol. CENTERS FOR DISEASE CONTROL, RECOMMENDATIONS FOR PREVENTING THE TRANSMISSION OF AIDS IN THE WORKPLACE, INCLUDING SCHOOLS (reproduced in WEINER, *supra* at 135, 146). *See also* PERSPECTIVE ON AIDS, *supra* note 1, at 3 (stating that intact skin is an absolute barrier to the AIDS virus).

4. PERSPECTIVE ON AIDS, *supra* note 1, at 8.

exclusively the disease of homosexuals and intravenous (IV) drug users. AIDS is now a global problem, and its victims come from all levels and segments of society.[5]

Compounding the problem is the fact that an increasingly disproportionate number of AIDS victims in the United States are members of minorities, especially children. Blacks and Hispanics account for over forty percent of reported AIDS cases.[6]

This Article examines the impact of AIDS on schools and on the lives of school children. The discussion focuses on recent developments in AIDS law and the effects of these developments on primary and secondary public education, where the Fourteenth Amendment guarantees of due process and equal protection attach directly. It analyzes state and local statutes[7] and AIDS policies, as well as national policies such as those recommended by the Centers for Disease Control, in light of medical research, economics, politics and the United States Constitution. It also discusses discrimination against the handicapped, statutory enactments, mandatory testing, board of education rules, the authority of departments of health and other school district issues. The Article closes with a series of recommendations regarding AIDS education in the schools.

I. SCHOOL CHILDREN WITH AIDS

A. *Incidence and Means of Transmission*

The number of AIDS cases among boys and girls who were under thirteen when they contracted the disease is growing at an alarming rate. The Centers for Disease Control reported 3,426 cases among children as of November 30, 1991.[8] Nearly one-fourth of these children acquired the disease through IV drug use or sexual contact. Most children with AIDS, however, contracted it *in utero*.[9] This suggests that at least one parent was an IV drug user with AIDS. As IV drug use increases, resulting in more AIDS cases, the number of children with AIDS is also likely to increase.

Pre-school children who have Human Immune Deficiency Virus (HIV)—the virus that causes AIDS—acquired it in one of two ways: they were born to infected mothers[10] or they received infusions of infected

5. Although linked in the United States with male homosexuals, who were its primary victims at first, AIDS has been discovered in heterosexuals, infants, women and minorities. Roden, *supra* note 2, at 1413.

6. Centers for Disease Control, *supra* note 2. *See also* Samuel R. Friedman et al., *The AIDS Epidemic Among Blacks and Hispanics*, 65 MILBANK Q. 455 (1987).

7. Ohio education statutes, which are similar to those of many other states, will be used in this Article to illustrate state policy regarding AIDS in the schools.

8. CENTERS FOR DISEASE CONTROL, *supra* note 2.

9. Laurence Lavin et al., *Health Benefits: How the System is Responding to Aids*, 22 CLEARINGHOUSE REV. 724 (1988) [hereinafter *Health Benefits*].

10. HIV can be transmitted only under very specific conditions. Carried in the blood, it is most often spread through sexual contact or the use of infected IV needles. It can also be transmitted from an infected mother to a fetus developing *in utero* or to a newborn infant. The most direct means of exposure to infected blood is a blood transfusion. PER-

blood.[11] Most AIDS cases transmitted this way are diagnosed by age two.[12] Children born with the virus may become ill, periodically, with one of the physical conditions associated with AIDS, such as a depressed immune system.[13] Many die less than a year after they are attacked by an opportunistic infection, but some ultimately recover and remain well. There is no reason why a child whose physical stamina is excellent should not be allowed to remain in school with his or her unaffected peers.[14]

The argument usually made for keeping children with AIDS out of school is that they will spread the disease to others. The only valid argument, however, is that the child with AIDS needs protection. The chance that a classmate or school employee will "catch" AIDS is negligible compared with the chance that the student with AIDS will "catch" an opportunistic infection like a cold, or any other germ, and die.[15]

Much of the fear that school children will infect their peers centers on the possibility that a sick child will bite a healthy one.[16] The medical consensus, however, is that biting is an unlikely route of transmission. The concentration of the virus is low in saliva, and young children have a minimum capacity to penetrate the skin deeply enough for the virus to enter the circulatory system through the wound.[17] In fact, no record exists of a child having received HIV from another child, either at home

---

SPECTIVE ON AIDS, *supra* note 1, at 4; AIDS AND THE LAW: A GUIDE FOR THE PUBLIC (Harlon L. Dalton et al. eds., 1987) at 31 [hereinafter AIDS AND THE LAW].

11. AIDS AND THE LAW, *supra* note 10, at 24.

12. WEINER, *supra* note 3, at 19.

13. AIDS-affected individuals include asymptomatic carriers, persons with AIDS-Related Complex (ARC) and persons with AIDS. Asymptomatic carriers of the HIV virus—those in whom the virus is dormant—are extremely dangerous because they have no reason to believe they are infected. They do not change their behavior and may unknowingly transmit the disease to others. The Centers for Disease Control estimate that more than one million people are asymptomatic carriers of the virus. WEINER, *supra* note 3, at 14.

Persons with ARC have symptoms indicating lowered immunity, such as weight loss, fatigue and swollen lymph nodes. ARC can eventually develop into a full-blown case of AIDS. Persons with AIDS are unable to resist infection because their immune systems are affected by opportunistic diseases such as pneumocystis pneumonia, tuberculosis and Karposi's sarcoma, a type of cancer that attacks the skin and then spreads to the lymph nodes, lungs and gastrointestinal tract. The incubation period for the disease—the time between the initial infection of the virus and the onset of AIDS—is more than nine years. AIDS is fatal, on average, two years after diagnosis.

There are many fewer persons with AIDS than there are asymptomatic carriers and persons with ARC. Ironically, people who are afraid of AIDS fear acquiring the disease from a person with AIDS, even though asymptomatic carriers or those with ARC can as easily infect others. U.S. DEP'T OF HEALTH & HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME (1986).

14. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 339 (N.Y. Sup. Ct. 1986).

15. Verla S. Neslund et al., *The Role of CDC in the Development of AIDS Recommendations and Guidelines*, AMA J. LAW, MED. & HEALTH CARE, Summer 1987, at 76; WEINER, *supra* note 3, at 29.

16. Acting on the recommendation of their AIDS medical teams, some schools have placed AIDS children who have a history of biting in home instruction. Yet research data and medical opinion support this approach only in the cases of HIV-infected children who are physically assaultive or incontinent or have weeping (wet) skin lesions. WEINER, *supra* note 3, at 29.

17. If a biting does occur, the virus can be destroyed by carefully washing the wound

or in school.[18]

Although biting is not considered dangerous by the medical profession, school boards take such occurrences seriously. A child with AIDS who bites an uninfected child may cause hysteria among parents and stigma for the families involved. This parental concern is real in the sense that HIV is found in saliva.[19] Thus, an AIDS-infected child's history of biting is a valid criterion for denying that child admission to school.

B. *The AIDS Crisis and Students' Civil Rights*

School officials should be sensitive to the fear and social stigma that children or school personnel with AIDS may experience if information about their condition is released, or if false information is transmitted.[20] They should also be mindful of other rights of persons with AIDS and of the concerns of children and employees about contracting AIDS in the school environment, and they need to make realistic plans for managing the school in light of the disease.

Recent United States Supreme Court decisions have restricted some of the rights of school children, compared with those of adults, possibly because the Court believes that educators need authority to control and regulate increasingly aggressive, crime-prone youth. In *New Jersey v. T.L.O.*,[21] the Court reduced the adult standard of probable cause to "reasonable suspicion" in a Fourth Amendment challenge of a student search. In *Bethel School District No. 403 v. Fraser*,[22] the Court allowed a school to regulate sexually explicit language through its "disruptive conduct rule." *Bethel* clearly gave school officials much greater discretion in controlling student expression than government agencies ordinarily would be allowed in controlling adult expression. *Hazelwood School District v. Kuhlmeier*[23] upheld a high school principal's decision to prevent publication of portions of the school newspaper. A reasonableness standard, not strict scrutiny, was applied to this curtailment of minors' freedom of speech in a school setting. Evidently the landmark 1969 *Tinker* decision,[24] which extended students' rights, has been seriously eroded, challenged, and some would argue, eviscerated as a result of these recent Court rulings.

---

with soap and water, followed by a disinfectant such as alcohol. WEINER, *supra* note 3, at 189.

18. AIDS AND THE LAW, *supra* note 10, at 35.

19. WEINER, *supra* note 3, at 19.

20. Falsely accusing someone of having a "loathesome disease" such as AIDS consititutes defamation in most states. A school employee or a prospective employee could sue for defamation if he or she were wrongly accused of having AIDS or referred to in derogatory comments about lifestyle or job performance.

21. 469 U.S. 325 (1985).

22. 478 U.S. 675 (1986).

23. 484 U.S. 260 (1988).

24. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (holding that school officials' ban against students wearing black armbands was an unreasonable regulation of the students' form of expression).

1. The Right to Privacy

When a student (or another person) with AIDS is publicly identified, his or her constitutional right to privacy[25] may be violated. In some states, students generally are protected by a statute providing that school officials may not release or permit access to personally identifying information (other than directory information) concerning any pupil attending a public school, without the written consent of a parent, guardian or custodian, or the written consent of a pupil who is over eighteen years old.[26]

Student records receive additional federal protection. The Family Educational Rights and Privacy Act (FERPA)[27] is much more detailed than most of the state rights and privacy acts that track FERPA. This federal law, known as the Buckley Amendment, provides students over eighteen years of age and their parents the right to inspect and review educational records,[28] to challenge information[29] and to prohibit the disclosure of selected records.[30]

State privacy protections such as the Ohio Public Records Act[31] and the Ohio Privacy Act[32] usually do not extend to the administrative use of public school records by authorized school employees, a court or the federal government.[33] This creates a problem when a student's records are transferred to another school. To forward student records in the standard manner may violate the student's constitutional right of privacy by making it possible for his condition to become public knowledge without his consent.[34] Therefore, the records of a student with AIDS should be transmitted under special cover directly to an official in the receiving school who has a "need to know." Otherwise, no one should be privy to the information.

In *Doe v. Borough of Barrington*,[35] a federal district court held that disclosure of an AIDS victim's condition to people with whom the victim had not even had casual contact violated that person's Fourteenth Amendment right to privacy. An earlier Fourth Circuit opinion acknowledged the right to privacy but held that the student plaintiff's privacy was not invaded by a school board policy of AIDS disclosure in

25. *See Doe v. Coughlin*, 518 N.E.2d 536, 539 (N.Y. 1987) (listing court decisions that have found a constitutional right to privacy regarding decisions relating to marriage, procreation, contraception and personal contact).

26. OHIO REV. CODE ANN. § 3319.321 (Anderson Supp. 1991). Interestingly, Ohio law provides less protection for school employees' records than for students' records, since the public's "right to know" allows anyone to see the public record of a school employee, with some exceptions.

27. 20 U.S.C. § 1232g (1984).

28. 20 U.S.C. § 1232g (a)(1)(A) (1984).

29. 20 U.S.C. § 1232g (a)(2) (1984).

30. 20 U.S.C. §§ 1232g(b)(1)-(2) (1984).

31. OHIO REV. CODE ANN. § 149.43(B) (Anderson 1990).

32. OHIO REV. CODE ANN. §§ 1347.01-1347.09 (Anderson Supp. 1991).

33. OHIO REV. CODE ANN. § 3319.321(C) (Anderson Supp. 1991).

34. WEINER, *supra* note 3, at 92.

35. 729 F. Supp. 376 (D.N.J. 1990).

untraceable and general terms.[36]

2. The Right to Education

Schools must also deal with the right of students with AIDS to attend school. Courts rarely disturb the judgment of a school board in the exercise of its duties as long as it acted in good faith and its decision was not arbitrary, unreasonable or in clear violation of the law.[37] A court might intervene, however, when a school tries to exclude pupils with AIDS or ARC. Injunctive relief has been granted liberally to children with AIDS who wish to attend regular school classes,[38] and courts have overturned school board attempts to exclude students with AIDS from the classroom. In California, for example, parents of an infected child brought an action against school officials who denied the child attendance in regular kindergarten classes.[39] The court held that in the absence of evidence that he posed a significant risk of harm to his kindergarten classmates or teachers, the child could attend regular classes. In Florida, parents of three hemophiliac, asymptomatic school children sought a preliminary injunction against the school's segregation of the children from a regular classroom setting, alleging violations of the federal Rehabilitation Act, Florida statutes and the Florida and United States Constitutions.[40] The court granted the injunction, unless and until it could be established that the children posed a real and valid threat to the school population. In Illinois, a student with AIDS was excluded from classes and given a home tutor. Alleging discrimination, the student brought suit against the school district and board of education. The court held that the student was not required to exhaust administrative remedies before bringing an action against the district and the board.[41]

3. Equal Protection

Children with AIDS may seek admission to a classroom setting under the Equal Protection Clause,[42] which prohibits state governments from treating similarly situated persons differently. Children with AIDS or ARC and children who have had no exposure to the virus may be considered similarly situated because neither group can transmit the dis-

36. Child v. Spillane, 875 F.2d 314 (Table) (4th Cir. 1989) (text in WESTLAW).

37. *See, e.g.*, Brannon v. Board of Educ., 124 N.E. 235 (Ohio 1919). *See also* 68 AM. JUR. 2D *Schools* § 52 (1973).

38. *See, e.g.*, Doe v. Dolton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Phipps v. Saddleback Valley Unified Sch. Dist., 251 Cal. Rptr. 720 (Cal. Ct. App. 1988); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988).

39. Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See also* Board of Educ. v. Cooperman, 523 A.2d 655 (N.J. 1987) (court upheld state commissioner's decision to overrule local school boards' exclusion of students with AIDS).

40. Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987). One child was given homebound instruction; the others were segregated from their classmates at school.

41. Doe v. Belleville Public Sch. Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987).

42. U.S. CONST. amend. XIV, § 1.

ease in a normal, unrestricted school setting. Whether, in a particular case, segregating children with AIDS violates their right to equal protection will be decided according to the standard the court applies—strict scrutiny or rational basis.

Strict scrutiny is the highest level of review employed when equal protection is at issue. It requires a close relation between the state interest and the means chosen to achieve it. The state could attempt to justify barring children with AIDS from regular classrooms by claiming a compelling government interest in preventing the spread of AIDS. Since the overwhelming weight of medical authority indicates that AIDS cannot be spread by causal contact, however, the state's action would not survive the strict scrutiny test.[43] In any event, the Court has applied strict scrutiny only when a fundamental right is affected. Education is not explicitly protected by the United States Constitution and, therefore, does not merit protection as a fundamental right.[44]

When a classification does not merit strict scrutiny, the courts apply the rational basis test. The test is whether a reasonable basis exists for treating children with AIDS differently from noninfected children in the context of regular classroom attendance.[45] Courts usually defer to a state assertion of power to protect the public health.[46] Medical opinion cannot guarantee that AIDS will not be transmitted in a classroom setting. A state may be justified, therefore, under the rational basis test, in barring or segregating children with AIDS from regular classroom attendance, even though such action might be deemed "unwise" or have an "unequal result."

Thus, courts probably will apply a rational basis test, not strict scrutiny, to the issue of whether children with AIDS should be allowed in the classroom. Further, courts using the traditional rational basis test are likely to support any state practice intended to protect the public health. Interestingly, a New York court used a rational basis test to uphold an anti-discriminatory school board policy.[47] The plaintiffs were not ag-

43. Alternatively, the state might argue that fear of AIDS and its disruptive consequences are an adequate reason for dissimilar treatment of a similarly situated class. As yet, however, the Supreme Court has not endorsed the view that popular opinion should override the Equal Protection Clause. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985).

44. Ambach v. Norwick, 441 U.S. 68 (1979); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Street v. Cobb County Sch. Dist., 520 F. Supp. 1170 (N.D. Ga. 1981).

45. Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) can be interpreted to suggest that school children with AIDS should be protected from discrimination by heightened scrutiny under the Equal Protection Clause. In *Brown*, the Supreme Court recognized "intangible" factors in segregating students, including stigmatization and feelings of inferiority. These intangible factors also apply to children with AIDS who are segregated from the regular classroom. For an extended discussion, see Susan A. Winchell, *Discrimination in the Public Schools: Dick and Jane Have AIDS*, 29 WM. & MARY L. REV. 881 (1988).

46. E.g., Breese v. Smith, 501 P.2d 159, 170 n.44 (Alaska 1972) (schools may exclude students with contagious diseases from class).

47. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

grieved students, but two local community school boards. Based on a New York City Board of Education policy that forbade the automatic exclusion of students with AIDS from the city schools,[48] a seven-year-old student with AIDS was permitted to remain in school. The local community boards sought injunctive relief to prevent the student's attendance and to require disclosure of the student's name and school. The court found that an automatic exclusion was not required because AIDS is not a communicable disease under city or state health statutes;[49] that using the required case-by-case determination of the placement of students with AIDS did not violate state or federal laws relating to handicapped children;[50] and that the requested disclosure of the name of the child with AIDS would violate city and state health laws.[51]

Under traditional equal protection analysis, a court should determine whether a rational basis exists for refusing to admit any category of AIDS patient to school. Because medical experts agree that AIDS "is not transmitted by casual interpersonal contact or airborne spread,"[52] there is no rational basis to support a decision to exclude a typical student with AIDS.

4. Other Theories that Favor Keeping AIDS-Infected Children in School

Other theories appear viable for the purpose of protecting students with AIDS, though they have not yet been developed in any reported cases. The Due Process Clause[53] requires that proper notice and hearing be given before a person is deprived of a property right such as school attendance, or the liberty rights of privacy and reputation. Because of the emotion involved in AIDS situations, victims' procedural due process rights may be ignored. Further, given the unanimity of medical testimony, a decision to remove or segregate a student with AIDS is arbitrary, capricious and a violation of the student's substantive due process rights.

Using the federal guidelines issued in 1985 by the Centers for Disease Control,[54] many school districts have adopted a case-by-case ap-

48. *Id.* at 328. No change in placement could occur except when recommended by a committee that had reviewed the case to determine whether the child posed a threat to others.

49. *Id.* at 333. In 1979, the Second Circuit prevented the New York City School Board from segregating 50 children with hepatitis B, which is far more communicable than AIDS. New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644 (2d Cir. 1979).

50. *District 27 Community Sch. Bd.*, 502 N.Y.S.2d at 339.

51. *Id.* at 340-41.

52. *Id.* at 330. *See also* Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987); and Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).

53. U.S. CONST. amend. V, applied to the states by amend. XIV, § 1.

54. In August 1985, the Centers for Disease Control published two sets of guidelines for schools—one for employees, based on the Centers' general guidelines for the transmission of AIDS in the workplace, and one for students. The guidelines advise schools to keep students with the virus in the classroom. For most school-age children with AIDS, the benefits of attending school outweigh the risk of catching infections from other stu-

proach. The guidelines suggest that schools exclude only children whose behavior might expose uninfected children to the virus. They also suggest that a team composed of the child's doctor, a public health official, the child's parent or guardian and a representative of the school make that determination.

Unless intervention is warranted,[55] schools officials can ease the psychological pain suffered by a student with AIDS by allowing him or her to remain at school, free of the stigma associated with the disease.[56] Many terminal cancer patients live much longer than expected when they are given support to pursue as many of their normal activities as they can. By analogy, the same would be true for AIDS-infected children. Engaging in their normal activities enhances not only the quality of their lives but also their will to live.

C. *Federal Protection for Handicapped Children*

The Rehabilitation Act[57] was enacted in 1973 to protect handicapped people. Section 504 has been used successfully in AIDS cases.[58] The Education for All Handicapped Children Act of 1975 (P.L. 94-142),[59] like the Rehabilitation Act, was intended to discourage institutions from discriminating against the handicapped. While both § 504 and P.L. 94-142 protect individuals with physical, emotional or intellectual handicaps, § 504 goes beyond these handicaps to include individuals addicted to alcohol or drugs. Additionally, while P.L. 94-142 has jurisdiction over handicapped students ages three to twenty-one, § 504 extends their civil rights protection to the adult work environment. To qualify as handicapped under P.L. 94-142, students initially must complete a formal evaluation establishing them as students with specific conditions. In contrast, § 504 does not require anyone to be formally evaluated before being designated as handicapped; being perceived as having a handicap is sufficient.

---

dents, and the benefits certainly outweigh "the apparent nonexistent risk" of other students contracting AIDS from them. A more restricted environment is recommended for pre-school age children, neurologically handicapped children and those who lack control of their body secretions, who bite others or who have open lesions. For a more complete discussion see PERSPECTIVE ON AIDS, *supra* note 1, at 38-40. The two sets of guidelines are reproduced in WEINER, *supra* note 3, at 127-50.

55. In Ohio, a rarely-used provision grants emergency power to a city health district. In cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, a city board of health may issue orders and regulations, effective immediately, necessary for the public health or the prevention or restriction of disease. OHIO REV. CODE ANN. § 3709.20 (Anderson 1992).

56. WEINER, *supra* note 3, at 126.

57. 29 U.S.C. §§ 701-796 (1988).

58. The Ninth Circuit strongly supported the use of § 504 in Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988). The court declared that Victor Chalk, a teacher who had "full-blown" AIDS, was handicapped but otherwise qualified to teach. Chalk was permitted to return to his classroom.

59. 20 U.S.C. §§ 1401-1485 (1988).

1. The Rehabilitation Act

Section 504 provides that "[n]o otherwise qualified individual with handicaps in the United States . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ."[60] The Act defines a handicapped person as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, and (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[61] An "otherwise qualified" person is "able to meet all of a program's requirements in spite of this handicap."[62]

Section 504 requires an employer—or an educational agency—to make any "reasonable accommodation" necessary that allows the person to perform the assigned tasks, thereby making the person "otherwise qualified" under the Act.[63] The Supreme Court has defined "reasonable accommodation" as not imposing undue financial and administrative burdens, or not requiring "a fundamental alteration in the nature of [the] program."[64]

What must a school district do, under § 504, to provide a free, equitable and nondiscriminatory education for students with AIDS? In *Ray v. School District of DeSoto County*, a federal district court ordered a school district to enroll three brothers—hemophiliacs who carried the AIDS virus—in a regular classroom setting "[u]nless and until it can be established that these boys pose a real and valid threat to the school population of DeSoto County."[65] Although it did not address family homebound instruction directly, the court determined that this alternative would violate § 504 because the brothers were otherwise qualified for regular classroom placement.[66]

In *Martinez v. School Board of Hillsbrough County, Florida*, however, the same court decided that a six-year-old mentally retarded student with AIDS-related complex (ARC) should be placed in a homebound program rather than in a regular classroom.[67] Along with her other disabilities, she was incontinent, drooled continually and sucked her thumb or

60. 29 U.S.C. § 794(a) (1988).

61. *Id.* § 706(8)(B). A "physical impairment" is "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal, special sense organs, respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 C.F.R. § 84.3(j)(2)(i) (1991). "Major life activities" are "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii) (1991).

62. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

63. 45 C.F.R. § 84.3(k)(1) (1991).

64. *Davis*, 442 U.S. at 410.

65. 666 F. Supp. 1524, 1535 (M.D. Fla. 1987).

66. *See also* Doe v. Belleville Pub. Sch. Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987) (a student with AIDS was otherwise qualified to attend school in a regular classroom setting rather than with the home tutor that the school district offered).

67. 675 F. Supp. 1574 (M.D. Fla. 1987).

finger.[68] The court held that it must weigh the public interest in protecting health against the child's interest in an education:

> [T]he specific potential harm to others clearly outweighs the interests of plaintiff, and . . . the public interest in this case weighs in favor of *not* returning Eliana Martinez to a classroom setting. *Where, as here, there is any question as to whether the public safety and welfare is threatened, the Court must rule on the side of that public interest.*[69]

Whether a child infected with AIDS was otherwise qualified to attend a regular kindergarten class, within the meaning of § 504, was at issue in a recent California case.[70] Ryan Thomas, who had AIDS, attended a regular kindergarten class without incident for three days. On the fourth day he bit another child on the leg. Although the other child's skin was not broken, Ryan was removed from the classroom and was required to undergo a psychological evaluation.[71] The court concluded that Ryan was handicapped within the meaning of § 504 but was otherwise qualified to attend the regular kindergarten class.[72] The ruling was based on a psychologist's finding that though Ryan might be prone to aggressive behavior because of his undeveloped language and social skills, there was no indication that he would bite another student again.[73] Weighing Ryan's rights and needs against the safety of the other students, the court concluded that Ryan's rights should prevail.[74]

When local school boards challenged the New York City Board of Education's policy against automatic exclusion of children with AIDS, a state court upheld the policy, basing its decision, in part, on § 504.[75] The court agreed with the New York City Board that no rational basis existed for automatically excluding all students with AIDS and that each student was entitled to a review to determine whether he or she was otherwise qualified to attend school in a regular setting.[76]

Section 504 was used successfully to force a federally financed vocational instruction center to admit a known Hepatitis B carrier.[77] The plaintiff, Kohl, a blind, mentally retarded adult, exhibited behavior problems, including scratching and biting. He claimed that he met the § 504 criteria for handicap and that he was otherwise qualified for admission to the program. The court agreed, finding that Kohl, was entitled to admission to the vocational program despite his behavior problems. Further, the accommodation required for his enrollment was

68. *Id.* at 1576.
69. *Id.* at 1582.
70. Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987).
71. *Id.* at 380.
72. *Id.* at 381.
73. *Id.* at 380-81.
74. *Id.* at 381-82.
75. District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325, 336 (N.Y. Sup. Ct. 1986).
76. *Id.* at 335.
77. Kohl v. Woodhaven Learning Ctr., 672 F. Supp. 1221 (W.D. Mo. 1987) *cert. denied*, 493 U.S. 892 (1989).

reasonable in view of the defendant school's four million-dollar budget and the minimal cost of inoculating the affected employees.[78] The court's reasoning in *Kohl*, if applied, would protect persons with AIDS in public schools, since public schools are instrumentalities of the state.

2. The Education for All Handicapped Children Act

The Education for All Handicapped Children Act of 1975 (P.L. 94-142)[79] was enacted to ensure that handicapped individuals between the ages of three and twenty-one would receive a free and appropriate public education.[80] Public Law 94-142 defines special education as "specially designed instruction at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."[81] The Act requires that each student be provided an individual education program[82] that specifies the least restrictive environment in which his or her education can effectively take place.[83] Mainstreaming, where the student is placed in a regular program for as much time as possible, is strongly encouraged.[84]

Case law has established that if P.L. 94-142 is to apply in an AIDS case, the child must display "limited strength, vitality, or alertness, which adversely affects [his] educatonal performance."[85] A handicapped child who has AIDS cannot be refused admission to the least restrictive environment for the handicapping condition.[86] The Act entitles all handicapped children to a public education, regardless of the severity of their handicapping condition.[87]

A mentally handicapped child with Down's syndrome who was also a Hepatitis B carrier successfully relied on P.L. 94-142 in *Community High School District v. Denz*.[88] The court upheld an independent hearing of-

78. *Id.* at 1232-33. The cost for inoculation was projected at $10,000 to $12,000 initially plus $4,500 for each future year based on expected employee turnover.

79. 20 U.S.C. §§ 1401-1485 (1988).

80. The purpose of the Act was to assure that all handicapped children have access to a free appropriate public education "which emphasizes special education and related services designed to meet their needs;" to protect the rights of handicapped children and their parents and to assist states and localities in providing for the education of handicapped children. *Id.* § 1400(c).

81. *Id.* § 1401(16) (1988).

82. *Id.* § 1401(19) (1988).

83. *Id.* § 1412(5)(1988).

84. *Id.* (states required to establish procedures to assure that, "to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped").

85. Doe v. Belleville Public Sch. Dist. No. 118, 672 F. Supp. 342, 344 (S.D. Ill. 1987).

86. Parents of Child, Code No. 870901W v. Coker, 676 F. Supp. 1072, 1074 (E.D. Okla. 1987). The child had been diagnosed with emotional problems and had also tested positive for the HIV virus. The court held that the student was handicapped under the definitions of P.L. 94-142, that the emotional disability classroom was the least restrictive environment and that the student could not be refused admission to the school system's class for emotionally disturbed students.

87. Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954 (1st Cir.), *cert. denied*, 493 U.S. 983 (1989).

88. 463 N.E.2d 998 (1984).

ficer's order requiring mainstreaming in a special education center, which was the least restrictive environment for the child's educational needs. The court held that in view of the child's behavioral history and the individualized instruction program at the center, the risk of transmitting hepatitis did not outweigh the injury to the student if she remained isolated from her peers.[89]

A plaintiff who brings an action under P.L. 94-142 usually is required to exhaust all administrative remedies prior to a judicial hearing. Courts have begun to recognize, however, that for AIDS victims, the procedural sequence specified in P.L. 94-142 must perforce be circumvented.[90] Time is the most valuable commodity of children with AIDS, and society must ensure that time is used to make their lives as normal and comfortable as possible.

II. TEACHERS AND OTHER EMPLOYEES

A. *The Right to Privacy*

Like students, teachers[91] and other school employees who may have AIDS or who are concerned about infection have a right to privacy. Their personnel records are protected by state statutes.[92] School employees' personnel records are provided additional protections in many states by collective bargaining agreements between boards of education and teachers' unions. Nevertheless, much of the information in a teacher's personnel file is available to the public on request in states where state law considers a public employee's personnel file a "public record."[93] In these states the general public's right to know usually prevails over a school employee's right of privacy.[94]

Although untested, it seems clear that in Ohio, at least, a school employee with AIDS could protect his or her records based on a three-part balancing test analysis used in non-AIDS cases to resolve potential conflicts between the privacy act and the public records statute. The test requires the court to consider whether disclosure of the information would result in an invasion of privacy and, if so, how serious the invasion would be; whether the public would be served by disclosure and whether the information is available from other sources.[95] Doubt as to whether disclosure is proper is resolved in favor of disclosure of "public

89. *Id.* at 1004.

90. *See supra* notes 38-41 and accompanying text.

91. In Ohio, the term "teacher" includes all persons certified to teach who are employed as instructors, principals, supervisors or superintendents, or in any other position requiring certification. OHIO REV. CODE ANN. § 3319.09(A) (Anderson 1990).

92. For example, in Ohio such protection is found in the Ohio Privacy Act, OHIO REV. CODE ANN. §§ 1347.01-1347.09 (Anderson Supp. 1991).

93. In Ohio, virtually every record kept by a public entity, including school districts, county divisions, state offices and administrative agencies, is a public record. OHIO REV. CODE ANN. § 149.43(A)(1) (Anderson 1990).

94. In Ohio, the statute unequivocally gives preference to public access. OHIO REV. CODE ANN. § 1347.08(E)(1) (Anderson Supp. 1991).

95. Wooster Republican Printing Co. v. City of Wooster, 383 N.E.2d 124, 129 (Ohio 1978).

records."[96] Although the Ohio Supreme Court subsequently reduced the weight of an "invasion of privacy" in the balancing test,[97] the generally heightened concern for the privacy of persons with AIDS should, on balance, prevail.

Medical records are specifically excluded from the operation of the Ohio public records law,[98] but it is unclear whether it is the medical record in the doctor's office or the medical record in the personnel file that is exempt from disclosure. If it is the medical record given to the employer by the AIDS patient's doctor, then that record would not have to be released by a public agency under existing Ohio law. It is also unclear what a school district should do when one of its employees tests positive for AIDS. Should the information be placed in his or her file? Should it be communicated? To whom?

The conditions under which a person with AIDS would prevail in a tort action based on a privacy violation have not been specifically determined,[99] though several cases have addressed students' privacy concerns.[100] Unless it has a malicious intent, a statement is not actionable when made within the context of a qualified or conditional privilege, that is, where a commonality of interest exists between the publisher and the recipient, and the communication is a kind reasonably calculated to protect or further that interest.[101] Frequently, in such cases, "there is a legal, as well as a moral, obligation to speak."[102] An actionable invasion of the right of privacy is the

> "*unwarranted* appropriation or exploitation of one's personalty, the publicizing of one's private affairs with which *the public has no legitimate concern*, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary

96. *Id.* at 129-30.

97. State *ex rel.* Dispatch Printing Co. v. Wells, 481 N.E.2d 632, 635 (Ohio 1985) (the public's right of access to a public employee's personnel file may not in any way be restricted by the terms of a collective bargaining agreement or be otherwise withheld from the public or the news media).

98. OHIO REV. CODE ANN. § 149.43(A)(1) (Anderson 1990).

99. One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977). Comment d states that "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy."

100. *See supra* notes 34-36.

101. The essential elements of a conditionally privileged communication are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion and proper publication to proper parties only. West v. People's Banking & Trust Co., 236 N.E.2d 679, 681 (Ohio Ct. App. 1967).

102. Creps v. Waltz, 450 N.E.2d 716, 718 (Ohio Ct. App. 1982) (quoting Hahn v. Kotten, 331 N.E.2d 713, 718 (Ohio 1975)). In *Hahn*, the trial court was required to grant a directed verdict for defendants if the statements at issue met the conditionally privileged communication definition and if the record contained no evidence of actual malice on defendants' part. *Id.* at 721.

sensibilities."[103]

The Ohio Court of Appeals has held that a medical examiner may not disclose information about a patient to anyone without first seeking the patient's permission.[104] Only certain aspects of the doctor/patient relationship are protected, however. For example, a secretary working at a medical center wrongfully divulged confidential information about a patient during her lunch hour, but the center was held not liable. The court held that corporations are liable for injuries caused by the wrongful acts of their employees only if the act was done within the scope of employment.[105]

B. *Employment Discrimination*

Are teachers and other employees with AIDS afforded the same protection against discrimination that students with AIDS enjoy? In 1988, the Ninth Circuit did extend protection to teachers, holding that a school system may not discriminate against a teacher infected with AIDS.[106]

Chalk, a teacher of hearing-impaired students, was hospitalized with pneumonia and diagnosed as having AIDS. After several months of treatment and recuperation, he was declared able to return to work, but his Orange County, California school district put him on administrative leave for the remainder of that year and then offered him an administrative job with the same salary and benefits that he would have received teaching. Chalk rejected this offer, preferring to return to the classroom. A federal district court refused to issue an injunction requiring that Chalk be allowed to teach. The Ninth Circuit unanimously reversed, relying on *School Board of Nassau County v. Arline*.[107] The court concluded that Chalk was "otherwise qualified" to teach under § 504 despite having AIDS and a history of previous physical impairment from AIDS. The "otherwise qualified" determination depended on whether a reasonable accommodation would eliminate any risk that Chalk would communicate an infectious disease to others in the workplace. The

103. Killilea v. Sears, Roebuck & Co., 499 N.E.2d 1291, 1294 (Ohio Ct. App. 1985) (quoting Housh v. Peth, 133 N.E.2d 340 (Ohio 1956) (emphasis added)).

104. Levias v. United Airlines, 500 N.E.2d 370, 374-75 (Ohio Ct. App. 1985) ("The discloser has no privilege unless he has reason to believe that the recipient has a real need to know, not mere curiosity.").

105. Knecht v. Vandalia Medical Ctr., Inc., 470 N.E.2d 230, 233 (Ohio Ct. App. 1984).

106. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988). In fact, a school may face a wrongful discharge claim if it terminates an employee with AIDS merely because he or she is perceived to be a threat to co-workers. The 1985 Centers for Disease Control guidelines regarding the transmission of AIDS in the workplace state that an infected employee should not be restricted from working solely because he or she has AIDS. CENTERS FOR DISEASE CONTROL, GUIDELINES FOR EMPLOYEES, cited in WEINER, *supra* note 2, at 148.

107. 480 U.S. 273 (1987) (establishing that § 504 of the Rehabilitation Act applies to public employees who are infected with a contagious disease, in Arline's case tuberculosis, and who have a history of previous physical impairment from the disease, even if they do not currently suffer from the impairment).

court reviewed the four *Arline* factors[108] before deciding that Chalk's return to the classroom would not pose a *significant* risk that he would communicate an infectious disease to his students.[109] Even though the potential harm resulting from AIDS is catastrophic and the duration of the risk of infection is indefinite (two of the *Arline* factors) the court found "an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS."[110]

While the Ninth Circuit ruling was not unexpected after *Arline*, it does mean that a school district should consider its decision carefully before arbitrarily reassigning a teacher with AIDS. By the same token, however, it must continue to monitor the condition of a teacher with AIDS who is allowed to remain in the classroom. For example, it was highly probable that Chalk's immune system would deteriorate over time, making him very susceptible to opportunistic infections. While these infections do not cause AIDS, they are contagious in a classroom setting. Eventually, if Chalk did not voluntarily leave the classroom, his school board would have to exercise its power to control, regulate and protect.

Many states have enacted strict handicap provisions that would protect teachers. For example, the Ohio Civil Rights Act prohibits discrimination against the handicapped and is even more pervasive and protective than the federal statutes.[111] Its provisions are enforced by the Ohio Civil Rights Commission (OCRC).[112] In cooperation with the Department of Education, OCRC must prepare a comprehensive education program for the public schools "to eliminate prejudice on the basis of . . . handicap."[113] State entities like OCRC can accept and investigate charges alleging discrimination on the basis of AIDS. Such charges would be analyzed under the commonly-accepted legal standards applied to other handicaps.

Finally, teachers do not have an option to leave when a person with AIDS enters the school,[114] but they may legitimately expect the school

108. *See infra* note 126 and accompanying text.

109. Since Chalk had physical symptoms and a previous physical impairment from AIDS, he was not asymptomatic, but fully met the *Arline* conditions. 480 U.S. at 288. The Ninth Circuit, therefore, did not address the critical question of protection for a staff member who is asymptomatic.

110. 840 F.2d at 706. Essentially, this is a finding that there is no known risk of transmitting AIDS through the nonsexual, noninvasive, day-to-day interaction between teachers and students in the classroom.

111. OHIO REV. CODE ANN. § 4112 (Anderson 1991).

112. *Id.* § 4112.04.

113. *Id.* § 4112.04(A)(9).

114. A difficult question is whether employees who object to working with an AIDS victim—or someone whom they fear will expose them to the disease—are protected against employer discipline for engaging in concerted activity, which is allowed under the National Labor Relations Act (29 U.S.C. §§ 151-169 (1988)). In an AIDS situation, such activity could conceivably consist of teachers refusing to work because a coworker who had AIDS was allowed to continue working in the school. This is a hypothetical situation; the author knows of no such present case. The author believes, however, that such an action would *not* be protected under the "concerted action" provisions of the NLRA. *See* 29 U.S.C. § 157 (1947).

district to provide adequate training to ensure that they understand AIDS and know how to act to avoid unreasonable danger. Their fears will diminish if they are taught to use the so-called "universal precautions."[115]

C. *The 1973 Rehabilitation Act*

Numerous state statutes prohibit employment discrimination against the handicapped; some of these extend protection to persons with AIDS.[116] Many of these statutes protect both public and private employees. The federal government also has adopted laws intended to integrate the handicapped into the social mainstream.[117] To determine coverage for the handicapped, therefore, persons with AIDS and schools should examine both sets of laws.

The model statute on disability discrimination is the federal Rehabilitation Act of 1973.[118] It is the vehicle most often used to redress claims of handicap discrimination in employment.[119] It applies to federal employees and contractors and to all programs receiving federal financial assistance. Its fundamental principle[120] is that an "otherwise qualified handicapped individual" may not be denied an opportunity to participate in any federally funded program or activity.[121] Under the federal definition, not only AIDS carriers but those who are victimized because they are thought to have AIDS or who seem likely to get AIDS could be protected.[122] Although no specific case law protects people in

115. "Universal precautions" consist of treating every situation as if it were one in which a person could, without proper precautions, become infected by someone with the HIV virus. In the school setting, this would mean, for example, that a teacher wears rubber gloves when helping any child who has suffered an injury that could cause an AIDS infection. This protects the teacher regardless of whether the child is infected.

Doctors disagree as to the risk that the virus will be transmitted through contact with blood during a fight or an injury that may occur at school. Studies have shown that to infect another person would require a large amount of blood, containing a large quantity of the virus particles, entering the other person's bloodstream. Furthermore, with the type of injuries that occur on a school ground, the body immediately begins to heal the open wound through the clotting process. This process, it has been argued, creates a natural barrier that prevents commingling of the two individuals' blood and thus forms a natural barrier to the virus. WEINER, *supra* note 3, at 190.

116. Arthur S. Leonard, *Employment Discrimination Against Persons With AIDS*, 10 U. DAYTON L. REV. 681, 689-96 (1985).

117. *See, e.g., id.* at 689-90 n.35; *see also* Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1991).

118. 29 U.S.C. §§ 701-796 (1991).

119. Although much debate surrounds whether § 504 applies to AIDS, Congress could not possibly have intended the Rehabilitation Act to cover AIDS because AIDS was not yet diagnosed in 1973 when the Act was passed. In *Arline*, the Supreme Court reviewed the scope of § 504 and specifically refrained from commenting on its applicability to AIDS. This was a purposeful decision on the Court's part, based on "ripeness." In a 1986 memorandum, however, the Office of Legal Counsel of the Department of Justice ruled that AIDS and disabling symptoms of ARC were "handicaps" under § 504. Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986).

120. As enunciated in § 504.

121. 29 U.S.C. § 791(b) (1991).

122. People who are infected by the virus but have not experienced debilitating symptoms appear to be covered by the final section of the Rehabilitation Act's definition, which refers to people who "are regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

the latter two categories, § 504 probably will be extended to them, because the Act unambiguously refers to physical impairments that substantially limit life activities.[123]

In *Arline*, the school board argued that discrimination against a handicapped person could be lawful if it is based on fears deriving from the handicap's contagious nature.[124] The Supreme Court rejected that argument and held instead that a school teacher afflicted with the contagious disease of tuberculosis is a "handicapped individual" within the meaning of the Rehabilitation Act. This means that a federally-funded state program may not discriminate against a person with tuberculosis solely because of the tuberculosis. As to whether an employer may discharge an individual who suffering from a contagious disease because of "fear of contagion," when the disease is defined as a handicap, the Court concluded that while school districts can protect an individual with AIDS from the irrational fears of others, only medical professionals can separate irrational fear from just cause. The school argued, unsuccessfully, that Arline had been discharged not because of her diminished physical capacity but because her tuberculosis posed a threat to the health of others. The Court ruled that the Rehabilitation Act does not consider conditions that could "impair the health of others" a handicap.[125]

The *Arline* Court did not determine whether the Rehabilitation Act protects a person with the HIV antibody. Instead, the Court adopted a four-part test recommended by the American Medical Association in its amicus brief. In remanding the case to the district court to determine whether Arline was "otherwise qualified," the Court required that the trial court base its decision on:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.[126]

The *Arline* decision protects individuals against irrational fear or prejudice on the part of employees or fellow workers, but it does not require an employer to hire someone who has a contagious disease. The Court said only that individuals who are both handicapped and otherwise qualified are eligible for relief under § 504. Later, in *Chalk*, the Ninth Circuit held that a teacher with AIDS was handicapped and otherwise qualified for employment under § 504.[127]

In fact, members of high risk groups who are *not* infected (or not known to be infected), but who are treated adversely in employment because they are perceived as threatening to infect others with AIDS, could be protected by the "regarded as" category.

123. *See, e.g.*, PERSPECTIVES ON AIDS, *supra* note 1, at 22-31.

124. *Arline*, 480 U.S. 273, 282.

125. *Id.* at 284-85.

126. *Id.* at 288.

127. 840 F.2d at 711.

Arline provided the commonly-used rationale for expressly rejecting the application of a standard of law based on the communicability of AIDS as opposed to the impairment itself. This is the legal crux of the AIDS issue, because *a person with AIDS may not be impaired at all.* If, in the specific case, medical opinion indicates that there is no likelihood or probability of communicating the disease through casual social contact, a person with AIDS probably will not be treated as handicapped. Thus, an asymptomatic carrier would not be treated as handicapped because of the low probability of communicating the disease through casual contact. As the danger of contagion increases, however, as for example with AIDS-Related Complex and certainly with full-blown AIDS, handicapped status will likely attach.

D. *The Americans with Disabilities Act of 1990*

The 1990 Americans with Disabilities Act (ADA) is effective on July 26, 1992. The Act makes it unlawful for private employers, state and local governments, employment agencies and labor unions to discriminate against qualified individuals with disabilities in the job application process or in hiring, firing, promotion, training, compensation or other terms and conditions of employment.[128]

Coverage under the ADA is parallel to that under the 1973 Rehabilitation Act with regard to definitions of disability and qualified individuals. Both statutes allow the option of being "regarded as having such an impairment." Although AIDS is not mentioned in the statute, it is clear from the legislative history that Congress intended the Act to protect persons with AIDS and those with HIV from discriminatory acts.[129]

III. PREVENTING THE SPREAD OF AIDS

Like everyone else, school employees and pupils have a duty to prevent the spread of a contagious disease. Many states have laws requiring that a person who knows or has reasonable cause to believe that he is suffering from a dangerous and contagious disease must take reasonable measures to prevent exposing others to the disease.[130] Thus, in states that have enacted this type of law, a person with AIDS who knowingly fails to take such reasonable measures could be found guilty of a criminal offense and could be subject to selective isolation. Many believe that a person with AIDS who has knowingly infected others[131] should be isolated. Selective isolation not only would prevent offenders from infecting more people, but also would highlight public concern about the spread of AIDS and might even deter potential offenders.

---

128. 42 U.S.C. §§ 12101-12213 (1991).

129. CIVIL RIGHTS DIVISION, U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: QUESTIONS AND ANSWERS (1991).

130. *See, e.g.*, OHIO REV. CODE ANN. § 3701.81 (Anderson 1988). A violation of this statute is a second degree misdemeanor. OHIO REV. CODE ANN. § 3701.99 (Anderson 1988).

131. Gaetan Dugas, a Canadian airline steward, is a well-known example. See RANDY SHILTS, AND THE BAND PLAYED ON 78-79, 438-39 (1987).

Some acts by AIDS carriers are regularly prosecuted as violations of existing criminal laws. For example, several persons have been charged with assault, attempted assault and reckless endangerment for allegedly biting or spitting at police or prison officers who tried to restrain them while they were in custody.[132] Simply exposing someone other than one's spouse to HIV infection through sexual activity constitutes a criminal offense in some states.[133] One court has indicated that a sex act by an AIDS carrier constitutes assault with a dangerous weapon or attempted murder.[134] In 1987, a West German court convicted an American serviceman with AIDS of causing bodily harm with "dangerous treatment" because he had had intercourse with several partners.[135]

In addition to invoking existing criminal laws in the new context of AIDS, some states have passed new legislation specific to AIDS transmission. Some forms of AIDS transmission, such as donating blood and having sexual intercourse without informing the partner, have already been criminalized.[136] Future state action criminalizing various forms of AIDS transmission might include making it a felony to engage in acts of prostitution while knowing one was infected with HIV, aggravating punishment for rape committed by someone who knows he is infected with HIV, and criminalizing sexual intercourse by a knowing AIDS carrier or the knowing commission of any act a person knows is likely to transmit AIDS to another.

In the wake of the AIDS epidemic, calls for mandatory testing and quarantine have mounted. The federal government now tests immigrants, federal prisoners, military personnel and federal employees in the Peace Corps, Job Corps and State Department Foreign Service. The testing of foreign service personnel was upheld, although the Job Corps' AIDS testing policy has been challenged.[137] The key question is whether mandatory testing violates an employee's Fourth Amendment rights against unreasonable search and seizure. Case law remains unclear, though one state case appears to limit the right to require testing.[138]

In addition, numerous states have passed laws that require testing of prisoners and convicted prostitutes, sex offenders and IV drug

132. Robert O. Boorstin, *Criminal and Civil Litigation on Spread of AIDS Appears*, N.Y. TIMES, June 19, 1987, at A1.

133. FLA. STAT. ANN. § 384.24 (1990); LA. REV. STAT ANN. § 14:43.5 (1987).

134. Berner v. Caldwell, 543 So.2d 686 (Ala. 1989). In this Herpes transmission case, the court specifically stated that the transmission of AIDS would also be construed as battery.

135. Serge Schmemann, *Bavarian Court Convicts American in AIDS Case*, N.Y. TIMES, November 17, 1987, at A5.

136. FLA. STAT. ANN. 384.24 (West Supp. 1986) prohibits a person infected with HIV from having sexual intercourse without informing his or her partner of the infection; IDAHO CODE § 39-601 (1986) prohibits a person with AIDS or an AIDS carrier from knowingly or willfully exposing another to AIDS, ARC or HIV; TENN. CODE ANN. § 68-32-104 (1986) prohibits AIDS carriers from donating blood.

137. Doreen Weisenhaus, *The Shaping of AIDS Law*, NAT'L L.J., August 1, 1988, at 1.

138. Guardianship of Anthony, 524 N.E.2d 1361 (Mass. 1988) (a sexually active retarded man who exhibited no symptoms of AIDS could not be tested for the disease).

users.[139] Illinois and Louisiana enacted mandatory testing for marriage-license applicants, but only four of the first 12,000 applicants tested positive for HIV, while the number of applicants for marriage licenses was significantly reduced.[140]

Quarantine of persons with AIDS has also been suggested. A 1986 Newsweek poll indicated that fifty-four percent of those surveyed favored quarantining people with AIDS.[141] Proposals for quarantine, however, represent an outdated medical practice. Quarantine is highly discretionary and relatively unconstrained by strict norms of notice, fair warning and due process. Nevertheless, many state health laws enacted during earlier epidemics were routinely upheld as an appropriate exercise of the state's police power. These laws have been largely unused, however, because antibiotics have proved more effective than quarantine in stopping most epidemics.

Several states have amended their public health laws to authorize some form of isolation for some AIDS carriers.[142] Other possible state actions might include permitting quarantine of any seropositive HIV carrier who knowingly exposes another person to the virus and authorizing quarantine of persons with AIDS and persons suspected of being infected with HIV pending testing. State lawmakers are likely to allow public health authorities to quarantine or isolate persons designated as diseased upon a showing that their conduct exposes others to the disease and that confinement is necessary to prevent its spread.

The substantive constitutional constraints that apply to criminal sanctions have not been applied to processes of quarantine, commitment and preventive detention.[143] Civil commitment, however, may involve greater deprivation of liberty than criminal punishment,[144] and quarantine of AIDS patients or carriers may violate their right to due

139. *Id.* at 30.

140. *Id.* Because of this experience, several states have instituted premarital education programs in lieu of testing.

141. *Growing Concern, Greater Precaution*, NEWSWEEK, Nov. 24, 1986, at 32. In 1986, California voters defeated a notorious pro-quarantine initiative that would have added AIDS and exposure to the HIV virus to the list of diseases reportable to the state health authorities. The authorities, in turn, would have been authorized to quarantine persons with AIDS or AIDS carriers. People living with or visiting AIDS patients or carriers would have been subject to criminal penalties if they failed to report this contact to public health authorities.

142. COLO. REV. STAT. § 24-4-1406(2)(c) (Supp. 1991) authorizes public health officials to order persons infected with HIV whose behavior endangers others to cease and desist, and in the event that they violate such orders, to apply restrictions necessary to stop them; IDAHO CODE § 39-601 (1986) adds AIDS, ARC and other manifestations of HIV infection to the list of diseases subject to quarantine; KY. REV. STAT. ANN. § 214.410 (Baldwin 1991) classifies AIDS as a sexually transmitted disease subject to quarantine or isolation.

143. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (civil commitment is not subject to the constraints of the Eighth Amendment's prohibition against cruel and unusual punishment). To invoke criminal sanctions would entail a more serious deprivation of individual liberties than civil sanctions such as quarantine, commitment and preventive detention.

144. *See, e.g.*, Powell v. Texas, 392 U.S. 514 (1968) (from an alcoholic's point of view, compulsory commitment for alcoholism "can hardly be considered a less severe penalty" than jail).

process and equal protection. In any event, quarantine of persons with AIDS is unreasonable because the AIDS virus is not easily communicated.[145] Quarantine, like isolation and placarding, is an extreme measure that should be implemented only when no less restrictive alternative is available to control transmission.[146]

A state board of health may have the responsibility to inspect schools and may close any school for health reasons.[147] When a dangerous communicable disease is unusually prevalent, as would be the case if AIDS were to become an epidemic, or a school or community is threatened with epidemic conditions, an Ohio statute permits the state board of health to close any school and even prohibit public gatherings for such time as is necessary. While medical knowledge about AIDS suggests that this action would be inappropriate, state law neverthess provides the authority for it in Ohio.[148]

IV. THE ROLE OF SCHOOL BOARDS

School board members are vested with management and control of all the public schools in their district.[149] Although a school board receives its power from the state, local boards are given broad authority in the conduct and management of their schools.[150] Absent gross abuse, a court has no authority to control the discretion vested in the board or to substitute its judgment for that of the board.[151]

A school board should develop policies before an AIDS crisis devel-

145. For a more extensive discussion of the quarantine issue see John A. Gleason, *Quarantine: An Unreasonable Solution to the AIDS Dilemma*, 55 U. CIN. L. REV. 217 (1986); Wendy E. Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985); Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988).

146. Case law has allowed such restraint of prisoners. For example, a New York court dismissed an attempt by prisoners who suffered from AIDS to enjoin their segregation from the general prison population. The court held that segregation of prisoners with AIDS from the general prison population bore a rational relation to prison officials' objective of protecting both AIDS sufferers and other prisoners from tension and harm that could result from other prisoners' fears. Further, the segregation did not inflict cruel and unusual punishment, deny prisoners with AIDS due process or violate their rights to privacy, free expression and free association. Cordero v. Coughlin, 607 F. Supp. 9 (S.D.N.Y. 1984).

When an inmate with AIDS was denied conjugal visits through the New York Prison Family Reunion Program, the inmate and his wife brought a mandamus proceeding to review the ruling and obtain declaratory relief. The court found that an inmate retains only those rights not inconsistent with the institution and his status. The inmate claimed that denying him visitation invaded an area of personal decision making. But the court held that the denial was appropriate as long as prison officials had a rational basis for it. In this case, prison regulations set forth 15 guidelines for consideration and balancing. The court noted that the guidelines, many of which were subjective, did not create an entitlement to the conjugal visits, and found, inter alia, that the inmate's AIDS was an appropriate reason for prison officials to deny his conjugal visits. Doe v. Coughlin, 518 N.E.2d 536 (N.Y. Ct. App. 1987).

147. *See, e.g.*, OHIO REV. CODE ANN. § 3707.26 (Anderson 1988).

148. *Id.* Such action may create rather than reduce the mass hysteria and fear of contagion that accompanies AIDS.

149. *See, e.g.*, OHIO REV. CODE ANN. § 3313.47 (Anderson 1990).

150. Greco v. Roper, 61 N.E.2d 307 (Ohio 1945).

151. State *ex rel.* Evans v. Fry, 230 N.E.2d 363 (1967).

ops. As elected officials, board members are under immediate political pressure when it becomes public knowledge that a person or child with AIDS is in school. There is simply no time for rational action once AIDS hysteria begins. Responsible school board planning in advance is particularly important because a school board may only take official actions in concert during an official session.[152] An individual board member has no authority to act on behalf of the entire board.

In developing policies to deal with AIDS, board members should review state and federal law regarding the treatment of persons with handicaps or infectious diseases. Although education is not a federal constitutional right,[153] it is a right under many state constitutions. Ohio, for example, provides public education as a right for citizens between the ages of five and twenty-one;[154] students cannot be deprived of this right without due process.[155] Without these statutory protections, students with AIDS would have no recourse if a school district excluded them in the misguided belief that its action is necessary to protect others.

Financial assistance in meeting the educational needs of handicapped children is available to states under P.L. 94-142, the Education for All Handicapped Children Act.[156] Federal assistance also is available for early childhood education under P.L. 99-457.[157] Some states have gone beyond the federal statute in providing assistance and protection for handicapped children. For example, the Ohio Administrative Code was revised in 1976 to establish an elaborate system of regulations and statutes regarding the handicapped.[158]

The Education for All Handicapped Children Act (P.L. 94-142) established handicapped children's right to be educated in the same classroom as nonhandicapped children, when this is feasible. School boards should consider this "mainstreaming" concept[159] in determining how to educate children with AIDS, ARC or the HIV antibody. The first issue to be resolved is whether AIDS would qualify as a handicapping condition under a provision regarding children who are "health impaired or who have specific learning disabilities requiring special education."[160]

If a student with AIDS is covered by special education provisions, the school district is required to provide for all the costs of that student's individualized educational plan. In Ohio, this includes "required related services and instruction specifically designed to meet the unique needs of a handicapped child, including classroom instruction, home instruction, and instruction in hospitals and institutions."[161] The concept

152. 68 AM. JUR. 2D *Schools* § 53 (1973).
153. City of San Antonio v. Rodriguez, 411 U.S. 1 (1973).
154. OHIO REV. CODE ANN. § 3313.48 (Anderson 1990).
155. OHIO REV. CODE ANN. § 3313.661 (Anderson Supp. 1991).
156. 20 U.S.C. §§ 1401-1485 (1990).
157. Early Education for Handicapped Children, 20 U.S.C. § 1423.
158. OHIO ADMIN. CODE §§ 3301-51-01 to -30 (1990).
159. 20 U.S.C. § 1412 (5)(B).
160. OHIO REV. CODE ANN. § 3323.01(A) (Anderson 1987).
161. OHIO REV. CODE ANN. § 3323.01(B) (Anderson Supp. 1990).

of an individualized education program is eminently useful for a child with AIDS.

Superintendents typically have a statutory right and duty to assign children.[162] Because of this responsibility, the superintendent must make the difficult decisions regarding the assignment of a student with AIDS. Each case should be dealt with on an ad hoc basis and each child should receive adequate substantive and procedural due process. Before excluding a child with AIDS, a school district should notify the child and institute a hearing of some kind, based on written board procedure or policy.

Substantive due process requires that a school district do more than merely review the facts. It requires the district to listen to the best medical and legal advice available and then make the best decision possible. Many school districts have established AIDS panels. Ideally, theses panels include at least one infectious disease specialist, a county health official, a medical doctor, a physician for the child with AIDS and an educator from the school district.[163] With four medical people on such a panel, the decision on an AIDS case would be likely to reflect the medical community's determination that the risk of AIDS transmission through casual contact in a school setting is minimal. A disturbing practice developing in some school districts, however, is to increase the number of non-medical school district personnel on these panels. Such panels are likely to favor the school, giving the school district greater leverage than the child when a sensitive AIDS decision must be made. This practice could create potential legal problems. If educators base their decisions solely on educational, rather than informed medical grounds, ignoring medical experts' testimony, their decisions may not hold up in the lawsuits to which they are likely to give rise.

The future regarding AIDS and the schools is far from bright. Most persons with AIDS, children included, will face discrimination and ill-treatment. Children will continue to face legal battles to stay in school, and teachers and staff will continue to lose their jobs. Discriminatory practices will increase as the fear and trauma of potential infection from AIDS is amplified and inflamed by the news media and imaginary fears. School systems must be at the forefront of concern and change, if for no other reason than the length of AIDS incubation. With a seven-to-ten year dormancy period (some studies indicate that it might be fifteen years or more),[164] many of those unknowingly infected with the virus will have children. Many of these children born with AIDS will enter schools in the mid-1990s.

A fundamental underpinning of our federal system is the belief that

162. *See, e.g.*, OHIO REV. CODE ANN. § 3319.01 (Anderson 1990).

163. The author discussed the proposed procedure with dozens of school superintendents at the 1991 American Association of School Administrators conference in New Orleans, La., March 2, 1991 during an open forum session. The consensus was that a medical panel recommendation was the best tactic, and in fact, the superintendents' school attorneys had recommended it.

164. *Health Benefits*, *supra* note 9.

the federal government should help with problems that are too big for local government to handle. This philosophy has resulted in federal initiatives in areas of defense, commerce and civil rights. At present, however, no federal law deals with AIDS and no federal plan addresses the AIDS crisis, despite the fact that a report by the Presidential Commission on AIDS called for sweeping measures, including voluntary testing and anti-discrimination laws.[165] Courts are still struggling with the appropriate application of the Rehabilitation Act to persons with AIDS, and while an explosion of litigation has occurred in state courts, federal courts have provided little guidance.

Present state and federal laws may protect people with AIDS who hold public sector positions, but in far too many states, individuals in private sector jobs have only limited protection. At first glance, protective legislation for people with AIDS may not seem as important as assistance in fighting the disease itself. Unfortunately, this is a shortsighted view. Persons with AIDS and their families—who also are not assured that they are secure in their jobs and apartments and safe from quarantine—will not come forward for testing and treatment. Because the threat of discrimination makes it unrealistic for a person to volunteer to be tested for AIDS before having children, many asymptomatic carriers will continue to have children who are born with the virus. Thus, the number of infected people will continue to grow, and the number of children with AIDS will continue to increase.

In the fifties, the dangers of drugs were featured in federal reports, journal articles and local publicity, yet we did nothing because vested interests were not affected. Drugs, it was said, were a black ghetto problem that did not concern the "good" kids. The result of this avoidance is that we now have a drug problem that is beyond the ability of any city, state or even the federal government to resolve. Similarly, the much needed, far-reaching federal AIDS initiative will not occur as long as people believe that AIDS is only a disease of homosexuals and drug abusers.

V. RECOMMENDATIONS

The following recommendations regarding AIDS policies, practices and procedures are intended for school boards, administrators, teachers and staff to use as they develop local practices. The recommended policies and procedures may help school officials avoid serious legal and community problems without jeopardizing the rights of people with AIDS.

AIDS policies must be in place in advance of a potentially critical situation. A school district has no time to develop a well-reasoned series of actions after an AIDS emergency develops, and community pressure and concern may lead to incorrect and possibly illegal actions. An AIDS advisory team composed predominately of medical experts should be in

165. *See* Weisenhaus, *supra* note 137, at 1.

place to recommend actions to the superintendent and school board. Expert medical advice is critical in protecting and insulating the school district, as well as in protecting the rights of a person with AIDS. An AIDS advisory team should include the child's or employee's doctor as well as county and district medical officials and a district educational representative.

A school district should communicate its AIDS policies and the underlying rationale to the public *before* a crisis occurs. For example, the public may be informed that medical evidence has ruled out transmission of AIDS by casual social contact and that there is no evidence of virus transmission within the classroom situation. This practice serves as a community education program and provides a basis for avoiding panic reactions if a crisis occurs.

As a general rule, discrimination against a person with AIDS in a school setting is irrational, unreasonable and probably unlawful as long as medical research continues to demonstrate that AIDS cannot be contracted through casual social contact. A school board should not transfer or fire a seropositive student or employee, or one with ARC or AIDS, merely because of that person's medical status. The medical team's recommendations should be the controlling factor in a decision regarding transfer or termination. Recent court action[166] indicates that transfer should only occur after a medical team decision based on the communicability and risk of transmission of the AIDS virus. Rarely, if ever, should a student be turned away or a school employee be fired because of medical status.

A school district should always explore the options of home instruction for a student and assignment to a nonteaching position for an employee. Student and staff may actually prefer an alternative in which they are not involved with the public and thereby avoid exposure to opportunistic infections. If the parents of the student with AIDS accept home instruction, or if an employee is willing to accept an assignment to a nonteaching position, the district is relieved of responsibility and liability.

Even when parents opt for home instruction, a school district must allow a child with AIDS to attend school. A child has a right to be educated among his or her peers. An exception should be made only when the child is a danger to others, as in the case of a young child with AIDS who has a history of biting others.

A school district may not exclude an employee because of the "fear" that he or she will spread the AIDS virus. *Arline* settled this question.[167] An employer may not discriminate simply because of an unfounded fear of transmission. Only when there is convincing evidence that a person with AIDS is a threat to others may an employer take pro-

166. Chalk v. United States Dist. Court, 840 F.2d 701 (9th Cir. 1988); *see supra* notes 65-78 and accompanying text.

167. See *supra* notes 125-26 and accompanying text.

tective action. Fear of contagion, alone, is not enough to justify discrimination.

An employer may not terminate an employee with AIDS without convincing evidence of a threat of contagion, but the same employer must take care in acting against people who object to continued employment with a person with AIDS. Workers engaged in "concerted activity" are protected by the National Labor Relations Act (NLRA)[168] whether or not they are members of a collective bargaining unit. Therefore, a school district may not arbitrarily terminate employees who complain about the perceived safety hazard of working with a person with AIDS. Of course, the employees must be reasonable in their beliefs and act in good faith. Since the medical facts at this time indicate that the disease is transmissible only through intimate physical contact, which would not occur in the performance of an employee's job, a court probably would find that fear of AIDS in this situation is not reasonable. Furthermore, the NLRA probably would not protect a "concerted activity" where the person with AIDS had previously been defined as handicapped, since a handicapped person is protected from discrimination under state and federal law.

Treating individuals with AIDS or ARC differently from those who are seropositive is an equal protection violation. It would be unconstitutionally discriminatory for a school board to terminate an employee or exclude a student with a given AIDS-linked condition while treating those in another category differently. Excluding all categories of AIDS victims also would fail. While education is not a "fundamental right," states that choose to provide a public education must make equal services available to all. Again, the behavior and physical condition of the person with AIDS must be the determining factor.

School district and employee insurance policies should be examined to determine the extent of coverage and protection. In most cases, insurance plans exclude or limit benefits for a pre-existing injury or sickness. Thus, an insurance company must continue to provide coverage for an individual who contracts AIDS during his or her employment, with no prior knowledge, as it does for a person who contracts cancer while employed. Some insurance companies have used a positive antibody test to justify denying coverage. This practice appears to be a departure from traditional group underwriting practices and therefore may trigger a charge of employment discrimination.

An AIDS condition should be kept confidential whenever a question arises as to whether information should be released. Confidentiality is implicated when an AIDS test is required, when an employee notifies the district of a positive test result and when a child with AIDS enters the school system. These results must not be released without consent, nor should they be used to determine insurability or suitability for employment. State laws vary, but revealing medical information could be a

168. 29 U.S.C. § 157 (1947).

clear invasion of the privacy of a student or employee. The general policy should be that if there is no need to fear AIDS, there is no rational reason to intrude on the right to privacy of a person with AIDS.

A school district must make a reasonable effort to accommodate an employee with AIDS. Because persons with advanced AIDS are likely to be considered handicapped, employers must make reasonable accommodations for their physical or mental limitations, unless those accommodations would impose an undue hardship—not merely an inconvenience—on the employer's business. Since AIDS is not spread by casual social contact, a school district would find it difficult to argue undue hardship.

A school district should take immediate action to eliminate or curtail students' drug activity, since the fastest growing cause of AIDS infection is intravenous drug use, and to initiate and sustain AIDS-prevention education programs. Teenagers are a high-risk group for AIDS because they tend to experiment with sex and drugs. Their impulsive behavior and lack of knowledge about long-term consequences make them especially vulnerable. A comprehensive program of AIDS education, which enhances personal awareness and instructs students on protective behavior, may reduce the number of students who acquire the disease. Since the incidence of AIDS among Hispanics and Blacks is far higher than in the general population,[169] education programs should include specialized AIDS instruction for minority children, geared to their cultural values.

Staff development programs focusing on AIDS education should be instituted at the same time as AIDS-prevention education programs for students. Many teachers are unaware of many facts about AIDS and many also are unable to deal with the complexity of students' concern and questions about AIDS prevention. Most adults are simply not comfortable talking about such AIDS concerns as anal intercourse, safe sex, and condom use. Only through proper in-service training, followed by on-going staff development based on open communication, will teachers develop the knowledge and ability to share critical AIDS information with students. Teachers and all staff who communicate with students should receive this training.

CONCLUSION

The present attitude of many people regarding AIDS is similar to the prevalent attitude in the 1950s regarding drugs. Religious fundamentalists are not the only ones who believe that AIDS may be a punishment for the sexual behavior of homosexuals or for the excesses of intravenous drug abusers. Medical science has established, however, that AIDS attacks everyone, not just homosexuals and drug addicts. Unfortunately, the "democratic" nature of the AIDS virus will so compound the problem that even comprehensive federal legislation may

169. *See supra* note 5 and accompanying text.

come too late to save most people who are infected by AIDS. The costs will be astronomical. Our health providers may be unable to meet the nationwide need. Likewise, our social systems—including public school systems—are ill-prepared to meet the interpersonal needs of AIDS patients, their families, and a hysterical public. The national will seems inadequate to provide both a coordinated federal AIDS effort and a stronger research effort; it may not even be strong enough to force lawmakers to enact additional supportive legislation.

The only realistic solution is prevention, and prevention requires education. Children are educated both at home and in school. With a comprehensive awareness program, the spread of both diseases, AIDS and AFRAIDS, can be slowed. Children will learn if they are taught effectively. Teaching about AIDS requires a sincere effort and a general acceptance of the lessons to be learned.[170] This is possible, but who will teach the parents, teachers and administrators who teach the children? Whither our future?

170. For additional information on schools and AIDS, see the following: Leah Hammett, *Protecting Children with AIDS Against Arbitrary Exclusion from School*, 74 CALIF. L. REV. 1373 (1986); Edward Knox Proctor, Delconte v. State: *Some Thoughts on Home Education*, 64 N.C. L. REV. 1302 (1986); Frederick A. O. Schwartz, Jr. & Frederick P. Schaffer, *AIDS in the Classroom*, 14 HOFSTRA L. REV. 163 (1985); Lisa J. Sotto, *Undoing a Lesson of Fear in the Classroom: The Legal Recourse of AIDS-Linked Children*, 135 U. PA. L. REV. 193 (1986); Matthew J. Welker, *The Impact of AIDS Upon Public Schools: A Problem for Jurisprudence*, 33 EDUC. L. REP. 603 (1986).

WHAT DO "THEY" THINK? THE DELINQUENCY COURT PROCESS IN COLORADO AS VIEWED BY THE YOUTH

REGINA M. HUERTER
BONNIE E. SALTZMAN*

INTRODUCTION

The statutory purpose of the Colorado Children's Code is to "serve the welfare of children and the best interests of society."[1] Unfortunately, this purpose often finds itself circumvented as the adversarial process of the juvenile justice system takes over. In delinquency proceedings, the often polarized parties do not collectively think in terms of the best interest of the child nor the best interest of the community. While this is the nature of a juvenile justice system, professionals within the Colorado system often ask some very important questions regarding how the system affects the youths involved: Are juveniles treated fairly? Are courts too lenient or to harsh on juvenile offenders? Do juveniles receive the support and skills necessary to rehabilitate and steer them away from future criminal activities? What are the roles of District Attorney (DA), defense attorney, guardian ad litem and judge? How dedicated are professionals who work within the system? Are the juvenile justice system resources being used properly? Is the Colorado Children's Code being properly construed to "serve the welfare of the children and the best interests of society?"[2] These questions often beget difficult and complex answers.

This Article examines some issues these questions pose—not from an "ivory tower" perspective, but from the youths' perspective. We report their thoughts and feelings about the juvenile justice system as expressed by the youths in a recently conducted survey. First, this Article presents an overview of the Colorado juvenile justice system of which the subject youths are a part. Next, this Article details the methodology and reports the findings of the survey. Finally, this Article concludes with the authors' impressions regarding the youths' responses in the survey. Although not every youth within the juvenile court system (for delinquency) was surveyed, and our research is a broad on-going project, we believe it is important to report our findings to date with the

* Bonnie Saltzman is an attorney in the juvenile division of the Denver District Attorney's office and holds a J.D. and Master of Social Work from the University of Colorado at Denver. Regina Huerter holds a Masters in Counseling and Personal Services from the Univeristy of Denver and is counselor and program director for Denver, Partners, Inc., a non-profit organization for youths. Kim Wagner was research assistant on the youths' interviews.

1. COLO. REV. STAT. § 19-1-102(2) (Supp. 1991).
2. *Id.*

hope of educating and instigating further discussion amongst professionals in the juvenile court system. While we may not agree with the surveyed youths' responses, we believe it is essential to listen and try to learn from them in order to improve the system.

OVERVIEW OF THE COLORADO JUVENILE DELINQUENCY SYSTEM

The Colorado Children's Code[3] (Code), divided into seven separate articles, outlines the law applicable to youth and family in a variety of situations.[4] This section provides a brief overview of Article Two of Title Nineteen—Delinquency. The Code's Delinquency provisions set forth procedures and guidelines to be used in delinquency proceedings.[5] These procedures range from arrest to parole. Juvenile court has jurisdiction over youths between the ages of ten and seventeen and uses the date of the offense as the guide for determining jurisdiction.[6] Generally, rights afforded to juveniles in delinquency cases align with rights afforded in adult criminal cases,[7] with a few exceptions. The parents or guardians are expected to take an active role in the delinquency proceedings and are named as respondents on the delinquency petition. For example, a parent or guardian must be present when the juvenile is being questioned by law enforcement personnel and must enter a waiver of the Miranda rights with the juvenile.[8]

At any stage in the proceedings, the court can appoint a Guardian Ad Litem (GAL)[9] for the juvenile. The GAL is a licensed attorney, who acts in the place of a parent or guardian for the youths. Such an appointment is often necessary when there is no parents or guardians of the youth to look after the best interests of the youth. At times, a GAL is also requested when the victim in the delinquency petition is the parent or guardian. Thus, the GAL represents the best interests of the juvenile, which may conflict with the youth's desires.

If a warrantless arrest is made and the juvenile is placed in detention, a probable cause determination must be made within forty-eight

3. The Colorado Children's Code is found in Title 19 of the Colorado Revised Statutes.

4. The Code contains seven articles - General Provisions, Delinquency, Dependency and Neglect, Colorado Children's Trust Fund, Uniform Parentage Act, Relinquishment and Adoption, and Support Proceedings.

5. A delinquent is a juvenile convicted of a delinquent act. A delinquent act is a violation of any statute or ordinance if committed by a juvenile. *See* COLO. REV. STAT. § 19-2-101 (4), (8) (Supp. 1991).

6. *Id.* § 19-2-102.

7. For example, in delinquency cases, a court appointed attorney is utilized as defense counsel when the State Public Defender's Office has a legal conflict in the case. The attorney is in private practice, but in such cases is paid by the State Judicial Department for his or her appointment. *See id.* 19-1-103(14) (general definition of court appointed attorney in juvenile proceedings).

8. *Id.* § 19-2-210.

9. In delinquency matters this is a court appointed attorney who takes the place of the parent or guardian in delinquency matters. This usually occurs when the parents or guardians are unavailable or there is a conflict between the interests of the parents and the juvenile. *See id.* § 19-1-103(14) (definition of guardian ad litem) and *id.* § 19-1-111 (concerning appointment of a guardian ad litem).

hours. Since the United States Supreme Court's decision in *Riverside County v. McLaughlin*,[10] these probable cause determinations are based on an affidavit from the arresting officer. This determination is made within forty-eight hours, including holidays and weekends, by a juvenile court magistrate or judge. This probable cause determination does not include the setting of bail, it merely determines if the juvenile should remain in detention.

If the magistrate or judge decides the youth should remain in detention, a hearing must be held within forty-eight business hours after the arrest to determine if the juvenile should be detained further and what amount of bail, if any, should be set.[11] Within seven days, if the juvenile is detained because the family can not make bail or the juvenile is held without bail, the DA must file a petition alleging that the juvenile is a "delinquent child."[12] If the juvenile is released or bonded-out from detention, there are no statutory guidelines for when the petition must be filed.

The decision to file a petition is solely at the discretion of the prosecutor. There are, however, alternatives available to the prosecutor to avoid a formal juvenile adjudication. One alternative to filing a petition is placing the youth in a diversion program,[13] a community-based alternative to the formal court system. Depending on the judicial district, the program is associated with either the prosecutor's office or a community-based organization. If the youth formally completes the program, no petition is filed. Even if a petition is filed, the prosecutor may agree to a second alternative, an informal adjustment, whereby the juvenile completes certain conditions and the petition is dismissed.[14] The failure to complete the conditions may result in a formal adjudication. A third alternative to a formal adjudication is a deferred adjudication.[15] The youth either enters a guilty plea or is found guilty at trial, but the prosecutor and judge agree to defer the formal adjudication for a certain period of time not to exceed one year. During this time, the youth is required to complete certain conditions. If the conditions are met, the petition is dismissed.

Once the petition has been filed and served upon the juvenile and parent/guardian, the proceedings follow the same procedure as in adult criminal cases. Felony cases are set for preliminary hearings, while misdemeanor cases are set for either trial or pre-trial conference. Prior to cases being set for either proceeding, the parent/guardian has the opportunity to attain counsel for the juvenile. The Colorado State Public

10. 111 S. Ct. 1661 (1991). Before *Riverside*, the Court required a "prompt" judicial determination of probable cause after a warrantless arrest. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

11. COLO. REV. STAT. § 19-2-204 (Supp. 1991).

12. *Id.* § 19-2-204(3)(a)(V) and COLO. R. JUV. P. Rule 3.1.

13. COLO. REV. STAT. § 19-2-303 (Supp. 1991).

14. *Id.* § 19-2-302.

15. *Id.* § 19-2-702.

Defender's Office accepts applications for representation in juvenile cases.

In Colorado, juveniles have the right to a jury trial, with one exception. If the offense would be *less* than a class-one misdemeanor had an adult committed the offense, there is no right to a jury trial.[16] In this situation, if the DA waives seeking a commitment to the Department of Institutions or a sentence to the county jail the trial is to the court.[17] In a juvenile jury trial, the jury generally consist of six members. However, if the youth is also charged with being an "aggravated juvenile offender,"[18] a sentencing enhancement, the jury has twelve members.[19]

The most drastic deviation from the adult criminal court occurs in the sentencing phase of the delinquency proceeding. One purpose of the Colorado Children's Code is to "secure for each child . . . such care and guidance, preferably in his own home, as will best serve his welfare and the best interests of society" and to "preserve and strengthen family ties whenever possible . . . ."[20] The sentencing guidelines attempt to reflect this purpose.[21] At the sentencing hearing the judge may consider any social, psychological and other relevant reports and evidence. This assures that the "proper disposition best serve[s] the interests of the juvenile and the public."[22] In addition, the victim has the right to attend the hearing and express concerns about the alleged crime, the juvenile, restitution and the sentencing orders.[23]

The Children's Code outlines a variety of sentencing options for the court. In short, the options are: probation, probation and up to forty-five days in detention (if the juvenile is over twelve years of age), probation with out-of-home placement in a residential child care facility or with other relatives or a commitment to the Department of Institutions (DOI)[24] in Colorado (if the juvenile is over twelve years of age).[25] The standard terms and conditions that apply to every juvenile placed on probation[26] include: no further violations of the law, no possession or consumption of alcohol or controlled substances, no possession of weapons, school attendance, restitution and reporting to the assigned probation officer as required. In addition to these standard terms and conditions, the court may also order the juvenile to complete commu-

16. An example of a class-one misdemeanor is third-degree assault. An example of a class-two misdemeanor is second-degree motor vehicle theft.

17. COLO. REV. STAT. § 19-2-501 (Supp. 1991).

18. *See infra* note 36 and accompanying text.

19. COLO. REV. STAT. § 19-2-501(1) (Supp. 1991) and *id.* § 19-2-804(4)(a).

20. *Id.* § 19-1-102(1)(a) & (b).

21. The sentencing guidelines for juvenile court in Colorado are outlined in COLO. REV. STAT. § 19-2-701 (Supp. 1991) and *id.* § 19-2-801.

22. *Id.* § 19-2-701.

23. *Id.* § 19-2-707.

24. The DOI is a Colorado government agency that administers the State treatment, rehabilitation, and mental health agencies, including the juvenile secured facilities (e.g., Lookout Mountain School). *Id.* § 27-1-101 and § 24-1-118.

25. *Id.* § 19-2-703(1)(a)-(k).

26. *Id.* § 19-2-705.

nity service hours, mental health treatment, substance abuse treatment and other conditions the court deems appropriate for the juvenile.

A commitment to DOI cannot be for longer than two years, unless the juvenile has been adjudicated an "aggravated juvenile offender," or DOI petitions the court to extend the period of commitment.[27] The terms of commitment are for a determinant period of time unless a sentencing enhancement applies, in which case the court can set a minimum period of institutionalization.[28]

There are four sentencing enhancers in juvenile court: mandatory sentence, repeat felony, violent juvenile and aggravated juvenile. A "mandatory sentence offender" is a juvenile who has been adjudicated three times. A sentence for such a youth requires a minimum one year out-of-home placement. It does not, however, require a commitment to DOI. Thus, many youths sentenced under this designation are placed on probation, but reside in a Residential Child Care Facility (RCCF)[29] or with another relative.[30] A "repeat felony offender"[31] has at least two adjudications—the latter for what would constitute a felony offense if committed by an adult. This designation gives the court discretion to commit the youth to DOI for a minimum term not to exceed two years. A youth over thirteen years of age and adjudicated for a crime of violence (according to the Colorado Criminal Statutes)[32] can be designated a "violent juvenile offender,"[33] with those fifteen years of age and over being placed out-of-home for at least one year.[34] A commitment to DOI is not mandatory for a "violent juvenile offender."[35] An "aggravated juvenile offender" is a youth twelve years of age or older adjudicated for a class-one felony,[36] or a youth sixteen years of age or older with both a prior felony and subsequent crime of violence adjudication.[37] The judge has discretion to extend the commitment period from two to five years for aggravated offenders.[38] In all cases, the judge also has discretion to sentence juveniles who are eighteen years of age or older on the day of sentencing to the county jail.[39] A probation officer is assigned to monitor the progress of a juvenile placed on probation.[40] If, on the

27. *Id.* § 19-2-704(3), (4) and § 19-2-804(6)(a).

28. *Id.* § 19-2-704(3).

29. An RCCF is a group home, not locked or secured, and is the least restrictive treatment (outside the home) setting for youths.

30. *Id.* § 19-2-801.

31. *Id.* § 19-2-802.

32. For example, first-degree sexual assault, aggravated robbery and first and second-degree assault are all crimes of violence.

33. *Id.* § 19-2-803.

34. Out-of-home placement is discretionary for those under 15 years old. *Id.* § 19-2-803(2)(a).

35. *Id.* § 19-2-203.

36. Only first-degree murder is considered a class-one felony.

37. *Id.* § 19-2-804.

38. *Id.*

39. *Id.* § 19-2-703(1)(b) & (c).

40. A probation officer, assigned to work with a youth and family when placed on probation, monitors progress in the community and makes recommendations to the court about the youth's treatment program. *Id.* § 19-2-1002.

other hand, a juvenile is committed to DOI, a client manager is assigned to the youth.[41] The client manager monitors and coordinates the youth's treatment and placement needs. A commitment to DOI often leads to a period of parole. If parole is granted, a parole officer is assigned to the juvenile.[42] The parole officer becomes the primary resource person for the youth; however, the client manager lends assistance when necessary.

The Colorado juvenile delinquency process is adversarial in nature, but with an orientation towards due process. Although judges have some sentencing discretion, the decision-making process is limited by statutes and the formal structure. The Colorado model of juvenile court best fits the structure defined as Autonomous/Noninterventionist - Type Four.[43] Type Four courts restrict judicial decision-making to non-discretionary, offense criteria limited by rules and structure. Youth social service agencies are separate and specialized. Therefore, the alleged crime dominates the judicial process, not the condition of the youth, except at the sentencing phase. At that point, the probation report supplies mitigating or aggravating social information that the judge uses to assess the type and severity of the sentence. The magnitude of the offense is subordinated to the importance of the offender's characteristics (e.g., family composition, education, mental health), which dominate at the sentencing. In Colorado juvenile courts "discretion enters after a legal finding."[44]

METHODOLOGY

Youths volunteered and responded to a structured questionnaire containing twenty sections with a total of ninety-six questions. The questions contained close-ended, fact finding items followed by open-ended questions to further examine the thoughts, attitudes and feelings of the interviewees. Each participant in this study was asked to respond to the same questions. This report provides a glimpse of the findings for thirteen of twenty sections.[45]

41. A client manager, assigned to work with a youth committed to DOI, coordinates treatment and the residential setting for the youth, but does not actually work in the facility.

42. A parole officer monitors youths who are granted parole after a period of commitment to DOI. *Id.* § 19-2-1205.

43. Jeanne Ito, Janice Hendryx and Vaughan Stapleton, *Inside Metropolitan Juvenile Courts: How Their Structure Affects the Outcome of Cases*, STATE CT. J., Fall 1982, 16, 17-18 (research study analyzing various juvenile court jurisdictions, categorizing them and studying how each category affects the treatment of offenders). Type One (or Integrative/Interventionist) courts control probation, intake, social services, detention and adjudication and the prosecutor does not participate in filing the petition. *Id.* at 16. Type Two (or Transitional) courts share control of authority and the prosecutor is involved in the decision to file a petition, but not in probation or administrative control of the court, as in Type Four. Type Three (or Divergent) courts have little centralized control over the juvenile process.

44. *Id.* at 35.

45. The other seven survey sections deal mostly with the youths' family and educational histories, not the youths' opinions regarding the juvenile system. However, since

The population represented a spectrum of Colorado counties as well as a cross section of involvement and history with the juvenile justice system. Even though the number of youths in the study is relatively small (twenty-four), they are reflective of youths involved in the system. The three areas represented in this study are: (1) adjudicated youths on probation who reside in an RCCF/unsecured facility; (2) adjudicated youths sentenced to DOI who reside in an RCCF/unsecured facility;[46] and (3) adjudicated youths committed to DOI who reside in a secured/locked juvenile facility.[47] Of the twenty-four youths, six were on probation, six were in unsecured facilities, eleven were in secured facilities, and one was on parole and living at home. The parolee youth was previously placed in an unsecured facility.

The interviews occurred at the youths' respective residential facilities. The youths were interviewed individually in a private setting. The results of the interviews were not disclosed to placement/residential staff or any other persons working with the youths because they were assured of confidentiality prior to the interview. A research assistant, a Master's candidate in social work at University of Denver, was employed to conduct interviews with the youths on probation and in unsecured facilities. Youths from secured facilities were interviewed by one of the authors. In order to be sensitive to the youths and gain honest answers, the author associated with the juvenile court was not involved in the interview process. The interviews, averaging forty-five minutes each, were conducted over a one-month period. The authors attempted to keep any personal bias out of this Article by reflecting only the opinions of the youths in all sections except the conclusion. Wherever possible, the youths were directly quoted; however, vulgar language was edited. Due to the qualitative design of this article, only basic statistics of means, modes, and ranges are reported.

FINDINGS

Of the twenty-four youths interviewed, twenty-three were male and one was female. The average age was 17.04 years old. The youths' ethnic breakdown is as follows: one Turkish, four African-American, one Native American, four Caucasian, seven Hispanic, six multi-racial and one unknown.[48] Six are currently on probation, six are in unsecured facilities, eleven are in secured facilities and one is on parole. All the youths, except the parolee, are currently placed out-of-home.

The offenses that resulted in their current placement represent a wide variety of crimes. They include: theft by receiving, motor vehicle theft, burglary, sexual assault, incest, aggravated robbery and murder.

---

this project is on-going, the authors hope to correlate the family and educational information with the incidence of self-reported crime and publish those results in a future article.

46. *See supra* note 29 and accompanying text.

47. This is the most restrictive treatment setting for youths.

48. The youths were asked to identify their own ethnicity within the structure of open-ended questions. The responses contained many different ethnic terms, such as such as black, African-American, Spanish, Mexican, Hispanic, white, and Caucasion.

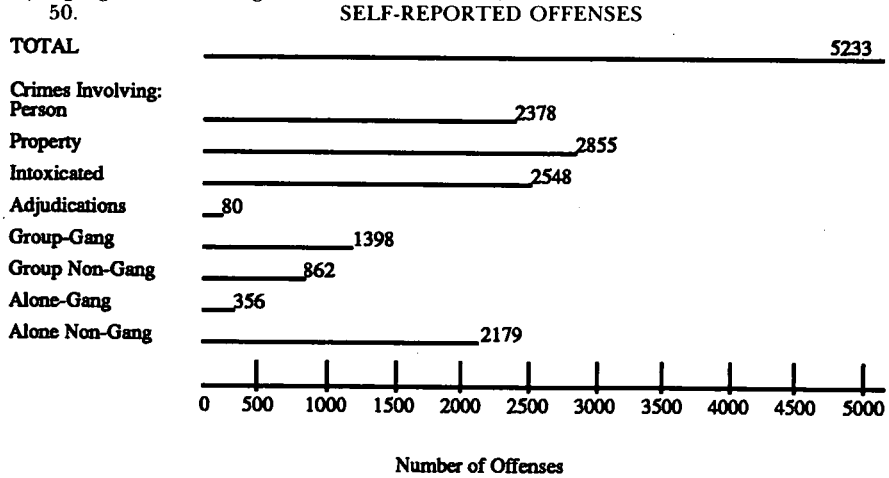
The youths self-reported[49] a total of 5233 crimes, yet had only a total of eighty adjudications. The mode number of crimes self-reported was 120 and the mode number of adjudications was three. Using these numbers, each youth participated in an average of 218 crimes prior to his or her current situation.

Out of the 5233 self-reported crimes,[50] 1398 committed as a group were gang related, 862 perpetrated as a group were non-gang related, 356 offenses committed alone were gang related and 2179 committed alone were non-gang related.[51] Approximately thirty-four percent of the self-reported offenses were gang related and fifty percent of the youths claimed gang affiliation. The youths reported that 2548 of the offenses were committed while they were intoxicated or under the influence of drugs and/or alcohol. The drug of choice was alcohol, and most often the alcohol was combined with marijuana. Only five percent stated that they were never under the influence of alcohol or drugs when they perpetrated their crimes. On the average, the youths were 12.10 years old at the time of their first experience with drugs and/or alcohol.[52]

Although the number of self-reported crimes for this population seems quite high, it correlates well with the research completed by the Colorado Division of Youth Services (DYS)[53] in 1986. That study found that each juvenile committed to DOI reported "breaking into a building or a vehicle an average of 27 times *in the year* before commitment."[54] In

49. Self-reported offenses include both those crimes the youths reported which they were not arrested for, along with those that resulted in arrest. A single incident may result in several self-reported crimes (i.e. a burglary involving violence to a person, committed by a gang-member acting alone while intoxicated).

50.



51. There was no standard definition for gang. Each juvenile defined the term for him or herself.

52. The age range for this first experience was three to seventeen years old.

53. DYS, a branch of DOI, is responsible for coordinating services to juvenile delinquents committed to the DOI.

54. COLORADO DIVISION OF YOUTH SERVICES, A REPORT TO THE COLORADO ALCOHOL AND DRUG ABUSE DIVISION, EXECUTIVE SUMMARY: THE RELATIONSHIP BETWEEN DRUG USE,

addition, this same study reported a *yearly average* of thirty-nine felony thefts and 101 acts of selling marijuana.[55] The study found that "compared to a national sample of youths from the general population, the involvement of the Division of Youth Services population was from three to ten times greater for most offenses."[56]

We began our examination into the justice system by asking the youths questions regarding the first juvenile justice professionals the youths encountered, the police officers on the street. Unfortunately, youths have a poor opinion of law enforcement. Fifty-eight percent of the youths interviewed stated that they had negative and often abusive experiences with the police. One youth reported that a police officer told him: "Obviously the Judge hasn't taught you a lesson, so I will." The most common experiences expressed by the youths were of harassment and "alley rides"—when police officers hit the youths after arrest. This certainly leaves a very impressionable youth with an incorrect impression of the purpose of law enforcement and results in fear of the police. The majority of the youths expressing negativity towards the police also recognized that their own behavior may have contributed to the situation. Many stated that, in retrospect, if they had been respectful upon arrest, the police may have been respectful in return. Several youths expressed respect for the police. Thirty-four percent stated that they understand that the police have a difficult job. Eight percent were neutral on this issue.

Court is the next step for the juvenile. The court process, to those inexperienced, is often confusing. What do the youths say? Fifty percent reported that they understood what happened in court when they attended. Those who did not understand had difficulty with the "long words," the rules and procedures, people who spoke too fast and a process that moved so quickly that no time was left for the youths' input. Youths who did understand asked questions and/or had attorneys who explained the process to them. In one case, a youth stated that he did not understand because he did not pay attention. He expressed a lack of control over his court situation as his reason for not paying attention.

There are many professionals in the courtroom during delinquency hearings: the judge, the defense attorney, the probation officer, the DA and often a GAL.[57] Do the juveniles understand what role each plays in the process? This query divulged an overwhelming amount of confusion for the youths. Although eighty-three percent of our population did not have a GAL, those who did (seventeen percent) reported that they did not know what the GAL was supposed to do. Comments on this issue of the GAL ranged from: "Don't know what they do" to

---

DELINQUENCY AND BEHAVIORAL ADJUSTMENT PROBLEMS AMONG COMMITTED JUVENILE OFFENDERS 9 (1986) (emphasis added).

55. *Id.* (emphasis added).

56. *Id.* at 28.

57. *See supra* note 9 and accompanying text.

"Didn't do anything." The youths were disappointed that the GAL never met with them outside of court and never got to know them.

When asked about the DA, three participants, twelve percent of the youths, did not know who the DA was or what he or she did. Twenty-nine percent of the youths spoke to the DA and reported positive experiences. One youth reported that the DA was a shrewd person, but that he was just doing his job. Others reported that the DA dropped charges and at times dismissed cases. Seventy-one percent stated that they did not speak to the DA, but sixty-four percent of these youths stated that they wanted to. If the sixty-four percent had spoken to the DA, they would have told the DA about themselves, asked the DA what his or her role is, asked what the DA's intentions were and would have asked the DA for alternatives. One youth found the DA too accusatory and another youth stated that the DA would not take the time to speak to him.

Most of the youths did have defense attorneys—only thirteen percent were pro se. Of those with attorneys, thirty-four percent had positive experiences and fifty-three percent had negative experiences. Fourteen percent remained neutral on this issue. Of those with attorneys, at least fifty-three percent had Public Defenders (PDs) (five youths that had attorneys did not designate whether the attorney was court appointed, PD or private attorney). Those with positive experiences stated that their attorneys presented the case well, did a good job and spoke well for them. Comments from the youths who had negative experiences with their attorneys included feelings that their attorneys gave up, would not explain what was happening, would not tell the judge what the youths wanted and was not on the youths' side. These youths had never met their attorneys before their court appearances.

Fifty-eight percent of the youths *wanted* to talk to the judge at sentencing. Of this fifty-eight percent, seventy-one percent actually did speak at their sentencing. This left twenty-nine percent of the youths silent who wanted to speak and forty-two percent who *never* wanted to speak. The most common issues the youths desired to address with the judge were to explain the circumstances of the offense and let the judge know *who* they are. The primary reasons for not speaking in court were intimidation, fright and a sense that the judge did not care anyway. Some youths wanted to speak about how unfair a probation officer had been, but they thought it would make the situation worse. Once again, at times the hearing proceeded too quickly for the youths to have time to formulate and express ideas.

When asked: "Do you think you were treated fairly or unfairly in court?" the youths focused on their sentences as a measure of fairness. Sixty-seven percent thought they were treated fairly, while twenty-nine percent thought they were treated unfairly. Four percent remained neutral on this issue. The youths' comments reflect that they understand the adage: "Do the crime, do the time." Most said they were treated fairly because they did the crime, the judge gave them a break, the judge gave them multiple chances and that they got counseling. A few youths

even commented on their sentence as "not much time." Those who thought they were treated unfairly often did not understand the process, felt no one listened to them and felt that there was not enough investigation into their case.

Seventy-five percent of the youths had some experience with probation. Of these, fifty-six percent had a helpful probation officer. The most common positive comments made about probation officers were that the officers were "too lenient," "cool," "nice," and "good." On the flip side, the negative comments included that the officer did not care, was on a power trip, was not too helpful and did not do any good. Sixty-one percent reported no behavior changes while on probation; instead they continued their pre-conviction behavior. Of those youths who did report a behavior change, forty-one percent reported a negative change—they "got worse." Thirty-nine percent of the youths on probation reported to the officer under the influence of drugs or alcohol. Most of these youths reported intoxicated more than once. Thirteen percent of the youths also appeared in court intoxicated or under the influence of drugs/alcohol.

The topic of client managers was discussed by all the Division of Youth Services (DYS) clients—seventy-five percent of the population. The range of time spent in DOI was three months to four years and five months, and the mode was ten months. One youth reported being a DYS client on and off for six years. Most comments about the client managers were positive. "Nice," "polite," "cool," "good," "great guy," "helpful" and "concerned," are sample comments. A few youths expressed concern that their client manager did not take care of business, was lazy, was inflexible and treated them as "a number".

SUGGESTIONS FROM THE YOUTHS

A majority of the youths, seventy-nine percent, agreed that juveniles should be treated apart from adults. The advantages of a separate juvenile system allowed them to get help, rehabilitate and avoid the more violent adult prisons. Some youths thought that juveniles should not be held as responsible as adults for their offenses because juveniles are immature and curious. However, twenty-nine percent of the youths thought that the more serious juvenile offenders should be placed in the adult system. Twenty-one percent of the youths did not want separate systems. Comments from youths who did not like the separation ranged from "treatment is unnecessary" to "there are less hassles in the adult lock-up facilities." One youth responded: "You make a decision as an adult, so you should be treated as one."

The message was clear—the juveniles want to be treated separately from adults, but they also want change in the current juvenile justice system. They offered several simple suggestions to improve the system. First, they want people to *speak* to them. This includes defense attorneys, GALs, judges, probation officers, and client managers. The juveniles repeatedly said that they are much more than a piece of paper.

The people handling their cases should make the time to meet with them before court and get to know them as people. Second, they want people to *listen* to them. They believe that they have valuable information, which is often over-looked by the professionals. The youths reported that "importance" is a subjective term, and what they view as important should be treated as such. The youths viewed family dynamics, their peers and their own fears of sharing information as important. In addition, they want to be heard before the sentencing phase of the proceedings. They would like the juvenile court system to be less offense oriented and more "offender characteristic" (family, mental health, education, etc.) oriented at all stages of the system. Such a change, the youths feel, would make the court and professionals more likely to listen and not simply pass judgment. Most youths believe they know what is best for themselves, but this rarely gets expressed. Third, the youths ask the professionals for patience. Juveniles have difficulty processing all the information flowing around the courtroom. They ask for time to formulate questions and comments. In addition, they ask for patience to build trust. Many youths felt that they could not be honest due to a lack of trust and the power structure of the system itself. Fourth, the juveniles ask to be educated about the juvenile system. They want to know the role of each person in court and out of court. This would facilitate communication, honesty and trust. They would know who to ask questions of and what questions to ask.

All of the youths recognized that their own conduct led to the consequences. They also recognized that they should have taken a more active part in the court process. All of the youths expressed some regret for not asking questions or for not speaking up in court. However, they cited intimidation and a desire not to ruin their case as reasons for minimal participation. Although the youths suggested making the process less intimidating, the only specific suggestions regarding that ideal were those listed above.

The youths gave several specific suggestions for the system. Most asked for more restrictions on the behavior of police officers. They also stated that the court, as well as the probation and client managers, should be more consistent—enforce sanctions instead of just threaten. One youth thought the law should allow more than three adjudications before out-of-home placement is enforced. Another juvenile felt he should have a choice of where to go if placed out-of-home.

Some suggestions involved complicated theories of law. For example, one youth wanted a shorter statute of limitations. Suggestions to make the civil rights law more positive were made along with reformation of the education system. The youths suggested making the educational system more flexible to meet student needs, possibly through individualized instruction. The youths also suggested stricter laws for police misconduct and getting rid of laws which "pick on youth" as ways to improve the system. One suggestion was very simple: Change all the private property signs that prohibit skate boarding.

The overall theme for the youths' suggestions was respect. They do not feel respected as people when they go through the court process. This lack of respect causes many of them to close up and not communicate.

Once a youth has become involved in the juvenile justice system, the role of a parent becomes overshadowed by the court process. Parents, like their children, are often intimidated by the court proceedings due to a lack of understanding or fear of saying something that will make the outcome worse. One youth reported that his parents are Spanish-speaking and did not understanding what happened in court. Thus, when his parents did speak, their comments were misunderstood.

All the youths discussed what they wished, in retrospect, they would have done or said regarding their parents. Seventy-seven percent said they should have respected and listened to their parents. (It is important to mention that ninety-two percent of the youths specifically identified their mothers in this section.) They went on to say they would have "trusted their mothers better," "explained that it wasn't their fault" and apologized for the trouble they caused. They felt they could have tried to talk to their parents, sharing their feelings and frustrations.

The youths also provided some great insight into what their parents could have done. Sixty-three percent stated their parents should have *enforced* punishments such as grounding and restrictions. These youths reported needing more structure, less rescuing and getting away with "things" without consequences. Although we did not ask if the youths had been abused at home, twenty-five percent stated they were, and that their parents should not have treated them in that way. Other input was that parents should spend more time with their children, listen to them and ask how they are doing. They felt that going places with their parents would have helped structure time and left less time for negative peers. Being given better values, not being taught to be prejudiced and parents leaving the past alone were all cited as important. Only twenty-five percent of the youths felt their parents did everything they could.

CONCLUSION: THE AUTHORS' IMPRESSIONS

It was surprising to discover that each youth, in his or her own way, and to different degrees, accepted responsibility for his or her involvement in the juvenile justice system. The findings and suggestions reported above are the honest and sincere thoughts of the youths interviewed. The youths took a risk in participating in this research and they trusted the writers to accurately reflect their comments and feelings. We have made every effort to do so.

The youths' reaction to the interview process was interesting. Some youths shied away from volunteering because they did not think people would listen. Others were enthusiastic about the opportunity to give input into a system that they feel controls their lives. We thank each of the youths for participating, for their candor, and for caring enough to spend time completing the interview.

One important issue this research did not touch upon is victimization. The self-reported crimes among our population totaled 5,233. This denotes 5,233 primary victims for only twenty-four juveniles. It is not our intention to minimize victimization. We recognize, professionally and personally, the tremendous impact these juveniles have had on society. Yet, this project focused on the youths' perceptions of how they "fit" into the juvenile justice system. Victim awareness is an issue that deserves further research (e.g., how does the victim "fit" into the justice system and how do the juveniles view their victims). The limited scope of this Article prevented us from addressing such significant issues.

As mentioned above, each youth, in his or her own way, accepted responsibility for his or her involvement in the juvenile justice system. Prior to the interview, the youths did not understand how they could actively participate in the system and play a responsible role in the court process. They understood the connection between the offense and the resulting sentence, but they did not understand the process of getting from one point to the next.

It should be noted that a circumscribed group was involved in our research—our sample is in out-of-home placement with treatment. This might account for the youths' ability to accept responsibility for their offenses and to be more insightful about themselves. Even though we did not interview youths who were placed at home or not in treatment, responses from the interviewed youths demonstrated the value of treatment over probation.

It was obvious to us that communication gaps exist within the juvenile justice system. The questionnaires revealed the youths' frustration with mixed messages. Often times, they were not treated consistently and did not experience what they were told they would experience. As professionals, we need to develop a method of communication among ourselves and with the juveniles, which would allow us to have a more positive impact upon youths without confusing them. Needs and expectations must be clarified for youths, and follow-through must be completed. The youths in our survey view communication, information and respect as important ingredients in the court process. Communication among professionals and youths can only enhance the purpose of the juvenile court system "to serve the welfare of the children and the best interests of society."[58]

58. *Id.*

ABANDONING OUR CHILDREN: MOTHERS, ALCOHOL AND DRUGS

JOHN W. KYDD*

TABLE OF CONTENTS

* Partner, Strong & Kydd, Seattle, Washington; University of Washington (B.A., 1976; M.S.W., 1978); University of Puget Sound (J.D., 1981); Secretary, Association of Family and Conciliation Courts, 1989-91.

I would like to thank the following people and organizations for their assistance in writing this Article: Dr. David Shurtleff, Dr. Russ Schoeneman, Dr. Anne Streissguth, Dr. Suzanne Dixon, Dr. Sterling Clarren, Dr. Mary Duryee, Dr. Ira Chasnoff, Honorable Douglas McNish, Honorable Steven Gaddis, Honorable Nancy Ann Holman, Lynn Paltrow of the ACLU Reproductive Freedom Project, Susan Galbraith, Robert Benjamin, Peggy Stotz, Marcie Cubbs, Alison B. Marshall, the National Council of Juvenile and Family Court Judges, the National Association of Perinatal Addiction Research and Education, the National Council on Alcohol and Drug Dependance and the Center for Science in the Public Interest.

The kind assistance of the above people and organizations does not necessarily constitute their endorsement of the ideas proposed herein.

We enjoin thee . . . that thou carry
This female bastard hence, and that thou bear it
To some remote and desert place, quite out
Of our dominions; and that there thou leave it
(Without more mercy) to its own protection
And favour of the climate.

- King Leontes[1]

INTRODUCTION

The problem of drug harmed babies stems from numerous abandonments. The most poignant abandonment is the pregnant mother relinquishing the safety of herself and her fetus to drugs and alcohol. This *abandonment*[2] is the culmination of a series of subtle and pernicious abandonments by our legal, medical and political systems that harm poor women in general and poor women of color in particular. From the fetal perspective, our political failure to provide comprehensive perinatal care for poor mothers creates a greater risk of harm than all but the most severe drug use by the mother. Within this context, a thorough legal analysis of the problem is necessary but not sufficient. This Article will endeavor to show that the problem of protecting the fetus

1. WILLIAM SHAKESPEARE, THE WINTER'S TALE act 2, sc. 4 (J.H.P. Pafford ed., The Arden Edition, 4th ed., Harv. U. Press 1963) (1912).

2. Abandonment is here used in the sense of relinquishing any part of one's duty to care for an infant.

from maternal drug use can be neither understood nor remedied within our present models of medical and legal practice. Our present concepts of punishment, child protection, treatment and professionalism exacerbate this problem. An interdisciplinary analysis is necessary to begin to understand the societal, political and professional abandonments that contribute to the crippling of our children.[3] The goal of this analysis is not to simply critique the professions, but rather to combine their perspectives to produce a different medical standard that better diagnoses the problem and a different medico-legal system that better prevents it.[4]

The medical evidence herein will demonstrate that the effects of poverty, homelessness, inadequate healthcare and racism are every bit as damaging to the fetus and the child as are alcohol and drug exposure. Malnutrition can cripple just as much as cocaine. If we wish to protect our children, we must have a standard that diagnoses a child who is at risk from preventable harm, whether that harm is heroin or homelessness, lead paint or poverty. Neither our medical model nor our legal model of causality adequately address the complexity of the problem. The Article proposes an "ecologic" model of analysis, which attempts to consider both the internal and the external environment of the mother.[5] From a fetal perspective, drugs are not needles, pills or smoke. Drugs are a pollutant of the blood that nourishes the fetus and a pollutant of the amniotic fluid it breathes. The fetus floats into life in a lake of amnion and feeds upon a river of blood. Both lake and river are very vulnerable to the "runoff" of toxins from malnutrition, stress, drugs and infection upon the mother's body. Like any other lake, it must be replenished with fresh water, and like any other river, one poisoned stream pollutes the entire river. When a pregnant woman cannot or does not feed herself adequately, the river weakens and no longer sustains fetal growth. Chronic stress weakens the river as do illness, infection, living in poverty and depression. Like drugs, each of these harm the fetal environment and, therefore, should be considered when looking for a way to improve newborn health.

3. Since this Symposium on Children will have an interdisciplinary audience, this Article covers medical aspects of the problem already familiar to medical practitioners and covers legal aspects of the problem familiar to legal practitioners. Since part of this problem stems from a failure of each profession to appreciate and understand the efforts of the other, a restatement seems advisable. Moreover, the lay reader (who is most affected by but least involved in this analysis) may benefit from this meager attempt to summarize the works of many disciplines. A review of the table of contents will allow the sophisticated reader to skip areas with which he or she is familiar.

4. For the purposes of this Article, prevention has three tiers. Primary prevention involves preventing maternal drug use or unplanned pregnancy. Secondary prevention concerns preventing harm to a fetus whose mother is drug dependant (e.g. comprehensive prenatal and drug treatment programs). Tertiary prevention involves limiting the harm and enhancing the rehabilitation of the child's injuries from prenatal drug exposure (e.g. postnatal nutrition, parenting classes and healthcare).

5. Here, the concept of ecology is rooted in the original Greek *oikos* (the *home* within which one's family resides) *logos* (study or knowledge of). An ecologic analysis assesses the strengths and shortcomings of the "home" environment as well as the internal "environment" of each family member. The first "environment" of the fetus is the womb and the second is the home. Each home is despoiled when the mother, father, family, and the medical, legal and political systems abandon their duty of care.

The majority of drug-addicted women and children at risk live in environments degraded by violence, poverty, illness, inadequate housing, unemployment or underemployment and the absence of adequate medical and legal care. The majority of drug-addicted mothers surveyed grew up in environments degraded by physical or sexual abuse in their childhood, obesity and clinical levels of depression beginning in their early teenage years and grossly inadequate health care, sex, parenting and relational education as adolescents. The young mother's degraded personal environment contributes to a staggeringly low sense of self-esteem that she may compensate for by forming highly dependent relationships with males. In order to maintain this "life raft" relationship, the woman will often agree to share both drugs and her body. The resulting addiction and pregnancy is either unintentional or intended to preserve the relationship. Young fathers (who have similarly degraded personal environments) are often as likely to abandon their children as the young mothers are to abandon themselves to the relationship.

Our historic penchant for abandoning poor single mothers of color creates special needs commensurate to the degree of harm they and their ancestors have endured. The ecologic analysis used herein includes the mother's community, culture and faith, recognizing that community support, cultural cohesion and a shared faith in some higher power are keys to prevention of and recovery from drug abuse and other risks of harm to the child. The present medico-legal standard of "drug exposed infant" allows an abandonment of infants equally at risk from other causes. It feeds historical prejudices against addicted, poor and minority women that culminate in family shattering attempts to criminalize and punish maternal drug use. This Article proposes a new standard of the "challenged child," which better captures preventable harms to the fetus, while discouraging the exercise of prejudice against the mother.

Next, this Article outlines a new medico-legal system for the challenged child, which would be separate from (and parallel to) juvenile court, dependency court and child protection services. The system is designed to increase the availability and use of perinatal (pre and post birth) care and to decrease the use of foster care and court intervention. It recognizes that protecting the child involves protecting the child's relationship with its nurturing parents and nurturing parental figures. Central to this system is the creation of a new legal relationship, a "co-parent." The co-parent is distinguishable from the foster parent and the guardian ad litem by: (1) being agreed to by the mother, (2) being related to the mother or the mother's community and (3) having a lifelong commitment and legal rights to the child. Co-parents work to enhance the parenting of the biologic parents, to enhance family and community support of parent and child, and to assist in the non-adversarial transition of parenting responsibilities from the mother in the event she is completely unable to fulfill them.

Part I of this Article begins with a brief review of the history of child

abandonment from Greek times to the present. It examines historical views of maternal "abandonment" due to drug use. It then reviews, from a medical perspective, maternal drug use and other threats of harm to the fetus, and estimates the size of the problem.

Part II considers past "solutions" and begins with a review of our historical attitudes towards drugs and alcohol and our attempts to deal with or ignore their abuse. It reviews the effectiveness of drug criminalization and drug treatment programs since the 1930s and concludes that we lack any model of drug treatment that effectively addresses the needs of women addicts in general and pregnant addicts in particular.

Part III summarizes the constitutional rights of the mother, fetus and child and then considers the efficacy of state remedies of criminalization, civil commitment, mandatory treatment, mandatory reporting and reduction or termination of parental rights.

Part IV focuses on the abandonments of mothers and families by our professions and our political institutions. It reviews certain iatrogenic (physician created) harms to highlight problems in the medical concept of treatment, professionalism and the structure of our healthcare system, which function to inadvertently abandon those women and children most in need of medical help. The term "legigenic" (law or lawyer created) harm is coined and used to examine some of the harms created by our present concept of justice, professionalism and the function of our criminal and dependency legal system. It highlights our many political abandonments of minorities, the addicted, the poor and their children to demonstrate that anti-discrimination laws are insufficient to remedy this problem.

Part V reviews the present medical/legal standards (e.g., "drug exposed infant" and "failure to thrive") and uses an ecologic analysis to redefine our concepts of the problem and of treatment. It explains the more comprehensive standard of "challenged child" and applies it to the cases of "Louise" and "Cecil."

Part VI explains the co-parent system as an alternative to court and as the better vehicle for remedying or preventing the many abandonments[6] that create a challenged child. It reviews protocols for the selection, training and compensation of co-parents and proposes expanded roles for family court services, churches and community centers. Implementing such a system demands that certain challenges to our professions and communities be met.

Part VII reviews certain challenges to law, medicine and other pro-

6. Abandonment extends to our poorer elders in our failure to provide adequate healthcare, housing and support. The crushing costs of maintaining an elder with Alzheimer's drain many parents' capacities to care for *their* children and lead to desperate acts of "granny dumping." *See A Dumping Ground for Granny*, NEWSWEEK, Dec. 23, 1991, at 64. While we act with outrage to both "drug babies" and "granny dumping," the reasons they occur and pressures they create on the family are similar. The concept of "challenged" should be applied to these elders, and co-parents should be made available to them. However, there are important differences in elder care and elder need that cannot be adequately covered in this Article.

fessions and recommends adoption of particular policies and pursuit of specific studies. Finally, it suggests four methods of funding this system (outside of legislative appropriation).

I. ABANDONMENT: PAST AND PRESENT

A. *Historical Child Abandonment*

Abandoned children suffuse our history. *Moses, Oedipus, Romulus, Remus and many more were saved by an ethic of care for strangers that is on the wane today.*[7] The responsibility to care for a child from classical Greece and Rome into the Dark Ages was very different than today. In Rome, for example, every free child born was ordinarily placed on the ground before the father. Whether the child was born within or without wedlock was not as important as whether the father was willing to be responsible for the child.[8] If the father picked the child off the ground, the baby would become part of the family. This act was known as "raising"[9] the child. Children not so "raised" were fostered with or given to other families in need of children or *abandoned* at central sites (e.g., the town square) in each locality. Children so abandoned rarely perished. They were quickly adopted by other families. Twenty to forty percent of free children in Rome were abandoned during the first three centuries of the Christian era.[10] Today, in contrast, fewer than 50,000 children, one and a half percent of newborns, are placed up for adoption in the United States annually.[11]

In ancient times, abandonment was neither criminally nor civilly punished. It was viewed as a painful and practical solution to economic difficulties, and since the places of abandonment were known and public, the likelihood that the infant would be raised by another family was very high. Some abandoned children became key members of wealthy families. Abandonment was also not permanent. Laws supported parents reclaiming their abandoned children if they properly paid the caretakers for interim care. Nor was an abandoned child stigmatized by a negative label. The Latin term "alumni" translates as "foster children." Fostering was highly esteemed as a "voluntary" love. An "alumnus" likewise indicated a relationship not founded in either blood or law. The pace of abandonment continued throughout the Middle Ages and

7. Romulus and Remus, the founders of Rome were allegedly suckled by a she-wolf. HOWARD H. SCULLARD, A HISTORY OF THE ROMAN WORLD FROM 753 TO 146 B.C. 26-27 (2d ed. 1951). This well reflects the ethic that no creature was so wild as to not care for and suckle a child.

8. This ethic of not penalizing the child for its mother's marital status continued until Constantine's decree in 336 A.D. barring inheritance from an unmarried mother. Constantine's decree reflected the emerging Christian ethic over the traditional Roman ethic. JOHN BOSWELL, THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE 72 (1988).

9. *Tollere*, the Latin word, means "to support, provide food, or sustenance for." OXFORD LATIN DICTIONARY 1946 (Combined ed.) (1983 reprint).

10. BOSWELL, *supra* note 8, at 135.

11. *Id.* at 16.

into the eighteenth century.[12]

However, the care received and the attitudes toward abandoned children began to decay rapidly from the twelfth century on. There were no orphanages or foundling homes of record prior to the 1200s. Families and the church took in the children. In the 1300s, the simultaneous rise of a church bureaucracy, detailed codes of law, the inquisition, church-based orphanages[13] and a serious bout of vicious discrimination against women, homosexuals and non-Christians occurred. As society was systematized under detailed, church-based legal codes, the traditional welfare functions of the parish community and the monasteries were institutionalized. The abandoned, the ill and the sick were housed in large structures and served by religious orders. Then, as now, hospitals shrank from the responsibility of caring for abandoned children. Then, as now, the mother came to be blamed for the problem.[14]

Then, as now, the population was fearfully responding to a chronically depressed economy after a long period of expansive affluence in the 1200s. The 1300s brought a massive expansion of the church and law and a massive contraction of charity and duty to one's larger community. Disease and disability, desire and difference became, in many respects, subjects of inquisition. The ethic of blaming the parents flowered in many forms. Leprosy, deformity and childhood disability were blamed on parental promiscuity or sexual relations during the time a woman was lactating or menstruating.[15]

In league with the ethic of parental blame rose the ethic of civic indifference to the plight of the poor and their children. By the end of the fourteenth century, children's "hospitals" received grudging support from civic authorities, with the result that infant mortality soared.[16] Then, as now, the poor and the afflicted were viewed as deserving of their plight. Their diseases were wrongly associated with immorality much like AIDS is today.[17] The status of woman and the support of

12. For example, the rates of *known* abandoned children according to birth registries were from 12-25% in Toulouse, 33% in Lyons and 20-30% in Paris in the last half of the eighteenth century. In poor areas the rate was estimated at 40%. *Id.* at 15.

13. *Id.* at 360.

14. For example, in 1300 the poet, Hugo von Trimberg, assailed "mothers of so little devotion that they leave their children alone in front of hospitals or churches." *Id.* at 362-63.

15. *Id.* at 403 n.15.

16. In Spain at San Gallo Hospital, 20% of the children died within a month of entry and only 13% lived to age six. The foundling home mortality rate continued to climb through the end of the eighteenth century, 91% among infants and 86.4% among children in Rouen and 77% in Paris (as opposed to 28% among children raised at home). *Id.* at 421-22.

17. In 1322, Charles IV ordered that all lepers in France be incarcerated forever to assuage his worried subjects. JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 272 n.4 (1980). The sentiments are not unlike those favoring lifetime quarantine of people with AIDS. Medically speaking, moralizing about a disease because of how it is transmitted is both misleading and dangerous. It is misleading because diseases have no moral aspect, they simply infect until they are stopped. The

motherhood also tumbled in the 1300s.

Women, who had been making in-roads into society and the church, were strongly challenged. They were viewed as carrying the guilt of Eve, not the grace of Mary. To consolidate its hegemony, the church challenged midwives, females in the clergy and the traditional female healers and herbalists that had served the community since the time of ancient Greece. Tens of thousands of these women were burned as witches. Men's relations with other men were also challenged. The homosexual love common in the clergy, royalty and aristocracy since classical Greece was suddenly prosecuted as an abomination.[18]

The persecution of many categories of parents created a great number of new orphans. The church "took in" these orphans to be properly raised under the watchful eye of God. Apparently from the church's perspective, the only way to stamp out heresy was to eliminate the parents and indoctrinate the children in institutionalized schools.[19] Our AIDS epidemic is accomplishing another child diaspora wherein fifteen million children will be orphaned by the year 2000.[20]

In the United States, slavery placed the fate of the Black family in the hands of the master. Children were taken and sold at any time, and their mothers were forcibly bred. After slavery, states continued to re-

---

more hardy (contagious) diseases, like influenza, survive in (and pass easily through) the air. Less contagious ones, like hepatitis, demand more warmth and moisture in the form of touch or contact. AIDS is vastly less contagious than hepatitis due, in part, to its viral density being 1/1000th of hepatitis and that it quickly dies without a constant source of moisture and warmth. As a result, the AIDS virus can *only* survive if transmitted through blood or other bodily fluids.

Venereal diseases are simply less hardy than other diseases. To impute immorality to a disease (and the diseased) because of its method of transmission is no less absurd than the fourteenth century burning of a non-Christian because of his method of worship. The fires of heresy then now burn in the form of bias. Since we are more a commerce and work based society, a few our heresies are: lacking money (poverty), lacking work (unemployment), lacking self-control (addiction) and lacking white heterosexual masculinity (not professional material).

If we seriously wish to reduce the harm to children we must come to see both the myriad harms of bias to their mothers and how that bias blinds us to their fate. Seen as a virus, bias infects and impairs our capacity to act (our bias against IV drug users, gays and the poor "infected" people with AIDS). Such children make up a significant percentage of those at risk for fetal drug exposure.

18. There is no record of any prosecution for sodomy in either ancient Greece or Rome. *Id.* Apropos to this, Boswell notes that, surveying the period from ancient Greece to the present day, the periods of greatest discrimination against gays were the fourteenth century in Europe and the first half of the twentieth century in the United States with all of our strenuous efforts at prescribing particular sexual acts.

19. This policy, in a slightly milder form, was reflected in the United States Government's attempt to "assimilate" Native Americans. Until 1967, Native American children were shipped off to different regions to attend school nine months a year. The children were punished for attempting to speak their native tongue or engage in any spiritual ceremonies. There were often identified by number, and not name, in schools. Their parents and grandparents were denigrated for being unsophisticated. Twelve years of this process shattered the parent/child and grandparent/child bond in many Native American families. Children subject to our forced boarding school ethic had no "home" to return to. The high degree of Fetal Alcohol Syndrome and other problems in native communities may, in part, be due to our government's misguided efforts to "assimilate."

20. *The AIDS Quarterly* (The Corporation for Public Broadcasting television broadcast, Jan. 6, 1992).

move Black children from their homes, terminate their parents' rights, sterilize their mothers and prosecute them for maternal drug use at a rate far greater than similarly situated Whites.[21]

The theory of abandonment proposed herein suggests that those subjected to the most systemic abandonment are most likely to be characterized as unfit and uncaring parents. In the fourteenth century, Jews were alleged to steal and eat children, and heretics in general were perceived to neglect and abuse children. Such stereotypes continue today in the form of "lazy welfare mothers" and "addict mothers," particularly if they are women of color.[22] Abandonment theory asserts that drug use by the most abandoned population will be subject to the greatest sanctions. Thus, an image of dignity is lent to Betty Ford's prescription drug and alcohol addiction, while an image of depravity is lent to any mother's crack addiction. It is easier to convict those already abandoned. There have been many prosecutions for maternal crack and opiate use. There have been no prosecutions for maternal alcohol use, even though it poses a greater peril to the fetus.

B. *Historical Maternal Drug Use: Our Alcoholic Heritage*

The problem has been with us since Biblical times: "Behold, thou shalt conceive, and bear a son; and now drink no strong wine or strong drink . . . ."[23]; "[o]ne who drinks intoxicating liquor will have ungainly children."[24]

Perhaps only the severity of the problem is new. Alcoholism was less common in Greece and Rome, since wine has only a fraction of the alcohol content of distilled spirits. The rise of the distillation process made it easier to give dangerous amounts of alcohol to the general public, just like the discovery of the crack process made it easier to distribute dangerous amounts of cocaine to the general public. As crack flooded New York in the late 1980s, cheap gin flooded London in the mid-1700s.

The status of women in the slums of eighteenth century England was, by any measure, harrowing and dismal. Once this inexpensive gin was available at local grocery stores, many poor women drank themselves into a stupor and sold most of what they had to buy enough to

21. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1440-43 (1991). Professor Roberts provides a cogent argument that the historic discrimination against blacks continues in the prosecutions of mothers using drugs (which are aimed primarily at poor women of color). *Id.* at 1420, 1421.

22. "Women of color" is an extremely inexact phrase referring to Black, Hispanic, Asian and Native American women. Homosexuals are another example of this phenomena in that they are presumed to be a sexual threat to children. This stereotype endures despite the fact that the clear majority of convicted pedophiles are married heterosexuals. Abandonment allows the creation and perpetuation of stereotypes.

23. *Judges*, 13:7.

24. MICHAEL DORRIS, THE BROKEN CORD: A FAMILY'S ONGOING STRUGGLE WITH FETAL ALCOHOL SYNDROME 144 (1989) (quoting Babylonian *Talmud* (200-500 A.D., Kehuboth 32b)). This should not be understood as a scientific observation in our sense of the word. It was likely an experiential admonition.

continue using this new "hard" drug. As a result, hundreds of children were miscarried, stillborn or born seriously retarded or deformed.[25]

In America, the connection between alcoholism and sickly offspring was not pursued. Colonial America had a reputation for very hard drinking. Elections were often decided upon who "treated" or "whiskied" the best on election day.[26] Thomas Jefferson invented the Presidential cocktail party, and President John Adams is reputed to have drunk a tankard of hard cider at breakfast.[27]

Although Jefferson, Andrew Jackson and Aaron Burr were famous for their wine collections, Chief Justice John Marshall was perhaps most devoted to his Madeira.[28] When distilled spirits became available to the general American public at affordable prices, consumption soared. In the 1820s, the annual per capita consumption of grain alcohol exceeded four gallons. This is equivalent to eighty gallons of beer (at five percent alcohol) or forty-five fifths of whiskey (at eighty proof). Consumption in the 1820s was almost three times the consumption today. Foreign visitors to the new nation were astonished at American consumption. A Swede, Carl D. Arfwedson, reported a "general *addiction* to hard drinking."[29]

The gracious host of the early nineteenth century considered it a social duty to get all of his guests drunk. Drinking whiskey was considered a *patriotic duty*, since whiskey was key to the early American economy and was used as a cash substitute.[30]

George Washington objected to alcohol abuse amongst workers. He stated that distilled spirits were "the ruin of half the workmen in this Country. . . ."[31] In addition, alcohol was such an accepted part of American life that in 1829, the secretary of war estimated that three-quarters

25. "The gin epidemic produced the first observations since classical Greece of the connection between hard-drinking mothers and sickly offspring. But in making this connection, indifference to the mother's alcoholism was only exceeded by the blame heaped on her for her children's afflictions." MARIAN SANDMAIER, THE INVISIBLE ALCOHOLICS: WOMEN AND ALCOHOL ABUSE IN AMERICA 31 (1980).

26. George Washington lost an early attempt at election to the Virginia House of Burgesses for failure to supply sufficient liquor to the electorate. He ran again in 1758 and won with 307 votes after providing 144 gallons of rum and other spirits. His return was slightly over two votes per gallon. W.J. RORABAUGH, THE ALCOHOLIC REPUBLIC: AN AMERICAN TRADITION 152 (1979). After his retirement, Washington moved to Mount Vernon, where he opened a major distillery in 1797. His distillery earned him 344 English Pounds in 1798, a phenomenal sum. *Id.* at 73.

27. *Id.* at 6.

28. In the 1790s, the members of the Supreme Court lived in a Boarding House that allowed Madeira (approximately 20% alcohol) only in wet weather, for sake of "health."

> Upon occasion, the chief justice would command Justice Story to check the window to see if it were raining. When informed that the sun shone brightly, Marshall would observe, "All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere." The chief justice, observed Story, had been "brought up upon Federalism and Madeira, and he [was] not the man to outgrow his early prejudices."

Id. at 106.

29. *Id.* at 6 (emphasis added).

30. Whiskey was one of the "Spirits of Independence." *Id.* at 59.

31. *Id.* at 6 (citing 11 Washington WRITINGS 377 (W.C. Ford ed, 1891)).

of the nation's laborers drank daily at least four ounces of distilled spirits."[32]

The concern over alcohol extended elliptically to women, who consumed an eighth to a quarter of the total. The subject of women with alcohol problems was considered "too delicate" to receive public attention. Women were rarely allowed to drink in taverns or grocery stores and were not allowed into the men's drinking clubs. Instead, they drank around collective activities such as quilting, plucking seeds from cotton or at social gatherings.[33] In the nineteenth century, women drank the predecessors of Valium, Librium and Dalmane in the form of "cordials" and "stomach elixirs" for their "health." Through the nineteenth century, these elixirs became even more powerful, containing ever larger doses of opium (as laudanum) and cocaine. Heroin and cocaine were, at one time, popular patent medicines. The addictive propensities of patent medicines in the 1900s continue in some of the pharmaceuticals prescribed today. Then, as now, the focus was on mood altering, elevating substances. Then, as now, they were seriously over-prescribed and over-promoted.

Today, women make up nearly thirty-five percent of the Alcoholics Anonymous membership. The incidence of heavy drinking among young women is declining more slowly than in young men.[34] Women frequently use other drugs in combination with alcohol, placing themselves at a higher risk for harming their fetuses.[35] Nearly twenty-six percent of girls in one study, age twelve to seventeen, abused an illicit drug, compared to twenty-four percent of boys. In that same age group, an estimated 100,000 girls and 88,000 boys tried crack cocaine.[36] The medical community is not without responsibility, since physicians prescribe two-thirds of all legal psychoactive drugs to women, and it is estimated that more than one million women in the United States are dependent on those drugs.[37]

Allowing such an addiction rate is a partial abandonment of the physician's Hippocratic Oath to "at least do no harm." Maternal drug use is an intergenerational problem. To understand it, a review of the effects of drugs on the fetus is necessary.

---

32. *Id.* at 15.

33. *Id.* at 12.

34. In 1975 and 1989, heavy drinking (five drinks in a row) reported during the prior two weeks declined more modestly among high school girls than among high school boys. LLOYD D. JOHNSTON ET AL., USE OF LICIT AND ILLICIT DRUGS BY AMERICA'S HIGH SCHOOL STUDENTS, 1975 TO 1989, NATIONAL INSTITUTE ON DRUG ABUSE (1991).

35. About 51% of women AA members in one study, as compared to 41% of male members, reported addiction to another drug. STANTON PEELE, THE DISEASING OF AMERICA (1989) (citing a 1989 Alcoholics Anonymous Survey).

36. NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, NCADD FACT SHEET: ALCOHOLISM, OTHER DRUG ADDICTIONS AND RELATED PROBLEMS AMONG WOMEN (citing NIDA, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE: POPULATION ESTIMATES, 1988, 1989 at 17, 35).

37. *Id.* (citing M. Sandmaier, *Alcohol, Mood-Altering Drugs and Smoking, in* BOSTON WOMEN'S HEALTH COLLECTIVE, THE NEW OUR BODIES, OURSELVES (1984)).

C. *Drugs and the Fetus*

The population of parents abusing alcohol, cocaine, opiates and other drugs is unknown. Estimates vary widely. The National Committee for the Prevention of Child Abuse estimates that there are ten million children being raised by "addicted parents," of which 675,000 children are abused.[38] There are an estimated ten million adult alcoholics, five million regular cocaine/crack users and 500,000 heroin addicts in the United States.[39] Most female users are in their childbearing years. Other estimates project 300,000 infants exposed to crack cocaine, 600,000 infants exposed to debilitating amounts of alcohol, 10,000 infants exposed to heroin and other opiates and an unknown number of fetuses exposed to prescription drugs, amphetamines and crystal.

Commonly, more than one drug is abused. One survey of drug dependent mothers found that 30% of cocaine users, 45% of methadone users and 66% of heroin users also used other drugs.[40] Studies project that up to 15% of all pregnant women in the United States abuse drugs during their pregnancy.[41] The AMA estimates that up to 11% of pregnant women have used illegal drugs during pregnancy,[42] and of those, 75% have used cocaine.[43] Women are now heavily targeted for marketing of alcoholic beverages.[44] They also have fewer physiological defenses to alcohol.[45]

---

38. Jan Bays, *Substance Abuse and Child Abuse: The Impact of Addiction on the Child*, 37 PEDIATRIC CLINICS N. AM. 881, 881 (1990) (citing *The Substance Abuse and Child Abuse Connection, in* THE NCPCA MEMORANDUM. CHICAGO, NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, October 1989).

39. Bays, *supra* note 38, at 881.

40. Bays, *supra* note 38, at 883.

41. *See* Rorie Sherman, *Keeping Babies Free of Drugs*, NAT'L L.J., Oct. 16, 1989, at 1; *see also* Catherine Foster, *Fetal Endangerment Cases Increase*, CHRISTIAN SCIENCE MONITOR, Oct. 10, 1989, at 8.

42. American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2666 (1990) (adopted as Report 00 by the House of Delegates of the American Medical Association at the Annual Meeting, June 1990) [hereinafter AMA Trustees] (citing American Medical Association Board of Trustees Report. *Drug Abuse In The United States: The Next Generation*. Interim 1989).

43. Ira J. Chasnoff, *Drug Use In Women: Establishing a Standard of Care*, 562 ANNALS N.Y. ACAD. SCIENCES 208, 208 (1989).

44. Women are projected to spend $30 billion on alcohol products in 1994, compared to $20 billion in 1984. Ed Fitch, *Betty Briefcase Buys More Bottles*, ADVERTISING AGE, Sept. 12, 1985, at 37.

45. If a man and a women of similar weight drink the same amount of alcohol, 30% more alcohol will enter the women's blood stream, because women have less of a particular enzyme that digests alcohol. NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, *supra* note 34 (citing M. Frezza et al., *High Blood Alcohol Levels in Women*, 322 NEW ENG. J. MED. 95 (1990)). Even with less alcohol consumption, women are more likely to develop cirrhosis of the liver than men, and they have a much greater risk of dying of cirrhosis. *Id.* (citing S. Hill, *Vulnerability to the Biomedical Consequences of Alcoholism and Alcohol-Related Problems, in* ALCOHOL PROBLEMS IN WOMEN 126 (Sharon C. Wilsnack & Linda J. Beckman eds., 1984). Alcoholic women are more frequently disabled for longer periods of time than alcoholic men. *Id.* (citing P. Roman, *Women and Alcohol Use: A Review of the Literature*, ADAMHA 18 (1988)). This may result from a systematic failure to diagnose the problem before significant damage has occurred, from the lack of affordable health care or,

The Dangerous Drugs. The fetus is at once more vulnerable to and more adaptive to drug exposure. Since it lacks the mother's capacity to metabolize many drugs, alcohol and other drugs remain in its system much longer.[46] Since the fetal brain continues to form new structures until thirty-six months after birth, it can recover from (or adapt to) *some* prenatal injuries. The failure to support these infants after birth causes this physiological "second chance" for recovery to be missed.[47]

Alcohol. The primary problem of maternal alcohol use is that it is not viewed as a problem by society at large. Despite clear medical evidence that alcoholism is a severe addiction that is difficult to terminate, alcohol use continues to be strongly promoted as an aid to self-esteem, a magnifier of one's desirability and a necessary part of social occasions.

Pregnant women abusing alcohol[48] create severe risks that their children will be born with fetal alcohol syndrome (FAS). FAS was first identified as a physical syndrome in 1973. It is the primary *preventable* cause of mental retardation in the United States and Canada.[49] The physiological defects created by FAS are facial malformations such as small head circumference, flattened midface, sunken nasal bridge, flat-

---

most importantly, from the mother's reluctance to use available health care for fear she will be reported to authorities and possibly lose her child.

46. See *The Fetal Recycling Effect*, *infra* note 86 and accompanying text. For example, with cocaine, the drug and its metabolites cease to function within thirty minutes. Cocaine is normally eliminated from the mother's system by breaking it down into benzoylecgoine through the cholinesterase system. A lesser amount is converted into norcocaine, a substance just as stressful as cocaine. Both the fetus and the newborn lack a developed cholinesterase system so the cocaine is converted into norcocaine. This norcocaine (which is almost as stressful as cocaine) simply sits in the fetal blood until it is slowly filtered out by the newborn's immature renal system. Ira J. Chasnoff et al., *Perinatal Cerebral Infarction and Maternal Cocaine Use*, 108 J. PEDIATRICS 456, 458-59 (1986); Ira J. Chasnoff, *Drug Use in Pregnancy: Parameters of Risk*, 35 PEDIATRIC CLINICS N. AM. 1403, 1405 (1988).

47. Properly cared for, newborns have a remarkable capacity to recover or simply grow around *some* pre-birth traumas. Some damaged organs, brain tissue and nerves can be regrown, replaced or "rerouted" through a variety of physiological redundancy systems. With comprehensive support and care significant recovery can occur within 12 months of birth. Controlled studies have demonstrated that pregnant women who enter treatment programs early in pregnancy and succeed in ceasing or reducing cocaine use can significantly reduce the harm to the child. Ira J. Chasnoff et al., *Temporal Patterns of Cocaine Use in Pregnancy: Perinatal Outcome*, 261 JAMA 1741, 1742-44 (1989).

Thus, the post birth environment is just as critical to the neonate's well being as the uterine environment. The scant support provided poor, addicted, single mothers cripples their capacity to maintain a home environment sufficient for the child to recover from pre-birth drug exposure. Cocaine suppresses the appetite such that the mother may go for long periods of time without proper nutrition, creating significant harm to the fetus. Hypertension is quite common amongst cocaine addicts. The stress created by the financial requirements of heavy addiction are ruinous regardless of the income status of the addict, commonly forcing the individual to sell all assets, abandon all friends, and live on the streets. Many cocaine addicts often resort to prostitution which could result in sexually transmitted diseases which could be passed on to the fetus, infections that aren't properly treated and, most importantly, exposure to the AIDS virus.

48. Women of childbearing age show the greatest increase in alcohol consumption: The AMA, former Surgeon General Koop, and a number of other experts have concluded that there is no safe level of alcohol consumption during pregnancy. AMA Trustees, *supra* note 42, at 2667 (citing Council on Scientific Affairs. Fetal Effects Of Maternal Alcohol Abuse. Chicago, Ill: American Medical Association; 1989)).

49. Spina Bifida and Downs Syndrome are the other two leading sources of mental retardation.

tened and elongated philtrum (the furrow under the nose), central nervous system dysfunction, motor impairments, impaired judgment, heart defects, eye anomalies, hearing disorders and malformations of various internal organs.

As Michael Dorris described his son, an FAS child:

> My son will forever travel through a moonless night with only the roar of wind for company. Don't talk to him of mountains, of tropical beaches. Don't ask him to swoon at sunrises or marvel at the filter of light through leaves. He's never had time for such things, and he does not believe in them. He may pass by them close enough to touch on either side, but his hands are stretched forward, grasping for balance instead of pleasure. . . . A drowning man is not separated from the lust for air by a bridge of thought—he is one with it—and my son, conceived and grown in an ethanol bath, lives each day in the act of drowning. For him there is no shore.[50]

Fetal Alcohol Effects (FAE) is a less severe version of FAS where there are no obvious physical manifestations. However, there is a tendency for low birth weight, subtle malformations and significant behavioral and academic problems.

Fetuses are extremely sensitive to alcohol and other drugs in the blood stream.[51] One episode of serious drinking during pregnancy is sufficient to diminish a child's IQ by one order of magnitude (approximately seven points) and double the likelihood of developmental disability.[52]

Approximately one in every 600 children is born with FAS. FAE is estimated to affect approximately 36,000 newborns each year in America.[53] Assuming lifetime medical and social costs of $1.4 million for each FAS child, a projected cost of $10 billion per year for FAS/FAE may not be unreasonable.

The greatest fetal damage occurs during the early stages of pregnancy when the mother may be unaware of her pregnancy. One to two drinks a day is sufficient to trigger FAS. FAE may be triggered by even

---

50. DORRIS, *supra* note 24, at 264.

51. Alcohol dehydrates so effectively that tissue can be preserved in it for years. Alcohol also dehydrates fetal brain tissue and, thereby, stunts its growth and development.

52. Ann P. Streissguth et al., *Moderate Prenatal Alcohol Exposure: Effects On Child I.Q. And Learning Problems At Age 7 1/2 Years*, 14 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 662, 662 (1990).

53. Henrick J. Harwood & Diane M. Napolitano, *Economic Implications of the Fetal Alcohol Syndrome*, ALCOHOL HEATH & RES. WORLD, Fall 1985 at 38, 42. "On Indian reservations in the southwest United States, minimal prevalence rates range from one in 97 to one in 750 live births. The highest reported prevalence is one child in eight in a Canadian Indian village, where all children and mothers were systematically evaluated." Ann Pytkowicz Streissguth et al., *Fetal Alcohol Syndrome in Adolescents and Adults*, 265 JAMA 1961, 1966 (1991) (citing P.A. May et al., *Epidemiology of Fetal Alcohol Syndrome Among American Indians of the Southwest*, 30 SOC. BIOL. 374 (1983); G.C. Robinson et al., *Clinical Profile and Prevalence of Fetal Alcohol Syndrome in an Isolated Community in British Columbia*, 137 CANADIAN MED. ASSOCIATION J. 203 (1987)).

less alcohol.[54] There is no known safe dose of alcohol during pregnancy. Although 90% of the public appears aware that drinking during pregnancy may damage the fetus, one study showed that one-third of women interviewed believed that drinking no more than three drinks a day during pregnancy was safe.[55] The mothers most abandoned by our political system (poor, single, minority and depressed) are least likely to understand the harms of alcohol and least able to refuse its easy availability.[56]

Tobacco (Nicotine). The harm of smoking is well established. The harm of breathing the smoke of others is becoming established.[57] "Cigarette smoking by pregnant woman results in higher rates of spontaneous abortion, premature birth, increased perinatal mortality, low birth weight and negative effects on later growth and development in infants."[58] In one study, "indirect or passive exposure to smoking by the father" had 66% of the effect in reducing fetal birth weight as did exposure to the mother's smoking.[59]

Cigarette smoking is notoriously difficult to stop. Many poly-drug addicts report that alcohol and opiates were less difficult to quit than cigarettes. The spiraling cost of cigarettes drains the limited budgets of single mothers and other poor families. Tobacco use remains high amongst the young, particularly among the poor and the isolated. Ciga-

54. Ann Pytkowicz Streissguth & Robin A. LaDue, *Psychological & Behavioral Effects in Children Prenatally Exposed to Alcohol*, ALCOHOL HEALTH & RES. WORLD, Fall 1985 at 6, 12.

55. Judith E. Funkhouser & Robert W. Denniston, *Preventing Alcohol-Related Birth Defects: Suggestions for Action*, ALCOHOL HEALTH & RES. WORLD, Fall 1985 at 54, 54.

56. Michael Dorris explains that among the Lakota, " '[t]o refuse a drink is tantamount to a slap in the face,' because it deprived the host of his or her *right* to be generous." DORRIS, *supra* note 24, at 89 (quoting Beatrice Medicine, *An Ethnography of Drinking and Sobriety Among the Lakota Sioux*. Doctoral Dissertation, University of Wisconsin at Madison, at 103) (emphasis in original).

57. "Sidestream smoke contains significantly *more* carbon monoxide, tar, nicotine, 3,4-benzopyrene, and cadmium than mainstream smoke." Children of parents who smoke have a significantly greater risk of bronchitis and pneumonia their first year of life, and a greater risk of a variety of severe respiratory illnesses in their second year than children of nonsmoking parents. WASHINGTON THORACIC SOCIETY, AMERICAN LUNG ASSOCIATION, INVOLUNTARY SMOKING 1-2 (1990) (citing Ira B. Tager et al., *Effect of Parental Cigarette Smoking on the Pulmonary Function of Children*, 110 AM. J. EPIDEMIOLOGY 15 (1979); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING, A REPORT OF THE SURGEON GENERAL (1986)) (emphasis added).

Sidestream smoke releases more toxins, in part, because the tobacco is burning at a lower temperature resulting in less complete combustion. Similarly, an open fireplace releases more pollution into the air than an airtight fireplace that burns at a higher temperature.

58. ABA Trustees, *supra* note 42, at 2666 (citing J. Pritchard et al. eds., *Williams Obstetrics*. Norwalk, Conn: Appleton-Century-Crofts; 1985; B. P. Sachs, *Sharing The Cigarette: The Effects Of Smoking In Pregnancy, in* Smoking and Reproductive Health 144 (M.J. Rosenberg ed., 1985); J.F. Murphy & R. Mulcahy, *Cigarette Smoking and Spontaneous Abortion*, BMJ 1978 (1988).).

Low birth weight is one of the clearest indicators of significant risk for fetal health. M.B. Meyer, *Effects of Maternal Smoking and Attitude on Birth Weight and Gestation, in* THE EPIDEMIOLOGY OF MATURITY (M. Reid & F. Stanley, eds.); L.P. Finnegan, *Smoking and Its Effect on Pregnancy and a Newborn, in* AT RISK INFANT: *Psychosocial, Medical Aspects* 127 (S. Harel & N.J. Anastasiou eds. 1985).

59. David H. Rubin et al., *Effect of Passive Smoking on Birth-Weight*, THE LANCET, Aug. 23, 1986, at 415, 415.

rettes are used by some women to suppress appetites to maintain a level of slenderness to match social expectations that can place the fetus at risk for undernutrition. Promotion of tobacco use as a false means of enhancing self-esteem, independence or desirability creates an unnecessary risk of harm to unborn children.[60]

Cocaine and Crack. Cocaine use can cause serious fetal harm, chiefly from the drug's capacity to choke off the normal oxygen and blood flow to the fetus.[61] Crack and cocaine use also cause premature birth, kidney dysfunction, strokes (causing brain damage) and significant malformations of the central nervous system, the heart and the gastrointestinal tract.[62] Cocaine-exposed infants are prone to strokes, which lead to further brain damage.[63]

Although cocaine may not have the teratogenic effect of alcohol, some of the short-term effects on the fetus can be quite harrowing. Because cocaine acts as a tremendous stimulant and vasoconstrictor (constriction of blood vessels), the fetus is immediately deprived of a good deal of its normal blood supply and oxygen for thirty to sixty minutes while the drug is active. This can create near asphyxiation of the fetus (hypoxia) and/or precipitous delivery of the child from the tremendous uterine cramps which effect a premature tearing away of the placenta from the uterine wall (abruptio placenta).

Cocaine was once viewed only as a psychological habit, because there were no dramatic heroin-like withdrawal symptoms.[64] We now

60. An interesting discussion setting forth a basis for a tort claim for prenatal exposure to sidestream smoke can be found in Julie E. Lippert, *Prenatal Injuries From Passive Tobacco Smoke*, 78 KY. L.J. 665 (1989-90).

61. Between 1979 and 1980, all categories of illicit drugs (e.g. opiates, amphetamines, hallucinogens) except one, began to decline. This drug is cocaine, whose use soared through the 1980s. Cocaine was originally secured by chewing the leaves of the coca plant which produced a highly fat soluble substance and stimulation of the brain for a period of many hours. In the United States market, this is broken down to a hydrochloride salt which is usually inhaled through the nose. With the invention of crack, smoking cocaine became possible. Attempting to smoke cocaine destroys the power of the drug. Smoking is only possible after the cocaine is chemically converted into an alkaloid which burns easily at lower temperatures. This product is marketed as "free base" or "crack."

Cocaine is arguably the most addictive drug known. It produces intense craving and intense drug taking behavior in all animal species studied, including man. Crack cocaine is more rapidly and completely absorbed into the brain leading to a more intense and less controllable high. Parallel to the rise of crack use has been a three to four fold increase in reports of adverse medical problems from cocaine use.

62. For a good overview review of cocaine's effects see Janet R. Fink, *Effects of Crack and Cocaine Upon Infants: A Brief Review of the Literature*, CHILDREN'S LEGAL RTS. J. 2 (Fall 1989). More recent data on all relevant drugs is available though the National Resource Center for the Prevention of Perinatal Abuse of Alcohol and Other Drugs, 1090 Vermont Avenue, N.W., Suite 700, Washington, D.C. 20005.

63. Like alcohol, most of the fetal damage occurs during the first trimester. Unlike alcohol, cocaine does not cause the visible deformities found in an FAS child. Ceasing cocaine use at any point can increase the baby's size, but does not remedy motor skill deficits and other abnormalities. Until longitudinal studies indicate otherwise, it is reasonable to assume the needs of crack exposed babies will be similar to those of FAS children.

64. Much remains to be known about precisely how cocaine functions. To clearly understand the method by which cocaine operates in the body, we must have an immensely greater understanding of the neurochemistry and electrophysiology of the brain. Research does document that the environment around the cocaine user and the user's behav-

know that cocaine use may create serious and long term biochemical alterations of the central nervous system, which further increase the craving for more drugs.[65] Some pharmacological treatments may be effective.[66]

Methamphetamines and Crystal. Methamphetamines and "crystal," a particularly concentrated methamphetamine, create harms similar to crack at a significantly lesser cost.[67] Withdrawal symptoms and neonatal abstinence syndrome (NAS) are like cocaine or heroin. Some fullterm newborns appear to be blind or deaf, are very sleepy, rarely cry, and suck so poorly that force-feeding is necessary.[68] In one study, one-third of fullterm methamphetamine-exposed newborns had brain hemorrhages and organ tissue death resulting from lack of adequate blood flow.[69]

Crystal is to methamphetamines what crack is to cocaine. Its impact on the user is devastating, with upwards of seventy-two hours of frenzied activity during which food is commonly ignored, followed by something close to physical collapse for another twenty-four to thirty-six hours.[70]

Marijuana. An estimated 6,000,000 women of childbearing age use marijuana.[71] The majority of studies indicate that use by pregnant mothers creates an elevated risk of prematurity, low birth weight and undersized newborns.[72] One study found marijuana's effect on fetal

---

ioral characteristics have a great effect over the degree of drug use. Many potentially useful therapeutic interventions have been suggested for out of control cocaine use, but little proof exists for their effectiveness. Cocaine abuse creates significant stress on the cardiovascular system and can create heart attacks. On the psychological level, it can create or on a lesser level, profound irritability, misperceptions (often relating to an exaggerated sense of competence) and paranoid thinking.

65. AMERICAN SOCIETY FOR PHARMACOLOGY AND EXPERIMENTAL THERAPEUTICS & COMMITTEE ON PROBLEMS OF DRUG DEPENDENCE: SCIENTIFIC PERSPECTIVES ON COCAINE ABUSE 20, 25 (1987) (the document is a consensus of participants in "Scientific Perspectives on Cocaine Abuse," held Jan. 12-13, 1987). For treatment of this condition, there are very few experimental studies which indicate what works with what populations. Cocaine abusers have a high incidence of psychopathology but we lack the diagnostic tools to determine whether the psychiatric symptoms exhibited by cocaine abusers were created by the drug use. *Id.*

66. Tricyclic anti-depressants such as desipramine and imipramine as well as dopamine agonists such as bromocriptine and amantadine show promise but the lack of knowledge of how cocaine works in the body and the pharmacology and physiology of cocaine withdrawal makes it difficult to confirm that these particular drugs are effective in the long term. *Id.*

67. Potential harms include premature birth, placenta previa, general growth, cardiovascular and neuromuscular impairment. Retarded brain development is evidenced by significantly decreased head size.

68. Bays, *supra* note 38, at 884.

69. *Id.* (citing Suzanne D. Dixon, *Effects of Transplacental Exposure to Cocaine and Methamphetamine on the Neonate*, 150 WEST J. MED. 436, 441 (1989)).

70. Psychotic episodes are not at all uncommon thereafter. The use of crystal is not yet widespread and may not be due to the highly traumatic nature of the withdrawal. The effects on fetuses remain to be discerned although spontaneous abortion should be a likely result.

71. Bays, *supra* note 38 (citing Edgar H. Adams et al., *Epidemiology of Substance Abuse Including Alcohol and Cigarette Smoking*, 562 ANNALS N.Y. ACAD. SCI. 14, 19 (1989)).

72. *Id.* at 884.

growth was equivalent to smoking twenty cigarettes per day.[73] Infants whose mothers are frequent marijuana users experience a mild version of heroin withdrawal.

Heroin and Other Opiates.[74] Perhaps 10,000 fetuses are exposed to significant opiates[75] resulting in intrauterine growth retardation (IUGR), prematurity, fetal distress, septicemia, miscarriage, placenta previa and increased need for Caesarean-section birth.[76]

Opiates do not create the facial deformation found in FAS children, but opiate-exposed infants do exhibit long term deficits in cognition, motor function and concentration, have poor self-discipline, low self-esteem and behavioral problems of hyperactivity, aggressiveness and poor peer relations.[77]

The harms to the fetus may have more to do with the semi-fugitive lifestyle forced on intravenous drug users in the United States than the drug itself. Our "War on Drugs" with its vast capacity to convict and its limited capacity to treat, pressures addicts to hide from the very relatives who might be best able to help them recover. The fetus is thereby doubly abandoned. Chronic infection and other illnesses (AIDS and Hepatitis B) are common due to unclean needles. Street heroin varies widely in strength, causing premature withdrawal symptoms or overdoses.

Comprehensive methadone maintenance programs have a beneficial effect on the fetus, despite the fact that fetal withdrawal from methadone is sometimes more difficult. Narcotic-exposed fetuses[78] often

---

73. *Id.* (citing Elizabeth E. Hatch & Michael B. Bracken, *Effect of Marijuana Use in Pregnancy on Fetal Growth*, 124 AM. J. EPIDEMIOLOGY 986, 992 (1986)). On the other hand, an exhaustive Canadian study found that maternal marijuana use created no significant increase in miscarriage, fetal distress (meconium staining) or birth complications. Twelve to fourteen months after birth, the earlier symptoms of growth retardation that had been observed had disappeared and there were no other discernable effects of marijuana use on the infant. This may be because the effects are subtle or confounded by other influences. Bays, *supra* note 38 (citing Peter A. Fried, *Postnatal Consequences of Maternal Marijuana Use in Humans*, 562 ANNALS N.Y. ACAD. SCI. 123 (1989)).

In addition, one study found that children frequently exposed to marijuana in utero were ten times more likely to contract a form of leukemia. The specific disease was acute nonlymphoblastic leukemia. Bays, *supra* note 38 (citing Leslie L. Robison et al., *Maternal Drug Use and Risk of Childhood Nonlymphoblastic Leukemia Among Offspring*, 63 CANCER 1904, 1906 (1989)).

74. Since 1984, heroin use has increased significantly. A purer and less expensive form is now being smoked alone or with crack (called "speedballing"). In King County, Washington, heroin use now exceeds speed use, and heroin was involved in close to half of the overdose deaths. *A Trend Toward Heroin*, SEATTLE POST-INTELLIGENCER, Feb. 26, 1992 at A1. The Senate Judiciary Committee found a 74% increase in heroin users in 1991. *Heroin Entering in Record Amounts at Bargain Prices*, SEATTLE TIMES, Feb. 24, 1992 at 1.

75. The primary opiates referred to here are heroin, morphine (more commonly used as the synthetic merpredine hydrochloride) and pentazocine.

76. Karol Kaltenbach & Loretta P. Finnegan, *Perinatal and Developmental Outcome of Infants Exposed to Methadone In-Utero*, 9 NEUROTOXICOLOGY & TERATOLOGY 311 (1987).

77. Bays, *supra* note 38 (citing Geraldine S. Wilson, *Clinical Studies of Infants and Children Exposed Prenatally to Heroin*, 562 ANNALS N.Y. ACAD. SCI. 183, 191 (1989)).

78. The rapid increase in technology regarding care of premature children has allowed many otherwise drug addicted babies to survive who would have previously died. In 1956, a comprehensive study indicated a 94% death rate amongst addicted infants who were untreated and a 34% death rate among treated infants. Milton J. Goodfriend et al.,

experience a much more gradual withdrawal extending to four to six months after birth, with peak symptoms occurring around six weeks of age.[79] Some methadone programs have reduced abnormality at birth and reduced or eliminated other abnormalities after birth.[80]

PCP (Phencyclidine). PCP is an inexpensive, mood-altering drug that is sometimes associated with highly aggressive behaviors. Infants exposed at birth suffer from milder withdrawal symptoms than infants exposed to cocaine or opiates.[81] PCP is commonly taken with a variety of other drugs such as cocaine and opiates. Perhaps its most important effect is that, among poly-drug[82] users, those who use PCP are significantly less likely to succeed in treatment than those who do not.

D. *Examining the Drug of Alcohol*[83]

From the perspective of the fetus, we must abandon the fiction that alcohol, tobacco and tobacco smoke are not drugs. They should be viewed as very harmful ones.[84] Alcohol consumption creates the greatest harm to the fetus in the month before the mother knows she is preg-

---

The Effects of Maternal Narcotic Addiction on the Newborn, 74 AM. J. OBSTETRICS & GYNECOLOGY 29 (1956).

79. Two-year follow-up on narcotic exposed infants who were well supported after birth found that their development as measured on the Bailey Scales of Infant Development was well within the normal range. Infants born to mothers on methadone, like other narcotic exposed infants, are usually born smaller in weight and length and this difference persists until 12 months of age when the infants usually catch up with the unexposed children. Ira J. Chasnoff et al., *Prenatal Drug Exposure: Effects on Neonatal and Infant Growth and Development*, 8 NEUROBEHAVIORAL TOXICOLOGY & TERATOLOGY 357 (1986).

80. Kaltenbach & Finnegan, *supra* note 76; Sydney L. Hans, *Developmental Consequences of Prenatal Exposure To Methadone*, 562 ANNALS N.Y. ACAD. SCI. 195, 195 (1989); *see also* Wilson, *supra* note 79.

81. Infants are likely to be jittery, hyperactive, difficult to console, difficult to feed and prone to coarse flapping of arms and wide-eyed non-specific stares. Bays, *supra* note 38, at 885.

82. Most drug taking and most drug abusing involves many drugs. The interactive effects of commonly prescribed medications can be severe. Also the use of licit drugs such as tobacco and alcohol is correlated with the later abuse of illicit drugs. Cocaine use persists and increases well through the child rearing years of adulthood. This is also true of alcohol. In contrast, the chance of initiating use of marijuana, LSD and other controlled substances in adulthood falls to a very low level. Young adults with a history of higher than average tobacco use, alcohol use and particularly marijuana use appear most vulnerable to cocaine use. Studies show that marijuana use among youth is much more common among youth with conduct problems in early elementary school. *See, e.g.*, PEELE, *supra* note 35.

83. For the purpose of illustration, the focus will be on an alcohol harmed (FAS) child. Sustained exposure to other drugs can create similar problems.

84. Alcohol, barbiturates, cocaine, valium, diazepam, heroin, marijuana (THC), methadone, phenobarbital, nicotine, T's and blues (tripelennamine's and pentazocine) and PCP (phencyclidine hydrochloride) share three key attributes:

1. Each stunts normal fetal development.
2. Each is addictive and is consumed by over 400,000 pregnant women annually who find themselves unable to deal with their immediate physical circumstances.
3. Each easily passes the placental barrier (due to low molecular weight and other factors) and enters into the bloodstream of the fetus.

Since there is more abuse of alcohol, cigarettes and legal drugs than illegal drugs, it stands to reason that the greatest source of harm is from alcohol, tobacco and legal drugs. Recent data suggests that during pregnancy, 50-60% of women use analgesics and 25% use sedatives. Alcohol uses ranges wildly. Chasnoff, *supra*, note 46, at 1403.

nant.[85] Many women with substance abuse problems do not notice they are pregnant until after the first trimester. Skipping menstrual cycles is a common occurrence for female drug addicts. Drug use continues without awareness of the child within. Once a fetus is implanted in the uterine wall (about two weeks after conception), it is supplied blood from the placenta. Alcohol and other drugs can then enter the fetus directly.

The Fetal Recycling Effect (FRE). FRE causes the fetus to be exposed to alcohol and other drugs longer than the mother. In the case of alcohol, the mother's liver can normally filter out approximately one ounce an hour. If she drinks approximately four ounces of alcohol in the form of four cocktails, the alcohol could clear her system entirely within four hours. Her fetus, however, lacks the liver function to metabolize alcohol until after birth. The alcohol simply recycles through the fetus and the placenta with a very slow absorption rate. Fetal alcohol is filtered out much more slowly through its semi-developed renal system. "Most drugs that have been studied have a longer half-life in the fetus than in the adult."[86]

FAS and FAE are lifelong impairments. The effects of other drugs are not quite as devastating, but are still very harmful. The harm to the child can be significantly increased by being exposed to an impoverished, neglectful and/or abusive home environment. Infants are at risk for central nervous system dysfunction, weak suck, feeding and sleeping difficulties and failure to thrive. Among young children, the FAS child stands out as significantly smaller, with a high need for attention. Intellectual capacities range from IQs of sixteen to ninety, with multiple impairments and behavioral problems. FAS children are initially quite dependent and loving if given large amounts of attention and clear structure. However, they are subject to significantly more psychopathology including hyperactivity, difficulty with peers and chronic attention-getting behaviors.

By adolescence, FAS children often engage in inappropriate behaviors leading to expulsion from school for males and premature sexual activity for highly suggestible females. In school and at work, the children harmed the most are those who are not recognized by the schools as having FAS/FAE and other drug-related educational impairments.

85. *See* James W. Hanson et al., *The Effects of Moderate Alcohol Consumption During Pregnancy on Fetal Growth and Morphogenesis*, 92 J. PEDIATRICS 457, 460 (1978). During the first trimester the fetus is developing key building block structures of its neurophysical and digestive systems. Drug use by the mother can make the uterus a less than friendly environment complicating the embryo's capacity to implant in the uterine wall. The placenta's capacity to attach to the uterine wall is also compromised by drug and alcohol abuse. Alcohol consumption early in pregnancy is associated with FAS/FAE, while late pregnancy consumption is associated with IUGR (intrauterine growth retardation). R.E. Little, *Moderate Alcohol Use During Pregnancy and Decreases Infant Birthweight*, 67 AM. J. PUB. HEALTH 1154 (1977). Binge drinking (five or more drinks) on occasion in addition to drinking an average of one and a half drinks per day dramatically increases the risk of harm to the fetus. E.M. Ouellette et al., *Adverse Effects of Offspring of Maternal Alcohol Abuse During Pregnancy*, 197 NEW ENG. J. MED. 528 (1977).

86. Chasnoff, *supra* note 46, at 1405.

School personnel routinely judge these children as simply choosing to act inappropriately instead of having significant organic impairments. Proper management demands periodic testing of all children in school and extra structure in their learning environment. As adolescents, these children tend to be sexually curious, yet fail to have understanding of socially appropriate sexual behavior. Thus, they are open to the risk of sexual victimization as well as thoughtless sexual relations.

Most FAS children reach an academic plateau in early high school and will be unable to hold a regular job. They would benefit from vocational training during high school, but most vocational and technical institutes offer training only beyond the high school level, frequently in a curriculum that is too academically rigorous. Some FAS children appear to have verbal skills near the level of their parents' skills, but on further analysis, they have significant deficits in memory and understanding. Arithmetic and logic skills are often more diminished than verbal skills. FAS children try to make up for these deficits by charm, deference, affection and, failing at those, hostility. One dilemma faced by many foster parents is that many FAS and FAE children are "too functional" to qualify for state and federal funds, yet they are unable to live and work independently.

As they mature, they are subject to hyperactivity, eating disorders, stuttering, reduced clarity of speech, upper and lower limb clumsiness, strabismus, head and body rocking, disturbed sleep, constant trepidation, delayed language disorder and significant difficulties in developing arithmetic skills. Self-management of finances in later life is rarely possible.[87] Most FAS patients require highly structured living situations throughout their lives and more specialized services than are generally available for retarded persons.[88]

Needs of the Parent. The caretaker of a drug-exposed (FAS/FAE) child assumes a responsibility far beyond that normally associated with parenting or foster parenting. The physical, intellectual and emotional needs of such children are very demanding. These children require constant supervision, an extraordinary amount of energy, love and, most of all, a rigorous consistency. Both parents alone rarely can provide sufficient support. Burnout from such parenting is common and is commonly attributed to the stress. It is equally reasonable to attribute the burnout to our systemic abandonment of poor single mothers. Such burnout among single mothers can result in child abuse, abandonment or neglect, for which only the mothers are held responsible.[89]

87. It is not uncommon for the FAS adult to instantly befriend whomever shows them kindness and invite them into their homes only to be robbed or sexually compromised. For the many who are unable to make change, whether they pay a one or ten dollars for a comic book is immaterial. *See* DORRIS, *supra* note 24.

88. A cogent discussion of the realities of such long term care can be found in James Bopp, Jr. & Deborah Hall Gardner, *AIDS Babies, Crack Babies: Challenges to the Law*, 7 ISSUES L. & MED. 3 (1991).

89. Abandonment theory suggests that the stress upon the mother of systemic abandonment would be ignored so that the state authority could more easily conclude the mother was "overwhelmed" by her parental responsibilities or her drug addiction.

E. *Poverty, Homelessness and Other Abandonments*

While the damage to a fetus from drugs is significant, it poses far less threat to the welfare of the child than the personal,[90] environmental[91] and societal circumstances that lead to the drug-taking behaviors. From the medical perspective, the absence of prenatal care, adequate food and adequate housing for the expectant mother (not to mention adequate drug treatment) creates a greater threat of infant mortality or morbidity than the drug use itself.[92]

Poverty as Abandonment. Since the "War on Poverty" in the 1960s, there has been a flattening of benefits to the poor, and since the 1980s, there has been a dramatic decline in services in general. There has been a significant lowering of the poverty level criteria in the 1980s such that the population in poverty appeared to be reduced. Even with America's artificially low level of poverty, children make up the largest population of those in poverty. Forty percent of black children and almost 40% of Hispanic children are poor. Children from families receiving Aid to Families with Dependent Children (AFDC) are four times more likely to enter foster care, particularly if they come from a single parent household.[93]

Homelessness as Abandonment. If homelessness is considered a drug, then the harms of this drug are appalling.[94] One recent survey found that 48% of homeless children had not yet secured appropriate immunization.[95] They were twice as likely to have chronic illnesses as children

90. Street drugs vary in strength and thus create the threats of alternating withdrawals and overdoses.

91. Needles that are unclean contribute to the likelihood of septicemia, hepatitis and AIDS. A poorly monitored drug withdrawal program can create premature delivery of the fetus by premature separation of the placenta from the uterine wall. Both over and under doses of drugs can lead directly to loss of blood (hypovolemia) and loss of oxygen (hypoxia) to the fetus.

92. Support for this contention comes from many sources; particularly the methadone programs for pregnant women which have babies born with significantly fewer abnormalities than babies born to non-addicted mothers who endure the abandonments of poverty, homelessness and absence of prenatal care.

93. Edward L. Schor, *Foster Care*, 35 PEDIATRIC CLINICS N. AM. 1241, 1243-45 (1988).

94. Mothers who fall into the homeless category are prone to the following:

1. An infant mortality rate of 24.9 per 1,000, ten times the norm. Garth Alperstein & Ellis Arnstein, *Homeless Children—A Challenge for Pediatricians*, 35 PEDIATRIC CLINICS N. AM. 1413, 1416 (1988).
2. An incidence of low birth weight (less than 2,500 grams) among 18% of the newborn which is 200% greater than the housed poor and over 500% greater than the norm. *Id.*
3. A reported rate of child abuse and neglect of 8.8 per 1000, over 300% greater than the housed poor. Once born, children exposed to "homelessness" have a higher likelihood of developing malnutrition or infectious diseases (pneumonia, tuberculosis, measles, dysentery) as well as emotional disturbances and depression. Ellen L. Bassuk et al., *Characteristics of Sheltered Homeless Families*, 76 AM. J. PUB. HEALTH 1097, 1099 (1986).

In a survey of homeless families in Boston, nearly 50% of the children were found to have significant developmental lags, clinical levels of anxiety, depression and/or learning difficulties. *Id.*

95. This compares to 8% amongst poor but domiciled children. As a result, children exposed to "homelessness" contracted measles at a rate 16 times higher than children in New York City as a whole. Seventeen percent of children in one shelter were found to

in poverty with homes.[96] Undernutrition was chronic, and its effect on infants devastating.[97]

Infant undernutrition not only impairs growth and near term health, but also contributes to lifelong stunting of mental faculties, growth impairments, behavior disorders and, perhaps most importantly, the capacity to maintain meaningful relationships.[98] The compensatory care needed for malnourished children is similar to that of drug-exposed children.

Nutritional supplements and medical care are necessary to correct growth deficits, but insufficient to compensate for developmental impairments. Where malnourished infants were offered a variety of basic social support services such as visiting nurses within a framework of home-based assistance, there was a substantial increase in developmental scores for their age group.[99] Similarly, drug-exposed infants whose families are provided treatment without substantial social services do not recover nearly as much of their impaired capacities as do children who are provided comprehensive social services support.

Violence as Abandonment. The homicide rate in the United States is ten times greater than that of England and twenty-five times greater than that of Spain. The rate is far higher in the ghettos where most drug-exposed children must live.[100] Mothers forced to live in fear pass

---

have chronic medical problems requiring multi-disciplinary team of health workers to provide comprehensive care. Alperstein & Arnstein, *supra* note 94, at 1418.

96. *Id.* (citing D. WEBER-BURDIN & J.D. WRIGHT, ROBERT WOOD JOHNSON FOUNDATION AND PEW MEMORIAL TRUST HEALTH CARE FOR THE HOMELESS PROGRAM, 5TH REPORT, FEBRUARY 1987). Of the estimated three million homeless people nationwide, 28% (840,000) are families with children. This group comprises the most grievously harmed sub-group of the 12 million children U.S. who are chronically undernourished according to the estimates of the Physician's Task Force on Hunger in America. J. Larry Brown, *Hunger in the U.S.*, SCI. AM., Feb. 1987, 36, at 36.

97. Although malnutrition at any time in a child's life is stressful, it is particularly harmful to the development of the child's brain between mid-pregnancy and the first 36 months of life. During this period, the brain grows very rapidly in its basis structure in forming synapses, branching dendrites and creating additional neurons in the cerebellum and hippocampus. During this "brain blossom" period, 60% of the infant's glucose utilization is directed towards the rapid blossoming of the child's brain. At each point in this "blossoming" appropriate nutrients must be available or the child's brain will remain stunted in both structure and function for life. The brain has the capacity to divide its neurons and form new synapses and dendrites only during the "brain blossom" period of infancy. At this time a mere eight hours without food with the proper amino acid balance creates a measurable decline in the infant's well-being.

No amount of compensatory feeding after the brain blossom period will correct the situation. Additional nutrition will correct the child's weight and height deficiencies but the child will remain with a clinically reduced head size and reduced cognitive functions. Deborah A. Frank & Steven H. Zeisel, *Failure To Thrive*, 35 PEDIATRIC CLINICS N. AM. 1187, 1187-93 (1988).

98. *Id.*

99. *Id.* at 1199 (citing Sally Grantham-McGregor et al., *Development of Severely Malnourished Children Who Received Psychosocial Stimulation: Six-Year Follow-up*, 79 PEDIATRICS 247, 247 (1987)).

100. Marvin E. Wolfgang, *Homicide in Other Industrialized Countries*, 62 BULL. N.Y. ACAD. MED. 400, 400 (1986). Almost 60% of victims and assailants knew each other and 20% of victims and assailants were members of the same family. Approximately one-half of all homicide victims have elevated blood-alcohol levels. Howard Spivak et al., *Dying is No Accident: Adolescents, Violence, and Intentional Injury*, 35 PEDIATRIC CLINICS N. AM. 1339

the stress on to their fetus. Drug use is one of the few ways to escape the pervasive fear of some neighborhoods. Thus, the damage of drugs to the fetus is aggravated by the environment into which it is born.[101]

Foster Care as Abandonment. Foster care could also be viewed as a drug, when it is dispensed liberally at great expense for a variety of problems it does not cure.[102] Like most drugs, it has a number of unpleasant side effects for those using it.[103] Children in foster care appear to have an elevated risk of developmental delays and educational problems.[104] Foster care can create multiple abandonments with resulting traumas that are very difficult to overcome.[105] The increasing need

(1988). Homicides in 1980 were responsible for 1,500,000 hospital days and $640,000,000.00 in health care costs. Non-fatal intentional injuries occur as must as 100 times more frequently than fatal injuries. Studies have shown that the report of assaults and intentional injuries to police are approximately 25% of the assaults and injuries from assault that are treated by medical facilities in the same locality. Jerome I. Barancik et al., *Northeastern Ohio Trauma Study: I. Magnitude of the Problem*, 73 AM. J. PUB. HEALTH 746 (1983).

101. The Violence Epidemiology Branch of the Center for Disease Control found that 80% of homicides occur between members of the same race. As blacks are over-represented in homicide statistics they are likewise over-represented in the ranks of families in poverty. In a recent study in Atlanta, the measure of people per square foot in each housing unit was used as an indicator of socioeconomic status. When reviewing the incidence of homicide among the poor, there was no significant difference between blacks and whites. Brandon S. Centerwall, *Race, Socioeconomic Status and Domestic Homicide, Atlanta, 1971-1972*, 74 AM. J. PUB. HEALTH 1813 (1984).

Comparing blacks and whites, low socioeconomic status was predicative of violence, not race. The Northeast Ohio Trauma Study found that lower socioeconomic status and residence in urban areas played a significant role in the likelihood of intentional injury. Center for Disease Control studies showed that homicides most often occur in urban areas with low socioeconomic status, high population density, poor housing and high unemployment. Spivak, *supra* note 100, at 1339 (citing Centers for Disease Control, *Homicides Among Young Black Males—United States, 1978-1982*, 34 MORBIDITY & MORTALITY WEEKLY REP. 629 (1985)).

A particular study in Dayton, Ohio demonstrated that a rise in unemployment would lead to an increased incidence of homicide with a lag period of one to two years. Spivak, *supra* note 100, at 1340-41 (citing Center for Disease Control, *Homicide-United States*, 31 MORBIDITY & MORTALITY WEEKLY REP. 599 (1982)).

102. This is not to say that foster care does not have some very beneficial uses. Like any drug, harm results when it is over-prescribed.

103. For the child protection system, it allows the perception that "something" was done even if that "something" created no measurable improvement in the welfare of the child. For the child, a series of foster care placements can effect, on a psychological level, much greater harm than fetal drug exposure. (Statement of a California State Psychologist who directed a recovery center for drug exposed children previously placed in foster care. *The Health Quarterly* (Corporation for Public Broadcasting television broadcast, Jan. 6, 1992)).

Chronic health care problems affect 40% - 76% of children in foster care. In one study of 149 children in foster care, because of abuse or neglect, only 13% of the children had normal physical examinations. Thirty-four percent has potentially serious medical problems requiring one or more sub-specialty consultations. Spivak, *supra* note 100.

104. They have been found to have cognitive and academic functioning at the low end of the average range which is very similar to low socioeconomic status children living with their own families. DAVID FANSHEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION (1978).

105. In 1980, Congress took a step to keep troubled families together when it passed the Adoption Assistance and Child Welfare Act (P.L. 96-272) (codified as amended in scattered sections of 42 U.S.C.). This law sought to: (1) prevent unnecessary foster care placements by making sure that the child cannot be protected in the home before even considering a placement; (2) return foster children to their families before considering

for foster care is more reflective of the larger failure of our government and social institutions to provide for the poor than of the increase of insoluble family problems.

The Harms of the Father. It is certainly common knowledge that many poor fathers abandon the mother and their child. A higher percentage fail to adequately support their child. The greater harm may be that the the father's alcohol and drug use may create fetal deformity.[106] In this circumstance, *a child with drug use related deformities could be born to a mother who has not used drugs.* The possibility that the harm to the fetus did not result from the *mother's* behavior challenges every effort to criminalize, civilly commit or allege abuse or neglect on the mother's part.

II. Past Solutions and Present Problems

Any review of the literature of neglected or harmed children reveals considerable conflict over what the causes precisely are, as well as considerable difficulty in assessing the efficacy of any given remedy. Different definitions of the problem begot different remedies. Every legislative remedy alters the family and the understanding of the problem such that over time the problem expands to include all the failed remedies of the past. Thus the problem is eventually understood in terms of the history of results of past remedies.

From the ecologic perspective, nature responds to forced intervention. For example, insects that are sprayed with insecticide develop

---

adoption or any other permanent arrangement; and (3) promptly adopt out children if the child's safety cannot be protected in the home.

Under this law state agencies are *required to make reasonable efforts* to look into all possible family supports, treatment programs and family assistance and counseling programs for the family in the home. This includes the caseworker making a mandatory case plan outlining all of the background, options and efforts. The effect of this well-intentioned law is in doubt. Between the massive budget cuts in social services and the rise in drug exposed infants, the mission appears to have been either compromised or lost. On the one hand, caseworkers can only do so much without adequate resources. On the other hand, it may be policy error to compel the caseworker in charge of placement (to protect the child from immanent harm) to also be responsible for avoiding placement until all other options are exhausted. This is a statutory oxymoron almost like having the probation officer serve as the public defender.

A more pernicious aspect of foster care is racial bias. According to Professor Roberts, black children in foster care receive less pleasant placements than whites, remain in the system longer and are less likely to be either returned home or adopted. Roberts, *supra* note 21, at 1440 n.109.

Malcolm X described his experience with foster care as follows:

> A Judge . . . in Lansing had authority over me and all my brothers and sisters. We were "state children," court wards; he had the full say-so over us. A white man in charge of a black man's children! Nothing but legal, modern slavery—however kindly intentioned. . . .
>
> I truly believe that if ever a state social agency destroyed a family, it destroyed ours.

Id. (citing M. Little, The Autobiography of Malcolm X 20-21 (1965)).

106. *See, e.g.*, Richard A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (1991); Gladys Friedler, *Effects on Future Generations of Paternal Exposure to Alcohol and Other Drugs*, Alcohol Health & Res. World, Winter 1987/88 at 126; Ruth E. Little & Charles F. Sing, *Association of Father's Drinking and Infant's Birth Weight*, 314 New Eng. J. Med. 1644-45 (1986). Thanks to the Seattle King County Task Force for Chemically Dependent Women for alerting me to the above.

resistance to it. Similarly, families that are repeatedly "helped" by state authority often develop a high resistance (skepticism) to any state intervention. Our endeavors to criminalize and otherwise punish substance abuse over the past sixty years and our decisions to exclude women from many treatment programs significantly changed the nature of the problem. Methodologically, we are faced with a situation akin to a dog chasing its tail. The problem, most narrowly defined, is that of a mother, drugs (including alcohol and nicotine) and her fetus. In the classical analysis, the mother is either ignorant of the effect of drugs or so morally lax or uncaring that she fails to protect her fetus. The fetus is an innocent victim of her myriad failings and deserves the protection of the state. This patriarchal, moral laxity model has been with us for millenniums. Roman law provided for a death sentence for women who were drunk.[107]

A. *From Fallen and Afflicted to Treatable and Addicted*

As mothers were penalized for their drug use, they were also penalized for their poverty, race and sexual activity. In America, from colonial times through the end of the eighteenth century, the churches and local communities worked together to address and ignore the needs of the poor. Indigence was a basis for removing children from their family, since poverty was prima facie evidence of neglect. Early on, children were commonly indentured or apprenticed to "such religious families where both body and soul may be taken good care of."[108] The late nineteenth century brought significant effort by the state to institutionalize these children until they were adopted or put in foster homes in the country to protect them from "the perils of want and the contamination of example."[109] The "example" to be avoided was that of an unwed or deserted mother without means to provide for herself. During the first half of the nineteenth century, it was quite common for Black slave children to be sold, for poor White children of single mothers to be "removed" and for children of Native Americans to be "relocated."

The twentieth century brought institutional welfare efforts from city, state and federal governments. Jane Addams's Hull House was a model for benefit programs for the poor, such as Aid to Families with Dependent Children (AFDC). However, the double standard towards women endured in the AFDC eligibility criteria. For example, single mothers found engaging in sexual activity were precluded from received AFDC benefits. In fact, extra-marital sexual activity was a common

107. Norma Finkelstein, *Treatment Issues: Women and Substance Abuse*, prepared for the National Coalition on Alcohol and Drug Dependent Women and Their Children, Sept. 1990, at 1.

108. Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM. J. PUB. HEALTH 483, 484 (1990) (quoting M. ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 92 (1988)).

109. *Id.* at 484 (quoting M. ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 165 (1988)).

ground for removing the child from its mother.[110]

The "example" set by the unmarried woman (including a widow) was sufficient to justify terminating her parenthood.[111] The standards of family normalcy and propriety derived by mostly White professionals worked a double hardship on women of color, resulting in a disproportionate level of intervention into their families and their capacity to have families.[112]

Addiction: Disease or Depravity? In the 1800s, alongside the heavy drinking Americans, determined temperance workers argued that liquor (the "Good Creature" of Benjamin Franklin's day)[113] was the root of all evil, and its users were demonized as "fallen" reprobates. "Demon rum" was alleged to have claimed many a soul.[114]

Interestingly, whiskey was not so demonized, which well reflects the immense power of whiskey in the nineteenth century. When drug addictions reached well into the middle and upper classes, the federal government moved against those with the least political clout. In 1914, the Harrison Narcotics Act launched a controversy that continues to this day as to whether addiction is a disease (a medical problem subject to treatment) or a depravity (a moral/legal problem to be deterred by criminal sanction). In the early 1900s, the depravity label won, and physicians were, with the cooperation of the medical community, prosecuted for prescribing opiates to addicts, even those trying to break their habit.[115]

---

110. *Id.* at 484 (citing LINDA GORDON, HEROS OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE - BOSTON, 1880-1960 (1988); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE, NEW YORK (1971)).

111. There is no evidence of widowers with children having their parental rights (or AFDC benefits) terminated for extramarital sexual activity.

112. Federal support for sterilization continues, but it seems to be applied to mostly poor women (who are mostly women of color). As recent as the 1970s, some doctors made sterilization a condition of agreeing to perform births or abortions. Sterilization agreements were also secured by threatening to revoke welfare benefits. Roberts, *supra* note 21, at 1443.

113. RORABAUGH, *supra* note 26, at 22.

114. *See, e.g.*, the Reverend Huntington Lyman's battle cry in 1830: "The devil had an efficient hand in establishing, perfecting, and sustaining the present system of making drunkards." RORABAUGH, *supra* note 26, at 185. The temperance tactics towards children of the 1830s were very like the "Scared Straight" anti-drug tactics of today. " 'If you must some times scare them,' pleaded William Hines, 'in the room of telling them that bears will catch them, that hobgoblins or ghosts will catch them, tell them that *Rum* will catch them. . . .' " *Id.* at 198 (emphasis in original). As crack addicts ruin communities now, drunkards ruined communities then. " 'The drunkard . . . cleaves . . . like a gangrenous excrescence, poisoning and eating away the life of the community.' " *Id.* (quoting HENRY WARE, A SERMON DELIVERED AT DORCHESTER 4 (1820)).

Amongst the poor women of child bearing age, the temperance movement, like the present war on drugs, functioned to make drug use more furtive and shameful thereby cutting off mothers from the family supports that could help them recover. The success rate of the Temperance/Prohibition movement appears not unlike that of the War on Drugs.

The abstinence ethic of the 1830s continues today in Alcoholic's Anonymous, Narcotic's Anonymous and related movements. The "demon" is gone but God remains. *See also* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT (1963).

115. Chavkin, *supra* note 108, at 484.

In 1925, the Supreme Court in *Linder v. United States* found in favor of the medical model when it stated that addicts "are diseased and proper subjects for such [medical] treatment . . . ."[116]

In the 1950s, the American Medical Association adopted a policy declaring such addiction a disease that should be addressed through medical treatment combined with social support. Drug addiction was acknowledged in the psychiatric community's Diagnostic and Statistical Manual of Mental Disorders as a "psychoactive substance dependency disorder." In 1962, the Supreme Court held firmly in favor of the medical model, declaring narcotic addiction to be a disease and thus not subject to criminal penalty.[117]

As medicine claimed the responsibility for dealing with drug addiction within its realm, it also claimed the responsibility for dealing with child abuse and neglect. The method of claiming involved discovering an identifiable syndrome that covered the problem. The first discovery was the "battered child syndrome," which was followed a few years later by the "battered wife syndrome" and still later by the "fetal alcohol syndrome."

We must recognize that female drug addiction is very different from male drug addiction. While male drug addiction is primarily to the substance, female drug addiction is often to the *relationship* in which the drug is shared. Prior abandonments fuel the need to remain in a highly dependent relationship, and the fear of future abandonment undercuts the capacity to say "no" to a lover's request to get high. The primary addiction of many of these women is to a destructive relationship from which alcohol and drug abuse results. The societal failure to educate and support parents, combined with historic discrimination against women, yields a besieged generation of young mothers who are highly vulnerable to substance abuse.[118] Substance abuse provides the additional threat to the fetus of diseases transmitted by substance abuse. Until recently, over 80% of women with AIDS were those who shared needles with other addicts or were the sexual partners of addicts.[119]

---

116. 268 U.S. 5, 18 (1925).

117. The Court stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to afflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Robinson v. California, 370 U.S. 660, 666 (1962).

In his concurring opinion, Justice Douglas added, "*the prosecution is aimed at penalizing an illness, rather than providing medical care for it.* We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick." *Id.* at 678 (Douglas, J., concurring) (emphasis added).

118. Although the causes of Sudden Infant Death Syndrome (SIDS) remain largely unknown, its incidence among drug exposed infants is two to twenty times higher. The risk may be partly environmental where, for example, the drunken or "high" parent inadvertently smothers the infant. *See, e.g.*, Bays, *supra* note 38, at 901.

119. Chasnoff et al., *supra* note 79.

B. *The Circular Reforms of Dependency*

Our legal model has travelled in a rather large circle, beginning 125 years ago with a mission of "rescuing" the child from the family, and finally returning to "protecting" the child from the family.[120] Somewhere in the 1970s and early 1980s, the larger mission of protecting the child *in* the family was lost.

Approximately thirty years ago, the concept of the "battered child syndrome" was presented to the American Academy of Pediatrics. In 1960, the problem was estimated to affect 447 children.[121] As of 1986, 2.3 million reports of suspected abuse and neglect were reported annually, and there were 2,000 to 5,000 deaths annually.

In response to this new phenomenon, all states, by 1967, passed laws requiring professionals who suspected abuse or neglect to report their cases to the local social service agencies. These agencies were in turn required to investigate and, if cause was found, to provide child welfare and mental health services to the family. For the family that was unwilling to cooperate, the pressure of juvenile court was used with a threat of dependency and/or termination of parental rights. When case loads were relatively low in 1970, the programs were successful.[122] Law enforcement in the criminal sense was not present in the field during the 1960s and early 1970s. Criminal charges were filed only in the rare instance of clear evidence of injury or homicide. Part of the reason for the few prosecutions was that there were rarely witnesses to serious abuse, and physicians were not able or willing to diagnose a "non-accidental injury" "with reasonable medical certainty." Medical text books of that era suggested that one-half of subdural hematomas (e.g., significant head injury) of infants were spontaneous.[123]

The late 1970s witnessed the rise of the battered woman syndrome, and with it the increased public awareness of sexual abuse, incest and a quickly developing support structure for battered women shelters and rape crisis centers. Society moved quickly in the direction of attempting to support victims of sexual assault, regardless of age, and soon found themselves dealing with young children.[124]

As case loads exploded, funding imploded. The Reagan adminis-

120. As mentioned previously, the original mission of many welfare societies founded to protect children after the civil war was one of rescue. Children were commonly "rescued" from urban ghettos and placed in the countryside. The often extremely stressful impact of being removed from their families was not initially perceived. With the rise of Hull House, Social Work and the Populist movement in the 1900s, there was a major effort to break away from rescuing the individual child to attempting to protect both child and their family. Paul G. Anderson, *The Origin, Emergence, and Professional Recognition of Child Protection*, 63 SOC. SERVICE REV. 222 (1989).

121. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962); Richard D. Krugman, *Future Role of the Pediatrician in Child Abuse and Neglect*, 37 PEDIATRIC CLINICS N. AM. 1003, 1004-11 (1990).

122. In Denver in the 1970s, 80% of children removed from their homes returned within a year and were not re-abused. Krugman, *supra* note 121.

123. *Id.* at 1004.

124. It is important to note that this "epidemic" of physical and sexual abuse has existed for many decades but, until then, had remained largely unreported.

tration deeply cut many basic support programs for families. In 1988, the Congressional Select Committee on Children, Youth and Families reported that although child protective cases increased 55% from 1981 to 1986, funding rose only 4%. Many agencies that normally provided services to families who were not abusive or neglectful were statutorily compelled to direct almost all their resources to treat abused children and their families. Thus, in some areas, there was a complete dearth of child welfare services for those who needed help, but were not abusive. Some families "admitted" to child neglect to get needed services, even though they were not neglectful.[125]

While funding for protection was cut, public health nursing was also cut. What was previously a comprehensive preventative health care system for mothers and infants in the 1970s evolved, by 1990, to a fee-for-service home health care industry whose employees visited only the insured. Cuts in school funding compelled many school districts to reduce or share their nurses. Another major resource that families had turned to with their children was thus put beyond their reach.

Another pressure against families with children was created in 1979 when Congress "de-institutionalized" the chronically mentally ill. The ill overwhelmed the community mental health centers and displaced many families who were in need. Treatment previously available to abusive families was cut. By the late 1980s, Child Protection Services (CPS), the agency charged with protecting both the child and the family, was reduced from being an advocate to merely being an investigator.[126]

Similarly, physicians involved in child protection actions were used as agents of diagnosis for purposes of prosecution and rarely used as agents of treatment. Many pediatricians have become increasingly reluctant to report suspected abuse because of their honest fear that the system will possibly create greater harm for the child than their informal efforts. Both criminal sexual abuse hearings and civil hearings regarding abuse have become increasingly more adversarial, even though the initial assumption was to have a more informal congenial atmosphere. Physical findings regarding abuse and neglect are increasingly challenged and increasingly in doubt.[127] During the past decade, a number of physical phenomena believed to be indicia of abuse were discovered in populations of non-abused children.[128] The net result of new knowledge regarding diagnosis of abuse was a net increase in the uncertainly

125. Krugman, *supra* note 121, at 1004.

126. The primary role of CPS is to collaborate with law enforcement to meet the minimums of statutory mandate. As treatment services within CPS declined, many of the clinical social workers left such that by 1990, most CPS workers were baccalaureate graduates with scant prior experience in entry level positions. The prior position of an advocate clinical social worker was now replaced by a "case manager" and the CPS worker was put in the position much like the probation parole officer.

127. J.A. Adams et al., *Anogenital Findings and Hymenal Diameter in Children Referred for Sexual Abuse Examination*, 1 ADOLESCENT PEDIATRIC GYNECOLOGY 123 (1988).

128. Krugman, *supra* note 121, at 1007 n.21 (citing John McCann et al., *Perianal Findings in Prepubertal Children Selected for Nonabuse: A Descriptive Study*, 13 CHILD ABUSE & NEGLECT 179 (1989)).

as to diagnosing abuse "with reasonable medical certainty." [129]

The mother witnessing paternal abuse or neglect became more and more reluctant to seek medical or therapeutic help in a crumbling family. If the mother sought help for an abusive spouse, she risked having him ordered from the home while having no guarantee that he would complete an adequate anger management program. Reporting the abuse of a child in the absence of effective and available treatment forced the mother to choose between losing the family breadwinner and thereby plunging herself and *all* the children closer to poverty or "protecting" *one* child. Double standards rose again as her failure to report was used as a basis for neglect charges against her. Thus, the mother risked a penalty for something she could not remedy.

Although the mother was abandoned by the treatment, welfare and medical systems, *she* alone was often blamed for the situation. The theme of maternal blame so clearly stated in the London Gin Epidemic (á la Dan Quayle) continues to infect our attempts to assist abused, abandoned single mothers. On top of these concerns was the nagging certainty that the vast majority of abuse cases did not rise to the level of being predicted "with reasonable medical certainty." Thus, many abusing parents were found innocent, even though they could have been found guilty under a lesser standard of proof. To address this, Congress, in 1989, founded the United States of America Advisory Board on Child Abuse and Neglect. The results are not yet in.

The medical community has become increasingly aware of the effects of failing to treat much of the harm detected. While a substantial literature documents the propensity of the untreated victim for becoming a victimizer it is a sad fact that vastly more public resources are spent incarcerating offenders than treating either victim or victimizer to prevent future abuse.[130]

III. CONSTITUTIONAL RIGHTS AND STATE REMEDIES

A woman who chooses to carry her pregnancy to term has a moral responsibility to make reasonable efforts towards preserving fetal health. Moral responsibility does not create a legal duty to accept medical procedures or treatments in order to benefit the fetus. The distinction between moral and legal responsibility is an important one. Our society places great moral value on assisting those in need or in danger. There is no *legal* duty that anyone risk his or her well-being to provide help, or for any person to donate tissue to another even if the risk is minimal and the donation would save the other person's life. The duty of a pregnant woman to her fetus is greater than this, but less that the

129. *Id.* at 1007 (citing Richard D. Krugman, *The More We Learn, the Less We Know "With Reasonable Clarity"*, 13 CHILD ABUSE & NEGLECT 165 (1989)).

130. While 22% of Colorado inmates and 33% of Alaska inmates are sex offenders, less than three percent of known child sexual abuse victims are receiving treatment. Krugman, *supra* note 121, at 1009 (citing Gail Ryan, *Victim to Victimizer: Rethinking Victim Treatment*, 4 J. INTERPERSONAL VIOLENCE 325 (1989)).

obligation of a parent to his or her child. Parents have a *legal* duty to provide reasonable support and health care for their children. However, they cannot be compelled to risk their life or health to protect their children's health.

If medical measures are necessary to protect the viability of a fetus, the mother faces a risk to her life and health in order to undergo treatment. Legally compelling a pregnant woman to undergo medical procedures for her fetus creates a penalty on pregnancy, a violation of her constitutional right to privacy and her constitutional right to decide to be a parent. Logically, there is no basis to assert that a pregnant woman's moral responsibility to her fetus exceeds a mother's legal duty to her child.

The medical and legal communities have asserted a broad range of suggested solutions. The power to implement these solutions that is *provided* by the United States Constitution is also *limited* by the Constitution. Thus, constitutional law provides a framework limiting the method, manner and means by which the state exercises power to protect the fetus. What follows is an overview of constitutional concerns[131] of which the state must be aware and options the state may use in efforts to protect the child.

A. *The Rights of Mother, Fetus and Child*

The Right to be Spared Cruel and Unusual Punishment. Punishment for drug and/or alcohol abuse, broadly recognized as a disease, is inappropriate under the Eighth Amendment.[132] Moreover, abuse of alcohol can and does in many cases pose a greater threat to fetuses than does abuse of illicit drugs. Similarly, use of tobacco creates a demonstrable threat to the well-being of the fetus in the form of premature births and low birth weight. Any criminal statute the legislature contemplates must consider criminalizing pregnant women's consumption of alcohol and tobacco.

The Right to Equal Protection. In a statute, the legislature must first face the challenge that a woman is being penalized for behavior that would not be actionable if the same drugs or alcohol were consumed by a male. Although objections to a statute on this ground would not likely be subject to strict scrutiny, the statute could likely further discrimination against abandoned minority mothers.[133] A 1986 review of court-

131. There are myriad works addressing constitutional issues in great detail. This article does not, therefore re-plow this well-turned field. A few of the more helpful articles are: Walter B. Connolly, Jr. & Alison B. Marshall, *Drug Addiction, Pregnancy, and Childbirth: Legal Issues for the Medical and Social Service Communities*, 18 CLINICS PERINATOLOGY 147 (1991); James M. Wilton, *Compelled Hospitalization and Treatment During Pregnancy: Mental Health Statutes as Models for Legislation to Protect Children from Prenatal Drug and Alcohol Exposure*, 25 FAM. L. Q. 149 (1991); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988).

132. U.S. CONST. amend. VIII.

133. The Supreme Court has not applied the strict scrutiny analysis for sex-based equal protection claims, apparently because sex, in and of itself, is not a suspect classification. *See* Stanton v. Stanton, 421 U.S. 7 (1975); Reid v. Reid, 404 U.S. 71 (1971).

ordered Caesarean sections found that all were public clinic patients, 81% were minority women, of whom 24% did not speak English as their primary language.[134]

The Privacy Right to Reproduce.[135] *Griswold v. Connecticut*[136] anchors a line of cases empowering women to make decisions regarding parentage without state intervention. The *Griswold* Court held invalid a Connecticut law which attempted to prohibit married couples from using contraceptive devices. The Court argued that enforcement of the law would require the state to invade "the sacred precincts of marital bedrooms."[137] The Supreme Court's decision in *Roe v. Wade*[138] held invalid the Texas statute prohibiting abortion. In *Carey v. Population Services International*,[139] the Supreme Court found the right of privacy for decisions regarding the creation of a family, including contraception, childbearing and child care.

The Privacy Right to Confidentiality. In *Whalen v. Roe*,[140] the Court found an "individual interest in avoiding disclosure of personal matters." There is, perhaps, nothing more crucial for the fetus than a mother's confidential relationship with her physician. For physicians and nurses to secure urine toxicologies without the mother's consent and to provide results to state authorities shatters the physician-client relationship and does not necessarily protect the fetus. A single incident of drug use caught by a toxicology screen does not create nearly the harm to a fetus as a mother's lifetime fear of seeking medical attention for herself and her children.

The Right to Bodily Integrity. In addition to the above-cited privacy rights, the Fourth Amendment also provides mothers the right "to be secure in their persons . . . against unreasonable searches and seizures . . . ."[141] Under the Fourth Amendment, serious questions can be raised as to whether courts can force mothers to undergo Caesarean sections or life sustaining medical treatment such as the treatment in *In re Quinlan*.[142] A drug urinalysis of the mother is not remotely as invasive as a Caesarian section.

In the last decade, there has been a significant expansion of the right to compel drug testing, even though drug testing is a search for purposes of the Fourth Amendment. In *National Treasury Employees Union v. Von Raab*,[143] the Court held that the United States Customs Depart-

134. Veronika E.B. Kolder et al., *Court-Ordered Obstetrical Interventions*, 316 NEW. ENG. J. MED. 1192, 1193 (1987).

135. These privacy rights are disputed by conservative jurists and strongly defended by others. Privacy rights are argued to be emanations from the penumbras of the First, Fourth, Fifth, Ninth and Fourteenth Amendments. For further argument see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302-1435 (2d ed. 1988).

136. 381 U.S. 479 (1965).

137. *Id.* at 485.

138. 410 U.S. 113 (1973).

139. 431 U.S. 678 (1977).

140. 429 U.S. 589, 599-600 (1977).

141. U.S. CONST. amend. IV.

142. 355 A.2d 647 (N.J. 1976).

143. 489 U.S. 656 (1989).

ment could require any employee applying for a particular position to be subject to drug testing even though there was no suspicion that individual had any history of prior drug use. Under *Skinner v. Railway Labor Executive Ass'n*,[144] the Court allowed complete toxicological tests of all workers on a train that was involved in an accident. Neither of the above cases required proof or even suspicion of individual use. Testing the child after birth involves no invasion of the mother's bodily integrity and would likely be permitted.

A Woman's Right to Govern Her Body. In 1973, the Fourteenth Amendment was construed to protect a woman's decision to terminate a pregnancy in *Roe v. Wade*.[145] This right was inferred, in part, from the above rights to privacy, confidentiality and the *Griswold* right to procreate.[146] The state's interest in protecting a woman's health and in protecting potential human life was balanced to allow no state intervention for a decision to abort during the first trimester.[147]

The *Roe* right to abortion and the privacy rights emanating from *Griswold* may not apply to the case of a mother who is harming her fetus through the use of drugs and alcohol, whereas the woman's right to reproductive choice is arguably compelling in the case of abortion. The state should have an equally compelling right to protect the fetus from harm once the mother decides to keep it. The likelihood that the *Roe* privacy protections will be extended to maternal drug abuse is undercut by the Court's ruling in *Cruzan v. Director, Missouri Department of Health*.[148] There, the Court rejected the opportunity to extend *Roe's* privacy rights beyond the context of abortion.

The Rights of the Fetus and Child. The rights of the unborn come from a patchwork of legal principals.[149] Neither *Roe* nor *Webster v. Reproductive Health Services*[150] require states to protect fetuses. If born alive, the fetus has a right to inherit and to sue others for pre-birth damages to it. Some states even allow a child to claim for damages by his or her

144. 489 U.S. 602 (1989).

145. 410 U.S. 113 (1973).

146. See *Roe*, 410 U.S. at 152-53.

147. *Roe* was recently modified by the plurality in Webster v. Reproductive Health Services, 492 U.S. 490 (1989), where the court upheld a statute requiring viability tests to be performed for any pregnancy of twenty weeks or more. The trimester standard was changed such that the state could regulate abortion at the point that potential life became "viable." The *Roe* Court considered viability to begin at the third trimester. The *Roe* Court also recognizes a state interest in protecting a woman's life and health over that of the fetus. Thus, the state has no right to prohibit abortion at any time if the woman's life or health is in peril. The Supreme Court recently affirmed *Roe*, but eroded womens' freedom to first trimester abortions. *See* Planned Parenthood of Southeastern Penn. v. Casey, 112 S. Ct. 2791 (1992).

148. 110 S. Ct. 2841 (1990). Here, the Court sustained the right of the comatose patient to stop the use of life supporting equipment and did so under the right of bodily integrity and the Fourteenth Amendment.

149. The most common method of asserting the rights of a fetus against its mother is extending the fetus's rights against third party injury to rights against its mother. Barbara Shelley ably argues this for Pennsylvania. Barbara Shelley, Comment, *Maternal Substance Abuse: The Next Step in the Protection of Fetal Rights?*, 92 DICK L. REV. 691 (1988).

150. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

mother.[151] *Roe* found clearly "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn,"[152] whereas the *Webster* plurality decision did not address this issue. The *Webster* plurality abandoned the *Roe* trimester framework as unduly rigid.[153] Under *Roe*, the state's interest in protecting the child becomes compelling in the third trimester.[154]

Further support for the notion that fetal health is distinguishable from the right to an abortion is found in the case *In re A.C.*, where the court held, "the right of a woman to an abortion is different and distinct from her obligations to the fetus once she has decided not to timely terminate her pregnancy."[155]

B. *Punishing the Abandoned: Concerns about Criminalization*

Professor Roberts notes an interesting ancestor of present day criminal prosecutions:

> Slaveowners forced women to lie face down in a depression in the ground while they were whipped. This procedure allowed the masters to protect the fetus while abusing the mother. It serves as a powerful metaphor for the evils of a fetal protection policy that denies the humanity of the mother.[156]

This denial of humanity is the maintenance of societal abandonment. As of November 1991, there were over 110 *reported* cases of women subject to criminal prosecution based on prenatal drug use.[157] Approximately 75% were poor women of color. Half of the White women prosecuted were identified as poor.[158] Only three cases involved alcohol abuse.[159] Seventy percent of the women prosecuted were Black and most were crack addicts.[160] Not one of the prosecutions was based on a statute that was designed or intended to govern the conduct of a pregnant mother towards her fetus.[161] The conviction of Jennifer John-

---

151. *See, e.g.*, Grodin v. Grodin, 301 N.W.2d 869 (Mich. Ct. App. 1981).

152. 410 U.S. at 158.

153. 492 U.S. at 517-18.

154. 410 U.S. at 113, 158, 162-164.

155. 533 A.2d 611, 614 (D.C. App. 1987). However, this case concerned a pregnant, terminally ill mother who was under such severe medication that an informed consent to a Caesarean section was not possible to secure. This is quite distinct from a mother who objects to mandatory treatment even if she is addicted to drugs or alcohol.

156. Roberts, *supra* note 21, at 1438 (footnote omitted).

157. Draft Memorandum, "State by State Case Summary of Criminal Prosecutions Against Pregnant Women," from Lynn Paltrow to ACLU Affiliates and Interested Parties (November 22, 1991) (on file with author). Ms. Paltrow stressed that these are only the *reported* cases from ACLU affiliates. The total number of prosecutions and convictions is likely much higher. Also, some cases did not report the mother's race and many did not report her income level. Only three women were specifically reported as being middle class. Telephone Interview with Lynn Paltrow, ACLU Reproductive Freedom Project, New York (March 24, 1991).

158. *Id.* at 2-24.

159. *Id.*

160. Roberts, *supra* note 21.

161. Connolly & Marshall, *supra* note 131, at 177. To date, no state has passed a statute authorizing criminal prosecution of substance abusing mothers. An early draft of Florida's child abuse statute authorized criminalization but its provision was reversed prior to

son for "delivery" of cocaine to a minor (her newborns) was handed down without any evidence of harm to the children from the drug exposure.[162] In this instance, delivery was via the umbilical cord for the few seconds after the child was born, until the cord was severed.

Societal abandonment can be maintained by criminalizing behaviors that are largely unique to the abandoned.[163] One of the rationales for conviction is that incarceration will protect the fetus. Regrettably, the evidence suggests that incarceration today affords no more protection for the fetus than the hospitals of eighteenth century France.[164]

Incarceration: A Greater Harm Than Drugs. Prisons and jails (like their "hospital" predecessors) are rarely provided budgets sufficient for adequate health care.[165] Prison health experts warn that prisons are shock-

---

passage indicating "that no parent of [a drug dependent] newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency." *Id.* at 175 & n.104 (citing FLA. STAT. ANN. § 415.503 (7)(a)).

162. Ms. Johnson sought hospitalization a month prior to birth when she was worried that her crack use would harm her unborn child. The state learned of her drug problem only after she confided her concerns to her obstetrician. Most courts would be hard pressed to find that an addict has the criminal intent to abuse her child. Ms. Johnson was prosecuted under the statute of having the criminal *intent* to deliver controlled substances to the a third party. The state found criminal intent by arguing that her attempts to get help demonstrated that she knew that her drug use was harmful. Roberts. *supra* note 21, at n. 156 (citing Brief of American Public Health Association and Other Concerned Organizations as Amici Curiae in Support of Appellant at 2, Johnson v. State, No. 89-1765 (Fla. Dist. Ct. App. Dec. 28, 1989) and Trial Transcript at 144, State v. Johnson, No. E89-890-CFA, slip op. (Fla. Cir. Ct. July 13, 1989), aff'd, No. 89-1765, 1991 Fla. App. LEXIS 3585 (Fla. Dist. Ct. App. Apr. 18, 1989)).

This was her third "cocaine child" and Johnson received a sentence of 14 years probation and one year of rehabilitation programs conditioned upon receiving treatment. Johnson sought the treatment, but the outpatient programs refused to treat her because they feared liability should her fetus fail to survive withdrawal. It appears that the tens of thousands of dollars spent on Jennifer Johnson's trial and conviction had little effect on the welfare of her child or the likelihood that this will not occur again. Ms. Johnson's trial is a clear example of retributive criminalization. The metaphor of whipping the slave endures.

163. The most recent law review article favoring criminalization is by James Denison, *The Efficacy and Constitutionality of Criminal Punishment for Maternal Substance Abuse*, 64 S. CAL. L. REV. 1103 (1991). Mr. Denison ably reviews many arguments against criminalizing and then advances a statutory formula designed to pass constitutional muster. Shona B. Glink proposes a very limited use of criminal sanction for prevention, not punishment of maternal substance abuse. Shona B. Glink, Note, *The Prosecution of Maternal Fetal Abuse: Is This the Answer?*, 1991 U. ILL. L. REV. 533. On the other hand, George P. Smith, II goes far beyond criminalizing to suggest damage suits and sterilization. George P. Smith, II, *Fetal Abuse: Culpable Behavior by Pregnant Women or Parental Immunity?*, 3 J.L. & HEALTH 223 (1988-89). Perhaps the greatest value of this article is its clear explication of how to intellectually abandon the humanity of a drug addicted mother. The author asserts that certain substance abusing mothers are no longer "moral mothers," only "biological mothers" and therefore not deserving maternal rights. The means by which the author prunes the limbs of the mothers' humanity clearly portrays the process of abandonment. Two other articles providing "kinder and gentler" analyses favoring criminal sanctions are: Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 HARV. J. ON LEGIS. 97 (1985); Catherine A. Kyres, Note, *A "Cracked" Image of My Mother/Myself? The Need for a Legislative Directive Proscribing Maternal Drug Abuse*, 25 NEW ENG. L. REV. 1325 (1991).

164. *See supra* note 16.

165. The institutions of the abandoned are sometimes funded like the services for the abandoned. Society's scant faith in the rehabilitative potential of abandoned individuals extends to its scant faith in the rehabilitative potential of its institutions for the abandoned.

ingly deficient in attending to the health care needs of pregnant women.[166] The result has been widespread deficiencies in prenatal diet, nutrition, exercise and seriously inadequate, if any, prenatal care. A recent American Medical Association (AMA) report found that pregnant women in jail are routinely subject to conditions that are hazardous to fetal health, such as gross over-crowding, twenty-four hour lock-ups with no access to exercise or fresh air, exposure to tuberculosis, measles, hepatitis and a generally filthy and unsanitary environment. Additionally, it is unclear if incarceration would prevent drug use by pregnant women, because drugs are readily available in prison.[167] Recent California cases well document the AMA findings,[168] and one of the few

166. Ellen M. Barry, *Pregnant Prisoners*, 12 HARVARD WOMEN'S L. J. 189 (1989).

167. *See* AMA Trustees, *supra* note 42.

168. Ellen M. Barry, *Pregnant, Addicted and Sentenced: Debunking the Myths of Medical Treatment in Prison*, CRIMINAL JUSTICE, Winter 1991, at 23, 23 (citing Jones v. Dyer, No. H-114544-0, Alameda County Superior Court, California)). Doris M. was sentenced to six months in the county jail for a minor probation violation when Doris was seven months pregnant. This unusually long sentence was apparently intended by the sentencing judge to protect her child from exposure to heroin during the remainder of her pregnancy. Doris was a heroin addict and had sought methadone treatment unsuccessfully prior to her sentencing. Once incarcerated, she was given no methadone and forced to withdraw "cold turkey" from heroin which resulted in severe vomiting, headaches, abdominal pain, diarrhea and other significant traumas.

> [Doris] was not examined by an obstetrician for almost six weeks and received no follow-up appointment or medical treatment. When she was approximately eight-and-one-half months pregnant, she had severe uterine pain and felt no fetal movement. Three days later, her stillborn daughter was removed by cesarean section.

Barry, *supra*, at 23.

Esperanza C. was denied access to an obstetrician during the entire course of her pregnancy and her fetus died in utero after eight and one-half months. *Id.* at 26 (citing Harris v. McCarthy, No. 85-6002-JGD); a copy of this state-wide class action complaint and settlement agreement can be obtained by writing to Legal Services for Prisoners with Children, 1535 Mission Street, San Francisco, CA 94103, telephone (415) 255-7036.

Linda H., one of the plaintiffs in *Harris*, was transported on the eve of the birth of her child to an outside hospital. Her mode of transport was in shackles, seated upright in a van. Her child was born severely distressed. It spent thirty-one days in intensive care and has permanent disabilities. Barry, *supra*, at 25-26.

Brenda J., another plaintiff in *Harris*, received inadequate treatment for placenta previa (breakthrough bleeding). She had a miscarriage at eight and one half months and had to undergo an emergency hysterectomy. *Id.* at 25.

Annette Harris, the lead plaintiff in *Harris*, suffered from vaginal bleeding for over three weeks without securing the attention of any physician. She was given a drug that was inappropriate for pregnant women because of the risk of inducing labor. As a result, she went into premature labor, and her newborn died shortly thereafter. *Id.*

Jessie V. was sentenced to six months at Kern County Jail for misdemeanor assault. Jessie was six months pregnant at the sentencing and addicted to heroin. She requested to be placed on methadone maintenance and for one week was given a very low dose of methadone, insufficient to prevent withdrawal. After that week she was denied methadone and forced to go through withdrawal unaided, suffering nausea, chills, shakes and vomiting. As a result, she was unable to eat or keep down any food. The only assistance provided by medical staff was Tylenol. Jessie had to sleep on the floor of the jail on an inch-thick mattress resulting in severe back pain and difficulty standing or walking. Although Jessie had a very high-risk pregnancy, she was not visited by any obstetrician until one occasion after she had secured the assistance of outside legal counsel. *Id.* at 23 (citing Yeager v. Smith, No. CV-F-87-493-REC (E.D. Cal.)).

Although sweeping victories have been secured in the above cases, demanding substantial change in the prisons, the reality remains that prenatal care is poor. The California Institute for Women involved in the *Harris* litigation is close to 300% over designed

comprehensive studies of pregnancy care in correctional settings documented severely inadequate medical care in two California state prisons and one large urban county jail.[169]

Jail does not limit access to drugs and alcohol.[170] Recent testimony before the California legislature indicates that drugs and alcohol are supplied to prisoners by outside visitors and correctional staff. Correctional staff may play a significant role in distributing illegal substances inside of the jail.[171] Jail may increase the likelihood of the abuse of drugs and alcohol. It does not provide better prenatal and obstetric care than the mothers would receive "on the streets" and often forces "cold turkey" drug withdrawals creating greater risk of harm to the fetus than continuing drug use. Jails are not equipped to accomplish the constant medical monitoring necessary to safely detoxify a pregnant woman. Overcrowding and the opportunistic infections common in jail populations create a significant and unnecessary risk of harm to the fetus.

The Wide Meshed Net of Drug Testing. Any state that passes legislation attempting to criminalize maternal substance abuse will face strict scrutiny. Hopefully, the purpose of the statute is not to punish the mother for being addicted, but to protect her fetus from harm. The statutory goal of protection rests on the assumptions that the course of drug use while pregnant can be detected and that the *detected* drug use is shown to be *harmful* to the fetus. These assumptions are often invalid. Testing at birth detects only recent use,[172] says very little about the amount used and nothing about the frequency or duration of use.[173] In other words, testing detects only recent *use* not *harm*. Some younger pregnant mothers can consume tremendous amounts of alcohol without triggering FAS or FAE. Others can consume illegal drugs without creating de-

---

capacity. County jails are similarly overcrowded with inmates routinely forced to sleep on the floor for weeks at a time. *Id.* at 26. The Doris M. case settlement created a treatment program for pregnant drug-dependent women in Alameda County. *Id.* at 23. In Kern County (*Yeager*), however, the promised program has yet to be provided because the county lacks resources in the general community for drug and alcohol treatment. Thus, there is some likelihood that less affluent county jails and state prisons in rural areas would lack funds and support necessary to provide adequate treatment for their pregnant inmates.

169. Barry, *supra* note 168, at 25 (citing C. McCall et al., *Pregnancy in Prison: A Needs Assessment Of Perinatal Outcome In Three California Penal Institutions*, California Department of Health Services, Maternal And Child Health Branch, 1985).

170. Elsa Walsh, *Drug Use At Lortan "Disturbing"; Increased Demand By Inmates Feared*, WASHINGTON POST, July 3, 1989, at B1.

171. *See, e.g.*, Barry, *supra* note 168 (excellent examination of the pitfalls of and alternatives to criminalization; demonstrates the efficacy of voluntary residential treatment).

172. Heroin, cocaine and its metabolites, methadone, benzodiazapines and amphetamines are usually undetectable 48 hours after ingestion. Marijuana can endure for up to 20 days, PCP for up to eight days and phenobarbital for two to three weeks. Alcohol endures in the system for perhaps two to three days. Sheila Ronkin et al., *Protecting Mother and Fetus from Narcotic Abuse*, CONTEMPORARY OB/GYN, March 1988, at 178.

173. Thus the physician is left to guess whether the infant's poor condition resulted from street drugs, prescription drugs, maternal malnutrition, maternal stress or a host of other factors. Even if cocaine was found at birth, testing cannot provide the crucial information concerning what drugs were taken during the prior nine months.

monstrable harm to their fetus. Thus, if drug use is the criteria for criminalization, then it is a crime based on a *potential* preventable harm to the fetus. Any effort to criminalize preventable harm to a fetus must address the fact that testing cannot prove preventable harm. Moreover, mandatory testing causes mothers to hide the precise data needed to detect risk of harm (drugs used, amounts, duration and other medical difficulties) from the doctor in order to avoid being prosecuted. Thus, the fact of criminalization functions to *reduce* the critical medical data available to the physician to assist the high-risk pregnancy.

If the statute is based on the harm to the infant from the mother's disease (addiction), it must answer to the fact that there are many other diseases that create a greater risk of harm.[174] If a mother's disease or impairment cannot be criminalized, the *crime must be based on her decision to have a child.* While this raises some equal protection problems, the fact that only diseases found mostly among "abandoned" women are criminalized raises *profound* equal protection problems. Criminal statutes would have to include the use or abuse of alcohol and cigarettes by pregnant mothers.

Alcohol creates more fetal harm than any other drug. States have significantly less authority to prevent fetal harm from alcohol, tobacco and licit drugs than from illicit drugs. Alcohol and cigarette use is legal and is heavily promoted in this society. It is unlikely that tobacco and alcohol use by pregnant women will be criminalized.

The threat of testing is an additional trauma to the pregnant mother, particularly when the test could cause the loss of her job and cancellation of health coverage. Even if the mother is drug free, she faces the nagging possibility of false positive test results. Prescription drugs can trigger false positives and false negatives on urine sampled enzyme-monitored immunoassays can be produced by diluting the urine sample or altering its pH.[175] If testing is limited to cases in which the baby exhibits Neonatal Abstinence Syndrome (NAS), many mothers will be long gone from the hospital before symptoms occur. NAS may not occur for up to fourteen days after delivery. Thus, an addicted mother who has only cursory access to health care during her pregnancy and who leaves the hospital a few days after delivery could successfully elude detection of her condition.[176]

174. Tay-Sachs disease is carried by the mother and causes death of approximately 40% of her offspring before they reach age six. Women with Tay-Sachs tend to be of Jewish Eastern European ancestry. The infant fatality rate for mothers with AIDS is not greater than that for Tay-Sachs.

175. For example, some over-the-counter cold remedies or diet pills can appear as amphetamines, non-steroid inflammatories can appear as marijuana and some antibiotics appear as a positive cocaine test. Codeine, which is metabolized into morphine, will yield a positive opiate test. Urinary tract infections may cause multiple false positive reactions giving the misimpression of poly drug abuse. Ronkin et al., *supra* note 172, at 178.

176. Cocaine has a short half life in the body of 30 minutes to a few hours before it is metabolized and converted into metabolites ecogoine methyl ester which continue in the body for only two to four days. The body fluid tests can confirm the use of cocaine as well as hair samples.

Deterrence, Rehabilitation and Retribution. Traditionally, criminal liability is imposed for purposes of deterrence, rehabilitation and retribution. The goal of deterrence is not met. The state lacks the authority to make drug addiction or alcoholism criminal conduct.[177] There is no evidence that addiction is a moral weakness that could be cured by jail time, nor is there evidence that a woman's knowledge of the threat of incarceration cause her to stop abusing herself and her fetus. Ironically, the only certain result of criminal deterrence is an incentive to abort her fetus in order to destroy the evidence.[178]

If the goal is immediate rehabilitation of the mother to prevent further harm to the fetus, then the criminal process takes a dangerously long time. Irreversible fetal damage can occur before an arrest can be made and irreversible harm could occur in order to *avoid* arrest. Jail is no place to avoid drugs, and states are under no duty to provide jail inmates addiction treatment that is available to normal citizens.[179]

The only goal met by criminalizing pregnant women's substance abuse is that of retribution. Such retribution is a ratification of abandonment theory and a reaffirmation of popular prejudice. While some pro-criminalization commentators argue that no "moral" mother would expose her child to harm from drugs,[180] they fail to address the morality of more privileged mothers with deadly diseases or the morality of a society that exposes millions of its children to poverty and denies health care and drug treatment to their parents. This failure to address the larger moral issues reflects a cognitive myopia that results from societal abandonment.

Many legislators continue to labor under the illusion that to criminalize a behavior is to cure it. However, in the case of maternal drug use, criminalization serves the more important function of legitimizing our abandonment of and popular prejudice against "welfare mothers on drugs." As Willie Horton was effectively used to personify the threat to womanhood, "crack mothers" personify the threat to childhood. This threat to childhood flows through our history on a river of abandonment. As impoverished "gin mothers" were punished in eight-

177. Robinson v. California, 370 U.S. 660, 666-67 (1962).

178. Cases brought in Florida, California and Ohio have been dismissed on grounds that the statute was not intended to apply to fetuses or to prenatal conduct or more importantly that the interpretation would make a fetus equivalent to a "child" in the statutes thus making pregnant women open to abuse or neglect charges for all aspects of prenatal care including the voluntary decision to have an abortion early in the pregnancy.

179. *State of Ohio v. Tammy Gray* concerned a child endangerment charge brought against a woman who had used cocaine during her pregnancy. The court dismissed the charge saying that to interpret the statute as sought by the state would be creating a duty of prenatal conduct and would, therefore, be interpreting the word "child" in the statute to include "fetus." Connolly & Marshall, *supra* note 133, at 176 & n.109 (citing State of Ohio v Tammy Gray, Slip op. No. CR88-7406, Court of Common Pleas, Lucas County, July 13, 1989).

180. *See e.g.*, Smith, *supra* note 163. The author distinguishes between a biological and a moral mother arguing that only a "moral" mother should be allowed to have children. He supports criminalization and sterilization as options. His argument most effectively supports abandonment theory in his sincere, eloquent and utter detachment from the humanity of addicted mothers.

eenth century London, "crack mothers" are punished in twentieth century Miami.

Roe v. Wade. If *Roe v. Wade* is overruled, a state's authority to criminalize will be expanded. The pro-criminalization forces argue that if injury to a child can be criminalized, injury to a fetus can be as well. One result of extending rights to a fetus is that the adversarial relationship between mother and doctor is extended to mother and fetus.[181] In this circumstance, the mother must seriously consider aborting her possibly healthy fetus to avoid the possibility she will be convicted and separated from her existing children. Any criminal statute must demonstrate that the harm of maternal drug use is a greater threat to the infant than the harm created by the state's attempt to prosecute the mother. From this perspective, it is difficult to understand how any statute's protection could exceed its harm.[182] The metaphor of whipping the Black slave mother as she lies over a hole endures.

C. *Civil Commitment: Pros and Cons*

The Uniform Alcohol and Intoxication Treatment Act[183] provides an interesting basis for civil commitment[184] of mothers with substance abuse problems. The Act could be amended to allow involuntary commitment of pregnant women abusing drugs (including alcohol and tobacco).

Arguments in Favor of Civil Commitment. Civil commitment is preferable to criminal punishment on a number of grounds. First, it is quicker than criminal punishment. Although civil commitment does have considerable procedure and safeguards, the time between detection and commitment is usually much less than in criminal cases between apprehension and conviction. Second, it is focused. Criminalization could be employed against casual users and as a vehicle for social retribution.

181. California State Senator Edward R. Royce proposed amending section 273a of California's Penal Code to define "child" as "a person under the age of 18 years or a fetus." Connolly & Marshall, *supra* note 131, at 176.

182. The harm to the existing family network and the mother's future capacity to secure employment at a reasonable wage would be immense as a result of prosecution. Since most pregnant women abusing drugs have been abandoned by the fathers, the children of such women would suffer from the economic discrimination against their mother every time she had to admit her criminal conviction on a job application.

183. UNIF. ALCOHOLISM AND INTOXICATION TREATMENT ACT, 9(1) U.L.A. 79 (1988). A thoughtful article exploring this and favoring the feasibility of civil commitment is Kristen Rachelle Lichtenberg, *Gestational Substance Abuse: A Call for A Thoughtful Legislative Response*, 65 WASH. L. REV. 377 (1990). A more detailed exploration of the Uniform Act can be found in Doretta Massardo McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505 (1990). James M. Wilton provides a careful analysis which may be used for commitment and compelled treatment. Wilton, *supra* note 132.

For a more comprehensive consideration of the policy, intent and procedures of civil commitment, see Sandra A. Garcia & Ingo Reilitz, *Involuntary Civil Commitment of Drug-Dependent Persons with Special Reference to Pregnant Women*, 15 MENTAL & PHYS. DISAB. L. RPTR. 418(20) (1990).

184. Civil commitment is here defined as court ordered temporary non-criminal placement of individuals in an institution for purposes of protecting them from harm to themselves or others.

However, the Commitment Act demands a case-by-case examination whereby the pregnant substance abuser must first fit the definition of an alcoholic, drug addict, etc. Whereas a criminal act could be construed to penalize pregnant women for *any* behavior that would harm the fetus, the Civil Commitment Act addresses only substance abuse.[185]

Third, civil commitment provides more protection of the mother and child. Civil commitment statutes protect fetal health by treating the mother's addiction. The state's interest should be in protecting the health of the fetus and the child thereafter. Criminal jail time may temporarily prevent substance abuse, but at a high cost to the fetus. Civil commitment recognizes the value of the mother as a separate person instead of a mere breeder for a more valuable fetus. Treatment, more than punishment, lessens the likelihood of drug abuse during future pregnancies.

Fourth, civil commitment allows for flexibility in treatment. Civil commitment law allows individual planning to address the unique needs and circumstances of each mother. Criminal sanctions fix the period of jail time. Civil commitment allows the addict to be retained in custody until she is no longer a threat to her fetus. If the danger persists, the abuser can be recommitted. The proposed Uniform Act requires a physician's certification to limit mis-commitment.

Finally, the social stigma of civil commitment is less than that of criminal conviction. Any criminal conviction is a significant blow to future employability. The only certain result of criminalizing pregnant women's substance abuse is undercutting their earning capacity and thereby their capacity to protect and defend the future livelihood of their children. In contrast, civil commitment proceedings are often not open to the public and the files are sealed.

Arguments Against Civil Commitment. Most states have civil commitment statues that contain carefully drawn due process protections, including mandatory reviews after short periods of commitment. Unfortunately, many civil commitment programs for addicts are far from civil. Civil commitment hearings are often held in prison-like facilities. Both the New York and California programs group civil and criminal addicts together.[186] In Massachusetts, many women addicts who were civilly committed ultimately went to prison. Massachusetts had earlier mandated additional treatment programs for female addicts, but the demand so exceeded the space available that women were sent to prison treatment programs.[187]

In addition, the question of whether civil commitment is effective remains unanswered. There have been no significant efforts to evaluate

185. For example, it would not be productive to attempt to prosecute or commit a woman for pursuing a rigorously vegetarian lifestyle during pregnancy which barred consumption of milk, although this could create a risk of harm to the fetus.

186. Wendy Chavkin, *Mandatory Treatment For Drug Use During Pregnancy*, 266 JAMA 1556, 1557 (1990).

187. *Id.*

civil commitment programs.[188] Although the 1967 Presidential Committee on Law Enforcement mandated that mandatory treatment be "substantive and distinguishable from imprisonment," most civil commitment procedures fall far short. Only fourteen states require evidence before commitment that appropriate treatment is "available," and only five states require a demonstration that the available treatment will be "beneficial."[189] Thus, addicted women are likely to be committed without any certainty that they will receive treatment and even less certainty that the treatment will be tailored to their needs.[190] It is particularly so regarding the care needs of the addicted woman's children.

Civil commitment and child abuse and neglect laws all founder on the status of the fetus. A mother who is abusing drugs is not necessarily a danger to herself, thus the only basis for commitment is that she is a "danger" to "others." Civil commitment has not been used on severely addicted (non-pregnant) women, even when they have AIDS, because there is no demonstrated danger to "others."[191]

None of the drafted civil commitment statutes contemplate a fetus as an "other," and only Minnesota provides for involuntary commitment of pregnant, drug-abusing women.[192] To civilly commit pregnant, drug abusing women raises the question of *Roe* and *Webster* anew and extends the adversarial relationship between mother and fetus from criminal to civil law. Child abuse and neglect laws face the same difficulty if they state that the fetus is a "person."

In addition, there is medical opposition to civilly committing pregnant, drug-abusing women. Forcing pregnant women into a penalty model is no small constitutional problem and is clearly at odds with the physician's hippocratic oath to "at least do no harm." The American Medical Association and the American College of Obstetricians and Gynecologists have adopted policies strongly opposing involuntary commitment for substance abuse or other mandatory treatment based solely on the pregnant mother's abuse of drugs.[193] In addition to the medical community's opposition, a formidable body of case law and constitutional concerns hamper the forced treatment model.

Another concern is that of inflated treatment costs. There are treatment and incarceration costs with civil commitment and criminalization.

---

188. *Id.*

189. *See id.*

190. *Id.* at 1557.

191. *See id.* at 1558 (citing Barry S. Brown, *Civil Commitment-An International Perspective*, 18 J. DRUG ISSUES 663, 666 (1988) and Michael P. Rosenthal, *The Constitutionality of Involuntary Civil Commitment of Opiate Addicts* 18 J. DRUG ISSUES 641 (1988)).

192. Minnesota appears to be the only state that authorizes involuntary commitment of pregnant drug users under MINN. STAT. ANN. §§ 626.5561(2)(West 1992). Unfortunately, the statute ignores alcohol and nicotine abuse, which likely harm more children than drug abuse.

193. Chavkin, *supra* note 186, at 1558 (citing American Medical Association Board of Trustees Report, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behaviour by Pregnant Women*, 264 JAMA 2663 (1990) and A. Allen, *An Affirmation of American College of Obstetricians and Gynecologists Committee Opinion*, WOMEN'S HEALTH ISSUES, Fall 1990, at 37)).

There is no doubt that civil commitment will cost more. Mothers whose only offense is drug use should be separated from criminals. Such separation creates vast institutional costs that could be better spent on the mothers' habilitation. Most of the mothers needing such treatment are near or below the poverty line and unable to pay for treatment. The Social Security Act as presently constituted only provides Medicaid benefits for methadone treatment.[194] Who will pay for another 250,000 potential civil commitments per year? Only 1% of our vast federal appropriation for the War on Drugs is budgeted for the treatment of women, and only a fraction of that for the treatment of pregnant women.[195] It is manifestly unreasonable to commit a pregnant mother without providing her with a reasonable certainty of appropriate treatment for herself and appropriate assistance for her other children and dependents. It is unlikely the government can afford treatment programs in jail when it cannot afford substantially less-expensive programs outside of jail.

Commitment would likely create harm to the existing children of the mother due to the absence of day care and appropriate residential care for the children while the mother is away. In addition, as noted above, there is no certainty that jail impairs the woman's access to drugs. In the present War on Drugs atmosphere, admitting to drug use could end the mother's custody of the child, terminate low-income housing and shred the fabric of family and social ties.[196] Civil commitment for substance abuse by pregnant women does not deter them from substance abuse as much as it deters them from seeking prenatal care or help for their addiction. Particularly where the woman has other dependent children, the threat exists that an unfavorable physician's report could result in a jail sentence.

Another problem with criminal or civil commitment statutes is that they would compel doctors to play the role of policemen, not healers. Addicted mothers could secure medical assistance only at the risk of legal peril. Addicted mothers would be more likely to not go to the hospital until it was time to deliver the child, after making strenuous efforts to rid themselves of drugs. This process creates manifestly greater harm to the infant than civil commitment could allay.[197]

194. Senate Bill 29 and House Resolution 1189, admitted in the first session of the 102d Congress, include the "Medicaid Drug Treatment For Families Act of 1991," which provides for Medicaid coverage of alcoholism and drug dependency residential treatment of pregnant women. This legislation is not yet passed but would likely better tend to defend the interests of the unborn from harm than any well-intentioned state statute directed at criminalization. S. 29, 102d Cong., 1st Sess. (1991); H.R. 1189, 102d Cong., 1st Sess. (1991).

195. *Health Quarterly* (Public Broadcasting Corporation television broadcast, Jan. 6, 1992).

196. One example is that of a pregnant woman who was battered severely by her husband and sought medical treatment from a local hospital. Tests administered during her treatment indicated that she had been drinking. On her release she was arrested and charged with criminal child abuse for consuming alcohol during her pregnancy. AMERICAN CIVIL LIBERTIES UNION, REPRODUCTIVE RIGHTS UPDATE, Feb. 3, 1990, at 2.

197. First, the absence of prenatal care creates a much greater risk of morbidity and

Civil commitment of pregnant, drug abusing women create the probability of expanded maternal duty to the fetus. Any civil commitment statute must, by necessity, create a duty of the mother towards her fetus. Once this duty is created, it could easily extend beyond the abuse of illicit drugs to any activity by the mother which creates a demonstrable risk of harm to the child.[198]

The probability of increased state liability also exists. Civil commitment (and criminalization) could substantially increase the cost of drug treatment for pregnant mothers. Such mothers are extremely high-risk obstetric patients and treatment centers reasonably fear legal liability to the subsequently born child since such a child is likely to be born with some injury resulting from prenatal drug use. The drug treatment center staff is faced with significant medical uncertainty as to appropriate drug treatment of the mother until delivery. They have no clear data as to the mother's prior drug use, and they likely have a scant medical history of her. Efforts by the treatment staff to shift the mother to methadone could backfire if the dose is inappropriate and creates premature labor.

Many addicted mothers use more than one drug. Polydrug abuse can create very difficult initial diagnostic problems. To avoid premature withdrawal that will harm the fetus, some form of drug use must continue. An addicted mother going into premature withdrawal can create a level of stress and tachycardia that directly limits both the blood and oxygen supplied to the fetus. The threat of criminalization is likely to influence the mother to under-report drug or alcohol consumption. This is particularly true if the mother believes that disclosure will result in an additional prosecution. The welfare of the child will more likely be protected if the mother can work with her established neonatal physician in conjunction with the hospital-associated confidential treatment program in which there is no statutory duty to report.

Conclusions Regarding Civil Commitment During Pregnancy. The fundamental problem of civil commitment is that it begs the question of systemic abandonment. Both civil commitment and incarceration function to punish the drug-using mother for deciding to keep her child.[199] Be-

---

mortality among children than drug use by a mother. Second, a mother's attempt to cease use of drugs or alcohol could create, as indicated elsewhere, significant unnecessary trauma to the child due to premature withdrawal symptoms. Third, the absence of prenatal care and stresses of drug related life are likely to result in the premature delivery of an underweight infant creating a great likelihood of ancillary medical costs. Fourth, the mother's fear of the hospital would cause her to be less likely to pay attention to her medical needs, thus increasing the likelihood that she would sustain aggravated medical conditions that would impair her capacity to care for her child after delivery. All of these combine to impair the hospital's capacity to provide comprehensive prenatal education and postnatal education to enhance or assess the mother's parenting capacities.

198. Fetal rights created by criminal or civil commitment statutes are subject to the same slippery slope of ever expanding harms subject to state sanction. An excellent discussion of this issue can be found in Kary Moss, *Substance Abuse During Pregnancy* 13 HARV. WOMEN'S L.J. 278 (1990).

199. Within the systemic abandonment theory, civil and criminal commitment would be preferred because they perpetuate the image that "something is being done" while

cause of fear of detection, both function to discourage the mother from seeking prenatal care. The cognitive myopia that fuels disparate prosecution of the abandoned would fuel disparate civil commitment. For example, consider a typical mother subject to commitment who is a poor, pregnant, addicted woman of color and has two other children, one of whom has been placed in foster care. This is contrasted to a typical mother with Tay-Sachs disease who is White, married, middle class and has two prior children, one of whom died at age four from the disease after a painful debilitating struggle. Each mother awaits the birth of her third child. The civilly committed mother waits in a jail-like setting, struggling with drug withdrawal and worrying about the safety of her child whom she is rarely able to see. Her fetus may or may not have suffered harm from her addiction, but the harm is very unlikely to be fatal. Efforts are made to convince the woman to agree to free federal sterilization in order that no more children will be harmed. In contrast, the Tay-Sachs mother awaits birth with her family at Mt. Sinai Hospital. After the death of her last child, she, with the support of her family and psychiatrist, was encouraged to try again. Her decision to become pregnant is seen as courageous. Her fetus has a 50% chance of getting the disease and the disease is 100% fatal.

D. *The Efficacy of Mandatory Treatment and Reporting*

Criminal prosecution, civil commitment and, to a lesser extent, dependency proceedings *assume* that involuntary treatment and reporting[200] have a positive effect. A similar faith is placed in the efficacy of testing. If these *assumptions* cannot be sustained, the problem of maternal drug use may need to be faced in an entirely different way.

Any comprehensive review of mandatory drug treatment programs in the United States yields little clear evidence of success. On the other hand, such review yields clear evidence of historic abandonment, in that the programs failed to meet the needs of woman addicts in general and pregnant woman addicts in particular. Most of the major programs studied were concerned mostly with males. The rate of success with females in such male-oriented programs was significantly lower.

In the 1930s, the United States Public Health Service established treatment programs for felons in Fort Worth, Texas and Lexington, Kentucky. After decades of effort, the evaluation found no clear evidence that such mandatory treatment was more effective than voluntary

---

avoiding consideration of our societal abandonments which contribute to the mother's plight.

One such abandonment is our War On Drugs which, according to one commentator, functions to impede the addicted mother's access to healthcare and sever her access to comprehensive rehabilitation. Larry Gostin, *An Alternative Public Health Vision For A National Drug Strategy: "Treatment Works"*, 28 HOUS. L. REV. 285 (1991).

200. A thorough analysis of many unanticipated shortcomings of mandatory reporting in Florida can be found in Brian C. Spitzer, Comment, *A Response to "Cocaine Babies"—Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent*, 15 FLA. ST. U. L. REV. 865 (1987).

treatment.[201] In the 1960s, California reached out beyond the felon community in its very ambitious California Civil Addict Program. One evaluator claimed success.[202] However, another author found treatment to be neither consistently effective nor consistently available.[203] In 1966, programs were developed under the Federal Narcotic Addiction Rehabilitation Program Act and the New York Narcotic Addiction Central Commission. The New York program provided no clear evidence of success.[204]

Under the 1972 Federal Alternatives To Street Crime, there was a concerted effort to move compulsory treatment from penal settings to community settings. One positive result was an increase in the length of stay of treatment.[205] However, there was no evidence that mandatory treatment reduced future criminality any more than voluntary programs. Later programs, including carefully structured treatment programs, small group size, the addition of ex-addicts to staff and significant secondary support, reported some success for males.[206]

As of late 1991, approximately 65,000 women in California were seeking comprehensive treatment for substance abuse. California had a total of 2,000 treatment "beds" available.[207] Many treatment centers do not accept women on welfare, and those who do give priority only to pregnant women. This ignores the likelihood that drug or alcohol use may simply be a side dependency for the primary dependency the woman have on a relationship with a male drug or alcohol abuser. The emphasis of treatment being available only to pregnant women may cause them to infer that they are important to the social system only

201. *See* Chavkin, *supra*, note 186, at 1556-57.

202. *Id.* at 1556 (citing M. Douglas Anglin, *The Efficacy of Civil Commitment in Treating Narcotic Addiction,in* NATIONAL INSTITUTE ON DRUG ABUSE, COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 8 (C.G. Leukefeld & F.M. Tims eds., 1988)).

203. *See* Chavkin, *supra* note 186, at 1556-57 (citing E. Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 198 (1989)).

204. Factors contributing to failure included "overreliance on criminal justice facilities and personnel, a shortage of experienced clinicians, large caseloads, high abscondence rates, and spurious evaluation efforts." *Id.* at 1557 nn.8-9 (citing J.A. Inciardi, *Some Considerations on the Clinical Efficacy of Compulsory treatment: Reviewing the New York Experience in* NATIONAL INSTITUTE ON DRUG ABUSE, COMPULSORY TREATMENT OF DRUG ABUSE: RESEARCH AND CLINICAL PRACTICE 126 (C.G. Leukefeld & F.M. Tims eds., 1988) and C. Winick, *Some Policy implications of the New York Civil Commitment Program*, 19 J. DRUG ISSUES 5 61 (1988)).

205. An increasing length of stay was directly related to the likelihood of reduction of future criminality.

206. Sadly, one of the few multisite studies of compulsory treatment of female addicts found that "female addicts who entered drug treatment under legal pressure . . . were less likely to remain in treatment than women who entered voluntarily." Chavkin, *supra* note 186, at 1557 (citing R. Moise et al., *Women in Drug Abuse Treatment Programs: Factors that Influence Retention at Very Early and Later Stages in Two Treatment Modalities: A Summary*, 16 INT'L J. ADDICT 1295 (1981)).

207. *Health Quarterly* (Corporation for Public Broadcasting television broadcast, Jan. 6, 1992).

when they are pregnant.[208]

Mandatory reporting presents problems as well. Any time a physician is compelled to report confidential information secured from his pregnant client or from her newly born child, the delicate relationship between health care provider and patient can be shattered. From a legal perspective, it is certainly preferable to limit reporting to whether the newborn has evidence of maternal drug or alcohol abuse (e.g., neonatal abstinence syndrome or fetal alcohol syndrome). This neonate-based reporting avoids creating rights in the fetus that compete with the rights of the mother.

The next risk of reporting is the not infrequent failure to keep records in a confidential manner. One positive (or false positive) test result could render the mother difficult to insure or uninsurable.[209] Small employers who self-insure would be unable to hire her. The requirement to report places heavy demands upon physicians to adequately diagnose drug and alcohol exposure at birth. Physicians face the further problem of securing the informed consent of their clients for drug screening while trying to maintain a relationship of trust.[210] This will likely cause the mother to fail to completely express all of her drug and alcohol problems and thus limit the physician's capacity to address them.

---

208. The special health needs and social problems of women demand more specialized treatment. For example:

> -Women alcoholics have death rates from 50 to 100 percent higher than those of male alcoholics, according to the U.S. Department of Health and Human Services. . . .
>
> -Three out of four chemically dependent women have been victimized by sexual assault.
>
> -Half have an eating disorder.
>
> -Twenty percent have attempted suicide, and as many as 65 percent of female alcoholics have a psychiatric disorder such as depression.

Cecelia Goodnow, *Falling Through the Cracks: Getting Proper Drug Treatment is a Major Challenge for Women*, SEATTLE POST INTELLIGENCE, Sept. 21, 1990, at C1, C3. Further, according to a recent study in King County, Washington, removing a drug problem is only part of the solution. Most women on federally funded treatment programs have less than a high school education, and even after treatment, 72% remain jobless. *Id.*

209. Insurance companies are active in their abandonment of particular populations. During 1990 and 1991, medical insurance companies raised their coverage for males in particular professions (interior design, waiting, florists etc) to levels far beyond the risk. The increase was apparently due to the inference that males in such work were more likely than not to be gay, that if they were gay they were more likely than not to be promiscuous and that if they were promiscuous they were more likely then not to acquire AIDS. While these presumptions are sustained by popular prejudice, they are denied by medical evidence. The incidence of new AIDS cases in the gay community went into a steep decline in 1988 and continues to fall. Faced with proof that their premiums were raised while risk was falling, some companies countered that the cost of AIDS deaths demanded higher premiums. However, recent studies have documented that the medical costs of a death by AIDS are far less than a death by heart attack, stroke or coronary artery disease.

210. This places healthcare workers in a Catch-22 where they are liable if they fail to report and they are liable if they misreport. This dilemma is exacerbated by their lack of authority to fully investigate the matter and their concern that any report would do more harm than good because of the manifest lack of comprehensive treatment for the mother. A cogent discussion of these and other mandatory reporting issues can be found in Sandra Bolton, Comment, *Maternal Drug Abuse as Child Abuse: Potential Liability for Health Care Professionals*, 15 W. ST. U. L. REV. 281 (1987).

When comprehensive treatment is unlikely to be available, the physician is acutely aware that a report could harm much more than help the child, mother and family. To get enough data to treat the mother, the physician needs her trust. As the physician loses her trust, he loses the capacity to address the medical needs of the rest of the family. Doctors become the practical equivalent of Bureau of Indian Affairs officers for the abandoned tribes of addicted mothers. They must betray those whom they are paid to serve. Their capacity to prevent fetal harm by educating future mothers about contraception, drugs and prenatal care is severely compromised. By removing the *option* to report from the physician, we remove one of the most important tools to convince the mother to enter into appropriate treatment.

Within the theory of abandonment proposed herein, the physician would be most likely to report the subgroup of drug using mothers with which he or she has the least relation or affinity. Within the population of all mothers testing positive for drugs, physicians are more likely to report those traditionally abandoned by medical practice; namely, mothers who are poor and nonwhite. This precise result occurred in a careful study of mothers in Pinellas County, Florida.[211] Of the mothers testing positive, Black mothers were reported 9.6 times more frequently than White mothers. This reporting bias continued regardless of income and of whether the mother was in a public hospital or a private obstetric office.

Voluntary reporting to a confidential registry is a much better option than mandatory reporting. Taking the legal, constitutional, medical and epidemiological data into account, it appears that the fetus is likely to receive the most protection if the mother has maximum access to pre-

211. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990). In March of 1987, Florida adopted a policy mandating reporting of births to women who use drugs or alcohol during their pregnancy even if there was no evidence of drug or alcohol use at the time of birth. The Florida child abuse statute, 415.503(9)(a)(2) (West 1992), defines "harm" to include "physical dependency" of a newborn infant upon almost any (controlled) drug. The county surveyed was Pinellas County which contains St. Petersburg. The population pool was approximately 860,000. Nine percent of the county residents were minorities. Twenty-seven percent of the residents were over age 65. Fifty-five percent were between the ages of 18 and 64, and in late 1988, approximately 6,256 families were receiving AFDC benefits. The National Association for Perinatal Addiction Research and Education conducted a study in which, during a one-month period, urine samples were taken from 390 women entering five public health clinics and 335 women entering private obstetrical care. 14.8% of all the women had positive toxicologic results for alcohol, marijuana, cocaine and opiates.

For the white women, 15.4% of the urine samples were positive. For the black women, 14.1% were positive. *During the following six months, only 1.1% of the white women were reported, while 10.7% of the black women were reported. Black women were 9.6 times more likely to be reported to authorities.* The black women had a somewhat higher incidence of alcohol and cocaine use than white women. The white women were alone in opiate use and used more marijuana and slightly less alcohol and cocaine.

This reporting bias prevailed regardless of income. In private obstetricians' offices, although black women made up less than 10% of the patient population, they represented 55% of those reported for substance abuse during pregnancy. Likewise, at public health care clinics, black women made up 44% of the patient population but they represented 67% of those reported for substance abuse. *Id.*

natal, obstetric and follow-up care to address any deficit she has in parenting, job and interpersonal skills. Such comprehensive healing programs are only effective where there has been full and complete disclosure of prior personal, interpersonal and substance abuse problems. Such disclosure will not occur where the physician is required to report evidence of substance abuse. Making the requirement to report voluntary maximizes the pediatrician's capacity to advocate for the mother, address her substance abuse problems and substantially increase the likelihood that her fetus will not be subject to further harm.

Under this standard, the physician would have the option to report the mother if, in his or her estimation, the mother willfully refuses to participate in treatment and rehabilitative programs designed to benefit her and her child. Nationally, physicians should be protected from liability for such reports in order that they would be able to fully provide all the information needed by the courts when legal action on behalf of a child is under consideration.

E. *Child Abuse, Neglect and the Minnesota Model*

Between 1963 and 1965, all fifty states and Washington, D.C. enacted child abuse reporting laws.[212] Thus far, only six states have defined specific sanctions for maternal substance abuse. Illinois, Florida and Oklahoma require reporting of children exposed to drugs during pregnancy or born addicted to illegal drugs.[213] Massachusetts requires filing a child abuse report for any child "determined to by physically dependent upon an addictive drug at birth."[214] Massachusetts did not include fetal alcohol syndrome as did Indiana, whose child abuse and neglect statute includes any child born with fetal alcohol syndrome or addicted to a controlled substance.[215]

New Jersey passed the most comprehensive statute allowing state

212. Connolly & Marshall, *supra* note 131, at 155 (citing *Civil Liability for Failing to Report Child Abuse*, 1 DET. C.L. REV. 135, 135-36 (1977)).

213. ILL. ANN. STAT. ch. 23, para. 2053(e) (Smith-Hurd Supp. 1991)(as amended by P.A. 86-274 § 1 and P.A. 86-659 § 1, which included in the definition of "neglected child," newborns whose blood or urine contains controlled substances or metabolites thereof.) and ch. 37 para. 802-3(1)(c) (Smith-Hurd 1990); FLA. STAT. ANN. § 415.503(9)(a)(2)(West Supp. 1991). The statute covers "physical dependency of a newborn infant upon any drug." The statute goes on to say "no parent of such a newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency;" OKLA. STAT. ANN. tit. 21, § 846 (West 1989) only applying to a child "who appears to be born in a condition of dependence on a controlled dangerous substance." § 846(A). This totally ignores the more serious threat of alcohol in favor of the more politically acceptable scapegoating of "controlled dangerous substances."

214. MASS. ANN. LAWS ch. 119 § 51A (Law Co-op. 1975 & Supp. 1991).

215. IND. CODE ANN. § 31-6-4-3.1 (Burns Supp. 1991). Addiction in a newborn is presumably determined by the observation of Neonatal Abstinence Syndrome (NAS) in the newborn. However, NAS can take up to 14 days to appear, and by then most women are far from the hospital. One effect of the statutory scheme in Florida, Indiana, Illinois, Oklahoma and Massachusetts is to push the mother into a medically unsupervised withdrawal before she appears in the hospital. The trauma to the fetus from such withdrawal is immensely greater than a medically supervised attenuation of drug use. The result can be an infant harmed more by the state's attempt to protect it than by the harm itself.

intervention wherever the "welfare" of the child "will be endangered" and expressly including "an application on behalf of an unborn child."[216] The breadth of this statute opens the door to take action against the mother for any activity that would cause harm to the child. This could include the mother's physical activity, the degree of hazard in the work place or pre-existing medical conditions. It appears to create constitutional legal rights for an unborn child and includes other problems suggesting that it is unlikely to pass constitutional muster if challenged.

In contrast, California, the state with perhaps the most experience in attempting to treat substance abuse, has passed a narrowly tailored statute giving physicians the option to report drug-dependent children to state authorities. Contrarily, California creates a parental duty to provide food and medical care to an unborn child under its child support statute.[217] Thus, California's child support statute has sanctions regarding neonatal support that do not exist in the child abuse and neglect statute.

A Legacy of Frustration: Neglect Proceedings for Maternal Addiction. Ohio[218] and New York[219] courts made strenuous efforts to contain and control seriously addicted mothers. A finding of neglect could be based on actual impairment (NAS) or imminent danger of impairment.[220] In 1985, the New York Family Court in *In re Danielle Smith*, jumped over the

216. N.J. STAT. ANN. 30:4C-11 (West 1981).

217. This is a criminal penalty found in the California Penal Code. CAL. PENAL CODE § 270 (West 1988).

218. In Cox v. Court of C.P., Franklin County, 537 N.E.2d 721 (Ohio App. 1988), the court focused upon a pregnant mother of four who abused cocaine and heroin and had failed no less than 23 drug screenings during her pregnancy. The father was also an addict and had been hospitalized recently for a drug overdose. The couple's four children were under state care pending placement with other families. The juvenile court ordered the mother to cease using illegal drugs that would endanger the fetus and further, that she submit to a medical examination to determine the health of her baby. The mother failed to do either, and the court filed a motion for contempt. The Ohio Court of Appeals found that the juvenile court lacked jurisdiction over the mother and, therefore, lacked jurisdiction to compel her to take any action on behalf of her unborn child. *Id.* at 724-25.

219. New York has repeatedly found that maternal drug use constitutes neglect. In *In re* Vanessa F, 351 N.Y.S.2d 337 (Sur. Ct. 1974), the court found that "[a] newborn baby having withdrawal symptoms is prima facie a neglected baby under the Family Court Act, Article 10, and custody of such a child can be withheld from the parents responsible until after court hearings and other safeguards." *Id.* at 340. The state of New York is, like many other states, notably short of treatment facilities for women, particularly pregnant women. This case does not clearly address whether the mother and father were capable of caring for the child, who was undergoing withdrawal from drug exposure. If the mother and father were capable, then the court action was basically punishment for the mother's prior drug use.

220. In another case where the mother was addicted to alcohol, barbiturates and cocaine and refused to enroll in either alcohol or drug treatment program, neglect was found after the child was born prematurely and suffered from mild withdrawal symptoms. *In re* "Male" R., 422 N.Y.S.2d 819 (Fam. Ct. 1979), the court could find neglect either upon the finding of actual impairment of physical condition or imminent danger of impairment. In this case there was a finding of imminent danger but not actual impairment. Although the child was certainly born with some impairments, the court focused on past conduct of drug use and the refusal to accept treatment as evidence of the mother's present incapacity to provide adequate care for the child.

Fourteenth Amendment to find that an unborn child is a "person" entitled to protection under the Family Court Act, Article 10.[221] In *In re Sharon Fletcher*, the Family Court rejected *Smith* and came in line with the position advocated by the pediatric community for decades, which was that prenatal drug abuse *alone* does not establish neglect.[222]

The *Fletcher* case in New York[223] parallels California's *In re Steven S.*,[224] where the court found that a fetus is not a person under the California Welfare and Institutions Code. This led the California Attorney General to conclude that "[a]cts or omissions by a pregnant woman or others which adversely affect the well-being of a fetus do not constitute child abuse. . . ."[225] The frustration of the judges in these cases is almost palpable, and each case points inescapably to our legal system as part of the problem of protecting children. The National Council of Juvenile Court Judges recently finished an impressive set of protocols addressing these issues and concluded, in part, that juvenile court was not the proper forum for addressing these issues.[226]

Such child neglect and child abuse law are the principle tools our legal system uses to protect children.[227] Harm resulting to infants from maternal drug abuse, poverty and hopelessness is not likely to be judged child abuse, because child abuse standards usually hinge on a finding of

221. 492 N.Y.S.2d 331 (Fam. Ct. 1985). The court found that the pregnant mother's abuse of alcohol created an imminent threat of impairment of the child. This finding was made with little evidence of actual impairment, only the "possibility that the child might have fetal alcohol syndrome." *Id.* at 333; *see also* Connolly & Marshall, *supra* note 131, at 166. The *Smith* case well demonstrates the fearful potential for family-shattering state intervention when there is no clear harm to the child.

222. 533 N.Y.S.2d 241 (Fam. Ct. 1988). The court held that maternal prenatal drug abuse alone cannot form a basis for a finding of neglect. Prenatal drug abuse *alone* does not establish a mother's inability to parent any more than drug use after pregnancy establishes a parent as unfit to parent. The court concluded that the state statute did not intend to regulate a pregnant woman's body or to control her diet, medication, exercise or smoking habits on behalf of a fetus.

223. It is reported that New York City also no longer takes legal action against pregnant women for actions which could endanger their fetuses. Connally & Marshall, *supra*, note 131, at 171.

224. 126 Cal. App.3d 23 (1981).

225. Connolly & Marshall, *supra* note 131, at 171 n.92 (quoting Attorney General, Informal Opinion, Child Abuse Reporting Law, Dec. 11, 1986).

226. The National Council of Juvenile and Family Court Judges noted:

> In many cases involving substance abuse, social service agencies often unnecessarily take custody of a baby shortly after birth while the baby is still in the hospital. Judges are then asked to detain the baby based solely upon the results of a positive toxicology screen . . . . A positive toxicology screen and confirmatory test are not sufficient basis for removal of a child.

NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DRAFT PROTOCOL FOR MAKING REASONABLE EFFORTS IN DRUG-RELATED DEPENDENCY CASES 20 (Sept. 1991).

Testing only indicates one exposure to drugs but no evidence of drug dependency. Dependency can be determined only by waiting and observing the child for signs of NAS (neonatal abstinence syndrome). The risk of serious trauma and harm to the child and the child's mother from over-reacting to a positive toxicology screen cannot be overstated. The National Council notes that "[j]uvenile and family court proceedings are not necessary, and probably not desirable in most situations involving substance-exposed infants." *Id.*

227. Sam S. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection for the Fetus*, 60 S. CAL. L. REV. 1209, 1209 (1987). This is one of the best early articles arguing for the state to act in a preventive fashion in behalf of the child.

some sort of willful mistreatment. While abuse focuses on a willful act, neglect focuses on a failure to act. The first problem with this standard is that there is no consensus as to the definition of what "act" means.[228] Whereas a physician might see neglect as malnutrition, dehydration, frost-bite or chronic illness, a case worker in the home may look to adequacy of food, furniture and safety. Teachers may report lack of cleanliness, slurred speech, body odor and inadequate clothing, while lawyers will attempt to demonstrate the cause and effect linkage between the act and the harm complained of.

The second difficulty with neglect is that it demands proving that something did *not* happen. Physicians are increasingly reluctant to testify that a parent's failure to do "x" resulted in neglect "y."[229] For example, a child clearly showing signs of malnutrition may reflect a failure of our educational system more than a failure of the mother.[230]

Similarly, when a teacher reports significant language and mathematic deficits, is the mother to blame if she is a member of our rapidly increasing population of illiterate parents? What responsibility does our school system have for the mother's illiteracy and the resulting difficulties faced by her child?[231] This highlights one of the central flaws inher-

228. For an excellent review of neglect from a medical, political and somewhat legal perspective see Ray E. Helfer, *The Neglect Of Our Children* 37 PEDIATRIC CLINICS N. AM. 923 (1990).

229. *See id.* at 932.

230. For example, one physician reported as follows, regarding a six-week old baby that had lost weight since birth, an undeniable sign of poor nutrition:

> Multiple visits to the clinic were made, and various laboratory tests done. The baby was malnourished and the mother genuinely concerned. She insisted she had been following all the directions given by the resident physician, particularly those relating to feeding the infant. When the baby was fed in the clinic he ate well and no evidence of serious illness, other than the malnutrition, was ascertained. Finally, the child was placed in the hospital, and during a 3-day period the infant began to gain a significant amount of weight. On the 5th day, I sat down with the mother to explain the outcome, which she had already ascertained. Her baby had done well in the hospital. On the one hand, the mother was happy, conversely, she was upset. The latter placed a certain degree of guilt in her mind. I asked the mother to show me exactly how she fed the baby, from the very beginning (something I should have done days or weeks earlier). She demonstrated how she mixed the formula, filled the bottle to the brim, placed the nipple on the bottle, held the baby, and fed the baby—all done correctly. When the milk reached the "6 mark" on the bottle, she stopped feeding. I asked her why she stopped, because the baby had only taken 2 ounces. She indicated that the doctor had told her to give her baby 6 ounces. When I realized that the milk level had moved from 8 to 7 to 6, it was only then that I tumbled to the fact that the mother had a serious cognitive problem, which was masked by her excellent social interactional skills. When I pointed out she should feed the baby until the milk reached the 2 mark, she said "If he wanted me to give him 2 ounces, why didn't the doctor tell me?"

Id. at 927.

231. Hot water burns on children are another source of neglect. The temperature of hot water from hot water heaters may vary from 120 to 170 degrees Fahrenheit. In congregate housing, the tenants have no control over the temperature of the hot water. It has been clearly demonstrated medically that a young child spending less than five seconds in 130 degree F water can receive third degree burns. Water out of the tap at 170 degrees F could produce severe burns in a much shorter period of time. *Id.* at 929 (citing K. Feldman, *Child Abuse by Burning in* THE BATTERED CHILD (C. Henry Kempe & Ray E. Helfer eds., 1980)).

Should the parent be held responsible if the landlord maintains the water at a very high temperature

ent in our child protection laws: *while every party present is represented, every responsible party is not present.* Child protective services have no capacity to act against landlords who fail to provide habitable premises, to act against public health authorities who are unable to provide minimal necessary daycare or to act against federal and state authorities who provide food stamps and other supplements that are not sufficient to meet basic nutritional needs.[232] While the medical community often sees neglect as a problem involving the responsibility of many institutions, the legal system, through child protective services, sanctions only the parents.

For more well-to-do parents, allegations of abuse and neglect are increasingly used in acrimonious divorces, often resulting in harm to the children that is much greater than they allegedly received. The difference in standards of proof, variances in investigation and the conflict between different bodies of law in divorce court and "abuse/neglect" court creates vastly more heat than light and often a significant dissipation of limited state resources.[233]

Racial and Economic Bias in the Diagnosis of Abuse. In a carefully controlled study, physicians and nurses were presented with medical histories for children with a variety of injuries. These histories were consistent except for variations in race, socioeconomic status and the degree of injury. The clinicians and case workers were asked to diagnose whether they felt this child's injury was an "abuse" or an "accident." The study results show that the diagnosis of abuse was significantly more likely in families identified as the poor or minority.[234]

---

in order to reduce his overall heating costs? Are parents to be held fully responsible for risk of hot water burns that they were not fully aware of? For a discussion of "[r]ights, [r]esponsibility, and [p]revention" see Helfer, *supra* note 228 at 930-31.

232. See, for example, the president's decision in 1981 to classify ketchup and relish as vegetable for the purpose of meeting minimum health standards for children's school lunches. *Condiment Capers*, FORTUNE, June 25, 1984, at 125. The regulation was rescinded in September 1981. *Id.* at 126.

233. As one physician recalled:

> Not long ago I testified in a case of two children whose parents were both professionals. They were in the process of getting a divorce, and a nasty custody battle was unfolding. They accused each other from time to time of inappropriate care of the children when they were under their respective supervision. The children were seen in the pediatric clinic with certain manifestations, both physical and psychological, that resulted from inappropriate care over a rather long period. In compliance with the child abuse and neglect reporting law a report was made to Protective Services. They, in turn, felt that the court should be involved with the ultimate decision regarding the outcome. A petition was filed detailing the problems. Because the divorce and custody hearings where the responsibility of the circuit court, the case was heard in this court. On my arrival in court to testify I found that the lawyers for the parents who handled the divorce were not sufficiently comfortable with issues of neglect and had little experience in this area. Consequently, each parent had two lawyers, one for the divorce and the other for the neglect charges, the children had their lawyer, and the Department of Social Services had their lawyer. As their testimony unfolded and the cross-examination by all six lawyers occurred nothing short of chaos developed. Everyone was upset and angry at everyone else. Those who were hurt the most were the children. The legal system was completely paralyzed.

Helfer, *supra* note 228, at 933.

234. Richard O'Toole et al., *Theories, Professional Knowledge, and Diagnosis of Child Abuse in* THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 349, 353 (David Finkelhor et al. eds., 1983).

The same bias towards the most abandoned is found in both physician reporting and physician diagnosis. To the insult of bias is added the injury of the child abuse rescue mentality. The rescue mentality devoted to severely abused children sometimes spills over into the swift and summary removal of babies who have been drug-exposed with no other evidence of harm.[235] On the other hand, some commentators believe that the threat of a dependency action after birth may encourage the mother to seek prenatal care and treatment to address her drug and alcohol abuse.[236]

Although there are certain constitutional difficulties for findings of neglect based on behavior during pregnancy, the practical difficulties loom even larger. Imagine a state agency charged with protecting a fetus pending delivery. How can this agency insure that that fetus is adequately cared for without the cooperation of the mother? Further, if the mother refuses to cooperate, how then would the agency protect the fetus, particularly if the mother's experience of the state agency's intervention creates additional stress and harm for the fetus? Either way, in the event of an uncooperative mother, the state faces tremendous liability problems not to mention the significant possibility of creating further harm in its well-intentioned attempts to help.

The Model of Minnesota. The state with the most exhaustive statutory provisions and best availability of treatment is Minnesota.[237] Minnesota allows intervention by the state during pregnancy to prevent harmful drug use[238] and defines child neglect to include the actual use of controlled substance where a health care professional has reason to believe a pregnant woman used to take a controlled substance during pregnancy. Every health care practitioner is required by law to file a neglect report with the local welfare agency if he or she knows or has reason to believe that a pregnant woman has used "a controlled substance for a

235. *See* Connolly & Marshall, *supra* note 131, at 175-76 n.105 (citing Reyes v. Superior Court, 75 Cal. App. 3d 214 (1977)), which concerned a mother addicted to heroin who was warned by public health nurses. Ms. Reyes continued to use heroin through the end of her pregnancy and her twin boys were born addicted and subject to neonatal abstinence syndrome. Charges against Ms. Reyes were dismissed by the court on the grounds that the statute was not designed to apply to either a fetus or the conduct of a pregnant woman. Approximately nine years later, charges were brought against Pamela Ray Stewart for willfully failing to furnish proper medical care for her baby by ceasing her use of controlled substances. Charges were dismissed on the grounds that the legislature did not intend the law to be used as a mechanism to regulate the conduct of a pregnant woman.

236. *See* Connolly & Marshall, *supra* note 131.

237. Minnesota is also alone in the nation in having a reported surplus of treatment beds. Authorities in the state represent that Minnesota has solved the indigent treatment funding issue by having the treatment dollar follow the client to whichever treatment is recommended. In other words, a pregnant mother could be placed in any treatment program in the state. Under the state reimbursement policy, the state pays 85% of the cost and the county of the woman's residence pays 15% of the cost. To date, Minnesota is the only state with a statute that was passed to specifically protect fetuses from prenatal drug exposure.

238. For a careful rationale for prenatal intervention under Minnesota and Illinois law, see Kevin Drendel, Comment, *When Self Abuse Becomes Child Abuse: The Need for Coercive Prenatal Government Action in Response to the Cocaine Baby Problem* 11 N. ILL. L. REV. 73 (1990).

non-medical purpose during the pregnancy."[239]

Physicians caring for pregnant women have a duty to test for drugs if a woman's medical condition could possibly be due to use of controlled substances. The results of such tests, whether positive or negative, must be reported to the agency.[240] Also, any individual, although he or she is not a health care professional, may report maternal drug use. Neglect extends past the point of birth. The duty to report extends to any toxicology tests performed on the fetus or the mother at birth, the child's postnatal behavior (such as NAS) evidencing withdrawal symptoms at birth and developmental delays during the first year of life.[241]

Under the statutory framework, multidisciplinary teams are supposed to determine the least restrictive option for care for the mother and her fetus. Expert testimony must present actual findings in behavioral terms rather than clinical conclusions, and the findings must be supported by specific witnessed events. There is a clear set of client rights regarding visitation, communication, access to records, access to advocates and access to care. Also, the statute requires after care planning between social service agencies and a treatment facility if the individual mother is committed. Those committed are sent to licensed care treatment facilities that imply that certain minimum standards have been met. Child welfare agencies require referral to treatment and prenatal care for the mother if appropriate, and civil commitment is required if the mother fails to follow the treatment plan.[242]

The primary shortcoming of the Minnesota statute is that it focuses only on the harms of the historically abandoned. The greater harm of alcohol and prescription drugs is not addressed. Secondly, the statute deters a mother's use of health services, prenatal care and parental education classes. Mothers will attempt to cease all drug use before going to the hospital, even though this could endanger the fetus. The Minnesota statute may be subject to significant circumvention or non-cooperation by the pediatric community. The single change that would most impact the health of mother and child would be to take the Minnesota services out of the context of dependency or juvenile court.

Minnesota, the state most endowed with treatment facilities, has only sixty slots for women with children. According to Mr. Wayne Raske, Alcoholism Specialist for the State of Minnesota, treatment would be vastly more effective if reporting was not mandatory. The goal should be to find and assist the troubled mother, not report her to authorities.[243]

In sum, our present legal model for child protection is relatively

239. MINN. STAT. ANN. § 626.5561(1) (West Supp. 1992).
240. MINN. STAT. ANN. § 626.5662(1) (West Supp. 1992).
241. MINN. STAT. ANN. § 626.556(2)(c) (West Supp. 1992).
242. MINN. STAT. ANN. § 626.5562(2) (West Supp. 1992).
243. Telephone Interview with Wayne Raske, Alcoholism Specialist, Chemical Dependency Program Division, Department of Human Services, State of Minnesota (June 12, 1992).

well-equipped to deal with parents who willfully injure their children. However, it is poorly equipped to prevent harm to the much larger population of children who are exposed to the abandonment (or neglect) of poverty, malnutrition, inadequate medical care, parental educational deficits, unemployment and the often resulting overuse of drugs. Thus, what is needed is both a new standard and a new forum in which that standard should be exercised. The present form of court is too adversarial, too costly and too parochial.[244] One step in this direction can be found in the Dependency Mediation Projects being tried in Los Angeles[245] and Connecticut.[246]

IV. Abandonments by Professionalism, Medicine and Law

Within the realm of the professional intellect, abandonment is rarely intentional or malicious. Since it is historical, it appears benign. It is maintained by intellectual neglect: the continuing avoidance of examining certain questions and assumptions. One such question is: How does a country with the greatest number of doctors and lawyers per capita, and the most sophisticated justice and healthcare system, manage to not address the fact that 20% of our families lack basic health care, legal representation and personal safety? Regarding our assumptions, we should ask, "What abandonment of compassion has occurred to create an 'intellect' that does not perceive or a 'reason' that is not compelled to address such a problem?"

The legal and physical apartheid in South Africa is sustained by an emotional apartheid within many white Afrikaaners. A similar but more subtle emotional apartheid suffuses our professions and their schools. For example, looking to headings by which legal knowledge is organized yields evidence of lingering bias. A search within LEGALTRAC by one commentator under the topic of "sexual preference" contained a "see also" to "sexual deviation," which, in turn led to "sexual perversion" and "sexual masochism."[247] Within "civil rights" there is a heading for "sex discrimination" and "race discrimination," but no heading combining the two to capture the common experience of many women of color.[248] The abandonment of women has been highlighted by feminist scholars who convincingly contend that threads of patriarchal dominance suffuse the fabric of law.[249] The abandonments of motherhood,

244. In that only the parental level of responsibility is considered, thus failing to prevent the conditions that contributed to the neglect.

245. *See* Charlene Saunders et al., *Mediation in the Los Angeles County Superior Court Juvenile Dependency Court: An Approach to Designing a Program That Meets the Interests and Concerns of All Parties*, 29 FAM. & CONCILIATION CTS. REV. 259 (1991).

246. *See* Margaret Shaw & W. Patrick Phear, *Innovation in Dispute Resolution: Case Status Conferences for Child Protection and Placement Proceedings in the State of Connecticut*, 29 FAM. & CONCILIATION CTS. REV. 270 (1991).

247. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and The Triple Helix Dilemma*, 42 STAN. L. REV. 207, 213 n.42 (1989).

248. *Id.* at 219.

249. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on A Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) and the more wide ranging work of CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

race, economic circumstance and addiction have not been fully addressed. Another level of empathic abandonment is found in the remarkable de-legitimation of emotion and intuition in professional education. Using law school as an example, great emphasis is placed on cultivating the capacity to consider horrid cases without any display of emotion. Cultivating the capacity of analytic detachment is part of learning how to "think like a lawyer." There is no curriculum for learning how to "feel like a lawyer" in the terms of increasing one's empathy for and capacity to represent the abandoned. In many law school classes, it is close to taboo to respond to a question with the words "I feel . . . ."[250] A class devoted to sharing one's inner hopes for and fears about professional practice would be a cornerstone of all law school curricula if the goal was to help lawyers to work *together* to lessen injustice. The ethic of intellectual solipsism that pervades law schools continues to make such classes un-needed and unlikely. The sad result is that law school demands an abandonment of empathic capacity.[251]

Many law schools demand an abandonment of well-being. Whereas 3 to 9% of individuals in industrial nations suffer from depression (and pre-law students fall within this normal range), depression among law students quickly increases within six months of entry and throughout law school.[252] Depression is joined by abnormally high levels of hostility, phobic anxiety, paranoid ideation, somatization and psychoticism.[253] Compared to medical students, the psychopathology of law students is greater on every measure except somatization and phobic anxiety.[254] This constellation of psychological attitudes is not unlike that found in battered women.[255] The abandonment felt by many students from their teachers is stunning. One survey of law students found 84% feeling that no professor was taking a special interest in their academic progress, 71% had no professor they could turn to for advice on personal matters and 72% felt that no professor took a personal interest

250. As Professor Meltsner notes:

> While only an extreme anti-intellectual would disregard the importance of objective thought, rational deduction and empirical proof to the practice of law, a method of training lawyers which ignores the intuitive, the emotive, and the personal belongs not to the history of science but to the history of pseudoscience.

Michael Meltsner, *Feeling Like a Lawyer*, 33 J. LEGAL EDUC. 624, 633 (1983). The concept of "feminist reason" also touches on this issue. *See* Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988). Professor Minow wisely notes that feminist reason does not cover the needs of all women but is a start in a healing direction.

251. The baseless arrogance of some (but *not* all) law professors results in needless savaging of first year students. There are few forums for confronting the professor with the harm of his or her arrogance or for defending a fellow classmate battered by needlessly derisive questioning.

252. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers* 1986 AM. B. FOUND. RES. J. 225, 247.

253. *Id.* at 247.

254. *Id.*

255. The emotional distance found in many battered women may correlate with their high frequency of battering their children. Law students assuming the parental role of professor who were harmed as students would be more likely to pass on the harm to their students and be less likely to be aware of the emotional abuse they were inflicting.

in helping them get a job after law school.[256] A similar frequency of paternal abandonment is found among poor addicted mothers. Student-faculty relations in law school are worse than in any other graduate school.[257] Law school workloads and environment needlessly impair the student's capacity to create and maintain family or other primary relationships.[258] As one commentator noted:

> For years professional education was America's pride and joy. . . . That era is now over. Today even top-ranked schools face increasing criticism. . . . In large measure they have brought it on themselves. Moreover, the culprits are members of their faculties, who have turned the schools into vehicles for their personal pursuits. . . . [T]he schools care surprisingly little about the needs of their own students, of those of the larger society our professions supposedly serve.[259]

The high incidence of depression in law school continues into legal practice and is joined by alcohol abuse.[260] It is difficult to expect lawyers to empathize with alcohol addiction among the poor if they cannot address it among their peers. The needless stress of law school continues into law practice with staggering demands for billable hours by many large firms. This leaves little time or opportunity to address the legigenic harms of law and legal practice.

Even if time were available, the narrow view of "case and controversy" under Article III of the constitution limits access to the court.[261] Physicians wishing to intervene as a party[262] in a suit by addicted mothers for adequate drug treatment programs would have difficulty establishing their "significantly protectable interest."[263] Doctors suing on behalf of their impoverished clients for decent housing and healthcare would likely fail to meet the Article III standard under *Schlesinger v. Reservists Committee to Stop the War*, which held that " 'abstract injury is not enough.' "[264] The doctrine of standing creates a further hurdle for the

256. Benjamin et al., *supra* note 252, at 249.

257. *Id.*

258. *Id.* at 244.

259. *Id.* at 250 (citing Andrew Hacker, *The Shame of Professional Schools* 32 J. LEGAL EDUC. 278, 278 (1982)).

260. A two state survey found 33% of practicing lawyers suffering from clinical depression, alcoholism or cocaine abuse. G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 242 (1990). A 1988 ABA survey found that 27% of the professional discipline cases involved alcohol abuse. *Id.* at 243.

261. U.S. CONST. art. III.

262. FED. R. CIV. P. 24.

263. *See e.g.*, Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (D.C. Cir. 1984); Natural Resource Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 578 F.2d 1341, 1344 (10th Cir. 1978).

264. 418 U.S. 208, 219 (1974) (quoting O'Shea v. Littleton, 414 U.S. 488, 494 (1974). *Schlesinger* concerned a challenge by citizen taxpayers to members of Congress who were also members of the Reserves. Plaintiffs contended this violated the incompatibility clause of the constitution. U.S. CONST. art. I, § 6, cl. 2. Their claim was ruled nonjusticiable because, in part, they lacked a concrete injury. Doctors suing for the poor could be disqualified for lacking a concrete injury.

altruistic professional.[265]

Through the lens of history, many common medical and legal practices of the eighteenth and nineteenth century appear, at best, misguided and, at worst, barbaric. Our present day efforts regarding maternal drug abuse may, in time, share a similar fate. Every new drug and medical technique, like every new law and legal doctrine, creates unintended side effects, impairing society's capacity to heal itself. Similarly, making the practice of law and medicine a *profession*, while intended to protect the public, had the "side effect" of severely limiting public access to medical and legal knowledge and practice. Much as the early Catholic church interposed the clergy between *laity* and their access to God, faith in professionalism interposed doctors and lawyers between *lay* people and their access to health and justice. Each profession must be aware of the harms created by its professionalism. Medicine has progressed more in this regard than law.[266] In 1924, the term *iatrogenic* (physician created) was coined to describe the harms caused by the doctor, not the disease.[267] Iatrogenic medicine is the study of such harms and the effort to limit them.[268] As there is no legal equivalent to iatrogenic, "legigenic" will be coined[269] to describe the harms created by lawyers and our legal system. Here, the focus is upon harms to the "abandoned," specifically, the drug exposed child and his or her mother.

Professional abandonment occurs on three levels. Primary abandonment occurs when the problem is not recognized at all. Secondary abandonment occurs when the problem is recognized and placed outside of one's professional responsibility. Tertiary abandonment occurs when responsibility is accepted but adequate resources are not provided to remedy it. To explore the above, three questions will be addressed: How does our concept of professionalism abandon? How

265. To have standing to sue one must allege actual injury, caused by the defendant and redressable by court. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984); Warth v. Seldin, 422 U.S. 490 (1975). *Warth* held against "generalized grievance[s]" and in favor of "some threatened or actual injury resulting from the putatively illegal action . . . ." 422 U.S. at 499 (quoting Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973)).

266. Part of the Hippocratic Oath is "never do harm to anyone." Lawyers, in contrast, are pledged to not advance any cause not reasonably founded in law and fact. This is a much looser standard, which tolerates an immense amount of nuisance or questionable litigation. The practice of such litigation is a bit like the practice of medicine in the eighteenth century where leeches were applied to bleed the client of his infirmity. Although the client did not always fare well, the leeches usually did.

267. "Caused by medical treatment: said esp. of symptoms, ailments or disorders caused by drugs or surgery." WEBSTER'S NEW WORLD DICTIONARY 595 (1988).

268. Iatrogenic injury is part of the larger category of adverse events that includes all injuries caused by medical intervention rather than disease. Adverse events include injury from substandard hospital conditions, failure to medicate etc. *See, e.g.*, Troyen A. Brennan et al., *Hospital Characteristics Associated with Adverse Events and Substandard Care*, 265 JAMA 3265 (1991).

269. This term is rooted in the Latin, *lex, legis*, a noun for "law" and the adverb *legitime*, meaning "lawfully." It is preferred over the Latin, *iurisconsultus*, for "lawyer" because the root term, *ius*, refers more to "right" than "law." Here, the effect of law and lawyers is the issue of concern.

does the profession of medicine abandon? How does the profession of law abandon?

A. *Professional Abandonment*

Professions are normally distinguished from other jobs by having a duty to provide care regardless of compensation. The International Code of the World Medical Organization declares, "a doctor must practice his [sic] profession uninfluenced by motives of profit." The AMA's Principles of Medical Ethics assert that "the principle objective of the medical profession is to render service to humanity" and that "a physician should limit the source of his [sic] professional income to medical services actually rendered by him [sic] or under his [sic] supervision, to his [sic] patients."[270] The desire for "profit" within "profession" is increasingly criticized[271] as a cause for the decline of professionalism.[272] However, the linguistic reality is that both our concepts of "profit" and "profession" have abandoned much of their original meaning.[273]

---

270. Arnold S. Relman, *What Market Values Are Doing to Medicine*, ATLANTIC MONTHLY, Mar. 1992, at 99.

271. *Id.* Dr. Relman, a former editor of the *New England Journal of Medicine*, has forcefully argued that market values and the force of technology are ruining medicine and harming society.

272. The sentiment is not recent, as the oath of Hippocrates declares that physicians should serve only "for the benefit of the sick." In the twelfth century the physician Moses Maimonides reportedly created a prayer asking God to prevent the "thirst for profit" or "ambition for renown" from interfering with medical practice. *Id.* at 99.

The devotion of Dr. Maimonides was likely influenced by the Knights Hospitallers, a monastic order founded by Gerard in 1099. Gerard's revelation was to expand the concept of hospice from caring for travellers to healing the sick regardless of their wealth and giving dignity to the death of the mortally ill. The result was a "hospital" devoted to providing rest for the weary, healing for the ill and opening to all who served and were served. For the professionals who flocked to this order, one goal was to feel that each knock on the door of the hospital was also a knock on the "inner door" of their hearts. The "knights" attempted to heal both the illness of the body and the illnesses created by the values of the marketplace. As the equivalent of today's best medical professionals, they served the abandoned before all others. *See, e.g.* Albert R. Jonsen, *Our Lords, the Sick*, Address at the Sixteenth Annual Meeting of the American Osler Society (Apr. 12, 1986) (citing EDGAR HUME, THE MEDICAL WORK OF THE KNIGHTS HOSPITALLERS OF SAINT JOHN OF JERUSALEM (1940)). Today, their spirit no longer flows in the mainstream of medicine. Instead it flows through Mother Teresa, Physicians Without Borders, Physicians for Social Responsibility and a number of others.

273. The Latin term *profiteor* means the act of professing to art, science or law as well as making a public promise, pledge or declaration. CASSELL'S LATIN ENGLISH DICTIONARY 180 (1987). This definition is very similar to the definition of "profess" found in WEBSTER'S NINTH COLLEGIATE DICTIONARY 939. The Ancient Greek term, *prophetes* meant "speaks for" and was a root of our modern concept of "prophecy." Original prophecy was not just "foretelling" by divine inspiration. It was also a very lawyerly "forthtelling" where the Word or Law was applied to a specific circumstance. EERDMANS BIBLE DICTIONARY 851, 853 (1987). Forthtelling involved a careful projection into the future of a particular application of the scriptural law. As law became secular, appellate law assumed the function of secular "forthtelling."

Our modern concepts of "profit" "prophet" and "profession" may be rooted in the concept of service to a higher cause. As one's word was one's bond (prophets and professionals vow not to misspeak fact or law) one's promise was one's profit. From this perspective, profit and profession have suffered a divorce from the concept of a higher ethical duty. As profit has deflated into mere "material gain," professionalism has declined into entrepreneurialism. Thus, as professions lose their relation with their higher calling, it becomes easier to sidestep their duty to the poor they vow to serve.

It is unfair to lay the problems of the drug-exposed child solely at the door of law or medicine. Both professions have a small percentage of practitioners working very hard for the poor for scant wages, and a larger percentage doing occasional work for no pay. The knotty problems of maternal drug use also involve failures by the professions of politics, economics, social work, public administration, business and the clergy. No single profession can be held to blame for our shameful lack of universal healthcare, appropriate drug treatment for mothers, affordable housing for the poor, *adequate* schooling and realistic sex education and family planning.[274] Precious resources that should be devoted to treatment are diverted to investigation, sanction and punishment. The act of turning the skills families need into esoteric "professional" fiefdoms exacerbates the problem. Each profession defines and handles the family differently. Professionals are united in their inscrutability and divided in their loyalty. Returning to the metaphor of drugs, "polydrug" abusers are the most difficult to diagnose and treat because of the exceedingly complex interactive effect of the drugs. Similarly, problems involving the participation of more than one profession ("polyprofessional") are most difficult to diagnose and treat. This is not because the needs of poor families have changed. Their needs for adequate food, shelter and social support have been with us for many millennia. What has not been with us until recently is the concept of a profession that places its maintenance and intellectual autonomy ahead of the maintenance of the human family.

The Duality of Denial. Another way to address the polyprofessional problem is to address how each profession ignores pressing social problems. Again, the metaphor of drugs is apt.

Drug addiction treatment literature is rife with descriptions of alcoholics and others who deny that the drug is the problem. In the professional community, there is the denial that one's profession is part of the problem and the denial that one's profession is responsible for *acting* on the problem. A few points of denial follow.

First, there is a denial that our concepts of health and justice contribute to the abandonment of our children.[275] Second, there is a denial that our unreasoned bias towards (or perhaps fear of) the addicted, the poor, minorities and gays allows us to ignore our continuing harm to their families. Third, there is a denial that our War on Drugs is waged only on controlled substances, ignoring the vast market forces promoting the greater harm of cigarettes, alcohol and prescription drugs and

274. However, the AMA has yet to endorse a universal comprehensive healthcare program and the ABA and the insurance industry have yet to endorse a universal legal care program.

275. For example, the rising tide of reluctance within the pediatric community to report impaired mothers because of lack of certainty that the outcome for the child will be positive. A recent National Incidence Study show that physicians reported only two-thirds of the cases for which they suspect maltreatment. Howard Dubowitz, *Pediatrician's Role in Preventing Child Maltreatment*, 37 PEDIATRIC CLINICS N. AM. 989 (1990). For the family in need, CPS has become more a source of stigma than a source of service. *Id.* at 991.

failing to provide comprehensive prenatal care, daycare, health care and support for struggling families. Fourth, there is a denial that our social, political and economic policies since the 1980s increasingly harm many of our children. Less than 1% of the funds spent on the War on Drugs is devoted to treatment of mothers.[276] Funding for the War on Drugs[277] has taken precious funds away from treatment programs and other programs designed to reintegrate the addicted mother back into society. The first casualties of the War on Drugs are the abandoned. Since this "war" excludes the most damaging drug, alcohol,[278] and fails to provide adequate and affordable treatment, it actually functions as a war on the abandoned.[279] While the United States is the only country claiming the right to invade other countries to catch drug traffickers, it is the largest consumer of cocaine, a major supplier of chemicals to manufacture cocaine and weapons to arm the cartels. The greatest profit from cocaine is made in the United States, not by cartels abroad.[280] Our historic anti-drug policy is fueled by the fantasy that the threat comes

276. The Council of Juvenile and Family Court Judges notes, "[t]he paucity of effective services for women and children still constitutes a national emergency." NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 226, at 38.

277. After spending $25 billion on drug interdiction and drug related incarceration in this "war" there has been no significant reduction in drug availability, drug cost, drug use or the healthcare costs related to drug use. NATIONAL COUNCIL ON ALCOHOL AND DRUG DEPENDENCE, THE WAR ON DRUGS: FALIURE AND FANTASY: WHAT HAS THE $35 BILLION INVESTMENT BOUGHT?, 2, 3, 4 (March 1992) [hereinafter NCADD]. While our "war" has reduced casual drug use, it has failed to reduce addiction or drug related crime. *Id.* at 1. We have doubled our prison population since 1980 (an increase of one million which are mostly drug related). An estimated 75% of those incarcerated, on probation or parole need comprehensive treatment and aftercare yet such services are available to only 1% of federal inmates, 10% of jail inmates and 20% of state inmates. *Id.* at 2. Today, up to 3 million people need, but cannot get, assistance for drug problems. The failure to provide care creates immense costs. The United States Department of Health and Human Services estimates that the social costs of alcohol and drug abuse were $140 billion for 1985. *Id.* at 1 (citing U.S. DEPT. OF HEALTH AND HUMAN SERVICES, THE ECONOMIC COSTS OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESSES: 1985 27 (1990)).

278. While over 100,000 die from alcohol abuse per year (liver cirrhosis, alcohol poisoning, and other alcohol injuries) NCADD, *supra* note 277, at 4., the total number of deaths from drug abuse in 1988 *and* 1989 was 14,016. CENTER FOR DEFENSE INFORMATION, THE DEFENSE MONITOR, Vol XXI, No. 1, at 5 (1992).

279. We are waging a war, by and large, only on those we have abandoned: the politically poor and powerless here and abroad. Clausewitz defines "war" as the total commitment of a nation. CENTER FOR DEFENSE INFORMATION, *supra* note 278, at 2. Our "war" targets selectively without the United States as it does within. The Medellin Cartel of Columbia was allowed to use "our" Contra supply channels to smuggle cocaine into the United States. *Id.* at 3. The United States support of Afghan guerrillas in 1979 also supported opium growers that resulted in a "flood of heroin" to this country. *Id.* at 2. Normally, using the military is the last resort. Now it is the first. In 1981, our Posse Commitatus Act of 1878 (which precluded the use of military for domestic law enforcement without specific consent of Congress) was amended to allow military support of anti-drug efforts. *Id.* at 3. This led to the Anti-Drug Abuse Act of 1988, which allowed direct military aid to the precise foreign police that have been terrorizing Central and South American democracy movements. The 1988 act waived the 1974 ban on such aid. Thus, our military aid is often channelled away from drugs and towards those anti-democratic militias not approved by our government. Taking Columbia as an example, only 16% of the aid was channelled to the National Police yet they were responsible for over 80% of all drug seizures. The rest of our "anti-drug" aid was used by the Army for its own ends. *Id.* at 7.

280. *Id.* at 2, 3.

from "foreign" producers,[281] which leads us to spending billions to reduce the drug *supply* and doing little to reduce *demand*. The policy of the United Nations International Narcotics Control Board is precisely opposite of ours:

> A critical and intractable component of the drug problem is the reduction of illicit demand. Unless progress toward this end can be made, sustained successes in other dimensions of the drug equation can only be temporary since otherwise one source of supply or one particular drug will inevitably be promptly substituted for another. Accordingly, the Board reiterates that Governments should redouble their efforts to enable accelerated progress to be made in reducing drug abuse.[282]

Fifth is the denial that our vast investment in institutionalized systems of law and health care has eroded the cohesion of our communities, our families, and our resulting capacity to heal ourselves. The sixth denial is the denial of the greatest rate of child poverty on statistical record in the United States. In 1974, 14.4% of children were born in poverty. That figure has now shot up to 20%. In contrast, 25% of our elderly were in poverty in 1970 and 12.6% in 1985. Thus, the poverty rate for our elderly has *decreased* approximately 50%, while the poverty rate of our children has *increased* approximately 40%.[283] For total government spending on the elderly relative to spending on children, the ratio remained approximately three-to-one in favor of the elderly from 1960 through 1979.[284] After 1975, AFDC benefits available to children were reduced along with medicaid benefits. *By 1988, the total government expenditure ratio between our elderly and our children was ten-to-one in favor of the elderly.*[285] While benefits to the elderly have remained relatively constant, benefits to children have slid precipitously, creating the greatest harm to those most in need.

The final denial is a denial of a 300% increase in the number of female heads-of-household between 1959 and 1985.[286] The literature contains much about the "feminization of poverty." While this argument is certainly warranted, it is a misconception to conclude that all children are in poverty because of abandonment by fathers. *Over 70% of the increase in the number of poor children in poverty occurred in families where the father was present.*[287] While poverty certainly plagues single mothers, it

281. In his recent testimony before Congress, Professor Donald Mabry of Mississippi State University stated: "For almost a century American antidrug policy has blamed foreigners for the American drug disease, thus preserving the myth that Americans are naturally good but corrupted by evil foreigners." *Id.* at 2.

282. *Id.* at 7 (quoting REPORT OF THE INTERNATIONAL NARCOTICS CONTROL BOARD FOR 1991, UNITED NATIONS (1991)).

283. Paul H. Wise & Alan Meyers, *Poverty and Child Health* 35 PEDIATRIC CLINICS N. AM. 1169 (1988).

284. *Id.* at 1171.

285. *Id.*; *see also* Samuel H. Preston, *Children and the Elderly: Divergent Paths for America's Dependents*, 21 DEMOGRAPHY 435, 436-37 (1984).

286. Wise & Meyers, *supra* note 283, at 1170.

287. *Id.*

extends to many two parent families. Approximately 25% of the families with married parents would be poor if they depended on their father's income alone. Two parents working minimum wage jobs are frequently unable to meet legitimate health care and other needs of their children.

Doctors vs. Lawyers: The Malpractice Debacle. Some members of the medical community have long argued that frivolous "the sky's the limit" insurance costs and medical malpractice lawsuits have forced the increase in medical costs. According to Jury Verdict Research, the median malpractice award has *decreased* 13% since 1985.[288] Since 1986, healthcare costs have increased by 65%. Less than 1% of the current healthcare costs of $817 billion are due to malpractice costs. Families USA, a Washington, D.C. group, found that the increase in malpractice premiums accounted for only .1% of the increase in healthcare costs.[289] While the insurance industry is certainly to blame for unreasonable premium increases in the past, much of the problem now centers on the increasingly troubled relations between doctors, patients and lawyers. Lawyers step in when the physician-patient relationship fails, and failure is more likely when general distrust of doctors increases.[290] In *Tomorrow's Doctors: the Path to Successful Practice in the 1990s*, Dr. Benjamin Natelson suggests that the problem of malpractice is a *medical* not a *legal* problem. He relates one case concerning a forty-year-old female diabetic who complained of leg pain. Her internist endocrinologist (specializing in diabetes) referred her to an orthopedist to no avail. As her pain increased, her internist sent her again to the orthopedist and then to a neurologist. Her pain increased and she lost partial use of her leg. Despite X-rays and bevies of tests, the stress fracture in her leg was not discovered. Natelson concluded, "[i]n hindsight, . . . the problem was a simple one. Each doctor was focusing on the area in which he was an expert. . . . Everyone was wearing the superspecialist's blinders."[291] Natelson feels this case is a "major indictment of our methods of teaching medicine" and warned new doctors:

> You must take off the blinders that the medical school has put on; more importantly, you must analyze the patient's problem in the context of the patient as a whole. Had this been the case,

288. Colman McCarthy, *Bungling Doctors Shouldn't Blame Lawyers*, SEATTLE TIMES, Feb. 14, 1992, at 6.

289. *Id.* Some malpractice insurance companies continue to charge high premiums then return part of them to subscribers as "dividends" and "credits." For example, physicians' insurance, covering 60% (4300) of the private physicians in the state of Washington, has had no increase in malpractice premiums since 1988, and voted to return $1 million as dividends and $4 million as Loss Experience Credits to their policy holders. The insurer reports returns to subscribers of $14 million since 1989. WASH. ST. MED. ASS'N REP., Dec. 1991, at 7.

290. The distrust of doctors stems not just from their individual practice. It also stems from the failures, frustrations and skyrocketing expense of healthcare. Lawyers are similarly blamed for the failings of the legal system. The writer takes no position regarding whether lawyers or doctors are "at fault" for medical malpractice litigation. However, lawyers and doctors *are* at fault for the increasing tension and distrust between the two professions. As each profession demeans the other, the client is the first to suffer.

291. McCarthy, *supra* note 288.

> and if this woman had not been viewed as someone with a sick 'leg,' 'nerve' or 'pancreas,' perhaps no malpractice[292] would ever have transpired.[293]

Similar problems occur in law, even though specialization is not as well developed. Specialization usually pays better and requires less work to stay current with the literature. However, poor mothers and families need general practice doctors and lawyers to address the broad range of their needs. Unfortunately, the general practitioner is an increasingly endangered species in both professions. From the perspective of the fetus at risk, the net result of specialization is a loss of knowledge and service. We must accept a simple gestalt: The whole of the problem is greater than the sum of the specialists.

A Double Standard for Professionals. Substance abusing doctors and lawyers who have neglected their clients have more procedural safeguards and rehabilitation treatment opportunities to avoid losing their right to practice than substance abusing parents have to avoid losing their right to parent. Although dependency statutes in all states have broad declarations of concern for the well-being of children, practically speaking, these concerns are not adequately supported. Defense counsel for dependency hearings have staggering case loads, scant staff support and an almost punitive level of compensation. States lack the funds to provide comprehensive treatment or care for addicted women, so the state often finds itself intervening on behalf of the child against a parent, and demanding significant change by that parent while being unable to provide significant resources to effect that change.

A mother or father who has lost a child to foster care frequently cannot afford the legal cost of fighting for the child's return. In most states, the state provides counsel for the child's removal, but not for his or her return. Return of the child from long-term foster care is the rare exception. In contrast, the return of the impaired[294] doctor and lawyer to practice is the norm, not the exception.[295] The clearest example of

---

292. The failure of the medical and legal community to self-police its ranks is a major contribution to malpractice. One ABA study of New York and California found 50 - 70% of disciplinary cases involved alcohol abuse. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, L. & PSYCHOL. REV. 9 (forthcoming 1992) (citing STANDING COMMITTEE ON BAR ACTIVITIES AND SERVICES, ABA MAP PROGRAM: ALCOHOL AND DRUG ABUSE PROGRAMS FOR LAWYERS AND JUDGES, Tab 1 Introduction/ Overview, 1 (1980)). Alcoholism amongst attorneys is twice the norm of adults in the United States. Benjamin et al., *supra* at 3 (citing NATIONAL CLEARINGHOUSE FOR ALCOHOL AND DRUG INFORMATION, ALCOHOL AND OTHER DRUG ABUSE AFFECTS THE LIVES OF MILLIONS OF AMERICANS, THE FACT IS . . . (Oct. 1988)). Substance abuse amongst doctors is more difficult to detect because doctors have immense access to controlled substances.

293. McCarthy, *supra* note 288 (quoting BENJAMIN NATELSON, TOMORROW'S DOCTORS: THE PATH TO SUCCESSFUL PRACTICE IN THE 1990S).

294. When professional persons are hooked on drugs or alcohol, they are rarely called "addicts." They are "impaired professionals" and are sheltered within a much larger group of professionals whose impairment results from disease, age or injury. Mothers of drug exposed infants are not afforded this comfort. By the same mechanism which the professionals are protected, the abandoned are shamed.

295. Benjamin et al., *supra* note 292; Emil J. Menk et al., *Success of Reentry into Anesthesiology Training Programs by Residents With a History of Substance Abuse*, 263 JAMA 3060 (1990).

this is in the field of anesthesiology, where the doctor has a constant access to drugs. Until 1980, a history of drug abuse precluded entry into an anesthesiology specialty.[296] In 1983, the American Society of Anesthesiologists' Committee on Occupational Health of Operating Room Personnel concluded that addicted doctors should be "encouraged and supported" to return to anesthesiology after successful treatment, followup and receipt of a positive prognosis for long-term recovery.[297] This laudable position was taken in the face of a relapse rate of over 60% by opiate-abusing anesthesiologists.[298] *In contrast,* a comprehensive community based program for "impaired" (addicted) mothers reports that 80% of the babies are born drug free.[299] Unlike professional drug rehab programs for professionals, future funding for the poor mothers' programs is uncertain at best.

That some pregnant mothers addicted to opiates, cocaine or other substances return to these drugs after a month or two of in-patient treatment is often used to rationalize the judgment that these mothers "do not care" for their children and that they are "hopelessly" addicted. A review of lawyer and physician abuse of alcohol indicates that these professions require far more medical attention before they successfully controlled their addiction to alcohol, a substance that is far less addictive than cocaine.[300] In one study physicians averaged 4.7 months of in-patient alcohol and drug related care before achieving sobriety. Perhaps national policymakers should be more patient with addicted single

296. Menk et al., *supra* note 295, at 3060.

297. *Id.* at 3060.

298. *Id.* at 3061.

299. Interview with Dr. Suzanne Dixon, Professor of Pediatrics at the University of California at San Diego (May, 1992), regarding the results after one year of a pilot program in San Diego, California.

300. According to Dr. LeClair Bissel, in his pioneering study, "[a]lcoholism is the most common, serious illness likely to affect a professional in the first fifteen years after completing graduate education." LECLAIR BISSEL & PAUL W. HABERMAN, ALCOHOLISM IN THE PROFESSIONS vii (1984).

Bissel and Haberman studied 407 professionals who admitted being alcoholics and who had been abstinent for at least a year such that their recollection and their prior alcohol history was more clear. The group consisted of 97 physicians, 55 attorneys, 100 nurses, 49 dentists, 56 college women and 50 social workers. They were extensively interviewed, and 97% were interviewed four years later. Most were in their late 40s, and 20% were Phi Beta Kappa and honor students and 60% graduated in the top third of their class. Most drank regularly from their late teens and became drunk regularly by age 26. The lawyers and doctors admitted that alcohol interfered with their lives and their practices at least four years following their graduation. Nevertheless, it took them approximately ten more years to definitively act on their alcoholism.

Forty percent of the lawyers and doctors received extensive psychiatric treatment before achieving sobriety. Sixty-eight percent of the men and 58% of the women were institutionalized at least once for alcoholism. Physicians were admitted for in-patient treatment for drug and alcohol care an average of 6.3 times and *spent an average of 4.7 months in hospital treatment for their drug problems. Id.* at 72. *The sample of 407 professionals reported over 1,500 in-patient hospital admissions before achieving sobriety.*

Twelve percent of the doctors and 17% of the nurses reported addiction to hard narcotics procured through pharmaceutical sources. Twenty-seven percent of the male attorneys were addicted to other drugs and 43% of the male physicians were addicted to other drugs. Eighty-four percent of that population used soft narcotics or "mood altering drugs," and 97% of the population reported using alcohol and mood altering drugs. Thirty-five percent of the sample had at least one alcoholic parent and approximately 30%

mothers who often have diminished IQs, scant job experience, limited education, limited literacy and who suffer from a history of domestic violence and sexual abuse.

B. *Medical Abandonment: Iatrogenic Harm*

Primary medical abandonment is medical ignorance. For example, it was medical doctrine until the 1940s that Blacks did not suffer heart attacks.[301] This misconception has been remedied for males but not for females. "Primary care professionals don't think women get heart disease," states Joanne Howes of the Society for the Advancement of Women's Health Research.[302] Medical ignorance is acute regarding the impact of drugs on women in general and on pregnant women and fetuses in particular. Major heart disease studies, such as the United States Physicians Study that examined the effects of an aspirin a day, did not include women. Government mandated Phase I clinical trials of new drugs rarely include women of childbearing years.[303] Thus, *in the United States, drugs are approved for public use without testing their effects on pregnant mothers and their fetuses*. Doctors prescribing new drugs do so on a prayer. "Women have more fatal drug reactions than do men, and they seem to be greatest during the reproductive years," states Dr. Susan J. Blumenthal, chief of the behavioral medicine program of the National Institute of Mental Health.[304] Here, abandonment takes the form of gender es-

reported having an alcoholic sibling. Twelve percent reported having a child who is alcoholic.

Ninety-one percent of the sample reported loss of control and professional judgment while under the influence of alcohol. Sixty-two percent drank during work hours. Eighty-eight percent reported experiencing blackouts, which were defined as periods where they made legal or medical decisions and had no recollection of their actions. Eighty-six percent of the sample reported making errors in professional judgment. Thirty-nine percent had auditory hallucinations, and 33% had visual hallucinations while on the job *Id.* at 75. Given this degree of impairment over an average of a decade, it is interesting to note that only 23% of the doctors and only 33% of the lawyers were ever warned about their drinking by either their employer or their professional society. Only seven percent of the doctors and none of the lawyers lost their license to practice. *Id.* at 76.

On re-interview four years later, 80% reported drinking again on one or more occasions and 48% of the men and 50% of the women reported using drugs other than alcohol. While this study does not document the incidence of alcohol abuse amongst the professions, it starkly illustrates the tremendous difficulty a sample of our professional peers have in dealing with drug problems.

Doctors and lawyers are on the front lines of the war on drugs. They are the best educated individuals in our society regarding the dangers of addiction and the many punishments that can result from drug and alcohol abuse. Many of them reported driving drunk and being pulled over but not being arrested because of their status as physicians, lawyers and judges. *Id.* at 69. Only 12% of the sample lost their license. *See also* Thomas J. Crowley, *Doctors Drug Abuse Reduced During Contingency Contracting Treatment*, 6 ALCOHOL & DRUG RES. 299 (1985-86); Michael A. Bloom & Carol L. Wallinger, *Lawyers and Alcoholism: It is Time for a New Approach*, 61 TEMPLE L. REV. 1409 (1988).

301. Marguerite Holloway & Phillip Yam, *Reflecting Differences: Health Care Begins to Address the Needs of Women and Minorities*, 226 SCI. AM., March 1992, at 13-16.

302. *Id.* at 13.

303. *Id.* at 13. Part of the rationale is the untested presumption that effects on mostly white males will generalize to women. Another concern is for liability if the drug harms a fetus. Thus, the drugs are tested unknowingly by women and fetuses. The situation is analogous to breast implants.

304. *Id.* at 13. Drug companies may use the question of fetal damage to avoid the cost

sentialism.[305] A similar abandonment led to the public release of thalidomide in the 1960s.

One study found that hospitals with more than 80% minority patients had the highest rate of iatrogenic injury.[306] Although this harm is immense, it is insignificant compared to the harm suffered by those unable to (or too fearful to) secure heath care.[307] Many public hospitals and emergency rooms are no longer able to provide the safety net for the uninsured or underinsured mother. Waits of over six hours for people in need of immediate medical attention are common.[308] At one major California hospital, patients waited an average of 6.4 hours before leaving. Fifty three percent left because they were too sick to continue waiting.[309] Any mother with other children could not likely wait six hours for care due to day care or job demands. Any drug-addicted pregnant mother would likely get too sick to sit for six hours to check on the health of her fetus. The gridlock of our public highways now extends to

---

of testing drugs on women of child bearing age, but Dr. Florence Haseltine, physician and director of the center for population research at the National institutes of Health notes, "What's wrong with giving an abortion to a woman who gets pregnant during treatment?" *Id.* at 16. Apparently, the expense of such clinical trials is too great, greater than the risk of harming thousands in the public. Proving a new drug to be harmful in the general population is much more difficult than in clinical trials.

305. "Gender essentialism" refers to the assumption that the masculine body is representative of all bodies for the purpose of testing drugs. Gender essentialism also occurs in medical diagnosis. For example, thousands of women died from AIDS without being diagnosed as having it. These women were diagnosed as having acute PIDS (pelvic inflammatory disease) and other maladies. Whereas a diagnosis for males with AIDS was well formulated by 1984, the symptoms for females were not ascertained until 1989. The harm of this delay is greater for women (and their children) since according to Dr. Blumenthal, "AIDS appears to have a more virulent course in women; they die sooner after being diagnosed." *Id.* at 16.

Another example is breast cancer, which causes one of nine female deaths each year. Black women have a poorer survival rate than whites. Despite vast investment in and progress towards curing other cancers and heart disease, a recent GAO report found that since 1971 "there has been no progress in preventing the [breast cancer] disease." *Id.* Scant progress has been made in diseases like lupus, which afflicts mostly Black women, and depression, which afflicts twice as many women as men. *Id.*

306. Brennan et al., *supra* note 268.

307. The experience of one Haitian mother trying to secure prenatal care is instructive:

> My friend say go to doctor and get checked. . . . My friend be on the phone much time before they make appointment. They no have space for 30 days.
>
> When I go to hospital, it confusing. . . . I go early, and see doctor late in the afternoon. . . . I wait on many long lines and take lots of tests. I no understand why so many test every time. No one explain nothing. No one talk my language. I be tired, *feel sick from hospital.* I go three times, but no more. Too much trouble for nothing.

Roberts, *supra* note 21, at n.144 (quoting F. CARO ET AL., BARRIERS TO PRENATAL CARE 75-76 (1988))(emphasis added).

308. David W. Baker et al., *Patients Who Leave a Public Hospital Emergency Department Without Being Seen by a Physician*, 266 JAMA 1085 (1991); Andrew B. Bindman et al., *Consequences of Queing for Care at a Public Hospital Emergency Department*, 266 JAMA 1091 (1991).

309. Baker et al., *supra* note 308, at 1088. All patients leaving without seeing a doctor were screened by the researchers. They found that 46% of those leaving were "in need of immediate medical attention," *id.* at 1085, and 71% of those "in need of immediate medical attention" left because "they felt too ill to wait longer." *Id.* at 1088. Contrary to earlier studies, the patients who left had medical needs just as serious as those who stayed. Eleven percent of those who left were hospitalized during the next week, and 49% did not see a physician during the week after they left.

our public hospitals. As a recent *Journal of the American Medical Association* editorial concluded, "[t]he system itself has become 'too sick to wait.' "[310] The writer also noted, "[e]fforts to foster health care competition worsened the problem by encouraging private hospitals to convert medical and surgical beds to more lucrative pursuits (such as *drug- and alcohol-treatment units*)."[311] Overcrowded hospitals, like overcrowded courts, are an important form of institutional abandonment (that often inflicts the greatest neglect upon those most in need of help).

Losing Control of Drugs and Knowledge. Any review of the immense drug treatment literature yields many views and scant consensus. As the health care field becomes more of a business and less of a profession, particular treatment programs and drugs are often propelled into popularity through promotion by the pharmaceutical industry. Over the past three decades, the medical community has lost significant control over the objective knowledge about many pharmaceutical and treatment modalities.[312] The Federal Drug Administration evaluates only the *safety* and *suitability* of the drug to be *marketed.* It has no oversight to prevent or limit over-marketing once the drug is approved for public use. The remaining reference for drugs, the *Physician's Desk Reference* (PDR), is published not by a consortium of university medical schools or the AMA. It is compiled and written by the Pharmaceutical Manufacturers Association (PMA). *The integrity of medicine is undercut when it loses control over the objective evaluation of medications.*[313] New drugs for use in drug treatment programs receive more publicity in journals than treatment programs that do not involve drugs. This is likely due to companies who are anxious to promote their new version of products.[314]

310. Arthur L Kellermann, *Too Sick to Wait*, 266 JAMA, 1123, 1124 (1991) (Editorial). A 1989 poll by the American College of Emergency Physicians found "serious overcrowding" in 41 states and the District of Columbia. A poll by the Emergency Nurses Association found overcrowding problems in all 50 states. *Id.* at 1123. A 1990 survey of 277 public and private hospitals found that 40% of hospitals diverted ambulances away because of overcrowding. Thirty-eight percent reported that overcrowding sometimes caused *admitted* patients to wait 24 hours or more in the emergency room until beds could be found in the appropriate ward. *Id.*

311. *Id.* at 1123 (emphasis added).

312. The *Journal of the American Medical Association* ceased its program of evaluating all new drugs in 1976. With it went the last comprehensive, publicly controlled evaluation of drugs.

313. The promotion of special interest medication is not unlike the promotion of special interest legislation. Each, in its own way, undercuts the integrity of the medical and the political community. Unfortunately, neither physicians nor the public has the right to elect officers within the pharmaceutical industry.

314. For example, if a given drug company discovers a new version of a benzodiazipene (e.g. valium), the drug company is quite likely to commission objective, university-based research to evaluate the efficacy of the drug in the market area sought by a manufacturer. Initially, many medical journals refused to publish such self-serving research even though it was done in a careful and scientific fashion by respected physicians. However, the tenuous economic reality of many medical journals forced them to occasionally publish these articles. The reward for publication came in the form of indirect compensation. If a given journal X published an article reporting favorable results for a new drug, the manufacturer could, with complete legitimacy, request 250,000 reprints to be mass mailed to target physicians, disseminated at conferences and provided by the company's drug sales force.

The legitimate profit realized from such an immense reprint request insured economic survival for many journals for years to come. Unlike *JAMA*, many professional jour-

Conflict of Interest: Entrepreneurialism as Professionalism. The abandonment of professionalism for entrepreneurialism occurs in all professions and is most advanced in medicine, where physicians own an increasing percentage of health care facilities through which they can channel patients and profit from their referrals. The temptation to use one's lab for testing and one's treatment center for treatment is immense. Lawyers are precluded from such associations *within the legal system.*

A 1991 study by the Florida Health Care Cost Containment Board found that 40% of the physicians had invested in joint ventures (diagnostic imaging centers, radiation therapy clinics, ambulatory surgical centers, clinical labs and physical therapy centers) to which they referred patients.[315] These joint ventures were originally promoted on the idea that costs could be saved, services could be improved and physicians would pool their funds to invest in labs in "medically underserved" areas. The study found that "none of the joint venture facilities are located in medically underserved areas" and that "joint ventures do not increase access to rural or underserved indigent patients." The study found that the joint venture clinical labs, diagnostic imaging centers, physical therapy centers and rehabilitation centers charged more, performed significantly more tests or services per patient, employed less-skilled staff and provided only limited access to the poor. Doctor-owned clinical labs performed an average of 3.3 diagnostic tests at the average cost of $43 per patient. Non-physician owned labs performed an average of 1.7 tests (94% less) at a cost of $20. In other terms, the doctor-owned labs performed 94% more tests per patient at a cost of 115% more per patient than labs not owned by doctors. Since almost all the diagnostic imaging centers in Florida were physician-owned, the study compared labs in Miami and Baltimore, where few were doctor owned. Both cities have similar socioeconomic profiles. Miami's rate for multi-

---

nals did not feel comfortable taking advertisements. Without such revenue it was difficult to survive.

Another example of abandonment is the AMA proposal to sell the use of the AMA logo for " 'special reports' . . . including 'live' or 'paper' symposia generated for medical meetings and press conferences sponsored by drug companies." Dennis L. Breo, *Sidney Wolfe, MD—Healing the System or Just Raising Hell?*, 266 JAMA 1131 (1991). Sidney Wolfe, Director of Public Citizen Health Research Group responded to this proposal:

> The AMA is blurring the line between education and advertising. The AMA is acting as a prostitute for the drug industry by wrapping its logo—its stamp of approval—around scientific studies that are otherwise unacceptable. This project is worse than sleazy. The AMA is putting crass commercialism and its desire to make money ahead of the interests of doctors and patients.

Id. at 1131. The AMA has since decided to drop the "special report" but to pursue being paid by the drug industry to distribute drug studies (largely sponsored by the drug industry) that appeared in AMA journals. *Id.* Thus some AMA journals are doubly funded by pharmaceutical companies: first by their advertising and second by republication of industry sponsored articles favorable to their products. The Fellowship Pledge of the American College of Surgeons states, in part, "[m]oreover, I pledge myself, so far as I am able, . . . to shun unwarranted publicity, dishonest money-seeking and commercialism as disgraceful to our profession . . . ." (*quoted in* Albert R. Jonsen, *Asklepios as American Surgeon*, AM. C. SURGEONS BULL., May 1989, 10, at 12).

315. *Referral Profits Line Doctors' Pockets*, PUBLIC CITIZEN HEALTH RESEARCH GROUP, HEALTH LETTER, Oct. 1991, at 1, 2-3.

ple resonant imaging was 67% higher and Miami's computerized axial tomography (CAT scan) rate was 29% higher than Baltimore's non-doctor owned labs.[316] While Florida may have the highest percentage of such joint ventures, a seven state survey by the Health and Human Services' Office of Inspector General found that 25% of the clinical labs and 27% of the diagnostic labs were wholly or partly physician-owned.[317]

The Compromise of HMOs. Health Maintenance Organizations (HMOs) began as a healthy alternative to traditional "fee-for-service" hospitals where the focus was on illness treatment with few services for prevention. HMOs emphasized prevention by keeping a cap on premiums.[318] HMO physicians were thus paid more for keeping patients healthy than for providing treatment.

The 1980s, however, brought a steep rise in *for-profit* HMOs, whose services are very similar to the insurance fund plans they were created to reform. HMOs were 50% corporate by 1986 and 66% corporate by 1989, an increase of 33%.[319] According to the Group Health Association of America's 1990 HMO Industry Profile, 63% now require members to pay out-of-pocket for primary care visits (in addition to their ceiling premiums).[320] For example, in mid 1987, two for-profit HMOs in Champaign County, Illinois dramatically increased premiums and began charging patients an additional $10 for each physician visit. The reasons cited were: that consumers were overusing physicians "like a revolving door;" that many "young healthies" had left, leaving the HMOs with the older, sicker patients; and that prior losses demanded a rate increase in order to remain fiscally sound.[321]

The Champaign County Health Care Consumers did a careful study of the two HMOs from 1984 through 1987 and found that the average number of physician and other walk-in visits *declined* 38.8% from 1984 to 1987.[322] The average number of physician encounters at the HMOs was "comparable to the U.S. population as a whole."[323] The study also found that the percentage of patients over sixty-five years of age was less than the national average and did not increase from 1984-1988.[324] Finally, the study found that the average length of stay at the HMOs declined between 1984 and 1987, and was less than the Illinois and national averages.[325]

The above statistics suggest that none of the reasons cited for the increase were based in fact. Further study revealed that physician *payment* per office visit *rose* 106% during the period where office visits per

316. *Id.* at 2.
317. *Id.* at 3.
318. *For Profit HMOs: Unmanaged Costs*, PUBLIC CITIZEN HEALTH RESEARCH GROUP, HEALTH LETTER, Oct. 1991, at 6.
319. *Id.* at 6.
320. *Id.*
321. *Id.*
322. The visits declined from 7.66% to 4.69%. *Id.*
323. *Id.* at 7.
324. *Id.*
325. *Id.*

patient *declined* 38.8%.[326] From 1984 through 1989, thirty of the forty-five Board Members of the HMOs had a direct conflict of interest where they benefitted from service contracts with the HMOs.[327] "Incentive payments" were made to doctors and hospitals as a reward for reducing the services provided to members. Normally, the savings from lower doctor use would be passed on to patients in the form of lower premiums. Had the HMOs not paid these bonuses, they would have posted healthy profits instead of declaring "losses" which, in turn, created the premium increase and patient out-of-pocket payments.[328]

In sum, the HMOs original mission of "maintaining" health where physicians were paid a flat salary for caring for their clients, was lost. The new mission was "managing" health care where the physician acted as a gatekeeper. According to one presiding judge, "[t]he result was that the fewer referrals a doctor made and the fewer hospitalizations he ordered for his patients, the more money he made."[329]

Gifts, Perks and Marketing Diseases. According to testimony before the Senate Labor Committee, in 1988 the pharmaceutical industry spent over $163 million on gifts to doctors, buffets, banquets and other support of national medical specialty meetings.[330] In 1991, the AMA and the Accreditation Council for Continuing Medical Education (ACCME) issued guidelines discouraging acceptance of gifts and industry sponsorship of continuing medical education seminars.[331] This has chilled promotional practices by some doctors. Others seem to ignore the guidelines. For example, Abbott Laboratories used a sweepstakes to send physicians to a convention. The Collagen Corporation offered an eight-day cruise to the South Pacific to fifty-five dermatologists who had purchased their injectable collagen. Warner Lambert sent its best physician customers on a "Texas style" vacation.[332]

Allowing "disease" to be defined only by medical doctors allows less scrupulous doctors to profit from their diagnosis. "Between 1978 and 1984, the number of for-profit residential treatment centers increased by 350 percent and their caseloads by 400 percent."[333] At the same time, physicians are increasingly ambivalent about diagnosing and treating alcoholism in their patients. One study noted, "[i]ndeed, with the general population, 71% of physicians fell either incompetent or ambivalent about treating alcoholism, and only 21% recognize alcoholism as a primary disease."[334] An even greater boom has occurred in the

326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at 8.
330. *Pharmaceutical Industry Gifts Influence Medical Care*, PUBLIC CITIZEN HEALTH RESEARCH GROUP, HEALTH LETTER, Oct. 1991, at 9, 9.
331. *Id.*
332. *Id.*
333. PEELE, *supra* note 35, at 49 (citing C. M. Weisner, & R. Room, *Financing and Ideology in Alcohol Treatment*, 32 SOCIAL PROBLEMS 167-84 (1984)).
334. Benjamin et al., *supra* note 292, at 4 (citing J.L. Coulehan et al., *Recognition of Alcoholism and Substance Abuse in Primary Care Patients*, 147 ARCHIVES INTERNAL MED. 349 (1987)).

cosmetic surgery "business," wherein the medical model seeks to transform physical difference into a surgically repairable deformity.[335] As Dr. Albert Jonsen, a distinguished medical ethicist, noted:

> Competition as the spirit of medical and surgical care erodes the compassion that has always been medicine and surgery's highest virtue. . . . [C]ompetition will lead to greater exclusion of those persons who will not be profitable patients and to greater solicitation of those who can be induced into being patients. The first will be deprived of needed surgery; the latter will be the victims of fashionable surgery.[336]

The Troubles of Treatment. Many of the iatrogenic ills of medicine find expression in treatment programs. Our over-reliance on narrow forms of treatment has some of its roots in our investment in penitentiaries in the late eighteenth century. One of the institutions that Alexis De Tocqueville, author of *Democracy In America*, found most intriguing was our penitentiaries. They were designed on the assumption that criminality could be diagnosed and, with proper treatment and opportunity for "penitence" (the root motive of "penitentiary"), dealt with.[337] A similar ethic inspired the "abstinence" movement. Both relied on the wedding of sudden conversion with institutional removal. Criminals, drunks and children had to be "removed" from their environments in order to be "saved." Comparing America to our European neighbors, we institutionalize (incarcerate) a greater percentage of our criminals for a longer period, and we "treat" a greater percentage of our addicts for a longer period. Also, we provide in-patient hospital procedures for a greater percentage of birthing mothers than Holland, yet, even correcting for differences in race and class, the United States has a higher incidence of infant mortality than our European counterparts.[338]

If drug addiction were only a medical disease, it would be distributed through our society regardless of social class. *People who are better off are less likely to become addicted.*[339] *Addiction is more likely in a hostile environ-*

335. Nicholas Regush, *Toxic Breasts*, MOTHER JONES, Jan.-Feb. 1992, at 24, 26 (quoting Memorandum from American Society of Plastic & Reconstructive Surgeons, Inc. to the FDA). The most telling recent case of iatrogenic disease is the epidemic of breast implants that have occurred in over two million women in the past twenty years. For example, in a memorandum sent to the FDA, the American Society of Plastic and Reconstructive Surgeons stated, " '[t]here is a substantial and enlarging body of medical information and opinion to the effect that these deformities [small breasts] are really a disease.' " *Id.*

336. Jonsen, *supra* note 314, at 15.

337. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

338. For example, comparing Holland to the United States, 5% of the births in Holland and 24% of the births in the United States were by Caesarean section. In Holland, 36% of the babies are born at home. Most deliveries on hospital premises are in non-medical settings in which the mothers are not attended by physicians and usually leave within 36 hours. Europe as a whole and Holland in particular have a significantly lower rate of infant mortality even though 70% of the births are accomplished by midwives. PEELE, *supra* note 35, at 245 (citing C.A. MILLER, NATIONAL CENTER FOR CLINICAL INFANT PROGRAMS, MATERNAL HEALTH AND INFANT SURVIVAL (1987); M. Wagner, testimony before the U.S. Commission to Prevent Infant Mortality (International Comparisons Section), United Nations, New York, Feb. 1, 1988)).

339. PEELE, *supra* note 35, at 160.

ment and recovery is more likely in a comfortable environment.[340] The medical model of disease—like the legal model of crime—fails to address this painful fact and, thereby, functions to perpetuate it. Drugs are more powerful for those accustomed to being powerless.[341] The narrow medical model of disease may simply shift the mother from dependence on a substance to dependence on a program. Within the model, addiction is not "cured," it is only overcome temporarily through the exercise of "self-control." This concept of addiction is quite similar to our classical concept of "possession" where one must be eternally vigilant to protect against the ever present threat of Satan. "Demon drug" thus replaces "Demon rum." The experience of addiction in our Vietnam veterans suggests that this model is inadequate.

America has developed, over the past thirty years, a vast investment in treatment programs that have become a major source of profit in the health care industry. In-patient "treatment" programs of five weeks range in cost from seven to thirty-five thousand dollars. In contrast to this model is the Alcoholics Anonymous (AA) model, where the alcoholic proclaims he or she is "powerless" over the addiction and will "always" be addicted.[342] Both of the above systems presume that the person is diseased. In AA, the disease is assumed to be incurable and will, like cancer, return unless the afflicted is eternally vigilant. Graduates of the AA school assert that they are only one drink/hit/injection away from complete personal disarray. While such a "disease" model may serve to reduce social stigma for the "impaired" (but not "addicted") professional, it may be the last straw for a mother in poverty whose self-esteem is already dangerously low.

340. Our Vietnam experience demonstrated that much drug use is situational. A large number of our soldiers in Vietnam used narcotics. In one major study of Vietnam addicts, it was found that 73% of those who use narcotics five or more times become addicted. However, the majority of those addicted in the hostile environment of Vietnam got over their addictions simply by leaving Vietnam. More surprisingly, half of the addicted men who returned used heroin in the United States, yet only 12% became re-addicted. The rest stopped short of re-addiction without any form of treatment. Among the group that used heroin extensively (more than once a week for a considerable amount of time) only 50% became re-addicted. PEELE, *supra* note 35, at 167-68 (citing L.N. Robins et al., *Vietnam Veterans Three Years After Vietnam: How Our Study Changed Our View Of Heroin, in* 2 THE YEARBOOK OF SUBSTANCE USE AND ABUSE (L. Brill & C. Winick eds., 1980)). Given that the incidence of homicide in the urban United States is approximately 10 times that of our European counterparts, the situation in some ghettos is, perhaps, not unlike Vietnam. Post Traumatic Stress Syndrome is a response to drive by shootings and chronic gang violence. The soldier of Vietnam faced constant fear, discomfort, isolation, lack of social supports, a lack of security and a lack of enduring relationships. This is almost the same inventory typical of single mothers in poverty. *See e.g.*, ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991) (Kotlowitz movingly documents the loss of childhood, loss of feeling and loss of hope in two young boys growing up in a Chicago Housing Project).

341. Although the cocaine epidemic raged in the middle class in the 1980s, there is clear evidence that, by 1987, it had peaked among members of the middle class and above. With the advent of an affordable type of cheaper cocaine—crack—cocaine addiction became a major problem among the poor.

342. The AA model that began with alcohol has been extended by others to cocaine, narcotics, victims of sexual crimes, victims of physical abuse, children of alcoholics and to the highly amorphous but burgeoning "co-dependents" movement. *See, e.g.*, PEELE, *supra* note 35.

Our medical system has invested so deeply in a limited variety of treatment programs that it becomes financially rewarding to expand the population needing "treatment" by expanding the population that is diagnosed as being "diseased."[343] Insurance companies pay millions of dollars for individuals to enter substance abuse programs, the effect of which are questionable.[344] A parallel structure of impropriety emerges from the professions of law and medicine. Within the law, overzealous prosecutors and legislators realize political profit by criminalizing maternal drug use. Within the medical community, overzealous elements of the "medical-industrial complex" compete to cash in on the possibility of vast state subsidized treatment programs.[345]

Dubious Results for Poor Women. What a few prosecutors and the treatment pushers have in common is that none of their methods is demonstrably effective in deterring or preventing drug and alcohol abuse among poor pregnant women. There is no controlled study documenting significant rates of long term recovery from any established alcohol treatment program, including Alcoholics Anonymous.[346] This may be because most of the established treatment programs have a distinct bias toward the middle class and toward males, wherein the focus is on the substance and the addict and not on the relationships that may influence the addiction. This method of treatment is rarely successful with poor single mothers. It fails to recognize that the mother and her relationships with herself, her family and her community must be the focus of treatment, and not just the mother as an individual. Contrary to common opinion, the typical female alcoholic is not the furtive middle-

343. Between 1977 and 1987, AA membership doubled even though the per capita alcohol consumption in the United States declined. According to John Noble, deputy director of biometry and epidemiology at the Nation Institute on Alcohol Abuse and Alcoholism, "[d]espite moderating per capita alcohol consumption nationwide, the treatment of alcoholism and other chemical dependencies will remain a growth industry well into the foreseeable future." PEELE, *supra* note 35, at 234 (citing M. Korcok, *Alcohol Treatment Industry to Grow as Risk Group Matures*, U.S. J. DRUG & ALCOHOL DEPENDENCE, Mar. 1987, at 1, quoting John Noble)).

344. *See* PEELE, *supra* note 35.

345. A sad example of the health care treatment industry taking advantage of public concerns about drug use is found in the recent experience of Ontario. When the province of Ontario decided to act on behalf of its residents who were addicted to drugs, they found themselves, like most U.S. states, without sufficient treatment facilities. They were approached by a variety of U.S. treatment programs, and the province decided to reimburse U.S. health care programs for 75% of the cost of treatment. Many U.S. "specialty hospitals" not only set up recruitment centers but, according to Canadian health officials, also paid local "patient brokers" to infiltrate Ontario Alcoholics Anonymous groups in search of likely customers. Thus, when a U.S. hospital got a referral, it would pay the broker a commission of $1,500 to $3,000, fly the patient south for a month of counselling and treatment and send the bill to the Ontario health program for $25,000 to $30,000. Some 150 U.S. hospitals were in on the recruiting bonanza. During the 1991 fiscal year, the cost to Ontario for those treatment programs was an estimated $100 million. This is 250 times the province's investment in U.S. treatment in 1980. The efficacy of this effort remains unclear. Geoffrey Cowley et al., *Money Madness: Are Private Psychiatric Hospitals Resorting to Kidnapping in Their Quest for Paying Patients?*, NEWSWEEK, November 4, 1991, at 50, 52.

346. PEELE, *supra* note 35, at 57 (citing F. Baekeland et al., *Methods for the Treatment of Chronic Alcoholism: A Critical Appraisal*, *in* 2 RESEARCH ADVANCES IN ALCOHOL AND DRUG PROBLEMS, 306 (R.J. Gibbons et al., eds. 1975)).

aged suburban housewife.[347] Given our penchant for judging women according to the form of their bodies, it may be no accident that poverty, obesity and abuse team together to dramatically reduce the self-esteem of poor female adolescents and dramatically increase the likelihood they will seek the false solace of a relationship where their boyfriend encourages drug use and sexuality. Treatment programs for the poor demand addressing a different world with different social circumstances.[348]

The federal government may be the only force powerful enough to contain the expanding medical industrial complex. Were we to adopt a federalized program like the Canadian program, there could be an immediate reduction of cost by approximately 25%, the estimated cost for administering our many separate reimbursement programs.[349] Secondly, consolidation of health care benefits would force down drug prices, stemming the tide of production of copycat designer drugs and increasing the use of generics. Instead of investing significant marketing sums in trying to demonstrate that look alike drugs have a differential effect, drug companies would be compelled to compete to produce the best quality versions of effective drugs at the lowest possible price. The more money that can be saved on pharmaceuticals, the more that can be spent on efforts to prevent drug abuse and to cure addiction.

If our goal is to have healthy babies, then no combination and treatment and prenatal care is enough. According to Marsden Wagner, a pediatrician and epidemiologist with the World Health Organization, prenatal care may help the birth outcome to a certain point, but the most critical factors are the *community supports* for the pregnant mother that our health care, welfare and political system increasingly fail to provide.[350]

---

347. Poverty and unsupported parenthood are significant vectors of female alcoholism and obesity. One study found a 900% greater incidence of obesity among poor young women than well-to-do young women at age six. At age 18 this difference was lower; there was a 300% greater incidence of obesity among poor women than well-to-do women at age 18. Albert Stunkard et. al., *Influence of Social Class on Obesity and Thinness in Children*, 221 JAMA 579, 580-81 (1972).

348. According to David Musto, a Yale psychiatrist, "[w]e are dealing with two different worlds here. The question we must be asking now is not why people take drugs, but why do people stop. In the inner city, the factors that counterbalance drug use—family, employment, status within the community—often are not there." PEELE, *supra* note 35, at 162 (citing P. Kerr, *Rich vs. Poor: Drug Patterns are Diverging* N.Y. TIMES, August 30, 1987, at 1, 28).

349. The Canadian health care program has one standardized patient intake form that can be used anywhere in Canada. At present, the competition of 1500 health insurance programs in the United States creates thousands of different reimbursement forms. The General Accounting Office has estimated that 25 cents of each health care dollar is spent on administration. For 1991, the savings created by adopting the Canadian plan could save an estimated $136 billion or $3,919 for each American insured in 1990. The actual cost of health care was approximately $3,011 per person. *The Administrative Cost of Health Insurance*, PUBLIC CITIZEN HEALTH RESEARCH GROUP, HEALTH LETTER, June 1991, at 1.

350. PEELE, *supra* note 35, at 242 (citing M. Wagner, *Testimony Before the U.S. Commission to Prevent Infant Mortality* (International Comparisons Section), United Nations, New York, Feb. 1, 1988).

C. *Legal Abandonment: Legigenic Harm*

Like iatrogenic harm, primary legigenic harm is the failure to see the harm. Secondary harm occurs when the harm is seen but not viewed as a legal problem. Tertiary legigenic harm is the failure to provide sufficient legal resources to understand and remedy the problem.

One primary harm is our heritage of exclusion. Women, Blacks, natives and White men of modest means were not included in our constitutional process or allowed to vote.[351] When Abigail Adams asked her husband, John Adams, to consider the women in the constitution he replied, "We know better than to repeal our Masculine systems."[352] Such "masculine systems" continue to thrive in the hyper-competitive atmosphere of law school, which selects in favor of tough, competitive students and against equally bright, but sensitive and compassionate students. The neglect of collegiality in law school reduces the value of collegiality in practice. *Loss of collegiality begets a loss of compassion.*[353] The needless curriculum overload of law school leaves little time for anything other than what must be done to survive. The same pace continues in many large law firms. The net result is a strong set of forces that support the legal *gladiator* and neglect the legal *healer*. Legal healers[354] are precisely what is needed to address the issues of abandonment. Healing demands the faculty of compassion to fully feel and understand what has been abandoned. Without compassion, there is room only for intellectual understanding. Zora Neal Hurston captures this loss of compassion while listening to jazz with a White friend:

> My pulse is throbbing like a war drum. I want to slaughter something—give pain, give death to what, I do not know. But the piece ends. The men of the orchestra wipe their lips and rest their fingers. I creep back slowly to the veneer we call civilization with the last tone and find the white friend sitting motionless in his seat, smoking calmly.
>
> "Good music they have here," he remarks, drumming the table with his fingertips.
>
> Music. The great globs of purple and red emotion have not touched him. He has only heard what I felt. He is far away and I see him but dimly across the ocean and the continent that have fallen between us. He is so pale with his whiteness and I am *so* colored.[355]

---

351. *See* CHARLES BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION 64-66 (1933).

352. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law* 100 YALE L. REV. 1281, 1281 (1991) (quoting 1 ADAMS FAMILY CORRESPONDENCE 370, 382 (l. Butterfield ed. 1963) (original manuscript dated 1776)).

353. Compassion in the literal sense of experiencing or suffering with (*passion* "from *passus* the past participle of *patior* meaning to suffer, undergo or experience," and *com* from *cum* meaning "with"). CASSELL'S LATIN-ENGLISH DICTIONARY 160 (1977).

354. In the sense discussed *infra* note 411 of making the person "whole." Here, wholeness is the person being wholly known, understood and represented within the law. Understanding here is not primarily intellectual, it is *experiential* in the original sense of sense of understanding which was "standing under."

355. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581,

Explaining the experiences of being a poor mother of color to the average law professor might be even more difficult than explaining jazz. What cannot be explained is what is *felt*. Similarly, it is difficult for the compassionate law professor to truly teach the many abandonments of the law without appearing political, partisan or otherwise non-professional. Law school thus promotes the inversion of professionalism where personal belief (what one professes) is hidden and only intellectual analysis is shared. This zealous faith in a transcendent reason (without compassion) has been with us since Socrates.[356] This ethic of "objectivity," "fairness" and "autonomy" so cherished in the law ignores the reality that mother's lives are not autonomous, they are *relational*.[357] Autonomy is also less valued than relation in many minority families. Law continues to promote a state composed of rational, autonomous individuals where *self* knowledge is vastly more important than knowledge of *another*.[358] Law cannot represent what lawyers cannot feel. It is not enough to let the abandoned into law school if their lives are not reflected in the curriculum. Without transcultural compassion, abandonment will continue.

Secondary legigenic harm can be found in the law's failure to affirmatively protect children from the ravages of poverty, homelessness, inadequate healthcare and undernutrition. *A child has no constitutional right to a safe and nurturant environment.* In *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court held, "[T]he Due Process Clauses generally confer no affirmative right to governmental aid, even when such aid may be necessary to secure life, liberty or property interests of which the government itself may not deprive the individual."[359]

This essentially negative interpretation has the Constitution functioning to insure only that the laws apply equally to people in very unequal circumstances.[360] In this interpretation, doctrines that protect

610 (1990) (emphasis in original) (quoting Zora Neale Hurston, *How It Feels to Be Colored Me*, *in* I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE 152 (A. Walker ed. 1979)).

356. "In this present life, I reckon that we make the nearest approach to knowledge when we have the least possible intercourse or communion with the body, and are not surfeited with the bodily nature . . . . [H]aving got rid of the foolishness of the body we shall be pure . . . ." Plato, *Phaedo*, *in* 7 GREAT BOOKS OF THE WESTERN WORLD 225 (1952). The abandoned in our society are mostly perceived as those who have *not* "got rid of the foolishness of the body." Women, gays and many minorities have been found wanting for being "too emotional," "lacking impulse control," etc.

357. For an excellent article exploring this in more depth, see Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory* 3 WIS. WOMEN'S L.J. 811 (1987). The high failure rate of mothers in drug programs designed for white males can be seen, in part, to the programs failure to understand and address the mother's relations.

358. *See, e.g.*, Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

359. 489 U.S. 189, 196 (1989).

360. One is reminded of Anatole France's observation, "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." ANATOLE FRANCE, LE LYS ROUGE ch. 7 (1894) (*quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 655 (15th & 125th Anniversary ed.)). For capable rebuttals and challenges to this limited role of the constitution, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH L. REV. 2271 (1989-90); MACKINNON, *supra* note 249.

some women harm abandoned women. The right of privacy is construed only to protect a woman's right to *choose* abortion but not the right to *be provided* an abortion if she lacks the funds. Similarly, the pregnant addicted mother may *choose* residential treatment, but she has no *right* to it. In a custody battle, the state has a very passive role of deciding between parents when the mother is well-to-do. When the mother is abandoned, on the other hand, the state may play the adversarial role of trying to take her children from the family.[361] A poor mother's right of freedom of association does not extend to living with her husband if she receives Aid to Families with Dependent Children (AFDC), unless she wishes to lose her benefits.[362] On the one hand, the child has no constitutional right to be protected by the state from an abusive parent.[363] On the other, the child removed from home has no constitutional right to be protected from an abusive *foster* parent.[364] Placing the child in jail provides the child more safety rights than placing the child in foster care.[365] Ironically, the child is afforded more constitutional protections when the parent fights the state than when the parent agrees to treatment and foster care.[366] Even when a right to safe foster care is acknowledged, binding state workers to exercise "professional judgement," the workers can avoid liability for foster care neglect by claiming that they *lacked the funds* to do proper placement.[367] Poor

361. *See e.g.*, Roberts, *supra* note 21, at 1471.

362. *See, e.g.*, KOTLOWITZ, *supra* note 340.

363. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989). "[T]he State had no constitutional duty to protect Joshua against his father's violence . . . ." *Id.* at 202. Joshua Deshaney had been repeatedly beaten by his father. The state had previously taken Joshua out of the home for prior abuse and had issued a steady stream of warnings to the father to remove the child again as third party reports of harm continued. Finally, the abuse became so severe that young Joshua was literally beaten into idiocy (lifelong brain damage). Although the Supreme Court denounced the failures by the state, it found that Joshua had no Fourteenth Amendment right to protection. "The most that can be said of state functionaries in this case is that they stood by and did nothing . . . ." *Id.* at 203. Had Joshua tested positive to a minute amount of cocaine at birth, he might have had a different fate.

364. *See, e.g.*, Daniel L. Skoler, *A Constitutional Right to Safe Foster Care?—Time for the Supreme Court to Pay Its I.O.U.*, 18 PEPP. L. REV. 353 (1991). Skoler provides an excellent review of the immunities afforded state workers and provides a number of grounds for asserting a right to safe foster care.

365. In Babcock v. Tyler, 884 F. 2d 497 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1118 (1990), the child was sexually abused in foster care and the State workers were given complete immunity. In Milburn v. Anne Arundel County Department of Social Services, 871 F.2d 474 (4th Cir.), *cert. denied*, 119 S. Ct. 148 (1989), the child was seriously abused by foster parents and the state failed to remove the child after receiving reports of probable harm. The court found the state had no due process responsibility since the foster parents were not state actors, and since the natural parents *voluntarily* placed the child in foster care. *Id.* at 476.

366. *See* Skoler, *supra* note 364.

367. In K.H. v. Morgan, 914 F.2d 846 (7th Cir. 1990), the court found a constitutional right to a safe environment but excused the state from liability for placement in foster where there was a known risk of abuse. In this case, the child was taken by the state and placed in nine different foster homes over three and a half years during which she was beaten and sexually assaulted. State workers were not held liable because they lacked the funds to monitor and oversee placements. For an excellent discussion of this and related cases, see Skoler, *supra* note 364, at 369-75.

mothers cannot defeat claims of neglect by claiming that they *lacked the funds* to do proper parenting.

While secondary legigenic harms focus on the absence of legal responsibility, tertiary harms focus on the maldistribution and misuse of legal authority. One such harm is the assumption that concentrating all of society's power to deal with fetal drug exposure in the court system will protect the fetus. By way of summary, the prior data suggests the following:

1. Criminalization does more harm than good.
2. Civil commitment, particularly where there are no adequate resources for treatment, support and child care, does more harm than good.
3. Child abuse and dependency laws, although well intentioned, lack the capacity to prevent or to support the mother in dealing with her problems and thus must resort to threats of removal.[368]
4. Each of the above threats cause the mother to be likely to avoid prenatal medical care when it is available and to avoid other involvement with the welfare system, substantially increasing the risk of harm to her fetus. The stigma[369] and trauma of testing[370] and court proceedings could drive an already desperate mother deeper into depression, thereby jeopardizing her capacity to care for her other children.

Another chronic tertiary harm is creating an institutional remedy and later failing to fully fund it. Foundling homes in the 1300s were a major "reform" during which new religious orders were established to serve abandoned children. Once institutionalized, the problem was no longer seen by the community on a daily basis. As the problem faded, the political willingness to pay for it lapsed, resulting in staggering foundling home infant mortality rates.[371] Child protection services and foster care programs were established with similarly high standards, which most states are no longer able (or willing) to fund. Now, we have

368. Only parents are held to be responsible parties. A better model of causality would be epidemiological or ecological: considering the contributions made by the federal government, state government, local community and the parents' prior history. Our legal system is not now inclined (and cannot afford?) to pursue such an inquiry and is, therefore, unable to help many of the children who need help. Under an ecologic model, the closest legal equivalent is the concept of comparative negligence, whereby each party's contribution to the harm is determined. It is unlikely that the juvenile courts would pursue such a line of inquiry.

369. The stigma our legal system places on drug use causes the mother to move further away from her family and other supports who would normally be key factors in her recovery and caretakers of her children if she entered into in-patient treatment.

370. In 1989, one of the most respected groups of physicians on the front lines of dealing with children's needs, the American Academy of Pediatrics, found it to be medically unethical to do drug testing for the primary purpose of detecting drug use. Chavkin, *supra* note 108, at 486 (citing Committee on Adolescence, Committee on Bioethics, and Provisional Committee on Substance Abuse, *Screening for Drugs of Abuse in Children and Adolescents*, 84 PEDIATRICS 396 (1989)).

371. *See supra* note 16.

programs for children harmed by the experience of normal foster care[372] and a medical community increasingly reluctant to report suspected abuse because it will probaly not help the child. A mother's failure to be "cured" by (or reluctance to enter) a narrow treatment program designed for males without dependent children can be evidence of her lack of care or unfitness.[373] The child is rarely helped when the law focuses on the act of substance abuse and not the myriad circumstances that drive the mother to substance abuse.[374]

The addicted mother is not alone in abandoning her child. The profession of law, now nearing 1 million lawyers, fails to meet the manifest needs of many single mothers and most lower income families. The few lawyers serving the poor are poorly compensated and face profes-

372. The primary harm to the infant is a result of the *normal* function of the foster system where the infant is placed in a series of foster homes until adopted or, in rare circumstances, returned to the mother. Such multiple placement creates substantial harm to the infant's ability to attach or bond to a parental figure, which is critical to the child's later capacity to maintain relationships.

One state program in California attempts to remedy the harm of multiple foster placements by providing stable group care over a longer period of time. Many children enter the program with clear evidence of retardation and developmental delay. With proper remedial care, the children can return to a normal level of functioning. Without such care, they would likely remain retarded for life. The cost per child is approximately $48,000.00 per year. *Health Quarterly* (Corporation for Public Broadcasting television broadcast, Jan. 6, 1992).

373. The AMA has stated:

> "[I]t is clear that addiction is not simply the product of a failure of individual willpower." Substance abuse is caused by complex hereditary, environmental, and social factors. . . .
>
> Punishing a person for substance abuse is generally ineffective because it ignores the impaired capacity of substance-abusing individuals to make decisions for themselves. *In all but a few cases, taking a harmful substance such as cocaine is not meant to harm the fetus but to satisfy an acute psychological and physical need for that particular substance.*

AMA Trustees, *supra* note 42, at 2667 (emphasis added)(citation omitted).

374. An AMA Board of Trustees Report found that pregnant substance abusers faced much more family dysfunction than non-abusers. They recorded high levels of depression, anxiety and powerlessness with low levels of self confidence and self esteem. The report states as follows:

> A study done by a center that treats female substance abusers found that 70% of them were sexually abused as children, as compared with 15% of nonsubstance abusers. Eighty-three percent had a chemically dependent parent, as opposed to 35% of the nonabusers. Seventy percent of female substance abusers report being beaten. Ten percent of female substance abusers in one study were homeless, while 50% had occasional housing problems.

Id. at 2668 (citations omitted).

> The California Medical Association has concluded as follows:
> While unhealthy behavior cannot be condoned, to bring criminal charges against a pregnant woman for activities which may be harmful to her fetus is inappropriate. Such prosecution is counterproductive to the public interest as it may discourage a woman from seeking prenatal care or dissuade her from providing accurate information to health care providers out of fear of self-incrimination. This failure to seek proper care or to withhold vital information concerning her health could increase the risks to herself and her baby.

Id. at 2669 (citation omitted).

In regard to the above, the AMA Board of Trustees recommended, in part, that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman towards her fetus are inappropriate," and that "[p]regnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs." *Id.* at 2670.

sional responsibilities almost as daunting as that of single parents. Since the early 1980s, Legal Services attorneys have had their three most effective tools for helping the poor (class action suits, administrative advocacy and legislative advocacy) largely removed by restrictive regulations. For example, prior to 1981, Legal Services attorneys could represent a group lobbying for prenatal care for poor mothers. The regulation allowed representation of a group if its "principle purpose" was to "benefit low-income people." As counsel, they could help draft model legislation, testify at hearings and lobby like any other legitimate political interest. After 1981, the regulation was changed requiring the group directors to be "primarily *composed* of low income people." A group suing for universal prenatal care would likely have doctors, nurses, educators, citizen activists and clergy on its board disqualifying it from representation. 1981 also brought severe budget cutbacks, halving the number of attorneys on staff. This substantially reduced their capacity to assist families in conflict. A divorce action with full representation often brings to light many substance abuse and abuse related problems in their early stages. Once alerted, the family court could order one or both parents into parenting, anger management or substance abuse programs. Legal Services rarely represents any family whose income is over 125% of the poverty line (for a family of four this is $16,750). An immense number of lower and lower middle class families who cannot afford counsel are left without representation. Canada, in contrast, provides counsel to all parents in divorce who cannot afford it.

Another legigenic harm is the unnecessary trauma of divorce and the related failure to pay child support.[375] Approximately 24% of the support awards from divorce remain unpaid. The national unpaid support debt currently exceeds $10 billion. Although divorce may resolve some conflicts, it invariably creates considerable stress for children as the parents spend spare assets attempting to resolve their conflicts. The nature of divorce law awarding custody to one spouse and visitation to another in most states creates an unnecessary sense of peril and an often unnecessary investment of funds in the legal conflict. The unfortunate psychological sequel of one parent "gaining custody" is that the other feels a loss of custody and a reluctance to pay support. Behaviorally, the custodial parent often has to become increasingly restrictive while the non-custodial parent becomes permissive in order to compensate for the perceived loss of parenthood. Of all age groups, preschool children appear to be the most easily harmed, with strong feelings of abandonment, grief, depressed play patterns, nightmares, sleep and eating problems and difficulties in toilet training which later manifest with a significant decline in school performance.[376] Literature demonstrates that the

375. Between 1955 and 1988, the dissolutions granted tripled from 400,000 to 1.2 million and from 1960 to 1984, the number of children involved in divorce increased from 460,000 to 1.1 million. Howard Dubowitz et al., *The Changing American Family*, 35 PEDIATRIC CLINICS N. AM. 1291 (1988).

376. JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980); Joan B. Kelly & Judith S. Wallerstein, *The*

harm children experience as a result of divorce can be significantly diminished if they are allowed to maintain a positive relationship with both parents, provided both parents are fit.[377]

The Structure of Family Law Deters Treatment of Substance Abuse. Many state statutes consider drug or alcohol abuse as grounds for reduction of parental rights. For many women who are economically dependent, a change of custody is catastrophic, since it will also result in a termination of state benefits, the loss of low income housing and loss of family ties where the relation of family is the only enduring relation. Frequently, such women have much less job experience than their ex-husbands and are much less able to earn sufficient income for their surviving children. The result is the breakup of the remainder of the family, forcing the children away from their mother into a series of foster homes, and increasing the likelihood of a repetition of harm to the children. This in turn increases the likelihood of drug and alcohol dependency as the children reach adulthood. In sum, it is fundamental legigenic harm to stigmatize and penalize the behavior of any mother when we fail to provide the comprehensive resources necessary for her healing.

V. TOWARDS A NEW ANALYSIS AND A NEW STANDARD

A. *Problems with Causality*

The failure of the "neglect and abuse" model detailed above stems, in part, from the contribution of the medical community in the late 1960s, which suggested a causilinear relationship between single traumas and lifelong impairments.[378] This approach, the "main effect" model, hypothesized a "continuum of reproductive causality," whereby harms during or near birth were assumed to create significant mental retardation and learning disorders for the remainder of life.[379] This confident medical assertion, that particular acts of abuse or neglect would lead to lifelong damage, fueled the legislative drive to sanction and punish these specific behaviors. However, in 1977, Emmy Werner and Ruth Smith published an exhaustive longitudinal study covering eighteen years of 88% of all 698 children born in 1955 on the island of Kauai. The effect of socioeconomic status (SES) was stunning, with high socioeconomic status erasing early trauma and low socioeconomic status *creating* trauma over time.[380] By the mid to late 70s, the "main effect"

Effects of Parental Divorce: Experiences of the Child in Early Latency, 46 AM. J. ORTHOPSYCHIATRY 20 (1976).

377. Lawrence A. Kurdek & Berthold Berg, *Correlates of Children's Adjustment to Their Parents' Divorces*, *in* CHILDREN AND DIVORCE 47, 58 (Lawrence A. Kurdek, ed. 1983). This is particularly true of the need for maintaining each parent's relationship with the same sex child. *Id.*

378. General reference for this section is: Steven Parker et al., *Double Jeopardy: The Impact of Poverty on Early Child Development*, 35 PEDIATRIC CLINICS N. AM. 1227 (1988).

379. *Id.* at 1228 (citing Benjamin Pasamanick & Hilda Knobloch, *Retrospective Studies on the Epidemiology of Reproductive Causality: Old and New*, 12 MERRILL-PALMER Q. 7, 7-8 (1966)).

380. At age two, children with significant perinatal damage in a high standard of living had IQ's five to seven points below their peers, whereas children with similar perinatal damage in a low standard of living had IQ reduction of 19 to 37 points. Over the course of

model that was used to rationalize much child neglect legislation was seen as a poor predictor of a child's developmental outcome.[381] The medical community began to look to the social environment as the primary source of major risk factors for the ultimate development and well-being of children.[382] The new model of child development replacing the "main effect" model was the "transactional" model of child development, which asserted that *a child's outcome could only be predicted by considering the relationship between the content of the child's behaviors and the context with which they are manifested.*[383] Loosely rephrased, it is the relation or transaction between nature (internal environment) and nurture (external environment), provided that nurture is defined to extend to the entirety of the child's extended family and social and economic environment.

In essence, the model is ecological with each factor modifying and potentiating the next. The following hypothetical case demonstrates this analysis.

B. *Applying an Ecological Analysis: The Case of Louise*

Louise was a fifteen-year-old single mother on welfare who received minimal prenatal care because of inadequate access to hospitals, her depression about being pregnant and the recent disappearance of her boyfriend. Louise had not expected to be pregnant. She had made love with her boyfriend, Cecil, mostly to please him, just as she had used drugs because of the intimacy he felt when they were "high together." Louise's family strongly disapproved of her boyfriend, so she moved to Miami to be with him. His drug of choice was cocaine. Louise had been having irregular menstrual periods as long as she had used cocaine and did not suspect she was pregnant until well into her second trimester. The guilt of knowing she may have exposed her baby to drugs was immense. Louise desperately tried to stop all drug use "cold turkey," creating further distress to her fetus in the form of impaired oxygen supply, impaired blood supply and placenta previa.

On her first prenatal appointment at five months, Louise was or-

---

the study, the high SES children with severe perinatal complications and injuries had IQ's similar to the low SES children with no perinatal complications or injuries. At age 18, only 10% of the children found to have poor behavioral and developmental outcomes had been exposed to significant perinatal stress or injury. The remaining 90% were babies whose only injury was being born into poverty. *Id.* at 1228 & n.90 (citing EMMY E. WERNER & RUTH S. SMITH, KAUAI'S CHILDREN COME OF AGE (1977)).

381. One landmark study of 26,760 infants enrolled in the National Collaborative Perinatal Project carefully traced 158 biomedical and 11 sociobehavioral independent variables and studied the relation between illness and injury at or before birth and intellectual performance at the age of four. Low SES and low maternal education were most predictive of poor performance, high SES and high maternal education were most predictive of positive intellectual performance. Parker et al., *supra* note 378, at 1228.

382. One study found a number of risk factors predictive of IQ at age four which are often related to socioeconomic status: e.g., maternal mental health problems, maternal anxiety, impaired mother-child bonding, low maternal education, unemployment, inadequate social support, and stressful life events. *Id.* at 1228 & n.67 (citing Arnold J. Sameroff et al., *Intelligence Quotient Scores of 4-year-old Children: Social-Environmental Risk Factors*, 79 PEDIATRICS 343 (1987)).

383. Parker et al., *supra* note 378, at 1229.

dered to be hospitalized and lie flat on her back. Louise's child was born three weeks premature. The child, Andy, was hospitalized in the intensive care unit for three weeks. On release, he was quite lethargic, distracted and was showing clear signs of Neonatal Abstinence Syndrome (NAS). Louise was overwhelmed with guilt and depression and lacked any source of emotional support. Andy's lethargy and reluctance to feed redoubled her feelings of maternal failure and deepened her depression, so that positive interactions with him became increasingly rare. Andy, in turn, did not look to his environment for stimulation. He withdrew and rarely vocalized, which further heightened Louise's feelings of despair. By age two, Andy was clearly developmentally delayed.

In the above circumstances, what is the cause of this child's developmental delay? Under Florida or Minnesota law, this child would already have been reported to the authorities and Louise given mandatory treatment for drug abuse when she had already quit. Louise's already teetering self-esteem might topple at the prospect of being publicly found to be "neglectful." Within the ecologic model, Louise's depression, Andy's temperamental passivity, inadequate social support and environmental stimulation, and low socioeconomic status would be factors deserving of equal if not greater attention than Andy's exposure to cocaine in utero. An ecological analysis of Louise's circumstances would consider key factors in the internal "environment" and the external "environment." An example of such analysis is given below.

Internal Environment.

Genetic Endowment. This is the most powerful predictor of a child's cognitive outcome. Studies estimate that genotype contributes to 40-60% of the child's eventual IQ.[384] This is based in part on studies comparing identical twins raised together or apart. One study comparing twins at age thirty-six found that the correlation for IQ for twins living apart was .58 compared with .66 for identical twins raised together. In contrast, a summary of 111 studies found the average IQ correlation for adoptive children raised in the same family from different biological parents to be .30.[385] Within the ecological theory, Andy's genetic endowment affects his responsiveness and his capacity to take advantage of his immediate environment. This genetic influence helps explain why children raised in the same environment develop different intellectual capacities, whereas identical twins raised in different environments exhibit startling similarities in personality and intelligence.

Temperament. Temperament refers to the "how" of behavior, motivation to the "why" of behavior and ability to the "what" of behavior.[386]

384. *Id.* at 1230.

385. *Id.* (citing Thomas J. Bouchard, Jr. & Matthew McGue, *Familial Studies of Intelligence: A Review*, 212 SCIENCE 1055 (1981)).

386. *Id.* (citing ALEXANDER THOMAS & STELLA CHESS, TEMPERAMENT AND DEVELOPMENT (1977)). Thomas and Chess refer to nine temperamental dimensions: activity level, regularity of biologic functions, approach/avoidance tendencies, adaptability, responsiveness to stimuli, intensity of reactions, quality of mood, distractibility and persistence. These

Children with "difficult" temperaments were more likely to have behavioral problems in the first five years of life but, by early adulthood, this relationship had disappeared.[387] The best predictor of outcome was the "goodness of fit" between the child's temperament and his or her environment. In higher socioeconomic status families, more resources and time were devoted to the child's shyness, moodiness or chronic illnesses, such that the child's difficult temperament would not hinder its future. In low socioeconomic status families, a child with the same "difficult" temperament is yet another source of stress to an already stressed system. Children of difficult temperaments in poor (or otherwise stressed) households are more likely to be physically abused than children of similar temperament in more affluent families.[388] In practical terms, many poor children are *penalized* for the same difficult temperament from which many affluent children are *protected*.[389] For example, Andy's withdrawn and listless temperament was perceived as rejection by Louise. Louise was provided next to no support[390] to face being abandoned by Cecil, the father, and being rejected by Andy.

Biologic Insults. Children like Andy are exposed to double damage from their immediate biologic environment, first by being subjected to a higher rate of infection and second by suffering greater harm from the infection. For example, low socioeconomic status increases the risk of contracting cytomegalovirus (CMV) infection. For middle and upper class infants with CMV, there was little effect on their IQs or school failures. However, infants with CMV from poor families had demonstrably lower IQs and 2.7 times greater school failure than their CMV middle and upper class counterparts.[391] Like Andy, infants of poor women are more likely to be harmed by maternal drug use, malnutrition, inter-uterine infections and a host of other diseases. The incidence of low birth weight (below 2,500 grams) babies (like Andy) is two to three times higher and significant developmental harm is greater in low socioeco-

---

authors followed 133 middle class children from birth to adulthood and found 40% with an easy temperament characterized by high adaptability to change, positive approach to new stimuli and a predominantly good mood and 10% with a "difficult" temperament characterized by irregular biologic functions, discomfort with new stimuli and extensive expressions of mood.

387. *Id.* (citing Alexander Thomas & Stella Chess, *Genesis and Evolution of the Behavioral Disorders From Infancy to Early Adult Life*, 141 AM. J. PSYCHIATRY 1 (1984)).

388. *Id.* (citing P. Vietze et al., *Transactional Approach to Prediction of Child Maltreatment*, 1 INFANT MENTAL HEALTH J. 248 (1980)).

389. Affluence, in the familial context, should not be understood as merely monetary. A warm extended family of modest means may be able to supply many of the supports that an affluent family could purchase. An affluent mother would have access to prompt emergency healthcare for her child, whereas the poor mother (with a shift job) would have to enlist three other relatives to help her wait seven hours in the emergency room so her child could be seen. Without a viable extended family, the mother would have to choose between keeping her job and her child's health.

390. Louise abandons herself and her duties as a mother only after being abandoned by many others. Providing Louise respite care, training in parenting, cooperative daycare tied to job skills training and group support for dealing with her sense of depression and loss could break her cycle of increasing depression and despair.

391. Parker et al., *supra* note 378 (citing James B. Hanshaw et al., *School Failure and Deafness After "Silent" Congenital Cytomegalovirus Infection*, 295 N. ENG. J. MED. 468 (1976)).

nomic status groups. In reviewing biologic impacts on children's development, Jack Shonkoff concludes that children in poverty "carry a disproportionate burden of biologic vulnerability that is largely related to the increased health risks of poverty. . . ."[392] Under this ecological model, Andy's biologic vulnerability is significantly influenced by his environment after birth. Key environmental factors are discussed below.

External Environment.

Stress.[393] This concept was adopted by Hans Selye in 1950 to explain a variety of physical disorders that were caused by hypersecretion of the adrenal glands.[394] Similar levels of stress engender more clinical depression among women from lower socioeconomic status than from higher socioeconomic status. Similarly, there is clear data that high stress impairs the mother's or other parent's capacity to form a stable relationship with his or her child. High stress environments are correlated with poor performance on developmental tests at eight months, lower IQ scores at four years and increased school problems and emotional problems at school age. High socioeconomic status families apparently have environmental resources to buffer the effects of high stress. Children of high socioeconomic status families had few school problems and little difficulty with emotional adjustment compared to their low socioeconomic status counterparts.

One factor that may explain this is that high socioeconomic status families are more likely to have parental substitutes who will provide stable role models for children whose parents are chronically stressed. Toddlers exposed to high stress appear to be less secure in their attachment to their mothers regardless of their mother's social class.[395]

Inadequate Social Support.[396] There is a clear relation between low

392. *Id.* at 1231 (quoting Jack P. Shonkoff, *Biologic and Social Factors Contributing to Mild Mental Retardation, in* PLACING CHILDREN IN SPECIAL EDUCATION: A STRATEGY FOR EQUITY 133, 171 (Kirby A. Heller et al. eds., 1982).

393. Major stressors include financial shortfalls, death of a relative or friend, divorce, housing problems, unemployment, and school difficulties. Low SES families are exposed to two to four times greater stress than those with significantly more financial resources. The stress is greatest for poor women with children under six years of age. *Id.* at 1232 (citing George W. Brown et al., *Social Class and Psychiatric Disturbance Among Women in an Urban Population*, 9 SOC. 225 (1975)). Lower income families also find themselves subject to the *stress multiplier effect*. As a chronic stress, poverty functions to increase the stress of childhood illness, drug use or divorce.

394. *Id.* at 1231.

395. *Id.* (citing Ross A. Thompson et al., *Stability of Infant-Mother Attachment and Its Relationship to Changing Life Circumstances in an Unselected Middle-Class Sample*, 53 CHILD DEV. 144 (1982)).

396. Shonkoff defines social support as "the availability of meaningful and enduring relationships that provide nurturance, security and a sense of interpersonal commitment." *Id.* at 1232 (quoting Shonkoff, *supra* note 392). Further:

> The benefits of social support fall into three categories: material supports (e.g., day care, nutritional supplements, availability of emergency help), emotional supports (e.g., friendships, counseling), and information/referral services (e.g., community resource availability, child-rearing techniques). Social support may derive from formal networks (e.g., health care providers, educational services, or peer groups) or informal networks (e.g., family, friends, or the media).

socioeconomic status and low social support (which is associated with decreased cognitive abilities at eight months, lower IQ and lower language skills at four years and greater behavior problems among five to eight year olds). Single parents are particularly susceptible to isolation, thus limiting their children's capacity to spend time with stable adults with positive parenting skills.[397] In contrast, mothers with high social support appear more satisfied with their lives in general and feel better about their roles as mothers.[398] High social support also results in reduced incidence of maternal depression,[399] anxiety and other psychiatric problems.

Mothers of children exposed to drugs particularly need a high degree of social support as a reserve for the patience and confidence necessary to deal with their challenging infants. Mothers who feel a high degree of support often use less punishment and are more responsive to their infants. These mothers are better able to form positive relationships and secure attachments with irritable infants.[400] Social support is an extremely powerful factor since it is associated with a more organized physical environment, the provision of appropriate play materials and a wider range of stimulation for the child. Regardless of stress levels, mothers who reported more social support are likely to provide more and better stimulation to their infant children.[401] Numerous studies have shown the stability and quality of the home environment to be one of the most powerful predictors of positive developmental outcome. In other words, the environment provided by Louise after birth will have a greater effect on Andy's well-being than his cocaine exposure.

Maternal Depression. Depression is defined as a mood characterized by sadness, helplessness, gloom, loss of interest, emotional emptiness and a feeling of flatness. Inadequate financial resources, low educational attainment, recent immigrant status, race, poor housing, stressful life events and inadequate social support all increase the incidence of maternal depression. Given the correlation of the above with low socioeconomic status, it is not surprising to find 500% more depressed low socioeconomic status women than middle-class women.[402] The younger the mother is at the time of her first child and the greater

---

Id. at 1232 (citing D. Unger & D. Powell, *Supporting Families Under Stress: The Role of Social Networks*, 29 FAM. REL. 566 (1980)).

397. *Id.* at 1232 (citing Marsha Weinraub & Barbara M. Wolf, *Effects of Stress and Social Supports on Mother-Child Interactions in Single- and Two-Parent Families*, 54 CHILD DEV. 1297, 1307 (1983)).

398. *Id.* (citing Virginia D. Abernathy, *Social Network and Response to the Maternal Role*, 3 INT'L J. SOCIOLOGY FAM. 86 (1973)).

399. *Id.* (citing Suezanne Tangerose Orr & Sherman James, *Maternal Depression in an Urban Pediatric Practice: Implications for Health Care Delivery*, 74 AM. J. PUB. HEALTH 363 (1984)).

400. *Id.* (citing Susan B. Crockenberg, *Infant Irritability, Mother Responsiveness, and Social Support Influences on the Security of Infant-Mother Attachment*, 52 CHILD DEV. 857 (1981)).

401. *Id.* (citing John M. Pascoe et al., *The Association Between Mothers' Social Support and Provision of Stimulation to Their Children*, 2 J. DEV. BEHAV. PEDIATRICS 15 (1981)).

402. *Id.* (citing George W. Brown et al., *Social Class and Psychiatric Disturbance Among Women in an Urban Population*, 9 SOC. 225 (1975)).

number of young children she has, the greater the risk for depression. Maternal depression is associated with many children's problems such as sleep problems, depression, attention deficit disorder, socially isolating behaviors at school age and withdrawn and defiant behavior during adolescence.[403] Even three-month-old infants will respond negatively when their mothers simulate a depressed mood.[404]

The synergistic effect of these factors is disturbing. An increase in stress causes greater depression, which impairs the mother's capacity to secure adequate social support. This, in turn, causes more stress, stimulating yet a more dangerous degree of maternal depression. Through the home environment and the parent-child relationship, these risks are passed on to the child. Examining the above factors in an ecological context, it is small wonder that two-thirds of all children who test as mildly retarded have grown up in poverty.[405] The greater tragedy is that 75% of this retardation was likely caused by preventable socioeconomic related factors, including reduction in maternal alcohol use. One good relationship with a parent (or parent figure) has been shown to significantly reduce psychiatric risk for children.[406]

C. *Redefining Treatment: Healing, Culture and Community*

As a term, treatment focuses much more upon the process than the product or the entity being treated. Treatment can be applied equally well to cargo, chemicals, the ill and the addicted.[407] The human relations inherent in some of these treatment programs appear to be ignored. Like chemotherapy, a method of cancer treatment, drug

403. *Id.* at 1233 (citing Myrna M. Weissman et al., *Depressed Parents and Their Children: General Health, Social, and Psychiatric Problems*, 140 AM. J. DISEASES OF CHILDREN 801, 803-04 (1986)).

404. *Id.* (citing Jeffrey F. Cohn & Edward Z. Tronick, *Three-Month-Old Infants' Reaction to Simulated Maternal Depression*, 54 CHILD DEV. 185, 192 (1983)).

405. *Id.* (citing Shonkoff, *supra*, note 392 at 171).

406. *Id.* (citing Michael Rutter, *Early Sources of Security and Competence*, *in* HUMAN GROWTH AND DEVELOPMENT: WOLFSON COLLEGE LECTURES, 1976 (Jerome S. Bruner & Alison Garton eds., 1978)); Michael Rutter, *Special Report: Psychosocial Resilience and Protective Mechanisms*, 57 AM. J. ORTHOPSYCHIATRY 316, 321 (1987). Dire circumstances do not always dictate dire outcomes. There is a small population of high risk, highly vulnerable children who excel in relationships, school and life. To study these children, Garmezy has suggested three categories of protective factors: (i) the personality characteristics of the child. (High self-esteem in the sense of self-mastery); (ii) a supportive, stable and cohesive family unit; and (iii) positive community support systems and relationships. *Id.* at 1234 (citing N. Garmezy, *Stress, Competence and Development: Continuities in the Study of Schizophrenic Adults, Children Vulnerable to Psychopathology, and the Search for the Stress-Resistant Child*, 57 AM. J. ORTHOPSYCHIATRY 159 (1987)). The protective factors of family and community are perhaps the most effective deterrent of maternal drug use and the most ignored and underfunded in our war on drugs.

407. The term "treatment" does not come from the family of words associated with healing or relationships. One root word for the term "treatment" is *tractare* (latin) for "to handle" or "to deal with." Thus, metal can be treated with an acid to produce a desired effect. Medically speaking, treatment is a prescribed manner of handling something or a process for handling something. In recent decades, treatment refers to waste (e.g., sewage treatment, radioactive waste treatment, emissions treatment, etc.). In this sense, "drug treatment programs" take a waste product (drug addict) and process him or her into a less harmful condition.

treatment concerns itself more with the completion of a process upon the individual than with the ultimate goal. The term healing[408] recognizes that the individual is not "whole" and that every person's "wholeness" is different. Healing is incompatible with punishment. Punishment derives from the root term "pain" which in turn, derives from older terms concerning the need "to pay for injury." Healing forces us to look more deeply into the individual subject. Healing assumes each case is unique, whereas treatment is a process that prefers mass application. The healer should always be mindful that the laws as written are always less than the laws of life. Healing, unlike treatment, begins with a voluntary act by the diseased. Healing cannot be compelled as treatment can. In epidemiologic terms, treatment can be a vector for punishment. One is given "the treatment" if one misbehaves. Treatment is thus often "infected" with punishment.

Under the healing model, we apply the ecological analysis with the assumption that the mother is abusing alcohol because she, her family and her community are not properly functioning. Thus, the mother is not "whole," and the purpose of healing is to make her "whole." The healing process endeavors to provide opportunities to replace the missing parts of home, family environment, safety, self-esteem, community, employability and job skills that are lacking in her life.

This healing model also applies to the treatment of child abuse which, under the disease model, is commonly assumed to be "intergenerational." The term "intergenerational" is an aphorism for the term "disease." However, a national sample of child abuse found that there was only "an 18 percent rate of transmission from parent to child."[409] When focusing on predominately single mothers living in poverty with high stress and few social supports, the intergenerational rate of transfer almost tripled.[410] By focusing on what *prevents* the perpetuation of abuse, instead of what causes it, research found that preventive factors include extensive social and community supports, improved parenting skills, parental self-confidence, parents' ability to deal openly with their experience of abuse as children and the creation of a stable relationship "with another adult—'a relative, teacher, minister, [or] friend—who is emotionally nurturing.' "[411] The ecological analysis presumes that any form of treatment that fails to integrate training and problem solving, job skills, behavioral family therapy, social skills training and building relations within the community is unlikely to succeed. The Community Reinforcement Approach, which involves many of the above processes, has shown a much higher level of success

408. "Healing" refers to the goal, and is derived from the old English, *hal*, meaning "whole" or "healthy" in the sense of complete in one's body, mind and spirit. MERRIAM WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1043 (1962).

409. PEELE, *supra* note 35, at 280 (citing M. Straus, *Family Patterns and Child Abuse in a Nationally Representative Sample*, 3 INT'L J. CHILD ABUSE & NEGLECT 213 (1979)).

410. Joan Kaufman & Edward Zigler, *Do Abused Children Become Abusive Parents?*, 57 AM. J. ORTHOPSYCHIATRY 186 (1987).

411. PEELE, *supra* note 35, at 280 (quoting D. Goleman, *Sad Legacy of Abuse: The Search for Remedies*, N.Y. TIMES, Jan. 24, 1989, at C1, C6).

than any of the established methods of alcohol treatment in which the treatment industry has deeply invested.[412]

Culture as Healing. Among some Canadian tribes with very high rates of Fetal Alcohol Syndrome, entire villages rallied together, reasserting norms of their traditional culture to support pregnant mothers to not drink during their pregnancy.[413] Hispanic and Black women have a higher abstinence rate than White women so long as their underlying culture remains strong. When the Hispanic community becomes acculturated (or deculturated) to White norms, the abstinence rate among Hispanic women drops significantly.[414] However, substantial penalties can accrue to those trying to maintain their cultures or even those with accents.[415] Loss of traditional culture can be related to loss of resistance to drugs. Culture is very difficult to define and certainly not limited to minorities. However, culture in whatever form is part of the web of social supports crucial for mothers. Parenting programs for minorities, which are based on white family norms, show about as much success as drug treatment programs for women designed for men. However, when parenting programs are adapted (or transculturated) to Hispanic and Black family values, parenting education is more effective.[416] The likelihood of securing prenatal care would be significantly increased by the existence of community medical clinics sensitive to the mother's culture (or cultures). By trusting in the clinic, she would also be honoring her culture. The resulting doctor-patient trust level is likely to be much

412. *Id.* at 262 (citing W.R. Miller & R.K. Hester, *The Effectiveness Of Alcoholism Treatment: What Research Reveals, in* TREATING ADDICTIVE BEHAVIORS: PROCESSES OF CHANGE (W.R. Miller & N.K. Heather eds., 1986)).

413. ANN PYTKOWICZ STREISSGUTH ET AL., DEPARTMENT OF PSYCHIATRY AND BEHAVIORAL SCIENCES, THE CHILD DEVELOPMENT-MENTAL RETARDATION CENTER, AND THE ALCOHOLISM & DRUG ABUSE INSTITUTE, UNIVERSITY OF WASHINGTON, A MANUAL ON ADOLESCENTS AND ADULTS WITH FETAL ALCOHOL SYNDROME WITH SPECIAL REFERENCE TO AMERICAN INDIANS (2nd ed. Oct. 1, 1988).

414. Abandonment occurs on a cultural level where particular cultures are devalued or even denigrated as being backward or dysfunctional. When, for example, a native american culture does not share the values of the dominant culture, this culture is denigrated as a barrier to progress (assimilation). For example, although everyone speaks with an accent, only certain people are recognized as having an "accent." Some accents (high british) are valued and others (Filipino, Hispanic, Black) are often devalued. For an excellent study of such linguistic and cultural discrimination, see Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and the Jurisprudence of the Last Reconstruction*, 100 YALE L.J. 1329, 1330, 1336-39 (1991).

415. A. M. Alcocer, *Alcohol Use and Abuse Among the Hispanic American Population*, SPECIAL POPULATION ISSUES, ALCOHOL & HEALTH REP., 4 NIAAA 361 (1990). In San Diego there was a fivefold increase in the number of Hispanic women whose newborns tested positive for speedball (heroin and amphetamines). The loss of traditional cultural values may be a significant factor in this increase. Conversation with Dr. Suzanne Dixon, Professor of Pediatrics, San Diego State University (Mar. 20, 1992).

416. The Center for the Improvement of Child Caring in Studio City, California has developed and evaluated the Effective Black Parenting Program and the Los Ninos Bien Educados Prevention Program. Each has shown significant success in reaching and teaching inner city black and hispanic mothers (and a few fathers) important parenting skills. HECTOR F. MYERS ET AL., CENTER FOR THE IMPROVEMENT OF CHILD CARING, THE EFFECTIVE BLACK PARENTING PROGRAM: A CONTROLLED RESEARCH STUDY WITH INNER CITY BLACK FAMILIES 26-33 (Oct. 1990). Amado M. Padilla & Lily Alvarez, *Evaluation Report of the Los Ninos Bien Educados Prevention Program*, prepared for the Santa Clara County Bureau of Drug Abuse Services 1 (Sept. 30, 1991).

higher than of an anonymous resident in a teaching hospital on the other side of town.

Community as Healing. The medical evidence suggests that no therapeutic technique, no medical treatment and no legal intervention can help these children as much as a viable community that meets the child's basic human needs. Majority culture psychology may focus too narrowly on the individual ego or the individual relationship as the unit of care. Community psychology would rekindle the healing aspects of neighborhoods. Instead of having groups of individuals who meet to explore their shared problem of alcohol or other substance abuse, a community psychology would encourage the meeting and affiliation of families, particularly families that consist of single mothers and their parents. Community psychology increases the degree of responsibility held by community members for the condition of community members. The Berkeley Alcohol Research Group found that less developed nations maintained a high level of responsibility *within* the local community for dealing with alcohol and alcohol related problems, whereas more industrialized countries delegated these problems to centralized agencies and professionals.[417] The ecological model proposes that alcohol and drug abuse is something for which all members of the community have some degree of responsibility. Community psychology also recognizes the healing effect of helping those who are less fortunate. The differences between actual community and therapeutic community are significant.[418] *In sum, the ecological analysis assumes that the context of healing is just as important as the content.* Healing that fails to honor the community is unlikely to be of significant use in preventing maternal alcohol and substance abuse.[419]

---

417. The group found:

> Studying the period since 1950 in seven industrialized countries [including California in the U.S.] . . . we were struck by the concomitant growth of treatment provisions in all of these countries. The provision of treatment, we felt, became a societal alibi for dismantling the long-standing structures of control of drinking behavior . . . .

PEELE, *supra* note 35, at 269 (quoting R. Room, "Closing Statement" *Evaluating Recovery Outcomes*, 43 (Proceedings of conference published by Program on Alcohol Issues, University Extension, University of California, San Diego (1988)).

Dr. Peele bluntly concludes: "The institution of modern medical and social services systems for dealing with problems like alcoholism coincides exactly with the removal of the forces most effective in curtailing these problems in the first place." PEELE, *supra* note 35, at 269.

418. For example, much of corporate America has been involved in a variety of "team-building" exercises where managers and line employees get together and attempt to relate on a variety of trust building exercises, such as falling backwards into the arms of their colleagues. The "feelings of community" that are created tend not to endure. In contrast, General Electric gave 500 of its employees the day off to construct a major shelter for St. Vincent De Paul. In one day, the group accomplished what would have taken months under the planned construction schedule with workers and managers sweating shoulder to shoulder.

The entire effort was devoid of the therapeutic rhetoric of team-building and created longer lasting team spirit and teamwork than any prior endeavor for the same period. The shared experience of having a "chance to do good" was the most powerful aspect of the experience. *Id.* at 272 (citing CNN television broadcast, Jan. 27, 1989).

419. The ecological model recognizes that our immune system is not simply biological.

D. *Redefining Prevention: Intervening in Adolescence*

The problem of mothers is part of the larger problem of drug use among adolescents. Childhood mortality was in decline from the early 1900s to the 1970s. Since the 1980s, we have witnessed a striking increase in adolescent death.[420] This peril is shared mostly by abandoned adolescents. One large study found that over 50% of teens completed adolescence without significant trauma to their functioning performance and relationships, 33% had minor intermittent problems and 12% had adolescence characterized by difficulty, disruption and harm. Fifty percent of this group had significant psychiatric problems.[421] High-risk behavior, disturbed relationships, school problems and challenges to parental authority are frequently associated with teenage drug abuse.[422] Until the 1980s, much adolescent drug use was attributed to "acting out." Since then, a strong correlation between adolescent depression and drug use has been found.[423] The overall rate of depression is higher in adolescents than adults and higher among female adolescents than males.[424] Adolescents in poverty have significantly higher rates of depression than their more privileged peers.[425]

Female adolescence, like childbirth, is a difficult transition. The etiology of female adolescent depression is similar to maternal depression. A number of studies have demonstrated an association between depression and drug use.[426] Adolescence, like motherhood, can be a severe

---

On a physical level it involves infection, malnutrition and undernutrition. On a psychological level it involves self esteem, dealing with the wounds of the past and the depression of the present. On the familial level, it concerns communication skills, relational skills, negotiation skills and parenting skills. On the communal level it concerns the persons sense of "belonging," the strength of church's, community centers, family to family relations, meeting minimum support needs, treatment, education, cultural support and identity. On a societal level it concerns ensuring that all children are provided decent housing, education, health care, safety, and self esteem regardless of the station of their birth or the status of their parents.

420. Neela P. Joshi & Marcia Scott, *Drug Use, Depression, and Adolescents*, 35 PEDIATRIC CLINICS N. AM. 1349 (1988).

421. Daniel Offer & Anne C. Petersen, *Child Psychiatry Perspectives: Adolescent Psychiatry*, 21 J. AM. ACAD. CHILD PSYCHIATRY 86 (1982).

422. Drug abuse, therefore, is often seen as the primary cause of morbidity and mortality in adolescents. It has become the symbol of "what is wrong" with adolescence. *In fact, however, drug use is usually a symptom of pervasive developmental disruption.* . . .

. . . Physicians can best interpret drug-using behaviors if they conceptualize them as deviate attempts at coping and remember that the drugs . . . interfere with social and emotional functioning and with interpersonal relationships, thereby threatening normal development. . . . Whereas many children and adolescents handle environmental stressors and developmental challenges well, others are more vulnerable. Their development and functioning are characterized by frustrations and helplessness that make them especially susceptible to continuing or intense drug use, deviant behavior, and developmental arrest.

Joshi & Scott, *supra* note 420, at 1349 (emphasis added).

423. *Id.* at 1350; E. Poznanski, *Childhood Depression: The Outcome*, 46 ACTA PAEDOPSYCHIATRICA 297 (1980-81).

424. Denise B. Kandel & Mark Davies, *Epidemiology Depressive Mood in Adolescents - An Empirical Study*, 39 ARCHIVES GEN. PSYCHIATRY 1205 (1982).

425. Stuart L. Kaplan et al., *Epidemiology of Depressive Symptomatology in Adolescents*, 23 J. AM. ACAD. CHILD PSYCHIATRY 91 (1984).

426. Joshi & Scott, *supra* note 420, at 1352.

stress for the female with few social supports, low intelligence and low self-esteem.[427] Adolescents flourish in the same environment in which children flourish. Children reared in poorly structured, highly stressful or chaotic environments will likely be less well-equipped to negotiate challenges in their lives. They are at greater risk of encountering significant depression when dealing with painful feelings and personal conflicts or social stigma.[428] Researchers find that depression correlates strongly with almost all aspects of low self-esteem. Long term low self-esteem predicted initiation into drug use in a longitudinal study of junior and senior high school adolescents.[429] In keeping with the ecological model, lack of mastery of social and intellectual skills, feelings of powerlessness or inadequacy and lack of significant stable parental relationships have been associated with increased alcohol and drug use in females.[430]

E. *Sex and Contraception: Expanded Roles for Physicians and Nurses*

The factors that fuel teen drug use also fuel teen sexuality. Women of low socioeconomic status backgrounds report initiating drug use and sex not for their own needs as much as to meet the needs of their male friend. Children from higher income, higher support families are more likely to delay sexual activity. If they do engage in sex, they are more likely to use contraception than children from lower socioeconomic status backgrounds and more challenging family situations.[431] The same high self-esteem that deters drug abuse also defers sex or unprotected sex. Many girls with low self-esteem are more likely to remedy their self-

427. The challenge of coming of age and becoming a mother may be overwhelming. Adolescent depression may reflect a difficult family heritage. Children of parents with major mood disorders show significantly higher rates of mood disorders in comparison with children of controls. Twin studies indicates there is some basis for arguing for a genetic vulnerability (but not a certainty) for alcohol and drug abuse. Helen Orvaschel et al., *Assessing the Psychopathology of Children of Psychiatrically Disturbed Parents: A Pilot Study*, 20 J. AMER. ACAD. CHILD PSYCHIATRY 112 (1981).

428. Depression results when the stress to the adolescent becomes unbearable and they are unable to secure sufficient social support to deal with their problems. Drug dependence may stimulate further withdrawal from the social networks necessary to meet their needs. This is not to say that all youngsters who use drugs are depressed or dysfunctional. Many adolescents simply use drugs during brief periods of acute crises. *See* Joshi & Scott, *supra* note 420.

429. Donna L. Yanish & James Battle, *Relationship Between Self-Esteem, Depression and Alcohol Consumption Among Adolescents*, 57 PSYCHOLOGICAL REP. 331 (1985); Howard B. Kaplan, *Antecedents of Deviant Responses: Predicting from a General Theory of Deviant Behavior*, 6 J. YOUTH ADOLESC. 89 (1977); Joshi & Scott, *supra* note 420, at 1355.

430. Linda J. Beckman, *Self-Esteem of Women Alcoholics*, 39 J. STUD. ALCOHOL 491 (1978); Linda J. Beckman, *Perceived Antecedents and Effects of Alcohol Consumption in Women*, 41 J. STUD. ALCOHOL 518 (1980); Gene M. Smith & Charles P. Fogg, *Psychological Predictors of Early Use, Late Use and Non-Use of Marihuana Among Teen-age Students*, *in* LONGITUDINAL RESEARCH ON DRUG USE: EMPIRICAL FINDINGS AND METHODOLOGICAL ISSUES 101 (Denise B. Kandel ed., 1978); Gene M. Smith & Charles P. Fogg, *Psychological Antecedents of Teenage Drug Use*, *in* 1 RESEARCH IN COMMUNITY AND MENTAL HEALTH: AN ANNUAL COMPILATION OF RESEARCH 87 (Roberta G. Simmons ed., 1979).

431. Linda M. Grant & Efstratios Demetriou, *Adolescent Sexuality*, 35 PEDIATRIC CLINICS N. AM. 1271 (1988); Edward Herold et al., *Self-Esteem, Locus of Control and Adolescent Contraception*, 101 J. PSYCHOL. 83 (1979).

doubt by over-investing in early intimate relationships.[432] The same young women are more likely to rely on their boyfriends for sexual decision making.[433] A parallel structure emerges of teenage women engaging in unprotected sex to enhance their relationship followed later by engagement in drug use to enhance their relationship followed still later by becoming pregnant to enhance their relationship. Males, in contrast, tend to engage in sex, like drug use, for the enjoyment of the act. If the unit of decision-making for engaging in unprotected sex and dangerous drug use is the couple, then we must develop programs addressing and supporting the relationship the young woman desires to preserve, provided that it becomes less harmful. Our preferred theories of psychology define healthy self-hood as an intact individual self-sufficient ego. We need a different psychology that does not assume the *self alone* is health, rather that the *self in relation* is health.[434]

Seen this way, part of the problem of fetal harm is the problem of contraception. Comprehensive sex education and family planning could prevent 313,000 teen pregnancies each year.[435] Surveys indicate that less than 10% of the sex education programs cover the necessary spectrum of sexual issues.[436] In 1985, the total AFDC benefits to women who had their first child as teenagers was $16.65 billion.[437] *These costs are largely preventable* if there is a willingness within society to implement comprehensive sex education and family planning practices.[438] The incidence of fifteen to nineteen year old adolescent girls engaging in sex rose from 28% in 1971 to 46% in 1979.[439] The fact that "[a]dolescent birth rates remain considerably higher in the United States than in most other developed countries"[440] may be related to the fact that "[t]he use of contraceptives by adolescents in the United States is relatively low and inconsistent."[441] Knowledge and availability of contraception does

---

432. A large percentage of low SES, low self-esteem girls report engaging in sex to please their boyfriends even though they do no derive any direct enjoyment from it. Grant & Demetriou, *supra* note 431, at 1278 (citing C.S. CHILMAN, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, ADOLESCENT SEXUALITY IN A CHANGING AMERICAN SOCIETY: SOCIAL AND PSYCHOLOGICAL PERSPECTIVES, publication No. (NIH) 79-1426 (1978)).

433. *Id.* (citing G. Cvetkovich & B. Grote, *Psychosocial Development and the Social Problems with Teenage Illegitimacy, in* U.S. DEPT. OF HEALTH & HUMAN SERVICES, ADOLESCENT PREGNANCY AND CHILDBEARING: FINDINGS FROM RESEARCH 15-41 (C.S. Chilman ed. 1980) publication No. (NIH) 81-2077).

434. *See, e.g.*, JEAN BAKER MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976); CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

435. Grant & Demetriou, *supra* note 431, at 1273 (citing ALAN GUTTMACHER INSTITUTE, TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY (1981)); *see also* Joshi & Scott, *supra* note 420.

436. 1 NATIONAL RESEARCH COUNCIL PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING (Cheryl D. Hayes ed., 1986).

437. Grant & Demetriou, *supra* note 431, at 1275 (citing M.R. Burt, *Estimating the Public Costs of Teenage Childbearing*, 18 FAM. PLAN. PERSP. 221 (1986)).

438. *Id.* at 1273.

439. *Id.* at 1272 (citing M. Zelnik & J.F. Kantner, *Sexual Activity, Contraceptive Use and Pregnancy Among Metropolitan-Area Teenagers: 1971-1979*, 12 FAM. PLAN. PERSP. 230 (1980)).

440. *Id.* at 1274-75 (citing GUTTMACHER INSTITUTE, *supra* note 435.

441. *Id.* at 1273.

not guarantee proper use. Teenage girls delay seeking contraceptive services an average of 16.6 months from their first intercourse and younger teenage girls wait even longer.[442] One-half of all premarital pregnancies occur during the first six months of sexual activity and more than 20% occur in the first month of sexual activity.[443]

Another factor contributing to the failure to use contraception is the developmental level of the young woman. Piaget found that one-third of the adults he worked with never fully matured to the level of formal operational thinking.[444] It is likely that many young women vulnerable to teenage sex and drug abuse are capable of little or no "formal" operational thinking. Our efforts at deterring drug use and unprotected sex should be revised to reach this audience.[445] Teenage pregnancy could be significantly reduced if pediatricians and public health nurses modelled appropriate sex education in schools and community clinics.[446] Contraception use is likely to be increased within a stable and trusting relationship with a pediatrician.[447] The breadth of the ecologic analysis demands a new standard that better captures infants harmed by drugs, their environment and other sources.

---

442. Laurie Schwab Zabin & Samuel D. Clark, Jr., *Why They Delay: A Study of Teenage Family Planning Clinic Patients*, 13 FAM. PLAN. PERSP. 205, 212 (1981).

443. Laurie Schwab Zabin et al., *The Risk of Adolescent Pregnancy in the First Months of Intercourse*, 11 FAM. PLAN. PERSP. 215, 215 (1979).

444. J. Piaget, *Intellectual Evolution From Adolescence to Adulthood*, 15 HUMAN DEV. 1 (1972). These adolescents move from the state of "concrete" operational thinking to "formal" operation thinking. Concrete operational thinking is based in the present time and, with the help of hormones, often infuses a sense of being special that provides many adolescents a perceived immunity from mishaps and an enhanced sense of infallibility (small wonder why crack is so attractive). The following stage, formal operational thinking, reflects the increased capacity to think further into the future and to specifically engage in extensive abstract thinking where the fantasy of sex can be distinguished from the reality.

445. The American Academy of Pediatricians has developed sample curriculum and reading lists regarding such "concrete" sex education. Grant & Demetriou, *supra* note 431, at 1283.

446. Ciaran S. Phibbs et al., *The Neonatal Costs of Maternal Cocaine Use*, at 3 JAMA (forthcoming) (citations omitted). A conservative and detailed study in a large inner city public hospital comparing cocaine exposed birth costs to a random sample of births without fetal drug exposure indicates significantly longer hospital stays and costs of $5,000 - 11,000 more than non-exposed infants. This increase in cost does not include the added cost of *border babies* or the costs of physicians, because the hospital involved was a teaching hospital. This estimate included only the costs incurred until medical discharge from the hospital. The lifelong special needs of cocaine exposed children and the particular pressures on their mothers reduces the mother's employability and the reduced productivity of the cocaine exposed child throughout their life are not factored in.

These staggering costs could be significantly reduced by the availability of appropriate programs for preventing drug use among adolescents, for preventing pregnancy among substance abusers, for comprehensive treatment programs for cocaine users with appropriate neo-natal and post delivery services. There is significant evidence that the harm created by cocaine use during the first trimester can be significantly reduced if not eliminated where the women enter treatment programs and cease using cocaine for the remainder of their pregnancy. Those mothers with prenatal care had average hospital costs $4,300 to $5,000 less than those without prenatal care. *Id.* at 9-10. Even a conservative analysis of the data suggests that comprehensive programs of drug use prevention, drug use treatment, pregnancy prevention, and prenatal care would be cost effective immediately. An investment in prenatal care saves over $500 million in direct hospital expenses and even more in post hospital rehabilitation expenses. *Id.* at 13.

447. Grant & Demetriou, *supra* note 431, at 1283.

F. *Toward a New Standard: The Challenged Parent and the Challenged Child*

The new standard should have the following attributes:

It should be neutral. The new standard should not label the parent as being "dysfunctional," "impaired" or otherwise guilty. Most poor mothers who abuse drugs already suffer from significant depression and low self-esteem. It makes no sense to further undermine their confidence with a charge of neglect.[448]

It should be non-pejorative. The standard should not discriminate against the abandoned (minorities, the poor, the homeless, single mothers, gays, addicts or people with AIDS). Our children can ill afford the price of unreasoned prejudice.

It should be inclusive of all levels of responsibility. The ecological approach suggested above includes responsibility on the level of the individual, the family, the community and society.

It should be epidemiological and thereby preventive. The focus should be on the medical harm to the fetus, not the harm to our commonly held values. In other words, a poor Black pregnant woman using drugs intravenously should be viewed with no less disfavor than a wealthy pregnant woman abusing barbiturates and alcohol in the privacy of her estate. The epidemiologic model understands that the intervention must be tailored to each situation. While the wealthy mother and her estate may benefit from *rehabilitation* through a private hospital, the poor IV drug using woman likely needs *habilitative* services focusing on securing adequate food, decent housing, education for parenting skills and counseling to deal with the strong likelihood that she was subject to sexual or physical abuse and has experienced long periods of low self-esteem and depression.

It should not deter parents from fully utilizing the health care system. A physician cannot maintain a "healing" confidential relationship if he or she must also play "cop." Thus, while it is certainly reasonable to require physician reporting of physical and sexual abuse, it is equally important *not* to require the reporting of drug use and neglect. This gives the treating physician the option to report only when he or she believes that all other options have been exhausted.

It should be administered in a fashion that would enhance and empower the parents, their family and the community within which they reside. As indicated above, social supports, home environment and community resources are key factors in a child's capacity to fulfill his or her potential and a parent's capacity to overcome a traumatic childhood, learn parenting skills and to cease drug abusing behaviors.

Presently, there is no standard that encompasses abandoned fetuses, newborns and young children. Within the medical community, the most common measure is anthropometric (the infants size and weight). Fetuses who are traumatized by their external environment

448. Unless and until a thorough exploration of all alternatives is done and reveals that such a conclusion would be appropriate.

(i.e., drugs, stress disease or undernutrition) or their internal function (i.e., some congenital deformities or genetic conditions) are usually born early and small. For the fetus, the diagnosis is intrauterine growth retardation (IUGR)[449] and for the newborn it is failure to thrive (FTT).[450] The rate of FTT infants amongst the abandoned (poor or uninsured) is estimated to be 500% greater than amongst the insured.[451] Fetal exposure to nicotine, many prescription drugs and controlled substances results in retarded growth. Maternal stress, malnutrition,[452] maternal depression and chronic maternal illness or infection from use of IV drugs can also result in FTT.[453] While the FTT standard is much more appropriate than "drug-exposed child," it is not adequate.[454] Many infants with FAE, significant heroin exposure or other traumas can rapidly gain weight after birth and be normally sized by twelve to eighteen months. While they are no longer FTT, they may likely have lifelong impairments in judgment and cognitive skills. FTT measures only *physical* "thriving," not intellectual, emotional or relational "thriving," which are equally important to the child.[455] To measure emotional and relational thriving demands an inquiry into the relationship between parents (who may have been FTT), home environment and child. FTT may not capture this. Thus, FTT is necessary, but an insufficient standard.

A better standard can be derived from the concept of abandonment. If every abandonment the child suffers challenges the child's capacity to thrive, then the concept of a "challenged child" should be more inclusive. Challenges to the child include IUGR, FTT, FAS, FAE,[456] NAS,

449. Birth weight less than tenth percentile for gestational age. Frank & Zeisel, *supra* note 97, at 1192.

450. *Id.* at 1187. "In broadest terms, failure to thrive refers to infants and children whose growth deviates from the norms for their age and sex." *Id.*

451. FTT has been diagnosed in 3-5% of infants in academic pediatric hospitals and 15-30% of admissions to inner city emergency departments. *Id.* at 1187 (citations omitted).

452. Malnutrition is the primary source of failure to thrive. *Id.* at 1187 (citations omitted); Robert Listernick et al., *Severe Primary Malnutrition in U.S. Children*, 139 AM. J. DISEASED CHILDREN 1157, 1160 (1985).

453. This standard depends upon an accurate determination of the fetus's age, usually through ultrasound methods as well as a careful record of the child's birthweight, birthlength, head circumference and gestational age. A child born premature for reasons unrelated to failure to thrive could be mistakenly diagnosed.

454. It is over-inclusive since, as a strictly anthropometric measure, it includes congenitally impaired infants of very well to do parents who have not been abandoned in any sense of the word. Such infants rarely need the environmental and nutritional supports so vital to abandoned FTT infants.

455. A broader standard that is being tracked in some states is High Priority Infant Tracking (H-PIT). H-PIT tracks infants meeting one or more of nineteen eligibility criteria (e.g., neonatal seizures, APGAR score of less than three at five minutes, low birth weight, mother is fifteen years or under). Unfortunately, funding often is available only to track but not to help these high risk infants. Telephone Interview with Donna White, Director of H-PIT Program, Washington State Department of Health (Mar. 30, 1992); *see also* THE HIGH PRIORITY INFANT TRACKING PROGRAM, DIVISION OF PARENT-CHILD HEALTH SERVICES, HIGH PRIORITY INFANT TRACKING PROGRAM, WASHINGTON STATE FACT SHEET (1991).

456. Along with the use of FAS/FAE, the term Alcohol Related Birth Defects (ARBD) is commonly used. ARBD overlaps both FAS and FAE. FAS and FAE are used herein

undernutrition, poor environment, lack of perinatal care, disease and congenital problems unrelated to the child's economic circumstances. Many "challenged" children have challenged parents whose childhood traumas, poor education and continuing lack of social support limit their capacity to parent and provide. The standard of a "challenged parent" is preferable to an "impaired parent" because it is less stigmatizing and more accurate.[457] "Challenges" can be met and sometimes overcome, whereas "impairments" are more often actual damage that cannot be reversed and can only be accommodated.[458] Children of pioneer women who lost their husbands in the perilous trek west over the great plains faced an environment just as hostile as a typical inner city housing project. Yet the pioneer mothers are viewed as heroines and the project mothers as "impaired" or as "lazy welfare mothers."[459] The concept of "challenged" recognizes all environments that are hostile without passing judgment on the parents. The standard is neutral and non-pejorative. It includes all responsible agents and is epidemiologically sound. It well reflects the ecological model of causality since the characteristics of the child, the mother and the environment are all considered when making the diagnosis. It captures those infants suffering from drug exposure and those suffering from malnutrition and poverty. After birth, the standard can be used with equal ease since it captures the effects of malnutrition, stress, chronic infection and exposures to environmental threats such as lead.[460]

---

because they are more precise. However, the symptoms of FAS can occur in the absence of alcohol exposure. To remedy this ambiguity, Dr. Sterling Clarren proposes to use "Smith Syndrome" (Dr. David Smith was the first to recognize FAS) instead of "Fetal Alcohol Syndrome." Telephone interview with Dr. Sterling Clarren, Pediatrician and Dysmorphologist at the Children's Orthopedic Hospital, Seattle Washington (Mar. 30, 1992).

457. The mother is no longer diagnosed as "dysfunctional." Rather, she is viewed as having her capacity to parent *challenged* by her experience of physical and sexual abuse, adolescent trauma and lack of education and social supports. The experience of growing up in poverty, having low self-esteem, failing to become successfully literate, being depressed and having inadequate social supports would all be considered *challenges* that limit the mother's inherent capacity to parent. Similarly, her child would be challenged by exposure to drugs, stressful uterine environment, chaotic and unstable environment at birth, malnutrition and lack of comprehensive perinatal medical care.

458. There are many parents who manage to parent adequately despite having horrible childhoods. These parents are challenged (and deserve help to deal with long deferred traumas, educational deficits and a hostile environment) but they are not "impaired" since they manage to conceal the harms they have suffered. Whereas the non-challenged parent might spend 50% of his or her daily energy parenting, the challenged parent might require 80%. The result is a parent who needs help but rarely asks for it for fear the result could be a loss of the child to the state. In this sense, many challenged parents are under the perpetual threat of losing their children to the state or the streets.

459. *See, e.g.*, BLACK WOMEN IN WHITE AMERICA 164-70 (Gerda Lerner, ed. 1973); Jewell Handy Gresham, *The Politics of Family in America*, THE NATION, July 24/31, 1989, at 116. Abandonment occurs here in our assumptions that the high fatality rate among Whites in Conestogas was due to the hostile *environment*, while the high fatality among Blacks in some housing projects is due to the Moynihanesque "disintegration" of black families. Both groups exposeed their children to a perilous environment, yet only those historically abandoned are deemed neglectful. As Daniel Moynihan noted: "At the heart of the deterioration of the fabric of the Negro society is the deterioration of the Negro family." Roberts, *supra* note 21, at 1442 (citing OFFICE OF PLANNING & POLICY RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 5 (1965)).

460. The Second National Health and Nutrition Examination Survey indicated that

This standard recognizes the special challenges of parenting a challenged child. Alcohol-exposed or malnourished children are likely to be chronically ill and may overwhelm a parent who would be capable of parenting a healthy child. Pediatricians recognize that such parents need both enhanced parenting skills and a respite from the demands of care if their children are to grow. This standard recognizes the myriad abandonments suffered by their parents.[461] These "ghosts in the nursery" challenge the parents' capacity to appropriately respond to their child's needs and further erodes the quality of the parent/child interaction. The apathy and irritability of the malnourished child is perceived as rejection by many mothers, which further enhances the mother's already sizable doubt that she can meet her child's needs.[462]

G. *A System for Challenged Children*

Many mothers of challenged children view the child protective service (CPS) and juvenile court as "the enemy." CPS threatens to take their children in a procedure that is bewilderingly complex, public and stigmatizing. While our present system of juvenile courts linked to foster care and dependency proceedings should remain in place for the many cases of physical and sexual abuse, the needs of the challenged child would be best met by developing a non-punitive parallel system. A few attributes of such a system are as follows:

Confidentiality. Alcohol or drug using mothers are likely to avoid any form of the prenatal care so necessary for their fetuses unless they can be assured of confidentiality. The pediatrician and the mother need to work together, not play "cops and abusers." The importance of a full and open confidential relationship between mother and doctor cannot be understated.[463] Doctors are adamant that they cannot adequately treat their pregnant clients unless they have won their trust sufficiently to fully disclose their medical history. The earlier the physician is able to detect IUGR, the easier it is to detect and reduce the harm. It is much easier to reverse the effects of fetal malnutrition and stress than fetal drug exposure.[464] With 20% of American children under the age of five in poverty, the risk is immense. However, malnutrition extends far beyond those who are in poverty to parents who are temporarily unem-

small increases in blood lead levels correlated strongly with impaired growth. Frank & Zeisel, *supra* note 97, at 1193 (citing Joel Schwartz et al., *Relationship Between Childhood Blood Levels and Stature*, 77 PEDIATRICS 281 (1986)).

461. Parents of *challenged* children were often deprived or abused as children, subjected to chronic illness, depression, intellectual impairment, marital conflict and, perhaps most importantly, isolation from relatives and the surrounding community. *Id.* at 1195 (citations omitted).

462. *Id.* at 1188 (citations omitted).

463. Only by knowing the mother's entire history of possibly inappropriate behaviors can the physician begin to ascertain the appropriate support systems that should be made available to her to minimize the future harm to her fetus. There are a variety of questionnaires that can be integrated into such interviews that would allow the physician to detect with reasonable certainty that the mother might be abusing drugs without the risk of directly asking her.

464. Frank & Zeisel, *supra* note 97, at 1192.

ployed or parents employed at or near minimum wage.[465] The federal government's decision to largely abandon poor children in the 1980s resulted in a vast increase in families who do not qualify for AFDC. For those lucky enough to qualify, the benefits rarely compensate for prior malnutrition.[466]

The medical community has developed protocols for maintaining confidentiality in treating AIDS patients. Persons with AIDS are subjected to an immense and unfair degree of discrimination that is parallel to our historic discrimination against poor women, particularly poor women who use drugs. By maintaining confidential registries of people with AIDS, physicians are able to deliver comprehensive medical treatment without ever providing notice to any public authority that an individual has AIDS. The same could be done for mothers with challenged children.[467]

The system must minimize or remove stigma from all aspects of its function. For example, there should be no more diagnoses that a beleaguered mother's family is "dysfunctional." The term dysfunctional is ambiguous, needlessly negative and acts more like a badge of abandonment than an assessment of parental skills. Every family has some degree of function, so at best the term is an oxymoron, somewhat like the phrase "unrelated relationship." "Dysfunctional" implies *complete* failure, giving the mother a sense of hopelessness and an excuse to no longer try to improve her difficult situation. Terms like the "impaired parent" or the "disturbed" or "retarded" or "developmentally delayed" child are similarly objectionable. Instead of negatively labelling the mother's relationship with her child as "impaired attachment" or the more simplistic concept of "maternal deprivation," her relationship with her child could be viewed as a "challenged attachment." For diagnostic purposes, the pediatrician would make an inventory of the challenges facing the mother, the child, the father and the relations between them. The "challenge inventory" would include biological, psychological, economic and social factors.

---

465. *Id.* at 1194 (citations omitted); *see generally* H. Peter Chase & Harold P. Martin, *Undernutrition and Child Development*, 282 NEW ENG. J. MED. 933, 938-39 (1970); Listernick, et al., *supra* note 452.

466. The WIC program reaches less than half of eligible families with pregnant women and young children. Of those it reaches, parents report difficulty paying for infant formula once the child's needs outstrip the 26 ounces per day provided by the program. Frank & Zeisel, *supra* note 97, at 1194 (citing J.E. McJunkin et al., *Errors in Formula Concentration In An Outpatient Population*, 111 J. PEDIATRICS 848 (1987)).

Food stamps allow approximately $.49 per meal per person. *Id.* (citing J.L. BROWN & H.F. PIZER, LIVING HUNGRY IN AMERICA (1987)). In addition, food stamps create significant stress to the mother due to the stigma of using them in public and the refusal of many shop keepers and store owners to accept them.

467. Many of the mothers of challenged children are at great risk of contracting AIDS through use of unsterilized needles and through sexual relations with males who carry the virus. The gay community succeeded in radically reducing the incidence of new AIDS cases within its ranks by instituting a systematic and comprehensive delivery of medical services and prevention education to its community. Could we not make a similar effort for parents with challenged children? We must continue to bring the condom "out of the closet."

Continuous medical oversight. Juvenile courts provide oversight so long as the child is "at risk." Under the challenged child system, the pediatrician and school nurses could stay with the child through adolescence into young adulthood. The relationship should begin with comprehensive prenatal care extending to perinatal follow-up through the brain blossom period ending at age three or four. The provider's role should continue as the child enters Head Start and any remedial programs into grade school with the pediatrician helping the child to be comfortable with his or her body and the challenges that must be faced. In junior high school, the provider would ensure that the child was positively and thoroughly explained the nature of sexuality and have a comfortable perception of his or her body leading to a thorough grounding in contraception and family planning. Once the child develops intimate relationships, the provider could also be consulted regarding decisions about sexuality, childbirth, contraception and abortion. Particularly in the case of significantly challenged mothers, the provider becomes a pseudo-parental figure who may play a key role in the child's capacity to overcome the biological and environmental insults experienced earlier in life.

Community Support. The ecological model is community based and reflects positive community cultural values. For the abandoned mother, social supports in the form of extended family and community services are critical to her capacity to recover and meet the needs of her child. Many mothers are simply unable to travel long distances to hospitals to secure medical care for lack of funds and inability to secure day care while they are gone. The ecological model recognizes that a mother's likelihood of recovering depends upon the strength and accessibility of the community around her. Community based services would extend to using public schools in the evening for classes on parenting, nutrition, job skills, incest and physical abuse survivors groups and housing advocacy groups. Churches in the community would be encouraged to make their facilities available for the support of the families within the area of their congregation.

Many challenged mothers of challenged children need habilitation rather more than rehabilitation. The "healing" model is more appropriate than treatment in that the mothers are not yet "whole" in regard to the basic skills necessary for parenting and survival. Habilitative support involves basic parenting, education, nutrition, self care, contraception, counseling for dealing with prior traumas of incest, abuse and neglect, couple counseling for dispute settlement and fair fighting, remedial education, literacy, basic financial planning and job skills. Generally speaking, rehabilitation is not appropriate until significant progress has been made in habilitation. Rehabilitation would involve addressing the challenges of drug use, relational conflicts and self-esteem deficits, which would include family counseling with fathers or husbands, children, parents and relatives. Assertiveness training might also

be appropriate. The most important rehiabilitation may be the legal reclamation of the extended family.

VI. EXPANDING THE FAMILY TO PROTECT: THE CONCEPT OF CO-PARENT

Where the mother is severely challenged, the extended family should be encouraged to assist. Unfortunately, the present legal structure places concerned grandparents and relatives of the embattled mother in an adversarial relationship with her. In order for relatives to have authority to play an active role in her child's life, the mother must "lose" some or all of her custodial rights. The cost and trauma of such confrontational proceedings drain precious resources from families. The scars resulting from such proceedings make many relatives reluctant to try to protect the next child born to the challenged mother. Among Native American communities and other cultures, it is not unusual for other relatives to become more involved in parenting and caring for the child without intervention by state authorities. Our system must develop a less harmful way of involving another parental figure actively in the life of the challenged child to assist the child and the mother. This individual could be called a "co-parent."

A. *Roles and Powers of the Co-Parent*

Unlike foster parents, a co-parent would work regularly *with* the parents. The co-parent would be a respected member of the local community who garners community support and sponsorship for the difficult challenges to be faced by the mother and her child. The co-parent would initially have no authority to override the parent. The co-parent would assist the parent to face her challenges and would assist her child directly. The co-parent would assist the parents to secure the resources and information they need to habilitate themselves as parents. Likewise, the co-parent would assist in securing rehabilitative resources and have full access to the child's pediatrician, teacher and public health nurse to coordinate the care of the child and to ensure that the ongoing needs of the child are being met. The co-parent would assist preschool and school teachers to ensure that the educational needs of the child are being addressed. The co-parent might assist lawyers to gather data for class action litigation to insure the provision of necessary services to the community, the parents and the child, such as health care, food supplements and housing.

The co-parent could attend classes with the parents on parenting, educational skills, job skills and dealing with childhood abuse and neglect. The co-parent could assist the biological parents to network with similarly situated biological parents for peer group support in the difficulties of raising a challenged child.

The co-parent would assist the biological parents to be more aware of the positive attributes of their ethnic heritage. He or she would assist

the mother to better understand and deal with how she may be discriminated against because of her gender, her culture and her economic status. The co-parent would assist in finding day care and other support for the mother if she decides to enter any in-patient treatment program. The co-parent would assist the pediatrician in updating the file on the challenges faced by the parent and the child. Most importantly, the co-parent would be an agent for the education of the mother, the child and the community at large. By working closely with the physician and the community coordinator, the co-parent could challenge existing community biases complicating the challenges faced by the mother. The co-parent could be an agent of change in the community to move aside the many curtains of fear and prejudice that often cloak the challenged child.

B. *Selection, Training and Subsidy of the Co-Parent*

The co-parent should be a relative or neighbor of the mother and one who is respected within the community. To qualify, the co-parent would need to undertake basic training regarding the needs of a challenged child and the structure and function of the system devoted to meeting the needs of that child. The co-parent would apply to the county family court services department and be investigated somewhat like adoptive parents. Upon the completion of satisfactory investigation and training, the co-parent would be ratified by the family court as a "co-parent," which would entitle her or him to all medical and academic records of the child and to serve as an advocate of the relationship between the mother and the child.[468] In the event that the mother became unable to care for the child, the co-parent could assume increasingly greater responsibility, which would culminate in the open adoption of the child by the co-parent or some other individual agreed upon by the co-parent, biological parent and the adoption authority. By having an open adoption, the child and mother could still maintain a relationship which may be critical to both, and the child would have the advantage of more stable parental support. If the mother was unable to take advantage of habilitative and rehabilitative services, such adoption would be vastly less stigmatizing than the trauma of a termination proceeding and the placement of the child with an unknown foster home. Further, the community would have the advantage of feeling that they are "taking care of their own."

It would be reasonable to provide the co-parent some compensation. First, the co-parent should be granted an additional dependency exemption for federal taxes. Second, the co-parent should be able to deduct all money spent on the child from his or her taxes. Third, the co-

468. A co-parent is somewhat like a Limited Guardian or a Court Appointed Special Advocate (CASA) in regard to the training and appointment. However, it is significantly different, in that the co-parent advocates for the parenting relationship, while the CASA advocates for the best interests of the child. The co-parent should be sworn in an adoption-like proceeding to enhance the prestige and gravity of the responsibility.

parent would be able to receive some subsidy from the parents.[469] Fourth, with the approval of the supervising pediatrician, the co-parent should be awarded some or all of the subsidy normally awarded by the state to a foster parent. The pediatrician should, with a community co-ordinator, review the performance of the co-parent every six months to consider whether to renew the subsidy.

C. *Co-Parents as a Political Force*

A national association of co-parents could be established to share strategies and techniques of co-parenting and to allow for information gathering about the nature and extent of the problems faced in beleaguered communities. Co-parents could have an important political effect as community advocates, since they would be intimately aware of the difficulties faced by many community members. For example, co-parents could, in communities particularly hard hit by poverty, drugs and violence, argue that their community should be nominated as a "superfund" site deserving of special assistance through block grant format. Co-parents could form a stable political block to ceaselessly represent the interests of challenged mothers, fathers and their children. Presently, there is no political lobby for challenged parents and their children. They need all of their resources simply to survive. The organization of co-parents could be a potent force, possibly affiliating with organizations such as the American Association of Retired Persons or the Association of Family and Conciliation Courts to advocate for the manifest unmet needs of the children of our nation. The Association of Family and Conciliation Courts recently adopted a policy which stated, in part: "The status of 'co-parent' should be explored and implemented in a series of pilot projects nationally. Co-parents should be encouraged in cases where the alleged harm does not constitute child abuse."[470]

D. *An Expanded Role for Family Court Services*

It is inevitable that conflicts will develop between co-parents and parents, health care providers and community authorities regarding the needs of the child. Normally, the juvenile court or an appointed caseworker would investigate and make a recommendation. Unfortunately, this creates an adversarial relationship between the co-parents, and the mothers with obvious negative implications for the future. Thus, it is preferable for a dispute resolution system to be like the health care delivery system: voluntary, confidential and *mediatory* instead of adversarial.

The four institutions most able to meet these needs are: family

469. This subsidy would only be in cash where the mother had an ability to pay. However, in kind compensation would be appropriate in the form of presents honoring birthdays, etc. The co-parent would be given the respect accorded "elders" in traditional Native American cultures.

470. ASSOCIATION OF FAMILY AND CONCILIATION COURTS, MATERNAL SUBSTANCE ABUSE POLICY AND RECOMMENDATIONS 3 (May 9, 1992).

court services, community dispute resolution centers, community centers and churches. For purposes of illustration, the focus will be on family court services.[471] During the last decade, family court services have spearheaded the use of mediation to attempt to resolve family disputes outside of the trial setting. Family court services have expanded mediation to address issues of adoption, child support and anti-harassment. The mediation provided by family court services is confidential, and the files are kept separate from investigation files.

The family court services could perform functions regarding co-parents. They could investigate and approve co-parents. Family court services adoption programs have substantial experience in this area and would be the best body of individuals to set up protocols for investigating, approving and legally recognizing co-parents. In addition, they could mediate extended family disputes. Family court workers have substantial experience in mediating family disputes around parenting, so they would be the natural group to turn to in the event of disputes between the mother, the co-parent and others.

The family court services could maintain centralized care files. Like those exposed to the AIDS virus, there is a need to maintain centralized files on each child. Such filing systems are key to keeping track of ongoing medical and psychological problems faced by the child and the mother. Also, this entire field suffers from a lack of quality data to trace the variant effects of different programs on the multiple challenges faced by mothers and children.

The family court services could offer basic education and parenting, nutrition, self care and career preferences. Many family court services already offer a variety of classes (either directly or through referral) covering issues of parenting, negotiation, mediation and other important skills. This training could be in the form of a series of videotapes that would be available for any individuals wishing to view them with a series of group meetings afterwards.

The family court services could train co-parents. Co-parents should either be related to the parents, friends with the parents' families or be a long time resident of the child's community. Family court workers, Child Protection Service (CPS) workers and other state workers are hired by virtue of their professional qualifications and experience in a given field. Co-parents, on the other hand, would be nominated for their experience with the parents, the family and their community.[472] Co-parents should be trained in the basics of infant nutrition, infant care

471. Family court services programs began in Los Angeles in the early 1960s with the first Conciliation Court, which was devoted to helping families address and resolve custody disputes. Family Court Services have expanded throughout the nation. There is some form of Family Court Service in almost every county of the United States. The Association of Family and Conciliation Courts, a non-profit organization devoted to coordinating Family Court Service and expansion, has members in nine countries including the United States and Canada.

472. Co-parents would come from many different ethnic backgrounds expressing very different attitudes about appropriate parenting. Thus, it would be important to assist co-parents of similar cultures to network together to determine how best to use their particu-

and infant child development. Family Court Services workers could teach some co-parents how to administer basic psychological tests such as the Beck's Depression Inventory to assess maternal depression, the FIRO-B to assess the parental locus of control and the Denver Developmental Inventory to measure infant cognitive capacity and other aspects of development.[473]

Family courts could assist in non-adversarial parental transitions. In the event that comprehensive attempts to habilitate the mother fail and she remains unable to adequately meet the needs of her child, family court services and the co-parents could assist in a gradual voluntary transfer of parental authority to the co-parent or some other agreed upon parent figure. Dependency proceedings force family members to testify against each other in public, creating wounds to the family that last many generations. Instead, family members, including co-parents and community members could come together to convince the mother that until she is better able to take care of herself, she should allow her child to primarily reside with the co-parent or some other agreed upon adult. This transition would be mediated, if necessary, by family court services or some other entity and the parenting agreement would be made part of the child and mother's permanent confidential file. Over time, the child would reside more and more with the co-parent (or another) and less and less with the mother. The rights of the mother to spend time with her child should not (with rare exception) be fully terminated. In a worst case analysis, the status of the child should be that of open adoption whereby the mother is allowed some contact. This allows the mother and the community to perceive that, at some level, the "family" still exists and that the community can "handle its own." From a medical and psychological perspective, termination is unwise for the highly needy parent because she may, upon losing one child, seek to bear another child to compensate for the loss of her first child. Thus, the cycle begins again.

Family court services could train staff of community dispute centers, churches and community centers as outreach workers. To truly implement the ecological model of prevention, the structure and function of communities and their families must be enhanced. These three groups would be the primary outreach workers for challenged families. Those doing outreach would be trained regarding legal, psychological and mediation techniques by family court services and trained regarding child nutrition, malnutrition and health care by the community pediatricians and public health nurses.

This family court/community based system is preferable to the CPS/juvenile court system for a number of reasons. An increasing

lar culture to maximize the chance that the parents will meet the many challenges they face and thus better provide for their child.

473. Administered periodically, such tests would help the co-parent chart changes in the parent(s) and the child and could also measure the efficacy of particular parenting support programs.

number of pediatricians feel that a CPS is not an ally and that courts in general do more harm than good (unless the situation is so deteriorated that immediate removal of the child is medically necessary).[474] It is better to rely on family court services than an expanded CPS, because CPS has a strict statutory function to *protect* that takes priority over its duty to *prevent*. There is not much of a lobby on the state level for children who are battered or abused, so inappropriate cuts in funding are, sadly, quite common. However, family court services are used by many divorce lawyers and middle to upper class families to resolve parenting disputes. Thus, there is a greater demand to maintain relatively high levels of professional expertise in family court services than there is in CPS. Also, there is a greater demand to maintain funding levels such that the disputes of families can be resolved outside of court. Furthermore, family court services have an institutional history of being able to maintain separate confidential files for mediations which are sealed from the family court investigators who do custody investigations for court. They also have more experience, perhaps, than any other sector of the legal system in assisting a family's shift from one family form to another (e.g., from married to divorced, from divorced to adding step-parents, from having children to adding co-parents to open adoption).

E. *Community Supports for Challenged Children*

Community based day care would allow mothers to attend treatment, counseling, school and employment. Even if the mother was not making a good faith effort to habilitate herself, the child's time in day care (prior to school attendance) would allow a non-intrusive method of assessing the child's needs and the degree to which they are being met. It is quite possible that mothers who meet their own personal challenges could find employment as day care workers. Day care could ensure that the child is receiving the nutritional supplements necessary to deal with prior malnutrition or undernutrition.

Community based health care should be the center of attention for the challenged child. A clinic would maintain records on all the challenged children. By strengthening the community, it would be better able to address the issues of poor housing, inadequate food, inadequate education and other services that are critical to the mother's capacity to meet the needs of her failure-to-thrive child. In this way, the community becomes better able to create political pressure to ensure that the child's needs and the mother's needs are met. There is evidence that community based health care delivery would be significantly less expensive than a centralized program run by state and federal authorities. Centralized programs often miss the simple facts that the existence of a community is therapeutic and that the existence of a community service that builds on existing community resources is doubly therapeutic in that it assists

474. The fault lies not with CPS workers but with our historic tendency to create institutions for the abandoned and later abandon our resolve to fully fund them.

the mother and enhances the self-esteem of community members.[475]

The United States Public Health Services already identifies "underserved" areas nationally. Doctors, nurses and other providers wishing to serve would receive a salary and have a percentage of their student loans paid off for each year they serve provided that such service would extend for at least five years. Although regional hospitals would be key for high risk births, community health care centers should provide sufficient prenatal and preventive care to reduce the staggering hospital costs of FAS children, borderline babies and otherwise unnecessarily traumatized infants. Community health care would be based on community epidemiology. This would involve looking to each community as a medical entity and assessing the various levels of its physical, psychological and cultural immune systems. Differences in culture and faith within communities should be affirmed and utilized to maximize the delivery of culturally appropriate health care. Each community would create a different challenge for the manner and method in which health care is delivered.

Community health care should also involve comprehensive outreach to all mothers and potential mothers to ensure they receive full contraceptive education and support so that births can be *planned.* For mothers already abusing drugs, methadone and other drugs support should be available to ensure that the fetus does not suffer from withdrawals or overdose during gestation. Provision of bleach kits and clean needles to all drug using women of child bearing age is a responsible minimum to prevent transmission of life threatening diseases to the fetus.

Community therapy and co-parenting should be available. Since research indicates that one stable emotionally nurturing relationship can make a tremendous difference in a challenged parent's ability to cope, co-parents would be key individuals for habilitation of "challenged mothers" and their "challenged children." Community therapy would involve regular meetings amongst challenged mothers and their extended families to pursue strategies for survival. Community therapy would not necessarily place the mothers in a group. Rather, it would bring together a few mothers along with their extended families (relatives, co-parents, etc.) as a counseling group. This unit of therapy would allow extended families to deal with any shame they have about their children and to share strategies on how to better support their challenged children. Within these therapeutic units, the mothers would be given support for facing the abuse and neglect they may have experienced as children and to remedy the damage to their self-esteem. Part of community therapy would be providing community recognition for the difficult work of parenting challenged children and preventing the

475. The Home Builders program begun in Tacoma, Washington and the Iowa Coordinated Community Program, are good examples of cost effective community based delivery of services. *See* NATIONAL COUNSEL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 276.

birth of more unplanned children. For example, local churches might choose to "sponsor" certain mothers and their children such that there could be public acclaim for progress made.

Outreach for fathers is critical, particularly if it is tied to enhancing their employability in areas where many males have been chronically underemployed. Challenged fathers should be provided comprehensive social supports to assist in their habilitation as well as psychological support for any abuse they have experienced that may hamper their capacity to achieve healthy attachments with the mother and their children. Fathers should also be "sponsored" by institutions within the community, so their success can be celebrated, and by implication, that their failure be a source of shame. Substance abuse treatment should occur within the context of community therapy. This would provide the community with the sense that it is able to address and assist those who need to be helped and to "clean up" those who do not seek to be helped.

Community housing for the homeless should be provided. The human cost to our children of disease, death, depression, retardation, psychopathology, unemployment and sociopathy vastly exceeds the cost of providing adequate housing. Communities should be primarily responsible for maintaining low income housing, and such housing should be scattered throughout the neighborhood, not localized into "projects." Initially, such efforts would involve rehabilitating existing residences with federal support. This effort could create significant employment opportunities for community members to rebuild their communities. The federal government now has control of an unprecedented number of housing units and apartments through the Resolution Trust Corporation, which are being sold at far below their value to a variety of private interests. Serious thought should be given to donating such properties to cities and communities on the condition that they be adequately maintained and used for families in need.

Community legal advocacy should be available. Class action and impact litigation will be necessary to secure and maintain adequate city, state and federal funding for the above programs. It will also be necessary to secure a change in the definition of poverty and the provision of adequate services to challenged children and their parents. Efforts need to be made within the legal community to redefine how the law views families, children and parents such that institutions charged with providing supports and services for families can be equally accountable for the harm resulting to children as parents who mis-parent.[476]

476. So long as women and children (and slaves in general) were property, the "owner" was afforded many means of compensation for harm to them. Today's property owner has increasingly broad powers to look to the government and private parties (Potentially Responsible Parties (PRPs)) for cleaning up polluted property under CERCLA (Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601(23)-(25), 9607(a)(4)(A)-(B) (1988)). The ecologic analysis used to define degradation of the physical environment can be adapted to assess the degradation of the familial environment. Areas where housing, schools and community supports are significantly "degraded" could be declared "Superfund" sites and subject to special funding and scrutiny. Co-parents and others could help gather some of the data to document degradation

Community based research should be undertaken. It would be naive to assume that this proposed system will solve all the problems raised. Like the solutions of centuries past, it will likely succeed in some areas and fail in others. The only certain result is that it will change the nature of the problem faced. To learn from our mistakes, we must try to determine how each innovation affects the health, psychology and social supports of challenged children and parents. The first challenge will be to better understand what it means to rebuild the infrastructure of beleaguered communities and their embattled families. The overlay of culture and faith will alter the needs of each community. One challenge to the social science research community would be to develop ways of measuring the degree to which each community succeeds in rehabilitating itself on its own terms instead of standardized terms that may have little relevance to the cultures and aspiration of community members.

Economic research is important to begin to quantify the true cost of poverty in terms of increased medical care (the pediatrics of poverty), increased impairment, lost productivity in the work place, lost capacity to maintain stable employment relationships and lost capacity to maintain stable familial relationships. Perhaps by better understanding the costs of what we have lost, we could better promote the necessity for investing in what our families must regain.

VII. CHALLENGES OF IMPLEMENTATION

As mothers and fathers are challenged, professionals are challenged to respond. Professional schools must integrate and support an ethic of care and service throughout their curricula. Law schools must retrieve a sense of reason that is not divorced from compassion and a sense of jurisprudence that demands redress of historic abandonment. Healing should be part of justice as well as medicine. Professors must be able to teach with both their heads and hearts before they are given tenure. Professional schools should pointedly enhance the status of those serving the abandoned and create a strong ethic of "giving back" for those pursuing more lucrative practices. Pressure should be brought to bear to create an ethic whereby well-paid professionals lend support to their peers working with challenged families. Although the challenges are different for each profession, a few are summarized below.

A. *Challenges for the Legal Community*

1. That the American Bar Association (ABA) pass a policy finding that:

a) criminalization of maternal substance abuse is not in the best interests of the child;

b) civil commitment is also inappropriate unless it can be proven

of the community. Perhaps major employers choosing to move their manufacturing facilities offshore might be PRPs for the unemployment they create. State governments with regressive tax systems that fail to adequately fund schools and city building departments that fail to enforce codes on housing might also be PRPs under such a hypothetical statute.

that the mother refused to avail herself of comprehensive perinatal care, substance abuse care, parenting and job skills training, adequate housing and counseling;

c) mandatory drug testing and reporting should be discontinued until comprehensive substance abuse and prenatal care is available to all regardless of their means;

d) neglect proceedings for maternal substance abuse[477] are inappropriate until after the mother refuses to avail herself of confidential comprehensive care;

e) preventable mental retardation and child neglect result from our systematic failure to provide reasonable health care and legal advocacy for children and parents;

f) Legal services corporations should be allowed to pursue any class-action or impact litigation reasonably necessary to defend or promote the rights of the abandoned.[478]

2. That the ABA Endowment, in league with the American Academy of Pediatrics, sponsor a series of co-parenting pilot projects in at least four cities nationally. A model for this could be the ABA's recent sponsorship of Multi-Door Dispute Resolution Centers in Tulsa and Washington D.C.

3. That a task force be formed[479] and funded to accomplish the following:

a) to generate protocols for a diagnosis of "challenged"[480] in infants and to generate an ecological evaluation of what comprehensive addiction services and other community supports are needed;

b) to generate protocols for selection and training of co-parents with minimum standards for their performance and their compensation;

c) to generate protocols for the use of family court services by challenged parents, challenged children, co-parents and the child's health care workers;

d) to generate models of data gathering (including control popula-

477. An ecological analysis should be used for future neglect cases until a better standard is promulgated.

478. Legal Services should have its eligibility criteria increased to 250% of the poverty level and should be funded to assist families in settlement of domestic disputes involving children.

479. It could consist of representatives from the American Academy of Pediatrics, American Association of Critical Care Nurses, American College of Preventive Medicine, American Society of Addiction Medicine, Center for Science in the Public Interest, Latino Council on Alcohol and Tobacco, NAPARE, NCADD, NAACOG, National Association of State Boards of Education, National Perinatal Association, National Women's Health Network, National Coalition of State Alcohol and Drug Treatment and Prevention Association, the National Council of Community Mental Health Centers, the Association for Family and Conciliation Courts, the National Council of Juvenile Court Judges, the Office of Substance Abuse and Prevention of the Department of Health and Human Services, the National Commission for Prevention of Child Abuse and Neglect, the American Humane Association, the Children's Defense Fund and other relevant organizations.

480. This could be an enhanced H-PIT criteria for children under 36 months. *See supra* note 455.

tions) such that all programs can be evaluated for their efficacy (without, of course, revealing the identity of their participants);

e) to develop methods of subsidizing lawyers to work in this area. Specific attention should be given to the loan forgiveness programs now in effect at thirty law schools nationally.[481] Partial funding should come from state interest on lawyers' trust accounts (IOLA), alumni and prominent law firms in each locality.[482]

4. That the ABA and the American Association of Law Schools establish a specialty in pediatric law, which would create a group of lawyers who were familiar with the medical needs of challenged children,[483] federal and state entitlement programs (AFDC, SSI, Medicaid), and the myriad federal and state administrative organizations charged with insuring adequate housing, adequate food, adequate education and adequate health care.

B. *Challenges for the Medical Community*

1. That the American Academy of Pediatrics (AAP) and the AMA make a policy finding that the failure to provide comprehensive, universal perinatal care for families constitutes systemic child neglect.

2. That the AAP and other relevant medical authorities work with the United States Public Health Service to determine appropriate methods of funding doctors and public health nurses to participate in community health services delivery to the poor and the near poor. This could be partly funded by the Public Health Service paying a salary and undertaking to pay-off a certain percentage of the doctor's student loans for each year he or she participates in the community health centers.

3. That the AAP and other relevant medical authorities to develop protocols for community health centers. In this regard, effort should be made to accomplish the following:

a) for pediatricians and public health nurses to adapt their medical knowledge to the norms of the community and to implement, to the

481. Michael Marriott, *Aid for Law Graduates Who Want To Aid the Poor*, N.Y. TIMES, December 13, 1991, at B-10.

482. The Association of Family and Conciliation Courts recently adopted the Policy that asked that such an interdisciplinary task force be formed and funded to accomplishing the following goals:

(a) to generate protocols for a diagnosis of "challenged" children and to determine which comprehensive addiction services and other community supports are needed;

(b) to generate protocols for selection and training of co-parents with minimum standards for their performance and their compensation;

(c) to generate protocols for the use of Family Court Services by challenged parents, challenged children, co-parents and a child's health care workers;

(d) to generate models of data gathering (including control populations) such that all programs can be evaluation for their efficacy (without, of course, revealing the identity of their participants); and

(e) to develop methods of subsidizing lawyers to advocate for challenged parents and children.

ASSOCIATION OF FAMILY AND CONCILIATION COURTS, *supra* note 470, at 3.

483. For example, failure to thrive, stress, nutrition, substance abuse and interpersonal violence.

degree possible, confidential relationships with all young women in their care. This would involve detailed sex and contraceptive education, and access to counseling for childhood abuse and neglect.[484] The pediatrician's role should extend to advocating enhanced sex education at schools. Initially, the physician may need to help the teachers and parents clear up misconceptions about the need for comprehensive sex education and contraceptive use.[485] Where pediatricians are not available, school-based health clinics should be funded and expanded to improve access to care and contraceptive use. Such school-based health clinics have been shown to reduce the rate of unwanted teenage pregnancy.[486] The Federal Healthy Start Program may be a helpful model;

b) to return and enhance school nurse services to each elementary, junior high and high school with underserved challenged children. These public health nurses could monitor the progress of the challenged children, suggest interventions in the event the children are falling behind and completely restructure the format for health and childbirth education within schools to the level of concreteness that would reduce the incidence of unplanned and unwanted teenage pregnancies.[487]

C. *Challenges for Other Professionals*

Psychologists, sociologists and educators should explore the structure and function of abandonment with a sharp eye on how culture and community can reclaim what was lost. On an individual level, psychologists should investigate how ego-based psychologies may fail to meet the needs of women in general and single mothers in particular. They should explore theories that treat the relationship, not just the ego, as

484. Such sex education should be discussed frankly with the child throughout his or her childhood, using appropriate names for anatomy. Just prior to puberty, there should be an openly negotiated shift in the provider's relationship with the child. Prior to puberty, the provider usually shares all medical information with the parents. At puberty, however, it would be appropriate to establish a confidential relationship between the provider and the child, while encouraging the child to speak with the parents. An entire sexual history should be taken and the child should have the opportunity to attend small group meetings to address sexual issues and concerns. Within this trusting concept, the provider could discuss the perceived stigma of being a virgin when "everyone is doing it" and support the child's preference to remain a virgin. With the detailed sexual history, the provider could determine if there are any prior difficulties such as incest and abuse that would complicate the child's future capacity to engage in mutually rewarding relationships.

485. While comprehensive sex education may increase the rate of contraceptive use, it does not promote either early or more frequent sexual activity. Grant & Demetriou, *supra* note 431, at 1285 (citations omitted).

486. NATIONAL RESEARCH COUNCIL PANEL ON ADOLESCENT PREGNANCY AND CHILDBEARING, *supra* note 436; Laurie S. Zabin et al., *Evaluation of a Pregnancy Prevention Program For Urban Teenagers*, 18 FAM. PLAN. PERSP. 119, 125 (1986).

487. The recent policy of the Association for Family and Conciliation Courts called for medical authorities to develop protocols for community health centers involving pediatricians, public health nurses and others to expand care within the community and within each elementary junior high and high school that serves challenged children. ASSOCIATION OF FAMILY AND CONCILIATION COURTS, *supra* note 470, at 3.

the fundamental unit of therapy in order to better meet the needs of challenged mothers fathers, and their children.[488]

Legislators need first to divert at least 50% of our antidrug budget[489] to community care facilities. Next, they must face up to alcohol as they are being forced to face up to AIDS. Lawmakers must consolidate the numerous and often competing agencies and organizations involved with different infant traumas and disabilities. Down's syndrome agencies should not be competing with FAS agencies. The Association of Family and Conciliation Courts recently adopted a policy endorsing the following action:

> A Challenged Child Act should be passed directing a consolidation of services to all challenged children. A Co-Parent Act should be passed providing co-parents appropriate authority and compensation so they could serve as a lobby for other challenged child legislation. Maternal child and health block grants available though Medicaid should be enhanced to fund school-based health clinics. Any bans on advertisement of non-prescription contraceptives on radio and television should be lifted and the significant pressure should be brought on media advertisers and networks for radio, television and magazines to portray sexuality in a responsible manner. Television should be pressured to frankly and fully deal with prevention of sexually transmitted diseases.[490]

Pediatric lawyers, doctors and therapists should work with national church organizations to cross train pastors to assist as co-parents and, more importantly, to weave together an interdisciplinary fabric of law, theology and psychology to best support the needs of challenged children, their parents, their co-parents and their communities.

D. *Funding for Change*

In our present economy, the only thing that exceeds the gravity of our social problems is our reluctance to find solutions. Legions of experts intone that Americans will not endure an income tax increase and that jobs must take priority. The forces seeking to secure reasonable

488. Specific consideration should be given to the Self In Relation theory of Jean Baker Miller and the emerging masculine psychologies proposed by Robert Moore and James Hillman, which place a higher value on parenting and the roles of fathering than many prior psychological theories. For an exploration of dysfunctional families resulting from an immature, weak or absent father and an equally immature concept of masculine psychology, see ROBERT MOORE & DOUGLAS GILLETTE, KING, WARRIOR, MAGICIAN, LOVER: REDISCOVERING THE ARCHETYPES OF THE MATURE MASCULINE 58 (1990).

489. Federal antidrug spending is projected to be $11,953.1 million in 1992 and $12,728.7 million in 1993. CENTER FOR DEFENSE INFORMATION, *supra* note 278, at 7. The concept of diverting 50% of our drug interdiction budget to community care facilities for parents with drug problems and their children was endorsed by the Association of Family and Conciliation Courts in its May 9, 1992 policy. ASSOCIATION OF FAMILY AND CONCILIATION COURTS, *supra* note 470, at 3.

490. ASSOCIATION OF CONCILIATION COURTS, *supra* note 470, at 4. "The American Academy of Pediatrics Committee on Adolescence published a policy paper documenting the need for more responsible treatment of sexuality in the media." *Id.* at 5 n.9 (quoting Canadian Adolescence: Sexuality, Contraception and the Media, *Pediatrics*, 78, 535, 1986).

healthcare, to reform the schools, to prevent drug use and to protect children are routinely forced to confront one another and fight for budgetary scraps. Perhaps our view of the funding problem is part of the problem. Looking just to Congress for funding makes the challenged child system prone to later budget cuts, reducing it to a mediatory form of CPS. Therefore, lines of dedicated funding should be pursued. Many assume that the only sources of federal funds are from cutting other budgets or increasing income taxes. Income tax based funding places a responsibility upon all taxpayers for the drinking and drug related behaviors of perhaps 10% of the population.

E. *Taxing Consumption*

From an ecologic perspective, the producers and users of drugs should be primarily obligated for the harm created by their use. They should be held to the same standard as those producing and using other hazardous chemicals. While we are expending vast sums attempting to tax illicit drug producers, we are doing little to tax licit drug producers and consumers. Alcohol is a case in point. In 1910, 80% of our federal revenues came from an excise tax on alcohol. By 1987, the same alcohol excise tax had dropped to 0.7% of federal revenues.[491] Alcohol use is directly related to 105,000 deaths per year, with direct societal (including medical) costs of $100 billion per year in 1990 and a projected $150 billion per year by 1995. In 1988, the total federal excise taxes collected for alcoholic beverages were $5.8 billion and in 1990, $5.7 billion.[492] Assuming that the alcoholic beverages purchased are consumed, the societal cost (excluding FAS and FAE children) of each ounce of alcohol is $1.25. Our federal excise tax covers seven cents of each drink and combined federal and state liquor taxes average twenty-three cents per drink. The actual alcohol in beer and wine, the beverages most highly promoted for and consumed by young women, are taxed far less than the alcohol in hard liquor.[493] Twelve ounces of beer contain approximately the same amount of alcohol as 4.7 ounces of wine and 1.4 ounces of eighty proof liquor. Beer is taxed at five cents, wine at four cents, and eighty proof liquor at twelve cents. Thus, alcohol in beer is taxed at 42% and wine at 30% of alcohol in hard liquor.[494] *Federal taxes on beer and wine have been increased only once since 1950.* If beer and wine alcohol were taxed at the same rate as spirits, and all were corrected for inflation since 1970, $16.6 billion in new revenues would be realized and an esti-

491. Bureau of the Census, *Historical Statistics of the United States; Colonial Times to 1970, Part 2*, Series Y 358-373 (1976); Department of the Treasury, Monthly Statement of Receipts for 1987 (cited in CENTER FOR SCIENCE IN THE PUBLIC INTEREST, STATE ALCOHOL TAXES: CASE STUDIES ON THE IMPACT OF HIGHER EXCISE TAXES IN 14 STATES AND THE DISTRICT OF COLUMBIA: RAISING REVENUES AND REDUCING ALCOHOL-RELATED PROBLEMS 4 (Feb. 1990)) [hereinafter STATE ALCOHOL TAXES].

492. Statistical Release: *Alcohol and Tobacco Tax Collections* Bureau of Alcohol Tax and Firearms, May 1, 1989 (cited in STATE ALCOHOL TAXES, *supra* note 491, at 2).

493. This is a clear example of political abandonment.

494. *See* STATE ALCOHOL TAXES, *supra* note 491.

mated $11.7 billion in alcohol related costs would be avoided.[495] *Setting the tax by correcting for inflation from 1934 would raise $62 billion and significantly reduce alcohol use among poor mothers.*

Taxing alcoholic beverages at a rate near their social cost is both reasonable and, compared to cigarettes, conservative. The state and federal taxes on cigarettes are 246% greater than their estimated societal costs.[496] The scant increase in federal taxes and the reduction of some state alcohol taxes is a tribute to a very strong alcohol lobby. As of 1989, California, the nation's largest wine producer, taxes wine at $.0004 per drink or only one cent per gallon. This is 1/1000th the federal rate.

F. *Taxing Promotion*

Public marketing of alcohol is estimated to cost over $2 billion per year.[497] The abandoned are strongly targeted. The average child sees 90,000 incidents of alcohol consumption on television before he or she is old enough to drink. A 1987 *Weekly Reader* poll found 34% of fourth graders reported "some to a lot" of pressure to drink wine coolers.[498] A 1988 sample survey of seven to twelve years olds in Washington, D.C. found the average child able to name more alcoholic beverages than presidents. This is partly achieved by the use of cartoon characters such as "Bud Man" or "Spuds Mackenzie."[499] The tax on *public promotion* would be paid in the form of *public education*. For example, for every $100 spent on television, radio, billboards and magazine advertisements, companies would contribute $20 to a federal fund for public service advertisements in the same media. Next, warning labels would be dropped in favor of a series of rotating *educational* messages.[500] These

495. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, FEDERAL ALCOHOL TAX FACTS (Dec. 1991).

496. Gina Kolata, *Taxes Fail to Cover Drinking Costs, Study Finds*, N.Y. TIMES, Mar. 17, 1989, at A13. The taxes are estimated at $.37 per pack and costs at $.15 per pack.

497. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ALCOHOL ADVERTISING FACTS (Apr. 1991). Just one company, Anheuser-Busch, helps sponsor all major league baseball teams, twenty NFL teams and over 300 college teams. *Id.* This company has an immense share of national beer advertising. If it could be persuaded to voluntarily join this effort, perhaps many others would follow.

498. *Id.*

499. "Inadequate voluntary industry codes cover only media advertising, thereby allowing promotions such as Anheuser-Busch's licensing of Spuds Mackenzie for some 200 consumer products, including dolls and stuffed animals." *Id.*

500. Proposed messages are:

1. SURGEON GENERAL'S WARNING: Drinking This Alcoholic Beverage During Pregnancy Can Cause Mental Retardation and Other Birth Defects.
2. WARNING: Drinking This Alcoholic Beverage Impairs Your Ability to Drive a Car or Operate Machinery.
3. WARNING: Alcohol May Be Hazardous If You Are Using Any Other Drugs, Such as Over-the-Counter, Prescription, or Illicit Drugs.
4. WARNING: Drinking This Alcoholic Beverage Can Increase Your Risk of Developing Hypertension, Liver Disease and Cancer.
5. WARNING: Alcohol Is a Drug and May Be Addictive.
6. Drinking Too Much, Too Quickly, Can Cause Alcohol Poisoning, Which Can Be Fatal.

CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NUTRITION ACTION HEALTH LETTER, July 2,

messages would be shown and spoken on all television commercials, spoken on all radio advertisements and clearly posted on all printed matter, including the front label of each bottle and the front and back of every cigarette pack.

G. *Tax Credits and Family Stamps*

The cost of raising our future workforce, which will fund our Social Security Benefits, should be born equitably.[501] Regardless of the method, there can be no dispute that income must be distributed from higher to lower income and from those without children to those with children. Households without children have risen from 49% in 1960 to 62% in 1988. Looking just at households with adults of childbearing age, the median income per person for those without children was 67% higher than for those with two children in 1988.[502] In the near term, middle and upper income parents should receive tax credits for childcare and child healthcare while those unable to use credits should receive Family Stamps, which could be exchanged for childcare, healthcare, housing and services to handle family disputes before they escalate into violence. Family Stamps could, with the approval of the pediatrician, be used for counseling of parents for childhood abuse, domestic violence and drug and alcohol addiction.

H. *Child Savings Bonds and Asset Forfeiture Funds*

Those purchasing United States Savings Bonds should have the option of buying "Child Savings Bonds," from which all federal revenue would be dedicated to challenged children's programs. Our War on Drugs has resulted in hundreds of millions of dollars of assets seized from those convicted. At least 50% of these funds should go to comprehensive community based treatment and community care facilities in high drug use areas.

1992, at 2-3 (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, SEVENTH SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH, Jan. 1990; U.S. DEPARTMENT OF AGRICULTURE, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NUTRITION AND YOUR HEALTH: DIETARY GUIDELINES FOR AMERICANS, (3d ed. 1990); *Health Warnings on Alcoholic Beverages, Hearing Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives* (July 18, 1990)).

501. Employer paid parental leave and child care is inequitable in that it provides the greatest benefit to those who need it least, the well paid parent. It provides scant benefit to those who need it most, the poor women with limited education and job skills who cannot maintain full time employment. It operates as a discriminatory tax on particular employers who historically employ women of childbearing age (e.g., textile mills). A tax only on these employers encourages them to move their manufacturing to other countries where they won't be taxed, or, if they remain in the United States, to pay lower wages or provide fewer benefits to employees in order to pay the leave and daycare. Thus, the proposal penalizes employers who hire and promote large numbers of women of childbearing age.

502. Victor R. Fuchs & Diane M. Reklis, *America's Children: Economic Perspectives and Policy Options*, SCIENCE, Jan. 3, 1992, at 41, 44.

CONCLUSION

The primary goal of this Article was to find a way to better address and understand the complex problem of maternal substance abuse. It has addressed as abandonments our many streams of parental failure, societal prejudice and professional neglect. The geography of abandonment is different in each locality, creating needs for very different programs. This Article has examined as challenges the myriad harms to our children. It is error, however, to view those we abandon as *only* being abandoned. "[T]here is something else: the faith of those despised and endangered that they are not merely the sum of damages done to them."[503] The "faith of those despised and endangered" can be found in battered women's shelters, in detoxification programs and behind triple deadbolted doors of project apartments with crumbling walls, scrambling rats and faucets that run day and night. The faith needed by the struggling single mother is not dissimilar to the faith needed by the lawyers and doctors struggling to reclaim their professions. Such faith cannot be explained as much as it can be experienced. It cannot be known as much as felt. In this sense, none of the solutions proposed herein is complete. Each solution assumes that we will view our profession and our reason in a way that the stories of the abandoned become *valued*, if only to help us better discover how we have strayed. Each solution assumes a group of doctors, lawyers and professors committed to pushing the pendulum of professionalism away from an ethic of entrepreneurialism and toward an ethic of compassion and healing for all. The curriculum[504] we need remains rigorously intellectual, but intellectual analysis alone is insufficient. It is professionally arrogant to assume we can heal others before we have healed ourselves. Without individual change, legislative change will be meaningless:

> [T]he moral is . . . to notice what one is doing, and in particular to notice what people are saying. . . . [I]t very often does turn out, that people are trying to tell you that they are suffering. Just insofar as one is preoccupied . . . , people are likely to suffer still more.[505]

To the extent we fail to face these challenges, our children will face them. Our task is to challenge ourselves and revive our professions from their roots in helping and healing. We must confront our apathy, prejudice and denial to discern how these abandonments pollute our hearts' capacity to understand and to act. We must begin to see through the eyes of the infant that the abandonment of maternal drug use is part of the larger abandonment of poverty, disease and diminished commu-

503. MACKINNON, *supra* note 249, at 83 (quoting Adrienne Rich, "Sources").

504. An alternative to our present jurisprudence is necessary to reclaim each abandonment. The Critical Legal Studies movement, the Feminist Jurisprudence movement, and the impressive scholarship on the black, Asian, Hispanic and gay experiences will hopefully lead to a fundamental revision of our concepts of reason, justice and liberty.

505. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 691 (1990) (quoting RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 164 (1988)).

nities. In the end, we must begin with the wisdom of our oldest Americans:

> Let us put our minds together and
> see what kind of life we can
> make for our children.
>
> - Sitting Bull[506]

506. Sitting Bull, *quoted in* STREISSGUTH ET AL., *supra* note 413 at i.

CONSORTIUM CLAIMS INVOLVING CHILDREN: SHOULD COLORADO CONTINUE AN ARCHAIC CONCEPT OR CONFRONT A FAULTY CORNERSTONE?

JOHN M. PALMERI*
CHRISTOPHER P. KENNEY**

I. INTRODUCTION

In a tort system premised upon economic compensation for personal injuries, a child's rights are difficult to define. Under basic tort principles, one who is injured by a negligent tortfeasor is entitled to recover for pain and suffering, loss of wages and medical expenses. This is the rule of recovery in most modern jurisdictions except when, by happenstance, the victim is married in which case an additional category of recovery called consortium is recognized. A consortium action allows the non-injured spouse to sue for the intangible losses resulting from his or her deprivation of the affection, society, companionship and aid of the injured spouse. Within the last fifteen years, a minority of jurisdictions have extended the consortium claim to the parent-child relationship. This Article examines the claims of filial consortium (a parent's claims for a negligently injured child) and parental consortium (a child's claims for a negligently injured parent). It tracks the development of consortium at common law and through statutory enactments as the roles of husband, wife and child have evolved. This Article will conclude by contending that Colorado should refuse to expand the consortium concept to the parent-child relationship because to do so merely perpetuates archaic beliefs of Victorian England, stretches tort law beyond its intended boundaries and adversely impacts the present tort system.

II. HISTORICAL VIEW

A. *The Spousal Consortium Claim and the Master-Servant Analogy*

At common law, when a servant was tortiously injured, the master possessed a cause of action for lost services.[1] While the servant had a claim for his injuries, the master's claim was independent and in the

* John M. Palmeri, Partner, White and Steele, P.C., Denver, Colorado; A.B. 1981 Columbia University; J.D. 1984 University of Denver.

** Christopher P. Kenney, Associate, White and Steele, P.C., Denver, Colorado; B.A. 1986 University of Colorado; J.D. 1990 University of Denver. The authors wish to thank Joseph Cachey and Joseph King for their research and editorial work on the article.

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 125, at 931 (5th ed. 1984) (citing John H. Wigmore, *Interference With Social Relations*, 21 AM. L. REV. 764 (1887)).

master's own right.[2] This rule was a holdover from the feudal relationship between serf and lord.[3] The master's claim was based on the general principle of the common law that where a person sustains loss or damage through the wrong of another, he has an action to be remunerated for that loss in damages.[4] Because the servant owed to the master the duty of his service or labor,[5] it followed that the master was entitled to recover for the loss of services or expenses incurred as a result of the servant's injury.[6] At common law, a wife's relationship to her husband was similar to the relationship of the servant to his master in that the wife had a duty to provide her husband service or labor.[7] Because the common law viewed the wife as her husband's servant, with no status to sue on her own behalf, when a married woman was injured, the husband sued for the damages and joined his wife in the action.[8] By 1619, the master's cause of action for the services of his injured servant had extended to allow a husband's independent recovery for lost services caused by an injury to his wife.

In *Guy v. Livesey*,[9] a husband failed to join his wife in an action for damages arising from the defendant's assault and battery on both spouses. The defendant argued that the husband could not recover for the damage done to the wife unless she was joined in the action.[10] The court disagreed, holding that the husband had an independent action since "he lost the company of his wife, which is only a damage and loss to himself . . . ."[11] The court further reasoned by analogy that because a master has a valid cause of action for the loss of his servant's service, a husband should similarly have such a cause of action.[12] Thus, the claim for loss of consortium was born.

Although initially a pecuniary claim, consortium soon began to encompass intangible elements such as society, affection, conjugal relations, companionship and sexual relations.[13] The reasoning behind expanding the consortium claim in this manner appears in numerous decisions from the late 1800s[14] in which courts presented this extension as a self-evident, pre-existing right rooted in the common law principle that the husband not only is entitled to loss of services, but also intangible losses unique to the marital relationship. Many courts determined that when an injury infringed the husband's right to companionship, he

2. Joseph H. Radensky, *The Child's Claim for Loss of Parental Consortium—The Prospects for the Nineties (The Decade of a Kinder, Gentler Society?)*, 17 W. ST. U.L. REV. 277, 281 (1990).
3. *Id.*
4. Blair v. Chicago & Atl. Ry., 1 S.W. 367 (Mo. 1886).
5. Selleck v. City of Janesville, 80 N.W. 944, 946 (Wis. 1899).
6. *Blair*, 1 S.W. at 368.
7. *Selleck*, 80 N.W. at 946.
8. Radensky, *supra* note 2, at 282.
9. 79 Eng. Rep. 428 (K.B. 1619).
10. *Id.*
11. *Id.*
12. *Id.*
13. *See* KEETON ET AL., *supra* note 1, § 125 at 931; Radensky, *supra* note 2, at 282.
14. David P. Dwork, Note, *The Child's Right to Sue for Loss of A Parent's Love, Care and Companionship Caused By Tortious Injury to the Parent*, 56 B.U. L. REV. 722, 724 n.22 (1976).

was entitled to compensation for loss of such right.[15] For example, the Wisconsin Supreme Court in *Selleck v. City of Janesville* stated:

> [f]rom before the days of Blackstone down to the present time, . . . the husband's recovery is for the loss or impairment of his right to conjugal society and assistance, and ordinarily, where the word 'services' is used, it signifies wifely services, such as are due from her, and includes the idea of her society.[16]

By the late nineteenth century nearly all American jurisdictions had passed Married Women's Acts.[17] These so-called "emancipation statutes," which allowed married women to sue and own property in their own name, cleared the way for the recognition of a wife's claim for lost consortium.[18] No longer was a wife seen as merely an appendage of her husband. It was not until the 1949 decision, *Hitaffer v. Argonne Co.*,[19] however, that a court first recognized that both husband and wife were entitled to the comfort, companionship and affection of the other.[20] Plaintiff, Lucia Hitaffer, brought an action against her husband's employer to recover for her loss of consortium. Her husband had sustained severe permanent injuries to his abdomen while in the employ of the defendant. Plaintiff's husband received compensation for his injuries pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act and was therefore barred from suing his employer. Ms. Hitaffer, however, initiated a claim in her own right for loss of her husband's aid, assistance, enjoyment and sexual relations. The court granted summary judgment for the defendant on the basis that plaintiff's consortium claim failed to state a cause of action upon which relief could be granted.[21] The Federal Court of Appeals for the D.C. Circuit reversed, holding there was no substantial rationale on which the court could predicate a denial of a wife's action for loss of consortium due to her husband's injury.[22] The primary basis for the court's decision was that a husband already had a cognizable action for consortium and therefore, the medieval concept that a husband is master should not survive in the "enlightened day and age" of 1949.[23] The court noted that marriage gives each spouse the same rights and therefore both are entitled to the comfort, companionship and affection of the other, not only as a natural right, but as a legal right arising from the marital relationship.[24] Thus, while noting that medieval and antiquated concepts should not be furthered, the court expanded a right of recovery based on just such an arcane theory.

---

15. Furnish v. Missouri Pac. R.R., 15 S.W. 315, 316-17 (Mo. 1891); Kelley v. New York N.H. & H. R.R., 46 N.E. 1063, 1063 (Mass. 1897); Selleck v. City of Janesville, 80 N.W. 944, 946 (Wis. 1899).
16. *Selleck*, 80 N.W. at 946.
17. Dwork, *supra* note 14, at 725 n.28.
18. *Id.* at 725.
19. 183 F.2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852 (1950).
20. 183 F.2d at 816.
21. *Id.* at 812.
22. *Id.* at 813.
23. *Id.* at 819.
24. *Id.* at 817-18.

B. *Expansion to the Parent-Child Relationship*

In the mid-1970s and beyond, law review commentators began calling for expansion of the consortium action to the parent-child relationship both in the form of filial consortium and parental consortium.[25] It was also during this time that courts began wrestling with the cognizability of parental and filial consortium claims.[26] At least with respect to the parental consortium claim, the expansionists had history on their side. From feudal times through the industrial revolution, a child was an economic asset to the family and often worked outside the home to contribute to the family economy. Thus, the common law considered children in the same way that it considered wives, as servants of the father or husband. The father, entitled to the services of the child, could recover for lost services or earning capacity when the child was tortiously injured.[27] A father was further entitled to recover for the child's medical expenses.[28] With the institution of child labor laws, however, children became a financial burden to the family unit thereby decreasing the importance of a father's right to recovery for services.[29] At no time prior to 1980, however, did the claim for the loss of the child's services expand to include recovery for intangible losses such as companionship, aid and comfort. Thus, within the context of modern society, the parent was equipped with what was essentially an inconsequential claim for lost services when his or her child was negligently injured. Historically, given that the child was viewed as a servant, he or she had no expectation of recovery for the negligent injury of a parent. Because the injured parent could recover for all economic losses, it was thought that the child's interest would be adequately protected, albeit indirectly.[30] Therefore, until recently, the right of recovery within the parent-child relationship was viewed as strictly pecuniary in nature.

In 1979, twenty-five years after the first judicial decision granting a wife's right to recovery for loss of consortium, a major step was taken concerning the same right within the context of the parent-child relationship. In *Shockley v. Prier*,[31] the Wisconsin Supreme Court overruled existing precedent and held that the parents of a blinded and disfigured

25. *See, e.g.*, KEETON ET AL., *supra* note 1 at 934-39 (1984); Jean C. Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590 (1976); Radensky, *supra* note 2; Mary Lee Tayrien, Note, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal*, 13 SAN DIEGO L. REV. 231 (1975); Dwork, *supra* note 14; Shirley S. Simpson, Note, *The Parental Claim for Loss of Society and Companionship Resulting from the Negligent Injury of a Child: a Proposal for Arizona?*, 1980 ARIZ. ST. L.J. 909 (1980); William F. Ellis, Note, *Expanding Loss of Consortium in Vermont: Developing a New Doctrine*, 12 VT. L. REV. 157 (1987); Nancy Wanderer Mackenzie, Note, *Maine Refuses to Recognize a Cause of Action for Loss of Parental Consortium: Durepo v. Fishman*, 41 ME. L. REV. 165 (1988); Marilyn S. Duncan, Comment, *Davis v. Elizabeth General Medical Center: Loss of Consortium in the Parent-Child Relationship*, 43 ARK. L. REV. 405 (1990).

26. *See infra* note 35 (parental consortium claims); *infra* note 36 (filial consortium claims).

27. KEETON ET AL., *supra* note 1, at 934.

28. *Id.*

29. *Id.* at 947.

30. KEETON ET AL., *supra* note 1, at 934.

31. 225 N.W.2d 495 (Wis. 1975).

infant could maintain an action for loss of aid, comfort, society and companionship. The court reasoned that it would be inconsistent to refuse recovery for filial consortium due to a nonfatal injury when Wisconsin law by statute allowed such recovery for a child's death.[32]

Shortly after the *Shockley* decision, three more jurisdictions judicially recognized parental consortium claims.[33] Today, twelve jurisdictions recognize the claim for parental consortium,[34] while eleven recognize filial consortium claims.[35] These cases generally acknowledge that expansion of consortium to the parent-child relationship is a logical progression from the starting point of spousal consortium. For instance, sharing love, companionship, society, comfort and affection characterizes both the husband-wife and parent-child relationships.[36] With respect to filial consortium, some courts note that the modern relationship between parent and child is, or should be, closer than the relationship between master and servant.[37] "The origins of the pecuniary loss limitation 'are rooted in Charles Dickens'[s] England'."[38] Moreover, these courts often analogize parental-child consortium to wrongful death cases in which nonpecuniary damages are allowed.[39] "[I]t would be anomalous to take the position that, if a child is injured, but does not die, the parents may not recover."[40] Commentators have argued that the need to compensate the parent's loss may be even greater in cases of severe injury because the injury continually reminds them of their loss.[41] Courts have supported their decisions by citing constitutional concerns protecting the family unit, arguing that the right to associate with one's immediate family is a fundamental liberty protected by state

32. *Id.* at 499.

33. *See* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981), *overruled by* Audibon-Extra Ready Mix, Inc. v. Illinois C.G.R. Co., 335 N.W.2d 148 (Iowa 1983) (*Weitl* was overruled on grounds other than the recognition of a parental consortium claim); Ferrieter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 303 N.W.2d 424 (Mich. 1981).

34. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1989); Villareal v. State Dept. of Transp., 774 P.2d 213 (Ariz. 1989); *Weitl*, 311 N.W.2d 159; *Ferriter*, 413 N.E.2d 690; Williams v. Hook, 804 P.2d 1131 (Okla. 1990); Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990); Hay v. Medical Ctr. Hosp., 496 A.2d 939 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190 (Wash. 1984); Belcher v. Goins, 400 S.E. 2d 830 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984); Nulle v. Gilette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171 (Wyo. 1990).

35. Reben v. Ely, 705 P.2d 1360 (Ariz. 1985); Yorden v. Savage, 279 So. 2d 844 (Fla. 1973); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Dymek v. Nyquist, 469 N.E.2d 659 (Ill. App. 1984); Davis v. Elizabeth Gen. Medical Ctr., 548 A.2d 528 (N.J. Super. Ct. Law Div.); First Trust Co. v. Scheels Hardware, 429 N.W.2d 5 (N.D. 1988); Noruel v. Cuyahoga County Hosp., 463 N.E.2d 111 (Ohio App. 1983); Hall v. Birchfield, 718 S.W.2d 313 (Tex. App. 1986), *rev'd.*, 747 S.W.2d 361 (Tex. 1987); Shockley v. Prier, 225 N.W.2d 495 (Wis. 1975).

36. Simpson, *supra* note 25, at 922.

37. *Shockley*, 225 N.W.2d at 500.

38. Siciliano v. Capitol City Shows, Inc., 475 A.2d 19, 26 (N.H. 1984) (Douglas, J., dissenting).

39. *See, e.g.*, *Masaki*, 780 P.2d at 577; Frank v. Superior Ct., 722 P.2d 955, 957 (Ariz. 1987) (en banc); *Shockley*, 225 N.W.2d at 498.

40. *Masaki*, 780 P.2d at 577.

41. *See, e.g.*, Simpson, *supra* note 25, at 923.

and federal constitutions.[42]

Despite these arguments, the majority of American jurisdictions continue to disallow claims for parental and filial consortium. Twenty-seven jurisdictions have expressly rejected parental consortium claims,[43] while numerous others have rejected filial claims.[44] Courts have denied these claims for various reasons, the most often cited being: (1) adoption of the right to such claims is properly a legislative function; (2) increased litigation through multiple claims; (3) possibility of double recovery; (4) difficulty in assessing damages; (5) inherent differences in the spousal and parent-child relationships; (6) potential expansion to distant relatives; and (7) increased societal costs in the form of insurance and expenses of litigation.[45] The merit of these arguments has been the subject of considerable commentary and, as noted below, has been criticized.

III. COLORADO LAW

A. *The Spousal Consortium Claim and the Master-Servant Analogy*

Until 1874, married women in Colorado had no legal existence.[46] This was a holdover from the common law view that a wife was a husband's servant and had no separate legal identity.[47] As noted by the Colorado Supreme Court, this legal theory derived from the view that marriage made a husband and wife one person.[48] A husband was therefore seated "as the head and governor of the family."[49] He had control of his wife, her property, children and labor.[50] In fact, a husband's control was so pervasive at common law that he possessed "by law power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent or cruel manner."[51] The 1868 enactment of the "Act Concerning Married Women"[52] emancipated a wife in Colorado from the condition of thraldom

42. Nulle v. Gillete-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1173 (Wyo. 1990) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)). *See also* Villareal v. State Dept. of Transp., 774 P.2d 213, 217 (Ariz. 1989).

43. For a list of such cases, see Williams v. Hook, 804 P.2d 1131, 1133, n.2 (Okla. 1990); *see also* Donald D. Schneider, *Loss of Parental Consortium*, FOR THE DEFENSE, August 1991 at 11; moreover, some commentators have agreed with this view; *see, e.g.*, Don E. Burrell, Note, *Parental Consortium: A House Built on Sand*, 58 UMKC L. REV. 145 (1989); Greg A. Guthrie, Comment, *Should Pennsylvania Recognize a Cause of Action for Loss of Parental Consortium?*, 28 DUQ. L. REV. 697 (1990).

44. *See* Todd R. Smyth, Annotation, *Parent's Right to Recover for Loss of Consortium in Connection with Injury to Child*, 54 A.L.R. 4th 112 (1987).

45. The seminal decisions advancing public policy concerns to support the rejection of such claims include: Borer v. American Airlines, Inc., 563 P.2d 858 (Cal. 1977)(en banc)(parental consortium claim); Baxter v. Superior Court, 563 P.2d 871 (Cal. 1977) (filial consortium claim).

46. Schuler v. Henry, 94 P. 360 (Colo. 1908).

47. Wells v. Caywood, 3 Colo. 487 (1887).

48. *Schuler*, 94 P. at 360.

49. *Id.* at 360.

50. *Id.*

51. *Id.*

52. This act, originally codified at R. S. 1868, ch. LX, § 3, is now codified at COLO.

in which she was placed at common law.[53] This act granted to the wife many essential rights but had no effect on the rule denying her the right to sue for consortium.

In the late 1800s, Colorado recognized that the consortium concept included the right to recover for various intangible losses. In *Denver Consolidated Tramway Co. v. Riley*,[54] the Colorado Court of Appeals reasoned that compensation for pecuniary loss resulting from a wife's inability to continue to perform household duties does not, by itself, fully compensate a husband's loss.[55] A wife makes a husband's "home cheerful and inviting, and ministers to his happiness in a multitude of ways outside of the drudgery of household labor . . . . All the work of the house may be done by hired employees, and her services still give character to the home."[56] The court recognized the intangible nature of a consortium award, but reasoned that a jury could capably determine the amount, not from evidence of value, but from their own observation, experience and knowledge.[57]

Thus, by 1899, Colorado's definition of consortium came to include society and companionship.[58] Until 1970, however, a married woman was not allowed to bring an action for loss of consortium based on injuries to her husband. The justification for this denial of a right to sue for loss of consortium was two-fold. First, this right of action was not recognized under the common law. Second, statutes that allowed women to sue on their own behalf did not specifically create the consortium right. Accordingly, the courts held that the action could not be maintained without legislative grant.[59] The Colorado legislature subsequently enacted Colorado Revised Statute (C.R.S.) § 90-2-11 in 1961, which codified a woman's right for consortium.[60] This enactment led to the 1970 decision, *Crouch v. West*,[61] wherein the Colorado Court of Appeals held that the enactment of C.R.S. § 90-2-11 expressly overruled the denial of the wife's right to sue for loss of consortium. The court also held that a wife's right was "a separate right similar to that held by married men."[62] Today, like the vast majority of jurisdictions,[63] Colorado recognizes

---

REV. STAT. § 14-2-202 (1987) and provides: "Any woman, while married, may sue and be sued, in all matters having relation to her property, person, or reputation, in the same manner as if she were sole."

53. *Wells*, 3 Colo. at 493.

54. 59 P. 476 (Colo. Ct. App. 1899).

55. *Id.* at 479.

56. *Id.*

57. *Id.*

58. *Id.*

59. Franzen v. Zimmerman, 256 P.2d 897, 898 (Colo. 1953); Giggey v. Gallagher Transp. Co., 72 P.2d 1100, 1102 (Colo. 1937).

60. COLO. REV. STAT. § 90-2-11 (1963), which is now codified at COLO. REV. STAT. § 14-2-209 (1987), and provides: "In all actions for tort by a married woman, she shall have the same right to recover for loss of consortium of her husband as is afforded husbands in like actions."

61. 477 P.2d 805 (Colo. Ct. App. 1970).

62. *Id.* at 806.

63. Five American jurisdictions do not recognize a claim for loss of spousal consortium. *See* Carey v. Foster, 221 F. Supp. 185 (E.D. Va. 1963) (holding that the Married

both spouses' right to recover for lost consortium. Under current Colorado law, consortium encompasses "noneconomic damages in the form of loss of affection, society, companionship, and aid and comfort of the injured spouse, and . . . economic damages in the form of lost household services the injured spouse would have performed . . . ."[64]

B. *Direct Actions by Parents and Children*

Although consortium recovery has not been expanded to the parent-child relationship in Colorado, a negligently injured child's parent is not without a form of recovery. In Colorado, when a child is negligently, but not fatally, injured the parent can recover pecuniary loss in the form of reasonable medical expenses,[65] the child's past and future earnings[66] and lost services.[67] The right to recover for injuries sustained by a child lies exclusively with the parent. Furthermore, when a parent is negligently injured, the child has no independent cause of action under the theory that the child's economic loss will be compensated in the parent's own action. *Burdsall v. Waggoner*[68] is one of the first Colorado cases to expressly rule that "the father is entitled to the earnings of his son during minority."[69] The court noted that the father may relinquish the right to claim the wages when "such minor son contracts on his own account for his services, and the father knows of it and makes no objection."[70] Under such circumstances "there is an implied assent that the son shall be entitled to his earnings."[71] In *Burdsall*, the issue arose as to whether the son was entitled to the purchase price of a lot that he had earned as wages during his minority. Because he had lived away from home without parental control, earning his own living with his fa-

Women's Act divested the husband of his common law right of recovery for loss of consortium as a result of his wife's disabilities caused by negligently inflicted injury, and the wife should not be exclusive treasurer of the right to recover for consortium); Hoffman v. Dautel, 388 P.2d 615 (Kan. 1965) (citing the standard drawbacks to any loss of consortium award, including indefinite nature and amount of damages and possible double recovery based on an award to the husband as justification for holding that the common law stands until it has been specifically overruled or modified by the legislature); Roseberry v. Starkovich, 387 P.2d 321 (N.M. 1963) (deciding not to endorse the right due to uncertain and indefinite nature of the recovery; the general and communal nature of the recovery; possibilities of double recovery; the fact that the legislature had not seen fit to speak on the subject); Cozart v. Chapin, 241 S.E.2d 144 (N.C. 1978) (holding that no cause of action for loss of consortium survived the transfer effected by North Carolina's Married Woman's Act of a husband's common law right of action to recover for the wife's services); Hackford v. Utah Power & Light Co., 740 P.2d 1281 (Utah 1987) (relying on previous Utah decisions which held that the common law cause of action for loss of consortium had been abolished in Utah by the Married Women's Act of 1898, and stating that if the cause of action were to be created anew, it should be done by the legislature).

64. COLO. JURY INSTRUCTIONS - Civ. 3d § 6:6 (1988) [hereinafter CJI].

65. *Id.* at 6:3.

66. Burdsall v. Waggoner, 4 Colo. 261 (1878); Pawnee Farmers' Elevator Co. v. Powell, 227 P. 836, 839 (Colo. 1924); CJI, *supra* note 65, at § 6:3.

67. Colorado Utilities Corp. v. Casady, 300 P. 606 (Colo. 1931); CJI, *supra* note 65, at § 6:3.

68. 4 Colo. 261 (1878).

69. *Id.* at 262.

70. *Id.*

71. *Id.*

ther's full knowledge and consent, he was essentially emancipated. He was therefore legally and justly entitled in his own right to his wages, which were applied to the purchase price of the property.[72]

In *Pawnee Farmers' Elevator Co. v. Powell*[73] a father brought an action as his minor's next friend rather than joining as an individual plaintiff. The court noted that there could be no recovery for the amount of the minor's lost wages since the father was not a plaintiff in the action.[74] According to the court, the minor had a cause of action in his own name for the injuries he sustained, but it was exclusively the father who was entitled to recover for the minor's lost earnings.[75] The rules set forth in *Burdsall* and *Pawnee* are the present state of the law in Colorado regarding direct actions by parents and children, although, as noted below, attempts were made to broaden those actions.

C. *Parental and Filial Claims in Colorado*

By the early 1980s, as courts began recognizing parental-filial consortium claims, the stage seemed set for judicial acceptance in Colorado. Spousal consortium claims had become a common form of recovery. Moreover, both the judiciary and legislature recognized recovery for derivative noneconomic loss, i.e. injury such as pain and suffering, inconvenience, emotional stress and impairment of the quality of life.[76] Furthermore, proponents of the claim found significance in *Miller v. Subia*,[77] often cited as a case that implicitly recognizes a filial consortium claim. In *Miller*, a father brought an action on behalf of himself and his minor son for damages arising from the son's automobile-motorcycle accident. After a $1,000 jury award, the father appealed, contending that the trial court erred in failing to instruct the jury on his entitlement to damages for loss of companionship. The court of appeals affirmed, finding no merit in the father's contention that the jury was not instructed on all elements of his damages.[78] The court did not specifically rule on the validity of the father's consortium action. Rather, it merely stated that there was inadequate evidence to support his claim.[79] For many, *Miller* stood for the proposition that damages for filial consortium could be recovered if adequately supported by the evidence.

Further inroads toward recognition were made in *Reighley v. International Playtex, Inc.*[80] In this wrongful death action, the district court affirmed the right of children to bring an independent claim for loss of parental consortium and companionship. Stephen Reighley sued the

72. *Id.*
73. 227 P. 836 (Colo. 1924).
74. *Id.* at 839.
75. *Id.*
76. *See* Towns v. Anderson, 579 P.2d 1163 (Colo. 1978)(en banc)(recognizing the claim of negligent infliction of emotional distress); COLO. REV. STAT. § 13-21-102.5(3)(a)(1987).
77. 514 P.2d 79 (Colo. Ct. App. 1973) (N.S.F.O.P.).
78. *Id.* at 80.
79. *Id.*
80. 604 F. Supp. 1078 (D. Colo. 1985).

defendant individually and on behalf of his two minor children for injuries resulting in the death of his wife as a result of "toxic shock" caused by the defendant's product. The defendant sought partial summary judgment seeking dismissal of the children's claim for loss of consortium. The *Reighley* decision, however, came four years before the enactment of C.R.S. § 13-21-203, allowing a spouse or heir to recover for nonpecuniary damages such as loss of consortium in wrongful death claims. The *Reighley* court conducted an analysis of parental consortium case law from other jurisdictions. The court found cases supporting the cause of action to be persuasive and additionally noted "the family unit has been recognized by the Supreme Court to bear constitutionaly protected aspects."[81] The court further opined that Colorado tort law had "evolved by legislation and judicial decision to impose duties and liabilities on individual conduct interfering with the family relationship."[82] This includes the judicial recognition of the spousal consortium claim[83] as well as the child's right to a secure home environment as manifested in the preamble to Colorado's Children's Code.[84] The court noted that "[f]or the state to declare its responsibility to protect and foster the parent-child relationship in this context and to ignore it when a third party negligently injures the family unit is too anomalous to be countenanced."[85] The court dismissed concerns about multiple suits, unlimited liability and the difficulty of calculating damages as knee-jerk reactions that arise each time a new cause of action is considered.[86] Moreover, if a spouse is entitled to recover for loss of consortium and a parent is allowed to recover for the intangible loss sustained due to the negligent death of a child, "[t]he child's loss of parental consortium is no more intangible . . . ."[87] The court adopted certain guidelines set forth by other jurisdictions for the management and determination of these actions, including joinder, wherever feasible, of the child's claim with that of the parent and a requisite showing that the minor child was dependent on the deceased parent for both economic and emotional support.[88]

81. *Id.* at 1081, citing Moore v. East Cleveland, 431 U.S. 494 (1977). *But see* Dearborn Fabricating & Eng'g Corp. v. Wickham, 551 N.E.2d 1135 (Ind. 1990) (reversing a lower court ruling that recognized a claim for parental consortium. The Indiana Supreme Court noted that recognizing the claim would only invite defendants to minimize its validity by proving inadequacies in the familial relationship, resulting in pretrial investigation attacking the quality of parent-child relationship enjoyed by the child before the parent's injuries, and these attacks could lead to children suffering significant emotional harm from the litigation process).

82. *Reighley*, 604 F. Supp. at 1081.

83. *Id.*

84. COLO. REV. STAT. §§ 19-1-101 to 116 (1986), which provides in part that the purposes of the Children's Code are to "secure for each child . . . such care and guidance, preferably in his own home, as will best serve his welfare and the interests of society; [and] [t]o preserve and strengthen family ties . . . including improvement of home environment." *Id.* at § 19-1-102(1)(a) & (b).

85. *Reighley*, 604 F. Supp. at 1083-84.

86. *Id.* at 1082.

87. *Id.* at 1082-83.

88. *Id.* at 1084.

D. *Lee v. Colorado Department of Health*

The uncertainty surrounding parental-filial consortium claims in non-fatal injury cases in Colorado appeared to end with the Colorado Supreme Court's decision in *Lee v. Colorado Department of Health*.[89] In *Lee*, an injured driver's five children joined their father's suit and requested an award of damages for their loss of companionship and support resulting from the father's injury in the car accident. The supreme court upheld the trial court's determination that the children's claims were not cognizable under Colorado law. Chief Justice Joseph A. Quinn, writing for a unanimous court, recited the standard difficulties with recognizing the claim, including: efficacy of monetary compensation as a substitute for companionship and guidance; intangible character of the loss; societal costs and risk of double recovery.[90] Moreover, the court noted that the legislature was in the best position to determine the viability of the claim.[91] Without reference to the modern trend, the *Reighley* opinion or views of legal scholars and commentators, the Colorado Supreme Court left little doubt that the claims for parental consortium, and by analogy, filial consortium, were not judicially recognized in Colorado.

E. *Post-Lee v. Colorado Department of Health Developments*

On the heels of *Lee*, the district court also retreated from the *Reighley* opinion, holding that under Colorado law a minor had no independent right of action to recover for loss of parental consortium in a wrongful death action.[92] In *Beikman v. International Playtex, Inc.*, Judge Jim R. Carrigan held that in light of *Lee*, any reform within the context of parental consortium claims would have to await legislative action.[93] It is obvious from Judge Carrigan's opinion, however, that he favors the child's right to recover for parental consortium. Labelling the modern trend of authority "the more persuasive cases,"[94] Judge Carrigan reasoned that the child's need for protection under the law is even greater than a spouse's, since the spouse is more able to fend for himself or herself.[95]

Another significant development in the parental-filial consortium controversy occurred in 1989 when the Colorado General Assembly amended the wrongful death statute[96] to permit a surviving party's recovery for noneconomic loss, including grief, loss of companionship,

89. 718 P.2d 221 (Colo. 1986).

90. *Id.* at 233.

91. *Id.* at 234. The Colorado Supreme Court agreed with the Kansas Supreme Court's reasoning for denying a child's claim for loss of consortium in Hoffman v. Dautel, 368 P.2d 57 (Kan. 1962). The Colorado court cited the Kansas court's decision in *Hoffman* for denial of the consortium claim due to "[t]he possibility of multiplicity of actions based upon a single tort and one physical injury, when added to the double-recovery aspect of such situation in the absence of some statutory control . . . ." *Id.* at 234.

92. Beikman v. International Playtex, Inc., 658 F. Supp. 255 (D. Colo. 1987).

93. *Id.* at 259.

94. *Id.* at 258.

95. *Id.*

96. COLO. REV. STAT. § 13-21-201 to 204 (1987).

pain and suffering and emotional stress.[97] Although the enactment of similar provisions in other jurisdictions may have provided an analogy for compensating familial consortium claims for personal injuries, these provisions were not often construed as pronouncements by the legislature that damages for lost consortium could be recovered in nonfatal cases. This is similarly true in Colorado where the wrongful death statute and its amendments do not create new causes of action; rather, they merely allow causes already recognized to survive death.[98] Because Colorado does not recognize filial and parental consortium claims under the auspices of *Lee*, it is doubtful that the wrongful death statute and the amendments thereto could logically be construed to create a new action in nonfatal cases.

The Colorado Court of Appeals was asked recently to consider the propriety of the *Lee* decision in *McGee v. Hyatt Legal Services, Inc.*[99] The *McGee* plaintiffs, a mother and her daughter, charged that the negligence of the Hyatt law firm caused temporary custody orders to be issued contrary to the mother's wish for sole legal custody, and as a result, there was a wrongful interference with her parental relationship. Citing *Lee v. Department of Health*, the court rejected the claim, because of the impossibility of ascertaining whether any tangible damages were or would be sustained by the mother because of the custodial order.[100] Although certiorari in *McGee v. Hyatt* was denied by the Colorado Supreme Court, given the immense judicial attention the consortium claim has caused of late, it is appropriate to consider whether or not the Colorado Supreme Court should re-examine its decision not to extend consortium recovery to the parent-child relationship.

IV. CRITIQUE OF COLORADO LAW

A critical analysis of *Lee* provides ample support for the proposition that the court has not been intellectually honest in rejecting consortium claims and that the basis for its decision is inherently flawed. As noted, the primary reasons for the court's decision are the intangible character of the loss, threats of double recovery and that legislative action is the proper means by which extensions of law should be accomplished.[101] Courts and legal scholars have rejected these arguments, espousing countervailing methods and considerations, which reveal *Lee's* flawed analysis.[102]

The double recovery argument in support of nonrecognition is that, as a practical matter, the jury implicitly awards an amount of damages for the impairment of the child-parent relationship when it considers its award for the injured family member. To the extent that implicit recov-

97. 1989 COLO. SESS. LAWS 752 (codified at COLO. REV. STAT. § 13-21-203 (1991 Cum. Supp.)).
98. *Id.*
99. 813 P.2d 754 (Colo. Ct. App. 1990).
100. *Id.* at 758.
101. *See* Guthrie, *supra* note 44, at 705.
102. *See infra* notes 103-17 and accompanying text.

ery presents a problem, it can be remedied by the use of narrowly tailored jury instructions that distinguish between nonderivative pecuniary loss and consortium damages.[103] "The specter of double recovery can be easily eliminated by the trial court's distinctly specifying in proper jury instructions the respective elements of damages to which the parent and the child are each entitled."[104] Moreover, there is a presumption that the jury reads and follows its instructions.[105] This procedure is used successfully in spousal claims. Parental-filial claims should pose no greater problems.

The concern for multiple claims and protracted litigation can be minimized by requiring joinder where feasible.[106] The perceived threat of multiple suits is primarily concerned with parental consortium claims where numerous children seek recovery. It has been suggested that there is no difference between these claims and tort claims involving numerous victims such as bus accidents or airline accidents.[107] Requiring all children in a family to sue as a class would solve this problem.[108]

The intangible nature of the award seems to be an artificial distinction when state law compensates similar losses such as pain and suffering, spousal consortium, emotional distress and nonpecuniary loss in wrongful death actions.[109] Thus, the same judicial rules which guide the jury in these instances can be applied relative to parental-filial consortium claims.[110] Along these lines it has been suggested that monetary compensation will merely make the consortium deprived child or parent a wealthy person rather than enabling them to regain the lost companionship and guidance.[111] Proponents of consortium claims eschew this argument, claiming that although a monetary award may be a poor substitute, it is the only workable way our legal system has found to ease an injured party's tragic loss.[112] One court has expressly stated that allowing such an award is preferable to complete denial.[113]

The *Lee* court additionally believed that recognition was best left to the legislature.[114] Causes of action for loss of consortium have historically been allowed or denied by common law.[115] Courts have long recognized their responsibility to adapt common law to the needs of society

103. *See, e.g.*, Williams v. Hook, 804 P.2d 1131, 1135 (Colo. 1990); Belcher v. Goins, 400 S.E.2d 830, 838 (W. Va. 1990); Radensky, *supra* note 2, at 293-94.

104. Nulle v. Gillette-Campbell Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990).

105. *Id.*

106. *See* Dearborn Fabricating & Eng'g Corp. v. Wickham, 532 N.E.2d 16, 17 (Ind. Ct. App. 1988), *rev'd.*, 551 N.E.2d 1,135 (Ind. 1990); Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 997 (Alaska 1987); *Nulle*, 797 P.2d at 1175-76.

107. Simpson, *supra* note 25, at 925.

108. Love, *supra* note 25, at 604.

109. *See* Simpson, *supra* note 25, at 925.

110. *Id.*

111. Borer v. American Airlines, Inc., 563 P.2d 858, 862 (Cal. 1977).

112. Theama by Bichler v. City of Kenosha, 344 N.W.2d 513, 520 (Wis. 1984).

113. *Id.*

114. *Lee*, 718 P.2d at 234.

115. Dearborn Fabricating & Eng'g v. Wickham, 532 N.E.2d 15, 17 (Ind. Ct. App. 1988), *rev'd.*, 551 N.E.2d 1135 (1990).

when the legislature has not spoken.[116] As noted by one court, "when the crowd is marching in the wrong direction, it is time to break ranks and strike out on our own."[117] Deference to the legislature flies in the face of the common law responsibilities of the judiciary. In all, there exist well-reasoned rebuttals for the policy arguments set forth in *Lee* and in other cases rejecting filial-spousal consortium claims. As previously noted, a majority of courts have had occasion to consider and deny parental and filial claims and are no doubt aware of these countervailing arguments. Why then are courts continuing to cling to the seemingly "artificial" concerns of double recovery, multiple claims and intangible recovery? What should Colorado's position be in this regard?

V. RECOMMENDATIONS

A. *The Original Analogy to Master-Servant Should Not Be Extended*

As noted above, spousal consortium recovery was based on an outdated and faulty premise that a woman was the servant of her husband with no independent legal identity. The claim grew from this erroneous idea when so-called enlightened courts recognized the fallacy of the husband's role as master, but chose to demonstrate their enlightenment by extending the consortium claim to the wife rather than eliminating it altogether. As such, the consortium claim has been imbedded in legal jurisprudence despite the archaic concept behind its early recognition. Extending it to the parental-child relationship only perpetuates an aberration in the law. The mere existence of a suspect form of recovery should not be the basis for its unrestricted expansion. Thus, any analogy to the spousal claim is not persuasive, and parental and filial consortium actions should not be recognized.

B. *Basic Tort Principles and Costs To Society Should Be Considered*

If the Colorado Supreme Court re-examines its position and does not reverse *Lee*, it should be intellectually honest and acknowledge the procedural mechanisms and considerations that exist to remedy the concerns raised in *Lee*. It could be that the *Lee* court and other courts that reject parental-filial claims are using these policy concerns in an attempt to limit spiraling tort recovery for those not directly injured, but who stand in a special relationship with the victim. Allowing secondary tort victims to sue is somewhat of an idiosyncracy in the law, extending liability from those who are immediately and directly injured to those whose liability is established by some source other than foreseeability.[118] While it is true that secondary claims are allowed in most jurisdictions for spousal consortium, wrongful death and emotional distress, recogni-

116. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 995 (Alaska 1987); *see also Theama*, 344 N.W.2d at 519 (noting that in defering to the legislature, the court would be shirking its responsibilities).

117. Berger v. Weber, 267 N.W.2d 124, 128 (Mich. Ct. App. 1978).

118. *Cf.* Guthrie, *supra* note 43, at 699 (noting Pennsylvania's attitude towards extended liability).

tion of those claims does not necessarily support the abandoning of traditional tort concepts in favor of creating a consortium claim within the parent-child context.

Compensating a secondary victim who views a tragic accident for his or her emotional distress requires physical manifestations of injury as well as the observer being physically present or in the "zone of danger."[119] With respect to parental-filial consortium, the child sitting in school across town, or for that matter in an entirely different state, is allowed to recover for injuries sustained solely by his or her parent. The child has suffered no cognizable physical injury, yet is allowed to recover in his or her own name against the tortfeasor. Thus, if parental-filial claims are viewed as independent claims, recognition would seem to be entirely contrary to the bounds of tort law and the reasons for their existence. In the words of Justice Benjamin J. Cardozo in *Palsgraf v. Long Island Railroad*,[120]

> the conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. . . . The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.[121]

With respect to the analogy to wrongful death causes of action, it has been pointed out that the policy considerations are different where a victim is killed and therefore can bring no direct action of his own.[122] The wrongful death action serves as the only means by which the family unit can recover compensation for the loss of parental care and services, whereas when the parent or child lives, the tangible aspects of the child's care can be compensated in an independent cause of action.[123]

Recognition of the parental-filial consortium claim also effectively creates a tort claim and extends liability beyond the ordinary principles of negligence, which limit recovery to those who are immediately injured and liability to those for whom liability is established by some legal source.[124] In essence, the spousal consortium claim, a legal idiosyncrasy, would be allowed to abrogate the sound principles of duty and foreseeability. Recognition would necessarily create a cause of action for psychic or emotional injury not accompanied by any actual or threatened physical harm or any injury to another legally protected interest.[125] In regard to the bounds of tort law, Judge Charles D. Breitel

119. Towns v. Anderson, 579 P.2d 1163 (Colo. 1978).

120. 162 N.E. 99 (N.Y. 1928).

121. *Id.* at 99-100.

122. Schneider, *supra* note 43.

123. *Id.*

124. Steiner v. Bell Tel. Co., 517 A.2d 1348, 1356 (Pa. Super. Ct. 1986), *allocatur granted*, 532 A.2d 437 (Pa. 1987), *aff'd without opinion*, 540 A.2d 266 (Pa. 1988).

125. *See* Norwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 327 (Or. 1982).

of the Court of Appeals of New York in *Tobin v. Grossman*[126] wrote a poignant and persuasive opinion wherein, with regard to emotional distress damages, he stated:

> Beyond practical difficulties there is a limit to attaining essential justice in this area. While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed.[127]

It is further instructive to note that in the context of actions not brought by the primary victim, concerns about the uncertainty of the intangible loss alleged and the inherent inadequacies of money damages as compensation loom larger, especially since the primary victim may also recover a sum for intangible, uncertain damages, i.e. pain and suffering, etc. Additionally, it may not be far-fetched to say that the cost of being a human being in a modern society could become too expensive, since one negligent mistake could lead to a tort award not only to the injured party but also to all those with whom he has relationships. Of course there is insurance. The insurance company raises its premiums and the public pays for the jury awards. It soon becomes too expensive for the average person to obtain liability insurance. Taxation, prices paid for consumer goods and medical service necessarily increase.[128] If the manufacturing industry is too adversely affected it could result in the loss of jobs.[129] Suggestions are made that these factors should not stand in the way of an enlightened tort system, which must be properly administered in terms of natural justice.[130] However, according to one commentator, this is not necessarily true: "A sound and viable tort system—generally what we now have—is a valuable incident to our free society, but we must protect it from excess lest it become unworkable and alas we find it replaced with something far from desirable."[131]

Of course, if compensation should prove too costly, the legislature could also put a ceiling on the amount of damages recoverable,[132] as the Colorado legislature has done in wrongful death actions for lost society

126. 249 N.E.2d 419 (N.Y. 1969).

127. *Id.* at 424.

128. *See* Guthrie, *supra* note 43, at 702.

129. *Id.* at 702.

130. *See* Love, *supra* note 25, at 604.

131. Guthrie, *supra* note 43, at 702 (citing Steiner v. Bell Tel. Co., 517 A.2d 1348 (Pa. Super. Ct. 1986)).

132. *Id.* at 702.

and companionship.[133] Nevertheless, once done, another secondary victim will be allowed to recover and an additional ripple of tort law will reverberate toward an unknown shore.

C. *Children Should Be Fully Compensated For Direct Injuries*

While the earlier consortium cases were consistent with English common law dealing with master-servant relationships, the more recent cases are simply not in step with modern trends. Very few minors at the present time would be considered an economic asset. Under Colorado law, when a child is negligently injured, medical expenses and past and future earnings are recoverable by the parent who must bring an independent action. Thus, Colorado law has continued the antiquated idea that the child is a servant of his or her parents and, like the servant in common law, can only recover for his or her injuries. When a parent is negligently injured, the child has no cause of action and, it is submitted, needs none since any economic losses will be compensated in the parent's own action. In both instances, however, the tortfeasor is held liable for all damages cognizable under general tort principles. Accordingly, Colorado courts simply need to address the issue that a minor, as with any injured party, should be entitled to complete and full compensation for his or her own losses. All earnings, during minority or following emancipation, should be awarded to a child. Of course, these earnings, as with any personal injury award, should be held in trust for the minor. Applying such a formula would provide the child with the same right of tort recovery as all other tort victims. Under this rule, both parent and child would be entitled to obtain the fullest recovery allowed within the proper boundaries of common law tort principles.

VI. CONCLUSION

Historically, derivative claims for consortium were premised upon archaic views of master-servant and husband-wife relationships. Society should no longer tolerate such views. Expansion of the concept of consortium to include filial or parental claims merely continues this fiction. As noted by Judge Breitel, the law today must recognize that, although injuries impact many people, difficult and somewhat arbitrary lines must be drawn.[134] Direct injury to a child must be fully compensated. Similarly, an injured parent should be entitled to recover in his or her own action for the change he or she experiences in dealing with a child in the form of expenses incurred in caring for the child. Derivative consortium claims, however, should not be expanded. Such claims would necessarily entail the abandonment of common law tort principles in favor of extending liability for psychic injuries not accompanied by actual or threatened physical harm. If such claims were recognized, liability would be improperly extended from those who are immediately and di-

133. COLO. REV. STAT. §§ 13-21-102.5(2)(b) and 203(1) (1991 Cum. Supp.).
134. *See supra* note 127.

rectly injured and whose cause of action is established by foreseeability, to those whose only connection with the accident is their fortuitous relationship with the primary victim. The tort concepts of duty and foreseeability and the reasons for which they exist would necessarily be abandoned. Recognition would mean disregarding the fundamental concepts which limit the legal consequences of wrongs to a controllable degree. In sum, the ripples from an injury must end if the tort system that we find so valuable is to remain effective.

JUDICIAL ASSAULT ON CHILD VICTIMS: AN UNINTENDED IMPACT OF CHILD PROTECTION LAWS

ANN SAYVETZ*
SHARI SHINK**

Dedicated to L.S. and A.L.G., whose cases were the catalyst for this Article

I. PROLOGUE

This Article explores statutory and case law which address the question of disclosure of medical records pertaining to physical and psychological evidence in cases involving adult victims, child victims and the accused in a variety of settings. Inconsistent results in Colorado give rise to the concerns expressed in this Article. Specifically, both child and adult victims have a right to assert a privilege and prevent disclosure of their confidential medical records when a case is brought in the criminal setting. If, however, a case is brought in the context of a dependency and neglect (D and N) proceeding or a criminal case *subsequent* to a report of abuse made under the Children's Code, the privilege appears not to exist. Additionally, even though the statute appears to also eliminate the privilege for the alleged perpetrator, in practice, only the child's records are sought. One is left with the question of why the Children's Code, the purpose of which is to protect children, provides this class of victims with the least protection in judicial proceedings.[1]

These problems first come to light when social services attorneys or District Attorneys (representing the county or state) and parents' defense attorneys in D and N custody or criminal cases request or subpoena medical records from health care institutions and professionals without proper consent.[2] Whether to produce these records or to assert the patient's privilege is an extremely difficult decision for the provider because there is conflicting guidance in the law. An improper disclosure can have grave consequences for the subject of the records;[3] not to men-

* Corporate Counsel, Children's Health Corporation, Denver, Colorado; University of Colorado (B.A., 1971); University of Colorado School of Law (J.D., 1975).

** Executive Director, Children's Legal Clinic, Denver, Colorado; University of Pittsburgh (B.S., 1970); Rutgers University (J.D., 1975).

1. For an excellent in-depth discussion of protected communications, see Robert Weisberg & Michael Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reform*, 18 FAM. L.Q. 143 (1984).

2. The authors caution members of the bar, health care providers and record custodians that a subpoena only triggers the question of whether disclosure is proper; it does *not* obviate the need for an appropriate consent, court order or determination that consent is unnecessary. Otherwise, testimonial privileges, *see* COLO. REV. STAT. § 13-90-107 (1987 & Supp. 1991), would be meaningless whenever a subpoena issued for such information.

3. Stauffer v. Karabin, 492 P.2d 862, 864 (Colo. Ct. App. 1971) (the physician-pa-

tion the risk to the integrity of the legal proceeding[4] and the provider who makes the wrong choice.[5]

Disclosure of medical records in response to a request or subpoena is not determinative of whether the records will be admissible as evidence in the subsequent judicial proceeding. However, the health care professional's obligation to assert the patient's privilege attaches at the point of the initial request for disclosure, and the law will provide protection at this point.[6] This Article focuses on the disclosure quandary, although admissibility of records are discussed where pertinent. The tensions between privilege and disclosure are addressed below in the context of D and N, criminal, civil and domestic relations (custody) cases. The inconsistency of outcomes is explored and suggestions for a more uniform approach are made below.

II. Dependency and Neglect Cases

Cases of abuse, ill treatment, physical or medical neglect of children are regulated by the Colorado Children's Code.[7] In these cases, county departments of social services or local law enforcement agencies investigate reports of suspected abuse or neglect.[8] Often medical records are sought in order to establish the nature of the child's injury, abuse, neglect or trauma (mental or physical). The Code is silent as to whether such records are to be disclosed to the investigators by health care providers or records custodians. Individual professional licensing laws generally prohibit disclosure.[9] The Children's Code, however, abrogates these privileges such that communications between a minor patient and provider are admissible as evidence in any case resulting from a report of child abuse or neglect.[10] The statutory language is broad enough to

---

tient relationship and information acquired from that relationship are extremely private matters for which a high degree of protection is warranted).

4. *See, e.g., id.* at 865 (improper admission of testimony which could have influenced the verdict is reversible error).

5. For example, unauthorized release of confidential information may result in civil liability for invasion of privacy, Levias v. United Air Lines, 500 N.E.2d 370, 374 (Ohio Ct. App. 1985); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 978 (M.D. Ala. 1974), as well as criminal liability, *see* Colo. Rev. Stat. § 18-4-412(1), (3) (1986 & Supp. 1991) (unauthorized disclosure of medical records is a class 6 felony theft); Colo. Rev. Stat. § 25-4-1409(20) (Supp. 1991) (unauthorized release of HIV information is a misdemeanor).

6. Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983) (once medical communications privileges attach, they prohibit both pretrial discovery of information as well as testimonial disclosure). *See also* Domako v. Rowe, 475 N.W.2d 30 (Mich. 1991).

7. Colo. Rev. Stat. §§ 19-3-101 to -702 (Supp. 1991), see especially definitions in § 19-3-102(1) (Supp. 1991).

8. *Id.* § 19-3-308(1).

9. *See* Colo. Rev. Stat. § 13-90-107(1)(g) (1987) (privilege for psychologists and persons working under the supervision of a psychologist); *id.* § 13-90-107(1)(d) (1987 & Supp. 1991) (protected communications with physician, surgeon or registered professional nurse); *id.* § 12-43-218(1) (1991) (nondisclosure by psychologists, social workers, marriage and family therapists, professional counselors and certified school psychologists).

10. Colorado Revised Statute § 19-3-311 provides that such communications are not privileged evidentiary matter:

The incident of privileged communication between patient and physician, be-

address communications and observations of both physical and psychological harm. If the privilege cannot bar testimony, it follows that the records may properly be disclosed in advance of the judicial proceeding,[11] and therefore production in response to a request or subpoena appears to be authorized, if not compelled, by the statute.

This abrogation of the patient's right to assert a privilege as to testimony about certain communications is a companion to the statutory duty of providers to report suspected child abuse.[12] However, the identity of the "patient" in this statute is ambiguous: is it the victim or the accused or both? The presumed purpose of this abrogation is to enhance the reporting of child abuse and to prevent the accused from hiding behind the privilege and thereby conceal admissions or physical evidence needed to determine what happened to the child.[13] On the other hand, the respondent often seeks the child's records in order to establish the child's lack of credibility, propensity to not tell the truth, or to give inconsistent accounts. In these cases, the alleged perpetrator, who should not be permitted to hide his or her *own* conduct behind the shield of privilege, seeks to use the statutory exemption to the *child's* privilege as a sword, to attack and undermine the child's testimony.

In the authors' experience, however, this section is relied upon by attorneys and providers to justify disclosure of a child's entire medical record.[14] This paradox thwarts society's desire to protect the child[15] and instead exposes the minor victim to further assault in a judicial forum, either in person through cross examination or by proxy if a professional testifies about the victim's statements as a permitted exception to the hearsay rule.[16]

---

tween patient and registered professional nurse, or between any person licensed pursuant to article 43 of title 12, C.R.S. [psychologists, social workers, therapists and other counselors], or certified school psychologist and client, which is the basis for a [abuse or neglect] report [required to be filed] pursuant to section 19-3-304, shall not be a ground for excluding evidence in any judicial proceeding resulting from a [filed] report . . . .

COLO. REV. STAT. § 19-3-311(1) (Supp. 1991).

11. *See* Clark v. District Court, 668 P.2d 3, 11 n.7 (Colo. 1983) (where a party intends to present testimony as to mental or physical condition, the substance of such testimony may be required to be disclosed prior to trial). *See* Jett v. State of Florida, WL 226466 (Fla. Dist. Ct. App. 1991) (permitting defendant's discovery of child victim's communications with therapist under similar statute).

12. COLO. REV. STAT. § 19-3-304(1) (Supp. 1991).

13. *See, e.g., In re* O.L., 584 A.2d 1230 (D.C. 1990) (disclosure of mother's past mental health records); *In re* M.S., 569 N.E.2d 1282 (Ill. App. Ct. 1991) (mother's medical records admissible in termination case); *In re* Baby X, 293 N.W.2d 736 (Mich. Ct. App. 1980) (mother's drug treatment records disclosed in addicted infant D & N case); Commonwealth v. Arnold, 514 A.2d 890 (Pa. Super. Ct. 1986) (defendant convicted of sexual assault was not permitted to assert privilege for inculpatory communications to a social worker).

14. The betrayal of trust by disclosure of a child's statements about a parent with whom the child still seeks a healthy relationship subjects the child to substantial distress. *See* Weisberg & Wald, *supra* note 1, at 211 n.215; Bond v. District Court, 682 P.2d 33, 39-40 (Colo. 1984).

15. *See* COLO. REV. STAT. § 19-1-102 (Supp. 1991) (generally, the legislative declarations of the general assembly demonstrate an intent to advance the welfare and best interests of an abused or neglected child).

16. A proxy is a professional who testifies about the child victim's statements in lieu of

It is important to note at this juncture that the authors assume, for purposes of this Article, that D and N cases involve injury allegedly caused by persons related to or known by the child, because the respondents in these proceedings are parents who have either caused harm to the child or have failed to protect a child from harm by another. In D and N cases therefore, the child's testimony often is to be used against the parent. How is the need for information in a proceeding to establish mistreatment or neglect of a child to be balanced with the child's need to confide in a health care professional and begin the process of physical and psychological recovery? Where the victim's physical or mental condition is a crucial component of such proceedings, evidence of same appears to be appropriate. The Colorado Court of Appeals has held there was no physician's privilege as to physical evidence because a report to Social Services constituted an automatic waiver.[17]

There do not appear to be any published Colorado cases addressing production of a child's post trauma mental health treatment records in a D and N proceeding.[18] In Colorado the statutory waiver provides the basis for disclosure of such records to Social Services and this seems proper at the investigative stage. However, disclosure to respondents and/or evidentiary use by the parties at hearing subjects the child to betrayal of those confidences which the privilege was intended to and should continue to protect, just as in the case of an adult victim.[19]

If the respondent seeks records of the child abuse investigation by the county social services agency or other social services records, an *in camera* evaluation has been held to be appropriate.[20] If these files contain the child's mental health records, the authors contend a hearing rather than an *in camera* inspection is required. There exits a virtually unknown and certainly under-utilized statute which establishes a hearing procedure to determine whether mental health records should be released[21] in the absence of a valid consent or other specified circum-

---

the child's testimony. In Colorado, such testimony has been allowed through use of the residual hearsay exception (COLO. R. EVID. 803(24) (Supp. 1991)). *See* Oldsen v. People, 732 P.2d 1132, 1136 (Colo. 1986) (child's hearsay statements related by psychologist, physician and social worker had sufficient circumstantial guarantees of trustworthiness to support admission).

17. *In re* T.S. and T.M., 781 P.2d 130, 132 (Colo. Ct. App. 1989), *cert. denied*, Oct. 10, 1989, (automatic waiver of mother's privilege).

18. In D and N cases from other states, the courts have denied fathers' requests for Social Services and mental health records of a child. *E.g.*, *In re* D.G., 416 A.2d 77 (N.J. Super. Ct. App. Div. 1980). Courts have also denied requests for a child's statements made to a treating therapist. *E.g.*, *In re* Daniel C.H., 269 Cal. Rptr. 3d 624 (Ct. App. 1990). Such access has also been denied in delinquency cases. *E.g.*, *In re* L.P., 593 A.2d 393 (N.J. Super. Ct. Ch. Div. 1991) (notes of school psychologist protected by confidentiality).

19. *See* Bond v. District Court, 682 P.2d 33, 39-40 (Colo. 1984) (protective orders may be issued when appropriate to prevent disclosure of communications); *infra* Section III, discussion regarding criminal cases.

20. People v. District Court, 743 P.2d 432, 436 (Colo. 1987) (*in camera* review required where the accused party who seeks access has proven an exception to confidentiality applies).

21. Colorado Revised Statute § 27-10-120(1) provides as follows:

> Except as provided in subsection (2) of this section [disclosure of information regarding a criminal defendant or crimes], all information obtained and records

stances.[22] This shall, for purposes of this Article, be referred to as a "27-10-120" hearing. This statute requires a hearing of which the *subject* of the record and the *custodian* must be given notice (in compliance with the Colorado Rules of Civil Procedure) and an opportunity to appear.[23] The authors theorize that the purposes of requiring notice to the custodian are twofold: first, to allow for assertion of privilege and, second to give notice to the treating professional. The latter may then also attend the hearing and offer testimony to the court about the potential harm to the subject and/or an ongoing therapeutic relationship if the pertinent records were to be disclosed. This may not always occur in a hearing on a motion for protective orders under Rule 26(c) of the Colorado Rules of Civil Procedure. The further value of a 27-10-120 hearing is the unique necessity of notice to the *subject* of the record, which is not required in a hearing on a motion to quash a subpoena (in which the court is asked to prevent disclosure of documents or testimony). This allows the subject, the party most affected by the outcome, to be present and place his or her consent or opposition to disclosure on the record. This statute is not restricted in its applicability to any particular kind of proceeding;[24] its definitions are broad and cover any mental health services.[25] It would seem very appropriate to use the 27-10-120 proceeding whenever a request for disclosure of a child's mental health records is received. The child can be represented and the custodian/provider can be present to fully advise the court as to the impact of disclosure on the child.

At this point, the question of consent to release the minor's mental health records must be considered, since existence of a valid consent moots the privilege issue and obviates the need for a hearing. Ordinarily a parent has legal authority to consent to the release of his or her child's records.[26] However, in a D and N proceeding, the interests of the parent and the child often conflict. For this reason, the respondent parent's consent should not be sufficient for disclosure,[27] especially

---

> prepared in the course of providing any services under this article [care and treatment of the mentally ill] to individuals under any provision of this article shall be confidential and privileged matter. Such information and records may be disclosed only . . . To persons authorized by an order of the court after notice and opportunity for hearing to the person to whom the record or information pertains and the custodian of the record or information pursuant to the Colorado rules of civil procedure . . . .

COLO. REV. STAT. § 27-10-120(1), (1)(f) (1989).

22. *See id.* §§ 27-10-120(1)(a)-(e), (g)-(h) (which permit disclosure to other providers, payors, researchers, courts reviewing commitments and families of adult patients).

23. One New York court denied a motion to compel the release of confidential records for lack of notice to the records custodian. Susan W. v. Ronald A., 558 N.Y.S.2d 813 (Sup. Ct. Queens County 1990).

24. When this arises in the criminal context, it assumes constitutional dimensions. *See infra* notes 46-51 and accompanying text.

25. *See* COLO. REV. STAT. § 27-10-102(1) (1989).

26. Ann Sayvetz, *Consent to Treatment and Access to Minors' Medical Records*, 17 COLO. LAW. 1323, 1324 (1988).

27. Despite the provisions of section 27-10-120(1.5), which permit parent access to the mental health records of the minor child. *See* COLO. REV. STAT. § 27-10-120(1.5) (1989).

where the contents of the records may be used to attack the child's credibility as a weapon in parent's defense. In other words, the release of the child's information to the parents may well promote the self interest of the parent; not the best interest of the child.[28] The child's interest in nondisclosure is more compelling than that of the adult, based on the potential threat to the child's physical and emotional well being.

If the parent in a D and N case is not able to act in the best interests of the child, who is? The Guardian Ad Litem (G.A.L.) who is appointed in D and N cases would appear to play this role.[29] The G.A.L. may assert the child's privilege to bar disclosure of records.[30] However, it is not clear whether the G.A.L. may waive it, since unlike the child's legal guardians, the G.A.L. has no authority to make treatment or placement decisions for the child. If Social Services has been granted temporary legal custody, the agency could provide a valid consent to release records to the parents. However, the authors submit that obtaining a judicial opinion ordering disclosure after a 27-10-120 hearing, which encourages provider input, is the wiser course.

If the court is to resolve the matter of disclosure of the child's records, what standard is to be applied? The courts could look to the already established statutory standard for a patient's access to his or her own hospital records: access to notes or psychological records may be denied if inspection would have a significant negative impact on the patient.[31] This procedure would be consistent with the fundamental purpose of a child protection system.

Sometimes, the facts of a D and N case appear to establish criminal conduct and a criminal case is filed. The respondent/defendant faces proceedings in two different settings with different disclosure and discovery rules. The Children's Code not only abrogates the privilege in D and N cases, but in "any judicial proceeding resulting from a report pursuant to this part 3 . . . ."[32] At present, the victim's mental health records are often available to the parent respondent in the D and N case under social services' broad discovery policies. The parent-defendant in the criminal case may already have obtained the records in the D and N case, or may seek them directly in the criminal case under the provisions of C.R.S. § 19-3-311. The existence of this statutory language explains the dearth of Colorado cases addressing disclosure of a child's mental health records in these circumstances.

Since the language of the Children's Code is ambiguous, the question of access to records where the D and N respondent is the "patient"

28. For a discussion of D & N cases where the parent's interests are elevated above the child's, see David C. Hoskins, *Representation of D & N Respondents: A Balanced Approach*, 21 COLO. LAW. 49 (1992).

29. COLO. REV. STAT. § 19-1-111(1) (Supp. 1991).

30. *See id.* § 19-3-203(3).

31. COLO. REV. STAT. § 25-1-801(1)(a) (1989). The authors believe the opinion required by this statute as to the significant negative impact of release of records may be supplied either by the child's therapist or an expert appointed by the court.

32. *See* COLO. REV. STAT. § 19-3-311(1) (Supp. 1991) (*See supra* note 14 for the full text of this section).

must be addressed. In one unreported Colorado case experienced by the authors, the trial court asked the mother to waive the privilege to her records; in the absence of such waiver, the court drew negative inferences as to the mother's psychological condition. Arguably, the Colorado statute eliminates the privilege, and a waiver by the parent should not be necessary for disclosure. Although the statute seems to permit it, the authors are concerned that treatment records of a D and N respondent are seldom sought. Admissions of an alleged perpetrator should not be shielded by the adult's assertion of a privilege with the provider, who is otherwise obligated to report suspected abuse. Cases from other jurisdictions have held that the privilege yields to the paramount interests of the child.[33] Full disclosure of such admissions clearly support the statutory intent to protect the child.[34]

III. CRIMINAL CASES

When an adult is the victim of an assault and evidence of *physical* harm is to be used, a waiver (either explicit[35] or implied[36]) is required. Medical records reflecting post-trauma mental health treatment of an adult victim are privileged and not subject to disclosure to the alleged perpetrator in a criminal case.[37] This is true whether the provider is a psychiatrist, psychologist, nurse or social worker.[38] Testimony about the assault and the fact that counselling took place does not constitute a waiver, and an *in camera* review of the records by the court has been held to be inappropriate.[39] The burden of establishing a waiver is on the party seeking to overcome the privilege and the application of the privilege does not violate the defendant's right of cross examination.[40]

Where a child is the victim of an assault by a stranger, the case is usually reported directly to the police, prosecuted solely as a criminal case and is not the subject of a report under the Children's Code. Therefore, the abrogation of privilege in the Children's Code does not apply, and the child's privilege now remains intact under the state criminal statutes. Before 1988 the statute on sexual assault on a minor child stated there was no victim-patient and physician privilege.[41] In 1988, the reference to "victim-patient and physician privilege" was deleted (for any crimes committed after July 1, 1988), thereby resurrecting the

33. *See supra* note 13.

34. To this end, there is also no spousal privilege in child abuse cases. *Id.* § 19-3-311(2); *see also* People v. Corbett, 656 P.2d 687, 688-89 (Colo. 1983) (applying former COLO. REV. STAT. § 19-10-112 (1973) in denying spousal privilege).

35. *See* Rohda v. Franklin Life Ins. Co., 689 F. Supp. 1034, 1039-40 (D. Colo. 1988).

36. Clark v. District Court, 668 P.2d 3, 8 (Colo. 1983).

37. People v. Silva, 782 P.2d 846, 850 (Colo. Ct. App. 1989).

38. *See* statutes cited *supra* note 9.

39. *Silva*, 782 P.2d. at 850.

40. Application of the privilege does not violate a defendant's right to confrontation. *People v. District Court*, 719 P.2d at 726-27 (construing COLO. REV. STAT. § 13-90-107 (1)(g)(Supp. 1985)).

41. COLO. REV. STAT. § 18-3-411(5) (1986). There is no ambiguity as to identity of the privilege holder in this statute; the defendant's privilege is not involved.

privilege.[42] Today, in the case of criminal assault, there is a privilege protecting the child's records, and the stranger is denied access; but the relative who commits an assault reported under the Children's Code may gain access to the child's post-trauma psychological records in the companion criminal case.[43] This inconsistency is contrary to the public policy of "child protection",[44] and legislation is needed to remedy this patently differential treatment.[45]

The privilege pertaining to a child's physical harm may be handled independently from that of psychological treatment. In one Colorado case, the mother waived the privilege for the hospital records of her child's physical examination, but the court held that such explicit waiver did not include a waiver of the psychologist-patient privilege for treatment at the Kempe National Center for Prevention and Treatment of Child Abuse.[46] The child's psychological condition was not an element of the crimes of sexual assault and sexual assault on a child. Therefore there was no implicit waiver. There is a danger of ignoring this distinction when both types of treatment are provided at one institution, and reflected in a single medical record.

A corollary issue is raised by testimony of a professional about a criminal assault in lieu of the child victim, under C.R.E. 803(24),[47] the residuary hearsay rule. So long as the scope of testimony is restricted to "what happened" as opposed to the rehabilitative process of the child, the substitute testimony should *not* be deemed a waiver such that all mental health records would be disclosed.[48] The contrary results in an unconscionable choice: either the child faces the trauma of testifying or where testimony is inappropriate, disclosure of confidences resulting in great harm to the therapeutic process.[49]

The issue most frequently highlighted in such a case is the *defend-*

42. COLO. REV. STAT. § 18-3-411(5) (Supp. 1991). An argument could be made, at least in sexual assault cases, that the privilege restored to the child-victim pursuant to the 1988 amendment of section 18-3-411(5) overruled the 1987 Children's Code abrogation of privilege in section 19-3-311(1) under the rules of statutory construction: where statutes are irreconcilable, statute passed later in time prevails. COLO. REV. STAT. § 2-4-206 (1980). The amendment to section 18-3-411(5) was passed in 1988 (1988 Colo. Sess. Laws 713), while the Children's Code was repealed and reenacted in 1987 (1987 Colo. Sess. Laws 695).

43. *See* COLO. REV. STAT. §§ 19-3-311, -308, -303(4.7) (Supp. 1991).

44. *See generally id.* § 19-1-102(1)(a)-(d) (legislative declarations to promote welfare and interests of children).

45. This problem has not gone unrecognized by courts addressing similar legislation. *See* Jett v. State of Florida, WL 226466, at *3 (Fla. Dist. Ct. App. 1991) (Sharp, J., dissenting) ("[A] close relative who rapes a child will have the benefit of requiring disclosure of the child's statements to his or her psychotherapist, but a stranger who rapes a child under similar circumstances will have no such right. Such an anomalous and unequal application of the law should be avoided.").

46. People v. Pressley, 804 P.2d 226, 228 (Colo. Ct. App. 1990).

47. *See supra* note 16.

48. White v. Illinois, 112 S. Ct. 960 (1992) (the Supreme Court approved the admissibility of testimony of adults recounting the four year old child's statements about a sexual assault under established exceptions to the hearsay rule, and rejected the defendant's Confrontation Clause challenge).

49. See cases cited *supra* note 18.

ant's constitutional right to confrontation.[50] In the 1987 case of *Pennsylvania v. Ritchie*,[51] the United States Supreme Court found that protection of a child's records did not violate the accused's right to confrontation. The Court did, however, require an *in camera* review of the child's records after which only that information that was exculpatory was to be disclosed to the defendant. In 1984, Illinois passed a statute providing an absolute privilege for statements made to rape crisis personnel.[52] The Illinois Supreme Court found the statute did not violate the defendant's rights to due process or confrontation, and upheld the trial court's refusal to conduct an *in camera* hearing to examine the communications.[53] Legislation such as that in Illinois should be considered in Colorado and elsewhere. In the meantime, the authors contend that 27-10-120 hearings offer greater protection for the child, in part to avoid the temptation for overworked judges to disclose the entire record, rather than engage in the time consuming task of *in camera* review.[54]

We now turn to the question of the criminal defendant as "patient" in a case arising from a report to Social Services. This in part involves the question of fairness of disclosure of confidential information of victim, defendant, neither or both. Where the defendant's medical condition is not an element of the crime, there is a privilege and a waiver is required.[55] However, if the criminal case arose out of a report under the Children's Code, at least under the current law, there may *not* be a privilege such that the District Attorney should be able to obtain and introduce admissions and observations contained in the defendant's medical records.[56] This may not, however, extend to records of court ordered therapy under a treatment plan for sexually abusive parents.[57] Further, in criminal cases of assault on a child, there is no spousal privi-

50. U.S. CONST. amend. VI. *See* Ebrahim J. Kermani, *The U.S. Supreme Court on Victimized Children: The Constitutional Rights of the Defendant versus The Best Interest of The Child*, 30 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY, 839, 840-42, (1991); *see also* People v. Reidout, 530 N.Y.S.2d 938, 944 (Sup. Ct. Bronx County 1988) (court must balance the competing interests between witness confidentiality in psychiatric records and defendant's right to confrontation).

51. 480 U.S. 39 (1987) (5-4 decision, distinguishing Davis v. Alaska, 415 U.S. 308 (1974), which disapproved the trial court's prohibition of cross-examination on the issue of a witness's prior juvenile record, which was privileged under state law, as a violation of the defendant's constitutional right to confront witnesses).

52. ILL. CODE CIV. PROC. § 8-802.1 (1985).

53. People v. Foggy, 521 N.E.2d 86 (Ill.), *cert. denied*, 486 U.S. 1047 (1988).

54. This was the experience of one author following production to the court of a child's psychiatric record.

55. *Cf.* People v. Bowman, 812 P.2d 725 (Colo. Ct. App. 1991) (defendant's patient-psychologist privilege was upheld under COLO. REV. STAT. § 13-90-107(1)(g) (1987)). The court noted, however, that in Children's Code cases after 1989, statutory amendments would dictate the opposite result, since psychologists and social workers had been added to the class of providers whose privilege was abrogated. *Bowman*, 812 P.2d at 728-29.

56. Credit for this idea is owed to the mother of a child, who, upon being informed by hospital counsel that her child's records would probably be disclosed to the defendant accused of sexually assaulting her daughter, without consent, asked why her ex-boyfriend's group therapy records recounting his admission of the assault would not be available in the criminal case. *See also supra* note 45.

57. *See* People v. District Court, 731 P.2d 652, 657 (Colo. 1987).

lege,[58] and one parent may have to testify about the other's inculpatory statements.

IV. Civil Cases

In civil cases, parties are entitled to assert a privilege for protection of medical records, unless the information is the basis of a claim or affirmative defense (including emotional distress).[59] This includes drug and alcohol records, which may only be disclosed with consent or a court order.[60] Where mental health records are sought (other than for a court ordered evaluation) in any civil matter, it should be presumed by the provider that the physician/psychologist/social worker privileges apply.[61] A 27-10-120 hearing should be utilized, especially where the patient has or had an expectation of confidentiality.[62]

The status of the medical communications privilege is less clear in custody proceedings. The Colorado Uniform Dissolution of Marriage Act[63] creates a right of access to the child's medical records for a parent who has joint legal,[64] but not physical, custody at the time of the medical records request "[n]otwithstanding any other provisions of law to the contrary."[65] However, the "notwithstanding" clause arguably supports a right of disclosure to a consenting parent whose parental rights have been terminated. This is patently contrary to the social aims of child protection, and the statute needs to be amended to make explicit the right of access applies only in the cases of joint custody.

V. Violation of Equal Protection?

It appears from the above discussion that disclosure of medical information, physical and psychological, varies with the situation. A child victim of an assault by a stranger or any adult victim has a privilege for post trauma mental health records, but a child assaulted by a relative or person known to the child, which is reported under the Children's Code, does not. This is an unfortunate and unintended byproduct of the statutes designed to protect children. It may well rise to the level of constitutional infirmity: a violation of these children's right to equal protection of the laws.

Equal protection of the laws is guaranteed by the federal constitu-

58. Colo. Rev. Stat. § 13-90-107(1)(a)(II) (Supp. 1991).

59. Clark v. District Ct., 668 P.2d 3, 9-10 (Colo. 1983). Of course, counsel for the parties will be aware of whether the privilege has been waived because a medical condition is the basis of a claim or defense, but the provider receiving the request for records will not know this. For optimal certainty in these situations, counsel should obtain consent or a judicial determination that the privilege has been waived *before* requesting records from the provider.

60. 42 U.S.C. §§ 290 dd-3, ee-3 (1988).

61. Colo. Rev. Stat. § 12-43-218(1) (1991).

62. *Id.* § 12-43-214(1)(d)(4).

63. Colo. Rev. Stat. § 14-10-101 (1987 & Supp. 1991).

64. *See* Colo. Rev. Stat. § 14-10-123.5(1) (1987) (defining joint custody).

65. *See id.* § 14-10-123.5(7).

tion.[66] Generally, the state may not classify groups of persons similarly situated and treat those classes differently unless the classification is rational and furthers a legitimate state interest.[67] If the affected right is a fundamental one, or a suspect class has been created, the legislation must pass a much more rigorous test of judicial scrutiny.[68] Where the state has declared that the purpose of the Children's Code is "[t]o secure for each child subject to [the Code's] provisions such care and guidance . . . as will best serve his welfare and the interest of society,"[69] and where the application of privilege laws affords the least protection to this class of children, a court may find the situation deserving of heightened scrutiny. Of three groups similarly situated (victims of assault), one group (minors reported under the Children's Code) has no ability to protect their confidences necessary for rehabilitation and treatment, unlike the other two groups (adults and minor victims of assault by strangers). This disparity and unequal treatment may not withstand a constitutional challenge, and should therefore be remedied by legislative or judicial action. In the meantime, the use of 27-10-120 hearings should result in more equitable and uniform treatment.

VI. Proposed Solutions

The authors recommend the following actions to remedy the inequities detailed above:

a) Custodians of records and professionals should oppose requests for production of a child victim's mental health records except to Social Services in the context of an investigation. If any mental health records are subpoenaed, the attorney issuing same should be promptly told of the provider's objection, advised of 27-10-120 procedure, and if the matter cannot be informally resolved, a motion to quash should be filed. The custodian should notify and involve providers in the hearing to testify about potential damage to the child and the therapeutic relationship based on disclosure. Treatment by psychiatrist, psychologist, social worker or school counsellor should be handled uniformly. Notice of request for disclosure should be given to parents/legal guardians and the child.

b) As long as the current law stands, district attorneys, county attorneys and *guardians ad litem* should consider the use of 19-3-311 to obtain records of respondents and/or defendants in D and N or criminal cases arising from reports under the Children's Code. Admissions may be contained therein.

c) District attorneys should use 18-3-411(5) to protect children from disclosure of psychiatric or psychological treatment records in

66. U.S. Const. amend. XIV, § 1.

67. United States v. Moreno, 413 U.S. 528, 533 (1973).

68. For a recent discussion of equal protection analysis by the Colorado Supreme Court, see State v. Defoor, 824 P.2d 783 (Colo. 1992) (applying federal law; the Colorado constitution does not contain an equal protection clause).

69. Colo. Rev. Stat. § 19-1-102(1)(a) (Supp. 1991).

cases arising outside the Children's Code setting. Also, district attorneys should argue that disclosure of the victim's records is inappropriate in cases of substitute testimony under Colorado Rules of Evidence 803(24).

d) Social Services agencies need to refuse disclosure to D and N respondents of a child's mental health records unless the court so orders after a 27-10-120 hearing. Colorado Revised Statute sections 19-1-113 and 114 may be cited as a basis for seeking initial orders against disclosure.

e) Judges and attorneys should recognize the applicability of the 27-10-120 hearing procedures to production of any mental health records (whether in D and N, criminal, domestic or civil cases) and use such hearings (with notice to the custodian of records and the subject of the records) to resolve questions of disclosure and privilege.

f) Legislation is needed to clarify the Children's Code to (1) abrogate the alleged perpetrator's privilege, (2) restrict disclosure of a child's medical records to those portions relevant to the reportable injury suffered by the victim, and (3) specifically preserve the child's privilege as to post trauma psychological records so as to treat children in D and N cases the same as child and adult victims in criminal cases. The latter could partially be achieved by changing the language from "any judicial proceeding resulting from a report pursuant to this part 3 . . ." to "any proceeding *brought* pursuant to this part 3 . . . ." At a minimum, this would limit access to and use of the child's records to D and N cases, and not permit access in a companion criminal case. Also the Illinois statute establishing absolute privilege for communications to rape counsellors could be considered for adoption in Colorado and elsewhere.[70]

VII. EPILOGUE—CASE STUDIES: DEMANDS FOR PRODUCTION OF CONFIDENTIAL INFORMATION

You represent a hospital where a child has been treated for non-accidental injuries which may include sexual assault. The child has also received post-trauma mental health treatment. Reports of suspected abuse have been made to the local social services agency. The hospital is served with *subpoena duces tecum* to produce all of the child's medical records to:

a) the attorney for the parents in a dependency and neglect proceeding;

b) attorney for the father in a criminal case for sexual assault against his minor child;

c) attorney for the suspect unrelated to the child in a criminal case for sexual assault;

d) attorney for same defendant in a civil case brought by the child's parents for injury and emotional distress.

70. *See supra* notes 52 & 53.

Are the records to be produced or should a motion to quash be filed? Is the "medical" portion of the records to be handled differently than the "mental health" portion? What notice, if any, is given to the child's providers (medical and mental health) that records are being sought? Is there any difference in outcome if the child has been seen by a psychiatrist, psychologist or social worker? What notice, if any, is given to parent/legal guardian that records are being sought? What notice to the child? Is a hearing needed? Is *in camera* review of records necessary?

e) Alternatively, you represent a healthcare provider who has treated or counselled the parent or defendant who has provided information about the abuse or assault. The district attorney, county attorney, or child's attorney or G.A.L. subpoenas records. Are they to be produced? Is notice, consent and/or a hearing required?

The authors recommend the following responses to the situations presented in the case studies:

a) The parents in a D and N proceeding should be able to obtain their child's medical treatment records pertaining to any reported injury, either from the provider or Social Services. Other psychological records should not be produced unless a 27-10-120 hearing results in a finding that disclosure would not have a significant negative impact on the child.

b) The father accused of sexual assault in a criminal case may receive records pertaining to the child's injuries which are also an element of the crime with which he has been charged. However, an objection to disclosure of any other records, including post trauma treatment, should be made by provider and guardians and G.A.L.s, based upon privilege and equal protection claims.

c) Defendant (stranger to the child) should not be able to obtain any mental health records under C.R.S. § 18-3-411(5).

d) Civil case: only those records pertaining to issues in the case. If emotional harm is a basis for a claim for damages, those records may be ruled to be discoverable after a 27-10-120 hearing or Rule 26(c) motion for protective orders.

e) The records of the accused may be subject to discovery without consent in a D and N or companion criminal case. In all other cases, a 27-10-120 hearing should be employed.

STIGMATIZATION AND DISCRIMINATION: VISITATION RIGHTS OF NONCUSTODIAL HOMOSEXUAL PARENTS AND THE EFFECT OF PARENTAL DEPRIVATION ON CHILDREN

INTRODUCTION

The division of a family following a divorce and the subsequent reordering of legal relationships present numerous difficulties for courts determining custodial and visitation issues. Courts are frequently called upon to resolve such sensitive issues as which parent is better suited to serve as the child's custodian, and whether visitation with the child should be granted to the noncustodial parent. These issues are further complicated when one parent is homosexual[1] but has a child from a heterosexual marriage.[2] In this situation, many courts deny custody to the gay parent and severely restrict or deny visitation with the natural child.[3]

This Note examines the legal status of homosexual parents seeking post-divorce visitation. In many jurisdictions, parental rights are denied on the basis of prejudicial and false judicial rationales. This Note argues that children are harmed more by deprivation of parental contact when

---

1. The terminology regarding individuals who are sexually oriented toward persons of the same gender is often imprecise. The terms "homosexual" and "gay" are used either synonomously, to refer only to males, or are used to refer to both males and females. According to one historian, the word "homosexual" is a relatively new term, and has been criticized because of its "bastard origin and vague connotations." JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 43 (1980). Boswell asserted that "gay" is a more accurate and useful word, in that it refers to "persons who are conscious of erotic preference for their own gender." *Id.* The term "homosexual" is broader, and "comprises all sexual phenomena between persons of the same gender, whether the result of conscious preference, subliminal desire, or circumstantial exigency." *Id.* at 44.

This Note follows contemporary usage and employs the terms "gay" and "homosexual" to refer to both men and women who are sexually and emotionally oriented toward persons of the same gender and "lesbian" to refer exclusively to gay females. However, "homosexual" is used as an adjective, rather than a noun. Boswell noted:

> The word 'homosexual' implicitly suggests that the primary distinguishing characteristic of gay people is their sexuality. . . . Sexual interest and expression vary dramatically in the human population, and a person's sexual interest may be slight without precluding the realization that he or she is attracted to persons of the same gender and hence distinct in some way from the majority.

Id. at 45. *See also* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 804 (1979) ("[U]sing 'homosexual' as a noun . . . implies a being whose sole dimension is an erotic one.").

2. A related issue beyond the scope of this article is whether a lesbian woman is entitled to parental rights following the termination of her relationship with another woman when her companion has borne a child conceived through artificial insemination. *See* Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), *aff'g* 552 N.Y.S.2d 321 (App. Div. 1990) (woman could not be considered a parent and had no visitation rights); *In re* Interest of Z.J.H., 471 N.W.2d 202 (Wis. 1991), *aff'g* 459 N.W.2d 602 (Wis. Ct. App. 1990) (same). *See generally* Nancy D. Polikoff, *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 (1990) (arguing that parenthood should be redefined to include anyone in a functional parent-child relationship).

3. *See* cases cited *infra* notes 20-21, 23-27.

visitation is denied than by the alleged adverse effects caused by exposure to a parent's homosexuality. The child's best interests are served when courts engage in unbiased inquiry regarding gay parents and acknowledge that parental contact is important for the child's psychological development.

Part I of this Note examines visitation actions and the standards that courts use to evaluate such disputes. Part II reveals the approaches courts use in visitation cases involving homosexual parents. Part III scrutinizes the factors courts advance to support presumptions of gay parents' unfitness. Part IV surveys the psychological research regarding the effects on a child deprived of post-divorce visitation and argues that the child's best interests are served by continued visitation with the noncustodial parent, absent an affirmative showing of harm as a result of exposure to the parent's homosexuality.

I. POST-DIVORCE VISITATION

Post-divorce visitation awards are generally decided simultaneously with custody determinations.[4] The typical visitation order occurs after sole custody[5] is awarded to a party in the divorce. Courts usually grant the noncustodial parent visitation with the child, absent any evidence of parental unfitness. The concept of "best interests of the child" is the primary consideration in both custody and visitation adjudications.[6]

4. Commonwealth *ex rel.* Williams v. Miller, 385 A.2d 992, 994 (Pa. 1978). Visitation decisions are usually made in the context of custody determinations between natural parents, although visitation disputes also occur in situations involving nonparents. More states are awarding visitation rights to nonparents. *See, e.g.*, COLO. REV. STAT. § 19-1-117 (Supp. 1991); HAW. REV. STAT. § 571-46(7) (1985 & Supp. 1990). *See generally* Henry H. Foster & Davis J. Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 ST. LOUIS U. L.J. 643 (1979); Samuel V. Schoonmaker III et al., *Constitutional Issues Raised by Third-Party Access to Children*, 25 FAM. L.Q. 95 (1991); Richard S. Victor et al., *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L.Q. 19 (1991); Howard G. Zaharoff, *Access to Children: Towards a Model Statute for Third Parties*, 15 FAM. L.Q. 165 (1981); Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 191 (1984) (arguing that visitation rights should be granted to any third party if such visitation would benefit the child).

5. Sole custody is not the only possible award; increasingly, courts are granting joint custody to parents. Joint custody has been defined as "co-parenting" following a divorce. H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 528-29 (1979). "Its distinguishing feature is that both parents retain legal responsibility and authority for the care and control of the child . . . ." *Id.* Joint custody differs from sole custody in that the parents share legal custody of the child, and are jointly responsible for making major decisions regarding the child's welfare. Physical custody may be split between the parents or retained primarily by one parent. *See, e.g.*, MINN. STAT. § 518.003(3) (1990). Over half of the states currently authorize joint custody awards by statute. *See, e.g.*, CAL. CIV. CODE § 4600.5 (West 1983 & Supp. 1992). Courts may award joint custody even if not authorized by statute. *See generally* David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345 (1979); Holly L. Robinson, *Joint Custody: An Idea Whose Time has Come*, 21 J. FAM. L. 641 (1982-1983); Sheila F.G. Schwartz, *Toward a Presumption of Joint Custody*, 18 FAM. L.Q. 225 (1984).

6. The concept of the "best interests of the child" is not new. Judge Turley stated in 1843: "It is to be observed that in all cases the interest and welfare of the child is the great leading object to be attained . . . ." Paine v. Paine, 23 Tenn. 523, 535 (4 Hum.) (1843). Judge Cardozo expanded upon the best interests standard in Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) ("[A judge] acts as parens patriae to do what is best for the interest

Virtually every jurisdiction requires courts to award custody and visitation rights based on each jurisdiction's adaptation of this standard.[7] In visitation cases, courts often presume that some form of continued access by the noncustodial parent is in the child's best interests.[8] Visita-

---

of the child."). Cardozo recognized that in a custody proceeding a court is not determining rights as it does in an adversary proceeding. Rather, the court is seeking to place the child in the best environment in which to mature.

The best interests standard is by nature indeterminate. Although some custody statutes list relevant factors that a court must consider, these guidelines are open to considerable interpretation. California's custody statute states:

> In making a determination of the best interests of the child . . . the court shall, among any other factors it finds relevant, consider all of the following: (a) The health, safety and welfare of the child[,] (b) [a]ny history of abuse by one parent against the child . . . [and] (c) [t]he nature and amount of contact with both parents.

CAL. CIV. CODE § 4608(a)-(c) (West Supp. 1992).

Some commentators have criticized decisions made under the best interests standard as biased and often irrational. One commentator noted:

> Custody litigation, unlike most other litigation, attempts to predict the future rather than to understand the past. In most other litigation, the result will depend upon the court's determination that some event did or did not take place at an earlier time. Aside from possibly bearing on credibility, the litigants' personality, priorities, lifestyle, financial resources, emotional stability, and other personal attributes have no relevance to the outcome. In custody litigation . . . those very factors will determine the result in large measure, with the court making a judgment as to whether the child is likely in the future to be "better off" with one parent than with the other. Not surprisingly, decisions made in this framework are less a product of reasoned application of precedent than of the personality, temperament, background, interests, and biases of the trial judge or the community that elected him.

Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 762 (1985) (footnotes omitted). Another author stated that "neither legislatures nor custom has provided judges with a coherent framework for thinking about what children's interests are. [An] equally serious [flaw] has been the inability of judges to make accurate determinations . . . of the quality of most individual children's relationships with their parents or of parents' skills at childrearing." David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 568 (1984). *See also* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975) (discussing the consequences of indeterminate custody standards).

7. This standard gives courts a great deal of discretion in the determination of parental fitness as it relates to the child's best interests. Steve Susoeff, Note, *Assessing Children's Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 UCLA L. REV. 852, 853 (1985). The best interests standard is mandated by statute in most states for custody disputes. Many statutes list the factors that a judge must consider in determining the child's best interests. *See, e.g.*, CAL. CIV. CODE § 4608(a)-(c) (West Supp. 1992); COLO. REV. STAT. § 14-10-124 (1987) (listing factors to be considered in custody determinations). Other statutes only require that the best interests standard be applied and give no guidance to judges. *See, e.g.*, WYO. STAT. § 20-2-113 (1990) (specifying application of best interests test without listing factors). *See generally* HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.4, at 797 & nn.3-4 (2d ed. 1988) (citing statutes and cases employing the best interests standard). In other states, case law requires that judges award custody based on the child's best interests. *See, e.g.*, Wolff v. Wolff, 349 N.W.2d 656, 658 (S.D. 1984).

In visitation cases, the best interests standard is also frequently required by statute. *See* CAL. CIV. CODE § 4601 (West Supp. 1992); CONN. GEN. STAT. § 46(b)-59 (1991); D.C. CODE ANN. § 16-914 (1989); HAW. REV. STAT. § 571-46(7) (1985 & Supp. 1991); IND. CODE ANN. § 31-1-11.7.3 (Burns Supp. 1991); MINN. STAT. § 518.175(1) (1990); N.Y. DOM. REL. LAW § 70 (McKinney Supp. 1991). If not mandated by statute, case law may require that the child's best interests prevail in visitation actions. *See, e.g.*, Allen v. Allen, 385 So. 2d 1323 (Ala. Civ. App. 1980).

8. In many states, the presumption of visitation by the non-custodial parent is man-

tion is typically restricted only if there is evidence that the child will be harmed by contact with the parent.[9]

Visitation awards vary in the degree of circumscription imposed.[10] Courts prefer to grant "reasonable" or "general" visitation rights to the

---

dated by statute. *See, e.g.*, NEV. REV. STAT. ANN. § 125.460 (Michie 1986); 23 PA. CONS. STAT. ANN. § 5301 (Supp. 1991). *See also In re* Marriage of Matthews, 161 Cal. Rptr. 879, 886 (Ct. App. 1980) (stating that courts should attempt to preserve visitation rights whenever possible). In some states, joint custody is presumed to be in the child's best interests by statute. *See supra* note 5. In these states, the term "visitation" might not be not used because each parent possesses legal custody of the child. Rather, such statutes use other terms to express the concept of visitation with each parent for a period of time. *See, e.g.*, N.M. STAT. ANN. § 40-4-9.1(F) (Michie 1989) (authorizing a "period of responsibility" to each parent).

9. Many states follow the Uniform Marriage and Divorce Act's visitation provision, which states, "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral, or emotional health." UNIF. MARRIAGE AND DIVORCE ACT § 407(a), 9A U.L.A. 612 (1987). *See* ARIZ. REV. STAT. ANN. § 25-337(A) (Supp. 1991); COLO. REV. STAT. § 14-10-129 (1987 & Supp. 1991); ILL. ANN. STAT. ch. 40, para. 607(a) (Smith-Hurd Supp. 1991); IND. CODE ANN. § 31-1-11.5-24 (Burns 1987); KAN. STAT. ANN. § 60-1616(a) (Supp. 1991); MO. ANN. STAT. § 452.400(1) (Vernon 1986 & Supp. 1992); MONT. CODE ANN. § 40-4-217(1) (1991); N.D. CENT. CODE § 14.05.22(2) (1991); WASH. REV. CODE § 26.09.240 (1989).

Another group of states has modified the Uniform Marriage and Divorce Act provision while still retaining the basic intent of the Act. *See* DEL. CODE ANN. tit. 13, § 727 (Supp. 1990); IOWA CODE § 598.41(1) (1991); OHIO REV. CODE ANN. § 3109.05(A) (Anderson 1989 & Supp. 1990); 23 PA. CONS. STAT. ANN. § 5301-5310 (1991); R.I. GEN. LAWS § 15-5-16 (1988 & Supp. 1991); UTAH CODE ANN. § 30-3-5(4) (1989 & Supp. 1990); W. VA. CODE § 48-2-15(b)(1) (1986 & Supp. 1991).

Other states have no statute dealing specifically with visitation, implicitly leaving visitation awards to the discretion of the court. *See* ALA. CODE § 30-3-1 (1989); ALASKA STAT. § 25.24.150 (1991); ARK. CODE ANN. § 9-13-101 (Michie 1991); GA. CODE ANN. § 74-107 (Michie 1991); IDAHO CODE § 32-717 (1983); KY. REV. STAT. ANN. § 403.270 (Baldwin 1984); LA. CIV. CODE ANN. art. 131, 134 (West Supp. 1992); MD. FAM. LAW CODE ANN. § 1-201(b)(1) (1991); MASS. GEN. L. ANN. ch. 208, § 28 (West 1987 & Supp. 1991); NEB. REV. STAT. § 42-364 (1988 & Supp. 1991); NEV. REV. STAT. § 125.480 (1986 & Supp. 1989); N.H. REV. STAT. ANN. § 458.17(I) (1983 & Supp. 1991); N.J. REV. STAT. § 2a:34-23 (West 1987 & Supp. 1991); OKLA. STAT. ANN. tit. 43, § 112 (West Supp. 1991); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 25-4-45 (1984); TENN. CODE ANN. § 36-6-101 (1991); VA. CODE ANN. § 20-107.2 (Michie 1983 & Supp. 1991); WYO. STAT. § 20-2-113 (1977 & Supp. 1991).

10. A radical alternative to the traditional visitation award was proposed by Goldstein, Freud, and Solnit. *See* JOSEPH GOLDSTEIN ET AL; BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979). The authors opposed legally enforceable visitation altogether and contended that all decisions regarding visitation should be left to the discretion of the custodial parent. *Id.* at 38. Thus, the noncustodial parent would have no legally enforceable right whatsoever and visitation could be completely foreclosed by the custodial parent. The authors stated:

> Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.

Id. (footnotes omitted).

The authors based their conclusion upon the theory that the relationship between the child and the "psychological parent" is crucial. The psychological parent, as opposed to the biological parent, is the one who meets the child's emotional and psychological needs, as well as providing physical care. *Id.* at 17. The authors argue that even a short absence by the psychological parent may harm the child. Thus, continuity of the relationship with the psychological parent and child must be maintained to the greatest extent possible. *Id.* at 31-34. If the parents do not have positive contact with each other, visitation may disrupt

noncustodial parent. "General" visitation awards impose no specific time or place for the visit, leaving the details of the visit to the divorced parents.[11] Such an award presumes the parents are capable of cooperation and can arrange a mutually acceptable schedule.[12] If the parents cannot cooperate to arrive at an agreement, the court may impose "specific" visitation. Conditions regarding the date, day of the week, time, location and circumstances of visitation may be judicially imposed.[13]

II. SEXUAL ORIENTATION, CUSTODY, AND VISITATION

Custody and visitation disputes involving homosexual parents and their children arise frequently.[14] As in any custody or visitation determination, courts must decide whether a gay parent is fit to serve as the child's custodian, or, alternatively, if the parent is fit to have visitation with the child.[15] The crucial analysis is the court's perception of the

---

the needed continuity with the psychological parent because of the inherent loyalty conflicts of the child. *Id.* at 37-38.

The implications of the Goldstein, Freud, and Solnit thesis extend beyond visitation rights. The authors assert that recognizing the primacy of the psychological parent-child relationship compels many profound changes in the legal ordering of the family relationship. They contend that the time periods involved in custodial and adoptive decisionmaking be sharply reduced. Thus, infants should be placed even before birth and custody decisions should be made prior to the divorce. Correspondingly, post-divorce custody modification would be eliminated. *Id.* at 42-47.

Courts have not adopted the Goldstein, Freud, and Solnit approach to visitation, and commentators have strongly criticized their thesis. The book was criticized for failing to provide any empirical data supporting the underlying presumptions. *See* Daniel Katkin et al., *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC. REV. 669 (1974). The Goldstein, Freud, and Solnit thesis has also been criticized on policy grounds. Commentators have pointed out that the practical effects of giving one parent complete control over visitation would be vengeful behavior and extortion. *See* Henry H. Foster, *A Review of Beyond the Best Interests of the Child*, 12 WILLIAMETTE L. REV. 545, 551 (1976); Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 160-65 (1983). Given the accepted view that children should have continued contact with noncustodial parents (so long as neither parent is homosexual), it seems unlikely that the Goldstein, Freud, and Solnit approach to visitation will be adopted by any court.

11. *See, e.g., In re* Marriage of Dirnberger, 773 P.2d 330 (Mont. 1989).

12. Judith A. Fournie, Note, *Post-Divorce Visitation: A Study in the Deprivation of Rights*, 27 DE PAUL L. REV. 113, 114-15 (1977).

13. *See, e.g.*, Ward v. Sams, 391 S.E.2d 748 (W. Va. 1990) (visitation order was amended to include specific times, days, and holidays, and also provided that visitation was to take place away from the mother's former sister-in-law).

14. There are approximately three million homosexual parents in the United States, and between eight and ten million children are raised in these households. Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1629 (1989). Custody issues are the most litigated of gay and lesbian issues. *See* Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311, 327 (1980-1981).

Suits in which gay parents fight to gain custody or visitation of their children have increased in recent years and are expected to increase further. This is probably due to growing pride on the part of gay parents as well as a growing support system to help them in these cases. *See* Rivera, *supra* note 1, at 886.

15. A parent's same-sex orientation usually becomes an issue only when that parent is at the time involved in a relationship with a person of the same gender. A parent's sexual orientation in the abstract may not necessarily provide adequate grounds for a denial of custody or visitation. Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 618-19 & n.9 (1989).

impact that the parent's homosexuality has or will have upon the child.[16] In visitation disputes, courts use two different approaches to make this evaluation.[17] Some courts create an irrebuttable presumption that a gay parent is unfit to have custody or visitation.[18] Other courts reject that presumption and rule that visitation may only be denied upon an affirmative showing of a nexus between the parent's sexual orientation and any adverse effect upon the child.[19]

A. *Irrebuttable Presumption Jurisdictions*

Courts adopting an irrebuttable presumption of parental unfitness for homosexual parents generally hold that custody of the child shall not be granted to that parent. Custody is denied whether or not the child would suffer any adverse effect from the parent's homosexuality and regardless of any evidence that the heterosexual parent is unfit.[20] The same approach is used to determine visitation, although outright denial of visitation is rare.[21] Instead, courts commonly impose a variety of restrictions upon the gay parent's visitation. Most commonly, the homosexual parent is not allowed to have the child overnight[22] or have the same-sex companion present during the visitation period.[23] Some courts have ordered that the child cannot be in the presence of other "known homosexuals"[24] or even be in the presence of any unrelated member of the parent's sex.[25] The effect of these restrictions is that the

16. Custody and visitation statutes in nearly half of the states list relevant factors for determining the child's best interests; many of these factors can be interpreted to allow judges to consider the parent's sexual orientation. For example, Alabama law allows consideration of a parent's "moral character." ALA. CODE § 30-3-1 (1989). *But see* D.C. CODE ANN. §§ 16-911(a)(5), 16-914(a) (1989) (only jurisdiction with a statute declaring sexual orientation irrelevant in determining custody or visitation). *See generally* Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK L. REV. 711 (1989) (survey of 81 family law attorneys regarding their impressions of custody cases involving homosexual parents).

17. In custody disputes, a third approach is also used. These courts impose a rebuttable presumption which places the burden on the gay parent to prove that his or her sexual orientation will not harm the child. *See* Thigpen v. Carpenter, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982); Constant A. v. Paul C.A., 496 A.2d 1, 5 (Pa. Super. Ct. 1985).

18. *See* cases cited *infra* notes 20-21, 23-27.

19. *See* cases cited *infra* notes 60-62.

20. *See* S v. S, 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); Bennett v. O'Rourke, No. 83D1327, 1985 WL 3464, at *3 (Tenn. Ct. App. Nov. 5, 1985); Dailey v. Dailey, 635 S.W.2d 391 (Tenn. Ct. App. 1981); Roe v. Roe, 324 S.E.2d 691, 693 (Va. 1985).

21. *See* Irish v. Irish, 300 N.W.2d 739, 742 (Mich. Ct. App. 1980); White v. Thompson, 569 So. 2d 1181, 1185 (Miss. 1990); S.E.G. v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) (court rejected expert testimony that stated no harm had or would occur to the child).

22. *See, e.g.*, *In re* Jane B., 380 N.Y.S.2d 848, 860 (N.Y. Sup. Ct. 1976).

23. *See, e.g.*, *Irish*, 300 N.W.2d at 741; L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982); DiStefano v. DiStefano, 401 N.Y.S.2d 636, 638 (App. Div. 1978); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *2 (Tenn. Ct. App. March 30, 1988).

24. *See Jane B.*, 380 N.Y.S.2d at 861.

25. *See* Roberts v. Roberts, 489 N.E.2d 1067, 1069 (Ohio Ct. App. 1985).

homosexual parent is often effectively prevented from visiting or having meaningful contact with his or her child.

A typical case utilizing an irrebuttable presumption of unfitness is *J.P. v. P.W.*[26] In *J.P.*, the Missouri Court of Appeals considered an action to modify a child custody decree.[27] The father and mother in the action married and had a daughter in 1986.[28] The wife left her husband and commenced divorce proceedings after learning that he was involved in a homosexual relationship during the marriage.[29] The father continued this relationship after the separation and moved in with his companion.[30] The court granted the divorce[31] and ruled that the father could have visitation with the child for ten days every other month.[32] Pursuant to an interim visitation order, the child visited the father for ten days following the divorce.[33]

The mother moved to modify the custody order in 1988 to restrict visitation.[34] At the hearing, the mother testified that the child's behavior negatively changed and physical abuse was present following the visit.[35] The mother stated that she was concerned about the child's exposure to the AIDS virus as a result of contact with the father.[36] The trial court ruled that the evidence did not establish a change of circumstances and, therefore, visitation could not be denied.[37] However, the trial court modified the visitation order by ruling that neither the father's lover nor any other live-in companion could be present in the home during the visitation period. Additionally, the father's companion could not exercise any discipline over the child nor accompany the father when visiting the child outside the home.[38] Following the trial court's ruling, the mother appealed to the Missouri Court of Appeals, contending that the restrictions were inadequate.[39] The father cross-appealed, asserting that the restrictions were improperly imposed.[40]

The *J.P.* majority ruled that a change had occurred in the circum-

---

26. 772 S.W.2d 786 (Mo. Ct. App. 1989).
27. *Id.* at 786-87.
28. *Id.* at 787.
29. *Id.*
30. *Id.*
31. The parties stipulated to the terms of the original divorce decree. Brief for Cross-Appellant at 3, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).
32. *J.P.*, 772 S.W.2d at 786.
33. *Id.* at 788.
34. *Id.* at 786, 788.
35. The mother asserted that the child exhibited "clinging" and insecure behavior after the visit. She also noticed vaginal swelling after examining the child. *Id.* at 788.
36. *Id.* at 788-89.
37. *Id.* at 789. MO. ANN. STAT. § 452.410 (Vernon Supp. 1991) provides in part:
> [T]he court shall not modify a prior custody decree unless . . . it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.

38. Brief for Cross-Appellant at 8-9, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).
39. *J.P.*, 772 S.W.2d at 787.
40. *Id.*

stances of the parties, thus allowing modification of the earlier custody decree because it was in the child's best interests.[41] The court first stated that Missouri had a state interest against the practice of homosexuality and in protecting minors from influence by gay men or lesbians.[42] Noting that Missouri law prohibited deviate sexual intercourse with a person of the same sex,[43] the court concluded that unrestricted visitation with the gay father would threaten the child's physical and emotional welfare.[44] It cited holdings establishing that homosexual relationships are immoral and illicit, and render the parent an unfit custodian.[45] Missouri law states that no child may be placed or remain in the custody of a homosexual parent, and visitation rights must be restricted or terminated.[46]

The *J.P.* majority stated that it need not wait for a child to be harmed before removing him or her from a gay parent.[47] Furthermore, expert testimony is not necessary for the court to find that the child would be harmed by exposure to the same-sex relationship.[48] The court noted, however, that there was evidence in *J.P.* that the child was harmed by the visit. The child's swollen vaginal area indicated there may have been sexual abuse.[49] The fact that the child's behavior had

41. The court found that the change in the child's behavior, her swollen vaginal area and the fact that the father and his companion kissed and held hands in the child's presence constituted a sufficient change of circumstances to modify the earlier decree. *Id.* at 793.

42. *Id.* at 792 (quoting Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio Ct. App. 1985)).

43. MO. ANN. STAT. § 566.090.1 (Vernon 1979). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a sodomy statute and refusing to grant a fundamental right to consensual homosexual sodomy); Darryl R. Wishard, Note, *Out of the Closet and Into the Courts: Homosexual Fathers and Child Custody*, 93 DICK. L. REV. 401, 405 & n.23 (1989) (noting that approximately half of the states have statutes prohibiting consensual homosexual acts).

44. *J.P.*, 772 S.W.2d at 794. *See also* S.E.G. v. R.A.G., 735 S.W.2d 164 (Mo. Ct. App. 1987); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865 (Mo. Ct. App. 1982); L. v. D., 630 S.W.2d 240 (Mo. Ct. App. 1982).

45. *J.P.*, 772 S.W.2d at 793. *See* Jacobson v. Jacobson, 314 N.W.2d 78, 80 (N.D. 1981) (holding that a lesbian woman living with her same-sex companion is not a fit custodian); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("The father's continuous exposure of the child to his immoral and illicit [homosexual] relationship renders him an unfit and improper custodian as a matter of law.").

46. *J.P.*, 772 S.W.2d at 793.

47. *Id.* at 792. *See also In re* Marriage of P.I.M., 665 S.W.2d 670, 672 (Mo. Ct. App. 1984) (holding that court need not wait for manifestation of harmful consequences in child when mother engages in adulterous relationships and smokes marijuana).

48. *J.P.*, 772 S.W.2d at 793. *See J.L.P.(H.)*, 643 S.W.2d at 869 (holding that court may determine adverse effect of homosexual father upon child).

49. The court did not explicitly state that the father or Reed had sexually abused the child. However, it mentioned the child's swollen vaginal area and stated that "sexual abuse need not be established by direct evidence." *J.P.*, 772 S.W.2d at 793. The inference by the court that the father or Reed sexually abused the daughter is absurd. Even if the assertion is accepted that homosexual men are more likely to molest children, the Court overlooked the fact that the child in this case is a female, and presumably is not attractive to gay men. *See infra* notes 110-14 and accompanying text. The dissent noted that no evidence supported the abuse claim. *Id.* at 795 (Prewitt, J., dissenting). The father's brief pointed out that the child was in the process of toilet training when the impairment occurred; furthermore, the mother did not call the daughter's physician to testify to the cause of the injury. Brief for Cross-Appellant at 18, J.P. v. P.W., 772 S.W.2d 786 (Mo. Ct. App. 1989) (No. 15981-2).

changed indicated that she may have been emotionally disturbed by the visitation or the alleged sexual abuse.[50] Because of the likely harm to the child, the court ruled that the father could have only supervised visitation in the presence of a responsible adult and no overnight or extended visits would be permitted.[51]

The *J.P.* dissent disagreed with the majority's ruling that no homosexual parent should be allowed custody or unrestricted visitation.[52] Judge Prewitt argued that each custody case should be determined on its own facts, rather than creating a per se rule of unfitness for gay parents.[53] The dissent contended that the trial court had reached a reasonable result in the case and did not abuse its discretion.[54] No proof indicated the father ever physically abused his daughter or allowed any abuse to happen.[55] Moreover, the evidence failed to show that the child would suffer emotional harm from visitation with her father.[56] The dissent emphasized that it was important for the child to receive paternal guidance and love.[57] Furthermore, the restrictions imposed by the majority would effectively result in little or no visitation, a result not in the child's best interests.[58]

B. *Nexus of Harm Jurisdictions*

A majority of states reject the presumption that a homosexual parent is unfit and require that a nexus of harm[59] be shown between a parent's sexual orientation and any adverse effect upon the child before denying custody to a gay parent.[60] Similarly, the mere fact of a parent's

50. *J.P.*, 772 S.W.2d at 793 (quoting State v. Burke, 719 S.W.2d 887, 890 (Mo. Ct. App. 1986) ("Common experience teaches us a sexual offense can cause behavioral and personality changes in the complainant.")).

51. *Id.* at 794.

52. *Id.* at 795 (Prewitt, J., dissenting). *See* G.A. v. D.A., 745 S.W.2d 726, 729 (Mo. Ct. App. 1987) (Lowenstein, J., dissenting) (arguing that Missouri's irrebuttable presumption of harm should be abandoned in favor of a rebuttable presumption).

53. *J.P.*, 772 S.W.2d at 795 (Prewitt, J., dissenting).

54. *Id.* at 794-95.

55. *Id.*

56. *Id. Cf.* Shepherd v. Shepherd, 719 S.W.2d 115, 116 (Mo. Ct. App. 1986) (holding that restrictions on visitation rights could not be upheld absent evidence that child's stress was due to visit).

57. *J.P.*, 772 S.W.2d at 795 (Prewitt, J., dissenting).

58. *Id.*

59. The first case to explicitly apply the nexus test was Bezio v. Patenaude, 410 N.E.2d 1207 (Mass. 1980). The court held that the mother's sexual orientation was irrelevant to her fitness as a parent; custody would only be denied if a nexus could be established between the mother's lesbianism and harm to the child. *Id.* at 1216. *See also* Barbara A. Smart, Note, Bezio v. Patenaude: *The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1981).

60. *See* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985); *In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 289 (Ct. App. 1988); D.H. v. J.H., 418 N.E.2d 286, 293 (Ind. Ct. App. 1981); Hodson v. Moore, 464 N.W.2d 699, 701 (Iowa Ct. App. 1990) (awarding joint legal custody and primary physical custody to lesbian mother); Peyton v. Peyton, 457 So. 2d 321, 324 (La. Ct. App. 1984) (awarding joint custody); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983); *In re* J.S. & C., 324 A.2d 90, 92 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (App. Div. 1976); M.A.B. v. R.B., 510 N.Y.S.2d 960, 969 (Sup. Ct. 1986); A. v. A., 514 P.2d 358, 360, (Or. Ct. App. 1973); Stroman v. Williams, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987); Medeiros v. Medeiros, 8 Fam. L. Rep. (BNA) 2372 (Vt. Super. Ct.

same-sex orientation is not sufficient to deny visitation to a homosexual parent; affirmative evidence of harm or likely harm to the child must be shown.[61]

A typical case using the nexus of harm approach is *In re Marriage of Birdsall*.[62] In *Birdsall*, the California Court of Appeals considered an action to restrict a homosexual father's visitation rights. Greg and Linda Birdsall separated after eight years of marriage, having had one son during the marriage.[63] At the initial hearing to show cause, the parties stipulated to joint legal custody of the child with the mother having physical custody and the father being granted specific visitation of one weekend per month and alternating legal holidays.[64] The mother requested a temporary restraining order to deny the father visitation at his residence because of his acknowledged homosexuality. The father stipulated to this request.[65]

At trial, the parties reiterated that physical custody of the child would be awarded to the mother,[66] but the issue of visitation was submitted to the court for determination. The father testified that he was leasing an apartment with two other gay men. He had never engaged in sexual relations with either of the men, but he was currently in a relationship with a man who visited his home approximately twice a month. The father testified that he had no intention of raising the child to be homosexual.[67] The mother testified that the child's behavior after previous visitation with the father was rude, insolent and unaffectionate and that the child was depressed for several days following visits.[68] The trial court ruled that the father could have visitation consisting of one weekend per month, Monday afternoons, alternate legal holidays and two weeks during the summer. However, the court ruled that the father was prohibited from visitation with the child in the presence of a known homosexual.[69] On appeal, the father contended that the trial court erred in imposing the restrictions.[70] He argued that the evidence was insuffi-

---

1982); *In re* Marriage of Cabalquinto, 669 P.2d 886, 888 (Wash. Ct. App. 1983); Rowsey v. Rowsey, 329 S.E.2d 57, 60-61 (W. Va. 1985); *see also* State *ex rel.* Human Servs. Dep't, 764 P.2d 1327 (N.M. Ct. App. 1988) (stating that the homosexuality of child's mother was not sufficient to deny custody).

61. *See Birdsall*, 243 Cal. Rptr. at 290-91; *In re* Marriage of Walsh, 451 N.W.2d 492, 497 (Iowa 1990); *J.S. & C.*, 324 A.2d at 94; DiStefano v. DiStefano, 401 N.Y.S.2d 636, 638 (App. Div. 1978); Woodruff v. Woodruff, 260 S.E.2d 775, 777 (N.C. Ct. App. 1979); Conkel v. Conkel, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987); *In re* Marriage of Ashling, 599 P.2d 475, 477 (Or. Ct. App. 1979); *Cabalquinto*, 669 P.2d at 888.

62. 243 Cal. Rptr. 287 (Ct. App. 1988).

63. *Id.* at 288. In his petition to dissolve the marriage, the father requested joint legal custody and primary physical custody with visitation rights for the mother. In her response, the mother requested sole legal and physical custody of the child. *Id.*

64. *Id.*

65. *Id.* The parties also agreed to psychological examinations for themselves and the child. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The order forbade the father from having overnight visitation "in the presence of any friend, acquaintance or associate who is known to be homosexual." *Id.*

70. *Id.*

cient to support the finding that unrestricted visitation was not in the child's best interests.[71]

The *Birdsall* court first recognized that California law mandates continuing contact with both parents following a divorce or separation, unless visitation is detrimental to the child's best interests.[72] The court then addressed the issue of same-sex orientation and its effect on child custody determinations and noted that courts in California may not determine custody on the basis of sexual orientation alone.[73] The issue of sexual orientation and visitation rights, however, was a question of first impression.[74] The court reviewed public policy concerns regarding visitation restrictions by examining cases in another context, noting that restraints on expression of religious views were also invalidated.[75]

Basing its conclusion on the premise that judges' moral values should not influence decisions, the *Birdsall* majority ruled that an affirmative showing of harm or likely harm is necessary to restrict parental visitation.[76] The court reviewed the trial court's conclusions and found no evidence of detriment to the child.[77] No evidence supported the trial court's finding that the father's sexual practices were indiscreet.[78] The father's stipulation to restricted visitation could also not be used as evidence that he recognized his lifestyle as harmful to the child.[79] Similarly, the father's statement that he would not raise his child to be homosexual failed to support an inference that he believed his lifestyle was harmful to the child.[80] Because there was no evidence of past or future harm to the child, the court vacated the portion of the judgment prohibiting visitation in the presence of any known gay man or lesbian.[81]

---

71. *Id.*

72. *Id.* *See* CAL. CIV. CODE § 4600(a) (West 1983) ("[I]t is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy."). *See also In re* Marriage of Matthews, 161 Cal. Rptr. 879, 883 (Ct. App. 1980) ("[T]he courts will attempt to preserve visitation rights whenever possible.") (citation omitted).

73. *Birdsall*, 243 Cal. Rptr. at 289 (citing Nadler v. Superior Court, 63 Cal. Rptr. 352, 354 (Ct. App. 1967)). However, the court recognized that a parent's sexual orientation may be considered. *Id.* (citing Chaffin v. Frye, 119 Cal. Rptr. 22, 25 (Ct. App. 1975)).

74. *Id.*

75. *Id.* (citing *In re* Marriage of Mentry, 190 Cal. Rptr. 843 (Ct. App. 1983) and *In re* Marriage of Murga, 163 Cal. Rptr. 79, 82 (Ct. App. 1980)).

76. *Birdsall*, 243 Cal. Rptr. at 290.

77. *Id.*

78. *Id.* The trial court concluded that the father's sexual practices had "hardly been discreet" as evidenced by the fact that "his church membership was terminated due to it." *Id.* The court rejected this bald assertion, noting there was no evidence linking the father's departure from the church with his homosexuality. *Id.*

79. *Birdsall*, 243 Cal. Rptr. at 290 (quoting *In re* Marriage of Lewin, 231 Cal. Rptr. 433, 436 (Ct. App. 1986) (quoting Burchard v. Garay, 724 P.2d 486, 490 n.4 (Cal. 1986)).

80. *Id.*

81. *Id.* at 291. The court stated:

> The unconventional lifestyle of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other parent's religion, which may result in confusion for the child, do not provide an adequate basis for restricting visitation rights. Evidence of one parent's homosexuality, without a link to detriment to the child, is insufficient to constitute

III. Analysis of Factors Used to Restrict or Deny Gay Parents' Visitation Rights

In disputes involving homosexual parents, courts often employ discriminatory generalizations and stereotypes regarding homosexuality[82] and its effect upon the children, rather than engage in an analysis of the fitness of the parents and the best interests of the child. One commentator noted, "widespread prejudice and discrimination against homosexuals and lesbian parents, as well as widespread misunderstanding about these parents, are apparent in child custody decisions to this day, despite studies supporting the suitability of gay individuals as parents."[83] Gay parents often have parental rights restricted or denied on the basis of these false assumptions. For example, courts have denied custodial or visitation rights to gay parents due to the following fears: A child may become homosexual through exposure to the parent;[84] a child may be molested by the gay parent;[85] a child may be exposed to the AIDS virus;[86] a child may be harassed by peers;[87] or a child's moral values may somehow be adversely affected through exposure to homosexuality.[88] These rationales are often the result of judges' lack of current knowledge. These judicial rationales may, however, reflect judicial homophobia, heterosexism and prejudice.[89] One commentator has characterized these stereotypes as "discriminatory ideologies disguised as scientific truth to serve as the basis for judicial and statutory activism in the area of child rearing."[90] Empirical analysis of these judicial pre-

---

harm. In the absence of any indication of harm, the restraining order is unreasonable and must be vacated.

Id.

82. *See generally* RICHARD D. MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY, AND LAW 22-27 (1988) (discussion of anti-gay stereotypes and generalizations).

83. Stone, *supra* note 16, at 739-40.

84. *See* cases cited *infra* note 92.

85. *See* cases cited *infra* notes 110-11.

86. *See* cases cited *infra* notes 116-17.

87. *See* cases cited *infra* notes 127-28.

88. *See* cases cited *infra* notes 143-44.

89. Homophobia is defined as fear and pathological hatred of individuals sexually oriented toward persons of the same gender. Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, WIS. L. REV. 187, 195 (1988). *But see* BOSWELL, *supra* note 1, at 46 n.11 (asserting that the derivation of "homophobia" actually suggests the meaning of "fear of what is similar," rather than "fear of homosexuality."). One commentator asserted that the bias against gay men and lesbians by the American judiciary merely reflects the prejudices held by the public. Joshua Dressler, *Judicial Homophobia: Gay Rights Biggest Roadblock*, 5 CIV. LIBERTIES REV. 19, 22 (1979). Professor Law suggests that the underlying roots of homophobia are found in societal "heterosexism." Heterosexism embodies "[t]he pervasive cultural presumption and prescription of heterosexual relationships—and the corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations . . . ." Law, *supra* at 195. Another author defined heterosexism as "a world-view, a value system that prizes heterosexuality, assumes it is the only appropriate manifestation of love and sexuality, and devalues homosexuality and all that is not heterosexual." Gregory M. Herek, *The Social Psychology of Homophobia: Toward a Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 925 (1986). Pervasive heterosexist attitudes, structured into basic societal relationships, may affect judges dealing with gay and lesbian issues.

90. Polikoff, *supra* note 2, at 545.

sumptions reveals no factual or scientific basis to support them.[91] Visitation denials based on these assumptions bear no relation to the child's best interests, and such restrictions will likely harm the child if they result in deprivation of parental contact. Absent any affirmative showing that the child will or has been harmed as a result of the parent's sexual orientation, full visitation rights should be granted to homosexual parents. Outdated myths regarding homosexual parenting must be discarded to truly serve the best interests of the child.

Courts have based custody and visitation denials on a fear that the child will become homosexual through contact with the gay parent.[92] These courts rely upon the preconceived assumption that children develop their sexual orientation by modeling themselves after their parents. Courts seek to prevent this by limiting the contact the child has with the homosexual parent.[93] This rationale is premised on the belief that sexual orientation is primarily influenced by environmental, rather than biological or genetic factors.[94] This assumption is contradicted by recent research indicating that sexual orientation may be, to a great extent, biologically determined.[95]

---

91. *See generally* Law, *supra* note 89 (arguing that negative legal attitudes toward homosexuality are a reaction to the violation of gender norms, rather than scorn for the sexual practices of gay men and lesbians).

92. *See* S v. S, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); J.L.P.(H.) v. D.J.P., 643 S.W.2d 865, 872 (Mo. Ct. App. 1982); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980); *In re* J.S. & C., 324 A.2d 90, 96-97 (N.J. Super. Ct. Ch. Div. 1974), *aff'd* 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976); Collins v. Collins, No. 87-238-II, 1988 WL 30173, at *6 (Tenn. Ct. App. Mar. 30, 1988); Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981).

93. "Young people form their sexual identity partly on the basis of models they see in society. If homosexual behavior is legalized, and thus partly legitimized, an adolescent may question whether he or she should 'choose' heterosexuality." *Collins*, 1988 WL 30173 at *6.

94. One court rejected expert testimony that stated that sexual orientation is biologically, not environmentally, influenced by pointing out that the father of the child must have developed his homosexuality after marriage, because he had previously engaged in heterosexual relationships.

> The father in this case is himself an example of the weakness of the [biological] theory espoused by the expert witnesses, since the father has engaged in a heterosexual relationship with the mother of this child and produced a child. He has engaged in heterosexual activity with, admittedly, one other woman since the divorce. He has, during the course of his marriage and subsequent to it, developed homosexual tendencies. . . .
>
> . . . .
>
> . . . Whatever the father's rights may be . . . concerning his own *choice* of "lifestyle," those rights do not extend to activities designed to induce in a child similar behavior.

J.L.P.(H.), 643 S.W.2d at 868-69 (Mo. Ct. App. 1982) (emphasis added). This reasoning ignores the possibility of a bisexual father or suppressed sexual orientation. Instead, the court relied upon anecdotal evidence and its own presumption to disregard scientific testimony.

95. A recent study found that a region in the brain that influences sexual behavior is structurally different in homosexual and heterosexual men. Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991). Dr. LeVay, a researcher at the Salk Institute, discovered that certain groups of nerve cells in the anterior hypothalamus of the brain were more than twice as large in heterosexual men than in homosexual men or women, suggesting that sexual orientation may be biological in nature. *Id.* at 1035. However, Dr. LeVay stated that the study is very preliminary and

Whether or not one accepts the hypothesis that sexual orientation is totally or partly biological in nature, a large body of research shows there is no correlation between a parent's and a child's sexual orientation. Virtually every comparative study of heterosexual and homosexual parents has found that homosexual parents are no more likely to have gay children than are heterosexual parents,[96] and that children develop their sexual orientation independent from parental influences.[97] One study compared fifty lesbian-mother families and forty heterosexual-

should not be viewed as conclusive. *Id.* at 1036. Further research, including a study of lesbian and heterosexual women's brains, is planned.

Dr. LeVay's findings have sparked a great deal of controversy in both the gay and heterosexual communities. Robert Bray, spokesperson for the National Gay and Lesbian Task Force, stated, " 'Some will say society could 'cure' or 'fix' gays if we just tweak this chromosome or zap that cell.' " Charlene Crabb, *Are Some Men Born to be Homosexual?*, U.S. NEWS & WORLD REP. Sept. 9, 1991, at 58. One commentator attacked the research as impliedly "legitimizing" homosexuality:

> Suppose some scientist does find the gene or the section of the brain that "controls" hotheadedness? Does that mean that we should cease urging hotheads to calm down? Does that mean that we must regard hotheadedness as morally equivalent to even-temperedness? No. We are all born with countless innate tendencies — to violence, to sloth, to selfishness — that we are socialized to control.

Mona Charen, *Copping Out: 'My Brain Made Me Do It'*, NEWSDAY, Sept. 4, 1991, at 86. One person attacked the study as biased: "[Dr. LeVay] is a professed gay who would have, I think, every reason to want to find some kind of finding as he is now reaching out for, but I would simply say that as a Christian minister, we look on homosexuality as we do any sin . . . ." Jerry Falwell, *on Nightline: Is Homosexuality Biological?* (ABC television broadcast, Aug. 30, 1991).

Another recent study also concluded that sexual orientation is biologically determined. Professors Michael Bailey and Richard Pillard studied the rate of homosexuality in identical and fraternal twin and adoptive brothers. They found that 52% of the identical twin brothers were gay, 22% of the non-identical twin brothers were gay, and only 11% of the adoptive brothers were gay. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21. *See also* Neil Buhrich et al., *Sexual Orientation, Sexual Identity, and Sex-Dimorphic Behaviors in Male Twins*, 21 BEHAV. GENETICS 75 (1991) (finding significantly higher rate of homosexuality in identical twin brothers than in fraternal twins). *But see* Elke D. Eckert et al., *Homosexuality in Monozygotic Twins Reared Apart*, 148 BRIT. J. PSYCHIATRY 421 (1986) (study suggested that female homosexuality may be an acquired trait, but genes may play some part in male homosexuality).

96. *See* Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOL. & PSYCHIATRY 551, 562-63 (1983) (finding no difference between children raised in lesbian or heterosexual single parent households and concluding that rearing a child in a lesbian household did not lead to atypical psychosexual development); Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167, 179-83 (1986) (same); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696 (1978) (finding typical psychosexual development in children raised by lesbian or transsexual parent); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 551 (1981) (reporting no difference in gender identity development in children studied); Brian Miller, *Gay Fathers and Their Children*, 28 FAM. COORDINATOR 544, 551 (1979) (concluding that gay fathers do not have a higher percentage of gay children than heterosexual fathers). *See generally* David Cramer, *Gay Parents and Their Children: A Review of Research and Practical Implications*, 64 J. COUNSELING & DEV. 504, 504-05 (1986) (reviewing studies of sex role development of children raised by a homosexual or lesbian parent).

97. Homosexual men and women are raised predominantly in heterosexual couples, thus disputing the notion that parental influence is the primary factor in sexual identity development. Donna J. Hutchens & Martha J. Kirkpatrick, *Lesbian Mothers/Gay Fathers*, *in* EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW 115, 121 (Diane H. Schetky & Elissa P. Benedek eds., 1985).

mother families and found no significant differences in the sexual identity of the children studied.[98] The authors stated, "boys and girls raised from early childhood by a homosexual mother without an adult male in the household for about 4 years do not appear appreciably different on parameters of psychosexual and psychosocial development from children raised by heterosexual mothers, also without an adult male present."[99] A denial of visitation rights based upon the premise of a child's emulation of the parent's sexual orientation simply ignores current scientific knowledge and can only reflect judicial prejudice and homophobia.

Even if it is assumed arguendo that sexual orientation is learned or chosen behavior and not biologically determined, the underlying premise is that being gay is inherently harmful and not in the best interests of the child.[100] This reflects the common prejudice that gay men and lesbians are psychologically maladjusted[101] and unhappier[102] than the heterosexual population. Indeed, many still view homosexuality as a mental illness.[103] This conclusion, however, is not accepted by the scientific community nor supported by research.[104] The American Psychiatric Association no longer regards homosexuality as a mental disorder or sexual deviation[105] and announced this resolution: "The sex, gender identity, or sexual orientation of natural or prospective adoptive or foster parents should not be the sole or primary variable considered in custody or placement cases."[106] Research has shown that homosexual men and women are no more unstable, immature, or unhappy than comparable groups of heterosexuals.[107] Indeed, several studies have found that lesbians may be emotionally more well-adjusted than heterosexual women.[108] A judicial presumption based on the mental instability of gay

98. Green et al., *supra* note 96, at 179-82.

99. *Id.* at 182.

100. Note, *supra* note 14, at 1639.

101. Hutchens & Kirkpatrick, *supra* note 97, at 117.

102. Note, *supra* note 14, at 1639.

103. *See* Susoeff, *supra* note 7, at 870 & n.120 ("[T]he judiciary has been slow to recognize that homosexuality is no longer regarded as a mental or emotional illness.").

104. *See* Susoeff, *supra* note 7, at 870-74 (reviewing research regarding same-sex orientation and mental illness).

105. "In December 1973, the Board of Trustees of the American Psychiatric Association voted to eliminate homosexuality per se as a mental disorder . . . ." AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d ed. 1980). *See also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 296 (3d ed. rev. 1987).

106. John J. Conger, *Proceedings of the American Psychological Association Incorporated, for the Year 1946: Minutes of the Annual Meeting of the Counsel of Representatives*, 32 AM. PSYCHOLOGIST 408, 432 (1977).

107. *See* ALAN P. BELL & MARTIN S. WEINBERG, HOMOSEXUALITIES: A STUDY OF HUMAN DIVERSITY (1978); Marcie R. Adelman, *Comparison of Professionally Employed Lesbians and Heterosexual Women in the MMPI*, 6 ARCHIVES SEXUAL BEHAV. 193 (1977); Marvin Siegelman, *Adjustment of Male Homosexuals and Heterosexuals*, 2 ARCHIVES SEXUAL BEHAV. 9 (1972); Norman L. Thompson et al., *Personal Adjustment of Male and Female Homosexuals and Heterosexuals*, 78 J. ABNORMAL PSYCHOL. 237 (1971). *See generally* Law, *supra* note 89, at 202-06, 212-14.

108. *See* Andrea K. Oberstone & Harriet Sukoneck, *Psychological Adjustment and Lifestyles of Single Lesbians and Single Heterosexual Women*, 1 PSYCH. WOMEN Q. 172 (1979) (finding that lesbian women were more satisfied in their relationships than heterosexual women); Mar-

men and lesbians is contradicted by a significant body of reseach and cannot logically justify visitation restrictions.[109]

Courts have denied custody or visitation to homosexual parents because of the fear that the parent or the parent's friends may sexually molest the child.[110] A good example of the judicial reluctance to abandon this stereotype is the statement in *J.L.P.(H.) v. D.J.P.*: "Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated."[111] This rationale is usually raised only in cases involving a gay father, thus perpetuating the myth that gay men are attracted to and may take advantage of children.[112] There is no scientific evidence to support this view. Research shows that almost all child abusers are heterosexual men.[113] Visitation restrictions based upon the supposed inclination of gay men to "prey" on young boys are not supported by scientific knowledge and embody judicial heterosexism and homophobia.[114]

The issue of the child's possible exposure to the Human Immu-

---

vin Siegelman, *Adjustment of Homosexual and Heterosexual Women*, 120 BRIT. J. PSYCH. 477 (1972) (noting that lesbians were better adjusted than heterosexual women in certain areas).

109. Some courts recognize this point. For example, one court stated, "homosexuality is not a 'disease,' and it is not, in and of itself, a mental disorder." Baker v. Wade, 553 F. Supp. 1121, 1129 (N.D. Tex. 1982), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986). The court added, "homosexuality in society does not adversely affect the growth and development of children." *Id.* at 1131.

110. *See* Newsome v. Newsome, 256 S.E.2d 849, 851 (N.C. Ct. App. 1979); *In re* J.S. & C., 324 A.2d 90, 96-97 (N.J. Super. Ct. Ch. Div. 1974) (quoting expert testimony, " 'it is possible that these children upon reaching puberty would be subject to either overt or covert homosexual seduction . . . .' "), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976).

111. 643 S.W.2d 865, 869 (Mo. Ct. App. 1982). Judge Dixon continued:

> A few minutes research discloses the following [seven] appellate decisions involving such molestation. It may be that numerically instances of molestation occur with more frequency between heterosexual males and female children, but given the statistical incidence of homosexuality in the population, which the father claims is 5 to 10%, homosexual molestation is probably, on an absolute basis, more prevalent.

Id. (citations omitted). This analysis would be almost comical, if not for the tragic consequences of such flawed reasoning. The judge ignored uncontradicted expert evidence and instead based his conclusion on the existence of seven cases involving child molestation by gay men, thus illustrating some judges' absolute refusal to acknowledge empirical data that rebuts long-held assumptions. One commentator pointed out that the generalization concerning the alleged predilection of gay men toward child abuse is perpetuated by judges' tendency to take "tacit" or "unconscious" judicial notice of this false stereotype. Susoeff, *supra* note 7, at 880.

112. *See* cases cited *supra* note 111. One student Note pointd out that because women, either lesbian or heterosexual, rarely molest children, "[i]f courts were making custody decisions based solely on the risk of molestation, therefore, they would award custody to the mother, whether or not she were a lesbian." Note, *supra* note 14, at 1640.

113. *See* ROBERT L. GEISER, HIDDEN VICTIMS: THE SEXUAL ABUSE OF CHILDREN 75 (1979); Marny Hall, *Lesbian Families: Cultural and Clinical Issues*, 23 SOC. WORK 380, 383 (1978) (noting that child abuse is disproportionately heterosexual in nature); Miller, *supra* note 96, at 546 (same). *See generally* Susoeff, *supra* note 7, at 880-81 & nn.183-86 (reviewing research showing that homosexual men are unlikely to be child molesters).

114. At least one court has recognized that this generalization is unfounded. "The vast majority of sex crimes committed by adults upon children are heterosexual, not homosexual. Homosexuals do not have a criminal propensity simply because they are homosexuals, any more than heterosexuals do." Baker v. Wade, 553 F. Supp. 1121, 1130-31 (N.D.

nodeficiency Virus (HIV)[115] from a homosexual parent has arisen in several states and may become a significant factor as the disease spreads.[116] Despite greater public awareness about AIDS, many parents may oppose visitation by gay parents because of the fear that the child will contract the virus through contact with that parent, even though the parent may not be HIV-positive.[117] Two separate issues are raised by the AIDS virus in regard to visitation. First, should visitation be denied solely on the assumption that a homosexual parent is more likely to contract HIV than a heterosexual parent? Second, should visitation be restricted or denied when a parent is actually HIV infected?

The mere *possibility* of HIV infection from a homosexual parent cannot logically be used to deny or restrict visitation with a child. The assumption that gay parents are more likely than heterosexual parents to contract AIDS is not logically or scientifically justified. First, AIDS can no longer be thought of as exclusively a gay disease. Because the disease has spread to the heterosexual population as well as the homosexual population, the possibility exists that either gay or heterosexual parents may be HIV infected.[118] Moreover, if a court bases custodial decisions on the statistical probability of HIV infection, then lesbian mothers should never be denied parental rights, because lesbians have the lowest rate of AIDS and HIV infection of all demographic groups.[119] The second issue—whether courts are justified in denying visitation

Tex. 1982) (footnote omitted), *rev'd on other grounds*, 769 F.2d 289 (5th Cir. 1985), *cert. denied*, 478 U.S. 1022 (1986).

115. HIV is the virus that causes Acquired Immune Deficiency Syndrome (AIDS). AIDS is the final, invariably fatal stage of the immune system deterioration caused by the HIV virus. The virus impairs the human body's immune system, rendering a person vulnerable to various infections and diseases. An individual can also become sick and die of AIDS Related Complex (ARC) without progressing to AIDS. Edward P. Richards, *Communicable Disease Control in Colorado: A Rational Approach to AIDS*, 65 DENV. U. L. REV. 127, 127 n.3 (1988). HIV is transmitted by three methods: sexual intercourse, sharing contaminated syringes and blood or blood-product transfusions. Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139, 141 (1988).

116. *See* Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988); Doe v. Roe, 526 N.Y.S.2d 718 (Sup. Ct. 1988); "Jane" W. v. "John" W., 519 N.Y.S.2d 603 (Sup. Ct. 1987); Conkel v. Conkel, 509 N.E.2d 983 (Ohio Ct. App. 1987).

117. *See, e.g.*, *J.P. v. P.W.*, 772 S.W.2d 786, 788-89 (Mo. Ct. App. 1989).

118. While any statistical breakdown is necessarily imprecise, current numbers indicate that approximately 23% of reported AIDS cases involved heterosexual men and women. Apparently, 19% of those contracted the virus through intravenous drug abuse, while the other 4% were exposed to the virus through heterosexual intercourse. CENTER FOR DISEASE CONTROL, WEEKLY SURVEILLANCE REP. (June 6, 1988), *quoted in* Larry Gostin, *The Politics of AIDS: Compulsory State Powers, Public Health, and Civil Liberties*, 49 OHIO ST. L.J. 1017, 1018 n.5 (1989). *See also* James W. Curran et al., *The Epidemiology of AIDS: Current Status and Future Prospects*, 229 SCI. 1352 (1985). The incidence of heterosexual cases will likely increase if effective programs to reduce transmission through the use of contaminated syringes are not implemented. Homosexual transmission of AIDS may decrease due to changed gay sexual practices adopted in response to the threat of the disease. John L. Martin, *The Impact of AIDS on Gay Male Sexual Behavior Patterns in New York City*, 77 AM. J. PUB. HEALTH 578, 580 (1987).

119. Law, *supra* note 89, at 195. Professor Law noted that "AIDS poses no risk to gay men in relationships that are affectionate but not sexual, or to monogamous, uninfected gay couples." *Id.* *See also* Mark S. Senak, *The Lesbian and Gay Community*, *in* AIDS AND THE LAW 290, 292 (Harlon L. Dalton et al. eds., 1987).

based on a parent's *actual* HIV infection—is more troublesome.[120] Judges understandably wish to protect the child's best interests by minimizing the inadvertent risk of HIV transmission from the parent. This concern is unfounded, however, because current research shows the AIDS virus cannot be transmitted through casual contact.[121] No documented cases of HIV transmission through casual contact exist—not even while a household is shared with an infected person.[122] Common household practices such as sharing silverware and towels with an HIV infected person do not present any risk of contracting HIV.[123] One court acknowedged that casual transmission of HIV is highly unlikely and stated, "[t]he overwhelming weight and consensus of medical opinion is clear; the HIV virus is not spread casually."[124] Several courts have addressed the issue of visitation rights when a parent is HIV infected and have ruled that parental rights cannot be terminated solely on the basis of parental HIV infection.[125] HIV infection alone should not be used as the sole basis for denial of visitation or custody, because the medical risk to the child is virtually nonexistent and greater harm may result to the child from parental deprivation.[126]

Denial of custody or visitation has been based on a fear that the child may be harassed or subject to community prejudice because of the parent's homosexuality.[127] One court stated that it was compelled "to

120. *See* cases cited *supra* note 116.

121. *See* Gerald H. Friedland et al., *Lack of Transmission of HTLV/LAV-III Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 NEW ENG. J. MEDICINE 344, 348 (1986) (study indicating that household members who have no sexual contact with AIDS carriers are at minimal risk). *See generally* Nancy B. Mahon, Note, *Public Hysteria, Private Conflict: Child Custody and Visitation Disputes Involving an HIV Infected Parent*, 63 N.Y.U. L. REV. 1092, 1101-02 (1988) (reviewing studies).

122. *See* Margaret A. Fischl et al., *Evaluation of Heterosexual Partners, Children, and Household Contacts of Adults with AIDS*, 257 J.A.M.A. 640, 644 (1987) ("Of 90 HTLV-III/LAV-seronegative children at entry into the study, there was no evidence of horizontal transmission. . . . These observations are important and suggest that contact in other settings (for example, schools) is not likely to transmit HTLV-III/LAV.").

123. *Id.* at 642.

124. Doe v. Roe, 526 N.Y.S.2d 719, 725 (Sup. Ct. 1988).

125. *See* Stewart v. Stewart, 521 N.E.2d 956, 965 (Ind. Ct. App. 1988) (visitation could not be terminated because of father's AIDS infection); *Doe*, 526 N.Y.S.2d at 726 (father's AIDS would not justify removal of child from his custody); "Jane" W. v. "John" W., 519 N.Y.S.2d 603, 605 (Sup. Ct. 1987) (visitation could not be terminated because of father's AIDS); Conkel v. Conkel, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987) (court stated that only minimal risk of exposure existed even if father had tested positively for the virus).

126. *See* Mahon, *supra* note 121, at 1138-41 (arguing that denial of custody or visitation because of parent's HIV infection ignores medical knowledge about the disease and endangers the child's psychological development). *But see* Amy R. Pearce, Note, *Visitation Rights of an AIDS Infected Parent*, 27 J. FAM. L. 715, 731 (1988-89) (suggesting that visitation precautions or supervised visitation with an HIV infected parent is appropriate to protect the child).

127. *See* L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982); Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) ("[W]e cannot lightly dismiss the fact that living in the same house with their mother and her lover may well cause the children to 'suffer from the slings and arrows of a disapproving society' . . . ."); M.J.P. v. J.G.P., 640 P.2d 966, 969 (Okla. 1982); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("[W]e have no hesitancy in saying that the conditions under which this child must live . . . impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large.").

protect the children from peer pressure, teasing, and possible ostracizing" resulting from the mother's homosexuality.[128] The possibility of societal homophobia, however, is not sufficient to justify the abridgment of parental rights. First, courts should not assume that such social pressures inevitably exist when a parent is homosexual.[129] Such logic inherently presumes that gay parents openly display their sexual orientation, thus subjecting the child to ridicule and taunting.[130] Homosexual parents, however, can be as discreet as heterosexual parents regarding sexual and familial issues. Moreover, even if the child is subjected to prejudice and ridicule from peers, courts should not assume that this harassment will necessarily harm the child.[131] Available research indicates that children are often able to withstand peer pressure regarding their parent's homosexuality.[132] Indeed, children are frequently taunted by peers for reasons unrelated to their parents' sexuality. The possibility of this harassment does not justify visitation restrictions or termination of parental rights.[133] Furthermore, courts should recognize

128. S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).

129. *See* Susoeff, *supra* note 7, at 877 & n.158 (citing research showing that only about five percent of children living with an openly gay parent had been harassed by other children).

130. *See* Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 532 n.147 (1984) ("The stigma rationale rests in part on the untested assumption that children have extensive knowledge of the lifestyles of their playmates' and schoolmates' parents.").

131. One court has recognized that the child's moral values may actually be strengthened by standing up to prejudice. M.P. v. S.P., 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) ("It is . . . reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, [and] better able to perceive that the majority is not always correct in its moral judgments . . . .").

132. One study reported that no significant differences were found in peer group relationships between children of homosexual and heterosexual parents.

> Eighty percent of the daughters of lesbian mothers and 75% of the heterosexuals' daughters said that they were liked "much more," "somewhat more," or "as much" by their same-sex peer group as other girls in their class. More than 80% of the sons of lesbian mothers and of the heterosexual mothers reported corresponding self-ratings of popularity with their male classmates. . . . The lesbian mothers rated 90% of their daughters and 96% of their sons as leaders or good mixers, compared to the heterosexuals' ratings of 92% for their daughters and 85% for their sons.

Green et al., *supra* note 96, at 178. Another study found that a majority of children of lesbian mothers were not conscious of any societal prejudice against their mothers. The children who were aware of the prejudice supported their mothers and rejected stereotypes. "[T]he majority of children combine any embarassment of initial uncomfortableness with an understanding that society has created the prejudice; that it is society, and not their mothers, that should re-examine its position." Lonnie G. Nungesser, *Theoretical Bases for Research on the Acquisition of Social-Sex Roles by Children of Lesbian Mothers*, 5 J. HOMOSEXUALITY 177, 184 (1980) (quoting Barbara S. Bryant, Lesbian Mothers 73A (1975) (unpublished manuscript, on file at Lymar Associates, 330 Ellis St., Room 401, San Francisco, Cal.). *See generally* Polikoff, *supra* note 2, at 561-66 (reviewing research showing that children of homosexual parents are psychologically well-adjusted).

133. "Children whose families are in some way different from the norm may have to confront distressing reactions from others. These differences can include, among other things, the family's ethnic traits and practices, race, religious affiliation, the parent's country of origin, physical appearance, or occupation." Polikoff, *supra* note 2, at 567-68. Professor Polikoff also noted, "it is unwarranted to assume that . . . harassment based on a parent's sexual orientation will be more troubling than harassment based on other reasons." *Id.* at 569.

that the child may be subject to harassment by peers merely because the parent is homosexual.[134] Reducing contact with the gay parent would have no effect on the possibility of peer pressure and prejudice.[135]

Even if the possibility of harassment is acknowledged, courts may not give judicial effect to this form of societal prejudice or stigmatization. In *Palmore v. Sidoti*,[136] the Supreme Court ruled that a mother could not be denied custody of her child because community prejudice could result following her interracial remarriage.[137] The Court acknowledged: "There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."[138] The Court recognized that custody determinations based on the best interests of the child are a substantial governmental interest, but ruled that the denial of custody based upon the effects of racial prejudice was a violation of the Equal Protection Clause.[139] The Court stated, "[t]he Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[140] Although *Palmore* involved potential racial discrimination, the principle applies equally to discrimination based on sexual orientation.[141] One court re-

134. One court acknowleged this fact and stated:

> [T]he children's exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of living with defendant, but because she is their mother, because she is a lesbian, and because the community will not accept her.

M.P., 404 A.2d at 1262. *See also* Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 BUFF. L. REV. 691, 730-31 (1976) ("[I]f the mother is known in the community as a lesbian, counsel can point out that the children may be harassed, if at all, regardless of with whom they live.").

135. *See M.P.*, 404 A.2d at 1262 ("Neither the prejudices of the small community in which they live nor the curiosity of their peers about defendant's sexual nature will be abated by a change of custody."). *See also* Donna Hitchens & Barbara Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U. L. REV. 451, 469 (1978-1979) ("Denying custody does not eliminate the mother's lesbianism. The child still has a lesbian mother and possibly faces a greater stigmatization as a result of having a mother who is considered so immoral or dangerous that she is denied the custody of her children."). *M.P.* involved an action for change of custody, but the argument used in a visitation context is even stronger. Limiting visitation with a homosexual parent to spare the child harassment or embarrassment will not affect existing community prejudice, and may threaten the child's best interests by decreasing necessary contact with the noncustodial parent. *See infra* part IV.

136. 466 U.S. 429 (1984) (unanimous decision).

137. *Id.* at 434. The father of the child sought to modify the earlier decree granting custody to the mother. He based his petition on changed conditions; the change was that the mother, a Caucasian, was living with and later married an African-American man. *Id.* at 430. The trial court, in an unpublished opinion, ruled that the child's best interests would be served by changing custody to the father and stated, "it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." Palmore v. Sidoti, 466 U.S. 429, 431 (1984) (quoting from Application to Petition for Certiorari at 26-27).

138. *Id.* at 433.

139. *Id.* at 433-34.

140. *Id.* at 433.

141. For discussions of homosexual individuals as a class entitled to heightened protection under the Equal Protection Clause, see Harris M. Miller II, Note, *An Argument for the*

lied on *Palmore* to deny a father's motion for change of custody based on the mother's homosexuality.[142] It follows that judicially imposed visitation denials are similarly invalid, if premised on the possibility of discrimination or prejudice resulting from a parent's sexual orientation.

Courts often deny custody or restrict visitation because of the supposed danger to the child's morals from exposure to the parent's homosexuality.[143] Illustrative is the statement by the court in *S.E.G. v. R.A.G.*: "Such [homosexual] conduct can never be kept private enough to be a neutral factor in the development of a child's values and character. We will not ignore such conduct by a parent which may have an effect on the children's moral development."[144] To be sure, the promotion of a child's moral development is a legitimate parental concern. However, it is impermissible for a court to impose majoritarian standards of morality on families.[145] Given the subjective nature of morality, it is difficult even to determine what prevailing standards of morality exist in a community.[146] Courts often point to state laws forbidding consensual sodomy as evidence of community standards condemning homosexuality as immoral.[147] The existence of these laws, however, does not support the premise that homosexuality is immoral.[148] The majority of these stat-

Application of Equal Protection Heightened Scrutiny to Classification Based on Homosexuality, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985). For discussions of custody decisions and equal protection, see David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395 (1990); Note, *supra* note 15.

142. *See* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985). The court stated, "Simply put, it is impermissible to rely on any real or imagined social stigma attaching to Mother's status as a lesbian." *Id. But see* S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (holding that *Palmore* does not apply to custody disputes involving homosexual parents).

143. *See, e.g.*, Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987); L. v. D., 630 S.W.2d 240, 243-44 (Mo. Ct. App. 1982); Constant A. v. Paul C.A., 496 A.2d 1, 10 (Pa. Super. Ct. 1985); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985).

144. 735 S.W.2d at 166.

145. *See generally* Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405 (1988) (arguing that fundamental parental rights should not be abridged because of community standards).

146. Religious doctrine may be invoked to establish that a community disapproves of homosexuality. Professor Polikoff noted, however, that "contemporary mainstream religious thought does not uniformly hold that homosexuality is immoral." Polikoff, *supra* note 2, at 550. Polikoff further pointd out that biblical references to homosexuality are open to interpretation: "Diversity of biblical interpretation defies the concept of a universally held religious conviction that homosexuality is immoral." *Id.* at 549.

147. *See, e.g.*, *Thigpen*, 730 S.W.2d at 514 (Cracraft, J., concurring) ("The people of this state have declared, through legislative action, that sodomy is immoral, unacceptable, and criminal conduct."). For an example of a sodomy statute that specifically prohibits only same-sex contact, see NEV. REV. STAT. ANN. § 201.190 (Michie 1986) ("[E]very person of full age who commits the infamous crime against nature shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years. . . . The 'infamous crime against nature' means anal intercourse, cunnilingus or fellatio between consenting adults of the same sex."). In 1986, the Supreme Court held that the enforcement of sodomy statutes did not violate the Due Process Clause because there is no right of privacy for acts of consensual homosexual sodomy. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

148. Sexual conduct alone is not determinative of morality. Professor Katz notes that, "There are moral choices other than sexual behavior. The decision to nurture, care for and protect one's child is also a moral choice, a choice entitled to encouragement and support." Katz, *supra* note 145, at 468-69 (footnote omitted).

utes do not specifically prohibit only homosexual sodomy, but rather prohibit all heterosexual and homosexual consensual sodomy.[149] One commentator noted, "[i]n those states that have sodomy statutes, neither the derivation nor the language of the statutes reflects a belief in the immorality of homosexuality. This is because sodomy and homosexuality cannot be equated."[150] Even if a court is able to determine that sodomy statutes are indicative of community standards condemning homosexuality as immoral, these standards do not justify visitation denials to gay parents. First, courts cannot presume that *all* homosexual parents engage in the prohibited sexual conduct. A significant percentage of gay parents do not engage in any form of sodomy.[151] A denial of parental rights, without any affirmative evidence that the gay parent has violated the sodomy law, is illogical and prejudicial.[152] Moreover, even if the sodomy law has been violated by the gay parent and is affirmatively proved, this breach does not render the parent immoral. The existence of a law does not necessarily mean that the infringement of that law is immoral. Laws against slavery and racial intermarriage are but two examples of laws that were immoral in themselves; violating these laws was not an immoral act and did not confer immorality upon the violators.[153] Furthermore, courts act selectively and prejudicially to focus on violations of sodomy laws by gay parents, while ignoring the violation of laws by heterosexual parents.[154] Denying a child parental visitation because

149. *See* Note, *supra* note 15, at 1520 (noting that, of the 25 jurisdictions that have sodomy laws, only seven specifically prohibit homosexual sodomy).

150. Polikoff, *supra* note 2, at 551.

151. *See* Note, *supra* note 15, at 635 (citing studies showing that many lesbians and gay men do not engage in sodomy). *See also* Martin, *supra* note 118, at 580.

152. Courts' homophobia and heterosexism is expressed when this reasoning is used to deny custody or visitation to gay parents. The majority of sodomy statutes apply to *both* homosexuals and heterosexuals, yet courts do not automatically assume that all heterosexuals engage in sodomy, without affirmative evidence.

153. *See* Polikoff, *supra* note 2, at 553 ("[T]he criminal law does not provide proof of morality or immorality, but instead expresses dominant values designed to preserve a particular social order."). One author noted that social mores do not confer morality on laws:

> Sometimes by "morality" is meant the overall beliefs affecting behavior in a society—its current mores, norms, and customs. On this understanding, gays certainly are not moral: lots of people hate them and social customs are designed to register widespread disapproval of gays. The problem here is that this sense of morality is merely a *descriptive* one. On this understanding of what morality is, *every* society has a morality—even Nazi society, which had racism and mob rule as central features of its popular "morality." What is needed in order to use the notion of morality to praise or condemn behavior is a sense of morality that is *prescriptive* or *normative* . . . .
>
> Moral thinking that carries a prescriptive or normative force has certain basic ground rules to which all people consent when attention is drawn to them. First, normative moral beliefs are not merely expressions of feelings. Rather we . . . are expected to be able to give reasons or justifications for them. . . . Second, moral thinking must be consistent and fair . . . . Third, we must avoid prejudice and rationalization . . . .

MOHR, *supra* note 82, at 31.

154. One commentator noted,

> The judiciary's concern with public policy and its concomitant fear of "condoning" illicit and immoral behavior seems highly selective, given the wide range of immoral behavior, (some of it even criminal) in which most parents engage at one time or another. The depth of the hatred and irrationality of the condemnation evoked by the sexual practices of parents, for example, is in sharp contrast to

of the gay parent's "immoral" violation of sodomy laws ignores the child's best interests. The morality or immorality of the homosexual parent's sexual practices is irrelevant to the child's need for parental care and guidance.[155]

IV. Analysis of Effect on Children from Lack of Visitation

Parental separation and divorce are invariably traumatic for the children involved. After a divorce, the child experiences feelings of grief, fear, guilt and rejection.[156] One study noted, "[w]hatever its shortcomings, the family is perceived by the child at this time as having provided the support and protection he needs. The divorce signifies the collapse of that structure, and he feels alone and very frightened."[157] When courts restrict visitation because of a parent's sexual orientation, the trauma may be exacerbated by the subsequent denial of parental contact. Courts should recognize the psychological implications on the child from deprivation of parent-child contact, and deny visitation with a gay noncustodial parent only when a clear nexus of harm to the child exists.[158]

A large body of psychological research shows that the noncustodial parent's visitation is vital to the child. The most extensive study of children of divorce was conducted by Wallerstein and Kelly and involved an examination of sixty families over a five-year period.[159] The authors found that soon after the divorce "children expressed the wish for increased contact with their fathers with a startling and moving intensity. . . . Complaints about insufficiency of parental visits were heard not just from those youngsters who rarely saw the absent parent, but from many who were being visited rather frequently as well."[160] In the year following the divorce, only twenty percent of the children were reasonably content with their individual visiting situations.[161] Wallerstein and

---

the legislative and judicial condonation of abusive physical behavior toward spouses and children by their rejecting or ignoring it as a factor in custody and visitation decisions.

Katz, *supra* note 145, at 461.

155. *See* Note, *supra* note 15, at 635 ("Surely, assuming the child is not present during the sexual activity, the difference between the child's parent receiving sexual gratification through oral or manual stimulation will not affect the child's well-being.").

156. JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-50 (1980).

157. *Id.* at 35.

158. *See* Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) ("If the courts are concerned with the best interests of the child, then visitation by the non-custodial parent must be recognized as necessary to the child's well-being.").

159. WALLERSTEIN & KELLY, *supra* note 156, at 134. Wallerstein conducted a ten year follow-up study and found that the conclusions made in the book were still valid. *See* Judith S. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-Up of Young Children*, 54 AM. J. ORTHOPSYCHIATRY 444 (1984). *But see* Carol S. Bruch, *Parenting At and After Divorce: A Search for New Models*, 79 MICH. L. REV. 708, 708 (1981) (reviewing JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP—HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-50 (1980) (suggesting that Wallerstein and Kelly's research should be viewed as suggestive and not conclusive)).

160. WALLERSTEIN & KELLY, *supra* note 156, at 134.

161. *Id.* at 143. The authors found that nearly 40% of the children who were visited by

Kelly examined the same children five years after the divorce and discovered that thirty-four percent of the children had adjusted successfully to the divorce.[162]

Regular and frequent visitation was found to be an important factor in the children's psychological health.[163] Twenty-nine percent of the children were classified as exhibiting "adequate and uneven functioning."[164] The authors classified a third group of children as extremely unhappy and dissatisfied with their lives.[165] The study revealed that lack of visitation played a large role in the children's maladjustment.[166] Children who were not visited by the noncustodial parent felt rejected and unloved,[167] suffered severe psychological damage[168] and experienced difficulties in school.[169]

Other studies show that visitation by the noncustodial parent is important to a child's psychological adjustment.[170] One study found that

---

the noncustodial parent experienced feelings of intense excitement and eagerness for the visit to occur. *Id.* Not surprisingly, "[d]isappointment was most intense when the visits were, in fact, few and far between or when a father failed to keep a scheduled appointment." *Id.* at 144. However, the authors found that reluctance to visit occurred in 11% of the children studied, mostly preadolescent girls. *Id.* at 146.

162. *Id.* at 209. The authors found that these children had high self-esteem and were coping well with the tasks of school and home. *Id.*

163. *Id.* at 219. The authors noted that "[t]he trio of good father-child relationship, high self-esteem, and absence of depression appeared . . . to hold for all age groups." *Id.*

164. *Id.* at 212-13. No data was given for this group on the effect of visitation upon the children. The children were considered uneven in their overall ego functioning; teachers considered the children average.

165. *Id.* at 211. Over one-third of the children studied fit into this group five years after the separation. These children were found to be moderately to severely depressed, and emotionally needy. *Id.*

166. *Id.* at 248.

167. *Id.* at 218. "The negative effect of irregular, erratic visiting was clear. The father's abandonment, relative absence, infrequent or irregular appearance, or general unreliability, which disappointed the child repeatedly, usually led the child to feel rejected or rebuffed and lowered the child's self-esteem." *Id.*

168. *Id.* at 248.

169. *Id.* at 283. One pair of authors, relying heavily on Wallerstein and Kelly's data, proposed that the noncustodial parent's visitation with the child be enforced by law following separation prior to the divorce.

> We propose that where one parent serves as the primary, day-to-day caretaker of the child, minimum standards of child visitation and child support be established by law, to go into effect immediately upon the separation of the parents. For either parent to fail to abide by at least the minimum standards of support and visitation, without court approval, would be a violation of the law.

Robert F. Cochran, Jr. & Paul C. Vitz, *Child Protective Divorce Laws: A Response to the Effects of Parental Separation on Children*, 27 FAM. L.Q. 327, 356-57 (1983).

170. *See* JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 232-40 (1989) (study showed that a strong father-son relationship following a divorce was crucial to the overall psychological adjustment of the children); William F. Hodges, *The Effect of Divorce on Children: Developmental Stages and Implications for Visitation*, *in* CHILD CUSTODY CONFERENCE: VISITATION—FROM CHAOS TO COOPERATION 30, 39 (1982) (reviewing research suggesting that the greater the time lost with the father as a function of divorce, the greater the maladjustment of the child); Gerald F. Jacobson & Doris S. Jacobson, *Impact of Marital Dissolution on Adults and Children: The Significance of Loss and Continuity*, *in* THE PSYCHOLOGY OF SEPARATION AND LOSS 316, 329-31 (Jonathon Bloom-Feshbach et al., eds., 1987) (reviewing research on visitation and its effect on children). *But see* James H. Bray & Sandra H. Berger, *Noncustodial Father and Paternal Grandparent Relationships in Stepfamilies*, 39 FAM. REL. 414, 418 (1990) (study found conflicting data regarding the effect of frequent visitation by the non-custo-

children exhibited severe "distress symptoms" following withdrawal of visitation by the noncustodial parent.[171] One researcher conducted in-depth interviews with forty children and teenagers who had experienced a divorce and found that children preferred flexible and unrestricted visitation arrangements.[172] The author stated, "[t]he children who were more content were those who maintained contact with the non-custodial parent on a continuous and flexible basis. . . . Our findings repeatedly single out the significance that children attach to maintaining relations with [noncustodial] fathers."[173]

Another study suggested that denial of visitation imposed by the custodial parent may hinder children's psychological health. The author commented, "[w]hen mothers had cut off fathers from parenting, it was reflected in children's poorer adjustment in the home."[174] Another researcher reported that, "visitation patterns of low frequency . . . and inconsistency are predictive of maladjustment in the child. . . . [B]ecause of the relationship of consistency of visitation to child adjustment, courts and parents might attempt as much as possible to provide predictible patterns of visitation for the preschool child."[175]

Lack of visitation with the noncustodial parent may have a detrimental effect on a child's psychological and social functioning. Courts should take these factors into account when analyzing parental fitness and sexual orientation. The child's best interests are served by requiring a showing of direct harm from a parent's homosexuality before imposing visitation restrictions or denying visitation with the child altogether.

CONCLUSION

Traditionally, gay parents have encountered great difficulty in securing parental rights. Many courts have restricted post-divorce visitation on the basis of outdated stereotypes and misconceptions regarding sexual orientation and gay parenting. This Note shows that homosexu-

---

dial father on the children); Joseph M. Healy, Jr. et al., *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531, 540-41 (1990) (study showed that although frequent visitation was beneficial to male children, frequent visits correlated with low self-esteem in female children).

Goldstein, Freud, and Solnit contend that visitation is not always necessary for the child. "Visits under favorable circumstances are, at best, a poor substitute for a parent in the family. Weekend visits do not compensate the child for parental absence at crucial moments in his life." GOLDSTEIN ET AL., *supra* note 10, at 118-19 n.*; *see also supra* note 10. *But see* Novinson, *supra* note 10, at 146-62 (criticizing Goldstein, Freud, and Solnit's conclusions regarding visitation).

171. JANET R. JOHNSON & LINDA E. G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 253-54 (1988).

172. R. Neugebauer, *Divorce, Custody, and Visitation: The Child's Point of View*, 12 J. DIVORCE 153, 166-67 (1988-89).

173. *Id.*

174. Anne H. Fishel, *Children's Adjustment in Divorced Families*, 19 YOUTH & SOC'Y 173, 194 (1987).

175. Carol W. Tierney, Visitation Patterns and Adjustment of Preschool Children of Divorce 132, 138 (1983) (unpublished Ph.D. dissertation, University of Colorado (Boulder)).

ality alone is not a permissible basis for visitation denial or restriction. If a child is denied regular contact with and affection from the noncustodial parent, greater harm will likely result from the deprivation of parental contact than from any possible adverse effect of a parent's sexual orientation. Absent an affirmative showing of harm to the child from the parent's homosexuality, courts should acknowledge the fundamental rights of gay and lesbian parents and allow unrestricted visitation.

*David L. Weiden**

* The author would like to thank Professor Penelope Bryan for her helpful comments and guidance.

HODGSON V. MINNESOTA: BALANCING THE COMPETING INTERESTS OF THE STATE, PARENTS AND MINOR—A MISSED OPPORTUNITY?

I. INTRODUCTION

The landmark decision of *Roe v. Wade*[1] established that the constitutional right to privacy encompassed a woman's choice to terminate her pregnancy through abortion.[2] This controversial 1973 ruling inspired a plethora of legislation as states sought to define the parameters of the abortion right; many states enacted statutes imposing informed consent, spousal consent and hospitalization requirements.

Further testing the scope of *Roe*, some state legislatures enacted regulatory provisions requiring parental consent or notification[3] before a minor could obtain an abortion. These parental involvement statutes purported to further the legitimate interest of the state in protecting the welfare of pregnant minors, and—to some extent—the parents' interests in the control and well-being of their pregnant child. Parental consent and notification provisions have been successfully challenged, however, when the asserted state and parental concerns supplant the minor's autonomy and fundamental right to choose abortion.

In *Hodgson v. Minnesota*,[4] the Supreme Court addressed the constitutionality of a Minnesota statute[5] requiring an unemancipated minor[6] to notify both of her parents[7] of her intent to obtain an abortion at least forty-eight hours[8] before the procedure was performed.[9] The Minne-

1. 410 U.S. 113 (1973).

2. *Id.* at 153. Noting that the Constitution does not explicitly provide for a right to privacy, the Court recognized that the right is found in the concepts of personal liberty and restriction upon state action contained in the Fourteenth Amendment. *Id.* at 153-54.

3. Consent provisions require the minor to secure parental *approval* of her decision to obtain an abortion. In contrast, notification provisions require the minor to *inform* her parents of her decision to have an abortion. Whether, in reality, "parental consent" is significantly different from "parental notification" remains to be seen.

Statutes differ with respect to the number of parents involved in the minor's decision; the state may require either single-parent or two-parent involvement with various exceptions. *See infra* appendicies 1 and 2 and notes 154-57 and accompanying text.

4. 110 S. Ct. 2926 (1990).

5. MINN. STAT. ANN. § 144.343 (West 1989).

6. Minnesota has no statutory definition of "emancipation." *See* Streitz v. Streitz, 363 N.W.2d 135, 137 (Minn. Ct. App. 1985). The Supreme Court, however, accepted the Minnesota case law notion of an emancipated woman as one who is living apart from her parents or who is either married or has borne a child. *Hodgson*, 110 S. Ct. at 2931 n.3 (applying MINN. STAT. ANN. §§ 144.341-.342 (West 1989)).

7. MINN. STAT. ANN. § 144.343(3) (West 1989) provides in part: " 'parent' means both parents of the pregnant woman if they are both living, one parent of the pregnant woman if only one is living or if the second one cannot be located through reasonably diligent effort, or the guardian or conservator if the pregnant woman has one."

8. MINN. STAT. ANN. § 144.343(2) (West 1989) provides in part: "[N]o abortion operation shall be performed upon an unemancipated minor or upon a woman for whom a guardian or conservator has been appointed . . . until at least 48 hours after written notice of the pending operation has been delivered [to the parent]."

sota statute provided no exception regarding notification of a divorced or noncustodial parent.[10] In anticipation of a challenge to the statute, the Minnesota legislature incorporated a provision that became effective if ever a court enjoined the two-parent notification requirement.[11] This alternative proviso retained the core notification requirements of the original statute, but provided a judicial bypass proceeding whereby a mature or "best-interests" minor could seek court approval of her decision instead of notifying her parents.[12] Through two different majorities, the Supreme Court held that the primary two-parent notice provision alone was unconstitutional,[13] but that the same two-parent notification requirement withstood constitutional challenge when accompanied by the judicial bypass alternative.[14]

This Comment examines the Supreme Court's treatment of the most restrictive[15] parental notification statute in the Nation. Part II traces the progression of Supreme Court abortion rulings from the recognition of a woman's fundamental right in *Roe* through cases limiting the scope of *Roe* with respect to parental consent and notification provisions. Part III surveys the facts and procedural history of *Hodgson*, providing a synopsis of the Justices' divergent opinions. Part IV presents an analysis of the *Hodgson* decision including: (1) a discussion of the competing interests of the state, parents and minor; (2) application of the judicial bypass alternative and (3) the burdens of two-parent notification. Part V concludes that the Supreme Court has validated a statute that surpasses both the degree of regulation necessary to effectuate the legitimate interest of the state in protecting the welfare of pregnant minors and the parents' interest in the well-being of their child. Unlike the

9. An analysis of the constitutionality of delay requirements is beyond the scope of this Comment. For a general discussion of the issue, see Debra Harvey, Note, *Zbaraz v. Hartigan: Mandatory Twenty-Four Hour Waiting Period After Parental Notification Unconstitutionally Burdens A Minor's Abortion Decision*, 19 J. MARSHALL L. REV. 1071 (1986).

10. *See supra* note 7.

11. MINN. STAT. ANN. § 144.343(6) (West 1989) provides in part:
If subdivision 2 of this law is ever temporarily or permanently restrained or enjoined by judicial order, subdivision 2 shall be enforced as though the following paragraph were incorporated as paragraph (c) of that subdivision; provided, however, that if such temporary or permanent restraining order or injunction is ever stayed or dissolved, or otherwise ceases to have effect, subdivision 2 shall have full force and effect, without being modified by the addition of the following substitute paragraph which shall have no force or effect until or unless an injunction or restraining order is again in effect.

12. MINN. STAT. ANN. § 144.343(c)(i) (West 1989) provides:
If such a pregnant woman elects not to allow the notification of one or both of her parents or guardian or conservator, any judge of a court of competent jurisdiction shall, upon petition, or motion, and after an appropriate hearing, authorize a physician to perform the abortion if said judge determines that the pregnant woman is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the woman is not mature, or if the pregnant woman does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parents, guardian, guardian, or conservator would be in her best interests and shall authorize a physician to perform the abortion without such notification if said judge concludes that the pregnant woman's best interests would be served thereby.

13. *Hodgson*, 110 S. Ct. at 2947.

14. *Id.* at 2961.

15. *See infra* notes 159-65 and accompanying text.

Minnesota two-parent notification provision, a single-parent notice requirement, combined with a judicial bypass option, would better balance the competing interests of the state, parents and minor. A single-parent involvement provision protects the welfare of pregnant minors and encourages minors to consult a parent without imposing an undue burden upon a minor's fundamental right to choose abortion.

II. BACKGROUND

A. *Recognition of the Fundamental Right*

Although *Roe* established that the right to privacy encompassed a woman's decision to choose abortion,[16] her freedom of choice is not absolute and "must be considered against important state interests in regulation."[17] Reaffirming "strict scrutiny" as the applicable standard of review, the Supreme Court observed that regulation of a fundamental right is justified only by legislation that is narrowly drawn to express a compelling state interest.[18] Compelling interests include those that safeguard maternal health and protect certain potential life.[19]

Applying the *Roe* standard, the Court determined that the important state interest in the mother's health became compelling at the end of the first trimester, and its interest in protecting potential life became compelling at fetal viability.[20] During the first trimester of pregnancy, therefore, the woman and her physician could choose to terminate the pregnancy without state interference.[21]

B. *Restricting A Minor's Fundamental Right*

Since *Roe*, the Supreme Court has decided several cases concerning the constitutionality of statutes restricting a minor's fundamental right to obtain an abortion through parental consent and notification provisions. One such case of particular importance is *Planned Parenthood v.*

16. *Roe*, 410 U.S. at 153. The Court noted that only personal rights, which can be deemed "fundamental" or "implicit in the concept of ordered liberty," are included in the guarantee of personal privacy. *Id.* at 152 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

17. *Roe*, 410 U.S. at 154.

18. *Id.* at 155 (citing Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627 (1969) and Griswold v. Connecticut, 381 U.S. 479, 485 (1965)).

19. *Id.*

20. *Id.* at 163-65. "Viability is usually placed at about seven months (28 weeks), but may occur earlier, even at 24 weeks." *Id.* at 160.

21. *Id.* at 163. *Roe*'s trimester framework for limiting a state's authority to regulate abortions "is inherently tied to the state of medical technology that exists whenever particular litigation ensues." Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 458 (1983)(O'Connor, J., dissenting). As a result, *Roe*'s trimester standard may be ill-suited for analysis as technological developments move the point of fetal viability further toward conception and enable the states to regulate the performance of an abortion at an earlier point in the pregnancy. *Id.* ("As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back to conception."). *See also* Jan G. Laitos, *The abortion question: Reasoning of Roe vs. Wade out of date*, ROCKY MTN. NEWS, Mar. 1, 1989, (Colorado Views), at 37 (questioning whether the exercise of a woman's right to an abortion should "vary according to the progress of medical technology").

Danforth.[22] There, the Court addressed a constitutional challenge to a Missouri statute regulating the performance of abortions by requiring the written consent of one parent or a person acting *in loco parentis* unless the abortion was necessary to protect the mother's life.[23]

The *Danforth* Court recognized that minors, as well as adults, receive constitutional protection because "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."[24] The Court observed, however, that states may regulate the activities of children to a greater extent than is permissible for adults.[25] This greater degree of control is reflected in the Court's application of the less-stringent standard of "intermediate review" to the challenged parental consent provision. Using an ends-means analysis, which required only a "significant state interest" to condition a minor's abortion on the consent of a parent, the Court demonstrated the application of this intermediate standard.[26] In contrast, the Court employed the "strict scrutiny" standard to provisions of the statute as applied to adult women.

Heeding the *Roe* requirement of narrowly drawn statutes that regulate fundamental rights,[27] the *Danforth* Court held the parental consent provision unconstitutional. It concluded that the asserted state interests did not justify an absolute and possibly arbitrary parental veto over the decision of the minor to terminate her pregnancy.[28] In so ruling, the Court observed that the award of parental veto power would not strengthen the family unit or enhance parental control "where the minor and nonconsenting parent are so fundamentally in conflict that the very existence of the pregnancy already has fractured the family structure."[29] Although the *Danforth* Court placed the minor's autonomy before the asserted state and parental interests, the majority emphasized that its holding did not suggest that every minor, regardless of age or maturity, may give effective consent to an abortion.[30] The Court, instead, limited its holding to statutes imposing unjustified third-party consent requirements as a prerequisite to a mature minor's abortion.[31]

In 1979, the Supreme Court presented guidelines that, if incorpo-

22. 428 U.S. 52 (1976).

23. MO. ANN. STAT. § 188.020(4) (Vernon 1974). The plaintiffs also challenged statutory provisions concerning fetal viability, informed consent, spousal consent, the standard of care for physicians, the custody of infants who survived an attempted abortion, amniocentesis, and reporting and record-keeping requirements. *See id.* §§ 188.010-040.

24. *Danforth*, 428 U.S. at 74 (citing Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967)).

25. *Id.* at 73-75 (citing Ginsberg v. New York, 390 U.S. 629 (1968); Prince v. Massachusetts, 321 U.S. 158 (1944)).

26. *Id.* at 75. For a discussion of the Supreme Court's inconsistent application of standards of review in the abortion context, see Note, *Leading Cases: I. Constitutional Law; E. Right to Privacy*, 104 HARV. L. REV. 247 (1990).

27. *Roe*, 410 U.S. at 155.

28. *Danforth*, 428 U.S. at 74.

29. *Id.* at 75.

30. *Id.*

31. *Id.*

rated, would have salvaged the infirmities of the Missouri statute under scrutiny in *Danforth*. In *Bellotti v. Baird (Bellotti II)*,[32] the Court addressed a facial challenge to a Massachusetts statute requiring the consent of both parents before a minor could obtain an abortion.[33] Unlike the consent provision struck down in *Danforth*, the Massachusetts statute provided for judicial authorization of the minor's abortion for "good cause shown" when one or both parents refused consent.[34]

The *Bellotti II* plurality observed that a child's peculiar vulnerability and inability to make informed, critical decisions—together with the importance of the parental role in child rearing—justified regulating a minor's fundamental rights to a greater extent than those of an adult.[35] The parental consent requirement of the Massachusetts abortion statute reflects that legislature's desire to exercise greater control over abortion rights of minors. The *Bellotti II* plurality concluded, however, that a pregnant minor was entitled to avoid a parental consent requirement through a judicial determination where either (1) she was mature and capable of giving informed consent independent of her parents' interests, or (2) the abortion was in her best interests regardless of her level of maturity.[36] The plurality also noted that the judicial proceeding should ensure the pregnant minor's anonymity and be expeditiously conducted to allow the minor an effective opportunity to obtain the abortion.[37] Thus the Court attempted to balance the pregnant minor's constitutional right with the state's interest in encouraging parental involvement by safeguarding against provisions that would amount to the veto power found impermissible in *Danforth*.[38] The plurality emphasized the balance that the bypass procedure lends to the competing interests rejecting the contention that, as a general rule, two-parent consent requirements unduly burden a minor's fundamental right to obtain an abortion.[39]

The plurality determined that the Massachusetts statute was unconstitutional because it failed in two respects to satisfy the articulated standards for a valid restraint on a minor's right. First, the statute permitted judicial authorization to be withheld from a minor who was otherwise

32. 443 U.S. 622 (1979). In *Bellotti I*, reported as Bellotti v. Baird, 428 U.S. 132 (1976), the Court vacated the judgment of a three-judge panel of the district court which had sustained a facial challenge to the statute. The Supreme Court held that the district court erred in not abstaining and certifying questions concerning the meaning of the statute to the Massachusetts Supreme Judicial Court. On remand, the district court certified nine questions to the state court. Following the judgment of the state court, the district court again found the statute unconstitutional and enjoined its enforcement.

Bellotti II, the appeal from the district court's ruling on remand, is a plurality opinion. Justice Powell's lead opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist. Justices Brennan, Marshall and Blackmun joined in Justice Stevens's concurring opinion. Only Justice White dissented.

33. MASS. GEN. L. ANN. ch. 112, § 12S (West 1983).

34. *Id.*

35. *Bellotti II*, 443 U.S. at 634-37.

36. *Id.* at 643-44.

37. *Id.* at 644.

38. *Id.*

39. *Id.* at 649.

found to be mature and capable of giving informed consent.[40] The plurality observed that a judge could, in effect, place the state's and parents' interests above those of the minor and deny authorization.[41] Second, the statute required parental involvement *before* the minor was afforded an opportunity to receive a judicial determination.[42] Under *Bellotti II's* guidelines, a pregnant minor must have an opportunity to obtain judicial approval of her decision without first consulting her parents;[43] the pregnant minor may be denied authorization only where the court is *not* persuaded that the minor is mature or that the abortion would be in her best interests.[44]

Both *Danforth* and *Bellotti II* involved statutes that conditioned a minor's right to abortion on parental *consent* to her decision. In contrast, the Supreme Court first addressed a constitutional challenge to a parental *notification* statute in *H.L. v. Matheson*.[45] This 1981 case presented a facial challenge to Utah's notification provision requiring a physician to "notify, if possible" the parents of a pregnant minor before performing the abortion.[46] The statute did not provide a judicial bypass alternative to the minor.

The plaintiff, a pregnant minor living with and dependent upon her parents, asserted that the statute was unconstitutional because courts could construe it so as to apply to all unmarried minors who were mature or emancipated.[47] The Court found, given the plaintiff's dependence upon her parents and her failure to allege that she was mature, that the minor lacked standing to advance the overbreadth argument.[48] Nevertheless, the Court upheld the provision only as it applied to immature and dependent minors. The Court reasoned that, as so limited, the statute was reasonably calculated to protect that class of pregnant minors by "enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences."[49]

Over a sharp dissent,[50] the *Matheson* Court observed that the Utah statute did not afford parents the veto power characterized by some consent provisions and noted that the "mere requirement of parental notice does not violate the constitutional rights of an immature dependent minor."[51] In effect, the lesser degree of intrusion accompanying notification, in contrast to requiring parental approval under a consent

40. *Id.* at 651.
41. *Id.*
42. *Id.*
43. *Id.* at 647.
44. *Id.* at 647-48.
45. 450 U.S. 398 (1981).
46. *See* UTAH CODE ANN. § 76-7-304(2) (1990).
47. *Matheson*, 450 U.S. at 405.
48. *Id.* at 406.
49. *Id.* at 411-12.
50. Led by Justice Marshall, the dissent rejected the majority's narrow holding grounded on a lack of standing. Moreover, the dissent argued that state-imposed notification results in the same infringement on the minor's right as does a consent requirement. *Id.* at 425-41.
51. *Id.* at 409 (quoting *Bellotti II*, 443 U.S. at 640).

provision, enabled the statute to survive a constitutional challenge without incorporation of the judicial bypass alternative. As applied to the class of immature and dependent minors, the statute furthered the interests of the state in protecting the welfare of its minors and preserving family integrity, and was narrowly drawn to protect only those interests.[52]

In 1983, the Supreme Court upheld an entire parental *consent* statute regulating a minor's right to abortion. That statute was the one challenged in *Planned Parenthood Ass'n v. Ashcroft*[53] requiring an unemancipated minor to (1) secure the consent of one parent or (2) obtain a court order for "good cause" shown before she could obtain an abortion.[54] Adhering to the criteria set forth in *Bellotti II* for a valid restraint on a minor's abortion right,[55] the question presented in *Ashcroft* was whether the Missouri statute provided a judicial alternative that satisfied those criteria without unconstitutionally burdening the minor's right.[56] The Supreme Court concluded that the interest of the state in protecting immature minors sustained the consent requirement because of the judicial bypass alternative. Because a court could not deny a pregnant minor's petition "for good cause" unless it first found that the minor was immature, the statute avoided any constitutional infirmities.[57]

The *Ashcroft* dissent, however, emphasized that *Bellotti II* did not command a majority, and thus, the Court was not bound by the judicial bypass guidelines.[58] It further maintained that a judicial proceeding imposes a burden on the minor of at least the same degree as obtaining parental consent and that the discretion inherent in the proceeding results in nothing less than a judicial veto of the minor's decision to obtain an abortion.[59]

In *Ohio v. Akron Center for Reproductive Health (Akron II)*,[60] the companion case to *Hodgson*, the Supreme Court upheld a parental *notification* statute prohibiting the performance of an abortion upon an unmarried, unemancipated minor unless, inter alia, the physician provided notice to

52. *Matheson*, 450 U.S. at 411-13.

53. 462 U.S 476 (1983).

54. MO. ANN. STAT. § 188.028 (Vernon Supp. 1991).

55. *Ashcroft*, 462 U.S. at 493.

56. *Id.* at 491. Justice Powell and Chief Justice Burger viewed the issue as a matter of statutory construction and applied the *Bellotti II* criteria. *Id.* at 491-92. Justices O'Connor, White and Rehnquist concluded in a concurring opinion that the provision was valid because it imposed no undue burden on the minor's fundamental right. *Id.* at 505.

57. *Id.* at 493.

58. *Id.* at 504. Justices Brennan, Marshall and Stevens joined Justice Blackmun's dissenting opinion.

59. *Id.*

60. 110 U.S. 2972 (1990). In City of Akron v. Akron Ctr. for Reproductive Health (Akron I), 462 U.S. 416 (1983), the Court held unconstitutional an ordinance that prohibited, inter alia, the performance of an abortion on a woman under 15 years of age unless the physician obtained the consent of one parent or the minor received judicial authorization. The Court stated that the judicial proceeding failed to meet the standard provided by *Bellotti II*, and was invalid because the ordinance made a blanket determination that all minors under the age of 15 are too immature to provide informed consent or that an abortion would never be in their best interests without parental consent.

one parent, or the minor received judicial authorization to obtain the abortion.[61] The majority concluded that the notification requirement and accompanying judicial bypass procedure did not impose an unconstitutional burden on the minor's right since the statute was in accord with the guidelines propounded by the Court in previous abortion rulings.[62] The bypass proceeding allowed the minor to avoid parental notification by establishing either her maturity or that the performance of the abortion, without notification, would be in her best interests.[63] Furthermore, the statute provided for an expedited and confidential determination of the minor's petition if she sought a judicial bypass.[64] The Court left unanswered, however, the question of whether parental *notification* statutes *must* contain a judicial bypass alternative to be held constitutional.[65] Recall that the Ohio statute included a bypass procedure that satisfied *Bellotti II's* standards, but the *Ashcroft* Court stated only that "it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice for a consent statute will suffice also for a notice statute."[66]

III. *HODGSON V. MINNESOTA*

A. *Facts and Procedural History*

On July 30, 1981, two days before the effective date of the Minnesota parental *notification* provision,[67] the plaintiffs[68] commenced their suit in the United States District Court for the District of Minnesota challenging the constitutionality of the statute and seeking declaratory and injunctive relief.[69] The primary requirement of the statute demanded an unemancipated minor notify[70] both her parents of her intent

61. *Akron II*, 110 S. Ct. at 2982. *See* OHIO REV. CODE ANN. § 2151.85 (Anderson 1990).

62. *Akron II*, 110 S. Ct. at 2981-82.

63. *Id.* at 2979.

64. *Id.* at 2979-80. The Court rejected the challenges to: (1) the constructive authorization condition of the bypass provision; (2) the standard for establishing maturity or best interests and (3) the pleading requirements. *See* OHIO REV. CODE ANN. § 2151.85(A)-(C) (Anderson 1990).

65. *Akron II*, 110 S. Ct. at 2978-79.

66. *Id.* at 2979.

67. MINN. STAT. ANN. § 144.343 (West 1989). The statute amended the "Minors' Consent to Health Services Act" which remains in effect as §§ 144.343(1) and 144.346. For a brief discussion of the Act, see *Hodgson*, 110 S. Ct. at 2931.

68. The plaintiffs included six class-action minors who claimed to be mature, two physicians and four abortion clinics in Minnesota. They argued that notification of one or both parents of the minors would not be in the minors' best interests. A mother of a minor plaintiff claimed that notifying the minor's father would not be in the minor's best interests.

69. Hodgson v. Minnesota, 648 F. Supp. 756 (D. Minn. 1986). The plaintiffs alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and various provisions of the Minnesota Constitution.

70. MINN. STAT. ANN. § 144.343(4) (West 1989) states:

No notice shall be required under this section if:

(a) The attending physician certifies in the pregnant woman's medical record that the abortion is necessary to prevent the woman's death and there is insufficient time to provide the required notice; or

(b) The abortion is authorized in writing by the person or persons who are entitled to notice; or

to obtain an abortion at least forty-eight hours before the procedure was performed.[71] The Minnesota legislature incorporated a judicial bypass provision, however, that was to become effective if the primary two-parent notification requirement was ever temporarily or permanently enjoined.[72] Under this contingency, a pregnant minor could obtain a waiver of the notification requirement if the court determined that the minor was mature or that the performance of the abortion, without parental notification, was otherwise in her best interests.[73] The statute provided that the bypass hearing must be confidential and be given precedence over other matters.[74] An expedited appeal was available to minors who were denied judicial authorization by the lower court.[75]

The district court temporarily enjoined the pure notification provision of the statute before its effective date, but allowed the enforcement of the notice-bypass provision since it was constitutional per se. The court determined, however, that the plaintiffs should have an opportunity to offer evidence in support of their allegations that the notice-bypass provision was unconstitutional as applied.[76] During a five-week trial, the court considered, apart from the remainder of the statute, both the forty-eight hour delay and two-parent notification requirements. The district court held that the waiting period was unconstitutional per se because it unduly burdened the opportunity of pregnant minors to obtain an abortion.[77] The core two-parent notice requirement, without the judicial bypass, was also held unconstitutional because it failed to promote the interests of the state and placed an unjustified burden of obtaining parental approval on mature and "best-interests" minors.[78] The trial court determined, however, that the judicial bypass procedure complied both on its face and in practice with the guidelines established by the Supreme Court[79] although extensive factual findings suggested that the procedure did not significantly further the interests of the state

(c) The pregnant minor woman declares that she is the victim of sexual abuse, neglect, or physical abuse as defined in section 626.556. Notice of that declaration shall be made to the proper authorities as provided in section 626.556, subdivision 3.

71. *See supra* notes 5-8 and accompanying text. MINN. STAT. ANN. § 144.343(5) (West 1989) provides in part: "Performance of an abortion in violation of this section shall be a misdemeanor and shall be grounds for a civil action by a person wrongfully denied notification."

72. MINN. STAT. ANN. § 144.343(6) (West 1989). *See supra* note 7 and accompanying text.

73. MINN. STAT. ANN. § 144.343(6)(c)(i)(West 1989).

74. MINN. STAT. ANN. § 144.343(c)(iii) (West 1989) provides in part: "[p]roceedings in the court under this section shall be confidential and shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interests of the pregnant woman."

75. MINN. STAT. ANN. § 144.343(c)(iv) (West 1989) states in part: "[a]n expedited confidential appeal shall be available to any such pregnant woman for whom the court denies an order authorizing an abortion without notification. An order authorizing an abortion without notification shall not be subject to appeal."

76. *See Hodgson*, 110 S. Ct. at 2934.

77. *Hodgson*, 648 F. Supp. at 779.

78. *Id.* at 778.

79. *Id.* at 775-76. *See Ashcroft*, 462 U.S. at 476; *Bellotti II*, 443 U.S. at 622.

in protecting pregnant minors or fostering intrafamily communication.[80] While the forty-eight hour delay provision was severable from the remainder of the statute, the statute could not be given effect in the absence of the two-parent notification requirement.[81] Accordingly, though the judicial bypass was held constitutional in isolation from the remainder of the statute, the two-parent notification requirement necessitated that the statute be enjoined in its entirety.[82]

On appeal, the Eighth Circuit reversed,[83] thus rejecting the state's argument that the two-parent notification requirement was constitutional without a judicial bypass option.[84] Concluding that a bypass procedure was constitutionally required under *Bellotti II*, *Ashcroft* and *Matheson*,[85] the Eighth Circuit determined that the two-parent notice requirement was valid only when accompanied by the judicial bypass alternative.[86] The appellate court considered the statute as a whole and stated that, by providing for a judicial bypass, the statute safeguards those minors for whom parental involvement may not be in their best interests, while at the same time encouraging parental involvement for those minors who may be greatly assisted at a difficult time.[87] Although the district court's factual findings concerning the burdens associated with the two-parent notice requirement and judicial bypass raised "considerable questions about the practical wisdom of the statute," the Eighth Circuit deferred to the decision of the legislature.[88]

Both parties appealed to the United States Supreme Court. Minnesota challenged the determination of the Eight Circuit that the pure notification provision was unconstitutional.[89] In contrast, the plaintiffs challenged the approval of the same two-parent requirement when accompanied by the judicial bypass alternative.[90] The Supreme Court, however, affirmed the holdings of the Eighth Circuit in two different majority opinions.

In the first opinion, Justices Brennan, Marshall, Blackmun and O'Connor joined Justice Stevens in striking down the primary two-parent notification provision. In the second, Chief Justice Rehnquist and Justices White and Scalia joined Justice Kennedy in upholding the two-parent notice requirement with the appended judicial bypass. As be-

80. *Hodgson*, 648 F. Supp. at 775-76. Between August of 1981 and March of 1986, judges denied only nine of the approximately 3500 judicial bypass petitions. In addition, the judges—hearing 90% of the petitions—viewed the process as a means to affix a "rubber-stamp" to the minor's decision. *Id.* at 781.

81. MINN. STAT. ANN. § 144.343(7) (West 1989) provides in part: "[i]f any provision . . . of this section . . . shall be held invalid, such invalidity shall not affect the provisions . . . which can be given effect without the invalid provision . . . ."

82. *Hodgson*, 648 F. Supp. at 780-81.

83. Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988)(en banc).

84. *Id.* at 1456.

85. *Id.* at 1462.

86. *Id.* at 1464.

87. *Id.*

88. *Id.* at 1459.

89. *Hodgson*, 110 S. Ct. at 2927.

90. *Id.* at 2961.

tween the two opinions, Justice O'Connor provided the swing vote in the decision by concurring with the judgment upholding the two-parent requirement when it was accompanied by the bypass procedure.[91]

B. *The Stevens Majority*

The Stevens majority began its scrutiny of the pure notification provision by noting that none of the Court's prior decisions in the abortion context focused on the significance of involving *both* biological parents in the abortion decision.[92] The majority then summarized the unchallenged factual findings of the district court concerning the distinction between one and two-parent involvement.[93]

The majority noted that—on the basis of testimony amassed at trial concerning the impact of the statute in operation—the district court found the two-parent notification requirement had harmful effects on both the minor and custodial parent where the parents were divorced or separated.[94] Some minors anticipated reestablishing their relationship with the absent parent after gaining that parent's advice, and were often disappointed when reestablishment did not occur.[95] In addition, the reaction of the custodial parent to the requirement of forced notification was often one of anger, resentment and frustration at the intrusion of the absent parent.[96]

The district court also found that involvement of the absent parent was especially detrimental when the minor came from an abusive, dysfunctional family. Studies, introduced into evidence, suggested that violence and harassment often continued well beyond the divorce, particularly where children were involved, and notification of the minor's pregnancy and abortion decision could provoke further violence.[97] Moreover, the district court believed that "a mother's perception in a dysfunctional family that there will be violence if the father learns of the daughter's pregnancy is likely to be an accurate perception."[98]

The two-parent notification requirement also had adverse effects in families where the minor lived with both parents in circumstances involving domestic violence. Even where minors lived in fear of physical and sexual abuse, few invoked the statutory exception to notice because of the reporting requirements and attendant loss of privacy.[99] Consequently, the two-parent notification requirement actually reduced, instead of fostered, intrafamily communication. Minors who would ordinarily notify one parent were dissuaded from doing so when notifi-

91. Justice Marshall filed an opinion concurring in part and dissenting in part in which Justices Brennan and Blackmun joined. Justice Scalia also filed a separate opinion concurring in part and dissenting in part.

92. *Hodgson*, 110 S. Ct. at 2938.

93. *Id.*

94. *Hodgson*, 648 F. Supp. 756, 768-69 (D. Minn. 1986).

95. *Id.* at 769.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

cation would involve the parent "in the tortuous ordeal of explaining to a court why the second parent should not be notified."[100]

Justice Stevens then analyzed the statute while considering the district court's extensive findings of fact. Noting that the state did not rely primarily on its asserted interest in protecting the welfare of pregnant minors in defending the statute, Justice Stevens concluded that instead it concentrated on its interest in protecting the right of the parents "to determine and strive for what they believe to be best for their children."[101] Wherever the emphasis, neither of these interests justified the two-parent notification requirement according to Justice Stevens. He concluded that the state had no legitimate interest in (1) questioning one parent's judgment that notice to the other parent would not benefit the minor and (2) in presuming that the custodial parent was incompetent to make decisions concerning the minor's health and welfare.[102] Thus, the two-parent requirement was unconstitutional because the "combined force of the separate interest of one parent and the minor's privacy interest must outweigh the separate interest of the second parent" in shaping the child's values and lifestyle.[103]

C. *The Kennedy Dissent to the Stevens Majority*

Justices Kennedy, White, Scalia and Chief Justice Rehnquist dissented from the portion of the Stevens opinion that struck down the primary two-parent notification requirement of the Minnesota statute. The dissent maintained that a state furthers legitimate ends when it attempts to foster and preserve intrafamily relations by "giving *all* parents the opportunity to participate in the care and nurture of their children."[104] The Kennedy dissent rejected Justice Marshall's assertion that Minnesota attempted, through the two-parent notification requirement, to force families to conform to a state-designed ideal.[105] Instead, the dissent supported the state's interest in providing information to both parents by arguing that such an interest was valid regardless of whether the child was living with one or both biological parents, or the particular relationship between the parents.[106]

The Kennedy dissent further observed that the notification statute was consistent with joint custody laws in Minnesota since it enabled divorced or separated parents to share the legal responsibility and authority for making decisions regarding their child's welfare.[107] Furthermore, the dissent asserted that the state did not dictate intrafamily communication by requiring parental notice. The Court ar-

100. *Hodgson*, 110 S. Ct. at 2939 (discussing *Hodgson*, 648 F. Supp. at 769).
101. *Id.* at 2946. *See* Brief of Respondents at 28-29, Hodgson v. Minnesota, 110 S. Ct. 2926 (1990) (No. 88-1125).
102. *Hodgson*, 110 S. Ct. at 2946.
103. *Id.* at 2946-47.
104. *Id.* at 2963 (emphasis added).
105. *Id.*
106. *Id.* at 2964.
107. *Id.* at 2964-65.

gued that Minnesota acted only on the common-sense proposition that—in counseling their minor child—parents could best fulfill their roles only when fully informed of the child's medical condition and relative choices.[108]

The dissent criticized the Stevens majority for doing the state and "our constitutional tradition a sad disservice by impugning the legitimacy" of such essential objectives.[109] In conclusion, Justice Kennedy stated that the permissive language and incorporated exceptions of the statute, combined with the less demanding nature of a *notice* provision as opposed to a *consent* provision, did not place an absolute obstacle before a pregnant minor seeking an abortion. Instead, Justice Kennedy viewed the statute as representing a considered weighing of the competing interests of minors and their parents.[110]

D. *The Kennedy Majority*

The Justices favoring the Kennedy dissent, with the addition of Justice O'Connor—who represented the swing vote between the two majorities—saved the two-parent notice component of the statute. Although Justices Kennedy, Scalia, White and Chief Justice Rehnquist would have upheld the two-parent notice requirement without an appended judicial bypass option, they were defeated by the Stevens majority. With the addition of Justice O'Connor, however, the Kennedy group succeeded in upholding the two-parent notification requirement when it was accompanied by the judicial bypass mechanism.

The Minnesota notification statute with a judicial bypass alternative purportedly conformed to the framework supplied by the *Bellotti II* plurality. The Kennedy majority noted that *Bellotti II's* guidelines would support a two-parent consent or notification statute if it provided, as did Minnesota's provision, for a sufficient judicial bypass alternative.[111] Minnesota's judicial bypass, according to the Kennedy majority, was valid since it furnished mature and best-interests minors with an opportunity to avoid parental notification through a confidential judicial proceeding.[112]

The Kennedy majority also reconciled the decision in *Matheson* with the facts presented by the Minnesota statute. Justice Kennedy observed that, as in *Matheson*, if a two-parent notification statute is constitutional as applied to immature minors whose best interests are served by notification, but not as applied to mature or best interests minors, "a judicial bypass is an expeditious and efficient means by which to separate the applications of the law which are constitutional from those which are not."[113] Thus legislatures are entitled to combat the wrongs of parental

108. *Id.*
109. *Id.* at 2964.
110. *Id.* at 2969.
111. *Id.* at 2970.
112. *Id.* at 2971.
113. *Id.*

failure and social ills and still take reasonable measures to "recognize and promote the privacy of the family tie."[114] This concept, maintained Justice Kennedy, was destined to constitutional irrelevance under the Stevens opinion.[115]

E. *Justice O'Connor's Concurrence with the Kennedy Opinion*

In casting the decisive vote, Justice O'Connor concluded that interference in the intrafamily relationship associated with requiring two-parent notice does not exist where the minor can avoid notification through the use of the judicial bypass mechanism.[116] If the questioned regulation does not unduly burden the fundamental right, observed Justice O'Connor, then the Court's evaluation is limited to a determination of whether the regulation rationally relates to a legitimate state purpose.[117]

Justice O'Connor maintained, as did Justice Stevens, that Minnesota offered no sufficient justification for the notice requirement's interference with the family's decision-making processes.[118] In support of her conclusion, she cited the stringent nature of the two-parent requirement, the ineffectiveness of the state's physical and sexual abuse exception, and the unreasonableness of requiring two-parent notice when only one-half of the minors residing in Minnesota live with both biological parents.[119] Emphasizing the Court's decision in *Danforth*, Justice O'Connor further observed that the infirmities of the statute were negated by the inclusion of the judicial bypass option. She concluded that the existence of such an alternative avoids unduly burdening the minor's limited right to obtain an abortion and alleviates the possibility of parental notification serving as an absolute condition upon the minor's fundamental right.[120]

F. *Justice Marshall Concurring and Dissenting in Part*

Joined by Justices Brennan and Blackmun, Justice Marshall concurred in the judgment with respect to the Court's rejection of the "unreasonable and vastly overbroad requirement" that a pregnant minor notify both her parents of her decision to obtain an abortion.[121] Justice Marshall adopted the Stevens rationale for holding the two-parent notification requirement unconstitutional, and noted that the provision would not satisfy the standard of strict scrutiny applicable to restrictions

114. *Id.* at 2972.
115. *Id.*
116. *Id.* at 2951 (O'Connor, J., concurring).
117. *Id.* at 2950. Justice O'Connor seems to apply the minimum rationality standard of review to the regulation of a minor's fundamental right to abortion, whereas the Marshall dissent would utilize the strict scrutiny standard applied in *Roe*. *See supra* note 26.
118. *Id.*
119. *Id.* at 2950.
120. *Id.*
121. *Id.* at 2960.

on fundamental rights.[122] According to Justice Marshall the parental notification requirement significantly restricted a young woman's reproductive freedom and was not narrowly tailored to serve any compelling state interest. Justice Marshall rejected the asserted state interest in protecting independent parental rights because the family's right against state interference in personal matters would be undermined by governmental intrusion in the form of forced compliance to the state's "archetype of the ideal family."[123] Furthermore, he argued, the exercise of parental authority in some instances obstructs the minor's decision to have an abortion. Stern parental disapproval, with the threat of withdrawal of financial support, accompanied by physical and emotional abuse would effectively become an impermissible veto over the minor's decision.[124]

Justice Marshall objected to forced notification of even a *single* parent, an argument which served as a foundation for opposing the rigors of a two-parent notification requirement. Justice Marshall observed that any notification requirement violates the privacy right of pregnant minors who choose not to inform their parents and further precipitates severe physical and psychological effects on the minor.[125] Additionally, Justice Marshall observed that a single-parent notice requirement may force some pregnant minors to travel outside of the state to obtain an abortion and others to resort to self-induced or illegal abortions.[126]

Justice Marshall vehemently dissented from the Kennedy decision, reasoning that the mere presence of a judicial bypass alternative did not rid the underlying notice requirement of its unconstitutionality.[127] The Marshall dissent argued that the judicial bypass procedure could not salvage the parental notification requirement because the procedure itself was unconstitutional. The bypass was invalid, according to Justice Marshall, since a court's refusal was the equivalent of a veto with respect to women who were denied a judicial bypass and were forced either to carry the fetus to term or were otherwise obstructed by their parents.[128]

The dissent argued that an immature minor has no less right to make decisions regarding her own body than a mature adult, and that the conditional defects in any provision effectively allowing for a third-party veto were exacerbated by the vagueness of Minnesota's statute.[129] In particular, the Marshall dissent challenged the standards, or lack thereof, for determining the maturity and best interests of the pregnant minor.[130]

The Marshall dissent then noted that the Court had never before

122. *Id.* at 2951.
123. *Id.* at 2956.
124. *Id.*
125. *Id.* at 2953.
126. *Id.* at 2953-54.
127. *Id.* at 2952. The Justices also dissented from the portion of the Court's decision upholding the 48 hour delay requirement. *Id.* at 2954.
128. *Id.* at 2957.
129. *Id.*
130. *Id.* at 2958.

addressed the constitutionality of a bypass option as applied.[131] Justice Marshall focused in large part on the factual findings of the district court and concluded that the Minnesota bypass provision was an excessive burden, not a remedy to an otherwise unconstitutional statute.[132] He argued that the statute "forces a young woman in an already dire situation to choose between two fundamentally unacceptable alternatives: notifying a possibly dictatorial or even abusive parent and justifying her profoundly personal decision in an intimidating judicial proceeding to a black-robed stranger."[133]

IV. ANALYSIS

A. *The Minor's Rights*

The historical attitude regarding children was one in which children were regarded as personal property of their parents or appendages of an entity, unable to develop an autonomous image.[134] In effect, children had no rights and were wholly subordinate to those who had power over them whether in the family, the factory or the community.[135] The Chancery Courts rejected appeals to subject parental authority to state intervention and ignored the wishes of children when they conflicted with those of their parents.[136] Furthermore, minors—not recognized as persons in their own right—could not consent to medical care, and physicians feared charges of assault and battery if they treated minors without first obtaining parental consent.[137]

Today, children are regarded as individuals, with constitutionally protected rights,[138] actively involved in decisions that affect their

131. *Id.*

132. *Id.*

133. *Id.* at 2960.

134. Nan Berger, *The Child, the Law and the State, in* CHILDREN'S RIGHTS: TOWARD THE LIBERATION OF THE CHILD 153, 179 (1971).

135. Maxine Greene, *An Overview of Children's Rights: A Moral and Ethical Perspective, in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 1, 7 (Patricia A. Vardin & Ilene N. Brody eds., 1979).

136. Berger, *supra* note 134, at 153. In effect, the father's rights were superior to those of the child since mothers had few legal rights in relation to their children. *Id.* "The right of a father to the custody and control of his children is one of the most sacred rights." *Id.* (quoting Lord Justice James, Chancery Court (1878)).

For a discussion of the protective nature of the current juvenile court system, see Laura J. Staples, Comment, *Parental Notification Prior to Abortion: Is Minnesota's Statute Consistent With Current Standards*, 14 WM. MITCHELL L. REV. 653, 662-67 (1988)(discussing Hartigan v. Zbaraz, 484 U.S. 171 (1987), and the ruling in Hodgson v. Minnesota, 853 F.2d 1452 (8th Cir. 1988)).

137. Harriet F. Pilpel, *Minors' Rights to Medical Care*, 36 ALB. L. REV. 462, 463 (1972). There are three recognized exceptions to the general rule requiring parental consent to medical treatment of a child. First, parental consent is not required in emergency situations involving an immediate danger to life or limb. *Id.* at 464. The second exception allows an emancipated minor to give effective consent provided he or she understands the nature and consequences of the treatment. *Id.* at 464-65. Third, mature minors, even if unemancipated, may give effective consent where the minor understands the nature and consequences of the treatment. *Id.* at 466.

138. *In re* Gault, 387 U.S. 1, 13 (1966)("neither the Fourteenth Amendment or the Bill of Rights is for adults alone"). Juveniles are entitled to due process protection including

lives.[139] Remnants of the common law are evident, however, in parental involvement statutes since some restrictions, having no legitimate basis as applied to adults, may be used to purportedly further significant state interests with respect to minors.[140]

Justice Powell, writing for the plurality in *Bellotti II*, stated three justifications for sanctioning greater state regulation of the constitutional rights of children: "[1] the peculiar vulnerability of children; [2] their inability to make critical decisions in an informed, mature manner; and [3] the importance of the parental role in child rearing."[141] The Supreme Court, however, has yet to articulate a general theory that properly balances the competing interests of the state, parent and child.[142] At the core of these rival concerns and the inconsistencies in the case law[143] preventing the formation of a standard "lies a controversy over the scope of the Constitution's protection of the individual's rights to autonomy and respect as a person."[144] Although the Supreme Court has addressed the minor's right to autonomy in developing the constitutional right to privacy, the right has been "unduly limited [by] the protection of biological parenthood."[145]

The inquiry, therefore, is "whether biological parenthood is the proper locus for the constitutional values of autonomy and respect inherent in the right to privacy."[146] In this sense, it would seem that re-

---

the rights to timely notice of the charges, assistance of counsel, the privilege against self-incrimination and the rights to confrontation and cross-examination. *Id.* at 49-57.

139. Berger, *supra* note 134, at 179.

140. Richard F. Thomas, Comment, *Distinguishing Guidelines for Minors' Abortion Rights*, 56 UMKC L. REV. 779, 780 (1988).

141. *Id.* (citing *Bellotti II*, 443 U.S. at 634); *see supra* note 35 and accompanying text. The Supreme Court stated that the protection of a minor's right to privacy would not be equated with that of an adult since a significant state interest, as opposed to a compelling state interest, would sustain restriction of a minor's fundamental rights. Carey v. Population Services Int'l, 431 U.S. 678, 692 (1977)(The Court also questioned whether the means employed by the New York legislature were related to the end it sought to achieve.).

142. David A.J. Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 3 (1980). Failure to articulate such a theory is to some extent a consequence of a judicial method focused on "cases and controversies" and "the idea that a decision need only articulate those principles that are necessary to the reasonable disposition of a particular case." *Id.*

143. *Id.* at 3-4. "Some decisions respect a child's right to autonomy, while others, inexplicably, ignore it." *Id.* (discussing Carey v. Population Services Int'l, 431 U.S. 678 (1977)(constitutional right to privacy extends to minor's access to contraceptives despite parental disapproval); Ingraham v. Wright, 430 U.S. 651 (1977)(denial of hearing or review after corporal punishment); Planned Parenthood v. Danforth, 428 U.S. 52 (1976)(parents cannot assert veto power over minor's constitutional right to privacy, abortion); Goss v. Lopez, 419 U.S. 565 (1975)(to satisfy due process concerns, students entitled to some form of hearing after suspension by school); Wisconsin v. Yoder, 406 U.S. 205 (1972)(parents' religious objections were sufficient to overcome the state's interest in education beyond the eighth grade); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969)(extending First Amendment rights to public school students); Prince v. Massachusetts, 321 U.S. 158 (1944)(state's interest in regulating child labor outweighed parents' religious interest in having child distribute religious literature)).

144. Richards, *supra* note 142, at 4.

145. *Id.*

146. *Id.* at 4-5. "Protecting the nuclear family by the right to privacy may only reinforce malign features of the American family." *Id.* at 5 n.36 (for a discussion of these

quiring a minor to notify an absent parent of her intent to obtain an abortion hinders the achievement of a proper balance between the opposing interests.

B. *The Judicial Bypass Mechanism*

While the judicial bypass may, in some instances, further the asserted state interest in protecting the welfare of pregnant minors without unduly burdening the minor's fundamental right, courts are selective in its application. The judicial bypass alternative allows only mature and best-interest minors to circumvent the rigors of notifying both parents. The mechanism provides no alternative to pregnant women deemed immature or to those minors whose best interests, according to the juvenile court, would not be served without parental notification. The limited application of the bypass, thus, forces the class of immature and non best-interest minors either to adhere to the two-parent notification requirement and its inherent burdens or to carry the fetus to term.

The judicial bypass mechanism, however, is not flawed merely because it excludes some pregnant minors from an alternative to parental notification. Rather, the procedure is warranted because the class of immature and non best-interest minors that are denied circumvention of the notice requirement arguably benefit from parental advice to a greater extent than their mature and best-interest counterparts. The real dilemma underlying the *Hodgson* holding concerns the ability to append a judicial bypass option to salvage an otherwise unconstitutional parental involvement requirement.

The judicial bypass option embodied in the Minnesota statute allowed the core two-parent notification requirement to pass constitutional muster.[147] Contrary to the holding of the Supreme Court, the incorporation of a judicial bypass mechanism does not negate the many burdens associated with the underlying two-parent notification requirement and thereby purge the statute of its unconstitutionality.[148] The judicial proceeding exists not for the purpose of making an unconstitutional notice provision constitutional, but because even a valid notice requirement may be imposed only on minors who are immature or whose best interests are not served by making the abortion decision without parental involvement.[149] The bypass alternative is intended only to address exceptions from a reasonable general rule and to thereby preserve the constitutionality of the substantive requirement.[150]

In contrast, statutes requiring single-parent involvement in the mi-

---

possible consequences, see ARLENE S. SKOLNICK, THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY 63, 134-35, 210-31 (2d ed. 1978).

147. The Court reaffirmed the *Bellotti II* guidelines for regulating a minor's fundamental right to obtain an abortion through the incorporation of a valid judicial bypass alternative. *See Hodgson*, 110 S. Ct. at 2970.

148. *See Hodgson*, 853 F.2d at 1468 (Lay, C.J., dissenting).

149. *Id.*

150. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J. dissenting). *See infra* notes 165-67 and

nor's abortion decision are reasonable general rules. Therefore, when an immature or non best-interest minor is denied judicial approval, she faces a single-parent involvement provision that balances the competing interests without unduly burdening her fundamental right.

C. *The Two-Parent Notification Requirement*

The Supreme Court effectively ignored the district court's extensive factual determinations that were based on the operation of the statute during the four and one-half years before it was enjoined.[151] The Court relied instead upon the incorporation of a valid judicial bypass alternative[152] to uphold the most restrictive parental notification statute in the Nation.[153]

In addition to Minnesota, only five[154] of the thirteen states[155] mandating parental *notification* before the minor may obtain an abortion impose a two-parent requirement. In comparison, five[156] of the twenty-three states[157] requiring parental *consent* impose a two-parent requirement. Each of the other five two-parent notification statutes—even where the statute does not include a valid judicial bypass[158]—provide exceptions to notice in the case of divorced or noncustodial parents, or where notice is otherwise impossible.[159] In contrast, the Minnesota statute provides no exception for notice to a divorced, noncustodial or disinterested biological parent. Furthermore, the statute makes no exception to notice for a parent, custodial or not, whom the minor considers likely to react abusively to notification, unless the minor declares that

---

accompanying text for a discussion of the burdens associated with the two-parent notification requirement.

151. *See Hodgson*, 648 F. Supp. at 759-70.

152. *Bellotti II*, 443 U.S. at 622.

153. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

154. *See* ARK. STAT. ANN. §§ 20-16-801 to 808 (Michie Supp. 1989); IDAHO CODE § 18-610(6) (1987); ILL. ANN. STAT. ch. 38, ¶ 81-63 to 68 (Smith-Hurd Supp. 1991); TENN. CODE ANN. § 39-4-202 (Supp. 1989); UTAH CODE ANN. § 76-7-304 (1990).

155. The seven parental notification statutes that impose one-parent requirements are as follows: MD. HEALTH-GEN. CODE ANN. § 20-103 (Supp. 1991); W. VA. CODE § 16-2F-3 (1985); MONT. CODE ANN. § 50-2-107 (1991); NEV. REV. STAT. ANN. § 442.255 (Michie 1986); GA. CODE ANN. §§ 15-11-110 to -118 (Michie 1990); NEB. REV. STAT. § 28-347 (1989); OHIO REV. CODE ANN. § 2929.12 (Anderson 1987).

156. DEL. CODE ANN. tit. 24, § 1790 (1987); KY. REV. STAT. ANN. § 311.731 (Michie/Bobbs-Merrill 1990); MISS. CODE ANN. §§ 41-41-51 to 57 (Supp. 1990); MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983); N.D. CENT. CODE §§ 14-02.1-03.1 to 04 (1991).

157. The 18 other consent statutes are as follows: ALASKA STAT. § 18.16.010 (1991); COLO. REV. STAT. § 18-6-1 (1986); N.M. STAT. ANN. § 30-5-1 (Michie 1991); S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986); WASH. REV. CODE ANN. § 9.02.070 (West 1988); ARIZ. REV. STAT. ANN. § 36-2152 (West Supp. 1990); CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1991); FLA. STAT. ANN. § 390.001 (West Supp. 1991); 18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1991); ALA. CODE §§ 26.21-1 to 5 (Supp. 1990); IND. CODE ANN. § 35-1-58.5-2.5 (Burns 1985 & Supp. 1991); LA. REV. STAT. ANN. § 1299.35.5 (Supp. 1991); ME. REV. STAT. ANN. tit. 22, § 1597-A (West Supp. 1990); MICH. COMP. LAWS ANN. §§ 722.902 to .909 (West Supp. 1991); MO. ANN. STAT. § 188.028 (Vernon Supp. 1991); R.I. GEN. LAWS § 23-4.7-7 (1989); S.C. CODE ANN. §§ 44-41-30 to 37 (Law. Co-op. Supp. 1990); WYO. STAT. § 35-6-118 (Supp. 1991).

158. After *Hodgson*, statutes that require parental involvement without providing a judicial bypass option for mature and best-interest minors are presumptively unconstitutional.

159. *See supra* note 156 and accompanying text.

she is a victim of physical or sexual abuse.[160]

The infirmities of this statute become more evident when one considers the characteristics of the modern-day family. National statistics indicate that approximately one out of every two marriages ends in divorce, and a study suggests that only fifty percent of the minors residing in Minnesota live with both biological parents.[161] Yet the statute makes no exception for minors residing in a single-parent home even where the minor has voluntarily notified the custodial parent. As a result, twenty to twenty-five percent of the minors who choose to initiate the judicial bypass procedure are either accompanied by one parent or have voluntarily consulted one parent, but are nonetheless required to endure the burdens of the court proceeding.[162]

The two-parent notification requirement also ignores the existence of dysfunctional two-parent homes. A pregnant minor, residing in such a home, may choose to consult with one parent, but not the other, out of fear of psychological, physical or sexual abuse directed toward her or the notified parent. Considering that domestic violence occurs in at least two million families in the United States,[163] the trauma inflicted upon a pregnant minor in such circumstances is exacerbated by the burdensome choice of facing either the two-parent notice requirement or a judicial bypass proceeding.

Only Justice Stevens, in a separate dissenting opinion, recognized and addressed the significant distinction between a statute requiring the involvement of both parents in the abortion decision and a statute requiring the involvement of only one.[164] The *Ashcroft* Court, using an ends-means analysis, upheld a statute requiring the pregnant minor to either secure the consent of one parent or succeed in a judicial bypass proceeding before she could obtain an abortion.[165] Justice Stevens noted that a two-parent notification provision must also be tested by its relationship to the legitimate state interests that it purportedly reflects.[166] States have a "strong and legitimate interest in providing the pregnant minor with the advice and support of a parent during the decisional period."[167] A single-parent provision, whether it requires consent or notification, combined with a judicial bypass alternative, furthers that legitimate interest without unduly burdening the minor's fundamental right. A provision, however, that requires a pregnant minor and

160. MINN. STAT. ANN. § 144.343(4)(c) (West 1989). Minors who are victims of physical or sexual abuse are often reluctant to report such abuse in order to invoke the exception. Reporting often results in parental notice and lost confidentiality. *See Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring).

161. *Hodgson*, 648 F. Supp. at 768. *See* Brief for American Psychological Association as Amici Curiae in Support of the Petitioners at 12-13, Hodgson v. Minnesota, 110 S. Ct. 2629 (1990) (No. 88-1125)(by age 17, nearly 70% of white children, and 94% of black children, will have lived in single-parent homes for some period of time).

162. *Hodgson*, 648 F. Supp. at 769.

163. *Id.* at 768.

164. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J., dissenting).

165. *See supra* notes 53-59 and accompanying text.

166. *Hodgson*, 110 S. Ct. at 2948 (Stevens, J. dissenting).

167. *Id.*

a consenting parent to petition a court to override required notice to the second parent constitutes an "unjustified intrusion into the family's decisional process."[168] The "minor and her custodial parent, by virtue of their major interest and superior position, should alone have the opportunity to decide to whom, if anyone, notice of the minor's abortion decision should be given."[169]

V. CONCLUSION

The Supreme Court in *Hodgson* further retreated from *Roe* by upholding unjustified regulation of a minor's right to choose abortion. Although the conservative composition of the Court coupled with the appropriate case may once again provide the states with limitless control over a woman's freedom to choose abortion,[170] *Hodgson* seems limited by allowing only for two-parent involvement in the minor's decision where the statute includes a valid judicial bypass alternative. The rule stands though Minnesota failed to establish that the two-parent notification requirement was narrowly drawn to further, or actually served during its operation,[171] the asserted state interests in protecting the welfare of pregnant minors, promoting intrafamily communication or improving family integrity in any meaningful way.[172] The statute actually served to undermine those interests because minors who would ordinarily notify one parent were often dissuaded from doing so when presented with the opportunity to avoid notice through a judicial bypass alternative.[173] Furthermore, a minor does not make better informed decisions upon counsel by a disinterested parent nor is family integrity fostered by forcing the minor and her custodial parent to notify the noncustodial parent of the minor's decision to obtain an abortion.[174]

The Supreme Court has, by implication, elevated the interests of noncustodial parents in the activities of their children to a level which surpasses the combined interests of the custodial parent and pregnant minor. After *Hodgson*, a pregnant minor who gains the consent of one parent must either receive judicial approval of her decision or notify a person who may have a propensity for abuse toward the minor or the consenting parent.

The Court should have held the two-parent notification requirement, which provides no exception for divorce or desertion, unconstitutional per se, and thus forced the Minnesota legislature to enact a statute

168. *Id.* at 2949.

169. *Id.*

170. President Bush appointed David H. Souter and Clarence Thomas to replace Justices William J. Brennan and Thurgood Marshall, respectively. Although Justices Souter and Thomas have yet to articulate their views on a right to abortion, they will likely vote to further restrict the minor's fundamental right.

171. For a discussion of facial and as-applied challenges, see Lisa K. Richmond, Note, *The Art of Constitutional Bootstrapping A Minor's Right to Abortion: Hodgson v. Minnesota*, 34 S.D.L. REV. 158 (1989)(analysis of the Eighth Circuit's determination).

172. *Hodgson*, 648 F. Supp. at 769.

173. *Id.*

174. *See Hodgson*, 110 S. Ct. at 2955 (Marshall, J., dissenting).

consistent with those of the other thirty-five states that require only one-parent involvement in a minor's abortion decision. A single-parent notification requirement and an appended judicial bypass option better balance the legitimate interests of the state in protecting pregnant minors, the parents' interests in the control and well-being of their child and the minor's need for autonomy. Such balance is accomplished without forcing compliance to any elusive ideal of "the family" or exacerbating an otherwise traumatic experience.

The rights of children must develop into a concept widely accepted as a primary social value that influences social policy and planning at every level.[175] Moreover, the acceptance of the child as a person with rights independent from those of his or her parents admits fully to the child's individual human and legal rights.[176] Children should be encouraged to consult their parents, however, when they are faced with making decisions as fundamental to their future as the choice to obtain an abortion.[177] In this context, "[p]erhaps the term 'parental responsibility' should be substituted for 'parental rights,' emphasizing the social obligation and accountability rather than suggesting a kind of finality that cannot rationally be granted."[178] The important societal interests in protecting the welfare of our minors and encouraging communication between parent and child should only be reflected in abortion regulation that balances the competing interests of the state, parents and minor by providing a method, such as the judicial bypass alternative, to address exceptions from a constitutionally valid general rule.

James Shortall

175. Albert E. Wilkerson, *Children's Rights*, *in* THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY 305 (Albert E. Wilkerson, ed., 1973).

176. *Id.*

177. *Cf.* Richards, *supra* note 142, at 57.

> [T]he willingness to allow people to experiment, make their own mistakes, and learn from bearing the consequences is part of the education in self-awareness that rights cultivate. We allow adolescents their rights to privacy because it appears, in the contexts of contraception and abortion, that we thus better respect their potential for dignity. Any mistakes they make in exercising these rights not only do not appear irreparable but also appear to be of the kind that will better enable them to achieve a rational vision of their own good.

Id.

178. Wilkerson, *supra* note 175, at 305-06. *See also* Richards, *supra* note 142, at 57.

> [A]dults have a special responsibility for affording the kind of education that will enable children to exercise these rights wisely. It is cruel folly to extend the right of privacy to children and not, concomitantly, to ensure the kind of sexual education that will enable them to use these rights responsibly. Richards, *supra* note 142, at 57.

APPENDIX 1
Consent Statutes

State Statute	Parental Consent	Bypass	Other Requirements or Exceptions
ALA. CODE §§ 26.21-1 to 5 (Supp. 1990)	Parent or Legal Guardian	Yes	• Includes legislative purpose & findings; • Incest exception; • Medical Emergency Exception.
ALASKA STAT. § 18.16.010 (1991)	Parent or Guardian	No	
ARIZ. REV. STAT. ANN. § 36-2152 (West Supp. 1991)	Parent or Legal Guardian	Yes***	• Medical Emergency Exception.
CAL. HEALTH & SAFETY CODE § 25958 (West Supp. 1991)	Parent or Legal Guardian	Yes***	• Medical Emergency Exception.
COLO. REV. STAT. § 18-6-101 (1986)	Parent or Guardian	No	
CONN. GEN. STAT. ANN. § 19a-900 to 602 (West Supp. 1991)	None	N/A	• Counseling of Minor required; • Medical Emergency Exception.
DEL. CODE ANN. tit. 24, § 1790 (1987)	Parents or Guardians residing in household	No	• Consent of one parent or guardian if minor does not reside with either parent.
FLA. STAT. ANN. § 390.001 (West Supp. 1991)	Parent, Custodian or Legal Guardian	Yes***	
IND. CODE ANN. § 35-1-58.5 to 2.5 (Burns 1985 & Supp. 1991)	Parent or Legal Guardian	Yes	• Physician may petition court for waiver of notice; • Medical Emergency Exception.
KY. REV. STAT. ANN. § 311.732 (Michie/ Bobbs-Merril 1990)	Both Parents, if available, or Legal Guardian	Yes***	• Medical Emergency Exception.
LA. REV. STAT. ANN. § 1299.35.5 (West Supp. 1991)	Parent, Legal Guardian or Tutor	Yes	
MASS. GEN. LAWS ANN. ch. 112, § 12S (West 1983)	Parents	Yes	• Deceased/Divorced or Unavailable Parent Exception.
ME. REV. STAT. ANN. tit. 22, § 1597-A (West Supp. 1990)	Parent, Guardian or Adult Family Member	Yes	• Counseling Required.
MICH. COMP. LAWS ANN. §§ 722.902 to 909 (West Supp. 1991)	Parent or Legal Guardian	Yes	• Medical Emergency Exception.
MISS. CODE ANN. §§ 41-41-51 to 57 (Supp. 1990)	Parents or Legal Guardian	Yes***	• Medical Emergency Exception; • Divorced/Unavailable Parent Exception; • Incest/Rape Exception.
MO. ANN. STAT. § 188.028 (Vernon Supp. 1991)	Parent or Guardian	Yes	

N.M. STAT. ANN. § 30-5-1 (Michie 1991)	Parent or Guardian	No	
N.D. CENT. CODE §§ 14-02.1-03.1 to 04 (1991)	Parents or Legal Guardian	Yes	• Includes legislative purpose & intent; • Deceased/Divorced Parent Exception; • Medical Emergency Exception.
18 PA. CONS. STAT. ANN. § 3206 (Purdon 1983 & Supp. 1991)	Parent	Yes***	• Medical Emergency Exception; • Divorced/Unavailable Parent Exception; • Incest Exception.
R.I. GEN. LAWS § 23-4.7-6 (1989)	Parent	Yes	• Legal Guardian may consent if both parents are deceased or unavailable.
S.C. CODE ANN. § 44-41-30 to 37 (Law. Co-op. Supp. 1990)	Parent, Legal Guardian, Grandparent or Person acting *in loco parentis*	Yes	• Medical Emergency Exception; • Incest Exception.
S.D. CODIFIED LAWS ANN. § 34-23A-7 (1986)	Parent or Person acting *in loco parentis*	No	
WASH. REV. CODE ANN. § 9.02.070 (West 1988)	Legal Guardian	No	
WIS. STAT. ANN. § 146.78 (West 1990)	None	N/A	• Parental notice encouraged, but not required.
WYO. STAT. § 35-6-118 (1988)	Parent or Guardian	Yes	• 48 hours Notice; • Medical Emergency Exception.

Generally, parental consent and notice statutes apply to pregnant minors who are under eighteen years of age, unmarried, and otherwise unemancipated. Statutes providing a judicial bypass option typically waive the parental involvement provision where the minor establishes either that she is mature and capable of giving informed consent or that the abortion is in her best interest.

*** Statute is currently enjoined from enforcement.

APPENDIX 2
Notification Statutes

State Statute	Parental Notice	Bypass	Other Requirements or Exceptions
ARK. CODE ANN. §§ 20-16-801 to 808 (Michie Supp. 1989)	Parents or Guardian	Yes	• 48 hours Notice; • Medical Emergency Exception; • Physical Abuse/Neglect Exception; • Incest/Rape Exception • No notice where parent has not been in contact with custodial parent for 1 year.
GA. CODE ANN. §§ 15-11-110 to 118 (Michie 1990)	Parent, Guardian or Person acting *in loco parentis*	Yes	• 24 hours Actual Notice; • 48 hours Constructive Notice; • Medical Emergency Exception.
IDAHO CODE § 18-609(6) (1987)	Parent(s)* or Legal Guardian	No	• Notice if possible; • 24 hours Notice.
ILL. ANN. STAT. ch. 38, ¶¶ 81-63 to 68 (Smith-Hurd Supp. 1991)	Parents or Legal Guardian	Yes***	• Divorce/Unavailable Parent Exception; • 24 hours Actual Notice; • Medical Emergency Exception; • Incest Exception.
MD. HEALTH-GEN. CODE ANN. § 20-103 (Supp. 1991)	Parent or Guardian	No**	• Reasonable Effort to Give Notice.
MINN. STAT. ANN. § 144.343 (1988)	Parents or Guardian	Yes	• 48 hours Notice; • Reasonably Diligent Effort; • Medical Emergency Exception; • Physical/Sexual Abuse Exception.
MONT. CODE ANN. § 50-2-107 (1991)	Parent, Custodian or Legal Guardian	No	
NEB. REV. STAT. § 28-347 (1989)	Parent or Legal Guardian	Yes	• 24 hours Actual Notice; • 48 hours Constructive Notice; • Medical Emergency Exception.
NEV. REV. STAT. ANN. § 442.255 (Michie 1986)	Custodial Parent or Guardian	Yes***	• Medical Emergency Exception.
OHIO REV. CODE ANN. § 2929.12 (Anderson 1987)	Guardian or Custodian		• 24 hours Actual Notice; • 48 hours Constructive Notice After Reasonable Effort; • Physical/Sexual & Emotional Abuse Exception.
TENN. CODE ANN. § 39-15-202(f) (1991)	Parent(s)* or Legal Guardians	No	• Medical Emergency Exception; • 2 day Notice.

UTAH CODE ANN. § 76-7-304 (1990)	Parent(s)* or Legal Guardians	No	• Notice, if possible.
W. VA. CODE § 16-2F-3 (1985)	Parent or Legal Guardian	Yes***	• 24 hours Actual Notice; • Reasonable Effort to Give Notice or 48 hours Constructive Notice; • Counseling Referral; • Medical Emergency Exception.

Generally, parental consent and notice statutes apply to pregnant minors who are under eighteen years of age, unmarried, and otherwise unemancipated. Statutes providing a judicial bypass option typically waive the parental involvement provision where the minor establishes either that she is mature and capable of giving informed consent or that the abortion is in her best interest without parental involvement.

* Idaho, Tennessee and Utah require a pregnant minor to notify her "parents" of her intent to obtain an abortion, but do not specify whether "parents" refers to either of the parents or both parents. Nor do these states specify whether notice to one parent would constitute constructive notice to the other parent. *Hodgson*, 110 S. Ct. at 2931 n.5.

** Maryland and West Virginia allow a physician to perform an abortion on a pregnant minor, without parental notification, where the physician determines—in his or her professional judgment—that the minor is either mature and capable of giving informed consent or where parental notification would not be in the minor's best interest. MD. HEALTH-GENERAL CODE ANN. § 20-103(c)(i) (Supp. 1991)(physician may also perform the abortion, without parental notice, where the physician determines that notice may lead to physical or emotioinal abuse of the minor); W. VA. CODE § 16-2F-3(c) (1985)(the physician waiving the notice requirement must not be associated professionally or financially with the physician who is to perform the abortion; physician's waiver is independent from the judicial bypass alternative of § 16-2F-4).

*** Statute is currently enjoined from enforcement.

IN SEARCH OF MULTI-DISCIPLINARY ENLIGHTENMENT TO THE JUDICIAL STANDARD OF BEST INTEREST OF THE CHILD: THE ABA RIPON CONFERENCE: FAMILY LAW AND THE BEST INTEREST OF THE CHILD

HONORABLE MARIANNE E. BECKER*

On April 11, 1991, a conference concerning children in the legal system was convened in Wisconsin on the campus of Ripon College. The conference, as a conference, was not a remarkable event. Ripon College hosts many conferences. Lawyers and judges frequently meet to discuss the adequacy of forum in addressing children's needs.[1] The American Bar Association, Family Law Section, lists no less than eight standing committees which continually review the law and social trends relative to the affected needs of children in court.[2] The respective state bar associations multiply this reviewing process at least fifty-fold. Mediators, social workers and other professionals who serve as adjuncts in support of courts meet with similar frequency and like dedication in an effort to ascertain and respond to specific needs of children in court. Often, leaders and scholars of other disciplines are invited to address gatherings and conferences of attorneys and judges on specific issues; but generally, it can be said that lawyers, judges and other governmental professionals most frequently talk to each other about the best interests of children.

The idea for "another kind of conference" began in a 1988 meeting discussion within the Alimony, Maintenance and Child Support Subcommittee of the Family Law Section.[3] The lawyers and judges on that subcommittee were then engaged in examining the link, if any, between the increasing numbers of children living in poverty or below the poverty line and the concept of no-fault divorce.[4] A seminal and controver-

* State of Wisconsin Circuit Court Judge, Waukesha County, 1985 to present. Chair of the international multidisciplinary group "Toward 2020: Family Law and 'The Best Interest of the Child'." B.A. 1963, Ripon College; J.D. 1966, Marquette University.

1. The American Bar Association/Family Law Section and the Johnson Foundation co-sponsored an October, 1988 national conference at the Wingspread Conference Center in Racine County, Wisconsin. The conference was entitled: *The Law and Contested Child Custody*. Most of the conference transcript was published in August, 1989 under the title: ABA SECTION OF FAMILY LAW, CHILD CUSTODY DISPUTES: SEARCHING FOR SOLOMON (1989). The opinions expressed by the experts at Wingspread provided the impetus for the ABA/Ripon inquiry.

2. The Family Law Section of the 1991-92 ABA Handbook lists thirty-eight additional standing committees, which can also be said to address the needs of children.

3. In 1988 the author was Chair of the Alimony, Maintenance and Child Support Subcommittee.

4. Although no book has been published at this writing, the author believes the concept will be included in a future ABA book entitled: TWENTY YEARS OF NO-FAULT.

sial concern was whether no-fault divorce was destructive to the best interests of children born into an intact family unit. That discussion led to further questions: Whether a troubled parental situation in an intact family is less, more or as damaging to children, than a marital dissolution; whether family life is necessary to the development of the child; if so, whether a child's needs supersede parental rights; and if so, to what degree.

The committee observed that personal parental decisions often appeared to be in derogation of the developmental best interests of the children. Yet the law and lawyers are not particularly well educated in understanding the developmental needs of children beyond food, shelter and clothing. Before positing any more legislative solutions to child-orientated issues in court, it was determined that the law and lawyers and judges should be educated in the best interests of the children, *by those who understand all the developmental needs of children, as these needs are ascertained by other professional disciplines.*

The idea to more closely examine the situation of children of divorced parents, and to do so as a multi-disciplinary exercise with reference to the children's best interest, was submitted to the Family Law Section leadership who endorsed the formation of a de facto committee to study the issue. This author was appointed Chair of the de facto committee in the summer of 1989, and, with the assistance of the other members of the committee,[5] began a search for a co-sponsoring entity. By autumn, Ripon College had accepted an invitation to co-sponsor the inquiry, and Robert Hannaford, Ph.D. and Douglas Northrup, Ph.D of the Ripon College faculty joined the committee.

The dedication of the de facto committee was unquestionable. Numerous meetings began. Telephone meetings were attempted but limited in-depth discussion. Face-to-face meetings were necessary, and they were held each month in Chicago or Milwaukee at substantial unreimbursed financial and scheduling costs to the scholars and the attorneys.

The Ripon College committee members were not lawyers; rather, they were scholars and academicians appointed to enrich the diversity of overview and experience. Each group educated the other, preparatory to examination of the judicial "best interests" standard. While the scholars originally accepted the best interests standard as flexible and straightforward, they were concerned to learn that the various states' legislatures were free to require their judges to interpret the best interests standards in keeping with specific factors recognized in that state.[6]

---

5. The author would like to express her gratitude for the work of attorney committee members Thomas Bailey, Esq., Milwaukee, Wis.; John Becker, Esq., Brookfield, Wis.; Ira Lurvey, Esq., Los Angeles, Cal.; Margaret McGovern, Esq., Chestnut Hill, Mass.; Thomas Mulroy, Esq., Pittsburgh, Pa.; Richard Podell, Esq., Milwaukee, Wis.; and Daniel Schultz, Esq., Wash., D.C., a Ripon college alumnus, who was most helpful in interesting the college in this project.

6. For example, in Wisconsin, legal custody and physical placement decisions are mandated under WIS. STAT. § 767.24 (Supp. 1991) and appropriate case law. The legisla-

Noting that the factors might be different among adjoining states of the same region, they raised questions: Was the nature of children's needs changed by passing from Wisconsin to Illinois? Are active parenting skills significantly altered at a state line? Who determines the factors and on what basis? Where was the statutory definition of the developmental needs of the child including the child's moral developmental needs? The lawyers, on their part, learned that existing legislative factors might not reflect the children's actual needs; that parental rights to have and raise their natural children might conflict with the children's developmental needs *if* judges interpreted those children's needs as children's *rights*.

Even as the array of questions before it expanded, the committee's commitment to build a bridge of understanding between the child and his or her needs intensified. Within the committee, it became clear that the law was, in fact, the best means by which to affect the best interests of the child. However, lest the standard be relegated to a platitude, or worse, to an institutionalized expression in justification of legal efficiency at the expense of the child, the inquiry must extend beyond children in divorce and identify, *a priori*, the needs of *the child*, that the law should substantively and procedurally promote.

To many readers, this retreat to the basics may appear obvious, but it was in fact, begrudgingly concluded. After many months, a mission statement was carefully prepared and disseminated to delineate what would become the conference charge.[7] In essence, it states:

---

ture has established eleven criterion which must be considered. Sub-section 5 of that statute provides:

> *Factors in custody and physical placement determinations.* In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one potential custodian over the other on the basis of the sex or race of the custodian. The court shall consider reports of appropriate professionals if admitted into evidence when legal custody or physical placement is contested. The court shall consider the following factors in making its determination:
>
> (a) The wishes of the child's parent or parents.
>
> (b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
>
> (c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
>
> (d) The child's adjustment to the home, school, religion, and community.
>
> (e) The mental and physical health of the parties, the minor children and other persons living in a proposed custodial household.
>
> (f) The availability of public or private child care services.
>
> (g) Whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party.
>
> (h) Whether there is evidence that a party engaged in abuse of the child, as defined in §§ 48.981(1)(a) and (b) or 813.122(1)(a).
>
> (i) Whether there is evidence of interspousal battery as described under § 940.19 or domestic abuse as defined in § 813.12(1)(a).
>
> (j) Whether either party has or had a significant problem with alcohol or drug abuse.
>
> (k) Such other factors as the court may in each individual case determine to be relevant.

7. The document was originally entitled TOWARD 2020: FAMILY LAW AND 'THE BEST

Survivors of the past two decades in American society bear witness to a national crisis in the lives of American children.

Traditionally, we have held the ideal of the family as the basic cell of society, centered around a marital union, the adult partners charged with the mutual responsibility for the nurturance, education and security of the children.

Given the frequency of divorce, the number of children born out of wedlock and the deprivation of a traditional cultural consensus, increasingly society has turned to the legislatures and courts of the many states which have reacted to provide various solutions to child oriented issues.

The legal community in most jurisdictions currently relies on the standard of "best interest of the child(ren)" to guide the development of law in family/child issues. When a cultural consensus of marriage-until-death prevailed, when divorce if not rare, was uncommon, most child-centered issues were resolved in family rather than in court. Society had little need to challenge, define or amplify the legal "best interest" standard. Affected were the few, not the many.

Frequently, the legislative branch interprets and confines "the best interest standard" to an economic context. Child support percentage guidelines, inter-state collection mandates and equitable property division statutes are examples of legislation directed to the correction of highly visible financial problems relating to children. However, our legislatures, and in turn, courts and lawyers, have given too little consideration to the non-economic ethical components of the "best interest of the child," the lack of which may profoundly impact on the ability of a child to mature into a responsible adult.

But, legislators buffeted by special interests, family law practitioners attempting to resolve the individualized problems of their clients, judges responding to the demands of too crowded calendars, seldom have the opportunity to examine the theoretical-ethical underpinnings of the law which they fashion, promote and enforce. When there is opportunity for discourse, most often, it is among themselves.

Law is a means, not an end. Law provides structure, order and sanctions to the substantive thought of other disciplines, in the absence of which, law is inherently arbitrary.

The existence of the child crisis raises fundamental questions about the role of family and of Law in the attempt to promote and secure the best interests of the child and the best interests of society, if these concepts are as they appear to be: mutually dependent.

While the legal profession, alone, cannot solve societal problems, the legal profession must be a part of the solution. The legal profession, the academic disciplines, and others concerned with serving the well-being of children must interact to

INTEREST OF THE CHILD.' Except for the specifics of the invitation to the conference, the statement above is quoted as written.

> examine that which we think we have known, and determine whether that wisdom shared can provide societal focus in the 21st Century.
>
> For those reasons the American Bar Association, Family Law Section and Ripon College will sponsor and facilitate an interdisciplinary symposium entitled "Toward 2020: The Family and the Best Interest of the Child." The symposium will seek the substantive thought of the various disciplines. It will ask: What elements of family life are necessary for a child to acquire the attitudes and values by which to become a healthy and responsible adult in society; and what impact should this identification have on family law and social policy in the 21st Century?
>
> To that end we propose to gather a panel of legislators, lawyers, judges, clergy, and representatives of the disciplines of philosophy, anthropology, history, sociology, psychology and psychotherapy on the campus of Ripon College from April 11 through April 14, 1991.
>
> The discussion should be spirited, the exchange of views insightful. We are looking for a new consensus and expression of appropriate measures toward which to direct the best interests of children as they relate to family and society.

While the committee had succeeded in preparing a focused statement of its inquiry, the scope of that inquiry had expanded exponentially. Under this statement, the committee could be confronted with an apparently endless inquiry in a controversial area that transcends many disciplines, with token funds and limited time to accomplish the task.[8] However, in the view of this author, this "labored conclusion in committee" may be one of the most significant determinations of the committee and of the conference that followed. The statement represents our reluctant realization that there is no easy way and no quick fix; that limiting an inquiry to a part of the problem produces limited if not skewed results; that the needs of the child are multiple; and that the best interests of the child are as dynamic as the society in which she or he lives.

The committee agreed that the ABA/Ripon conference would consist of scholars of the several disciplines who would begin at the beginning, identify the basics and hopefully establish a continuing forum through which the various disciplines can collaborate in the definition and refinement of the judicial standard of best interests of the child. The committee proceeded to locate and invite individuals who had acquired experience and professional distinction as academicians in philosophy, psychology, history, anthropology; and as practicing psychologists, social workers, educators, psychiatric counsellors, legislators, lawyers and doctors. The dedication of those who accepted was manifest by the lack of honoraria, special recognition of individual achievement or lavish surroundings. Additionally, the conferees agreed

8. The conference had many "ifs," funding chief among them. The conference dates and location, however, were never in doubt after January, 1990.

to read hundreds of pages of pre-conference materials submitted to them and to seriously consider working for the best interest of the children after the conference concluded. These limitations, imposed by the mutual tenets of cognitive direction and limited funding, were the making of the conference. Conferees came to examine what they thought they knew and to confront myths and their own personal bias(es). Each committed to think more than to act, a concept difficult for many professionals often motivated by expectation to produce visible and immediate solutions, the bottom line of the "fix-it yesterday" era in which we live.

From Thursday, April 11, through Sunday, April 14, 1991, the conferees met, endured the changing Wisconsin weather, rejoiced in the gracious hospitality of Ripon College and formally listened, conferred and debated with each other until as late as 11:00 p.m. Historians and child development specialists put their particular issues into perspective. Educators and anthropologists discussed the issue of the nuclear American family as myth, image and/or expectation vis-a-vis our actual history. Physicians, child psychologists and behaviorists explained child development from pre-birth through adolescence. They concentrated their explanation on birth through age three, the period of time during which the child learns the quickest and his or her moral, intellectual and emotional development are most influenced. It is also the period during which the child experiences the greatest amount of parental or child care-giver modeling.

The conferees met as a large group, then were split into smaller groups as diverse in education and academic background as possible. With the help of word processing equipment and Ripon College students, the points of consensus of the various groups were submitted in writing to the larger group for discussion and further critical examination.

The exchange of views among the conferees proved to be a valuable learning experience in itself. For instance, that which might have seemed self-evident to the attorney or psychologist was questioned by the analysis of the historian. That which appeared to be an obvious solution to child development specialists was frequently challenged by lawyers, ever-mindful of constitutional rights of the natural parents in the care, custody and control of their children. This mutual introduction was beneficial, but time consuming and limited the symposium's ability to more closely refine the following points of consensus and/or to organize any scheme of implementation.[9]

In summary, the conclusions receiving the greatest consensus among conferees are as follows:[10]

9. Refinement and implementation will hopefully be the charge to later conferees.

10. The author compiled this list from small group consensus sheets and her personal notes. She took license, for the purpose of this article, to list only those points that met with significant approval and/or were within the meeting mission. For example, small groups listed "guaranteed parental leave for a minimum of four months in aspects of the labor force" and noted "we are in a hell of a mess," but such observations were omitted.

1. A child develops quickly and after birth through the first three years of life, learns chiefly by the example of his or her early caregivers, usually his or her natural parents.

2. Every child requires a secure, consistent, supportive, nurturing and loving environment provided by caring adults throughout its development.

3. These needs of the child must be more carefully defined and expressed in terms of psychological, moral and educational development.

4. A child's first experience of community is in its family. The raising of children within a natural family is expressly endorsed and promoted.

5. Children are the building blocks of our society; each must enjoy the respect of the other and understand his or her role in interdependency.

6. Parenting or child rearing must be elevated to national prominence; every member of society should bear a moral responsibility for the proper care of all the children of the community.

7. While all families require the support of the community, some families require more intensive support. Where the methods of raising a child in a family are inconsistent with the child's developmental needs, it is appropriate that society intervene to safeguard the child through the informed efforts of the extended family, close community associations and/or welfare agencies respectively.

8. The physical, moral, intellectual and emotional-developmental stages of a child should be widely disseminated, formally taught in schools and considered by all whose conduct affects the life of the child in order to avoid predictable developmental, intellectual, emotional, and moral damage.

9. There are predictable developmental crises in a child's life and appropriate times, many also predictable, to intervene on behalf of a child.

10. Mindful that there are different methods to encourage the moral intellectual and emotional development of the child, society must strictly avoid cultural, ethnic, gender or socio-economic stereotyping of children.

11. When a child-centered issue, especially that of child custody, is before the court, the standard of best interests of the child must consider that:

A. Individual moral responsibility is as necessary to societal continuation as it is to the physical development of each individual in society. The individual moral development of the child is of equal importance with that of its physical well-being.

B. Children learn moral responsibility primarily from the example of their parents or caregivers. Education as to moral responsibility is

reinforced by repetition, verbal declaration and ongoing discipline appropriate to the child's developmental capacity.

C. Moral behavior is culturally dependent; parental lifestyle will influence the moral development of the child. The child's moral needs are its right, equal or superior to the rights of the parent.

D. The best interests of the child must be supported and enforced by the work of other disciplines and cannot be determined by the legal processes alone.

E. The litigants to a disputed custody proceeding should be educated as to the child's needs in an effort to mediate a determination separately from the other issues confronting the parties.

F. Judges, lawyers and other helping professions should be educated in child development and family dynamics as part of law school curriculum or continuing education.

Many conferees were surprised at their findings. Those non-legal/non-judicial delegates were clearly concerned that the best interests standard was often over-shadowed by a struggle with legally asserted parental rights. Legal/judicial conferees were likewise somewhat taken aback that current legislatively endorsed factors, which often disallow parental lifestyle issues from consideration in child placement matters, might be in opposition to the actual developmental best interest of the child.[11]

All parties concluded that the moral development of all children was necessary to the healthy maintenance and continuance of society and the advancement of appropriate social goals. The statement was inherent that moral development must be promoted, particularly in a non-religious state where parents or child rearers, rather than the church, are expected to exemplify and convey to children moral principles of honesty, trust, loyalty and respect for human life, property and culture.

As the conferees concluded their deliberations, many resolved to continue multi-disciplinary efforts and their own personal efforts to promote public policy and to provide protection of all the needs of children, not only their financial needs.[12] The participants felt the weight of their four days deliberations; yet, they were refreshed and encouraged by their fellow conferees, three-quarters of whom opted to accept the challenge to continue to work together to promote a multi-disciplinary effort for children both in and out of court.

As Dean Northrop closed the conference, he reminded the group that "137 years ago, about fifty people gathered in Ripon to confront an

11. Attorneys expressed more distress than non-legal conferees. For example, legal conferees took note of the attachment theory argument vis-a-vis the right of the mother to work outside the home and away from the infant. A second example, early intervention to prevent child abuse/neglect or infant failure to thrive, flies in the face of parental notification and the opportunity to correct conditions authorized by various jurisdictional statutes.

12. *See* mission statement, *supra* note 7 and accompanying text.

issue of concern, and their efforts contributed to the founding of a new political party dedicated to the abolition of slavery.[13] A few people deeply committed can make a difference if we care enough, work enough and draw on our resources and those of others."[14]

From those moving words, action must follow.

Children have necessary developmental needs which are known and predictable. While theories to meet these needs may be in or out of vogue or favor, the child's needs do not fluctuate. When a court intervenes in a particular matter, it must employ the best interests standard flexibly and effectively for that particular child, in keeping with what we know about the developmental needs of all children. Judicial platitudes, legal presumptions and currently fashionable legislatively mandated factors must not be the fulcrum of the best interests balancing decision; rather, the needs of the child must be the cornerstone of child-centered decisions.

The basic cell of tomorrow's society is today's developing child. The developmentally healthy child is likely to grow to be a fulfilled, mature adult. If a child's nurturance needs have been met, that individual will be willing and likely to assume adult responsibilities of citizenship. If a child's developmental needs have not been met, he or she is more likely to grow into an immature individual, unable to positively respond to societal demands.

To defend the smallest, least politically powerful members of society has long been the challenge to the legal profession, to lawyer and judge alike. It is appropriate that the considerable influence of the legal community should be joined with the efforts of other professionals and scholars interested in and knowledgeable about a child's total developmental needs. To elevate the child's total developmental needs to the standard of legal rights is to promote the total health of society.

13. The Republican Party was founded in Ripon, Wisconsin in 1854.

14. Douglas Northrup, Ph.D., is Academic Dean of Ripon College. His statement was quoted in the Ripon College press release issued at the conclusion of the conference.

THE LAW AND POSTMODERN PERCEPTIONS OF CHILDREN AND YOUTH

DAVID ELKIND*

I. INTRODUCTION

Our laws regarding children and youth generally mirror the prevailing societal perceptions of these age groups. As societal perceptions change, so do the laws regarding children and youth. Since the 1960s, our perceptions of children and youth have been more reflective of the needs and priorities of adults then they have been of what is in the best interests of the young. To the extent that the law reflects these dysfunctional perceptions, it contributes to hardships experienced by children and youth.

Without fully realizing it, perhaps, we have experienced a momentous, tectonic shift in our society that has affected all aspects of our existence and challenged the basic premises of our established world view. This transformation has perhaps been best described as a change from modern to postmodern ways of thinking, understanding and perceiving.[1] This change has been occasioned by a movement away from the assumption of rationality on which modern western thought was founded, namely, Descartes' assertion that "I think, therefore I am." In contrast, postmodern thinkers argue that language, not thought, has to be the starting point for our philosophical, scientific, literary, political and economic understanding of the world.[2]

This tectonic shift from modernism to postmodernism has necessarily affected our family life, our perceptions of children and youth and the laws that pertain to them. Accordingly, this Article will attempt to show how family perceptions of children and youth have changed from the modern to the postmodern era and the ways in which the modern and postmodern laws reflect these changed perceptions. This Article will also attempt to demonstrate how contemporary laws that mirror the prevailing perceptions of children and youth are dysfunctional for them. A final section will suggest ways to make our laws less debilitating to children and adolescents.

This is not the place to discuss postmodernism at length, but is possible to suggest some of the major shifts that make it different from modernism.

---

* David Elkind, Ph.D., is currently Professor of Child Study at Tufts University in Medford, Massachusetts. He is author of THE HURRIED CHILD among other books and is a contributing editor to *Parents Magazine*.

1. STEVEN CONNOR, POSTMODERNIST CULTURE (1989); DAVID HARVEY, THE ORIGIN OF POSTMODERNITY (1989).

2. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PAXIS (1983).

From Universals to Particulars

In philosophy, literature and the arts there has been a movement away from the belief in universals that was implicit in the Descartian assumption of a rational universe. Freud, for example, writing within a modern perspective, assumed that the "Oedipus Complex" was a universal phenomena and even argued that monotheism was one of its products.[3] However, today we recognize that Freud was writing within the context of a middle-class, victorian, Viennese family. Outside this context, the Oedipus Complex may never be experienced by children growing up within single parent families or in communal settings. Modern writers assumed they could transcend time and space and speak for all humankind. Postmodern writers accept the fact that they are always working within a social historical context and cannot get outside of it.

From Harmony to Pastiche

Modernism was also characterized by the belief in harmony. This was expressed in the arts and architecture as well as in literature. Modernist architect, Frank Lloyd Wright, for example, designed not only the building, but the building's furnishings; including the drapes and lamps as well. All elements of a building had to combine to form a harmonious whole. Postmodern architecture—like postmodern art and literature—is characterized by pastiche; a heterogeneous mixture of styles and elements. Modern buildings tend to be stark glass and steel. Postmodern buildings combine Greek columns, with atrium and copper domes. Postmodern art, like the portraits of Picasso, reflect this "pastiche" agenda and clash with the harmonious and perspective oriented paintings of the impressionists.

II. FROM THE MODERN TO THE POSTMODERN WORLD

Not surprisingly, the changes in the ways we view the world, along with the actual societal changes that came about as a result of the revolutions of the 1960s, have transformed the character of American family life. These changes have also transformed our perceptions of children and youth. In turn, the law has progressively sought to reflect and reinforce these new social perceptions.

The modern era perceptions of children and youth, as well as the laws growing out of these perceptions, were generally beneficial to those they affected. An example is the child labor laws. Postmodern perceptions of children and youth, and the laws that mirror them, on the other hand, are often more stressful than beneficial. Indeed these laws add to the many other inappropriate demands being made upon contemporary children and youth.

3. SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS (W.J.H. Sprott trans., 1933).

III. FROM MODERN TO POSTMODERN FAMILY TIES

The modern family ties that once nourished, supported and protected us have now been replaced by postmodern family ties that often put us under stress. Family ties include not only our basic kinship ties but also our feeling ties; the sentiments, values and perceptions that unite us, as family members, one with the other. The family ties of the modern era were centripetal in the sense that they tended to draw us together. In contrast, the family ties of the postmodern family are centrifugal in that they tend to pull us apart. It is this centrifugal tendency of postmodern family ties that makes them so stressful, particularly to children and youth.

Kinship Ties

The transformation from centripetal to centrifugal family ties has taken place over the last half century. The kinship structure of the modern nuclear family was an ideal: two parents living together in harmony for their entire lives; two or three children doing well in school, getting into the right colleges and eventually marrying and providing grandchildren for the doting grandparents. This kinship structure emphasized the importance of mutual dependence, caring and subordination of one's self to the family.

In the postmodern world, there is not one, but several, acceptable family kinship structures. The postmodern family is a pastiche of different kinship structures. Two-parent working families, single parent families, blended families, adoptive families, like-sex parent families, test-tube-babies and surrogate-mothers are all acknowledged, if not accepted, kinship structures. What characterizes these kinship structures is that they often necessitate mutual independence and autonomy. In the postmodern kinship structure, each family member is constrained, in whole or part, to subordinate family to self.

Feeling Ties

In addition to these postmodern changes in family kinship structure, there has also been a change in the structure of family feeling ties. The modern family feeling ties, its sentiments, values and perceptions, were such as to provide a palisade that protected family members from the dangers and the temptations of the outside world. In the postmodern world, however, these feeling ties reflect the permeability of the postmodern family. These new sentiments serve not as a wall against, but rather as a pathway to, the larger society.

The sentiments of the modern nuclear family: romantic love, maternal love, domesticity[4] and the value of togetherness, formed a tight nucleus that protected family members from the harsh, cruel outside world. In this nuclear family, children were perceived as innocent and in

4. EDWARD SHORTER, THE MAKING OF THE MODERN FAMILY (1977).

need of the care and protection of a mother guided by her instinct of maternal love. Adolescents were seen as immature and as going through necessary periods of storm and stress.[5]

In contrast, the sentiments of the postmodern, permeable family: consensual love, shared parenting and urbanity,[6] reflect the new openness of the family to societal influences. As marriages become less permanent, as non-parental caregivers share childrearing and as images of violence, depravity and disease invade our homes, our perceptions of children and youth have changed. Within the context of postmodern realities, children are perceived of as being competent to deal with any and all of life's vicissitudes, and teenagers are seen as sophisticated users of the media, technology and commodities.

It is important to emphasize that these postmodern perceptions of childhood competence and of adolescent sophistication did not originate in the media. Nor were these perceptions introduced to correct the wrongs or injustices that the modern conceptions of childhood innocence and of adolescent immaturity had brought down upon young people. On the contrary, the perception of childhood innocence and adolescent immaturity were, for the most part, beneficent. They generated what has come to be seen as a "golden age" of childhood and youth that lasted from the end of the last century to the middle of this one. The postmodern perceptions of children and youth are essentially accomodations to the demands upon and limited time available to parents.

IV. Laws and the Societal Perceptions of Children and Youth

The Modern Era

In the modern era, the perceptions of children as innocent and teenagers as immature gradually led to the enactment of laws that mirrored these perceptions. In the early nineteenth century, the obligation of parents to nourish, protect and educate young people was so well accepted it was seldom thought to require enforcement by "Human Laws." In the same way, " 'the promptings of parental affection and wholesome public opinion' were assumed to be enough to prevent the abuse of parental authority . . . ."[7]

The abuses of child labor in the latter part of the nineteenth century increasingly pressured the state to pass and enforce "Human Laws" to ensure that parents did indeed, protect, nurture and educate their children. Parents who neglected their responsibilities were very much on the minds of "[A]merican reformers who advocated strenuous exercise of *parens patriae* (the duty of the state to protect children from all who

5. *See generally* Erik H. Erikson, Childhood and Society (2d ed. 1963)(Erikson termed these periods of storm and stress as an "identity crisis;" the proving ground of separation from the family to an independent adult life).

6. David Elkind, Ties That Stress: Maladies of the Postmodern Family and Self (1992)(manuscript on file with the author).

7. James S. Coleman et al., Youth Transition to Adulthood 30 (1974)(citation omitted).

would harm them) to supplant the authority of parents who neglected their obligations to offspring."[8]

In the latter part of the nineteenth, and the first half of the present century, the State acted to ensure that children's health, education and welfare was looked after:

> Using the data of medicine, physiology, psychology and pedagogy, progressive reformers viewed childhood as a critically important period of life, during which the child required protection, care, and special treatment, not just in the interests of future citizenship, but in order to develop and realize his potential as a human being. More effective regulation of child labor by the states, creation of juvenile courts, establishment of the federal Children's Bureau, the manifold activities of that bureau, and improvements in the administration of public child welfare services at all levels of government represent the achievements of the "rights of childhood" movement.[9]

The overall thrust, then, of the laws for children and youth during the modern era was to protect them from themselves as well as from others. In this way, the laws recognized the developmental differences between children and adolescents on the one hand and adults on the other. In many ways, childhood, and to a lesser extent adolescence, were regarded as special periods of life that were unique and valuable. Many portrayals of fictional characters such as "Peter Pan," "Huckleberry Finn" and "Penn Schofield" reflected this idealized image of childhood that the laws sought to preserve and protect.

The Postmodern Era

With the movement into the postmodern era and the emergence of the sentiments and perceptions of the permeable family, the temper of the laws regarding children and youth have changed. The change in the laws is very much in keeping with the new perceptions of children as competent and teenagers as sophisticated. In addition, these changes also mirror the new egalitarianism engendered by the Civil Rights and the Women's Movements. The emphasis is no longer upon protecting children but rather upon protecting children's rights.

Not surprisingly, however, there are still many carryovers from the modern era. As a consequence, there is a great deal of contradiction in the contemporary laws regarding children and youth. Some postmodern laws are founded upon the modern perception of children as innocent and teenagers as immature, while others are based on the perception of children as competent and teenagers as sophisticated. Although the Supreme Court has said that children are possessed of fundamental rights that the state must respect, it is not clear what rights these are and whether, and in what situations, these rights preempt parental rights.

---

8. *Id.* at 31 (footnote omitted).
9. *Id.* at 31-32 (footnote omitted).

> Americans have not made up their minds on the matter of children's rights. In 1967, for example, the U.S. Supreme Court (*In re Gault*) ruled that juveniles charged with delinquency were entitled to adult rights of due process—right to counsel, right to appeal, and so on. Yet juvenile offenders are still considered special. Thus, in Arizona, upon reaching 18 a person may have his juvenile court and police records destroyed (even if the crime involved was murder). Other states also have such "wipe the slate clean" provisions.[10]

Likewise, children and youth are still not regarded as fully entitled to the right to protection from cruel and inhuman punishment. For example, an act amounting to assault and battery is not punishable if done by a teacher while exercising his disciplinary authority over a pupil, where the punishment inflicted by the teacher consists only of a whipping with a switch, a ruler or something in the nature of a stick.[11]

In other cases, the Supreme Court has ruled that children have the same rights as do adults. In *Belloti v. Baird*,[12] a state law requiring parental consent for a minor's abortions was successfully challenged. In *Goss v. Lopez*,[13] the Court ruled that schools were required to provide students with due process before subjecting them to short term suspensions. Likewise, in *Smith v. Organization of Foster Families for Equality and Reform*,[14] the Court ruled that New York City authorities were required to hold a hearing before a child could be transferred from one foster home to another.

In The Best Interests of Children and Youth

It is certainly true, of course, that in many of these cases the children have benefited from adults defending their constitutional rights. But many postmodern adults argue on the children's behalf because they have accepted the postmodern perceptions of childhood competence and teenage sophistication, not because of their abiding commitments to the health and welfare of children. Lawyers themselves are beginning to question this overemphasis upon children's rights. For example, Bruce C. Hafen wrote:

> With our loss of confidence in paternalism, however, a subtle but important shift has occurred in the public mind away from a commitment to the right of children to belong and to be nurtured. . . .
>
> Similarly, some commentators have argued that children must be "liberated" from minority status or from other age-related legal limitation, sometimes drawing parallels between the inferior statuses of slaves, women, and children. The reform movement for children's rights, especially in its approach

10. Philippe Aries, *The Sentimental Revolution*, WILSON Q., Autumn 1982, at 51.
11. 6 Am. Jur. 2d *Assault and Battery* § 46 (1963).
12. 428 U.S. 132 (1976).
13. 419 U.S. 565 (1975).
14. 431 U.S. 816 (1977).

> to group litigation and its reliance on constitutional theories, has borrowed extensively from the legal experience of the civil rights movement, risking some uncritical transfers of egalitarian concepts that ignore children's lack of capacity and their need to be protected from their own immaturity.[15]

Another legal commentator, Philippe Aires, concludes that "[f]or better or worse, American children enjoy more "adult rights" today than they did 20 years ago—and often more adult responsibilities as well."[16]

V. LAW AND THE NEW (POSTMODERN) MORBIDITY

The postmodern perceptions of children as competent and teenagers as sophisticated appear to have had mostly detrimental effects. Although correlation is certainly not the same as causation, the increase of stress-related indices among children in step with the progressively more accepted postmodern perceptions of children and youth is strongly suggestive. To the extent that our laws mirror and reflect these perceptions, they contribute to the dysfunction of contemporary youth.

The data on the increase of stress-related dysfunction in children and youth has come to be called the "new morbidity."[17] That is to say, some fifty years ago the leading cause of death among children and youth was disease.[18] Fortunately, many of the diseases that once accounted for the majority of deaths among young people, such as tuberculosis and polio, have now been conquered by medical science. Today, psychological and social pressures, not physical disease, account for most of the deaths among young people.[19] Stress-related deaths among youth thus constitute the new, postmodern morbidity.

The facts regarding the new morbidity are all too easy to document. On every measure that we have, children and youth today are doing less well than they did hardly a quarter century ago. On tests of strength, endurance and general muscle tone, young people today perform less well than young people of comparable age even ten years ago.[20] Verbal Scholastic Aptitude scores have fallen almost fifty points from the late fifties and early sixties.[21] Alcohol related accidents are the leading cause of death for fifteen to twenty-four year old Americans, either as passengers or drivers.[22]

---

15. Bruce C. Hafen, *Exploring Test Cases in Child Advocacy*, 100 HARV. L. REV. 435, 447 (1986)(footnotes omitted)(reviewing ROBERT H. MOONKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (1985)).

16. Aries, *supra* note 10, at 51.

17. ROBERT J. HAGGERTY ET AL., CHILD HEALTH AND THE COMMUNITY (1975).

18. UNITED STATES DEPARTMENT OF EDUCATION, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, YOUTH INDICATORS 95 (1988) [hereinafter YOUTH INDICATORS].

19. *See* THE NATIONAL COMMISSION ON THE ROLE OF THE SCHOOL AND COMMUNITY IN IMPROVING ADOLESCENT HEALTH, CODE BLUE: UNITING FOR A HEALTHIER YOUTH 3-4 (1989) [hereinafter CODE BLUE].

20. YOUTH INDICATORS, *supra* note 18, at 92.

21. *Id.* at 68.

22. *Id.* at 102.

Other statistics add to this picture. Suicide rates for teenagers have more than doubled since 1965.[23] Overall, ten percent of adolescent boys and eighteen percent of adolescent girls have attempted suicide.[24] The United States also has the highest teenage pregnancy rates of any Western country, twice that of any other industrialized country.[25] The incidence of sexually transmitted diseases among young people have reached epidemic proportions. The number of young people diagnosed with gonorrhea and syphilis has increased a thousandfold since 1965.[26] The number of teenagers between the ages of fourteen and seventeen arrested per year has increased nearly thirtyfold since 1950.[27] Every day 135,000 American students bring guns to school.[28]

VI. TOWARDS DEVELOPMENTALLY APPROPRIATE LAWS FOR CHILDREN AND YOUTH

The contradictory messages being given to young people by society in general, and the legal system in particular, contributes to the stresses young people experience, and thus to the "new morbidity." In many cases the contradictions in the laws regarding the children and youth derive from the fact that in some cases the law takes account of human development, whereas in others it does not. However, human development must always be taken into account when dealing with the young. This is particularly true today because we now have more than a century of research on all facets of child growth and development.

Lawmakers must come to appreciate that recognizing the limits imposed by children's developmental level is in no way limiting their rights. In fact, just the opposite is true. Only when we recognize the limits as well as the capacities of children and youth do we really accord them their full rights under the law.

> This need (of children for parental love, affection, discipline and guidance) suggests a general right of children to be protected from their own immaturity. Of course each child requires gradually increasing freedom to make important choices, even at the risk of harming himself through bad judgments. The capacity to weigh risks in making personal choices is only developed as children live with, and learn from, the unpleasant consequences of their decisions. For this reason, adolescence should be seen as a time in which children are given low-risk levels of autonomy as a way of learning how to assume greater responsibility. Still, in a paradoxical but important sense, a child has a basic right to be protected against complete freedom.[29]

23. *Id.*
24. CODE BLUE, *supra* note 19, at 2.
25. *See id.* at 3.
26. YOUTH INDICATORS, *supra* note 18, at 95.
27. *Id.* at 115.
28. CODE BLUE, *supra* note 19, at 4.
29. Hafen, *supra* note 15, at 446.

Within the postmodern perspective, the law, like every other human invention, is necessarily couched in the perceptions and discourse of its social and historical context. A major tenet of postmodernism is the importance of the particular and the doubtfulness of universals. In many ways, the insistence on children's rights as on a par with adult rights is an appeal to universals that is a throw-back to modernism. Paradoxically, therefore, many of the older laws, geared to protecting children, were more postmodern than many of the newer laws seeking to protect children's rights.

1992: A YEAR TO REDISCOVER THE BEST INTERESTS OF THE CHILD

HONORABLE HUGH S. GLICKSTEIN*

In *Jackson v. State*,[1] I made the following suggestion:

> I suggest that we are a society pervaded with not just the visible dysfunctional family, but also invisible non-harmonious families which do not produce the tragedy of suicide, but do produce tragedies of emotionally unhealthy children who pass along their toxic shame to their own children.

One psychologist has recently observed that our challenge is to change a society of human doers to human beings. We start with ourselves. Accordingly, to the bumper sticker question "Have *you* hugged your child today?" we now answer "Yes, my inner child." We judges, I suggest, could set an example by learning to understand ourselves. Arthur Schopenhauer put such individual challenge best "All truth passes through three stages. First, it is ridiculed. Second, it is violently opposed. Third, it is accepted as being self-evident."[2]

My personal core belief was expressed in *Costa v. Costa*:[3]

> It would be society's greatest reward—tangibly and otherwise—were the future adult inhabitants of this state able to look back to the 1980's and reflect how their predecessors finally came to recognize the priority to be given the well-being of children. Such future citizens would undoubtedly be the beneficiaries from (1) our present awareness that children are our most precious gift and entitled to enjoy the happiness which those adults responsible for them can provide; and that they are our only priceless commodity—the key to the well-being of society; and (2) our recognition that without prioritizing the physical, emotional and educational needs of children, all the efforts to eliminate crime, poverty and ignorance are only kneejerk, bandaid solutions which cure none of society's basic

---

* Chief Judge Hugh S. Glickstein of the Fourth District Court of Appeal was elected by his colleagues as Chief Judge in April, 1991. He was the first chairman of The Florida Bar Legal Needs of Children Committee and the first chairman of the ABA Family Law Section Task Force for Children. This article originally appeared in FLA. B.J., Feb. 1992, at 67.

1. 553 So. 2d 719 (Fla. Dist. Ct. App. 1989).

2. *Id.* at 727 (emphasis in original). When this opinion was written, I pointed out that a book by Dr. Scott Peck had been on *The New York Times'* paperback best seller list for over 300 weeks and suggested that it "will continue to be read because of our growing appreciation of the indispensable need to understand ourselves." It has remained on that list two years later and, I hope, will continue to appear there each week as a sign of our perceived need to understand and feel better about ourselves. *See* SCOTT PECK, THE ROAD LESS TRAVELED: A NEW PSYCHOLOGY OF LOVE, TRADITIONAL VALUES, AND SPRITUAL GROWTH (1985).

3. 429 So. 2d 1249 (Fla. Dist. Ct. App. 1983).

ills.[4]

The foregoing still rings true nine years after becoming the initial statement of purpose for The Florida Bar's Special Committee for the Needs of Children, an interdisciplinary committee.

Our involvement in the best interests of the child requires, in my view, unlocking a series of doors, the first of which is getting in touch with our own feelings as adults to validate our inner child's feelings from birth, respect our inner child's uniqueness and allow our inner child's self-esteem to grow and flower.[5]

Opening the next door means that we need to understand that our parenting has multi-generational effects—both positive and negative. Since hearing Reverend Glen Rediehs speak on parenting in 1984, I have often said that in child advocacy, parenting is the dog and everything else is the tail. This translates into educating our young people about parenting skills and alerting our new mothers and fathers about realistic expectations of their children's behavior to prevent and diffuse possible child abuse.[6] It means educating the community to understand that an infant without bonding can wind up a psychopathic killer;[7] that a small child without nurturing will be a dysfunctional adult;[8] and that by the time a child is as young as three, he or she becomes "shame based" because of dysfunctional parents.[9]

In his most recent best seller, John Bradshaw says this:

> PARENTING—THE HARDEST JOB OF ALL
>
> Being a good parent is a tough job. I believe it is *the hardest job any of us will ever do.* To be a good parent, you must be mentally healthy. You need to be getting your own needs met through your own resources, and you need a spouse or significant other to support you in the process. Above all, *you must have healed your own wounded inner child.* If your inner child is still wounded, you will parent your child with this frightened, wounded, and selfish inner child. You will either do a lot of what your parents did to you or you will do just the opposite. Either way, you will be trying to be the perfect parent your wounded inner child dreamed of. However, being just the opposite is equally damaging to your children. Someone once said, "One hundred and eighty degrees from sick is still sick."[10]

---

4. *Id.* at 1252.

5. *See* SUSAN FORMAN, TOXIC PARENTS (1989).

6. Having heard Reverend Rediehs discuss the parenting programs he had instituted at Valencia Community College, I called the President of Broward County Community College and the Chairman of its Board of Trustees and asked them to join me for breakfast. When we finished our breakfast, the two of them had conceived a Parenting Resource Center for their college.

7. *See* KEN MAGID & CAROLE A. MCKELVEY, HIGH RISK: CHILDREN WITHOUT A CONSCIENCE (1987).

8. *See* E. KENT HAYES, WHY GOOD PARENTS HAVE BAD KIDS (1989).

9. *See* JOHN BRADSHAW, BRADSHAW ON: THE FAMILY (1988). Bradshaw says: "[g]uilt says I have *made* a mistake; shame says I *am* a mistake." *Id.* at 2 (emphasis in original).

10. JOHN BRADSHAW, HOMECOMING: RECLAIMING AND CHAMPIONING YOUR INNER CHILD 87 (1990) (emphasis in original).

Florida statutes establish, as the public policy of that state, that shared parental responsibility shall be ordered unless it would be detrimental to the child.[11] Professor Hyde suggests shared parenting is a message to the child that says your mother and father love you very much and are both going to care for you.[12] If the child is to understand it whenever possible and if the parents are to give the message to the child whenever possible, then lawyers and judges should view themselves as Western Union—making sure the message is delivered and understood. The Florida statutes provide the blanks that must be filled with solid, accurate information so that the trial court's decision upon the best interests of the child rests on a sure, factual footing. This brings the dissolution contest quickly to an end with an enlightened plan for the child's future.[13]

Shared parental responsibility was a visionary act by the Florida legislature. Trial judges and lawyers, however, must still deal with emotionally dysfunctional parents who blame each other instead of learning to understand themselves through available therapy. What went awry was the legislature's fiddling with the Uniform Dissolution of Marriage criteria, leaving out one critical criterion and chopping up another.

I never focused on the omission until the Florida Supreme Court's recent decision in *Schutz v. Schutz*,[14] involving a mother's ongoing post-dissolution invalidation of the father in the children's eyes and ears. Neither the trial court nor the supreme court had the benefit of the omitted criterion protecting the children: "The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent."[15] All that either court had was the Florida criteria for establishing the best interests of the child based on which parent was more likely to allow contact with the nonresident parent.[16] Obviously, this section is simply is not enough.

In my concurring opinion in *Frisard v. Frisard*,[17] I compared the Florida and Michigan versions of the act.[18] The opinion shows that Michigan requires inquiry as to: "the capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or

11. FLA. STAT. ch. 61.13(2)(b)2 (1991).

12. Laurance M. Hyde. Jr., *Child Custody in Divorce*, JUVENILE AND FAMILY COURT JOURNAL, Spring, 1984, at 1, 22.

13. FLA. STAT. ch. 61.13(3)(a)-(j) (1991).

14. 581 So. 2d 1290 (Fla. 1991).

15. MICH. COMP. LAWS § 722.23 (3)(j) (1991).

16. FLA. STAT. ch. 61.13(3)(a) (1991). "The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent."

17. 453 So. 2d 1150 (Fla. Dist. Ct. App. 1984) (Glickstein, J., concurring).

18. *Id.* at 1153 (quoting Doris J. Freed & Henry H. Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 415 (1984)). FLA. STAT. ch. 61.13(3)(a)-(j) (1991). MICH. COMP. LAWS § 722.23 (3)(j) (1991). Michigan's statute reads a little differently in that it refers to the court's finding the child to be of sufficient "age." Florida's statute does not mention age. It speaks to the child's intelligence, understanding and experience, which we should not forget.

creed, if any."[19] The Florida legislature chose only to require inquiry as to "the love, affection and other emotional ties existing between the parents and the child."[20]

The existing language in Florida's version is a "take 'em as you find 'em" approach, while the Michigan version opens the door to changing dysfunction to function before writing off the family's existence as a family. I heard one out-of-state family lawyer describe his specialty as a "funeral director." Families in crisis need therapy, not funerals. Without studying the legislative history, I do not know why the legislature chose to omit one critical criterion and shorten up another. Otto Von Bismarck observed: to retain respect for sausages and laws, one must not watch them in the making.[21]

The third door we face is the Child's Bill of Rights. The Report of the Florida Study Commission on Child Welfare,[22] in March, 1991, said that:

> Florida must formulate a policy for children and their families around these basic concepts:
>
> a. Every child must be:
> 1) protected from harm;
> 2) provided with basic food, clothes, and shelter;
> 3) provided with necessary medical services and a basic education; and
> 4) provided with the opportunity for cognitive, aesthetic and emotional development.
>
> b. When help is needed, the first obligation is to assist the child in his or her family. If, despite such assistance, the family cannot meet the basic needs of its children, government must assure that their needs are met, regardless of economic status.
>
> c. Local communities are best suited to identify needs, provide accountability, and support a child's sense of identity. Local communities should be given more control in selecting, purchasing, and delivering services to children and families in compliance with statewide standards.[23]

This door requires a number of keys to open, the first of which is *risk taking*. Emerson wisely observed that every revolution begins with a single thought in an individual's mind.[24] I believe that, in child advocacy, individual heroes and heroines conceive programmatic responses, then have the courage to take the risks necessary for success. As has been said, one cannot have lemonade without lemons; and one cannot meaningfully address the best interests of the child without leaders—

19. *Id.* at 1152.
20. FLA. STAT. ch. 61.13(3)(b) (1991).
21. *Quoted in, in re* Graham, 104 So. 2d 16, 18 (Fla. 1958).
22. STUDY COMMISSION ON CHILD WELFARE, REPORT OF FINDINGS AND RECOMMENDATIONS (Fla. 1991) [hereinafter STUDY].
23. *Id.* at 1.
24. Ralph Waldo Emerson, *History*, *in* EMERSON'S ESSAYS 1, 2-3 (Harper & Row, 1951).

individuals with vision, faith, courage, energy, creativity and commitment. Such individuals understand that their involvement is neither a marathon nor a sprint, but is more like a mile run—requiring pacing and grit but having a destination in mind and in sight. They act out Reinhold Niebuhr's Serenity Prayer: God, give us grace to accept with serenity the things that cannot be changed, *courage to change the things which should be changed,* and the wisdom to distinguish the one from the other.[25]

The next key to this door is *interdisciplinary networking.* The success of this mission lies in its multi-discipline composition—legislators, Governor and cabinet officers, doctors, lawyers, teachers, judges, social workers and others in common focus. Networking must be horizontal and vertical. Associations and institutions must join hands; counties must exchange ideas and programs; every area of government—judicial, legislative and executive—must play an equal role. Similarly, within each state, the individual communities are best able to focus on prevention and early intervention to thwart a child's misdirection, with the resources of the state opened to rehabilitation and long-term treatment.

The final key to this door is *political will.* If a state or community has it, results will be achieved. Two examples of political will in Florida were The Florida Bar's Children's Committee in 1984 which undertook to establish guardians ad litem in Florida for children caught up in dissolution proceedings, and a consortium of groups bringing the Family Court to Florida, as authorized by the supreme court's opinion in *In re Report of the Commission on Family Courts,*[26] which held:

> We approve the recommendations of the Commission on Family Courts, and we accept the Commission's recommendation concerning the jurisdiction of a family division. We emphasize our support for the recommendation that there be a means to assign all family court matters that affect one family, including dissolution of marriage, custody, juvenile dependency and delinquency proceedings, to one judge. In approving these recommendations, we note the need for each circuit to design a family division to best serve its particular area. Geography, population, and available facilities are all factors that must be considered in tailoring a family division to the needs of a particular circuit.
>
> We agree that the assignment of a judge to family law cases is one of the most difficult and stressful of all the responsibilities of a circuit judge. Consequently, we acknowledge that there is a need for rotation among judges assigned to the family division. For such a division to work, judges must be committed to carrying out this judicial responsibility and willing to participate in education and training programs in this area of the law. Family law is a developing and expanding area of court jurisdiction. As noted in the Commission's report, approximately fifty

25. REINHOLD NIEBUHR, THE SERENITY PRAYER (emphasis added) (JOHN BARTLETT, FAMILIAR QUOTATIONS, 823 (15th ed. 1980)) (1943)).

26. 588 So. 2d 586 (Fla. 1991).

> percent of the civil court jurisdiction in our circuit courts, without the inclusion of juvenile delinquency and dependency cases, is comprised of family law matters. New techniques are regularly being implemented to try to make this jurisdiction of our courts work more effectively. Further, we recognize that delays in family law matters aggravate the parties' problems. Clearly, an early resolution is best for all concerned.[27]

It took until 1990[28] to get legislation to authorize appointments of guardians ad litem.[29] Without the statute, many trial judges were not making the appointments due to an absence of authority. Children need the protection of a guardian ad litem in many dissolution cases because one or both of the parents is likely to be emotionally dysfunctional. Lawyers, judges and parties need to understand that; and if Schopenhauer is right, someday we shall understand it.[30] What the legislature did not do, however, was to provide any funding for guardians ad litem. The irony is that the lawyers representing the adults in the marriage may receive a statutory fee and costs but the guardians of the unprotected children have no fiscal support in individual cases. This has to be corrected.

Another problem in the area of guardians ad litem came to light with the 1991 National Study of Guardian ad Litem Representation.[31] The Child Abuse Prevention and Treatment Act in 1974 required states to appoint a guardian ad litem for maltreated children as one condition of receiving federal grant funds authorized by the act.[32] The repassage of the act in 1988 required the Administration for Children, Youth and Families to conduct a study to determine how each state was providing guardian ad litem representation.[33] The national study's conclusions

---

27. *Id.* at 591.

28. In 1983, The Florida Bar sponsored the first interdisciplinary state bar-sponsored children's committee, upon which other states such as Virginia, Delaware, Massachusetts, Missouri and Utah have patterned similar efforts. The Florida committee discovered immediately that other states were providing guardians ad litem for children caught up in dissolution cases while Florida's children had to fend for themselves. Audrey Schiebler, vice-chairwoman of the committee, dogged the legislature for four sessions until it funded pilot programs in several judicial circuits. In 1988, committee members joined with the state guardian ad litem program in training volunteers.

29. FLA. STAT. ch. 61.401-404 (1991).

> In an action for dissolution of marriage, modification, parental responsibility, custody, or visitation, if the court finds it is in the best interest of the child, the court *may* appoint a guardian ad litem to represent the child. In such actions which involve an allegation of child abuse or neglect as defined in ch. 415.503(3), which allegation is verified and determined by the court to be well-founded, the court *shall* appoint a guardian ad litem for the child.

Id. at ch. 61.401 (emphasis added).

30. *See supra* text at page 1.

31. ADMINISTRATION FOR CHILDREN, YOUTH AND FAMILIES, OFFICE OF HUMAN DEVELOPMENT SERVICES, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, NATIONAL STUDY OF GUARDIAN AD LITEM REPRESENTATION (1990).

32. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247. 88 Stat. 4 (codified as amended at 42 U.S.C. §§ 5101-07) (1974).

33. Child Abuse Prevention and Treatment Act, sec. 104, Pub. L. No. 100-294, 102 Stat. 102 (1988).

and nine recommendations should awaken our consciousness. In Florida, the study found:

> Florida has a statewide volunteer GAL [guardian ad litem] program. In 1979, the Florida Office of the State Courts Administrator studied the use of lay volunteers, Public Defenders, and private attorneys in abuse and neglect proceedings and concluded that lay volunteers are effective advocates for children. In 1982, Florida Supreme Court Rule 8.300 approved the use of lay volunteers as GALs. Florida Statute § 415.508 mandates the appointment of GALs in all civil and criminal abuse and neglect proceedings. Despite this requirement, only 3 of the 11 counties sampled provide representation for 100 percent of all abused and neglected children. Eight counties do not appoint GALs in 20 to 100 percent of their cases. While Glades, Hendry, and St. Johns Counties provide representation in 100 percent of their cases, Clay, Dade, DeSoto, Duval, Lake, and Polk Counties provide representation only in 50 percent, 50 percent, 75 percent, 35 percent, 8 percent, and 40 percent of their cases, respectively. In Sumter County, the local court does not appoint GALs, so no cases are represented. Statewide an estimated 49 percent of the cases are represented. This figure agrees with an estimate given by the State-level respondent. Respondents in all of the counties reporting a lack of representation said that there were not enough GALs for all cases.[34]

Other states should follow Florida's example and seize the opportunity to open all of these doors for children, and to set an example for those states that are reluctant. After all, to influence others, example is not the main thing—it is the only thing. How well will we involve ourselves in the best interests of the child? Gabriela Mistral cautioned us:

> WE ARE GUILTY
> OF MANY ERRORS AND
> MANY FAULTS
> BUT OUR WORST CRIME
> IS ABANDONING THE CHILDREN,

---

34. STUDY *supra* note 22 at 84. In August, 1991, I successfully tendered to the Executive Council of the ABA Family Law Section a resolution, which was revised and adopted, subject to approval by the ABA House of Delegates in February, 1992. It now reads:

RESOLUTION

RESOLVED, that the American Bar Association urges:

(1) Every state and territory to meet the full intent of the Federal Child Abuse Prevention and Treatment Act, whereby every child in the United States who is the subject of a civil child protection related judicial proceeding will be represented at all stages of these proceedings by a fully-trained, monitored, and evaluated guardian ad litem in addition to appointed legal counsel.

(2) That state, territory and local bar associations and law schools become involved in setting standards of practice for such guardians ad litem, clarify the ethical responsibilities of these individuals and establish minimum ethical performance requirements for their work, and provide comprehensive multidisciplinary training for all who serve as such guardians ad litem.

(3) That every state and territory, where judges are given discretion to appoint a guardian as litem, in private child custody and visitation related proceedings, the bench and bar jointly develop guidelines to aid judges in determining when such an appointment is necessary to protect the best interests of the child.

NEGLECTING THE
FOUNTAIN OF LIFE.

MANY OF THE THINGS WE NEED
CAN WAIT. THE CHILD CANNOT.
RIGHT NOW IS THE TIME
HIS BONES ARE BEING
FORMED, HIS
BLOOD IS BEING MADE, AND
HIS SENSES ARE BEING
DEVELOPED.
TO HIM WE CANNOT ANSWER
"TOMORROW."
HIS NAME IS "TODAY."[35]

35. Gabriela Mistral, Nobel Laureate of Chile, *cited in* 397 N.W.2d 81, 88 (S.D. 1986).

TIMING, FRAGILITY AND CHILDREN'S LAW

ROBERT V. HANNAFORD*

Last April, Ripon College's ABA Family Law Section conference, "Family Law and the 'Best Interests of the Child,' " focused on two fundamental questions: (1) what elements of family life are most important to children's moral development and (2) how are these elements relevant to family law and public policy? Although these questions could not be fully answered in any conference, they suggest that law and public policy should aim to protect and secure those elements most important to children's moral development. The discussion of children's moral development was unusually productive during the conference and produced legally relevant questions regarding the importance of understanding the elements of children's moral development.

Pediatric psychiatrists, clinical and experimental psychologists and moral theorists presented evidence and arguments which supported this basic point: Caretakers must treat infants as responsive and concerned for others and give consistent and loving nurturing if children are to attain a sense of identity and self-esteem. Otherwise, children will lack the means for communicating and establishing relations with others and for determining how to control their own impulses. If children lack these qualities, they are more likely to become delinquents. Moreover, caretakers should themselves be morally concerned and responsive so that children's moral development is enhanced by example and guidance. In sum, children need loving, consistent caretakers who provide an example of acting with respectful concern for others and who place moral demands and expectations on them from infancy onward.

Although conference participants continued pressing for their individual cherished views of family as the best means to *secure* the essential elements of children's moral development, a consensus as to *what those elements are* soon formed. This consensus owed a great deal to the general agreement of observers from a variety of disciplines regarding a new awareness of the importance of the elements of timing and fragility to children's moral responsiveness. Until recently, both lawyers and moral development theorists spoke and acted as if our treatment of infants and toddlers made no great difference to their moral development. For example, lawyers often spoke of children's "best interests" as if they were property rights, treating children as if they were chattels disposed of strategically in divorce settlements.

At the same time, child development theorists, such as Jean Piaget and Lawrence Kohlberg, proceeded from the assumption that toddlers and infants were egoistically self-absorbed. These theorists believed

* Professor of Philosophy, Ripon College.

that infants and toddlers had neither concern for, nor the ability to understand, others' intentions and purposes.[1] In Piaget's highly influential study of the language of Swiss pre-school children, he asserted that the young child does "not attempt to place himself at the point of view of his hearer," for the child's egoism is "complete and unconscious."[2] In another study, Piaget argued an infant's perception cannot differentiate one person from the rest of the world.[3] To Piaget and Kohlberg, toddlers' "moral responses" are little more than mere expressions of feelings.[4] From Piaget's and Kohlberg's assumptions, it follows that children must be amoral and exploitative until they develop new intellectual capacities and broader interests. These most influential studies of children led to the general belief that it would be a mistake—it would be unscientific—to treat pre-schoolers as sensitive and responsive to others' interests or needs. Any efforts to begin early work toward infants' and toddlers' moral development would be wasted.

Conference participants provided abundant evidence and reasons for calling Piaget's and Kohlberg's assumptions into question. For example, conference participants provided evidence that an infant (1) noticed when its caretaker showed concern; (2) responded with delight to loving attention; (3) failed to thrive when no concern was shown and (4) followed and responded to the caretakers' intent in simple interactions. How could this be if the Piaget-Kohlberg account had been correct? These and other observations called into question the accounts of Piaget and Kohlberg and showed how moral development is crucially dependent on the early care and treatment of infants and toddlers.

This Article focuses on the philosophical arguments drawn from action theorists, which call into question the assumptions of Piaget and Kohlberg regarding children's moral development.[5] Action theorists study how beliefs, desires and intentions are involved in human action, including communication and language use. Action theorists' work im-

1. Jean Piaget, THE LANGUAGE AND THOUGHT OF THE CHILD (Marjorie Gabain trans. 1955). Kohlberg patterns his six stages of moral development after the stages presented by Piaget. Kohlberg's definition of stage one of moral development, which characterizes responses of youngsters up to age 10, holds that for persons in this stage: "There is no differentiation between the moral value of life and its physical or social status value." 1 LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT 118 (1981). Even his stage two is described as a case in which the "[v]alue of a human life is seen as instrumental to the satisfaction of the needs of its possessor or others." *Id.* However, this is a position that Kohlberg does not hold with complete consistency; he also states that "[a]t every stage, children perceive basic values such as the value of human life and are able to empathize and take the roles of other people and other living things." *Id.* at 143. Still, his repeated theme is that young children act only out of self-concern and respond only to the threat of punishment at the earlier two stages. Moreover, he urges that it is a mistake to attempt to treat children at the earlier stages as if they were capable of responding out of empathic concern. A number of people offered decisive criticism of this position in the conference. *See* MICHAEL PRITCHARD, ON BECOMING RESPONSIBLE (1991).

2. *See generally* Piaget, *supra* note 1.

3. *See generally* JEAN PIAGET, THE CHILD'S CONSTRUCTION OF REALITY (1958).

4. 1 KOHLBERG, *supra* note 1, at 118.

5. My focus will be on philosophical arguments drawn from action theorists. A detailed discussion of all the arguments presented at the conference is beyond the scope of this Article.

plies awareness of, and concerned responsiveness to, others' intentions and actions are conceptually necessary to a toddler's moral development. Current psychological observations support the argument of action theorists that this responsiveness, or attentive concern for others, is fundamental to our moral anatomy and is with us from earliest infancy. Observers from various disciplines agree that a child's moral responsiveness is dependent on the quality of attention given to its moral development.

These new philosophical arguments rest on the conception that morally responsible people are accountable and responsive to others. By this conception, a morally responsible person must: (1) be able to give an account of his or her actions; (2) have acquired moral language by which to describe actions; (3) be able to describe motives and ascribe them to others; (4) be able to give acceptable moral reasons for actions and (5) be prepared to act in ways that are morally permissible or required.[6] Thus, at the center of our moral development is responsive concern, or the capacity to respond to another person out of interest and concern. These five characteristics of a morally responsive person will be considered in turn.

The first characteristic concerns accountability and holds that a responsible person is able to account for his or her actions as well as answer questions and give reasons for these actions. In order to do this, a responsible person must be able to describe actions in language understood in the community, recognize what others include in the description and know particular actions belong under that description.[7] This is a conceptual, not an empirical, point: To be accountable (by our common understanding of the notion), an individual must know how to describe actions and, to be responsible, must also aim to achieve some result when engaged in voluntary action.

The second characteristic concerns the ability to view one's actions as similar to those of other community members. As pointed out by P.F. Strawson, in order to describe one's own actions, one must be able to ascribe the same intent to oneself as one ascribes to others. States of consciousness can only be ascribed to others by identifying others as subjects of experience and possessors of states of consciousness.[8] There must be some identifiable, observable criteria to ascribe states of consciousness if language is to be intelligible for people generally, or if intentions or subjective states are to be communicated. As Donald Davidson noted, individuals must describe their own purposes and situations in a language that can be applied to others.[9] Strawson explains

6. While other characteristics of the morally responsible person might be cited, these five carry considerable philosophical agreement and rest on mutually supportive arguments.

7. *See, e.g.*, Daniel Dennett, *Conditions of Personhood*, *in* PERSONAL IDENTITY, 175, 191 (Amelia Oskenberg Rorty, ed., 1976).

8. P. F. STRAWSON, INDIVIDUALS, AN ESSAY IN DESCRIPTIVE METAPHYSICS 100 (1959).

9. DONALD DAVIDSON, PSYCHOLOGY AS PHILOSOPHY: ESSAYS ON ACTION AND EVENTS 229-34 (1980).

that we must see the connection between the first and third person application of language.[10] We must see ourselves as persons like others. If I correctly describe myself as melancholy or angry, the words "melancholy" and "angry" must mean the same things as when applied to others. Hence, to acquire the ability to apply personal predicates and descriptions to my own behavior, I must identify others' intentions and determine these intentions are similar to my own.[11] As Lawrence Blum notes, self-knowledge cannot be sharply separated from knowledge of others.[12] To develop self-descriptive language, a person must be able to reason about others' intentions and must, in some measure, conceive of him or herself as a person among persons with motives and intentions like others' to develop any language to describe his own actions.

The "first person criteria," the criteria for applying words describing conscious states, must correlate with the "third person criteria," the criteria for words describing the same states in others. This ability to conceive of oneself and other persons must be a matter of degree. It does not come to everyone all at once or in equal amounts. Some emotions and intentions are understood by the very young while others require more human relations and world experience. A toddler may recognize anger or hurt, while only more mature persons can correctly identify and describe jealousy or ambition in themselves and others. We are (and should be) held responsible in various degrees, partially because we are capable of understanding ourselves and others in various degrees that change as we acquire a clearer conception of ourselves and others through acquiring language. In learning language, an individual must be interested in, and attentive, to other persons, for it is from those persons that the individual acquires the language with which to describe feelings and situations.

The third characteristic concerns the ability to describe motives in language understandable to the community. Some words we learn to describe states of mind are words by which we ascribe motives and give general reasons, words that must have the same meaning for others as for ourselves. For example, in order to describe my own penitence or impartiality, we must know how those terms are tied into others' intentions and actions. To learn these words, we must (1) understand others' intentions; (2) compare these intentions and motives with our own; (3) master language to describe actions; (4) give reasons for these actions and (5) compare these reasons with others' reasons. Once again, self-knowledge is tied to attention to, and knowledge of, others.

The fourth characteristic concerns an individual's ability to compare reasons, to know what are good reasons and evaluate those reasons. To be accepted as adequate, reasons must be relevant to the conclusion reached and proceed from morally acceptable motives. By our common

10. STRAWSON, *supra* note 8, at 100.

11. Lawrence Blum, Particularity and Responsiveness, *in* THE EMERGENCE OF MORALITY IN YOUNG CHILDREN 316 (Jerome Kagan and Sharon Lamb, eds., 1987).

12. *Id.*

understanding, if we are correctly described as acting responsibly, our reasons for acting must be acceptable to impartial judges generally. To understand the reasons for acting, actions must be described in general, intelligible terms. But a central feature of understanding actions is understanding whether the action is permissible in society. Until an individual recognizes whether actions are acceptable to others in the moral community, an understanding of the true effect of these actions is incomplete. An individual must view these actions as an impartial spectator to acquire and correctly use moral language in order to articulate actions as permissible. Until this language is mastered, one cannot describe or clarify one's own purposes or plans of action.

It follows that a person who projects responsible plans of action, must to some degree, master the moral language with its matrix of acceptable reasons and permissible actions. A person does not understand the language of reasons until he or she learns how the reasons apply and how the acts and reasons supporting them are perceived as affecting others and oneself. Thus, once again, moral reasons rest on the language of self-description, which requires a conception of oneself as a person among persons with the ability to focus alternately on his or her own and others' interests and purposes.

Some might object to this argument by asserting that we cannot know that this quest for moral reasons is indeed universal for all cultures. While it is common enough in our own culture for people to be ignorant of their reasons for acting, nonetheless, we agree that people should have relevant reasons. If someone fails to give a reason for hitting another or the reason is irrelevant (e.g., "I hit him because his eyes are green"), our culture will not accept the action as valid. The action must be suited to the situation and the supporting reasons relevant to the situation in order for the reasons to be adequate. Otherwise, we blame the persons for their inadequate reasons.

The concept of blaming is part of every human culture and involves the giving of reasons. When we blame someone, we judge that individual as having acted wrongly in some identifiable particular. Whoever blames (with adequate reason) must be able to identify the particular feature that makes the act wrong and give reasons in support of the blaming judgment. Whoever cannot identify the specific feature that makes an action wrong has not made a clear or reliable judgment. To be valid reasons, their relevance must be clear to members of the general community. Giving and assessing reasons are features of every culture;[13] the characteristics necessary to give and assess reasons must equally be a feature of our moral anatomy.

Agreement as to others' moral reasons involves agreement as to

13. *See* Richard Shweder, Elliot Turiel, and Nancy Much, *The Moral Intuitions of the Child*, *in* SOCIAL COGNITIVE DEVELOPMENT: FRONTIERS AND POSSIBLE FUTURES (John Flavell and Lee Ross, eds., 1981).

their motives and intentions. Thomas Nagel and Richard Peters[14] explain how those whose motives we accept as responsible are those who exhibit some concern for others. These observations are similar to Herbert Fingarette's description of responsibility as a specific kind of care.[15] Theorists, such as Roger Beehler, note the link between caring for others and prescriptive moral language[16]—that is, specific criteria for moral language exists and these criteria include the requirement of caring about one another, just as specific criteria exist for language describing colors (such as "red"). Thus, caring is a central factor in moral reasoning. To be acceptable, our reasons must, at a minimum, indicate we have considered others. We must know how others view a situation and what motives they will accept. We must recognize what it means to be a person in the process of communicating about and judging our and others' actions.

On one hand, the notion of "good reasons" implies the notion of a community of moral reasoners whose agreement gives at least a prima facie sanction of one's judgment. On the other hand, "good reasons" implies the notion of acceptable motives, or acting out of deference or concern for others' desires and intentions. Although some theorists argue all our motives are selfish, our language condemning selfishness shows that one's motives in acting will not, as a rule, be acceptable if one shows no concern for how one's acts undermine others' interests. The component of selfishness will be condemned, perhaps as "heedless" or "greedy," perhaps as "callous" or "ruthless," but condemned in any case.

Moreover, as many have argued, to act voluntarily to protect others' moral rights, some concern must be shown for those whose rights are protected. A morally responsible person takes his or her self-description from society, responding to its demands as reflected in its moral language. Choosing one's identity in this way is an expression of regard for its members. Having concern for others and seeing oneself as a person among persons must, in some degree, *be with us from infancy*. It is part of the process by which we become morally responsible. Without concern and attention to others' interests, children could not learn language with which to describe their situation. Without the language, they could not achieve self-knowledge nor offer reasons in support of their choices. Thus, in a language-using and reason-giving community, mutual awareness and concern must pervade moral relationships.

Toddlers must learn to use the moral language. Infants possess this reciprocating awareness and interest in others as observed in their earliest learning of social relationships. This awareness and interest—the abilities and responses of an infant—are vividly suggested in the following description by the father of a newborn:

14. THOMAS NAGEL, THE POSSIBILITY OF ALTRUISM (1970); RICHARD PETERS, REASON AND COMPASSION (1973).

15. HERBERT FINGARETTE, ON RESPONSIBILITY (1967).

16. ROGER BEEHLER, MORAL LIFE 32 (1978).

> Thirty minutes after her birth, my daughter was already taking my measure. She lay in my lap, startlingly alert, scanning me as I scanned her, our gazes moving about each other's bodies, limbs, faces, eyes, returning, then locking. The same thing happened, I soon noticed, as she lay cradled in my wife's embrace, this locking of gaze into gaze. And it was only gradually that the wondrous mystery of that exchange began to impress me—for even an hour ago my daughter's eyes had been sheathed in undifferentiated obscurity—and now what captured their attention? Other sets of eyes . . . of all the possible objects of attention, what is so naturally compelling about two dark pools of returned attention.[17]

Observations of infants show a parallel kind of interest.

Part of our fun and our philosophical interest in baby-watching comes from seeing an infant's delight and excitement grow with the appearance of its mother, perhaps beginning to cackle and to pedal its feet in the air, as she engages its eyes, and then seeing the delight with which it imitates her moves. Our fun comes in witnessing their communication and in seeing the baby's demonstration of its awareness of its mother and its delight in her. Our philosophical interest is drawn to its concern for her and its lively interest in others, but it is especially drawn to the baby's delight in entering into little games with its mother and others. For *in order to play* a game, a baby must recognize what the other person is up to, what kind of rule is to be followed.

We may feel our own observations are inconclusive because we cannot be sure we are reflecting on the same kind of mother-child interchange. But if there is doubt on that score, we can turn to some of the filmed studies that have been used in support of attachment theory.[18] In these studies, mothers are filmed playing with and caring for their babies. In one such study—an extensive one—the mother-child relationship was filmed during the first twenty weeks of the infants' lives. From studying the films, the authors report that, from the first, the mother takes on facial expressions, motions and postures indicative of emotion, as though she and her baby were communicating . . . Most mothers, in sum, are unwilling or unable to deal with neonatal behaviors as though they were meaningless.[19] But of course, if the earlier discussed Piaget-Kohlberg view were correct,[20] infants' behavior would be

17. *Talk of the Town*, THE NEW YORKER, Mar. 9, 1987, at 25.

18. "Attachment theory" is perhaps too grand a term; it consists of a series of studies begun by John Bowlby, and taken up by Mary Ainsworth and her followers, which show how infants become "attached" or psychically bonded to loving caretakers. Mary Ainsworth's account of how an infant's pattern of behavior comes to form a system, in which a securely attached child of 12 months takes its caregiver as a base for explorations, sharing and growth. *See* MARY AINSWORTH, PATTERNS OF ATTACHMENT (1978). *See also* ATTACHMENT IN THE PRE-SCHOOL YEARS: THEORY, RESEARCH AND INTERVENTION (Mark Greenberg, Dante Cicchetti and Mark Cummings, eds., 1990).

19. T. Berry Brazelton, B. Kosloski & M. Main, *Origins of Reciprocity in* THE EFFECTS OF THE INFANT ON THE CARE GIVER 49 (Michael Lewis and Leonard Rosenblum, eds., 1974).

20. 1 KOHLBERG, *supra* note 1, at 118.

meaningless in the sense that it could involve no mutual caring relationship between caretaker and infant.

The account of the filmed study continues, describing how the mother's treatment initiates a reciprocal caring relationship with the infant through which it learns to play, and hence, communicate. The mother treats her time with the infant as a time for communicating, adjusting the complexity of her behavior to fit the infant's stage of development. She presents behavior as a model for the infant. She imitates its activity, enlarging upon it, and it delightedly enters into the play. Thus the infant "becomes aware of his action, visualizing her imitation of it and reproduces it for himself again. As he does so, he has the opportunity to add on to it . . . (in part) by modelling his behavior to match the enlarged version."[21] After observing mothers with their newborns over a 20-week period, the authors concluded that *both* mother and child were learning rules for their interaction, rules "which were being constantly altered by each."[22]

In films of infant attachment made by the investigators, we see that the child's capacity for seeing what its mother is doing and responding to it requires that the child see her intent and reciprocate, knowing she will see its intent and respond to it: reciprocity and taking the view of the other is essential to the play. Theirs is a kind of game in which the mother does this, the infant does that, then the mother does another thing (in accord with a pattern), or it might be a case of imitation in which *if* the mother does this, then the infant does this also. In either case, there is a kind of rule generation involved in the communication: the infant knows how to take the mother's intention, knows what she has in mind for it and knows that she will also know how to take what it does. So the infant must have an awareness of its behavior as falling under what it takes to be intended for it. Thus, contrary to what Piaget and Kohlberg would lead us to expect, at the age of four weeks (when one can definitely say that such play begins) we see, in primitive form, the abilities that are described as necessary to moral personhood in the philosophical literature—down to and including the beginnings of self-consciousness. The infant's self-consciousness is not consciousness of behavior as falling under a verbal description that is known to the infant, but it is consciousness which it uses in its game with its mother and on which it builds in subsequent play and learning.

Both parties possessed a consuming interest in the other partner to the play. Investigators report that in looking at films of four-week-old infants, they could look at any segment of the infant's body shown on the film and detect whether he was watching an object or interacting with his mother because the child's attention was quite different if vocalizing, smiling and using motor behavior in response to inanimate stimulus as opposed to the mother.[23] Thus, we find in primitive form, not

21. Brazelton, *supra* note 19, at 74.
22. *Id.* at 73.
23. *Id.* at 53.

only the ability to gain insight into another's desires and intentions (required for moral reasoning), but also the understanding of intentions, an indication of the concern for others that enters into moral motivation, according to the foregoing account of our moral anatomy. The infant's consuming interest in others appears at a time when the infant could not calculate what would serve its own future interests: the interest it exhibits is in others' delight and response. Moreover, the concern—the interest and delight in others' activity and responses—is an important factor in the mother-child games in which the infant begins to develop moral capacities. The games begin and attachment is formed through the infant's first interest in others, which is apparently heightened because of mother-child games. In those interchanges we observe its first exercise of capacities that will be required in order for it to develop rational competence. Thus, the interest shown in others is not a lapse from some rational calculation of self-interest. The interest, the responsiveness, must be there for the reasoning to begin. It is in us from the beginning, waiting to be channeled into the many determinate kinds of concern and respect that figure in moral action and reasoning.

Such interchanges mark peaks of cognitive performances for an infant of under six months old. But the child builds on that beginning. Other studies, made of children from six months to one year old, show during that period the child is more likely to become involved in activities turning on such reciprocity and mutuality.[24] If given a caring environment during this time, it will be likely to be working out what a number of investigators describe as a secure attachment. This attachment is characterized by the child's preference for its caretaker, shown by its heightened interest directed toward her or him and by the frequency with which it takes care to establish eye contact with her or him. It is also characterized by its initiating interchanges with the caregiver and by what investigators describe as trust.

Our philosophical interest in attachment is drawn to the point that the child can only become attached through an already present responsiveness and ability to read others' intentions. It is as a result of the attachment that it moves toward limited autonomy and independent satisfaction in its activities and becomes more responsive toward others. A number of observers of child development support these conclusions and suggest the child's relation to other members of the family is crucial to that development. Martin Hoffman is among those who have called attention to toddlers' ability to take an interest in, and to interpret, others' intentions. He noted that very young children are able to learn about social rules through conversations between family members about their feelings and inner states.[25] Judy Dunn reports that two-year-olds grow in their ability to anticipate others' feelings, to under-

24. *See infra* notes 25-26 and accompanying text.

25. Martin Hoffman, *Empathy, Role-Taking, Guilt and the Development of Altruistic Motives in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH & SOCIAL ISSUES 124 (T. Likona ed., 1976).

stand others' intentions and to understand and communicate about social rules. She observes that such children . . . take part in conversations about others' feelings in the second year; they play and show interest in the cause of such feelings. While they are not able to make judgments about complicated hypothetical moral dilemmas, she writes "they are very close to being able to assign responsibility for family transgressions, to make choices about whom to support in family disagreements and to use this understanding . . . ."[26] Moreover, their preparedness to act out of concern for others seems not to be a matter of fixed phases or stages, as both Piaget and Kohlberg claim, but is instead related to the concern exhibited by other members of their family. Dunn notes that as parents were more intense in their concern in discussing the importance of not hurting others, children were more likely subsequently to be sympathetically aroused and helpful in response to others' distress. Then too, she finds that toddlers with close, affectionate relations with their siblings show an earlier development of the ability to role-play, to act as conciliator and to cooperate with others.

Thus, family members' concern about others and their feelings for the child are instrumental in introducing the child to a sense of membership in the larger moral community. The family's interest in providing moral education is an important feature of the child's moral development *from infancy*. A philosophical perspective on child development that focuses on a child's learning and using moral language will hold that a child comes to apprehend moral meaning through observing and using moral language in action, a process that can only take place through its *entering into* relationships of mutual concern in the moral community. It must learn what it means to share and to wait one's turn. The evidence of attachment theory and of other observers support this view. Attachment theory evidence suggests, contrary to much of the psychological opinion of the past, that a child's earliest human relationships (as well as its subsequent learning) are made possible by its concern for others and its awareness of their concern and their intentions both for itself and for others.[27] Other psychologists observing child development now report that a toddler exhibits the responsiveness that moral relations require—in the ability to see itself as like others, as a person among persons. It is worth noting that the toddler can do so because members of its family have insisted on it entering into moral relationships; by insisting that it not hurt others, that it share, that it wait its turn, that it respect others' rights.

On the other hand, the fact that abused and neglected infants often fail to develop (if they survive) or develop into violent and aggressive children indicates that the process of moral development is a fragile one, one where timing is all important.

One of the most essential elements of family life is the caretakers'

26. Judy Dunn, *The Beginnings of Moral Understanding*, *in* THE EMERGENCE OF MORALITY IN YOUNG CHILDREN, *supra*, note 11, at 91-110.

27. *See generally* AINSWORTH, *supra* note 18 and accompanying text.

evident concern about others' rights and their fair treatment: their loving, consistent, and stable nurturing and their introduction of the child into their micro community of mutual respect and concern. As the development process is shown to be fragile and timing critically important, let us hope the law attends to those elements.

As I have no training in the law, I am not competent to proceed from these points to suggest specific changes which should be made in law or court procedure. But speaking broadly, I, or anyone, can mention some of the more important points which are indicated. The timing and fragility of a young child's moral development mean that we have stronger reasons for providing for its moral development than we have for either parent's custodial rights. The courts must work within a small window of time. Clearly it cannot postpone providing for the child's interests in favor of its parents whose claims are more forcefully presented by their lawyers.

Indeed, unless parents can provide the requisite consistent, loving, nurturing moral guidance, there is no reason they should be considered to be *eligible* for custodial rights. The foregoing implies that the family's importance to the child's best interests is its ability to provide the requisite conditions and the parents' biological relationship to the child is irrelevant to their being able to provide an acceptable claim to the custody of the child. It seems clear the law's definition of "family" should be shaped around that point.

As no prospective caretakers could produce decisive evidence that they would be able to provide such care on a continuing basis, there is no reason for treating custody decisions as single, final decisions. Rather, they are matters which require monitoring and continuing review. Moreover, the monitoring can only be intelligently reviewed by someone who understands the complexity of the developmental process and its relation to family life. Thus, special qualifications of education and training should be attached to the position of family court judges or to whatever court officer is empowered to review and decide such cases: we require a whole new set of criteria of eligibility for family court judges or the court officers to whom such authority is delegated.[28]

28. I do not propose that these are all of the changes which need to be made, but they are the substantive ones. These changes are essential to providing for the well-being of children whose destinies are affected by courts' decisions.

IN THE BEST INTERESTS OF THE CHILD: MANDATORY INDEPENDENT REPRESENTATION

EMILE R. KRUZICK*
DAVID H. ZEMANS**

INTRODUCTION

Our justice system articulates reliance upon the best interests of the child standard when dealing with the child. This simple standard implies that the child is the focus of any decision making process which impacts upon the placement or welfare of the child. In application, however, courts appear to experience great difficulty with the application of the test, particularly because they must consider the competing interests of parents in custody and access conflicts, and the interest of the state, or its agencies, in child welfare matters. The focus of this Article is custody and access. Notwithstanding difficulties applying the best interest test, we are of the view that the test should remain the primary analytical tool used by courts in the determination of child custody and access cases. However, to ensure that the best interests of the child are met, independent representation for children should be made mandatory in all child custody cases.

Interest in the subject matter evolved as a result of an invitation to participate in the American Bar Association conference titled "Family Law and the 'Best Interest of the Child,' " held at Ripon College, Ripon, Wisconsin, April 11-14, 1991. The multi-discipline symposium focused on the issue of best serving the interests of the child. It became apparent during the four day conference that our institutions that were designed to serve the needs of the child often ignore that voice and fail to represent the child's best interests. This Article explores the history of the best interest test and its application within the justice system by first considering custody and access from a Canadian perspective, through Canadian statutes and jurisprudence and their respective application in Canadian courts, and second, considering similar developments in England and other common law jurisdictions, specifically making comparisons with the United States. The Article concludes with a discussion of the role of counsel for the child in custody disputes.

Upon examination of the inherent difficulties in applying the standard and the available alternatives, our conclusion is that in order to ensure that the best interests of the child are met, mandatory independent representation of the child is an essential safeguard and worthy of

* Emile R. Kruzick, Partner, Osler, Hoskin & Harcourt, Toronto, Canada; B.A. 1967, University of Toronto; LL.B. 1970, Dalhousie University, Faculty of Law.
** David H. Zemans, Student-at-Law, Osler, Hoskin & Harcourt, Toronto, Canada; LL.B. 1991, Dalhousie University, Faculty of Law.

the resources necessary to implement such a program. Without independent representation, it is impossible to guarantee that the best interest test will be applied in such a manner as to protect the child's best interests.

I. THE BEST INTEREST TEST

A. *Early History*

The best interest test is relatively new to the common-law system. Until the last century in our society, the common-law regarded children as an economic asset which denied them legal identity and treated them as objects. Fathers had the prerogatives of ownership until children reached twenty-one years of age,[1] and only "extraordinary unfitness would deprive the father of his custodial right."[2] Through the vague doctrine of parens patriae, however, the Chancery Court did occasionally intervene to ameliorate a paternalistic common-law system.[3] The phrase "parens patriae" is used to describe the power of the court to act in loco parentis to protect the personal or the property interest of a child.[4]

> Under this "wardship" jurisdiction, the Court of Chancery assumed guardianship of the child. This power developed . . . from about the time of the Restoration of the Monarchy in 1660, when the Ancient Court of Wards was abolished . . . and for three centuries was used almost exclusively to protect the property and persons of infants. The power was not created by any statute and could not therefore . . . be affected, restricted or curtailed by any legislation unless that legislation [was] clearly directed to that power or purpose.[5]

In the old English case of *Shelley v. Westbrooke*,[6] the court exercised its parens patriae jurisdiction after considering whether a father was fit to exclusively make decisions on behalf of his children. The court stated:

> I consider this, therefore, as a case in which the father has demonstrated that he must, and does deem it to be [a] matter of duty which his principles impose upon him, to recommend to those whose opinions and habits he may take upon himself to form, that conduct in some of the most important relations of life, as moral and virtuous, which the law calls upon me to consider as immoral and vicious - conduct which the law animadverts upon as inconsistent with the duties of persons in such relations of life, and which it considers as injuriously af-

1. Tenures Abolition Act , 1660, 12 Car. II, ch. 24, (Eng.).
2. Harvey R. Sorkow, *Best Interests of the Child: By Whose Definition?* 18 PEPP. L. REV. 383, 384 (1991) (citing Shelley v. Westbrooke, 37 Eng. Rep. 850, 851 (1821)).
3. Greenspan v. Slate, 97 A.2d 390 (1953).
4. Monrad G. Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV., 167, 173.
5. OLIVE M. STONE, THE CHILD'S VOICE IN THE COURT OF LAW 123-24 (1982).
6. 37 Eng. Rep. 850 (1817).

> fecting both the interests of such persons and those of the community.
> I cannot, therefore, think that I should be justified in delivering over these children for their education exclusively, to what is called the care to which Mr. S. wishes it to be intrusted.[7]

Not until the 1839 enactment of the Custody of Infants Act[8] could a mother apply to the Court of Chancery, which "might, in its discretion, give her custody of her younger children . . . and access or visitation rights to all her minor children."[9]

The past century saw the demise of the common-law notion that the father should always have custody, and the emergence of the best interest test. In the United States, these opinions were first expressed by Justice Brewer,[10] and later by Justice Cardozo.[11] Assuming a mother was morally fit, this new standard resulted in an almost automatic preference for the mother with no meaningful inquiry into what would be in the best interest of the child.[12] What emerged was a shift in the proprietary interest in children from the father to the mother.[13] However, at the turn of the century in most common-law jurisdictions, legislation entrenched the rights of children expressed in the best interest test, though it was not until the last half of this century that the status of the child gained attention and courts gave children individual identity and attention as an independent person.

B. *Current Applications*

Legislation in most jurisdictions has entrenched the application of the best interest test. In Canada, the statutory basis for the test is found in the federal Divorce Act of 1985.[14] The Divorce Act has universal application in all of Canada when parties are dissolving a marriage and continues to apply to the status of children after the divorce judgment where custody and access are at issue. As well, each province has its own applicable legislation. Provincial legislation can be invoked where there is no divorce proceeding or in conjunction with a divorce action. In the Province of Ontario, for example, the Children's Law Reform Act[15] deals with custody and access. While both the federal Divorce Act and the provincial Children's Law Reform Act differ in some respects, they both provide guidance and parameters to the adjudication of custody matters, and require that the issue of custody and access be deter-

---

7. *Id.* at 851.
8. Custody of Infants Act, 1839, 2 & 3 Vict., ch. 54 (Eng.).
9. *Id.* (custody was considered for children up to age 7 in 1839, and later extended to age 16 in 1873).
10. Chapsky v. Wood, 40 Am. Rep. 321 (1881).
11. Finlay v. Finlay, 148 N.E. 624 (1925).
12. Robert F. Drinan, *The Rights of Children in Modern American Family Law*, 2 J. FAM. L. 101 (1962).
13. HENRY H. FOSTER, JR., A "BILL OF RIGHTS" FOR CHILDREN 3-7 (1974).
14. Divorce Act of 1985, S.C., ch. 4 (1986) (Can.).
15. Children's Law Reform Act, R.S.O., ch. 152 (1980) (Can.).

mined in accordance with the best interests of the child.[16] Section 24(2) of the Children's Law Reform Act, however, is more directive and provides more statutory criteria than the federal Divorce Act which must be considered by a court in determining what constitutes the best interests of the child. The Act reads:

> In determining the best interests of a child for the purposes of an application or motion under this Part in respect of custody of or access to a child, a court shall consider all the child's needs and circumstances, including
>
> (a) the love, affection and emotional ties between the child and,
>
> (i) each person seeking custody or access,
>
> (ii) other members of the child's family residing with him or her,
>
> (iii) persons involved in the child's care and upbringing,
>
> (b) the child's views and preferences, if they can be reasonably ascertained;
>
> (c) the length of time the child has lived in a stable home environment;
>
> (d) the ability of each person seeking custody or access to act as a parent;
>
> (e) the ability and willingness of each parent seeking custody to provide the child with guidance, education and necessities of life and meet any special needs of the child;
>
> (f) any plans proposed for the child's care and upbringing;
>
> (g) the permanence and stability of the family unit with which it is proposed that the child will live; and
>
> (h) the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion.[17]

Both the federal and provincial statutes, which are meant to achieve similar purposes, exemplify the differing approaches that the various provincial legislatures have taken.[18]

An examination of relevant case law leads to the conclusion that Canadian courts have difficulty in applying the applicable law and its best interests philosophy. In the Ontario Court of Appeals case of *Carter v. Brooks*,[19] the court considered the best interest test and how it remains the primary analytical tool used by contemporary courts when determin-

16. Compare Divorce Act at § 16(8) ("In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.") with Children's Law Reform Act at § 24(1) ("The merits of an application . . . in respect of custody of or access to a child shall be determined on the basis of the best interests of the child.").

17. Children's Law Reform Act at § 24(2).

18. *See* R.S.A., ch. D-37, Part 7 (1980) (Can.); R.S.B.C., ch. 121, sec. 24 (1979) (Can.); R.S.M., ch. 8, sec. 2(1) (1985-86) (Can.); S.N.B., ch. F-22, sec. 129 (1980) (Can.); NFLD. R.S., ch. 61 (1988) (Can.); R.S.N.S., ch. 160, sec. 18(5) (1989) (Can.); R.S.P.E.I., ch. C-33 (1988) (Can.); R.S.Q., ch. 39, sec. II, arts. 568-70 (1980) (Can.); S.S., ch. c-8.1, pt. II, sec. 8 (1990) (Can.).

19. 30 R.F.L.3d 53 (Ont. C.A. 1990).

ing custody. The court also discussed some of the difficulties courts face in their application of the test. The court stated:

> What guidance can be given for the application of the best interests of the child test? This area of the law is no different from many others where, in the application of a broad legal standard, what is desired is both predictability of result and justice to the parties based on the particular circumstances of the case. It is often difficult to ensure by "rules" that both objects are met. If the rules are too precise, it may be that important circumstances in some cases will be left out of account in applying the governing test, and justice will suffer. On the other hand, if there is [sic] not certain common understandings in how the issue is to be approached, the danger is one of undue subjectivity, with the consequence of reduced predictability. Having regard to the foregoing, I am satisfied that the best interest test cannot be implemented by the devising of a code of substantive rules, even if this could be done within the confines of a single case.[20]

In the British case of *J v. C*,[21] Lord MacDermott outlined his view of the statutes to be considered by a court applying the *best interests test*. He stated:

> Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interests of the child's welfare as that term is now to be understood. That is the first consideration because it is of the first importance in the paramount consideration because it rules upon and determines the course to be followed.[22]

It appears that the best interest test is a balancing and weighing of numerous factors that may impact upon the upbringing of the child. Consequently, this is an area of law where subjective views and feelings can and often do, exert subtle influences.

Author Kingsley Davis discussed the difficulty with the application of the best interest test and wrote that "[t]he welfare of the child rather than the claims of the parents is supposed to be the goal, but what is 'welfare' to one Judge is apt to differ from what is welfare to another."[23] Professor Adrian Bradbrook later discussed the Ontario Court's application of the best interest test, and compared the similarities between On-

---

20. *Id.* at 61.

21. 1 All E.R. 788 (1969).

22. *Id.* at 820-21.

23. Kingsley Davis, *Sociologic and Statistical Analysis*, 10 LAW & CONTEMP. PROBS. 700, 706 (1944).

tario's application of custody law with the findings of Kingsley Davis' similar Pennsylvania study twenty-seven years earlier.[24] Professor Bradbrook writes:

> There is no area of law over which the Judge has a wider discretion than child custody adjudication. . . . In view of the disparity of opinions expressed by the judges in almost every topic discussed in the study, it would seem that the findings of the 1943 Pennsylvania study, that there are no universally applicable principles in custody disputes, still apply today . . . in Pennsylvania there was an almost complete lack of crystallized opinion regarding custody. The judges needed to use rough and vague rules of thumb in making their decisions and believed that general principles were inapplicable because of the different fact-situation in each case. Although the majority of the judges relied to some extent on the advice of social work agencies, only twenty-five percent admitted that they were influenced by changing customs and social values when formulating their judgments.[25]

It is submitted that in the twenty years following Professor Bradbook's article, and despite clearly defined statutory guidelines, common-law courts continue to grapple with the application of the best interest test in the determination of child custody and access.

II. Analysis of Experience With the Best Interest Test

A. *Inherent Difficulties*

In presenting the issues that impact the child, a parent's position is not only opposing, but also subjective. In *Ford v. Ford*,[26] the United States Supreme Court considered the application of the best interest test and the inherent problems in relying on bitter and acrimonious parents to adequately represent their children during the custody proceeding. The Court found "experience has shown that the question of custody, so vital to a child's happiness and well being, frequently cannot be left to the discretion of parents. This is particularly true where . . . the estrangement of husband and wife beclouds parental judgment with emotion and prejudice."[27]

Canadian authors Philip Epstein and Susanne Goodman find that the central issue in child custody disputes is determining what type of evidence must be presented to enable the presiding judge to objectively ascertain the best interests of the child.[28] In addressing custody and access issues, the authors write:

---

24. Adrian Bradbrook, *An Empirical Study of the Attitudes of the Judges of the Supreme Court of Ontario regarding the Workings of the Present Child Custody Adjudication Laws*, 49 Can. B. Rev. 557 (1971).

25. *Id.* at 571.

26. 371 U.S. 187 (1962).

27. *Id.* at 193. *See also* Donald N. Bersoff, *Representation for Children in Custody Decisions: All that Glitters is not Gault*, 15 J. Fam. L. 27 (1976-77).

28. Philip Epstein & Susanne Goodman, *Custody and Access*, *in* Family Law Reference Materials, ch.4, 1 (Law Society of Upper Canada 1991).

> It is clear from the opening words of § 24(2) [of the Ontario Legislation] that the enumerated criteria are not to be viewed as exhaustive. Also evident from this section is that the paramount consideration in a custody dispute is the best interests of the child. Accordingly, the object of the proceeding is to place the child, rather than the persons applying for custody, at the crux of the decision. Due to the inherently adversarial nature of a court proceeding, coupled with the emotional anxiety which is part and parcel of a custody dispute, the central focus is often misplaced. As was stated by Mr. Justice Bayda in *Wakaluk v. Wakaluk* (1976), 25 R.F.L. 292 (Sask. C.A.), at 292-293:
>
> > The issue of custody is without doubt the most important one — and was so treated by counsel at the hearing of this appeal — and the most troublesome. While at the hearing of the appeal the parties concentrated their attention on this issue, they were not so mindful at the hearing of the petition, even though the issue was far from settled. From the standpoint of custody, the meaning of the petition was, in my respectful view, quite unsatisfactory. Virtually no evidence was directed to this issue. The parties primarily concerned themselves with adducing evidence to show whether, on the basis of the many material battles engaged in by them, one or the other of them should be favoured by the trial judge in his determination of the issue of cruelty.
> >
> > No one bothered to bring forward much information in respect of the two individuals who of all the persons likely to be affected by these proceedings least deserved to be ignored — the children.[29]

Child psychiatrist Dr. Richard Gardner studied the effects of custody litigation on parties and concludes from his research that parents may not be capable of the objectivity required to represent the best interests of their child during a custody dispute.[30] Dr. Gardner writes:

> People involved in custody litigation are fighting. They are fighting for their most treasured possessions — their children. The stakes are extremely high. Litigation over money, property, and other matters associated with the divorce produce strong feelings of resentment and anger. However, they are less likely to result in reactions of rage and fury than are conflicts over the children. Children are the extensions of ourselves, our hopes for the future, and thereby closely tied up with our own identities. Fighting for them is almost like fighting for ourselves. The two may become indistinguishable, and the fight becomes a 'fight for life.'[31]

---

29. *Id.* at 4-8.

30. RICHARD GARDNER, CHILD CUSTODY LITIGATION - A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS (1986).

31. *Id.* at 19.

Custody hearings are wrought with underlying hostility and conflicting opinions and attitudes regarding the child's best interests. When considered logically, the only reason courts are involved is because of the parents' inability to agree on what is in the child's best interest.

B. *Alternatives*

Many writers have criticized the best interest test in child custody proceedings and have argued for a more defined and easily applied test. Professor Martha A. Fineman argues that there are viable and perhaps preferable alternatives to the best interest test.[32] Professor Fineman recommends a test that is not dependent on the weighing of parental attributes, but one that boldly prioritizes the most significant factors to be considered by courts when determining child custody. In her article, Professor Fineman discusses what she considers to be the amorphous, undirected, incomprehensible and indeterminable subjective standard that has evolved in custody matters as a result of the best interest test, and argues in favour of courts alternatively applying a "primary-caretaker" rule.[33] With respect to the "primary-caretaker" rule, Professor Fineman states:

> This rule has been characterized in different ways, but the essence of the primary-caretaker standard is that children need day-to-day care, and that the parent who has performed this primary care during the marriage should get custody. . . . The primary-caretaker rule implicitly recognizes that no expert can confidently make the predictions required under the future-oriented best-interest placement, and that past behaviour may in fact be the best indication we have of commitment to the future care and concern for children.[34]

Professor Fineman's approach may be distinguished from the general judicial application of the best interest test in that it may be a more intellectually honest approach and more objective in its application as between the parties, and not as dependent upon the norms and values of a particular judge or the presentation by parents' counsel. In fact, when the courts apply the best interests standard, are they not in fact addressing who is best able to provide the child with day-to-day care? There is no doubt that a better test could assist the courts in awarding custody in a more consistent and seemingly less arbitrary manner. A test where

32. Martha A. Fineman, *The Politics of Custody and the Transformation of American Custody Decision Making*, 22 U.C. DAVIS L. REV. 829 (1989).

33. *Id.* at 835 n.19 ("The best interest of the child test involves a comparative balancing of the strengths and weaknesses of the parents. Factors such as health, wealth, education, and moral conduct have all been considered. The test is indeterminate and easily manipulated by judges and lawyers. Appellate review is rare since it is very fact specific and the trial judge has wide discretion to conclude which parent will act in the child's interest."). *See also* Jon Elster, *Solomonic Judgments: Against the Best interest of the Child*, 54 U. CHI. L. REV. 1 (1987).

34. MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 181 (1991).

prior to trial, the parties could know more precisely on what factors the court will place emphasis could also result in more out of court settlements of custody and access issues. Professor Fineman's approach, however, has the inherent danger of ignoring the child.

Professor David L. Chambers also perceives difficulties in the application of the best interest test.[35] Professor Chambers writes:

> The current approach states use for resolving custody disputes in divorce — a case-by-case inquiry into the best interests of the child — has many flaws. One has been that neither legislatures nor custom has provided judges with a coherent framework for thinking about what children's interests are. A second, equally serious, has been the inability of judges to make accurate determinations, under the circumstances prevailing in the context of litigation, of the quality of most individual children's relationships with their parents or of the parents' skill at childrearing. . . . Because of the many ways in which court determinations under the current rules are likely to be unreliable, if there is a sound basis for believing that any general rule will produce better outcomes than a random assignment, such a rule has a plausible foundation.[36]

Professor Chambers concludes, however, by stating that despite numerous criticisms of the best interest test, that it should remain the primary analytical tool used by courts in the determination of child custody disputes.[37]

III. MANDATORY INDEPENDENT REPRESENTATION: A NECESSARY SAFEGUARD

We are of the view that the best interest standard is still the best test to be applied in contested child custody and access cases, and that a child's best interests can be properly considered by a court if the child is independently represented by a child advocate or comparable legal counsel. We are of the view that independent representation is essential to ensure that the trier of fact is provided with all the salient information necessary to canvass and consider the issue of child custody. Independent counsel can also ensure that the child's rights are vigorously advocated and defended. Authors Goldstein, Freud and Solnit, however, express concerns about encouraging state involvement in the resolution of "private" domestic disputes.[38] The authors do, however, acknowl-

35. David L. Chambers, *Rethinking The Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

36. *Id.* at 558-59.

37. *Id.* at 559 ("Having completed the review, I now believe that no new or revived presumptions based on gender or primary-caretaker status can meet this standard on the basis of the existing empirical studies standing alone. There is simply not enough hard evidence that children in general are better off with women, primary-caretakers, or the parent of same sex than with the opposite parent. However, the state of evidence with regard to the three factors is not identical, and one of them, primary-caretaker status, may still warrant some sort of preference, when developmental theory and practical values that a preference — serve are taken into account.").

38. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979).

edge the need for intervention by the state to protect the best interests of the child in contested custody disputes:

> In divorce and separation proceedings, the imposition of counsel under this ground is justified only if the parents are unable to decide custody on their own—that is, if they ask the court to decide. By failing to agree on a disposition, separating parents waive their claim to parental autonomy and thereby their right to be the exclusive representatives of their child's interests. The child then requires representation independent of his parents' to assure that his interests are treated as paramount in determining who shall have custody.[39]

Independent representation is premised on a growing recognition that children have interests and rights that need to be considered distinctly and separately from those of adults, particularly their parents. Independent representation allows for the identification of the rights and needs of the child. A policy whereby children would be universally entitled to, and represented by their own counsel will ensure that the child's needs are given the priority the best interest test assumes it does. The authors of one study wrote:

> [W]ithout separate representation for the child, the court may neglect important interests of the child in both the outcome and the process of the proceeding. Because the best interests standard is a general principle or statement of values rather than a precise test, it has been criticized for providing "no indication of the degree of attention paid to the child's needs" in application, for reducing judicial opinions to "amorphous platitudes or generalizations," and for leaving the custody decision essentially indeterminate.[40]

Former Chief Judge Andrews of the Ontario Provincial Court's Family Division, and Pasquale Gelsomino write in their article:

> Traditionally, the courts have been satisfied the children's interests were adequately represented by the adult parties. In recent years, however, children have been increasingly recognized as individual persons, with views, preferences and interests distinct from those of their parents, guardians and child protection agencies.[41]

It is submitted that the best interest test, as it is currently applied, makes the court dependant upon the feuding parents' counsel to adduce and present all the information necessary to make an informed decision with regard to the custody of the child. Consequently, a court's decision in any proceeding where a child in a contested custody hearing has not been represented by independent counsel, should be suspect. Furthermore, a lawyer with a professional obligation to an adult client will not

---

39. *Id.* at 115.

40. Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1135 (1977-78) (citations omitted).

41. H. Andrews & Pasquale Gelsomino, *Legal Representation of Children in Custody and Protection Proceedings: A Comparative View*, *in* FAMILY LAW: DIMENSIONS OF JUSTICE 141, 141 (Rosalie S. Abella & Claire L'Heureux-Dube eds., 1983)).

present evidence that is relevant to the child's best interests where that evidence is damaging to the adult's case. As well, if counsel is expected to represent the parent's and child's best interest, ethical and professional dilemmas will arise by having to prioritize conflicting interests. There is also a real danger that if parents are not cross-examined by the independent counsel representing the child, that the intentions and integrity of each parent's testimony will not be adequately challenged, or at the very least not adequately examined through the eyes of the child. Where a child is not independently represented, the cumulative effect is that the court may be making decisions without truly addressing the child's best interest.[42]

Some would also argue that court appointed mental health professionals are capable of presenting all the necessary information and evidence pertaining to the child's best interests. It is our view that while mental health professionals play a crucial role in assisting the court in child custody disputes, they are not adequate replacements for a child being represented by independent legal counsel. Legal counsel, unlike mental health professionals, are able to participate in all aspects of the proceeding, including negotiations between parents' counsel. A child's independent counsel is also able to actively participate in the trial and ensure that the focus of the trial remains in the best interests of the child.

Appointing independent legal counsel to represent the child will also "assure that one voice will be raised in sole representation of the best interests of the minor child."[43] Professor Kerin S. Bischoff discusses the potential dangers of a system in which the appointment of independent representation is not mandatory, particularly in custody cases where child sexual abuse has been alleged.[44] The advocate for the child, rather than the trial judge or parents' counsel, is in the best position to determine whether the child's circumstances have been fully litigated.[45] Bischoff concludes that absent this vigorous independent representation, the record available for the trial judge will be "woefully incomplete,"[46] and that such representation should be mandatory in all custody proceedings.

In 1974, the Law Reform Commission of Canada issued a report challenging the long held belief that a child's interests in a custody matter would be adequately protected by the child's parents.[47] The Com-

42. *See supra* text accompanying note 40. "[T]he judge is not well placed to reduce the rancor of the proceedings, and is restricted to the courtroom and cannot on his own obtain the facts pertaining particularly to the child's viewpoint." *Id.* at 1136.

43. Clark v. Clark, 358 N.W. 2d 438, 441 (Minn. Ct. App. 1984).

44. Kerin S. Bischoff, *The Voice of the Child: Independent Legal Representation of Children in Private Custody Disputes When Sexual Abuse is Alleged*, 138 U. PA. L. REV. 1383, 1390 (1990).

45. *Id.* at 1390-91.

46. *Id.* at 1391.

47. LAW REFORM COMMISSION OF CANADA, WORKING PAPER NO. 1 - THE FAMILY COURT 40-41 (1974) (where the right or interest of a child is directly or indirectly affected by the court proceeding, it is not enough to rely on the judge, the parents, or the parents' counsel to act as an advocate of the child). *See also* ONTARIO LAW REFORM COMMISSION REPORT

mission's report provoked a number of Canadian provinces to legislate certain recommendations embodied in the report and to begin considering the need for children to be independently represented, particularly in acrimonious custody proceedings where the court could not confidently conclude that the parties would present all the evidence relevant to the best interests of the child. Ontario's 1984 Court of Justice Act, for example, makes provision for minors to be represented by the Ontario government's Official Guardian.[48]

In the Saskatchewan case of *McKercher v. McKercher*,[49] the Court of Queen's Bench shied away from the normative attitude that the interests of children always coincide with those of the parents, and that parents always act in the best interests of their children.[50] The Saskatchewan court's decision in *McKercher* reflected a growing recognition of the fact that a child has interests, wishes and needs which conflict with those of his or her parents. Despite resistance from the Official Guardian, whose role had until then been limited to protecting the child's property interests, the court ordered that the child be represented by independent counsel.[51]

Legislation governing custody and access in most Canadian provinces now provides for appointment of independent counsel for children at the court's discretion. The Canadian Law Reform Commission's recommendation that a child be represented in all custody proceedings, however, has yet to be adopted in full by any Canadian court or legislature. The prevailing attitude apparently remains to be that a child's interests and needs will be protected by his or her parents unless the court determines otherwise.

Some countries and jurisdictions take a more active role in seeing that the child's interests are independently represented. The Australian Family Law Act governs the appointment of independent legal counsel for children in custody disputes and makes specific provisions for a child's separate representation.[52] However, similarly to the statutes in most North American jurisdictions, the Australian act lays down no guidelines indicating when the court should appoint independent counsel to represent the child, nor does it absolutely require appointment. Section 65 of the Australian act provides:

> Where, in proceedings with respect to the custody, guardianship or maintenance of, or access to, a child of a marriage, it appears to the court that the child ought to be separately represented, the court may, of its own motion, or on the application

---

ON FAMILY LAW, PART III - CHILDREN 124 (1973) (discussing the child's right to be independently represented by counsel).

48. Court of Justice Act, S.O., ch. 11, § 102 (1984) (Can.).

49. 2 W.W.R. 268 (Sask. Q.B. 1974).

50. *Id.* at 270.

51. *Id.* A case comment on *McKercher* notes it is reasonable to assume that independent counsel is the most viable method of representing the child, given that other techniques have proven their own inadequacies and no viable alternative has yet presented itself. Ron W. Hewitt, *Case Comments*, 42 SASK. L. REV. 295, 297 (1977-78).

52. Family Law Act, No. 53, § 65 (1975) (Austl.).

> of the child or of an organization concerned with the welfare of children or of any other person, order that the child be separately represented, and the court may make such other orders as it thinks necessary for the purpose of securing such separate representation.[53]

In the United States, while the majority of states have enabling legislation authorizing courts to appoint independent representation, only Wisconsin[54] and New Hampshire[55] currently mandate independent representation of children in custody proceedings. Legal scholars widely applaud the Wisconsin approach, stating:

> Wisconsin moved to the forefront of developing child custody law by recognizing the complex aspects of custody disputes. Wisconsin realized that courts may be incapable of protecting and advancing the child's best interests because a court must "evaluate evidence which is offered by the parents within a highly volatile and emotional atmosphere."[56]

The evolution of Wisconsin's child custody law can be traced to the Wisconsin Supreme Court's *Wendland v. Wendland*[57] decision. In *Wendland*, the court discussed why independent legal representation for children, in certain circumstances, was crucial to ensure that the court's decision reflected what was in the best interests of the child. Justice Wilkie stated:

> The appointment of a guardian *ad litem* to represent the interests of children who are the subject of a custody fight in a divorce proceeding is a step that the trial court should take only in an extraordinary situation where the trial court believes that what may be in the best interests of the children may not be brought out by the two contesting parties. . . . Where there have been instances of immoral misconduct on the part of one (or both) parties and where the court is concerned over the effect of such misconduct on minor children, the court, in its capacity as a family court, recognizing that "children involved in a divorce are always disadvantaged parties," may well take additional affirmative steps to protect the welfare of the children. . . . Where there is a hotly contested dispute, and the court is satisfied that the procedure of relying on the two parties and the investigation of a welfare agency may not produce all the important evidence that the court should consider in looking after the best interests of the children, a guardian *ad litem* should be appointed. Inevitably this will add to the expense of the divorce proceedings. But such expense will be re-

---

53. *Id.*

54. WIS. STAT. § 767.045 (1991).

55. N.H. REV. STAT. ANN. § 458:17-a (1989).

56. Brenda M. Flock, *Custody Disputes Arising From Divorce: The Child's Need For Counsel In Pennsylvania*, 87 DICK. L. REV. 351, 354 (1983); *see also* Tari Eitzen, *A Child's Right To Independent Legal Representation in a Custody Dispute: A Unique Legal Situation, A Necessarily Broad Standard, The Child's Constitutional Rights, The Role of the Attorney whose Client is the Child*, 19 FAM. L.Q. 1, 53 (1985).

57. 138 N.W.2d 185 (1965).

warding if the interests of the children are better served.[58]

While the court in *Wendland* clearly stated that the discretion to appoint independent legal counsel should be exercised in only limited circumstances, the same court held ten years later that children are "indispensable parties to the proceedings," and stressed the need for children to be independently represented in any custody proceeding.[59] It is submitted that Wisconsin's legislation is an excellent basis upon which to model similar legislation in Canada, and for this reason the germane sections of the Wisconsin statute are worthy of note:

> (1) APPOINTMENT (a) The Court shall appoint a guardian ad litem for a minor child in any action affecting the family if any of the following conditions exists:
>
> 1. The court has reason for special concern as to the welfare of a minor child.
> 2. The legal custody or physical placement of the child is contested.
>
> . . .
>
> (4) RESPONSIBILITIES. The guardian ad litem shall be an advocate for the best interests of a minor child as to legal custody, physical placement and support. The guardian ad litem shall function independently, in the same manner as an attorney for a party to the action, and shall consider, but shall not be bound by, the wishes of the minor child or the positions of others as to the best interest of the minor child. The guardian ad litem shall consider the factors under s. 767.24(5) and custody studies under s. 767.11(14). The guardian ad litem shall review and comment to the court on any mediation agreements and stipulation made under s. 767.11(12). Unless the child otherwise requests, the guardian ad litem shall communicate to the court the wishes of the child as to the child's legal custody or physical placement under s. 767.24(5)(b). The guardian ad litem has none of the rights or duties of a general guardian.
>
> . . .
>
> (6) FEES. The guardian ad litem shall be compensated at a rate that the court shall determine is reasonable. The court shall order either or both parties to pay all or any part of the fee of the guardian ad litem. In addition, upon motion by the guardian ad litem, the court shall order either or both parties to pay the fee for an expert witness used by the guardian ad litem, if the guardian ad litem shows that the use of the expert is necessary to assist the guardian ad litem in performing his or her functions or duties under this chapter. If either or both parties are unable to pay, the court may direct that the county of venue pay the fees, in whole or in part, and may direct that any or all parties reimburse the county, in whole or in part, for the payment.

58. *Id.* at 191 (citations omitted).

59. Montigny v. Montigny, 233 N.W.2d 463, 468 (Wisc. 1975). One author argues that even in the absence of statutes mandating consideration of the child's wishes, judges who fail to elicit or who totally ignore children's custodial preferences are increasingly likely to have their custody orders reversed on appeal. Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 270 (1991).

> The court may order a separate judgment for the amount of the reimbursement in favour of the county and against the party or parties responsible for the reimbursement. The court may enforce its orders under this subsection by means of its contempt power.[60]

Wisconsin's legislation clearly articulates the need for children to be independently represented in contested custody matters and ensures that the focus of any proceeding remains where the enabling legislation meant it to be - on the best interests of the child.

IV. ROLE OF COUNSEL FOR THE CHILD

Although the role of counsel for the child is to express the child's point of view, in court, counsel for the child plays a unique role in contested custody dispute resolutions. Dan L. Goldberg, counsel for the Office of the Official Guardian in Ontario, Canada wrote:

> Unless an assessment has been conducted it is likely that counsel (and possibly his/her social worker) are the only person(s) to have met all the key people. If we have done a thorough job of preparation and appropriately express our knowledge the Official Guardian counsel should be cloaked with a high degree of credibility with the parties and their lawyers when we hold a settlement meeting.
>
> Given our previous interviews we will, hopefully be able to know the difficult issues and those that are capable of easier resolution. By continually emphasizing the benefits to their child of an amicable resolution to the dispute as well as the high cost of litigation the parties' focus often begins to move from antagonism with each other to a greater willingness to compromise.[61]

Because child custody trials have the potential for having a debilitating effect on all the parties involved, it is of the utmost importance that negotiation and settlement are encouraged. Dr. Richard Gardner adds that litigation should be avoided due to its devastating impact on the respective parents and children involved.[62] Dr. Gardner writes:

> The adversary system, which professes to help parents resolve their differences, is likely to intensify the hostilities that it claims it is designed to reduce. It provides the litigants with ammunition that they may not have realized they possessed. It contributes to an ever-increasing vicious cycle of vengeance — so much so that the litigation may bring about more psychological damage than the pains and grief of the marriage that originally brought about the divorce.[63]

Independent legal counsel for the child in custody disputes is in a better position to foster out of court settlements because he or she is in

60. WIS. STAT. § 767.045 (1991).

61. Dan L. Goldberg, *Representing Children in Custody and Access Proceedings in Ontario*, CAN. B. ASS'N INST. C.L.E. 37 (1989).

62. GARDNER, *supra* note 30.

63. *Id.* at 19.

a unique position that enables them to shift the focus of the dispute from the feuding parents to the needs of the child. Counsel for the child is also in a better position to assess the chances of success at trial. At a preliminary stage, independent counsel can also assist in forcing parents to seriously consider alternatives to a prolonged and difficult trial, bearing in mind the needs of the child.

In *Leatherdale v. Leatherdale*,[64] the Supreme Court of Canada discussed the need, and even responsibility of legislatures, courts and the bar to develop more easily applied and understandable tests in family law matters. Mr. Justice Estey wrote:

> Family law, more than any other branch of the law, must provide, where it is possible, simple and clear rules which readily lend themselves to expeditious application in the trial courts. Litigation over family matters is never economic, always a heavy expense and a painful experience. The simpler the rules, the easier their application by the courts; and even more importantly, the more readily applied by the legal advisors to the members of the family who must always strive to settle differences without recourse to the delays, expense and pain of court proceedings.[65]

Independent counsel for the child may not necessarily simplify the case, but the role of counsel for the child should be to attempt to settle differences from the child's point of view, without litigation if possible. As well, if parents are confronted with the additional burden of paying the legal fees of counsel representing their child, as they would be under the Wisconsin legislation for example, parents will be more likely to evaluate their chances of success before the beginning of a long trial in order to minimize the risk of having to pay additional fees to legal counsel who represented their child.

V. CONCLUSION

We support the best interest test because it is simple and clear. Application of the standard, however, begs the question, in whose best interest? We must ensure that the child remains central to the test. Professor Foster's summary targets the denial of due process and the failure to regard children as persons with rights, as the result of not providing a child independent legal counsel. Professor Foster writes:

> Children do have a right to childhood but it must be recognized that childhood is preliminary to adolescence and eventual adulthood and moreover, it is the most crucial period in human development. It is also obvious that much depends upon one's definition of "childhood" . . . . But there are certain fundamentals that are constant, such as the interest in having independent counsel whenever the placement of a child is at stake, and the right to fair treatment from all those who are in authority.[66]

64. 2 S.C.R. 743 (1982).
65. *Id.* at 772-73.
66. *Supra* note 13, at 3-7.

Children should therefore have independent counsel whenever their interest is in issue. This recommendation ensures that the best interest of the child is met and is made within the context of the legal and adversarial system, which we believe is here to stay. Given this adversarial system, independent representation is essential if the child's voice is to be heard. Although most legislation affords the child access to independent counsel, statutes do not go far enough to mandate representation. In the administration of justice, if the best interest of the child is to be served, then the child must be heard and must have legal status where placement or welfare is in issue. Counsel for the child should be afforded full status throughout the matter as if the child were a party to the proceeding.[67] The Law Reform Commission made its recommendation for independent representation for the child in 1974.[68] Professor Foster made his plea some eighteen years ago.[69] The legal community has come a small distance, but a great distance remains to ensure that the legal system serves the best interests of the child.

67. Reid v. Reid, 11 O.R.2d 622, 630 (Ont. H.C.J. 1975).
68. *See supra* text accompanying note 47.
69. *See supra* text accompanying notes 13 & 68.

THE MASSACHUSETTS EXPERIENCE: ADDRESSING THE LEGAL NEEDS OF CHILDREN

HONORABLE SHEILA E. MCGOVERN*

Several important legal changes for the children of Massachusetts had their genesis in January, 1986, when the Governor's/Massachusetts Bar Association's Commission on the Unmet Legal Needs of Children began its work. This Article details the process the Commission used to achieve its goals as well as the substantive changes in the law that were attained. It is hoped that the Commission's success can enable others to enact the necessary legislative changes that will enhance the development and potential of every child.

The establishment of the Commission was in itself a strong statement of policy, an acknowledgment of need and a commitment to change.[1] The ultimate goal of the Commission was to make recommendations to address the unmet legal needs of children, including specific legislative changes. To accomplish this goal, those political forces necessary for change—the executive, the legislative and the legal—were arrayed even before the actual work of the Commission began. The membership of the Commission was multi-disciplinarian, including lawyers, judges, state officials, mental health professionals, teachers and others from diverse backgrounds. The first and most arduous task was to eliminate many issues worthy of study in order to focus on those we could pragmatically accomplish. After extensive review, we resolved to focus on those legal needs that were most immediately pressing and were not being addressed by any other commission.

The Commission was divided into seven sub-committees whose task was to generate two or three specific recommendations. The seven sub-committees were: Due Process for Children, Family Needs, Rights and Obligations, Legal Resources and Judicial Education, Guardians ad Litem, Divorce and Custody, and Structure and Jurisdiction of the Courts.[2] For the next twenty months, the subcommittees participated in committee and sub-committee meetings, engaged in research, consulted

* First Justice, Middlesex County Probate and Family Court, Cambridge, Massachusetts.

1. The proposal to undertake a survey of children's needs was initiated by Michael S. Greco, then President of the Massachusetts Bar Association, and presented to Governor Michael Dukakis who immediately accepted a two-year commitment to the project and appointed his legal counsel, Stephen Rosenfeld, and the author, Judge Sheila E. McGovern, as co-chairpersons.

2. Amongst other topics, the Commission explored issues relating to divorce and custody, care and protection and Children in Need of Services (CHINS) cases, termination of parental rights, tracking guidelines to eliminate court delays, uniform rules of procedure, appointment of counsel for children, the redefinition of the role of guardians ad litem, continuing education programs for lawyers, judges and court personnel on developmental, psychological and evidentiary issues pertaining to children, and the creation of

with other experts and held public hearings. In May of 1987, the final Report[3] was published incorporating twenty-two recommendations of the Commission,[4] including specific draft legislation and preliminary

court intake centers and mental health clinics for all courts concerned with child and family issues.

3. *See* REPORT OF THE GOVERNOR'S/MASSACHUSETTS BAR ASSOCIATION'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN (on file with the *Denver University Law Review*).

4. The Commission's recommendations included the following:

1. Legislation should be introduced to better define the types of endangerment that justify state intervention in families for the care and protection of children.

2. All courts with authority to intervene in families for the care and protection of children should adopt uniform time guidelines to track cases from beginning to end.

3. The District, Juvenile, and Probate Court Departments should adopt uniform rules and procedures for handling care and protection cases.

4. G.L. c.210, § 3 should be amended to require that in contested cases where parental rights may be terminated, the court shall appoint counsel for the child.

5. G.L. c.210, § 3 should be amended to better define the grounds for termination of parental rights, and to mandate that when children's interests and parental rights conflict, the child's interests shall prevail.

6. Legislation should be introduced creating a Children's Services Division within the Committee for Public Counsel Services, as an experimental pilot project in two courts, to provide children's advocacy and representation through appropriately trained and qualified attorneys and support staff. The Children's Services Division shall supplement, but not replace, representation currently being provided by the private bar.

7. By legislative or administrative order judges, court personnel, attorneys, and Guardians Ad Litem handling cases involving children should attend continuing education programs on developmental, psychological and evidentiary issues pertaining to children. For judges and court personnel, such programs should be regarded as part of their regularly assigned duties.

8. Compensation for attorneys appointed by the court to represent children should be increased to $60/hour plus reasonable out-of-pocket expenses, exclusive of travel, for work performed in or out of court, and judges should have the discretion to cap the total amount paid.

9. In the initial stages of proceedings involving CHINS, care and protection or delinquency the court should consider, on the record, whether the child should be referred to the local educational agency for a Chapter 766 Team evaluation, if the facts indicate possible impairment of the child's ability to progress effectively in a regular education program. Parents or legal guardians—or children themselves, if over 14—should be parties to such consideration. In addition, the Office for Children should receive funds to support research and advocacy related to children's special education and other needs.

10. The Chief Administrative Judge of the Trial Court should establish a committee to develop and promulgate uniform, comprehensive written rules or standards for every Department of the Trial Court, including Probation, which govern Termination of Parental Rights Actions (G.L. c.210); Care and Protection Actions (G.L. c.119, § 24 or § 23C); Children in Need of Services (CHINS) (G.L. c.119, § 52 *et seq.*).

11. *Define G.A.L. (Guardian ad Litem) Role by Statute*: Legislation should be introduced to clarify and define the functions of G.A.L.s in cases where the children are involved. G.A.L.s should function as Next Friend of the Minor, Investigator or Evaluator, but not as Attorneys/Advocates, as they have in the past.

12. G.L. c.215, § 56A should be amended to give the court discretion to appoint counsel for children in cases of disputed custody and in cases where the court determines that visitation, support, or other substantial rights of children are at stake. Judges should also have the authority to assess said counsel's fees and expenses to the parties, on the finding of ability to pay, or to the Commonwealth of Massachusetts, subject to a cap to be determined by the court.

If, in a given case, both a G.A.L. and an attorney are appointed by the court to protect the children's best interests, the G.A.L.'s services shall be to the court on the children's behalf. That means that G.A.L.s, if asked by the court to make recommendations, shall do so based on their own perception of what is in the

guidelines for the judiciary. Although the specific proposals were diverse, the underlying and unifying theme was the best interest of the child, not simply as a legal term of art, but as a shared value and attitude. This thematic principle was emphasized in the Report's introductory statement that our recommendations were designed to effect behavioral changes on the part of parents, lawyers and judges. Legal changes alone, without a corresponding attitudinal change, often become empty formalism. We hoped to make pervasive the principle that children's needs and rights are paramount and that in conflict situations other interests should be subordinated. Ideally, in the course of court proceedings, the parents, their counsel and the judge would come to

---

children's "best interests," which may or may not coincide with the children's wishes. Attorneys, by contrast, shall represent the children's position, consistent with an attorney's representation of any other client.

13. Motions to appoint a G.A.L. may be made by children's attorneys, attorneys to other parties, or on the court's own initiative, but the decision to appoint a G.A.L. should be at the discretion of the court. The court should also specify whether the appointee will function as a G.A.L. Next Friend, a G.A.L. Investigator, or a G.A.L. Evaluator. A G.A.L. Next Friend should be an attorney; a G.A.L. Investigator should be an attorney, social worker or other appropriate professional; and a G.A.L. Evaluator should be a mental health professional, such as a psychiatrist, psychologist, or licensed independent clinical social worker. The G.A.L.'s duties, and timeframes for submission of reports, should be specified in the court forms.

14. *Economic Support*: G.L. c.208, § 34 should be amended to add an additional mandatory criterion, namely, "the present and future needs of dependent children," in cases of divorce where children are involved. Children's needs shall be the court's primary concern in determining the distribution of marital assets, and in assessing alimony and child support.

15. *Fiduciary Obligations of Parties to Divorce*: To assure full and realistic financial disclosure, Rule 401 of the Domestic Relations Special Rules should be revised to recognize marriage as a "partnership," to impose fiduciary responsibilities of full disclosure upon the parties to divorce, and to authorize sanctions for failure to do so.

16. *Emotional Support*: G.L. c.208, § 31 should be amended to require divorcing parents who request shared legal custody to demonstrate their ability to cooperate in protecting the child's interests by developing a mutually acceptable parenting plan, prior to the date the court renders its final judgment. At a minimum, this plan should provide for decision-making concerning the child's education, regular and emergency health care, religious training and observance (if any), and procedures for resolving parental disputes concerning child-raising decisions and duties after divorce.

. . . .

17. *Creation of Court Intake Centers*: Intake Centers staffed with clinical social workers should be created within each probate court to provide education and evaluation, as well as direction and access to necessary services, for couples involved in divorce proceeding and custody disputes.

18. Mechanisms should be established to identify all cases pertaining to a single family unit.

19. Procedures to coordinate and consolidate cases affecting a single family unit should be implemented by the Courts.

20. Mental health clinics should be established, under the aegis of the Department of Mental Health, for all courts in which child and family issues are heard.

21. Legislation should be introduced authorizing court-appointed counsel for minor children alleged to be victims of child abuse in cases where statutory authority for such appointments does not currently exist, and funds should be appropriated by the legislature to underwrite the cost of such representation.

22. Increased funding should be made available to encourage expanded use of mediation by the courts—particularly in CHINS cases—as an informal alternative for families willing to try mediation before resorting to litigation.

understand children's needs and respond to them, so that children's lives are improved by virtue of the court's involvement.

After the Commission Report was officially released at a Governor's press conference, it was disseminated to libraries and published in legal newspapers and periodicals. In addition, several seminars were conducted in various parts of the state. However, the most important step in ensuring that this Report would not die on the vine was the establishment by the Massachusetts Bar Association of a Standing Committee on the Unmet Legal Needs of Children. This Committee, chaired by the author, formed subcommittees to draft specific legislative proposals to implement the Commission's recommendations. As a result of the Committee's efforts, five bills were filed by the Massachusetts Bar Association at the next two legislative sessions. The endorsement by a respected state-wide bar association is critical in establishing credibility with legislators and in being able to utilize the Association's resources and lobbying efforts. In addition, individual members of the standing Committee attended legislative hearings on the various bills, gave testimony at public hearings, wrote letters and made calls in support of the legislation.

The efforts of the Commission have been very successful. Four of the proposed bills have been enacted into law.[5] These include an Act

5. One of the Commission's proposals was not enacted by the legislature. The proposed legislation would have changed MASS. GEN. L. ch. 215, § 56A (1989), which deals with Guardians ad Litem. The primary goals of the Commission's recommendations in the area of G.A.L.s were as follows:

1. To clarify and define the varying roles fulfilled by G.A.L.s in court proceedings involving children;

2. To distinguish these roles from those of attorneys representing children before the court; and

3. To specify the qualifications needed by G.A.L.s to fulfill their roles.

The proposed legislation incorporated those recommendations. Part I addressed the court's role in appointing G.A.L.s, while Part II addressed the G.A.L.'s duties and role. Part I provided that the court may appoint one of three kinds of G.A.L.s in proceedings involving a child's welfare. It went on to define the three types of G.A.L.s that could be appointed and the qualifications that are necessary for each type of G.A.L. Part I also required the court to specify which type of G.A.L. was being appointed. The three types of G.A.L.s are the Guardian ad Litem Investigator, the Guardian ad Litem Evaluator and the Guardian ad Litem Next Friend.

Part II outlined the G.A.L.'s duties, which included conducting his or her investigation and filing reports with the court. Part II also provided for the court to appoint an attorney for the child when the court determined that the child's interests cannot otherwise be protected. This section clarified the distinction between a G.A.L. and an attorney for the child, stating that the G.A.L. shall not act as the child's attorney. The G.A.L. is not to act as an advocate for the child per se but rather as an independent investigator/evaluator of the child's needs.

The fundamental purpose of the legislation is to clarify the roles and duties of G.A.L.s in the court process and to ensure the promotion of the best interests of children involved in domestic relations proceedings. The text of the proposed legislation read as follows:

> MASS. GEN. L. ch. 215, § 56A is hereby amended by striking all of said section and inserting in place thereof the words:
> PART I.
>
> (1) The judge of a probate court, on application of a party or on the court's own motion, may appoint a guardian ad litem at any stage of a proceeding involving the care, custody or maintenance of minor children and as to any matter in-

Providing for Counsel in Certain Proceedings,[6] an Act Providing for the

volving domestic relations except those for the investigation of which provision is made by section sixteen of chapter two hundred and eight.

(2) The court shall designate in the order of appointment the category of guardian ad litem appropriate to act in the best interests of the child. The court shall designate the guardian ad litem as one or more of the following: (i) Guardian ad Litem Next Friend; (ii) Guardian ad Litem Evaluator; or (iii) Guardian ad Litem Investigator.

(a) Guardian ad Litem Next Friend shall be an attorney appointed under the provisions of section thirty-four of chapter two hundred and one and governed by the provisions thereof.

(b) Guardian ad Litem Evaluator shall be a psychiatrist, psychologist, licensed independent clinical social worker or other appropriate mental health professional appointed by the probate court to evaluate the mental and emotional needs of the child and the parties to the proceeding or any other mental health issues pertinent to a determination of the best interests of the child and make recommendations and report thereon.

(c) Guardian ad Litem Investigator shall be an attorney, social worker or other appropriate professional or lay person appointed by the court to conduct an investigation into the facts of the proceeding at issue and make recommendations and report thereon.

(3) When appointing a Guardian ad Litem Evaluator, the court shall specify in its order who is to be evaluated and the purpose of such evaluation.

(4) The court shall designate the term of a guardian ad litem's service.

(5) The court shall fix compensation for guardians ad litem and such compensation and any expenses approved by the court shall be paid by the parties or the commonwealth upon order of the court.

PART II.

(1) The duties of a Guardian ad Litem Next Friend shall be those specified in section thirty-four of chapter two hundred and one. The duties of a Guardian ad Litem Evaluator or Guardian ad Litem Investigator shall include performing an evaluation or making an investigation to determine the facts, the needs of the child and the family and the available resources within the family and community to meet those needs; to make a written report; and to promote the best interest of the child until formally relieved of such responsibility by the court.

(2) Upon request, any agency, person, police officer or probation officer shall provide a guardian ad litem with all reports made to or by such agency, person or officer and all records of such agency, party or officer relating to the child.

(3) A guardian ad litem shall be given immediate notice of any hearings in the pending case. A guardian ad litem shall report to the court in writing not less than once during each six month period following the date of appointment or as is otherwise ordered by the court, regarding such guardian ad litem's activities on behalf of the child. In any proceeding in which a guardian ad litem is appointed, the guardian ad litem shall file a current report with the Clerk of Court or Register of Probate no later than seven days prior to any final hearing involving the placement or custody of the child unless otherwise ordered by the court. No judgment or decree shall enter until the court has reviewed the guardian ad litem's report. Such reports shall be admissible into evidence in lieu of testimony by the guardian ad litem, subject to the right of the parties to cross examine the guardian ad litem. Parties may depose guardians ad litem in anticipation of trial or evidentiary hearing only by order of the court, for good cause shown.

(4) A guardian ad litem shall not act as the child's attorney. Upon a determination by the court that the best interests of the child would not otherwise be protected, the court may appoint special counsel for the child to serve as the child's legal advocate. The court in such cases may assess the child's reasonable attorney's fees and costs against the parties or against commonwealth.

6. This proposal amended MASS. GEN. L. ch. 210, § 3(b) and read as follows:

AN ACT PROVIDING FOR THE APPOINTMENT OF COUNSEL FOR A CHILD IN CERTAIN PROCEEDINGS

SECTION 1. MASS. GEN. L. ch. 210, § 3(b) as appearing in the 1986 Official Edition, is hereby amended by adding after the second sentence the following sentence:

The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party.

Future Needs of Children in Divorce,[7] an Act Relative to Shared Custody[8] and an Act Relative to the Support of Children.[9] The latter three

7. This proposal amended MASS. GEN. L. ch. 208, § 34 and read as follows:

AN ACT PROVIDING FOR THE FUTURE NEEDS OF CHILDREN IN DIVORCE

SECTION 1. MASS. GEN. L. ch. 208, § 34, as amended by section 67 of chapter 23 of the acts of 1988, is hereby amended by inserting after the word "estate" in the third sentence:

the present and future needs of the dependent children of the marriage.

So the statute would read "the court . . . shall consider the length of the marriage, the conduct of the parties . . . the vocational skills, employability, estate, present and future needs of the dependent children of the marriage, liabilities and needs of each of the parties . . ."

The following proposal was rejected by the Family Law bar:

PROPOSAL NO. 2. To add an additional paragraph to MASS. GEN. L. ch. 208, § 34 as follows:

> In making an assignment of property under Section 34 of this chapter, the court, in order to protect the best interests of any dependent children of the marriage, may set aside or assign a portion of the estate of the parties to secure the present and future financial needs of the dependent children of the marriage. In determining the financial needs of each child, the court shall consider the following needs in the context of the parties' station in life: housing, food, clothing, social and recreational, medical and other special needs, and the educational needs and capacity of each child including higher education. An order under this paragraph shall be in addition to and shall not be in lieu of any order for support. An order made pursuant to the provisions of this paragraph, to assign or set aside a portion of the estate of the parties for a dependent child, may be modified only upon a finding that the original order no longer serves its intended purpose.

8. This proposal amended MASS. GEN. L. ch. 208, § 31 and read as follows:

AN ACT RELATIVE TO SHARED CUSTODY OF CHILDREN

SECTION 1. MASS. GEN. L. ch. 208, § 31, as appearing in the 1986 Official Edition, is hereby amended by striking out section 31 and inserting in place thereof the following section:

Section 31. For the purposes of this section, the following words shall have the following meaning unless context requires otherwise:

"Sole Legal Custody," one parent shall have the right and responsibility to make major decisions regarding the child's welfare, including matters of education, medical care, emotional, moral and religious development.

"Shared Legal Custody," continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare, including matter of education, medical care, emotional, moral and religious development.

"Sole Physical Custody," a child shall reside with and under the supervision of one parent, subject to reasonable visitation with the other parent, unless the court determines that visitation would not be in the best interest of the child.

"Shared Physical Custody," a child shall have periods of residing with and under the supervision of each parent. Physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his or her physical, mental, moral or emotional health.

Upon the filing of an action in accordance with the provisions of this section, section twenty-eight of this chapter, or section thirty-two or chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child.

Nothing herein shall be construed to create any presumption of temporary shared physical custody.

In determining whether temporary shared legal custody would not be in the best interest of the child, the court shall consider all relevant facts, including, but not limited to, whether any member of the family has been the perpetrator of domestic violence, abuses alcohol or other drugs, has deserted the child, and whether the parties have a history of being able and willing to cooperate in matters concerning the child.

If, despite the prior or current issuance of a restraining order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

There shall be no presumption either in favor of or against shared legal or physical custody at the time of the trial on the merits.

At the trial on the merits, if the issue of custody is contested and either party seeks shared legal or physical custody, the parties, jointly or individually, shall, submit to the court at the trial a shared custody implementation plan setting forth the details of shared custody, including, but not limited to, the child's education; the child's health care; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside and/or visit with him or her, including holidays and vacations, or the procedure by which such periods of time shall be determined.

At the trial on the merits, the court shall consider the shared custody implementation plans submitted by the parties. The court may issue a shared legal and/or physical custody order and in conjunction therewith accept the shared custody implementation plan submitted by either party or by the parties jointly or may issue a plan modifying the plan or plans submitted by the parties. The court may also reject the plan and issue a sole legal and/or physical custody award to either parent. A shared custody implementation plan issued or accepted by the court shall become part of the judgment in the action, together with any other appropriate custody orders and orders regarding the responsibility of the parties for the support of the child.

Provisions regarding shared custody contained in an agreement executed by the parties and submitted to the court for its approval that addresses the details of shared custody shall be deemed to constitute a shared custody implementation plan for purposes of this section.

An award of shared legal or physical custody shall not eliminate responsibility for child support. An order of shared custody shall not constitute grounds for modifying a support order absent demonstrated economic impact that is an otherwise sufficient basis warranting modification.

The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the parent not granted custody to have such access to the academic, medical, hospital, or other health records of the child, as he or she would have had if the custody order or judgment had not been entered; provided however, that if a court has issued an order to vacate against the noncustodial parent or an order prohibiting the noncustodial parent from imposing any restraint upon the personal liberty of the other parent or if nondisclosure of the present or prior address of the child or a party is necessary to ensure the health, safety or welfare of such child or party, the court may order that any part of such record pertaining to such address shall not be disclosed to such noncustodial parent.

Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interests of the children.

9. This proposal amended MASS. GEN. L. ch. 208, § 28 and read as follows:

AN ACT RELATIVE TO THE SUPPORT OF CHILDREN

SECTION 1. MASS. GEN. L. ch. 208, § 28, as appearing in the 1988 Official Edition, is hereby amended by inserting after the second sentence the following sentence:

> The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance.

statutes were drafted by the Divorce and Custody Subcommittee.[10] It is in the arena of divorce that children's needs are most often subsumed with parental needs or worse, when they are perceived as being aligned with one or another parent in the oppositional camp. Too often the ends of justice were deemed served by "cutting the baby in half," in an effort to appease both parents. This was especially revealing in joint custody situations where a child was shuttled back and forth between parental homes, too often with little regard for his or her best interest.

To remedy this problem and to clarify the widespread confusion between legal and physical custody, and shared and sole custody, the amended statute provides a definitional section for these terms. The statute explicitly requires a court to consider certain factors in the determination of whether temporary shared legal custody is appropriate, including incidents of domestic violence, alcohol or substance abuse or child neglect. As a prerequisite to the granting of shared custody at the trial on the merits, the new statute also requires the submission of a shared custody implementation plan prepared by the parties including provisions for the child's education, health care and a schedule of shared parental time as well as procedures for resolving disputes between the parties regarding the child. To minimize the misuse of shared custody to exact monetary concessions, the amended statute explicitly deals with the relationship between shared custody orders and responsibility for child support.

Another area of divorce in which children's needs were often ignored was in the area of property division. One of the most controversial proposals involved amending our equitable distribution statute to include the present and future needs of dependent children as a mandatory factor for the judge to consider in making a division of property in divorce. Under the law as it existed, the trial judge was required to make specific findings on the parties' automobiles, but not on their children in reallocating the family's resources. The amended statute requires the judge to consider the present and future needs of the dependent children of the marriage in making an award of property.[11]

SECTION 2. MASS. GEN. L. ch. 209, § 37, as appearing in the 1988 Official Edition, is hereby amended by inserting after the first sentence the following sentence:

The probate court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance.

10. This subcommittee was chaired by then-attorney Beverly Weinger Boorstein, now a Judge of the Middlesex Probate and Family Court.

11. The amended law reads as follows:

MASS. GEN. L. ch. 208, § 34. Alimony; assignment of estate; rights and funds accrued during marriage; determination of amount of alimony or value of property; health insurance.

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the

Although it will probably take another ten years before the scope of this amendment has been fully defined by case law, we are already seeing its effect at the trial level in both contested and uncontested cases. The areas specifically affected are the disposition of the marital home and the setting aside of educational funds. There is growing consensus that, if there are enough financial resources, the marital home should be preserved if possible if it is in the best interests of the child to do so. Additionally, some judges have taken the position that the statute permits them to set aside funds in trust for future college expenses. In any event, the statutory changes have sparked much discussion and renewed emphasis on children's needs, even where there is not total agreement on how to meet them. To foster this discussion, the Committee members gave several seminars across the state to members of the bench and bar. The purpose was not only to apprise them of the statutory changes, but also to sensitize them to the needs of children and to foster a judicial construction of those needs which would incorporate the best interest standard. These seminars were well received and promoted much discussion and implementation into pending cases. Appellate decisions have supported this construction, including assessing children's needs in the context of parental station in life.[12]

On July 29, 1991, another bill was passed amending the child sup-

---

estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. *In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage.* The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

(Emphasis added).

12. *See, e.g.*, Pare v. Pare, 565 N.E.2d 1195 (Mass. 1991) (court held that property division following divorce was inequitable and that the husband was required to set aside a portion of the proceeds of the sale of the marital home as security for future child support obligation); LoStracco v. LoStracco, 584 N.E.2d 633 (Mass. App. Ct. 1992) (court held that marital home could not be sold following divorce because the children's psychological and emotional well-being required stability); Dennis v. Dennis, 558 N.E.2d 991 (Mass. App. Ct. 1990) ("a judge may consider a child's 'standard of living' in deciding whether the level of available support for that child is adequate.").

port statute[13] extending the age until which an order of support for purposes of education may be made from age twenty-one to age twenty-three.[14] This bill was to prevent the stranding of college students on the educational beaches when their support suddenly ebbed at age

13. The new legislation amended § 28 of MASS. GEN. L. ch. 208 and § 37 of MASS. GEN. L. ch. 209. The amended law reads as follows:

MASS. GEN. L. ch. 208 § 28: Children, care, custody and maintenance provisions for education and health insurance.

Section 28. Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children. Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care, custody and maintenance of the minor children of the parties provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

MASS. GEN. L. ch. 209 § 37: Support orders for children of separated parents; provisions for education and health insurance.

Section 37. If the parents of minor children live apart from each other, not being divorced, the probate court for the county in which said minors or any of them are residents or inhabitants, upon complaint of either parent, or of a next friend in behalf of the children after notice to both parents, shall have the same power to make judgments relative to their care, custody, education and maintenance, and to revise and alter such judgments or make new judgments. The probate court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for support or maintenance on behalf of a child, and such child is not covered by a private group health insurance plan, said court shall determine whether the obligor under such order has health insurance on a group plan available to him through an employer or organization that may be extended to cover the spouse or child for whom support is ordered. When said court has determined that the obligor has such insurance, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such child.

14. The following proposal is still pending in the Massachusetts legislature:

MASS. GEN. L. ch. 209C, § 9, as appearing in the 1990 Official Edition, is hereby

twenty-one before most of them had a chance to graduate. The resistance with which this proposal was originally met subsided rather dramatically when it was pointed out to critics that the legislature had previously changed the legal entrance age of a child into school from five to six years of age with the inevitable result that the age of graduation from college had thereby been delayed one year. Therefore, the majority of college students would not graduate until age twenty-two.

In addition to these enacted bills, three more are pending in the Massachusetts legislature. They include an Act Relative to Guardians Ad Litem;[15] an Act Expediting Resolution of Legal Proceedings Involv-

---

amended by inserting after the first sentence of subparagraph (a) the following sentences:

The Court may make appropriate orders of maintenance, support and education for any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The Court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree.

15. The text of the proposed law is as follows:

AN ACT RELATIVE TO GUARDIANS AD LITEM

SECTION 1. Chapter 215 of the General Laws, as appearing in the 1986 Official Edition, is hereby amended by striking section 56A and inserting in place thereof the following sections:

Section 56A. During the pendency of any proceeding, a justice of the probate and family department of the trial court may appoint a guardian ad litem to investigate or evaluate any questions or issues raised in the proceeding and related to the care, custody or maintenance of minor children or related to any domestic relations issue except where the investigation is for such issues governed by section sixteen of chapter two hundred and eight.

The court shall include in the written order of appointment a specific description of the role and duties which the guardian ad litem is to perform and assume in the investigation or evaluation in the proceeding in which the appointment is ordered. The court shall designate the term of a guardian ad litem's service and shall designate the guardian ad litem as one or both of the following: (i) A Guardian ad Litem Evaluator; or (ii) A Guardian ad Litem Investigator. When appointing a Guardian ad Litem Evaluator, the court shall specify in its order who is to be evaluated and the purpose of such evaluation.

A Guardian ad Litem Evaluator shall be a psychiatrist, psychologist, licensed independent clinical social worker or other appropriate mental health professional appointed by the probate court to evaluate the mental and emotional health of the child or any party to the proceeding or any other mental health issues pertinent to a determination of the best interests of the child and make written recommendations and report thereon.

A Guardian ad Litem Investigator shall be an attorney, social worker or other appropriate professional or lay person appointed by the court to conduct an investigation into the facts of the proceeding at issue and make written recommendations and report thereon.

The court shall fix compensation for any guardians ad litem and all such compensation and any expenses approved by the court shall be paid by the parties or the commonwealth as ordered by the court.

A Guardian ad Litem shall have access to all records of the child which are available to either parent, unless otherwise ordered by the court.

A Guardian ad Litem shall be given timely notice of any hearings in the pending case.

Within a time period specified in the order of appointment, the guardian ad litem shall file with the court a written report detailing the results of the investigation or evaluation or any interim report as ordered by the court, setting forth any recommendation, if a recommendation is requested by the written order of ap-

ing Children in Need of Care and Protection; and an Act Clarifying Child Abuse and Adoption Procedures.

The Committee continues its task of implementing the Commission's recommendations. Among other issues, we are studying revisions to financial statements filed in divorce proceedings and proposed methods of establishing a fiduciary duty between spouses to report their assets fully and accurately in divorce and the imposition of penalties for failure to do so. It is the consensus of the Committee that these financial aspects have not been adequately recognized in assessing the best interests of the child. The expense and time involved in complicated discovery procedures inevitably involve a serious depletion of economic resources that would otherwise benefit the family unit after the divorce. As the Report noted, there was one final theme that transcends all others, and this is the link between children's unmet legal needs and children's poverty. At the time of the Report, children in Massachusetts constituted thirty-eight percent of the poor. Other studies have corroborated that poverty among children is growing.

Our ideal is to move beyond basic needs to the enhancement of the full potential of each child. This is the best interest of the child. If this cannot be realistically achieved all of the time, it should nevertheless remain our goal. To achieve this goal we must forge a new ethic, an ethic that recognizes the primacy of the child's interests.[16]

---

pointment. If any proceeding in which a guardian ad litem is appointed, the guardian ad litem shall file a current report with the Clerk of Court or Register of Probate no later than thirty days prior to any final hearing involving the placement or custody of the child unless otherwise ordered by the court. The written report shall be open to inspection by the parties and their counsel. Upon a request of the guardian ad litem or any of the parties, a judgment or order shall not enter until the court has reviewed the guardian ad litem's report.

A Guardian ad Litem shall not act as the child's attorney. Upon a determination by the court that the best interests of the child would not otherwise be protected, the court may appoint special counsel for the child to serve as the child's legal advocate. The court in such cases may assess the child's reasonable attorney's fees and costs against the parties or against the commonwealth.

16. Professor Mary Ann Glendon has characterized the idea that children's needs should be considered foremost as the "children-first principle." *See* Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1559 (1984). This principle requires that property division following a divorce should provide for the children's support before the spouses' needs are addressed. In another work, Professor Glendon stated:

> To apply this principle consistently in divorces involving minor children, would mean that the judge's main task would be to piece together . . . the best possible package to meet the needs of the children and their physical custodian. Until the welfare of the children had been adequately secured in this way, there would be no question or debate about "marital property." All property, no matter when or how acquired, would be subject to the duty to provide for the children. Nor would there be any question of "spousal support" as distinct from what is allocated to the custodial spouse in his or her capacity as physical custodian. In cases where there is significant income and property left over after the children's needs have been met, the regular system of marital property division and spousal support could be applied as a residual system.

MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 95 (1987).

CHILDREN, FAMILIES AND THE STATE: AMERICAN FAMILY LAW IN HISTORICAL PERSPECTIVE

STEVEN MINTZ*

INTRODUCTION

May minor children sue their parents? Do children have a right, independent from their parents' wishes, to choose where they will live? May minor children be permanently removed from their parents' custody if the parents do not do an effective job of raising them? These are among the questions that the nation's courts have had to wrestle with as the nature of American family life has, in the course of a generation, been revolutionized.[1]

In recent years, few subjects have generated more controversy or evoked more perplexing ethical dilemmas than family law. Jurists have had to grapple with the meaning of such broad and malleable legal concepts as "privacy," "due process," "equal protection" and "the best interests of the child." An explosion of family law litigation has forced judges to confront a series of extraordinarily difficult questions: What is a family? Who is a parent? What are parents' obligations? When and how can the rights of biological parents be terminated? What constitutes a child's best interests in custody and visitation disputes?

Today, half of all civil court cases involve questions of family law.[2] A widespread sense of dissatisfaction has accompanied the proliferation of litigation over the family. Critics charge that family law decisions are too unpredictable and arbitrary; that family law judges exercise excessive discretion; that our present system of family law generates too much litigation and that legal concepts like "the best interest of the child" are so broad and undefined that they allow jurists to impose their own moral preferences in their rulings.[3]

Two broad perspectives dominate public discussion over family law. One perspective, held by many conservatives, complains about the apparent increase in judicial intervention in the internal functioning of

* Associate Professor of History, University of Houston. The author thanks Susan Kellogg, Michael Grossberg, Tamara Harevan, Anne Hornsby, Susan Lehmann, Theda Skocpol and Cindy Zollars for their comments and criticisms.

1. *See generally* MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTION: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE (1988); EVA R. RUBIN, THE SUPREME COURT AND THE AMERICAN FAMILY (1986); Stephen J. Morse, *Family Law in Transition: From Traditional Families to Individual Liberty*, *in* CHANGING IMAGES OF THE FAMILY 316-60, (Virginia Tufte & Barbara Myerhoff eds., 1979).

2. MINTZ & KELLOGG, *supra* note 1, at 228. *See also* Angel Castillo, *Judges Flip the Family Album*, N.Y. TIMES, May 3 1981, at E9.

3. *Cf.* David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, U. MICH. J.L. REF. 805, 806-13 (1985) (discussing government intrusion into the family).

families. It regards the recent spate of family law litigation as a symptom of an erosion of community. According to this view, the proliferation of litigation reflects the breakdown of a broad ethical consensus within American society and the collapse of traditional limits on acceptable behavior. Society has come to believe that every grievance should be cast as a conflict of rights and that all social conflicts should be adjudicated.[4]

A second perspective, held by many liberals, celebrates the growing judicial concern with privacy and individual rights. This perspective regards increasing litigation as an inevitable and essentially positive by-product of a growing concern for individual rights and of dramatic demographic changes—such as increasing rates of divorce and numbers of working mothers—which have generated new kinds of conflicts demanding judicial intervention.[5]

There are kernels of truth in both points of view; yet both perspectives are profoundly ahistorical, and they obscure a fundamental paradox at work in family law. Two apparently contradictory historical developments have occurred simultaneously in family law. One involves a gradually growing emphasis on privacy and individual rights; the other, a gradual increase in the involvement of the legal system in the internal functioning of families. In the pages that follow, we will examine the changing role of law in regulating familial behavior from the seventeenth century to the present, focusing on the transformation of legal norms for marriage, divorce, parent-child relationships and custody and support obligations. What we will see is the way that two paradoxical developments—a stress on privacy and equal rights and a shift toward greater public involvement in internal family functioning—arose hand-in-hand, each reinforcing the other. We will trace the emergence of the idea that family members are individuals who have distinct interests, not reducible to the interests of a family patriarch; and we will see how this idea contributed to the view that the state has a duty to intervene in the family "in the public interest."

I. STATE, LAW AND FAMILY

Given the weakness of other institutional authorities, law has played a particularly important role in American society. Law has provided an arena of social and cultural conflict. It has served as a moral theater where fundamental values have been defined and dramatized. It has furnished a standard by which all forms of disputation are measured. Finally, it has served as a mediator between individuals and the state, defining the limits of state intervention.

Yet for all of its obvious importance, American law poses difficult conceptual issues. Law is, at once, an intellectual system with its own

4. *See id.*; *see generally* CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977).

5. *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).

commitments, forms and procedures; an ethical structure defining permissible behavior and ways of resolving disputes; and a social process in which legal principles are established through the adjudication of many individual cases. Not simply a mirror of society, the law is a semi-autonomous realm, partially responsive to statutory enactments, social practices and cultural values, and also to its own traditions and precedents. In addition, the law is a powerful legitimizing force, which (in theory) relegates conflicts to a special, abstract realm where decisions are supposed to be made on an evenhanded, non-partisan basis, reflecting broadly accepted notions of equity, fairness and impartiality.[6]

An intensive look at the history of American family law can help us to understand the critical social functions played by law in American society. Such a study can also help us understand the changing relationship between government and individual families and the relationship between the broad social and cultural sources of legal change and the more intrinsically technical sources of legal innovation. Since the earliest days of colonization, government has shown a special interest in the family, enacting statutes to regulate familial behavior, empowering public officials to oversee familial relations and intervene in internal family functioning, assigning rights and obligations to family members and conferring privileged status upon particular kinds of family units. Through law, government has helped socially construct what Americans mean by family.[7]

II. HISTORICAL OVERVIEW

Over the past decade, scholars have engaged in a far-reaching effort to reconstruct the legal history of the family. Although some of their conclusions must remain tentative and subject to revision, this scholarship has clearly identified the outlines of legal change.

A. *The Colonial Law of the Family*

The colonial law of the family varied sharply from one colony to another, reflecting differences in religious ideology, regional economies and demographic circumstances. Colonies actively involved in trade with England, including Maryland, New York, South Carolina and Virginia, created chancery courts modelled on those in England. They retained English common law principles more readily than Connecticut, Massachusetts and Pennsylvania, where religious ideas led authorities to reject English common law and equity.[8]

During the seventeenth century, lawmakers in Massachusetts and Connecticut revised English common law and created a system of family

6. *See* BRUCE H. MANN, NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT 1-10 (1987).

7. *See generally* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960 (1988).

8. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 185-93 (1986).

law embodying basic religious beliefs about how families were to be ordered and authority distributed, the nature of the marital bond and the proper roles of married women and children. This body of law stressed the hierarchical and patriarchal nature of familial relationships, conceived of marriage as a civil contract and placed an emphasis on family unity and interdependence, a wife's submission to her husband's will and children's dependent and subordinate status.[9]

In accordance with their organic conception of society, Puritan Massachusetts and Connecticut required all individuals to marry and live in "well ordered" households, taxing bachelors and single women who failed to marry, fining couples who lived apart from each other and requiring unmarried persons to enter an established household as a boarder or servant.[10] Since marriage was regarded as a public act and an alliance among families, town governments required brides and grooms to submit to extensive community and family supervision. A father had a legal right to determine which men could court his daughters and a legal responsibility to give or withhold consent from a child's marriage, though he could not "willfully" or "unreasonably" deny his approval. No couple could legally join in marriage without announcing their intention to do so at three successive public meetings or by posting a written notice on the meetinghouse door for fourteen days.[11] In all colonies, however, a shortage of clergy and onerous regulations contributed to large numbers of "informal" marriages lacking legal sanction.[12]

Because Puritan lawmakers considered marital unity under the husband a prerequisite of social stability and because they assumed that husbands (or grown sons) would provide for their wives and widows, they tended to eliminate certain English common law protections for married women which assumed that husbands and wives had separate interests within the family. Both Massachusetts and Connecticut rejected English ideas of separate estates for women, dower interest, prenuptial contracts and suits in equity as well as certain common law protections for women against coercion by their husbands.[13]

In sharp contrast, in Maryland, South Carolina and Virginia, where the death rate was higher and widows were more likely to be left with young children, women received somewhat greater protections of property rights as dower was extended to personal and real property. These colonies also retained English protections against coercion by husbands (by requiring wives to acknowledge their consent to the conveyance of property in private examinations apart from their husbands). New York

9. *Id.* at 3-13; Marylynn Salmon, *The Legal Status of Women in Early America: A Reappraisal*, 1 LAW & HIST. REV. 129 (1983).

10. MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT 53-54 (1988).

11. EDMUND S. MORGAN, THE PURITAN FAMILY: RELIGION & DOMESTIC RELATIONS IN SEVENTEENTH CENTURY NEW ENGLAND 30-34, 83-84 (1944).

12. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 at 92-94 (1976).

13. *See* SALMON, *supra* note 8, at 185-93.

and South Carolina also recognized the principle of separate estates for women, allowing married women limited rights to own and control property apart from their husbands.[14]

Although married women in colonial New England were legally subordinate to their husbands, they did possess limited legal rights and protections. Husbands who refused to support or cohabit with their wives were subject to legal penalties. Because Puritans regarded marriage as a civil, not a sacred, contract, they permitted divorce in cases of a husband's impotence, cruelty, abandonment, bigamy, adultery, incest or failure to provide. Massachusetts granted approximately forty absolute divorces between 1639 and 1692;[15] another twenty-three divorce petitions were brought to the Governor's Council from 1692 to 1789.[16] In contrast, Maryland, New York and Virginia strictly opposed absolute divorce with right to remarry, while allowing divorce *a mensa et toro* (separation from bed and board) and private separation agreements.[17] In addition to authorizing divorce as a protection to women, Massachusetts Bay and Plymouth colonies also enacted the first laws in the western world protecting "marryed woemen . . . from bodilie correction or strikes by her husband . . . unless it be in his own defense."[18]

The significance of these legal protections for women must not be overstated. In practice, Puritan law reinforced a hierarchical and paternalistic conception of the family. In order to obtain a divorce, a wife had to prove that she had "acted dutifully" and not given her husband "provocation."[19] In a number of instances, authorities allowed husbands to punish an abusive wife or a disobedient child by whipping. Perhaps as a result of the emphasis attached to order and patriarchal authority, women were more likely than men to be punished for adultery, fornication and bastardy.[20]

Even in cases of abuse, Puritan magistrates commanded wives to be submissive and obedient, telling them not to resist or strike their husbands but try to reform their spouses' behavior.[21] Women who refused to conform to Puritan ideals of wifely obedience were subject to harsh punishment including fines or whippings. Courts prosecuted 278 seven-

14. *See id.*

15. *See* LYLE KOEHLER, A SEARCH FOR POWER: THE "WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND 49-50, 77-79, 152-53 (1980); SALMON, *supra* note 8, at 58-80; Henry S. Cohn, *Connecticut's Divorce Mechanism: 1636-1669*, 14 AM. J. LEGAL HIST. 35 (1970); Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts* 18 WM. & MARY Q. 586 (1976); Nancy F. Cott, *Eighteenth-Century Family and Social Life Revealed in Massachusetts Divorce Records*, 10 J. SOC. HIST. 20 (1976); D. Kelly Weisberg, *Under Great Temptations Here: Women and Divorce Law in Puritan Massachusetts*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 117-28 (D. Kelly Weisberg ed., 1982).

16. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, *supra* note 15.

17. SALMON, *supra* note 8, at 58-68.

18. ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 21-22 (1987).

19. *Id.* at 24. *See also* KOEHLER, *supra* note 15, at 136-60.

20. *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 31, 38 (1988).

21. *See* KOEHLER, *supra* note 15, at 136-46.

teenth century New England wives for heaping abuse on their husbands. In general, colonial New England courts valued family preservation above the physical protection of wives and children, seldom granted wives divorce on grounds of cruelty, only punished the most severe instances of domestic abuse and generally meted out mild punishments to men.[22]

New England law treated children, like women, as subordinate and dependent beings. In exchange for paternal support, education and training, children's service and earnings were their father's property. In order to reinforce paternal authority, one law adopted by the Massachusetts General Court in 1646 made it a capital offense for "a stubborn or rebellious son, of sufficient years and understanding [viz. sixteen years of age], to not obey the voice of his Father . . . or mother."[23] In Connecticut and Rhode Island, a rebellious son could be confined in a house of correction. Rebellious daughters and sons under sixteen were subject to whippings. The Massachusetts code did extend certain minimal protections to children. Just as the code outlawed wife beating, it prohibited "any unnatural severitie" toward children.[24]

Since the family was the foundation stone of the Puritan social order and disorderly families defiled God's injunctions, the larger community gave fathers legal authority to maintain "well-ordered" families. If they failed, the community asserted its responsibility for enforcing morality and punishing misconduct. If a family failed to properly perform its responsibilities for teaching religion, morality and obedience to law, then town selectmen had orders to "take such children or apprentices" from neglectful masters "and place them with some masters . . . which will more strictly look unto, and force them to submit unto government."[25] Each year, courts tried a few dozen cases of spouse abuse, cruelty to children and servants, threats against parents, child neglect, adultery and, above all, fornication.[26] In 1648, Massachusetts Bay Colony, fearing that "many parents and masters are too indulgent and negligent" ordered selectmen to keep "a vigilant eye over their brethren

22. *See id.*; *see also* PLECK, *supra* note 18, at 29-31 (discussing the reluctance of the Puritans to invade family privacy); *cf.* D'EMILIO & FREEDMAN, *supra* note 20, at 31-38 (discussing Seventeenth-Century family violence).

23. JOHN R. SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES, 1640-1981,at 10 (1988).

24. *See* MORGAN, *supra* note 11, at 78-79, 148; PLECK, *supra* note 18, at 25-28; SUTTON, *supra* note 23, at 10-42; Lee E. Teitelbaum & Leslie J. Harris, *Some Historical Perspectives on Governmental Regulation of Children and Parents*, *in* BEYOND CONTROL: STATUS OFFENDERS AND THE JUVENILE COURT 1-35 (Lee E. Teitelbaum & Aidan R. Gough eds., 1977); Lee E. Teitelbaum, *Family History and Family Laws*, 1985 WIS. L. REV. 1135 (1985).

25. Teitelbaum & Harris, *supra* note 24, at 12. *See also* MORGAN, *supra* note 11 at 27, 78, 148 (noting similar rules).

26. *See* D'EMILIO & FREEDMAN, *supra* note 20, at 22, 27-38; KOEHLER, *supra* note 15, at 136-60; PLECK, *supra* note 18, at 27-32; Henry Bamford Parkes, *Morals and Law Enforcement in Colonial New England*, 5 NEW ENG. Q. 431, 443-47 (1932); Linda Auwers Bissel, Family, Friends, and Neighbors: Social Interaction in Seventeenth-Century Windsor, Connecticut (1986) (unpublished Ph.D. dissertation, Brandeis University); *cf.* ROGER THOMPSON, SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649-1699, at 169-89 (1986) (discussing community control).

and neighbors to see . . . [that] their children and apprentices [acquire] so much learning as may enable them perfectly to read the English tongue and knowledge of the capital laws."[27] Between 1675 and 1679, Puritan authorities extended public supervision of familial behavior by authorizing the selectmen in every town to appoint tithingmen, "each of whom shall take the Charge of Ten or Twelve Families of his Neighbourhood, and shall diligently inspect them."[28]

To what extent did the seventeenth century New Englanders use courts to encourage and enforce proper domestic behavior? Not as frequently as popular attitudes about Puritans suggest. Only rarely did courts become involved in cases of domestic violence. Only one rebellious adult son was prosecuted for "reviling and unnatural reproaching for his natural father,"[29] and he was punished, not by hanging, but by whipping. Similarly, only one natural father was prosecuted for excessively beating his daughter.[30] Prosecutions for wife beating were relatively infrequent. Between 1630 and 1699, 128 men are known to have been tried for physically abusing their wives.[31] The punishments for wife abuse were generally mild, usually amounting only to a fine, a lashing, a public admonition or supervision by a town-appointed guardian. In two instances, however, colonists did lose their lives for murdering their wives.[32]

Although early New Englanders paid close attention to the domestic and sexual behavior of individuals, prosecutions were generally infrequent, except in cases of repeated offenses, especially disruptive behavior or in cases involving the indigent. In cases involving the indigent, lawmakers separated children from parents and required them to work for strangers. They also required paupers and their families to wear the letter "P" on the sleeve of their outer garment, removed indigent families out of town and compelled relatives, including grandparents, to support grown children or grandchildren at risk of fines or imprisonment.[33] Punishment of offenses was designed to strengthen communal norms by bringing deviation into the public realm and eliciting proper attitudes—shame and recantation—on the part of the convicted. Couples found guilty by a church court of fornication had to repent publicly before their child could be baptized. Public humiliation, confession and repentance affirmed the boundaries of acceptable behavior.[34] By the mid-eighteenth century, community regulation of the family had dramatically declined due to rapid population growth, increasing

27. Teitelbaum & Harris, *supra* note 24, at 11.

28. MORGAN, *supra* note 11, at 149. *See also* PLECK, *supra* note 18, at 29 (discussing the rationale behind, and the effectiveness of, such rules).

29. PLECK, *supra* note 18, at 26, 29-31.

30. *Id.* at 26-27.

31. KOEHLER, *supra* note 15, at 137.

32. *Id.* at 137-42. *See also* PLECK, *supra* note 18, at 29-31 (describing one instance of wife abuse).

33. Bissell, *supra* note 26, at 106-29. *See also* D'EMILIO & FREEDMAN, *supra* note 20, at 27-32; PLECK, *supra* note 18, at 32-33.

34. Bissell, *supra* note 26, at 106-29.

religious fragmentation, new ideologies emphasizing personal privacy and the spread of market relationships that undercut paternalistic social relationships. The breakdown of communal controls was manifest in rising rates of illegitimacy and premarital pregnancy, the abolition of many church courts and declining legal prosecution of sexual offenses. By the mid-eighteenth century, courts and town selectmen were less concerned about married couples guilty of premarital pregnancy, and more concerned about the economic maintenance of the illegitimate children born to single women.[35]

B. *Family Law of the Poor*

Even in the seventeenth century, a dual system of family law existed, with one set of principles—of patriarchal authority, family unity, domestic privacy and the primacy and inviolability of the family—applying to most families, and a different set of principles applying to the families of the poor. Four key principles characterized the colonial family law of the poor: local responsibility for assisting poor families, outdoor relief (that is, assistance for the destitute in their own homes), the legal obligation of family members to support relatives and apprenticeship of minor children.[36]

Eligibility for public relief was defined by settlement and removal laws. Colonial settlement laws, which grew stiffer with time, authorized local authorities to deny residence to newcomers who might become a burden on the town, required newcomers without means of support to post bond and barred property owners from selling land to newcomers without prior approval by local authorities.[37] During the nineteenth century, residency requirements for public relief were lengthened, and penalties for those who brought the indigent into local communities were toughened. In a number of cases, courts split up indigent families and transported sick or elderly paupers across local boundary lines.[38] Other regulations empowered local officials to remove children from indigent and neglectful parents and apprentice them with a master. They further required parents, grandparents, children and, in Massachusetts and New York, grandchildren to provide support for poor relatives.[39]

Even in cases involving the indigent, a broad stress on the primacy of the family remained. During the colonial era, most indigent individuals received assistance in their own homes, although some elderly, widowed, sick or disabled persons, who were unable to care for themselves, were placed in neighboring households. It was not until the mid-eighteenth century that a small number of towns erected almshouses or workhouses to serve individuals without families, such as vagrants,

35. *See* D'EMILIO & FREEDMAN, *supra* note 20, at 32-34; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 110-11 (1975); PLECK, *supra* note 18, at 29-35.

36. *See* ABRAMOVITZ, *supra* note 10, at 75-79; BLOOMFIELD, *supra* note 12, at 99-104.

37. *See* ABRAMOVITZ, *supra* note 10, at 79-83; BLOOMFIELD, *supra* note 12, at 99-104.

38. BLOOMFIELD, *supra* note 12, at 99-104.

39. *See id.* at 103-04.

dependent strangers, deserted children or orphans. Yet even these institutions were modelled upon families; such institutions were built in the style of ordinary residences and patterned after the organization of the family.[40]

C. *The Early Nineteenth-Century Reconstruction of Family Law*

During the first decades of the nineteenth century, American jurists, legislators, litigants and legal commentators reformulated English and colonial legal rules and doctrines dealing with families and created a new system that used contract, gender and family status to structure legal rights and obligations. This new set of rules, regulations and practices rearranged the balance of power within the home and dramatically altered the relationship between family members and government.[41]

The new system of family law embodied emergent republican notions of what constituted a proper family. There was a new conception of the woman's role, which defined the ideal wife and mother in terms of piety, virtue and domesticity; a new sentimental conception of children as vulnerable, malleable creatures with a special innocence and a romantic conception of marriage based on free choice and romantic love.[42]

A belief that choice of a spouse should be based on romantic love rather than parental arrangement led judges and legislatures to make matrimony easier to enter. State legislators lowered marriage fees and authorized an increasing number of churches and public officials to perform marriages while courts rejected colonial rules that made marriage licenses and parental consent necessary for a valid marriage. Judges voided state statutes setting minimum age of marriage and reduced restriction on marriages among affines (such as marriages between a widower and his sister-in-law). They also tended to uphold the validity of common law marriage—in sharp contrast to English courts, which rejected "irregular marriage" as invalid—on the grounds that a prohibition on informal marriages would throw into question the legitimacy of such unions and "bastardize" many children.[43]

A belief that the primary object of marriage was the promotion of personal happiness encouraged jurists and legislators to increase access to divorce and remarriage in instances of adultery, physical abuse or failure of a marriage partner to fulfill his or her proper role. In the early

40. *Id.* at 99-104; DAVID J. ROTHMAN, THE DISCOVERY OF ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 3-56 (1971).

41. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK, 70-112 (1982); BLOOMFIELD, *supra* note 12, at 91-131; MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA, ix-xii (1985); Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346 (1979).

42. *See* CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT 3-25 (1980); JAY FLIEGELMAN, PRODIGALS AND PILGRIMS: THE AMERICAN REVOLUTION AGAINST PATRIARCHAL AUTHORITY, 1750-1800 (1982); MINTZ & KELLOGG, *supra* note 1, at 43-65; MARY P. RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865, at 18-59, 145-85 (1981).

43. *See* GROSSBERG, *supra* note 41, at 64-83.

nineteenth century, the availability of divorce as a remedy to intolerable marriages expanded as states transferred jurisdiction over divorce petitions to courts. By the 1830s, a number of states adopted extremely permissive divorce laws, allowing a divorce to be granted for any misconduct that "permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relation."[44] In conception and in practice, nineteenth century divorce law tended to reinforce contemporary notions of wifely and husbandly behavior. Divorce laws were built around the concept of spousal fault or moral wrongdoing, and in order to obtain a divorce it had to be demonstrated that a husband or wife had violated his or her domestic role in a fundamental way. In a typical divorce, a wife sued her husband for nonsupport, intemperance and his "indolent," "profligate" and "dissipated" behavior while she sought to demonstrate her "frugality" in managing the home.[45]

A view of married women as individuals possessing distinct rights was apparent in the enactment of married women's property acts, which gave married women limited control over property they brought to marriage or inherited afterward, rudimentary contractual capacity and the right to sue or be sued.[46] Despite these statutes, married women were still treated as a separate and special class in the eyes of the law.[47] Courts held, for example, that ambiguous or intermingled assets belonged to the husband, that women's customary ways of earning money, such as taking in boarders, did not meet the legal requirements of a separate estate and that wives could not establish a separate estate without their husbands' consent.[48]

The new domestic ideology was also recognized in legal changes involving child support, child custody and illegitimacy. During the middle decades of the century, New York state judges were the first to establish the principle that parents had a *legal* obligation to support their children, reversing the old common law doctrine that parents had only a nonenforceable *moral* duty to support their offspring.[49] Many courts went even further and rejected the notion that fathers had an unlimited

44. DAVID BRION DAVIS, ANTEBELLUM AMERICAN CULTURE: AN INTERPRETIVE ANTHOLOGY 96 (1979).

45. *See* ROBERT L. GRISWOLD, FAMILY AND DIVORCE IN CALIFORNIA, 1850-1890: VICTORIAN ILLUSIONS AND EVERYDAY REALITIES 39-140 (1982). The arguments advanced in nineteenth-century divorce petitions reflected broader cultural ideas of womanhood and manhood. Wives told the courts that they were chaste, modest, industrious, frugal and orderly, while their husbands complained that they were unfaithful, slovenly, lazy and improvident. Conversely, husbands asserted that they were kind, thoughtful, affectionate, temperate, industrious, self-controlled and sexually restrained, while their wives complained that they were cruel, indolent, profligate, dissipated and unfaithful. Legal arguments in divorce cases focused on such issues as sexual decorum, work habits and the nature of family relationships. *Id.*

46. *See* BASCH, *supra* note 41, at 200-23.

47. Norma Basch's detailed study of married women and the law of property in nineteenth century New York found that judges severely restricted women's contractual capabilities and strictly construed statutory provisions in order to maintain husbands' common law right to their wives' earnings and services. *Id.*

48. *Id.*

49. BLOOMFIELD, *supra* note 12, at 119-20.

right to their children's earnings and services, ruling that emancipated minors had full control over their own earnings. A growing number of judges also moved away from the common law principle that gave fathers almost unlimited rights to the custody of their children.[50] By the 1820s, a growing stress on children's welfare and women's childrearing abilities led American judges to limit fathers' custody rights. In determining custody, courts began to look at the "happiness and welfare" of the child and the "fitness" and "competence" of the parents.[51] As early as 1860, a number of states had adopted the "tender years" rule, according to which children who were below the age of puberty were placed in their mother's care unless she proved unworthy of that responsibility.[52] Nineteenth-century American law also broke with English common law by extending many legal rights to illegitimate children and making it easier to legitimate children born outside of wedlock by permitting adoption.[53]

D. *The Paradox of the "Modern" Family*

The late eighteenth and early nineteenth centuries witnessed a fundamental redefinition of the boundaries of domestic and civic spheres. In the early seventeenth century, the family's functions were broad and diffuse. It educated children, it cared for the elderly and ill, it transferred property and skills to the next generation and it was the economic center of production. By the early nineteenth century, non-familial institutions assumed many of these functions. The middle class family's roles grew narrower and more specialized: The family provided emotional support and affection and contributed to the socialization of children.[54] While in one sense the family became more private, by appropriating the realms of feeling and emotion, this was essentially a means geared to a public end. The family was supposed to serve the political order by diffusing self-serving needs and instilling the values of willing obedience, service and rational impartiality—the values of good citizenship.[55]

But what about families that failed to perform these critical public

50. *See id.*; GROSSBERG, *supra* note 41, at 235-59; Michael Grossberg, *Who gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth-Century America*, 9 FEMINIST STUD. 235 (1983).

51. BLOOMFIELD, *supra* note 12, at 119-20; GROSSBERG, *supra* note 41, at 235-60; Grossberg, *supra* note 50, at 238-46 (1983).

52. GROSSBERG, *supra* note 41, at 248-50. *See also* Anonymous, 55 Ala. 428, 432-33 (1876); State v. Kirkpatrick, 54 Iowa 373, 375 (1880); Landis v. Landis, 39 N.J.L. 274 (1877); State v. Baird & Torrey, 21 N.J. Eq. 384, 388 (1869); *In re* Pray, 60 How. Pr. 194-96 (N.Y. 1881); McKim v. McKim, 12 R.I. 462, 466 (1879).

53. GROSSBERG, *supra* note 41, at 196-228; Michael Grossberg, *Crossing Boundaries: Nineteenth-Century Domestic Relations Law and the Merger of Family and Legal History*, 4 AM. B. FOUND. RES. J. 799, 834-40 (1985).

54. JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 185-86 (1970).

55. *Lasch*, *supra* note 4, at 3-4; Barbara Laslett, *The Family as a Public and Private Institution: An Historical Perspective*, 35 J. MARRIAGE & FAM. 480, 487-89 (1973); Teitelbaum, *supra* note 24, at 1141-81.

functions? Perhaps the most striking development in early nineteenth century family law was the development of a host of public and private institutions designed to rectify family failures. Convinced that such failures were to blame for an alarming increase in violence, robbery, prostitution and drunkenness, reformers responded by creating substitute families such as public schools, houses of refuge, reform schools, YMCAs for young rural migrants to cities, orphanages and penitentiaries.[56]

A blurring of boundaries between domestic and civic life emerged, which encouraged the transfer to public agencies of moral prerogatives and of the presumed benevolence and good will that had grown out of kinship bonds. During the mid-1820s, Boston, New York and Philadelphia established the nation's first publicly funded children's asylums for the moral rehabilitation of delinquent, incorrigible and neglected youths. These houses of refuge separated children from "incompetent" parents, removed them from the sources of temptation, pauperism and crime and instilled habits of self-control through moral education, work, rigorous discipline and an orderly environment.[57]

The early nineteenth century houses of refuge set four important legal precedents. The first was that public and private officials had a right to act *in loco parentis* by removing children deemed unruly, incorrigible, in need of supervision, or abused or neglected and placing them in foster homes or institutions where they would be rehabilitated rather than punished.[58] The second precedent was the establishment of formal distinctions between children and adults before the law. Drawing upon the emerging sentimental conception of childhood, jurists held that a child could not, "by reason of infancy,"[59] be considered criminally responsible. Third, juvenile statutes placed non-criminal behavior, including incorrigibility, habitual disobedience and vicious and immoral behavior, under the jurisdiction of the courts. Finally, the new system embodied two key characteristics of the modern juvenile justice system: commitment of juveniles to institutions after summary or informal hearings and indeterminant sentencing.[60]

The early nineteenth century reconstruction of family law and the creation of public institutions in the form of surrogate families represented a fundamental shift in the locus of cultural authority. On one dimension, this involved a shift away from authority vested in household

56. DAVIS, *supra* note 44, at 40; ROBERT M. MENNELL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE AMERICAN STATES, 1825-1940, at 11-12 (1973); ROBERT S. PICKETT, HOUSES OF REFUGE: ORIGINS OF JUVENILE REFORM IN NEW YORK STATE, 1815-1857, at 74-75 (1969); STEVEN L. SCHLOSSMAN, LOVE AND THE AMERICAN DELINQUENT: THE THEORY AND PRACTICE OF "PROGRESSIVE" JUVENILE JUSTICE, 1825-1920, at 124 (1976); SUTTON, *supra* note 23, at 43-89; Steven L. Schlossman, *Justice in the Age of Jackson*, 76 TCHRS C. REC. 119 (1974).

57. ROTHMAN, *supra* note 40, at 257-62.

58. JOSEPH M. HAWES, CHILDREN IN URBAN SOCIETY: JUVENILE DELINQUENCY IN NINETEENTH-CENTURY AMERICA 41 (1971); SUTTON, *supra* note 23, at 45-49; Teitelbaum & Harris, *supra* note 24, at 20.

59. HAWES, *supra* note 58, at 41; SUTTON, *supra* note 23, at 45.

60. HAWES, *supra* note 58, at 41, 57; SUTTON, *supra* note 23, at 43-46; Teitelbaum & Harris, *supra* note 24, at 20.

patriarchs to appointed or elected judges who received broad discretionary authority to interpret law, investigate the moral fitness of parents and act in children's supposed best interests. On a second dimension, it involved a growing differentiation of law from other cultural authorities. By the early nineteenth century, courts showed a reduced interest in enforcing Christian religious and moral values—such as blasphemy, profanity, lewdness and fornication—which became the exclusive province of churches and voluntary reform societies; instead, courts increasingly devoted their attention to disputes involving property and business. Henceforth, when courts intervened in domestic affairs, most notably in cases involving poverty or delinquency, public involvement was justified on a new and explicitly secular ground, as an effort to rectify family failure.[61]

E. *The Late Nineteenth-Century Reorientation of Family Law*

In the late nineteenth century, legal priorities shifted away from individual choice toward social control. A rising divorce rate, a declining middle class birth rate, changes in women's role and mounting concern about child abuse and neglect all encouraged unprecedented arguments for public paternalism and provided new justifications for intervention in the family by secular authorities.[62]

Eugenicistic, racist and nativistic ideas led many states to impose physical and mental health requirements for marriage, outlaw polygamy (in Idaho and Utah) and interracial marriages (primarily in the boarder states and lower South), establish a waiting period before marriage, institute a higher age of consent and adopt procedures for public registration of all new marriages (by 1907, twenty-seven states required registration).[63] A growing number of states barred first cousin marriage and other marriages between blood relations, and an increasing number of judges refused to accept the validity of common law marriages. Convinced that family limitation was an assault on the home, legislators held abortion to be a criminal offense and restricted the dissemination of birth control materials and information. The publication of an 1886 report estimating that the United States granted more divorces than all other western countries combined led many states to make it more diffi-

61. NELSON, *supra* note 35, at 110-11.

62. The late nineteenth-century perception of a crisis of the family had a number of long-term causes. The climbing divorce rate reflected rising marital expectations and demands, as a more companionate ideal of marital relationships spread. The falling birth rate partly reflected the fact that in an urban, commercial society children were no longer economic assets who could be productively employed. The emergence of a self-conscious middle class concerned about social mobility also encouraged new limits on family size, as did women's desire to free themselves from an unending cycle of pregnancy, birth, nursing and new pregnancy. Changes in women's roles added to the sense of crisis, as increasing numbers of women attended high school and college, joined clubs, participated in mixed-sex leisure activities and worked outside the home.

63. MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE-NINETEENTH CENTURY AMERICA 461-72 (1977); GROSSBERG *supra* note 41, at 103-95; Michael Grossberg, *Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. LEGAL HIST. 197 (1982).

cult to obtain divorces by raising the age of marriage, restricting remarriages after divorce, lengthening residence requirements for divorce and reducing the grounds for divorce from over 400 to fewer than 20.[64] By 1900, just three states—Kentucky, Rhode Island and Washington—permitted courts to grant divorces on any grounds the courts deemed proper. Through law, government articulated a series of moral ideals: that marriage was a life-long commitment (by permitting divorce only on grounds of serious fault), that sexual relations should be confined to monogamous marriage (by prohibiting adultery, cohabitation, fornication and polygamy), and that the purpose of sexual relations was procreation (by criminalizing sodomy and restricting access to contraceptives and abortion).[65]

The increasing social control orientation of family law cannot be reduced simply to a resurgence of moralism in the face of a perceived crisis of the family; it also reflected the rise of a therapeutic conception of law, which viewed families as instruments of the state, children as public wards and the courts as proper vehicles for solving family problems. The rise of a therapeutic view is most evident in new forms of institutional intervention in the family that arose in the late nineteenth century.[66]

Societies for the prevention of cruelty to children (the first was founded in New York in 1875) sought to assist orphaned, destitute, deserted and illegitimate children and rescue ill-treated children from neglectful and abusive parents. Child labor and compulsory education laws sought to take children out of the labor force and keep parents from exploiting their children economically. To provide children with a more wholesome environment, most cities established kindergartens and playgrounds and removed wayward and homeless children from poorhouses and other institutions, placing them instead in "family-like" arrangements such as foster homes and apprenticeships. Public health reformers sought to reduce infant and child mortality, pasteurize milk and cut the death rate from such diseases as tuberculosis and diptheria. Other reformers attacked the double standard of sexual morality and worked to reduce rates of venereal disease. Still others advocated closing down red-light districts and supported pensions for indigent mothers. "Child-savers" and "family protectors" varied widely in their assumptions about the propriety of religious or benevolent organizations running child- or family-saving institutions; the appropriate role of the state and private agencies acting as *parens patriae* and the relative merits of custodial institutions and the family. They were united, however, by a convic-

64. GROSSBERG, *supra* note 41, at 108-09; Grossberg, *supra* note 63; J.P. LICHTENBERGER, DIVORCE: A SOCIAL INTERPRETATION 154-87 (1931); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA 4-7 (1980); MINTZ & KELLOGG, *supra* note 1, at 126-27; JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, at 20-45 (1978).

65. MINTZ & KELLOGG, *supra* note 1, at 107-13.

66. LYNNE CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES (1980).

tion that many of society's most intractable social problems originated in deformed or dysfunctional homes and that it was necessary to expand the state's supervisory and administrative authority over the family.[67]

Perhaps the most dramatic attempt to save the family was the movement to prevent cruelty to wives and children. During the last third of the nineteenth century, concern about family violence and child abuse mounted, and philanthropists founded 494 child protection and anti-cruelty societies. Several states passed laws allowing wives to sue saloon-keepers for injuries caused by a drunken husband, and three states (Maryland in 1882, Delaware in 1901 and Oregon in 1905) passed laws punishing wife-beating with the whipping post. These late nineteenth century reformers largely blamed cruelty to children upon alcohol and the flawed character of immigrant men—in sharp contrast to their counterparts of the 1930s and 1940s who downplayed male violence and blamed abuse on mothers who nagged their husbands and children and refused to accept the female role. After the turn of the century, the anti-cruelty movement declined rapidly for two reasons: opponents were convinced that the societies were prejudiced against the poor and the working class and much too frequently removed children from their parents' custody.[68]

The extension of the state's authority over children was also apparent in new policies toward "wayward" children. New legislation, drawing on the old legal doctrine that the state had an obligation to protect children from "imminent harm," gave public agencies the power to remove neglected and vagrant children from their parents, construct industrial-training and reform schools and invoke criminal penalties against parents for abandonment, nonsupport and contributing to the dependency or delinquency of a minor.[69]

To provide care and supervision for neglected, delinquent and vagrant children, philanthropic organizations, settlement houses and private individuals established more than 450 charitable day nurseries in working-class neighborhoods by 1910. The nurseries not only provided custodial care for children whose mothers worked, they also sought to "Americanize" immigrant children through instruction in proper man-

67. *See generally* LEROY ASHBY, SAVING THE WAIFS: REFORMERS AND DEPENDENT CHILDREN, 1890-1917 (1984); GEORGE K. BEHLMER, CHILD ABUSE AND MORAL REFORM IN ENGLAND, 1870-1918 (1982); MICHAEL B. KATZ, IN THE SHADOW OF THE POOR HOUSE, (1986); MIRIAM LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING OUT OF THE NEW YORK CHILDREN'S AID BUREAU (1964); ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (1969); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); SUSAN TIFFIN, IN WHOSE BEST INTEREST? CHILD WELFARE IN THE PROGRESSIVE ERA (1982); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA (1970); Michael B. Katz, *Child-Saving*, 26 HIST. EDUC. Q. 413 (1986).

68. BEHLMER, *supra* note 67, at 11, 52, 136, 213; PLECK, *supra* note 18, at 69-121, 125-63.

69. KELLER, *supra* note 63, at 465-67; SUTTON, *supra* note 23, at 121-53; Douglas Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAL. L. REV. 205, 233-36 (1971).

ners, eating habits and personal hygiene. Many reformers viewed day nurseries as a "more humane and less costly substitute" for orphan asylums, where many working parents, lacking other forms of child care, temporarily placed children. In New York City alone, parents placed 15,000 children in orphanages in 1899.[70] The enactment of mother's pensions in thirty-nine states during the Progressive era represented another attempt to help indigent, widowed, separated, divorced and unmarried mothers to preserve their families.[71]

By the beginning of this century, a new mode of discourse and a new set of standards dominated discussion of government policy toward the family. Jurists, charity workers, settlement house workers and other professionals dealing with family problems evolved new notions of "parental fitness," "parental duties," "child welfare" and "children's rights and needs" that justified state supervision of the family "for the protection of society, and the welfare of the child himself."[72] Along with this change, a new therapeutic conception of law emerged, increasing formal state involvement in family affairs, viewing parents as agents of the state and giving judges more discretionary power to set standards of parental fitness and child welfare. This new legal ideology involved a view of all children—not simply poor or delinquent children—as wards of the state, a broadening of problems demanding public intervention, an increase in judicial discretion and a growing conviction that courts could resolve domestic problems.

Nowhere was this viewpoint more apparent than in the reconstruction of the juvenile justice system. In an effort to give special attention and rehabilitative opportunities to youngsters who broke the law, Illinois established the first juvenile court in 1899.[73] By 1917, all but three states had enacted juvenile justice legislation. Within these separate tribunals for young people, informal hearings were designed to replace adversarial proceedings and diagnostic investigations, psychological assessment and rehabilitation were to replace judgments of guilt and innocence and imposition of punishment. In these courts, however, young people were deprived of constitutional safeguards that would apply in a criminal trial. These included protections over the admission of hearsay and unsworn testimony, criminal standards of proof, privilege against self-incrimination and double jeopardy and right to bail and counsel.[74]

The growing assertion of a special state interest in family welfare during the Progressive era can also be seen in the establishment of the first family courts. Family courts were to provide a less formal and less

70. MINTZ & KELLOGG, *supra* note 1, at 129; LESLIE WOODCOCK TENTLER, WAGE-EARNING WOMEN: INDUSTRIAL WORK AND FAMILY LIFE IN THE UNITED STATES, 1900-1930, at 161-65 (1979); Virginia Kerr, *One Step Forward—Two Steps Back: Child Care's Long American History*, *in* CHILD CARE—WHO CARES 159 (Pamela Roby ed., 1973).

71. MINTZ & KELLOGG, *supra* note 1, at 129-30.

72. GROSSBERG, *supra* note 41, at 248-50, 281-85; SUTTON *supra* note 23, at 142.

73. HALEM, *supra* note 66, at 220; SUTTON *supra* note 23, at 121-53.

74. HALEM *supra* note 66, at 220; SUTTON, *supra* note 23, at 121-53; Roger C. Algase, *The Right to a Fair Trial in Juvenile Court*, 3 J. FAM. L. 292 (1963); Frank W. Nicholas, *History, Philosophy, and Procedures of Juvenile Courts*, 1 J. FAM. L. 151, 151-52 (1961).

adversarial forum than the criminal courts for a broad range of family problems including desertion, divorce, child neglect and maltreatment and juvenile delinquency. First in New York City in 1910 and then in many other municipalities and states, family court judges, assisted by a professional staff of psychologists, social workers, probation officers and divorce proctors, were charged with settling domestic conflicts, resolving marital disputes and reconciling marriage partners.[75]

After 1920, a growing number of reformers, convinced that the roots of marital breakdown lay in lack of communication and cooperation, unsatisfactory sexual relationships and psychological maladjustments, created new programs in sex education, marriage reconciliation and counseling services and courses in family living.[76] Believing that the law's adversarial approach to divorce was harmful both to spouses and children, reformers also recommended changes in divorce proceedings. The recommendations included mandatory counseling of parties seeking divorce, nonadversarial divorce proceedings and greater availability of divorce on grounds of mental cruelty and incompatibility. Two states—New Mexico and Oklahoma—revised their divorce statutes to allow divorce on grounds of incompatibility, and three other states—Arkansas, Idaho and Nevada—shortened residency requirements and liberalized divorce codes in order to attract couples seeking divorce.[77]

From the early 1920s onward, family law was increasingly influenced by psychological and clinical studies of the family. Custody law was recast in light of new notions of "psychological parenthood" and the importance of continuity and stability in caretakers (assumptions which led jurists to frown upon joint and divided child custody arrangements).[78] In divorce proceedings, judges tended to dilute stringent legal statutes. In 1931, only seven states specifically permitted divorce on grounds of mental cruelty, but judges in most other jurisdictions reinterpreted laws permitting divorce on grounds of physical cruelty to encompass such conduct as constant nagging, humiliating language, unfounded and false accusations, insults and excessive sexual demands. In these ways and others, psychological and clinical research was incorporated into family law.[79]

One ironic consequence of the continuing academic and clinical research into the family was that it increasingly threw into question certain assumptions held by family professionals, most notably the emphasis attached to preserving the family unit. Studies of divorce, for example, raised penetrating questions about the psychological and emotional implications of divorce for children. In the 1920s, authorities on the family, using the case-study method, had concluded that children experienced the divorce of their parents as a devastating blow that

75. HALEM, *supra* note 66, at 116-28, 220-21, 241-51, 280; MINTZ & KELLOGG, *supra* note 1, at 126-27.
76. MINTZ & KELLOGG, *supra* note 1, at 125-29.
77. HALEM, *supra* note 66, at 129-57.
78. *Id.* at 136; MINTZ & KELLOGG, *supra* note 1, at 107, 126-29.
79. HALEM, *supra* note 66, at 136; MAY, *supra* note 64, at 5-6, 30, 104.

stunted their psychological and emotional growth and caused maladjustments that persisted for years.[80] Beginning in the late 1950s, a growing body of research argued that children from conflict-laden, tension-filled homes were more likely to suffer psychosomatic illnesses, suicide attempts, delinquency and other social maladjustments than were children whose parents divorced. The research further argued that the adverse effects of divorce were generally of short duration and that children were better off when their parents divorced than when they had an unstable marriage.[81]

Professional concern about child abuse and family violence also grew, leading a growing number of physicians and psychologists to call for expansion of child protective services and separating abused children from their parents. In 1954, the Children's Division of the American Humane Association conducted the first national survey of child neglect, abuse and exploitation.[82] Three years later the United States Children's Bureau launched the first major federal study of child neglect, abuse and abandonment. Child cruelty captured the attention of a growing number of radiologists and pediatricians who found bone fractures and physical trauma in children suggesting deliberate injury. After C. Henry Kempe, a pediatrician at the University of Colorado Medical School, published a famous essay on the "battered child syndrome" in 1962, legal, medical, psychological and educational journals began to focus attention on family violence.[83] It is not clear that the incidence of abuse increased; certainly recognition and reporting of abuse increased. Growing professional concern about child abuse led to calls for greater state protection and services for abused and neglected children and their parents.[84]

F. *Legal Regulation of the Family Today*

Up until the mid-1960s, certain largely unquestioned assumptions guided American family law. It was a basic, if generally unstated, premise of family law that the nuclear family had a privileged status and that government could discriminate against non-nuclear families in granting benefits.[85] Similarly, it was taken for granted that the father, as "head and master" of his family, automatically gave his children his surname,[86] determined the family's legal residence,[87] was immune from lawsuits in-

80. HALEM, *supra* note 66, at 158-232.

81. SAR A. LEVITAN & RICHARD S. BELOUS, WHAT'S HAPPENING TO THE AMERICAN FAMILY? 69-72 (1981); HALEM, *supra* note 66, at 158-232.

82. PLECK, *supra* note 18, at 165-81.

83. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 17-24 (1962).

84. PLECK, *supra* note 18, at 164-81.

85. *See* Reynolds v. United States, 98 U.S. 145, 164, 165 (1879).

86. *See, e.g.*, People *ex rel.* Rago v. Lipsky, 63 N.E.2d 642, 644 (1945). *See generally* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 105 (1989).

87. *See, e.g.*, Carlson v. Carlson, 256 P.2d 249, 250 (Ariz. 1953).

stituted by his wife[88] and was entitled to have sexual relations with her.[89] Other underlying legal assumptions were that marriages could only be dissolved on grounds of serious fault, that following a divorce young children were better off with their mothers unless the mothers were unfit, that children were legally incompetent and subject to parental guidance and discipline and that states had the power to regulate private sexual behavior and define the sexual norms according to which citizens were supposed to live.

Since the early 1960s, all of these assumptions have been called into question as new notions of privacy, sexual equality and children's rights produced a revolution in American family law. The practical effect of this revolution has been a gradual erosion in the traditional conception of the nuclear family as a legal entity with its own distinctive rights.[90]

In recent years, courts have overturned older legal definitions of what constitutes a family. In cases involving zoning and public welfare, influential court decisions declared that local, state and federal governments cannot define "family" too restrictively, holding that common law marriages, cohabitation outside of marriage and large extended households occupying the same living quarters are entitled to protection against hostile regulation.[91] In other cases, the Supreme Court ruled that government cannot discriminate against groups of non-related individuals living together in providing food stamps and that state legislatures cannot designate one form of the family as a preferred form.[92] Meanwhile, courts and state legislatures have tended to weaken or overturn laws that assign individual responsibilities on the basis of family relations, including laws that make children legally responsible for the support of indigent parents or statutes that hold parents accountable for crimes committed by their children.[93]

At the same time that definitions of family grew broader and more pluralistic, courts became increasingly willing to intervene in the internal functioning of on-going marriages. Until recently, it was assumed that courts should not interfere in marital decision making except in cases of divorce or separation nor interfere in the parents' discretionary authority over the details of their children's upbringing, except in cases involving neglect, abuse, delinquency or child custody.[94] These assumptions have recently been challenged, as courts have increasingly

88. *See, e.g.*, 1 WILLIAM BLACKSTONE COMMENTARIES *443; Kennedy v. Camp, 102 A.2d 596 (N.J. 1954).

89. *See* State v. Haines, 25 So. 372 (La. 1899) (holding that a husband cannot be found guilty of raping his wife).

90. Glendon, *supra* note 1, at 1-7; Stephen J. Morse, *Family Law in Transition*, *in* CHANGING IMAGES OF THE FAMILY 319, 320-21 (Virginia Tufte & Barbara Myerhoff eds., 1979).

91. RUBIN, *supra* note 1, at 143-61; Morse, *supra* note 90, at 322-25.

92. RUBIN, *supra* note 1, at 143-61; Morse, *supra* note 90, at 322-25; Moore v. City of East Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

93. *See* MINTZ & KELLOGG, *supra* note 1, at 232-33; W. Walton Garrett, *Filial Responsibility Laws*, 18 J. FAM. L. 793, 804-08 (1979).

94. Mary Ann Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMP. L. 1 (1975).

stressed the equality of spouses and have held that minors have independent rights that can override parental authority. Invoking the principle that all individuals have rights to privacy, due process and equal treatment under law, courts have increasingly emphasized the separateness and autonomy of family members. Courts have held, for example, that a husband's surname is not necessarily his wife's or his children's,[95] that a husband's home is not necessarily his wife's domicile,[96] that spousal immunity is not inviolate[97] and that under certain circumstances a husband can be prosecuted for spousal rape.[98] In cases involving children's rights, a number of courts have ruled that parents do not have an absolute veto over whether minor girls can obtain contraceptives or abortions (while upholding statutes requiring doctors to *notify* parents before performing abortions).[99]

While judicial involvement in the decision making of ongoing families has increased, the nation's courts and state legislatures showed a decreasing interest in enforcing sexual norms. Beginning in 1965, the Supreme Court, declaring that the constitution created a right to privacy, struck down a series of state statutes that prohibited the prescription or distribution of birth control devices or that limited circulation of information about contraception.[100] In 1972, the Court extended access to contraceptives to unmarried persons.[101] In 1973, it decriminalized abortion, and in 1976 the Court held that a "competent" unmarried minor can decide to have an abortion without parental permission.[102] Since 1962, when Illinois became the first state to decriminalize all forms of private sexual conduct between consenting adults, twenty states have decriminalized private consensual sexual conduct and judicial decisions in four other states have invalidated statutes making such conduct a crime.[103] Today, two-thirds of the states have repealed statutes prohibiting fornication, adultery and cohabitation outside of

95. *See* Commonwealth v. Lowell, 366 N.E.2d 717, 720, 721, 725 (Mass. 1977).

96. OHIO REV. CODE ANN. § 3103.02 (Page 1972)(stating that a husband's home is his wife's domicile)(repealed 1974); Green v. Commissioner 305 N.E.2d 92, 94 (Mass. 1973).

97. Beaudette v. Frana, 173 N.W.2d 416 (Minn. 1969).

98. People v. Liberta 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985). *See generally* Susan Estrich, *To Have and to Hold: The Marital Rape Exemptions and the 14th Amendment*, 99 HARV. L. REV. 1255, 1258-60 (1986).

99. Bellotti v. Baird, 443 U.S. 622 (1979); *cf. In re* Lori M., 496 N.Y.S.2d 940, 942 (N.Y. Fam. Ct. 1985)(upholding the right of a minor to associate with a lesbian).

100. *See e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

101. Eisenstadt v. Baird, 405 U.S. 438 (1972).

102. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See also* Morse, *supra* note 1, at 325-27, 349-50. Although the Supreme Court greatly expanded liberty interests during the 1960s and 1970s, the present Court appears to be moving toward limiting the further growth of such interests. *See, e.g.*, Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

103. State v. Saunders, 381 A.2d 333 (N.J. 1977); Commonwealth v. Bonadio, 415 A.2d 47 (Pa. 1980); Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982). *See generally* G. SIDNEY BUCHANAN, MORALITY, SEX, AND THE CONSTITUTION 81-82 (1985); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 950-51 (1979).

marriage.[104]

By far the most dramatic changes in family law have involved divorce. Beginning in California in 1970, no fault divorce statutes replaced laws that allowed divorce only on grounds of fault in every state.[105] Instead of holding a trial to determine whether a spouse was guilty of a serious marital offense, no fault statutes allowed spouses to obtain divorces by mutual consent or on grounds of incompatibility or "irretrievable breakdown" of the marriage.[106] Proponents of change—largely lawyers and judges—argued that no fault divorce would create less adversarial divorce proceedings, reduce perjury and bring law into line with the social reality of sharply rising divorce rates.[107]

Although advocates of divorce reform described the introduction of no fault statutes as a technical modification of existing laws rather than as a major legal reform, in fact the new statutes had far-reaching effects on such issues as alimony, child custody, child support and the division of property. The new no fault statutes undermined the traditional legal assumptions that wives had a right to lifelong support, to retain the marital dwelling and to child custody. Under the new legislation, certain preferences that had generally worked to the advantage of women were eliminated. Temporary "maintenance" or "spousal support" replaced alimony; the principle of equal or equitable division of property replaced the distribution of property on the basis of fault; and gender neutrality, and, in some cases, a presumption in favor of joint custody, replaced the older presumption in favor of mothers in disputes over young children.[108]

One ironic consequence of the new statutes has been to contribute to a sharp increase in the number of poor divorced women. The no fault statutes have not, in practice, effectively aided most divorced women. Most divorces involve families with little property to divide. Moreover, child support awards are often inadequate and compliance with support orders is low. In fact, many women, especially older women, are able to find employment only in lowpaying sales, clerical or service occupations. As a result, the household income of divorced women and their children tends to fall sharply after a divorce, while the

104. *See Constitutional Barriers to Civil and Criminal Restrictions of Pre- and Extramarital Sex*, 104 HARV. L. REV. 1660 (1991).

105. HERBERT JACOBS, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 619-34 (1988); LENORE WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN (1985); Lenore Weitzman & Ruth B. Dixon, *The Transformation of Legal Marriage Through No-Fault Divorce: The Case of the United States*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL, AND ETHNICAL CHANGE 143 (John M. Eekelaar & Sanford N. Katz eds. 1979). *See also* HALEM, *supra* note 66, at 233-83 (discussing divorce statute reform in the years 1966-1976).

106. *See, e.g.*, CAL. CIV. CODE § 4506(1) (West 1983).

107. HALEM, *supra* note 66, at 233-83; JACOBS *supra* note 105; Weitzman & Dixon, *supra* note 105, at 143-53.

108. HALEM, *supra* note 66, at 233-83; JACOB, *supra* note 105; PHILLIPS, *supra* note 105, at 561-72; WEITZMAN, *supra* note 105, at 15-28.

husbands' income rises.[109]

The revolution that has occurred in family law since 1960 can be viewed from two very different perspectives. On the one hand, this legal revolution has extended gender equality, increased personal freedoms and recognized a right to privacy. Courts and state legislatures have eliminated certain historical preferences given to nuclear families and to fathers, made divorce less adversarial and more accessible and granted wives and children greater access to courts in family disputes. Yet at the same time, a disparate group, which includs women's organizations and "pro-family" conservative groups, has viewed these changes from a much more negative perspective, arguing (in quite different ways) that this legal revolution has produced hardship for many women and children, undermined family stability and intruded on family autonomy in decisionmaking.

III. Sources of Changes in Family Law

It is helpful to interpret transformations in family law in terms of a shifting balance among five broad themes in public discourse on the family. At each historical period, one finds a different balance in the dominant ideology. One theme involves the changing functions of family law. At certain times, family law has been essentially pedagogical; at other times, essentially prescriptive; at still other times, protective of individual rights. A second theme involves the relative responsibility of individuals, public and private institutions and the courts for enforcing values. A third key theme involves the values upheld by family law. At certain points in American history, family law has stressed marital unity and family solidarity; at other times, personal choice and responsibility; at others, family privacy and individual autonomy. A fourth fundamental theme is the form of legal intervention in the family, ranging from non-intervention, which implicitly ratifies socially-assigned family roles and power relationships, to the explicit extension of legal rights, criminalization of certain acts and state-ordered mediation of familial disputes. The final theme concerns changing family ideologies that extend from patriarchal and hierarchical ideals to more romantic and companionate conceptions of familial relationships.[110]

For simplicity of analysis, we will examine transformations in family law in terms of changes in the legal realm and changes in family and society.

A. *Changes in the Legal Realm*

Over the past three hundred years, the functions of family law have undergone a profound change, from pedagogical to therapeutic, from

109. Phillips, *supra* note 105, at 628-30; Weitzman, *supra* note 105, at 70-73. Weitzman found that in California the share of property that wives received following a divorce declined sharply after the adoption of the state's no fault divorce law.

110. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1487 (1983).

prescribing to proscribing and fixing. In colonial New England, family law was conceived in essentially pedagogical or symbolic terms, emphasizing exhortation rather than enforcement. Family laws were taken word for word from the Old Testament. Yet while the realm of law was defined more broadly than it is today, encompassing moral and religious offenses as well as economic disputes or criminal offenses, most legal punishments were by our standards quite mild. Punishments were not designed to imprison or ostracize offenders, but to reinforce communal norms and reintegrate offenders back into the community.

By the nineteenth century, the functions of family law had shifted. Family law was increasingly conceived in instrumental terms, as a way of resolving conflicts, enforcing agreements, assigning rights and promoting socially desirable conduct. Jurists and legislators used new conceptions of contract, gender, and family status to restructure family law and reformulate doctrines governing marriage formalities, divorce, alimony, marital property, child custody, adoption and child support. Accompanying this new instrumental conception of law was a persistent view of law as moral discourse. Legal doctrines governing divorce, custody and other aspects of family relationships were explicitly framed in terms of ethical conceptions of fault and fitness.

In the twentieth century, conceptions of the functions of law again shifted radically. Family law was increasingly conceived in secular and therapeutic terms, reflecting a view that courts had the capacity to solve family problems. Since 1960, expectations about what law can do have risen even further. Increasingly law—like public schools and the tax code—has been regarded as a social institution which could self-consciously promote social change.

To a great extent, these changes in the functions of law reflect broad historical changes in the legal profession. In the American colonies, there were few professional judges or lawyers. Most judges were lay people lacking formal legal training; often they were members of local elites holding positions of authority in other community institutions, such as church courts, and had many face-to-face relationships with litigants. In their decisions, these jurists generally sought to reinforce a consensus of opinions and express shared ethical principles.[111]

By the early nineteenth century, the number of formally trained judges and lawyers had sharply increased. These jurists were interested in establishing principled rationales for legal decisions. They tended to view law in increasingly instrumental terms, as a way of resolving conflicts and promoting socially desirable conduct. By the early twentieth century, family law had become a specialized field within the legal profession, with its own courts focusing exclusively on resolving family-re-

111. Maxwell H. Bloomfield, *Law: The Development of a Profession*, *in*, THE PROFESSIONS IN AMERICAN HISTORY (Nathan O. Hatch ed., 1988); Patricia U. Bonomi, *"Stewards of the Mysteries of God": Clerical Authority and the Great Awakening in the Middle Colonies*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 29 (Gerald I. Geison ed., 1983). *See generally* READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION (Dennis R. Nolan ed., 1980).

lated problems such as desertion, parental neglect or maltreatment of children, adoption, juvenile delinquency and divorce. These courts were designed to offer a less formal and less adversarial mechanism than the regular courts and to draw upon the advice of social workers and psychologists. The shift to specialized jurists aided by psychology and the social sciences helps to account for one of the most striking developments of twentieth century family law: the gradual rejection of the idea that family law should be framed in moral terms such as fault and moral fitness.

B. *Social Changes in Society and the Family*

Transformations in family law resulted in part from changes within the legal system, but they also were the product of broader economic transformations and changes in family ideologies, family functions and gender relations. For example, the patriarchal character of law in colonial New England was tied to particular religious ideologies and to the predominance of a household system of production in which a father's control of land and craft skills reinforced paternal authority. A father's control over inheritance allowed him to exercise control over his children's sexual behavior and their choice of marriage partners. In the eighteenth century, a father's ability to transmit land to his children declined, as did his ability to enforce obedience. A symptom of this decline was a marked increase in children's discretion in deciding whom and when to marry.[112]

The early nineteenth century reconstruction of family law was in part the product of a fundamental transformation in the family itself: the separation of production from other family functions and the isolation of married women and young children in what contemporaries called a "separate sphere of domesticity."[113] As the middle class family lost many of its earlier public functions as a center of production and a mechanism for transmitting skills, and as married women were stripped of traditional productive roles (such as spinning, weaving and fabricating clothing), the functions and responsibilities of the family underwent radical redefinition. Middle-class women gained new roles in the domestic domain and childrearing. In colonial America, childrearing manuals had been addressed to fathers; in the early nineteenth century, in contrast, such tracts were written almost exclusively for mothers. Gender and particularly the mother's role were at the heart of the redefinition of boundaries of domestic and public realms.[114]

At the same time, conceptions of childhood underwent a radical transformation. Children were increasingly regarded in a new light: as special beings with distinctive needs and impulses. Childhood was increasingly viewed as a period of innocence, growth, development and preparation for adulthood. Whereas in the colonial period it was com-

112. *See* STEPHANIE COONTZ, SOCIAL ORIGINS OF PRIVATE LIFE 73-115 (1988).
113. MINTZ & KELLOGG, *supra* note 1, at 50-51.
114. MINTZ & KELLOGG, *supra* note 1, at 43-65.

mon for parents to send off children at the age of eight or nine to work as servants or apprentices in other households, a growing number of nineteenth-century parents kept their sons and daughters home well into their teens and even their twenties. Nineteenth-century parents also made unprecedented efforts to shelter their children from knowledge of such "adult" realities as sexuality and death. One justification for this new emphasis on sheltering and nurturing children was a growing belief that "adolescence" (previously a rarely used term) was a particularly unsettled phase of life during which children were deeply in need of paternal protection and supervision.[115]

The increasing emphasis in family law on equal rights and gender neutral standards since 1960 is linked partly to the rapid influx of married women into the workforce. This contributed to a new image of family as an economic partnership in which husband and wife both share burdens and contribute economically. Married mothers in the workforce have risen from less than 20% in 1950 to 54% in 1980 and over 70% today.[116]

The recent emphasis on children's rights is in part a reflection of the growing litigiousness of the broader society, in which every group asserts its own set of rights. The growing stress on children's rights is also related to an erosion in family structure that has undermined the notion of the family as a single legal entity. The most recent census figures indicate that the number of children living in single parent families has grown significantly.[117]

A high divorce rate, continuing growth in female-headed families and an increase in out-of-wedlock births have all contributed to radical changes in American family structure. In 1989, the divorce rate was more than double the 1966 rate and three times as high as the 1950 level.[118] In each year since 1975, over a million children under age eighteen have been affected by divorce.[119] Largely as a result of the high divorce rate, "[m]ore than one-half of black children lived in single-parent homes in 1989."[120]

Also contributing to a rapid increase in single-parent families is a rising rate of out-of-wedlock births. Out-of-wedlock births have climbed from just 5% in 1960 to 23.4% in 1986.[121] In recent years, single-parent families, once dismissed as "problem" families, have grown progressively more common. This is evidenced by the fact that 22% of American children lived in a single parent family in 1989 as compared with 10% in 1965.[122]

115. OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, U.S. DEPARTMENT OF EDUCATION, YOUTH INDICATORS 1991: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH 3 (1991).
116. *Id.* at 46-47.
117. *See id.* at 28-29.
118. *Id.* at 16-19.
119. *Id.* at 16.
120. *Id.* at 29.
121. *Id.* at 24.
122. *Id.* at 2.

Another demographic factor that has led to an increasing emphasis on children's rights is a marked lengthening of the transition from youth to adulthood. Women are beginning marriage at older ages. During the 1950s, women typically married at relatively young age; the average age of first marriage was around 20.[123] During the 1970s, the marriage age rose rapidly and now stands around 24, higher than at any point since 1890.[124] Meanwhile, young adults are living with their parents longer. Between 1960 and 1990, the proportion of young adults ages 18 to 24 living with their parents increased by nearly 25%.[125] Today, 53% of these young adults are living with their parents.[126] This lengthening of the transition period between youth and adulthood may have increased the willingness of courts to accord children new legal rights.

CONCLUSION

Although it is always treacherous to draw lessons from history, a knowledge of the history of family law can help us identify those elements of contemporary legal discourse that are particularly distinctive and problematic. Two elements stand out: a de-moralizing of family law, that is, a growing hesitance to discuss family issues in moral terms, and an erosion of explicit legal presumptions governing legal decision making, which has markedly broadened the reach of judicial discretion.

One of the most distinctive characteristics of contemporary legal discourse on the family is the tendency to avoid terms that connote moral blame or judgment. In addressing questions of divorce or child custody, courts tend to avoid issues of fault or moral fitness. In cases of child abuse or neglect, the trend in legal opinion is to allow intervention in cases in which a child has suffered or risks physical or mental injury. Today, family regulators are little concerned about questions that preoccupied their predecessors, such as family formation and dissolution (including limitations on marriage, common law marriage, legitimacy and grounds for annulment or divorce) or the obligations of spouses. This new view presupposes diversity in the characteristics and functioning of families and rejects the earlier view that certain specific family roles (such as the supposedly natural capacity of mothers for childrearing) were rooted in moral, religious or natural law. Replacing the older moral discourse is a discourse emphasizing equality and individual rights.[127]

Of course, to say that the drift in family law is away from explicit moral judgments is not to suggest that the law does not make implicit moral judgments. Prior to the adoption of no fault divorce statutes, the law of marriage implicitly upheld a marital ideal involving lifelong sup-

123. *Id.* at 3, 14-15.
124. *Id.*
125. *Id.* at 3, 30-31.
126. *Id.* at 30-31.
127. Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1803-04 (1985); Lee E. Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 431 (1985).

port and marital fidelity. This was done by making divorce obtainable only on grounds of serious fault and requiring the breadwinner to pay lifetime support in the form of alimony. Since divorce was obtainable only on fault grounds, the spouse who was opposed to a divorce had an advantage in negotiating a property settlement. The tendency now is to avoid questions of fault or responsibility in dissolving a marriage or dividing marital assets. Contemporary notions of divorce law are much less judgmental: either spouse is free to terminate a marriage at will for almost any reason, after a divorce each spouse is expected to be economically self-sufficient and termination of a marriage frees individuals from most economic responsibilities to former dependents.[128]

One of the most striking characteristics of our current structure of family law—with its rejection of earlier forms of moral discourse and its acceptance of the terminability of familial obligations—is its tendency to decontextualize individuals and to eliminate a sense of on-going responsibility. Law is not simply an instrument of dispute adjudication; it is also (as the Puritans and, later, nineteenth century jurists realized) a powerful instrument of moral pedagogy, conveying important messages about responsibility and obligation. Rather than stressing on-going responsibility, the law today tends to reinforce broader individualistic and therapeutic currents in the culture, stressing self-fulfillment and individual happiness as the ultimate social values.[129]

Earlier in American history, one of the basic functions of family law was to articulate and reinforce certain widely-held standards and norms about the family. In recent years, jurists have backed away from using law and family policy to enunciate family standards and norms. Yet value judgments remain implicit in the law, and the values that the law currently tends to stress, such as the terminability of family relationships and obligations, tend to undermine broader values that the society claims to hold, such as the notion that having children entails responsibilities that do not disappear following separation or divorce.

128. *See* GLENDON, *supra* note 1, at 108-11.

129. *See* Walter O. Weyrauch & Sanford N. Katz, AMERICAN FAMILY LAW IN TRANSITION, 496-98 (1983); Schneider, *supra* note 127, at 1814-19.

NO FAULT DIVORCE AND THE BEST INTERESTS OF CHILDREN

DONALD S. MOIR*

I. INTRODUCTION

The fundamental change from law which sought—to the extent the law could—to uphold and sustain the institution of the family[1] to law which facilitates its dissolution began less than twenty-five years ago.[2] Weitzman[3] has called the change a revolution, Glendon[4] and Jacob[5] have called it a transformation of the law. Jacob calls it a "silent revolution"—a revolution brought about by "experts" with little public discussion.[6] The revolution *has been* silent, in that until recently there has been no public and little professional awareness of its impact. Consequences have emerged[7] that were not within the horizons of the reformers.[8]

Wallerstein[9] has commented on "how little we really know about the world we have created in the last twenty years—*a world in which marriage is freely terminable at any time, for the first time in our history*."[10] But to say we know little is not to say we know nothing. There is substantial

* Barrister and Solicitor, Moir Associates, Vancouver, Canada; University of Toronto (B.A., 1948); University of British Columbia (LL.B., 1951); Past President, Association of Family and Conciliation Courts; Past Chairman, Family Law Section, Canadian Bar Association, B.C. Branch.

1. In this Article, "family" means husband and wife in an existing or former marital relationship and children of that marriage, if any.

2. No fault divorce in the United States began with California's Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312 (codified at CAL. CIV. CODE § 4506 (West 1970). *See also* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath* 56 CINCINNATI L. REV. 1, 1 & n.1. For the progression of no fault divorce statutes through the states, see Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79. The grounds for divorce vary from state to state. Wardle classifies 13 states as "pure" no fault. Other states' statutes contain mixed grounds. *Id.* at 137.

3. *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

4. *See generally* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

5. *See generally* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988).

6. *Id.* at 15.

7. Some argue that the present high rate of divorce is a social phenomenon, not a legal one. As to that argument, *see infra* notes 62-80 and accompanying text.

8. *See infra* notes 81-99 and accompanying text. In this Article "reformers" include all those who advocated and brought about change in the law. Principal sources of information are Kay *supra* note 2, at 5 nn.14 & 16, *citing* the CALIFORNIA GOVERNOR'S COMM'N ON THE FAMILY, REPORT 1-2 (1966); JACOBS, *supra* note 5, at 66-79 & nn.10-32.

9. Dr. Judith S. Wallerstein is Executive Director of the Centre for the Family in Transition, Corte Madera, California.

10. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 297 (1989)(emphasis in original).

A recent Canadian study found that "[t]he rise of divorce . . . over the past twenty years makes it appear that the institution of marriage, having held firm for centuries, is being shaken to its foundations." JEAN DUMAS & YVES PÉRON, *Preface to* STATISTICS CANADA,

documentation of two consequences of the "free terminability of marriage:" (1) the impoverishment of divorced women together with the children in their care,[11] and (2) the risk of harm to children of divorce.

That there are other consequences of endemic family breakdown broadly affecting society and the economy is apparent, but the available data is insufficient to permit more than informed speculation about their nature and extent. Indeed, it would be surprising if a revolution affecting our basic institution did not substantially affect the social structure and the economy.

The divorce revolution has brought with it grave consequences. This Article will consider those in relation to children. Without diminishing the accomplishment of those single parents who, under great difficulties, *do*, it argues that our society does not know how to raise children well—emotionally, economically, developmentally—except in a secure institution of marriage. If that institution "has been shaken to its foundation"[12] in part, at least, because of no fault divorce,[13] the law must be reconsidered if society and the economy are to function up to their potential.[14]

The Article will suggest that in the concern about symptoms rather than causes, conventional scholarship in family law, and, in the behaviourial sciences, has failed to address fundamental issues. I propose a different way of addressing them.

The Article does not offer solutions; that task calls for the knowledge and insights of a broad spectrum of disciplines. I argue that the

---

DEMOGRAPHY DIVISION, MARRIAGE AND CONJUGAL LIFE IN CANADA: CURRENT DEMOGRAPHIC ANALYSIS (March 1992).

11. WEITZMAN, *supra* note 3, at 338. Weitzman found in her California sample that at the time of her study, divorced women experienced a 73% drop in their standard of living a year after divorce, whereas divorced men experienced a 42% increase. Weitzman attributes her well-known finding to no fault divorce. *See also* James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 352-53 (1987) (a compilation of studies in other states in addition to McLindon's own New Haven County, Connecticut study); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986). Weitzman has critics: *See* JACOB, *supra* note 5, at 159-64; Herbert Jacob, *Faulting No-fault*, AM. B. FOUND. RES. J. 773-81 (1986); Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, AM. B. FOUND. RES. J. 759-72 (1986). *But see* Weitzman's reply, *Bringing the Law Back In*, AM. B. FOUND. RES. J. 791-97 (1986). The most penetrating critique of Weitzman is that of Jed H. Abraham, *The Divorce Revolution Revisited: A Counter Revolutionary Critique*, 9 N. ILL. U.L. REV. 251 (1989). The essential difference between Weitzman and her critics appears to be the degree of impoverishment and whether it can be attributed to no fault divorce. An effective support regime is inconsistent with the premises of no fault divorce and, in any event, impractical in most family circumstances. A separated family is economically inefficient. Two can live more cheaply as one.

12. *Supra* note 10, DUMAS & PÉRON.

13. *See infra* notes 100-126 and accompanying text.

14. The Article does not argue that a change in the law of divorce and ancillary relief alone will diminish all the problems now affecting children. A whole spectrum of policy issues needs correction: anti-child tax policy, the social support network, health, security, physical security, education, housing and so on. There is an African saying that "it takes a whole village to raise a child." Nevertheless, I argue that unless family law itself offers a framework within which children can best be nurtured, a nation's capacity to correct the broad spectrum of adverse policies will be diminished.

policy choices are of great difficulty; that simplistic policy changes are at risk of doing more harm than good.

II. The Risk of Harm to Children of Divorce

The National Centre for Health Statistics reports that in 1988, children in single parent and step families were two to three times more likely to have emotional and behavioural problems than those in intact families.[15] Their academic achievement is significantly lower.[16] There is now a substantial literature reporting the results of empirical studies of varying rigour and research design on the impact on children of the divorce of their parents.[17] This Article will review a few of the recognized longitudinal studies that have implications in structuring legal policy.[18] Given the different research designs, the data are not totally congruent but they do converge on two points: (1) the separation of their parents is profoundly traumatic for all children (except those in highly conflicted or abusive families) and interferes with their developmental progress for shorter or longer periods;[19] and (2) a significant minority of children of divorce do not recover and are chronically disabled in their emotional, social and academic functioning.[20]

A. *The Data: A Sampling*[21]

The most frequently referred to study is that of Wallerstein and Kelly,[22] pioneers in empirical studies on the divorce process and its impact on children. Starting in 1971 they followed sixty divorcing families and their one hundred and thirty-one children ages three to eighteen from Marin County, California, a white, privileged community.[23] The assumption at that time was that divorce was a brief crisis quickly resolved by the adults and children involved. Based on that assumption,

15. Nicholas Zill & Charlotte A. Schoenborn, *Developmental, Learning, and Emotional Problems: Health of Our Nation's Children, United States, 1988*, 190 Nat'l Center for Health Stat. Advance Data (1990).

16. John Guidubaldi et al., *The Impact of Parental Divorce on Children: Report of the Nationwide NASP Study*, 12 Sch. Psychol. Rev. 300 (1983).

17. There are more than 700 reported studies. Interview with Dr. William F. Hodges, Department of Psychology, University of Colorado, in Halifax, Nova Scotia (Oct. 22, 1990).

18. In doing so, I rely in substantial part on Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. Fam. Psychol. 119 (1988) and Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. Am. Acad. Child Adolescent Psychiatry 349 (1991).

19. Kelly, *supra* note 18, at 122; E. Mavis Hetherington, *Stress and Coping in Children and Families*, *in* Children in Families Under Stress 7 (Anna-Beth Doyle et al., eds., 1984).

20. For the nature of the disabilities, refer to the studies. It is to be recognized that there is no information about the children beyond the periods of study.

21. A summary of the researchers' findings risks making them appear less complex than they are. The results and symptoms differ with age, gender, economic circumstances and other factors. Nevertheless, these variations should not obscure the generality of the findings reported here.

22. Judith S. Wallerstein & Joan Berlin Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce (1980).

23. *Id.* The authors note, "[i]t may well be that there would be a considerably greater emotional decline among children in a general population." *Id.* at 307.

the authors' original intent was a short term study[24] from crisis through to resolution. As expected, they found the children to be acutely disturbed at the time of divorce filing. To their surprise, however, and contrary to the then professional expectation, when they assessed the parents and children eighteen months after the divorce filing, they found a large number of the children were on a continued "downward course." In response to the unexpected finding, the study was continued and the parents and children were assessed again five years after the divorce filing.[25]

In summary, at the five-year assessment, the study found that notwithstanding the initial trauma of the children, about a third had recovered and were doing "especially well,"[26] a "middle" group of less than a third had resumed their developmental progress but remained somewhat symptomatic,[27] and the disabilities of more than a third of the children observed immediately post divorce and at the eighteen-month checkpoint had become chronic.[28]

Wallerstein continued to follow a group of the children,[29] then aged eleven to twenty-nine, some for ten years and others for fifteen. She reported her findings in *Second Chances*.[30] She reports that over half the children "emerged as compassionate and competent people," while almost half were "worried, underachieving, self-deprecating, and sometimes angry young men and women." Boys of school age suffered a wider range of difficulties than did girls at that age, but in young adulthood the differences dissipated "when many of the young women were involved in maladaptive pathways including multiple relationships and impulsive marriages that ended in early divorce."[31]

Two new phenomena became apparent: (1) the "sleeper effect"—those who were doing "especially well" at the five-year checkpoint, in

24. The assessment was essentially clinical, using a variety of techniques, together with interviews of parents, siblings and teachers. The children were initially screened for their psychological health—that is, the study was skewed in favour of sound pre-divorce adjustment. *Id.*

25. WALLERSTEIN & KELLY, *supra* note 25, at 4-5.

26. *Id.* at 209.

27. As to the "middle" group at the five-year checkpoint, it was found that "[a]lthough these youngsters had resumed their developmental progress, islands of unhappiness or anger continued to demand significant portions of their attention and psychic energy and to hamper the full potential of their development." *Id.* at 213.

28. The study:

> [F]ound 37 percent of all the children and adolescents to be moderately to severely depressed. As at the eighteen-month check point, depression was the most common psychopathological finding and was manifested in a wide variety of feelings and behaviour, including chronic and intense unhappiness (at least one child with suicidal preoccupation), sexual promiscuity, delinquency (drug-abuse, petty stealing, some alcoholism, breaking and entering), poor learning, intense anger, apathy, restlessness and, . . . a sense of intense, unremitting emotional deprivation.

Id. at 211. Wallerstein later reported that at the five-year checkpoint most of these children were on a yet further downward course. Judith S. Wallerstein, *Children After Divorce: Wounds That Don't Heal*, N.Y. TIMES MAGAZINE, Jan. 22, 1989, at 19, 20.

29. One hundred thirteen out of an initial group of 131.

30. WALLERSTEIN & BLAKESLEE, *supra* note 10.

31. Wallerstein, *supra* note 18, at 354.

particular, girls who had now become young women, became symptomatic;[32] and (2) the "over-burdened child"—the child who assumes a parental role over an inadequately functioning custodial parent without the buffering available from a functioning second parent.[33] Particularly disturbing for the purpose of this Article was that forty percent of the nineteen to twenty-three year old young men remained aimless, had limited educations[34] and had a sense of limited control over their lives.[35]

Mavis Hetherington and her colleagues at the University of Virginia followed a matched group of children, half from intact and half from divorced families for six years following divorce.[36] Children of divorce were significantly more symptomatic[37] than those in intact families at each of the examinations. Hetherington and her colleagues found the problems to be more severe and enduring for boys than for girls of divorce and found that their socio-behavioural difficulties were not related to income.

Guidubaldi and his colleagues conducted a longitudinal study of nationwide, randomly selected matched samples, about half from intact families and half from divorced families.[38] Children from intact families performed significantly better on socio-behavioural criteria and mental health indices than did those from divorced families. The academic achievement of children of divorce was much lower.

---

32. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 56-64; Wallerstein, *supra* note 28, at 42.

33. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 184-204; Judith S. Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 30 SOC. WORK 116 (1985).

34. She reports on a number of well-to-do college-educated fathers who would not support their children at college. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 154-60.

35. Wallerstein, *supra* note 28, at 42.

36. E. Mavis Hetherington et al., *Effects of Divorce on Parents and Children in* NON-TRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (Michael E. Lamb, ed., 1982); E. Mavis Hetherington et al., *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 518 (1985). Since then, Hetherington has reported 40% of boys whose custodial parent remarries while the child is in early adolescence develop "serious" psychiatric problems. GLOBE & MAIL, Nov. 9, 1991, at A4; Hetherington, *supra* note 17. There was a total of 144 white middle-classed children in the group, all four years old when first examined. The children of divorced families were first examined two months after the divorce (together with the others), two years later and after a further four years when the children were ten. The assessment was primarily through standardized objective psychological tests—as opposed to the essentially clinical approach of the Wallerstein and Kelly study.

37. There are convenient summaries of the symptoms in Kelly, *supra* note 18, at 123 and Wallerstein, *supra* note 18, at 351-53.

38. John Guidubaldi, *Differences in Children's Divorce Adjustment Across Grade Level and Gender: A Report from the NASP-Kent State Nationwide Project, in* CHILDREN OF DIVORCE 185 (Sharlene A. Wolchik and Paul Karoly, eds., 1988); John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531 (1985); John Guidubaldi et al., *Assessment and Intervention for Children of Divorce: Implications of the NASP-KSU Nationwide Study, in* 4 ADVANCES IN FAMILY INTERVENTION, ASSESSMENT AND THEORY 33 (John P. Vincent ed., 1987). There were 341 children of divorce and 358 from intact families. The children of divorce were first tested, on average, four years after divorce and two and three years later. Children from intact families, matched as to age and sex were tested at the same times. There were standardized tests of socio-behavioural and academic competence supplemented with information from parents, children, psychologists and teachers obtained in standardized interviews.

Socio-behavioural scores did not vary when corrected for income; those for academic performance did.[39] As in the Hetherington study, Guidubaldi found the disparity between divorced families and intact families to be greater for boys than for girls. The disparity for girls decreased over the period of the study,[40] that for boys increased.

There is a recent report based on two large data bases,[41] one in Great Britain, the National Child Development Study (NCDS) and one in the United States, the National Survey of Children (NSC),[42] which suggests a different etiology of the problems of children of divorce. Both studies sought a broad range of information other than about children and divorce, but included in the report was information on divorce in the cases in which it occured. There was information on pre-divorce interspousal conflict in each of the studies.

The studies found the disabilities of children of divorce to be greater than those of intact families. However, when pre-divorce spousal conflict was taken into account, the statistical differences between the two groups (children of divorce and children in intact families) disappeared.

The authors of the report (Cherlin and his colleagues) concluded: "[T]hose concerned with the effects of divorce on children should consider reorienting their thinking. At least as much attention needs to be paid to the processes that occur in troubled, intact families as to the trauma that children suffer after their parents separate."[43]

B. *Analysis*

As we have seen, all the studies found among children of divorce a higher proportion of dysfunction than among children in intact families. The longer range studies show the dysfunction is chronic among a minority of children of divorce.

Cherlin and his colleagues attribute more of the post-divorce dysfunction to pre-divorce family conflict than the others appear to.[44] All

39. For the scores, *see* Guidubaldi, *Differences in Children's Divorce Adjustment*, *supra* note 38, at 202-24.

40. But note the "sleeper effect" observed in WALLERSTEIN & BLAKESLEE, *supra* note 10, at 56-64.

41. Andrew J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 SCIENCE 1386 (1991).

42. NCDS began as a survey of a total of all 17,414 mothers who gave birth in Great Britian in one week in 1958. The study was not directed at children of divorce, but pertinent findings have been extrapolated from it. When the children were seven in 1965, public health nurses interviewed their mothers using a standardized test. There were reading and mathematics tests and behavioural assessments by teachers. Similar assessments were made in 1969 when the children had reached eleven. *Id.* at 1387. The NSC survey began in 1976 with a national random sample of 2,279 children between seven and eleven. Standardized assessments of their behaviour were made through telephone interviews of their mothers. The mothers were questioned, inter alia, about interspousal conflict. There was a second round of interviews in 1981 when the children were between 11 and 16. *Id.* at 1388. The data available from both studies permitted a comparison of the performance of children in intact families and children of divorce.

43. Cherlin et al., *supra* note 41, at 1388.

44. The Hetherington study divided both the divorced and intact families into intense

agree that high levels of family conflict to which children are exposed is detrimental. The difference, if there is a difference, is critical to the policy maker. If Cherlin and his colleagues are correct that a significant part of the post-divorce dysfunction observed in children can be attributed to pre-divorce family conflict, then in the interest of children, theoretically, the law ought to encourage the divorce of conflicted spouses. If, on the other hand, divorce and its attendant circumstances is the more significant causitive factor of the dysfunction observed than is pre-divorce conflict, then the law ought not to facilitate divorce as it now does.

It may be that it is the degree of conflict that is crucial. There are reasons to suggest that the conclusions of Cherlin and his colleagues, important as they are to the policy maker, should be carefully examined, if only to determine degrees of conflict:

(a) The data from the British NCDS[45] was for the period from 1965 to 1969 when England and Scotland had rigourously fault-based regimes of divorce. In England, adultery was the only grounds for divorce; the remedy for cruelty was judicial separation.

The low rate of divorce reflected in the NCDS study,[46]—two percent[47]—among the parents of the cohort probably reflects the then law. It may follow that the small number of children, the subjects of Cherlin and his colleagues' report, came from the most highly conflicted families. The experience of these children may not have been the same as those of children from less conflicted families.

(b) In neither the British NCDS nor the American NSC did the children get better, as might have been expected if the conclusions are correct. They got worse.[48]

(c) Kelly has found that the stereotype of intense spousal conflict preceding divorce is not always accurate. Fifty percent of her group re-

---

and low-conflict groups. Hetherington found no negative outcomes attributable to pre-divorce conflict among children who were sheltered from parental dispute—"encapsulated" was her term. In the first year following divorce, the children of divorce functioned less well than those in intact, high-discord families. At two years, the difference among children in high-conflict intact families and those in low-conflict divorced families disappeared. Boys from high-conflict divorced families showed more problems than any other group at all times. *See* Hetherington, *supra* note 36.

45. Cherlin et al., *supra* note 41.

46. Furstenberg and Cherlin estimated that 44% of children born between 1970 and 1984 in the United States lived in single parent families before they were 16 and that the rate for children born in the 1990s may be as high as 60%. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 11 (1991). *See also* Neil G. Bennett, *Letter to the Editor*, N.Y. TIMES, May 27, 1990, § 4, at 12. A March, 1990 census survey found that in 1970, 40% of households had a married couple and child or children under 18 as opposed to 31% in 1980 and 26% in 1990. *Change in the American Family, Now Only 1 in 4 is "Traditional,"* N.Y. TIMES, Jan. 30, 1991, at A19. For the purposes of this Article, I need not discuss the complex subject of the rate of divorce. It is sufficient to note that the rate is much higher than it was before no fault divorce.

47. Two hundred thirty-nine out of 11,658. This refers specifically to the instances of divorce occurring when the children were between ages seven and eleven. Cherlin et al., *supra* note 41, at 1387.

48. Cherlin et al., *supra* note 41, at 1387-88.

ported high conflict while twenty-five percent of women and thirty percent of men reported little or no conflict.[49]

(d) Wallerstein questions the reliability of market research methods such as those of Cherlin and his colleagues.[50]

(e) Wallerstein and Kelly selected their sample of children for psychological health at the time of divorce. That is, the sample is skewed towards sound pre-divorce adjustment.[51] Yet five years after divorce, they found a high proportion of dysfunction.

(f) A non-specialist may speculate that there may be something to be learned from the predominant reconciliation fantasies of children, the intense, enduring longing for the absent parent. Is this feeling among such a high proportion of children no more than bizarre masochism? Or are the children telling us that even if parents quarrel (absent, of course, abuse or spousal violence), children's healthy development needs both parents in an intact relationship?

None of the data I have referred to (or other data available) is conclusive. Yet a policy maker never has the luxury of certainty. If evidence shows there to be a likelihood of wide-spread social harm,[52] the concerned policy maker cannot wait for certainty. She must be cautiously aware of the limitations of the social and behavioural sciences without ignoring what they have to tell.

C. *The Contribution and Limits of Social Science*

Lawyers and behaviourial and social scientists are from disparate professional cultures. They think and speak with different languages, or, sometimes, use the same words to express different thoughts. Their implicit, unspoken, value systems are different. Each profession has its own perception of reality (both of which are valid) and varying perceptions of what is relevant to the reality sought to be examined. What lawyers think important, a clinician may not and vice versa. It follows that communication between the professions is subject to misinterpretation and at risk of distortion.

Nevertheless, the insights and the developing knowledge of the social and behaviourial sciences are crucial to the development of a benign family law and process, whatever the difficulties of communication. For example, most mental health professionals of the 60s and 70s assumed that divorce was a brief and transitory crisis from which adults and children would recover and go on to a better, happier life.[53] All of the studies referred to show that assumption to be wrong for many people and,

49. Kelly, *supra* note 18, at 121-22.

50. Judith S. Wallerstein, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1022 (1991) (Dr. Wallerstein's reply to a reader's Letter to the Editor).

51. WALLERSTEIN & KELLY, *supra* note 22, at 328-30.

52. *See infra* notes 56-61 and accompanying text (speculating as to the possible dimensions of the social harm).

53. Wallerstein, *supra* note 28, at 19; WALLERSTEIN & BLAKESLEE, *supra* note 10, at 241-73.

in particular, many children. The advice of the behaviourial sciences of that time to the policy makers was greatly different than it would be now.[54] The policy maker must be not only cautious of the "trendy" in the behaviourial sciences, she must be equally cautious of the "trendy" in the law.

Similarly, the policy maker must be aware that the search for exactness demanded by the behaviourial and social sciences necessarily limits their inquiry. Fineman and Opie are correct when they say that "the elevation of rationality as a primary virtue can result in the construction of a model that depicts only a small segment of the 'real world'."[55] A lawyer's perception of the "real world" is similarly limited.

The policy maker must also be aware that however rigorous the research design of a behaviourial or social scientist, bias is inescapable.[56] The hypothesis of the researcher will necessarily structure the research design and the data sought. Predisposition will necessarily affect the interpretation of the data. Furstenberg and Cherlin, in discussing the data that only a minority of the children of divorce become chronically sypmtomatic say that "[t]he glass is either half full or half empty, depending on one's point of view."[57] I illustrate my bias (as they have theirs) when I question that policy makers should be content that as bad as things are, they are not as bad as they might be.

The limitations of the studies referred to in this Article are readily apparent. The sample sizes are necessarily small and some, arguably, select. The longer the period of study, the smaller the sample studied. The larger the sample, the more suspect becomes the methodology. Nor can it be otherwise. It is impossible to conceive that resources can be found to fund a nation-wide study to exclude all the variables or even most of the variables of the human condition except the one under examination. If the problems illustrated by the data we now have are to be addressed, society does not have enough time for the definitive study.

The foregoing brings out yet another cultural difference between the sciences and the legal policy maker. The sciences necessarily seek certainty. The policy maker, necessarily, if he is to serve the perceived social need, must be content to act upon a preponderance of the best evidence available. The evidence from the studies *is* that children of divorce are at greater risk of harm than are children in the general population. The question becomes: What are the dimensions of the problem?

D. *Economic and Social Effects*

There is little information on the consequences for the society and

54. Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act — and Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 48-52.

55. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policy Making: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 128.

56. *Id.* at 124-30.

57. FURSTENBERG & CHERLIN, *supra* note 46, at 69.

the economy as a whole of endemic[58] family breakdown with its attendant risk to children. There is some basis for speculation. Take, as an example (but not as fact), the findings of Wallerstein and Kelly[59] that more than a third of the children of divorce whom they observed became chronically disabled in their functioning.[60] Suppose those findings applied across the general population. Suppose, further, that fifty percent of children experience the separation of their parents.[61] This would suggest divorce as a significant factor in disabling one-sixth of the population. Society cannot afford that increase in the population of disabled children. The figures are not offered as fact, but as a possible guide to the dimensions of the problems observed. Even if the incidence of disabled children of divorce is less than that found in the Wallerstein and Kelly sample, it is nevertheless so high as to command attention.

The economic component of the harm to children of divorce as an isolated factor contributing to dysfunction has not been measured. Guidubaldi found, as we have seen, that low academic achievement and lowered IQ among the children of divorce was related, in part, to economic factors, but that socio-behavioural problems were not.

In theory, adequate and enforced child support, adequate alimony to the custodial parent or greater public subsidization of children of divorce[62] could correct the economic component of the harm. As will be discussed later, however, there is seldom enough private money to go around (since a separated family is economically inefficient) and adequate public subsidization is most unlikely.

The long-term consequences to the national economy of such a large new group of under-functioning and malfunctioning children (and, in the Wallerstein sample, young adults), must be serious, though we do not yet have data on the macro-economic consequences.

Poor performance at school entry[63] disadvantages the child's whole academic career. Poor performance and limited education in later adolescence and early adulthood must have already diminished the economy's human resources. Both have been measured in higher proportions among children of divorce than among the general population. The economy increasingly needs ever greater competence. This new class of disadvantaged children appears unable to provide it. If the problems have the dimensions they appear to have and diminish society's and the economy's capacity to function, can a change in the law alleviate them?

---

58. *See* authorities cited *supra* note 46 and accompanying text.

59. WALLERSTEIN & KELLY, *supra* note 22, at 211.

60. A higher proportion of dysfunction emerged in later years. Wallerstein, *supra* note 28, at 20.

61. *See* authorities cited *supra* note 46 and accompanying text.

62. Children of divorce are subsidized through various welfare programs, but public support is gravely inadequate.

63. John Guidubaldi & Joseph D. Perry, *Divorce, Socioeconomic Status, and Children's Cognitive-Social Competence at School Entry*, 54 AM. J. ORTHOPSYCHIATRY 459 (1984).

III. DOES THE LAW MAKE A DIFFERENCE?

Is the present high rate of divorce a consequence alone of social and economic influences? Or is the transformation of the law a contributing cause? The conventional wisdom holds that the change in the law in the 70s and 80s had no influence on the rate of divorce.[64] The argument is that the fault-based divorce laws had become so subverted by collusion and perjury[65] that legislative abandonment of fault made no difference. The rate of divorce, it is argued, increased in response to the changing social and economic milieu, and the changed law made no difference. Marvell, contrary to the conventional wisdom, found a significant correlation between no fault statutes and the rate of divorce nationwide, but when the impact of changed law was examined state by state, there was a significant correlation in only a minority of states.[66]

Conventional wisdom is that the law does not matter, that people will do what they will, regardless of the civil law, in response to the social and economic influences of the time. I am skeptical of such wisdom for at least four reasons. First, the divorce rate from 1940-65 was essentially stable (with a bulge in 1945-46 immediately post-war). The rate doubled from 1965-76.[67] This must surely be more than coincidence when one considers that there was not the slightest public clamour for more liberalized divorce—it was a silent revolution, a revolution brought about by "experts" pursuing their own agendas, quietly.[68] Second, trend lines can be adjusted to show differing results. Third, under which law is the rate more likely to increase: One that facilitates divorce or one that does not? Finally, how could family law not have an influence? Approximately fifty percent of adults have been exposed to it.

There is no doubt that the rate of divorce would not have increased as rapidly as it did following the introduction of no fault divorce had not the social and, even more, economic conditions been favourable to it. The economy was relatively prosperous, and women, increasingly, were less dependent (but still dependant, the more so with children); the moral imperative had diminished. However, as we have seen, it was not these and other social and economic conditions which prompted the change in the law.

---

64. *See, e.g.*, JACOB, *supra* note 5, at 162 (citing studies). *See also* Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543, 544, 546-48 (1989)(review of the research).

65. I am not aware of any data nor is it likely that any could have been found. My experience in Canada in the 1960s suggests that the legal profession was not as corrupt as academics seem to think. Nor do I have any reason to suppose that Canadian lawyers were any more upright than those in the United States. Nevertheless, collusion and perjury did happen. Note that collusive divorces, to the extent they occurred, were necessarily consensual—conceptually and in terms of ancillary relief different from unilateral divorce.

66. Marvell, *supra* note 64; (citing Weiss & Willis, *An Economic Analysis of Divorce Settlements*, unpublished, Population Research Centre, University of Chicago (1989)) (a positive relationship found by a different method).

67. Wardle, *supra* note 2, at 139-41.

68. This is convincingly shown by JACOB, *supra* note 5, at 83. A 1982 poll showed, inter alia, that a majority thought divorce laws should be more strict. *Id.*

But there are other reasons to believe that the law makes a difference.[69] First, in a pluralistic society (as we are said to be), increasingly detached from other value systems, the law alone may in time become a predominant source of values. If the law says, contrary to the cultural perception of the marriage covenant,[70] that marriage is a transitory arrangement severable at will by one of the parties to it, the law's perception, may in time, like Gresham's Law, change the former cultural perception.

Second, the law has a regulatory function.[71] If family breakdown creates a risk of doing harm to children, it is in society's interest that the law do what it can in a free society to discourage it. The regulatory power of civil law is limited. Law that seeks to impose a standard well beyond the mores of the time will be evaded by one means or another. The civil law cannot compel spouses to live together in harmony and does not try. The law can, however, seek to encourage family stability by financially penalizing the spouse who disrupts it and by rewarding the spouse who keeps to the covenant (or, at least, securing, to the extent possible, his or her economic interest).[72] Alimony was the principal remedy[73] under the old law before law reform destroyed its conceptual roots.[74]

The old law did what it could to encourage family stability. It penalized a spouse erring in its eyes and secured the "innocent" spouse to the extent possible.[75] With its theological roots, the old law was directly interested in the rectitude of adults, but if family stability is in the interest of children, the law did what it could to protect them. The truly

69. This argument rejects the positivist and relativist allegedly value-neutral school of legal thought, at least as it might influence such a socially sensitive issue as family law. I do not agree that the law should do no more than adapt itself to a perceived (or, more likely, presumed) least common denominator of human behaviour—the "equity of the mean" as Max Weber has called it. In this discussion, I am indebted to Mary Ann Glendon, in MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987).

70. Marriage as a life-long commitment remains deeply rooted in our culture. There is strong evidence that is so, including the fact that marriage remains a significant personal, family and community festival. Marriage vows, civil and religious, continue to involve a serious life-long commitment. Popular literature, arts and advertisements assume marriage is a lasting commitment. Notwithstanding the law's inducements to divorce, about half of married couples stay married. This author does not find Bellah and his colleagues' assumption that there is a changed ethos of marriage wholly convincing in the face of the evidence to the contrary. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

71. In this context, I equate its protective as well as its dispute-resolving function.

72. I do not here intend to suggest that there is an analogy between contract and the marriage covenant. There is not. The attempt to suggest that there is has only served to distort our thinking about family issues. Marriage is sui generis. *See* Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437 (1988); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197; Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 3 (1989).

73. In few urban families is property division an adequate remedy. Sanctions and rewards of the civil law (at least in family cases) are not likely to be wholly effective for families below the "middle" middle-class.

74. *See* authorities cited *supra* note 72 and accompanying text.

75. Today, of course, the gender discrimination of former alimony law would have to be removed.

remarkable aspect of no fault divorce is that it is wholly adult-centred, with the welfare of children subservient to adult interest. In that sense, no fault divorce, in theoretically abjuring sanctions and rewards, does what it can to encourage divorce because of the economic benefits to one spouse or the other.

To what extent can the penalties and rewards of the law influence marital conduct? We may be thankful that people, particularly in their intimate relations, may not look to the law as their guide. Yet one wonders, as the knowledge of the present law's economic incentives to the economically stronger spouse to divorce permeate the culture and the law's values displace traditional values, whether the incentives will not be increasingly acted upon.

Further, the law has an hortative function. In the classical view, it was the purpose of law to promote virtue, a view which is now unfashionable[76] if only because, it is said, the state ought not to define virtue in a diverse society. If, however, family instability puts children at risk, I assume that there can be a broad consensus even in a morally diverse society that the law ought to do what it can to encourage stability. On such an issue law cannot be morally neutral. For the law to be neutral about the welfare of children is to say, as essentially no fault divorce law does, that their welfare takes second place to the "happiness" of adults in the eyes of the law.[77]

Further, Glendon, following Gertz and White, points out that "[b]ecause law is also constitutive, it is incumbent on us to be attentive, intelligent, reasonable, and responsible in the 'stories we tell,' the 'symbols we deploy,' and the 'visions we project'."[78] In time, these stories, symbols and visions may, as we have seen, displace other values of the culture.[79]

What stories does the present law tell? What is its message? It says, among other things, that the marriage covenant is freely and unilaterally terminable, that the welfare of children is subservient to the personal fulfillment of adults, that a parent's affective relationship with his or her children may be terminated at any time without cause at the will of the other parent.[80]

---

76. *But see, e.g.*, GLENDON, *supra* note 69; Schneider, *supra* note 72.

77. GLENDON, *supra* note 69, at 139; Schneider, *supra* note 72, at 236-37.

78. GLENDON, *supra* note 69, at 142.

79. For example, Chambers argues that with the waning sense of moral responsibility of the non-custodial parent, perhaps unwillingly separated from his children at the will of his former wife without cause, the law may be changed to eliminate child support or limit it to a transitional period. David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614-15 (1982).

80. Furstenberg and Nord found that: (a) "marital disruption effectively destroys any on-going relationship between children and biological parents living outside the home in a majority of cases;" (b) less than half the children had seen the absent parent in a year; (c) 20% had not seen him in more than five years; and (d) normally when there is contact, the relationship is social, not instrumental. Frank F. Furstenberg, Jr. & Christine Winquest Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 895 (1985). A recent study in Canada and Scotland found significant structural and emotional obstacles to anything like shared parenting after divorce in many cases. Edward

Lastly, even if everyone cannot or will not respond to the exhortations of the civil law, if the message of the law is less than the culture's ideal,[81] then, as we have seen, that lesser norm, in time, can displace other societal values in the same way that debased currency drives out good currency. The analogy is more than theoretical: if family stability is in the interest of a child and one parent seeks to achieve that ideal while the other parent, with the permission of the law does not, the latter will prevail. That is, even if the civil law cannot compel socially beneficial conduct, it can impede it if socially beneficial conduct is not encouraged by the law.

If, as I have argued, the law does make a difference, why did the family law reformers go wrong?[82]

IV. THE FAILURE OF SCHOLARSHIP[83]

A Canadian survey, *Law and Learning*,[84] drew a distinction between what it called doctrinal research and fundamental research in law.[85] Doctrinal research analyzes law (and recommends change) within the context of established doctrine. Fundamental research, in addition, looks to the underlying social forces, the needs to be served, the probable consequences of change and so on. In so doing, the fundamental researcher in law will look not only to her own discipline but to the insights that all other relevant disciplines can bring to bear.

For example, were fundamental research to be done on family law reform, questions would be asked such as: What is the nature and purpose of marriage and the family in the eyes of the state? To what extent should the law in a free society intervene in marital and family affairs and decisions? Such questions would inevitably lead into questions about how the needs and welfare of children can best be served within the framework of the law. In searching for answers, the researcher would look to the sort of people brought together by the Ripon Project.[86]

Kruk, *Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce*, 30 FAM. & CONCILIATION CTS. REV. 81 (1992). The Kruk study is important as the first to examine reasons for the breakdown of relationships between children and nonresidential divorced fathers.

81. That is, assuming, as I do, that society as a whole still values the welfare of children.

82. That they did is, I submit, beyond argument, if only because of the unanticipated consequences. *See* Weitzman, *supra* note 3.

83. The thinking of the reformers is well outlined in JACOB, *supra* note 5. *But see* Levy, *supra* note 54, at 45: "The most unrelenting criticisms appear . . . to have been designed primarily to serve the theoretical or ideological agenda of the critic rather than some sensible law reform agenda."

84. CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW, LAW AND LEARNING, REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA 65-72 (1983).

85. In French, *recherches ponctuelles* and *recherche sublime*, which may more clearly suggest the distinction.

86. One recent, innovative and overdue response to the problems of the revolution was a symposium in April, 1991, jointly sponsored by the American Bar Association and Ripon College entitled "Family Law and the 'Best Interest of the Child'." A group of 40

The law reformers did not do fundamental research.[87] Their focus was on the correction of the ills wrought by fault-based regimes of divorce—the exacerbation of acrimony thought to be implicit in adversarial divorce; the perjurious, consensual nature of divorce law in practice which was condoned by the courts.[88]

Their correction was no fault divorce. It was a path they need not have taken. But no fault divorce, necessarily, required a fundamental reconsideration of the property, alimony and custodial regimes. This the reformers undertook with admirable ingenuity. And today, their solutions offer ample fodder for academics, a comfortable living for lawyers, busywork for judges that is on occasion intellectually challenging, as well as an ever-growing divorce industry.[89]

As a result, the equitable jurisdiction states[90] (and Canada, including formerly community property Quebec) have been left with elaborate and inefficient[91] family property regimes resting on contrived rationales of dubious tenability[92]—rationales in the current jargon which boil down to "contribution" and "partnership."[93] A basic flaw in the rationales is that they are modelled on a theory of the marriage covenant that no fault divorce denies, namely, that spouses *will* contribute, each in his and her own way, and *will* be faithful to the partnership. Under no fault, the faithful contributing spouse has no remedy against the spouse who is unfaithful and/or non-contributing.

---

specialists from a number of disciplines—judges, lawyers, pediatricians, mental-health professionals, child-development specialists, social historians, anthropologists, educators and ethicists—were invited to consider what children need and fundamental changes in law that can best foster their optimal development. Additional "Ripon Project" symposia are in the planning stage. The Ripon Project *is* innovative. For the first time in North America, a discussion of family law reform begins with fundamentals: What do children need? What framework of law can best serve these needs?

87. *But see* Levy, *supra* note 54. The advisors to the National Conference of Commissioners on Uniform State Laws included representatives of the social and behaviourial sciences. Commissioners, advisors and reporters necessarily brought individual agendas to the discussions. Further, it must be recognized that the advice of the social and behaviourial sciences today with all that has been learned since the 1970s would be greatly different than it was then. *See* JACOB, *supra* note 5; UNIFORM MARRIAGE AND DIVORCE ACT 9A U.L.A. (1979) and commentary.

88. *See* Wardle, *supra* note 2, at 91-97. Wardle questions whether no fault divorce achieved its limited objectives. *Id.* at 97-112.

89. The phrase, "divorce industry" so far as I know, originated with Mr. Justice Raymond Watson, formerly of the Family Division of the Australian High Court, one of the pioneers in Australia in family law reform. It refers to the growing number of judges, lawyers, mental health professionals, mediators, accountants, tax experts, appraisers, evaluators, actuaries and so on who, under the legislation, have become necessary to serve the industry.

90. I do not extend the analysis to community property states.

91. "Inefficient" as used here means costly to administer. Alimony, lump sum and periodic, rid of some of the encrustations of the past, is the more efficient remedy, but is inconsistent with no fault divorce.

92. A thorough analysis of the untenability of the theories is beyond the scope of this Article. *But see, e.g.*, 23 FAM. L.Q. 147-381 (1989) ("Special Issue on Property Division at Divorce"). A critical reading of these essentially doctrinal analyses well illustrates the point.

93. Even if the partnership analogy is misleading and distorting, it will be an insensitive husband and an imprudent politician who denies that marriage is a partnership.

The essential flaw in the theories is that they do not serve the social need. In most urban family circumstances there is not enough property to go around. Yet to be consistent with the premises of no fault divorce, property division was necessarily put forward as the predominant economic remedy for divorce, and alimony was relegated to an occasional, short term, "bridging" remedy.

We, today, with the benefit of hindsight, may wonder that when fundamental change in the nature of marriage and the parent-child relationship was in contemplation, the need to consider an equally radical change in the family property regime in the interests of children was not apparent. Alimony, much more clearly than property division, was cast adrift from its former theoretical roots, its rationale, by no fault divorce. If marriage is freely terminable at any time without cause; if, in the eyes of the law, marriage is no more than a temporary liaison of two individuals for so long as it is convenient to both and who go back to their two solitudes upon divorce, why should either have any continuing responsibility for the other?[94]

That alimony has uneasily survived its illogic under no fault reflects the need for it. But an ancillary remedy without roots in a defensible rationale consistent with law can, at best, give rise to inconsistent application and, at worst, perceived injustice.

The loss of alimony as a viable remedy has a most direct impact on children of divorce. For if a child's custodial parent is poor, so must be the child.[95] Nor, under the logic of no fault divorce can that poverty be remedied by adequate child support under private law,[96] because its logic demands that a custodial parent not share in any benefit to the child.

In distinction, the rationale for the property and alimony regimes under the old law, whatever its flaws, was soundly based in it. Marriage was a lifelong covenant to be severed only for a grave breach. Until death or remarriage, the "innocent" spouse (and children in her care) were, in theory, entitled to what they would have enjoyed but for the breach.

The changes in the custodial regime were, on the face of it, not as far-reaching, but may have been, in substance, more profound. The Uniform Marriage and Divorce Act proposed the already recognized "best interests" test as the guide in determining custody but recommended that conduct, unrelated to the children, be removed from the court as a discretion structuring factor. Thus, not only did no fault divorce change the nature of the marriage covenant,[97] it changed the parent-child relationship from one that was assumed to be sacrosanct (in

94. *See* authorities cited *supra* note 72 and accompanying text.

95. The positive relationship between family income and children's academic achievement and IQ is well established. *See generally supra* note 63, at 466-67.

96. Even if there were enough monetary resources to go around. In most family circumstances, there is not.

97. *See* WEITZMAN, *supra* note 3, at 366-68.

the absence of grave misconduct) to one that is terminable for all practical purposes[98] by the other parent without cause.

The reformers did not intend to change the nature of the marriage covenant or the parent-child relationship. But in their too narrow focus on the ills of fault-based divorce, in their failure to do fundamental research, to think fundamentally, the reformers, unwittingly, as we now know, profoundly changed the parent-child relationship[99] and, to the extent that the law has influence, changed the husband-wife relationship, two relationships basic to the functioning of society.

Another gift of reform has been the most bizarre and thought distorting jargon ranging from the offensive—"rehabilitative maintenance," for example, to the misleading—"clean break," "partnership" and "equality," words that become icons detached from the limited reality which spawned them, which ignore the total reality and prevent us from thinking clearly how to serve the underlying social need.

Consider "equality," a principal icon, for example. Surely it is now the cultural perception that the equality of spouses is the very basis of what marriage ought to be—equality of commitment, of management, of obligation. But these words do not readily translate into words of law. Men and women have differing needs[100] and the law's arithmetic equality does not serve them. Those who must show a proper reverence for the icon "equality" at law, yet who recognize the differing needs, have had to devise daedalian rationales for what might be called "asymmetrical equality."[101]

Would we not think more clearly about what the law ought to be if we were to call "a spade a spade" and recognize need for what it is? But with need goes an obligation to meet it and such an obligation is outside the context of no fault divorce.

With hindsight and more than twenty years of experience under the premises of no fault divorce, we can better see their flaws than could the reformers. And the hubris of that time is no longer with us. We now better know that we must think fundamentally if we seek to change law affecting the fundamental institution of society. It is to be regretted that the now vast, and, for the most part, excellent, literature on legal issues affecting the family remains doctrinally captive so that the remedies proposed are no more than palliative and do not get to the root of the problems we face.

V. REMEDIES

Of the many proposals to alleviate the risk of harm to children of

98. *See* authorities cited *supra* note 80 and accompanying text.

99. *See* JACOB, *supra* note 5, at 133 (Levy appears to have considered the custodial issue in more depth than the Commissioners were prepared to accept).

100. O'Connell puts it neatly: "Women are not damaged men . . . [they] are not undamaged men either." O'Connell, *supra* note 72 at 506-07.

101. *See, e.g.*, Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989).

divorce in the context of no fault, I will do no more than touch upon a few broad categories. First, the economic component of the harm to children[102] was sought to be addressed in the federally required child support guidelines. Overdue and prudent as that measure was, a recent study has found that the changes brought about by passage of the guidelines have been modest.[103] The inescapable fact remains that separated parenting is economically inefficient. In the majority of circumstances, separated parents do not have the resources to support their children adequately.[104] The extent of child poverty attributable to divorce is a product of the high incidence of divorce.[105]

Second, there have been recent congressional suggestions that the "waiting period" for divorce should be increased to give couples time to "sober up" (as one report put it) and consider reconciliation.[106] The proposal has its flaws. Until 1985, a ground for divorce in Canada was, in theory, three years consensual separation. In practice, the "waiting period" was detrimental to women and children in that during the separation period, they were denied some of the spectrum of remedies available on divorce.[107]

There is no evidence that people *do* "sober up" during the waiting period. The tensions and uncertainties of unresolved issues are not conducive to reconciliation. Further, time reduces the chances of women for remarriage more than it does for men, and pre-divorce liaisons are much more open to men than they are for women with children. Nevertheless, there is some symbolism, some "message" in law that says

102. Which, as we have seen, is real but which has not been measured as an isolated factor.

103. Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 345 (1991). The study involved only three states: Colorado, Hawaii and Illinois, with different guideline models. The results in other states may differ.

104. *See generally* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1 (1990).

105. It is to be recognized that the impoverishment of children of divorce is only one corner of growing child poverty in general, which is so detrimental to the society of both the United States and Canada and has such short and long run economic implications, if only because you cannot educate a hungry child. Growing child poverty is the result of a spectrum of changed social and economic policies: the unweaving of the support network during the prosperity of the 1980s, tax and welfare policies increasingly detrimental to children, family law and so on. *See, e.g., U.S. Panel Warns on Child Poverty*, N.Y. TIMES NATIONAL, April 27, 1990, at A22 (citing a report of the National Commission on Children); SYLVIA A. HEWLETT, WHEN THE BOUGH BREAKS: THE COSTS OF NEGLECTING OUR CHILDREN (1991). There has been an enormous transfer of wealth from the young (that is, those who raise children) to the old in the last two decades. Iver Peterson, *Why Older People are Richer Than Other Americans*, N.Y. TIMES, Nov. 3, 1991, at E3. It is truly astonishing that during a time when "family values" are on so many political lips (which we, apparently, are intended to read) the tax exemption for children has been reduced. It was 42% of *per capita* income in 1948 and is now 11%. Steven A. Holmes, *Unlikely Union Arises to Press Family Issues*, N.Y. TIMES, May 1, 1991, at A18. In Canada (before the imposition of the Goods and Services Tax in 1990), a married couple earning the median income with two children paid marginally *more* tax (100.1%) than a childless couple earning the same income.

106. *See* Holmes, *supra* note 104.

107. The result might be somewhat different in the United States. In Canada, divorce and ancillary relief, custody and maintenance, are under federal jurisdiction. There are some pre-divorce remedies under provincial jurisdiction.

one cannot be quickly freed from the marriage covenant. It is questionable, however, that longer "waiting periods" would reduce the rate of divorce sufficiently to justify the detriments.[108]

Third, joint custody in various guises—from joint residential custody to a right on the part of the access parent to be consulted about major decisions affecting the child—is now the statutory preference in a majority of states. The rationale for joint custody rests on two concepts. First, that children of divorce do best when they maintain a close relationship with both separated parents.[109] Second, that parent and child have a right to a continuing relationship after divorce. "Parents are Forever" was coined to express these two concepts.[110]

Notwithstanding the broad acceptance of the idea of joint custody and it attractiveness, there have been no long-range and few shorter range studies regarding the impact of joint residential custody on children. We know nothing (except that which can be speculated from theories of child development) about infants and joint custody—at a time when parent-child bonding, if it is to occur, must occur.

Johnston and her colleagues conducted a study of children in post-divorce conflicted families where there was court ordered joint custody or frequent access. Their findings were grave indeed. A comparison of that group and children in sole custody showed the former to be more dysfunctional than the latter.[111]

It seems clear that the automatic imposition of joint custody without skilled and time-consuming assessment of the families can be detrimental to children. But, on the other hand, if as a rule of thumb, joint custody or frequent access are ordered only when there is agreement, the non-residential parent is hostage to the continuing goodwill of the residential parent—an intolerable situation if there is to be equity to both the children and the absent parent. Moreover, it makes an ass of the law.[112]

There are perhaps irremovable structural reasons for the findings of Furstenberg and Nord[113] that divorce terminates the absent parent's

108. It is clear, of course, that if the full spectrum of ancillary relief were available during the "waiting period," the separation would be permanent and the chance of resumed cohabitation no greater than that of remarriage to one another after divorce.

109. *See, e.g.*, WALLERSTEIN & KELLY, *supra* note 22. *But see* FURSTENBERG & CHERLIN, *supra* note 46, at 73-76 (Furstenberg and Cherlin, with their different methodology, found no correlation between children's adjustment to divorce and their relationship with an absent parent).

110. The phrase is that of Meyer Elkin, formerly director of the Los Angeles County Conciliation Court. Elkin was a pioneer and a leader from the 1950s on of the conciliation court movement.

111. *See* JANET R. JOHNSTON & LINDA E. G. CAMPBELL, IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988); Janet R. Johnston et al., *Latency Children in Post-Separation and Divorce Disputes*, 24 J. AM. ACAD. CHILD PSYCHIATRY 563 (1985); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCHIATRY 576 (1989).

112. Experience suggests the sanction against the obdurate parent of losing custody is seldom a realistic alternative. When patterns of separated parenting have been established it is very difficult, and often impossible, to change them.

113. *See* Furstenberg & Nord, *supra* note 80.

parent-child relationship in the majority of cases and that in the majority of the remainder, the relationship is social, not affective. A recent study of disengaged divorced fathers found substantial structural impediments to continued parent-child engagement of non-residential fathers. A notable finding was that many fathers who were most engaged with their children during marriage eventually ceased contact because their profound sense of loss and bereavement as well as the artificial access conditions made a continued truncated relationship too painful.[114]

Fourth, therapists[115] propose that the harm to children of divorce that they have observed can be reduced therapeutically. In response to the conciliation court movement[116] there are now court-connected programmes in most jurisdictions of varying elaborateness conducted by persons with varying credentials and skills to mediate or conciliate issues involving children and their future parenting and to counsel parents and children.

To say that there has been no overall[117] assessment of such programmes and their long-term results is not to diminish their value. Social experience does not yet offer guidance in the difficult art of separated parenting. There is no social knowledge and almost no empirically based clinical guidance in the even more difficult art of step-parenting. Therapeutic programmes, even if they do no more than raise some consciousness of the difficulties, must have value. There is no doubt that in skilled hands (of which there are too few) some children can be saved from harm.

Yet there is no evidence that such programmes, extended as they are, have or can significantly reduce the incidence of harm to children of divorce.[118] It is doubtful that we have the resources in money or in uniquely skilled personnel to be able to address the problem in all its dimensions. In any event, if the law is counter-therapeutic, the law will prevail.

There is another issue: state intrusion into parenting through doctrinal[119] therapeutic intervention following divorce is now on a scale

114. Kruk, *supra* note 80.

115. "Therapists" is used here generically for lack of a better word to encompass all those in "helping professions" of different disciplines who assist, in a number of ways, to resolve the human issues of divorce and ameliorate the consequences.

116. It is beyond the scope of this Article to discuss the nature and extent of the movement, its ideological thrusts or to assess their merits. In general, the movement seeks to humanize the divorce process, to observe and within the possible, correct the consequences. It is interesting and perhaps regrettable that conciliation (to use the term broadly) has had no legal analysis although through it, for the most part, judges in practice, if not in form, delegate decision-making involving children (but not their support) and their future parenting to therapists.

117. *See* 30 FAM. AND CONCILIATION CTS. REV. (April, 1992) which is devoted to reports on court-connected mediation and conciliation in California.

118. *See, e.g.*, Johnston, *supra* note 111; Furstenberg & Nord, *supra* note 80; Kruk, *supra* note 80.

119. This refers to the fact that, of necessity, state administered programmes (*e.g.* mediation, conciliation, counselling, child custody assessment) must be doctrinally conforming within themselves. It does not mean that the programmes are necessarily homogeneous across the nation—nor that the doctrines followed are necessarily "wrong."

about which a free society might be uneasy, however benign the intent and the therapeutic accomplishment.

In summary, the experience so far does not suggest that the continuing search for the "best" custodial/access regime and therapeutic guidance has or is likely to obviate the structural impediments to effective separated parenting or to significantly reduce the incidence of harm to children of divorce. That does not mean, given the present state of the law, that we should not try or, in trying, ignore the risks of state intrusion that trying involves.

Fifth, Weitzman,[120] Glendon[121] and others propose what Glendon calls a "children first" regime of property division, alimony and child support to remedy the economic component of harm to children and the economic deprivation of custodial mothers. Without going into the details,[122] they propose that the needs of children have a first call on the income of the non-custodial parent and the family home. For example, Weitzman proposes that a custodial mother be granted either title to the family home or a right of occupation while the children are dependant. Neither she nor Glendon recommend that a child's interest in family property be expressly recognized but rather that it be derivative through the custodial parent.

A "child first" policy is attractive conceptually, but there are substantial practical and theoretical impediments to it. It does not address the psychic component of harm to children. It does not recognize the economic inefficiency of separated parenting and would leave in effect law which facilitates that inefficiency. However draconian its measures against the non-custodial parent, in the majority of family circumstances, he will seldom have enough to maintain his family at an adequate standard without public subsidization,[123] no matter what penury is imposed on him.

What I call the theoretical impediments to a "child first" policy

---

However, following Bellah, Glendon says that the therapeutic culture "not only refuses to take a moral stand, it actively promotes distrust of 'morality'." GLENDON, *supra* note 69, at 108 n.113. That is, in this context, it exalts perceived self interest at the expense of obligation to others or to the society. "Americans are seldom as selfish as the therapeutic culture urges them to be." BELLAH ET AL., *supra* note 70, at 112. Thus, the crucial involvement of the therapeutic community in family law decision-making reinforces the adult-centredness, implicit in no fault divorce. As noted before, the law appears to be counter-cultural: the cultural perception of marriage and family is on a "higher," less self-centred, plane than is the law. It is, of course, an argument of this Article that the law's perception must, of necessity, in time displace that of the culture.

120. WEITZMAN, *supra* note 3, at 379-87. Weitzman gives detailed proposals for remedying the economic consequences of no fault divorce within its context, which are a more or less unseverable "package." *Id.* at 357-401. The text refers to those most directly affecting children, but all have an indirect impact.

121. GLENDON, *supra* note 69, at 91-104.

122. For example, that there should be three classes of marriage and divorce—short childless marriages, those with dependent children and those involving older women who have reared now independent children. Arguably, the details of the proposals are crucial if one is to assess their effects, but they are beyond the scope of this Article.

123. Weitzman seeks an equalization of standards of living in the separated households. This would mean, in most circumstances, a significant reduction from that formerly enjoyed by the children. WEITZMAN, *supra* note 3, at 380.

within the context of no fault divorce are substantial. In operation, the proposal would surely leave the adult self-interestedness of the custodial parent with the benefits of no fault divorce and leave the non-custodial parent to pay most of its costs.[124] The proposal is inconsistent with and against the tenets of no fault divorce, namely, that each adult is equally free to terminate a marriage at any time without cause, to equally share in the acquests of it and each, thereafter, to have the fruits of her and his individual efforts.[125] Law which is not equitably coherent within itself cannot stand, however benign its intent. Finally, Wardle came more directly to the point of harm to children of divorce by tentatively proposing that "divorces involving minor children [might be] excluded from no fault divorce processes or be subject to more protective no fault divorce procedures."[126]

The Wardle proposal for different grounds of divorce when there are children and when there are not, is of a different dimension than the "child first" policy. Different grounds of divorce necessarily mean that the marriage covenant at law changes once there are children. What changes in the alimony, property and custodial regimes are suggested? What would be the grounds of divorce? Would the pre-child marriage be, in effect, only a trial marriage to become "real" only when a child was born—with what impact on the alimony and property regime?

I argue that for the law to recognize differing classes of marriage giving rise to differing grounds of divorce and differing economic entitlements and obligations is to diminish the institution of marriage;[127] and that society's interest in the welfare of children is best and most simply and logically served by sustaining that institution. The complexities of any other approach are formidable.

In summary, I submit that the ever more elaborate search for palliatives will, in the end, be unavailing because they do not get to the root of the problem, the high incidence of divorce facilitated by the law and the consequent risk of harm to children.[128]

Does not the question come down to this: If the law influences the rate of divorce (as I argue it does) and if divorce puts children at risk and they do best in an intact family (in the absence of exposure to abuse or marked spousal conflict), should not the law do what it can to encourage

124. Weitzman's proposal for equalization of standards would, in theory, avoid the problem. But maintaining the family home for children either by transfer to the custodial parent or postponement of sale while the children are dependant (with all the practical and financial difficulties involved) would be at the individual cost of the non-custodial parent. This is true even if determining the respective standards of living included a right on the part of the non-custodial parent to own or occupy a property equivalent to the family home. Such duplication is within the means of only a few.

125. To state the proposition in its stark terms is to show its fallacy in the real world. The reformers, of course, had to dilute the stark premise to grudgingly allow for the facts that women are sometimes economically disadvantaged by marriage and that children are, as the premises of no fault divorce would have it, an economic liability.

126. Wardle, *supra* note 2, at 133-35.

127. Bearing in mind, as Groucho Marx has told us, "that marriage is a great institution but who wants to live in an institution?"

128. Together with other problems accompanying a high incidence of divorce.

family stability, rather than facilitating instability? Finding the answer to that question seems to be urgent.

VI. DIRECTIONS

A beginning, if not yet a substantial literature, calls for a changed direction in the law, new law that encourages family stability. Bartlett urges that family law ought to be based on "notions of benevolence and responsibility . . . [that] reinforce parental dispositions toward generosity and other-directedness . . . ."[129] Minow says that the law must not create "obstacles to affiliation;" that it should "nurture the relationships between individuals that constitute families."[130] Schneider would go further in saying that the law of divorce (and, therefore, of marriage) should emphasize the unity of spouses and not their separateness; that it should emphasize their obligations to each other and not their autonomy.[131] Hafen argues that the individualism of no fault divorce is, in fact, counter-productive; that true freedom arises from and, for its exercise, is dependent on belonging; that, in any event, a sense of belonging is crucial to a child's capacity to become a individual.[132] We know beyond doubt that these ideals, these aspirations, are just those under which children can best be nurtured. The vitality of the society and its economy, in turn, depends on the quality of their nurture.

What framework of law can best help people to try to reach these ideals? Turning the clock back to a fault-based regime of divorce is, I suggest, repugnant to most of us. Yet policy options based on "notions of benevolence," that "nurture relationships," and "emphasize obligations, not autonomy" and which, at the same time, do not reintroduce the flaws of the old law are not yet clearly apparent. To find them, is, I suggest, a pressing need, and will require a reorientation of thinking among legal scholars.

We must bear in mind Ronald Coase's caution in another context:

> [I]n choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. . . . In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.[133]

129. Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988).

130. Martha Minow, *"Forming Underneath Everything That Grows:" Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

131. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 257.

132. Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 3, 39-41.

133. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960). Dr. Coase was awarded the 1991 Nobel Prize in Economics.

FAMILIES, SCHOOLS AND THE MORAL EDUCATION OF CHILDREN

MICHAEL S. PRITCHARD*

The seeds, as it were, of moral discernment are planted in the mind by him that made us. They grow up in their proper season, and are at first tender and delicate and easily warped. Their progress depends very much upon their being duly cultivated and properly exercised.[1]

I. INTRODUCTION

This Paper is concerned with the moral education of children.[2] It is often asked whether morality can be *taught*. In higher education this question is commonly converted to the question of whether morality can be *studied*.[3] This shifts the emphasis from teacher to learner. A major theme of this Paper is that the schools, too, should reframe the question of whether morality can be taught. Particularly at the elementary school level, moral education is commonly regarded as a matter of "instilling" or "implanting" moral values. Fearing moral indoctrination, many reject the idea that moral education belongs in the public schools. But, taking the cue from higher education, moral education in the schools need not be a form of indoctrination. It can be much more like studying morality than having moral values "implanted." But this requires acknowledging, with Thomas Reid, that the "seeds of moral discernment" are present even in the early school years. What is needed are opportunities for children's powers of moral discernment to be "duly cultivated and properly exercised."

Moral discernment is highly valued. We value it in ourselves and others as a mark of reasonableness.[4] But, as Reid says metaphorically, it

* Professor of Philosophy and director of the Center for the Study of Ethics in Society, codirector of the Center for Philosophy and Critical Thinking in the Schools, Western Michigan University.

1. THOMAS REID, *Essays on the Active Powers of the Mind*, *in* PHILOSOPHICAL WORKS 595 (1967).

2. I offer no definition of 'moral education.' Indeed, it is precisely controversies about what constitutes moral education that fuels much of this Paper. I do hope that a reasonably clear and plausible conception of the kind of moral education I favor in the schools will emerge from my discussion. By 'moral' I mean, roughly, that which has to do with right and wrong, good and evil, and virtue and vice. This includes a consideration of principles, standards, rules, attitudes and sentiments that can plausibly be said to be moral. Morality cannot be equated with religion, law, or social etiquette, however intimately they might be related in some areas. By 'education' I mean to include a variety of means of learning, ranging from formal, didactic instruction to learning for oneself. Which end of this spectrum I favor in regard to moral education in the schools will, I hope, become clear as the Paper unfolds.

3. *See* Daniel Callahan, *Goals in the Teaching of Ethics*, *in* ETHICS TEACHING IN HIGHER EDUCATION 61-74 (Daniel Callahan & Sissela Bok eds., 1980) (the emphasis is on students as active learners rather than passive recipients of moral instruction).

4. *See infra* notes 19-26 and accompanying text.

is only the *seeds* of moral discernment that are "planted in the mind by him that made us."[5] We naturally look to children's caretakers, typically their families, to protect these seeds while they are so tender, delicate and easily warped. But this is the language of passivity. To understand fully what Reid means by the seeds of moral discernment "being duly cultivated and properly exercised," we must view children as agents, not merely patients.

In some contexts "cultivated" implies passivity. For example, a field is cultivated by a farmer. It does not cultivate itself. In an educational context teachers might attempt to cultivate appreciation and judgment in their students. However, children can be encouraged to do this for themselves. If moral discernment is a mark of reasonableness, it is clear that at some point children themselves must begin to exercise their powers of judgment—that is, develop a capacity to think for themselves. In this they cannot remain passive.[6]

In this Paper I promote a view that includes moral education within the larger aim of helping children develop their capacity for reasonableness. However, in doing so I must address the concerns families have about the moral development of their children. These include worries about whether it is the business of the schools to enter into the arena of moral education at all. I argue that it is unavoidable that the schools do so to some extent. The real question is how they can do so in a responsible manner. An entering wedge is civic education, which aims at helping children prepare for citizenship in a constitutional democracy. However, this wedge opens up a much wider area in which children should be given opportunities to, as Reid might put it, duly cultivate and properly exercise their "seeds of moral discernment."

II. WHOSE RESPONSIBILITY?

Whose responsibility is it to duly cultivate and properly exercise children's "seeds of moral discernment?" A short answer is: Those who bear primary responsibility for the education of children. A moment's reflection reveals that this short answer requires a rather lengthy explanation. Who does bear primary responsibility for the education of children? I will focus on three major candidates. The first is obvious, the second is controversial and the third is typically underestimated, if not overlooked entirely. They are families, schools and children themselves.

5. REID, *supra* note 1, at 595. Some may balk at the theistic tone of Reid's remark. God does play a part in Reid's account of morality. But nothing I say in this Paper requires his theistic assumptions. The essential point here is simply that moral development begins at a very early age and that its "seeds," as it were, will grow only in a suitable environment. What the elements of such an environment might be is one of the major concerns of this Paper.

6. This does not mean that children are to be regarded as adults. Moral discernment requires experience as well as judgment. And there is much that young children are not experientially or emotionally ready to confront. However, as will be shown later, many have already developed a surprisingly sophisticated understanding of morality by the time they enter school.

Families are recognized by law to have a right to morally nurture their children. For example, in exercise of this right, families may establish rules of behavior for their children, extend or restrict privileges, monitor television viewing, read their children stories with moral messages and take their children to the church of their choice. Families can also fail to exercise this right responsibly. In cases of child abuse (for example, severe beatings), legal intervention is justified. Although abusive treatment may not be directly related to a parent's efforts at "moral instruction," parental abuse of any sort can surely have an adverse effect on the moral development of the child.

However, there are more subtle ways in which families can fail to responsibly exercise the right to morally nurture their children. They can simply fail to attend carefully to those aspects of their children's lives that need moral nurturing. Young children may be left too much on their own, they may be unloved even if they are not beaten, and so on. Much of this may go unnoticed by others. And even when noticed, it may be unclear to what extent, if any, legal intervention is permissible. Still, we need not conclude that, as long as their behavior is shielded by law, families are fulfilling the *moral* responsibilities they have to their children.[7] Because a legally recognized right to morally nurture children creates a protected zone for families, it seems reasonable to insist that there is an accompanying moral responsibility to exercise that right responsibly.[8] This is especially so given the obvious dependency and vulnerability of children and the substantial legal power families have to govern the lives of their children.

Of course, nothing said so far implies that *only* families have a legal right to morally nurture children. Families may acknowledge that others, too, have such a right by sending their children to accredited private schools. What about the public schools? In the absence of an approved alternative, the state legally requires children to attend the public schools. Thus, the state accords public schools a right and responsibility to provide a major portion of the education of children. To what extent, if any, should this be understood to include the *moral* education of children?

Here opinion sharply divides. Oddly, the voices of children are seldom heard or even represented in these disagreements. Yet, surely at some point in their formal education, children become moral agents with rights and responsibilities of their own. Full acknowledgement of this strengthens the case for according public schools the right and responsibility to provide an environment within which the "seeds of moral

7. This point follows from the broader notion that moral and legal responsibility are distinguishable. For example, if I agree to meet a struggling student in my office at 3:00 p.m., but cavalierly decide to play golf instead, this is a failure in moral, not legal, responsibility.

8. Whether there is a legal responsibility as well is a more difficult matter, one best settled by legal experts. In any case, for reasons given *supra* note 2, whatever legal responsibility may exist now or through future changes in law, it is unlikely to reach as far as moral responsibility does.

discernment" can be, as Reid puts it, "duly cultivated and properly exercised."[9]

Because national surveys consistently reveal that more than eighty percent of the parents in our society favor some sort of moral education in the schools, we might be tempted to conclude that there already is a virtual mandate for the public schools to place moral education explicitly on their agendas.[10] However, because of the vast differences of opinion about just what is to count as moral education, it is not clear what, if any, mandate exists.

For example, many believe morality and religion are inseparable. If they agree with the doctrine of the separation of church and state, they may fear that "secular humanist" teachers will, unwittingly perhaps, undermine the religious foundation of their children's morality. So, if they nevertheless favor moral education in the schools, they will be wary of just how this is to be done (and by whom). Others may simply insist that moral education has no place in state supported, public schools. Private, sectarian schools, however, are another matter, and that is where they will send their children. Still others might wish to overturn the doctrine of the separation of church and state so that moral education, in full religious dress, may be brought into the public schools.[11]

But even those who believe that morality and religion can and should be separated in a public school setting may have very different ideas about moral education in the schools. Some believe it is the job of the schools to "indoctrinate" students with certain values. Their detractors object to this as reinforcing a kind of mindless absolutism. Others favor "values clarification," the aim of which is to help students clarify the values they already hold, while at the same time withholding critical evaluation of those values. Detractors charge that this implicitly reinforces mindless relativism.[12]

Given these controversies, it is no wonder that some families insist

9. This statement is intentionally vague. What must be taken up below is what such an environment should be like.

10. *See, e.g.*, THOMAS LICKONA, EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY 21 (1991) ("For more than a decade, every Gallup poll that has asked parents whether schools should teach morals has come up with an unequivocal yes. Typical is the finding that 84 percent of parents with school-age children say they want the public schools to provide 'instruction that would deal with morals and moral behavior.' ").

11. For a very constructive attempt to show how morality and religion can be distinguished without detracting from either, see Larry P. Nucci, *Doing Justice to Morality in Contemporary Values Education*, *in* MORAL, CHARACTER, AND CIVIC EDUCATION IN THE ELEMENTARY SCHOOL 21, 27-33 (Jacques S. Benninga ed., 1991).

12. "Mindless absolutism" and "mindless relativism" should not be construed as representing anything clear or precise. Those who use these expressions are speaking pejoratively of positions they (fairly or unfairly) attribute to their opponents. "Mindless," as applied to both "absolutism" and "relativism," implies uncritical acceptance and application. So, it may be alleged, "mindless absolutism" favors "implanting" universal, and possibly exceptionless, moral principles in children. Children are not invited critically to evaluate these principles. Children are to be indoctrinated to accept and apply them, thus circumventing their critical intelligence. Similarly, "mindless relativism" allegedly encourages uncritical acceptance of the view that "any moral opinion is as good as any other."

that the moral education of their children is their responsibility, and that the public schools should not interfere. However, I will argue that they are mistaken in this. In making my case, I will suggest a path between the contending parties that at the same time addresses their fears. Three basic points can be made. First, moral education in the public schools should, among other things, strive to help students become reasonable persons. Reasonable people can deeply disagree about many things, including religion. So, aside from any constitutional guarantees, there is good reason for public schools to respect religious differences. Second, helping students become reasonable persons is the most effective way of fighting the twin specters of mindless absolutism and mindless relativism. It would be odd to think of a reasonable person as a *mindless* absolutist or relativist.[13] Whatever attraction such a person might have toward any form of absolutism or relativism would involve some degree of reflection or thoughtfulness. The best defense against either form of mindlessness would therefore seem to be to help students develop their capacity to be reasonable. Third, in a pluralist society such as ours, families that attempt to "go it alone" with the moral education of their children are unlikely to succeed—at least not in a way that will serve their children well.

III. Civic Education: A Link Between School and Family

It should be noted that there is a place where the legitimate concerns of public education and families clearly join. Public education in our society is sustained by a political system committed to certain individual liberties and democratic decision making.[14] In turn, public education is legitimately expected to help sustain that system by preparing children for citizenship. This is the function of civic education, which aims at helping students acquire the necessary understanding and skills for effective, responsible participation in a constitutional democracy.[15] What, then, are the values civic education should emphasize? Robert Fullinwider suggests the following: the capacity to make independent, rational judgments about civic matters, respect for the rights of others and the capacity to discuss and defend political views that may differ

13. Any reflective form of absolutism can be expected to show some sensitivity to the particular contexts within which moral judgement and choice are made. Any reflective form of relativism is likely to embrace common values such as self-respect, respect for others, fairness, truthfulness, keeping one's word and not harming others. Thus, neither view could fairly be called "mindless."

14. *See* Robert K. Fullinwider, *Science and Technology Education as Civic Education*, *in* Europe, America, and Technology: Philosophical Perspectives 197, 197-215 (Paul T. Durbin ed., 1991).

15. For a detailed discussion of where civic education might best fit in the curriculum, see Alita Z. Letwin, *Promoting Civic Understanding and Civic Skills Through Conceptually Based Curricula*, *in* Moral, Character, and Civic Education in the Elementary School, *supra* note 11, at 203, 203-11 (discussing educational materials developed by the Center for Civic Education, a California nonprofit corporation that develops programs for both private and public schools). *See also* Carolyn Pereira, *Educating for Citizenship in the Early Grades*, *in* Moral, Character, and Civic Education in the Elementary School, *supra* note 11, at 212, 212-26.

from theirs.[16]

These civic values form an important part of the social virtue of reasonableness. Civic education's concern for the reasonableness of students joins with the family's concern for the moral development of its children. This is so for several reasons. First, civic values such as respect for the rights of persons are themselves moral values. Thus, no clear separation of civic and moral education is possible. Second, as Fullinwider amply shows, the dispositions that civic education encourages do not, in fact, confine themselves to the civic arena. For example, the ability to discuss and defend political views is not an ability to discuss and defend *only* that. Once encouraged, the critical thinking skills exhibited in the civic arena are likely to show up anywhere. And, just as these skills are assets in the political arena, they are assets in other areas of life as well.[17] Third, families should desire their children to grow up to be well-developed, moral persons. As will be shown, reasonableness is a central feature of such persons.

Finally, we need to consider the perspective of children themselves. They have a *right* to be given opportunities to become well-developed, moral persons.[18] This right is as basic as the right to be given opportunities to develop the ability to read, write or compute. Families that do not want or do not care whether their children become well-developed, moral persons pose a special problem. The failure of such families to provide adequate opportunities, or their active interference with this endeavor, can only strengthen the case for the schools providing such opportunities. The case for schools doing this is even stronger if, as seems likely, even the most conscientious families cannot by themselves provide adequate opportunities.

IV. A CASE FOR REASONABLENESS

I have referred to reasonableness as a social virtue. What does this involve? Minimally, it can be understood to include those skills and dispositions encompassed by what educators refer to as *critical thinking*. Robert Ennis succinctly defines "critical thinking" as "reasonable reflective thinking that is focused on deciding what to believe or do."[19]

16. Fullinwider, *supra* note 14, at 198. As authority for these ideas, Fullinwider cites BRIAN S. CRITTENDEN, PARENTS, THE STATE, AND THE RIGHT TO EDUCATE 13, 122 (1988); AMY GUTMANN, DEMOCRATIC EDUCATION 38-39 (1987); William Galston, *Civic Education in the Liberal State*, *in* LIBERALISM AND THE MORAL LIFE 89, 97 (Nancy L. Rosenblum ed., 1989).

17. How else are we to understand the nationwide call for greater emphasis on developing critical thinking skills? This is not simply a call for critical thinking in civic education.

18. This is at least a moral right. Whether it can plausibly be construed as a legal right as well is a question best left for legal experts. I would think that there *should* be such a legal right, even if presently there is none. What respect for such a right would entail for families, schools and others would still be subject to much debate. However, the importance of acknowledging such a right is that this recognizes children themselves as having a *claim* in the matter.

19. Robert H. Ennis, *A Conception of Critical Thinking—With Some Curriculum Suggestions*, NEWSLETTER ON TEACHING PHILOSOPHY (American Philosophical Association, Newark,

Although admirably brief, Ennis's definition may be too narrow. Critical thinking can also be used to make sense of what we read, see or hear and to make inferences from premises with which we may disagree or about which we have no particular view. Such critical thinking may lead one to decide what to believe or do, but it need not.[20]

In addition to his definition of critical thinking, Ennis provides an elaborate taxonomy of critical thinking skills. This taxonomy is actually broader than his definition would suggest. It includes dispositions to seek clear statements of questions, to be open-minded, to seek as much precision as the subject permits, to think in an orderly manner and to be sensitive to the feelings and level of understanding of others. It also includes abilities such as focusing on the context of an argument, detecting unstated assumptions, clarifying arguments, making inferences from premises and interacting with others in a reasonable manner.

It is clear from this list that critical thinking involves more than the employment of "higher level" thinking skills, and more than clever or skillful argumentation. Critical thinking involves thinking for oneself. But it also involves thinking well—that is, exercising good judgment. This means having reasons for one's judgments, or, as Matthew Lipman puts it, having reliable *criteria* for one's judgments.[21]

If the point of encouraging the critical thinking of children is to help them become more reasonable, then moral education should be seen as an explicit part of the broader educational agenda of the schools. This is because reasonableness applies to morality as much as to any other area of judgment and conduct. How reasonableness should be understood in the context of morality requires special comment.

It should be especially noted that reasonableness in the context of morality is not to be equated with rationality. Someone can be unreasonable without thereby being irrational. A selfish person may (unreasonably) take more than his or her fair share, likely at the expense of others. Yet, from the standpoint of self-interest, this is not necessarily irrational. A person may make excessive (unreasonable) demands and yet not be irrational. A person might be unwilling to reason with others about an issue or refuse to listen to others's points of view without being irrational. But we may regard this as unreasonable. It is only when rationality is combined with fairminded regard for the views and interests of others that reasonableness is present. Thus, reasonableness is actually a *social* virtue. As W.M. Sibley states:

> If I desire that my conduct shall be deemed *reasonable* by someone taking the standpoint of moral judgment, I must exhibit something more than mere rationality or intelligence. To be reasonable here is to see the matter—as we commonly put it—

Del.), Summer 1987, at 1 (emphasis omitted). *See also* ROBERT H. ENNIS & STEPHEN P. NORRIS, EVALUATING CRITICAL THINKING 3 (1989).

20. *See* Michael S. Pritchard, *STS, Critical Thinking, and Philosophy for Children*, *in* EUROPE, AMERICA, AND TECHNOLOGY: PHILOSOPHICAL PERSPECTIVES, *supra* note 14, at 217, 217-46.

21. MATTHEW LIPMAN, THINKING IN EDUCATION 114-42 (1991).

> from the other person's point of view, to discover how each will be affected by the possible alternative actions; and, moreover, not merely to "see" this (for any merely prudent person would do as much) but also to be prepared to be disinterestedly *influenced*, in reaching a decision, by the estimate of these possible results. I must justify my conduct in terms of some principle capable of being appealed to by all parties concerned, some principle from which we can reason in common.[22]

Ronald Dworkin provides a good illustration of the importance of encouraging this sort of reasonableness in children:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my 'meaning' was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice-versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.[23]

It should be noted that Dworkin is not inviting just any kind of challenge to his conception of fairness. Presumably it will have to be one capable of *convincing* him that he was mistaken; and this implies that the challenge is accompanied with good reasons. Thus, both parent and child are subject to the constraints of reasonableness. Like any parent, Dworkin would like to believe that the examples of unfairness he has in mind at any given time are reasonable. But he is not willing to hold that belief in the face of convincing reasons to the contrary. As a reasonable parent, he is open to the possibility that he might be wrong about some of his examples. To deny this possibility (and reject evidence to the contrary) is to be willing to be wrong *twice*—and to wish that for his child as well.

Of course, being a well-developed, moral person involves more than reasonableness. But in our pluralistic society it may be difficult to specify what else is essential. Not all values are specifically moral values, and there is no reason to insist on uniformity across persons. But even within morality there may be many different ways of satisfying plausible criteria for being a well-developed, moral person, and reasonable people might even disagree about some of the criteria. However, broad consensus about some basic features in addition to reasonableness may be attainable. Here are three candidates:

1. Self-respect;

22. W.M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554, 557 (1953).
23. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977).

2. A capacity to resist, if not overcome, egocentricity in circumstances calling for moral sensitivity and judgment; and

3. Commitment to other-regarding values (e.g., respect for others, justice, beneficence), with appropriate supportive virtues (e.g., considerateness, compassion, fair-mindedness, benevolence).

Although distinguishable, these features are not independent of one another. In addition, each has a special relationship to reasonableness. For example, someone who is seriously deficient in other-regarding values will not be regarded as a reasonable person. And someone who is excessively egocentric will have distorted other-regarding values and, thereby, lack reasonableness. Finally, the acknowledgement and appreciation by others that one has the virtue of reasonableness can contribute to one's self-respect.

If the sort of reasonable person Sibley describes is the sort of person families should want their children to become, it is a tall order, indeed, for families to "go it alone." Without the assistance of the kind of civic education Fullinwider describes, how are children to develop the capacity to understand and discuss views different from those they encounter in the smaller circles within which their families may try to enclose them?

Nevertheless, families obviously play a crucial role in determining the extent to which children grow up to be well-developed moral persons. On the negative side, various forms of child abuse (physical and psychological) can impede this development, as can parental neglect or absence. Parental modelling of behavior and attitudes can have either a positive or negative effect, as can that of other older family members.[24] If reasonableness is a desired outcome, then *inductive* modelling is likely to prove most effective. This requires both exhibiting the desired types of attitude or behavior and providing the child with *reasons* for embracing them.[25] Finally, on the positive side, the unconditional love that parents have for their children is a fundamental source of self-respect and self-esteem.[26]

So, enroute to becoming well-developed, moral persons, children need from their families good modelling, love, support and the absence

24. For convenience, I will refer to parents as the significant adults in family life. But, I make no special assumptions about what constitutes a standard family. There may be one or two natural parents present—or none. There will be at least one adult, however related to the children. Beyond this, nothing I say is intended to support one particular family arrangement rather than another. How families might best be structured is an interesting and important topic, but is beyond the scope of this Paper.

25. For more on inductive modelling, see Martin L. Hoffman, *Empathy, Role-Taking, Guilt, and the Development of Altruistic Motives*, *in* MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES 124, 124-43 (Thomas I. Lickona ed., 1976).

26. 'Unconditional' may seem too strong, since parental love can be withdrawn under some circumstances. However, what is meant by 'unconditional' is that the child does not have to do anything or have any special qualities in order to be loved by his or her parents. Such love is not conditioned by one's accomplishments or special characteristics. For a good discussion of unconditional love and its importance for developing self-respect and self-esteem, see LAURENCE THOMAS, LIVING MORALLY: A PSYCHOLOGY OF MORAL CHARACTER (1989).

of abuse and neglect. However necessary these might be, they are not sufficient. Taking only these elements into account, the child is largely being portrayed as a *patient*—someone to whom something is happening or for whom something is being done. But at some point the child as *agent* must enter the scene. So, we might ask, when does the child "get in on the act?" We need to ask not just what is to be done *to* and *for* children, but also what might enable them to *do things for themselves*.

V. CHILDREN AS MORAL AGENTS

The four features of a well-developed, moral person outlined above clearly portray the person as an agent, not merely a patient. To encourage the development of these features, it is important to recognize the earliest appearance of those affective and cognitive capacities that are essential to that development.[27] This has been precisely the agenda of developmental psychologists such as Jean Piaget and Lawrence Kohlberg.[28] Their theories of moral development are so influential among parents and educators that they warrant some attention here, for these theories are as misleading as they are promising in suggesting how moral development can be encouraged.

Piaget and Kohlberg offer encouragement to parents who worry that their children's basic moral development is completed before they even enter school. They reject this Freudian view in favor of the idea that moral development is dependent on cognitive development. So, basic moral changes can be expected to occur well into school years, and even into adulthood. Of course, this may be unwelcome news to parents who would like to minimize the influence of the schools and peer groups on their children's moral development. But for many it is a relief to know that their first, often fumbling efforts at parenting may not have sealed their children's moral fate.

However, Piaget and Kohlberg accept Freud's view that, even well into the early school years, children are basically self-centered. Morality for young children is first grounded in the fear of punishment or loss of love and then in an "instrumental egoism" of reciprocal exchange.[29] Even Carol Gilligan's critique of Kohlberg's neglect of the affective side of moral development accepts the view that early childhood is basically

27. Roughly speaking, affective capacities are capacities for emotion and feeling, whereas cognitive capacities are capacities for rational and logical thought. Just what relationships these capacities have to one another in the moral domain is subject to much debate. *See* MICHAEL S. PRITCHARD, ON BECOMING RESPONSIBLE 58-159 (1991).

28. For a discussion of Piaget's views on moral development, see JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD (Majorie Gabain trans., 1965). Kohlberg's basic theories are presented in LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: ESSAYS ON MORAL DEVELOPMENT (1981) and LAWRENCE KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT (1984).

29. "Instrumental egoism," for Kohlberg, is understood as "backscratching"—"You scratch my back and I'll scratch yours." This is self-serving in the following sense: I will do things that will benefit others, but only in the actual or expected return of benefits from them. Thus, there is an expectation of fully reciprocal exchange of benefits and, therefore, no unilateral sacrifice.

self-centered in these ways.[30]

Unfortunately, this view of the self-centeredness of young children conflates egocentric and egoistic behavior. What is overlooked is the possibility that much apparently egoistic behavior is only egocentric. Egoistic behavior is self-centered in the sense that one is seeking something for oneself. Egocentric behavior is self-centered in the sense that one does not fully understand or take into account the different perspectives of others. Although someone's behavior on a particular occasion can be both egoistic and egocentric, it need not be. For example, a younger brother may buy a present for his older brother that is no longer of any interest to the older brother. The older brother may then permit the younger brother to use it. If we surmise that the younger brother bought the present with precisely this in mind, his behavior will be construed as egoistic. But it should be noted that this interpretation assumes that the younger brother *does* understand the perspective of his older brother. So, if he behaved egoistically, he was not entirely egocentric. However, if the younger brother's thinking was basically egocentric, he might not have behaved egoistically at all. Suppose the younger brother failed to realize that his older brother no longer shared the same interests. He might then have bought a present he mistakenly thought would please his older brother. This would be egocentric but not egoistic behavior.

The extent to which young children are self-centered—and how this is to be understood—is a central concern for child rearing. If parents believe that their children will respond only to threats of punishment or the withdrawal of love, what is reinforced is a *morality of threats*. The longer this is reinforced, the more firmly entrenched it is likely to become (and the greater the danger of its becoming abusive). If, as Kohlberg suggests, children are responsive only to such threats well into their early school years, how is it, we might wonder, that they *ever* acquire genuinely other-regarding concerns? Kohlberg's apparent answer is that at roughly age seven or eight children's social understanding is transformed through further cognitive development. At this point they are able to understand perspectives other than their own, thus enabling them to empathize with others. However, seven or eight years of parental reinforcement of a morality of threats, plus another two or three years in an authoritarian school environment are likely to make such a transformation quite difficult.

Psychologist Martin Hoffman points out a fundamental problem with Kohlberg's account:

> It is . . . conceivable that a person could understand the social order and see its functional rationality quite well, discuss moral

30. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan criticizes Kohlberg for overemphasizing justice, rights, duties and abstract, universal principles. Equally important for morality, she argues, are compassion, caring and responding to the needs of others, regardless of whether there is a strict duty or obligation to do so. So, Gilligan contrasts what she calls a "morality of care" with Kohlberg's "morality of justice."

> dilemmas of others intelligently and take the role of most anyone—and still act immorally himself and experience little or no guilt over doing so. Indeed, these social insights might just as readily serve Machiavellian as moral purposes.[31]

Not only is this conceivable, it is precisely how sociopaths are typically characterized by psychiatrists.[32] Because Kohlberg supposes that young children do experience guilt, it is clear that he is not thinking of young children as sociopaths. However, apparently he is not thinking of their experience of guilt as reflecting genuine concern about the well-being of others. Instead, guilt is strictly tied to real or imagined threats of power or punishment. So, Hoffman still has a point. If children are egoistic from the outset and remain so until seven or eight, perhaps as they acquire greater social understanding they will simply incorporate this within their egoistic perspective. Thus, moral development could be seen as a gradual development of enlightened self-interest—that is, a more sophisticated form of egoism.[33]

Finding this implausible, Hoffman offers us a different view of young children. He provides convincing evidence that very young children are capable of genuinely empathic responses to the distress of others.[34] These responses manifest some awareness of the very different perspectives of others. They also seem to manifest a genuine concern for the distress of others. William Damon's *The Moral Child* presents further evidence of this from recent research on the moral development of children.[35] So, there is good reason to suppose that non-egocentric and non-egoistic behavior is possible much earlier than Kohlberg allows. Because both are essential to later moral development, it is important for parents to be attentive and responsive to early manifestations.

Recall Thomas Reid's observation that the progress of the "seeds of moral discernment . . . depends very much upon their being duly cultivated and properly exercised."[36] If parents believe their children are not ready to accept non-egoistic reasons for behaving or not behaving in

---

31. Martin Hoffman, *Moral Development, in* 2 CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY 281 (Paul H. Mussen ed., 3d ed. 1970).

32. *See* WILLIAM MCCORD & JOAN MCCORD, PSYCHOPATHY AND DELINQUENCY (1956); PRITCHARD, *supra* note 27, at 39-57.

33. PRITCHARD, *supra* note 27, at 119-23.

34. According to Hoffman, even infants give evidence of empathic responses to the crying of other infants. However, at this stage infants apparently have no clear sense of the distinction between themselves and others. So, he refers to this as "global empathy." Still, as young children develop their understanding of the perspectives of others, empathy becomes differentiated. This is not an escape from egoism, for it is only at this point that ego itself clearly emerges. Now there can be concern both for others and self. Equally important, non-egocentric understanding begins to develop much earlier than Kohlberg suggests. Hoffman's earliest example is an 18 month-old child comforting another toddler. There is little reason to suppose that very young children cannot respond to overt expressions of adult distress as well. However, the understanding of more subtle and complex forms of suffering no doubt must await appropriate cognitive development.

35. WILLIAM DAMON, THE MORAL CHILD: NUTURING CHILDREN'S NATURAL MORAL GROWTH (1988).

36. REID, *supra* note 1, at 595.

certain ways, they will not cultivate the "seeds of moral discernment" in that direction. In fact, by substituting egoistic reasons in their stead, parents may actually contribute to the warping of those "seeds." If children are capable of non-egocentric thinking at a very early age, then parents would do well to reinforce this and provide opportunities for their children to develop this capacity. By assuming that their children are not capable of non-egocentric thinking until well into their school years, parents may actually reinforce and prolong the "tunnel vision" that so often impedes the development of moral sensitivity.

Of course, it is implausible to suppose that an eighteen month-old child's empathic response to the distress of another child incorporates moral conceptions. However, the responsiveness and caring that are present can be expected eventually to contribute to that child's moral outlook—*unless this is otherwise discouraged.* Furthermore, the wait will not be long. Richard Shweder, Elliot Turiel and Nancy Much provide evidence that children as young as four have an intuitive understanding of differences among prudential, conventional and moral rules:

> In fact, at this relatively early age, four to six, children not only seem to distinguish and identify moral versus conventional versus prudential rules using the same formal principles (e.g., obligatoriness, importance, generalizability) employed by adults; they also seem to agree with the adults of their society about the moral versus conventional versus prudential status of particular substantive events (e.g., throwing paint in another child's face versus wearing the same clothes to school every day).[37]

Lest it be concluded that the basic story of moral development is completed in the pre-school years after all, it should be emphasized that this *is* just the beginning. Gareth Matthews nicely outlines what we should expect to follow:

> A young child is able to latch onto the moral kind, bravery, or lying, by grasping central paradigms of that kind, paradigms that even the most mature and sophisticated moral agents still count as paradigmatic. Moral development is then something much more complicated than simple concept displacement. It is: enlarging the stock of paradigms for each moral kind; developing better and better definitions of whatever it is these paradigms exemplify; appreciating better the relation between straightforward instances of the kind and close relatives; and learning to adjudicate competing claims from different moral kinds (classically the sometimes competing claims of justice and compassion, but many other conflicts are possible).[38]

This may seem to place too much emphasis on the cerebral. What about

37. Richard A. Shweder, Elliot Turiel & Nancy C. Much, *The Moral Intuitions of the Child, in* SOCIAL COGNITIVE DEVELOPMENT: FRONTIERS AND POSSIBLE FUTURES 288 (John H. Flavell & Lee Ross eds., 1981). *See also* Nucci, *supra* note 11, at 22-26 (children as young as two and one-half can differentiate between moral and conventional issues).

38. Gareth B. Matthews, *Concept Formation and Moral Development, in* PHILOSOPHICAL PERSPECTIVES ON DEVELOPMENTAL PSYCHOLOGY 185 (James Russell ed., 1987).

the will, one might ask? What about matters of the heart? What about behavior? However, what must be borne in mind is that typically the kinds of reflection Matthews describes take place in contexts in which it very much *matters* to the participants how issues are understood. There may be concerns about sharing toys, distributing dessert fairly, doing household chores or helping an elderly neighbor who is too ill to care properly for her pet. There might also be concerns about all sorts of issues at school—sharing materials, taking turns, school government, privileges and rights, punishments and rewards, social relationships, and so on. That is, sorting through and refining paradigms is not typically just an intellectual exercise.

"That's just it," an objector might say, "the problem is that these things do matter to children—too much, in fact. Children aren't ready for reasonable discussion of such issues. Aristotle is right, first they need to be *habituated*—their passions have to be brought under control by good habits. Give them firm rules and reinforce them. Then, much later, such matters can be discussed." This underestimates children in two respects. First, it assumes that they do not already have some rather stable moral dispositions by the time they enter school. Second, it assumes that reflection and discussion can contribute little to the refinement the dispositions that are already somewhat in place. It is again, to view children as patients rather than agents.

Fortunately, there is now a great deal of empirical evidence that these assumptions are not warranted. Ask any group of five to ten year-old children what they think about lying or fairness, for example, and marvel at the range of thoughtful responses.[39] It is often difficult to see what basic moral distinctions they leave out that adults would put in. For example, favoritism, taking more than one's fair share, not taking turns, listening to only one side of the story, jumping to conclusions, not treating equals equally (and unequals unequally), and the like are readily volunteered as kinds of unfairness. These are staple fare in the lives of children from a very early age—within their family structures, on the playground and in school. That young children, like the rest of us, may more readily recognize unfairness in others than in themselves does not mean that they do not understand what fairness and unfairness are. That they will later extend their conceptions of fairness and unfairness to situations they cannot now understand very well (e.g., taxation)—and that they will discover conflicts with other fundamental values—does not imply that they do not now have access to moral concepts at their most basic level.

Still, there is no necessary connection between moral thought and action. A crucial part of the mix is the social environment. Because

39. *See, e.g.*, GARETH B. MATTHEWS, DIALOGUES WITH CHILDREN (1984); MICHAEL S. PRITCHARD, PHILOSOPHICAL ADVENTURES WITH CHILDREN (1985); *see generally* GROWING UP WITH PHILOSOPHY 311-91 (Matthew Lipman & Ann M. Sharp eds., 1978) (collection of essays regarding ethical inquiry in the schools); *see also* any publication of the Institute for the Advancement of Philosophy for Children at Montclair State College, New Jersey.

families constitute only a part of that environment (especially once the child is school-age), it is clear that any adequate account of how children might grow into well-developed, moral persons must focus on much more than the family. But the family itself plays a fundamental role. It is to be hoped that families and schools can work together in encouraging the moral development of children. However, two worries about families should be mentioned—worries about families contributing either *too little* or *too much* to the process.

First, the worry about too little: Families may provide little or no love for and acceptance of their children. They may sustain an environment ranging from indifference to abuse. And they may provide little or no good modelling. The causes may be various (e.g., poverty, lack of education, family breakdown), but in such circumstances children are bound to be shortchanged. Through a strong natural constitution, strong support outside the family or good luck, many children in these families will nevertheless grow up to be well-developed moral persons. Many others, however, may not. External support from the schools, social services or the law may be helpful. In any case, it is unrealistic to expect each family on its own to be able or willing to work things out in the best interest of the child. Government, social services, schools and family law must work together in trying to provide needed assistance.

Second, the worry about too much: Families can attempt to be too supportive and protective of their children. A family may try to protect its children from an external world perceived to be hostile to what the family's adults most value and want for their children. Or, as already mentioned, the family's adults may be convinced that moral education belongs exclusively in the home. Thus, deliberate attempts by the schools to undertake some of the tasks of moral education are viewed with suspicion and may be vigorously opposed.

VI. Empowering Children

The cost of keeping moral education out of the schools is likely to be high. Deliberately or not, moral values are reinforced (or undermined) in the schools. Cheating is discouraged, respect for students and teachers is encouraged, and so on. In short, educational institutions depend for their viability on the acceptance of basic moral values, values that may or may not match up well with values found in the corridors, the playgrounds and the streets between home and school—or even in the homes of some children. To expect all of this to work out well without moral education being in any explicit way placed on the educational agenda is quite optimistic.

It might be replied that these moral values are reinforced only to enable schools to get on with their main business—educating students. These are ground rules for the schools to function effectively. Distinct from this, however, is the question of whether moral values should be discussed *within* the curriculum itself. But, attempting to keep moral

content out of the curriculum is equally hopeless. As Fullinwider states, a school that attempted this would probably have to close down:

> It could not teach children their native language since so much of any natural language is about how to be and not to be. It would have to deprive its students of all stories of human affairs, since those stories are structured by evaluative concepts—by ideas of success and failure, foresight and blindness, heedfulness and heedlessness, care and negligence, duty and dereliction, pride and shame, hope and despair, wonder and dullness, competition and cooperation, beginning and ending. But without stories of human affairs, a school could not effectively teach non-moral lessons either. It could not teach about inflation, log-rolling, scientific discovery, coalition-building, paranoia, ecological niches, deterrence of crime, price controls, or infectious disease.[40]

Worse, anything resembling critical thinking would need to be eliminated from the schools as well. Thomas Reid notes that our "power of reasoning, which all acknowledge to be one of the most eminent natural faculties of man, . . . appears not in infancy."[41] This capacity, like that of moral discernment, also needs to be duly cultivated and properly exercised. The recent hue and cry that the schools are failing to help students develop critical thinking skills echoes Reid's observation. So, there is a nationwide call for getting beyond rote learning. Hardly anyone would oppose critical thinking in the schools—as long as it can stay away from the moral domain. But it cannot be kept away.

An anecdote will illustrate the problem. A few years ago I visited a fourth-grade class. I spent the half hour discussing assumptions with the students. I gave them several "brainteasers" that can be solved only if one examines unwarranted assumptions that block our ability to proceed. For example, six toothpicks can be placed end-to-end to form four equilateral triangles only if we construct a three-dimensional pyramid, rather than lay them all on a flat surface.[42] As long as we assume we are restricted to a two-dimensional, flat surface, we will not be able to solve the problem.

After class, one of the students told me a story. A father and son are injured in a car accident. They are rushed to separate rooms for surgery. The doctor attending the son announces, "I cannot perform surgery on this boy. He is my son." The student then asked me to explain how the boy could be the doctor's son. I had heard the story several years earlier, so I quickly answered the question. Some of today's fourth graders still struggle with this question for a while ("The first father was a priest," "The doctor was his step-father"). But when this was first aired on television's *All in the Family*, Archie Bunker was not the

40. Fullinwider, *supra* note 14, at 206-07.

41. REID, *supra* note 1, at 595.

42. The pyramid will have an equilateral triangle as its base, with each side of the triangle being a toothpick. Each of the remaining three toothpicks can then have one of its ends placed at one of the angles of the base triangle, while the other ends are brought together at a single point. The result is a four-sided pyramid.

only one who was stumped. A significant percentage of adult viewers were as well.

Why did this fourth grader come up with this example? We had been talking about assumptions, but none of my examples had any social content. Here was an example resting on an unwarranted assumption—an assumption that contains gender stereotypes. The student apparently understood very well the basic point about assumptions. Then, like any good critical thinker, she *applied* it in a novel way—a way that has everything to do with moral education. So, even critical thinking about seemingly innocuous "brainteasers" threatens to get out of control.

Given this, it seems best simply to face up to the task of moral education, rather than act as if it could be avoided altogether. However, something interesting happens when moral education is put on the main agenda, rather than remaining on the hidden agenda. If schools explicitly acknowledge they are in the moral education business, how will they defend themselves against the charge of indoctrination? Fullinwider suggests that we see moral education as something like learning a vocabulary, learning how to use words and concepts. This is much like Gareth Matthew's suggestion that we view moral development more in terms of enlarging concepts, as well as like Ronald Dworkin's notion of being guided by a concept of fairness while working out particular conceptions of fairness. As Fullinwider puts it, "A moral education supplies tools of evaluation (a vocabulary) rather than a doctrine for adhesion (dogma)."[43] To this we should add that students need to be encouraged to *use* these tools in the classroom. That is, they need to be encouraged to engage in evaluative thought—with each other.

When this is done in a mutually supportive atmosphere, what evolves is a *community of inquiry*.[44] In such a classroom each student is regarded as having the potential to make valuable contributions to the issues discussed. Students are expected to give reasons in support of what they say, to listen to one another carefully, and to be responsive to one another. This kind of learning environment can be expected to help develop and refine the reasonableness of students. Such a community of inquiry, Reid might agree, affords students opportunities to "duly cultivate and properly exercise" their "seeds of moral discernment." And this is what *empowers* students eventually to go on responsibly, on their own, rather than under the watchful eye of teacher or parent.

To deprive students of such opportunities in the schools is to deprive them of an educational right as basic as any other. No one seriously suggests that students should be legally required to go to school, but that math and science education have no place there. Why should it be any different if we substitute 'moral education' for 'math and science education?' If the answer is that most parents cannot handle the math

43. Fullinwider, *supra* note 14, at 207.

44. For a thorough discussion of the idea of community of inquiry, see Ann M. Sharp, *What is a 'Community of Inquiry'?*, 16 J. MORAL EDUC. 37 (1987).

and science education of their children all by themselves, the same is true of moral education.

Moral education agendas developed exclusively in the home may result in over-dependency of children on their families for moral support. The kind of autonomous, critical thinking that children are likely to need once they leave the home to lead their own lives may be blunted by a family that itself exhibits highly egocentric thinking. While not an inevitable consequence of the morally insular family, the risk of children emerging who are not well equipped to deal with the complexities of a pluralist society is substantial. Finally, we should ask, what about those children whose homes provide little, if any, moral support?

VII. Conclusion

Earlier I listed four features of a well-developed, moral person about which we might expect there to be broad consensus. What has emerged from subsequent discussion is that there are substantial obstacles in the way of enabling children to achieve this end. These obstacles are of various sorts, and they are formidable. A start, however, would be to carefully identify them and determine what may be required to minimize their severity—and to do so with a resolve to work toward making those changes that are most likely to enhance the moral development of children.

FAMILY STRESS AND SELF-ESTEEM

CHARLOTTE REED*

The family, not the judicial or educational systems, or any social or government entity, is the best agent for nurturing children and enhancing the self-esteem of today's youth. Unfortunately, the family is often unable or unwilling to meet this task. Society continues to change, and in the process many longstanding values disappear, leaving the family with less direction and unity as a social entity. The changing structure and function of the family is reflected in the various labels associated with this social unit, including "dysfunctional," "reconstructed," "nontraditional" and "blended."

Over the past twenty years, society raised a generation of physically, mentally and often morally underdeveloped children. This generation of youth remains plagued by high rates of malnourishment, obesity, academic failure, teen pregnancy, infant mortality, sex and drug related diseases, drug and alcohol abuse, gang activity, homicide, suicide, violent crime and low levels of competence and confidence. Accompanying these factors is the chronically negative self-concept possessed by many members of this generation of youth.

Jerome B. Dusek defined self-concept as "[o]ne's perception of the self" and self-esteem as an "evaluation, from positive to negative of the self-concept."[1] William Watson Purkey stated that "self-concept is a complex, continuously active system of subjective beliefs about one's personal existence. [Self-concept] serves to guide behavior and it enables the individual to assume a particular role or stance in life."[2] Many determinants influence the self-concept, including family structure, social class, maturation and cognitive competence. Purkey identified the family as exerting the greatest influence on the manner in which children perceive themselves and their abilities.[3] Furthermore, Dusek's summary of the available research clearly indicates that child-rearing techniques, family composition, and parent-child identification or relationships are crucial to the adequate development of self-concept.[4]

Many family characteristics are associated with children who possess low self-esteem. Among these characteristics of the family are: (1) a reconstructed or blended family structure; (2) an insufficient income; (3) protected class membership; (4) poor or strained family relationships;

---

* Associate Professor of Education, Purdue University Calumet. This Article was developed from my oral presentation at the "Family Law and Best Interest of the Child Conference," which was held at Ripon College on April 12, 1991.

1. JEROME B. DUSEK, ADOLESCENT DEVELOPMENT AND BEHAVIOR 168 (2d ed. 1991).

2. WILLIAM WATSON PURKEY, INVITING SCHOOL SUCCESS: A SELF-CONCEPT APPROACH TO TEACHING AND LEARNING 30 (1978).

3. *Id.* at 28.

4. DUSEK, *supra* note 1, at 156-61.

and (5) parents who are unemployed, teenaged, overindulgent, overly-strict, divorced, separated or single.[5] Children's low self-esteem is usually attributed to the complex interaction of several factors and not the impact of a single factor. For example, an unfavorable family structure alone does not cause low self-esteem, but this factor may contribute to low self-esteem especially when accompanied by other factors including poor family relationships and overly strict parenting.

Low self-esteem is identified more with the quality of experience in the home environment than it is associated with the structure of the family.[6] For instance, some studies found that children from single-parent households possess a level of self-esteem equivalent to those of two-parent households, and self-esteem in both family structures is negatively affected by disharmony in the home.[7]

Schools also play an important role in self-concept development through their programs, policies, personnel and processes. Much attention is focused on the significant relationship of teachers' attitudes and behaviors to the students' self-concept. For example, when teachers view their students as valuable, capable and responsible, and treat the pupils accordingly, they encourage the development of positive self-concept.[8] Unfortunately, a great number of students, especially those who are "at-risk" or differ from the cultural norm, languish in the classrooms of disinviting teachers who do not believe these students hold the capacity or motivation to learn. These teachers even doubt their own ability to make a difference with such students because they believe the environmental and emotional problems cannot be overcome.

Children and youth are labeled as "at-risk" because they are unable to cope with stress without turning to drugs, sex, gangs, suicide, delinquency or other failings. At-risk children lack a belief in the efficacy of their families and themselves. A disproportionate number of these students differ from the cultural norm and are thus described as "culturally different."

Culturally different and poor children are often evaluated and educated using a deficit model. The deficit model assumes that children are less likely to succeed because they are inferior and may lack money, status, a complete family, legitimacy, intelligence or motivation. This is not a real model, but a mind-set based upon cultural, racial or economic inferiority, which has given rise to such terms as "disadvantaged," "culturally deprived" and "underprivileged."

In their book, William Watson Purkey and John M. Novak stressed the importance of perceiving children as valuable, capable and responsi-

5. *See generally* DUSEK, *supra* note 1; PURKEY, *supra* note 2; Lawrence A. Kurdek & Ronald J. Sinclair, *Adjustment of Young Adolescents in Two-Parent Nuclear, Stepfather, and Mother-Custody Families*, 56 J. CONSULTING & CLINICAL PSYCH. 91 (1988); Barbara H. Long, *Parental Discord vs Family Structure: Effects of Divorce on the Self-Esteem of Daughters*, 15 J. YOUTH & ADOLESCENCE 19 (1986).

6. DUSEK, *supra* note 1, at 300.

7. Kurdek & Sinclair, *supra* note 5, at 91; Long, *supra* note 5, at 19.

8. *See* PURKEY, *supra* note 2, at 27-28.

ble. They also emphasized the necessity of sending youth intentional messages confirming positive expectations and inviting children to view themselves and their circumstances in positive ways.[9] Since perceptions develop from experience within a particular environment, it seems important to focus more on improving the quality of children's experiences in their various life environments than to denounce those environments because they are characterized as single-parent, poor, blended or culturally different.

Families are bombarded with economic, social, educational, and physical and mental health concerns that contribute to their demise. One scenario may involve an impending divorce, which is an open and constant topic, creating an unstable and hostile environment where children may either repeatedly witness, or be victimized in, verbally abusive and violent episodes. Another scenario may be characterized by the lack of money or employment, causing an unemployed, frustrated father to abuse or desert his family or an emotionally distraught mother to neglect or abuse her children. A third scenario may involve an employed single parent and the difficulty he or she faces in securing adequate childcare, resulting in inappropriate arrangements such as underage children caring for themselves and other siblings. Although each scenario could end with the dissolution of the family unit, there are remedies that may be utilized to avoid dissolution. One common remedy utilized to save the family from disintegration is the removal of the children from the home for placement in foster or protective care. Such an arrangement endures until the court is convinced that the natural parents are willing and able to provide a safe and nurturing environment.

The plight of the American family cannot be ignored, nor can society minimize the deleterious effects of the various conditions the family has endured. The circumstances contributing to the breakdown of the family include, but are not limited to: (1) a skyrocketing divorce rate; (2) a rising number of single-parent households; (3) increasing unemployment and poverty; (4) ever-changing gender roles; and (5) an increasing incidence of women in the work force. To this list, T. Berry Brazelton adds the following factors that place stress on the family unit: (1) households comprised of two working parents; (2) the disappearance of the extended family; (3) unclear cultural values; (4) inadequate surrogate care; and (5) a poorly defined support system.[10]

The plight of the family is magnified by the impact of these factors on African-American families. One report cites an alarming increase in the following African-American family characteristics: (1) young, poor and uneducated mothers; (2) absent fathers; (3) high infant mortality rates; (3) abused and malnourished children; and (4) a lack of loving

9. WILLIAM WATSON PURKEY & JOHN M. NOVAK, INVITING SCHOOL SUCCESS: A SELF-CONCEPT APPROACH TO TEACHING AND LEARNING 96-98 (2d ed. 1991).

10. T. Berry Brazelton, *Stress for Families Today*, 9 INFANT MENTAL HEALTH JOURNAL 65, 65 (1988).

discipline and standards.[11] The family unit is at risk of dissolving as these characteristics continue to pervade our society.

John S. Wodarski and Pamela Harris state that growing up today is not like maturing in the 1960s.[12] These researchers characterized that period as one in which most children enjoyed relatively caring families, a stable school environment and trusting adults in their lives.[13] The authors also assert that today's youth must cope with daily fears about their uncertain futures and feelings of alienation.[14] For instance, it is not uncommon for young urban children to fear molestation, abduction or murder, especially when youth are prematurely exposed to drugs and sex by uncaring and abusive adults.[15]

Certain family characteristics are associated with children and adolescents who are particularly susceptible to unwanted pregnancy, suicide, abuse, dropping-out of school and low self-esteem. These characteristics include: (1) family structure; (2) education; (3) income and employment; (4) race or culture; (5) family relationships; and (6) the parents' age and marital status.

Some studies focused on family characteristics and situations in which adolescents dropped out of school, while others addressed suicide and teen pregnancy. One study found a relationship between academic failure and family poverty, working mothers, single parenting and the level of education attained by adult family members.[16] Another study explored family relationships and suicide and found that experiences in non-supportive and overly hostile environments, as well as a lack of empathetic communication, contributed to the development of suicidal personality characteristics.[17] Furthermore, parental discord and intentional separations from the child were related to the incidence of adolescent suicide.[18] A recent study associated teen pregnancy with family conflict and a deficiency of love in the family relationship, finding that pregnant teens held lower self-esteem and experienced feelings of worthlessness to a greater extent than their non-pregnant peers.[19] The study noted that pregnant teens attempted to use their pregnancy to influence their parents, eliminate feelings of isolation and loneliness,

11. *See generally* BLACK CHILD IN CRISIS (William E. Cote ed., 1987).

12. *See generally* John S. Wodarski & Pamela Harris, *Adolescent Suicide: A Review of Influences and the Means for Prevention*, 32 SOCIAL WORK 477 (1987).

13. *Id.*

14. *Id.*

15. *See generally* ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991) (presenting a biographical account of the deplorable circumstances in which urban families live and the fears that the children in these families experience).

16. Roy M. Gabriel & Patricia S. Anderson, *Identifying At-Risk Youth in the Northwest States: A Regional Database*, Report No. CG019889 (1987), *available in* ERIC Document Reproduction Service, No. ED282125.

17. Wodarski & Harris, *supra* note 12, at 477.

18. *Id.*

19. *See* Alice Sterling Honig, *Developmental Effects on Children of Pregnant Adolescents*, Report No. PS012861 (1980), *available in* ERIC Document Reproduction Services, No. ED217969.

and gain attention.[20] The study also found that teenage parents were often impatient, insensitive and irritable.[21] Teenage parents held unrealistic expectations of their child's development, which often resulted in physical punishment of the child.[22] While each of the studies found significant relationships between these variables, it is important to recognize that the presence of one or more factors in an individual's life does not necessarily lead to manifestations of at-risk behavior.

The role of the family in the development of positive self-esteem is clearly established. Moreover, the need to involve parents in this development is evidenced by the studies discussed above and informal observations made by parents and teachers regarding the present status of our children and youth. The remaining question concerns the method of furthering parental involvement in developing children's self-esteem.

Some qualities and parental behaviors that seem to promote positive self-esteem in children include: (1) mutual respect between parents and children; (2) parents according dignity to their children; (3) parents serving as positive adult role models for their children; and (4) parents providing a home atmosphere that is conducive to the growth and normal development of all family members.[23]

Jackie Patterson stated these qualities in a slightly different way when she outlined four conditions necessary for the development of positive self-esteem. Those conditions involve: (1) connectiveness, which essentially equates to a sense of belonging; (2) models, which indicate some form of guidance, values and morals; (3) uniqueness, which provides a perception of positive self-worth and identity; and (4) power, which establishes areas of self-governance and control.[24]

William Purkey and John Novak concluded that positive self-esteem is most likely to develop in a friendly, optimistic, respectful and caring atmosphere.[25] These educators assert that positive family relationships are characterized by: (1) respect for individual uniqueness, emphasizing the importance of relating to children as individuals who bring different qualities and abilities to the family group setting; (2) cooperative spirit, emphasizing the importance of working cooperatively for the benefit of all family members while avoiding unnecessary competitive practices; (3) sense of belonging, stressing the relevance of creating a caring environment and developing significant relationships to promote feelings of unity and self-efficacy; (4) pleasing habitat, emphasizing the relevance of providing a clean, safe and attractive environment for all family members to enjoy; and (5) positive expectations, conveying the importance of possessing positive beliefs about the potential success of each family member.[26] The consistent and reliable presence of these functional

20. *Id.*
21. *Id.*
22. *Id.*
23. *See generally* DUSEK, *supra* note 1.
24. Videotaped presentation at Alverno College, Milwaukee, Wis. (Spring, 1989).
25. *See* PURKEY & NOVAK, *supra* note 9, at 27-28.
26. *Id.*

family characteristics creates beneficial environments and relationships and invites positive self-esteem.

Building upon these concepts, I suggested to parents that they invite positive self-esteem by: (1) not trying to clone their brightest, most social, athletic, musical or otherwise talented child, but allowing each child to develop his or her own strength; (2) not placing children in competition with each other, but rewarding them for working cooperatively for the general good; (3) not decorating their homes like museums where children are not allowed to enter certain rooms or sit on the furniture, but allowing the house to reflect the fact that children are an integral part of the family and providing a happy, wholesome atmosphere; (4) not holding inappropriately high expectations of children, but gearing expectations to their abilities; and (5) not spoiling children and granting their every wish to prove your love, but providing parameters, guidance, continuity, warmth and genuine love.[27]

Norma and Gene Leach and Pat Schroeder compiled a tip sheet for parents and suggested that parents could enhance their children's self-esteem by creating a homelife fostering acceptance, trust, concern and love among all family members. Among the seventeen tips were: (1) provide consistent rules for behavior; (2) hold realistic expectations for your children; (3) spend at least fifteen minutes conversing daily with your children; (4) display your child's good work; and (5) help children develop responsibility by assigning chores.[28] All of these tips appeared in one form or another in popular magazines, books and pamphlets on self-esteem, workshop materials for parents and teachers and televised programs concerning self-esteem. This article invites a return to those strategies, which were successfully employed by yesterday's families.

In conclusion, the preamble to the United Nations Convention on the Rights of the Child[29] proclaimed that the child should mature in a family environment and an atmosphere of happiness, love and understanding, which the convention believes would assure the complete and harmonious development of the child's personality. This observation is consistent with my earlier proposition that the family, not the courts, schools, or other social or government agencies, is the best means for nurturing children and enhancing their self-esteem. Therefore, those of us in the "helping professions" must support families, from our various vantage points in a sensitive and non-judgmental manner, and work cooperatively with families in the best interest of children. Professionals must set aside counter-productive views and condescending, inappropriate, if not outright racist or classist, behaviors. We need to demonstrate a concern for all children, beginning with the manner in which mothers are treated before the children are born. We must care for the children

27. Charlotte Reed, Ed.D, Panel Presentation at the "Family Law and Best Interest of the Child" Conference at Ripon College, Ripon, Wis. (Apr. 12, 1991).

28. Gene Leach, Norma Leach & Pat Schroeder, "Ways To Enhance Student Self-Esteem: Tips For Parents" (1990) (unpublished class paper on file with the author).

29. ABA Center on Children and the Law, Preamble, *Children's Rights in America: United Nations Convention on Rights of Child Compared With United States Law* (Dec., 1990).

after birth, providing adequate food, shelter and clothing for families in need or employment for heads of households. We must educate children and their parents, and we must change the manner in which we care for people when they become ill, hurt or troublesome. Finally, we should modify how we handle the loss of childhood. Let us not repeat the errors of the educational, legal, medical and social systems depicted in such novels as *There Are No Children Here*.[30] The persons described in that novel ignored the needs of families and children, delayed necessary services and programs and denied the existence of deplorable circumstances, until it was too late and there were no children there.

30. KOTLOWITZ, *supra* note 15.

THE JUDGE AS HEALER: A HUMANISTIC PERSPECTIVE

HONORABLE SUSAN SNOW*
STEVE FRIEDLAND**

> The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers—healers of conflicts. . . . Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?[1]

I. INTRODUCTION

The role played by the judge in our legal system is clearly defined by the tasks to be performed. The perception of the manner in which those tasks are to be performed, and the perception of the nature of the process and its outcome, can be reexamined by judges.

The role of the judge[2] as healer is of biblical dimensions, possessing a history at least as long.[3] Former Chief Justice of the United States Supreme Court, Warren Burger, has stated, "[t]he obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts."[4] It should not be such a difficult concept to accept: judges as actors in a process that restores people to their integrity and overcomes undesirable conditions.[5] This role or perspective is entirely consistent with a humanistic or humanitarian philosophy already held by many judges. This Article suggests that the role and the process used by judges can be reconceived as having a healing character and used to that effect in the system of justice.

A judge is charged with the responsibility of deciding conflicts between individuals, companies and even governmental entities. This re-

---

* Associate Judge, Circuit Court of Cook County, Illinois, Domestic Relations Division, and President, Association of Family and Conciliation Courts (1991-92).

** Professor of Law, Nova University, Shepard Broad Law Center and Research Associate to The Center for the Study of Youth Policy, University of Michigan, School of Social Work.

This Article is dedicated to the memory of the Hon. Samuel S. Berger, whose life served as a model and an inspiration.

1. Warren E. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62, 66.

2. Judge: an appointed person who pronounces a decision in a dispute or context; WEBSTER'S NEW COLLEGIATE DICTIONARY 626 (1977).

3. *See generally* Joseph Vining, *Legal Affinities*, 23 GA. L. REV. 1035 (1989).

4. Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J., Mar. 1982, at 274. Burger states that "[m]any thoughtful people, within and outside our profession, question whether that is being done today. They ask whether our profession is fulfilling its historical and traditional obligation of being healers of human conflicts."

5. To heal: "[T]o restore to original purity and integrity." WEBSTER'S 9TH NEW COLLEGIATE DICTIONARY 558 (9th ed. 1987).

sponsibility, besides being significant in its scope, is expected to be administered within certain constraints. One commentator suggests that judges "have a multitude of role-defined tasks that we expect them to carry out with impeccable honesty, resolute evenhandedness, conspicuous humanity, and a high degree of judicial wisdom."[6] A judge is required to be objective, and is not to let his or her personal emotions enter into the decision making process. In addition to being objective, a judge is expected to follow precedent, and to be consistent with the direction of prior authority. Yet, at the same time, a judge is expected to be compassionate, forgiving and understanding, particularly when applying judicial discretion. The perspective from which each individual judge approaches this area of jurisprudence, his or her judicial discretion, is the one area in which a judge is allowed sufficient flexibility to display a humanistic philosophy.

In many forums, and in an increasing number of substantive areas of the law, our system of justice can be found insensitive to, or unconcerned with, the effects that the process has upon those who are served by it. Judges concern themselves with the court system's negative impact before beginning an effort to use the process for a result that is positive.

This Article will first suggest some of the problems in the courts which have a dehumanizing effect on the litigants. Then, based upon the assumption that the judiciary is very much in control of the process, we will suggest how to use the judicial process to effectuate a more positive outcome. We propose that it is through process, and the conceptualization of process, that the judiciary can begin a significant shift towards a healing effect in the system of justice.

II. BACKGROUND

A. *Humanism*

Humanism is defined as any system or mode of thought or action in which human and secular interests predominate.[7] A humanist, or humanitarian, is a person who promotes the welfare of others,[8] stressing an "individual's dignity and worth and capacity for self-realization through reason."[9]

Significantly, judges are expected to be humanists. Justice John Parker stated that a judge should be "honest," "absolutely courageous" and "a kindly man."[10] Numerous other qualities involving compassion and sensitivity are considered prerequisites to good judging by many lawyers and judges alike.[11]

6. Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision Making*, 39 MERCER L. REV. 937, 938 (1988).
7. WEBSTER'S NEW COLLEGIATE DICTIONARY 556 (1977).
8. *Id.* at 557.
9. WEBSTER'S 9TH NEW COLLEGIATE DICTIONARY 586 (9th ed. 1987).
10. Watson, *supra* note 6, at 941 (quoting D. Jackson, JUDGES 8 (1974)).
11. *Id.*

A judge's values are subject to exposure every time a decision arises. The decision making process alone is enormously important and, as such, is difficult for many. The decision making responsibility often restricts a judge's desire or ability to be humanistic at the same time. Because the decision making process is a structured task, performed within the limited context of the facts and the applicable law, it is a protective construct. With a litigant's need for the careful objectivity of an impartial decision maker, a judge might justifiably avoid exhibiting any perspective from which an observer could determine the judge's personal views or concerns. For many, the relative anonymity of the robe and the austerity of the legal structure are preferable when the alternatives include expressing or pursuing personal values in judicial philosophy or procedures that exceed the strict limits of the traditional litigation setting. One commentator has suggested that "[b]y tradition and often by temperament as well, judges usually choose to remain as close to invisible as possible. Many of them believe that their role precludes acknowledgement of their own humanity."[12]

B. *The Structure of the Current System*

The structure of the current system impedes a humanistic approach to judging.[13] Former Chief Justice Warren Burger has stated that "[o]ur system is too costly, too painful, too destructive, too inefficient for a truly civilized people."[14] Chief Justice Burger blamed, in part, the adversarial system: "Our distant forbears [sic] moved slowly from trial by battle and other barbaric means of resolving conflicts and disputes, and we must move away from total reliance on the adversary contest for resolving all disputes."[15] Litigants in the system are assigned impersonal names like "plaintiff" and "defendant," and speak to the court through their attorneys. This formality depersonalizes the process and limits any expression of sensitivity to individual concerns.

The overwhelming number of cases on court dockets further contribute to the depersonalization and dehumanization that people experience when they enter the judicial system. "Overcrowded court dockets and increasing costs to the judicial system may be a result of the 'inherently litigious nature of Americans', but our courts have never been as heavily burdened as they are now."[16] The concern for judicial economy often interferes with efforts to avoid the perception of the system as dis-

12. Watson, *supra* note 6, at 950 (quoting D. Jackson, JUDGES 8 17 (1974)).

13. There are some exceptions, however. For example, Judge Perry Edwards of the Santa Clara County, California Juvenile Court system. Darlene Ricker, *Esq.*, 19 STUDENT LAW. 8, at 8-10 (Oct. 1990) (Judge Perry Edwards of the Santa Clara County, California, Juvenile Court system promoted change which makes the California juvenile court system more humanistic).

14. Burger, *supra* note 1, at 66.

15. *Id.*

16. Scott S. Partridge et al., *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 227 (1985) (footnote omitted) (quoting Marc Glantor, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 10 (1983)).

pensing assembly line justice, with the litigants appearing to be no different than any mass produced product.

Richard T. Andrias, supervising judge of the Manhattan Criminal Court nightshift, noted that the 266,590 misdemeanors and felonies in the year 1985 alone was "a horror show."[17] Judge Andrias understated his point when he said that "a judge can get worn down."[18]

The movement towards automation further contributes to depersonalization, with computers reducing real life emotional tragedies to electronic data on a screen. The growing size and complexities of many court systems, moreover, aggravates the perception that one is on an assembly line, since a given judge may only handle a small aspect of the case before it moves on through the system.[19] This is less than satisfying for judges, as well, because they may never see or know the final outcome. Removed from the results of their own labors, as well as the people involved in the cases they have dealt with, it is understandable that judges come to feel disconnected from the individuals who appear in their courtroom. This disassociation helps the judge insulate him or herself from the frustration of working in a fragmented process. The net result may be a system that is judicially efficient, but one that lacks humanism.

III. THE JUDGE AS HEALER

A. *History*

In many an historical setting, the court's role was viewed as that of a healer. In the Bible, for example, judges were temporary and special deliverers, sent by God to deliver the Israelites from their oppressors.[20]

Throughout the Old Testament, there are references to judges. These judges were originally "appointed" by Moses to be leaders and caretakers for the Israelites. The direction to the judges was to administer the Law of God in an impartial and fair manner. These laws were those originally given to Moses by God.[21]

---

17. John A. Jenkins, *The Lobster Shift*, 72 A.B.A. J. (Nov. 1, 1986), at 56 (profile of Richard T. Andrias).

18. *Id.*

19. Though many court systems continue to use a vertical prosecution system of administration, in which one judge handles each case from commencement to conclusion, larger court systems, such as that in which the author, Snow, works in Cook County, Illinois, have adopted administrative patterns which subdivide cases in procedural sections. Judges are assigned the responsibility for cases at certain stages of their passage; for instance, preliminary motions, pre-trials and trials. Some judges are assigned cases for specific substantive subparts of cases, such as parentage determination, child support enforcement or orders of protection.

20. WILLIAM SMITH, A DICTIONARY OF THE BIBLE (Zondervan Publishing House, 1948).

21. 'The people come to me', Moses answered, 'to seek God's guidance. Whenever there is a dispute among them, they come to me, and I decided between man and man. I declare the statues and laws of God.' But his father-in-law said to Moses,' [i]t is for you to be the people's representative before God, and bring their disputes to him. You must instruct them in the statues and laws, and teach them how they must behave and what they must do. But you must yourself search for capable, God-fearing men among all the people, honest and incorruptible

The Bible also expresses the mandates which Moses gave the judges he appointed. Explaining how he instructed them, Moses is quoted from one of his several public addresses:

> I gave your judges this command: 'You are to hear the cases that arise among your kinsmen and judge fairly between man and man, whether fellow-countryman or resident alien. You must be impartial and listen to high and low alike: have no fear of man, for judgment belongs to God. . . .'[22]
>
> [T]hey shall dispense true justice to the people. You shall not pervert the course of justice or show favour, nor shall you accept a bribe; for bribery makes the wise man blind and the just man give a crooked answer. Justice, and justice alone, you shall pursue . . . .[23]
>
> When the issue in any lawsuit is beyond your competence, whether it be a case of blood against blood, plea against plea, or blow against blow, that is disputed in your courts, then go up without delay to the place which the Lord your God will choose. There you must go to the levitical priests or to the judge then in office; seek their guidance, and they will pronounce the sentence.[24]

Also, in the Bible, mention is made of other leaders giving the same type of mandate to their judges. For example, King Jehosphahat of Judah (king during Solomon's reign) gave the following instructions to his appointed judges:

> Be careful what you do; you are there as judges, to please not man but the Lord, who is with you when you pass sentence. Let the dread of the Lord be upon you, then; take care what you do, for the Lord our God will not tolerate injustice, partiality, or bribery.[25]

B. *The Judge as Healer*

Although it is frequently the administrative direction to judges that they concern themselves with managerial skills, efficiency and the availability of support services, there is still room to consider the humanistic perspective as one of the judge's most important tools.

In his commentary on Jewish Law, Moses Maimonides examined the philosophy of judging therein espoused. Maimonides was himself a judge and a physician. His commentary admonished judges to attempt less radical procedures first, just as a doctor should in attempting to

---

men, and appoint them over the people as officers over units of a thousand, of a hundred, of fifty or of ten. They shall sit as a permanent court for the people; they must refer difficult cases to you but decide simple cases themselves. . . .'

Exodus 18:15-22 (The New English Bible). The Bible contains the instructions given to Moses as to what God's Laws are and how to apply them. *See Exodus* 20:1-22, *Exodus* 22; *Leviticus* 19:1-18.

22. *Deuteronomy* 1:16-17 (The New English Bible).
23. *Deuteronomy* 16:18-20 (The New English Bible).
24. *Deuteronomy* 17:8-9 (The New English Bible).
25. *Chronicles* 19:6-8 (The New English Bible).

treat a patient. For judges, this means striving to effect a settlement before taking over the decision making process.[26]

The effort to provide an alternative to the traditional litigation process for the resolution of disputes is particularly relevant in courts where the parties would benefit greatly from judicial sensitivity, compassion and individual attention. The courts where family matters are heard, such as divorce and child related concerns, and the juvenile jurisdictions, are natural arenas for a more humanistic approach. The specially established juvenile court law and procedures suggest by definition the incorporation of humanism in the judicial process. In practice, however, the intended results may not have been accomplished.

IV. TECHNIQUES

Humanism does not require great deviation from a judge's approach to the actual task of decision making. Humanism focuses more on the choice of process and the use of this process. In practice, it is an attitudinal enhancement. A humanistic approach includes such techniques as the way the judge speaks and acts in the courtroom, the application of the procedures used, the kind and amount of education the judge seeks or obtains and the decisions ultimately made when applying the law. These various techniques might be useful as tools for a healer/judge.

Research done by Professor Tom R. Tyler into the concerns of disputants and the ways in which disputants utilize dispute resolution procedures, has underscored the benefits of applying common standards of interpersonal interactions to traditional judicial processes and other alternative processes. Professor Tyler reminds us that "litigants are more willing to comply voluntarily with decisions reached in ways that they believe are fair."[27] Professor Tyler summarized the responses of those surveyed about the nature of fair process. Representation (participation) in the process, the ethical appropriateness of the behaviors involved, the honesty of the third parties involved in their process, or the perception that the third parties have not been dishonest, and the consistency of outcomes (relative to others'), are the common elements that affect litigant or disputant satisfaction with a process.[28] Though there is a danger of diminishing the importance of these humanistic standards in complex and serious litigation, Professor Tyler found that the value placed upon these elements in the process did not decrease with the relative increase of the importance of the issues. Clearly, these are elements judges should include in any healing approach to a given process.

26. Baruch Bush, *Traditional Jewish Ethics and Modern Dispute Resolution Choices*, Remarks at Siyam Harambam Celebration, Madison, Wisconsin, 1986 (on file with the *Denver University Law Review*) (referring to *Introduction to the Talmud*, 122-23 (Judaica Press 1975)).

27. Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, NEGOTIATION J., Oct. 1987, at 368 (citations omitted).

28. *Id.*

A. *Respect for the People*

The essence of humanistic interaction is respect. The establishment of a set of procedural tasks and rules for courtroom process has created a context in which a judge can actually choose whether or not to show respect for others in the courtroom. The established courtroom hierarchy requires respect to be shown to the court. The judge is in a position to review that conduct on the spot. Those who have the authority to review a judge's conduct and temperament are not usually present in the courtroom. The judge must, therefore, be self-monitoring. It is there, in the courtroom, that a judge should begin to concern him or herself with the effect of his or her behavior on the resolution of the issues and his or her effect on the parties themselves.

Professor Tyler's study referred to this area of judicial behavior as "ethical appropriateness."[29] The disputants surveyed in Professor Tyler's study were concerned with the "degree to which the behavior of third parties accorded with general standards of ethically appropriate behavior. This included the interpersonal dimensions of the interaction, such as rudeness or unneeded deprecation and disparagement, and the more general comportment of third parties following standards of appropriate interpersonal behavior."[30] Disputants' sensitivities to the relationship between their personal dignity and feelings of self-worth and the behavior of public officials towards them, is guidance for our achievement of the goal of a more healing judicial process.[31]

Respect for other people, litigants in particular, can be affirmatively displayed in a number of ways. The words chosen and the tenor of their delivery are obvious ways in which a judge can communicate respect for those being served by the process. The atmosphere created by the judge's treatment of all involved in the courtroom, including staff, lawyers and witnesses, as well as litigants, is a good foundation from which to demonstrate a further concern over individual human needs. The generality of this standard can be converted to an individual judicial reality by employing a self-checking technique such as the following: Imagine that a loved/honored one is seated in the back of the courtroom. What would that person (about whom the judge cares greatly or for whom the judge has great respect) think of the manner in which the judge is treating the people in the courtroom? Further, imagine that the same loved one is before the bench of another judge: How would the judge want that person treated by any judge, vis-a-vis the questions of human dignity and respect?

An important skill in interpersonal relations of any kind is the ability to listen. One of the essential components of communication is to listen to the message the other party seeks to deliver. One may disagree with the content of the message, but it is a demonstration of respect to

29. *Id.* at 371.
30. *Id.*
31. *Id.*

the speaker to allow him or her to participate in the process. The listener can imply that the speaker is valued simply by listening to what he or she has to say. This suggestion does not require that a judge ignore the appropriate procedures and forms for hearing, but only suggests that when it is time for a litigant to speak, the judge endeavors to listen. A judge who is actively listening can demonstrate that in many ways. One can simply display quiet and full attention. Frequently, a judge can demonstrate that he or she has listened by reiterating, in the ruling or decision given, what the litigant has said. Professor Tyler concludes that people experience a degree of satisfaction based upon the nature of their participation in the decision making process.[32] By acknowledging their thoughts and words, the judge can contribute to that satisfaction.

B. *Empathy*

The logical companion to a respect for the human beings served by the court is the understanding of that which one observes in those human beings. Rollo May defines empathy as the "experience of understanding that takes place between two human beings."[33] It is his view that empathy is the fundamental element of all healing.[34] Empathy is both an active pursuit and a passive opportunity to be in touch with a litigant's response to the facts, the process and the outcomes of judicial proceeding. It is the additional element in a judge's choice of words, gestures, process or decisions that, again, communicates that the other person has worth in the eyes of the court. To be empathic is for some, instinctive, natural. For others, the desire to operate from a base of understanding may require a determined effort to "put themselves in the other man's shoes." May suggests that the very sharing of the feeling is a part of the effective healing process.[35]

Empathy is a particularly important quality for a judge who comes in contact with children during the court process or whose decisions affect children. Though it would be best to have a knowledge of child development when assessing a child's status and the consequences of the contemplated court actions on it, the empathic judge goes a long way towards sensitive results by endeavoring to understand what the child is feeling. Empathy for the child's parents will enhance the judge's ability to estimate the complex family dynamics acting on the child as well. The instinctive empathies many judges experience in family court matters should be thought of as the basic tools, but are capable of being sharpened by education, training and experience so that the effect on children is optimal.

32. *Id.* at 370.

33. Rollo May, *The Empathic Relationship: A Foundation of Healing*, *in* HEALERS ON HEALING 108 (R. Carlson & B. Shield eds., 1989).

34. *Id.* at 108-10.

35. *Id.* at 109.

C. *Process Selection*

The current trend in our courts, to shift away from traditional courtroom adjudication and adopt alternative dispute resolution techniques, offers judges the opportunity to demonstrate a healing attitude towards the subjects before them by selection of process. Professor Tyler's research and conclusions suggest that a more participatory, more empowering format, such as mediation, is more satisfying to disputants.[36] Our own experience supports Tyler's conclusion. In addition, it is our observation that mediation helps disputants return to more normal problem solving functions and restores to them some degree of personal integrity. This is consistent with the definition of healing we adopted earlier.

Some courts are experimenting with other techniques away from the traditional litigation process for cases involving children and families, in an effort to sensitize the process. For some that may mean eliminating some or all of the formal rules of procedure to maximize the litigant's participation and comfort.[37] For example, the Family Court of New Zealand created its own unique, but less formal, set of rules to accomplish the goal of making the process more sensitive to people, where disputes focused on family matters and children.[38] Other procedural modifications might include rewriting court rules to embrace more of the human needs and taking some proceedings out of the courtroom.

One procedure already established out of the courtroom is the settlement conference, involving both the parties and a judge. The judge's ability to participate in such a conference with litigants is clearly impacted by the local legal culture and court rules. There is also concern about the integrity of such a process when objection to the judge's bias is made. Yet, there is so much to be gained and so much apparent satisfaction as a result of the settlement conference, that it is worth the effort to make them happen.

The opportunity for litigants to see for themselves the benefits of compromise is perhaps the most prevalent result of the settlement conference. Maimonides wrote: "It is the positive obligation for the judge to say to the parties at the beginning of the case, 'Do you really want to litigate this case, or wouldn't you prefer to work out a pshora.' "[39] Mai-

36. *See supra* notes 28-33 and accompanying text.

37. Judge Anne Kass, District Judge, 2d Judicial District, New Mexico. Judge Kass is currently using an innovative trial format when consented to by the participants. Rules of evidence are somewhat relaxed and the parties have more informal opportunities to speak and participate, particularly in matters relating to their children.

38. The New Zealand Family Court Act 1980 states: "10. Avoidance of unnecessary formality—(1)Family Court proceedings shall be conducted in such a way as to avoid unnecessary formality[.] (2)Neither judges sitting in Family Courts, nor counsel appearing in such Courts, shall wear wigs or gowns." S. R. Cartwright, *The New Zealand Family Court—An Overview*, 25 CONCILIATION CTS. REV. June, 1987, at 29. The author, Snow, had the opportunity to observe New Zealand's family court facilities during a tour conducted by the Association of Family and Conciliation Courts. The court buildings housing family courts are frequently in separate and informal settings away from the other court buildings.

39. Bush, *supra* note 26 (quoting Moses Maimonides, CODE OF JEWISH LAW (commen-

monides spoke of the preference for compromise because its results exceeded those of strict adjudication. In the adjudication of rights, each party gets strictly what he or she is entitled to. In compromise, each side becomes involved in the process of giving the other person more than they perceive they are entitled to. In this way, compromise incorporates the values of charity and righteousness.[40] Compromise would indeed enhance the attitude of all disputants and is thus a worthy judicial goal.

D. *Benefits to Judges*

We have thus far focused on the values a healing judicial process affords litigants. It is important, however, to consider the value of doing healing work for the benefit of the judges themselves.

First, the attitude of the judge, who wishes to have a healing impact on the disputes brought to court, is a self-fulfilling prophecy. Wanting to heal is itself such a philosophical shift that this alone creates a new direction for the judge's energies and a new environment in the court.

Second, a shift of emphasis from outcome to process, as we have described here, has a healing effect on the judge. The pressures imposed on a judge by the notion that the court's only product is a "right decision" can become an enormous burden in the reality of judicial life. To distance oneself from the value of the decision by increasing the value of the process brings an unexpected relief to judges who relentlessly pursue the perfect solution in cases presented with very imperfect possibilities. "The true healer merely gives the gift of healing but does not watch over the patient to say in what form it is to be received."[41]

There is new self-esteem to be had for judges who shift to a healing attitude and then observe the litigants' satisfaction with the results of their efforts. For judges who have spent months or years in frustrating and unsatisfying court situations, this might be just the surprising and refreshing reward that they need to continue on. In addition, there is Maimonides' notion that, to add the elements of charity and righteousness to the act of giving, to give the other person more than just the minimum of his or her rights, is a healing experience.[42]

Finally, sharing in the healing experience, with or without the achievement of another goal, is itself healing:

> The mind that sees itself as whole and another as sick unquestionably requires healing. True healing is thus expressed within the mind of the healer and not within the body of the patient. When a healer sees that he or she is not separate from the patient—and only love holds this vision—healing is already accomplished. The mind that no longer struggles to contrast itself with another, but looks happily upon its oneness with all

tary on the Mishneh Torah, Sefer Shoftim, Hilchos Sanhedrin, Ch. 22, Halacha 4)). A pshora is a settlement by concessions on all sides.

40. *Id.*

41. Hugh Prather, *What is Healing?*, *in* HEALERS ON HEALING 14-15 (R. Carlson & B. Shield eds., 1989).

42. Bush, *supra* note 26.

> living things, has moved into that level of reality where healing is constant. The healer has now received and accepted the only thing that can be given away.[43]

V. CONCLUSION

In today's court system, it seems difficult for judges to create and practice the role of a healer. The overwhelming numbers and difficulties of the cases, and the pressure to capitulate to a total depersonalization of the process, threaten to deprive the judges' work of any humanistic orientation. Yet, with a deliberate shift in attitude, individually or collectively, judges can establish, or hold on to, the humanistic principles that people still value. To take on the role of healer is to elevate the work of "judging" so that it generates satisfaction for all involved in the judicial process.

43. Prather, *supra* note 41, at 16.