Child Advocacy Program
Art of Social Change:
Child Welfare, Education, & Juvenile Justice

Professor Elizabeth Bartholet
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ASSIGNMENT PACKET for Session #2
September 20, 2012

Child Maltreatment:
The Family Preservation Policy Debate

Andrew Hoffman, Managing Attorney for the Boston Office, Child and Family Law Division, Committee for Public Counsel Services

Leora Joseph, Former Assistant District Attorney and Chief of the Child Protection Unit, Suffolk County District Attorney's Office

Session #2
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Assignment

Speaker Biographies

Session Description

Readings: **Pages ***

Bartholet, *Nobody's Children* NC 33-67

Andrew Hoffman:

- Guggenheim, Somebody's Children, Book Review of Bartholet's NOBODY'S CHILDREN, 113 Harv. L. Rev 1716-1748 1-16
- Hoffman, *The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification*, 3 Conn. Pub. Int. L. J. (2004) 17-41

Leora Joseph

- Excerpted transcript from child abuse trial to be included in a supplemental packet.

* NC refers to Nobody's Children pages: all other page numbers refer to this Assignment Packet

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Speaker Biographies

Andrew Hoffman is the Managing Attorney for the Boston office of the Children and Family Law Division (CAFL) at the Committee for Public Counsel Services, where he represents children and parents in child abuse and neglect cases. He previously served as staff counsel to CAFL and also practiced in civil legal services. He is the author of The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification, 3 Conn. Pub. Int. L.J. 269 (Spring 2004) and several chapters in Child Welfare Practice in Massachusetts, MCLE (2006). He is a graduate of Princeton University and the University of Pittsburgh School Of Law.

Leora Joseph served as Chief of the Child Protection Unit in the Boston (Suffolk County) District Attorney's Office between 2004 and 2012. In that capacity she reviewed 1100 cases annually on child abuse and neglect, supervised a staff of 13, prosecuted and investigated serious child abuse felonies, and served as liaison with other state agencies in issues like juvenile exploitation.

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The proper role of law and policy around child maltreatment issues evokes strong emotions. When and how should the state intervene into the private lives of children and families? Is the state intervening too often and too aggressively, needlessly stripping children away from their birth families and cultural heritage, placing them into inadequate foster homes? Or, instead, is the state's role currently miserably weak, allowing children to suffer indelible harm at the hands of birth parents and other kin who are incapable of providing the basic parenting they need?

Attorneys Andrew Hoffman and Leora Joseph come at the family preservation policy debate from two very different perspectives. Hoffman heads the Boston Office of the agency charged with providing legal services to indigent parents and children in abuse and neglect cases. Among other roles, his job is to zealously defend clients whose parental rights are in jeopardy, parents at risk of losing custody of their children. Hoffman argues that too often the state intervenes into the lives of families, taking children away from birth parents and kin for inappropriate reasons including poverty and discrimination.

Joseph, on the other hand, spent her days as Chief of the Child Protection Unit prosecuting caretakers who allegedly victimize children. Egregious cases of child maltreatment came across her desk daily, but due to limited resources and other constraints, her office could not possibly prosecute each meritorious case. And only a very small percentage of child maltreatment cases are even presented to prosecutors since child maltreatment is dealt with primarily in the civil not the criminal system with social workers playing the major decision-making role. In her experience, Joseph found that far too often the state does not intervene to protect vulnerable children, continually prioritizing the rights of parents and kin. Rather than freeing up children for adoption in a timely fashion, when all indications are that a birth parent will never be capable of providing a stable, nurturing home, children remain in foster care limbo for years. Or, worse, children are reunited with birth families when there is reliable evidence that the home is unsafe and a good chance the child will be re-abused and/or neglected.

113 Harv. L. Rev. 1716-1748 (2000)

SOMEBODY'S CHILDREN: SUSTAINING THE FAMILY'S PLACE IN CHILD WELFARE POLICY

NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE. By Elizabeth Bartholet. Boston: Beacon Press. 1999. Pp. viii, 304. $28.50.

Reviewed by Martin Guggenheim

(Professor Elizabeth Bartholet will respond to this Review in the June issue.)

Virtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis. In particular, most observers of child welfare complain that too many children remain in foster care for too long.[1] Those hoping to reform the system approach this task from many different directions. Some propose vastly increasing the state's role in assisting families.[2] Others recommend sharply limiting the state's role to save scarce resources for those most in need.[3]

In *Nobody's Children*, Professor Elizabeth Bartholet articulates a differ- ent premise from which to examine why the child welfare system is in cri- sis. She asserts that current practice fails to protect children from parental abuse and neglect. As this Review elaborates, she recommends an aggressive policy of removing children from their biological families and placing them for adoption. The principal question I address is whether Bartholet's definition of the problem and her proposals for change are appropriate for the children whose lives are at stake. Although I agree with Bartholet's contention that aggressive measures are needed to serve children at risk of entering foster care, I believe her proposals would gravely harm these children and their families. We must find ways to reduce reliance on out-of-

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Professor of Clinical Law, New York University School of Law. I am grateful for the encouragement, comments, and suggestions of Linda Mills, Randy Hertz, Gerald López, and Michael Wald. I would also like to thank Jessica Marcus for research assistance.

[1] As of 1998, between 500,000 and 600,000 children were in foster care, the highest number in American history. *See* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2291 (1998); Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 244 & n.6 (1999) (citing U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-98-182, FOSTER CARE: AGENCIES FACE CHALLENGES SECURING STABLE HOMES FOR CHILDRE N OF SUBSTANCE ABUSERS 1 (1998)).

[2] *See, e.g.*, Sheila B. Kamerman & Alfred J. Kahan, *Social Services for Children, Youth and Families in the United States*, 12 CHILDREN & YOUTH SERVICES REV. 1, 145–67 (1990).

[3] *See, e.g.*, Douglas J. Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539, 554–56 (1985).

home care for children so that their own families may successfully raise them.

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IV. IS ADOPTION REALLY THE BEST WE CAN OFFER POOR CHILDREN WHO END UP IN FOSTER CARE?

I suggest in Part I that Professor Bartholet may be cynical about the degree to which Americans care about the plight of poor children in the United States.[94] But such an assertion does not adequately capture the avowed spirit of *Nobody's Children*. I am confident that Bartholet considers her book to be optimistic, even aspirational. Bartholet is striving to create a new America in which privileged citizens would come to regard the children in foster care as part of the larger community, even as belonging to them. She states:

> What matters is that the children get into homes where they can thrive. But if we want to find truly nurturing homes for all the children in need, we have to reach out to the entire community . . . . Encouraging people who are in a position to provide good parenting to step forward, without regard to race or class or membership in the local village, encouraging them to see children born to others as children they are responsible for, can be painted as a form of vicious exploitation. But that's not how I see it. It seems to me that if more

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90 S.D. CODIFIED LAWS §§ 26-8A-2, 26-8A-6 (Michie 1999).

91 *See* N.Y. SOC. SERV. LAW § 422(5) (McKinney 1992). New York's "some credible evidence" standard was found by the Second Circuit to "result[] in many individuals being [listed in a state central register of purported child abusers] who do not belong there." Valmonte v. Bane, 18 F.3d 992, 1004 (2d Cir. 1994).

92 One federal study found that investigators are more than twice as likely to "substantiate" a case erroneously than to mislabel a case "unfounded." NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT 6-5 (1988).

93 *See supra* pp. 1732–33.

94 *See supra* p. 1722.

> members of the larger community thought of all the community's children as their responsibility, we'd have a much better chance of creating the just society that is our goal. (p. 6)

Thus, an important message of *Nobody's Children* is a call to invoke the Golden Rule for the poorest of American's children: Do Unto Others' Children as You Would Do Unto Your Own. Bartholet encourages us to re-imagine, for a moment, this society as one that regards all its children as equally important.

But Bartholet is far too unimaginative. This Part first challenges Bartholet's limited vision of a new corps of committed Americans providing adoptive homes to foster children, and then maps out a strategy that addresses the underlying societal tragedy endemic in foster children's lives.

A. The Artificial Narrowing of Child Welfare

An important explanation for Bartholet's limited vision may be found in the history of child welfare reform. When the child welfare movement began in the United States during the late nineteenth century, it was broadly conceived; child protection was a piece of a larger movement to rectify social ills for children.[95] This larger movement was not to last; in the twentieth century, the federal government rarely furnished funds to ameliorate the effects of poverty on children. One exception was the Depression Era legislation providing Aid to Dependent Children.[96] Another was the short-lived War on Poverty in the mid-1960s. But with the election of Richard Nixon in 1968 and the prompt collapse of the War on Poverty agenda, "child welfare" policy was purposely shifted to a much narrower focus.

In the early 1970s, liberals seeking to improve the lives of poor children realized the importance of developing new strategies to secure bipartisan support for government spending toward that end. Chiefly the work of Senator Walter Mondale,[97] the new strategy found its home in the field of child abuse and protection. Mondale led the legislative effort that resulted in the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.[98] CAPTA directed a significant amount of federal

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95 *See* WALDFOGEL, *supra* note 36, at 139.

96 *See* Social Security Act of 1935, ch. 531, § 521, 49 Stat. 620, 633 (repealed 1968). This exception is, of course, a prominent one. Money was provided as an entitlement to poor families with children without regard to any allegation of abuse or neglect, representing a commitment that government would invest in families so that children could stay with them. But this very important program was strictly limited to providing money to parents; it did not address larger issues of poverty and its effects on children.

97 *See* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15, 97–103 (1984).

98 *See* Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247 (codified as amended at 42 U.S.C. §§ 5101–5107 (1994)).

money to states to fund efforts to protect children from harm.[99] As part of a conscious plan to prevent the proposal from being viewed as a disguised poverty program, Mondale emphasized that child abuse was a "national" problem, not a "poverty problem."[100] Stressing that child abuse affected families of all classes[101] and that federal money would help children who were both rich and poor, Mondale won support for the proposal from politicians across party lines.[102] Ever since, "child abuse and neglect" in the United States have come to be seen and defined as an individual problem caused by individual sets of parents.[103] No longer a social problem, child welfare has come to be viewed as a matter of individual failure.[104] Much of the public debate has ignored or understated the evidence suggesting a correlation between abuse and neglect on the one hand and poverty on the other.[105] Indeed, a remarkable characteristic of the growth of support for child protection in the United States has been the deliberate claim that middle-class and upper-class children need child protective legislation just as much as do poor children.

The consequences of this strategy have been profound. In recent years, most observers have come to see child abuse primarily as a defect in a particular family, with limited or nonexistent societal roots.[106] The opportunity to examine such root causes has thus been overlooked. Duncan Lindsey suggests that the current "residual approach" to child welfare policy does a poor job of accounting for these problems. He observes:

> The traditional residual approach to child welfare focuses on the problems in the parent/child relationship and the provision of services to ameliorate those problems. However, the broad social changes that affected families, especially those served by the public child welfare system, had little to do with that rela-

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99 *See* 42 U.S.C. § 5106a (1994).

100 NELSON, *supra* note 97, at 107 (quoting *Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93rd Cong. 17–18 (1973) (internal quotation marks omitted) (statement of Sen. Mondale)).

101 *See id.*

102 *See id.* at 93–94.

103 Child welfare services are by their nature residual, serving only those children suffering or at great risk of suffering the gravest mistreatment, rather than the whole population of families in which children experience serious deprivation. Many scholars argue that the residual approach is doomed to be inadequate absent vast new investments in antipoverty programs. *See* COURTNEY, *supra* note 57, at 16; LINDSEY, *supra* note 29, at 4–5; LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 176–77 (1989).

104 *See* WALDFOGEL, *supra* note 36, at 139.

105 *See* PETER J. PECORA, JAMES K. WHITTAKER & ANTHONY N. MALUCCIO WITH RICHARD P. BARTH & ROBERT D. PLOTNICK, THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH 66–67 (1992) (tracing the correlation between poverty and child maltreatment); Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 609 (1978) ("Every national survey of officially reported child abuse and neglect incidents has indicated that the preponderance of the reports involves families from the lowest social economic levels."); Pelton, *supra* note 75, at 19, 23 (noting the "abundant evidence that child abuse and neglect are strongly related to poverty").

106 Despite shifts over the years in perceptions of child abuse, "the dominant model continues to be one of child maltreatment as an individual problem." WALDFOGEL, *supra* note 36, at 139.

> tionship. Further, the problems created by these major social changes are not amenable to solution through the residual perspective. The main service provided by the residual child welfare system is foster care . . . . The residual approach doesn't provide for developing policies and programs that would prevent these egregious problems from occurring in the first place.[107]

Although those hoping to improve child welfare once examined broader issues of poverty, a specific emphasis on abuse has replaced those socioeconomic concerns.

That one could propose the radical social re-engineering that lies at the core of *Nobody's Children* without first insisting that American society pay more attention to the social conditions that create the need for foster care testifies to the success of Mondale's strategy. That strategy narrowly de- fines the subject of child welfare as a problem of pathological child abuse. It is especially ironic that Bartholet endorses this extremely shortsighted view because she fervently aspires to transform the values and culture of "privileged" Americans.

Bartholet suggests that certain "local villages . . . . are not going to have enough good homes to spare," such as Bedford-Stuyvesant and the South Bronx (p. 6). But we make a choice when we act as if the conditions in these villages no longer deserve serious attention from policymakers or activists. Surely the first step toward the creation of a more just society ought not to be cultivating the "larger community's" willingness to take foster children into their own homes and raise them as their own children.

The abysmal conditions of poverty and despair into which millions of poor children are born are not immutable facts of life. It is essential that we determine the extent to which these conditions are caused by factors for which we may hold the larger society accountable and, therefore, could improve or eliminate. *Nobody's Children* fails to consider the extent to which these conditions are a product of various social forces influencing American society and policy.

Herein lies the central unanswered question of *Nobody's Children*: If Bartholet is right that the core plight suffered today by America's foster children is that they are "nobody's children" (that is, the children of no- body particularly important), is Bartholet's proposal the morally appropriate response?[108] Let us briefly examine some facts about poor children in the United States today. If we could start over and conceive of child welfare as a public health or shared social problem, rather than focus on the

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[107] LINDSEY, *supra* note 29, at 79 (citations omitted).

[108] It is never clear precisely what Bartholet means by calling her book "Nobody's Children." Most of the children Bartholet writes about have families, including parents. It is inarguable, however, that almost all foster children have parents who are without political influence and that, consequently, these children are not the concern of citizens with significant influence on social policy.

"red herring" of child abuse,[109] we could develop policies that address directly and proactively those conditions that adversely affect the health and welfare of poor children in the United States.

1. Poverty. — About fourteen million children in the United States live below the poverty line.[110] Children are twice as likely as adults to live in such conditions.[111] Of all industrial nations worldwide, the United States has the highest child-poverty rate. This may be related to governmental policies and priorities: Britain, France, Sweden, and Canada each spend two to three times more on children and families than does the United States.[112]

The percentage of the United States population that falls below the poverty line is disproportionately composed of people of color. Close to half of the children who live in poverty conditions are African-American; only about 16% are white.[113]

In addition, the child-poverty problem is steadily getting worse. Since 1969, even as the GNP has risen 50%, child poverty has increased by 50%.[114] And poverty is increasing at an even more rapid rate as the effects of recent welfare "reforms" begin to take effect. In 1997, a year after welfare reform was enacted, there were 400,000 more children living below one-half the poverty line than there were in 1995.[115] A study of former welfare recipients in South Carolina found that one in ten could not afford medical care, one in six could not afford food, one in four could not pay the rent, and one in three had fallen behind in paying utility bills.[116]

2. Housing. — There is a drastic shortage of adequate housing for indigent children in the United States. In 1995, there were 4.4 million more low-income renters than there were affordable housing units.[117] As a result, a vast number of families settle for substandard housing; those who seek minimally adequate conditions are often forced to pay more than half their income in rent.[118] Here again, children feel the brunt of the problem:

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109 LINDSEY, *supra* note 29, at 157.

110 *See* RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 55 tbl.1 (1997).

111 *See* Jim Weill, *The Convention on the Rights of the Child and the Well-Being of America's Children*, 5 GEO. J. FIGHTING POVERTY 257, 257 (1998).

112 *See* GOLDEN, *supra* note 110, at 55.

113 *See id.* at 68.

114 *See id.*

115 *See* ARLOC SHERMAN, CHERYL AMEY, BARBARA DUFFIELD, NANCY EBB & DEBORAH WEINSTEIN, WELFARE TO WHAT: EARLY FINDINGS ON FAMILY HARDSHIP AND WELL-BEING 51 (1998), *available at* http://www.childrensdefense.org/fairstart_welfare2what.html [hereinafter WELFARE TO WHAT].

116 *See id.* at 2.

117 *See id.* at 30.

118 One study found that 5.3 million households pay more than half their income in rent, or live in substandard conditions, or both. *See id.* at 31.

in a survey of thirty cities, children constituted 25% of the homeless population.[119]

This problem is also getting more serious every year. The average period of time spent awaiting Section 8 housing assistance rose from twenty-six to twenty-eight months between 1996 and 1998; in the nation's largest housing authorities, the average waiting period increased from twenty-two to thirty-three months during this same period.[120]

Welfare reform has further exacerbated the problem. With welfare benefits eliminated or substantially reduced, indigent families have less money to pay for housing and utilities. A Children's Defense Fund survey of former welfare recipients who were seeking services at nonprofit agencies found that 23% of the families had been forced to move because they could not pay their rent, 25% had doubled up housing to save money, and 25% had had their heat shut off.[121] In one Wisconsin county, the number of homeless children increased by 50% after the implementation of welfare reform.[122]

3. Health. — More than eleven million children in the United States have no health insurance.[123] In 1997 alone, 400,000 children lost their insurance as a result of welfare reform.[124] Between 1996 and 1998, approximately 643,000 children lost Medicaid coverage.[125]

Life in the urban ghetto holds numerous, substantial health hazards for children. Data suggest that nearly two million children suffer from lead poisoning,[126] and those with lead poisoning are most often found in families in the lowest income brackets.[127] Indigent children suffer asthma at rates twice as high as children in higher-income families.[128] Every year, asthma attacks caused by cockroach infestation at home require hospitali-

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119 *See* U.S. CONFERENCE OF MAYORS, SUMMARY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES — 1998, at 2 (1988), *available at* http://www.usmayors.org/uscm/homeless/hhsummary.html.

120 *See id.* at 87–89.

121 *See id.* at 13.

122 *See id.* at 16.

123 *See* U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 1998, http://www.census.gov/hhes/hlthins/hlthin 98/hi98t 2.html (on file with the Harvard Law School Library); *see also* Weill, *supra* note 111, at 259 (reporting that there are now more than 10 million American children without health insurance).

124 *See* Families USA Found., Losing Health Insurance: The Unintended Consequences of Welfare Reform 2 (May 1999) (unpublished manuscript, on file with the Harvard Law School Library), *available at* http://www.familiesusa.org/united.pdf.

125 *See* Jocelyn Guyer, Matthew Broaddus & Michelle Cochran, *Missed Opportunities: Declining Medicaid Enrollment Undermines the Nation's Progress in Insuring Low-Income Children*, *at* http://www.cbpp.org/10-20-99health.htm (on file with the Harvard Law School Library).

126 *See* Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 468 (1999). Lead poisoning is defined as a blood level equal to or above ten micrograms per deciliter. *See id.*

127 *See infra* note 131.

128 *See* Weill, *supra* note 111, at 259.

zation for 10,000 children between the ages of four and nine.[129] Asthma can adversely affect a child's essential well-being, ability to participate in sports and other activities, academic performance, and even life expectancy.[130]

Here again, the burdens and the suffering fall disproportionately on children of color. Twice as many black children as white children suffer from lead poisoning in the family income bracket of $6000 or less; in the slightly higher income bracket of $6000 to $15,000, three times as many black children suffer from lead poisoning as white children.[131] The asthma rate for African-American children is 26% higher than the rate for white children.[132]

B. Who Is Responsible for Poor Children?

When we recalibrate the lens of child welfare to include these basic issues within its view, the core proposal in *Nobody's Children* seems both inadequate and inappropriate. It is inadequate because it still will leave millions of children to suffer the consequences of being born into poor families.[133] It is inappropriate because, fully understood, Bartholet's proposal that privileged Americans adopt these children subverts, instead of advances, the Golden Rule by championing the unnecessary permanent destruction of familial ties.

In addition, when we widen the lens in this way, we quickly realize that, of the preventable conditions most threatening to children, maltreatment by parents is a relatively minor public health concern. Emergency medical accidents, for example, kill 22,000 children annually in the United States;[134] "inexpensive injury prevention programs and emergency medical systems for children" could save an estimated 6000 to 10,000 of these children's lives each year.[135] An additional 4205 children were killed by

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129 *See* MEGAN SANDEL, JOSHUA SHARFSTEIN & RANDY SHAW, THERE'S NO PLACE LIKE HOME: HOW AMERICA'S HOUSING CRISIS THREATENS OUR CHILDREN 6 (1999).

130 *See* Bullard, *supra* note 126, at 470.

131 In families with a yearly income of less than $6000, 68% of black children and 36% of white children had lead poisoning. In families with a yearly income of less that $15,000, 38% of black children and 12% of white children had lead poisoning. *See id.* at 467–68 (citing a 1988 study by the Agency for Toxic Substances Disease Registry).

132 *See id.* at 470–71 (citing a 1994 CDC-sponsored study in Atlanta).

133 In most cities, for example, we can predict the number of children that will end up in foster care by the single variable of their zip code. In New York City's Central Harlem, for example, one of every ten children is in foster care. *See Child Removals: Dislocating the Black Family*, CHILD WELFARE WATCH, Spring/Summer 1998, at 4.

134 *See* R. Christopher Barden, Robert Kinscherff, William George III, Richard Flyer, James S. Siedel, Debra Parkman Henderson & Harvard Law Sch. Law and Med. Soc'y, *Emergency Medical Care and In-jury/Illness Prevention Systems for Children*, 30 HARV. J. ON LEGIS. 461, 462 (1993).

135 *Id.*

guns in 1997.[136] By contrast, child abuse fatalities appear to be a rare event (estimated to be between 1000 and 1200 annually).[137]

Imagine for a moment that we could achieve the goal of convincing all Americans to take responsibility for all children living in the United States. In such a world, two consequences would be readily apparent. First, we would find ways to make substantial improvements to the quality of life of poor minority children and to ameliorate most of the currently unacceptable conditions they experience. The children would receive better health care and live in cleaner, safer, and healthier communities and homes. They and their families would be treated with dignity and respect by the myriad adults with whom they interact on a daily basis. This change alone would obviate the need for taking these children out of their own communities and having them adopted into "better" ones.

Second, and even more crucial, once Americans started loving other people's children as their own, they would find repugnant and abhorrent a systematic strategy of taking children from their families, permanently banishing their birth relatives from their lives, and sending them to live with strangers. Bartholet argues that:

> At the core of current child welfare policies lies a powerful blood bias — the assumption that blood relationship is central to what family is all about. Parents have God-given or natural law rights to hold on to their progeny. . . . These beliefs are deeply entrenched in our culture and our law. And they are common to the thinking of people from one end of the political spectrum to the other . . . . (p. 7)

It is this aspect of Bartholet's reasoning that I find astonishing. The power of government to permit the formation or continuation of a family is totalitarianism at its most basic level. American constitutional law rightly insists that any government attempt to regulate the intimate details of family life be subject to the strictest scrutiny and justified only by a compelling state interest. Thus, the rights of Americans to choose their marital partner,[138] to procreate,[139] to keep custody of children,[140] and to control the details of raising them[141] are not accidentally or carelessly selected freedoms. Properly understood, they form

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136 *See* Jill M. Ward, CHILDREN AND GUNS: A CHILDREN'S DEFENSE FUND REPORT ON CHILDREN DYING FROM GUNFIRE IN AMERICA 2 (1999), *available at* http://www.childrensdefense.org/youthviolence/report.html.

137 *See* LINDSEY, *supra* note 29, at 93 tbl.5.2.

138 *See* Loving v. Virginia, 388 U.S. 1 (1967).

139 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162–64 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

140 *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 658 (1972).

141 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

the core of our most sacred liberty. As declared by the Supreme Court, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[142]

Justice Goldberg articulated this principle eloquently in his *Griswold v. Connecticut* concurrence:

> "The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected.[143]

In this sense, Bartholet's attack on the application of these core freedoms to child welfare must be seriously examined. The use of coercive state power to redistribute children from their biological parents to others deemed by the state to be superior caregivers is perhaps a necessary power to cede to government. But it must be given and utilized on an exceedingly spare basis. We protect liberty best by thwarting government power to redistribute children in accordance with the opinions of welfare officials or judges.

Bartholet's dismissal of the value of the rights of biological parents is of great concern.[144] If we adhere to the Rawlsian principle of ordering society without knowing how the rules will be applied to each of us,[145] it is important to ponder the implications of a policy that would treat families without means differently from families with means.[146] In the case of the

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142 *Yoder*, 406 U.S. at 232.

143 *Griswold*, 381 U.S. at 495 (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

144 Bartholet's disdain for our legal system's preference for keeping children with their biological families is especially troubling in light of Peggy Cooper Davis's important book *Neglected Stories: The Constitution and Family Values* (1997). In that book, Davis demonstrates that the drafters of the Fourteenth Amendment expressly intended to include family and personal autonomy — rights that slavery notoriously denied — within the freedoms that the Amendment was designed to protect. *See id.* at 214–21, 223–24. In this important sense, the American commitment to constitutional protection against government intrusion into the intimacy of the family (what Bartholet reduces to a "blood bias") is considerably more than merely a reflection of a value system. It is born out of hard fought experience. Many commentators in the past generation, including Malcolm X, have compared the ease with which state officials in the child welfare system separate children from their parents, either temporarily or permanently, to slavery. *See* MALCOLM X, THE AUTOBIOGRAPHY OF MACOLM X 24 (Ballantine Books 1992) (1964).

145 *See* JOHN RAWLS, A THEORY OF JUSTICE 12, 17–22 (1971).

146 Marsha Garrison reminds us that in the area of custody and divorce, it is a truism that children deserve the right to maintain ties with biological parents but that, for some, this right is dramatically undervalued in the context of foster care. *See* Marsha Garrison, *Parents' Rights v. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 378–86 (1996).

poor, we would tolerate the permanent separation of children from their families even though we have not seriously considered making meaningful efforts to ameliorate the conditions that precipitated their placement in the first place.

When we realize the society to which Bartholet and I both aspire, I am confident we will regard coercive adoptions of other people's children — somebody's children — as a necessary evil, not a desirable goal.

In addition to this basic principle, Bartholet's call for massive adoptions of children currently in foster care (and children who ought to be in foster care) is hopelessly impractical on several levels. First, the legal standard necessary for removal and termination of parental rights prohibits such an ambitious project. Although Bartholet advocates that many more children be removed from their families, placed in foster care, and subsequently adopted, she offers no details about the standards officials should use when deciding whether to remove children or to terminate parental rights. Without new standards, it is unclear whether or why more removals would occur. Second, an increase of cases by the factor Bartholet seeks would overwhelm the current child welfare system. We would need not only to quadruple the number of case workers and agency personnel responsible for placing children and monitoring their placements, but also to quadruple the number of judges and court personnel. These expenses are simply prohibitive. Third, even were we to expend these resources, we still would likely never achieve the results Bartholet advocates. She suggests that adults will come forward to adopt these children once all barriers to transracial adoptions have been eliminated (pp. 181–83). But she fails to address the timelines necessarily built into the process of adopting foster children. When children enter foster care, the planning goal for virtually all cases — and certainly for the non-life-threatening cases that Bartholet argues merit foster care — is to return children to their families. When children enter foster care, parents are given services and time to improve the conditions that led to the removal. Under current federal law, a minimum of seventeen months must elapse before termination proceedings may even commence.[147] Commencing termination proceedings itself involves a time-consuming process of protracted trial proceedings of up to one year and appeals that can easily add an additional year. Moreover, the prospects of biological parents winning at the trial or appellate level are substantial.

Finally, Bartholet takes no account of the complexities of adopting a foster child. The infertile couples Bartholet expects to adopt these children want to form a permanent family. But these couples may be either unwilling or ineligible to become foster parents of newly placed children. They will be unwilling once they understand that there is neither a promise they

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147 *See* 42 U.S.C. § 675(5)(E); *see also supra* note 76.

will be able to adopt the child nor a commitment to strive for adoption. The most an agency can promise is that if the child becomes eligible for adoption, the foster parent will be permitted to adopt over anyone else. But the agency will be obliged to work assiduously with the birth family to assist it in overcoming the barriers to returning the child.[148] Reunion is success. Adoption is an option only when failure occurs — failure to reunite the child with his or her birth family. Under these conditions, the couples Bartholet talks about are likely to be unwilling (as they have been historically) to become foster parents (p. 180). Even if they would be willing, they would be ineligible unless they truly were committed to the idea of foster parenting; namely, that they are not striving ultimately to adopt the child, but instead, are offering their home and their love with the aim of eventually returning the child to his or her birth family.

For the foster care system to truly work, everyone connected with the child must be working toward the same goal rather than conflicting ones. The people Bartholet imagines becoming adoptive parents are not going to become foster parents. By the time the foster children are eligible for adoption — the time it will take to exhaust reunification efforts and the time it will take for the courts to order termination — children will almost certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt. Bartholet's proposal is thus utterly impractical unless we thoroughly change the rules of foster care and the process by which foster children become eligible for adoption. Of course, Bartholet could be proposing that whenever children are removed from their parents because of suspicion of abuse or neglect, the children should be placed for adoption. However, such a proposal is so patently unlawful that it cannot be implemented. If she means to give parents some time to demonstrate that the children can be safely returned to their custody, then we are back in the current system and the book provides no hint of how things would be different.

C. An Alternative to Bartholet's Alternative Vision

It is one thing to tolerate the radical social engineering that constitutes the core of Bartholet's proposals as a "least worst" alternative.[149] It is another to advance it before insisting that less drastic solutions be attempted.

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148 *See, e.g.*, *In re* Sheila G., 462 N.E.2d 1139 (N.Y. 1984) (holding that only after the agency has proved by clear and convincing evidence that it has fulfilled its statutory duty to attempt to reunite the family may the court consider whether a parent has fulfilled his or her duties); *In re* William, 448 A.2d 1250 (R.I. 1982) (noting that the agency is obliged to do everything in its power to assist the family before termination will be permitted).

149 Joseph Goldstein and his colleagues coined the term "least detrimental alternative" as a substitute for "best interests of the child" as a reminder to judges obliged to make custody determinations that often it would not be possible for them to issue orders that were "best" for children; it would be wiser for them to recognize that their task frequently is to order what would be "least worst." JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 6 (1979).

Regrettably, the reason Bartholet touts adoption of foster children remains unclear. Either it is because she anticipates that America will continue to fail to equip poor families with the resources necessary to keep their children at home, or it is because she so negatively assesses foster children's families and communities themselves.[150]

Since the 1970s, the concept of "child welfare" has been artificially narrowed to mean little more than protecting children from parental harm. During this same period, child welfare agencies have been transformed from programs that attempt to serve needy families to investigative bodies that follow up on often spurious allegations of maltreatment.[151] As observed by Jane Waldfogel and others, "the problem is not just that CPS is the only door; it is also that CPS is 'a door to an empty room.'"[152]

As we look to the near future, we can predict that child welfare personnel will be able to provide even less for poor families as changes in government policies require that they interact with increasing numbers of families.[153] We need to change this predictable path if we are to improve

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[150] *See supra* pp. 1722–23. The impression one gets is that adoption will be very good for these children in their own right. Because they are poor, single parent families in urban ghettos need a broad range of services, from universal health care to universal, free child care. Bartholet suggests that the biological families of these children are so inappropriate as people, and their communities so inappropriate as neighborhoods, that the children deserve new communities and new neighbors:

> [W]e need to recognize that children who are abused and neglected, children who are growing up in foster and group homes, are . . . victims. Like their parents, they are often black and brown-skinned victims, and most of them are poor. Keeping them in their families and their kinship and racial groups when they won't get decent care in those situations may alleviate guilt, but it isn't actually going to do anything to promote racial and social justice. It isn't going to help groups who are at the bottom of the socio-economic ladder to climb that ladder. It is simply going to victimize a new generation. (p. 6)

Some of the book is regrettably reminiscent of a Connecticut Supreme Court decision written in 1883:

> Next to intemperance, and generally accompanying it, a habit of idleness helps to fill our alms houses with paupers and our jails with criminals. By means of these two causes the burden is imposed on the public of maintaining a worthless class of humanity as well as the great expense of our criminal courts.

Reynolds v. Howe, 51 Conn. 472, 477 (1883); *see also* Harrison v. Gilbert, 43 A. 190, 191 (1899) (displaying a similarly disdainful view of poor people).

[151] *See supra* pp. 1736–37.

[152] WALDFOGEL, *supra* note 36, at 119.

[153] Waldfogel states:

> It is generally agreed that the safety net for children whose families cannot provide for them is the child welfare system, including foster homes, groups homes, or some other form of residential care. To the extent that reductions in cash assistance and food stamps increase the number of families who cannot provide for their children, such reforms are likely to increase the number of families referred to CPS. Thus, even as CPS agencies were trying to define their mission more narrowly to exclude lower-risk cases (such as poverty-related neglect), they might receive more referrals as a result of families' deteriorating economic circumstances. . . . Because so many more children are on welfare than are in CPS, the children affected by welfare reform could swamp the child protective services system, especially if they have to be placed in foster care or other out-of-home care. It is estimated that 1.1 million children will be made poor as a result of the welfare reforms. Placing one in five of those children in out-of-

the lives of poor children. To accomplish this, it is critical that we restructure child welfare to include, for example, early intervention services for health care, child care, and education. Paradoxically, this vision requires that we find a way to narrow what now overwhelms the child welfare system — the investigative function of child welfare personnel. Although Bartholet proposes a mandatory home visitation program for all "highest-risk families" (p. 170), she stresses the value of surveillance of dysfunctional families as much as the benefits of service provision (pp. 163–75).[154]

There has been considerable ferment in the field during the past few years surrounding initiatives that would advance this specific and important agenda. Through the far-sighted efforts of the Edna McConnell Clark Foundation, among others, a number of communities have experimented with "community partnerships" that seek to change the function of child welfare from policing to helping. In these initiatives, the focus is on helping families rather than assessing blame.

The simple fact is that government agencies alone cannot protect children. Thus, efforts to organize networks of neighborhood and community support that reach out to families at risk provide great hope for the future. The goals are to reach these families before a crisis occurs and to expand the scope of those who receive services well beyond the category of "unfit families."

This transformation is exceedingly difficult to accomplish because there is no single formula that works for all communities. But the core goal is to make the "local villages" work well for their children by seeking to accomplish precisely what I understand to be Professor Bartholet's ultimate aspiration: to make the adults in the community feel responsible for all the children within it. Regrettably and surprisingly, Bartholet reserves her strongest condemnation for the community partnership programs, which she very broadly calls "family preservation" efforts (pp. 141–42). Critical of virtually all projects designed to identify the specific needs of families and to redress them with intensive support services, she is particularly skeptical of broader efforts to improve conditions within the communities from which foster children disproportionately come. Her major criticism of community partnership initiatives is the following:

> home care would add 220,000 children to the pre-welfare reform foster-care population of some 450,000 and constitute a nearly 50 percent increase in the foster-care caseload.

Id. at 130.

Bartholet implicitly acknowledges the relationship between dwindling governmental support for poor families and an increasing reliance on foster care: "In the 1980s new emphasis was placed on preserving the family, but with . . . other social and economic problems came an increase in the number of . . . child removal rates" (p. 154).

154 This proposal is even more radical than Bartholet's adoption proposal, and she acknowledges that it is unlikely to be implemented (pp. 174–75).

> Community Partnership advocates argue for putting responsibility in the "village" for raising the child. But they fail to address the realities of today's villages. Child abuse and neglect take[] place disproportionately in the poorest, most dysfunctional communities in our society — in communities which are the least likely to have the healthy organizations which are seen as central to the Community Partnership concept. (p. 153)

This is a circular complaint. It is precisely because so many children in foster care come from identifiable dysfunctional communities that these new initiatives seek to improve them. It is hardly legitimate to point out that these communities should not be targeted because they are dysfunctional.[155]

It is vital to acknowledge the disorganization of the communities from which the disproportionate number of foster children come. Efforts to improve those communities deserve our full support, unless those efforts result in inadequate protection of children. But the most Bartholet can say about community partnership efforts is that "it's not so clear that they will reduce child abuse and neglect" (p. 49).[156] Although no definitive evidence has yet been obtained that demonstrates the effectiveness of community partnerships, these efforts are allowing earlier interventions to identify at-risk families, revealing strengths in communities, and filling gaps in services for parents.[157]

V. CONCLUSION

"Child welfare" as defined in the United States during the past thirty years is a social construct that deliberately excludes larger, more pressing issues affecting the well-being of children. This narrow definition — pro-

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155 Bartholet describes some of these efforts:

> [Family Group Decision Making] advocates have chosen the feel-good phrase *family empowerment* to describe the essence of what their movement is about. In fact it is about giving *parents* accused of maltreatment, together with other *adult* family members, even greater power than they now have over the fate of their children. It is about limiting the state's power to intervene to protect these children, and limiting the larger community's sense of responsibility for them.
>
> It is important to support and empower families and to encourage extended family members to take responsibility for their youngest members. But when children have been subjected to severe forms of abuse and neglect, the state should not abdicate *its* responsibility. (p. 146)

156 Bartholet suggests that residents of these communities may not be reliable because there is "a risk that neighbors and trusted community representatives will be unduly reluctant to intervene to protect children for fear of alienating their parents" (p. 152).

157 Bartholet never quite explains her opposition to these initiatives. At one point she provides the following clue, to which I am reluctant to give much weight: she once attended a conference at which one of the advantages listed for community partnerships was their instrumental role in preventing transracial placements (p. 144). I recognize, of course, that Professor Bartholet is the country's leading advocate of transracial adoptions. However, I am most reluctant to believe that Professor Bartholet has come to regard transracial adoption not as a tolerable solution, but as a preferred one. I cannot easily conclude that Professor Bartholet sees adoption as good for children, when a caring society could have prevented the need for adoption by helping families stay together.

tecting children from parental abuse — not only excludes from its focus extremely important problems that policymakers concerned about children must address, it also contributes to proposals by well-meaning advocates that actually worsen the plight of many children.

Duncan Lindsey, who has pondered these problems for many years, concludes as follows:

> The problem of poverty among lone-parents and their children has become the core social problem in North America. The problem has been cast as the collapse of the family, a plague of illegitimacy, an epidemic of child abuse, and a crisis for children. At the core all stem from the same problem, child poverty. Child poverty will not end without intervention. Yet, there has not been a broad commitment to solving this problem, in part because the problems facing these mothers and their children have been defined within a residual perspective.[158]

The narrow picture of child welfare policy that is currently accepted primarily focuses on children harmed by their own families and the apparatus and policies of state action that aim to find and protect those children. However important the issue of children being harmed by their parents, it is far from the most pressing issue in child welfare. Those of us who care most about children need to develop strategies that broaden the lens of problems facing children so that states with the will to ameliorate or avoid these problems can do so. Most important, this strategy must find a way to maximize the chance that children will be raised by their own willing families.

There will, of course, be occasions when it is necessary to separate children from their families and even to sever permanently all legal ties between children and their families to protect them from harm and to permit them to be raised by new families who will love and guide them. But a child-friendly child welfare policy certainly will regard the forcible removal of children from their families, and particularly the permanent banishment of birth relatives from their lives, as a necessary failure, rather than an outcome worthy of celebration.

The last words of *Nobody's Children* are ideal ones with which to end this review. Although Professor Bartholet and I may differ on exactly how the sentiments of these last words ought be manifested, we are in full ac- cord on the importance of recognizing the risks inherent "in continuing to abdicate any community responsibility for our nation's children — in continuing to see the children suffering abuse and neglect as *not* belonging to all of us" (p. 243).

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158 LINDSEY, *supra* note 29, at 327.

The Role of Child's Counsel in State Intervention Proceedings: Toward a Rebuttable Presumption in Favor of Family Reunification

ANDREW HOFFMAN[†]

Scenario 1:

The Court appoints you to represent John, a six-year-old, removed by the State Department of Social Services ("DSS") due to allegations of lack of supervision, medical neglect, and a filthy home. John was found wandering outside at night -- hungry, cold, dirty, and confused. His mother could not be found. John looked emaciated. When the police arrived at the apartment, it was filled with garbage, dirty clothing, and a filthy mattress lying in the corner of a room. John spent the past few days in a foster home, where he has eaten everything in sight. He visited a doctor who determined that aside from an earache he is in good health. Although John transitioned well in the foster home, he cries himself to sleep every night, asking for "Mommy". When you visit his foster home, John shows no understanding of why he was removed from his mother's care. He states his foster mother is nice to him, but he wants to return to his mother. What position do you take on behalf of your client?

Scenario 2:

The Court appoints you to represent Lisa, a fourteen-year-old, removed from her mother's care by DSS due to alleged sexual and physical abuse by her mother's live-in boyfriend. Several times over the last few months, Lisa arrived at school badly bruised. She allegedly confided to a friend that her mother's boyfriend made unwanted sexual advances toward her. When confronted by school authorities about these remarks, Lisa denied them. Lisa's mother obtained a restraining order against her boyfriend, but dismissed it and he returned home. DSS placed Lisa in her friend's home. You visit Lisa at school; she tells you her mother's boyfriend hit her, denying sexual abuse. She appreciates her friend's family for accommodating her, but wants to return home. Lisa is aware the abuse will probably continue, but worries about her mother, because the

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boyfriend abuses her. Lisa feels the boyfriend is less likely to abuse her mother if Lisa is in the home. What position do you take on behalf of your client?

Scenario 3:

The Court appoints you to represent Reid, a nine-year-old removed from his parents' care after they were thrown out of a transitional living apartment through a homelessness program. Reid's family was transient for two years, and although he missed a lot of school and bounced between homes of various relatives and friends, he is reportedly reasonably emotionally stable and well-adjusted. You visit Reid in his foster home, in an upscale suburban neighborhood, where he is playing video games. Although he does not totally turn his attention away from the games, he does talk to you. Reid conveys anger at his parents for their situation. In his new environment, he can eat and play video games all he wants, provided he completes his homework. He says he wishes to live there forever. Reid tells you he hates his parents and refuses to speak with you further about his situation, turning sullenly back to his video games. What position do you take on behalf of your client?

I. INTRODUCTION

Should you advocate for John's return home? Lisa? Reid? Who decides the child client's position? What if adults involved in the case disagree as to the child's position? If you decide, how do you determine your client's position? What factors should you consider? How important is the client's expressed preference? What level of understanding of relevant legal proceedings might a six, eight, or fourteen-year-old child possess? How important are family ties? How important are material advantages or disadvantages? How important are ethnicity and culture? How important is socioeconomic status? Does the child have disabilities or unusual medical needs? Is the client's position ephemeral? Is the client's position conditioned on the occurrence or non-occurrence of certain future events?

The debate over the appropriate model for legal representation of a child in state intervention proceedings rages on. Despite the best efforts of many well-informed, well- intentioned people, we lack consensus as to the proper role for child's counsel in these cases.[1]

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[1] See, e.g., Bruce A. Green & Bernadine Dohrn, Ethical Issues in the Legal Representation of Children, 64 FORDHAM L. REV. 1281-2132 (1996) (compilation of

Attorneys practicing in this field of the law are, perhaps, as rudderless as ever, with no clear direction regarding their responsibilities to the client. Scenarios like those described above, although troubling, are common. Attorneys for children are presented with similar excruciating ethical dilemmas on a daily basis.

Reasonable minds differ as to the proper approach for counsel in these cases. Models for child advocacy encompass a broad spectrum, from traditional client-centered advocacy where the attorney counsels the client, but ultimately advocates for the client's expressed preference, to pure best interests advocacy, where the attorney accounts for a client's expressed preferences but ultimately advocates for what she perceives is in the child's best interests.[2] Today, few advocates occupy either extreme of this spectrum; virtually every model of representation combines elements of each, and falls somewhere in the middle. And, virtually every model of representation gives attorneys great discretion to determine the client's position in litigation.[3] With such a large degree of discretion, different attorneys inevitably reach different conclusions as to how to approach the case. Given this acceptance of broad attorney discretion, the debate seems utterly incapable of resolution.

Additionally, attorneys often make decisions regarding child clients that they are unqualified to make. Many questions posed by this article require a substantive, clinical understanding of children's social, emotional, and developmental needs, but an overwhelming majority of attorneys lack the background and training necessary to make these types of decisions.[4]

Perhaps the best way to eliminate attorneys' confusion in determining a child client's position is to decrease their sweeping discretion. Attorneys should not be divested of all discretion or decision-making authority; an attorney's exercise of independent judgment is the hallmark of the legal profession. Well-established standards are

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articles submitted by leading commentators for conference regarding ethical issues in the legal representation of children) (hereinafter "Green").

[2] See generally, Green & Dohrn, supra note 1.

[3] The American Bar Association (ABA) and the National Association of Counsel for Children (NACC) promulgate standards for representing children in "abuse and neglect cases". The ABA adopted its "Standards Of Practice For Lawyers Who Represent Children In Abuse And Neglect Cases" in 1996; NACC adopted the ABA's standards with amended Sections B-4 and B-5, effective 1999. These standards are fairly representative of the considerable degree of discretion vested in attorneys who practice in this field of the law.

[4] Janet Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System, 52 U. MIAMI L. REV. 79, 104-05 (1997).

challenged in each case, and an attorney's ability to apply her understanding of legal standards to facts, and act accordingly, defines her role. However, to the extent the child's position can be prescribed to the attorney, this may clarify the role.

The appropriate model for child's counsel in state intervention cases is to presume the child's position in litigation is reunification with her family. Unless counsel is presented with credible evidence that rebuts this presumption, counsel should advocate for reunification on the child client's behalf. While unsolved issues remain with this model, it represents a vast improvement over other frameworks. The concept of a rebuttable presumption that favors family reunification informs a perpetually vexing issue for child advocates.

A. Legal Framework for State Intervention Cases

States provide governmental intervention in private family life to protect children from abuse and neglect.[5] Civil in nature, rather than criminal, these proceedings are referred to interchangeably as "state intervention" cases, "child welfare" cases, "abuse and neglect" cases, and "care and protection" cases.[6] The underlying principle in these cases, regardless of state-specific procedures, is the state should protect children from parental abuse or neglect and intervene in family life, on behalf of children, if necessary to protect them.[7]

The scope and duration of intervention depends on the child's need for protection. In many cases, the state intervenes minimally and temporarily to assist a family in resolving problems, and subsequently removes itself from their affairs. This is often done without initiating legal process. Sometimes the family's problems are addressed without

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[5] Jean Koh Peters, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2001) (general survey of various child welfare statutory schemes).

[6] This article is concerned with involuntary rather than voluntary state intervention. Although states may have some system for families to turn to voluntarily for help, that type of state intervention is not the subject of this article. The sole subject of concern here is those cases in which the state acts of its own volition, without a request from the family.

[7] See, e.g., MASS. GEN. LAWS ch. 119 § 1 (2003):

> It is hereby declared to be the policy of this commonwealth . . . to provide substitute care only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual, and moral development.

removing the child from the home. In fact, the state is obligated to first explore remedies short of removal.[8]

Unfortunately, the state often removes children from their homes to address abuse and neglect. To do so, the state must initiate legal proceedings and establish the necessity of removal.[9] Sometimes removal, and resulting separation, is of short duration, perhaps a few days or weeks. Other times, the child is removed from her parent(s) for several months, or years, prior to reunification. During the separation period, parents may address issues that led to removal, and eliminate further risk of abuse or neglect.[10]

In some cases, because parents fail to achieve sufficient progress, or because the child's best interests otherwise dictate, the separation becomes permanent; through adoption, guardianship, or long-term foster care, the child never returns to the parent.[11] In many of these cases, the Court terminates parental rights, meaning the parent no longer has a legal right to involvement in the care and upbringing of her child, who is freed for adoption.[12]

As the state must use reasonable efforts to address risks of abuse or neglect without removing the child, it must also employ reasonable efforts to assist in family reunification after removal.[13] The state must

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[8] The Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §620-628 (1980), mandates the state to make reasonable efforts to prevent removal of children from their families, or, alternatively, to reunify children with their families after removal. The Adoption and Safe Families Act ("ASFA"), 42 U.S.C. § 671(a)(15), passed in 1997, contains further refinements of this concept. See also Suter v. Artist M., 503 U.S. 347 (1992) (discussing general duty of state to make reasonable efforts).

[9] See, e.g., MASS. GEN. LAWS ch. 119 § 21-24 (2003), (setting forth Massachusetts's 'statutory scheme for the removal of children from the custody of their parents). In Massachusetts, the state must prove by a "fair preponderance of the evidence" at the initial removal that the child is at immediate risk of abuse or neglect. Care and Protection of Robert, 408 Mass. 52 (1990).

[10] 42 U.S.C. § 671(a)(15)(B).

[11] See, e.g., MASS. GEN. LAWS ch. 210 § 3(c), as an example of the factors a court must consider in determining whether the best interests of the child mandate termination of parental rights.

[12] Petition of the Department of Social Services to Dispense with Consent to Adoption, 391 Mass. 113, 119 (1984) ("When a child is adopted, 'all rights, duties and other legal consequences of the natural relation of child and parent . . . except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred.' G. L. c. 210, § 6. The allowance of a petition to dispense with a parent's consent to his child's adoption means that the parent no longer has the power to prevent the termination of these rights, duties, and other legal consequences of his relation to his child.").

[13] 42 U.S.C. § 671(a)(15)(B).

attempt to work with parents and children to address issues that led to removal. With limited exceptions,[14] only after the state clearly exhausts reasonable efforts to reunify, can the remedy shift from reunification to adoption, guardianship, or long-term care.

B. Fundamental Rights, Presumptions, and Due Process

Individual and family autonomy to regulate affairs privately, without threat of unwarranted state intervention, is a constitutionally protected fundamental right.[15] However, the right is not absolute, and must be compromised for competing rights.[16] Thus, the state may intrude on a parent's rights regarding her children but must justify its actions by proving the child is at risk of abuse or neglect.[17] It is not simply the parent's rights vis-à-vis the child at stake: the child is has a corresponding interest in family unity, in maintaining a fundamental liberty interest in her family's maintenance without unwarranted intervention.[18] The child shares the parent's right to state justification

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[14] 42 U.S.C. § 671(a)(15)(D). (The state is not required to make reasonable efforts toward reunification in cases in which a parent: has subjected a child to aggravated circumstances (including but not limited to abandonment, torture, chronic abuse, and sexual abuse); committed, aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child of the parent; or had his or her parental rights to a sibling of the subject child involuntarily terminated.)

[15] Santosky v. Kramer, 455 U.S. 745, 758-59 (1982).

[16] See, e.g., Custody of a Minor 375 Mass. 733, 748 (1978) ("[T]hese '"natural rights'" of parents have been recognized as encompassing an entire private realm of family life which must be afforded protection from unwarranted state interference. Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 842 (1977), and cases cited. In light of these principles, this court and others have sought to treat the exercise of parental prerogative with great deference.") (citations omitted).

[17] "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation … if it appears that parental decisions will jeopardize the health or safety of the child…" Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (citation omitted); See also, e.g., MASS. GEN. LAWS ch. 119, § 24:

> "If . . . there is reasonable cause to believe that the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child to [the state] . . . "

[18] Santosky, 455 U.S. at 760 ("Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); see also, Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 588 (1981) ("there exists a 'substantial and impressive consensus' among experts in the field of child development that 'disruption of the parent child relationship carries significant risks' for the child.") (citations omitted).

for a compelling need to interfere in her family life.

Unsurprisingly, the child welfare system places great emphasis on the importance of family unity and cautions against unwarranted state intervention. The status quo is family unity.[19] A parent is presumed fit, and a child's best interests are presumed served by remaining with the parent.[20] The state bears the burden of proving that altering the status quo would protect the child from abuse and neglect. Until it does so, the state may not intervene in private family matters.[21]

As a result, families in state intervention cases maintain considerable due process rights. In Santoskv v. Kramer, 455 U.S. 745 (1982), the Supreme Court applied the "clear and convincing evidence" standard to state intervention proceedings to terminate parental rights, holding that "Before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State supports its allegations by at least clear and convincing evidence."[22] This is an intermediate standard, below the criminal "beyond reasonable doubt" standard, and above the civil "fair preponderance of the evidence" standard.[23]

[19] See, e.g., MASS. GEN. LAWS ch. 119, § 1 (2003) ("It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself . . . [is] unable to provide the necessary care and protection . . . .").

[20] Santosky, 455 U.S. at 760.

[21] Id.

[22] Id. at 747-48.

[23] Again, the scope and duration of state intervention depends on the circumstances of the case. The range includes: no separation of parent and child; short-term separation with custody vested temporarily in the state; longer-term separation with a finding of parental unfitness and "permanent" custody vested in the state prior to eventual reunification (permanent custody does not mean a final resolution - it is a legal construct intended simply to differentiate from temporary custody); or permanent separation with a finding of parental unfitness and resulting in adoption, guardianship, or long-term foster. While the standard for initial removal is the lower "fair preponderance of the evidence" (see, e.g., Care and Protection of Robert, 408 Mass. 52 (1990)), the high standard of "clear and convincing evidence" set forth in Santosky v. Kramer has been extended to apply not just to the termination of parental rights but to any decisions of parental fitness and permanent custody. See, e.g., Custody of a Minor, 389 Mass. 755, 766 (1983). Further, it should be noted that the typical statutory

The "clear and convincing" standard is often articulated in light of parental rights. However, a parent's rights to a child and a child's independent interest in family integrity are both judged by this standard. The state must prove by clear and convincing evidence that a child needs to be permanently separated from her parent to protect her from abuse and neglect.

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III. THE ATTORNEY'S ROLE IN CHILD WELFARE PROCEEDINGS

In most legal proceedings, the determination of a client's position is fairly straightforward. However, child welfare cases are complicated by the question of the client's capacity for adequate decision-making with regard to representation. Child welfare proceedings are significantly different from other proceedings and the juvenile or family court, rather than a court of general jurisdiction, is accepted as their proper context.[31] Likewise, child welfare proceedings are not simply adversarial in nature, as normal standards for adversarial legal representation are altered for child clients.[32] The scenarios provided at the beginning exemplify situations in which normal modes of legal representation should be altered due to clients' competency. The manner and extent of alteration, however, remains disputed.

Some experts attest the proper model for child advocacy is the "best interests" approach, wherein the attorney considers the child's stated desire but ultimately advocates for what she believes is in the child's best interests.[33] In contrast is traditional client-directed advocacy, where, after full counseling and advice, the attorney advocates for the reasonably competent child client's expressed preference.[34] Most attorneys fall between these two poles and attempt to balance competing interests. All solutions are flawed.

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[31] See, e.g., MASS. GEN. LAWS ch. 211B, § 1 (2003) (creating jurisdiction of the Juvenile Court).

[32] See generally Weinstein, supra note 4.

[33] See, e.g., Richard Kay &Daniel Segal, The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach, 61 GEO. L.J. 1401 (1973).

[34] Martin Guggenheim, The Right to be Represented but Not Heard: Reflections on Legal Representation for Children, 59 N.Y.U. L. REV. 76, 87 (1984).

A. "Best Interests" Model

Under the "best interests" approach, the attorney's asserted position may not be consistent with the child's expressed preference. Often, application of the best interests model empowers attorneys to diverge from clients' expressed preference due to personal discomfort. While this per se qualifies as advocacy, and may assuage an attorney's conscience, it retains few vestiges of the adversarial system; it reflects no true effort to ascertain a child's expressed preference, leaving the child essentially unrepresented.

Some believe the adversarial system is incompatible with determining a child's best interests.[35] Regardless, there is no doubt the best interests standard is incredibly vague. It is "not a standard, but a euphemism for unbridled judicial discretion."[36] "Regardless of how it is measured, the best interests of children are generally indeterminate, and largely a matter of values."[37] Unsurprisingly, there is a well-established history of bias by various child welfare system actors, including judges, child welfare agencies, and service providers, on the basis of class, race, and lifestyle.[38] Whether the best interests of a child can be determined in an adversarial system remains questionable, and there are surely myriad cases where a child's future hinges solely on decision-makers' personal biases.

The notion that attorneys can objectively conclude what serves a child's best interests is preposterous. Attorneys are no more inherently objective than anyone else. They struggle to divest advocacy from prejudice, bias, and belief about how people should live, and how children should be raised. Attorneys hold different personal beliefs, and advocate based on their beliefs, resulting in divergent outcomes. That children's positions differ according to who is appointed as their attorney is untenable.[39]

[35] See generally Weinstein, supra note 4.

[36] Andrea Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, CHILD, PARENT, AND STATE 3, 5 (S. Randall Humm et al. eds., 1994).

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[37] N. Dickon Reppucci & Catherine A. Crosby, Law, Psychology, and Children: Overarching Issues, 17 LAW & HUM. BEHAV. 1, 4-5 (1993) (quoting ROBERT H. MNOOKIN, CHILD, FAMILY & STATE: PROBLEMS & MATERIALS ON CHILDREN AND THE LAW 163-64 (1978)).

[38] Dorothy Roberts, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8-9, 17, 19-25, 27, 35, 38, 50-51 (2002) (citing research studies documenting disparate treatment of children and families in the child welfare system on the basis of race and socioeconomic status).

[39] Guggenheim, supra note 34, at 77.

An attorney's opinion should be irrelevant to a case. Attorneys forced to advocate for an outcome they find unacceptable should withdraw, rather than advocate an outcome that makes them more comfortable. The judge, not the attorney, is vested with broad discretion to exercise judgment for the good of the child.[40] The adversarial system in child welfare proceedings depends on the judge's wisdom, not the attorney's. In the event the judge is guilty of poor judgment, the appellate process is designed to remedy the error.[41] The system fails when the attorney, rather than the judge, focuses on best interests.

B "Client-Directed" Model

At the opposite end of the spectrum is the client-directed model. Clinicians argue that although a child might be old enough to articulate a preference, children lack the developmental capacity to appreciate the nature of proceedings and ramifications of their decisions, and thus, honoring their stated desires through legal advocacy is fruitless.[42] As clinicians often posit, children are not little adults; just as their bodies are not physically mature, children's minds have not developed full capacities for logic, reason, and judgment.[43]

[40] The state child welfare authorities, and courts, are to be guided by the child's best interests. See, e.g., statement of policy contained in MASS. GEN. LAWS ch. 119, § 1 (2003). "The health and safety of child shall be of paramount concern and shall include the long-term well-being of the child." Id. Although the state may have other agendas (e.g., financial or political considerations, desire to punish the parent, personal animus on the part of the case worker, administrative difficulties), at least in theory the child's best interests are included in the state's position. Often there is a guardian ad litem, court-appointed special advocated (CASA), court-appointed investigator, or other "best interests" advocate to advocate for what he or she believes is in the child's best interests. Thus, there are plenty of other actors available to advocate for the child's best interests; there is no need to assign yet another person for this purpose in the form of the child's attorney.

[41] See, e.g, MASS. GEN. LAWS ch. 119, § 27 (2003) (allowing an appeal as of right from an adjudication by the juvenile court that the child is in need of the care and protection of the state).

[42] Sarah Ramsey, Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity, 17 FAMILY LAW QUARTERLY 287, 309-20 (1983) (discussion of means for assessing a child client's capacity to make decisions in regard to directing the litigation).

[43] See generally SHANNON BROWNLEE ET AL., Inside the Teen Brain, U.S. NEWS & WORLD REPORT, Aug. 9, 1999, at 44-54 (documenting that research has shown that adolescents' brains, studied through magnetic resonance imaging (MRI), actually work differently than adult brains).

Opponents of the pure adversarial model mischaracterize the approach as blind adherence to a child's directives. In response, proponents emphasize the counseling aspect of legal representation. An attorney should only take a client's direction after having provided the client with information and advice necessary to allow for a fully informed, carefully reasoned decision.[44] Even if this is what the client- directed model means, it is doubtful that any child can make a fully informed and adequately considered decision in a complex child welfare proceeding. Problems with application of the client-directed model in child welfare proceedings arise when the child client is unquestionably immature or otherwise incapable of making adequately considered decisions. Codes of professional ethics, and other ethical codes promulgated by organizations like the ABA and NACC, unsuccessfully attempt to provide direction to attorneys for clients under disability.[45]

This advocacy model directs an attorney to ascertain, to the greatest degree possible from available information, the child's position if the child were capable of adequately considered decision-making.[46] To do this, the attorney must make subjective predictions regarding what the child would want in a given situation. This is commonly referred to as "substituted judgment".[47]

[44] See, e.g., Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures, § 1.6, at http://www.mass.gov/cpcs/manuals/pcmanual/MANUALChap4Civil.htm (last visited April 22, 2004).

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[45] See ABA and NACC standards, supra note 3. Nothing about these standards is manifestly unreasonable, however, due to unavoidable, inherent ambiguity, their application to real cases leaves them open to interpretation.

[46] See, e.g., Massachusetts Committee for Public Counsel Services, Assigned Counsel Manual: Policies and Procedures § 1.6, supra note 44.

[47] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 751 (1977):

> [W]e realize that an inquiry into what a majority of people would do in circumstances that truly were similar assumes an objective viewpoint not far removed from a 'reasonable person' inquiry. While we recognize the value of this kind of indirect evidence, we should make it plain that the primary test is subjective in nature – that is, the goal is to determine with as much accuracy as possible the wants and needs of the individual involved. This may or may not conform to what is thought wise or prudent by most people.

Id. at 750-51.

C. Irrelevance of Distinction Between the Models

In many cases, both models -- "substituted judgment" and "best interests" -- result in the same outcome, though this is far from universal. Scenario Two presents a case where substituted judgment for a client incapable of making an adequately considered decision may result in a different litigation position than application of a best interests model. In this case, attorneys applying best interests would advocate for Lisa to remain away from her mother due to the risk posed by the boyfriend. Alternately, attorneys using substituted judgment would advocate for Lisa's expressed preference to return to her mother's care.

The differences between substituted judgment and best interests are largely immaterial to the present discussion, because both involve projecting an attorney's judgment and opinions on their client. An attorney cannot ascertain the expressed preference of an infant or manifestly immature child. And, regarding older children who can express preferences, if the attorney doubts the child fully understands the nature of the proceeding, or doubts the child can make an adequately considered decision, she interposes her judgment for her client's anyway. Thus, in the child advocacy context, the same problems underlying the best interests model often exist in the client-directed adversarial model.

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IV. SOLUTION: PRESUMPTIVE REUNIFICATION

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A. Public Policy Dictates Presumptive Reunification

The presumptive reunification model finds its genesis in a basic tenet of child welfare public policy: where possible, families belong together, and children belong with their parents. As a society, we recognize children are to remain with parents unless there is a clear need to remove them, and even after removal we must do whatever is reasonably necessary to reunify them. Children's interests are best served by a safe, healthy, happy relationship with their family. In an ideal world there would be no foster care, adoption, and or familial disruption. Foster care and adoption reflect crisis: death, illness, unwanted pregnancy, economic hardship, inadequate parenting. It is unassailable that a child's ideal situation includes loving parents who provide for their child's emotional, physical, and material needs.

The Supreme Court incorporated this public policy perspective in child welfare cases; through a heightened standard of clear and convincing evidence, parents are presumed legally fit to care for their children until otherwise proven. It is impermissible to presume that child and parent have adverse interests prior to a legal finding that a parent is unfit. The child welfare system thus contains an inherent, rebuttable presumption favoring reunification, which the judge considers in deciding a child's fate.

This presumption should guide attorneys' decisions regarding advocacy on behalf of child clients. If the legal analysis of a child's situation is based on a rebuttable presumption favoring reunification, it is consistent and appropriate for attorneys to incorporate the presumption in representation. The attorney does not determine the child's position starting from a blank slate -- the explicit status quo favors reunification. The attorney must recognize that absent factors indicating otherwise, the child has an interest in remaining with, or returning to, her family.

B. Prior Configurations of the Model

Other notable commentators support this mode of representation. Martin Guggenheim broached this model for very young children,[65] drawing upon similar logic of other experts.[66] Although couched within a larger argument questioning the wisdom of appointing counsel for very young children in various legal proceedings, the reasoning is consistent with presumptive reunification. A child's interests are presumed best served by maintaining the family unit; the presumption remains that until there is a finding the parent neglected or abused the child, the child per se favors family autonomy; ergo, until there is a finding of abuse or neglect, counsel for very young children must advocate against state intervention.

Guggenheim's approach is more extreme and less flexible than the presumptive reunification model proposed here. For instance, he makes no allowance for rebutting the presumption. There are other problems with it, and other differences from the presumptive reunification model,[67] but the theory reflects how the model finds support in mainstream thought.

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D. Rebutting the Presumption

The presumptive reunification model, as explained thus far, specifies that absent credible evidence to the contrary the child's position is reunification. This begs the question: what constitutes this type of credible evidence?

To avoid the major cause of ambiguity under current practice standards, namely reliance on attorney discretion to determine the child client's position, we must seek objective factors. Absent objectivity, allowing for rebuttal of the reunification presumption will plunge attorneys back into the current morass. A rebuttable presumption is virtually meaningless unless there are well-defined criteria guiding its application.

In theory, there should be few instances of objective factors that dictate abandoning the reunification presumption. One example is drawn from the Adoption and Safe Families Act (ASFA),[72] which recognizes certain situations where the legal presumption favoring reunification should be forsaken. Specifically, ASFA exempts the State from making reasonable efforts to reunify if:

> (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
> (ii) the parent has--
> (I) committed murder (which would have been an offense under section 1111(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
> (II) committed voluntary manslaughter (which would have been an offense under section 1112(a) of Title 18, if the offense had occurred in the special maritime or territorial jurisdiction of the United States) of another child of the parent;
> (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
> (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
> (iii) the parental rights of the parent to a sibling have been terminated involuntarily . . . .[73]

[72] 42 U.S.C. § 671(a)(15) (2000).

[73] 42 U.S.C. § 671(a)(15)(D)(i),(ii),(iii).

An attorney should presume reunification because our laws support it. Thus, it follows that if those same laws eliminate the presumption in specifically enumerated situations, the attorney should abandon it. Although this is logically consistent, the result may be somewhat harsh in its application to reasonably foreseeable situations. For instance, it seems unquestionably fair to dispense with the reunification presumption when a parent has subjected a child to extreme cruelty. However, reasonable minds might differ as to whether involuntary termination of a parent's rights as to one child should lead to a presumption that another child would not want to remain with that parent. This exception to the reasonable efforts requirement is efficient, but does not necessarily equate to a child's desire for her relationship with her parent.

Another ground for abandoning the presumption favoring reunification is that the child's position might constitute the clearly expressed preference of a mature child. This prospect leads back to the morass we seek to evade. What constitutes a mature child? How is an attorney qualified to make this determination? When should an attorney give full weight to a child's expressed preferences? How is this different than the models presently in place? There are no clear answers to these questions, and no concrete standards for determining if a child is sufficiently mature to direct the attorney to advocate for their stated desire against reunification. This realization highlights the very essence of the presumptive reunification model; if the attorney is unsure, the status quo is reunification.

An applicable analogy can be drawn from professional football, with its use of automatic replay to review referee decisions. The validity of the referee's call is subject to videotape review, and is overturned only if convincing evidence dictates. If the videotaped replay is inconclusive, the call on the field stands. The same standard can be applied to presumptive reunification in the representation of children. Absent conclusive evidence to the contrary, the "call on the field" -- reunification -- stands. If there is doubt regarding a child's maturity to direct counsel, or the child's statements are ambiguous, counsel must retain the reunification presumption.

In reality, the presumptive reunification model will be most helpful in "middle-of-the-road" cases.[74] In some cases, the evidence of maltreatment is so manifest, or the need to move toward termination of parental rights so apparent, that the final outcome is a foregone conclusion. However, child welfare agencies tend to overreact to perceived threats, and sometimes remove children based on ulterior motives like personal animus by a social worker.[75]

In most cases, there are compelling arguments that can be made for and against reunification, and reasonable minds could differ as to the outcome. In these cases, the presumptive reunification model would help. Under present standards allowing counsel to exercise broad discretion to determine the child client's position, the attorney would

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[74] A significant majority of child welfare cases involve neglect, rather than headline-grabbing allegations of physical or sexual abuse. See Administration for Children and Families, U.S. Department of Health and Human Services, Child Maltreatment 1998: Reports from the States to the National Child Abuse and Neglect Data System (2000), available at http://www.acf.dhhs.gov/programs/cb/publications/cm98/ (last visited April 20, 2004) (illustrating that in 1998, for instance, 54% of substantiated cases involved neglect, 23% involved physical abuse, and 12% involved sexual abuse). One commentator suggests that for children in foster care, cases can be viewed in three categories. The first is the most serious cases, which carry criminal implications because of the severity of the harm to the child. The second is cases that are serious but do not necessitate criminal proceedings (e.g., a single instance of physical injury to a child, such as an unexplained bruise or scratch). The third is those cases in which the risk of harm is relatively low, and the parents may be willing to some extent to work with child welfare authorities to address the issues that led to removal (e.g., substance abuse with no other protective concerns, lack of supervision, missed medical appointments). It is estimated that the first category of cases accounts for only 10% of the children in foster care. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION 124-25 (Harvard University Press 1998).

[75] Although guided by regulation, state child welfare agencies are nevertheless unavoidably dependent on the individual judgment of agency employees, and are therefore not immune from decisions that are based on ulterior motives rather than the best interests of the child. As an example of a child welfare agency's self-serving decision-making, see Adoption of Natasha, 53 Mass. App. Ct. 441 (2001), where the Massachusetts Department of Social Services (DSS) prosecuted a case in which the prospective adoptive parent was a supervisor in the DSS office that was purportedly making reasonable efforts to assist the family with reunification.

likely advocate for continued separation.[76] In contrast, under the presumptive reunification model, the attorney's direction is clear. In effect, the majority of cases will result in child's counsel advocating for reunification due to a lack of a clear rebuttal. If the factors rebutting the presumption are inconclusive, counsel adheres to the status quo and advocates for reunification.

VI. CRITICISM AND DOUBTS

A. Why Make the Presumption Rebuttable?

Why bother with a rebuttable presumption? If it is beyond question the preference is reunification whenever possible, why not assign counsel to advocate for reunification regardless of rebuttal? This is the protocol in mental health proceedings,[77] and in child welfare proceedings there is a strong interest in guarding against unnecessary state intervention. Why not assign an attorney to act as a quasi-guardian ad litem for the family's due process rights, forcing the State to meet its burden of proof in every case? This would eliminate attorney discretion and uncertainty, and distinctly clarify prosecution and defense roles.

From a theoretical perspective, forcing the state to meet its burden makes sense in an adversarial system, where the issue is whether or not to remove a child. This mechanism analogizes to mandatory prosecution of domestic violence cases, which disregards victims' preferences.[78] It becomes an inquiry driven by community exigency rather than parties' individual wishes. If we wish to address domestic violence systemically, we prosecute offenders regardless of victims'

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[76] This commentator's own anecdotal observation that children's counsel sides with the state in an overwhelming majority of cases is supported by other commentators and by the only available study of this issue. See Besharov, supra note 67, at 218; Robert Kelly & Sarah Ramsey, Do Attorneys for Children in Protection Proceedings Make a Difference? A Study of the Impact of Representation Under Conditions of High Judicial Intervention, 21 J. FAM. L. 405, 451-52 (1982) (the presence of a guardian ad litem appointed for the child in a protective proceeding in North Carolina resulted in no overall effect on the litigation, as the guardian agreed with the recommendation of the state child welfare agency in 88% of the cases).

[77] Santosky v. Kramer, 455 U.S. 745, 760 (1982).

[78] Kalyani Robbins, No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?, 52 STAN. L. REV. 205, 216 (1999) ("With a no-drop policy, either the victim must testify or the prosecutor must use other evidence such as 911 tapes, other witnesses, and photographs of the injuries - but either way the case must proceed to trial. Basically, 'once the charges are filed, the state, and not the victim, becomes the party.'") (citations omitted).

wishes. Likewise, if we view child abuse and neglect as a community or systemic issue, we should prosecute alleged perpetrators and defend against unnecessary state intervention without regard to the parties' wishes.

Many factors determine a child's best interests, including a child's expressed preference. This argument poses a problem when a child old enough to understand the nature of legal proceedings articulates that she wants to go home. While a child's expressed preference is not controlling, it cannot be separated from a best interests analysis. Because the best interests inquiry incorporates the child's wishes, her wishes must be advanced. For this to occur, an advocate must be devoted to the child, free from personal motive or agendas of other parties who purport to speak on the child's behalf, including parents and state agencies. Clients direct representation.

Another problematic situation is when a parent does not want her child to return home, or is otherwise unavailable due to death, abandonment, incarceration, deportation, or illness. In such cases, it is pointless to assign an attorney to strictly advocate for reunification. Sometimes reunification with parents is not an option. Instead, the fight consists of competing plans for the child, i.e. foster care vs. adoption, adoption by a relative vs. adoption by a foster parent, psychiatric hospitalization vs. specialized foster care. Here, strict instructions to advocate against state intervention and in favor of reunification, are inapplicable.

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VII. REALISTIC HOPES FOR A PRESUMPTIVE REUNIFICATION MODEL

A. The Need for Courageous, Zealous, Principles Advocacy

Clearly, the presumptive reunification model is not a panacea. There remain a number of details that must be are addressed through trial and error. However, this framework can move the legal profession closer to defining the proper role for child's counsel.

Most importantly, this model demands attorneys' courage. The field of child advocacy attracts people who strive to "help children", "speak up for a child", "defend the defenseless", etc. In action, this amounts to social engineering. Low-income children and children of color are systematically removed from parents, and moved to wealthier, white families. The "lucky" ones find a family. Others suffer the

ultimate in unsuccessful state intervention: long-term foster care.[90] One must question whether moving a child from family to long-term foster care is worse than no intervention at all.

The scores of attorneys, mostly white[91], striving to "save" children call to mind white, Christian missionaries and settlers who considered it their noble duty to "save" dark-skinned aboriginal peoples of the lands they conquered, or slaveholders who rationalized their trade as serving slaves' best interests. This paternalistic perspective deems that inferior life forms improve through the beneficent intervention of a superior human class; without white intervention, these savages are destined for self-destruction.

Obviously, not all white attorneys hold this view. However, child advocates often rationalize their participation in the racially and socioeconomically imbalanced, large-scale disruption of family life by conceiving of their legal actions as in their clients' best interests. Clearly there is an analogy to be drawn between this and the mindset of the missionaries, settlers, and slaveholders who rationalized what they did as benefiting those to whom they did it.

Some mainstream commentators espouse essentially the same philosophy:

> She [Bartholet] proposes a vision of child welfare that would permit more poor Black children to be removed from their communities and adopted by white middle-class families…Bartholet assails just about every protection of Black children's ties to family, community, and culture as harmful to children and an impediment to adoption by more privileged people. She ridicules the interest in preserving Black cultural heritage as "romantic" by pointing out that most children in state custody come from "neighborhoods which are the least supportive environments for children and families." According to Bartholet, entire communities

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[90] Richard Wertheimer, Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects, Child Trends Research Brief 1 (2002) (documenting that in 2000 alone, more than 19,000 children "aged out" of foster care, meaning that they turned 18 without returning home or being adopted).

[91] The American Bar Association's Office of Diversity Initiatives states that the legal profession is more than 90% white., at http://www.abanet.org/leadership/diversity.html.

> breed child abuse and neglect and should be treated as inferior venues to raise children.[92]

Statistics bear out the grim reality for minority families affected by child welfare. Families and children of color, especially blacks, are disproportionately represented in the system. One study found that although black children represent only 17 percent of the general population nationwide, approximately 42 percent of children in foster care are black.[93] In some communities, the disparity is more skewed.[94] Sadly, responsible parties defend their actions under the guise of "best interests." As such, children and families of lower income and darker skin fare worse with regard to state intervention than their white, wealthier counterparts:

- low-income children are more likely to be reported to state child welfare authorities and to have the report substantiated;[95]

- low-income children are more likely to be removed from their parents;[96]

- low-income children, once removed from their parents, are more likely to remain in long-term foster care;[97]

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[92] Roberts, supra note 38, at 168 (citing ELIZABETH BARTHOLET'S NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)).

[93] Annie Woodley Brown & Barbara Bailey-Etta, An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System, 76 CHILD WELFARE 65, 74-75 (1997).

[94] Martin Guggenheim, Somebody's Children: Sustaining the Family's Place in Child Welfare Policy, 113 HARV. L. REV. 1716 n.11 (2000), citing New York City Admin. for Children's Servs., Selected Child Welfare Trends 81 (1998) (noting that as of the end of 1997, only 1,300 of the 42,000 children in the foster care system in New York City were white).

[95] Duncan Lindsey, Adequacy of Income and Foster Care Placement Decision: Using an Odds Ratio Approach to Examine Client Variables, 28 SOCIAL WORK RESEARCH AND ABSTRACTS 29 (1992).

[96] Mitchell Katz et al., Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect, 56 AMERICAN JOURNAL OF ORTHOPSYCHIATRY 253 (1986) (noting that the best predictor of whether a child would be removed from his or her parents was Medicaid eligibility).

[97] Lindsey, supra note 95.

- black parents are more likely to have their children removed for the same behaviors;[98]

- black children spend more time in foster care and are far less likely to be adopted;[99]

- black families and children receive inferior treatment in adoption services, housing assistance, visitation, contact with case workers, mental health services.[100]

There are only two possible explanations for these kinds of disparities. Either (1) parents who are low income and/or of color are inherently worse at caring for their children, and warrant unequal treatment, or (2) those in the child welfare system responsible for identifying and responding to incidents of child maltreatment, and serving the families involved, are prejudiced by race and class.

Sadly, many agree with explanation (1), and dismiss explanation (2), even though the same behaviors that lead to removal of black and low-income children from their families occur with equal frequency in white, suburban neighborhoods.[101] Some wealthy families address these

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[98] One well-known context for this disparate treatment on the basis of race is in the removal of newborn babies from their mothers on the basis of prenatal substance abuse. See, e.g., Ira Chasnoff et al., The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida, 322 NEW ENGLAND JOURNAL OF MEDICINE 1202 (1990) (finding that although there was little disparity between white and black mothers in the prevalence of prenatal substance abuse, black mothers were ten times more likely to be reported to state child welfare authorities); Daniel Neuspiel & Terry Martin Zingman, Custody of Cocaine-Exposed Newborns: Determinants of Discharge Decisions, 83 AMERICAN JOURNAL OF PUBLIC HEALTH 1726 (1993) (finding that of those mothers whose newborns tested positive for cocaine, blacks were 72% more likely than whites to have their babies removed by state child welfare authorities).

[99] Richard Barth, Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care, 76 CHILD WELFARE 285 (1997) (stating that black children are five times less likely than white children to be adopted through state intervention proceedings); Wertheimer, supra note 90 (although black children comprise about 15% of the population nationwide, more than 35% of those children who "age out" of foster care are black).

[100] Ann Garland & Bridgett Besinger, Racial/Ethnic Differences in Court Referred Pathways to Mental Health Services for Children in Foster Care, 19 CHILDREN AND YOUTH SERVICES REVIEW 651 (1997); Mary Close, Child Welfare and People of Color: Denial of Equal Access, 19 SOCIAL WORK RESEARCH AND ABSTRACTS 13 (1983).

[101] See, e.g., U.S. Department of Health and Human Services, Mental Health: Culture, Race, and Ethnicity – A Supplement to Mental Health: A Report of the Surgeon General

issues through nannies, preparatory schools, and other interventions available to those with means.[102] Others do not respond to problems at all. Regardless, few doctors, nurses, teachers, and guidance counselors notify child welfare authorities about wealthy families.

Strengthening the family structure, and assisting a family to meet a child's emotional, developmental, and material needs, benefits a child more than placing her with a wealthy, white, unrelated adoptive family. Yet, that reunification serves a child's best interests is a rare sentiment in the child welfare system. Rarely does an attorney state, "I determined my client's position through applying a best interests approach, and I

(2001) (noting that major mental disorders like schizophrenia, bipolar disorder, depression, and panic disorder occur with similar prevalence among racial minorities and whites in the United States, although minorities have less access to and availability of mental health services, are less likely to receive needed mental health services, often receive a poorer quality of mental health care, and are underrepresented in mental health research); Jay P. Greene & Greg Forster, Sex, Drugs, and Delinquency in Urban and Suburban Public Schools, MANHATTAN INSTITUTE FOR POLICY RESEARCH EDUCATION WORKING PAPER 4 (2004) (noting that while our society has been inundated with statistics about the 'urban underclass' -- typically accompanied by compelling anecdotes designed to convey 'the corrosive features of growing up in persistent poverty' -- that have become part of our conventional wisdom, in both professional and popular writings, about the crisis that exists for families in the inner city, in reality the flight from city to suburbs has not changed the incidence rates of problematic behaviors: suburban public high school students have sex, drink, smoke, use illegal drugs, and engage in delinquent behavior just as often as urban public high school students (citations omitted)); JANE DOE INC. VOICES FOR CHANGE, http://www.janedoe.org (noting that while domestic violence occurs at all levels of society, regardless of social, economic, racial or cultural backgrounds, the myth that most domestic violence occurs in lower class or minority communities is perpetrated in part by the fact that wealth allows for private help -- doctors, lawyers, and counselors -- that lower-income people cannot access in place of the police or other public agencies, and that because these public agencies are often the only available source of statistics on domestic violence, lower income and minority communities tend to be overrepresented in these statistics).

[102] A similar argument to that of the skewing of data on domestic violence, as set forth in the previous footnote, can be made with regard to the incidence of child abuse and neglect along racial and socio-economic lines. Low-income persons and persons of color are more likely to rely on public agencies for child care, medical care, cash assistance, etc., and therefore are exposed to a greater number of mandatory reporters. While private doctors and day care providers are also mandated reporters, because they depend on the business of wealthier, paying clients, it is reasonable to expect them to be less likely to report suspected abuse and neglect. Thus, any data that might suggest a higher incidence of child abuse and neglect among minority or low-income populations must be considered in light of the inherent population sample bias. ROBERTS, supra note 38, at 32-33.

advocate for her to return home to her parents."[103] Participation in social engineering might ease an attorney's conscience, but it is an affront to children involved in the system to characterize it as predicated on their best interests.

The presumptive reunification model requires attorneys to risk their professional reputations, withstand the sanctimony and hypocrisy of self-appointed "guardians" or "saviors" of children , reject hysteria resulting from high-profile tragedies, and uphold ethical vows to represent a client's interests regardless of personal views. It requires attorneys to reject the system's institutional classism and racism, the notion that wealthy is better than poor, and that white is better than black. This model shifts the self-conceived characterization of child welfare practice from noble, beneficent, and non-confrontational, to zealous, and tenacious. It will make many attorneys uncomfortable and motivate imposters to find other employment.

B. The Misnomer of Wrongful Reunification

Fear that presumptive reunification will result in wrongful reunification of children with dangerous parents, and will place children at risk, is the most commonly advanced argument against client-directed advocacy and in favor of the best interests model.[104] Many attorneys cannot bear that their efforts might result in wrongful judicial decisions that subject children to neglectful or abusive parents. The potential for their advocacy to place children at risk convinces them to argue their conscience rather than clients' desires. This position belies a fundamental misunderstanding of the adversarial system. It is not an attorney's job to personally endorse his client's desires. His job is to advocate his client's position and allow a judge to decide.[105] That the system can lead to harmful outcomes does not mean it should be defied.

Allegations against criminal defendants often horrify their defense attorneys. Many criminal defense attorneys believe their clients are guilty. However, it is patently improper to subvert a client's case for fear of acquittal. If an attorney fears her performance may lead to undesirable results, withdrawal is the cure, rather than predetermining a

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[103] Kelly & Ramsey, supra note 76.

[104] This conclusion is not based on any empirical data. Rather, it is simply an anecdotal observation by this commentator, based on countless conversations with child welfare attorneys over several years, that this is by far the most common basis argued by attorneys in favor of the best interests model of representation.

[105] MODEL RULES OF PROF'L CONDUCT R 1.2(b) (2002).

client's fate by refusing to represent her stated position. If reunification occurs when it should not, perhaps blame should fall on a child welfare agency attorney who failed to properly present the case, or a judge who made an improper decision, rather than on the child's attorney who advocated for reunification.

It is easy to frame the debate in terms of "wrongful reunification," when that drastically distorts the true dilemma. The possibility of harm to the child due to unnecessary family disruption, separation, and foster care placement should be the heart of the debate, along with the possibility of harm from reunification. Foster care is anything but a benign experience; yet, there is no outrage, no headlines, when a child is slowly and methodically harmed by forced separation from her family.[106] There are numerous instances of burgeoning numbers of children in foster care following high-profile cases of abuse at the hands of parents,[107] but credible evidence suggests that children are more likely to be abused in foster care than with their parents.[108] Aside from acute harm, including physical or sexual abuse perpetrated in foster homes by foster parents and foster siblings, among others, it is the separation from family and its attendant emotional effects that make foster care so harmful in the long term. Foster care breeds attachment disorder.[109]

Too many child advocates are blinded by preconceived notions, and conveniently ignore obvious problems underlying their views. Instead of focusing on the "save the children" rhetoric, they should pay attention to the slow, steady, pervasive harm perpetrated upon thousands

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[106] Eagle, R., The Separation Experience of Children in Long Term Care: Theory, Resources, and Implications for Practice, 64 THE AMERICAN JOURNAL OF ORTHOPSYCHIATRY 421 (1994) (long-term foster care is associated with increased emotional problems, delinquency, substance abuse and academic problems); Wertheimer, supra note 90 (documenting that children in foster care are more likely than children living with their parents to experience behavioral and emotional problems, school adjustment problems, and physical and mental health issues, and are more likely to engage in risky behaviors).

[107] Guggenheim, supra note 94, at 1725-26 (documenting an increase of almost 55% in the number of abuse and neglect petitions filed in New York City over a period of four years following a highly publicized death in 1995, despite the lack of any evidence of a change in the rate at which child abuse was actually occurring).

[108] See, e.g., William Spencer & Dean Knudsen, Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children, 14 CHILD. AND YOUTH SERVICES REV. 485 (1992) (finding that rates of maltreatment were higher for children in a variety of out-of-home settings than for children in their own homes).

[109] See generally John Balby, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988).

of children through unnecessary foster care placement. In a context where the modus operandi is to "err on side of caution" courts should place equal value on harm caused by unnecessary separation and harm caused by failure to remove children from families quickly enough.

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