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The Rights of Parents†

Robert J. Levy*

My topic today transcends doctrinal confines. My concern is perpetuation of the family as the most important relationship in our society—as the unit which provides, and should continue to provide, the basic emotional and socializing experiences for our children. Those functions can be served effectively, I believe, only if the family is considered to be and is treated as an autonomous unit, and if families are protected from untoward governmental interference with their operations.¹ Yet the current “children’s rights” campaign, by increasing government intrusion into family decisionmaking, has at least the potential to upset the traditional social compact that undergirds these family-centered values. To eliminate the threat, we must strive to maintain a stance of “family privacy”—a policy that families may not be supervised by judicial or other agents of the state. I choose to call that stance “Respect for Family Autonomy;” the people I call the “new child savers” claim that I am simply an old-fashioned supporter of “parental rights.”

Let me start with a few “war stories”—because they are dramatic, because they make my points, and because “the other

† This paper was prepared for delivery at the 1976 Conference on Government Impact in Family Life, conducted by the Family Research Center of Brigham Young University. It was one of several relatively short addresses presented at one session of the conference; as a result, many of its themes are not fully documented and developed, nor are its proposals exhaustively defended. Versions of this paper will appear in the *Proceedings of the conference at Brigham Young University* and in the *Proceedings of the University of Wisconsin Child Advocacy Conference*.

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1. If the family relationship were not given primacy among social values, the proper scope of governmental interference with family functions might well depend solely on an empirical inquiry and a weighing of the costs to families and children of government intervention against its benefits. But I would urge minimal government intrusion in family decisionmaking even if an investigation showed that such intrusions would be, on balance, of more help than harm. See particularly the text following note 15 *infra*. Yet the assignment of primacy to family values (as contrasted, say, with giving preference to individual autonomy—a stance that might imply quite a different approach to judicial supervision of parents’ care of their children) obviously proceeds from a broader theory as to the respective spheres of governmental and family authority and individual discretion. Delineation of that broader theory must await another occasion. It is worth noting, however, that many of the recent scholarly explorations of the issues considered here seem to make a similar if not identical assumption as to the importance of the family. See authorities cited in note 19 *infra*.

side" always makes use of them. Despite the differences in their legal contexts, each of these cases provides an apt illustration of a judicial disposition—most noticeable at the trial court level—to intrude unduly upon the privacy of family decisionmaking; to put it in the terms of my title, a judicial penchant for interfering with the exercise of parent rights.

Consider first *Kilgrow v. Kilgrow*.² The case arose as the result of a dispute between a Catholic father and a Protestant mother, living together as husband and wife, as to whether their only child should be enrolled in a parochial or a public school. The trial judge enjoined the mother from interfering with the child's enrollment in parochial school because that educational choice would be in the child's "best interests." The Alabama Supreme Court reversed, holding that the trial court had no jurisdiction to determine the dispute. Consider also *In re L.A.G.*,³ in which a Minnesota juvenile court judge, citing the Magna Charta and *Wisconsin v. Yoder*,⁴ decided that he had jurisdiction to decide a dispute between a 15-year-old girl and her parents as to whether it was better for her to go on a 2-year yacht trip which the parents had been planning for 10 years, or to remain in Minnesota in close proximity to a boyfriend (of another race) of whom the parents disapproved. Yet when the parents, seeing the jurisdictional handwriting on the wall, suggested as an alternative plan that the child spend the next 2 years in the custody of a maternal aunt in Philadelphia, the judge ordered that disposition on grounds that the parents' plan for their child must be accepted if it is "reasonable."

In *Frizzell v. Frizzell*,⁵ a father who had been separated from his wife for 10 years under a separate maintenance decree was unhappy with her decision to send their son, of whom she was the legal guardian, to a private Catholic university; the trial court's residual authority to supervise its decrees was invoked by the father and the judge ordered the boy enrolled in a state college. The appellate court agreed with the mother that the custodian normally has authority to make decisions about the child's education; the trial judge's interference was nonetheless approved because the custodial parent's authority is subject to judicial con-

2. 268 Ala. 475, 107 So. 2d 855 (1958).

3. Hennepin County Dist. Ct. (Juv. Div.), Minn., Aug. 11, 1972. See also C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIALS ON FAMILY LAW 8-9* (2d ed. 1976) [hereinafter cited as FOOTE, LEVY & SANDER].

4. 406 U.S. 205 (1972).

5. 158 Cal. App. 652, 323 P.2d 188 (1st Dist. 1958).

trol in the "best interests" of the child and in this case the trial judge did not abuse his discretion. In another case involving a post-divorce dispute,⁶ a referee in a Minnesota Family Court heard the father's motion to transfer custody of a 3-year-old child from the mother. Because the father presented testimony that the mother was keeping company with another man (a man, by the way, whom she planned to marry as soon as his own divorce was granted), the judge continued the case for 6 months and ordered the probation service of the court to make unannounced visits to the mother's home during that period. The order continued:

Effective immediately and during the period of continuance, [the wife] shall not permit any non-related male to reside in [or] remain overnight in her household. Violation of any condition hereunder shall be deemed sufficient grounds for an immediate transfer of permanent custody to [the father].⁷

The order was amended to delete the quoted provision when the mother appealed to the Family Court judge.

You may also be interested in the difficulties of the Raya family.⁸ Poor Chicano parents were obtaining a divorce after a 6-year separation. They had not been able to obtain a legal remedy for their marital problems earlier because the local Legal Aid Society had refused to handle divorces. Each parent had established a stable, nonmarital relationship with another person (which had resulted in four more children for the mother, three more for the father). Although a custody investigator reported that the two children of the couple were well cared for, doing well in school and should remain in the mother's custody, and although both parents planned to marry their informal mates when the divorce was finalized, the trial judge referred the matter to the juvenile court. The children were adjudicated neglected solely because of the mother's extramarital liaison and were removed from her home. (Interestingly enough, the children were originally placed with the maternal grandmother until, 3 months later, the judge found that the grandmother wasn't married to her "husband" either.) The appellate court reversed the neglect adjudication.

One last "war story." Some years ago, when I visited the New York City Family Court, I was invited to share the bench with one of the judges hearing truancy cases—unauthorized absence from

6. Unreported decree of Minnesota Family Court, on file with author.

7. *Id.*

8. *In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967).

school was one of the grounds for juvenile court jurisdiction in New York at that time. As the judge thumbed through the file, a stray remark of a social worker concerning a spanking given by the father to the child was noticed. With a remark to me about the evils of battering children (but with no evidence whatever as to the family relationship or the extent of the physical harm the child had suffered, if any), the judge peremptorily ordered the hearing converted to a neglect proceeding with at least the possibility that the child would be removed from the parent's home.

It should be clear that the cases I have described are disparate: in two of them, the parochial school dispute and the affair of the yacht trip, a judge was asked to act as an arbitrator of an intrafamily controversy (in one, between the parents, in the other, between the parents and the child); in two cases, the Catholic college contretemps and the mother who began her new marriage prematurely, a judge who had "jurisdiction" over the parents and/or the child because of a prior judicial decree (of divorce in one instance, of separate maintenance in the other) interfered with the custodial parent's decisionmaking autonomy at the behest of the noncustodial parent; and finally, there were two juvenile court neglect cases—the context which in recent years has most often inspired the charge that judges muck around entirely too much in family life or, if you will, with parental rights. Although the contexts differ, the cases all illustrate a current norm which is both unwise and dangerous: judicial over-involvement in family affairs and parental decisionmaking.

It would not be difficult to multiply my "war stories." I would not assert that the cases chosen are fairly representative of judicial efforts concerning children and families. Yet I have avoided choosing the rock-bottom "worst" cases simply to persuade you of the thesis which follows. Moreover, the cases are typical in the sense that each periodic survey I make of recent appellate decisions turns up one or more cases suitable for my library. More important, the broad public support which the child welfare movement commands leads me to believe that my library will expand more rapidly in the future. Lest you conclude that I overestimate the risk of wholesale intervention, consider the recent suggestion made by Patricia Wald, a widely known and respected child's advocate. After cataloguing a long list of denials of rights to children, Wald contends:

[I]n situations where the interests of the child (no matter his age) and the parents are apt to conflict or a serious adverse impact on the child is likely to be the consequence of unilateral

parental actions, it is now argued that the child's interests deserve representation by an independent advocate before a neutral decisionmaker.⁹

I believe that we must take account of the terrible risks to private family decisionmaking that current legal doctrines and the current fascination with "children's rights" pose; we must pay close attention to the extent to which current practices of judges in fact maximize those risks; and we must create corrective doctrines—judicially or, preferably, legislatively—which adequately protect the interests of families.

I should add a note of caution. I am not one of those (there are a few) who believe that it is under all circumstances improper for judges to intrude upon parental decisionmaking. Rather, I would draft rules that carefully, overtly, and severely circumscribe judges' power to do so. You will no doubt note that since I am thus obligated to draft quite specific statutory guidelines, and since some family situations which merit intervention will inevitably escape through the legislative interstices, I have weakened my defenses to the impact of the "war stories" of "child savers." The last time I argued this thesis I heard about the mother who liked to iron her daughter's dresses—while the daughter wore them. (Indeed, the impact of that case on the audience induced my decision to begin this talk with a few "war stories" of my own.) I recognize that the policies I recommend will inevitably produce cases in which parents make family decisions that are *not* in the child's best interests although a judge would make the "right" decision with little long-range impact on *that* individual family; these policies will also produce some cases in which parents will behave toward their children in a fashion that everyone at this Conference would believe probably places the child at present or future psychological, perhaps even physical, risk (although I doubt that our consensus as to behavior that produces such risk would hold among all socioeconomic, ethnic, and racial classes). Nonetheless, doctrines that permit us to reach these cases by authoritarian intervention also permit and encourage a larger amount of intervention of which all of us, or at least all but the most recalcitrant "child savers" among us, would disapprove.

9. P. Wald, *Making Sense Out of the Rights of Youth*, 4 HUMAN RIGHTS 13, 17 (1974). I hasten to add that Wald later makes sophisticated adjustments to this expansive principle. Thus, after outlining a number of narrowly drawn procedural and substantive rights children should enjoy, to none of which I would object, she comments: "No one envisions allowing children to run to court for an injunction whenever their parents lay down unacceptable rules of conduct." *Id.* at 21.

Since legal doctrines should be adopted only after assessing their costs as well as their benefits, I would opt to save more families from judges even if it means that some parents will be permitted to sacrifice their children. Thus, I prefer to maximize "family autonomy" or, if you still insist, to preserve "parental rights."

II

Although it may belabor the obvious, let me quickly outline the justifications for preferring "family autonomy."

In the neutral arbitrator cases (the parochial school dispute and the almost aborted yacht trip), judicial noninterference helps to reinforce the notions that the family is the basic social institution, that the family unit will be undermined if outsiders, especially judges, make decisions for it. The only alternative is to assume that parents will take the family's needs and their children's interests and wishes into account, and to permit the parents to make decisions in as familiarly democratic or parentally fascistic a fashion as they choose, but without outside interference. Moreover, in general (again a warning: not in every case), parents will make better decisions than judges since they are more familiar with the psychological and other dynamics of the family than judges can become through judicial processes.

The themes are nicely expressed in the *Kilgrow* case:

It seems to us, if we should hold that equity has jurisdiction in this case such holding will open wide the gates for settlement in equity of all sorts and varieties of intimate family disputes concerning the upbringing of children. The absence of cases dealing with the question indicates a reluctance of courts to assume jurisdiction in disputes arising out of the intimate family circle. It does not take much imagination to envision the extent to which explosive differences of opinion between parents as to the proper upbringing of their children could be brought into court for attempted solution.

In none of our cases has the court intervened to settle a controversy between unseparated parents as to some matter incident to the well-being of the child, where there was no question presented as to which parent should have custody. In all of our cases the real question has been which parent should properly be awarded custody. Never has the court put itself in the place of the parents and interposed its judgment as to the course which otherwise amicable parents should pursue in discharging their parental duty

The inherent jurisdiction of courts of equity over infants is a matter of necessity, coming into exercise only where there has

been a failure of that natural power and obligation which is the province of parenthood. It is a jurisdiction assumed by the courts only when it is forfeited by a natural custodian incident to a broken home or neglect, or as a result of a natural custodian's incapacity, unfitness or death. It is only for compelling reason that a parent is deprived of custody of his or her child

. . . .¹⁰

The same note was struck in *People ex rel. Sisson v. Sisson*,¹¹ a case in which the parents could not agree as to the religious training of the child. The trial judge and two sets of appellate judges seemed to agree that Mr. Sisson's behavior was "extreme and unreasonable" and that "it would be difficult for the average man of sound mental balance, education and clear understanding of the nature and necessity of family unity, to dissent from this conclusion."¹² Nonetheless, the court of appeals ordered the mother's writ of habeas corpus, designed to constrain the father's behavior, dismissed:

The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law. The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act.¹³

In divorce-custody and juvenile court neglect cases, additional considerations can be isolated. A democratic society must provide freedom from authoritarian interference by governmental agencies—that freedom must be maximized even if it entails leaving children to their parents' sometimes not very tender mercies. Moreover there is now an accumulation of evidence (of which I have barely given you a taste) that the absence of a constraining doctrine of "family autonomy" leads frequently to trial court and juvenile court excesses—unnecessary, sometimes outrageous, intrusions upon family decisionmaking as well as flagrant floutings of common sense. There is also a substantial body

10. *Kilgrow v. Kilgrow*, 268 Ala. 475, 479, 107 So.2d 885, 888 (1958).

11. 271 N.Y. 285, 2 N.E.2d 660 (1936).

12. *People ex rel. Sisson v. Sisson*, 246 App. Div. 151, 155, 285 N.Y.S. 41, 44-45 (3d Dep't 1936).

13. 271 N.Y. at 287-88, 2 N.E.2d at 661.

of evidence indicating that, while trial judges are considerably more interventionist than appellate court opinions suggest is appropriate, control by appellate review is not an adequate safeguard: appeals are uncommon since the populations at risk lack money and social sophistication. It is clear, moreover, that the families at risk are usually lower class, ethnically or racially different from the personnel of the intervention agencies, and they often do not share the middle class values that those agencies believe (on the basis of very little evidence) are vital to healthy child development.

Transcending these considerations in every context, in my view, is the need to control judicial discretion. In the neutral arbitrator cases—as the yacht trip decision indicates—any exercise of jurisdiction entails substantial amounts of discretion at two levels: (1) in the original decision to intervene, and (2) in the details of the judicial disposition once intervention is permissible. In the divorce-custody cases, the guiding shibboleth—the “best interests of the child”—hardly constrains trial judge discretion.¹⁴ And the juvenile court’s neglect jurisdiction has traditionally been so broad and so vague as to authorize juvenile court judges to intervene in family affairs virtually whenever they want to. Consider the Minnesota Juvenile Court Act’s definitions of neglect:

“Neglected child” means a child:

(a) Who is abandoned by his parent, guardian, or other custodian; or

(b) Who is without proper parental care because of the faults or habits of his parent, guardian, or other custodian; or

(c) Who is without necessary subsistence, education or other care necessary for his physical or mental health or morals because his parent, guardian, or other custodian neglects or refuses to provide it; or

(d) Who is without the special care made necessary by his physical or mental condition because his parent, guardian, or other custodian neglects or refuses to provide it; or

(e) Whose occupation, behavior, condition, environment or associations are such as to be injurious or dangerous to himself or others; or . . .

(g) Whose parent, guardian, or custodian has made arrangements for his placement in a manner detrimental to the welfare of the child or in violation of the law . . .¹⁵

14. See generally FOOTE, LEVY & SANDER 400-430.

15. MINN. STAT. ANN. § 260.015(10) (Supp. 1975).

Clearly, such vague phrases are necessary if juvenile court judges are to have authority to intervene in all cases in which they could conceivably be useful. But it is also clear that such authority has often been used where it shouldn't have been, and has often resulted in unquestionably unjustifiable judicial impositions on individual and family decisions. These results, I believe, are the inevitable byproducts of the vagueness of the legislative direction. Virtually unconstrained discretion permits, even fosters, the imposition by a judge of his own personal values upon the litigants before him. Consider *In re Woodward*,¹⁶ a guardianship case (jurisdiction was thus not in issue) in which a Catholic stepfather was litigating against his deceased wife's Protestant parents for custody of the child. An unusually frank trial judge commented:

There being no disputed question of law or fact herein, the Court turns to the consideration of the exercise of its judicial discretion. Although a court is charged with the duty of dispensing even-handed justice in accordance with law, and makes its best and sincere effort to do so, it is recognized that where a decision rests upon judicial discretion, to some extent the parties are at the mercy of the court's background and experience. And that is something very difficult for the parties, through their counsel, to meet. They cannot cross-examine the Court on his life history and personal biases and prejudices, many, if not most, of which he himself may not realize he possesses. Nonetheless, in some measure in matters of this sort the background and experience of the Court affect his decisions very much as though a highly respected and competent expert witness had taken the stand and testified concerning the principles involved, with the evidence standing undenied and unimpeached. Respondent's counsel seem to have recognized this in making one of their arguments personal to the Court's family.¹⁷

Or consider the comment of a California legislative committee about divorce-custody litigation:

The exercise of this discretion cannot be considered simply as a legal function, no matter how learned in the law a judge may be. We must recognize that the discretion exercised by a trial judge is far less a product of his learning than of his personality and temperament, his background and interests, his biases and prejudices, conscious or unconscious. Hence, it is both necessary

16. 102 N.Y.S. 2d 490 (Surr. Ct., Monroe County 1951).

17. *Id.* at 494.

and practicable to attempt to give more definite substance to the generalizations that creep into our laws and into our cases.¹⁸

Imposition of personal values—which a discretionary system cannot avoid—is especially dangerous in the contexts with which we are concerned. In neutral arbitrator cases, a judge can eliminate from his calculus neither his own feelings as to the obedience children owe their parents nor his feelings as to the choices the parents have made or are planning to make. It is not uncommon for a judge in divorce-custody cases to impose not only his own values as to child-rearing on the litigants before him, but also his unresolved feelings about his own divorce. Most dangerously, the juvenile court judge is accustomed (if not invited by the legislature) to impose his middle class values on a population which, by and large, does not share those values. To give one homely illustration: I find it difficult, at best, to predict that my children will turn out better because I'm too guilty to spank them than will the children of an old-fashioned Eastern European parent who believes in the virtues of the belt or even the rod. But under the typical discretionary juvenile court-neglect statute, if the judge is surer of his "no-spank" methods than I am of mine (and the New York Family Court judge I mentioned certainly was!), the belt or rod father may be in deep trouble.

Discretion also gives the judge permission to vent his wrath on the recalcitrant people who regularly appear before him but refuse to "better themselves" in accordance with the personal standards he shares with his probation officer colleagues. If you accept the system's premises, of course, the judge often has good cause to be angry. But the bottom line is that a system created to benefit children often results in punitive expeditions against the parents as well as the children: placements in foster homes for little reason, with the expectation not that parental attitudes and behaviors will change, but only that the children will be further alienated; and unnecessary terminations of parental rights. I will probably not be able to persuade you from the evidence I have time to present today that such punitive expeditions occur; but I can assure you that in recent years an increasing body of secondary literature attests to their existence and gives some indication of their frequency.¹⁹

18. CAL. ASSEMBLY INTERIM COMM. ON JUDICIARY, FINAL REPORT RELATING TO DOMESTIC RELATIONS 153 (1965).

19. See, e.g., FOOTE, LEVY & SANDER 54-72; M. Wald, *State Intervention on Behalf of "Neglected Children": A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973).

Wald's approach to some of these problems, proceeding from quite different premises than my own, deserves careful attention:

[A] fundamental reason why children's rights has emerged as a serious topic at all is the erosion in confidence in the family [reliably] to meet all the needs of the child. . . . Intact families whose members love and respect each other would not be likely to disintegrate if there were to be a different allocation of rights and privileges within the family. I would wager that most strong family units already allow their children the freedom we are talking about. It is the borderline, shaky or unstable family structures that might split open when the lines of authority become more blurred. These are also the high risk families in which abuse and exploitation of children are most likely to occur, and where children most need an affirmation of their basic rights. Subconsciously, we may worry that parents will say "why should I feed, house and educate you if you won't do what I say; if, in short, I can't control you?" . . . I do not think we have any evidence that the viability of the family will be jeopardized by more freedom for the children or, indeed, that the continuation of its present rigid power structure is essential to preservation at all²⁰

In the first place, there is no evidence that "unstable" families (that is, those most likely to "split open" because of judicial intervention) are also abusive and exploitative—unless those phrases describe parents with whose childcare decisions the author disagrees. It may well be true (although, once again, we have no accurate information on the subject) that "strong family units" allow their children considerable freedom; and certainly there is no evidence that weak or strong family units will "split open" if a different legal regime were to be instituted or if judges in occasional "low visibility" cases were to displace parental authority. But the argument simply misses the point. Even if all family units could withstand the occasional impositions and idiosyncrasies of juvenile court discretion, believers in a democratic and pluralistic society should be unwilling to give so much unbridled discretion to judges. Even if the issue were posed strictly in terms of weighing costs and benefits, my own experience with juvenile courts and trial judges in custody and intrafamily dispute cases leads me to conclude—on the basis of very impressionistic rather than quantified data—that the demonstrated abuses of discretionary jurisdiction outweigh its benefits. But we

20. P. Wald, *supra* note 9, at 23-24.

must add in the balance the independent social value of family autonomy and the necessity to constrain the judiciary. With these weighty considerations buttressing it, the case for "parental rights" seems to me to be overwhelming.

Children's rights advocates often respond to these contentions by claiming that I ignore the state's traditional *parens patriae* role toward children. Perhaps I do. But I typically call to my defense another Latin phrase: if judges and lawyers are to protect children from the depredations of their parents, *quis custodes custodiet?*

III

It remains only to sketch, quickly and inadequately, some of the implications of the notion of "family autonomy." As you have surmised from the variety of my "war stories," I would apply the notion across the board to every aspect of family law doctrine. Consider just a few of the legal contexts in which parental decisionmaking and judicial discretion have often in the past come in conflict.

The courts should be denied authority to intervene in the neutral arbitrator-intrafamily dispute cases unless the parental behavior falls below minimal community standards of adequacy as articulated in those considerably narrowed jurisdictional definitions of parental neglect that "family privacy" principles would permit. Because children, parents and nonmembers of the family with whom they deal often need legal guidance, the legislature should provide rules that would determine after-the-fact litigation but would not allow a judge to make ad hoc family decisions for the child and the parents. In this fashion the value choices that should be made can be made overtly and with careful attention to the intricacy and subtle variety of the issues: modifying policies, perhaps, as the factual context changes slightly. Consider the problem of medical care for an unemancipated minor. For the Juvenile Justice Standards Project, a joint endeavor of the Institute of Judicial Administration and the American Bar Association,²¹ Professor Feld and I are drafting legislative rules that address the following separable questions: at what age can

21. For other endeavors attributable, at least in part, to the Standards Commission see, e.g., *The Ellery C. Decision: A Case Study of Judicial Regulation of Juvenile Status Offenders*, INSTITUTE OF JUDICIAL ADMINISTRATION (1975); Note, *Contemporary Studies Project: Funding the Juvenile Justice System in Iowa*, 60 IOWA L. REV. 1149 (1975). See also M. Wald, *supra* note 19. Neither the policies described here nor other standards in "The Rights of Minors" volume have been finally approved by the Commission.

a child decide for himself, without prior parental consent, that he needs or wants a specific form of medical treatment; at what age, or under what (if any) circumstances, must a doctor notify parents that he is performing a given medical procedure on their child even if their consent need not be obtained; under what circumstances are parents liable for the costs of a medical procedure. We believe that the legislative rules should be mechanical and should vary with the danger of the procedure and its importance to the child. Thus, an abortion should be available to a child without parental notice or consent after age 14 and, perhaps, at some earlier age, with parental notice but without parental consent; but a sterilization should never be permissible, even with parental consent, prior to the age of 18 because the procedure is irremediable and the risks of "involuntary consent," by both parents and child, are too great. A child should be able to obtain drug abuse treatment without notice to or consent of parents, but only a limited number of crisis psychological treatments should be available without notice to parents and without parental consent. Parents should be financially liable only for those medical procedures for which the legislative rules require their prior consent.

Divorce-custody law and practice would also profit if legislatures and judges gave greater deference to "family privacy" values. Family court judges should not be permitted to interfere with voluntary parental decisions as to the child's post-divorce custody—even to appoint a guardian ad litem for the child. The juvenile court is always available, of course, if the prospective custodial parent neglects the child; and separating the state's divorce and neglect jurisdiction provides parents and children with some protection from too intrusive judges just when intra-family strife is most likely to make the family appear from the outside to need intervention.²² The reasons were articulated by a British study some years ago:

Some people think that there are many instances where better arrangements could have been made for the children; other people think that these cases are few

It is, however, important to keep the following considerations in mind. . . . The question in almost all cases is that of deciding which of the parents is to be responsible for the child's upbringing, and in which home the child is to live. However unsatisfactory some homes may appear to be, it is generally

22. See generally FOOTE, LEVY & SANDER 447-48.

accepted that such conditions can often co-exist with strong ties of affection between parent and child. The alternative to leaving the child in the charge of the parent would be to try to find a suitable relative or friend who is willing to undertake the child, or failing that, that the local authority [the welfare department] should receive the child into care; and it is obvious that conditions would have to be really bad before one of these courses could be justified. Moreover, we consider that in the great majority of cases parents are the best judges of their children's welfare. Where they are agreed upon the arrangements for the children, very strong evidence indeed would be required to justify setting aside their proposals.²³

To protect families from the vagueness of the "best interest" doctrine applicable to initial custody decisions, the legislature should enact a series of presumptions, very difficult to rebut, that would guide judicial decisions in contested cases, and incidentally, discourage contests. Legislation should make original custody decisions very close to final unless the parents change the child's custody by agreement.²⁴ At a given age—at 12 perhaps, or 14 if I am feeling like a parental fascist—the legislature should instruct the judge to leave the custody decision to the child. To further constrain trial judges, the legislature should add to the divorce-custody statute a direction that trial judges must decide "to which of the parents" the child should be awarded.²⁵ By denying divorce jurisdiction judges authority to award custody to a third person, such a statutory provision may discourage such judges from confusing their powers with those of juvenile courts. Finally, the legislatures should deprive judges of authority to review the decisions of the custodial parent as to all issues but visitation by the noncustodial parent.²⁶ The Catholic college case would not arise in my system.²⁷

I do not have time this morning to explore in detail the impli-

23. ROYAL COMM'N ON MARRIAGE AND DIVORCE, Cmnd. No. 9678, paras. 370-371 (1956).

24. An increasing number of judges and commentators seem to agree with this proposition. See, e.g., *Miller v. Miller*, 202 N.W.2d 105 (Iowa 1972); Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody in and out of State*, 46 U. COLO. L. REV. 495 (1975). However, that does not make me confident that the other propositions will also be eventually accepted.

25. See, e.g., MINN. STAT. ANN. § 518.17(2) (Supp. 1975).

26. Cf. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37-38 (1973) (urging that even visitation should be at the sole discretion of the custodial parent).

27. These issues are explored in greater detail at FOOTE, LEVY & SANDER 388-438; Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies*, 4 LAW & SOC. REV. 167 (1969).

cations of a notion of "family privacy" for the law of neglect. But I can refer you to some excellent recent examinations of the topic by Professor Michael Wald²⁸ and Professor Mnookin.²⁹ Not surprisingly, both authors recognize the risks and the incidence of juvenile court abuse of discretionary jurisdictional standards and recommend constraints on judicial power. It is fair to say that the logic of my statement of the family autonomy principle would compel me to adopt even narrower definitions of neglect (e.g., eliminating "emotional neglect" as a ground for intervention) than does Professor Wald; yet I am informed that his relatively modest proposals have already brought the child welfare lobby to the trenches. I would eliminate entirely a number of the typical definitions of neglect—such as the reference in the Minnesota Act to the parents' "faults or habits,"³⁰ and the provision directing attention to the child whose "environment or associations are such as to be dangerous to himself or others . . ."³¹ These provisions, and others like them, give juvenile court judges virtually unreviewable discretion to intervene in too many family situations where the need for judicial supervision cannot be justified and the consequences of judicial supervision have too often been disastrous. In addition, we should draft all jurisdictional provisions narrowly—knowing that some children who need help will thus escape our net, but also knowing that juvenile court judges, encouraged by their "child saving" fantasies and emboldened by the "children's rights" movement, will in any event interpret the jurisdictional provisions at least as expansively as the latest appellate court decision will allow.

28. M. Wald, *supra* note 19.

29. Mnookin, *supra* note 19.

30. MINN. STAT. ANN. § 260.015(10)(b) (Supp. 1975).

31. *Id.* § 260.15(10)(e).

