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SPECIAL REPORT

Why Has the Best-Interest Standard Survived?: The Historic and Social Context

*by Professor Janet L. Dolgin**

For almost two centuries, American family law has asserted that it places children and their welfare at the heart of custody and parentage determinations. That statement, institutionalized in the United States as the "best-interest" standard (or principle),[1] has become almost impossible to attack. However, the best-interest standard is widely criticized for providing little concrete guidance to courts asked to settle disputes involving children's custody. The standard, as applied, grants courts remarkable flexibility. As a result, reliance on the standard ensures widely discrepant, even contradictory, results in custody cases, depending on the presiding judge. The standard, presumed to determine and protect the interests of children, more often seems to encourage courts to focus on and to protect the interests of the disputing adults.

The consistency with which state legislatures have historically required courts to apply the best-interest standard, or with which courts themselves have depended upon judicial precedent for applying the standard, is puzzling in light of the steady flow of criticism that has been applied to the standard since its inception. From time to time, negative appraisals of the standard have resulted in statutory adjustments, but not in a definitive replacement of the standard with an essentially different approach to custody determinations.

The continued vitality of the best-interest standard as the central principle in custody cases seems puzzling. However, its success can be explained. That explanation, which depends on an examination of the historic context within which the standard developed and within which it has been applied, suggests that the survival of the best-interest principle is essentially unrelated to actual children and the protection of their interests.

In presenting that explanation, this article first reviews criticisms of the standard. That review is followed by an examination of the 19th century social and familial world within which the best-interest standard was conceived, adopted, and institutionalized. Finally, the many advantages that the best-interest standard has held for the legal system are described within the context of the legal history of family regulation during the past two centuries.

Thus, the central aim of this article is to explain how and why a principle so obviously flawed and so openly criticized as the best-interest standard has not only survived but flourished for well over a century and a half.

I. Criticisms of the Best-Interest Standard

The best-interest standard has been often criticized for requiring courts to make subjective decisions regarding children's welfare. At best, the standard offers some broad guidance to courts handling children's custody or parentage disputes.[2] The standard, however, is vague and non-directive, and permits the law to justify custody (and sometimes even parentage) decisions that actually harm children. In effect, it provides the illusion rather than the reality, of legislative guidance to courts facing disputes about the selection of children's custodians and parents. More specifically, invoking children's interests as the guiding principle in such cases can disguise other agendas that serve neither the particular children at issue nor children in general.

Since Robert Mnookin's seminal critique of the best-interest standard in 1975, many others have agreed with his central criticism that the standard proves "indeterminate" in practice.[3] Thus, the standard often fails to provide any direction.[4] Because the standard provides no objective basis for judicial choices, best interest decisions depend on the character, values, and prejudices of the presiding judge.

The level of insight needed to make wise best-interest determinations is greater than that

possessed by most people, including most judges. Even if judges were able to make reasonable guesses about the consequences of various options for a child—and they, like most people are not—best-interest decisions demand more. Such decisions require that judges sort out, and select among, a wide array of seemingly reasonable value choices available within the culture at any time. As Mnookin explained two decades ago:

> Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warm, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation? Those questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.[5]

Even statutory versions of the best-interest standard that attempt to delineate relevant values and give some content to those values remain normative rather than objective.[6] Thus, best-interest determinations remain dependent on the values and choices of particular judges, thereby ensuring wide differences in the character of decisions made in custody cases.

Moreover, a well-intentioned judge, anxious to discern a child's best interests in a custody case must consider the lives and personal characteristics of potential custodians. That task encourages courts to compare these adults. In making such a comparison, it is easy to weight the balance in favor of one potential custodian by focusing on negative behaviors associated with another. Stereotypic behaviors can be institutionalized as grounds for automatically refusing custody. For instance, courts have denied custody to a parent because that parent was involved in a same-sex relationship[7] or an interracial marriage.[8] These and other behaviors viewed by a court as socially marginal may become determinative in custody decisions. They may preclude judicial review of the child's larger situation. This in turn minimizes the likelihood that the best interests of the child will in fact be met.[9]

Judges in general are not provided the luxury of time necessary to consider and analyze the details of each custody case, including the social and economic facts, the characters of the people involved and the complicated interactions that have occurred, and that are likely to occur, among these people. As a result, information about disputing adults' psychological, social, behavioral, or moral traits can easily become conclusions about a child's custody rather than information that should be considered by courts before reaching custody determinations.

By focusing on the traits of potential custodians, the needs and interests of children can become secondary to those of contending adults. In consequence, courts can inadvertently focus on the "best interests" of adults rather than of children. That focus, however, is often disguised by the use of the best-interest standard which states unequivocally that children and their interests are primary.

Indeed, the readiness of the law to bypass the needs and interests of children is demonstrated by cases in which the child's interests are displaced by constitutional principles that expressly protect adults' rights and needs. Professor Wendy Fitzgerald has asserted that "[w]here the parents wield a well-recognized constitutional right, such as the general right to custody or right to freedom from racial discrimination, the statutory 'best interests' mandate for the child is doomed."[10]

Thus, the interests of a child can be subverted by a judge who displaces that child's interests through application of a principle aimed at protecting the constitutional rights of adults. More often, children's interests are subverted less self-consciously and less transparently by a judge who simply fails to understand the complicated personalities and interactions involved in a custody case, or by one who assumes that middle-class, comparatively mainstream adults will better serve a child's interests.[11] In almost all of these cases (especially those involving judicial failure to perceive and to understand children's interests) application of the best-interest standard masks the disregard of

children's welfare.

Furthermore, the institutionalization of the best-interest standard is redundant. The large majority of courts involved in determining a child's custody or parentage are likely to be attentive to children's interests, at least for purposes of composing judicial rhetoric. Only rarely would a court openly abrogate a child's welfare or fail to invoke the interests of children as an express dimension of, and justification for, a custody determination. The invocation of children's interests—an invocation that often represents the full extent of the law's attention to, and concern for, children's welfare—would likely be heard in family courts even if the best-interest standard had never become the predominant rule of law. As Professor Clark noted in his hornbook on family law: "(i)t would be an odd legal system indeed which would announce that custody would *not* be awarded with regard to the child's best interests."[12] Today such an announcement *would* be more than odd. It would be morally suspect as well.

Nevertheless, other societies, and our society centuries ago, did not consider the welfare of children when establishing their custody or parentage in cases of parental failure, death or separation. Only a review of that earlier history, including the conception, early adoption and later institutionalization of the best-interest standard in American family law, shows why a standard that so often fails to attain its avowed end has endured for so long.

II. The Historic Context

In the United States, children and their interests became the intellectual and moral focus of custody and parentage determinations only in the first half of the 19th century. Before that time, courts did consider, and then rejected consideration of children's interests in custody determinations. In the centuries that preceded the Industrial Revolution, it was almost unimaginable that anyone would have thought to frame custody determinations in terms of the interests of the children involved.

In the colonial period and for almost two centuries thereafter, children were routinely hired out as indentured servants pursuant to contracts between their parents and their caretaker-bosses. These indenture agreements gave no rights to the indentured children, and only those rights enumerated in the contract to the children's parents.[13] Many other children came to the United States forcibly as indentured servants.

Moreover, the common law, following the model of Roman law, almost invariably granted custody to fathers in contested cases. This was not done in order to serve the interests of children, but because children were viewed as property and, as such, were owned and controlled by their fathers. For instance, in *Rex v. Manneville*,[14] decided at the start of the 19th century and often cited to indicate the strength of the law's preference for fathers, an English court gave custody of a baby to its father despite the mother's uncontested claims about the father's great cruelty.

In the next several decades a broad social transformation in images of family and children occurred. At the same time, and not by coincidence, the best-interest standard developed and children's interests became central, in custody and parentage determinations, at least rhetorically.

The vast disruptions brought with the Industrial Revolution, including the practical and ideological separation of home and work, encouraged a far-reaching nostalgia for traditional social patterns and values. As fathers began routinely to leave home each day for work in the marketplace, home and hearth became the exclusive domain of mothers and children. Within that context, women and children became more and more independent of men. At the same time, newly romanticized understandings of family relationships appeared and soon developed into the central ideology[15] of 19th and 20th century family life. In this new view, the home was identified with nurturing women and their treasured children. Such images of home, increasingly understood in contrast to images of work, depicted the home as an emotional refuge from the tensions of the marketplace and helped ensure the continued separation of men at work from women and children at home.

The new ideology of family and home increasingly focused on children and childhood as central to the creation of family life. Between the end of the colonial period and the start of the 20th century, new, affectionate views of children and childhood were firmly cemented in society and law. This development is still evident in the law's understanding of family relationships in general and in the survival of the best-interest standard, in particular, into the present time.

Glorified notions of women and children that developed during the 19th century evoked old-

fashioned, decent American families. Ironically, these images represented contemporary rather than ancient understandings of women and of children. This model, born of an understanding of the family that developed during the early 19th century, continues to provide many with images of what makes up a proper (traditional) family life. This is true despite the vast and unprecedented transformations now occurring in the American family.

Almost from the start, the 19th century family, glorified as a hierarchial domain of love, responsibility, and enduring commitment was beset with pressure to conform more fully to the expectations of the market--to recognize family members as autonomous individuals, free to design the terms of their own realities. Within the past few decades, the second tendency (recognition of the autonomy of family members), has more and more often replaced the first (recognition of the family as an enduring, hierarchial whole). This is true especially with regard to the understanding of adults within families.[16] However, even in the 19th century basic social patterns within the family began to change. Not only did paternal authority weaken noticeably during this time, but the divorce rate rose;[17] the birth rate fell (especially within middle-class families);[18] and, marriage became increasingly a matter of individual choice rather than a matter to be arranged by the couple's larger family to serve their own interests. As relations among family members (especially spouses) began to resemble relations within the market, the countervailing ideology of the family as a domain set apart, and protected from, the world of work developed.

During the 19th century, society, perhaps for the first time in history, began to see the family as a product of historic processes rather than, or as well as, a product of nature. One of the earliest and most long-standing consequences of this new recognition was the appearance in the first half of the 19th century of custody decisions that relied on the best interests of the child. Within family law, as in the larger society, the developing recognition of children and their interests began to challenge familiar notions of familial connections. Thus, attention to the best interests of children justified displacing the once unyielding principle that always gave fathers custody of their children. In 1824, Justice Story expressly recognized the shift from absolute paternal rights in custody cases to a more flexible standard, as well as the greater transformation that was thereby implied. Continuing to recognize a general preference for paternal custody, Justice Story qualified the suggestion that fathers always deserve custody. He explained:

> But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education. When therefore the court is asked to lend its aid to put the infant into the custody of the father . . . it will look into all the circumstances and ascertain whether it will be for the real, permanent interests of the infant.[19]

Within a decade or two, the principle of paternal custody gave way to a preference for maternal custody in most cases. Preference for the mother in custody disputes grew almost inevitably out of the century's developing image of mothers, in contrast with fathers, as nurturing, selfless and virtuous,[20] and as endowed by nature with the capacity to raise children. At the same time, children lost the economic value they had held for agrarian families. With the Industrial Revolution, the economic role of children altered from producer to consumer.[21] Thus, fathers no longer had an economic incentive to retain custody of their children.

By the middle of the century, a treatise on marriage law proclaimed that a father's right "is not an absolute one, and is usually made to yield when the good of the child, which, especially according to the modern American decision, is the chief matter to be regarded, requires that it should."[22] Soon, through invocation of children's interests, American courts relied on a series of presumptions that favored mothers in most cases. These included the so-called "tender years presumption," which gave custody of young children to mothers, and the presumption that maternal custody better served the interests of older girls.[23]

By the second half of the 19th century, the shift away from paternal custody was acknowledged by state legislatures which began to direct courts to rely on the best interest principle in custody litigation. In 1855 and 1857, for example, Massachusetts promulgated statutes that granted courts some freedom in determining custody according to the "happiness and welfare of the

children."[24]

By the start of the 20th century, the best-interest standard had become firmly institutionalized. Since that time it has provided the central directive for courts resolving disputes about children's custody, and sometimes about their parentage. Over time, however, the standard has been used in the service of a variety of presumptions about children and about how the law can best protect their interests. For many years, the preference for maternal custody guided courts resolving custody disputes. That preference—expressly described by courts as a "presumption"—reflected understandings of affectionate, self-sacrificing mothers and their beloved children, inexorably connected through enduring bonds of love that contrasted completely with forms of interaction enjoyed by men in the marketplace.

Over time, as social understandings of mothers and fathers shifted, other preferences gradually replaced the widespread preference for maternal custody. Among the preferences (and presumptions) that have directed applications of the best-interest principle have been those for custody with the "primary caretaker,"[25] with the "psychological parent,"[26] with the parent of the same gender as the child,[27] with the parent preferred by the child,[28] and with both parents jointly.[29]

As a group, judges reflect the society and culture of which they form a part. Therefore, as social mores have changed, so have judicial preferences in child custody cases. It is not surprising that the best-interest principle has been used to affect a wide variety of preferences about children's custody. The principle has been amenable to each new preference. Indeed, the standard has not only tolerated change, but has practically mandated that judges apply their own values and understandings of family and of familial connections to particular cases. As Lee Teitelbaum explains:

> To make custody turn on the "best interests" of the child means that a court must decide what conduct and circumstances are desirable and what are not. The criteria for this decision, if not supplied by the parents, themselves, must derive from the judge's views of good child rearing and good citizenship.[30]

The various presumptions that, over time, have directed application of the best-interest principle represent shifting social understandings of children and of the parent-child relationship. These understandings have interacted with the values and beliefs of individual judges to produce the history of child custody litigation since the beginning of the 19th century.

III. Flexibility, The Illusion of Stability, and Images of Children: The Survival of The Best Interest Standard

The best-interest standard has often served actual children poorly. A standard that directs courts to focus on children's interests in determining their custodial arrangements can only provide scanty concrete guidance. Even more, the best-interest standard is so vague that it can be, and sometimes has been, used to subvert children's interests entirely and instead to serve the interests of contending adults. This standard—expressly constructed to focus on, and to protect, children—often allows courts to serve the interests of those children's parents and potential guardians. Why then has this vague, often self-contradictory rule of law survived for almost two centuries?

The best-interest standard has certainly survived. More than that however, it has been crucial to the evolution of family law within at least the past century and a half. The explanation of that success is, essentially, unconnected to actual children and their interests. The standard has survived because it has served other ends.

The standard has provided the illusion of consistency for the law in the regulation of family matters during a period of tumultuous change in the form and ideology of family. Only because the principle is so broad has it been able to serve this end. In this regard, its limitations for the law (its "indeterminacy")[31] has also been its benefit for the law (its adaptability). As social visions of children and of the parent-child bond have evolved during the period between the start of the Industrial Revolution and the present, the best-interest standard has been flexible enough to allow courts to recognize and to support those changing visions. Moreover, the standard, because it ostensibly protects children and serves their needs, appears to connect the law, as well as the families created through reliance on that

law, to notions of morality and social decency.

A. The Flexibility of the Best-Interest Standard

The law's capacity to accommodate social change is usually limited by the ability of law-makers to perceive and to accept such change. Innovations in social patterns and beliefs demand equally far-reaching changes in the rules that govern behavior. But even somewhat slower social changes—changes that may be dramatic without threatening to create chaos--necessitate changes in the law. Yet, law-makers tend to be conservative, to prefer tradition to change, and to overthrow precedent and amend existing rules only reluctantly and only under pressure.

Given this, the best-interest principle has been surprisingly well suited to accommodate the vast changes that have characterized the American family between the beginning of the Industrial Revolution and the late 20th century. The principle, precisely *because of* its indeterminacy, has been flexible enough to justify shifting social preferences and to reflect changing visions of the family without requiring an express alteration in the rule of law. Thus, the standard has been invaluable to a legal system obviously adjusting to changing mores and patterns but anxious to preserve tradition. The standard has allowed the law to favor changing patterns and simultaneously to erect the illusion of stability and continuity. As families have changed to include non-marital cohabitation, frequent divorce, and unwed parents, the law has continued to resolve custody disputes through apparent reliance on one continuously applicable standard of review. In fact, the standard has provided very little direction to courts and has often not served its own avowed end—to focus on children and their interests and to protect those children within the individual circumstances of each custody case. But the standard has survived, and in that alone, it has provided comfort to a society and a legal system beset with unending and bewildering changes in the character of family.

However, the flexibility of the best-interest principle does not alone explain the longevity of a rule that has consistently been criticized as vague, indeterminate and self-contradictory. The standard's survival and dissemination within the United States has depended on something more than its adaptability. The standard has not only provided the illusion of continuity but also, and almost as significantly, it has consistently suggested that the decisions it engenders are principled and decent.

B. Nostalgia and the Preservation of Tradition

Clearly, any comparatively amorphous standard would not have survived almost two centuries of constant change in the American family and in the law regulating that family. The indeterminacy, and consequent flexibility, of the best interest standard do not alone explain its survival. The standard has survived because it has associated the varied best-interest decisions reached under its rule with a moral order.

When courts first began to suggest that custody determinations should reflect children's interests, children and the notion of childhood were fast becoming central to social images of decent, proper families. Beginning with the early years of the Industrial Revolution, the family itself came to be understood as a special, almost sacred, realm, separate and protected from the harshness of the marketplace. As society placed children (and the connection between children and their mothers) at the center of understandings of family, an interest in family necessitated an interest in children. Protecting children and their interests came to seem synonymous with protecting families.

Even more, as the disruptions occasioned by the Industrial Revolution multiplied, society reacted with nostalgia by constructing images of a precious and hallowed past, characterized by stable families, joined in love and loyalty. Ironically, those images described the hopes and wishes of the century that constructed them far more than the past which they ostensibly depicted. But, increasingly, the protection of the family and, accordingly, of the moral order, seemed to depend on the preservation of traditional family life, understood to include children directly at the center.

The best-interest principle, itself a consequence of the romanticization of children (and women) brought with the Industrial Revolution, has represented and presumed to protect the family from the disruptions of the modern world. Ironically, the standard not only developed from the demands of modernity but has disguised, and thereby eased, the transition away from tradition, toward modernity.

The best-interest standard would probably not have enjoyed such remarkable longevity had it

not been almost unfailingly presented—even in its very name—as serving and protecting children. That task is morally unassailable in the contemporary world. Moreover, the assumption that courts applying the standard consistently *intend* to serve children has concealed occasional contradictions between the stated aim of the best-interest standard and its actual results in particular cases in which the standard has served adults at the expense of children. Thus, the standard has survived because those who use it *presume* to serve children, not because the standard actually serves children. In so presuming, society and the law work to sustain the illusion that the moral essence of old-fashioned, traditional families can be preserved even as those families are changing under the pressures of modernity.

Whether the best-interest standard will continue to serve as the central tenet of American custody law during the next century depends on whether the ideology of family constructed during the 19th century, and elaborated during the 20th century, will itself survive. Society's rapid acceptance within the past three decades of definitions of family that depend on forms of interaction previously found almost exclusively in the marketplace suggests it may not. However, at present, the best-interest standard continues to sustain society's nostalgia for what was once thought to have been and thus continues to dominate custody law.

IV. Conclusion

Regardless of what happens next, the best-interest principle has established a strong frame within which a significant part of American family law has developed during almost two centuries of increasingly rapid, often astonishing, change. The principle has been used to assimilate and justify a shifting array of assumptions and conclusions about custody, and sometimes about parentage. The principle can be, and has been, used to prefer mothers; to prefer fathers; to prefer joint custody; and to prefer "psychological," over biological, parents; or biological over psychological parents. In every case to which it is applied, the best-interest principle asserts that children constitute the primary concern of the law. In so asserting, the principle associates itself, and the results to which it leads, with old-fashioned, decent, proper families. And thus the principle always sides with tradition. But, equally, the best-interest principle sides with modernity. It can justify both tradition and the changes that undermine tradition. It affirms the continuing value of traditional family life despite widespread social upheaval and at the same time, masks, and thus helps to ensure, departures from tradition. The best-interest principle has served modernity and transformation in the name of social continuity and tradition. Thus, it has survived and remained central to the law's regulation of family matters during a long period of astonishing transformation in the form and meaning of family.

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Endnotes

1. In all states, either statutory law or judicial precedent asks courts determining a child's custody to ascertain the "best interest" of the child and to effect the custodial arrangement believed to be most likely to ensure those interests. *See, e.g.*, Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest fo the Child Being Sacrificed to Maintain Societal Homogeny?*, 59 MO. L. REV. 775 (1994) (noting that the applicable standard for determinign custody in all states is the best interest standard), (citing HOMER J. CLARK, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES at 19.4 (1988)).

2. Careful study of almost any state statutory provisions defining a child's best interest shows the lack of guidance this standard provides to courts. These statutes often refer to a large number of details and contests relevant to the child's life, yet do not usefully explain methods for judicial analysis of the information collected. The Minnesota statute (one of the better ones) provides a good illustration of this principle. This statute defined best interests as: all relevant factors to be considered by the court, including:

1. The wishes of the child's parent or parents as to custody;
2. The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
3. The child's primary caretaker;
4. The intimacy of the relationship between each parent and the child;

5. The interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
6. The child's adjustment to his home, school, and community;
7. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
8. The permanence, as a family unit of the existing or proposed custodial home;
9. The mental and physical health of all individuals involved;
10. The capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
11. The child's cultural background;
12. The effect on the child of the actions of an abuser, if related to domestic abuse . . . MINN. STAT. ANN. Sec. 518.18 (West. Supp. 1994).

In the vast majority of cases a judge relying on the statute could reach, and could justify, almost any custody determination. Only in the most egregious cases would the statute dictate a custodial decision, and in such cases few courts would need the statute's assistance to arrive at the proper custodial conclusion.

3. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Inderterminacy*, 39 LAW & CONTEMP. PROB. 226 (1975); John Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 12-16 (1994); Martha L. Fineman & Ann Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107.

4. Elster, *supra* note 4 at 11.

5. Mnookin, *supra* note 4 at 60.

6. Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 57 (1994).

7. See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987); *Roe v. Roe*, 324 S.E.2d 691, 693 (Va. 1985), where the courts found a parent who engages in same sex relationship to be unfit per se. *See also* Cox, *supra* note 2 at 792-805 (considering use of the best interest standard in cases involving same sex relationships).

8. *See Palmore v. Sidoti*, 466 U.S. 429 (1984), (overturning as unconstitutional a Florida judicial decision which transferred custody from a child's mother to father following the white mother's relationship with, and subsequent marriage to, a black man. *See also* Cox, *supra* note 2 at 776-85.

9. *See* Janet L. Dolgin, *The Law's Response to Parental Alcohol and 'Crack' Abuse*, 56 BROOK. L. REV. 1213 (1991) (analyzing and criticizing judicial tendency to focus on parental misconduct rather than on wider interests of children in custody and parentage determinations).

10. Fitzgerald, *supra* note 7 at 61.

11. See, e.g., Brian D. Gallagher, *The Indian Child Welfare Act: The Congressional Foray into the Adoption Process*, 15 N. Ill. U. L. Rev. 81, 86-87 (1994), for discussion of how such a problem encouraged enactment of the I.C.W.A.

12. Clark, *supra* note 2 at 788.

13. I am grateful to Professor Katherine Stone for having drawn my attention to these cases. *See also* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 2 (1994).

14. 5 East. 221, 102 Eng. Reprint 1054 (King's Bench 1804).

15. The term "ideology" is not used here to refer to a set of false beliefs but rather to the basic forms through which people understand the human condition. *See* Janet L. Dolgin & JoAnn Magdoff, *The Invisible Event* in SYMBOLIC ANTHROPOLOGY: A READER IN THE STUDY OF SYMBOLS AND MEANINGS 363 N. 7 (jANET l. DOLGIN *et al* eds. 1977). The definition of ideology used here is similar to that of the French anthropologist and Indologist Louis Dumont, who wrote:

> Our definition of ideology thus rests on a distinction that is not a distinction of matter

> but one of point of view. We do not take as ideological what is left out when everything is true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies. LOUIS DUMONT, FROM MANDEVILLE TO MARX; THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY 22 (1977).

16. With regard to adults, family law within the past three decades has been amalgamated very significantly with the law of the marketplace, including contract, tort and property law. So, for instance, antenuptial agreements in contemplation of divorce, once routinely dismissed by courts as antithetical to a public policy concern of encouraging and preserving traditional marriage, are now widely recognized and enforced by the courts. *Posner v. Posner,* 233 So.2d 381 (Fla. 1970); *Osborne v. Osborne*, 428 N.E.2d 810 (Mass. 1981). The law has also begun to consider contracts between couples that define the terms of the ongoing relationships. Most important, with the so-called "divorce revolution" beginning in the late 1960's, couples were able to divorce without accusations of marital fault. At the same time, changes in the procedural rules defining the divorce process make divorce easier. Thus, a significant part of the responsibility for establishing the terms of both marriage and divorce has been transferred from the state to the parties involved. Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1559-61 (1994); Jana B. Singer, *The Privatization of Family Law*, 1992 WISC. L. REV. 1443 (considering changes in family law in past few decades).

17. STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC RELATIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 19, 20, 108 (1988).

18. *Id.* at 108. Mintz and Kellogg report that about a quarter of all marriages in San Francisco ended in divorce in 1916. At the same period, about one fifth of all marriages in Los Angeles and a seventh of marriages in Chicago were terminated through divorce. *Id.*

19. United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (cited in Lee E. Teitlebaum, *Family History and Family Law*, 1985 WISC. L. REV. 1135, 1154).

20. MINTZ & KELLOGG, *supra* note 17 at 55.

21. Id. at 58.

22. MICHAEL GROSSBERG, GOVERNING AND THE HEARTH: LAW AND THE FAMILY IN 19th CENTURY AMERICA 242 (1985) (quoting JOEL BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (1852)).

23. Tietlebaum, *supra* note 20 at 1155.

24. MAXWELL BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776 to 1876, at 119 (1976) (citing *Married Women*, MONTHLY L. REPT. 23 (1860)).

25. *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981) (applying primary caretaker presumption to establish custody for child of "tender years").

26. *See, e.g., Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976) (granting custody to child's caretaker from birth despite availability of fit mother).

27. *Warner v. Warner*, 534 N.E.2d (Ind. App. 1989) relying in part of psychological report that older male child is better served by paternal custody); *In re Marriage of Clement*, 627 P.2d 1263 (Or. App. 1981) (granting custody of girl to mother and stressing importance of role model).

28. *Hammett v. Hammett,* 239 So.2d 778 (Ala. Civ. App. 1970) (granting custody to father in case in which both parents found fit, custody determination predicated on, *inter alia,* express preference of children (ages fourteen, twelve, and eleven) for paternal custody).

29. *Taylor v. Taylor*, 508 A.2d 964 (Md. 1986) delineating factors to be considered in granting joint custody).

30. Teitlebaum, *supra* note 20 at 1156.

31. Mnookin, *supra* note 4 at 226-27.