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Article

THE KIDNAPPING OF EDGARDO MORTARA: CONTEMPORARY LESSONS IN THE CHILD WELFARE WARS

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I. INTRODUCTION

IN recent years, with increasing regularity, legal scholars and other commentators have called for changes in the legal systems and rules that govern child welfare.¹ Much of this discourse has been driven by a series of wrenching custody cases, in which judges have been called upon to balance the claims of biological parents against those of third parties who have established durable attachments with children in their care. Understandably, public opinion almost invariably supports the “de facto” or “psychological” parents, on the ground that it would do enormous harm to remove young children from a nurturing home. At the same time, claims of birth parents tend to be discounted as rigid formalities—mere procedural rights of adults that should not be allowed to interfere with the obvious and unarguable interests of the children. For their part, judges may find themselves frustrated by these same procedural rights, which limit their freedom to reach decisions that seem clearly in the “best interest” of the child.

Accordingly, commentators, journalists and politicians have called for changes in the law that would allow judges greater freedom to abrogate the rights of biological parents in favor of others who are “attached to their children in all the essential emotional and caregiving ways.”² For example, Mary Ann Mason, a professor of social welfare at the University of California, recently put it this way:

The point of establishing a de facto parent principle would be to allow judges—who are currently required by custody laws to favor biological parents unless they’re legally proved unfit—to give these de facto parents the nod when, in fact, it appeared to be in the best interests of the children. Judges would still have discre-

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1. See Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework For Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 93 (1997) (“The need for comprehensive reform of child welfare policies and systems has long been evident.”).

2. Mary Ann Mason, *Fostering Family*, NEW REPUBLIC, Aug. 30, 1999, at 14.

tion; the only difference would be that they'd have more discretion than they do now.³

In other words, judicially determined "best interests" could become the principal reason for depriving "legally fit" parents of their children and awarding custody instead to adopting parents, foster parents or residential stepparents.⁴ This enhanced judicial discretion is seen as a progressive change because the analysis would begin with "the rights of the children in question rather than those of the parents fighting for custody."⁵

Everyone favors the protection of children's best interests. It turns out, however, that the strength of best interest determinations has everything to do with the quality of the decisionmaker's judgment.⁶ In practice, the best interest of a child may not be so easy to recognize, and cultural, ethnic or religious biases may muddy the decision.⁷ Although all judges presumably do their best to make the right rulings in cases affecting children, it takes a good deal of naive faith to assume that all judges will inevitably use enhanced discretion wisely. One need only look at the array of custody decisions in divorce cases governed by the best interest standard to see that mistakes, even tragic mistakes, happen all the time.⁸

In much of the commentary calling for reform of custody laws, insufficient regard has been paid to the protections of due process that, ultimately, guard against the inevitable risk of governmental interference with families whose gravest offense is their failure to conform.⁹ In this Article,

3. *Id.* at 15.

4. *See id.* Professor Mason adds that "most nannies" would not meet threshold for obtaining custody. *See id.* Some nannies apparently would meet the threshold, however, raising a chilling implication that Professor Mason does not explore. *See id.* (choosing qualified descriptor "most" to modify "nannies").

5. *Id.*

6. For a discussion of the best interest standard and its effect, see *infra* notes 67-69 and accompanying text.

7. *See* Mason, *supra* note 2, at 15 (discussing best interest standard).

8. For example, in 1994, Susan Smith was awarded custody of her two sons in a divorce proceeding, presumably because the court determined that would be in the children's best interest. *See Here's a Chronology of Events in Susan Smith's Life*, CHATTANOOGA TIMES, July 24, 1995, at A7 (providing timeline of Susan Smith case). Exactly two weeks later, Ms. Smith strapped the boys into car seats and rolled her automobile into a lake, drowning them. *See id.* Ms. Smith subsequently confessed to the crime and was convicted of murder. *See id.*; *see also* Art Barnum & Ted Gregory, *Mother is Denied Bond in Slayings; Psychiatric Exam Set for Naperville Suspect*, CHI. TRIB., Mar. 9, 1999, at A1 (describing case in which custodial parent, Marilyn Lemak, was charged with suffocating her three children.)

9. Consider the case of Margaret Wambles, a white woman whose son was forcibly removed by an Alabama police officer following a complaint that she was "living with a black man and entertaining other black men." *Roe v. Conn*, 417 F. Supp. 769, 774-75 (M.D. Ala. 1976) (describing events prior to seizure of child in case and noting that "[t]he only facts about Margaret Wambles known to Judge Thetford before he issued the pick-up order were that she was unemployed and that she and her child are white and were living with a black man in a black neigh-

we will use the 19th Century case of Edgardo Mortara, a six-year-old Italian Jewish child forcibly removed from his family so that he could be raised by Christians, as a template for understanding the inherent limitations of the so-called "best interest" standard.¹⁰ As we shall detail in Part II, Edgardo was taken from his parents by the Papal police and eventually adopted by the Pope himself.¹¹ The boy's seizure was justified as essential to his best interest, and the rights of his biological parents were dismissed as secondary to Edgardo's "obvious welfare."¹²

As evidenced by Edgardo's story, there are old themes inherent in the tension between the rights of families and the State's obligation as *parens patriae* to protect its children from harm. Part III of this Article examines the broad contours of the ongoing debate over the permissible scope of state intervention to protect child welfare.¹³ It highlights the tension between the traditions of family autonomy and due process that shelter modern families from such intrusion, and the state's legitimate *parens patriae* interest in taking steps necessary to guard a child at risk.¹⁴ In Part IV, we revisit the story of Edgardo Mortara and the aftermath of his kidnapping, suggesting that these competing notions of due process and *parens patriae* explain much of the battle that defined the future of a boy whose parents' only offense was having been born Jewish.¹⁵ Part V seeks to project the lessons of Edgardo's story into contemporary child welfare history by ex-

borhood"). A juvenile court judge, vested with great discretion by the Alabama statute, subsequently deprived her of custody, holding that "it was not a healthy thing for a white child to be the only [white] child in a black neighborhood." *Id.* at 775.

10. The tragic story of Edgardo Mortara is familiar in broad outline to most students of Jewish history. See, e.g., 5 HEINRICH GRAETZ, *HISTORY OF THE JEWS* 700-01 (1895) (citing Mortara's story as example of persecution that "awakened a feeling of brotherhood unexampled in Jewish history since the separation of Israel from Judah"). Mortara's story was recently explored in compelling detail in David Kertzer's brilliant book, *The Kidnapping of Edgardo Mortara*. See generally DAVID KERTZER, *THE KIDNAPPING OF EDGARDO MORTARA* 97 (1997) (offering most comprehensive collection and translation of history of Edgardo Mortara's life to date). Through his own translations of documents from Papal and other archives, Kertzer, a professor of anthropology at Brown University, brings to light the whole agonizing story, much of it previously unknown or only dimly understood. See *id.* at 299-306 (explaining dearth of historical work on Mortara, reasons for his interest in story and process when researching his book). For a discussion of the 19th Century case of Edgardo Mortara, see *infra* notes 20-41 and accompanying text.

11. For a discussion of Edgardo Mortara's life, see *infra* notes 20-41 and accompanying text.

12. See KERTZER, *supra* note 10, at 97 ("In such a case, canon law held, the importance of allowing a soul to go to heaven outweighed the customary commitment to parental (and especially paternal) authority over children.").

13. For discussion of the ongoing debate over the permissible scope of state intervention, see *infra* notes 44-94 and accompanying text.

14. For discussion of the tension between state and family interests, see *infra* notes 95-119 and accompanying text.

15. For discussion of the lessons learned from Edgardo Mortara, see *infra* notes 119-96 and accompanying text.

ploring several more recent episodes that echo many of the same disturbing concerns.¹⁶ In Part VI, we conclude that the cautions arising from Edgardo's kidnapping continue to resonate today, and that concerns over unfettered state authority should not be taken lightly.¹⁷ The amorphous goal of protecting a child's best interests is easier to expound than to achieve, while the erosion of due process safeguards may impose far greater costs than many have been willing to recognize.

II. THE KIDNAPPING OF EDGARDO MORTARA

On the evening of June 23, 1858, an officer of the Papal police knocked urgently on the door of Signor Momolo Mortara, a Jewish merchant living in the Italian city of Bologna.¹⁸ Marshall Pietro Lucidi, accompanied by several other of the Pope's *carabinieri*, demanded entry to the apartment.¹⁹ The Mortaras—Momolo and his wife Marianna—were understandably apprehensive, suspecting and dreading the likely reason for police interest in their family.²⁰ Their worst fears were confirmed when Marshall Lucidi began questioning them about the names and ages of their eight children.²¹ His interest quickly focused on six-year-old Edgardo. "Your son Edgardo has been baptized," Lucidi informed the terrified parents, "and I have been ordered to take him with me."²²

At that moment, the Mortara's world collapsed. Through a relentless legal process overseen by the highest authorities of the Catholic Church, their child was removed from their custody—never to be returned.²³ Edgardo was sent to be raised in an institution devoted to the conversion of Jews and Muslims to Christianity—Rome's "House of the Catechumens"—and was eventually "adopted" by Pope Pius IX himself.²⁴

The catalyst for the sudden and unheralded removal of young Edgardo from his parents' home lay in the unconfirmed tale of an illiterate

16. For discussion of contemporary child welfare history, see *infra* notes 119-96 and accompanying text.

17. For discussion of the concerns over unfettered state authority, see *infra* notes 196-97 and accompanying text.

18. See KERTZER, *supra* note 10, at 3 (recounting events of June 23, 1858, at Mortara home).

19. See *id.* (describing police's return to Mortara home at which time they entered and questioned Mortara parents).

20. See *id.* at 3-4 (discussing Mortaras' reaction to arrival of police).

21. See *id.* at 4 (detailing police's inquiry regarding Mortara children).

22. *Id.* at 5.

23. See *id.* at 11 (recounting seizure of Edgardo from his father's arms).

24. See Steven Lubet, *Judicial Kidnapping, Then and Now: The Case of Edgardo Mortara*, 93 NW. U. L. REV. 961, 961-62 (1999) (book review) (introducing book review with brief recounting of Mortara's story). The description of the Mortara case in Part II is adapted from Steven Lubet's recent book review, *Judicial Kidnapping, Then and Now: The Case of Edgardo Mortara*, and is reprinted with permission of the author. See *id.* at 961-63 (retelling Mortara's story from time of his baptism until his death).

Catholic housemaid named Anna Morisi.²⁵ It seems that about five years before the arrival of the Papal police at the Mortaras' doorstep, the servant—herself then a child of only fourteen—had consulted with a neighborhood Catholic grocer about the ailing Edgardo, sharing her fear that the boy might not recover from a childhood illness.²⁶ On the grocer's advice, the servant had waited for a moment alone with the boy and then sprinkled a bit of water on his brow while he slept, whispering "I baptize you in the name of the Father, of the Son, and of the Holy Ghost."²⁷ This act, it turns out, was sufficient under Canon law to constitute a baptism. Thus, the sleeping Edgardo was instantly transformed into a Catholic, unbeknownst to him or his parents.

Edgardo recovered soon thereafter and Anna Morisi thought nothing more of her action, reporting it to no one at the time.²⁸ In the course of the next few years, however, she mentioned the "baptism" in passing to at least one friend, who repeated the story to others.²⁹ The information was eventually relayed to Bologna's Inquisitor, who felt compelled under the law to take action.³⁰ According to the Inquisitor, Father Pier Gaetano Feletti, his duty had been made clear: "[T]he boy was a Catholic and could not be raised in a Jewish household."³¹

The Inquisitor's seizure of Edgardo Mortara eventually became an international *cause celebre*, drawing official government protests from France, England and the United States.³² Pope Pius IX, however, was unyielding. He was unmoved by the anguished pleas of Edgardo's parents, and he could not be swayed by the various forms of diplomatic pressure asserted by more enlightened governments, much less by the increasingly barbed attacks in the liberal press.³³ Having assumed personal responsibility for

25. See KERTZER, *supra* note 10, at 40-41 (giving reasons for Edgardo's removal from family).

26. See *id.* at 40.

27. *Id.* (detailing nurse's story of her baptizing Mortara). The grocer later claimed in sworn testimony that he could not possibly have given the advice attributed to him. See *id.* at 209-10.

28. See *id.* (noting that Anna "didn't think any more about" her actions).

29. See *id.* at 148 (explaining how Church learned of nurse's baptizing Mortara).

30. See *id.* (examining how Church learned of incident).

31. *Id.* at 6.

32. See *id.* at 43 ("In the Italian peninsula, public protest was limited to Piedmont, for only there did Jews have basic constitutional rights, and these had been granted only a decade before. But in France and Britain, not to mention the United States, Jews were free to organize politically."). The Mortara incident triggered clerical and secular debate across the world. See *id.* at 85-90.

33. See *id.* at 84-85 (discussing Pope's refusal to return Edgardo Mortara to his family). Professor Kertzer noted:

Throughout the controversy over the abduction, the Pope never wavered in his belief in the righteousness of the cause he was championing. Everything we know about his worldview suggests that, unlike his Secretary of State, Pius IX saw the decision to take Edgardo from his Jewish family as a sacred obligation.

the boy's Catholic upbringing and religious education, Pius IX came to consider Edgardo's attachment to the church as a sign of God's continued blessing of the Pope's temporal rule.³⁴ "My son," he once told Edgardo, "you have cost me dearly, and I have suffered a great deal because of you."³⁵ Then, speaking to others in attendance, the Pope added, "Both the powerful and the powerless tried to steal this boy from me, and accused me of being barbarous and pitiless. They cried for his parents, but they failed to recognize that I, too, am his father."³⁶

The story does not have a tidy ending. Edgardo was never returned to his parents. He continued his religious education at the Vatican, eventually becoming a priest of some renown, taking the name Father Pio Edgardo in honor of Pius IX.³⁷ He remained completely estranged from his family and from Judaism, to the point of fleeing Rome in disguise to avoid the possibility of being returned to his parents during Garibaldi's overthrow of the Papal States.³⁸ In 1878, he met briefly with his then-widowed mother, and thereafter remained in some contact with the other members of his family.³⁹ In 1940, Father Pio Edgardo died in Belgium at age eighty-eight.⁴⁰ David Kertzer reminds us in his comprehensive book, *The Kidnapping of Edgardo Mortara*, that only one month later, "German soldiers flooded Belgium, so to begin rounding up all those tainted with Jewish blood."⁴¹

III. DUE PROCESS AND *PARENS PATRIE*: THE RELATIONSHIP BETWEEN CHILD, FAMILY AND STATE

The tensions reflected by the Mortara case are by no means unique to 19th Century Europe. Much of the developing law in the area of children's rights is marked by the efforts of courts and legislators to balance principles of family autonomy against the State's responsibility to guard the wel-

Id.

34. *See id.* at 148 (examining how Church learned of incident).

35. *Id.* at 161.

36. *Id.*

37. *See id.* at 260 (discussing Edgardo Mortara's involvement with Church).

Professor Kertzer recounted Edgardo's adult life:

By the time he was thirteen, Edgardo had decided to devote his life to the Church, and he became a novice in the order of the Canons Regular of the Lateran, on his way to becoming a monk himself. He took the name of Pio, honoring his new father and protector, Pius IX.

Id.

38. *See id.* at 264 (characterizing Mortara as "loath to see his father" and quoting Mortara's account of his escape).

39. *See id.* at 296 (describing Mortara's reunion with his mother and noting "[f]rom that moment, Edgardo remained in touch with his family and, as he aged, sought out family members when he found himself in Italy").

40. *See id.* at 298 ("On March 11, 1940, the 88-year-old monk died at the Belgian abbey in which he had lived for many years.").

41. *Id.*

fare of its most vulnerable citizens.⁴² In modern American society, the rights of individual autonomy and self-determination are considered fundamental across the political spectrum.⁴³ In the context of family relations, principles of individual freedom have driven the development of constitutional jurisprudence over the last seventy-five years, imposing the protections of due process on the State's authority to take away parents' presumed rights to decide how to raise their children.⁴⁴

In the area of family law, the line of modern cases establishing the constitutional boundaries of family relations begins with the United States Supreme Court decision in *Stanley v. Illinois*.⁴⁵ *Stanley* involved a challenge to the application of a statute presuming unmarried fathers to be unfit for purposes of assigning custody to the state in a neglect, abuse or dependency case.⁴⁶ Mr. Stanley had lived out of wedlock with his children's mother for many years, and when the mother died, the children were summarily removed from his custody and care pursuant to the challenged stat-

42. See generally Lisa A. Brunner, *Circumventing the "Best Interests of the Child" Standard: Child Custody Law in Missouri as Applied to Homosexual Parents*, 55 J. MO. B. 200 (1999).

43. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Supreme Court stated:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

44. See *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (invalidating Oregon statute requiring attendance at public schools); *Meyer*, 262 U.S. at 403 (striking down law prohibiting teaching of any subject in any language other than English below eighth grade). The literature charting the development of this history, beginning with the Supreme Court's decisions, is abundant. See, e.g., Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 67-74 (1995) (exploring constitutional limitations on states' authority to intervene in parent-child relationships); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights"*, 1976 BYU L. REV. 605, 615-626 (1976) (discussing common law and constitutional backgrounds of parental rights).

Legal commentators generally now view *Meyer*, *Pierce* and their progeny as standing for the values of pluralism, family autonomy and the right "to heed the music of different drummers." See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-6, at 1319-21 (3d ed. 1999) (assessing legacy of *Meyer* and *Pierce*). This view, however, is not universal. See, e.g., Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (arguing that *Meyer* and *Pierce* decisions were motivated by "a conservative attachment to the patriarchal family, to a class-stratified society, and to a parent's private property rights in his children and their labor").

45. 405 U.S. 645 (1972).

46. See *id.* at 646-47 (summarizing Stanley's claim and procedural history of case).

ute.⁴⁷ In ruling that the statute violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the Court found that the existing relationship between Mr. Stanley and his children warranted constitutional protection.⁴⁸ The Court held that because of the compelling nature of the interests at stake in the parent-child relationship, all parents "are constitutionally entitled to a hearing on their fitness before their children can be removed from their custody."⁴⁹ Although *Stanley* does not explore the meaning of the term "fitness," the Court nevertheless makes it abundantly clear that this due process inquiry must encompass individualized consideration of the status and conduct of the parent in question.⁵⁰

Ten years after its decision in *Stanley*, the Supreme Court articulated the substance of this due process right, in the context of proceedings to terminate parental rights.⁵¹ The Court established the minimum constitutional requisites necessary to permanently sever the legal relationship between a parent and a child in its 1982 landmark decision, *Santosky v. Kramer*.⁵² Justice Blackmun's opinion describes a bifurcated test under which a court must first focus on the fitness of the parent; only after the parent has been found unfit, may a court consider what is in the best interest of the child.⁵³ The Court set a high standard for termination of paren-

47. *See id.* at 646 ("Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her but also his children.").

48. *See id.* at 651 (summarizing due process protections for parents and children and noting that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection").

49. *Id.* at 658 (establishing parents' entitlement to hearing and finding Stanley's denial of hearing "contrary to Equal Protection Clause").

50. *See id.* at 657-58 ("The State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father. It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove."). The Court in *Stanley* recognized that the protection of an individualized hearing inures to the benefit not only of the parent, but also of the child: "[W]hen, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 657 (emphasis added). This language reflects the fact that while threshold inquiries guarding against the disruption of family relationships may compel a focus on the parent, the protections embodied by such procedural requirements safeguard the reciprocal interests that parents and children share in preserving their relationships against undue interference.

51. *See Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982). The Court articulated the standard, "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* at 747-48.

52. 455 U.S. 745 (1982).

53. *See id.* at 760 ("But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."). Similarly, in the context of child welfare proceedings, courts must satisfy the threshold statutory requirement that the conduct of the parent has

tal rights, requiring that the initial showing of unfitness must be supported by clear and convincing evidence.⁵⁴ In this initial stage of the factfinding process, Justice Blackmun concluded that there is simply no room for consideration of the circumstances or the interests of the child, or of the relative merits of the claims of the individuals who are seeking to adopt the child.⁵⁵ The protections of due process described in *Santosky* thus serve as a check on the state's ability to impose its will on parents whose childrearing is at least minimally adequate, but whose choices may not be consistent with prevailing societal norms.⁵⁶

Central to the Court's decision in *Santosky* is its view that any effort to sever the parent-child relationship, as a constitutional matter, *must* begin with an inquiry that is parent-focused.⁵⁷ *Santosky* thus stands for the critical principle that before the state may sanction interference in the relationship between a parent and a child, there must be some threshold showing—independent of what may be in the best interest of the child—that the parent's conduct falls beneath some minimum acceptable threshold.

The boundaries of the state's *parens patriae* authority described by the Court in *Santosky* are mirrored in other areas. For example, provisions

been somehow deficient (*i.e.*, that the child has been "abused" or "neglected"), before it may make dispositional judgments about what is in the child's best interest. *See, e.g.*, N.Y. FAM. LAW §§ 614, 622 (McKinney 1999) (providing subject matter of fact-finding hearing prior to dispositional hearing).

54. *See Santosky*, 455 U.S. at 769 (imposing "clear and convincing evidence" standard of proof).

55. *See id.* at 759-60 (explaining content and purpose of factfinding hearing). The Court elaborated:

The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. The questions disputed and decided are what the State did—"made diligent efforts", – and what the natural parents did not do—"maintain contact with or plan for the future of the child."

Id. (citations omitted).

56. Although *Santosky* may stand as the most significant procedural safeguard for parents threatened with the loss of their children, the Supreme Court has acknowledged other important procedural rights of similar significance. *See, e.g.*, *See M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that indigent parent challenging termination of parental rights was entitled by Fourteenth Amendment to free trial transcripts); *Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 32 (1981) (stating that due process may in some circumstances require appointment of counsel for indigent parent facing termination of parental rights).

57. *See Santosky*, 455 U.S. at 753 ("[P]arents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.").

of the Uniform Marriage and Divorce Act ("UMDA")⁵⁸ limit the filing of an action for custody by a nonparent to circumstances in which the child is not in the physical custody of one of his parents. In many jurisdictions, courts have narrowly construed the meaning of the term "physical custody" to require that the applicant for custody have not only physical control of the child, but also the parent's agreement to relinquish custodial responsibility.⁵⁹ Other jurisdictions have required that third-party custody applicants must have had physical responsibility for a child for a minimum period of time before they may claim standing to file for legal custody.⁶⁰ Whatever their specific boundaries may be, limitations on the right of a third party to apply for custody protect fit parents and their children from being subjected to hearings on applications for custody by individuals with only casual contact with or limited responsibility for the child.⁶¹

Both the constitutional due process requirements described in *Santosky* and the standing requirements of state custody law derive from the same theories of rights-based liberalism.⁶² According to these theories, limits on the authority of the state serve in essence to insulate families

58. Uniform Marriage & Divorce Act, § 401(d), 9A U.L.A. 263-64 (1998) ("UMDA"). The Act states:

A child custody proceeding is commenced in the [] court: . . . (2) by a person other than a parent, by filing a petition for custody of the child in the [county, judicial district] in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.

Id. For examples of states that have adopted the exact language or language substantially similar to the UMDA, see, e.g., ARIZ. REV. STAT. § 25-401 (1998); COLO. REV. STAT. § 14-10-123(1)(b) (1999); 750 ILL. COMP. STAT. 5/601(b)(2) (West 1999).

59. See, e.g., *In re* Petition of Otakar Kirchner, 649 N.E.2d 324, 335 (Ill. 1995) ("The determination that a parent does not have physical custody of a child turns not on possession; rather, it requires that that parent somehow has voluntarily and indefinitely relinquished custody of the child.").

60. See, e.g., COLO. REV. STAT. § 14-10-123(1)(c) (granting standing to file action for legal custody to persons who have had physical care of child for six months or more).

61. See *In re* Peterson, 491 N.E.2d 1150, 1152-53 (Ill. 1986) ("[T]he standing requirement . . . should not turn on who is in physical possession, so to speak, of the child at the moment of filing the petition for custody. To hold differently would be to encourage abductions of minors in order to satisfy the literal terms of the standing requirement. . . ."); *Henderson v. Henderson*, 568 P.2d 177, 179 (Mont. 1977) (defining "physical custody"). The court elaborated:

"Physical custody" is not limited to having actual, immediate control of the physical presence of the child. Rather, this phrase relates to the custodial rights involved in the care and control of the child. To interpret this phrase otherwise would allow a nonparent to file a petition for custody anytime the child is out of the physical presence of the parent or parents, even if for a few minutes, or under the watchful eyes of an authorized babysitter. . . .

Id.

62. See generally Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485, 505-14 (1996) (discussing work of John Locke and John Stuart Mill and application of traditional liberal theory to children's law).

from unnecessary or inappropriate interference with their right to self-governance.⁶³ Whether constitutional or statutory, the purpose of such threshold requirements, in simple terms, is to ensure that children are not arbitrarily separated from their families for reasons that have more to do with the racial, religious or cultural preferences of the decisionmaker than with legitimate concerns for the protection of the child.⁶⁴

Once these threshold requirements have been satisfied, consistent with the constitutional protections derived from the Fourteenth Amendment, courts that address the welfare or disposition of children are bound to serve the best interest of the child. The meaning of this term has been subject to considerable debate—a seemingly inescapable consequence of its amorphous nature.⁶⁵ Many commentators have explored the pitfalls associated with an indeterminate and vaguely defined standard, raising questions about the dangers of value-laden judgments of decisionmakers

63. See, e.g., Hafen, *supra* note 44, at 628-41 (discussing protections against abuse and other forms of parental unfitness within family tradition); see also *Kirchner*, 649 N.E.2d at 335 (“It is this standing requirement that ensures that the superior right of natural parents to the care and custody of their children is safeguarded.”). For examples of the burgeoning literature exploring and challenging the application of liberal theory to children’s rights, see Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 20 (1994) (demonstrating how both constitutional law and family law jurisprudence exclude children’s personhood); Roberts, *supra* note 62, at 486 (suggesting that “children have rights of liberty so long as our recognition of those rights is consistent with the various responsibilities and duties we as a community have to protect the well-being of children and to promote their interests”); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1749 (1993) (exploring “ways in which legal norms of family and fathering currently fail children”).

64. See *Roe v. Conn.*, 417 F. Supp. 769, 781 (M.D. Ala. 1976) (“[R]ace per se can never amount to sufficient harm to justify a constitutional termination. . . .”). In *Roe*, a federal district court found unconstitutionally vague a state statute that permitted the removal of a child from his mother for “neglect,” based solely on the fact that the child’s mother was living with a man of a different race. See *id.* at 779. Numerous commentators have explored the risks inherent in indeterminate standards that permit the separation of children and parents for reasons grounded in the personal biases of the decision makers. See, e.g., LEROY H. PELTON, FOR REASONS OF POVERTY 48-53 (1989) (explaining process and effects of child removal); Fitzgerald, *supra* note 63, at 53-64 (assessing “best interests” standard); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 268-77 (Summer 1975) (discussing four reasons why indeterminate standard and broad judicial discretion adversely affect children); Nannette Schorr, *Foster Care and the Politics of Compassion*, TIKKUN, May-June 1992, at 19 (“[O]nce having identified the primary problem as bad parenting, the state is free to intervene without restraint in its clients’ daily lives by removing children from their parents with minimal investigation and little respect for legal procedures. . . .”).

65. See Appell & Boyer, *supra* note 44, at 66 (criticizing best interest standard for failure to provide guidance and for producing arbitrary results); Andrew S. Rosenman, Note, *Babies Jessica, Richard and Emily: The Need for Legislative Reform of Adoption Laws*, 70 CHI.-KENT L. REV. 1851, 1876 (1995) (labeling best interest standard as “amorphous concept” that should not be applied until after finding of questionable relationship between parent and child).

who may not share or even understand the ethnic, cultural or economic background of the children whose futures they judge.⁶⁶ Yet, in some respects, the indeterminacy that has been at the heart of much of this criticism is also what lends the concept its strength. Once a court has been properly charged with responsibility for determining the disposition of a child's future, it must retain the flexibility to respond to the child's individual circumstances. Whether legislative or judicial in origin, efforts to capture the essence of "best interest" in a finite series of criteria can only contribute to the categorical treatment of children, leading ultimately to a reduction in the ability of individual judges to meet the fluid and evolving needs of their wards. For this reason, despite its flaws, the concept of best interest must continue to inform custody, child protection and other legal proceedings in which children's futures are weighed.

Although the best interest standard will no doubt continue to play an important role in judicial decisionmaking, its use as a threshold device for regulating judicial intervention raises a distinct set of concerns. Increasingly, however, commentators have argued that the notion of best interest should serve not only as an aspirational goal, but also as a legal standard governing judgments about when the state should be permitted to interfere with the relationship between a parent and a child.⁶⁷ Driven by a series of high-profile cases, critics of uncompromising due process have attacked standing and other threshold limits on the court's power to intervene as overly protective of "parents' rights."⁶⁸ Arguments for restructur-

66. See Appell & Boyer, *supra* note 44, at 66 ("[S]uch ambiguity will have the greatest impact on the least visible and respected population of families whose racial and economic status already place them at great risk of destructive state intervention.").

67. See Mnookin, *supra* note 64, at 227-28 (advocating use of less discretionary standard that focuses on needs of child rather than parents).

68. See Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, the Deboer-Schmidt Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 37-38 (1996) (stating that courts should rethink constitutional and policy reasons behind preference for rights of parents over rights of children). Most notable among these are three cases. First, is the Gregory K. case, which involved a Florida boy who with the help of his foster parent sought to establish an independent right to bring an action to sever his relationship with his natural parents. See *id.* at 37 (discussing standing of 12-year-old boy to bring suit against his natural parents to terminate their parental rights). The "Baby Jessica" and "Baby Richard" cases also involved children separated from their custodial parents and returned to their natural parents. Both children, in the wake of failed adoptions, were compelled to leave behind the adults who nurtured them through their early years and to return to natural parents who were virtual strangers. See *id.* at 15-16 n.2 (discussing court decisions to return Baby Jessica and Baby Richard to natural fathers). The latter two cases, in particular, have spawned a wealth of commentary arguing for changes in the laws that denied these children the ability to remain with the adults they knew as parents. See Roberts, *supra* note 62, at 526-41 (discussing facts of Baby Richard case). See generally Hollinger, *supra* note 68, at 15-16 nn.1, 2 (citing Baby Richard and Baby Jessica as part of series of cases in which legal system has been slow or unable to resolve conflicting claims, generating "yet more media attention to the questions of 'where do children belong?' and 'to whom do children belong?'""); Suellyn Scarnecchia, *Imagining Children's Rights*, 12

ing the role of the courts to make them more responsive to the needs of children have come from all quarters, including judges, legislators and legal scholars.⁶⁹ Some legal commentators have challenged the application to children's law of the liberal rights-based theories that form the foundation for the Supreme Court's decisions in *Meyer v. Nebraska*,⁷⁰ *Pierce v. Society of Sisters*⁷¹ and their progeny.⁷² Others have focused more practically on the definitions of "family" and of who constitutes a "parent" entitled to the protections of due process.⁷³ Much of the more provocative literature in this field seeks to expand the definition of "parent" to accommodate within the scope of the Fourteenth Amendment's due process protections the psychological equivalents of parent-child relationships that develop when children are raised by adults to whom they are not biologically related.⁷⁴

Proposed reforms promoting legal protection for these kinds of relational interests have arisen largely in response to cases in which children have been abruptly and traumatically removed from non-biological families. Reactions to the now infamous case of the boy known popularly as "Baby Richard" are emblematic of the increasing pressure on the due pro-

T.M. COOLEY L. REV. 1, 6-9 (1995) (telling stories of Baby Jessica and Baby Richard and noting "failure by the court to recognize the child as an individual person who has feelings, who can be hurt and hurt badly"); Rosenman, *supra* note 65, at 1851 ("Along with Baby Jessica, the recent case[] of Baby Richard . . . illustrate[s] the need for immediate legislative reform of state adoption laws.").

69. See, e.g., Rosenman, *supra* note 65, at 1876-94 (discussing reforms that would further best interests of children).

70. 262 U.S. 390 (1923).

71. 268 U.S. 510 (1925).

72. See James Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1376 (1994) ("Finally, the elimination of parental rights would not entail the 'liberation' of children from all parental governance and discipline."); Fitzgerald, *supra* note 63, at 99-111 (utilizing "legal history of women's property rights" to develop structure for valuing children's perspectives); Roberts, *supra* note 62, at 514-26 (discussing reasons to limit children's right of liberty); Woodhouse, *supra* note 44, at 997 (arguing that foundation for *Meyer* and *Pierce* is theory of children as property).

73. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 944-51 (1984) (advocating legal recognition of child-parent relationships arising outside nuclear family); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L.J. 459, 483-90 (1990) (discussing need to "develop a new definition of legal parent to solve" uncertainties in cases where family does not fit traditional "one-mother/one-father" model); Suellyn Scarnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL. 41, 53 (1995) ("This Court must recognize that a child faced with the imminent loss of everyone he knows is a person with due process rights."); Woodhouse, *supra* note 44, at 1761-67 (discussing supportive role of partners and extended family in childrearing).

74. See Polikoff, *supra* note 73, at 483-90 (suggesting three theories for redefinition of parent: equitable parenthood, child-parent relationship standard and nonexclusive parenthood).

cess safeguards grounded in *Meyer*, *Pierce*, *Santosky* and related cases. Richard was the subject of an adoption petition filed by a couple who obtained custody of the boy through the consent of his mother.⁷⁵ Before his birth, Richard's parents had temporarily separated.⁷⁶ Consequently, Richard's birth and his placement for adoption were concealed from his father, as a result of both the mother's refusal to cooperate with efforts to notify the father and affirmative misrepresentations to the court by the adoptive parents and their lawyer about the father's status.⁷⁷ The adoption petition was grounded in the charge that the father, a Czech immigrant named Otakar Kirchner, was unfit as a consequence of his failure to demonstrate a reasonable degree of interest in the child during the first thirty days after the child's birth—a charge that was patently inconsistent with Mr. Kirchner's un rebutted testimony about his unsuccessful efforts to locate the boy in the weeks after the child's expected due date.⁷⁸ By the time the trial was concluded, the boy had been with his putative adoptive parents for more than a year. Mindful of both the boy's best interest and his obligations under state and federal law (if not the facts of the case), the trial judge found that the father was, indeed, unfit.⁷⁹

By the time the Illinois Appellate Court reviewed the case, the boy was nearly two-and-a-half years old and still living with his putative adoptive parents. Clearly affected by the unhappy prospect of moving Richard from his settled home, the court affirmed the finding of unfitness and the consequent adoption.⁸⁰ In doing so, however, the court dramatically departed from the dictates of *Santosky*, concluding that termination of a parent's rights could be supported by a finding that adoption was in the best interest of a child, even in the absence of a finding of parental unfitness:

[A]fter a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be contrary to the best interest of

75. See Bob Greene, *Who Will Hear the Child's Cry*, CHI. TRIB., Aug. 22, 1993, at C1 (stating facts of case); see also *In re Doe*, 638 N.E.2d 181, 182 (Ill. 1994) (same).

76. See *In re Doe*, 638 N.E.2d at 182 (stating that biological mother separated from biological father after hearing allegations of his affair with another woman).

77. See *id.* at 187 (McMorrow, J., concurring) (stating that adoptive parents knew of biological mother's active misrepresentation to biological father and "acquiesced in the biological mother's scheme").

78. See *id.* at 186-87 (McMorrow, J., concurring) (discussing biological father's actions to "locate and establish contact with the child").

79. See *id.* at 182 (discussing holding of trial court); see also *In re Syck*, 562 N.E.2d 174, 183-84 (Ill. 1990) (discussing judicial interpretations of statutory obligations). Following the Supreme Court's decision in *Santosky*, the Illinois Supreme Court acknowledged its constitutional obligation to follow the bifurcated test for termination of parental rights described by Justice Blackmun. See *Syck*, 562 N.E.2d at 183 (stating that parent must be determined unfit before court may consider best interest of the child).

80. See *In re Doe*, 627 N.E.2d 648, 654 (Ill. App. 1993) (discussing reasons biological father not fit parent), *rev'd*, 638 N.E.2d 181 (Ill. 1994).

the child to remove him from his home and family by disturbing the judgment of adoption.⁸¹

Although the court's view about the importance of protecting children's interests is unremarkable, the same cannot be said for its willingness to dispense with the requirements of due process imposed by *Santosky*.⁸² The appellate court's radical departure from established law was ultimately reversed on appeal, but the cause of the adoptive parents generated a flood of public support for the boy's plight.⁸³ To most observers of the case, Mr. Kirchner's efforts were cruel and heartless, an attempt to sever Richard's loving connection to the only family he had ever known. Critics castigated the Illinois Supreme Court for failing to consider Richard's best interest, which they believed was best served by leaving him in the care of his adoptive parents.⁸⁴ There were repeated calls for a best interest hearing, in which predictions of the child's future happiness would outweigh assertions of parental rights. The ruling generated questions on the part of many journalists, lawyers and judges "because it was decided on the basis of the rights of the adults involved and without taking into account the 'best interests' of the child."⁸⁵ One highly respected legal commentator observed:

No state should be allowed to deny a child the love and support and affection of his parents without even considering the child's interests. That is what the Illinois Supreme Court did. It held that a father had a right to be with his child but ignored the rights of a child to be with his [adoptive] parents.⁸⁶

81. *Id.* at 653. The majority distinguished the *Syck* precedent because, unlike this case, *Syck* did not involve a judgment of adoption. *See id.* at 652 n.2.

82. *See id.* at 652 ("If there is a conflict between Richard's best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception."). The court expressed the view that in any situation in which the interests of a child are at odds with those of his or her parents, the child's interests must take precedence. *See id.*

83. *See In re Doe*, 638 N.E. 2d at 182 (criticizing appellate court for "wholly missing the threshold issue"). Co-author Bruce Boyer submitted an *amicus curiae* brief to the Illinois Supreme Court, arguing that the termination of the father's parental rights was inappropriate and that the Appellate Court's disregard of the requirements of *Santosky* was contrary to both law and public policy. He subsequently appeared for Mr. Kirchner in the United States Supreme Court in opposition to petitions for *certiorari*.

84. *See* Jan Crawford Greenburg, *Custody Ruling Stands: No Words Barred as Edgar and Heiple Trade Jabs on "Richard,"* CHI. TRIB., July 13, 1994, at N1 (criticizing decision as "tragic").

85. Darryl Van Duch, *Adoption Case Sparks Press-Judiciary Feud*, NAT'L L.J., Mar. 4, 1996, at A10.

86. Susan Estrich, *What About Child's Interests?*, USA TODAY, July 21, 1994, at 9A.

This view was shared by Illinois Supreme Court Justice Mary Ann McMorrow, who wrote a powerful dissent to the Court's order that Richard be "delivered to his father, Otakar Kirchner."⁸⁷ Although she had initially voted to overturn the boy's adoption, Justice McMorrow later assailed her colleagues for their "total failure to recognize the rights of the child"⁸⁸ and for their refusal to grant Richard "an evidentiary hearing to determine what is in his best interests."⁸⁹

This rising tide of public opinion did not go unheard in the Illinois Legislature. In the days immediately following the Illinois Supreme Court's reversal of Richard's adoption, a hastily constructed coalition of advocates and legislators conceived, drafted and passed curative legislation that came to be known as the "Baby Richard" law.⁹⁰ The legislation was designed to overcome the standing limits that would otherwise preclude Richard's adoptive parents from requesting a hearing to determine the boy's custody following the vacation of his adoption.⁹¹ Legislators were spurred to act before the Illinois Supreme Court denied the then-pending motion for reconsideration, out of the hope that they might thereby successfully defeat arguments against the legislation's retroactive application to Richard.⁹² Although this effort ultimately proved unavailing for Richard, Governor James Edgar signed the resulting bill into law a mere seventeen days after the Illinois Supreme Court's initial decision in the case.⁹³

Like much of the related legal commentary, the Illinois Legislature, in its haste, failed to grapple in any significant way with the consequences of supplanting existing due process safeguards against unwarranted judicial intervention with more open-ended tests based on relational interests. Indeed, best interest hearings are notoriously prone to a narrow focus on

87. *In re* Petition of Otakar Kirchner, 639 N.E.2d 324, 340 (Ill. 1995).

88. *Id.* at 343 (McMorrow, J., dissenting).

89. *Id.* (McMorrow, J., dissenting). Illinois Governor Jim Edgar took the same position, stating it even more bluntly:

[The case] is about a young boy whom the court has decreed should be brutally, tragically torn away from the only parents he has ever known—parents who by all accounts loved and nurtured him from the second he joined their family. . . . This young child should have found a champion—a protector—in the highest court of the state. Instead, he found justices who betrayed their obligations to him and to the people who placed them in their lofty positions.

Greenburg, *supra* note 84, at N1.

90. *See* Rosenman, *supra* note 65, at 1874 (discussing amendment requiring best interest hearing after adoption is vacated).

91. *See* Illinois Public Act 88-550 Art. 9 § 975, (amending Illinois Adoption Act, 750 ILL. COMP. STAT. ANN. 50/20 (West 1994)) (stating that court shall "promptly conduct a hearing" after order for adoption is vacated).

92. *See id.* (providing that statute applies to all cases pending on or after July 3, 1994).

93. *See In re* Kirchner, 649 N.E.2d 334, 337 (Ill. 1995) (refusing to apply amendment to further proceedings in Baby Richard case).

the child's current attachments.⁹⁴ To the extent that this is true, the claim that a person has developed a parent-like attachment with a child would likely rest on much of the same proof as would the same individual's claim for custody. Consequently, in a contested third-party custody dispute, one might reasonably expect that a threshold hearing to evaluate whether the third-party claimant has standing as a "psychological parent" would be difficult to distinguish from the custody hearing itself. If so, then the price of developing open-ended gatekeeping standards that are more responsive to the individual circumstances of the child *must* be the sacrifice, at some level, of the protections that shield fit parents and their families from the taxing burden of judicial intervention. Any measure of the extent of this burden must account for the kinds of concerns raised when the intervention of the state—however benevolent it may be—is colored by the cultural and religious biases that resulted in the Papal adoption of Edgardo Mortara.

IV. FAMILY VERSUS STATE: THE FIGHT FOR EDGARDO MORTARA

With the twin themes of procedural due process and *parens patriae* as a backdrop, we turn again to the story of Edgardo's kidnapping, to consider how effectively the procedural protections afforded to the boy's parents guarded against cultural and religious biases.⁹⁵ In one sense, the events surrounding Edgardo Mortara's removal from his family are almost unfathomable to modern Americans. Under no conception of the First Amendment, from extreme right to extreme left, could a child be forcibly taken away from his biological parents solely on the basis of their religion.⁹⁶ The very thought is offensive, evoking (with good cause) images of the other theocratic persecutions from which the Establishment Clause is intended to protect our citizens. Viewed strictly as a matter of religious coercion, then, it is safe to assume that the Mortara case is of historical interest only. Nothing like that could happen here, and if it did, we can be confident that the courts would quickly correct the abuse.

94. See Rosenman, *supra* note 65, at 1875 (noting subjective nature of inquiring into child's best interests); see also Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609, 1618 (1998) (discussing numerous attachment factors that court can consider in best interest standard, such as parent-child bond and playing with child).

95. For discussion of the 19th Century case of Edgardo Mortara, see *supra* notes 20-41 and accompanying text. Part IV of this Article appeared in substantial part in a book review written by co-author Steven Lubet, and it is reprinted with the permission of its author. See Steven Lubet, *Judicial Kidnapping, Then and Now: The Case of Edgardo Mortara*, 93 NW. L. REV. 961 (1999).

96. See, e.g., Drobac, *supra* note 94, at 1642-46 (proposing bifurcated framework for courts considering role of religion in child custody cases). To be sure, religion may and frequently does factor in to the resolution of disputes between parents over the custody of their children, in ways both permissible and impermissible under the Constitution. See *id.*

But the Mortara case was not exclusively about religion. The religious authority of the Papacy in the mid-19th Century was inextricably bound up with its temporal powers, and with its rights and duties as *parens patriae*. The story of young Edgardo's kidnapping thus speaks as well to the manner in which Papal authorities exercised their responsibility as the ultimate protector of the citizens of the Italian state. As Kertzer's narrative so ably illustrates, it is beyond question that the intentions of the Pope and his emissaries were benevolent; Pope Pius IX and others within the Papal hierarchy believed fervently in the rightness of their actions in wresting Edgardo from his family. They measured the value of their service to the boy not only against their religious convictions, but also by the opportunities they felt they were creating for a child who would otherwise have been raised by a demeaned and persecuted social minority. Throughout the years of Momolo Mortara's efforts to free his son from the control of the Papacy, state authorities remained firm in their professed commitment to the boy's welfare.

Moreover, in the face of growing international criticism, the same authorities took refuge in the assurances that they had offered to the Mortara family every available legal recourse. With the benefit of more than a century of perspective, it may seem difficult to reconcile the Church's treatment of Edgardo with legitimate State objectives.⁹⁷ But lawyers are trained to look for both sides of every story, and one cannot help but observe the procedural regularity with which the matter went forward.

From the standpoint of the Church, which is to say the Papal government and its agents, the removal of Edgardo was not a kidnapping at all. Rather, they regarded the events as profoundly "lawful," attended by rigorous safeguards and carried out with scrupulous concern for the rights, and even the sensitivities, of everyone involved. It seems clear that the officers of the Inquisition did not react rashly or hastily to the news of Edgardo's covert baptism. The only witness to the event, Anna Morisi, was brought before the Inquisitor, Father Feletti, pursuant to a written summons. She was placed under oath prior to her interrogation, which was transcribed.⁹⁸ Approximately six months passed before the Inquisitor ordered the *gendarmes* to remove Edgardo from his parents,⁹⁹ during which time the Inquisitor consulted with his superiors in Rome, in order to be certain that everything was done "punctiliously according to the sacred Canons."¹⁰⁰

97. David Kertzer repeatedly refers to the boys "kidnapping." See Lubet, *supra* note 24, at 964. Other sources are in accord. The *Encyclopedia Judaica*, for example, uses the term "abduction" three times in the single paragraph it devotes to the case. See 12 *ENCYCLOPEDIA JUDAICA* (1972).

98. See Kertzer, *supra* note 10, at 83-84 (noting that Anna Morisi was summoned before Inquisitor to be interrogated and that her testimony was transcribed).

99. See *id.* at 207.

100. *Id.* at 6.

Following Edgardo's remand to the custody of the Papacy, the Mortaras embarked on an extended campaign of petitions and appeals. The Mortaras quickly began assembling evidence in support of their cause, much of it directed at a legal technicality. It seems that, absent parental consent, Catholics were allowed to baptize Jewish children only if there was strong reason to believe that the child was about to die. "In such a case, canon law held, the importance of allowing a soul to go to heaven outweighed the customary commitment to parental (and especially paternal) authority over children."¹⁰¹

Thus, the Mortaras and their supporters collected a series of affidavits and depositions designed to show that Edgardo had never been deathly ill, and certainly not at the time he was allegedly baptized by Morisi. By attacking the legal validity of the baptism, they hoped to undo its effect and win the return of their son.

After several meetings with church officials, including Cardinal Giacomo Antonelli, the Vatican Secretary of State, the Mortaras prepared a formal legal brief for the Pope's consideration. The document, which appeared to have been drafted with the assistance of a canon lawyer, perhaps even a priest, was styled a "Pro-memoria and Syllabus."¹⁰² The Pro-memoria included the facts of the case and a seven page section, written in Latin, citing the works of various church authorities in support of the Mortaras' plea. Another section, in Italian, listed similar instances in which baptized children had been allowed to remain with their Jewish parents.¹⁰³ The main document in the appeal was the Syllabus, a fifty page brief, written in Latin, that rested on citation and interpretation of ecclesiastical legal sources and detailed references to prior cases of forced baptism.¹⁰⁴

Pope Pius IX might have simply ignored the Mortaras document, but instead he directed his legal advisors to prepare a response, also based on Church law. The result was a thirty-four page document titled *Brevi cenni*—"A brief explanation and reflections on the pro-memoria and syllabus humbly presented to His Holiness, Pope Pius IX, concerning the baptism conferred in Bologna on the child Edgardo, son of the Jews Salomone and Marianna Mortara."¹⁰⁵

Although dismissive of the Mortaras claims, *Brevi cenni* refuted their arguments point by point in a clear effort to demonstrate the legality of the child's removal by the Papal authorities. It listed five conclusions, refuting the five major points of the appeal, and it distinguished each of the

101. *Id.* at 97.

102. *Id.* at 144.

103. *See id.* at 144. It appears that the Mortaras were arguing in the alternative. First, the baptism was invalid; but even if valid, Edgardo should be restored to their custody. *See id.*

104. *See id.* at 145-46 (detailing Context of Syllabus showing why Edgardo's return to his family was warrante dunder Church dogma).

105. *Id.* at 146.

prior cases relied upon by the Mortaras.¹⁰⁶ Although the Pope certainly owed no response to the Mortaras, the length and detail of *Brevi cenni* clearly indicates the perceived importance of legality. The document was, in fact, distributed to Papal representatives and ambassadors throughout Europe and Latin America, as evidence that the Church had acted in fairness and justice.¹⁰⁷

All of which brings us to the subject of Edgardo's welfare. From the first moment that the case came to the attention of the Inquisitor, Papal authorities firmly believed that they were acting in furtherance of Edgardo's obvious best interest. Having been made a Christian, even an unconscious one, it seemed obvious to everyone in the Church—from the Pope to the police marshal—that nothing but harm could come to Edgardo if he remained in the custody of his infidel parents. The boy had to be removed for his own safety, quickly and completely.

In defending the Church's abduction of Edgardo Mortara, the Jesuit journal *Civiltà Cattolica* offered a succinct justification for removing the boy from his family:

If nature gives the father full responsibility for the care of his own son, it is not so the father can do as he pleases, but so that the son's interests can be protected. How can anyone think that such authority should be left to the father when "it is almost certain that it will be for the son's good but rather for his supreme ruin? . . . Does not civil law provide that one should take a child away from a cruel and murderous father in order to protect his life? And why, then should it be unjust for someone's eternal life that which seems so just when it concerns his temporal existence?"¹⁰⁸

Put in this way, the position of the Church seems straightforward and readily defensible. How could any thinking citizen resist the effort of the State to protect a child so clearly at risk of serious and avoidable harm? If the object of the State, in fashioning rules of process, is to guard against undeniable and remediable harm, it seems there is little room to question the underlying rationale supporting State intervention, against the interests and "rights" of the offending parents.

But clearly, the reactions naturally evoked by the retelling of Edgardo's story suggest that there is more to understanding the legitimacy of the state's actions than simply acknowledging the theoretical basis of its powers as *parens patriae*. Ultimately, the legitimacy of its intervention in Edgardo's case must rest on an understanding of what exactly *was* the nature of the interests the Church sought to protect, and how this interest balanced against the "rights" of the boy's family.

106. *See id.* at 149-50.

107. *See id.* at 146.

108. *Id.* at 115.

With the passage of time, it surely became easier to defend Edgardo's continuing residence in the Catholic community with increasing confidence. By the time he furtively passed by his unsuspecting father in the Rome train station—as Garibaldi's forces moved in to Rome to wrest control of the city from Papal authorities—Edgardo, at age nineteen, had long since lost any desire to re-establish contact with his Jewish family.¹⁰⁹ His dialog with the King's emissary to Rome, seeking to avoid being turned over to his parents by the police, reflects not only his desire to assert his own autonomy, but also the distance he had traveled in the twelve years since being removed from his family.¹¹⁰

But what of the defense of the Church in the immediate wake of the abduction? Then, of course, Edgardo had no relationship with the Catholic Church whatsoever. Yet the rhetoric of the Pope's supporters was no less forceful or adamant about the rightness of the Church's actions, even long before the boy had a chance to grow accustomed to life as a Catholic initiate. Defenders of Edgardo's abduction pointed to the boy's nearly instantaneous attraction to the Catholic faith. For example, Kertzer recounts a passage from one of the most prominent church-linked papers in Italy at the time, *L'Armonia della religione civiltà*, which published a story titled, *News of the Young Christian Mortara*. The paper described the boy's miraculous transformation to Christianity:

[Edgardo] had entered the Catechumens with a single idea 'already stamped on his forehead, and even more in his heart—the great benefit for him of being Christian, the singular grace that he had received through Baptism and, by contrast, the immense misfortune for his parents of being and wanting to remain Jews.'¹¹¹

To make the story more palatable, the Catholic press dismissed the obvious anguish and protestations of Momolo and Marianna Mortara as resulting not from the loss of their son, but rather from their "hostility

109. See *id.* at 264. Indeed, one (perhaps overly dramatized) account describes an encounter between Edgardo and his brother Riccardo, who entered Rome in 1870 wearing the uniform of the nationalist Italian army, reflected how deeply entrenched his loyalty to the Pope had become:

[Edgardo], dressed in a 19-year-old initiate's robes, placed one hand over his eyes to shield them from the sacrilegious sight and raised the other in front of him, signaling Riccardo to stop where he was. 'Get back, Satan!' Edgardo shouted. But, the crestfallen Riccardo replied, 'I am your brother.' To this Edgardo responded, 'Before you get any closer to me, take of that assassin's uniform.'

Id. at 263.

110. See *id.* at 265. The arguments that must have been made in defense of Edgardo's preservation of connections fashioned over more than a decade under the protective arm of the House of Catechumens will no doubt seem familiar to contemporary scholars who have advocated for greater legal protection of children's existing psychological attachments. See *id.* at 266-71.

111. *Id.* at 69.

toward the church.”¹¹² The importance of Edgardo’s rapid integration into the Catholic Church was obviously central to the case made by the Church’s defenders.

In fact, the claims of Edgardo’s miraculous and sudden attachment to the Catholic church—beginning in the carriage that transported the boy from Bologna to Rome—explain little.¹¹³ Not only were these claims hotly disputed by Edgardo’s family,¹¹⁴ but they were (as Professor Kertzer notes) on their face incredible.¹¹⁵ More telling are the comments of the Genoa newspaper *Il Cattolico*, which reflect the extent to which negative stereotypes of Jewish faith and culture drove and justified the abduction of young Edgardo:

Whoever among us gives a little serious thought to the matter, compares the condition of the Jew—without a true Church, without a King, and without a country, dispersed and always a foreigner wherever he lives on the face of the earth, and moreover, infamous for the ugly stain with which the killers of Christ are marked—[whoever] compares this reviled man with a Roman citizen, who has as his country the most civil nation in the world, Italy, and who can occupy the most splendid civil and ecclesiastical offices of the eternal city, will immediately understand how great is this temporal advantage that the Pope is obtaining for the Mortara boy.¹¹⁶

The theme of religious persecution was of course central to the lives of Jews in 19th Century Italy. In the tumultuous days of the *risorgimento*, as Italian nationalists sought to wrest control of civil affairs from Pope Pius IX, protecting the rights of the oppressed Jewish minority was assuredly not a matter of utmost importance to the beleaguered papacy. In the Italian states of the mid-19th Century, following several hundred years of religious oppression, confinement to ghettos and deprivation of basic human rights, Jews certainly had little reason to expect respectful or even-handed treatment of their family relations at the hands of the ruling Catholic authorities.

This history sheds considerable light on the forces that led the Inquisitor of Bologna to act upon a third-hand account of an illiterate teenager’s baptism of a Jewish infant. Once the children of infidels had experienced

112. *Id.* at 114.

113. *See id.* at 51. In the Church narrative, according to Professor Kertzer, during his trip to Rome, Edgardo almost immediately began to demonstrate an acute interest in the subject of the Christian religion, asking repeatedly to be taken to visit church whenever his carriage stopped in a new town (*see id.* at 51-52), such that his trip “began to take on the mythic quality of a voyage from error to enlightenment.” *Id.* at 51.

114. *See id.* at 52-53.

115. *See id.* at 70 (noting European liberals’ view of Church’s story as absurd).

116. *Id.* at 135.

the blessings of Christianity, it was the Church's duty to "protect in them the sanctity of what they have received, and to nourish them for eternal life."¹¹⁷ First and foremost, Catholic authorities were concerned for Edgardo's immortal soul. While the "worldly wise"¹¹⁸ might easily discount this motive, there can be no doubt that the Church officials firmly and sincerely believed that they were acting with Edgardo's ultimate happiness in mind. They did not seize the boy for the conscious purpose of tormenting his parents, or even to coerce the Jewish community generally. The Church had no particular animus toward the Mortaras and it did not make a general practice of depriving Jewish parents of their children. Rather, the entire impulse was protective—Edgardo's interest in salvation simply outweighed his parents' interest in custody.¹¹⁹ That is why Pope Pius IX always replied *non possimus*—impossible!—when he was petitioned for Edgardo's return.

It may say little for the Church that its position in the Mortara case appears beneficent only in comparison to the later atrocities of the Nazis. Still, it is impossible—*non possimus*!—to deny that the Pope and his agents, even the Inquisitor, were impelled in their actions by both the law and their own good intentions. Yet this combination of strict legality and determined benevolence makes the Mortara case, if anything, even more troublesome than if it had been merely a hateful abduction. More troubling because it is suddenly more relevant than we might have thought to contemporary juvenile law. And it is to those implications that we now turn.

V. LESSONS OF THE MORTARA CASE IN MODERN CHILD WELFARE

The Mortara case offers strong evidence that the benevolence of state actors can be insufficient to guard against undue interference with family relations. Yet one need not delve so deeply into history for evidence of the risks attendant upon unchecked state authority over family affairs. What follows is a discussion of four more recent chapters in the realm of child welfare, each of which suggests similar cautions about undue reliance on the belief that even the most well-meaning state actors can be trusted completely to further the "best interests" of our children.

117. *Id.* at 149.

118. See Clay Chandler, *Scalia's Religion Remarks: Just a Matter of Free Speech?*, WASH. POST, Apr. 15, 1996, at F7 (reporting Justice Antonin Scalia's acerbic observation that the "worldly wise" consider basic tenets of Christianity to be "absurd" and "simple-minded"); see also Steven Lubet, *Judicial Independence and Independent Judges*, 25 HOFSTRA L. REV. 745, 749 (1997) (defending Justice Scalia from criticism that his remarks were improper for judge).

119. See Kertzer, *supra* note 14, at 149 (listing reasons for Church's conclusion that paternal rights were not violated).

A. *The Indian Child Welfare Act*

The pernicious cultural and ethnic stereotyping that seems to lay at the heart of the Mortara case has been echoed in various chapters of modern American history. One such chapter, reaching back decades rather than centuries, recounts the treatment of Native American children at the hands of non-Indian child welfare authorities and the circumstances surrounding passage of the Indian Child Welfare Act ("ICWA").¹²⁰ This Act was the product of rising concern in the mid-1970s over the consequences to Indian children, families and tribes of abusive child welfare practices that resulted in the removal of large numbers of Indian children not only from their families, but also from their tribal communities.¹²¹

By the time of the ICWA's passage in 1978, the formal and informal adoption of Native American children by non-Native American families had become so prevalent as to create a cultural crisis for many Indian tribes.¹²² In 1974, four years prior to enactment of the ICWA, Senate oversight hearings yielded an abundance of case stories, statistical data and expert testimony documenting what one witness called "[t]he wholesale removal of Indian children from their homes [creating] the most tragic aspect of Indian life today."¹²³ In its first decision applying the provisions of the ICWA, the Supreme Court recounted an alarming set of statistics that helped drive passage of the Act:

Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions. Adoptive placements counted significantly in this total: in the State of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes.¹²⁴

120. 25 U.S.C. §§ 1901-1963 (1978).

121. For further discussion of the concerns over the consequences to both Indian children and families from abusive child welfare practices, see *infra* notes 148-49 and accompanying text.

122. See generally *Indian Child Welfare Program: Hearings before the Subcomm. on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93rd Cong. (1974) [hereinafter *1974 Hearings*] (statement of William Byler) (listing placement of Indian children in foster care and adoptive names).

123. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *1974 Hearings*, *supra* note 122, at 3.

124. *Choctaw*, 490 U.S. at 33, *citing* H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531; see *1974 Hearings*, *supra* note 122, at 75-83 (discussing surveys of states and placement rates for Indian versus non-Indian children).

Notwithstanding the extreme disruptive effect of these placement practices on Native American Communities, many proponents of trans-racial adoption practices—not unlike the Papal authorities who supported Edgardo's removal—were fully committed to the rightness of their actions and to the sense that they were performing a valuable service.¹²⁵ Throughout the 1960s, one of the centerpieces of public policy regarding Native American children was the Indian Adoption Project, a program undertaken in 1958 jointly by the Bureau of Indian Affairs and the Child Welfare League of America.¹²⁶ This program was seen by its sponsors as a way of opening the security and permanency of the adoption process to a cultural minority of disadvantaged children.¹²⁷ Most of the children placed through the program went to live with non-Indian families, many at great distance from their original homes, and most in communities where Native American children were seen as “anomalies.”¹²⁸

Descriptions of the program echo the rationale offered by Papal authorities for Edgardo's kidnapping, suggesting in no uncertain terms that its subjects were being “rescued” from the harsh social and economic conditions then prevalent in many Native American communities.¹²⁹ In a 1972 report detailing the results of a longitudinal study of some 100 children placed through the project, one of the central analysts of the relocation program recounts a series of statistical indicators reflecting the “tragic plight” of American Indians.¹³⁰ These markers depict conditions of deprivation affecting the education, health, living conditions and overall stability of living arrangements for Native American children in general.¹³¹ Although the report's author, Professor David Fanshel, acknowledges that removal from their families is not a solution for the “mass of Indian children suffering from longstanding national neglect and abuse,” the report nevertheless defends the program as having offered a valuable service to a

125. For further discussion of Native American child placement and those who view it as correct see, *infra* notes 126-36 and accompanying text; KERTZER, *supra* note 10, at 84 (stating Pope's belief in righteousness of cause).

126. See DAVID FANSHIEL, *FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN* iii (1972) (describing initiation of Indian Adoption Project).

127. See *id.* at ix (“The Indian Adoption Project was initiated . . . out of concern to open up the option of adoptive placement to the American Indian child.”).

128. See *id.* at 22, 33-36. The 1974 congressional hearings adduced evidence that approximately 85% of all Native American children living in foster homes were living in non-Indian homes. See 1974 *Hearings*, *supra* note 122, at 17, 72-94.

129. See H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* U.S.C.C.A.N. 7530, 7531 (describing reasons for removing children from Native American communities).

130. See FANSHIEL, *supra* note 126, at 22-24 (noting statistics indicating poor conditions of Native American Indians).

131. See *id.* For example, the report notes that some 50 thousand Indian families live in unsanitary dilapidated dwellings, including huts, shanties and abandoned automobiles; that literacy, education and unemployment rates were among the worst in the nation and that American Indian communities are plagued by alcoholism and other health problems. See *id.*

minority of children in the worst of circumstances. "The children placed through the Indian Adoption Project were those who, from the perspective of the social workers who intimately knew their situations, were doomed to lives of stark deprivation."¹³²

The report's conclusions about how Native American children fared in culturally dissimilar homes seem excessively sanguine.¹³³ Professor Fanshel recognizes at the outset the uncertain long-term consequences of separating children from their social and cultural heritage,¹³⁴ acknowledging as well the likelihood that many of the youths studied were likely to develop additional problems as they became teenagers.¹³⁵ However, his conclusions about the practices of the Indian Adoption Program, although qualified, are generally quite positive: "More than fifty percent of the children were rated as showing relatively problem-free adjustments . . . and another 25 percent were rated as showing adequate adjustments with strengths outweighing weaknesses."¹³⁶

It is clear from his report that Professor Fanshel went to some lengths to limit the degree of subjectiveness inherent in his measures of outcome. Yet it is equally clear that he did not entirely succeed in avoiding the traps set by nonnative social workers who claimed to know what was best for the subjects of the program. The determination of how well children who have been removed from their native culture and community fare in a new setting is, to a large extent, inherently and inescapably subjective. Even beyond the delayed effects that Fanshel acknowledges may be associated with this kind of disruptive trauma, many of the costs of such an upheaval simply cannot be quantified.¹³⁷ Much of the research and commentary on the subject of adoption in general acknowledges the likelihood that as adopted children grow older, they are increasingly likely to raise questions

132. *Id.* at 24.

133. *See id.* at 50-76. Professor Fanshel's assessment of the success of the Indian Adoption Program is based on an examination of the circumstances of a sample of approximately 100 Native American children placed through the program. *See id.* at 53. His conclusions rest on a series of structured interviews with adoptive and biological parents, following progress of the children over a period of approximately five years. *See id.* at 50-53.

134. *See id.* at 22 (noting uncertainties involved in separating children from heritage).

135. *See id.* at 269. Professor Fanshel expresses particular concern about the matter of interracial dating and courtship. *See id.*

136. *Id.* at 280. In a foreword to the study, then Executive Director of the Child Welfare League of America, Joseph Reid, summarizes the study's conclusion: "Fanshel found that the children had fared well physically, intellectually and emotionally and that the parents were highly satisfied with their experience in having adopted Indian children." *Id.*

137. *See* Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 998-99 (1995) (noting that adopted children have multiple losses, some deeply psychological).

about their origins and about their lost family and heritage.¹³⁸ The difficulties associated with an adoptee's search for identity are likely to be particularly pointed for children adopted transracially.¹³⁹

Moreover, judgments about the seriousness of the deprivation associated with the environment from which a child is removed may also be highly subjective. Fanshel's report analyzes the frequency of occurrence of various "disabling conditions" of the biological mothers questioned in the study, and the results are striking.¹⁴⁰ From his sample of ninety-eight families, by far the most common reported problems were in the categories of alcoholism (39) and "personality disorder" (41).¹⁴¹ An additional twenty-nine families were guilty of either "neglect" (18) or "severe neglect" (11).¹⁴² In contrast, more objective measures of family disfunction were comparatively infrequent, including history of incarceration (16), diagnosed mental illness (3) and abuse (1).¹⁴³ These figures reflect the fact that the majority of disabling conditions attributed to the adoptees' biological families were in categories that are fluid, difficult to quantify and highly susceptible to the subjective judgments of the individuals responsible for diagnosing the family's problems.¹⁴⁴

138. See *id.* at 999-1001 (discussing adopted children's interests in origins); Kenneth Watson, *The Case for Open Adoption*, PUB. WELFARE, Fall 1998, at 24, 27-28 (same).

139. See, e.g., RUTH MCROY & LOUIS ZURCHER, *TRANSRACIAL AND INTRACIAL ADOPTED CHILDREN* 124-34 (1983) (discussing difficulties transracially, (specifically black children in non-black families) adopted children have in search for identity); Arnold Silverman, *Outcomes of Transracial Adoption*, 3 *FUTURE OF CHILDREN*, 104, 109-11 (1993) (same).

140. See FANSEL, *supra* note 126, at 62 (evaluating disabling conditions of mother).

141. See *id.* at 63. The House Report on the ICWA noted that: One of the grounds most frequently advanced for taking Indian children from their parents is the abuse of alcohol. However, this standard is applied unequally. In areas where rates of problem drinking among Indians and non-Indians are the same, it is rarely applied against non-Indian parents. Once again cultural biases frequently affect decision making." H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

142. See FANSEL, *supra* note 126, at 63 (listing results).

143. See *id.* (listing objective measures of familial problems).

144. See H.R. REP. NO. 95-1386, at 10 (discussing standards used for defining mistreatment). This conclusion is echoed by the House Report accompanying the ICWA:

Very few Indian children are removed from their families on the grounds of physical abuse. One study of a North Dakota reservation showed that these grounds were advanced in only 1 percent of the cases. Another study of a tribe in the Northwest showed the same incidence. The remaining 99 percent of the cases were argued on such vague grounds as "neglect" or "social deprivation" and on allegations of the emotional damage the children were subjected to by living with their parents. Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers.

Id.

Like the Papal authorities who forced young Edgardo's removal, defenders of the Indian Adoption Program had their vocal critics.¹⁴⁵ Professor Fanshel's reliance on the non-Native social workers who claimed intimate familiarity with the subject families contrasts sharply with much of the commentary made during debates over the ICWA, passed by Congress only two years after Fanshel's study.¹⁴⁶ Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, summarized succinctly what numerous witnesses saw as the principal reason for the high rates of removal of Indian children:

One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.¹⁴⁷

Ultimately, both Congress and the Supreme Court responded to the decimation of Native American communities. The House Report on the ICWA expressly acknowledged the underlying concern that Indian child welfare determinations should not be based on "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."¹⁴⁸ Moreover, the condemnation of culturally insensitive judgments made by non-Native social workers was an important theme in the Supreme Court's decision in *Mississippi Band of Choctaw Indians v.*

145. See 1974 *Hearings*, *supra* note 122, at 116-17 (criticizing placement of Indian Children with non-Indian families).

146. See FANSEL, *supra* note 126, at 24.

147. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989); 1974 *Hearings*, *supra* note 122, at 191-92.

148. H.R. REP. NO. 95-1386, at 10, *reprinted in* 1978 U.S.C.C.A.N. at 7530, 7546 (seeking by-law to protect Indian child's rights as Indian). Justice Stevens' dissenting opinion in *Mississippi Bank of Choctaw* explains that:

The apparent intent of Congress was to overrule such decisions as that in *In re Cantrell*, 159 Mont. 66, 495 P.2d 179 (1972), in which the State placed an Indian child, who had lived on a reservation with his mother, in a foster home only three days after he left the reservation to accompany his father on a trip.

Mississippi Band of Choctaw Indians, 490 U.S. at 58 (citing Mack T. Jones, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123, 1129 (1979)); see H.R. REP. NO. 95-1386, at 10 ("In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.").

Holyfield.¹⁴⁹ Certainly, state courts have gained considerable experience in applying the ICWA in the years since Fanshel's study. As fights over the scope of the ICWA rage on, the question of whether these same courts have become better overall in accounting for cultural bias continues to be a subject of considerable debate.¹⁵⁰

B. *The Case of Walter Polovchak: The "Littlest Defector"*

Clearly, concerns about the imposition of value-laden and subjective best interest decisions lay at the heart of the ICWA. Is it fair to assume that the ICWA put these concerns to rest? The extreme impact of placement practices affecting Native American Children may never have been duplicated to quite the extent seen in the decades preceding the ICWA's passage, but the same type of problems clearly continue to recur on a regular basis. Consider, for example, the celebrated case of Walter Polovchak.¹⁵¹

In the spring of 1980, Michael and Anna Polovchak were Ukrainian immigrants living in Chicago.¹⁵² For whatever reason, they became unhappy in the United States and decided to return to their homeland, then still part of the former Soviet Union.¹⁵³ Their twelve year-old son, Walter, was persuaded by other family members that he would be better off remaining in the United States.¹⁵⁴ Fearing that his parents would force him

149. See *Mississippi Band of Choctaw Indians*, 490 U.S. at 30, 35 n.4. Justice Brennan wrote in his opinion in *Mississippi Band of Choctaw Indians* that:

[O]ne of the particular points of concern was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. The House Report on the ICWA noted: "An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights."

Id. (quoting H.R. No. 95-1386, at 10).

150. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 522-30 (1996) (limiting application of the ICWA to situations where child's parents have significant relationship with Indian tribal culture). *In re Bridget R.* provides a detailed account of the debate over the limits of state court jurisdiction over Indian children, the "existing Indian family" doctrine, and the constitutional limits on the reach of the ICWA. See *id.*

151. See generally *Polovchak v. Meese*, 774 F.2d 731, 732 (7th Cir. 1985) (affirming parental rights but remanding for new remedy); *Polovchak v. Polovchak*, 734 F.2d 18 (7th Cir. 1984) (unpublished disposition); *Polovchak v. Landon*, 614 F. Supp. 900 (N.D. Ill. 1985) (ruling that parents were denied due process rights); *In re Polovchak*, 454 N.E.2d 258 (Ill. 1983) (granting parental rights).

152. See *Polovchak v. Meese*, 774 F.2d at 732-33 (giving factual background of case).

153. See *id.* (describing facts of case).

154. See *id.* (noting that sister also refused to return).

to move, Walter secretly left home to live with an older cousin.¹⁵⁵ His parents sought police assistance in finding their son.¹⁵⁶ An international incident ensued.

Once his story became known, Walter was dubbed "the littlest defector."¹⁵⁷ He was lionized in the press for his refusal to return to the Soviet Union. His parents were vilified as traitors and scoundrels,¹⁵⁸ as were the attorneys who represented them.¹⁵⁹ The Cook County, Illinois juvenile authorities intervened on behalf of Walter's best interest, removing him from his parents' custody and seeking permanent guardianship.¹⁶⁰ Within forty-eight hours Walter was granted political asylum in the United States, in a proceeding of which his parents had no notice and in which they were not permitted to participate.¹⁶¹ The State Department took up his cause, on direct order of then Deputy Secretary of State, Warren Christopher.¹⁶²

155. See Charles Leroux, *Whatever Became of That Soviet Kid Who Sued His Folks to Stay Here? He's Become Joe Suburbia*, CHI. TRIB., July 2, 1999, § 5, at 1 (disclosing that Polovchak ran away from parent's house).

156. See *Polovchak v. Meese*, 774 F.2d at 732 (stating that parents sought assistance of police).

157. See, e.g., Phyllis Mensing, *Walter Polovchak, Now 20, Writes Book; 'Littlest Defector' Has No Regrets About Staying in U.S.*, L.A. TIMES, July 10, 1988, at 24; Ludmilla Thorne, *The Littlest Defector, Walter Polovchak*, NAT'L REV., Mar. 18, 1983, at 314.

158. See Thorne, *supra* note 157, at 319 (recognizing public opinion). Assertions about the Polovchaks virtually mirrored allegations made against the Mortaras nearly 130 years earlier. See generally KERTZER, *supra* note 10 (writing on Edgardo Mortara's kidnapping). According to the attorney who obtained asylum for Walter, Michael and Anna were abusive parents in both the Ukraine and in Chicago, for example, "we found that Walter needed glasses very badly, he could barely read We also noticed that [he] needed extensive dental care." Thorne, *supra* note 157, at 318. It was suggested that the father's intention to return to the Soviet Union was prompted by "very selfish" reasons, including the desire to be reunited with his "girlfriend." *Id.* at 319. Michael Polovchak was said to be "explosive" and "unbalanced." *Id.* at 320. According to one Ukrainian community activist, "One time, he physically attacked me, screaming that I was helping [Walter's lawyer] deprive him of his son. Anna had to pull him away." *Id.*

159. See George F. Will, *Safe From the ACLU*, WASH. POST, Sept. 26, 1985, at A25 (criticizing position of American Civil Liberties Union ("ACLU") in case). Michael and Anna were represented by lawyers provided by the ACLU, including co-author Steven Lubet. See Leroux, *supra* note 155, at 1, 4.

160. See *Polovchak v. Meese*, 774 F.2d at 732-33 (stating that authorities intervened on Walter's behalf).

161. See *id.* at 733 (recognizing speedy asylum process and parent's challenge based on due process rights); see also Wendy Leopold, *The Littlest Defector Grows Up; Soviet Immigrant Walter Polovchak Chronicles His American Dream*, L.A. TIMES, Apr. 3, 1988, § 6, at 1.

162. See Mensing, *supra* note 157, at 24 (noting Secretary of State's direct involvement).

Everyone "just knew" it was better for Walter to stay in the United States, rather than remain part of his parents' family.¹⁶³ One journalist intimated that only Russian dupes would represent Anna and Michael: "The Soviet Union howled. The Illinois chapter of the American Civil Liberties Union screamed. And for the next five years both worked tirelessly to ship him back to the USSR."¹⁶⁴ According to another, "[f]ifty states would remove Walter from the custody of parents who abused him. But the ACLU . . . supports the right of Walter's father to commit the ultimate and unappealable abuse of consigning him forever to a prison society."¹⁶⁵ An emigre lawyer was quoted as saying that, "[the Soviets] will never forget or forgive what he did and said here. They will also do everything possible to shake Walter's belief in God, and, eventually they may force him to renounce his faith."¹⁶⁶

In the end, the Polovchak case had disparate legal and practical outcomes. The higher courts consistently ruled that Michael and Anna's parental rights had been violated, but the litigation continued until Walter turned eighteen, making the legal issues moot and entitling him to obtain United States citizenship in his own behalf.¹⁶⁷ His parents had by then returned to their home in Lvov, now part of the non-Soviet, free-market, independent Ukraine.¹⁶⁸ Walter remains in the United States, having had only occasional contact with his family in the years since he reached his majority.¹⁶⁹

The government authorities who "protected" Walter from the evils likely to befall him as a Soviet citizen would have done well to recall *Il Cattolico's* defense of Edgardo's removal.¹⁷⁰ Whatever one thinks of the parties or the principles in the Polovchak case, it is safe to say that the matter was driven more by ideology than by child welfare. The authorities who permitted Walter's separation from his family no doubt knew little of what the boy's life was like in the home with his parents, and even less about what Walter might expect day-to-day upon his return to his native country. Although Walter's best interest was a constant refrain, there had been no previous case (and there has been no subsequent one) in which

163. See Leopold, *supra* note 161, at 1 (noting that Polovchak's defection garnered support of Ukrainian community, anti-communists and both Carter and Reagan Administrations).

164. Roger Simon, *Land of the Free is American Way*, CHI. TRIB., Oct. 13, 1985, at 5.

165. Will, *supra* note 159, at A25.

166. Thorne, *supra* note 157, at 320.

167. See *Polovchak v. Meese*, 774 F.2d 731, 732 (7th Cir. 1985) (affirming parental rights but remanding for new remedy). See generally *Polovchak v. Polovchak*, 734 F.2d 18 (7th Cir. 1984) (unpublished disposition); *Polovchak v. Landon*, 614 F. Supp. 900 (N.D. Ill. 1985) (ruling that parents were denied due process rights); *In re Polovchak*, 97 Ill. 2d 212 (1983) (granting parental rights).

168. See Simon, *supra* note 164, at 5.

169. See Leroux, *supra* note 155, at 4.

170. See Lubet, *supra* note 24, at 974 (applying lesson of Edgardo Mortara case to Walter Polovchak case).

the federal government intervened to deny parents custody of their child.¹⁷¹ The best interest claim was at best a hook on which to hang the true, and undoubtedly benevolent, purpose of Walter's partisans, which was to ensure through any means possible that he could remain in the United States.

C. *The Case of Alison Miles: The First Test of the "Baby Richard" Law*

The history of Native American adoptions and the story of Walter Polovchak both suggest cultural pitfalls that may stem from permitting the State to make determinations about children's futures over the objecting voices of their parents and communities. From a somewhat different perspective, the story of Alison M. suggests a related but distinct set of procedural concerns about the potential consequences of eroding traditional protections against state interference with parent-child relationships.¹⁷²

In 1993, seventeen-year-old Christina Miles left her home in Chicago with her fifteen-month-old baby, Alison, to visit her mother in Texas.¹⁷³ The trip was an unsuccessful attempt at reconciliation; following an argument during the visit, Christina's mother locked Christina out of the home and left Alison with other family members, in conditions described as "squalid" and "abusive."¹⁷⁴ Unsure of how to recover custody of her child, Christina turned for assistance to a family friend back in Chicago, who had previously expressed an interest in adopting Alison shortly before her birth:

In September 1993, Respondent, herself then a minor was faced with an exigency that would tax the mental resources of an experienced adult. She was alone, in strange surroundings, and her daughter had been taken away from her and turned over to strangers. Without the benefit of family support, Respondent turned to Petitioner for help.¹⁷⁵

According to Christina, the family friend, Colleen Henry, agreed to assist her only on the condition that she relinquish the child for adop-

171. See Howard French, *State Dept. Awarded Custody of African Boy in Abuse Case*, N.Y. TIMES, Jan. 3, 1998, at 22 (reporting child custody dispute). In the case of Terrance Karamaba, the nine year old son of a Zimbabwean diplomat, the State Department intervened to return the boy to his homeland, despite allegations by the New York Human Resources Administration that he had been regularly beaten by his father. See *id.*

172. See Michelle Campbell, *Tangled Adoption Case Tests Baby Richard Law*, CHI. SUN-TIMES, Nov. 28, 1995, at 1 (recognizing effect of Baby Richard law on adoption statutes).

173. See *In re Alison M.*, No.93 CoA 1697, at 3 (Cir. Ct. Cook Co. Ill. Feb. 15, 1996) (unpublished Memorandum Decision and Judgment Order) (on file with authors) [hereinafter *Alison M.*, Judgment Order] (discussing trip to Texas).

174. See *id.* at 4 (describing events during trip and child's living conditions).

175. *Id.* at 14.

tion.¹⁷⁶ Lacking any alternative, Christina agreed to allow Ms. Henry to fly to Texas and assist in recovering custody of the child.¹⁷⁷ Upon their return to Chicago, Ms. Henry permitted Christina to stay in her home for several weeks, but then in October 1993 purchased a plane ticket for her and urged her to visit her boyfriend in Texas.¹⁷⁸ The same day, following Christina's departure, Ms. Henry filed a petition seeking to adopt Alison and secured an *ex parte* order granting her temporary legal custody of the baby.¹⁷⁹

In her initial petition, Ms. Henry alleged that Christina had indicated her willingness to consent to the adoption.¹⁸⁰ Following her return to Chicago, however, Christina refused to surrender her child for adoption. Ms. Henry consequently terminated all visitation between Alison and her mother and filed an amended petition to adopt, alleging that Christina was an unfit parent.¹⁸¹ At the same time, Ms. Henry also requested that in the event her petition to adopt was denied, she be granted full custody of the child.¹⁸² Following a contested hearing in August of 1994—almost a year after Ms. Henry coerced Alison's teenage mother into surrendering custody of Alison—the trial court dismissed all of the allegations of unfitness against Christina.¹⁸³

At this point in the case, the real battle for Alison's future was joined. Although Illinois law permits the entry of *ex parte* interim custody orders, the Adoption Act made no provision for rehearing the issue of temporary custody, at the request of a parent who did not receive notice of the original hearing.¹⁸⁴ Thus, upon the dismissal of Ms. Henry's petition to adopt,

176. See *id.* at 4 (stating alleged conditions of assistance).

177. See *id.* (relating events of trip).

178. See Brief of Respondent-Appellee at 2, *In re Alison M.*, No. 93 CoA 1697, (Cir. Ct. Cook Co. Ill. Feb. 15, 1996) (No. 96-0878) [hereinafter *Alison M.*, Brief] (relaying facts of case).

179. See *id.* (discussing initial filing of petition).

180. See *Alison M.*, Judgment Order, *supra* note 173, at 5 (recognizing alleged condition).

181. See *id.* (stating that visitation rights were unlawfully terminated).

182. See *In re Colleen Henry*, No. 96-0878, at 2 (Ill. App. Ct. 1st Div. Dec. 24, 1997) (unpublished disposition) (on file with authors) [hereinafter *Alison M.*, Appellate Order] (identifying request for permanent custody if adoption petition failed).

183. See *Alison M.*, Brief, *supra* note 178, at 3-4 (commenting trial court dismissed allegations). The allegations of unfitness against Ms. Miles were patently without basis. See *Alison M.*, Appellate Order, *supra* note 182 (affirming trial court opinion). All but one of the specific allegations were dismissed on directed verdict following the close of petitioner's case, and the remaining charge of abandonment was dismissed following the presentation of evidence by Ms. Miles that she had been prevented from seeing her baby by Ms. Henry. See *id.* (discussing procedure of case and affirming trial court decision).

184. See 750 ILL. COMP. STAT. ANN. 50/13(f) (West 1999). In other circumstances, the right of a parent who does not receive notice of a custody hearing, and who loses legal custody pursuant to an *ex parte* order, can receive a hearing, for example, under Illinois law governing abused and neglected children, a parent who does not receive notice of an emergency shelter care hearing may file an

Christina was presented with her first opportunity to challenge an order depriving her of legal custody of her child, entered in her absence almost a year previously.

Before 1994, Christina's recovery of custody of her daughter would have been routine and uneventful. Prior to the Baby Richard case, Illinois adoption courts generally recognized that the assignment of temporary legal custody was dependent on the consideration of a petition to adopt and that the completion of adoption proceedings would eliminate the legal foundation for an interim custody order.¹⁸⁵ Petitioners seeking to adopt a child thus understood that the interim custody order was nothing more or less than a device to ensure the orderly transition of responsibility of a child and that no advantage could be gained from dilatory tactics causing delays in the ultimate resolution of a contested adoption.¹⁸⁶

All of this changed with the legislative backlash prompted by the Baby Richard case.¹⁸⁷ In June 1994, the Illinois Supreme Court handed down its highly publicized decision vacating the finding of unfitness against Otakar Kirchner and overturning his son's adoption.¹⁸⁸ Legislators sympathetic to the putative adoptive family understood that the laws then in effect would limit the family's ability to seek legal custody of the boy, who at that point had lived with them for more than three years.¹⁸⁹ With an eye toward providing Richard's caregivers with a legal basis for keeping the child in their home, the Legislature hastily passed the "Baby Richard" legislation, amending the adoption statute to require a best interest hearing following a failed adoption, with the petitioners as necessary parties.¹⁹⁰

affidavit and demand a rehearing within 48 hours. See 705 ILL. COMP. STAT. ANN. 405/2-10(4) (West 1993).

185. See Joseph Gitlin, "Baby Richard" Law Poses Many Questions for Adoption Attorneys, CHI. DAILY LAW BULL., June 19, 1995, at 6 (stating that "[ev]en the Illinois legislature . . . rush[ed] to pour legislation on the fire [public outcry over 'Baby Richard' case]").

186. See *id.* (mentioning temporary nature of interim custody order).

187. See *id.* (noting legislative backlash following Baby Richard case).

188. See *In re Doe*, 638 N.E.2d 181, 183 (Ill. 1994) (vacating lower court ruling).

189. See 750 ILL. COMP. STAT. ANN. 5/601(b) (West 1999); *In re Peterson*, 491 N.E.2d 1150, 1151-52 (Ill. 1986) (requiring third-party applicant for custody must show parent intentionally relinquished physical custody of child, and only "[w]hen this requirement is met [will] the non-parent be considered for legal custody of the child under a best interest of the child standard"). Relevant provisions of the Illinois Marriage and Dissolution of Marriage Act, as interpreted by the Illinois courts, precluded a third party from seeking custody of the child of a fit parent, absent both the physical custody of the child and the consent of the child's parent or parents. See 750 ILL. COMP. STAT. ANN. 5/601(b).

190. 750 ILL. COMP. STAT. ANN. 5/601(b). The amendment provided that: In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological

The Legislature thereby sought in effect to circumvent the limitations on standing that would otherwise have prevented the boy's caregivers from filing a request for legal custody. Thus, when Christina finally defeated the charges of unfitness leveled against her by Ms. Henry, she was forced to respond to a petition for permanent legal custody under this newly minted statute.

What followed between Ms. Henry and Alison's mother was a pitched battle, waged in both the courts and the press and marked by delay and dilatory tactics.¹⁹¹ The matter was not concluded in the trial court until after a contested evidentiary hearing was held under a best interest standard, fully eighteen months after the adoption petition was dismissed.¹⁹² Alison, by then, was almost four years old. By the time she was permitted to return to live with her mother, she had spent almost two and a half years in the home of an unrelated woman who had dragged out legal proceedings in the hope that the mere passage of time would solidify an otherwise legally groundless claim for custody.

In some respects, the trauma suffered by young Alison—forced from a home where she had lived for most of her young life—mirrors the injustices served by the court system upon her more well-known cousins, Baby Richard and Baby Jessica. Like these other children, Alison was forced to endure months of acrimony and contentious hearings over her future that cannot possibly have been in her best interest.¹⁹³ Moreover, she was ulti-

parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings.

Id. The legislation adding this language to the statute was conceived, drafted, passed and signed into law all within less than three weeks after the Illinois Supreme Court announced its decision vacating Baby Richard's adoption on June 16, 1994. See Illinois P.A. 88-550, Art. 9, § 975, effective July 3, 1994 (relaying legislative history).

191. See generally Campbell, *supra* note 172 (quoting attorneys involved in case); Andrew Fegelman, *Test of "Richard" Law Goes to Birth Mom*, CHI. TRIB., Feb. 16, 1996, at Metrolake 1 [hereinafter Fegelman, *Test*] (discussing outcome of case); Andrew Fegelman, *"Baby Richard" Law Faces 1st Test in Custody Fight*, CHI. TRIB., Apr. 28, 1995, at 1 [hereinafter Fegelman, *"Baby Richard"*] (reporting seamy details from trial); Gitlin, *supra* note 185 (discussing impact of law).

192. See *In re Colleen Henry*, No. 96-0878, at 2 (Ill. App. Ct. 1st Div. Dec. 24, 1997) (unpublished disposition) (on file with authors) (noting timetable of trial court). Ultimately, in what can only be described as a legal sleight of hand, the trial court determined that the petitioner was still obligated to satisfy the standing requirement of the MDMA, notwithstanding the clear legislative intent behind the Baby Richard law. See *id.* at 17-19. The trial court's refusal to either follow the statute or find it constitutional was affirmed on appeal. See *id.*

193. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 83-85 (1997) (relating effects of adversary system on custody disputes). Professor Janet Weinstein aptly notes that:

The adversary system is not humane. It does not concern itself with the welfare of the parties involved in terms of how the process itself may affect them. Although much attention has been paid to attempting to create a more humane and child-centered courtroom, the process of engaging in a battle with family members cannot be a positive experi-

mately forced out of the home of a parent who had cared for her for most of her life, into a home that was, at best, completely unknown.

Yet in one critical respect, Alison's story stands apart. In the cases of Baby Jessica and Richard, scholars and public commentators alike roundly criticized the results of legal disputes that were driven by the application of traditional due process safeguards protecting parental and familial autonomy.¹⁹⁴ In contrast, the harm to Alison arose in large part directly out of the legal reforms prompted by these earlier cases. In October 1994, when Colleen Henry began in earnest her quest to secure permanent legal custody of the child, she had every reason to believe that she would be successful. Public opinion generated by the Baby Richard case was still strong, and the legislature had recently removed what seemed to be the only legal barrier to her claim of custody.¹⁹⁵ The child had been in her care for a full year. Ms. Henry had good reason to believe not only that the strength of her attachment with Alison would be central to the court's judgment about the child's best interest, but also that the slow resolution of her petition would only serve to solidify her claim for custody. In the absence of the Baby Richard law, Alison's future would have been cleanly and quickly resolved following the dismissal of unsubstantiated charges of unfitness supporting the adoption petition. Instead, spurred by the hope of winning a secondary claim for custody, Ms. Henry continued to battle for another eighteen months. In this way, the harm suffered by the child as a result of the court process was directly related to the legislation seeking to break down the due process safeguards embodied in the standing requirement.¹⁹⁶

ence; certainly it is not for the children who are often placed in the middle of this internecine warfare . . . Ultimately, proceedings which pit children against parents, or place children in the middle of a battle between parents, are antithetical to the best interests of those children.

Id.

194. *See id.* (citing commentators and cases disputing due process arguments).

195. *See* Campbell, *supra* note 172, at 1, 16 (stating that "[i]f not for the Baby Richard law, Alison would be back with Gomez").

196. *See Alison M.*, Judgment Order, *supra* note 173, at 17-19 (noting attempted breakdown of due process safeguards). After determining that Ms. Henry lacked standing to pursue a claim for custody, the trial court nevertheless went on to consider the merits of her case, concluding that the evidence presented by the parties still justified restoring custody of Alison to her mother. *See id.* at 17. This finding, too, was affirmed on appeal. *See Alison M.*, Appellate Order, *supra* note 182, at 20-23. Although the authors acknowledge the possibility that the harm to Alison stemming from the court hearings might have been lessened had she been allowed to remain with Ms. Henry, this conclusion does not seem to be warranted from the court's treatment of the evidence adduced at the best interest hearing. *See id.*

D. *The Saga of Elian Gonzalez*

Walter Polovchak is no longer a boy, and his native Ukraine is no longer part of the despised Soviet Union. Yet while the winds of foreign policy constantly change, the existence of political factions remains a fixed and essential element of a democratic regime, assuring the continuing importance of procedural safeguards that protect family relationships. No case in recent memory demonstrates this truism more forcefully than the saga of the Cuban boy named Elian Gonzalez.

On Thanksgiving morning, November 25, 1999, two Florida fishermen came across young Elian clinging to an inner tube found drifting in the waters off of coastal Florida.¹⁹⁷ As the story of the boy's unlikely rescue unfolded, immigration authorities learned that three days prior to his rescue, 5-year-old Elian, his mother and eleven other refugees had left Cuba in a flimsy aluminum dinghy, bound for the United States.¹⁹⁸ When their motor quit and high seas capsized the boat, the passengers abandoned the dinghy in favor of two large inner tubes towed behind as life preservers.¹⁹⁹ Two days later, Elian's mother and nine other adults had slipped into the sea and drowned.²⁰⁰

The fishermen delivered the boy—sunburned and dehydrated—to Coast Guard authorities, who arranged to have him hospitalized and treated.²⁰¹ Upon Elian's release from the hospital, INS officials paroled the boy to a great uncle in Miami,²⁰² who had fled Cuba ten years earlier and who had met Elian only once previously.²⁰³ With the support of anti-Castro Cuban expatriates in South Florida, the great uncle, Lazaro Gonzalez, promptly submitted an application for asylum to the INS on behalf of Elian, seeking to prevent his return to communist Cuba.²⁰⁴ The conservative Cuban American National Foundation immediately seized on Elian's

197. See Defendant's Motion to Dismiss at 7, *Gonzalez v. Reno*, No. 00-206-CIV-MOORE, 2000 U.S. Dist. LEXIS 3225, (S.D. Fla. Mar. 21, 2000) [hereinafter *Gonzalez*, Motion to Dismiss]; Lisa Arthur et al., *5-year-old Survivor Clung to Inner Tube Two More Rafters Rescued, but 11 Other Cubans May Have Died at Sea*, MIAMI HERALD, Nov. 26, 1999, at A1.

198. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 8; *Little Rafter Leaves Hospital*, MIAMI HERALD, Nov. 27, 1999, at A1.

199. See *Little Rafter Leaves Hospital*, *supra* note 198, at A1.

200. See *id.*

201. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 7; *Little Rafter Leaves Hospital*, *supra* note 198, at A1.

202. See *Little Rafter Leaves Hospital*, *supra* note 198, at A1; Sue Ann Presley, *Young Refugee at Center Of International Dispute; Father, Cuba Want Return of Boy Rescued at Sea*, WASH. POST, Nov. 30, 1999, at A3. Elian was paroled to his uncle pursuant to 8 U.S.C. § 1182(d)(5)(A), which grants authority to the Attorney General to permit aliens in the United States to remain free from detention while their immigration status is considered, but provides that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. § 1182(d)(5)(A) (2000).

203. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 13.

204. See Order at 3, *Gonzalez v. Reno*, No. 00-206-CIV-MOORE, 2000 U.S. Dist. LEXIS 3225, (S.D. Fla. Mar. 21, 2000) [hereinafter *Gonzalez*, Order].

plight, literally turning the youth into a poster-child for their continuing political battle against the communist government in Cuba.²⁰⁵ The Cuban-American community in South Florida began lobbying heavily for government permission to allow Elian to remain in the United States, organizing a series of protests and demonstrations that brought traffic in the city of Miami to a standstill.²⁰⁶ Like Walter Polovchak some twenty years earlier, Elian quickly became a household name, capturing front-page headlines in newspapers across the country.²⁰⁷

Back in Cuba, Elian's father, Juan Miguel Gonzalez, publicly called for his son's return to his home in Cardenas.²⁰⁸ Mr. Gonzalez and Elian's mother had shared responsibility for Elian following their divorce. The father claimed to be very close to his son and unaware of his ex-wife's plan to flee Cuba with Elian.²⁰⁹ When INS officials failed to return the boy immediately, Cuban leader Fidel Castro issued sweeping condemnations of the United States government, increased the numbers of troops stationed outside of the United States Interests Section in Havana and organized his own series of protests and rallies involving tens of thousands of Cuban citizens.²¹⁰

For its part, the INS sought to remain focused on Elian. After paroling the boy to his great uncle, the INS launched an investigation into Elian's circumstances, conducting interviews of both his extended family

205. See Ana Aclé et al., *Raft Survivor at Center of Spat*, MIAMI HERALD, Nov. 29, 1999, at A1; Presley, *supra* note 202, at A3.

206. See *Miami Protests Erupt over Cuban Boy's Deportation, Police Arrest Dozens Who Oppose U.S. Ruling*, CHI. TRIB., Jan. 6, 2000, at C1 [hereinafter *Miami Protests Erupt*]; *Sit-Ins Block Intersections and Disrupt Dade Traffic*, MIAMI HERALD, Jan. 7, 2000, at A1 [hereinafter *Sit-Ins Block Intersections*].

207. See, e.g., Lizette Alvarez, *Protesters Choke Miami in Rage over Cuban Boy*, PLAIN DEALER, Jan. 7, 2000, at A1; Eric Lichtblau, *U.S. Officials Ask Judge to Return Elian to Cuba*, L.A. TIMES, Jan. 28, 2000, at A1; Jean Marbella, *A pawn in a Political Battle; 'El Milagro': The Cuban 'miracle' boy has become a larger-than-life symbol for the adults fighting over his future*, BALTIMORE SUN, Jan. 31, 2000, at A1; *Miami Protests Erupt*, *supra* note 206, at C1; *Sit-Ins Block Intersections*, *supra* note 206, at A1.

208. See, e.g., Jay Weaver, *Cuban Father, Grandmother: Return Boy*, MIAMI HERALD, Dec. 31, 1999, at B3 (reporting Juan Miguel Gonzalez's appearance on nationally televised "Nightline" program and his plea for Elian's return home). More formally, Mr. Gonzalez contacted the Cuban Foreign Minister the day after his son's rescue, seeking assistance in securing the boy's return home. See Gonzalez, *Motion to Dismiss*, *supra* note 197, at 9.

209. See Gonzalez, *Order*, *supra* note 204, at 4 (describing Juan Miguel's relationship with Elian); *Fight Shifts to the Courts; Congress Subpoenas Boy; Family Files Petition*, MIAMI HERALD, Jan. 8, 2000, at A1 (reporting that Elian's father was unaware of his ex-wife's plan to flee Cuba with his son).

210. See, e.g., *Cuban Mothers Decry U.S. Delay: Angry Marchers in Havana Campaign to Reunite*, CHI. TRIB., Jan. 14, 2000, at C1 (reporting mass demonstrations of Cuban protesters); Juan O. Tamayo, *Castro Ultimatum: Return Boy in 72 Hours or Migration Talks at Risk*, MIAMI HERALD, Dec. 6, 1999, at A1 (reporting increase in troops stationed outside U.S. Interests section in Havana, Fidel Castro's demand for immediate return of child, and promised "battle for world opinion").

in South Florida and his father and grandparents in Cuba.²¹¹ Ultimately, the INS concluded that Elian's father, Juan Miguel Gonzalez, was fully capable of making decisions on behalf of his son, and INS officials accordingly credited his decision to withdraw the asylum application submitted on Elian's behalf by great-uncle Lazaro.²¹²

Enraged at the prospect that the United States Government would contemplate repatriation of a Cuban national, Lazaro Gonzalez and his legal team brought a custody action before an elected Florida State Court judge with close ties to the Cuban community in South Florida,²¹³ and secured an *ex parte* order purportedly granting Lazaro both temporary legal custody of Elian and the legal authority to speak for the boy on immigration matters.²¹⁴ The Florida family court judge—Rosa Rodriguez—acted under a statute permitting certain close family members to seek temporary legal custody of a child, either upon the consent of the parent or upon a showing that a non-consenting parent unfit to care for the child.²¹⁵

Armed with the family court order, Lazaro returned to the INS and demanded again that his request for asylum on Elian's behalf be considered.²¹⁶ Backed by Attorney General Janet Reno, the INS again refused, responding that only Elian's father was authorized to speak for the boy.²¹⁷ However, Attorney General Reno declined to take any immediate steps toward Elian's return to Cuba, instead inviting Lazaro's lawyers to seek review of her decision in the federal district court.²¹⁸ Lazaro obliged, filing a federal lawsuit seeking to compel the INS to initiate asylum proceed-

211. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 10-22; *Gonzalez*, Order, *supra* note 204, at 3-6.

212. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 22-24; *Gonzalez*, Order, *supra* note 204, at 7-8.

213. See, e.g., Manny Garcia et al., *Judge Employed Elian Family Advisor*, MIAMI HERALD, Jan. 12, 2000, at A1 (reporting judge's financial and political ties to one of primary advisors to Lazaro Gonzalez and his family).

214. See *Gonzalez v. Gonzalez*, No. 00-00479 (Fla. Cir. Ct. Jan. 10, 2000) (Temporary Protective Order), at 4 (granting Lazaro temporary legal custody of child and authority to speak for him in immigration matters) [hereinafter *Gonzalez*, Family Court Order]; *Gonzalez*, Motion to Dismiss, *supra* note 197, at 25-27.

215. See generally FLA. STAT. ANN. § 751 (West 1999). This statute permits an award of temporary legal custody over the objection of a parent "only upon a finding, by clear and convincing evidence, that the child's parent [is] unfit." See *id.* § 751.05(3). This standard is the same high standard which the State must satisfy under the Constitution in order to permanently sever the legal relationship between a parent and a child. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (requiring states to support allegations of unfitness by clear and convincing evidence before they can permanently sever parent-child relationship).

216. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 27-29 (discussing Attorney General Reno's response to Lazaro Gonzalez's request for reconsideration).

217. See *id.* (same); *Gonzalez*, Order, *supra* note 204, at 10 (noting letters from Attorney General Reno and INS stating that Elian's father was only person authorized to speak for him).

218. See, e.g., Frank Dawes & Andrew Viglucci, *Reno Rejects Judge's Ruling in Boy's Case*, MIAMI HERALD, Jan. 13, 2000, at A1.

ings and indefinitely preclude Elian's return to Cuba and reunification with his father.²¹⁹

For the next several months, with Lazaro's federal lawsuit pending, the propaganda war between entrenched political enemies continued unabated.²²⁰ Advocates on both sides traded accusations and challenges, arguing vociferously over the relative merits of communism and democracy, and what is "best" for Elian.²²¹ Anti-Cuban politicians in the United States pursued various tactics designed to prevent Elian's return to his homeland, including the highly unusual introduction of a special "private bill," designed to decree citizenship for the boy and preclude the INS from deporting him.²²² One Congressional Representative went as far as issuing a subpoena commanding six-year-old Elian to testify before a House Committee, in an unabashed attempt to force his continuing presence in the United States.²²³ Elian himself remained caught squarely in the middle of this political fracas, no doubt appreciating nothing of the debate other than that his future depended on its outcome.

On March 21, 2000, the federal court dismissed Lazaro's lawsuit, finding no merit in his contention that the INS' refusal to consider his asylum applications violated either Elian's or his own statutory or constitutional rights.²²⁴ As of this writing, Elian remains under the care of his great-

219. See generally Motion for Preliminary and Permanent Injunction and Petition for Writ of Mandamus, *Gonzalez v. Reno*, No. 00-0206 (So. D. Fla., Jan. 27, 2000).

220. Major newspapers across the country maintained weekly, or even daily coverage of the story throughout the early months of 2000. A Westlaw search of the Miami Herald alone returned more than 400 stories, opinions and letters on Elian's case, from January through March 2000.

221. See, e.g., Jay Weaver, *Elian's Fate Unclear*, MIAMI HERALD, Dec. 1, 1999, at B1 (reporting claim of Lazaro Gonzalez's lawyer that it "would not be in Elian's best interest to be returned to the oppression in Cuba"). Even Presidential candidates George W. Bush and Albert Gore weighed in on the boy's fate, declaring respectively that Elian's best interests should be determined by the Florida family court (Bush), and that the "real fault here lies with Fidel Castro" (Gore). See *Elian's Future Is up to Reno, Judge Says U.S. Can Wait out Appeal or Return Boy to Cuba*, MIAMI HERALD, Mar. 22, 2000, at A1. Among the more pointed charges were the claims of Cuban officials that the arrest of an alleged Cuban spy and the expulsion of a Cuban diplomat in February 2000, were part of a United States Government plot to impede Elian's return to his homeland. See Steven Pearlstein, *Cuban Diplomat Remains in Canada; Havana Orders Alleged Spy to Stay, Requests 30-Day Visa*, WASH. POST, Feb. 29, 2000, at A1).

222. See Karen DeYoung, *Rare Act of Congress Is Planned for Elian: GOP Leaders Back Citizenship Bills*, WASH. POST, Jan. 16, 2000, at A3.

223. See Sue Anne Pressley & Karen DeYoung, *Hill Committee Subpoenas Cuban Boy*, WASH. POST, Jan. 8, 2000, at A12 (discussing subpoena issued by Rep. Dan Burton (R-Ind.) commanding boy's testimony before House committee).

224. See *Gonzalez*, Order, *supra* note 204, at 49-50 (dismissing Lazaro Gonzalez's lawsuit).

uncle, the Florida family court suit still pends, and Lazaro Gonzalez has promised further appeals and delays.²²⁵

Even this brief review of the legal tactics used in Elian Gonzalez's situation teaches—yet again—that the interests of children are simply not served when politics dictate decisions about the future of a child. Particularly noteworthy are the actions of the Florida family court—granting Lazaro Gonzalez temporary legal custody and purporting to authorize him to pursue a claim for asylum in the federal system on behalf of Elian.²²⁶ The statute relied upon by Judge Rodriguez permits only certain specified members of a child's extended family to request temporary legal custody of the child.²²⁷ In granting Lazaro Gonzalez's preliminary request, however, the family court judge made no mention of the fact that Elian's great-uncle was not among the specified relatives authorized to proceed under the statute, and therefore clearly lacked standing to pursue his claim.²²⁸ Moreover, in purporting to assign to Lazaro Gonzalez the "legal authority to assert and protect such rights as the child may have under United States immigration law,"²²⁹ Judge Rodriguez paid equally little heed to principles of federalism that preclude state courts from interfering with matters preempted by federal law, including immigration statutes.²³⁰

If Judge Rodriguez's decision indeed lacked legal foundation, her conclusion that Lazaro Gonzalez's petition established a *prima facie* case of imminent risk of harm²³¹ can only be explained in political context. Though styled as an order designed only to preserve the "status quo," the initial family court order found that absent judicial intervention, Elian would likely have returned promptly to Cuba, creating "an emergency which requires the Court to exercise its jurisdiction for Elian's protection."²³² At the time this finding was made, the family court had before it

225. See *Elian's Future Is up to Reno, Judge Says U.S. Can Wait out Appeal or Return Boy to Cuba*, MIAMI HERALD, Mar. 22, 2000, at A1.

226. See *Gonzalez*, Family Court Order, *supra* note 214, at 4 (granting Lazaro Gonzalez temporary legal custody and authorizing him to speak for Elian in asylum proceedings). In dismissing Lazaro's federal suit, the District Court declined to consider the effect of the Family Court Order, finding on other grounds that he had sufficient standing to pursue a claim on Elian's behalf. See *Gonzalez*, Order, *supra* note 204, at 20 n.15.

227. See FLA. STAT. ANN. § 751.011 (West 1999) (defining extended family members includes child's "brother, sister, grandparent, aunt, uncle, or cousin.")

228. See *Gonzalez*, Family Court Order, *supra* note 214, at 5 (granting Lazaro Gonzalez temporary legal custody without mentioning his status as unauthorized relative under statute).

229. *Id.* at 5.

230. See *Gonzalez*, Motion to Dismiss, *supra* note 197, at 40-50 (explaining doctrines of field and conflict preemption and their application to immigration law).

231. See *Gonzalez*, Family Court Order, *supra* note 214, at 5 (stating that "[p]etitioner has established a *prima facie* case that Elian may be subject to imminent harm if temporary relief is not granted").

232. *Id.* at 4.

only the generalized charges in Lazaro's petition, "alleging that if Elian is returned to Cuba he faces threat of mistreatment or abuse, including the loss of any due process rights he may have under United States immigration law, as well as harm to his physical and mental health and emotional well being."²³³ Lazaro claimed nothing specific about the parenting capacity of Juan Miguel Gonzalez, or about the nature of his relationship with his son. Rather, his charges were based solely on broad concerns about the relative lack of political, economic, and other opportunities available to children raised in Cuban society. Moreover, despite Juan Miguel's widely reported opposition to the boy's remaining in the United States,²³⁴ neither Lazaro nor the family court made any effort whatsoever to address the statutory requirement that an objecting parent be found "unfit, by clear and convincing evidence."²³⁵ As a consequence, the court's conclusion that Elian would be in imminent and immediate risk of harm if returned to Cuba²³⁶ had less to do with Juan Miguel's fitness to parent than with the fitness of Fidel Castro to govern his country.

To some, the refusal to return a child to an impoverished, economically depressed, and politically oppressive nation may seem an unassailable choice. Yet ultimately, the parallels between the plight of Elian Gonzalez and the kidnapping of Edgardo Mortara seem inescapable. At comparable ages, both boys were separated by state authorities who paid superficial heed to the requirements of due process, but who seemed in retrospect to be swayed chiefly by the partisan winds of the day. The rhetoric of Edgardo's captors—disparaging the spiritual and temporal opportunities available to children raised in a Jewish community—was no less forceful than that of detractors of the Cuban state a century and a half later.²³⁷ In the end, many of the arguments offered to support Elian's separation from his father in Cuba seem nearly indistinguishable from the conceptual justifications for Edgardo's removal from his parents, and from the destruction of a family for the sole offense of being Jewish.

VI. CONCLUSION

With questions about cultural and ethnic stereotyping as a backdrop, the story of Edgardo Mortara's kidnapping and its aftermath teaches valuable lessons about the use and limits of legal process in furtherance of state objectives. Although Edgardo's family claimed no guaranteed right to ap-

233. *Id.* at 3.

234. For a further discussion of Juan Miguel Gonzalez's opposition to Elian's presence in the United States, see *supra* note 209 and accompanying text.

235. FLA. STAT. ANN. § 751.011 (stating that requirement of unfitness be shown by clear and convincing evidence).

236. See *Gonzalez*, Family Court Order, *supra* note 214, at 5 (finding that Elian would be in imminent risk of harm if returned to Cuba).

237. Of course, Elian was rescued at sea and brought to the United States to save his life. But the Papal authorities in 1858 also regarded the covert baptism of Edgardo Mortara as a miraculous deliverance.

peal their son's removal to Catholic authorities, his case was nevertheless notable for its procedural regularity. From the Inquisitor's response to the initial revelation about the boy's baptism, through Edgardo's removal from his home, to the Pope's answer to the legal appeal carefully prepared by the family's advocates, the case proceeded with all the hallmarks of contemporary due process. Like modern families, the Mortaras depended on the available avenues of legal recourse that channel the state's enforcement of religious, social and cultural ideals. Their ultimate failure to achieve redress casts doubt not only on the value of procedural safeguards against undue interference in family relations by state agents, but also, in the end, on the utility of such safeguards as an aid to achieving outcomes that are truly in the "best interest" of the child.

Troubling stories about children whose lives have been up-ended by rigid legal processes no doubt will continue to demand the attention and concern of the caring public. Moreover, the continuing reexamination of tested legal doctrines should be seen as part of a healthy and needed effort to ensure that our legal systems do the best possible job of protecting vulnerable children from avoidable harm.

If legal doctrines are to be rewritten to extend the protection of the courts to relationships between children and surrogate parent figures, the costs of such a change should be understood and weighed. To the parent who seeks to preserve or protect a custodial relationship with his or her child, there would likely be little to distinguish the burden of facing a threshold evidentiary hearing to determine if a third-party claimant has in fact established a psychological parent-child relationship, from a full-blown best interests custody hearing. Considerable room remains for debate about the relative importance of shielding families from state intervention and about when a parent's conduct justifies such intervention. If in fact, however, there is a value to the preservation of threshold safeguards that protect fit parents from challenges to their presumptive right to raise their families as they see fit, it must be acknowledged that expanding the role of the courts to determine children's futures must necessarily sacrifice this value on the altar of the "best interest of the child."

Moreover, the cautionary tale of Edgardo Mortara, with vivid and disturbing clarity, drives home another point: so called best interest judgments simply cannot be freed from the cultural biases of those who would seek to impose their judgments on the relationships between children and parents. As Professor Robert Levy argues, caution in using the standard as a guidepost is warranted because of "the invitation the 'best interests' standard's indeterminate qualities offers to judges to award custody to those litigants whose attributes and values most resemble their own."²³⁸

To be sure, courts that have been legitimately charged with the task of deciding a child's future may have no choice but to ground their judg-

238. Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197 (1993).

ments in a view of the child's interests that derives from personal experience. Yet in the end, judges are human, prone to the same prejudices and fallibilities as any person who acts with responsibility for a child. The stories of Edgardo and his more modern counterparts suggest that even seemingly clear-cut procedural safeguards are often clouded by subjective judgments. This inescapable fact suggests good reason to be skeptical of the claim that the overall quality of justice afforded to children by our legal system can be enhanced by leaving courts free to decide when and how the state should interfere with parent-child relationships, unfettered by anything other than their own biases, experiences and notions about the "best interest" of the child.