1995

Imagining Children's Rights

Suellyn Scarnecchia

University of Michigan Law School, scarnecchia@law.unm.edu

Available at: https://repository.law.umich.edu/articles/349

Follow this and additional works at: https://repository.law.umich.edu/articles

Part of the Civil Rights and Discrimination Commons, Courts Commons, Family Law Commons, Juvenile Law Commons, and the State and Local Government Law Commons

Recommended Citation


This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
IMAGINING CHILDREN’S RIGHTS

SUELLYN SCARNECCHIA*

On the day that Nelson Mandela was elected President of South Africa, my husband and I happily told our eight year old son Robert that this, indeed, was a day for celebration. At last, everyone in South Africa could vote. Without hesitation, Robert asked, "Can the children vote, too?"

Robert plays the role in our family of providing the child’s voice. He is our window into how the world appears to one little eight year old. In growing up and becoming the adults, the parents, my husband and I have lost the child’s point of view.

In imagining children’s rights, I imagine a legal system wherein the particular views, needs and wants of children are given voice and respect. That vision — a legal system wherein the particular views, needs and wants of children are given voice and respect — now exists only in our imaginations and is viewed as ridiculous and even dangerous to some.

Today, I will tell you some stories about real, live children, whose futures have been determined by our legal system. To speak of children’s rights hypothetically, raises images of children suing to go live with their rich uncle or suing to demand a Nintendo system from their parents. I hope that by bringing you stories of the legal system’s treatment of real children, you will have a better understanding of what I mean by children’s rights and why they must be recognized. Although children’s rights have been recognized in limited ways in the areas of free speech,¹ criminal law² and reproductive rights³, a child’s rights in the context of custody decisions have not been recognized — those decisions continue to revolve around the rights of the adults battling for possession of a child.

I ask you to imagine children’s rights, because I do think it takes imagining to view children as rights-bearing citizens, and not as the property of their biological parents. Professor Stone in his 1972 article "Should Trees Have Standing?"⁴ wrote:

* Clinical Professor of Law, University of Michigan Law School; J.D., Michigan, 1981; attorney for Jan & Roberta DeBoer, the prospective adoptive parents of "Baby Jessica," in their Michigan and U.S. Supreme Court litigation. See pp. 286-287, Infra.

4. Christopher D. Stone, Should Trees Have Standing? - Toward Legal Rights For...
Each time there is a movement to confer rights onto some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us" — those who are holding rights at the time.5

The tempting alternative to recognizing children's rights is to simply blame these difficult cases on the adults. To say, if only the adults had made better judgments along the way, then this would not have happened. This became the easy way to dismiss the Baby Jessica case. Well, if the birth mother hadn't lied about the birth father's identity; if the prospective adoptive parents had just given the baby back right away; if the courts had worked faster .... But none of these answers, so clear in hindsight and not so clear at the time decisions were made by the parties, protects the next child who comes along. When you listen to the cases I describe today, you will hear of many different ways in which courts are led to this Solomon-like decision. Blaming the adults makes us feel better, but it does not address the underlying failure to recognize the child as a person who is independently affected by the actions of the other parties. Adults and their lawyers do not necessarily make good judgments in child custody cases, that is why the child's interests must be given an independent voice. By concentrating on the adults and their failures, we continue to render the children and their needs invisible.

THE STORY OF KASSEN

The New Mexico Supreme Court is now considering the fate of four year old Kassen Roth.6 When Kassen was nine months old, his birth mother delivered him to an Albuquerque adoption agency and signed away her parental rights to the little baby.7 She reported to the agency that the child's father had not supported the family for two months.8

Kassen had been badly neglected in his birth mother's care. When he went to his adoptive parents' home, he did not know how

---

Natural Objects, 45 S. CAL. L. REV. 450 (1972).
5. Id. at 455. (footnote omitted).
8. Id.
to cry and he did not know his name. He would eat only if the food was placed on the floor.  

The Roth family took in Baby Kassen and made him a part of their family. He overcame his earlier neglect and grew to love his parents and his two brothers. He had a family.

His father learned of the adoption and contested it immediately. The adoption agency thwarted his attempt to obtain immediate custody of Kassen. The lower court in New Mexico found by clear and convincing evidence that his birth father had abandoned Kassen and thus terminated his parental rights. The New Mexico Court of Appeals reversed and ordered Kassen transferred to his birth father. The New Mexico Supreme Court heard oral arguments in the case in June 1994 and a decision is pending.

The legal question in Kassen's case is whether or not the birth father's parental rights could be properly terminated at the time of the adoption. If his rights were improperly terminated, Kassen will live with his birth father and lose the family that has nurtured him from nine months to over four years old. He will lose the people he loves as his mom and dad. He will lose his two brothers.

THE STORY OF CAMERON AND BRANDON

Cameron and Brandon Baldanza were born a little over a year apart to a heroin-addicted birth mother who abandoned them both at the hospital. The birth mother's cousin, Millie Baldanza and her husband took the boys in. Millie nursed them through the effects of heroin addiction at birth and loved them as her own. After years of abandonment, the biological parents contested termination of their parental rights when the boys were two and three years of age.

10. In re JJB, 868 P.2d at 1258.
11. Id.
12. Id. at 1259.
13. Id. at 1256-66.
15. In re JLB, (Roth v. Bookert) Supreme Court of New Mexico No. 21864. Attorney Cynthia A. Fry, counsel for the Roths confirmed over the phone with the author that the case was argued in June 1994 and a decision is still pending.
The New York social services agency began efforts to reunify the boys with their birth parents. In fact, the agency began to reunify a family which had never existed. This reunification process continues today. The boys are four and five years old now. They are sent off to stay with their birth parents for court-ordered visits and return to the Baldanzas shaken and traumatized.

I have met Millie Baldanza and I heard her speak recently.\textsuperscript{16} She told this story: One day, one of the brothers held Millie’s hand and brought her to his bedroom to show her how he had cleaned his room. Millie praised his work and he turned to her and asked, "Now can we stay with you Mommy?" Millie cannot promise Cameron and Brandon that they won’t lose her.

\textbf{THE STORY OF EMILY}

Prior to the birth of Baby Emily, a Florida judge signed an order finding her birth father, Gary, to have abandoned the birth mother.\textsuperscript{17} Emily was born August 28, 1992. Three days later her prospective adoptive parents brought her home and soon filed for adoption. The birth father contested the adoption, in fact he had informed the attorney who was handling the adoption that he would not consent, even before the adoption was filed. That attorney did not inform the adoptive parents nor the court of this conversation with the father.\textsuperscript{18} In October 1992, after hearing the father’s evidence, the court reversed its earlier decision and found that Gary had not abandoned the birth mother and so the adoption must fail.\textsuperscript{19} A rehearing on the abandonment was granted the next month. The testimony at the rehearing revealed that Gary had been convicted of rape in the past and that Gary physically and emotionally abused the birth mother while she was pregnant with Emily and had provided no support during the pregnancy.\textsuperscript{20}

In September 1993, the court reversed its earlier ruling and once again found abandonment by Gary and thus waiver of his consent for the adoption. Baby Emily’s adoption was finalized.\textsuperscript{21}

\begin{itemize}
  \item \textsuperscript{16} Public Statement at the Conference of the DeBoer Committee for Children’s Rights, in Ann Arbor, MI (Oct. 1, 1994).
  \item \textsuperscript{17} \textit{In re Baby E.A.W.}, 647 So.2d 918 (Fla. 1994).
  \item \textsuperscript{18} Mark Hansen, \textit{Fear of the Heart}, A.B.A.J. (Nov. 1994).
  \item \textsuperscript{19} \textit{In re Baby E.A.W.}, 647 So.2d at 918.
  \item \textsuperscript{20} \textit{Id.} at 920-21.
  \item \textsuperscript{21} \textit{Id.} at 922.
\end{itemize}
The birth father appealed the adoption and on June 22, 1994, a Florida Appeals Court ruled that Gary did not abandon the birth mother during pregnancy; that his past criminal record was irrelevant; the child’s best interests were irrelevant; and the abuse of the birth mother during pregnancy was irrelevant. The adoptive parents appealed and the entire appeals court bench reversed the first panel and affirmed the trial court’s order granting the adoption. The birth father has appealed to the Florida Supreme Court. Emily is now over two years old.

THE STORY OF JULIO

Julio Sanchez was born in 1986 with severe physical complications. The Orsi’s, experienced and licensed foster parents, took him in at his birth mother’s request. Expected to live only one year, Julio is now eight years old. Despite his severe disabilities, he lives at the center of the Orsi family where all of the other children interact with him regularly. He smiles, laughs, plays with toys and loves his parents and siblings.

Earlier this year the Connecticut Department of Mental Retardation issued an order to remove Julio from the only home he has ever known to place him in a group home closer to his birth mother’s town. All of his nurses (eight in total) and his pediatrician have written affidavits that say he will suffer greatly and could die if removed from his family.22

THE STORY OF JILLIAN

The Tennessee Supreme Court has recently held that Jillian Bond was not a party to her own adoption and therefore was not permitted to have counsel represent her. Jillian is seven years old. Her attorney tells us that "Jillian lives day to day, hoping to be able to stay with her family (the Bonds) and constantly dreading the knock on the door that will take her away."23

When she was eight months old, Jillian’s birth mother abandoned her in the care of the Bonds family. At the age of three, the Tennessee Department of Human Services decided to reunite Jillian with paternal grandparents — again reuniting a family which never existed in the first place. While in the care of her paternal grandpar-

---

23. Letter from Kathleen Mitchell, Jillian Bond’s Attorney.
ents, Jillian was severely sexually abused and eventually returned to the Bonds family. Later, Jillian's birth mother contested an attempt by the Bonds family to adopt her.24 The Court of Appeals of Tennessee affirmed the lower court's decision which denied the Bonds the right to adopt Jillian, but gave permanent custody of Jillian to the Bonds.25 The birth mother has appealed the custody decision and the Tennessee Supreme Court agreed to hear the appeal.

After the Tennessee Supreme Court denied standing to Jillian in her own adoption, her attorney filed suit in the United States District Court seeking a ruling that Jillian is indeed a person with rights and is entitled to standing and counsel. That suit is pending.26

**THE STORY OF RICHARD**

In Illinois, Baby Richard's mother placed him for adoption and told the birth father that the baby had died.27 When the father found that the child had been placed for adoption, he contested the adoption.28 Because he had not come forward during the time limits required under Illinois Adoption law, the trial court granted the adoption over his protests.29 The Illinois Court of Appeals affirmed the trial court's grant of the adoption and stated the following:

Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the *Dred Scott* mentality that a human being can be considered a piece of property "belonging" to another human being. To hold that a child is the property of his parents is to deny the humanity of the child.30 In an adoption, custody or abuse case, ... the child is the real party in interest. [I]t is his best interest and corollary rights that come before

28. *In re Doe*, 647 N.E.2d at 649.
29. *Id.* at 651. The trial court found by clear and convincing evidence that the father had failed to demonstrate any interest in the child during the first thirty days after the birth. The trial court found the father to be unfit and that his consent to the adoption was not required.
30. *Id.* at 651-52.
anything else, including the interests and rights of biological and adoptive parents.  

The case was appealed by the birth father to the Illinois Supreme Court, which reversed and ordered that the child be transferred to the custody of the birth father, who has since married the birth mother. The United States Supreme Court denied certiorari on the case this month.

While the case was pending, the Illinois legislature passed a law which will allow Richard's adoptive parents to file for custody of Richard, once the adoption had failed. The birth father petitioned the Illinois Supreme Court for a writ of habeas corpus to have the child transferred to his custody without a hearing. The Illinois Supreme Court granted the writ and ordered that the child be transferred "forthwith." The United States Supreme Court has denied a stay of the Illinois transfer order, with two justices dissenting.

The Illinois Supreme Court stated in its decision:

In the opinion below, the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. [The child's best interests] should never have been reached and need never have been discussed.

THE STORY OF STEPHANIE

Stephanie Meade was four days old when she went home with Jim and Jackie Meade, who were her foster parents and eventually became her legal guardians. She is now eight years old. When she was three, her birth mother began an attempt to dismiss the guardianship. Stephanie's case has been contested since then. The Meades, who have raised Stephanie for 8 years, have been denied standing in Michigan to sue for her custody. Her birth father, who has nothing

32. In re Doe, 638 N.E.2d 181 (III. 1994); rehearing denied, 159 Ill. 2d 347 (III. 1994).
35. In re Doe, 638 N.E.2d at 182.
but a biological connection to Stephanie, has come forward to file a
custody case, asking the court to leave Stephanie with the Meades,
the only parents she has ever known.\(^{36}\) The hearing to determine
which home would be in the best interest of Stephanie is scheduled
for 1995 and will mark the first time in five years of litigation that
Stephanie's interests will be considered relevant.

Recently, Jackie Meade, through her tears, relayed this moment
in the life of a little girl who doesn't know when she might lose the
family she loves: Jackie was helping Stephanie tie her shoes. They
were both looking down at her shoes, when Stephanie looked up and
captured Jackie's eyes. She said "You can't help me mommy, can
you?" She had learned that the woman upon whom she depended for
everything was not able to guarantee that they would remain a family.

THE STORY OF THE GRISSOMS

The three Grissom teenagers live with their mother in Missou-
ri.\(^{37}\) Tony, Rachel and Rebecca have testified openly and clearly
that their father abuses them on visits, including sexual abuse.
"[T]hey refuse to visit him because his behavior frightens them."\(^{38}\)
The judge has threatened their mother with jail and the children with
foster care if they don't visit their father.

A children's rights lawyer, Lewis Pitts, attempted to appear on
behalf of the Grissom children, to protect their right to be heard. The
court ruled that the teens had no right to intervene in the case and had
no right to counsel and sanctioned Mr. Pitts for bringing a frivolous
action. The Missouri Court of Appeals agreed that the children could
not intervene or have an attorney in a case involving their custody
and visitation, but reversed the order of sanctions against the
children's attorney.\(^{39}\)

THE STORY OF JESSICA

Jessica was placed for adoption, and a man who was not the birth
father was named by the birth mother.\(^{40}\) She was placed with Jan
and Robby DeBoer shortly after her birth and the birth mother
revealed the name of the actual birth father a few weeks later. The

---

38. Id.
39. Id.
case was litigated for two and a half years and I carried Jessica from the DeBoers' home and left her with her birth parents, Dan and Cara Schmidt, who had married when Jessi was fourteen months old.

As a result of the decisions of the Iowa and Michigan courts, it was ruled that:

1. When deciding between the two families, Jessica's interests were irrelevant.\(^{41}\)
2. Jessica did not have the right to bring an action in her own name, to ask the court to determine custody.\(^{42}\)
3. Jessica had no constitutional rights separate from the rights of her biological parents, unless those parents were unfit.\(^{43}\) On the issue of fitness, it was determined that the birth father's prior abandonment of two other children was irrelevant to the question of his fitness in Jessi's case.\(^{44}\)

Jessica is now called Anna Schmidt and lives with her birth parents in Iowa. The DeBoers have been denied any contact with the little girl and have no way of knowing how she is faring other than what the media is told by the Schmidts. More importantly, Jessi, now Anna, has never been permitted to see the parents who raised her from birth and has no idea whether they are still alive and whether they still love her.

**DISCUSSION**

I have briefly described nine cases to you. I could easily go on for hours describing more like them.

For me, the thread that connects these cases, is the failure by the court to recognize the child as an individual person who has feelings, who can be hurt and hurt badly. The child in each of these cases is still the item to be bartered over, the prize at the end of the litigation, the silenced party to the action.

You should note that the cases I've described are not all contested adoption cases. The contested adoptions are the most difficult perhaps, because of our tradition of adoption as an all-or-

---

42. In re Clausen, 502 N.W.2d at 655.
43. Id. at 666-67.
44. In the Interest of B.G.C., 496 N.W.2d at 246. But see, 496 N.W.2d at 247 (Snell, J., dissenting) (holding abandonment of other children proved abandonment for purposes of the adoption statute).
nothing proposition. You either are the parent or you are not — we have no tradition of compromise, and thus King Solomon must either split the baby in two or declare one parent the loser and one the winner.

But this question of recognizing the needs and interests of children arises in other settings, too. It arises daily in the context of foster care cases, wherein the state promises the biological parents that the children will be reunited with them if the parents change, while, especially infant children, are busily bonding to the foster family who cares for them. When the parents are ready to take the child back, is the child ready to go?

The cases become even more difficult as we attempt to protect not only the child's biological link to his or her birth parents, but to anyone who happens to be related. Under the pressure to keep children with blood relatives, we see twisted decisions, like Lenny's case in Texas45, which ripped a boy from the foster family that raised him from birth and from his birth parents, to live with a biologic brother whom he has never met in Oregon. Or, we see the Cox case in Wisconsin46, where two African American girls, raised by white foster parents, were to be placed with their aunt who had been pressured to take them because they should be raised inside their own family and their own race. The fact that one of the girls had described being abused at the aunt's home on visits and was terrified to return there was irrelevant.

We have guardianship cases where children have been left to be raised by nonbiological parents and where the law says the birth parent can come back and reclaim their property, their children, at any time. The law usually makes an exception if the birth parent is unfit. Yet, the definition of unfitness does not include the prior abandonment and because the birth parent has not had the child in his or her custody, there is no way to measure the parent's actual fitness for parenting. We see in Baby Emily's case the law's presumption in favor of a convicted rapist over the parents who have raised the child since birth — apparently because he has never had an opportunity to abuse this child, he must be presumed fit.

45. In the Interest of Lenny Vitinner, 105th Judicial District, State of Texas, Cause No. 92-1486-D.
46. Eldon Knoche, Foster girls will remain with Whites, MILWAUKEE SENTINEL, May 20, 1994 at 1A, 10A.
Finally, we have contested custody or visitation cases between two birth parents. The right of a noncustodial parent to visit is often protected at any cost to the child. If one of us is sexually assaulted or physically beaten by a stranger on the street, we are not forced to visit that person on a weekly basis, even with a supervisor present. But, children who have been attacked by a biological parent are rushed back to the scene of the crime to spend quality time with their attacker. A child who says, "No, I don’t want to see daddy" is silenced by a court system which is permitted to ignore the child’s voice. A little girl in Michigan was beaten black and blue from the waist down during a visit to her father’s home. Her father pled guilty to the assault and battery and within a year, the child was visiting again. Within a few months after visits resumed she was rushed to the hospital during a visit at her father’s home, near death from having been shaken so violently. I learned of the case when the mother’s attorney called to consult with me about preparing for the upcoming visitation hearing. Yes, the father had the right to request continued visits with this little girl.

Many barriers stand in the way of imagining a legal system wherein the particular views, needs and wants of children are given voice and respect. They fall generally into two categories:

1. The disbelief that children are actually harmed by custody decisions which exclude consideration of their interests. You see, if the children in these cases are resilient and can cope with change, then why should we be concerned? Adult-centered custody decisions would be acceptable.

2. The strength of our legal and social tradition which places biological links above links formed by love and relationship. The idea that a child might have a protectable interest in his or her relationship with someone other than blood relatives, flies in the face of our traditional definitions of family and of parental rights.

I believe these two barriers to meaningful children’s rights in the context of custody cases are related. Our understanding of children and what it means to be a child has advanced tremendously during the 20th century. At the same time, our legal system has been bombarded with the need to respond to social changes. The cases I have described today reflect an intersection of social and legal change which has not yet been resolved, which may seem too dangerous and threatening to resolve, but which cries out for resolution.

47. Telephone Interview with Jane Bader, Attorney at Law.
On the social side, we have greatly advanced understanding of children and their needs. Experts in early childhood development began to describe for us the process of bonding and attachment — the natural process between a child and one or two adults which creates the building blocks for the child’s physical, psychological and intellectual development. Indeed, it was discovered that when a baby did not emotionally attach to an adult, because of neglect, the child could actually stop growing, physically and emotionally, resulting in a condition called failure to thrive. The child’s very existence is dependant on someone responding to his cries, on feeding her when she’s hungry, on holding and caressing him, so that growing up can be faced with some sense of security.

Experts in early childhood development began to recognize that once a child was around six months old, the identity of the adult caregiver mattered to the child. Children begin to know when they are left with strangers. As they get older, their attachment to the adult or adults they know as parents becomes more and more necessary to their growth and development. Experts in children’s mental health advocated for continuity in a child’s relationships with adults and for secure attachments between children and adults.

When the Baby Jessica case was filed in Michigan, we knew that the Michigan courts could not finalize an Iowa adoption, so we were requesting that the DeBoers be permitted to keep physical custody of Jessica, that they become her legal custodians. Dan Schmidt would remain her legal father and have the right to visit and know her as she grew older. The trial court in Michigan held a hearing on what would be in the best interests of Jessica, regarding her custody, not an adoption. The trial lasted eight days and six experts testified. The trial court held by clear and convincing evidence that Jessi should remain in the custody of the DeBoers. His decision was reversed on appeal.

The trial witnesses who included psychologists, social workers, an infant mental health expert, and a psychoanalyst, all testified that Jessica’s loss of her attachment to Robby and Jan DeBoer would hurt her. In summarizing this testimony, the trial judge said: "We had different degrees of testimony from the experts. All the way from permanent, serious damage, she would never recover from, down to the child would recover in time. But every expert testified that there would be serious traumatic injury to the child at this time." (emphasis added).48

48. In re Clausen, 502 N.W.2d at 669. (quoting Circuit Judge William F. Ager, Jr.).
Any expert asked would likely agree that we should not remove a two year old child from the parents to whom the child is attached unless we are required to remove her. Often, we are required to remove children from their parents because the parents have abused or neglected them. We are to do this only when the child’s safety requires removal. That was not the case for Baby Jessica — by all accounts the DeBoers had provided good and proper care and she had a healthy relationship with them. The only other circumstance under which the state removes children from parents with whom they have bonded is when another adult makes a better or stronger legal claim to the right to custody of the child.

So, the experts agree that removing a child like Baby Emily, from her adoptive parents in Florida is likely to harm her. But, perhaps we aren’t as worried about Baby Emily and her future now that we have seen that Baby Jessica, after moving to another family and changing her name to Anna is just fine. Two television shows and Newsweek magazine have rushed to tell a nation mourning Baby Jessica’s loss of her family, that Anna Schmidt is a happy, healthy girl with no apparent scars from the transfer of custody. In fact the Newsweek story was so anxious to reassure us that the newly named Anna is fine that they titled their piece "She’s Not Baby Jessica Anymore: A Family Visit One Year Later." This "one year later" article appeared in the March 21, 1994 issue of Newsweek, only 7 months after her transfer to Iowa.

And these pictures of the new Anna smiling and playing with her birth parents and baby sister have reassured many. We apparently do believe everything we see on TV. In writing an amicus brief for the Baby Richard case in Illinois, I cited evidence, gathered from Baby Jessica’s case, of harm which a child Richard’s age would suffer if he lost his adoptive parents. An attorney reviewing the brief for me, for possible filing with the United States Supreme Court, wrote to me and suggested that I should not use the evidence concerning harm to Jessi in light of recent media reports that she’s okay. Just as the media image of Jessi being ripped from her house in Ann Arbor

49. Michele Ingrassia, She’s Not Baby Jessica Anymore, A Family Visit One Year Later, NEWSWEEK, Mar. 21, 1994, at 60; American Journal (ABC television broadcast, Nov. 1993); Prime Time (ABC television broadcast Mar. 10, 1994).

moved the nation, the media image of her playing and laughing with the Schmidts reassured the nation that everything is all right now.

You won’t be surprised, I am sure, when I suggest that these images of the new Anna do not tell the whole story. The experts who predicted harm to Jessica never said that she would never laugh and play again. In fact, most of them said that after she overcame the immediate pain and loss, she was unlikely to experience problems until her adolescent or early adult years where issues of trust in close relationships will become more central to her.

But, what about the pain she suffered in 1993 when she lost her parents? Do we have to see a child suffer long-lasting and agonizing pain to make it relevant to the custody decision? Are we willing to ignore a child’s pain because she is too young to explain it to us? Is the pain forgivable if she grows up and consciously forgets it? If Jessica would have been physically harmed by the change in custody would any court have allowed it? If she had broken an arm and it healed within six months, would this have been acceptable? Psychological pain and suffering can be invisible, especially in a young child who does not yet express herself as adults would.

In the Newsweek interview entitled "She’s Not Baby Jessica Anymore" Cara Schmidt told the reporter that Jessica, who was last seen by the public screaming "Daddy, Daddy" as I carried her out of the home, stopped crying when she saw Cara.51 I had mixed emotions when I read that sentence. I knew it was not true. In fact, Jessica had stopped crying and had calmed down during the ride from one family to the other. But, when we exited the van and saw Cara and Dan, Jessica refused to let go of my arm and would not let me hand her to them. After some unsuccessful attempts at turning her over directly to Cara, I brought Jessica to the Schmidts’ van and coaxed her into entering the van by promising that she could see a new car seat the Schmidts had brought for her. Dan and Cara then entered the van after Jessica. I had mixed feelings because I knew that Cara’s description of that day was not true, but I understood why she would want to believe it was true and why she would need the public to believe it was true. The Schmidts have set about retelling Jessica’s story, so that Anna’s story will begin to make sense.

We all place ourselves in a convenient state of denial if we allow ourselves to believe that Jessi, now Anna, was not hurt when she lost

51. INGRASSIA ET AL., supra note 49.
her loving family. We are able to reach this state of denial, however, because we do not want to believe that we can stand by and watch a child be intentionally harmed and because Baby Jessica was too young to speak for herself. We do not hear anyone asking Anna whether or not she would like to go back to the DeBoers or to at least visit them. We see a little girl who had no choice, whose interests were not considered, making the best of what the courts and all of her parents have handed her.

We learn much from older children of course, like Jenny Yang from Grand Rapids, who at the age of twelve was forced to testify that her birth parents were unfit, in order to remain with the family who had raised her since birth. Jenny testified that she had considered suicide as an alternative to losing the only family she had ever known.

This first major barrier, then, to recognition of the child’s right to have his or her interests considered in all custody decisions is our collective failure to recognize that a child is hurt when he or she loses an established family and perhaps our collective disbelief that the harm to the child is significant enough to overcome the rights of biological parents.

In fact, the legal system has accepted the premise learned from psychology that a child needs continuity and stability when a custody dispute is between two biological parents. In 1973, Goldstein, Freud and Solnit published Beyond the Best Interest of the Child. As an interdisciplinary team of authors, they outlined basic needs of a child and described how these needs should be respected in the context of custody decisions. Many states adopted their conclusions and at least where the battling parents were both birth parents, we saw legal reform in response to a new understanding of children. The psychological world and the legal world joined hands to improve decisions concerning children.

Here in Michigan, for instance, a trial court is to presume that a child will remain in the custody of the parent with whom the child has an established custodial environment. An established custodial environment exists where "over an appreciable time the child

55. Id.
naturally looks to the custodian in that environment for guidance, discipline, the necessities of life and parental comfort.\textsuperscript{56}

This happy marriage of two disciplines greatly concerned about children, law and psychology, fails though when the custody battle pits a birth parent against a parent not related to the child by blood.

This brings me to the second major barrier to imagining a legal system wherein the particular views, needs and wants of children are given voice and respect. That is, the legal system’s strong tradition of protecting the rights of biological parents.

In ancient times, parents could openly treat children as property — selling them, beating them, marrying them off for profit, even killing them.\textsuperscript{57} In modern times the right of parents to treat their children as their property has been tempered. There are minimal standards which all parents must meet or the state may remove from parents children who are abused and neglected. There is a legal tradition, therefore, which supports the conclusion reached by the Supreme Court of Michigan in Jessica’s case, when the court stated:

\begin{quote}
It is true that children, as well as their parents, have a due process liberty interest in their family life. However, in our view those interests are not independent of the child’s parents. The mutual right of the parent and child come into conflict only when there is a showing of parental unfitness.\textsuperscript{58}
\end{quote}

To support this view that children had no rights independent of their birth parents, the Michigan Supreme Court depended, in part, on authority from earlier Michigan Supreme Court decisions from 1938, 1944, 1945 and 1961.\textsuperscript{59} In all of those cases, the trial courts, who saw the witnesses, ordered that a child remain with his or her psychological parents, the parents with whom the child had built an attachment. In each of those cases, the Supreme Court of Michigan reversed the trial courts, ordering the child transferred to the custody of the biological parent, because the biological parent had not been found unfit. The biological parent’s lengthy absence from the child’s life was not viewed as unfitness.

\textsuperscript{56} MICH. COMP. LAWS ANN. § 722.27(c) (West 1993).
\textsuperscript{57} STONE, \textit{supra}, note 4 at 451.
\textsuperscript{58} \textit{In re Clausen}, 502 N.W.2d 649, 665 (Mich. 1993).
\textsuperscript{59} \textit{Id.} at 666-67.
In 1976, the Supreme Court of Michigan was faced with facts similar to the Baby Jessica case in a case called *In re Weldon*. The *Weldon* court left the child in the custody of her adoptive parents. In her majority opinion, former Chief Justice Mary Coleman wrote the following:

Many eloquent words have been written and spoken concerning "the best interests of the child" only to evolve into an analysis of rights of parents and others as to a piece of property. To minimize these regrettable results, the Child Custody Act was passed and hailed as implanting in our statutes the humane and progressive mandate that children are people who have the same unalienable rights as all other citizens. As such, children are deserving of the right to those liberties in which physical, mental and emotional growth are essential. They are endowed with a right to the "pursuit of happiness."

By 1992, the Supreme Court of Michigan had reversed its decision in *In re Weldon*, and instead relied on its earlier line of cases, from the 1940's, which protected the right to custody of birth parents. The promise that Michigan children would be recognized as possessing inherent rights was forgotten.

In light of the nine cases I described to you earlier and others, it is clear that courts all over the United States are unwilling to view the child as an independent actor when the child's interests clash with those of biological parents. I want to quickly suggest some reasons for this:

**FIRST.** A fear that all biological parents will be at risk of losing their children if some lose their children.

**SECOND.** A belief that in the long run, children are always better off with their blood relatives, even if this flies in the face of what experts and what children themselves say.

**THIRD.** Established precedent recognizing a constitutional right in birth parents to protect their relationship with their children. And, no parallel precedent recognizing the right of children to protect their relationships with nonbiological parents.

**FOURTH.** Our confusion over definitions of family. Granting birth parents certain rights over their children occurred along with a presumption that the parents would likely be married to one another

---

61. *In re Weldon*, 244 N.W.2d at 837-45.
62. *Id.* at 837.
63. *Id.*
64. *Bowie*, 490 N.W.2d at 577-80.
and that the parents would not be crack or heroin addicts, would not
be convicted rapists and would not have a history of abandoning other
children in their past. Certainly, the contested adoption cases like
Jessica’s, Richard’s, Emily’s and Kassen’s would not have been
possible in the years when unwed fathers had no rights vis a vis an
adoption.

Therefore, a decision must be made. State legislatures and courts
must decide just what to do with the harm caused by separating a
child from the nonbiological parents he or she loves. Will we ignore
the pain and expect children to survive whatever we throw at them?
Or, will we begin to fashion rules and recognize rights which
acknowledge that children are not fungible articles which can be
traded between homes like other pieces of property?

There are risks involved in beginning to protect nonbiological
relationships between children and adults. We risk being terribly
unfair to well-intentioned birth parents who did not intend to abandon
a child. We risk making it more difficult for parents who need
support to turn to others for help — they will have reason to fear that
if the child is in the care of others long enough, the child will not be
returned. We risk the promotion of pseudo-kidnapping, rewarding
badly intentioned adults who hold on to a child long enough to make
it harmful to remove the child.

Certainly, some children will still suffer the harm of losing a
psychological parent. If a person actually kidnaps a child, the child
must be returned to the birth parent regardless of the effect on the
child. This is one obvious place where the law should ignore
psychology and deter crime instead. Also, we will always be making
judgments about which adults have an attachment to the child and
sometimes we’ll be wrong and the child will suffer.

Limitations must be placed on the protection of nonbiological
parent-child relationships. A child must be in the psychological
parent’s care for a minimum amount of time, for instance, before the
adult may sue for custody. When a child has lived for a long time
with another adult, but has maintained his or her attachment to the
birth parent, then the child should be returned to the birth parent.
Birth parents who voluntarily leave their children in the care of others
must be provided an opportunity, if they choose, to maintain their
relationships.

But, if a birth parent does not or cannot continue an attachment
or has never formed an attachment with the child, the birth parent
must not be permitted to simply reclaim the child without regard to
the effect on the child of losing his or her established family.
Rather than giving weight to precedent which treats children as the property of their biological parents, courts must begin to recognize the humanity of children, to recognize that at times the interests of children differ from the interests of their birth parents, and to recognize that no decision concerning a child's custody should be made without regard to how it will affect the life of the child.

Justice Blackmun authored a four paragraph dissent to the DeShaney case, a case involving the right of a child to sue a state agency which may have had a duty to protect him from abuse. The majority found that the child had no right to sue the agency. Justice Blackmun pointed out the judicial courage which is required to recognize rights which have not been recognized before. This dissent could certainly appear at the end of the Baby Jessica or Baby Richard decisions as well:

Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts.

Like the antebellum judges who denied relief to fugitive slaves, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.

If our imaginings of a legal system wherein the particular views, needs and wants of children are given voice and respect, are to become reality, then several things must occur. I will list my suggestions for reform here:

1. Pass legislation which treats the interests of the child or the potential harm to the child as a legitimate consideration of the court anytime a child's custody is at issue. This would potentially require reform of our adoption, custody, guardianship, paternity and child protection laws.

---

66. Id. at 202-03.
67. Id. at 212-13. (Blackmun J., dissenting) (citations omitted).
2. Judicial interpretation of state constitutions and the United States Constitution to require the recognition of children as persons with a right to due process when their custody is at stake. This due process should include, at a minimum: the right to a hearing wherein the effect of the custody decision on the child is weighed equally against the interests of the parents; the child's right to counsel; and the child's right to standing as an equal party to the action.68

3. Reform of legal education, both in law school and after, to require those who will practice in the field of family law to study the effects of custody and visitation decisions on children and to be encouraged to engage in interdisciplinary study of families and their problems.

4. Advancement within the legal profession and the courts of alternatives to "winner-takes-all" remedies in family law cases, including, the promotion of mediation at early stages of cases involving a child's custody and creative solutions which begin to recognize that children sometimes have several parent figures who may play some role in the child's life. The physical possession of the child, however, cannot be the only option as a means of furthering a parent-child relationship.

5. Reform of court practices, from the lowest level state court to the United States Supreme Court, to ensure that decisions concerning the custody of children are made quickly and with finality. But, when courts do not act quickly, it should not be the child who pays the price.

There are often glimmers of hope as I look to a future where children are treated by the courts with human dignity. Decisions which are harmful to children often spark powerful and compelling dissents. Trial courts, who have the most contact with the actual people involved, will often make child-centered decisions which are later reversed on appeal. And, sometimes, a judge will have the courage to say that our legal system cannot tolerate decisions or laws which treat children as less than human. Today, I can only hope and imagine that these judges will someday be the authors of majority decisions which will finally settle this issue for the good of all children.