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OF FAMILY VALUES AND CHILD WELFARE: WHAT IS IN THE “BEST” INTERESTS OF THE CHILD?

JAMES DONALD MOOREHEAD*

[T]he people deciding which families to preserve have no idea what they're doing.¹

INTRODUCTION

Baby J was born prematurely to a woman addicted to crack cocaine. The mother's three other children had been removed from her custody and placed with their natural father. Baby J's natural father could not be identified, however, and state social service officials made the decision to place Baby J in a foster home. Her new “foster mother” held a Ph.D. in education and was a member of the local town council. When the child's natural mother failed repeated attempts to overcome drug addiction, Baby J's foster parents' hope of adopting the child grew stronger.

Then, without warning, after the foster parents had spent almost two years caring for Baby J, a cousin of the child's natural mother came forward and sought custody. On the recommendation of state officials, and against the wishes of the foster mother (who, for a short time, hid the child from authorities), Baby J was sent to live with her natural family. An article in the New York Times gave the following account of the debate surrounding Baby J and the much larger debate that permeates modern child welfare decision-making:

Custodial disputes between foster parents and relatives are common . . . and the relatives usually win out on the strength of blood. Some argue, however, that in certain cases the children are better off staying in the foster home even when there are family members who want them.

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1. Michael Grunwald, *Abuse Shows Danger of Birth-Family Bias*, BOSTON GLOBE, Jan. 27, 1996, at A1, A12 (quoting Dr. Charles Welch, psychiatrist at Massachusetts General Hospital).

"Any time you move the child, you damage the child," said Mary Beth Style, a vice president of the National Council for Adoption "What a lot of us are saying is that you ought to look at the impact on the child."

. . . .
[Anita M.] Bock, of the rehabilitative services department, said she thought that placing Baby J with relatives was in the girl's best interest because it would have been more traumatic for the child to have been cut off from family members for whom she would eventually have searched. . . . "We would have been postponing the trauma this child would have gone through," Ms. Bock said. "When children get older, they want to know."

Many advocates agree with the emphasis on reunification.

"Kids really belong with the family first," said [Carole] Shauffer of the Youth Law Center. "We don't want to redistribute children."

But many fear psychological harm to the children when they are taken from the only family they have known for years.²

The case of Baby J raises questions of great consequence. How should society respond when one of its children is identified as a victim of parental abuse or neglect? Do we quickly remove the child from an abusive or neglectful situation and place the child in foster care? Should we place the child in an orphanage to stop the abuse (an idea popular, for very different reasons, with House Speaker Gingrich)? Should we terminate parental rights and encourage adoption? Or should we have a bias in favor of maintaining a child's contact with the family of origin, even to the point of leaving the child in a potentially harmful environment? Should the rights of the family *ever* outweigh the welfare of the child?

The debate surrounding these questions first became heated in 1975, when Professor Michael Wald proposed a controversial policy of keeping the abused/neglected child in the parental home in all but the most dangerous of circumstances.³ This leading article was followed in 1977 by the Juvenile Justice Standards Project-Standards Relating to Abuse and Neglect, co-reported by Wald and Professor Robert Burt, which sought to codify many of Wald's earlier views.⁴ The movement was

2. Mireya Navarro, *Battle for Baby J: Foster Mother Fights Family for Permanent Custody*, N.Y. TIMES, May 9, 1995, at A7.

3. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

4. INSTITUTE OF JUDICIAL ADMINISTRATION & THE AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT

advanced in 1979 by Professors Joseph Goldstein, Anna Freud, and Albert Solnit,⁵ who expanded their earlier bias for "minimum state intervention" in the case of parental child custody disputes⁶ to include those situations where parental abuse and neglect are discovered outside the context of a custody proceeding. The writings of Wald, Burt, and the Goldstein group were widely discussed and debated in scholarly circles. The views of these "minimum state interventionists" were philosophically grounded in the fields of social science and child psychology, and as such, they appeared to be reliable and authoritative. As a result, the "least detrimental alternative" model, with its emphasis on family privacy and autonomy, became an influential force in shaping judicial and legislative decisions regarding the public response to child abuse.⁷

In recent years, the tide has turned somewhat, and the public perception of the problem has returned to a more interventionist bias. Child advocates and scholars such as Douglas Besharov, Patrick Murphy, and David Herring have refuted the arguments of Wald and the Goldstein group, and have encouraged a more activist state response to child abuse and neglect. And at least one scholar, who initially appeared to support the minimum state intervention theory, has revised her views and now encourages an activist approach.⁸

(1977) [hereinafter ABA STANDARDS]. These standards were not adopted.

5. JOSEPH GOLDSTEIN, ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter GOLDSTEIN 1979].

6. JOSEPH GOLDSTEIN, ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter GOLDSTEIN 1973].

7. See generally Peggy C. Davis, *Law, Science, and History: Reflections Upon In the Best Interests of the Child*, 86 MICH. L. REV. 1096, 1096 (1988):

In the legal context, the authors' goal has been "to provide a basis for critically evaluating and revising [consistently with their beliefs about psychological parenthood] the procedure and substance of court decisions, as well as statutes." In this, they have had notable success. The theories and recommendations of these scholars have stimulated a significant, albeit incomplete, restructuring of statutes and common law governing child placement decisionmaking.

(citations omitted).

8. Compare Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983) (arguing that "[t]ermination of [parental] rights should be ordered only after a judicial finding that the child will otherwise suffer specific, significant harm and that any alternative short of termination will not avert that harm"), with Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1780 (1987) (arguing for broad statutory definitions of abuse and neglect, and stating that "separation from a disturbed home, which produces an improvement in the child's care, is often preferable to a child's remaining in the disturbed environment").

Research for this Article was initiated for the purpose of discovering the reasons underlying this shift in opinion. It was suspected that new, significant empirical data had surfaced that would question the theories of the minimum state interventionists. This proved not to be the case. Although scholars on both sides of the argument seem to have rational reasons for their position, and each side supports its prescription for appropriate child welfare standards with general pronouncements of what truly benefits the child in the long term, the evidence in favor of either position falls far short of being persuasive. Upon consideration of the contrasting arguments, one is struck by the lack of persuasive empirical data supporting either position. True, there exist ample data on the deleterious effects of long-term foster care placement,⁹ and, as will be discussed, at least one study has attempted to compare children in foster placement with those who are left in a highly state-supported and monitored parental home environment. However, these studies fail to address one of the central tenets of the minimum state intervention theorists—that the state must refrain from any contact with a family where the environment is not so abusive or neglectful as to warrant removal of the child. As will be discussed, Wald and the Goldstein group maintain that the mere presence of the state in family life disrupts the child's sense of normalcy and security. Therefore, the question becomes, "Is it possible to gather data that will adequately compare the minimum state intervention model, in its purest form, with the bias in favor of removal?" And if this question is answered in the negative, we must then ask, "How do we go about making our policy decisions in the light of inherently inadequate data?"

This Article attempts to answer both questions. Part I of the Article provides an overview of those scholars who argue in favor of minimum state intervention and those who are in favor of a more activist state approach. Specifically, this Part exposes the lack of empirical data supporting either of these views. Part II of the Article examines one group's attempt to design an effective empirical study and the shortcomings of their methodology. This Part discusses the problems inherent in any collection of influential data. Part III of the Article proposes a way in which public policy should be shaped in light of the problems with empirical data gathering.¹⁰

9. Even this assumption, however, is not without its detractors. See, e.g., Garrison, *Child Welfare Decisionmaking*, *supra* note 8.

10. The continuing support for our flawed system of child welfare decisionmaking is illustrated in a recent article from *The Boston Globe*, which describes the concern held by

I. ARGUMENTS FOR AND AGAINST INTERVENTION

A. *The Minimum State Interventionists*

1. The 1975 Wald Article

The principle of minimum state intervention tends to rest on a support for family autonomy and privacy, and as a result, those who argue for such autonomy find it necessary to espouse a correspondingly narrow definition of parental abuse and neglect. Michael Wald's ground-breaking article set the stage for this model:

I submit that a narrowing of neglect jurisdiction is needed. The sympathetic appeal of beaten, malnourished, or helpless children is a strong inducement for expanded intervention. However, because legislators and judges presume the beneficence of such intervention, there is great temptation to intervene too often, and restraints placed on the exercise of coercive state power elsewhere are minimized or disregarded in the child neglect area.¹¹

Wald bases his call for a narrowing of neglect definitions and a corresponding removal of state intervention on empirical data exposing the risks inherent in foster care placement.¹² However, Wald himself admits that:

[s]ince no studies exist comparing children placed in foster care with a matched sample of children left in their own homes under conditions that led to the removal of the first group, it cannot be conclusively said how many, if any, minors are "worse off" as a result of foster-care placement.¹³

many professionals that "the history of family preservation has created an increased risk for children." See Grunwald, *supra* note 1, at A12. These professionals suggest that this risk arises, not from the indeterminacy underlying the normative assumptions of the decision-making process, but from the ineptitude of individuals selected to apply those normative assumptions and make child placement decisions. According to the *Globe* article, "[m]any clinicians say the way to avoid . . . disasters [of child abuse, neglect, and even death] is not to abandon family preservation, or to adopt it in all cases, but to ensure that trained professionals decide which families can be saved." *Id.* (emphasis added). This Article argues that such ideas are pure fantasy and that even "trained professionals" are presently unequipped to make sound child placement decisions.

11. Wald, *supra* note 3, at 987.

12. *Id.* at 993-95.

13. *Id.* at 995. Interestingly, Wald speculates that "[f]ew judges or social workers are willing to risk such experiments, perhaps with good reason." *Id.* at 996. As will be discussed in Part II of this Article, however, Wald himself designed and conducted such a study in the late 1970s and early 1980s.

Furthermore, and more significant for this discussion of the problems of empirical testing of the theories of Wald and the other minimum state interventionists, Wald goes on to question even those intervention programs that do not remove the child from the parental home. Relying upon the earlier work of the Goldstein group in the area of child custody disputes, Wald argues that "[t]he presence of a caseworker supervising parental behavior can interfere with the psychological system of the family."¹⁴ Wald finds even these supportive roles, when imposed by the state (rather than offered on a voluntary basis), to be inherently coercive.¹⁵

Wald proposes a new standard for parental abuse and neglect that is significantly narrower than the prevailing standard. He maintains that the focus of the state inquiry should shift from the gravity of the parental behavior to the gravity of the harm inflicted upon the child. Wald's proposal for physical abuse standards is representative of his philosophy:

Except in cases where the beatings are so severe that death or maiming is likely to occur, it is difficult to predict the long-term negative consequences for the child that might be associated with having been abused. . . .

There is no reason why children should suffer the short-term pain, trauma, and danger caused by severe beatings. *However, it is necessary to consider the resultant harms if the child can be protected only by removing him from the family.*¹⁶

14. *Id.* at 999.

15. *Id.*

16. *Id.* at 1010-11 (emphasis added). Again, it should be noted that Wald argues not only that removal from the family harms the child, but also that intervention in the family system is itself harmful. Furthermore, it is of interest to note that Wald carries his narrow definition of abuse into other areas, including child sexual abuse:

[D]espite an abundance of theoretical material about the harm of sexual activity within the family, there are very few studies demonstrating the negative impact of sexual "abuse." The damage, if there is any, is usually emotional and the symptoms may not be manifest. . . .

In addition, any intervention, insofar as it requires the child to tell his or her story to the police, welfare workers, and court, may cause more trauma than parental behavior.

Id. at 1024-25 (citations omitted).

Thus, Wald shows a reluctance to rely upon "theoretical material" which fails to support his suppositions about human behavior, yet he is a proponent of theoretical material that supports his views. Wald ultimately argues that due to the unlikelihood that states will revoke criminal penalties for child sexual abuse (a revocation which he supports), the state should intervene upon a finding of "sexual abuse"—a term which he admits a reluctance to define. *Id.* at 1024-27.

It is this belief that the "resultant harms" from state intervention outweigh the harm from parental abuse that characterizes Wald (and the Goldstein group), and it is this belief that is asserted without the support of any empirical data.

2. The Juvenile Justice Standards Project

Many of Wald's views regarding the importance of family autonomy, the virtues of limited state intervention, and the necessity of continuity and stability in the family system were included in a project of the American Bar Association that sought to provide a codification of juvenile justice standards.¹⁷ Wald and his co-reporter, Robert Burt, drafted a comprehensive model for child abuse and neglect standards that drew heavily upon the existing literature, including the first work of the Goldstein group.

Like the earlier Wald article, these standards rest upon the baseline assumption that "coercive intervention can be harmful to children as well as helpful."¹⁸ Specifically, the commentary to the standards relies, in part, upon the data regarding the negative effects of child foster care placement. Because psychological research indicates that children function best in a stable family situation, and because the very nature of the foster care system has proved harmful to children, Professors Burt and Wald developed a standard that:

reflects the judgment that coercive intervention is not appropriate merely because a child is being "harmed," regardless of the nature of the harm. It is further a rejection of the claim that the goal of state intervention should be to protect a child from a home environment which is not "optimal" for the child. Instead it calls for a statutory definition which limits intervention to situations involving "serious" harm.¹⁹

The commentary to the proposed ABA standards contains the explicit assertion that in all but the most severe cases, retention of the child in the parental home is preferable.²⁰ Again, this belief is grounded in literature that points to the great problems in the foster care system. However, the commentary goes on to assert that "[r]emoving a child from his/her family may cause serious psychological damage—*damage more serious than the harm intervention is supposed to*

17. ABA STANDARDS, *supra* note 4 at 26.

18. *Id.* at 40-41.

19. *Id.* at 42.

20. *Id.*

prevent.”²¹ It is this assertion that, although it finds some support in Wald’s later study, discussed *infra*, was unsupported at the time of drafting by any specific empirical research.

The Abuse and Neglect standards reflect a clear bias against state coercive action in all but the most serious cases of child mistreatment. Although not as explicit as the earlier Wald article, this bias seems to stand for the proposition that any state involvement in the family is disruptive to family harmony and childhood development. The standards contain no “sliding scale” of harm that might provide certain limited intervention (for instance, periodic social worker visits) in the case of less than serious harm. As discussed in relation to the Wald article, and as will be seen in the discussion of the Goldstein group’s second work, it is this assumption regarding the harms inherent in minimal state contact with the family unit that is wholly unsupported by empirical data, and that may be difficult to test even under optimal conditions.²²

3. Goldstein, Freud, and Solnit

In many ways, the works of Wald, Burt, and the Goldstein group resemble each other. Wald based his 1975 article on the Goldstein group’s premise that a child’s need for stability was paramount.²³ Wald notes that the Goldstein group’s initial work on child custody disputes had been interpreted by some as support for broader abuse and neglect statutes and expansive state intervention (to place the child in a nurturing environment).²⁴ But as Wald correctly predicted, the Goldstein group’s next work implicitly supported his call for limited state intervention in abuse and neglect cases.²⁵

Like Wald and Burt, the Goldstein group sets forth narrow definitions for abuse and neglect. For instance, the group proposes that state intervention be tolerated only in the case of “serious bodily injury,” protecting children “who are brutally kicked, beaten, or attacked by their parents . . . [or] whose parents may have attempted to injure

21. *Id.* (emphasis added) (citations omitted).

22. In interviews with the author of this Article, Professor Burt stated that at the time of the drafting of the ABA standards, he was reluctant to support this extreme view of the harms created by all minimal state contacts with the family (for instance, intervention in the form of non-threatening home visits).

23. Wald, *supra* note 3, at 987.

24. *Id.* at 987 n. 11.

25. *Id.*

them, for example, by starvation, poisoning, or strangling.”²⁶ In the realm of child sexual abuse, the Goldstein group gives an even narrower definition than Wald and the ABA standards:²⁷

When suspicion is aroused, the harm done by inquiry may be more than that caused by not intruding. The harm already inflicted upon the child—and it may be difficult to learn its extent—is aggravated by violations of family integrity, particularly by the investigation that is triggered. . . . For these reasons, justification for separating the child and offending parent seems best left to the criminal law—to its high standard of evidentiary proof and its goal of reinforcing society’s moral position.²⁸

The emphasis on “harm done” by the very act of inquiry on the part of the state is a recurring theme in the Goldstein group’s discourse. According to this expansive concept, “[w]hen child protective services, for example, invoke the process by making inquiry about a particular child or family, the state intrudes.”²⁹ To protect the child from the harms caused by this “undermin[ing] . . . of parental authority,”³⁰ it is necessary for the Goldstein group to propose their extremely narrow definitions of abuse and neglect. The relationship between the statutory definition (which serves to authorize coercion) and the theory that “any interference”³¹ is detrimental to the child is summarized by the Goldstein group: “We urge, therefore, that at no stage should intrusion on any family be authorized unless probable and sufficient cause for the coercive action has been established in accord with limits prospectively and precisely defined by the legislature.”³² Because “intrusion” is synonymous with any state action that cannot be supported by the narrow statutory definition, the family is essentially protected from the inquiry of social workers and other state authorities in all but the most abusive or neglectful situations.

The Goldstein group relies exclusively on psychological literature, including studies of how children react to displacement from family and the erosion of parental authority. However, this influential work is not

26. GOLDSTEIN 1979, *supra* note 5 at 72.

27. Section 2.1(D) of the ABA STANDARDS, *supra* note 4, states that courts should assume jurisdiction when “a child has been sexually abused by his/her parent or a member of his/her household (alternative: . . . and is seriously harmed physically or emotionally thereby).”

28. GOLDSTEIN 1979, *supra* note 5, at 64 (citations omitted).

29. *Id.* at 23.

30. *Id.* at 24.

31. *Id.*

32. *Id.* at 25.

based on any empirical data that would support the baseline assumptions made by the authors.³³ Interestingly, the Goldstein group wholly ignored the existing body of empirical studies that questioned the foster care system and inherently supported the group's theories.

As with the Wald article, however, it is the Goldstein group's support for minimal state inquiry into only those cases of "serious" injury that exposes not only a lack of current empirical grounding, but also points to an even more significant problem in the development of such studies. As discussed in Part II of this Article, Wald has shown that it is possible to compare (on a limited basis) foster care placement and intensive in-home interventions. However, the reluctance of the Goldstein group to authorize any contact with a family whose dysfunction is not severe enough to warrant full-blown state intervention presents a dilemma in the acquisition of supporting empirical data.

B. Interventionist Arguments

1. Child Public Advocates

In recent years, advocates for child welfare intervention have become more vocal, and the public outcry for governmental action in this area appears to be on the increase. For instance, Cook County (Illinois) Public Guardian Patrick Murphy has been an outspoken defender of the rights of abused and neglected children, fighting against the reduction of state intervention services³⁴ and prosecuting particular offenders.³⁵ Douglas Besharov, another staunch advocate for the rights of abused children, has written several manuals and books on the recognition of abuse and neglect.³⁶ Besharov supports the current definitions of abuse

33. "This book's grounds for intervention and the guidelines in *Beyond the Best Interests of the Child* incorporate principles of general application that have been distilled from psychoanalytic theory and from an extensive body of diagnostic and therapeutic work in child development." *Id.* at 228-29.

34. See, e.g., Rob Karwath, *DCFS Plans to Farm Out Some Cases*, CHI. TRIB., Apr. 21, 1992, at 3; Rob Karwath, *Court Orders DCFS to New Plan of Action*, CHI. TRIB., Dec. 21, 1991, at 5; Rob Karwath, *Hearing Asked Before Kids Sent to Horner*, CHI. TRIB., Nov. 27, 1991, at 4.

35. See, e.g., Rob Karwath, *DCFS Worker Guilty of Contempt*, CHI. TRIB., Sep. 25, 1991, at 1.

36. DOUGLAS J. BESHAROV, *CHILD ABUSE AND NEGLECT REPORTING AND INVESTIGATION: POLICY GUIDELINES FOR DECISION MAKING* 6 (1988) (stating that "[s]ociety, however, does not wait until a child is seriously injured before taking protective action. The purpose of child protective intervention is also to protect children from *future* injury"); DOUGLAS J. BESHAROV, *CHILD ABUSE: A POLICE GUIDE* (1987); DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED* (1990).

and neglect, and his philosophical differences with the minimum interventionists is evident in his writings:

Children who live through years of assault, degradation, and neglect bear emotional scars that can last for years. We all pay the price of their suffering. Maltreated children often grow up to vent on their own children—and others—the violence and aggression their parents visited on them. . . . Even when maltreated children do not become violent or socially destructive adults, they may have emotional deficits and learning problems that make them a continuing burden on a community's welfare, social service, and mental health systems.³⁷

Neither of these representative advocates, however, provides a systematic explanation for their belief in significant intervention. Whether the impetus for their beliefs is public outcry, an impression that abuse and neglect are on the rise, or a general internal sense that intervention is the best solution, we are left to speculate. For a better comparison to the tenets of the minimum interventionists, we must look at the arguments of academics who attempt to counter their assumptions.

2. The Garrison Article

Perhaps the best example of the arguments presented in favor of greater state intervention is found in a 1987 article by Professor Marsha Garrison.³⁸ Garrison, a professor at Brooklyn Law School, had been an advocate for the continuation of parental rights, even in cases where removal from parental custody was necessary.³⁹ Her 1987 article, while not a direct refutation of her earlier work, displays a clear bias towards state intervention. Indeed, her argument for broad abuse and neglect definitions would seem to weaken the very parental rights for which she had earlier argued.

Garrison is a harsh critic of the methodology of the Goldstein group, identifying their studies as "an excellent example of cavalier and over-optimistic analysis."⁴⁰ In many ways, Garrison points to the concerns raised in this article:

In order to evaluate the [Goldstein group's] proposal, it is necessary first to assess carefully the risks of intervention in the home and removal from it, and then to balance these risks

37. BESHAROV, *RECOGNIZING CHILD ABUSE*, *supra* note 36, at 2.

38. Garrison, *Child Welfare Decisionmaking*, *supra* note 8.

39. Garrison, *Why Terminate Parental Rights?*, *supra* note 8.

40. Garrison, *Child Welfare Decisionmaking*, *supra* note 8, at 1762.

against the risks of nonintervention and the possible benefits of intervention. Goldstein, Freud, and Solnit not only fail to do this; they also provide no evidence at all, other than vague pronouncements on the tenets of psychoanalytic theory, in support of their claims. They ignore the many studies of how children fare in foster care, along with the evidence on the risks of nonintervention and the benefits of state action. . . . [T]hey also ignore the problem of insufficient evidence⁴¹

In an attempt to highlight the problems with the Goldstein group's work, Garrison gives a thorough recount of the available empirical data. She begins by stating her view, not inconsistent with that of Goldstein and his colleagues, that the "family law traditions" of "family autonomy, privacy, and parental authority" provide the best guidance for our policy decisions.⁴² While Garrison is quick to point out that these "traditions" do not provide clear answers to tough policy choices,⁴³ she argues that such values should fill in the gaps of our empirical data.⁴⁴ With this in mind, Garrison reviews the available studies.

Garrison begins her analysis with the caveat that "the available data can produce only a vague design for the least drastic alternative . . . [and] much of the available data is highly flawed."⁴⁵ Specifically, she points to the problems in predicting personality, the lack of data addressing specific scenarios, and problems with experimental controls (e.g., methodology and follow-up).

Garrison questions the assumptions made by the Goldstein group regarding the negative effects of foster care and the benefits of continuity within the family. She cites several studies which lead her to the conclusion that "although the research data is not yet definitive, separation from a disturbed home, which produces an improvement in the child's care, is often preferable to a child's remaining in the disturbed environment."⁴⁶ To reach the conclusion that neglect is more damaging than discontinuity,⁴⁷ Garrison relies on several research studies that provide indirect psychological support for her conclusion.

41. *Id.* at 1763.

42. *Id.* at 1768-69.

43. For instance, Garrison states that family law tradition supports a model of intervention that is based on harm to the child, rather than parental misconduct. However, as she notes, this support does not help to determine empirically just how much harm is enough to be labeled 'serious' for statutory purposes. *Id.* at 1774.

44. *Id.* at 1769.

45. *Id.* at 1767.

46. *Id.* at 1780.

47. *Id.* at 1778.

For instance, Garrison notes that one study has demonstrated that the "failure to thrive" syndrome in infants is reported in families that remain intact as well as in institutionalized children.⁴⁸ She also points to psychological research which suggests that children in homes with marital conflict fare better after parental separation,⁴⁹ and that the adaptation of children discharged from institutions is dependent on the quality of the new "family" arrangement.⁵⁰

Garrison's conclusions, like those of the Goldstein group, are based primarily on broad, psychoanalytic studies of how very specific groups of children react to various changes in environment. She points to no empirical studies designed specifically to study the relative benefits and harms of foster care versus family continuity.⁵¹ As such, Garrison's arguments are essentially the converse of those made by the minimum interventionists. While reaching the opposite conclusion, she also fails to provide persuasive evidence. For instance, how do we know that children react to parental separation in the same ways that they react to child abuse? One is left with the impression that Garrison's beliefs, like those of the Goldstein group, are based on little more than a patchwork of vague psychological studies, with an attempt to mold the inconclusive and perhaps irrelevant data into workable policy.

It would be unfair to portray Garrison as one who does not recognize the conflicting nature of the available data. Unlike the Goldstein group, she points to the collective limitations of the studies and states that the process of child welfare decisionmaking is both "elusive"⁵² and "indeterminate."⁵³ Based on this recognition, Garrison encourages us to find a middle ground for our policy.

In refuting the narrow definition of abuse and neglect proposed by the minimum interventionists, she states that "at least based on the risks children who receive child welfare services typically confront, and the evidence regarding the risks of intervention, we cannot say that neglect should be redefined to exclude large numbers of families currently served by the child welfare system."⁵⁴ Garrison concludes:

48. *Id.*

49. *Id.*

50. *Id.* at 1778.

51. Garrison does point to the Wald study, discussed *infra*, but she does not use his data regarding the sometimes positive effects of foster care placement.

52. Garrison, *Child Welfare Decisionmaking*, *supra* note 8, at 1796.

53. *Id.* at 1774.

54. *Id.* at 1791-92.

In view of the varied circumstances that can evidence a serious risk to a child's well-being, and the concomitant difficulty of formulating a precise definition of the circumstances in which intervention is appropriate, I believe that a somewhat open-ended definition of neglect, which relies on a broad array of symptoms and measurements, is warranted. . . .⁵⁵

3. The Herring Article

A 1992 article by Professor David Herring,⁵⁶ a child advocate and critic of the minimum intervention model, argues for the abolition of the "reasonable efforts requirement" that is applicable when the state attempts to terminate parental rights. Usually, such termination is sought for the purpose of freeing the child for adoption—thereby removing the child from the natural family and from the foster care system.

To support his argument, Herring points to several sources, including the 1975 Wald law review article, and new studies which support Herring's belief that foster care is detrimental to children and that adoption is the preferred means of solving the child abuse and neglect dilemma. Curiously, Herring fails to mention the Wald empirical study, discussed *infra*, and chooses instead to focus on a paragraph in the 1975 Wald article that is essentially a summary of the minimum interventionists' opposition to foster care placement. As will be seen, Wald's later empirical study questions these very assumptions about the deleterious effects of foster care placement.

Apart from the Wald article, Herring points to three empirical studies which seem to support his conclusion that adoption is a better alternative than foster care placement, or, in the case of one study, is also preferable to placement in the home of the natural mother. The studies conclude that insecurity and low self-esteem, the inability to adjust socially, and the rate of disturbance were all greater in children

55. *Id.* at 1799. It is interesting to note the significant difference between Garrison's "middle ground" approach, which encourages broad definitions of neglect and leans toward overinclusiveness, and the Juvenile Justice Standards Project's "moderate" approach, which proposes a narrower definition where "some children will be excluded who need protection." ABA STANDARDS, *supra*, note 4 at 50. These differing opinions as to what constitutes the "middle ground" and the "moderate" are a direct consequence of the authors' differing beliefs in the problems associated with over-intervention by the state.

56. David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992).

placed in foster care.⁵⁷ With the exception of one study, which determined that adoption was preferable to placement with the natural mother, none of the studies compared foster care with retention in the home. And even in the study that included natural mothers, the children were simply "candidates for adoption."⁵⁸ Neither this study, nor the other two cited by Herring, concerned abused and neglected children. Each was based on children from disadvantaged families.

Despite the patent inconsistency between Herring's and Garrison's selective interpretations of foster care data, Herring cites the Garrison article as documenting "[t]he theoretical framework supporting the argument that temporary foster care placements result in significant harm to children"⁵⁹ While it is true that Garrison outlines the arguments of the minimum interventionists regarding the negative effects of foster care, it should be made clear that Garrison is no supporter of these views. Indeed, the comparison of the Garrison and Herring articles demonstrates how two scholars, both of whom disagree with the minimum interventionist theory, can interpret available data in such disparate ways. Or perhaps it could be said that, rather than evidencing a conflict in interpretation, the two articles demonstrate the willingness of advocates of a certain position to highlight those studies that provide support for their cause.

Whether the differences between Garrison and Herring are differences of interpretation or differences attributable to a bias in selecting data, these differences point to an ultimate problem in interpreting any proffered data concerning the relative benefits of removal from the home. Accurate interpretation of such data necessarily rests on its comparison with data evaluating the risks of non-intervention. This need for comparison of foster care families with families in which the state has not intervened exposes the difficulty in gathering such data, discussed further in Part II, *infra*—the inability to determine accurately the harm caused or not caused by true non-intervention on the part of the state. By definition, once a study is designed to measure the effects on children who are placed in the home of the natural parent, an outside group has interfered in the natural processes of the family. According to the minimum interventionists, such a disruption disturbs the child, exacerbating any sense of insecurity that she may already feel, and is an unwarranted intrusion in all but the

57. *Id.* at 142.

58. *Id.* at 148.

59. *Id.* at 144.

most severe cases of abuse. Therefore, the interpretation of the scant data we have appears to be a matter of speculation, and perhaps even depends on one's initial bias. One thing seems clear from the comparison of Herring and Garrison, indeed, from an overview of the minimum interventionist and their detractors: the data are inconclusive and conflicting.

II. THE WALD STUDY AND EMPIRICAL UNCERTAINTY

From 1978 to 1982, Michael Wald conducted a study that sought to test some of the assumptions of the minimum interventionists regarding retention of children in the home of the natural parents.⁶⁰ The study was conducted by choosing two representative counties in California in which a narrow definition of abuse and neglect would be instituted. In these two counties, only the most serious cases of abuse and neglect would result in foster care placement. Those children who remained in the home, and who would otherwise have been eligible for removal under the general state guidelines, were provided (along with their families) extensive state services. Significant funds for these in-home interventions were allocated by the same legislation that established the test counties. In the remaining counties of California, the broad statutory definitions of abuse and neglect remained, and the guidelines for removal were unchanged.⁶¹ It was these two groups of children, the two-county group and the remaining statewide group, who were compared with each other.

As the authors of the Wald study admit, the findings are inconclusive, and it is difficult to draw broad policy inferences even from this detailed, well-funded study.⁶² Despite its shortcomings, the study concludes that "there was not a great deal of difference between home and foster care."⁶³ Nevertheless, the authors make it clear in their summary analysis that foster care was the preferred placement. For instance, in relation to the home group, the study states that "home placement, even with services to the family, did not help the children overcome their academic, emotional, and social problems."⁶⁴ As for the other group of children, the study found the following:

60. MICHAEL S. WALD, ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN (1988).

61. *Id.* at 3-4.

62. *Id.* at 181-82.

63. *Id.* at 183.

64. *Id.* at 184.

The outcomes for the foster children were somewhat more favorable, at least for the white children. It seems clear from our data, which are consistent with the findings of [various studies] . . . that *foster care was not detrimental to most children. All but two children were protected from further abuse or physical neglect.* There was no area of development . . . where the white foster children, as a group, appeared worse off at the end than initially.⁶⁵

As for black children, the study found that they were no worse off in foster care than they were at home. Thus, the study concluded, at least on the basis of this empirical data, that:

[A]lthough there was relatively little major change among the children in either group, there is some indication that foster care was more beneficial to the children most at risk, at least with regard to improving physical health, school attendance, and academic performance and preventing deterioration in social behavior at school. Both situations—remaining at home and placement in foster care—involved emotional stress for the children, but the stress caused by the conflict and chaos in their home environments may have had a more negative impact on the home children than the stress that separation, movement, and adjustment to new “parents” had on the foster children.⁶⁶

These findings are especially dramatic in light of Wald’s earlier bias in favor of minimum state intervention, which was based in large part upon his belief in the negative effects of foster care placement and the benefits of continuity and permanence. Surprisingly, however, despite the empirical findings that refute these assumptions, Wald’s group goes on to suggest that home placement is the better legislative decision. According to the study, the findings are not dramatic enough to warrant the “transfer [of] children from parents to nonparents just because the child might do ‘better,’ in some aspects of development.”⁶⁷ Essentially, the authors argue, the decisions comes down to a “value choice,” and the policy concerns of family unity take preference over possible, less than life-threatening harms to children.⁶⁸

One suggestion made by the authors as a result of the disappointing experiences with the children left with their natural families is to redirect

65. *Id.* (emphasis added).

66. *Id.* at 185.

67. *Id.* at 188.

68. *Id.* at 187.

funds in the future to services aimed at the child, rather than the parent. According to the authors:

The nature and extent of these children's problems raise significant questions about current means of intervention. All courts and child welfare agencies assume that the purpose of intervention in abuse and neglect cases is to protect the child. However, the focus of intervention services in the majority of cases is on the parent. Unless the child exhibits significant behavioral problems, most agencies do not evaluate the child's academic or social development. The majority of children do not receive any services aimed at promoting their social development.⁶⁹

Based on these observations, the study recommends several changes in intervention, including "full developmental assessments" for children targeted by the system for home intervention or foster care, "[c]ounseling [and] support services . . . focused on the child as well as the parents," possible inclusion of family therapy, and "alternative support systems" such as extended-day school programs or surrogate sibling programs.⁷⁰

Several shortcomings of the study bear mention. First, the amount of funds expended in support of the home placement children is not typical of available resources in most communities. As the authors point out, "[t]he legislature . . . provided the experimental counties with a substantial amount of money to be used for services to the families of the children left at home. The services were designed to minimize the need for removal and to protect children left in their homes."⁷¹ And as explained, even with these funds, foster care children still fared better than those children left in the home. Second, the money constraints faced by the study also led to a necessarily small sample size and a corresponding inability to make broad generalizations about all children, or even the "average" child.⁷² This is true even though the authors note that, because of legislative support, this study was as well-funded as any before its time and any that might be expected in the future.⁷³ Third, as best explained in the study:

[The] analysis also was complicated by the fact that the developmental status of the home and foster children differed somewhat

69. *Id.* at 192.

70. *Id.* at 194.

71. *Id.* at 4.

72. *Id.* at 181.

73. *Id.* at 182.

at the time of our initial interviews, which took place after the children had been in foster care for several months. Since there was relatively little change in the overall well-being of the majority of children during the two-year period, the reasons for the initial differences are crucial for policy analysis. . . . [W]e cannot know whether they were attributable to random variation, to differences in the children prior to intervention, or to an initial positive impact of foster care.⁷⁴

Finally, the study only looked at children in the five to ten year-old age group. The authors speculate that, due to the absence of parental attachment, younger children will likely benefit even more from separation.⁷⁵ This assumption, however, is not supported by data, and appears to be based on the general principles set forth by the Goldstein group, Wald, and the other minimum interventionists in their earlier writings. The study's authors state that "[q]uick removal of younger children would minimize the negative impact of the home environment, which probably has a greater impact the longer the child is in it."⁷⁶ Those who oppose the minimum interventionist arguments would likely wonder why this same rationale does not apply to older children who continue to suffer the impact of a harmful home environment.

This probable disagreement on the relative negative impact of home placement points to the most significant shortcoming of the study, but one for which its designers should probably not bear responsibility. The study does not consider the arguments of the "pure" minimum interventionists (including a younger Wald), who maintain that any state intervention is harmful in all but the most severe circumstances.⁷⁷ Wald and his co-authors appear to assume without question that, in those cases where the child remains in the home, the state should direct extensive resources to the child and the family. But ultimately, this overlooks the question of the harm done to the family unit by state intervention and intrusion. If Wald has indeed given up his support for the extremes of state intervention, he has done so without explanation. One is left to guess why the concerns of parental autonomy, cultural diversity, and family privacy are no longer relevant.

As mentioned in Section II, *supra*, such a study, designed to determine the negative effects of minimal state intervention, appears to

74. *Id.*

75. *Id.* at 191.

76. *Id.*

77. Wald, *supra* note 3, at 1000.

be, by definition, impossible. The very presence of those conducting the study goes against the minimum interventionist model, where the family is to be left entirely to its own methods of dealing with problems and conflicts. Thus, there appears no way to target and study those children who are not identified under the narrow abuse and neglect standards proposed by the minimum interventionists. As best, one can imagine a study designed to measure juvenile delinquency, recidivism, juvenile health problems, and other indicators of childhood difficulties in the region assigned a narrow statutory definition, but the results of such a study would be speculative at best. With these thoughts in mind, it seems wise to explore the best ways to minimize such unavoidable limitations in the development of policy.

III. POLICY CHOICES IN THE VOID OF EMPIRICAL DATA

As a starting point, it seems that the views of Wald, Burt, the Goldstein group, and Garrison concerning the importance of parental authority and family autonomy carry significant weight. These assumptions, as noted by Garrison, are grounded not only in other areas of family law, but also in constitutional principles.⁷⁸ Because of their broad support, it seems reasonable that these principles should be the baseline from which our policies begin. Of course, as each of the authors discussed above agrees, the child's welfare is always the most important factor. As we have seen, within this framework, the debate centers around the question, "What is the least detrimental alternative?" For minimum interventionists, the privacy/autonomy concerns are thought to complement the child's welfare, and are believed to play a major role in providing an environment that is "least detrimental." For those who disagree with the minimum interventionists, autonomy and privacy may be valid concerns, but they are usually trumped by overall concerns about the child's best interests. This difference is, of course, attributable to the level of importance that one ascribes to the role of family autonomy in the creation of a good environment for the child.

The suggestion, however, that *any* state contact with a family harms children (because it invades privacy and destroys the child's trust in the parents) is wholly unsupported, even by the Wald study. This casts doubt on the theories of the "pure" minimum interventionists who would withhold state involvement with the family in all but the most severe abuse and neglect cases. Although the Wald study favors

78. Garrison, *Child Welfare Decisionmaking*, *supra* note 8, at 1769-70.

placement in the home of the natural parent(s), the study's invocation of the importance of continuity is based on those same assumptions that earlier led him to support only the most minimal of state interventions. However, as explained in Part II, *supra*, Wald himself no longer accepts the position that the state should refrain from contact with the family even when the abuse or neglect fails to reach the level of severity necessary for removal. The broad pronouncements for an absence of state interference, made by the extreme minimum interventionists like the Goldstein group, place the unidentified child who falls outside the narrow statutory net in an extremely vulnerable position. Furthermore, as previously discussed, such a proposition (by its nature) can never be tested.

Recognizing the impossibility of empirically verifying the pure minimum interventionist theory, we should choose, instead, to develop standards that sanction the appropriate, measured use of state intervention, while keeping the virtues of family privacy and parental autonomy in focus. As modeled, at least primitively, in the Wald study, the intervention must be commensurate with the magnitude of the abuse. There should be various levels of intervention that fall between the extremes of state silence and child removal from the home. However, as the 1975 Wald article, the Goldstein group, and particularly the Juvenile Justice Standards Project all make clear, the danger accompanying state intervention is that important value choices and differences in child-rearing methods will—through ignorance or prejudice—be overrun and destroyed by the state. The ABA Project even includes a specific standard relating to cultural differences, with this comment:

Given the cultural pluralism and diversity of childrearing practices in our society, it is essential that any system authorizing coercive state involvement in childrearing fully take those differences into account. Moreover, failure to recognize that children can develop adequately in a range of environments and with different types of parenting may lead to intervention that disturbs a healthful situation for the child.⁷⁹

In order to ensure respect for this diversity, we must find creative ways to provide state support in homes where the child's welfare calls for limited invasion of family privacy and parental autonomy. This will necessarily be a difficult task, and in our majoritarian culture it will be easy for us, either purposefully or by ignorance and oversight, to destroy values that are alien to us but that do no harm, and may very well do

79. ABA STANDARDS, *supra* note 4, comment to § 1.4, at 44.

much good, to the child. One possible solution is to ensure that state workers who provide assistance to the family be of the same ethnicity or cultural heritage as the family. Perhaps community groups could be enlisted to work in tandem with the state, providing protection for the values of the community and giving necessary input and feedback to those conducting state intervention. These thoughts were alluded to in the comments to the ABA Standards:

[T]his standard [for the maintenance of diversity] requires that a child's need for cultural identity and continuity of cultural heritage be recognized whenever intervention is necessary. Every effort should be made to preserve such continuities if a child must be removed from the home or when a family is required to accept casework supervision.⁸⁰

Whatever the solution, it is clear that, as we develop policies of intervention with families where warranted by sufficient abuse and neglect, we must put much effort into overcoming our biases and respecting differences that exist wholly apart from the issues of abuse and neglect.

Without question, we are faced with a dilemma in the formulation of our policy. Even if we understand the concerns of autonomy, privacy, and diversity, and even if we recognize the overriding concern for the welfare of the child, history has shown that we are making policy blindly. We have no persuasive empirical data to support our various suppositions (Wald being the closest attempt), and given the magnitude of the effort needed to conduct such studies, it is doubtful that any private group or state-funded study will adequately undertake the comprehensive task. Yet we continue to insist, as evidenced in our propensity to pronounce what is best for the child, that we have some reason to believe that our prescriptions (be they minimum interventionist or otherwise) are correct. The problem of abuse and neglect, however, does not seem lessened by our efforts to date. Perhaps part of this appearance of knowledgeable policymaking is attributable to the demands made by the "consumers" of our policy. It may be difficult for us to "sell" public policy when we are not certain if that policy will work. The public wants to know what will happen when we institute a particular child welfare policy. Guaranteed results are what the public craves. Thus, we create the illusion of knowledge and refrain from policymaking choices that might expose our ignorance.

80. *Id.*

We need a new framework for making these policy decisions that recognizes the difficulties inherent in gathering information and that admits a certain amount of indeterminacy, at least at the outset. We must move from a willingness to accept the current "fad" and challenge ourselves to address the problem creatively. One way to go about this is to institute policies that are "self-checking." In other words, control groups should be set up within the policy framework, and the various levels of intervention should be measured over time. Instead of conducting small, limited studies, we should create policy that contains internal mechanisms to evaluate its own success or failure. In this way, the policy itself becomes a broad empirical study of the effects of various child welfare policies. This framework might operate in similar fashion to new medical advances, where novel drugs or surgeries are tested and compared to a control group receiving the old treatment. Such a framework will require the incorporation of a research methodology that may be foreign to our typical policymaking. For instance, in order to evaluate various options, our policy choices must be assigned to children and families with a degree of randomness. As one text on social science methodology explains:

The essence of true experimentation is that some people are treated differently than other people and that randomization determines who gets which treatment. This has sometimes been thought to conflict directly with the Fourteenth Amendment's guarantee of equal protection. However, virtually all scholarly analysis and case law has concluded that "if the proposed research is not otherwise constitutionally impermissible, random assignment of research subjects, with limited exceptions, should not be considered to violate equal protection."⁸¹

It is not the purpose of this Article to attempt to suggest a research or policy design which might maximize our knowledge and best inform our subsequent policy alterations. However, one can imagine a broad-

81. JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 61-62 (1985) (citation omitted). According to the authors:

For many purposes, the "ideal" research design in social science is the "true" experiment. The true experiment is defined by the random assignment of subjects either to an experimental (or treatment) group or to one or more comparison (or control) groups that do not receive the treatment under investigation. Random assignment means that each subject has an equal probability of being assigned to each group. In other words, in a true experiment, the researcher controls the independent variable and deliberately creates variation within it, rather than measuring variation that occurs naturally (as in correlational designs).

Id. at 59.

based policy, similar to Wald's study, that provides for various levels of intervention (possibly ranging from no intervention to extensive intervention) and that is conducted over an extensive period of time. To test the theories of the minimum interventionists and their detractors, the policy might experiment with various definitions of abuse and neglect and with differing levels of interventions assigned to those definitional categories. To test the extreme minimum interventionist view, over a long period of time, one might even suggest that children whose families initially fall under a broad abuse and neglect category be silently identified by the state, left with their families during their formative years with no interventions, and (only after reaching adulthood) be approached for the purposes of comparison with those persons whose families received intervention. Again, such a policy may be difficult to reconcile with our notions of fairness and equal protection and may be difficult to explain to the public. But if we truly have no way to know which of our policies are best, and if those experts who influence our policy do not agree on very basic predictions of outcome, then we must be prepared to face the indeterminacy and try to find answers. It is through these self-checking mechanisms that we have the greatest hope of developing the most appropriate guidelines and the truly "least detrimental alternatives" for our children.

In developing a self-checking policy, standards should be developed that give concrete guidelines to those authorities who make decisions regarding services in the home, foster care, and ultimately, termination of parental rights. As Monahan and Walker explain, the validity of a research design is only as good as its methodology.⁸² And the gathering of information in a proper way is central to good methodology.⁸³ Therefore, those officials chosen to determine the appropriate disposition of each child's case should not have unfettered discretion. Indeed, unless it is a specific part of the policy's research-based goals, such officials should have virtually no discretion. The guidelines, as we develop them, must be based on our best attempts to match the level of abuse and neglect with the appropriate intervention. It is only when officials follow these guidelines, and the results are evaluated, that we will be able to adjust the interventions accordingly. If we choose to direct part of the study towards measuring the effectiveness of official discretion in these cases, then we must be clear that this is part of our

82. *Id.* at 45-48.

83. *Id.*

policy design. Each piece of the policy must be developed with the ultimate goal of reevaluating and adjusting the policy as time provides valuable information.

IV. CONCLUSION

As Marsha Garrison explains in her article, our policy-making efforts can never give the assurance of success. The significant variables inherent in the nature of families and children, and the imperfection involved in carrying out any policy which requires such extensive human resources, make success a relative concept. However, if we take the best of our psychological research and systematically test it through self-checking policies, we should eventually be able to refine our policy to the extent that it protects not only family autonomy, but also protects the child.

How the balance between privacy/autonomy and child welfare should be struck—indeed, the extent to which these concerns are interdependent or in conflict—is a matter of speculation. Each side in the battle over minimum intervention has sought to defend its position with vague pronouncements and psychological prescriptions. In her article on newborns with disabilities, Janna Merrick repeats this pessimistic outlook:

There is no check on the fantasies and conceptualizations of those who can never test objectively their conviction(s) . . . nor is there the check of reality and feedback. Conclusive demonstrations that their heroes' policies may often be futile or misconceived are impossible simply because the link between dramatic political announcements and their impact on people is so long and so tangled.⁸⁴

Perhaps through the honest recognition that our child welfare decision-making has been and continues to be indeterminate, and through the development of new policies that measure their own effectiveness and are developed so that we can appropriately respond to their impact, we will finally place a check on the myriad "fantasies and conceptualizations" that have infused our policy decisions thus far.

84. Janna C. Merrick, *Conflict, Compromise, and Symbolism: The Politics of the Baby Doe Debate*, in *COMPELLED COMPASSION: GOVERNMENT INTERVENTION IN THE TREATMENT OF CRITICALLY ILL NEWBORNS* 68 (Arthur L. Caplan et al. eds., 1992) (quoting MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964)).

