

*Judges Take Over
Parents' Rights*

FAMILY COURT JUDGES may be the most powerful judges in the American judicial system. While they are the lowest in the judicial hierarchy, they have become the most activist and unaccountable of all courts because of the tremendous number of families and amounts of money under their control.

The U.S. Census Bureau reported that, in 2002, 13.4 million parents had custody of 21.5 million children under age twenty-one whose other parent lived somewhere else. Along with the 13.4 million “other parents,” these Census Bureau figures imply that judges have control over the private living arrangements and income of 48.3 million Americans—one sixth of our population.

The Census Bureau also reported that, in 2002, \$40 billion in transfer payments were made between households. That money is under the direction and control of family court judges.

These shocking statistics show that family courts are now an arm of government that routinely exercises virtually unlimited power to dictate the private lives and income of millions of American citizens who have committed no actionable offense. The reason these figures are so extraordinary is that family courts exercise the same power to dictate the private lives and income of parents who are self-supporting, law-abiding, and responsible in the care of their children, as family courts exercise over parents who are none of those things.

Major social trends of the past three decades, including no-fault divorce, illegitimate births, the feminist movement, the redefinition of domestic violence, and aggressive enforcement of household-support laws, have vastly increased the number of Americans who come into family courts. Decisions of family court judges are seldom reported in law books and seldom appealed or reviewed. Not only do few people have the funds to finance an appeal, but since decisions are a matter of judicial discretion, the chances of overturning a family court judge are close to zero unless gross judicial abuse can be proved.

Divorcing parties who separate amicably and reach a private final agreement to divide their property may not realize the power of the family court. Decisions about child custody and household support are never final and are always subject to attack by either parent. One parent can challenge a private custody agreement at any time for any reason. The family court has the power to ignore private agreements about child custody, even if in writing and signed, and order new custody and support terms on

the theory that new circumstances require the court to reevaluate its prior decision. Family court judges amassed these powers by co-opting and changing the definition of a time-honored concept: “the best interest of the child.”

The original concept of the best interest of the child comes from English common law as compiled by William Blackstone in 1765, who said that parents are presumed to act in their own children’s best interest. Courts honored parents’ rights by recognizing a legal presumption that the best interest of the child is whatever a fit parent says it is, and that a court should not second-guess a parent or substitute its own opinion.

About thirty years ago, as states revised their family-law statutes, the concept of best interest of the child became disconnected from parents’ decisions. Family courts got the idea that they have discretion to make independent decisions about what is in a child’s best interest, especially for children of divorced or unmarried parents, even though little or no objective standards are set forth in statutes.

The concept that persons other than parents are better able to decide what is the best interest of a child is illustrated by the slogan “it takes a village to raise a child.”

The notion that the “village” should make childrearing decisions rather than parents is manifested in the way the public schools have taken over many responsibilities traditionally in the domain of parents, such as providing meals, healthcare, and pre-kindergarten services. Public schools notoriously assert their right to override parental decisions about the assignment of books that parents find immoral or profane, the use of privacy-invading questionnaires, teach-

ing about sex and evolution, the provision of contraceptives and abortion referrals, the use of school counselors, and demands that children be injected with vaccines or put on psychotropic drugs.

The growing power of the public schools to override parents' rights is evident in the 2005 Ninth Circuit outrage, *Fields v. Palmdale School District*. The opinion, written by Jimmy Carter–appointed Judge Stephen Reinhardt (who had earlier declared that one atheist could silence all school-children from reciting the Pledge of Allegiance), was joined by two other judges, one appointed by Bill Clinton and the other by Lyndon B. Johnson. These three supremacists ruled, based on “our evolving understanding of the nature of our Constitution,” that parents' fundamental right to control the upbringing of their children “does not extend beyond the threshold of the school door,” and that a public school has the right to provide its students with “whatever information it wishes to provide, sexual or otherwise.”

Best interest of the child is totally subjective; it's a matter of individual opinion. Parents make hundreds of different decisions and should have the right to make their own decisions, even if they contravene custom. Whether the decision is big (such as living in an urban or rural neighborhood) or small (such as playing baseball or soccer), there is no objective way to say which is better.

Since judges are supposed to base their decisions on evidence presented in open court, and there is no societal consensus about the best way to raise a child, they have demanded the testimony of expert witnesses. A big industry has grown up of psychologists, psychiatrists, social workers,

custody evaluators, and counselors who are eager to give their opinions. Having opinions produced by so-called experts with degrees or professional certification is a way to make a subjective and arbitrary judgment appear objective. With the ever-increasing volume of family cases coming through the courts, judges began rubber-stamping the opinions of these court-appointed experts.

The use of so-called experts by family courts has become standard procedure. Divorced parents are routinely “sentenced” to submit to psychological evaluations (often by persons who have no experience with raising a child), and to parenting classes designed to re-educate the parent according to the instructors’ biases (which may include hostility to spanking, the military, religion, and homeschooling).

Court-appointed evaluators purport to judge the parents’ parenting capacity and determine custody, but no scientific basis exists for their methodologies, for the tests they use, or for the recommendations they make. There is no agreement among professionals on how to conduct a proper examination, what standards to use if any, or what should go into an assessment. The evaluators’ reports are not scientific findings but expressions of personal preference. The use of people other than parents to determine the best interest of a child cannot be justified by science, law, morality, or common sense. Even if there were a way to define “best interest,” it would lead to all sorts of undesirable consequences. Should we take children away from poor parents and give them to richer parents? Of course not.

When a judge makes a decision based on the best interest of the child, there is no way to determine whether the

decision is correct. A family court judge has tremendous power to do whatever he wants in determining the lifestyle of American families, the authority parents have over their own children, and the time each parent is permitted to spend with his or her own children.

The decisions of family court judges are effectively final because a judge's decision can be reversed only for abuse of discretion, and it's not clear what, if anything, could constitute abuse of such unlimited discretion.

When one parent files for divorce, that parent surrenders both parents' authority to decide "best interest" to the judge, who then divides the parental custody time into shares that are usually vastly unequal. The parent with the larger share is labeled the custodial parent, and the parent with the smaller share is called the non-custodial parent.

Census Bureau figures show that 85 percent of custodial parents are mothers. The father, who is typically designated the non-custodial parent, is customarily allowed "visitation" with his child every other weekend. The father's presence in the child's life is thus lowered to 20 percent, more or less.

Even more significantly, as a non-custodial parent, his authority as a father is reduced to zero, and his right to make childrearing decisions is eliminated. The father's value to the family is reduced to providing a paycheck and being an occasional visitor. No statute requires this unequal division of time or parental authority: it's all done by judicial discretion. Why a parent's rights should be denied or diminished after divorce has never been explained; after all, it is the husband and wife who are divorcing, not the children.

When divorced parents disagree, as for example, about which religion the child will be taught, judges must leave this important decision to the parents to work out themselves no matter how much conflict may ensue. Disagreements about numerous other matters, great and small, involved in the raising and education of a child inevitably arise, but a judge should not be allowed to take over any fit parent's power to participate in decisions—or bargain with an ex-spouse about them. Transferring child-raising decisions to a judge should not be the solution.

Every successful civilization has placed the shared responsibility for rearing the next generation on married parents. Replacing that proven practice with the notion that “a village” should raise children according to an assortment of outside opinions of what is in a child's “best interest” is a radical departure from the traditional rule that married parents should possess shared responsibility for raising their own children. This change in social policy has not proved successful anywhere, and history offers numerous examples of unsuccessful alternate patterns.

We have already witnessed the unhappy consequences of our government's liberal welfare policy (starting with Lyndon Johnson's Great Society in the 1960s) which, by channeling money through the mother, thereby relieving the father of duties and decision-making power, has changed the welfare class into a matriarchal society. The tragic results are obvious. Most of our social problems are caused by the 40 percent of our nation's children who grow up in homes without their own father: drug abuse, illicit sexual activity,

unwed pregnancies, youth suicide, high school dropouts, joblessness, runaways, and crime.

The best interest of the child rule, which typically eliminates both the authority and the presence of the father, is now doing to the middle class what the mistaken welfare policy has already done to the welfare class.

Other constitutional rights can also disappear in family court. If a man is accused (but not tried or convicted) of being an imperfect father (or of not conforming to “village” opinions about child-raising), he loses constitutional rights as well as his children. Restraining orders (orders of protection) are widely used by women in divorce cases as a weapon to gain total custody of the children. The *Illinois Bar Journal* called restraining orders part of “the gamesmanship of divorce.”

Divorce should not deprive parents of the fundamental right to rear their children. Children should not be deprived of their father and of father-parenting, which (contrary to feminist ideology) is different from mother-parenting and just as essential to the child’s well-being.

No one, not even a judge, should have the awesome power to take away the fundamental right and authority of a parent over his own minor child in the absence of a criminal conviction or life-endangering circumstance. No one, not even a judge, should have the awesome power to deprive a child of his or her father by reducing the father’s role in the family to providing a paycheck and a few days of “visitation.” That level of power produces supremacist judges—those who think they are supreme enough to dictate the lives of individual Americans.

II *Judges Take Over Parents' Rights*

- The figures on custodial parents and children, and on 85 percent of custodial parents being women, are from U.S. Census Bureau, Current Population Reports, Oct. 2003.
- The \$40 billion figure for support payments in 2002 is from U.S. Census Bureau News, Feb. 25, 2005.
- The right of parents to authority and autonomy in the rearing of their children traditionally enjoyed consensus in the United States. This principle—that “parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them”—was unanimously reaffirmed by the U.S. Supreme Court in 2000 in *Troxel v. Granville*. This was a case of grandparents who sought visitation with their grandchildren over the opposition of the surviving parent. The Supreme Court invalidated a Washington State statute that gave judges the power to order visitation of children on “a best-interests-of-the-child standard.” The statute placed hardly any limit on a judge’s discretion to award visitation whenever he thought he could make a better decision than a child’s parent. The justices split on that issue, but both majority and dissenting justices unanimously upheld the principle that “parents have a fundamental constitutional right to rear their children, including the right

to determine who shall educate and socialize them,” citing the famous cases of *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923). Justice O’Connor’s plurality opinion (joined by Rehnquist, Ginsburg and Breyer) explained: “. . . the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent’s estimation of the child’s best interests, the judge’s view necessarily prevails.” Rebutting this error and the lower court judge’s argument that “I think [visitation with grandparents Troxel] would be in the best interest of the children,” O’Connor wrote: “The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. . . . The court’s presumption failed to provide any protection for [parent] Granville’s fundamental constitutional right to make decisions concerning the rearing of her own daughters.”

- Parents’ rights are not only protected by the U.S. Constitution, but are also recognized as a fundamental principle of state law. Citing both federal and state constitutions, a New York appellate court ruled in *Alfonso v. Fernandez* (1993) that parents’ fundamental rights are violated when public schools distribute condoms to high school students without their parents’ consent. The court’s opinion said that parents “enjoy a well-recognized liberty interest in rearing and educating their children in accord with their own views. Intrusion into the relationship between parent and child requires a showing of an overriding necessity.” The court noted that “At common law it was for parents to consent or withhold their consent to the rendition of health services to their children.” When public schools with compulsory attendance dispensed condoms to children without their parents’ consent, the court found that parents were “being forced to surrender a parenting right—specifically, to influence and guide the sexual activity of their children without State interference.”
- In *Parham v. J.R.* (1979), Justice Potter Stewart wrote: “For centuries it has been a canon of the common law that parents

Speak for their minor children. So deeply imbedded in our traditions is this principle of law that the Constitution itself may compel a State to respect it.”

- Public schools began to take over parenting authority and duties in the 1970s. This change was best capsuled by the Honorable Samuel I. Hayakawa, former president of San Francisco State College, when he was a U.S. Senator from California: “An educational heresy has flourished, a heresy that rejects the idea of education as the acquisition of knowledge and skills . . . the heresy of which I speak regards the fundamental task in education as therapy.”
- Resolutions passed by the National Education Association at its 2005 national convention assert the power of public school personnel over parents in numerous areas of curriculum. For example, Resolution B-42 states: “Sex Education. The Association recognizes that the public school must assume an increasingly important role in providing the instruction. Teachers and health professionals must be qualified to teach in this area and must be legally protected from censorship and lawsuits. The Association also believes that to facilitate the realization of human potential, it is the right of every individual to live in an environment of freely available information and knowledge about sexuality and encourages affiliates and members to support appropriately established sex education programs. Such programs should include information on sexual abstinence, birth control and family planning, diversity of culture, diversity of sexual orientation and gender identification, parenting skills, prenatal care, sexually transmitted diseases, incest, sexual abuse, sexual harassment, homophobia.” [In this resolution, “every individual” includes children of every age starting with pre-kindergarten, and “censorship” is the word the NEA commonly uses to describe parents’ efforts to protect the morals and values of their own children.] Resolution B-1 states: “Early Childhood Education. The National Education Association supports early child education programs in the public schools for children from birth through age eight.”

- *Scientific American Mind* (October 2005, 65-67) published a paper by psychologists Robert E. Emery, Randy K. Otto and William O'Donohue, entitled "Custody Disputed," which states: "Our own thorough evaluation of tests that purport to pick the 'best parent,' the 'best interests of the child' or the 'best custody arrangement' reveals that they are wholly inadequate. No studies examining their effectiveness have ever been published in a peer-reviewed journal. Because there is simply no psychological science to support them, the tests should not be used. . . . Court tests that expert evaluators use to gauge the supposed best interests of a child should be abandoned. . . . The coupling of the vague 'best interest of the child' standards with the American adversarial justice system puts judges in the position of trying to perform an impossible task: making decisions that are best for children using a procedure that is not. . . . We believe it is legally, morally and scientifically wrong to make custody evaluators de facto decision makers, which they often are because judges typically accept an evaluator's recommendation. Parents should determine their children's lives after separation, just as when they are married. . . . Parents—not judges or mental health professionals—are the best experts on their own children. We are simply urging the same rigor that is applied to expert testimony in all other legal proceedings." See also, "For Arbiters in Custody Battles, Wide Power and Little Scrutiny" by Leslie Eaton, *New York Times*, May 23, 2004.
- The California statute states: "The mother of an unemancipated minor child and the father, if presumed to be the father under Section 7611, are equally entitled to the custody of the child." California Family Code, sect. 3010(a). Such provisions are generally ignored by family courts, which order custody based on the judge's opinion of the best interest of the child.
- California's attempt to define "best interest" says that the court should consider whatever factors it finds relevant, including "the health, safety, and welfare of the child" and a few other factors. Michigan lists twelve factors, starting with "the love,

affection, and other emotional ties existing between the parties involved and the child.” The statutes offer no clue as to how these factors should be measured or weighted.

- The famous 1965 Daniel Patrick Moynihan report, “The Negro Family: The Case for National Action,” warned that the rise in single-mother families was no harmless lifestyle choice, but was unraveling “the basic socializing unit” and causing high rates of delinquency, joblessness, school failure and male alienation. Moynihan was bitterly attacked for speaking what is now universally recognized as the awful truth. Kay S. Hymowitz, in the Manhattan Institute’s *City Journal* (August 2005, 12-23) wrote that Moynihan’s critics romanticized female-headed families as a good thing. She described how the feminists, who were fixated on notions of patriarchal oppression, claimed that criticism of mother-headed households was really an effort to deny women their independence, their sexuality, or both.
- The Census Bureau reports that 31 percent of children do not live in a home with two parents, based on a non-legal definition that includes stepparents. The more accurate and widely used statistic is that 40 percent of children live in homes without their own two parents.
- The *Illinois Bar Journal*, June 2005, 29off., explained how women use court-issued restraining orders as a tool for the mother to get sole child custody and to bar the father from visitation. In big type, the magazine proclaimed: “Orders of protection are designed to prevent domestic violence, but they can also become part of the gamesmanship of divorce.” The “game” is that mothers can assert falsehoods or trivial marital complaints and thereby get sole-custody orders which deprive children of their fathers based on the presumption (popularized by the radical feminists) that men are abusers of women. The article states that restraining orders, which courts “customarily” issue at an “ex parte hearing without testimony,” actually “make the case ineligible for mediation,” “limit settlement options,” and mean that “joint parenting is not an option.”

- Researchers Margaret F. Brinig and Douglas W. Allen explain how the typical pattern of giving primary custody to the mother deprives the father not only of his time with his children but also all of his authority and decision-making in the rearing of his children: “If the court names her primary custodian, she makes most, if not all, of the major decisions regarding the child. As custodial parent, she will be able to spend the money the husband pays in child support exactly as she pleases—something she may not do during marriage. Finally, although the court will usually have ordered visitation she can exert some control over her former husband by regulating many, although not all, aspects of the time he spends with the child. In the extreme, she can even ‘poison’ the child against the father.” “These Boots Are Made for Walking: Why Most Divorce Filers Are Women,” *2 American Law and Economics Review* 126 (Spring 2000).
- The preponderance of academic research shows that shared parenting is superior to single-parent custody by all available measures. Meta-analyses of the research can be found in *Father and Child Reunion* by Warren Farrell (Penguin, 2001) and in “Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review” by Robert Bauserman, *Journal of Family Psychology*, 2002, Vol. 16, No. 1, 91102. One of the benefits of shared parenting is that it reduces court involvement and litigation. Nevertheless, unscientific ideology-driven arguments that are lacking in common sense continue to be highly publicized. For example, see Peggy Drexler, *Raising Boys Without Men: How Maverick Moms Are Creating the Next Generation of Exceptional Men* (Rodale, 2005), which makes the argument that single mother and lesbian homes are the best environments for boys.
- Divorce law is now commonly called no-fault. This radical change in divorce law, which took place in the 1970s, made it possible for either party to unilaterally walk out of the marriage contract without asserting fault by the other spouse, but courts definitely consider fault in determining child custody.

The domestic-violence lobby has implemented the use of a long litany of new and ill-defined (including non-physical) faults against spouses that can be invoked by the courts in deciding the terms of child custody. As a result, divorce proceedings are often much more bitter and contentious than ever before.

LESSON ELEVEN

JUDGES TAKE OVER PARENTS' RIGHTS

QUESTIONS FOR DISCUSSION:

- ★ Should we let supremacist judges get away with ruling that a school has the right to teach anything it wishes about sex?
- ★ How can judges have the power to rule that one atheist parent can silence all schoolchildren from reciting the Pledge of Allegiance, but no parent even has the right to object to or to opt out his child from instruction about sex, homosexuality, or Islam?
- ★ Discuss the famous quotation from Samuel Hayakawa.
- ★ What is the policy of the National Education Association about parents' rights in public schools, and has this teachers union been successful in establishing its policy?
- ★ What do Supreme Court decisions say about the fundamental right of parents to the care and upbringing of their own children?
- ★ What is it that makes family court judges so powerful and unaccountable?
- ★ Discuss how family courts have adopted the notion that "it takes a village to raise a child."
- ★ Should parents or court-appointed experts decide what is "the best interest of the child"?
- ★ Is there any legal, moral, or scientific standard on which to judge "best interest of the child" or is it completely subjective?
- ★ How have family court judges used divorce as an excuse to take over parents' rights over the care and upbringing of their children?