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Recommended Citation

Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995).

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REFLECTIONS ON A CASE (OF MOTHERHOOD)

*Jane M. Spinak**

I.

Inanimate materials decay over time, but for the mind, time is not the principle of dissolution but rather the medium in which we create the present by reconstructing the past.

*Murray Edelman*¹

She surveyed my office for signs of conspiracy. We had had two or three telephone conversations that had conveyed my ambivalence about representing her. A former colleague had urged her to call the clinic for help but I was reluctant to accept her case for the clinic: we rarely represented foster parents and the procedural complexity of the case convinced me that I would be unable to assign students to represent this client so late in the semester. I was resigned, however, to help her find a lawyer, both because a former colleague had sent her and because the snippets of her story that I had heard so far were troubling. So, for a few weeks I had tried to find former students to take her case pro bono, but none was available. After failing to secure anyone's help, I telephoned her once more and listened to her story in more detail. I couldn't imagine what was compelling me to consider representing her myself. The

* Edward Ross Aranow Clinical Professor, Columbia Law School (on leave); Attorney-in-Charge, Juvenile Rights Division, The Legal Aid Society of New York. An article of such long gestation owes thanks to many friends and colleagues. To begin, I would like to thank the participants of the 1992 Clinical Theory Workshop and the 1992 Feminism and Legal Theory Workshop, "Women and Representation," (both at Columbia Law School) as well as the participants at the 1992 AALS Clinical Section Conference for their comments and suggestions on Parts I and II. Peggy Davis, Nina Tarr, Mary Jo Eyster and Nancy Cook provided unsolicited and thought-provoking observations on the same sections. Throughout the process, Martha Fineman, Philip Genty, Tony Alfieri, Carol Liebman, JoAnn Clark, Mary Banach and the members of my ersatz reading group (Alice Dueker, Minna Kotkin, Carolyn Kearny, Sue Bryant, Barbara Schatz, Kathy Sullivan, and Jean Koh Peters) dispensed an unending supply of sustenance, critique and common sense. Steve Ellman provided, as he has for so many other clinicians, a safe, yet fruitful, place to begin the process. Kendall Thomas's recommendation to incorporate actual case documents within the article was pivotal. I would like to thank Lance Liebman for the critical time needed to finish writing and the Columbia Law School Alumni Research Fund for financial support. Delzora Preshae Wilson's recent production assistance smoothed a rough process. Jennifer Lemberg defied every belief I held about student editors; her careful, considerate and insightful readings enhanced what you read today. I had only one other editor during the last (almost) four years. He read every word, over and over, and suggested a few of his own. The walks from Tregadillet to St. Stephen's Hill sharpened and clarified my thinking. Thank you Warren, for always. Finally, this is dedicated to Jenni and our children.

1. Murray Edelman, *The Symbolic Uses of Politics* 204 (1985).

semester was well in progress. I was already thinking about the summer and balancing the time I wanted to spend with my year-old daughter, my clinic responsibilities, and some unfinished research. To protect myself, I told her that I was willing to meet with her and decide whether the office could represent her (I continued to use the office as a shield against taking the case). I was sending very mixed messages and neither of us felt comfortable with this accommodation when our telephone conversation ended. Nevertheless, she persisted. My former colleague had told her about my experience in representing clients in foster care matters and I had reinforced that story in our discussion. My indecision contained advice which might eventually have to satisfy her. The information I offered her told her I knew the system and was part of it. Thus she searched my office and my face for signs of allegiance with her enemies.

Four women met in my office: two students (Martha and Ali), Ms. Parsons (the prospective client) and me.² The students had volunteered to work with me on the case, in addition to their own clinic responsibilities, if the client were accepted. They were a particularly effective team—careful, reflective, engaged, and diverse: an African-American woman with a few years of relevant work experience and an enthusiastic white woman just out of college. Earlier in the semester, they struggled to establish their own relationship and succeeded. They surveyed their differences, compared their similarities, and recognized their combined strengths. Not an easy task. Their comfort with each other and with me would support the relationship we would have to develop with the client. When Ms. Parsons was introduced, her first smile was for Martha, the Black student. I saw the pleasure in her eyes. I believe she had expected only the law professor with the discouraging voice and she found something more: a young woman in her own image. Ms. Parsons is of African and western European heritage. She considers herself part of the African-American community and believes, as I do, that minority families are assaulted by the state at all turns. But that came later. Now there was just the smile for Martha before we began the interview.

For the next two hours Ms. Parsons told us her story. We sat in a circle in my office with no table between us. Ali and Martha just listened and watched. From time to time I would ask a question, try to move her along or urge her to complete a thought. Mostly, I listened too. I checked off boxes on the form in my head: court proceedings, notice, counsel, dates of foster care placements, dates of reviews, provision of services, and status of children. The lawyer in me swam in the details, rushing from fact to fact, posturing theories, weighing options, assessing success. Twelve years of lawyering in the foster care system organized Ms. Parsons's story into a case file. This was not a case that lawyer wanted. At another time I would have redoubled my efforts to find her counsel,

2. Names in this Article have been altered in the interest of privacy and confidentiality.

given her some advice and told her that the office couldn't undertake such a massive job as the end of the semester approached. I was going to have to do that with other prospective clients. But I couldn't say no that day. Her anguish as a mother overwhelmed me: her terror became mine. Her boys became my girl. My shoulders and chest ached under my dress as I listened to her loss. I let myself listen to the client for the first time as a mother and I couldn't say no.

Now, much later, I need to write about the experience. I had thought, when contemplating motherhood, that the central impact on my work would be balancing my need to be a mother to a child with my need to be a teacher to students and a lawyer to clients. Even though I have always urged students to draw on their life experiences for their lawyering, I never considered that becoming a mother would change the way I considered the process of my work. In retrospect, this seems foolish. Some time after having become a parent, Martin Guggenheim wrote an important article about the limits of child advocacy.³ He had been a child advocate for many years and had been my first teacher of child advocacy. His vision had changed and I had smugly laughed at the transformation. Now I understand the need to explore my lawyering through this new filter.

Ms. Parsons became a foster mother when she was in her early forties. Her goal was to adopt children and taking foster children appeared to be the most effective route. She wanted to be a "pre-adoptive" foster parent, one who accepts foster children already freed or likely to be freed for adoption. The foster care agency knew she preferred two boys, toilet trained but not much older. She anticipated some of the difficulties of being a single mother and had elaborately organized her life, nursing schedule and home to minimize the chaos of suddenly being thrust into this new role. After more than a year of waiting, three small boys—Juan, Mati and Michael—appeared at her door one night, aged seven, four and two. One more than expected and one needing a crib and diapers: the first step away from control over chaos. Her joy at beginning her life as a mother was tempered by her fear that her plans were altered. As she recounted the story, I felt that fear. At the time my daughter was born, when I was in my late thirties, I knew the fear of losing the control built over years of professional adult life. Early in my daughter's life, the fluidity of our days unnerved me: What would I have done if our plans had been altered? If I had not had the support of a sharing husband, a maternity leave, financial stability, years of working with children and parents?

3. See Martin Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. Rev. 76 (1984).

Ms. Parsons's fear was mine confirmed. She nevertheless plunged into motherhood.

Ms. Parsons is a proud and contained woman. She does not easily share her feelings and rarely finds humor in life's vagaries. When she first told us what had happened, she circled around her despair. The disjointed narrative, her flashes of anger at "the system," her constant vigilance toward our ability to take her side were intended to keep us at a distance from her pain. She wasn't looking for sympathy or compassion. I don't think she cared what I thought of her as long as I could help her reclaim her motherhood. I have helped other mothers who have been separated from their children. With some of them I have developed an easygoing rapport. We like each other, we try to develop a mutual trust, and we share fairly easily in the struggle to reunite their families despite enormous differences in our backgrounds and experiences. Maybe they are better at hiding their pain. Maybe I shut my eyes to it so that I can do this work. Maybe I distance myself from them intellectually so that I can distance myself emotionally. Maybe they take similar actions. Maybe they just act the way they think I want them to. I certainly would not like to feel about all my clients and cases the way I feel about Ms. Parsons.

During this initial discussion, only some of the background details emerged. The children had been abandoned in a welfare hotel, but for two or three years following their foster care placement they would periodically see their biological mother (and, more frequently, their maternal grandmother). Ms. Parsons was confronted with a dilemma she had not anticipated: these were not children ready to be adopted. The foster care agency had given her children with a mother who had only temporarily placed them in care. The agency's first responsibility was to try to reunite these children with their mother.⁴ Whether the agency or the children's mother or both had failed in this effort, by the time I spoke with Ms. Parsons, the mother's rights to the children had been terminated for over two years and Ms. Parsons had commenced adoption proceedings. These usually crucial factual and legal issues remained on the periphery. Instead, we were assaulted (and I, finally, overwhelmed) by the emotions of a mother whose children were wrenched from her. More than six years after Ms. Parsons began to care for the children, they were suddenly removed from her home. She was not accused of abusing or neglecting the children. She was not being charged in any civil or criminal action. She had been told that she would no longer be able to raise these children because officially, legally, she was accused of using corporal punishment.

State regulations prohibit foster parents from using any form of corporal punishment.⁵ I agree with this rule even as I marvel at its context.

4. See N.Y. Soc. Serv. Law §§ 392(5-a), 384-b(1) (McKinney 1992); N.Y. Fam. Ct. Act § 1055(c) (McKinney 1983 & Supp. 1995); *In re Sheila G.*, 462 N.E.2d 1139 (N.Y. 1984).

5. See N.Y. Comp. Codes R. & Regs. tit. 18, § 441.9 (1995).

In our country, biological parents are free to use corporal punishment that is not excessive and many of them do. Public school officials have the right to use corporal punishment with some procedural constraints.⁶ I don't believe in corporal punishment but I sometimes have to use all my strength to avoid its insidious immediacy. The ability of most foster parents to restrain from using any corporal punishment has to be suspect. Nevertheless, parents who permit their children to be placed in state custody or who are compelled to do so are not also compelled to allow the custodians to have the freedom to strike their children. And children who have lost so much already should not live in fear of physical punishment. This is right as a general proscription; but what happens when the rule is broken?

This was the second time Ms. Parsons was caught breaking this rule. Two years earlier, in 1989, during an evening when the children were out of control, fighting with her, fighting with each other, Ms. Parsons hit Juan, then aged twelve, on his back with the full force of her hand. He was refusing to take his shower and go to bed. He kept goading his youngest brother, Michael, trying to get the family "baby" into trouble. Juan had already taken off his shirt; her hand hit his bare skin. Furious at his mother, Juan went off to take his shower and, without further discussion, went to bed. The next morning, all the children got ready for school and left without any unusual problem. Ms. Parsons expected to see them around three. Instead, she was summoned to Juan's school later that morning for a meeting with the principal.

Parents are summoned to school all the time: kids are hurt, they misbehave, they reveal secrets about their home lives that provoke investigations. Foster parents, who live in limbo somewhere between family integrity and the state, are summoned along with the caseworker responsible for "the case." Foster parents are instructed about the temporary responsibility of their job and many rely on the determinations of the caseworker in emergencies. Ms. Parsons had never felt comfortable with this division of responsibility. She had not sought to be a temporary foster parent and reluctantly fulfilled her duties in that role. Once the biological parents' legal relationship with the children was severed and she was approved as an adoptive parent, Ms. Parsons resentfully complied with the continued agency supervision.

Ms. Parsons arrived at school to find the principal, the guidance counselor and Juan's teacher conferring while they awaited her and the caseworker's arrival. Ms. Parsons was told that she would receive an explanation for her being summoned when the caseworker arrived. Nothing could have made her angrier while she waited: another reminder that her children were not yet really hers. When the worker arrived, Juan was asked to lift his shirt. There, for all to see, was the imprint of Ms. Parsons's hand on his back. The hot shower that immediately followed

6. See *Ingraham v. Wright*, 430 U.S. 651 (1977).

the bare back slap had sealed the impression in place. Juan, furious at Ms. Parsons for this injustice among many, decided to retaliate. He had told his teacher; he had displayed his back. His teacher told school officials who, under state law, are mandated reporters of suspected abuse or maltreatment.⁷ Sensationalized tragedies, like the Lisa Steinberg case, have kept this obligation in the forefront. In the Steinberg case, school officials were chastised repeatedly for not sufficiently investigating Lisa's apparent maltreatment.⁸ In this case, the school officials already knew that Juan was a foster child and so called the foster care agency directly instead of making a report to the State Central Register of Child Abuse and Maltreatment.⁹ The agency's response was mixed. On the one hand, here was a foster child who had been struck by a foster parent in direct violation of state regulations precluding the use of corporal punishment. On the other, Ms. Parsons had been Juan's foster mother for five years. The agency had recommended adoption and that proceeding was pending. Juan, Mati and Michael were then twelve, nine and seven: three Hispanic boys, one approaching adolescence, one knowing no mother but Ms. Parsons, two experiencing behavioral and learning difficulties at school, all having suffered extremely prior to their placement with Ms. Parsons. Statistically, these boys had a very slight chance for adoption by other parents. By virtue of their ages, background and sibling status, they are considered "hard to place" by the child welfare system.¹⁰ They would be facing likely separation into different foster families, group home care or even institutional residential placement if they were removed from Ms. Parsons's care. The agency decided to send the boys home, to reprimand Ms. Parsons for slapping Juan and to require her to begin family counseling with him. At the same time, the agency's necessary consent to the adoptions being finalized was put on hold until everything settled down.

Juan's ambivalence about the replacement of his biological mother by Ms. Parsons and her difficulty in understanding his dilemma was dramatized through this incident. Juan wanted Ms. Parsons's attention, her connection, her unquestioned love. He wanted what his biological mother had never been able to provide to him. And he wanted his biological mother. His foster mother could not be all he wanted. And if she couldn't, he could not forgive her.

The agency's determination to permit the children to remain with Ms. Parsons was one possible response to the broken rule. While Ms. Parsons had some rights as a pre-adoptive foster parent, the local commissioner of social services, through the foster care agency, is the legal guardian of the children and remains ultimately responsible for their well-be-

7. See N.Y. Soc. Serv. Law § 413(1)-(2) (McKinney 1992 & Supp. 1995).

8. See Jane Perlez, Report Faults School in Case of Slain Girl, N.Y. Times, Jan. 20, 1988, at B1.

9. See N.Y. Soc. Serv. Law § 415 (McKinney 1992).

10. See N.Y. Comp. Codes R. & Regs. tit. 18, § 421.24(3) (1995).

ing.¹¹ The agency may have believed that the most appropriate response to the situation was to keep the family intact. To do that, the agency recommended the same type of services often offered to reunite or maintain biological families: family therapy, individual therapy for Juan and parent training. There are no statistics on the efficacy of such services; how can social scientists identify which bunch of factors results in some families succeeding and others failing? But if the agency were right, and the services were needed, could the agency expect the family to succeed without the services? For this family, that was part of the problem. About the time of the incident, the family therapist they had been seeing left her position and the agency failed to secure another therapist for five months. At precisely the time the agency determined that the family most needed mental health intervention, they failed to provide it. Ms. Parsons agreed that Juan needed individual therapy. Yet for over nine months, Juan was never provided with that therapy. Having determined that the appropriate response was to maintain the family intact and to provide services which would enhance the probability of adoption, the agency was legally obliged to secure the services.¹² Moreover, even if Ms. Parsons had been able to locate the services herself (as she eventually did for Juan's individual therapy), the agency first had to approve their use.

Juan and Ms. Parsons had set in motion a series of interactions which almost severed all three children from Ms. Parsons. Fear and animosity swirled around the younger children, who remained unambivalent about Ms. Parsons being their mother. Their loss would have been as profound as Juan's had been when their biological mother had abandoned them. What impeded the agency's ability to sustain this family?

The caseworker responsible for the family, Lisa Jean Ames, was twenty-three. Ms. Ames's primary goal for the children was to stabilize the family so the adoption could be completed. She had a bachelor's degree in history and no prior experience or training in child welfare. This was her first job after college. She was assigned to the case, one of her first, three months after the slapping incident occurred. Had the crisis never occurred, this still would have been a difficult case. Ms. Parsons is not a typical foster mother. She is dissatisfied with bureaucratic excuses for inefficiency and inaction. Throughout the time the children lived with her, she fought for proper school placements, extra-curricular activities, and therapies to address the children's needs. Ms. Parsons wanted them in the best program available. She feared the statistics working against inner-city minority boys completing their education and moving into the adult work world. The agency was consistently content with sending them to the nearest school or most easily secured program or therapy. Ms. Parsons told me later that she exploded when she was informed that Ms. Ames would be her new caseworker: a young white

11. See N.Y. Soc. Serv. Law §§ 383(2), 384-b(3)(a) (McKinney 1992).

12. See N.Y. Comp. Codes R. & Regs. tit. 18, §§ 421.1(b), 421.2, 421.8(f), (h) (1995).

woman (twenty years younger than Ms. Parsons) with no training or experience was now going to enforce the rules for how Ms. Parsons raised her family, secure the services the agency insisted were necessary and monitor their efficacy.

Over the next year and a half, Ms. Parsons and Juan lurched from crisis to crisis. Juan was repeatedly in trouble in school; once he was suspended. Eventually, he was transferred to a highly structured school connected with a residential treatment program designed to assist children with severe emotional or behavioral problems. When he finally saw a therapist (a psychiatric resident on rotation), the psychotropic drug Ritalin was recommended to control his behavior. Securing approval of the drug's use highlights the complexity of New York City's foster care system. The therapist had to transmit his recommendation to the foster care agency responsible for Juan's case. The agency then submitted an application to the agency designated by the City's Commissioner of Social Services (Juan's legal guardian) to supervise private foster care agencies: the Child Welfare Administration (CWA). CWA was then required to determine whether the drug should be administered to Juan. CWA, however, never processed the application despite requests from both Ms. Parsons and the agency. The drug was not prescribed and the only consistent support remained the new family therapist who met regularly with Ms. Parsons and Juan. These sessions proved to be insufficient to address the myriad problems agitating the family, including, the therapist would later allege, the failure of the agency to have the adoption finalized. Ms. Parsons was often unable to restrain Juan's behavior at home; she took to calling 911 on occasions when she felt he was out of control. The family moved from crisis to chaos.

The failure to reach the point where the adoption could be finalized added a draconian twist to the family's ability to remain intact. When the school officials reported Juan's bruise to the agency, a process was set in place whereby a complaint was lodged in the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment.¹³ For the adoption to be completed, either this complaint had to be expunged from the state register or the adoption papers amended to reflect the complaint.¹⁴ The judge would then have to decide whether the facts of the complaint and its resolution should affect the ultimate adoption. Despite the family's traumas, toward the end of 1991, the agency had renewed its consent for the adoption to be finalized. The adoption, itself, was considered a stabilizing force. Ms. Ames wrote three times to the state register asking that the complaint be deleted; there was never a reply.

13. See N.Y. Soc. Serv. Law § 422 (McKinney 1992).

14. See N.Y. Dom. Rel. Law § 112(2) (McKinney 1988 & Supp. 1995); N.Y. Soc. Serv. Law § 422(6) (McKinney 1992).

Ms. Parsons's attorney, the person responsible for amending the adoption petition, never offered her client this option. The reason for the attorney's failure compounds her already questionable ethical behavior. When the original adoption papers needed to be filed, the agency referred Ms. Parsons to an attorney. She retained the attorney who eventually filed the petitions in Surrogate's Court, one of the two courts in New York having jurisdiction over adoptions.¹⁵ The attorney who filed those petitions for Ms. Parsons, who took \$500.00 of her money for that work, was also the agency's attorney. This practice of agency attorneys representing foster parents who are adopting children under the care of the agency is common. It also is wrought with ethical dilemmas. Before an adoption can be finalized, the agency must consent.¹⁶ What if, as here, positions change? Who does the agency attorney represent? Even if the attorney had been able initially to justify the dual representation, the moment the agency decided temporarily to withhold its consent to the adoption, the attorney should have applied to withdraw from representing Ms. Parsons and the agency in the adoption proceeding. Because of the knowledge she had gained from the agency and Ms. Parsons during the course of representing them both, the Disciplinary Rules of the New York State Bar Association's Lawyers Code of Professional Responsibility prohibited her from continuing to represent either of them. The standard under Rule 5-105—whether the lawyer can exercise independent judgement on behalf of multiple clients—cannot possibly be met when the two clients are taking adversarial positions in the same litigation.¹⁷ Instead, she told Ms. Parsons nothing of this conflict of interest and simply took no further action toward completing the adoption. Ms. Parsons erroneously believed that her only option was to wait for the state to clear her name from the register.

On the surface, an argument could be made that as long as the family remained together, no harm was done. The family therapist, however, attributes the failure to finalize the adoption as a major impediment to Ms. Parsons's and Juan's ability to resolve their conflicts. Had the adoption been completed, Ms. Parsons's commitment to Juan would have been concrete: she would have become his legal parent with all the accompanying rights and responsibilities. Her authority to make decisions on his behalf without the approval of the agency was essential to both parent and child. Juan saw this lack of authority as a reminder of his unsettled existence as a foster child, his disbelief in Ms. Parsons's commitment to him, and as a place to challenge her rule. Ms. Parsons saw it as the omnipresent reminder that her children were hers only at the pleasure of the state. During the time that the adoption remained uncompleted, the issue of commitment pervaded the therapeutic meetings. The

15. See N.Y. Dom. Rel. Law §§ 109(2)–(3), 112(1) (McKinney 1988); N.Y. Fam. Ct. Act § 641 (McKinney 1983).

16. See N.Y. Dom. Rel. Law § 111(1)(f) (McKinney 1988).

17. See N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.24 (1995).

family therapist found it difficult to move the family on to other issues. In the meantime, the children went to school, played on sports teams, took music lessons and hung out at the local pool. Friends came for dinner and neighbors visited. Everyone went to church together on Sundays and holidays were celebrated. The younger children's lives, after the trauma of their earliest years, appeared remarkably stable. The very ordinariness of their existence would make the later disruption so much more compelling for me.

One evening in February 1991, Juan, then thirteen, and Michael, eight, were roughhousing and then began to fight. Ms. Parsons intervened, pulling the children apart. She struck Juan. He threatened to "fix her" by calling "child abuse." She took his sneaker and threw it out the front door. This had become an effective form of discipline without using physical punishment, a way for Juan to calm down and a time to get the younger boys settled. Juan would go to retrieve his sneaker in the hall and Ms. Parsons would close the door. Juan would wait in the hall, sometimes banging on the door or pushing the doorbell, until Ms. Parsons believed he was composed. He would then be let back into the apartment, usually fifteen or twenty minutes later, never longer. He always remained in the hallway near the door until he came back inside. This time, however, they struggled at the door, Juan trying to prevent Ms. Parsons from closing the door against him. Their physical struggle closely reflected their psychological one. They each won a little. With his greater strength, Juan pushed back into the apartment. But Ms. Parsons was still the authority figure; she managed to keep him away from his brothers until they were asleep and then got him to go to bed as well. Finally, she went to sleep.

The next morning Juan went to school. Late in the day, when Juan should have been home, Mati came back from mailing the children's baseball team applications and told Ms. Parsons that Juan was in the lobby unwilling to come upstairs. Mati said that people from the agency and "child abuse" were coming and Juan was waiting for them downstairs. Ms. Parsons went to the lobby and told Juan that they didn't live in the lobby and he could wait for the people at home. He refused. Soon after, the CWA child abuse investigator, Ms. Thomas, arrived. Ironically, she was the same worker who had investigated the family two years earlier after the slapping incident. This coincidence was quite unusual. The turnover rate of CWA caseworkers during the late eighties and early nineties was extremely high, one year reaching almost eighty percent.¹⁸ Yet that evening, Ms. Thomas appeared, as she had two years earlier, to consider the fate of this family.

When children are in foster care in New York City and there is an allegation of maltreatment, a caseworker from a special CWA "Confiden-

18. See Celia W. Dugger, Shortage of Trained Caseworkers Imperils Young Victims of Abuse, N.Y. Times, Dec. 28, 1992, at A1.

tial Investigation Unit" (CIU) is assigned to investigate. The caseworker speaks to family members, agency personnel and others in order to determine whether the children should remain with the foster parents and, on occasion, whether the District Attorney should be informed of possible criminal culpability. In 1989, Ms. Thomas had investigated the slapping incident but had conducted a minimal investigation based on the agency's judgment that the children should remain with Ms. Parsons. Ms. Thomas agreed with the agency that the children were neither abused nor neglected and that, with the proper services in place, the family should remain together. Ms. Thomas also believed that Ms. Parsons was remorseful and therefore that she would not use corporal punishment again.

What part did remorse play? Individuals and families whose conduct is regulated by the state are often expected to act in prescribed ways. Welfare recipients, for example, are supposed to be grateful for their income despite Supreme Court decisions which pronounce such payments to be an entitlement. Biological parents who are forced by circumstance or unfitness to place their children in foster care are then required, while the state acts as guardian, to solve their problems of poverty, illiteracy, homelessness or drug addiction while developing a thorough understanding of child development and family dynamics. They are expected, furthermore, to be resolute, even cheerful, when they are permitted to visit their children for an hour every other week and to troop off steadfastly to any and all programs that their caseworker has identified as necessary for return of the children. They also must be understanding and thankful that their children are being raised by other parents. And, if their children are in foster care because the state has determined that they are unfit parents, they are supposed to be sorry and to say so—to their therapist, their caseworker, the judge—to anyone in the system who requires the apology as a condition for reunification of the family. This apology on demand, or the remorse it is supposed to represent, is the cruelest, even most sadistic, requirement. Even if a parent is able to acknowledge personal responsibility (as distinguished from societal responsibility) for a child's maltreatment, this private understanding should not require repeated public airings. I can't believe this public humiliation enhances anyone's ability to care for their children.

Ms. Parsons shared most of the trials of biological parents separated by the state from their children. She wanted to keep and adopt these children and only the state had the power to grant that desire. She, too, needed to conduct herself in ways that the state found acceptable. For Ms. Thomas that conduct included sufficient exclamations of remorse. Ms. Parsons complied: she was sorry that she had hit Juan and she declared it wouldn't happen again. She knew she had broken the rules; she was willing to attend therapy and training to assist her in parenting the children. But being sorry and being able to cope with the immediate crisis are not the same. When Ms. Parsons struggled with Juan at the

door two years later (and when, from time to time, she had used physical punishment as a means of discipline) she was no less sorry for what she was doing than she had been in July 1989. It just had nothing to do with what was happening at those moments.

Ms. Thomas questioned Ms. Parsons and the children about what had occurred the previous evening. Ms. Thomas spoke briefly to each boy and later testified that each one indicated that on some occasions when they were bad they were hit by Ms. Parsons. Ms. Thomas did not remove any of the children that night; she did not consider them to be at imminent risk of harm, the standard for immediate removal.¹⁹ She told Ms. Parsons that she would speak to agency personnel the next day. Ms. Thomas did speak to Ms. Ames the following day and to a psychologist at Juan's school. The psychologist said that Juan had just told her that day about the fights with Ms. Parsons, that Juan didn't want to be adopted by her and that Ms. Parsons had told Juan she didn't want to adopt him. The psychologist's statements were important to Ms. Thomas; they indicated to her that the relationship between Juan and Ms. Parsons had deteriorated gravely. But when she spoke to Ms. Ames the next day, she didn't advise her to remove Juan or the other children from Ms. Parsons's care immediately. She just noted that this was the second reported incident of corporal punishment and that she would continue her investigation while the children remained with Ms. Parsons.

Ms. Ames talked to Juan at his school the day after Ms. Thomas went to Ms. Parsons's home. After speaking with him and the school psychologist and conferring with her supervisors on the phone, Ms. Ames decided to remove Juan from Ms. Parsons's care. She was sure that Juan did not want to return home and that the relationship between Juan and Ms. Parsons had deteriorated sufficiently to justify the removal. She spoke to Ms. Thomas the following day and asked her whether she would recommend removing the other two children. Ms. Thomas said that the agency would have to decide what to do since this was the second reported incident. She never told Ms. Ames to remove the children. Pending a final determination by Ms. Thomas whether the allegations were "indicated" or "unfounded,"²⁰ the agency decided to remove the two younger children from Ms. Parsons's care.

In 1977, the Supreme Court decided *Smith v. Organization of Foster Families for Equality and Reform*.²¹ There, the foster parents hoped the Court would decide that a foster parent has a "liberty" interest in maintaining the foster family which grows from the care that the foster parent has provided to the foster child. Instead, the Court determined that whatever interest did result from the foster family relationship, the New York rules and regulations which governed that relationship were suffi-

19. See N.Y. Comp. Codes R. & Regs. tit. 18, § 443.5 (1995).

20. See id. § 432.2(b)(1).

21. 431 U.S. 816 (1977).

cient to protect it.²² The specific issue addressed by the Court was the appropriateness of the procedures established by New York State (and, for children living in New York City, by CWA) for removing foster children from foster homes. The procedures in effect in New York at the time *Smith* was decided, and when the removal of Ms. Parsons's foster children occurred, require that an agency notify the foster parents of the agency's intent to remove the child at least ten days prior to the child's removal. The foster parent can then request a conference and, with counsel present, hear the basis for the agency's decision and submit reasons why the child should not be removed.²³ If the determination is made to remove the child, the foster parent may request a state administrative "fair hearing" to review the decision and, if necessary, pursue subsequent judicial reviews. The removal, however, is not automatically stayed.²⁴ If the removal affects a child in the care and custody of CWA in New York City (or one of its subcontracting agencies) as Juan, Mati and Michael were, the foster parent has the right to a full administrative hearing prior to the child's removal. The ten day notice still applies.²⁵ These were the rules that the *Smith* Court determined were sufficient to protect the rights of foster families. At the time Ms. Parsons faced removal, two exceptions to these rules existed: when the foster parent waives, in writing, the ten day notice and when a determination is made that the child's health or safety is in imminent danger.²⁶ Since Ms. Parsons had never waived the ten day notice, the first exception was not relevant. The second exception was.

Ms. Thomas, the CIU investigator, never determined that any of the three children's health or safety was in imminent danger. Ms. Ames and her supervisors determined that Juan's was; their decision excused them from providing prior notice of his removal. Ms. Ames also decided to remove Mati and Michael pending the outcome of Ms. Thomas's investigation. At the fair hearing months later, she testified that her supervisor agreed with that decision; her supervisor testified that she would not have removed the younger children without providing a ten day notice. The supervisor believed that Ms. Thomas had recommended the removal; Ms. Thomas, of course, had not. Whatever procedures the Supreme Court thought were sufficient to protect a foster parent's interests in providing a stable home to children while they remain in foster care or the children's interest in being shielded from unnecessary and disruptive moves while they are separated from their biological family or until the state can

22. See *id.* at 849-56.

23. See N.Y. Comp. Codes R. & Regs. tit. 18, § 450.14 (1974) (currently at N.Y. Comp. Codes R. & Regs. tit. 18, § 443.5 (1995)) (on file with the Columbia Law Review; provided by the New York County Lawyer's Association Library).

24. See N.Y. Soc. Serv. Law § 400 (McKinney 1976) (amended 1978 & 1981).

25. See Dep't of Social Services—Special Services for Children, City of New York Human Resources Admin., S.C.C. Procedure No. 5: Removal of Children from Foster Family (Aug. 5, 1974) (on file with the Columbia Law Review).

26. See N.Y. Comp. Codes R. & Regs. tit. 18, § 443.5 (1995).

find another permanent home for them failed to protect this foster family. In the hands of inexperienced or untrained or sloppy decisionmakers, the most carefully constructed procedure cannot provide sufficient safeguards against bad decisions.

Ms. Ames took Juan from school on the day he was removed from Ms. Parsons's care. The following evening, she went with Juan to Ms. Parsons's apartment. She had earlier called to say she would be picking up some of Juan's clothes and possessions. She had not said that she intended to take the other two children as well. When she arrived, Ms. Parsons helped Juan gather his things together. Then Ms. Ames informed Ms. Parsons that the other two children would also be removed. Ms. Parsons was panic-stricken. Michael and Mati became upset, pleading not to be taken. Despite the surprise and subsequent shock Ms. Parsons and the children felt, Ms. Parsons did not hinder Ms. Ames. She packed some of the children's clothing and told them to listen to Ms. Ames. She said good-bye to them calmly. She said this would all be settled soon and she would see them in a day or two. She didn't see them again for four months.

The three boys were immediately placed together in a suburban foster home within short commuting distance from New York City. Juan's own school was nearby and he remained enrolled there. Mati and Michael were transferred to new schools. They never said good-bye to their friends and neighbors. Family therapy simply stopped. Their after-school activities ended; no more swimming, violin, or team sports. Their life, as they had known it for more than six years, was over. Their mother, their home and their community had vanished. Miraculously, they had each other, at least for a while. The agency would later say that the children were very happy in their new foster home, well-adjusted and content.

When the children were removed from Ms. Parsons's care, she immediately asked to visit them. The agency denied her request: it would be better for the children to adjust to their new family without being confronted by the conflict of seeing their former foster mother. The children were also discouraged from calling Ms. Parsons by the agency and the new foster mother. Overnight, Ms. Parsons became a legal stranger to the children. Without permission of the agency, their legal guardian, she could not interfere with their lives in any way. If she tried, the agency could obtain an order of protection to stop her.

At the times when I thought I would never be able to move the agency or the lawyers off their positions, those times when I wanted to quit, I would think about Ms. Parsons at home. On odd days when I am at home and my daughter is out or staying with grandparents, the quiet in the house is startling. Her room appears to be suspended, toys and clothing waiting for mischief. I wonder what life would be like if she were not there and I shudder, burying such thoughts deep in my mind. Whenever I imagined Ms. Parsons alone at home, these thoughts rushed into my

consciousness. She came home to a house, day after day, to face emptiness. Her children were legally dead for her but she knew they laughed and cried and breathed a few miles away. She could not grieve and bury them. She could not hound the police to find them because they had run away or been taken. She could not call the agency daily to ask of their health and happiness. She could not know whether they suffered, and if they did, she could not comfort them. She could do nothing but wait while her life became a series of legal proceedings.

Ms. Parsons had no established legal right for involvement in the children's lives. The few cases which have discussed the rights of former foster parents generally determined that they had no custodial or visitation rights with their former foster children.²⁷ Once deconstructed by the state, the foster family broke into separate legal pieces. While Ms. Parsons could challenge the removal in an administrative proceeding, the administrative law judge had no power to grant her visitation. Her one potential avenue for securing visitation was the foster care review proceeding that happened to be pending in Family Court.

When children are placed voluntarily in foster care, as these children had been, that placement is reviewed periodically by the Family Court.²⁸ The foster care reviews permit judges to monitor placements, ensuring that the agency caring for the children is working first to reunify the biological family and, if that is not possible, to find another permanency plan for the children, preferably adoption. The plan should not be long-term foster care.²⁹ Current foster parents who have cared for children for at least twelve months are notified of the review proceeding and permitted to intervene as parties.³⁰ Juan, Mati and Michael's latest foster care review proceeding had been pending at the time they were removed from Ms. Parsons. She had previously been sent notice of the proceeding and had intended to intervene as she had at most of the earlier hearings. No published decision had ever addressed her right, the right of a foster parent, to intervene after having received notice but then having had the children removed from her care.

During the last ten years, Family Court judges have been given increasing amounts of discretion in determining whether an agency's actions on behalf of their wards have been appropriate. Lawmakers were clearly concerned that agencies were making incorrect or inappropriate decisions. Judges now can even decide to place a child in a different home than the one chosen by the agency if the judge believes that it would be in the child's best interests.³¹ Moreover, once a child has been

27. See *Bessette v. Saratoga County Comm'r of Social Services*, 619 N.Y.S.2d 359 (App. Div. 1994); *Minella v. Amrhein*, 516 N.Y.S.2d 494 (App. Div. 1987); *In re Mavis M.*, 441 N.Y.S.2d 950 (Fam. Ct. 1981).

28. See N.Y. Soc. Serv. Law § 392(2) (McKinney 1992).

29. See *id.* § 392(5-a).

30. See *id.* §§ 392(4)(c), 383(3).

31. See *id.* § 392(6)(a)-(b).

freed for adoption, the judge has been given increased authority to order the agency to take specific actions to find an adoptive home for the child.³² Despite this increased power, judges remain reluctant to disturb agency decisions. Many judges are simply uncomfortable with the role of superagency and prefer to leave what they view as social work determinations with the social workers. They may also believe that the children's interests are sufficiently protected by their own attorneys.

The Juvenile Rights Division of The Legal Aid Society represents most of the dependent or delinquent children who pass through Family Court in New York City. Juan, Mati and Michael were represented by a Legal Aid attorney. Legal Aid is assigned as "Law Guardian" for the child, an oddly titled position which suggests both advocacy and protection. The applicable statute says as much: the law guardian is supposed to express the wishes and protect the interests of the child.³³ For many child advocates, this produces an unacceptable form of schizophrenia. What if the expressed wishes and interests are in conflict? Which role triumphs? And when? The age, maturity, intelligence and capacity of the child are all relevant; so is the child's stage of development, perception of the world and relationship to the other parties, especially her family. Equally determinative is the perspective of the law guardian: some are child savers, others nascent social workers, still others zealous representatives of their client's choice, no matter what the reason. I have represented children for most of my legal career, including several years at Legal Aid. I have also taught hundreds of law students how to think about representing children. I doubt there is an area of representation more difficult to learn given the nature of the client. Each new client must be assessed to determine where, along the continuum of capacity, the client or the lawyer makes decisions. While I believe there are some basic rules to begin with—including a strong belief in family integrity, an abiding mistrust of the state's ability to care for children, a willingness to listen to the client, and an acceptance of one's own inability to predict the future—child advocacy, like custody determinations, remains a fact-based enterprise time after time. The outcome of this case for the family was clearly affected by the role the law guardian played.

The children's law guardian had been working at Legal Aid for a few years. She had met the children a year earlier prior to the last foster care review proceeding. She hadn't seen or spoken to them since then. For efficiency's sake, she began by believing the agency. She would have little time to spend with her clients so she gathered collateral information from the agency caseworker, Ms. Ames. Ms. Ames told her that the children were happy to have been removed from Ms. Parsons's care and did not want to return to her. That satisfied the law guardian for the few

32. See N.Y. Fam. Ct. Act § 1055-a(7)-(11) (McKinney Supp. 1995); N.Y. Soc. Serv. Law § 392(6)(d)-(g) (McKinney 1992).

33. See N.Y. Fam. Ct. Act § 241 (McKinney 1983 & Supp. 1995).

weeks until the day of the foster care review proceeding when she would have the children brought to her office in the court to speak to her.

When the law guardian saw the children on that first court date, Ms. Parsons was in the building waiting for the case to be called. Despite the fact that she had not seen the children for three weeks and that the law guardian believed that at least the two younger children should visit Ms. Parsons, Ms. Parsons was not told that the children were there. Nor, when the case was eventually called, did the law guardian ask the judge to order visitation pending any ultimate outcome. A few weeks after that court date, when I reached the law guardian, I asked her if she would support recalendaring the case to get a visitation order if the agency was unwilling to provide visitation voluntarily. She would not agree, although she said she had told Ms. Ames there should be visits if the children wanted them. To me, she acknowledged the close relationship between Mati and Michael and Ms. Parsons (although she did not believe that Juan wanted to visit and thought that his presence at visits would be disruptive for the younger children). Following her first interview with the children, she was not, however, in favor of reunification. She distrusted Ms. Parsons. She thought that a pattern of corporal punishment was being established that was unhealthy and the children were content in the new foster home.

I knew, from years of representing children, that having the law guardian on our side was essential. If she supported reunification, we had a shot at it. If she said the children wanted to visit, the judge might order visitation despite agency objections. She wielded disproportionate power because she spoke for the children. She and the agency had access to the children; we did not. If she chose to be a gatekeeper, translating what the children said through her own interpretations, we would only know what the law guardian said the children said they wanted; and there is always the possibility of the children providing the answers to Ms. Ames or the law guardian that they think those adults want to hear. The same could be true, of course, if they had an opportunity to speak with Ms. Parsons: what they say to her may also reflect what they believe she wants to hear. The significance is that the judge would know that different stories are being told and would eventually have to resolve the inconsistencies. If the children are never permitted to see Ms. Parsons, the judge loses crucial information relevant to any ultimate decision. I was reluctant, though, to confront the law guardian. She had acknowledged the relationship between Ms. Parsons and the children and was not opposed to visitation. Since I still knew so little about the case, I couldn't know why she was unwilling to force the issue in court. Maybe she was still gathering information; maybe she was afraid to lose access to agency confidences by staking out a clearly adversarial position too early; maybe she was waiting to see if it was only a honeymoon period at the new foster home. None of these answers would be sufficient for my client. She had no faith in the sympathies of the law guardian.

The first time I met with Ms. Parsons, she had already gone to Family Court on the initial date of the foster care review proceeding. She didn't understand anything that went on that day. She was told to wait outside the courtroom while the agency personnel, their counsel and the law guardian went in. She believes that before she was allowed into the courtroom, the judge had been warned that she was dangerous. She was not told what had occurred when she was barred from the courtroom. She was given no opportunity to speak and was told she would be given an opportunity to seek counsel prior to the next court date. She was furious. She described the behavior of the judge as racist and classist. I would later suggest to her that it was also sexist. She saw this as just another opportunity for a white male judge to treat minorities disrespectfully. Her opportunity to express her sorrow or her anger had been entirely suppressed; her ability to reflect on it was not.

Much of our first interview had been spent in her decrying the system which destroys minority families. For her, I was part of that system. Nevertheless, I agreed to represent her and she signed the office's retainer agreement. During the first few weeks of my representation, she repeatedly asked me to contact an African-American female lawyer to whom she had also been referred for help. I wasn't happy about pursuing this lawyer. I had already told Ms. Parsons that if the clinic were to represent her, she would have to agree that I would be her sole counsel. I believed, however, that even when she reached a point of trusting me, she would continue to search for other help, so deep was her need to regain the children. I also believed such a search would undermine the course we would have to develop to win: the too many cooks theory. And I just wanted her to trust me so that I could do my job. Still, I called the lawyer. Ms. Parsons was my client and I felt obligated to follow her direction. Even more, she had a right to feel that someone with whom she identified might help her. The lawyer was friendly and concerned; she also had no experience in this area and practiced outside the city. She couldn't have helped much if she had wanted to, but that didn't matter. However little I wanted to make the call, I needed to listen to my client and not treat her as she had so far been treated.

In the Winter 1990 volume of the *Buffalo Law Review*, Professor Lucie White published an instrumental article entitled "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G."³⁴ We have assigned this article to our clinic students for the past few years; it has become the pivotal reading for a class in which the students reflect on their experiences observing administrative fair hearings and Family Court proceedings. Central to White's thesis is the question of her client's—Mrs. G.'s—voice in resolving a dispute over welfare entitlements in an administrative fair hearing. White addresses the question of her

34. Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 *Buff. L. Rev.* 1 (1990).

client's voice and place in the hearing through an historical analysis of subordinate speech in general and within the legal system in particular.³⁵ White believes that Mrs. G.'s status as a poor, unwed, African-American mother permeates her inability, by other than subordinate means, to maneuver, let alone wrench justice from, the welfare system upon which she depends. Mrs. G.'s status precludes her from addressing the welfare officials as equals using formal legal strategies and language. Rather, she must rely on speech and action which confirm her subordinate position to the other players in the system.³⁶ Whether Mrs. G. is ultimately successful in her appeal or not, White considers the danger of this route to be threefold: the stereotypical subordination of women like Mrs. G. will be perpetuated, governmental bureaucracy will fail to recognize the need to alter its present decisionmaking methodologies to encompass traditionally less favored discourse, and constitutionally mandated due process requirements will continue to sustain societal beliefs that procedural safeguards are sufficient to ensure full participation both in the adjudication itself, and more broadly, in the political system.³⁷

The immediacy of Mrs. G.'s story attracts our students. The story of Mrs. G. is the story of their first clients: predominantly poor, minority women dependent upon an inhospitable social services system which rarely addresses their needs or concerns and often precludes them from voicing their own perspectives. When the students discuss their observation experiences, they now invariably include whether the "client" was permitted to describe, in her own words, the dilemma and its possible resolution. The students quickly note the ability of the client to speak in fair hearings (where they are usually unrepresented) and not in Family Court (where they are usually represented). They generally believe that the client's ability to speak at the fair hearing is positive but they don't concomitantly believe that the client's inability to speak in Family Court is negative. They distinguish the two settings by discussing their relative levels of formality: the client talks when the proceeding is more informal and, when formality is introduced, the lawyers should talk. They are intrigued with the client having a voice but concerned that their own voices not then be lost. What they often fail to distinguish between is speaking and having a voice.

If White is correct, the nature of the proceeding is not the issue; a good lawyer counsels a client in every proceeding so that a determination is made as to when the client or the lawyer should speak. What matters is the way in which we value the client's story. If the story is properly valued and understood, the lawyer and the client have an opportunity to determine the way in which the story will be told. If the lawyer fails to value the client's voice, the ultimate decision can never be truly shared and the client's voice will then fail to be heard in the larger context of the hear-

35. See *id.* at 6-19.

36. See *id.* at 32-44.

37. See *id.* at 53-58.

ing (or, White would say, of society). In the story, White, as Mrs. G.'s young legal services lawyer, describes two options to her client based on White's knowledge and experience. She wanted her client to tell a story which would justify Mrs. G.'s buying shoes and other necessities with a lump sum payment which her welfare worker had incorrectly permitted her to spend. She wanted her client both to challenge the system—by saying the worker had been wrong—and yet to admit her dependence on that same system to determine when her children needed shoes.³⁸ When the time came, Mrs. G. did neither. She simply said that she bought the girls new Sunday shoes. She challenged the system to deny her that those shoes were a necessity.³⁹ She lost the hearing, but soon after, the County decided to drop the matter and not require Mrs. G. to pay back the money.⁴⁰ The fact that Mrs. G. found her voice and used it only superficially defies White's theoretical construction: the right set of circumstances permitted a victory on Mrs. G.'s terms. The rule—and not the exception White describes—has to focus on how lawyers help their clients achieve Mrs. G.'s victory. This lesson may be too hard for our students. They have too little experience to understand that it is not Mrs. G.'s voice alone that White is extolling but that voice understood and respected within the legal system, particularly by the lawyer. White had never given Mrs. G. a chance to tell her lawyer about the Sunday shoes; she never was given the choice about what she wanted to say. White's counsel may have ultimately been the same but the client would have made the decision with her lawyer and not in spite of her. White's article and motherhood had both recently confronted me when Ms. Parsons came along. As a result, I entered into a more interesting and difficult relationship with my new client than I would have only a year earlier.

For six months after I began to represent Ms. Parsons, I spoke to her three or four times a week. I was virtually always available for her. Our conversations ranged from a few moments to half an hour. I hated talking to her. For months, I never had good news, I often had bad news, and I was always the messenger. She suffered horribly from her forced separation from the children. I would go home on days when no law, no policy, no friend in the system could move the mountain and I would hold my baby and cry. The Family Court judge refused to consider the request for visitation. Even when the law guardian eventually joined in the application, the judge continued to refuse to order visitation without the agency's support. He reminded me that my remedies were in the administrative proceeding and that he would consider no substantive application until the fair hearing was completed. Since the agency believed the decision to remove the children was correct and that Ms. Parsons would never be considered a resource for the children unless the agency decision were reversed, the agency refused to consider any interim re-

38. See *id.* at 27–30.

39. See *id.* at 30–32.

40. See *id.* at 32.

quests by Ms. Parsons. I began to prepare for the administrative hearing. With the help of my students Martha and Ali, I requested discovery, sifted through documents, read agency records, and reviewed policies and procedures. We developed a fairly unremarkable but workable case theory and organized our lives around Ms. Parsons, when we weren't being teachers or students or the other roles of our lives. I cursed on a regular basis taking the case. I was afraid we were going to lose.

Unlike clients that my students represent under my supervision, I could not distance myself from Ms. Parsons. She was my client and I was her lawyer. Being in a supervisory position most of the time means that I don't regularly form a personal relationship with the clinic's clients. When the students are on vacation or during the summer when we manage the cases directly, we are more actively involved with the clients. But unless the case requires significant client counseling during these interim periods, I rarely feel personally connected to the students' clients. My professional responsibility is to supervise and ensure appropriate representation, but clinical supervision by its very nature has a distancing effect. While we are ultimately responsible for the clients, we refrain from interfering directly between the clients and the students unless it is essential for the case. This distance is imperative to the role assumption model to which our clinic (and most others) subscribes. We ask our students to begin practicing in simulation exercises, to reflect on what they have done, and to incorporate the simulation experience into their framework for lawyering. The process is repeated, with some modifications, with their actual clients. The role of the supervisor is to help the student prepare for and reflect on the student's interactions with the client. If the supervisor were directly engaged in the process with the client, there is little likelihood the student would be able to assume the lawyer role even in a co-counsel model. The most competent student would be daunted by inexperience and hierarchy and the most basic tenet of role assumption—establishing a relationship with the client—would be destroyed. Nevertheless, having established a relationship with Ms. Parsons, I now question the effect of this forced separation from clients on my teaching.

Representing Ms. Parsons has reminded me how important the human connection to the client must be for my students. To feel an alliance in a common effort, to experience the highs and lows, the stress, the occasional slivers of triumph has been missing. Minna Kotkin has urged clinicians to review our abiding faith in role assumption as the appropriate clinical methodology.⁴¹ Drawing on her own clinical teaching experiences and the writings of learning theorists, she identifies a significant flaw in role assumption: that not all students will learn from doing. Rather, some students need to have the practice modeled for them before they will be able to practice themselves.⁴² Kotkin suggests, as one

41. See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. Rev. 185, 186 (1989).

42. See *id.* at 193–96, 199.

alternative, assigning students to some cases in which they will work with the supervising teacher and to some cases in which the students will be primarily responsible. Those students who learn from observing will greatly benefit from watching the teacher represent a client.⁴³ Kotkin acknowledges the difficulty of instituting this practice given the time constraints on clinical teachers, but hints, toward the end of the article, that there may be benefits for the teacher as well as the student.⁴⁴ I have supported Kotkin's learning theory analysis since I became aware of it, but I had always considered this approach from a lawyering task perspective: if they watch me do a good interview, they will learn to do a good interview. Now I think there is another dimension and that is what Kotkin largely leaves unsaid when she suggests benefits for the teacher. By representing Ms. Parsons, I have felt more alive as a teacher than I have in a number of years. I have become more vulnerable to my own and my students' emotions about representation and less glib about how to draw professional and personal boundaries. I am reminded of how hard decisionmaking can be for both the client and the lawyer, especially a student-lawyer. By placing myself back into the role of my students and of a practicing lawyer, it has been easier to teach them that lawyering is a lifelong learning experience. Role modeling then becomes more a question of sharing experience than asserting authority and may undermine the clinical concept of role assumption less than Kotkin fears our clinical colleagues, who are so firmly rooted in role assumption, will assert.

The weeks leading up to the administrative fair hearing were tense. Classes had ended, students were wrapping up their cases and preparing for graduation and summer jobs. My client was anxious and angry. Almost three months had passed since she had seen her children. I kept searching for the right balance between reassurance and honest appraisal of our chances. I couldn't find it. The standard of review in the administrative proceeding for determining the appropriateness of the agency's decision to remove the children was whether the decision was an abuse of discretion.⁴⁵ Our theory was that it was an abuse of discretion to remove these children from an intact family situation because of the occasional use of corporal punishment; the correct response would have been to continue to assist the family through its problems and to finalize the adoption. The totality of the circumstances of the children's lives had to be considered and the agency had abused its discretion in failing to weigh the competing factors prior to the removal.

The hearing was conducted over two days, ten days apart. The first day we went from mid-morning until after six in the evening. The second day started around eleven and finished just after five. A total of twelve hours of testimony and argument was to determine the life path of these four people. The administrative law judge (ALJ) was careful in protect-

43. See *id.* at 201.

44. See *id.*

45. See N.Y. Civ. Prac. L. & R. § 7803(3) (McKinney 1994).

ing procedural rights. The examination of witnesses, for example, adhered to formal courtroom practices. At the same time, however, he liberally construed the already lax evidentiary standards of the fair hearing to permit the parties to introduce almost any information that could be deemed relevant. The parties to the proceeding were CWA, the agency and Ms. Parsons, all represented by counsel. CWA would call the protective services worker, Ms. Thomas, and the agency would call all agency witnesses. The law guardian for the children in Family Court and her social worker requested permission to observe the proceeding. The law guardian had no standing since Ms. Parsons, and not the boys, had challenged the removal decision. She was not there to participate and I had previously decided to challenge her presence if she appeared. Whatever her thoughts about visitation between Ms. Parsons and the children, she continued to believe that removal had been appropriate. I saw no reason to provide the agency with a rooting section. The ALJ denied my request. I had made a reasonable strategic request in opposing the law guardian's presence. The ALJ's denial would eventually prove crucial.

The first witness to testify was Ms. Thomas, the protective services worker. Ms. Thomas reported that she had investigated Ms. Parsons twice: in 1989 and in 1991. In 1989, Ms. Thomas concluded that Ms. Parsons was providing inadequate guardianship based on incidents of corporal punishment. Nevertheless, Ms. Thomas concurred with the agency's decision to allow the children to remain with Ms. Parsons. In 1991, Ms. Thomas conducted the second investigation. Having found no imminent danger to the children on the evening she went to Ms. Parsons's home, she had decided not to remove any of them. She testified that the removal was solely the agency's decision. A month or so after the removal, she issued her report indicating that the home suffered from "inadequate guardianship" based, in part, on the allegations of corporal punishment and on the deterioration of Juan and Ms. Parsons's relationship. As a result, the report recommended that Ms. Parsons's home be closed. She testified that during the course of her investigation she never read the agency records, never spoke to the family therapist or to Juan's psychiatrist, and never contacted the children again except for a brief telephone call a week after they were removed from Ms. Parsons's care.

Ms. Ames was the second witness. She testified that during the entire period she was responsible for the case prior to the removal, she acted mostly as a monitor. The real issues of the family were being addressed, if at all, by the family therapist and Ms. Ames felt frustrated by her inability to engage Ms. Parsons in a relationship. This was not her favorite case. After the incident, when Juan and the school psychologist called Ms. Ames and she went to see Juan at school, she decided that Juan should not go back home. Her actual testimony, a lay opinion admitted over my objection, was that she wouldn't assume that a child would react so strongly to the possibility of returning home if the allegations of corporal

punishment weren't true. She also based her decision on her own frustration about her attempts to resolve the issues between Ms. Parsons and Juan. She thought this incident only proved that their relationship was significantly deteriorating. She seemed to have forgotten that she had admitted that she really had no responsibility for any such resolution since the family therapist was responsible for the therapeutic issues. Her frustration, I believe, was not in failing to resolve the issues but in knowing that she played no real part in the resolution. The tensions between Ms. Parsons and Juan were easily mirrored in Ms. Ames's own relationship with Ms. Parsons. The psychological parlance is transference. Ms. Ames felt every frustration that Juan was feeling. She could not distance herself sufficiently to consider other meanings. The determination to remove Mati and Michael was less complex but equally disturbing. Ms. Ames believed that Ms. Thomas had given her approval for the removal. That belief was conveyed to her supervisor, Ms. Remson, and the removal was effected.

At the conclusion of the first day of testimony, the ALJ seemed disturbed by the possibility that the younger children, at least, had been removed without complying with the necessary procedures. Nothing in Ms. Thomas's or Ms. Ames's testimony, however, suggested that the decision hadn't been approved by the agency supervisors. We had laid the groundwork, through cross examination, for arguing that neither caseworker had sufficiently investigated the danger to the children or the options for keeping the family together prior to removal.

The second day of the hearing began with the testimony of the children's former teacher, Ms. Paul. Her testimony, part of our case, was taken out of order because of her teaching schedule. At the time of the removal, Michael was enrolled in Ms. Paul's fourth grade class. Two years earlier, Mati had also been her student; before that, she had taught Juan. She was intimately familiar with the children and Ms. Parsons. I think of her as the reality test in the whole case.

I went to see Ms. Paul in her classroom on a lovely spring afternoon. The halls of the school smelled like my elementary school halls: a mixture of disinfectant and finger paint, cafeteria spaghetti and locker stuffiness. Just a whiff of it made me feel small. The classroom had the opposite effect as I sat in a little chair and listened about the children who worked and played there. I had held my own fourth grade teacher in great esteem. She had read us chapters of *The Secret Garden* every day after lunch and had taught all of us, boys and girls, how to sew. We each had made a small quilt. I gave mine to my eldest cousin for her first baby. Ms. Paul was another teacher of such fine distinction.

I believed my client on some deep level. I knew that her descriptions of her life together with the children defied the recent progress notes that filled the agency records. The letters that she gave me from friends further attested to her commitment to the children. I also knew that she was not an easy person or mother. Her expectations for the children

were great and her ability to understand their early deprivations—especially Juan’s—was sometimes limited. She wanted to believe that by sheer force of will and proper example she would protect them from their past. I didn’t want her to be a perfect parent, but I wanted to understand her more as a parent. I needed help and Ms. Paul offered it. In the faltering light of late afternoon she talked about the responsibilities of being a single parent of three young boys, of the insecurity Ms. Parsons must have felt from not knowing everything about the children’s lives, about her commitment to school and after school activities as a means of stabilizing their existence and protecting them from being examples of the statistics that doom similar children to delinquency and despair. She did not minimize Ms. Parsons’s inadequacies. She just provided a context for understanding them. I came away thinking that someone had just given me a two hour lesson about being a good parent that was as relevant to me as to my client. Much later I realized she had also taught me something about being a better lawyer.

I thought Ms. Paul provided the same lesson to the ALJ. She spoke convincingly about the children while they were her students. She spoke honestly about Juan’s ambivalence toward and Michael’s unquestioning love of Ms. Parsons. And she discussed why, in her experience of nineteen years of teaching, she believed that disrupting the lives of these children was so wrong. The hearing then took a remarkable turn. The ALJ asked the Director of Adoptions, Ms. Remson, who had appeared on behalf of the agency if she would answer a few questions. He asked her to describe how the decision to remove the children had been made. Much to everyone’s amazement, she said that while she agreed with the determination that Juan was in imminent danger, she was surprised to have heard at the time that Ms. Thomas had decided to seek the removal of the younger children as well. She didn’t think those children were in danger and she would have issued a ten day notice of removal if the decision had been hers. Ms. Remson had been excluded from listening to Ms. Thomas’s or Ms. Ames’s testimony the previous week. She knew neither that Ms. Thomas had testified that she had not recommended removal nor that Ms. Ames had said the agency based its removal decision on Ms. Thomas’s recommendation. Ms. Remson sat there contentedly stating that there was no basis for an immediate removal. I thought of all the times I’ve told my students that the real world doesn’t work like Perry Mason. No one gets on the stand and says they did it. But here she was. My theory had been that they had made the wrong decision. Now the question became did they make any decision.

As Ms. Parsons prepared to testify, I was glad my motion to have the law guardian excluded had been denied. Ms. Thomas’s testimony had both uncovered the fact that she had never recommended the initial removal and highlighted the later inadequacy of her investigation. Ms. Ames’s testimony about both the removal and the agency’s failure to provide services in the period between the two corporal punishment inci-

dents emphasized the agency's mishandling of the underlying family problems. The affidavit of the family therapist (who was unavailable to testify) confirmed the agency's and CWA's failure ever to contact her about the appropriateness of removal. Finally, Ms. Paul's moving descriptions of the children's relationships with Ms. Parsons could never have been replicated. Regardless of the ALJ's ultimate decision, the alliances had shifted. The law guardian would have to go back to talk to her clients. Maybe a terrible mistake had been made.

Ms. Parsons would be able to testify from a sudden position of strength. We relaxed a little. I became less concerned that Ms. Parsons's usual inclination to ramble would harm her. Now the details would enhance justifiable distress. The private, contained person opened her life for inspection one more time, hoping that she could bear the substantial violation for the greater reward. Mostly she talked about the family she and the children had become. She described a typical school day and the activities of a weekend. She repeated her understanding of her role as a foster parent, acknowledging that she knew it was against the rules to use corporal punishment. She then tried to explain the instances when she had used physical punishment with the boys. The lawyer for CWA did a fairly credible job establishing that Ms. Parsons had used corporal punishment on more than one occasion. The agency attorney—the lawyer who was still her counsel of record in the adoption proceeding—badgered Ms. Parsons with argumentative questions, her voice registering annoyance, anger and disdain. She ineffectively tried to portray Ms. Parsons as a child abuser in order to justify the removal. When it was over, we put in some documentary evidence and summed up. I felt impassioned by the events of the day. My hopes had never been higher that the children would be returned. Even if the judge decided that Ms. Parsons had broken the rules, he couldn't ignore the agency's own malfeasance. The testimony of the CWA and agency personnel strongly supported our theory that the removal decision had been unreasonable. The children—certainly Mati and Michael—may never have been removed if the proper procedures had been followed. Since the children were never in danger, less drastic intervention would have been appropriate. And if the people who had had close contact with the family had been consulted—especially Ms. Paul, other school officials, and the family therapist—the agency might have realized that it needed to support the family during this crisis and not destroy it. We left the hearing secure in our chances of victory.

II.

STATE OF NEW YORK
DEPARTMENT OF SOCIAL
SERVICES

In the Matter of the Appeal of

LUCILLE PARSONS

DECISION AFTER FAIR
HEARING

from a determination by Lewdown
Children's Services and the New
York City Department of Social
Services to remove foster children
from her home.

JURISDICTION

The New York City Department of Social Services (the City) and Lewdown Children's Services, an authorized child care agency (the Agency), removed three foster children from the home of Lucille Parsons (the Appellant) on February 12 and 13, 1991.

Pursuant to Section 400 of the Social Services Law, any person who is aggrieved by a Social Services official's determination to remove a child from a foster care placement in a family home may appeal that determination to the New York State Department of Social Services.

FINDINGS OF FACT

An opportunity to be heard having been afforded the parties and evidence having been considered, it is hereby found:

1. Juan, born August 1977, Mateo, born November 1979, and Michael, born March 1982, were placed into the Appellant's foster care by the Agency in September 1984. Juan and Mateo are brothers and Michael is their half brother through their common mother. The natural parents' rights in these children were terminated in 1988, and the Agency's permanency planning goal is adoption.

2. In May 1989 the Appellant hit Juan. The Agency was advised of this incident, but after investigation and after receiving assurances that the Appellant's use of corporal punishment would not be repeated, determined to allow the children to remain in the Appellant's foster care.

3. The Appellant continued to use corporal punishment as a means of discipline for all three children. On Febru-

ary 11, 1991, this continuing use of corporal punishment came to the Agency's attention.

4. On February 12, 1991, the Agency removed Juan from the Appellant's foster care. Michael and Mateo were removed the following day. The children are together in another foster home.

5. On March 4, 1991, the Appellant requested this hearing to review the Agency's determination to remove Juan, Mateo and Michael from her foster care.

ISSUE

Was the removal of Juan, Mateo and Michael from the Appellant's foster care a proper exercise of the Agency's discretion?

DISCUSSION

The City and the Agency did not act arbitrarily or capriciously in removing Juan, Mateo and Michael from the Appellant's foster care.

The statutory provisions applicable to this case can be set out briefly. Section 400 of the Social Services Law provides:

1. When any child shall have been placed in an institution or in a family home by a social services official, the social services official may remove such child from such institution or family home and make such disposition of such child as is provided by law
2. Any person aggrieved by such decision of a social services official may appeal to the department pursuant to the provisions of section twenty-two of this chapter.

Section 383(2) of the Social Services Law provides:

The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded.

Pursuant to these laws, removal of a foster child is within the discretion of the City and its authorized agencies. A removal will be reversed by an administrative hearing decision only if the removal is found to be an abuse of that discretion.

Juan, Mateo and Michael were placed in the Appellant's foster care in September 1984 when they were 7, 4 and 2 years old. In 1988 they were freed for adoption and the Appellant was approved as the adoptive parent. They are now 13, 10 and 9 years old. The Appellant devoted over six years of her time and energy to these children. She seems to have taken particular pains over their educational needs. She expected to adopt them and considered them to be her family already. The fact remains, however, that they were always in foster care, in the legal custody of the City.

In May 1989 a report was made to the State Central Register of Child Abuse and Maltreatment (SCR) alleging that the Appellant had inflicted bruises upon Juan by the use of corporal punishment. This report was investigated by the City, which found that the Appellant had, as she herself acknowledged, hit Juan hard enough to cause bruises on his back. The City, noting that the Appellant showed remorse and promised never to hit the children again, recommended that the foster home be reevaluated. The Agency did reevaluate the home, and concluded that the children could remain in the Appellant's foster care provided steps were taken to address the Agency's concerns about discipline, among other things, in the home. The adoption plan, suspended because of the SCR report, was eventually reinstated.

On February 11, 1991, a second SCR report was made after Juan complained at school of ongoing physical and verbal abuse. The Agency's caseworker, Ms. Ames, met with Juan at his school the next day. Juan told her he felt upset and intimidated and did not want to go home. Ms. Ames consulted with her supervisors, and they decided not to send Juan home to the Appellant. The next day, Ms. Ames talked with Ms. Thomas, who was investigating the SCR report for the City. Thomas informed Ames that this was the second reported and confirmed incident of corporal punishment in this foster home, and that Thomas was recommending that the home be closed. Ms. Ames then removed the two younger children, Mateo and Michael, from the Appellant's home.

Corporal punishment of a child in foster care is prohibited under the Department's Regulations at N.Y. Comp. Codes R. & Regs. tit. 18, § 441.9. The Appellant signed a foster parent agreement with the Agency that specified "I will never punish a foster child by . . . hitting." Being entirely prohibited under the Department's Regulations,

such punishment need not rise to the level of maltreatment in order to be of legitimate concern to the Agency. For this reason, the fact that the second SCR report was not "indicated" for excessive corporal punishment is of little significance in this case, where it is uncontroverted that the Appellant did administer corporal punishment to these children.

The Appellant used corporal punishment against Juan in May 1989, and she continued to use it for the next two years against all three children. She used it again on February 10, 1991, the occasion of the second SCR report and the removal decision under review in this hearing. All of this was acknowledged by her at the hearing.

There is other support in the record for the Agency's concern about the children's continued placement in this foster home. There were continuing problems between the Appellant and Juan. According to the Appellant's foster family therapist, Ms. Sanders, who was not associated with the Agency, the Appellant does not always respond successfully or appropriately to Juan. Juan was so distraught on February 12 that he did not want to return to the Appellant's home. Less than two months before the removal, but before the continued use of corporal punishment was known, the Appellant was seen by the Agency's psychiatrist, Dr. Cirque. His report predicted only more serious behavioral problems for all three boys as they grew into adolescence in the Appellant's care.

Even if there is room for a difference of opinion between reasonable, caring persons about a removal decision, this does not establish that the decision was arbitrarily or capriciously made. An act of corporal punishment in violation of the Department's Regulations occurred in 1989. On that occasion the Agency, receiving assurances that the violation would not be repeated, exercised its discretion in favor of the Appellant. Two years later, the Agency learned that corporal punishment was still being used. Removal of all three children under these circumstances was neither arbitrary nor capricious.

While the removal decision itself is affirmed on the grounds that it was not an abuse of discretion, it is noted that the Agency failed to comply with the requirements of Section 443.5 of the Department's Regulations found in Title 18 of the N.Y. Comp. Codes R. & Regs., which sets forth certain notice and conference rights. The Agency's position at the hearing was that Juan's removal on February 12

was undertaken as an emergency measure which did not require prior notice. No such claim was advanced with regard to the removal of Mateo or Michael. The Agency and the City, in fact, agreed that the younger boys were in no immediate danger.

Even where a child's health and safety warrants removal prior to the ten day period specified in Section 443.5, the foster parent is still entitled to a written notice of the removal and a conference with the City to have that decision reviewed. Written notice of the removal was never given, and a conference with the City about the removal decision was neither offered nor held.

It is difficult to understand why City and Agency personnel responsible for removal decisions do not familiarize themselves with Section 443.5 of the Department's Regulations. This regulation admits no exceptions to the requirement that written notice of removal, including notice of the right to a conference, be provided to the foster parent. It *admits* only two exceptions to the requirement that the notice be given ten days prior to the removal: when the health and safety of the child are at immediate risk and when the foster parent waives, in writing, the ten day period.

While there is no excuse evident in this record for the City's and the Agency's disregard of the Appellant's notice and conference rights, return of the children to the Appellant is in this case not an appropriate remedy for these procedural violations. The Agency and the City are directed to comply in the future with all notice and conference requirements of Section 443.5 in Title 18 of the N.Y. Comp. Codes R. & Regs.

Decision: The determination of Lewdown Children's Services and New York City Department of Social Services to remove Juan, Mateo and Michael from the home of Lucille Parsons is affirmed.

This decision is made by Arthur O'Donnell, Office of Administrative Hearings, who has been designated by the Commissioner of the New York State Department of Social Services to make such decisions.

"Mary, Mother of God." Now, almost a year later, I still hear her pain echo in my head. The image in my mind's eye is one of those grainy news photos of women in black in some Near Eastern land, grieving over the bodies of children slain in wars or destroyed in one of nature's disasters. Often they hold the child up for display, as if to force the world to see what folly is our attempt for order and control and peace. The crucified child and the mother's lamentations: Ms. Parsons chose not to invoke the image of her Lord when she responded but that of His mother. I was of little comfort. Realizing that, I retreated into my legal persona. I began to outline our next steps.

The options were limited in all three possible forums. We were unlikely to prevail on appeal of the administrative hearing to the state supreme court: the fair hearing decision was legally defensible. The ALJ's determination was not an abuse of discretion. Like the original decision to remove the children, the ALJ's decision had to be no more than that.⁴⁶ Moreover, the ALJ's finding that Ms. Thomas had recommended the removal of the children when she had testified that she had not was irrelevant to the ultimate determination. If we pursued the case in Family Court, we would have to convince the Family Court judge to see the fair hearing decision in the way we did—a narrow ruling which failed to address the issue of the boys' long-term best interests—in order to shift the focus away from corporal punishment and toward the future. But I wasn't hopeful: this judge had already made clear to me that he believed Ms. Parsons's legal remedies were in the administrative proceeding and subsequent appeals. He didn't want Family Court used as an alternative forum for unsuccessful foster parents. We would have to rely on the law guardian to convince the judge that the case was now about the children's need for stability and permanence and not about the rights of Ms. Parsons.

The other available forum was the adoption proceeding pending in Surrogate's Court. The adoption petitions had been filed in 1989; additional documents needed to be filed before the Surrogate judge would consider the petitions. Ms. Parsons's right to proceed on the adoption is a peculiar one. Once a child has resided with a foster parent for six months for the purpose of adoption, the foster parent can file for adoption.⁴⁷ That was what Ms. Parsons had done. Even though the children subsequently had been removed from her care, the adoption statute does not explicitly preclude her from maintaining the adoption action.⁴⁸ Legally, however, the agency would have to consent in order to finalize the adoption.⁴⁹ This was impossible at the moment. A foster parent like Ms. Parsons who has cared for children for at least one year also retains the

46. See N.Y. Soc. Serv. Law § 22(9)(b) (McKinney 1992); N.Y. Civ. Prac. L. & R. §§ 7801, 7803(3) (McKinney 1994).

47. See N.Y. Dom. Rel. Law § 112(6) (McKinney 1988).

48. See *id.* § 110 (McKinney 1988 & Supp. 1995).

49. See *id.* § 111(1)(f) (McKinney 1988).

right to intervene in any other adoption proceeding and attempt to prove that adoption by another person would not be in the children's best interests.⁵⁰ The foster parents the children were living with were not yet considering adoption but since the children had already been freed for adoption, the agency was required to begin aggressively seeking a permanent home for the children.⁵¹

In each court Ms. Parsons would have to overcome the ALJ's affirmation of the agency's action to remove the children. I envisioned never getting beyond the removal to a place where someone would ask not whether a mistake had been made earlier—by Ms. Parsons, by the agency, by CWA—but whether another mistake would be made now by failing to consider reunification. I decided to press forward in all three proceedings. We had legally justifiable positions in each but the blitz strategy was also intended to force the agency to reassess the financial and psychic costs of ignoring Ms. Parsons's claims. My only advantage was my freedom to choose the best strategy without financial constraints: the cost of the litigation was my time and the students' interests. And, of course, my client's ability to suffer extended litigation. In our discussions, she was prepared to take any action that offered some chance of winning. In some ways, the effect on the students was the easier constraint to justify. I would have no trouble recruiting new clinic students to assist me in the fall. I knew they would love working on this case; it contained all the components of the underdog against the system, with the added attraction of novel legal issues and multiple fora. Come September, they would have plenty to do. My interests were less obvious. I was allocating time set aside for other activities; three months of research, handling other clinic cases and mothering would clearly be compromised by our legal blitzkrieg. The summer would be consumed by a case and a client unable to be less than consuming. I was tired and depressed; the elation we felt at the end of the fair hearing mocked me now. I wanted to retreat into my motherhood, sitting in the late afternoon sunlight under the trees while my daughter and other neighborhood children ran through the sprinkler. I wanted, as I have often done before, to forget for hours or even days about the families who don't have my option of forgetting, ever. I didn't promise to do more than the fair hearing; I didn't have to do more than advise my client about her legal options. I laugh at these words knowing my soul had made a remarkable connection which could not be severed with a little good advice. I prepared to talk to the opposing attorneys.

The strategy was neither difficult nor original: threaten litigation and hope that someone will want to settle. I knew that the law guardian was no longer complacent about the removal. While she still distrusted Ms. Parsons, she had begun to question the agency's motives. Around

50. See N.Y. Soc. Serv. Law § 383(3) (McKinney 1992).

51. See N.Y. Fam. Ct. Act § 1055-a(11) (McKinney Supp. 1995).

the time the administrative decision was issued, two changes occurred. The first, long expected, was that the children's lives began to unravel at the new foster home. I had often wondered why their adjustment had seemed so easy. I questioned the veracity of reports that they were happy. Everything I had learned about these children and their lives said that, at the very least, Michael and Mati would be devastated by their separation from Ms. Parsons. Instead of a precipitous crisis, what happened instead was a slow deterioration, hardly noticeable at first. A little problem in school, some acting out at home. Nothing that young children don't experience everyday. Then, at the end of May, at the same time the agency was hinting to us that the new foster parents would consider adopting the children, the implosion happened. Within a few short weeks, Mati and Michael were arrested for helping a neighborhood tough break into a number of houses, Juan had taken the foster father's car and smashed it, and Mati had become so uncontrollable that he was separated from his siblings and moved to a new foster home in the city. While Juan's behavior had always reflected his anger and frustration, resulting in school suspensions, fights with Ms. Parsons and his brothers and other flashes of distress, the two younger boys were rarely in trouble at home or at school. Their early deprivations had been buffered by the years of stability that had followed.

The lawyer in me was relieved. I didn't want the children to suffer, to be subject to arrest or separation. Two little boys who had been sheltered from the worst of New York City's streets were now, in a sunny suburb, facing serious charges. Even Juan had never been in trouble with the law. What parent, what person of good conscience, would be happy to hear this news. I was happy. I knew, as lawyers know, that sometimes bad things lead to victories. I was thinking like a lawyer; Ms. Parsons was feeling like a mother. As she learned, in bits and pieces, what was happening to her children, she suffered. She had little patience for my speculations on how these misfortunes would prove to be helpful. She wanted to comfort the children, reassure them, make them safe again. I wanted that for her and them; for me the lawyer, I was relieved.

The second change resulted from sheer good fortune: the agency switched attorneys. The new firm was experienced and competent. I had worked with the assigned attorney on many cases. While he would hear his client's story, he would still be approachable. I also knew he would have little stomach for extended litigation; he knew how to save clients' money. I asked if we could try a settlement meeting. I knew he knew the children were falling apart and that different long-term plans would have to be formulated. The current foster parents would provide only interim care. The law guardian was reassessing her position for the same reason. The present conditions allowed for the possibility of formulating a reunification plan. This could not be accomplished, however, without an evaluation of the children and Ms. Parsons. Any settlement discussion

would include whether an outside arbiter should be asked if the family should be reconfigured.

A great debate within family law rages about the role of the mental health and social service professional—psychiatrist, psychologist or social worker—who is asked to evaluate a family and recommend a disposition such as a private custody arrangement, services to address neglect or abuse, or a family reunification plan for children living in foster care. The essential issue in the argument is to what extent, if any, the legal system, and by implication, society as a whole, should rely upon these professionals to provide answers to the problems that face families in crisis. At one extreme stand those who believe that these questions should be removed from the legal system entirely and decided by professionals who can craft appropriate plans for families based upon their unique knowledge of psychology and family ecology. Adherents decry the legal system's adversarial approach to truth finding, pitting expert against expert and discrediting the opposition in order to win the trial, the children, one's good name. They posit that the fact finding judge is untrained in the complexities of individual and family dynamics as well as biased in listening to the experts and thus is unable to render the correct decision.⁵² They would prefer to delegate the decisionmaking to one or more mental health or social services professionals who would search for an holistic approach to solving or resolving the family's dilemmas. These experts could draw from their extensive study and experience to frame a workable solution.⁵³

At the other end of the spectrum, a growing number of legal analysts find disturbing the way in which the legal system has come to depend upon mental health and social services professionals making what they would characterize as legal determinations. This has evolved in two ways: first, courts rely increasingly on mental health empirical studies to define what is true about the ways in which families work and, second, those same courts rely upon local experts to tell them what is true about a particular family. The courts' ready acceptance of these truths belies the fact that these experts come to their professions with personal beliefs and values which color their empirical research, their theories, and the way in which they view individual cases.⁵⁴ By permitting the expert to define the nature of the problem and then offer the solution, courts have relinquished their power to determine what the law requires and have transferred their decisionmaking authority to an appointed substitute. The danger is not simply to the workings of the legal system but also to the

52. See Andrew S. Watson, M.D., *The Children of Armageddon: Problems of Custody Following Divorce*, 21 *Syracuse L. Rev.* 55, 61-64 (1969).

53. See Martha A. Fineman, *The Illusion of Equality* 152-53 (1991).

54. See *id.* at 146; Peggy C. Davis & Richard G. Dudley, *Family Evaluation and the Development of Standards for Child Custody Determination*, 19 *Colum. J.L. & Soc. Probs.* 505, 507-08 (1985).

rights of the parties which are now dependent on the vagaries of social science rather than on the more stable traditions of the law.⁵⁵

A third, more centrist approach, recognizes the dangers of the two extremes and seeks to balance the extent to which the legal system relies on expert opinion with the recognition that the court, in the end, should make the ultimate decision.⁵⁶ The most common solution in this camp is to have the parties agree upon a single expert or team of experts (for example, a social worker and a psychiatrist) who will conduct an investigation and make recommendations to the court. The parties are then given the opportunity to challenge those recommendations through cross examination or the production of other witnesses.⁵⁷ Since the experts are not hired by one side, their opinions are less likely to be biased for that particular reason. Concerns about the expert's particular perspective on the issues involved can be vented when the parties are choosing the evaluator. Finally, since the witness doesn't belong to any side, the court can be more directive in defining the expert's role, including limiting the issues the court believes are within the expert's competence. The court remains free to accept or reject the conclusions of the expert. Depending on individual perspective, this is either the best alternative, the least dangerous one, or another compromised muddle about neutrality.

The agency attorney agreed to the settlement meeting and we went, hoping to convince him to have the family evaluated by a "neutral" expert. Neutrality is an illusion of liberal ideology. After years of working in this system, I can tell who believes in parents (even poor, minority parents) and who believes in saving children from their parents (especially their poor, minority parents). My hope was that the agency might agree to the expert we wanted or, at the least, consider some of the experts who would be more likely to see Ms. Parsons as the children's mother. The CWA attorney and the law guardian were coming as well. I knew from experience that the law guardian would be happy to turn the question over to one of the helping professionals. Legal Aid had, for years, relied on social workers to support their representation and had come to rely heavily on their opinions. I had no such illusions about the CWA attorney. He thought he had won (he had) and that the case was over. He didn't see why the agency was even talking to us.

Ms. Parsons was a skeptical participant in the meeting. She found it difficult to believe that the agency would agree to any plan that involved her and she had little interest in being evaluated by a psychiatrist. The lowest point of the fair hearing was when the ALJ permitted the agency to

55. See Fineman, *supra* note 53, at 169.

56. See *id.* at 188-89.

57. See Robert J. Levy, *Custody Investigations in Divorce Cases*, 1985 *Am. B. Found. Res. J.* 713, 729; Andrew P. Musetto, *The Role of the Mental Health Professional in Contested Custody: Evaluation of Competence or Facilitator of Change*, 4 *J. Divorce* 69, 72-74 (1981).

introduce a document purporting to be a psychiatric evaluation of Ms. Parsons by an agency psychiatrist. The ALJ later relied on this document to confirm Ms. Parsons's inability to control the children other than by corporal punishment. What the ALJ's decision failed to say is that the psychiatrist was not seeing Ms. Parsons to do a psychiatric appraisal. She had been told by Ms. Ames that all pre-adoptive parents must attend a disclosure interview with the agency psychiatrist. At that meeting the psychiatrist would inform the pre-adoptive parent about any outstanding medical or mental health issues he believed might be relevant to the success of the adoption. Ms. Parsons went to the meeting reluctantly; having cared for the children for over six years, she had been fully informed of their needs from the agency perspective and had experienced them daily. She thought this was just another hoop to jump through. Soon after the meeting started, the psychiatrist began to ask Ms. Parsons questions about her background and personal life in very suggestive and negative ways. Most specifically, he questioned her ability to raise three boys without a man in her life. She was outraged about this intrusion of privacy and sexist perspective on parenting, particularly since she was told that the purpose of the interview was to provide her with relevant information about the boys. She had not come prepared to submit to questions concerning the most intimate details of her life and told this to the psychiatrist before she stormed out of the room and into Ms. Ames's office. The psychiatrist pronounced her guarded, suspicious, even paranoid; he noted that she was "easily set off into a misunderstood provocation and gets angry." She was not paranoid. The provocation was real and perfectly understood: while the state held the children she was subject to a kind of invasion, a certain diminishment of her life, which was greater than the need to protect the children's interests.

When we arrived at the meeting, the law guardian asked me whether we ought to meet without Ms. Parsons. She thought this would permit everyone to speak more freely, everyone, that is, but my client. I have been faced with this prospect many times before: objectifying the parent. If we can all talk about the parent without her being present, we can say what we really think about her as if she were the problem to be solved rather than one of the problem solvers. The distinction between the law guardian's request and a negotiation which excludes clients is that all of the other adult clients, the other parties, would be present: the agency worker and supervisor and the CWA case manager. The absent party is the mother. Just another way in which the personhood of parents caught in the state's web is destroyed. At times I had acquiesced to this request; at times, when I represented children, I had even made it. Until I began to represent parents, I was never conscious of the full force of the request, of the marginalization that it entailed for the client and the potential co-opting of the lawyer. It is so easy for the lawyer to think that this is a harmless request, something that can be easily traded for a little goodwill when it is needed. And for lawyers who would rather work without

their clients' close scrutiny, negotiating out of sight enables them to edit the final report. The client, unschooled in the ways of the law and lawyers, is unlikely to challenge this particular insult in an array of others. Even a client like Ms. Parsons would be too anxious on this occasion to assert her autonomy. I thought about White's Mrs. G. I knew Ms. Parsons would agree to whatever I thought should be done even if she raged against the exclusion. The power here was to allow myself to substitute her judgment for mine. There was no time for an extensive counseling session to play out the meaning of the alternatives. I had to decide what I thought she would decide if she knew all the permutations that I knew. I said no.

A certain discomfort pervaded the room. No one was sure what should or could be accomplished. Before writing this, I went back and read the notes in the file that Ali, one of the students, had written. Ali had continued to work on the case after the semester ended. She came to the meeting and recorded the results in a memo. What surprises me, on rereading her notes, is how matter of fact this turning point looks on paper.

I had already experienced one unimaginable moment in this case when the agency's Director of Adoption testified that she did not decide to remove the children and she would not have made such a decision. I had floated on that revelation, dreaming of victory snatched from the proverbial mouth of defeat. So I was wary when another such moment arrived. The law guardian had begun the meeting by suggesting that the family be referred to an eminent New York family psychiatric institute which accepted families unable to afford its standard fees. She wanted to reexamine the bonds the children had developed with Ms. Parsons, to analyze whether a family still existed here. This was not a bad way for the meeting to begin. Clearly, the law guardian was prepared to consider reunification if she was suggesting a reevaluation. But her words and the tone of her voice held less promise; she sounded like an exasperated school teacher who was giving an errant child one last chance before being sent to the principal's office. In addition, the psychiatric institute would require a lengthy intake process, then a commitment to extensive evaluations and months to complete a final report. Since the August psychiatric hiatus would soon be upon us followed by the September arrival of new graduate students, I foresaw endless waiting. My client's face registered the same realization. Years before she had sought help through this institute and while she and the children had eventually settled into a good routine with a therapist there, establishing a relationship had taken a very long time. The agency attorney responded to the law guardian's suggestion by recommending a specific psychiatrist, Jerry Taylor, who would do an evaluation of Ms. Parsons and the children during the summer and make a recommendation. We would all agree today to abide by his recommendation.

I trust Jerry Taylor. I have worked with him for many years and know his beliefs and values. Jerry looks the part: lots of bushy black hair, a beard that's starting to gray and glasses. He speaks with remnants of Brooklyn in his voice and laughs heartily at his own jokes (which are very funny). He believes in his ability to unravel the complexity of the human mind and would dismiss any suggestion that he held such power. His honesty and manner are disarming. Parents he believes are unable to care for their children ask whether he will talk with them again after the case is over. After nearly twenty years, he manages to retain a belief in the ability of ordinary people to control their own lives and the lives of their children. He had consulted on many clinic cases and, until a few years ago, had introduced our students to psychiatry and law. And while I knew that he has, on many occasions, recommended that children not be returned to their parents, I knew—from his years of experience and mine—that his recommendation here would likely send the children home. When the agency attorney evoked his name, I wanted to leap from my chair and yell, "Yes! Yes! Yes!"

I looked at my client for assent. She looked back at me with disbelief as if I were urging her to play Russian roulette with her and the children's lives. I whispered to her that we should agree. I told her this was the psychiatrist I had told her about, the one who would be able to find her strengths as a mother. We were also going to suggest that Jerry do a family evaluation and present his recommendations to the court. I later told her that if I had used the same words as the agency attorney, recommending the same person under the same conditions, we may or may not have been able to convince everyone of the appropriateness of our choice. I thought we would spend a good deal of the afternoon struggling over the evaluator, the process and the resolution. Now, with the exception of the CWA attorney who said he would consider Dr. Taylor's recommendations but would not bind his client to them, everyone else was agreeing that what Jerry said would happen. I never had to say a word.

I almost forgot there were other issues, even important ones, like visitation. I just wanted to get out of the room before the dream was over. Instead, we sat there and plodded through details about the various proceedings, protecting our legal options if the evaluation were not dispositive. Finally, I asked for visitation. Ms. Parsons had not seen the children for over four months. The agency attorney said she could see them once a month until the evaluation was completed. I knew this was everything and nothing for her. What would it mean to hold your child, to caress him and whisper to him for a few hours and then to say good-bye again? How could I agree to such torture? I agreed, quickly and with little discussion. We would not win this fight. The agency personnel believed that any visitation undermined their continued belief that Ms. Parsons was not capable of caring for the children. They would have preferred that the only contact between the children and Ms. Parsons take place

during the evaluation. Some of them, I knew, were convinced that a psychiatrist would never suggest reunification and had reluctantly agreed to limited visitation as a interim element of settlement until the expert would affirm their position. Until this point in the meeting, we had deflected old arguments. I wanted to avoid the unraveling which might have happened if we began to argue over more visitation. I agreed to once a month and the meeting ended.

We left the law guardian's office totally at odds with each other. I was ecstatic. After today—if Jerry agreed to the consultation—the case would never be the same. Ms. Parsons was despondent; the prospect of weeks of evaluations dismayed her. She was angry with me for agreeing to such a limited visitation schedule. She didn't care about legal strategy or short-term losses for long-term gain. She wanted to see her children. She wanted the bad dream to go away. She wanted to feel normal again. We went to a fast food place and sat at an empty counter. The conversation began with my trying to convince her of the victory at hand. I told her again about my belief in Jerry, about his compassion and good sense. I told her that the agency attorney had created a way for the agency to change their position toward her without losing face by transferring the decision to a third person with the right credentials. Permitting Jerry to recommend what would be in the children's best interests would not require the agency to admit past fault; what happened before would be irrelevant to what would be best now.

She couldn't hear me. I had moved away from her to a place where wheelers and dealers speculate on futures. It didn't matter if I was right. She wanted results now, today, this minute. She was tired of me, of my half-assurances, of my inability to produce her kids. She didn't know Jerry, she didn't trust the agency to give her the visits, she saw an endless summer of loneliness. I started another conversation about us. I told her I was tired too, that I saw her not simply as a case but as someone like me trying to hold on to being a parent. I wanted to feel a communion with her so that neither of us were alone. I had never felt that way before with a client. I had always prided myself, as criminal lawyers tend to do, on my indifference as to the client's feelings about me. If I did a good job, what did it matter if the client liked me? Yet now I was asking the client for more than I believed I had the right to ask. I told her that I needed her to trust me if I was going to be able to continue. I believed that. At times I would feel as if my shoulders were stepping stones for her journey from one week to the next. I told her how hard it is to work on a case like this with so little hope and so much to lose, how I dreaded her phone calls when I knew there was nothing to say. I asked her to believe in me despite her anger and pain and expectations.

When the fair hearing was over and we were awash with hope, Ms. Parsons told me she wanted a copy of my summation to keep. She said that no matter what happened, the summation would always reflect what she believed was the truth about the case. I was grateful for her praise

but in the weeks that followed I never sent her the pages. Her praise and my gratitude were the stuff of winning. We were thrilled with each other because we thought the end that was coming was victory. When the loss arrived so did our discomfort with our earlier joy. I was trying, now, to find something else between us, something more permanent to take us through the next times. Summoning great strength, she joined me. She told me it was never a question of trust. She knew that I would only do what I thought would help her. As she talked I realized I was her lifeline to the children. The most casual conversation I had with the law guardian or the agency attorney was news about her life. She hoarded those bits of words for sustenance late at night. Silently, she had moved beyond trust with me. I had been too self-absorbed to notice.

III.

Lucy threw the raggedy clothes away and bought me new clothes and I went to sleep.

Mati

Lucy Parsons, that's the only address.

Michael

I will always love Rachel. She did love me. She would tell me that.

Juan

Our lives have many stories. When Lucy testified at the fair hearing, her story was about the very ordinariness of her life with the boys. The mornings getting ready for school, after-school activities, weekends filled with soccer teams and church. The problems that had led to the removal were contextualized into an acceptable tale of a single mother trying to cope with three growing boys. Lucy acceded to this particular rendition because it was her idealized version, as well as mine. The portrayal was constructed to appeal to the ALJ in the same way and to counter the agency's conflicting portrait of the same life. The children were noticeably absent: they were not parties or witnesses or even observers. They were phantoms of their own lives, haunting the adult-created tales with muted voices. While the adults were relaying their reconstructed versions of the past, the children's versions remained untold. And whatever was happening at the moment—the present, the immediate, the intensely felt now—was legally irrelevant. The children's tales emerged much later, outside the text of the hearing, more real in their messiness and immediacy, layers of lived words unencumbered by legal constraints.

Jerry Taylor's reports are notable for their length. Fifty or sixty pages is not uncommon. I used to be disappointed with his recommendations though, filling less than a page or two, cryptic and often bare of even the most palatable psychological jargon. I wanted the bottom line to be easy to sell, trussed up in language the judge could easily incorporate into a later decision: "The evaluating psychiatrist, Diplomate in Forensic Psychiatry and noted expert on the child welfare system, concluded" But that was not his style and soon I stopped thinking about it, working around what I foolishly thought was some intellectual limitation. I became convinced, nevertheless, that he was exceptional.

Not all lawyers share this view. Many attorneys who regularly represent parents in Family Court proceedings in New York City think Jerry Taylor has a "bonding" bias: he too readily favors the relationships formed between children and foster parents, undermining the biological connections between parents and children. The psychological theory justifying this bonding perspective is contained in the classic essay by Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child*.⁵⁸ They posit that a child's positive psychological development is centered in a stable, continuous relationship with the child's psychological parent: the parent who "on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs."⁵⁹ Since that person is usually the child's biological parent, Goldstein, Freud and Solnit strongly argue against state intervention which results in removing children from their family unless such intervention is absolutely required for the child's health and safety.⁶⁰ The basis of their thesis is, nevertheless, a psychological relationship between adult and child. If a separation from the biological parent does occur and the child forms a strong, substitute psychological bond with another caretaker adult, that adult then becomes the child's psychological parent and the child should not have this new relationship disrupted. The continuing biological connection is subordinated to the intervening psychological one.⁶¹

The theory has been challenged on psychological, cultural and political grounds. The most persuasive attack on the theory is that it lacks sufficient statistical or experiential support, reflecting the authors' beliefs but not sufficient empirical findings.⁶² Equally significant is their failure

58. Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973).

59. Id. at 98.

60. See id. at 19-20.

61. See id. at 99-100; Nadine Taub, *Assessing the Impact of Goldstein, Freud and Solnit's Proposals: An Introductory Overview*, 12 N.Y.U. Rev. L. & Soc. Change 485, 486 (1983-1984).

62. See Peggy C. Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539, 1545-46 (1987); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. Rev. L. & Soc. Change 557, 566 (1983-1984) [hereinafter Davis, *Family Bonds*]; Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in*

to acknowledge the intensity of the earlier relationships between the child and the biological parents, which complicate the psychological parentage of later caretakers, and to consider the diversity of family structures.⁶³ Finally, among legal scholars concerned with the ability of the state to protect children by substituting its agents for parents in any but the most dangerous situations, the psychological parent theory is considered a simplistic justification for favoring foster and adoptive parents over biological parents, particularly poor and minority parents most often identified by the state as inadequate parents, once a child has been in foster care for even as little as a year.⁶⁴

Jerry Taylor is not an apologist for the psychological parent theory. He does believe children form attachments to their caretakers, sometimes sufficient to become parent-child relationships. But he never ignores the biological parental relationship and he never trusts the state. That is why I first began to trust him. We share a cynicism about the ability of any institution—foster care agency, court, legal services office, psychiatric institute—to solve the profound issues which affect the clients we see. This includes, of course, ourselves. Moreover, as I became increasingly comfortable with listening to the stories of my clients, I came to realize that Jerry Taylor has always listened. His endless reports were effective because the stories that filled their pages were far harder to challenge than the psychological theories I had wanted Jerry to espouse. His conclusions often seemed to emerge inevitably from the recorded voices. I began to understand why I usually believed his conclusions even when I disagreed with them.

The August psychiatrists' hiatus slowed, but did not stop, the series of interviews Jerry Taylor conducted with Ms. Parsons and the children. The agency and our law school clinic had agreed to share the cost of his evaluation; he charged his pro bono rate, which eased the financial burden. By the middle of September, Jerry was done:

As a result of my interviews, conversations and review of the above-mentioned materials, I have reached the following conclusions:

1. The best interests of Michael would be served by his immediate return to the home of Lucille Parsons and his speedy adoption by her.

Doing the Right Things for the Wrong Reasons, 12 N.Y.U. Rev. L. & Soc. Change 505, 514-15 (1983-1984).

63. See David Fanshel, Urging Restraint in Terminating the Rights of Parents of Children in Foster Care, 12 N.Y.U. Rev. L. & Soc. Change 501, 502 (1983-1984); Carol B. Stack, Cultural Perspectives on Child Welfare, 12 N.Y.U. Rev. L. & Soc. Change 539, 541 (1983-1984).

64. See Davis, Family Bonds, *supra* note 62, at 557-59; Martin Guggenheim, The Political and Legal Implications of the Psychological Parenting Theory, 12 N.Y.U. Rev. L. & Soc. Change 549, 551 (1983-1984).

2. The best interests of Mati would be served by his immediate return to the home of Lucille Parsons and his speedy adoption by her.

The return of these children should be immediate and not contingent upon the implementation of the following additional recommendations:

3. Miss Parsons, Michael and Mati should enter into family therapy with a therapist chosen by Miss Parsons as soon as possible to aid the children's reintegration into her home, as well as to facilitate discussion and working through of their reactions to the events surrounding and since their removal. Such treatment would also help to provide advice and counsel for Miss Parsons as she attempts to serve again as the children's caretaker. The family therapist may advise Miss Parsons further regarding the need of any individual therapy for any of the family members.

4. The best interests of Juan would not be served by his immediate return to the home of Miss Parsons. The severity of the conflict between them and its persistence over time, as well as Juan's resistance to therapeutic interventions, militate against such a return as does Juan's strongly felt opposition and threats to display escalating, negative behavior if an attempt was made to force such a step on him.

Although his return to Miss Parsons, at this time, is not recommended, it is urged that an opportunity be provided for Juan and Miss Parsons to speak together, privately or with the family therapist she obtains. Their lengthy relationship of almost seven years duration and the complex and ambivalent feelings each hold regarding the other suggest that both would be well served by an opportunity to speak. Such an effort to try to clear the air, and effect a kind of psychological closure to this period of their lives would be of assistance to them as they face the future. Juan needs to know that Miss Parsons continues to care about him and remains available to play a role in his life. Moreover, Miss Parsons and Juan will continue to co-habitate the same interpersonal orbit, if only because of their mutual interest in and attachment to Michael and Mati. Therefore facilitating their ability to deal with one another constructively is, in this sense, in the interest of all family members.

5. Frequent visitation between Juan and his brothers is recommended to continue the important relationship that exists among the three boys.

The recommendations came near the beginning of the report but he had added a "comment" at the very end that was unusual for him:

Comment: I believe that the six and one half year association between Miss Parsons and Mati and Michael led to the development of a psychological parent/child relationship. As such, I believe this relationship needs to be protected and nurtured. The fact that Miss Parsons may have flaws as well as strengths as a person and as a parent does not negate the fact that to these two children, she has become their mother and a primary source of security. Reestablishing their relationship as soon as possible appears to be the course most likely to minimize the damage which the separation may have entailed and most likely to minimize the pain and behavioral acting out which these two children have displayed. It is my recommendation that they be returned immediately to allow the process of psychological reintegration and healing to begin.

The recommendations were not surprising. Juan's leap into delinquency and the younger children's total disintegration during the six month separation chronicled in Dr. Taylor's report was shocking. Even prior to the report, we had begun to hear hints that life in the new foster home had deteriorated. Since Lucy no longer had any legal role in the children's lives, the agency refused to provide details about the children's conditions. The law guardian was increasingly sympathetic to the idea that a mistake had been made, but she didn't trust Ms. Parsons and maintained a concerted silence. She would not talk about the children's future until Dr. Taylor finished his report. To complete the report, Jerry had to see Ms. Parsons with the children. And the agency had agreed to a few additional visits while the evaluation continued. The children, at least Mati and Michael, began to talk during the visits about the conditions of their placement. (Juan attended the visits too but kept his distance.) Since the visits were always supervised, the children were rarely explicit, though from time to time the younger ones now began to telephone Lucy to find out when they could come home and to complain about what was happening to them. What they said made Lucy distraught. How was it possible in such an adversarial case, with the prospect of the court's intensive scrutiny, for the agency and the city to fail to protect these children (let alone protect their own position)?

Lucy was angry: at the agency for what happened to the children, at Dr. Taylor for not recommending Juan's return to her, at me for under-

standing Jerry's position. Secretly, I thought she would be relieved that Jerry had not recommended Juan's return. Their last year together had been bleak. She knew that he had deliberately called the agency on her, and even though she believed he had not meant the other children to be removed, it had happened with devastating consequences. With his explicit instigation, Michael and Mati had reluctantly joined him in rampaging their new neighborhood, getting into fights, stealing from the foster parents, neighbors and stores, skipping school, throwing rocks at passing cars. The foster parents had demanded Mati's removal. The children had never been separated, even when they were very young and living with their mother in a series of welfare hotels. Mati, the middle child, was the most vulnerable of the three. Juan often scapegoated him, and Michael was the favored youngest. Mati suffered from severe learning disabilities and, even when he lived with Lucy, played the role of follower to other boys. But he had never been a troublemaker and the friends that Lucy had steered him toward were safe to follow. Mati was moved to another foster home where he was given money every day and told to buy food for himself wherever he liked. If he didn't want to go to school, that was fine as long as he stayed outside the home during school hours. He wasn't yet twelve. While Juan was telling everyone that life in the new foster home was great, Michael was quickly deteriorating. In this Dickensian plot, he had been conscripted into a marauding gang, forced to steal, lie and be truant from school. His foster parents scarcely noticed. In addition to the overt delinquency, he was overwhelmed and depressed by the enforced separation from Lucy. He cried himself to sleep at night. He was more distraught after Mati was moved; he wanted "things put back the way they was." He wanted to go home to his mother.

His mother wanted them all back. Why should a boy barely fourteen years old be able to decide where he would live? Ms. Parsons had developed a grudging respect for Dr. Taylor. He had treated her carefully. He had not rushed her, not presumed who she was by her outward manner. He seemed immune to some of the worst characteristics of his profession and, though a white man, was not a racist. These were her insights, not mine. She realized that he didn't care if he or anyone else liked her; he just wanted to figure out whether these children belonged with her. Then he decided that one of them didn't. Surely he didn't believe that Juan was better off where he was, sinking ever deeper into a life Lucy had tried to protect him from since he had come to her?

In the continuing debate about the role of the child in decisionmaking about that child's life, the question of the child's voice is a persistent theme. When the child is at the center of a legal controversy over the child's custody and care, the adults involved—from the parents or caretakers to the lawyers, the mental health and social services professionals and the judges—all struggle to determine how much "voice" the child should possess. Voice is a layered phenomenon. The first question is whether the child should be heard at all. Today few courts would deter-

mine a child's custody without first hearing from the child. That hearing, however, can vary substantially in form. The child may speak to the judge directly, to one or more mental health or social services professionals, to his or her own counsel, or even on rare occasions by testifying in the judge's chambers or in open court. The nature of the questions asked is likely to reflect the age of the child, the extent of the interviewer's familiarity with child development and effective interviewing techniques, as well as the interviewer's personal biases. Most lawyers and judges have had little training in interviewing children and rely on that old stalwart "common sense" to get them by in the few minutes they allot to the interview. In the ten years that I represented children, I can remember only a handful of times that a judge spoke to a child for longer than five minutes. The judges were generally uncomfortable and awkward during those few minutes, anxious to return to the stacks of cases awaiting them in the courtroom. The lawyers, including the children's lawyers, were often no better. When I began to represent children, I had had some rudimentary interviewing training as a "law guardian" in the clinical program I had taken in law school and had been exposed to some of the dilemmas facing lawyers who represent children. Nevertheless, I was unprepared for the varied and complex problems my child clients would present. Within six months of starting work as a child advocate, I was representing fifty or sixty children; by the time I left Legal Aid, over one hundred. I improved on the job but I didn't get good for a long time. And even when I finally developed a credible technique and style, I rarely had the opportunity to speak to the client properly. There was little privacy and less time. I did what every lawyer and judge I know does most of the time: in the hard cases, I relied on "experts" to tell me what my client was saying.

A highly trained, experienced and open-minded observer can provide great insight into a child's words and actions. Unfortunately, few such professionals are available in the child welfare system. In most cases involving children in the Family Courts in New York City, only some of the mental health and social services professionals involved have had the proper training; virtually all have little time to spend on each case. An hour may encase the entire interaction between the child and the interviewer. The same amount of time may be spent with the other relevant parties. The child, often unprepared for what will occur, is brought by a parent, foster parent or case worker to an office in or near the courthouse to speak to a psychiatrist, psychologist or social worker. Ms. Parsons's case was exceptional in one way. The interviewer was very experienced. He had interviewed thousands of children by the time he spoke to Juan, Mati and Michael. He knew the right questions for fourteen-, eleven- and nine-year-old boys. When he finished, he was supposed to inform the rest of us what they wanted, what was best for them, or both. This becomes the center of the voice dilemma: what meaning do we extract from the child's words?

Juan was fourteen. He had reached the age where a judge was required to ask his consent to an adoption.⁶⁵ He would never agree. While the court has the power to override the child's wishes,⁶⁶ no judge would order an adoption of this teenager without his consent. The moment when Lucy could have mothered all three children had passed. Wherever Dr. Taylor had looked—in the agency records, in conversations with former therapists or teachers, during the younger children's interviews—he had heard voices urging the adoptions to be completed. Time—and the path of the lives lived through it—had finally muted those voices.

Between Juan and Lucy there had been a fragile peace. Juan was seven when he came to her. He loved his mother Rachel and suffered from their separation. He had taken care of her other children for her, and had assumed an adult role for her love and attention. He resented Mati and Michael's transformation into Lucy's children even as he began to conform to the new life of school, sports, church, home. He knew Lucy was not responsible for his separation from his mother. Lucy dutifully took the children for visits with Rachel whenever she appeared. As those appearances became less frequent and the agency began to prepare to terminate Rachel's parental rights, Lucy maintained the children's ties with Rachel's mother. Family holidays were often shared with their maternal grandmother. Lucy's illusions did not include pretending the children were orphans. Perhaps she believed she could, by sheer example, will Juan to be her son. It almost worked. Dr. Taylor found opportunities in his travels through their lives when Juan and Lucy could have substituted finality for love. But those chances were disrupted by the family crises which brought the state agents to their doorstep. The rupture of the removal became insurmountable. Juan's frustration with waiting for Lucy to love him as he wanted to be loved, for himself and not her image of him, his remorse for abandoning Rachel, his brothers' ability to love Lucy as their mother and her mirrored response, and his growing guilt that he had harmed his brothers with the removal all solidified into a determination never to return. And he liked the new freedom of the foster home. Even with the troubles with school and police, his new foster family liked him. The older sister included him in her adolescent pranks and he wasn't under Lucy's persistent gaze. He insisted to everyone—his lawyer, the agency, Dr. Taylor—that he and Lucy would never be able to be a family. To Jerry, Juan's descriptions and desires paralleled his needs. It was not best that Juan return with his brothers to Ms. Parsons.

Lucy disagreed. If he came home with his brothers, the soothing regularity of their daily existence would reshape their family life. The adoption could be finalized and with the agency vanquished, they could finally resolve their differences together. I kept wondering why she was

65. See N.Y. Dom. Rel. Law § 111(1)(a) (McKinney 1988).

66. See *id.*

so insistent on Juan. In her own words, they were constantly fighting. She needed physically to guard Michael and Mati from his often unprovoked attacks. His actions at home and school resulted in calls to the police, disrupted plans, repetitive conferences, lost work and pay. She constantly dreaded his effect on the younger boys, which was one of the reasons she was particularly strict with Juan. They would need even more attention now: Jerry's report had uncovered the devastating impact of the removal on Mati and Michael and the agency's malfeasance in not rectifying their action once its impact became known. The charade of the happy foster home had been permitted to play for months while the children suffered. The agency would have little justification for maintaining the children in their present placements. I anticipated some form of settlement before our next court appearance. I still do not know Lucy's reasons for persisting in her desire to have Juan returned with his brothers. A pact with God: give me these children and I will serve you forever? Or was it a sheer stubbornness, an unwillingness to struggle with the complexities that crippled her creation of family? She wanted the creature alive, deformed though it was; the desires of a fourteen-year-old, the pronouncements of a psychiatrist, and her lawyer's counseling were insufficient dissuasions. The state's agents and her own could collude with this child to destroy the life she had built, but she would not.

At a Term of the Family Court
of the State of New York,
held in and at New York
County on October 22, 1991

In the Matter of Juan, Mati,
and Michael,

Docket Nos. K /89

Pursuant to Social Services Law
Section 392.

The New York City Commissioner of Social Services (hereinafter "CWA") by her representative, Ellen Schwartz, and counsel, Thomas Nederland; Lewdown Children's Services by its representative, Lisa Jean Ames, and counsel, Taisha James; the children, Juan, Mati and Michael (hereinafter referred to by their first names or as "the children") by their Law Guardian, Allen Polson, and Lucille Parsons and her counsel Morningside Heights Legal Services, Inc. by Jane M. Spinak, agree and stipulate to the following:

1. Juan, Mati and Michael were placed in the home of Lucille Parsons in September 1984.

2. Juan, Mati and Michael were removed from Ms. Parsons's care on February 12 and 13, 1991 after a report that Ms. Parsons had used corporal punishment on the children in violation of the rule that foster parents may not use corporal punishment.

3. On March 14, 1991, the Office of Confidential Investigations of CWA issued an "indicated" report of inadequate guardianship.

4. On March 4, 1991, Ms. Parsons requested a fair hearing to review the removal of the children from her care.

5. A fair hearing was held on May 1 and May 10, 1991 before Administrative Law Judge Robert Sanders, and a determination was made on May 23, 1991 by Arthur O'Donnell on behalf of the Commissioner of the New York State Department of Social Services, that the agency's determination to remove the children was not arbitrary and capricious. No determination was made concerning the children's long term best interests or permanency planning goals.

6. During the period that the children were removed, a foster care review proceeding was scheduled. This foster

care review proceeding was adjourned on April 19 and June 6, 1991.

7. On June 20, 1991, all parties met to discuss permanency planning for the children. On that date, the agency suggested that Dr. Jerry Taylor conduct an independent investigation into the children's best interests. All parties agreed to Dr. Taylor conducting such an assessment.

8. Dr. Taylor began his assessment on July 15, 1991.

9. The foster care review proceeding was adjourned again on July 18 and September 5, 1991.

10. Dr. Taylor conducted his investigation throughout the summer. On September 23, 1991, Dr. Taylor sent to this court and to all parties his recommendations and assessment concerning the best interests of the children. Dr. Taylor recommended that Mati and Michael be returned to Ms. Parsons's care immediately for the purpose of being adopted. He recommended that Juan not be returned to her care.

11. The foster care review proceeding was adjourned on October 8, 1991 for the parties to be afforded the opportunity to reach a stipulated agreement concerning the permanency planning goals of the children.

12. The parties to this stipulation agree that Mati and Michael be returned to Ms. Parsons's care, effective October 23, 1991 or as soon thereafter as the paperwork can be completed, for the purpose of being adopted by Ms. Parsons pursuant to the following conditions:

(a) Ms. Parsons and Mati and Michael will enroll in a program of family therapy for the purposes of facilitating reunification and addressing appropriate forms of discipline to be used while the children remain in Ms. Parsons's care as foster children. Pursuant to this condition, Ms. Parsons has already applied for readmittance to family therapy at Brearly-Hewitt Services, which has informed Ms. Parsons that a determination will be made whether to assign the family's former family therapist to the case, to assign a new therapist, or to make a referral to another program because of insufficient availability of services. Ms. Parsons, with the assistance of the agency, will make all diligent efforts to enroll in an appropriate family therapy program as soon as such program becomes available.

(b) Ms. Parsons and the agency agree to take all necessary steps to insure that Mati and Michael are enrolled in the appropriate school program.

(c) Ms. Parsons will take all necessary steps to secure employment in the nursing field within three months of Mati and Michael's return to her. To assist in helping Ms. Parsons secure employment, the parties to this stipulation agree that any report within the State Central Register concerning the children's removal should be expunged pursuant to Section 422(6) of the Social Services Law which permits the Commissioner to expunge any record on good cause shown. The parties agree that the finding of inadequate supervision based on the use of corporal punishment (for which no physical abuse was found) is not relevant to Ms. Parsons's professional activities, that Ms. Parsons agrees not to apply for the care of other children, and that expunging the report will aid Ms. Parsons in her pursuit of employment. The parties to this stipulation further agree to forward a request to expunge the report to the Commissioner.

(d) Ms. Parsons and the agency agree to facilitate visitation between Juan, Mati and Michael on at least a bi-weekly basis.

(e) Ms. Parsons agrees that she will attend counseling with Juan, if Juan agrees to attend, for the purpose of addressing unresolved family issues between Ms. Parsons and Juan. Ms. Parsons and the agency agree to foster a continuing relationship between Ms. Parsons and Juan to the extent that Juan wishes to participate in such a relationship.

(f) Ms. Parsons, the agency and CWA agree to move with all deliberate speed to complete the adoption of Mati and Michael by Ms. Parsons.

(g) The agency agrees to facilitate appropriate long term plans for Juan, including but not limited to adoption and independent living. The agency agrees to provide Juan with the requisite independent living services for which he is entitled.

(h) The parties agree to foster care continuing for six months for all three children, with each party retaining the right to recalendar the case for good cause shown.

(i) Ms. Parsons agrees not to use money received for the children's foster care to repay any current debt.

[Signatures of the Attorneys]

So Ordered:

. Hon. Keith Lewes

These words mock me with their pretense to fairness and finality. Like many contracts, they contain only those terms necessary to seal the bargain. The language is cleansed of the human actions and emotions which led to the agreement. In this case, the pain of separation and the failure to reunite the entire family are transformed into requirements to enter family counseling, facilitate visitation among the boys and plan for Juan's "independent living." No wrongdoing by the city or agency is acknowledged; no admission to hastiness, poor judgment, mistake. I had written most of the agreement myself, putting our particular spin on the official blandness which would have to satisfy the judge reviewing the children's foster care and the Surrogate who would eventually determine whether to complete the adoption. The city attorney, at the last minute, insisted that the two *mea culpas* be added: for my sins I will not ask for other children or use foster care money to repay the loans that I used to survive while I fought to regain my children. The grudging acceptance that Lucy had become Mati and Michael's mother was not an admission that she should foster other children. Her name should be expunged from the central register so she could obtain employment, not so that the error of the original decision could be righted.

Lucy resisted. I reminded her that she did not want more children anyway and that the provision concerning her debt was ineffectually written. She and the children could live off the foster care money and she could use her salary to pay her debt. As long as the children were being properly housed, clothed and fed, no separate accounting was required when foster care checks were sent to her. She would be able to determine how to structure her finances once the children returned home and she began to work. I argued that these last indignities were the price she would have to pay for the boys' immediate return. If all the parties were not in complete agreement, this judge would insist on a hearing. He loved messy cases which permitted him to grouse out minor legal points and gave him an opportunity to play Solomon with a modern psycho-social twist. From a systemic perspective, the interests of the children he was charged with protecting would be best served by strong-arming the attorneys to get their clients to agree. These particular points were not central to the children's interests and had, whatever their symbolism, no practical effect. If we had entered the courtroom and said that there were one or two sticking points, his job should have been to pressure the city attorney and me to find a way to compromise. But I knew he wouldn't do that. I told Lucy what I thought of the judge.

I had actually come to hate him: pompous, self-satisfied and frequently ineffectual. I dreaded appearing before him. Some time previously, the clinic had represented two children in a termination of parental rights case. The children had been in care for years and the clinic had been their law guardian in the foster care review proceedings. Three sets of students had diligently worked to help the children be reunited with their mother. Eventually, the mother gave up. She had

abused and was too abused by drugs, illness and the system to try any longer. And the children gave up on her. They had reached early adolescence and wanted to stop being part of the fight; they finally decided that they wanted to be adopted. Their father was in prison as a result of a vicious assault which the children had witnessed years earlier. The termination of parental rights petition alleged that their mother had failed to plan for their future and that their father had abandoned them. The agency had to prove that their father had abandoned them and that the abandonment was not the result of the agency discouraging the parent from contacting the children or the agency.⁶⁷ The case was not legally complicated. While the father knew how to contact the agency, he had not done so for years. Another judge had already held a preliminary hearing which ordered the agency to begin termination proceedings against the father. To his credit, the father's attorney shaped a defense which questioned the agency's integrity in its dealings with the father. Nevertheless, the evidence showed overwhelmingly that the father had abandoned the children. A competent and careful judge would have completed the case over the course of two or three months, scheduling a half dozen or so afternoon sessions for testimony. Instead, the case required seventeen appearances stretching over more than two years. The longest sessions were spent discussing which sections of the agency records could be entered into evidence. The judge spent hours postulating his reasons for permitting or excluding an entry. He was so pleased with his pronouncements, like the emperor with his new clothes, that he forgot entirely about the children who were waiting to get on with their lives. In the end, since there were no significant legal issues or factual discrepancies, he didn't review the transcripts and write a decision. He just terminated the father's rights with an oral order from the bench. Yet those meaningless evidentiary pronouncements were not harmless: they provided a basis for the father's appeal to wend its way through the appellate courts and in the meantime, the children's adoptions had fallen apart.

This picture that I painted for Lucy worked. She agreed to the changes in exchange for expediency and avoidance. Still, I admired Lucy's defiance as we appeared before the judge. She continued to refuse to conform her behavior to her role. She could barely control her impulse to denounce the settlement agreement as a Faustian pact. She would not sell her soul even for her children. The white-washed language mocked her; its neutralizing tone offended her continuing suffering. My admiration did not destroy my fear. This judge, of all, was unlikely to appreciate Lucy's conception of herself. He would want someone contrite and appreciative. I kept hoping he would read the agreement and ask no questions. He had had almost a month to read Jerry's evaluation. All the "facts" were there. No one was disagreeing

67. See N.Y. Soc. Serv. Law § 384-b(5)(a) (McKinney 1992).

with the legal resolution (even if Lucy disagreed privately with the determination to keep Juan from her). The parties had done the work for the judge: the agreement was reasonable and could be justified as being in the children's best interests. If we could get in and out of the courtroom without the judge addressing Lucy, I thought my work would be done. The rest of the story would resolve into the younger children's return and speedy adoption and an uneasy truce with Juan as he centered his life with another family. My first wish was granted: the judge accepted the parties agreement and signed the order with no more than a gratuitous warning to Ms. Parsons that she had better figure out a different way to discipline the children. But the quick resolution of a made-for-TV movie did not occur. I was part of a soap opera script where a little variation each day snares the audience as the characters stumble from one disaster to another.

IV.

Unadorned, uninterpreted events are not in and of themselves what one 'experiences.' Interpretation of events is an extremely significant aspect of this process of individual experiencing.

*Martha Fineman*⁶⁸

Mati and Michael returned to Lucy within a few days and my constant communication with her finally ended. The fall semester was passing quickly with new students and cases demanding attention. I turned eagerly to the daily jumble of other matters. I knew that the agency would require a number of months of undisrupted reunion before it would even consider signing the consents necessary for the adoption to be finalized. And the city would insist on the therapy beginning and Lucy returning to work. With the exception of pursuing the expungement, I would have little to do for awhile. Yet the case could not be (not so) neatly filed away as so many others had been. It had become a touchstone for my lawyering, a way of measuring my approach to clients and, necessarily, for my teaching. I could not deny the powerful emotional parallels between my newly experienced mothering and the motherhood of my client. I had, for reasons I could not intellectualize, exposed myself to learning in ways that I demanded of my students but rarely required of myself. I felt the need to do something with this learning beyond incorporating it into some lesson plans or supervisory sessions. I didn't, at first, think about writing. My thoughts about the meaning of this experience failed to take the shape of conventional legal scholarship; they didn't fit well into discrete areas of study like the rights of foster parents, the scope of jurisdiction in administrative proceedings, the role of the

68. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 U. Fla. L. Rev. 25, 38 (1990).

mental health professional in custodial determinations. The parts were less than the sum of the whole.

Shortly after the semester began, in the fall of 1991, the Hastings Law Review solicited articles for a conference and symposium issue on progressive legal theory and practice. As I read the letter, I immediately thought of this case:

Our purpose in hosting this conference and publishing the theme issue is to promote the integration of progressive legal theory and actual practice in teaching, scholarship, and advocacy. To that end, we are inviting scholars who, to varying degrees, have embraced one or more of the following approaches: clinical, critical race, feminist, law and society, and critical legal studies. We encourage scholars from these communities to present papers, serve as discussants, and participate in workshops at the conference, as well as to submit pieces for publication in the theme issue.

The conference and issue will explore the intersections of theory and practice as they are affected by and reflect issues of class, race, gender, ethnicity, and sexual orientation. In addition to the legal movements listed in the preceding paragraph, we encourage reference to any related field of study—anthropology, linguistics, sociology, history and literature are a few examples—and any form of practice—corporate, public interest, or government; large or small “firm.” Among the range of concerns we expect to figure in the discussions and papers are: hierarchy and the empowerment of marginalized people; improving the delivery of legal services; coping with the bureaucracy of the welfare state; the function of voice and storytelling in interviewing and counseling clients; the relative merit of differing modes of dispute resolution; and the efficacy of the present regime of professional ethics.⁶⁹

The broad framework of this solicitation was inspiring: here was a way to think across issues of substance and theory. Including clinical studies along with other critical movements was also reassuring. Too often, I had thought, critical scholars who were not also clinicians had failed to draw on the insights of clinical teachers when discussing the impact of their theories on the law. Like their conventional academic colleagues, they had generally marginalized clinical scholarship by failing

69. Letter from Simeon Herskovits, Editor-in-Chief, Hastings Law Journal, to Jane M. Spinak, (Aug. 22, 1991) (on file with the Columbia Law Review).

to read it (or cite it). In specifically soliciting clinical scholars, the symposium was acknowledging the burgeoning scholarly contribution of this movement.

While there always was some clinical scholarship in law reviews, recently professors like Stephen Ellmann began to encourage clinicians to focus intently on their work as lawyers and clinical teachers and to transform their ideas into scholarship that spoke especially to their clinical colleagues and the practicing bar. Clinical workshops, like the one begun in the mid-1980s by Ellmann, have provided a safe environment for clinicians to discuss their work among sympathetic colleagues. A central tenet of clinical teaching is effective critique: providing students with constructive comments about their work which builds upon what they have begun rather than simply challenging its validity. This methodology has been carefully developed and discussed—with numerous individual variations—at clinical conferences for almost two decades. Using this same methodology to discuss clinical scholarship in these workshops empowered many clinicians to begin their own writing. Furthermore, as more law schools began to require scholarship from clinicians for hiring and promotion, the workshops provided two unique services: they validated a new kind of writing about clinical work and they introduced new clinical teachers to the intellectual milieu of clinical scholarship.

The development of clinical scholarship has its risks. I recently participated in planning a national clinical conference. In determining the focus of the conference, the committee discussed, among other issues, whether clinicians had abandoned their basic goal of teaching students about the practice of law. Had the inclusion of clinical scholarship as a central issue at clinical meetings distracted clinicians from their foremost responsibility of imparting to students a sense of how to lawyer? Or was the question whether some clinical scholarship had, by having openly espoused a theoretical perspective, lost its ability to advance an understanding of practice to its audience? I think the answer to both questions is no; but I don't think the questions can be dismissed simply as backlash.

Robert Dinerstein has warned clinicians who are interested in the "theoretics of practice" movement to remember two points: first, produce well written, lucid articles rather than abstruse, citation laden, inaccessible ones; and second, say something useful to the practitioner. What he calls "overly academic" articles will fail to interest the practicing bar unless they provide a framework for thinking like a lawyer in a constructive way. As Dinerstein notes, most poverty lawyers for whom clinicians are writing have neither the time nor the inclination to struggle with ideas buried in law review articles of any sort.⁷⁰ Dinerstein may be right in his analysis but wrong in his concern. Clinicians, like all other academics, write predominantly for each other. The difference between clinical

70. See Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 *Hastings L.J.* 971, 982-83 (1992).

writing and most other legal academic scholarship, however, is that the writer has a clear intent to have a direct impact on the practice of law. Most clinicians care deeply about how clients are represented and how lawyers learn that representation. This is why we teach clinically. I believe this also leads us to consider the impact of diverse trends in legal thought: we see the human dimension to theory in our practice decisions. The communities that the critical theorists discuss are our clients. In our joint roles as lawyer and educator, we have the time (or at least more time than the average practitioner) to weigh the effects of these new theoretical constructs on our lawyering. That is one of the reasons why clinical scholarship of even the most theoretical bent is filled with examples of case work: there is a commitment to grounding our thoughts in the experience of practice. Nevertheless, the integration of theory into our writing has a price: what we say will enter mainstream practice, if at all, much more slowly. The ideas will first be incorporated into lesson plans, simulation exercises, supervision sessions, clinical conference presentations and, inevitably, other articles. Gradually, we will expose law students to new ideas about practice through clinicians' distillation of our theoretical musings into practical responses to real problems. That will be the evolutionary achievement of the so-called dialectic of theory and practice.

There is a second dimension to the issue of theory and practice in clinical writing. Dinerstein wonders whether the theoreticians like practice.⁷¹ I wonder whether some of them are very good at it. Theory is intended to inform not to substitute for practice. A number of recent articles by clinicians about how supervisors and students handled cases assert that if the supervisors had applied some of the lessons of the critical movements, they would have been better lawyers. I understand their assertions; I make some of them for myself here. The assertions are raised in good faith even though the headiness of the new may obscure aspects of reliable traditional lessons. But too many of these articles are filled with examples of bad lawyering or teaching disguised as a failure to apply critical theory. This is a dangerous path for clinicians to take. Our central task remains the teaching of practice; our justification within legal education is our lawyering competence. When clinicians write about the failure to conduct a rudimentary interview to discover the client's wishes, the failure to follow our own pedagogical standards by making important decisions in a case without ever consulting the students representing the client, and the failure to prepare students adequately before going to court, then the creative and new perspectives we discuss in the same breath are in danger of being dismissed by traditional clinicians and practitioners alike. They will be unable to see past the examples of relinquishing twenty-five years of clinical learning only for the illusion of integration into current legal discourse.

71. See *id.* at 983-84.

The Hastings solicitation provided the context, but not the form, for writing about the case; the structure of a traditional law review article was incongruent with my need to share its personal impact on my lawyering. A recent reading of Patricia Williams's remarkable *The Alchemy of Race and Rights*⁷² encouraged me to consider the integral factors of voice and form in legal writing. Narrative appeared to encompass my ability to convey something concrete about the experience. I wrote the first few pages of what I called an essay and sent it off to Hastings with an explanation of my intent. I was almost giddy in my luck of this convergence of motif and method. I was sure they would be too. A month later I called: they would not be able to use the essay but thanked me for submitting the idea. I was too emotionally connected not to feel personal disappointment. I also knew my own priorities: without a deadline, I wouldn't justify the work. This writing was a luxury which would soon be snuffed out by the commitments of other responsibilities and the pull of home.

Yet I was not happy to abandon a project that had so readily drawn me in. My new, and my client's tenuous, status as mothers had provided the emotional impetus to explore this particular state. The legal, social and even biological definition of mother within the dominant culture has become a subject of increasing complexity and importance. Feminist and critical race theory scholars, in particular, have been actively deconstructing motherhood into its myriad dimensions: stereotypical white mothers, stereotypical minority mothers, lesbian mothers, working mothers, welfare mothers, divorced mothers, single mothers, loving mothers, hating mothers, good mothers, bad mothers, sacrificing mothers, selfish mothers, biological mothers, psychological mothers, surrogate mothers, custodial mothers, non-custodial mothers, mothers of many dimensions at different times, circumstances and perspectives. Which mothers were I and which were Lucy? Was it possible to find a place within motherhood where this uniquely gendered experience transcended the multidimensional divisions and individual experiences of our lives? I admitted the importance of these questions to myself and agreed with Steve Ellmann's recommendation that I write a draft of something for his clinical theory workshop.

Here's what I think my clients think about me. I am privileged. I am a white woman lawyer who always has some money for emergency cabs or lunches for them, who wears a gold wedding ring and who doesn't look or act like I have or will ever experience motherhood in the way they do. I have the perquisites which keep poverty, homelessness, dislocation, unemployment, maltreatment, and thus the state from my and my child's door. I know no one will keep the shop locked against me after the briefest look at my skin. I will not live with fear that my sexual orientation could strip me of my parental rights. I do not have to protect myself or my child from domestic violence. I work for pleasure as well as money.

72. Patricia J. Williams, *The Alchemy of Race and Rights* (1991).

The inequality of this existence is so profound that I wonder whether most of my clients realize its true power.

These differences have usually existed between my clients (or, when I represented children, my clients' parents) and me. I treated them as divisions between us which could be intellectualized as much as felt. They were societal injustices which my lawyering skill was supposed to be able to abstract and thus help alleviate. When I became a mother, and returned to practice as a lawyer, something changed. In assuming the responsibility for another life, I had shed something of my insularity. Love and care for another adult—husband, parent, friend—has required various amounts of time, commitment and adjustments. They are part of but do not permeate my entire existence. I do not feel their responsibility incessantly. Whatever kind of mother I am, mother I am. This is what I felt when Lucy first came to my office. We shared—with our differences—this incessant, maddening pull. I hate its strength, its ability to arouse guilt, jealousy, and fear, especially fear. Random harm is a constant part of my consciousness; deliberate or unintentional cruelty a subconscious menace. As I listened to this client—and later to others—her exposure to me became more personal. Her otherness defined and intensified but did not destroy this shared existence. Nevertheless, to abstract meaning about motherhood from my narrow framework felt false. I was afraid that whatever I said, it would fail to capture—in any useful way—the spirit of what I had been feeling.

My concern is rooted in recent feminist theory. Undifferentiated universality has been identified as a dangerous feminist perspective. As a result of the initial and persistent efforts on the part of feminists of color, most feminists today recognize the positional experiences of women which form the bases of their particular experience of gendered inequality. This recognition parallels two other strands of feminist expression: the abandonment of grand theory as an authentic scholarly representation of women's experiences and the incorporation of narrative technique into feminist scholarship.

Martha Fineman has argued that grand theory "relies on abstractions not grounded in women's gendered life experiences."⁷³ Some feminists' attempts to create a "totalizing theory of patriarchy" have resulted not in the gendered transformation of law but in the incorporation—or subjugation—of feminist theory by the dominant legal discourse which shuns the concrete in its pursuit of universal truth. Fineman identifies the absorption of feminist sensibilities into the self-contained, self-congratulatory and self-fulfilling tendencies of the dominant legal discourse as destroying feminism's ability to offer an effective competing methodology to grand theory.⁷⁴ It is what Ann Scales has labeled "incorporationism":

73. Fineman, *supra* note 68, at 25 n.1.

74. See *id.* at 30.

By trying to make everything too nice, incorporationism represses contradictions. It usurps women's language in order to further define the world in the male image; it thus deprives women of the power of naming. Incorporationism means to give over the world, because it means to say to those in power: "We will use your language and we will let you interpret it."⁷⁵

Fineman argues that feminist theory has been ensnared in the trap of a discourse which focuses substantially on legal doctrine and results in legal reforms which fail to challenge the essentialism of neutrality and equality.⁷⁶ She offers, as a feminist alternative, a "middle range" methodology which is openly critical, experiential, gender-sensitive, and political in acknowledging its attempt to transform the dominant culture and not just the legal rules which mirror its power.⁷⁷ Nevertheless, this transformation is not intended to be immutable; in its defiance of assimilation into the status quo, it recognizes the relativity of truth over time. Its purpose is to challenge the present domination, the "tasks of the moment," and not to define the needs of the future.⁷⁸ In that way, this feminist theory is rooted in the present, concrete, experienced existence and not in the abstract of universal truth. Scales has called this "concrete universality," which reinterprets differences in three ways: "First, concrete universalism takes differences to be constitutive of the universal itself. Second, it sees differences as systematically related to each other, and to other relations, such as exploited and exploiter. Third, it regards differences as emergent, as always changing."⁷⁹

Fineman distinguishes between the multidimensional yet always gendered experience of women and the necessity of each woman representing this experience to embody the characteristics of those being represented. "It should not be the characteristics of the *speaker* which are considered most relevant but the quality and nature of that which is *spoken*."⁸⁰ She warns that the purely personal perspective that locates all experience in the individual threatens to authenticate, and thus stereotype, the speaker. The purely personal narrative encourages a selective tokenism which can result in exclusivism within the feminist community as well as the broader society.⁸¹ The concern that personal narrative can be a dangerous construct is mirrored in discussions of the growing role of narrative in legal discourse. After presenting the first part of this story at Ellmann's clinical theory workshop, I found myself plunged into two streams of thought: the abandonment of grand feminist theory and the

75. Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1383-84 (1986) (citation omitted).

76. See Fineman, *supra* note 68, at 29-30, 34-35.

77. See *id.* at 30-33.

78. See *id.* at 33-34.

79. Scales, *supra* note 75, at 1388.

80. Fineman, *supra* note 68, at 41.

81. See *id.* at 42.

appropriate use of narrative. Whatever story I had begun to reveal, I would have to consider its place in a much larger conversation.

"Whose story is this," my colleagues kept asking, "yours or your client's?" I was so engaged initially with the telling that I hadn't spent much time contemplating this question. Certainly I thought that if there were lessons to be learned from this story, they would be lessons for lawyers who represent or teach students how to represent clients like Lucy. That was my role as a law teacher. But the power of the narrative was rooted in Lucy; the convergence of factors which enabled me to translate this story into legal learning were not compelling without her. "It's such a great story," many of them suggested, "just take out all the parts about you and lawyering and send it to *The New Yorker*." I resisted this suggestion even as I imagined its cachet. I was a law teacher. Would such a writing have any meaning for me? Is this what my client would want? She knew, then, that I was working on an article about "the case." I had told her it was becoming very personal: what I thought about her, me, the whole system. She was not very interested at the time; the previous nine months were far more central to her than some article I proposed to write. I don't think she would have felt the same way, however, if I had said that I wanted to write a story about her. The trust that we had slowly developed was based on our attorney-client relationship, not my interest in "doing" a story about her life.

Susan Sheehan would publish such a story a year later.⁸² Coincidentally, the mother (and later, the daughter) in that story was also the clinic's client and our representation was described in the articles. Sheehan's ethnographic account of one family's involvement in the foster care system draws its power from the personal reminiscences of the family members and the social service and legal personnel who interacted with the family. While no story told fails to reflect its author's beliefs, this story is determinedly centered in the thoughts and actions of the people whose lives are being portrayed. Sheehan has, in fact, been criticized for not explicitly discussing the meaning of the story.⁸³ Apparently this was not her purpose. She was content to let the readers draw their own conclusions from her account.

The professional relationship I have with the clients that Sheehan portrays deeply affected my reading of their story. I became a voyeur of their lives. Annette Garrett, in her classic text *Interviewing*, warns social workers against becoming voyeuristic, insisting that all of their questions of clients be grounded in the issues being addressed.⁸⁴ When we teach

82. See Susan Sheehan, A Reporter at Large: A Lost Childhood, *New Yorker*, Jan. 11, 1993, at 54; Susan Sheehan, A Reporter at Large: A Lost Motherhood, *New Yorker*, Jan. 18, 1993, at 52.

83. See Samuel G. Freedman, Caught in a Culture of Failure, *N.Y. Times*, Oct. 3, 1993, § 7, at 30.

84. See Annette Garrett, *Interviewing: Its Principles and Methods* 32-34 (Margaret M. Mangold & Elinor P. Zaki, revisors, 3d ed. 1982).

interviewing practice, we focus on the harms of voyeurism. Reading Sheehan, I was suddenly confronted with the most intimate details of my clients' childhoods, love relationships and sexual experiences. I am uncomfortable with the knowledge: my professional ethics dictate that I learn only the information necessary to assist my client. Sheehan's purpose was different. With their permission, she opened their lives to public scrutiny. The changed identities were not intended for me. I thought the clients would also become uncomfortable. Their experiences were not only intensely personal but also included explicit accounts of domestic and child abuse, drug use, criminal actions. I was wrong. When they discussed the articles, they were proud of themselves and Sheehan. They had opened their lives to her and she had treated them respectfully. They were happy that the students who had helped them had gotten credit for their hard work. They thought their story was a good one to tell. We went on being their lawyers.

Lucy had not opened her life to me in the same way. The purpose of our professional relationship limited my inquiries and her responses. It also limits what I say here. I expect that she will ask me to revise some of this before publication but I don't think very much. I think she will recognize—though it took me very long to do so—that this narrative is about my experiences representing her, not about her.

The space between living and telling this story is where the issue of representation is situated. I do not expect that most of this story's readers are mothers or lawyers for mothers nor, even if they were, that their experience of these conditions mirrors mine or my client's. The particulars of our lives remain ours. Something about motherhood, nevertheless, came to center the way in which I worked with this client and its power began to infect the way I thought about lawyering. This did not feel like the lawyerly empathy that enabled me to listen "actively" to a client, both following and conducting the client through her tale. That respectful empathy was a learned construction with clear benefits: the client would provide more relevant information in a shorter time period if the lawyer confirmed her understanding of the client's tale during the client's telling. Empathy's thoughtfulness does not deconstruct the tale or the teller. It does not offer an alternative vision. It does not require the listener to abandon learned knowing. It is polite but not political. Empathy is an effective tool for lawyers who are trying to fit their client's story into what Christopher Gilkerson has called "universalized legal narratives." These narratives are the stories we learn in the study and practice of law that are "composed of positive elements such as rules and principles as well as dominant assumptions and stereotypes reflected in and reenforced by law."⁸⁵ Gilkerson says lawyers apply what Anthony Alfieri has called "preunderstanding" to their listening of client's stories:

85. Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 *Hastings L. Rev.* 861, 867 (1992).

fitting the client's story into the appropriate universal narrative.⁸⁶ In doing so, lawyers (and Gilkerson is particularly concerned with poverty lawyers) fail to permit their clients to tell the story the client would like told and fail to hear the entire story the client is trying to tell. For the poverty lawyer, the likelihood of the client's "otherness" in its myriad forms requires the lawyer to find the right space for that telling and hearing to go on.

What made that space available for me was a different kind of preunderstanding. Not the preunderstanding of legal rules and doctrine and societal beliefs that Alfieri and Gilkerson believe limits the effectiveness of poverty law practice, but the preunderstanding of diverse human conditions which draws its strength from the vulnerability of living. This time, it was my experience of motherhood in the face of the challenge to my client's motherhood that shook off my insularity. In that way only is it representational: not that I became a mother but that I permitted the strength of this ultimate personal experience to transform my professional role. Lucy's uncompromising insistence on being herself and, in this way, challenging multiple stereotypical notions of mothers and mothering forced me to reconsider my lawyering role. We drew, this time, on the same vulnerability.

This configuration of factors will never happen to me again. That matters only if I forget its impact; if the protective cover of repetition and bias and inertia falls again over my practice; if I don't, myself, see a representational meaning to the experience or permit myself to be vulnerable to other such representations. I sometimes wonder if the dismissal of feminist and critical theorist narratives as appropriate methods of legal discourse is not, foremost, a profound discomfort with vulnerability (which, itself, has a kind of power). After attending the first presentation of an early draft of this work, an older male colleague told me how brave I was to present it. At the time, I didn't know what he meant. Since then, I have read many legal narratives and critiques of the form. The discomfort inherent in the best legal narratives is not in their writing or analytical power: what bleeds between the lines in the most carefully constructed story is the unsettling exposure of innards.

I wondered, for a long time, about this exposure. Carolyn Heilbrun has said that women lack "a tone of voice in which to speak with authority."⁸⁷ In uncovering the difficulty in writing about women's lives, she identifies one of the bases for this missing authority: "There is no 'objective' or universal tone in literature, for however long we have been told there is. There is only the white, middle-class, male tone."⁸⁸ Legal narrative in its most powerful form today is almost never white, middle class and male. Yet it contains the two ingredients Heilbrun sees as necessary

86. See *id.* at 902-05.

87. Carolyn G. Heilbrun, *Writing a Woman's Life* 25 (1988).

88. *Id.* at 40.

for women's writing: power and anger. Heilbrun says of power: "Women need to learn how publicly to declare their right to public power. . . . Power is the ability to take one's place in whatever discourse is essential to action and the right to have one's part matter."⁸⁹ Of power and anger, she says: "And, above all other prohibitions, what has been forbidden to women is anger, together with the open admission of the desire for power and control over one's life"⁹⁰ The exposure in the best legal narratives, the willingness to defy the conventional norms of legal scholarship, conforms to Heilbrun's recommendations about a new way of writing about women's lives. What women have begun to write in law reflects the lessons of other women writers. Heilbrun says that the women poets of the mid-twentieth century "began to seize upon their own stories, and to tell them with a directness that shocks as it enlightens."⁹¹ In her struggle to understand and celebrate the role of feminist narrative in legal scholarship, Kathryn Abrams recognizes that it is the particularity of describing events in vivid detail from the inside that can be instructive. In speaking of Martha Mahoney's work on battered women, Abrams could be Heilbrun writing of Anne Sexton's poetry:

The tone of passionate engagement with the problem does not waver throughout; Mahoney identifies herself simultaneously with social and legal analysts, and with the women whose lives they study. This reflects, first, a degree of authorial freedom won by the feminist critique of objectivity: it is an act of bravery, but no longer an unprecedented choice, to acknowledge that one writes from a situated perspective. But the unity of these roles is also, I suspect, a part of Mahoney's message about denial and the complexity of the battered woman: one doesn't have to stop being a battered woman in order to be an insightful social and legal analyst.⁹²

Abrams cares that the mainstream legal education community has not examined publicly the value of feminist narrative writing. She wants this writing examined beyond the closed doors of appointments and tenure committees. She quotes Martha Minow's statement, "To be taken seriously in the business of law and legal scholarship . . . means becoming the subject of sustained criticism."⁹³ In her caring, Abrams has done a service in providing a key to understanding the feminist narrative form which appears to elude the capabilities of many legal academics. I would not have been so kind; I would have left them to be uncomfortable in their confusion, to force them to struggle, as she believes Patricia Williams does, with stories that contain "the almost unfathomable com-

89. *Id.* at 18.

90. *Id.* at 13.

91. *Id.* at 64.

92. Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971, 990 (1991) (citation omitted).

93. *Id.* at 976-77.

plexity of the human beings whom the law takes as its subject."⁹⁴ I don't blame Abrams for her work. It has its own kind of bravery because conventional academic discourse does not provide her with a ready methodology for discussing feminist narrative form. In the end, after she responds to what she believes have been the most problematic—if sometimes invalid—questions for conventional scholars (is the story "true"? is it typical? what gives this author "authority"? does it have any normative meaning? does it preclude the reader from challenging the author?), she offers an alternative route for future analysis:

It would be more productive, I suspect, to assess innovative methodology by asking the following questions: first, what factors influence the choice of narrative rather than conventional methodology and narrative's divergence from the conventions of legal argument, and, second, do the factors that account for the difference themselves yield standards by which the relationship between narrative and legal prescription can be judged.⁹⁵

Or, as Scales would posit, "This is a normative, but not illogical process. Any logic is a norm, and cannot be used except with reference to its purposes."⁹⁶ Abrams's own readings of the narrative authors she reviews are effective examples of her proposed methodological critique: she offers a considered explanation for the authors' style, tone, language and subject and then asks whether the author succeeds on her own normative terms. Abrams doesn't believe all the authors do succeed but that does not lead her to conclude that "the form of legal persuasion" they have chosen to employ lacks validity.⁹⁷ She would agree, I believe, with Scales's conclusion that "[t]he description that uses no formula, but which points to the moral crux of the matter, is exactly what we need."⁹⁸

I'm glad there are scholars like Abrams who educate the legal academic community about feminist legal narrative. Her analysis will matter when articles need to be published, appointments made or tenure conferred. And that is important for the long-term integration into the legal community of feminist, critical race, and clinical theorists who have embraced narrative. I profit from Abrams's work in this legitimizing way. Yet the true service is more consequential: it assists me in recognizing how I came to write this particular narration and how I have greedily appropriated legal reality in the way that Heilbrun, quoting Teresa de Lauretis, says that consciousness raising has appropriated reality for women in the past:

The fact that today the expression consciousness raising has become dated and more than slightly unpleasant, as any word will that has been appropriated, diluted, digested and spewed out by

94. *Id.* at 1003.

95. *Id.*

96. Scales, *supra* note 75, at 1387 (citation omitted).

97. Abrams, *supra* note 92, at 978.

98. Scales, *supra* note 75, at 1388.

the media, does not diminish the social and subjection impact of a practice—the collective articulation of one's experience of sexuality and gender—which has produced, and continues to elaborate, a radically new mode of understanding the subject's relation to social-historical reality. Consciousness raising is the original critical instrument that women have developed toward such understanding, the analysis of social reality, and its critical revision.⁹⁹

Feminist legal narrative, in using that critical instrument, has as its core purpose a validation of experience which is uncompromisingly intended to transform legal thought, and through discourse, legal practice.

V.

If the mind were clear

and if the mind were simple you could take this mind
 this particular state and say
This is how I would live if I could choose:
this is what is possible
 . . . But the mind
 of the woman imagining all this the mind
 that allows all this to be possible . . .
 does not so easily
 work free from remorse
 does not so easily
 manage the miracle
 for which mind is famous
 or used to be famous
 does not at will become abstract and pure
 this woman's mind
 does not even will that miracle
 having a different mission
 in the universe

*Adrienne Rich*¹⁰⁰

99. Heilbrun, *supra* note 87, at 45 (quoting Teresa de Lauretis, *Alice Doesn't: Feminism, Semantics, Cinema* (1984)).

100. Adrienne Rich, *What Is Possible, in A Wild Patience Has Taken Me This Far* 23, 23-24 (1981).

SURROGATE'S COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the
Adoption of A Child
Whose First Name is

Mateo

AFFIDAVIT

Lucille Parsons, being duly sworn, deposes and says:

1. I am the preadoptive mother of Mateo L. DelGado ("Mateo"). Mateo was placed in my care by Lewdown Foster Services ("Lewdown") on September 2, 1984. He has resided with me since that time with the exception of February 13, 1991 through October 24, 1991. He resides with me at present.

2. I am the subject of two indicated reports in the State Central Register of Child Abuse and Maltreatment. Those reports are listed as NYS Registry #2378AZ (Subject: Lucy Parsons; May 24, 1989) and #PL1583 (Subject: Lucille Parsons; February 11, 1991). I have never been the subject of a court proceeding alleging child abuse or neglect pursuant to Family Court Act Article 10.

3. Mateo was not removed from my care following the first report. I did not pursue any administrative remedies concerning that report.

4. On October 22, 1990, an adoption petition was filed on my behalf in this court by the attorney for Lewdown. No other papers were ever filed by this attorney or Lewdown and no docket number was ever issued. I am filing the present petition to substitute for that original petition.

5. Following the second report, Mateo was removed from my care on February 13, 1991 because I had used corporal punishment for a second time in violation of the rule that foster parents may not use corporal punishment. I requested a fair hearing concerning that removal. The removal was sustained on May 23, 1991 on the basis that the agency's decision to remove the children had not been arbitrary and capricious. No determination was made concerning Mateo's permanency planning goal or best interests.

6. An independent child psychiatrist, Dr. Jerry Taylor, began an assessment of Mateo's best interests on July 15, 1991 at the request of Lewdown Children's

Services, the Child Welfare Administration, the Law Guardian for Mateo (The Legal Aid Society, Juvenile Rights Division) and myself. On September 23, 1991, Dr. Taylor recommended that Mateo be returned to my care for the purpose of adoption. That recommendation was forwarded to the Hon. Keith Lewes of the New York County Family Court.

7. A foster care review proceeding was held before Judge Lewes on October 22, 1991. Based on all the evidence before him, Judge Lewes so-ordered a stipulation agreed upon by all parties to the foster care review proceeding. That stipulation is attached here as Appendix A. In that stipulation, the parties agreed that Mateo should be replaced with me for the purpose of adoption.

8. Mateo was replaced with me on October 24, 1991 and has lived continuously with me since that time.

9. Following Mateo's replacement with me, all the parties to the foster care review proceeding sent a letter on January 17, 1992, to the State Central Register asking that the two indicated reports be expunged. That letter is attached as Appendix B. No action has been taken on that request by the State Central Register.

10. Mateo has two brothers, Juan and Michael. As you can see from the accompanying affidavit, I am also requesting to adopt Michael. I would also like to adopt Juan but Dr. Taylor did not recommend that he be returned to my care for the purpose of adoption. Juan is now almost fifteen years old. He does not want me to adopt him and he does not want to live with me. I am facilitating visitation between Juan and his brothers and I will continue to do so after they are adopted. I hope the day will come when Juan and I will reestablish a family relationship.

11. I love Mateo and desire to adopt him as soon as possible. I have acted as his mother for nearly eight years and would like to continue to do so, as a legal parent, for the rest of my life. I believe Mateo wants to be adopted by me very much and to have me be his legal mother for as long as I live.

Lucille Parsons

Sworn to before me this
29th day of June 1992

NOTARY PUBLIC

During May 1992, a flurry of activity surrounding Mati and Michael's adoption took place. The agency completed its revised home study; Lucy had somehow been transformed on paper from stubborn, uncooperative and irresponsible to caring, insightful and independent. The home study focused on Lucy's willingness to cooperate with the terms and conditions of the settlement order, particularly by facilitating visitation among the brothers. The agency forwarded most of the necessary adoption documents to the Surrogate's Court within two weeks of the completed report. The affidavit submitted by the caseworker explaining the agency's third reversal of position on the adoption (in favor, against, in favor) incorporated the language of the settlement order practically word for word. Clearly, the agency had determined to finish its responsibilities for these children as quickly as possible. Lucy was puzzled by their sudden burst of enthusiasm. She had minimally complied with the requirements contained in the court order but had not even tried to conceal her disdain for the agency and its personnel. Another caseworker was assigned to monitor her life. Each contact with this new worker confirmed her precarious status between foster and adoptive parenthood. She refused to compromise her continuing advocacy on Juan's behalf even though she knew this advocacy could jeopardize her ability to complete the adoption of Mati and Michael. She was furious that the agency appeared simply to have cut Juan loose. Still shy of fifteen, he was drifting among the extended relatives and friends of his present foster family, attending school erratically and getting into trouble. At visits he would boast of his misdeeds to his brothers. Lucy warned him not to seduce his brothers with his tales or risk losing their visits. When she confronted the agency about their responsibilities for Juan, she was ignored or told that Juan was no longer her concern. She bristled at the agency's nonchalance toward the new foster parents' care while she remained closely monitored.

The adoption, nevertheless, proceeded. By the end of June, we had filed a new set of adoption petitions to replace the originals filed in 1990. The agency was also required to amend some of its documents and to apply for state reauthorization of an adoption subsidy to maintain payments to Ms. Parsons for the children's care following the adoption.¹⁰¹ The reauthorization was approved in September 1992 and submitted to the Surrogate. I began to call the adoptions clerk at the Surrogate's Court from time to time about scheduling a date to hear the adoption petition. The fair hearing decision, Jerry Taylor's report, the settlement order, and the new home study had been provided to the Surrogate. I knew that the Surrogate was likely to have some questions about the preceding two years so I didn't expect that she would finalize the adoption without reassurance that the papers submitted accurately reflected the boys' status. I had anticipated a lawyers' conference in chambers first; if that didn't satisfy her concerns, perhaps testimony by an agency represen-

101. See N.Y. Soc. Serv. Law §§ 450-53 (McKinney 1992 & Supp. 1995).

tative or Dr. Taylor would. Instead, she appointed a "guardian ad litem" for the boys.

Unlike the law guardian the boys shared in Family Court, the guardian ad litem was charged solely with assuring his charges' "best interests."¹⁰² His duties were not divided between protecting their interests and assisting them in expressing their wishes as the law guardian's were.¹⁰³ If the guardian determined that the boys' best interests would not be served by an adoption, he could advocate that position regardless of the children's wishes. Since the adoption papers indicated that the boys already had a law guardian in Family Court, the Surrogate could have asked that law guardian to submit a report to her. Not only would a great deal of time be saved, but the boys would not have to be subjected to yet another interrogation by a stranger. The law guardian would have done it as a courtesy to the Surrogate even though Legal Aid Juvenile Rights Division lawyers did not customarily appear in that court. The delay seemed unnecessary; I was more disappointed than concerned. I knew the guardian who had been appointed; he was well-meaning and generally approachable. He was counsel for a foster care agency that had once been responsible for a toddler that I had represented in a termination of parental rights case. Jerry Taylor had, coincidentally, evaluated the parents. We were all in agreement that the child should be freed for adoption. Both parents suffered from mental illness and were most concerned that the other parent not be permitted to care for the child. They both fought the termination out of fear that the other would somehow be granted custody of the child and therefore triumph in their troubled and complicated relationship. The professionals involved, including the new guardian, had treated the parents respectfully and kindly, recognizing that their mental illness diminished their capacity to understand the effect of their spiraling discord on their young child. While I had also disagreed with this lawyer on other occasions—especially, once, as I advocated the appropriateness of returning some children I represented to their mother—I didn't anticipate such differences here. The hardest work had been done already; once the Family Court judge had sanctioned the children's return to Lucy's care and the agency had approved proceeding with the adoption, the guardian's report would simply delay the finalization.

I waited a few days to tell Lucy the news. We had been hoping to have the adoption completed by Christmas. The children had been back home for a year. They had quickly readjusted to their routines, especially their friends and sports activities. Lucy had found a nursing position in Brooklyn. The hours kept her at work later than she wanted and the commute was long. She arrived home in the early evening now. Both she and the children regretted the need to scramble for alternative care until

102. See N.Y. Surr. Ct. Proc. Act § 403(2) (McKinney 1994).

103. See N.Y. Fam. Ct. Act § 241 (McKinney 1983).

she returned home; Lucy wasn't comfortable leaving them alone at home. The only serious problem was that Mati's learning disabilities were beginning to affect his behavior. At thirteen, he was unable to read. The trauma and dislocation of the removal had erased the little progress he had made a few years earlier. He was getting into fights and disobeying the teachers. Lucy had long argued to the agency and school personnel that Mati needed more specialized assistance than his present school could provide. She was dissatisfied with the special education evaluations administered by the public school; she began to have him tested by psychologists and neurologists at nearby Columbia Presbyterian Hospital. Her intention was to challenge the school's decision to maintain Mati in his present class. Lucy wanted him transferred to a more appropriate program or, if the program did not exist, for the school board to pay tuition at a specialized private school. The agency believed that Lucy was overreacting. Since the agency (on behalf of the Commissioner of Social Services) remained Mati's legal guardian until the adoption was finalized, she was unable to pursue this course without the agency's sanction. She was particularly anxious to banish the agency now so that she could freely pursue her plans for Mati's education. The guardian's appointment at the end of November effectively ended that hope. We could plan on early spring.

I don't know why I tried to be reassuring when I finally called after Thanksgiving to tell Lucy about the guardian. I suppose I believed what I was saying about this being a temporary set-back but I was recycling old platitudes for a client whom I knew would dismiss them. After the call, I chastised myself for trying to hide behind meaningless words. Even if my lawyerly experience suggested that we shouldn't worry about this guardian's role, I needed to acknowledge more directly both her disappointment in the delay and the potential harm his appointment could cause. I knew better than to overlay the effect of the guardian's appointment with my tepid reassurances. If nothing else, I should have learned this from representing Lucy for two years.

SURROGATE'S COURT OF THE
STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the
Adoption of
A Child Whose First Name
is

Michael

Docket No.

Affirmation in Support of
Motion to Substitute
Guardian Ad Litem

JANE M. SPINAK, deposes and says:

1. I am an attorney duly admitted to practice in the State of New York and a member of the Columbia Law School faculty. In that capacity, I am the Director of Morningside Heights Legal Services, Inc. ("MHLS"), a clinical program of Columbia Law School. This affirmation is based upon personal knowledge or information and belief.

2. MHLS has represented the petitioner, Lucille Parsons, since March 12, 1991. In June 1992, I filed an adoption petition on behalf of Ms. Parsons asking that this court permit Ms. Parsons to adopt Michael and his brother Mati. In November 1992, Adrian P. Marcus was assigned as Guardian Ad Litem ("GAL") for Michael and Mati and was asked to submit a report to the Surrogate on behalf of his charges' interests in the adoption proceeding.

3. In discharging that duty, Mr. Marcus conducted two meetings with Ms. Parsons. I was not present at the first meeting. At the second meeting, I was present and witnessed Mr. Marcus's behavior. As a result of that meeting, I have filed the attached motion requesting that a substitute GAL be appointed for this proceeding.

4. Mr. Marcus's conduct at the second meeting was not befitting a GAL. In his attempt to gather information about the children and Ms. Parsons, Mr. Marcus was antagonistic and rude. He raised his voice to Ms. Parsons, repeatedly interrupted her, and treated her as if she were a hostile witness. He slammed his pencil down on his desk several times while demanding an answer, shook his head or threw his hands into the air in disgust. He often used the same gestures in response to something I would say. If I would try to summarize or rephrase what I thought was a confusing or extended answer of Ms. Parsons's, he would sometimes talk right over what I was saying or begin a new question.

At other times he just stared at me until I finished speaking and then proceeded as if I had never uttered a word. This mode of interaction continued with little variation throughout a meeting that lasted nearly two and one-half hours.

5. Ms. Parsons was devastated after we left the meeting. She could not understand why Mr. Marcus had been so belligerent and disrespectful during the meeting. While she understood that Mr. Marcus was asked to report to the Surrogate about the adoption and was required to investigate any issues he identified as relevant, she did not think he had been authorized to demean her by ordering her to answer questions and cross examining her as if she had committed a crime in order to complete his investigation. Even if Mr. Marcus ultimately reported that he would not recommend the adoption, she did not believe this gave him license to degrade her.

6. The events leading up to this second meeting and the meeting itself must be described fully in order to explain the basis for making such an unusual request. The request is grounded in the belief that the role of the GAL is to nurture and defend the interests of the children and to investigate their relationship with their pre-adoptive parent in the least intrusive and most respectful manner. Mr. Marcus's total failure to assume the proper role of GAL or to understand the effect of his behavior on his ability to provide a reasoned and careful report to the Surrogate fully justifies the step of substituting a new GAL for Mr. Marcus.

7. Following Mr. Marcus's appointment as GAL, he met with Ms. Parsons and Michael and Mati at his office in March 1993. Following that meeting, Mr. Marcus requested that Linda Marchese, a social worker, interview Ms. Parsons. Ms. Parsons had no objection to speaking with Ms. Marchese and the meeting took place in April 1993, for approximately an hour at Ms. Parsons's home. Mati was also at home during that meeting; no other person was present.

8. In May 1993, a foster care review proceeding was held to extend the foster care status of Michael and Mati. Mr. Marcus observed that proceeding in his role as GAL. Michael and Mati were represented by their Law Guardian, Allen Polson, Esq., of the Legal Aid Society, Juvenile Rights Division ("JRD"). Mr. Polson replaced the children's previous law guardian, who is no longer employed at JRD. He had recently interviewed the boys and had informed the judge that Michael and Mati continued to

want to be adopted by Ms. Parsons. Since all parties had agreed to continue foster care pending the finalization of the adoption proceeding, Ms. Parsons did not take off a day from work to attend the proceeding. I represented her on that date and consented to continued foster care on her behalf.

9. Immediately following the foster care proceeding, Mr. Marcus requested that I meet with him and Ms. Marchese at a later date to discuss the conditions necessary for the adoption to be completed. He said that he had some concerns that he would like to resolve. I informed Mr. Marcus that I was happy to meet with him and Ms. Marchese with my client present. I explained to him that Ms. Parsons would want to participate in any discussion which addressed concerns Mr. Marcus may have about the boys or about the adoption. I explained to him that if he had any reservations about the adoption, it was very important for Ms. Parsons to hear them so that she would be able to address those concerns either at that time or through some later action that he recommended. I stated explicitly that I did not want to act as a go-between nor did I think that Ms. Parsons would permit me to play that role as her counsel.

10. Mr. Marcus agreed that Ms. Parsons could attend the meeting. During the next few weeks, the meeting was scheduled for June 24, 1993 at 5:30 p.m. I informed Mr. Marcus's office that I might bring the social worker on our staff to the meeting; there was no objection. As the date approached, however, I thought it would be wiser to ask Dr. Jerry Taylor to attend the meeting. Dr. Taylor had done an assessment of the family in 1991 on behalf of all the parties in an earlier foster care review proceeding and had forwarded that assessment to the Hon. Keith Lewes of the Family Court. A copy of that assessment was submitted with the present adoption petitions. Given Dr. Taylor's familiarity with the family, I thought his presence would assist in resolving any outstanding issues. Dr. Taylor and Mr. Marcus are well acquainted professionally.

11. On June 24, 1993, I was scheduled to appear in Queens Family Court at 2:00 p.m. The case was not called until 5:10 p.m. At 5:20 p.m., I called Mr. Marcus's office to inform him that I was leaving the court and would try to reach his office as soon as possible. I arrived at his office at 6:40 p.m. Ms. Parsons, Dr. Taylor, Ms. Marchese and Mr. Marcus were all waiting for me; Dr. Taylor had another

appointment at 7:00 p.m. and would only be able to remain for ten minutes. We began the meeting anyway.

12. As soon as we were all seated, Mr. Marcus asked Ms. Parsons to leave the room so that the rest of us could discuss the case first. I reminded Mr. Marcus that I had specifically stated that Ms. Parsons wanted to attend any meeting concerning the children and that she was prepared to hear anything he or Ms. Marchese had to say, regardless of how negative or unflattering it might be. I reiterated to him that the children had lived with Ms. Parsons most of their lives, that she considered them her children and that she felt that anything that needed to be said about the adoption should be done in her presence. I explained to him that I had already told Ms. Parsons everything he had previously conveyed to me about his and Ms. Marchese's concerns. I also reminded him that he and Ms. Marchese were only the latest in a long line of professionals who had intervened in her and the children's lives and that to gain her trust, it was important for him to respect her wish to hear directly those concerns.

13. At that point, Mr. Marcus demanded that Ms. Parsons leave the room. Raising his voice, he stated emphatically that, as the children's GAL, he had the authority to order her to leave and that he would refuse to discuss anything more in her presence until he had an opportunity to speak first to me, Ms. Marchese and Dr. Taylor. In order to facilitate the meeting, and thinking that perhaps some issue had arisen that was so serious that Mr. Marcus could not address it in Ms. Parsons's presence, I reluctantly requested that she leave the room. She did so, exhibiting a shocked and confused countenance but saying nothing other than "Do I have to?".

14. As soon as Ms. Parsons left the room, Mr. Marcus stated that he could not proceed with the discussion in Ms. Parsons's presence because of her hostility toward Ms. Marchese at their earlier meeting. I reminded him, yet again, that I had already told Ms. Parsons that Ms. Marchese had thought Ms. Parsons was hostile toward her and that I thought that was one of the issues we would address today. I said that it would be difficult to do that now that Mr. Marcus had embarrassed and antagonized Ms. Parsons by demanding that she leave the room. He responded by saying that Ms. Parsons had to realize that she would have to cooperate or she would be unable to adopt the children. I said that she had come to the meeting to do just that. Mr. Marcus then stated that he also wanted to

discuss whether Ms. Parsons was using any form of corporal punishment with the children. Again I stated that since he had earlier raised that issue with me, it was now necessary for him to raise it with her.

15. Dr. Taylor then indicated that he would have to leave. Mr. Marcus asked Dr. Taylor what he thought about Ms. Parsons using corporal punishment. Dr. Taylor said that he would be surprised if some forms of corporal punishment were not a part of Ms. Parsons's discipline of the children. He stated, however, that he did not believe that Ms. Parsons would use any form of excessive corporal punishment or abuse the children in any way. He also stated that he believed strongly that even if Ms. Parsons were using corporal punishment, the adoption should be finalized.

16. Mr. Marcus then asked Dr. Taylor whether, if Ms. Parsons were using corporal punishment or, alternatively or in addition, Ms. Parsons were hostile to Ms. Marchese, didn't that indicate that Ms. Parsons was trying to sabotage the adoption? Dr. Taylor responded that such an interpretation may be true in some cases, but that given Ms. Parsons's love of and commitment to the children, he did not believe that this interpretation applied in this case. He said that, unlike many people, Ms. Parsons did not hide her feelings in order to accomplish her goals. While that may be an unpopular and at times unwise way to act, it was her personality and not more. If she did not like Ms. Marchese, for example, she would not hide her feelings in order to play along. He concluded that you may not like her personality but that should not jeopardize the adoption. It just meant she had a difficult personality.

17. Dr. Taylor rose to leave. I asked whether Mr. Marcus and Ms. Marchese thought it would be useful for Dr. Taylor to see the children again since he had not interviewed the boys in almost two years. They both agreed that Dr. Taylor should see them as well as Ms. Parsons. Ms. Marchese asked Dr. Taylor whether he would have difficulty interviewing Ms. Parsons; Dr. Taylor responded that he did not know why but that Ms. Parsons had always been open and forthcoming to him. He did say, however, that it was important to leave a substantial amount of time for the interview because Ms. Parsons was quite digressive.

18. Following Dr. Taylor's departure, Ms. Parsons returned to the meeting. At that point I recounted to her what had occurred during the previous ten minutes.

19. I then asked Ms. Marchese if she would like to discuss her concern about Ms. Parsons's hostility with her. Ms. Marchese said that she did not understand why Ms. Parsons should be hostile. I said that Ms. Parsons had had many social workers intervene in her life and that it was difficult for her to trust new professionals who were asking her the same questions that she had been asked previously. Ms. Parsons agreed. Ms. Marchese then asked why should she be hostile if the professionals were trying to help. Ms. Parsons and I both stated that it wasn't always clear who was trying to help and who was not; that was why it took time to trust someone. Ms. Marchese then stated that she believed Ms. Parsons had deliberately scheduled another appointment on the day that Ms. Marchese had visited her and that when Ms. Marchese asked her questions about using corporal punishment, Ms. Parsons refused to answer. Ms. Parsons replied that she had just been given the name of a potential school for Mati to attend and, given that this was her only day off, she had to visit the school on that day or she would be unable to visit it until the following week. In the meantime, Mati would not be in school. She had not intended to cut short the visit or to refuse to answer Ms. Marchese's questions.

20. Mr. Marcus then stated that Ms. Parsons had not cooperated with Ms. Marchese in scheduling appointments because she refused to meet with her on any day but Wednesday. Ms. Parsons said that Wednesday was her day off and that it was very difficult to take other days because she had had to take many days off in order to attend school conferences and administrative hearings about Mati. She was concerned about jeopardizing her job. I asked what was wrong with Wednesday. Mr. Marcus said it wasn't a good day for Ms. Marchese and that she had even offered Sunday as a good faith effort. I reminded Mr. Marcus that Ms. Parsons is an observant Catholic and that Sunday was considered a religious and family day. Ms. Parsons said that she would try to reschedule her day off to accommodate Ms. Marchese.

21. In an attempt to refocus the meeting on what Mr. Marcus wanted Ms. Parsons to do toward finalizing the adoption, I said that I knew he was concerned about the fact that the family had stopped family therapy but that Ms. Parsons had made efforts to begin again. I said that they stopped in December 1992 after having attended since the previous January or February. Ms. Parsons explained that she believed in December 1992 that there were no pressing issues that seemed to indicate a need to

continue. At the time she informed the therapist that they would no longer attend as a family, the therapist did not tell her that Mati could not continue in individual therapy (Mati was seeing another therapist individually in the same program). Approximately one month after the family stopped attending, Mati's therapist called to say that he could not continue in the program as an individual if the family wasn't also in separate family therapy. Ms. Parsons replied that there were no pressing family issues, that she preferred not to use her one day off to attend and that Mati should continue if he needed to.

Ms. Parsons stated to Mr. Marcus that at no time did the therapist insist that the family should continue or even urge Ms. Parsons to do so so that Mati could continue. Ms. Parsons stated that since she anticipated that Mati would soon be in a special education program that would include therapy, she decided to wait until the new school program began. When the school process began to take longer than she had anticipated and Mati had started having a behavioral problem at school as well, she decided to register him for a program she had heard about at Harlem Hospital near their home. This was in April 1993. After going through the referral process, Mati was accepted. After attending a few sessions, however, Mati insisted that he would not attend any further sessions. He did not like the therapist and refused to speak with him. Ms. Parsons called a psychologist she knew at Columbia Presbyterian Hospital, Dr. Suarte, and asked her advice. Dr. Suarte recommended another program at Columbia Presbyterian but informed Ms. Parsons that Mati could not apply until July 1993 when the new residents began their rotation. Ms. Parsons explained to Mr. Marcus that since July was a week or so away, she will now start this referral process.

22. At this point, I said that in retrospect, Ms. Parsons would not have stopped the family therapy so that Mati could have remained in the program. Mr. Marcus then turned to Ms. Parsons and asked her if she would affirm the exact words I had just said. Ms. Parsons did not understand what he meant. He repeated it, raising his voice and insisting that she affirm every word I had said. She began to explain, in her own words, how she felt about having stopped the therapy when she did. He cut her off, insisting that she affirm only what I had said. I asked him to stop cross examining her and trying to make her affirm what I had said, to give her an opportunity to explain in

her own words. He refused to let her speak; he insisted that she affirm my statement and that she not change a single word of what I had said. I finally said that I saw no reason to continue discussing the issue in this fashion.

23. The last major issue Mr. Marcus raised was the use of corporal punishment. Ms. Parsons stated that she does not hit the children. She said that she uses physical force at times to push, pull or shove them but that she does not hit them with a flat hand or fist. She also uses punishments such as taking away possessions or not permitting them to do certain things. Mr. Marcus said that Michael said that she hit him. Ms. Parsons said that a day or two after Michael and Mati met with Mr. Marcus, Michael had told her that he had told Mr. Marcus that his mother hit him eight times. Ms. Parsons asked Michael why he had told that to Mr. Marcus and Michael responded that it was because Mr. Marcus had asked him so he picked a number and told Mr. Marcus that was the number of times he was hit. He picked eight. Mr. Marcus, however, indicated that that was not what Michael said. Mr. Marcus stated that in the middle of asking Michael other unrelated questions, he asked Michael if his mother ever hit him. When Michael said yes, Mr. Marcus said that he quickly changed the subject and asked Michael nothing more about it. I asked Mr. Marcus why didn't he pursue Michael on the issue to clarify what Michael meant. He said that he didn't want to get into it with Michael. He also said that Mati had said nothing about being hit. Ms. Parsons explained to Mr. Marcus that she was concerned that Michael would say something like that and she would like to know what might have prompted such a response. Mr. Marcus did not respond to Ms. Parsons's question.

24. By this time, over two hours had passed and it was almost 9:00 p.m. I said that unless there was something new to discuss, I saw no reason to continue the meeting. Mr. Marcus agreed. I asked if Ms. Marchese wanted to see the children and Ms. Parsons; she said she did and would call Ms. Parsons to set an appointment. Ms. Parsons went to make a phone call. I said to Mr. Marcus that I would appreciate his completing his report as soon as possible; I said that I hoped he would submit a favorable report and that the adoption would not be contested. We then left the office.

25. As I described previously, Ms. Parsons and I were both shocked by Mr. Marcus's conduct. In retrospect, I believe that when he began to behave in an intimidating and

inappropriate fashion, I should have recommended that Ms. Parsons and I leave the meeting. Not having done that, and having had an opportunity to reflect on the meeting and discuss it with Ms. Parsons, we both concluded that requesting another GAL would be in the children's and Ms. Parsons's interests. Ms. Parsons is fearful of meeting with Mr. Marcus or of discussing the adoption further with him. She is now also distrustful of his meeting with the children; she is particularly concerned that he may act in the same manner with them.

26. Mr. Marcus is not acting in the children's best interests. Regardless of his ultimate position on the adoption of these children, he has a duty to proceed in the most careful and respectful way. Mr. Marcus is aware that the children's and Ms. Parsons's lives were substantially disrupted with the children's removal from and replacement in Ms. Parsons's home. The trauma surrounding this disruption has been well documented in agency records and Dr. Taylor's independent evaluation. Any attempt to reevaluate the appropriateness of the children's replacement with Ms. Parsons must be carefully pursued to minimize any further trauma to the children or Ms. Parsons. Furthermore, it should proceed on the assumption that the children's present legal guardian (the agency on behalf of the Commissioner), the law guardian (Mr. Polson), and the independent psychiatric evaluator (Dr. Taylor) did not lightly come to the determination that the adoption was in the children's best interests. Any reevaluation must begin with that presumption.

27. The children's best interests would be served by appointing a new GAL. Allen Polson, who has represented the children most recently in Family Court, is already familiar with the children and the circumstances of the case. The children would not be required to meet yet another new person and repeat, yet again, the story of their lives. In addition, a social worker in Mr. Polson's office has been actively involved with this case since the time of the children's removal from Ms. Parsons in February 1990. She has met the children and Ms. Parsons on numerous occasions and would be able to assist Mr. Polson in preparing his report.

28. The children's best interests would also be served by having Dr. Taylor conduct a supplementary evaluation. Since the agency, the Commissioner of Social Services and Judge Lewes relied substantially on Dr. Taylor's evaluation prior to consenting to the children's return to

Ms. Parsons, Dr. Taylor would be able to provide the most informed reconsideration of the issue.

29. These children have the right to permanency. They have a right to be let alone to get on with their lives. The swift appointments of Allen Polson as their GAL and Dr. Taylor to reevaluate their present living situation would facilitate this Court's ability to determine quickly and finally whether they will be adopted by Ms. Parsons.

Jane M. Spinak

Dated:

New York, New York

I never sent this affirmation. It could not have achieved its purpose which, only on one level, was the change of guardians. Beneath the restrained numbered paragraphs was the rage that both Lucy and I felt as we left Mr. Marcus's office that evening and I drove her home. Was that rage palpable in the affirmation? When Mr. Marcus read these words, would he have recognized that June evening? In her recent writings on Sylvia Plath, Janet Malcolm muses about a letter that Malcolm wrote but did not send. She says, "But I feared that she would not read the scene as I had read it, that she would tell me that her own experience of the moment had been entirely different and that I had my nerve attributing motives and feelings to her that she did not have."¹⁰⁴ That fear for me was compounded by the realization that the sending would have been a public act: before the court we would have offered our competing renditions. Lucy, Dr. Taylor and Ms. Marchese would have been required to provide their perspective. And even then, I wasn't sure that the real meaning underlying the written words would be exposed. Lucy and I believed that Mr. Marcus's behavior reflected a kind of bigotry that was so well-shrouded in professional garb that if we wrote or later testified that he had exhibited blatantly offensive racist and sexist behavior, no one would believe us. Malcolm says of the unsent letter,

The preservation of the unsent letter is its arresting feature. . . . By saving the letter, we are in some sense "sending" it after all. We are not relinquishing our idea or dismissing it as foolish or unworthy (as we do when we tear up a letter); on the contrary, we are giving it an extra vote of confidence. We are, in effect, saying that our idea is too precious to be entrusted to the gaze of the actual addressee, who may not grasp its worth, so we "send" it to his equivalent in fantasy, on whom we can absolutely count for an understanding and appreciative reading.¹⁰⁵

Malcolm actualizes her fantasy when she publishes the letter as part of her study of Plath. I do it here. The decision not to send the affirmation was made after long discussions with the two lawyers upon whom I depend for legal advice: my husband Warren Scharf and my clinic colleague Philip Genty. The likelihood of satisfaction on any level was slight. Both agreed that the Surrogate would be very unlikely to address the real meaning of Mr. Marcus's behavior: that he had acted in a discriminatorily offensive way. Judges would have few lawyers to assign if this behavior were considered as something more than inappropriate or unnecessary. These were serious allegations against another lawyer: Were they defensive tactics to protect the adoption from his scrutiny? Were these feminist ravings concocted by two overly sensitive women? Could we dare to call someone a racist who had simply treated us offensively? Wasn't this a bit much? In determining whether a discriminatorily abusive work environ-

104. Janet Malcolm, *The Silent Woman—Part III*, *New Yorker*, Aug. 23 & 30, 1993, at 134, 146.

105. *Id.*

ment violates statutory requirements for workplace equality, the Supreme Court has recently stated:

This is not, and by its nature cannot be, a mathematically precise test. . . . But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.¹⁰⁶

I imagined that a parallel argument using the totality of the circumstances surrounding Ms. Parsons's encounters with the guardian would have to be designed to justify his removal on the grounds that he had been discriminatorily offensive rather than just professionally inappropriate. Months would pass while we argued; the adoption would certainly be delayed if not actually threatened. I was scheduled for a sabbatical leave in six months. What if we were unable to resolve this issue in six months? Could Lucy possibly accept another lawyer? Could I?

The guardian's behavior still felt more offensive than dangerous. There was a strong presumption that the adoption would be completed; Jerry Taylor was not likely to change his mind when he reevaluated the family. Allegations of such consequence, however, would certainly revive questions of Lucy's competence to parent these children. Voicing her allegations of victimization would challenge her authority as a mother as she had suddenly challenged this lawyer's professional authority. If asked her opinion of Mr. Marcus and most of the other professionals to whom she had submitted, she would not have hesitated to express her disdain and, in many cases, abhorrence. She hated the legal system which had sullied her life for such a long time now; she distrusted almost everyone she encountered—judges, lawyers, agency personnel—and she would be unable not to say so. In the face of this defiance, even with Jerry's immaturity, the presumption of her as the adoptive parent would be rebutted.

The cost of sublimating the desire to seek justice for the ultimate claim cannot be measured. A student once reported that her client wanted to ask that the supervising caseworker in her child's foster care agency be removed from the case. The client felt the supervisor was offensive, denigrating the client's position as the child's mother. The student had dissuaded the client from making the request until the student and I could discuss its ramifications. The child was scheduled to be returned to her mother in the next few months and the mother was only partially complying with the agency's conditions for discharge. The student was fearful that even if the request were granted, the heightened scrutiny of the case that might result could jeopardize the agency's willingness to discharge the child. The student needed to counsel the client about this possibility. I warned the student, however, about the danger of

106. *Harris v. Forklift Systems*, 114 S. Ct. 367, 371 (1993).

substituting her priorities for the client's. The client had to determine whether to take the risk; the lawyer was unable, ultimately, to know the effect of the decision. The student's very good reasoning about the possible effect had to be tempered by the possibility that the empowering action the client wanted to take could enhance the client's ability to conform to the agency's conditions. I told her that the cost for the client of not seeking fairness was real, even if unmeasurable.

When Lucy and I had weighed the options and agreed not to file the motion, there was a kind of diminishment in her that saddened me. If she were never an easy client, she was always an inspiring one. Her refusal to play the part commanded my respect. I knew in how many ways we were alike: my willingness to express my feelings on issues that mattered to me and my dismissal of others' "principled" positions, which I have often believed are really dressed up personal and political views, have often worked against my interests. Lucy and I frequently express the anger that Heilbrun has said "has always been a terrible hurdle in women's personal progress."¹⁰⁷ We have both sought the power over our lives that is both public and private, which does not divide us against ourselves. But Lucy's resistance has both a greater courage to it and a greater risk. It can't be just some stubbornness that makes this Black woman defy playing her assigned role.

Dorothy Roberts has effectively established that issues of motherhood cannot be considered outside the context of racism. Conceptions of good and bad motherhood are uncompromisingly entwined, not just in the primal condition of slavery, but in the racist policies and stereotypes which have been its legacy: forced sterilizations, removal of Black children from their families based on childrearing patterns divergent from the dominant configuration of the nuclear family, the creation of the Black welfare queen and the preguant Black teenager.¹⁰⁸ Roberts says,

Most white mothers do not know the pain of raising Black children in a racist society. It is impossible to explain the depth of sorrow felt at the moment a mother realizes she birthed her precious brown baby into a society that regards her child as just another unwanted Black charge. Black mothers must bear the incredible task of guarding their children's identity against innumerable messages that brand them as less than human.¹⁰⁹

They must guard themselves as well. It is a great resistant power for Lucy not to pretend she is someone less than who she is. If Jerry Taylor is right, why must she be someone else to raise these children; the woman who has been their mother for eight years is this woman. What is she really being asked to surrender for the sake of her children?

107. Heilbrun, *supra* note 87, at 25.

108. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *Am. U. J. Gender & L.* 1 (1993).

109. *Id.* at 4-5.

The sacrificing mother is a powerful totem. Deep in Western consciousness lives the Biblical mother—do we even remember her name—who would relinquish her child to another rather than see it killed. This ultimate sacrifice led King Solomon to determine that this mother must be the true mother of the child for only a true mother would make such a sacrifice. I have often heard lawyers and judges wonder why mothers faced with “facts” that prove that the interests of their children would be best served by their being cared for or adopted by other parents continue to insist that the children should be returned to them. What are the lessons of maternal sacrifice that they have defied?

The clinic has represented a young mother, Anthea Martin, for the past three years. She came to us initially because she feared that the agency caring for her child wanted to terminate her parental rights. She was very distrustful of the agency. She had been cared for by the same agency off and on since she was nine years old. She was convinced that the agency would never assist her to care for her daughter; they wanted her to surrender her daughter for adoption. She was seventeen, living in a shelter and about to enter a drug treatment program. Her child had been born two years earlier as a result of a statutory rape. Termination proceedings may be brought on a number of grounds in New York.¹¹⁰ In this case, the agency was alleging that Martin had failed to plan for the future of her child despite the agency's diligent efforts to assist her.¹¹¹ If the agency establishes this “failure to plan,” a dispositional hearing is then held to determine if the best interests of the child would be served by terminating parental rights and freeing the child for adoption or by planning with the parent for reunification.¹¹² The two students assigned to represent Martin valiantly attempted to preclude the initiation of the termination proceeding. First they tried to cooperate with the agency to develop a plan for their client's reunification with the child. After many months, the agency finally refused to consider reunification. One of the students graduated and the other began to work on her own. She tried to convince the court to dismiss the termination proceeding because it would have two possible results: either it would be a waste of time or it would destroy any possibility that Martin would be able to work with the agency toward reunification with her daughter. She argued, first, that even if the agency were able to establish that Martin had previously failed to plan, in the end, given Martin's current relationship with her daughter, the court would be likely to determine that the child's best interests would be served by reunification. Second, she urged the court to avoid a lengthy and extremely adversarial proceeding which she believed would destroy Martin's and the agency's ability to work together toward reunification even if the court believed that reunification was in the child's best interests. She tried to convince the judge that the standard process

110. See N.Y. Soc. Serv. Law § 384-b(4) (McKinney 1992).

111. See *id.* § 384-b(4)(d), (7).

112. See N.Y. Fam. Ct. Act §§ 611, 623, 631 (McKinney 1983).

should be reconsidered in light of its capacity to imperil Martin's ability ever to draw on the system which was created to assist her. She was asking the court to see the way the system worked from her client's perspective and to consider its destructive impact on this particular client at this moment in time. The judge refused to reach the merits of the motion; it was dismissed as having no basis in law. That dismissal is the unsent guardian ad litem affirmation, just as it is White's tortured attempt to reconfigure Mrs. G.'s shoes story. These accounts have yet to find a place, a basis in law, for their telling.

Marie Ashe, in a recent article has recommended that clinical law teachers, whose clinics represent parents (especially mothers) in maltreatment cases, expose their students to literary narratives that portray stereotypical "bad" mothers.¹¹³ Ashe's laudable goal is to undermine the destructive effects she believes this negative stereotype has on the student lawyer's ability to represent this kind of client; it is another example of challenging a lawyer's preunderstanding of the client. She believes the stereotype of the bad mother interferes with basic lawyer tasks: critical inquiry into the "facts" of the case, client-centered decisionmaking, and zealous advocacy for the client's wishes. The lawyer's notions about good and bad mothering can lead to potential or real moral devaluation of the client who faces charges of improper parenting and, as a result, to inadequate representation.¹¹⁴ Ashe is concerned, as I am, that the stereotype can lead to an exaggeration of the harmfulness of the mother's actions on her child, to an easy acceptance of the prosecuting attorney's characterization of that harm, and to a failure to determine the extent to which the harm is being caused by socioeconomic and cultural policies beyond the mother's control.¹¹⁵ Ashe chooses as her example the character of Sethe in Toni Morrison's *Beloved*.¹¹⁶ Sethe, on the verge of being recaptured with her children by her slave master, cuts the throat of her eldest child and attempts to kill the other three.¹¹⁷ Ashe believes that the novel reveals the "utter inadequacy of the 'bad mother' stereotype" by inquiring into "who she is; what motivates her; what are the consequences of her acts or omissions; what is the moral value of her acts?"¹¹⁸ Sethe's story, for Ashe, offers "an insistence and a strongly persuasive account of the complexities of certain maternal experiences out of which apparent 'bad mothers' may emerge and act."¹¹⁹

I don't believe Sethe provides a useful representational figure for these students to study. She is the inverse of the "true" mother in

113. See Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 *Hastings L.J.* 1017, 1018 (1992).

114. See *id.* at 1021.

115. See *id.* at 1020-21.

116. Toni Morrison, *Beloved* (1987).

117. See Ashe, *supra* note 113, at 1025.

118. *Id.* at 1022-23.

119. *Id.* at 1028.

Solomon's dilemma: she would sacrifice her children rather than return them to the life of slavery. When I read *Beloved*, I thought this was an ultimate act of motherhood, reminding me of Sophie's decision to keep one child alive at the expense of the other in William Styron's *Sophie's Choice*.¹²⁰ These mothers' acts force us to confront our own personal moral structure, to wonder what we might do as individuals when challenged by horrifying dilemmas. These acts, which arise out of moments of extreme terror, fail by themselves to provide representational lessons for the more tempered (yet nevertheless harsh) reality of these client/mothers' daily existence.

The two students who represented Anthea Martin understood that their client was neither good nor bad. They recognized the complexity of her life and tried to translate this recognition into legal arguments to maintain her motherhood. They failed—as I later failed after they graduated—in their attempt to offer a more complex vision of this young woman to the other parties and the judge. What impressed me profoundly was their unwillingness ever to see their client in the way the agency, its lawyers and the court saw her. They had achieved Ashe's goal of defying the effects on their representation of the conscious or unconscious stereotype of the bad mother; they worked hard with their client to transcend the particular bunch of beliefs that typically translated into a set preunderstanding of her. While they were clearly saddened and depressed by her/their/society's inability to protect her from drugs and maltreatment and by the impact this had on her children, they never once collaborated with all the "helping" personnel and the agency attorneys by accepting a kind of professional kinship of knowledge about their client. Never a wink or a sigh or "well, you know," to acknowledge that whatever they said as advocates, they knew what "kind" of mother she really was. I carried with me their tenacious resistance to the easy characterizations of the single, teenage minority mother through the termination proceeding long after they had said goodbye to their client. By the time I had to write a summation, I had represented both Lucy Parsons and Anthea Martin for a number of years. I wanted to capture all of the resistance I felt—from these mothers, from my students, in myself—to the facile generalizations about our clients. I wanted to write a summation which dared the judge to do the same. Amid the necessary structural arguments and citations, I tried, as Mark Fajer has suggested, to attack the judge's preunderstanding directly, to "disarm and disable the sense judges might otherwise have that what they believe is objectively 'true.'"¹²¹ Ironically, when I failed in this challenge, I felt a greater disappointment: not only had I lost for my client in the legal sense but my attempt, as Fajer would say, to "animate the particular discrimination" I

120. William Styron, *Sophie's Choice* (1979).

121. Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 527 (1992).

was challenging, "to provide evidence that the preunderstanding is either incorrect or is a vastly overinclusive generalization,"¹²² to offer what I believe was ultimately a portrait the client would have been able to recognize of herself and the legal system controlling her in all its complexity, nevertheless failed to disarm the judge. Martin remained, this time, just another example of an irresponsible teenage mother.

What my students, and later I, faced when we represented Anthea Martin was a mother, like most of the mothers that we represent, whose decisions and actions could not easily be characterized by moments of extreme moral determination. Rather, they are mothers caught in the daily requirements of parenting, often unable or unwilling or unaided in their attempts to care for their children. It is the details of their lives understood in an historical and sociological and cultural context that enable students to break down stereotypical notions of "good" or "bad" mothers in order to represent them. I agree with Ashe that they must learn to recognize the essential complexities of their clients' lives. The more students understand the ways in which their clients' children are housed, clothed, fed, schooled, doctored or nursed, played with, minded, disciplined, and entertained, the better they will represent the parent attempting to accomplish these things. They need to read Dorothy Roberts's series of articles on motherhood and racism¹²³ and Linda Gordon's historical study of child abuse¹²⁴ and Susan Sheehan's account of three generations of mothers with children in foster care¹²⁵ and Carol Stack's sociological study of Black kinship structure.¹²⁶ They need to integrate the Children's Defense Fund's statistics about poor and minority families in our rich country¹²⁷ with the stories their clients tell about their everyday lives. They need to read critically the accounts of clients given by judges in their decisions; they need to understand the hierarchy in which their clients are judged. But I don't think most of my students have to "perceive moral worth" in their clients in order to "act in ways that [they] . . . find morally satisfactory" as Ashe proposes.¹²⁸ These complexities need not translate into examples of moral agency to justify representation shed of the worst examples of stereotyping. My disagreement with Ashe is not with her choice of literary narrative to communicate a

122. *Id.*

123. See Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 Conn. L. Rev. 871 (1994); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tul. L. Rev. 1945 (1993); Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95 (1993); Roberts, *supra* note 108; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419 (1991).

124. See Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* (1988).

125. See Susan Sheehan, *Life For Me Ain't Been No Crystal Stair* (1993).

126. See Carol B. Stack, *All Our Kin: Strategies for Survival in a Black Community* (1974).

127. See Children's Defense Fund, *The State of America's Children Yearbook* (1995).

128. Ashe, *supra* note 117, at 1021.

sense of women's lives as mothers. What concerns me is that her desire to find something defined as moral worth in these women reinforces the very stereotype she hopes to eradicate.

We don't stop being ourselves when we become mothers. We may be more or less than we were before. We may fight against notions of what makes us mothers or we may embrace them. We make choices or we don't get choices and we try to live with the consequences. Lucy's attempts to remain herself make her neither a good nor a bad mother. They are part of who she is; she is not some other mother. For all our similarities, I would have made different choices, for myself, for her. But I have come to understand how the choices would reflect how and why we aren't the same: not as women, not as mothers, not as attorney and client. If I had been asked to give the same, if I could ever be asked that, I would not have suffered the same. The deep racist history that has defiled Black motherhood, that has made race a component of the bad motherhood stereotype, cannot be ignored in considering her choices. Lucy was trying to hold on to all she was: her bow to the state had more meaning than mine ever would. Her subordination, as Lucie White had warned,¹²⁹ would perpetuate society's complacency about a system which so degraded her. If I felt force, I could always pretend to be the ideal mother. But, as Dorothy Roberts has said,

Black women can never attain the ideal image of motherhood, no matter how much we conform to middle-class convention, because ideal motherhood is white. The maternal standards created to confine women are not sex-based norms which Black women happen to fail. They are created out of raced, as well as gendered, components.¹³⁰

This echoes Angela Harris's insight that "by defining black women as 'different,' white women quietly become the norm, or pure, essential woman."¹³¹ In making her choices, Lucy lived consciously what Audre Lorde has written:

Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you, we fear our children will be dragged from a car and shot down in the street, and you will turn your backs upon the reasons they are dying.¹³²

In what appeared to be her unjustifiable attempt to defy the Solomonic image, Lucy was, perhaps, just reminding us that no matter what she did, she would never, could never be the good mother. And so, instead, she remained herself.

129. See *supra* text accompanying notes 34–40.

130. Roberts, *supra* note 108, at 15–16.

131. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581, 595 (1990).

132. Audre Lorde, *Age, Race, Class and Sex: Women Redefining Difference*, in *Sister Outsider* 114, 119 (1984).

VI.

It simply won't do to be telling a story and have it trail off, or break up, or have another story poke its nose in. When you tell a story, you make a choice. That's the story you're telling. It could have been otherwise, but it isn't.

*Richard Sherwin*¹³³

In February, three years will have passed since the children were removed from Lucy's care. Now it is the end of December and I am leaving for England. Michael and Lucy arrive at my office to say goodbye. I haven't seen them for a few weeks since we sat in the Surrogate's chambers with Mati and Mr. Marcus and the boys told the Surrogate what it means to be adopted. Whatever it means, it is done. Jerry completed his second evaluation and urged that the adoption be finalized as soon as possible. Once the evaluation reconfirmed Jerry's initial recommendation for adoption, Mr. Marcus filed his report, urging the same result. Neither Mr. Marcus nor Ms. Marchese, his social work consultant, interviewed Ms. Parsons or the boys again. In late November, it appeared that the adoption would not be completed before the new year. I had been assured by the adoptions clerk that all the necessary papers had been filed but they hadn't been. At least three documents were missing, including a report from the State Central Register stating that Ms. Parsons had not been the subject of any other child maltreatment reports since the children had been returned to her. And now the clerk was ill and no one was available to replace her. Word was that the Surrogate would schedule no further adoptions in 1993.

Unlike other trial level courts, few people frequent Surrogate's Court in lower Manhattan. The court's business is mostly with trusts and estates and if there are actual litigants, they are rarely needed in the courthouse. The stately Beaux Arts building echoes the occasional footfall of someone searching for the hidden elevators. Offices are all concealed behind milk-glassed closed doors. Clerks sit in rooms piled with unfiled cases. Each time I open one of those doors and peer across those piles to the lone person sitting at a paperless desk, I shudder at the similarities between the scene and Dickens' *Bleak House*. Family Court has the advantage of having to clear out the people who fill its bowels everyday. Even if the judge does nothing more than pass the case on to the next date, the lawyer (and sometimes even the litigant) usually has the chance to catch the judge's attention. In the eighteen months since I had filed the adoption papers in Surrogate's Court, I had only seen and spoken to the adoptions clerk. She had given me the wrong advice and now she was gone and no one was taking her place. The literary legacy was feeling remarkably real. Even if I managed to secure the rest of the needed documents,

133. Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 *Stan. L. Rev.* 39, 40-41 (1994).

neither Lucy's wish to have it all done before Christmas nor my wish to see it through to the end would be granted.

When I look back at the case, I am struck by how much we had to prove. Jerry's determination that a fundamental relationship existed between Ms. Parsons and the two younger boys enabled her to reconstruct part of the family. But without Jerry's imprimatur, Juan was lost. He calls her still, seeking approval or testing his continuing ability to anger or dismay her. She remains, if unofficially, his only parent. I know we would have been "luckier" if she had not been so adamant in her refusal to cooperate with the system. Can I blame her for trying to hold on to both her essential nature and the children? Five days before the adoption took place, the agency wrote her a letter saying that she had failed to attend scheduled meetings or to file some necessary documents. What the letter said wasn't technically true but that didn't matter. It was the fact that she wouldn't ever accommodate them that had engendered the threat that if she did not cooperate immediately, they would reopen an investigation of her care of the children. Any other foster parent, on the verge of completing an adoption, would have been cheerfully chided for forgetting some minor details. She was threatened again with a city investigation.

We were, though, finally lucky. When the adoptions clerk fell ill, I was told to contact the Surrogate's law clerk. I told him about our desire to complete the adoption before my departure (Lucy had already given up on Christmas). He said he doubted the Surrogate would be willing to schedule a special time for the adoption so near to the holidays but he would review the papers and let me know. I wasn't hopeful; if Lucy had maintained her integrity, the price each time had been a strict conformity to the rules. No exceptions were ever made for her. The law clerk would see the complications sewn into the fabric of the case and—even without knowing her—would see no reason to rush his boss into a final decision. What difference would a few more weeks make? He didn't do that, though. At the end, we enacted the breathless twists found only in a popular romance novel. Having read the documents, he didn't see why the adoption couldn't be completed. The next day he became ill. From home, he found another court clerk familiar with adoptions to ensure that all of the necessary papers had been filed. One was still missing and we spent a day rushing around state offices getting the right forms. Then the Surrogate was reluctant to rearrange her calendar. The law clerk told me to find an hour when Mr. Marcus would also be available. I did. At seven in the evening, long after the court offices were usually closed, the law clerk called to say that we should come to court the following morning at eleven. He thought—but couldn't promise—that the adoption would be heard. Maybe he would know for sure in the morning. I called Lucy with the news. Adoptions are usually scheduled several weeks in advance. The children and parents wear new clothes, extra film is purchased for cameras and relatives and friends plan parties. Even the

final celebratory preparation was denied this family. I told Lucy to keep the children home from school and to meet me at the court at ten-thirty. The logistics of travel would prevent me from reaching her with a final answer before she left for court. At nine-thirty the next morning I knew the adoption would be completed but they didn't. I grabbed a camera, stopped at the florist for corsage and boutonnieres and hid both just in case something else went terribly wrong. It didn't. Lucy signed some papers and we were told to wait until the Surrogate could see us. I took out the flowers. For five minutes we sat in the Surrogate's chambers while she asked Mati and Michael if they understood what adoption meant. Reassured that they did, she signed the papers. We took some pictures and went out to lunch. We smiled a lot and I wondered what they were feeling; I couldn't imagine.

A few weeks later I left the country for six months. When I returned—and while I was away—there was more to do. I keep waiting for the story to end. I forget still that these are lives and the story doesn't end, just the telling. I've done enough telling now, for me and for Lucy. We go on, a little wiser for the living and the telling.