

February 2021

Timing, Fragility and Children's Law

Robert V. Hannaford

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Robert V. Hannaford, Timing, Fragility and Children's Law, 69 Denv. U. L. Rev. 593 (1992).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

TIMING, FRAGILITY AND CHILDREN'S LAW

ROBERT V. HANNAFORD*

Last April, Ripon College's ABA Family Law Section conference, "Family Law and the 'Best Interests of the Child,'" focused on two fundamental questions: (1) what elements of family life are most important to children's moral development and (2) how are these elements relevant to family law and public policy? Although these questions could not be fully answered in any conference, they suggest that law and public policy should aim to protect and secure those elements most important to children's moral development. The discussion of children's moral development was unusually productive during the conference and produced legally relevant questions regarding the importance of understanding the elements of children's moral development.

Pediatric psychiatrists, clinical and experimental psychologists and moral theorists presented evidence and arguments which supported this basic point: Caretakers must treat infants as responsive and concerned for others and give consistent and loving nurturing if children are to attain a sense of identity and self-esteem. Otherwise, children will lack the means for communicating and establishing relations with others and for determining how to control their own impulses. If children lack these qualities, they are more likely to become delinquents. Moreover, caretakers should themselves be morally concerned and responsive so that children's moral development is enhanced by example and guidance. In sum, children need loving, consistent caretakers who provide an example of acting with respectful concern for others and who place moral demands and expectations on them from infancy onward.

Although conference participants continued pressing for their individual cherished views of family as the best means to *secure* the essential elements of children's moral development, a consensus as to *what those elements are* soon formed. This consensus owed a great deal to the general agreement of observers from a variety of disciplines regarding a new awareness of the importance of the elements of timing and fragility to children's moral responsiveness. Until recently, both lawyers and moral development theorists spoke and acted as if our treatment of infants and toddlers made no great difference to their moral development. For example, lawyers often spoke of children's "best interests" as if they were property rights, treating children as if they were chattels disposed of strategically in divorce settlements.

At the same time, child development theorists, such as Jean Piaget and Lawrence Kohlberg, proceeded from the assumption that toddlers and infants were egoistically self-absorbed. These theorists believed

* Professor of Philosophy, Ripon College.

that infants and toddlers had neither concern for, nor the ability to understand, others' intentions and purposes.¹ In Piaget's highly influential study of the language of Swiss pre-school children, he asserted that the young child does "not attempt to place himself at the point of view of his hearer," for the child's egoism is "complete and unconscious."² In another study, Piaget argued an infant's perception cannot differentiate one person from the rest of the world.³ To Piaget and Kohlberg, toddlers' "moral responses" are little more than mere expressions of feelings.⁴ From Piaget's and Kohlberg's assumptions, it follows that children must be amoral and exploitative until they develop new intellectual capacities and broader interests. These most influential studies of children led to the general belief that it would be a mistake—it would be unscientific—to treat pre-schoolers as sensitive and responsive to others' interests or needs. Any efforts to begin early work toward infants' and toddlers' moral development would be wasted.

Conference participants provided abundant evidence and reasons for calling Piaget's and Kohlberg's assumptions into question. For example, conference participants provided evidence that an infant (1) noticed when its caretaker showed concern; (2) responded with delight to loving attention; (3) failed to thrive when no concern was shown and (4) followed and responded to the caretakers' intent in simple interactions. How could this be if the Piaget-Kohlberg account had been correct? These and other observations called into question the accounts of Piaget and Kohlberg and showed how moral development is crucially dependent on the early care and treatment of infants and toddlers.

This Article focuses on the philosophical arguments drawn from action theorists, which call into question the assumptions of Piaget and Kohlberg regarding children's moral development.⁵ Action theorists study how beliefs, desires and intentions are involved in human action, including communication and language use. Action theorists' work im-

1. Jean Piaget, *THE LANGUAGE AND THOUGHT OF THE CHILD* (Marjorie Gabain trans. 1955). Kohlberg patterns his six stages of moral development after the stages presented by Piaget. Kohlberg's definition of stage one of moral development, which characterizes responses of youngsters up to age 10, holds that for persons in this stage: "There is no differentiation between the moral value of life and its physical or social status value." 1 LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* 118 (1981). Even his stage two is described as a case in which the "[v]alue of a human life is seen as instrumental to the satisfaction of the needs of its possessor or others." *Id.* However, this is a position that Kohlberg does not hold with complete consistency; he also states that "[a]t every stage, children perceive basic values such as the value of human life and are able to empathize and take the roles of other people and other living things." *Id.* at 143. Still, his repeated theme is that young children act only out of self-concern and respond only to the threat of punishment at the earlier two stages. Moreover, he urges that it is a mistake to attempt to treat children at the earlier stages as if they were capable of responding out of empathic concern. A number of people offered decisive criticism of this position in the conference. See MICHAEL PRITCHARD, *ON BECOMING RESPONSIBLE* (1991).

2. See generally Piaget, *supra* note 1.

3. See generally JEAN PIAGET, *THE CHILD'S CONSTRUCTION OF REALITY* (1958).

4. 1 KOHLBERG, *supra* note 1, at 118.

5. My focus will be on philosophical arguments drawn from action theorists. A detailed discussion of all the arguments presented at the conference is beyond the scope of this Article.

plies awareness of, and concerned responsiveness to, others' intentions and actions are conceptually necessary to a toddler's moral development. Current psychological observations support the argument of action theorists that this responsiveness, or attentive concern for others, is fundamental to our moral anatomy and is with us from earliest infancy. Observers from various disciplines agree that a child's moral responsiveness is dependent on the quality of attention given to its moral development.

These new philosophical arguments rest on the conception that morally responsible people are accountable and responsive to others. By this conception, a morally responsible person must: (1) be able to give an account of his or her actions; (2) have acquired moral language by which to describe actions; (3) be able to describe motives and ascribe them to others; (4) be able to give acceptable moral reasons for actions and (5) be prepared to act in ways that are morally permissible or required.⁶ Thus, at the center of our moral development is responsive concern, or the capacity to respond to another person out of interest and concern. These five characteristics of a morally responsive person will be considered in turn.

The first characteristic concerns accountability and holds that a responsible person is able to account for his or her actions as well as answer questions and give reasons for these actions. In order to do this, a responsible person must be able to describe actions in language understood in the community, recognize what others include in the description and know particular actions belong under that description.⁷ This is a conceptual, not an empirical, point: To be accountable (by our common understanding of the notion), an individual must know how to describe actions and, to be responsible, must also aim to achieve some result when engaged in voluntary action.

The second characteristic concerns the ability to view one's actions as similar to those of other community members. As pointed out by P.F. Strawson, in order to describe one's own actions, one must be able to ascribe the same intent to oneself as one ascribes to others. States of consciousness can only be ascribed to others by identifying others as subjects of experience and possessors of states of consciousness.⁸ There must be some identifiable, observable criteria to ascribe states of consciousness if language is to be intelligible for people generally, or if intentions or subjective states are to be communicated. As Donald Davidson noted, individuals must describe their own purposes and situations in a language that can be applied to others.⁹ Strawson explains

6. While other characteristics of the morally responsible person might be cited, these five carry considerable philosophical agreement and rest on mutually supportive arguments.

7. See, e.g., Daniel Dennett, *Conditions of Personhood*, in *PERSONAL IDENTITY*, 175, 191 (Amelia Oskenberg Rorty, ed., 1976).

8. P. F. STRAWSON, *INDIVIDUALS, AN ESSAY IN DESCRIPTIVE METAPHYSICS* 100 (1959).

9. DONALD DAVIDSON, *PSYCHOLOGY AS PHILOSOPHY: ESSAYS ON ACTION AND EVENTS* 229-34 (1980).

that we must see the connection between the first and third person application of language.¹⁰ We must see ourselves as persons like others. If I correctly describe myself as melancholy or angry, the words "melancholy" and "angry" must mean the same things as when applied to others. Hence, to acquire the ability to apply personal predicates and descriptions to my own behavior, I must identify others' intentions and determine these intentions are similar to my own.¹¹ As Lawrence Blum notes, self-knowledge cannot be sharply separated from knowledge of others.¹² To develop self-descriptive language, a person must be able to reason about others' intentions and must, in some measure, conceive of him or herself as a person among persons with motives and intentions like others' to develop any language to describe his own actions.

The "first person criteria," the criteria for applying words describing conscious states, must correlate with the "third person criteria," the criteria for words describing the same states in others. This ability to conceive of oneself and other persons must be a matter of degree. It does not come to everyone all at once or in equal amounts. Some emotions and intentions are understood by the very young while others require more human relations and world experience. A toddler may recognize anger or hurt, while only more mature persons can correctly identify and describe jealousy or ambition in themselves and others. We are (and should be) held responsible in various degrees, partially because we are capable of understanding ourselves and others in various degrees that change as we acquire a clearer conception of ourselves and others through acquiring language. In learning language, an individual must be interested in, and attentive, to other persons, for it is from those persons that the individual acquires the language with which to describe feelings and situations.

The third characteristic concerns the ability to describe motives in language understandable to the community. Some words we learn to describe states of mind are words by which we ascribe motives and give general reasons, words that must have the same meaning for others as for ourselves. For example, in order to describe my own penitence or impartiality, we must know how those terms are tied into others' intentions and actions. To learn these words, we must (1) understand others' intentions; (2) compare these intentions and motives with our own; (3) master language to describe actions; (4) give reasons for these actions and (5) compare these reasons with others' reasons. Once again, self-knowledge is tied to attention to, and knowledge of, others.

The fourth characteristic concerns an individual's ability to compare reasons, to know what are good reasons and evaluate those reasons. To be accepted as adequate, reasons must be relevant to the conclusion reached and proceed from morally acceptable motives. By our common

10. STRAWSON, *supra* note 8, at 100.

11. Lawrence Blum, Particularity and Responsiveness, in *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN* 316 (Jerome Kagan and Sharon Lamb, eds., 1987).

12. *Id.*

understanding, if we are correctly described as acting responsibly, our reasons for acting must be acceptable to impartial judges generally. To understand the reasons for acting, actions must be described in general, intelligible terms. But a central feature of understanding actions is understanding whether the action is permissible in society. Until an individual recognizes whether actions are acceptable to others in the moral community, an understanding of the true effect of these actions is incomplete. An individual must view these actions as an impartial spectator to acquire and correctly use moral language in order to articulate actions as permissible. Until this language is mastered, one cannot describe or clarify one's own purposes or plans of action.

It follows that a person who projects responsible plans of action, must to some degree, master the moral language with its matrix of acceptable reasons and permissible actions. A person does not understand the language of reasons until he or she learns how the reasons apply and how the acts and reasons supporting them are perceived as affecting others and oneself. Thus, once again, moral reasons rest on the language of self-description, which requires a conception of oneself as a person among persons with the ability to focus alternately on his or her own and others' interests and purposes.

Some might object to this argument by asserting that we cannot know that this quest for moral reasons is indeed universal for all cultures. While it is common enough in our own culture for people to be ignorant of their reasons for acting, nonetheless, we agree that people should have relevant reasons. If someone fails to give a reason for hitting another or the reason is irrelevant (e.g., "I hit him because his eyes are green"), our culture will not accept the action as valid. The action must be suited to the situation and the supporting reasons relevant to the situation in order for the reasons to be adequate. Otherwise, we blame the persons for their inadequate reasons.

The concept of blaming is part of every human culture and involves the giving of reasons. When we blame someone, we judge that individual as having acted wrongly in some identifiable particular. Whoever blames (with adequate reason) must be able to identify the particular feature that makes the act wrong and give reasons in support of the blaming judgment. Whoever cannot identify the specific feature that makes an action wrong has not made a clear or reliable judgment. To be valid reasons, their relevance must be clear to members of the general community. Giving and assessing reasons are features of every culture;¹³ the characteristics necessary to give and assess reasons must equally be a feature of our moral anatomy.

Agreement as to others' moral reasons involves agreement as to

13. See Richard Shweder, Elliot Turiel, and Nancy Much, *The Moral Intuitions of the Child*, in *SOCIAL COGNITIVE DEVELOPMENT: FRONTIERS AND POSSIBLE FUTURES* (John Flavell and Lee Ross, eds., 1981).

their motives and intentions. Thomas Nagel and Richard Peters¹⁴ explain how those whose motives we accept as responsible are those who exhibit some concern for others. These observations are similar to Herbert Fingarette's description of responsibility as a specific kind of care.¹⁵ Theorists, such as Roger Beehler, note the link between caring for others and prescriptive moral language¹⁶—that is, specific criteria for moral language exists and these criteria include the requirement of caring about one another, just as specific criteria exist for language describing colors (such as "red"). Thus, caring is a central factor in moral reasoning. To be acceptable, our reasons must, at a minimum, indicate we have considered others. We must know how others view a situation and what motives they will accept. We must recognize what it means to be a person in the process of communicating about and judging our and others' actions.

On one hand, the notion of "good reasons" implies the notion of a community of moral reasoners whose agreement gives at least a prima facie sanction of one's judgment. On the other hand, "good reasons" implies the notion of acceptable motives, or acting out of deference or concern for others' desires and intentions. Although some theorists argue all our motives are selfish, our language condemning selfishness shows that one's motives in acting will not, as a rule, be acceptable if one shows no concern for how one's acts undermine others' interests. The component of selfishness will be condemned, perhaps as "heedless" or "greedy," perhaps as "callous" or "ruthless," but condemned in any case.

Moreover, as many have argued, to act voluntarily to protect others' moral rights, some concern must be shown for those whose rights are protected. A morally responsible person takes his or her self-description from society, responding to its demands as reflected in its moral language. Choosing one's identity in this way is an expression of regard for its members. Having concern for others and seeing oneself as a person among persons must, in some degree, *be with us from infancy*. It is part of the process by which we become morally responsible. Without concern and attention to others' interests, children could not learn language with which to describe their situation. Without the language, they could not achieve self-knowledge nor offer reasons in support of their choices. Thus, in a language-using and reason-giving community, mutual awareness and concern must pervade moral relationships.

Toddlers must learn to use the moral language. Infants possess this reciprocating awareness and interest in others as observed in their earliest learning of social relationships. This awareness and interest—the abilities and responses of an infant—are vividly suggested in the following description by the father of a newborn:

14. THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970); RICHARD PETERS, *REASON AND COMPASSION* (1973).

15. HERBERT FINGARETTE, *ON RESPONSIBILITY* (1967).

16. ROGER BEEHLER, *MORAL LIFE* 32 (1978).

Thirty minutes after her birth, my daughter was already taking my measure. She lay in my lap, startlingly alert, scanning me as I scanned her, our gazes moving about each other's bodies, limbs, faces, eyes, returning, then locking. The same thing happened, I soon noticed, as she lay cradled in my wife's embrace, this locking of gaze into gaze. And it was only gradually that the wondrous mystery of that exchange began to impress me—for even an hour ago my daughter's eyes had been sheathed in undifferentiated obscurity—and now what captured their attention? Other sets of eyes . . . of all the possible objects of attention, what is so naturally compelling about two dark pools of returned attention.¹⁷

Observations of infants show a parallel kind of interest.

Part of our fun and our philosophical interest in baby-watching comes from seeing an infant's delight and excitement grow with the appearance of its mother, perhaps beginning to cackle and to pedal its feet in the air, as she engages its eyes, and then seeing the delight with which it imitates her moves. Our fun comes in witnessing their communication and in seeing the baby's demonstration of its awareness of its mother and its delight in her. Our philosophical interest is drawn to its concern for her and its lively interest in others, but it is especially drawn to the baby's delight in entering into little games with its mother and others. For *in order to play* a game, a baby must recognize what the other person is up to, what kind of rule is to be followed.

We may feel our own observations are inconclusive because we cannot be sure we are reflecting on the same kind of mother-child interchange. But if there is doubt on that score, we can turn to some of the filmed studies that have been used in support of attachment theory.¹⁸ In these studies, mothers are filmed playing with and caring for their babies. In one such study—an extensive one—the mother-child relationship was filmed during the first twenty weeks of the infants' lives. From studying the films, the authors report that, from the first, the mother takes on facial expressions, motions and postures indicative of emotion, as though she and her baby were communicating . . . Most mothers, in sum, are unwilling or unable to deal with neonatal behaviors as though they were meaningless.¹⁹ But of course, if the earlier discussed Piaget-Kohlberg view were correct,²⁰ infants' behavior would be

17. *Talk of the Town*, THE NEW YORKER, Mar. 9, 1987, at 25.

18. "Attachment theory" is perhaps too grand a term; it consists of a series of studies begun by John Bowlby, and taken up by Mary Ainsworth and her followers, which show how infants become "attached" or psychically bonded to loving caretakers. Mary Ainsworth's account of how an infant's pattern of behavior comes to form a system, in which a securely attached child of 12 months takes its caregiver as a base for explorations, sharing and growth. See MARY AINSWORTH, PATTERNS OF ATTACHMENT (1978). See also ATTACHMENT IN THE PRE-SCHOOL YEARS: THEORY, RESEARCH AND INTERVENTION (Mark Greenberg, Dante Cicchetti and Mark Cummings, eds., 1990).

19. T. Betty Brazelton, B. Kosloski & M. Main, *Origins of Reciprocity* in THE EFFECTS OF THE INFANT ON THE CARE GIVER 49 (Michael Lewis and Leonard Rosenblum, eds., 1974).

20. I KOHLBERG, *supra* note 1, at 118.

meaningless in the sense that it could involve no mutual caring relationship between caretaker and infant.

The account of the filmed study continues, describing how the mother's treatment initiates a reciprocal caring relationship with the infant through which it learns to play, and hence, communicate. The mother treats her time with the infant as a time for communicating, adjusting the complexity of her behavior to fit the infant's stage of development. She presents behavior as a model for the infant. She imitates its activity, enlarging upon it, and it delightedly enters into the play. Thus the infant "becomes aware of his action, visualizing her imitation of it and reproduces it for himself again. As he does so, he has the opportunity to add on to it . . . (in part) by modelling his behavior to match the enlarged version."²¹ After observing mothers with their newborns over a 20-week period, the authors concluded that *both* mother and child were learning rules for their interaction, rules "which were being constantly altered by each."²²

In films of infant attachment made by the investigators, we see that the child's capacity for seeing what its mother is doing and responding to it requires that the child see her intent and reciprocate, knowing she will see its intent and respond to it: reciprocity and taking the view of the other is essential to the play. There is a kind of game in which the mother does this, the infant does that, then the mother does another thing (in accord with a pattern), or it might be a case of imitation in which *if* the mother does this, then the infant does this also. In either case, there is a kind of rule generation involved in the communication: the infant knows how to take the mother's intention, knows what she has in mind for it and knows that she will also know how to take what it does. So the infant must have an awareness of its behavior as falling under what it takes to be intended for it. Thus, contrary to what Piaget and Kohlberg would lead us to expect, at the age of four weeks (when one can definitely say that such play begins) we see, in primitive form, the abilities that are described as necessary to moral personhood in the philosophical literature—down to and including the beginnings of self-consciousness. The infant's self-consciousness is not consciousness of behavior as falling under a verbal description that is known to the infant, but it is consciousness which it uses in its game with its mother and on which it builds in subsequent play and learning.

Both parties possessed a consuming interest in the other partner to the play. Investigators report that in looking at films of four-week-old infants, they could look at any segment of the infant's body shown on the film and detect whether he was watching an object or interacting with his mother because the child's attention was quite different if vocalizing, smiling and using motor behavior in response to inanimate stimulus as opposed to the mother.²³ Thus, we find in primitive form, not

21. Brazelton, *supra* note 19, at 74.

22. *Id.* at 73.

23. *Id.* at 53.

only the ability to gain insight into another's desires and intentions (required for moral reasoning), but also the understanding of intentions, an indication of the concern for others that enters into moral motivation, according to the foregoing account of our moral anatomy. The infant's consuming interest in others appears at a time when the infant could not calculate what would serve its own future interests: the interest it exhibits is in others' delight and response. Moreover, the concern—the interest and delight in others' activity and responses—is an important factor in the mother-child games in which the infant begins to develop moral capacities. The games begin and attachment is formed through the infant's first interest in others, which is apparently heightened because of mother-child games. In those interchanges we observe its first exercise of capacities that will be required in order for it to develop rational competence. Thus, the interest shown in others is not a lapse from some rational calculation of self-interest. The interest, the responsiveness, must be there for the reasoning to begin. It is in us from the beginning, waiting to be channeled into the many determinate kinds of concern and respect that figure in moral action and reasoning.

Such interchanges mark peaks of cognitive performances for an infant of under six months old. But the child builds on that beginning. Other studies, made of children from six months to one year old, show during that period the child is more likely to become involved in activities turning on such reciprocity and mutuality.²⁴ If given a caring environment during this time, it will be likely to be working out what a number of investigators describe as a secure attachment. This attachment is characterized by the child's preference for its caretaker, shown by its heightened interest directed toward her or him and by the frequency with which it takes care to establish eye contact with her or him. It is also characterized by its initiating interchanges with the caregiver and by what investigators describe as trust.

Our philosophical interest in attachment is drawn to the point that the child can only become attached through an already present responsiveness and ability to read others' intentions. It is as a result of the attachment that it moves toward limited autonomy and independent satisfaction in its activities and becomes more responsive toward others. A number of observers of child development support these conclusions and suggest the child's relation to other members of the family is crucial to that development. Martin Hoffman is among those who have called attention to toddlers' ability to take an interest in, and to interpret, others' intentions. He noted that very young children are able to learn about social rules through conversations between family members about their feelings and inner states.²⁵ Judy Dunn reports that two-year-olds grow in their ability to anticipate others' feelings, to under-

24. See *infra* notes 25-26 and accompanying text.

25. Martin Hoffman, *Empathy, Role-Taking, Guilt and the Development of Altruistic Motives* in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH & SOCIAL ISSUES* 124 (T. Likona ed., 1976).

stand others' intentions and to understand and communicate about social rules. She observes that such children . . . take part in conversations about others' feelings in the second year; they play and show interest in the cause of such feelings. While they are not able to make judgments about complicated hypothetical moral dilemmas, she writes "they are very close to being able to assign responsibility for family transgressions, to make choices about whom to support in family disagreements and to use this understanding . . ." ²⁶ Moreover, their preparedness to act out of concern for others seems not to be a matter of fixed phases or stages, as both Piaget and Kohlberg claim, but is instead related to the concern exhibited by other members of their family. Dunn notes that as parents were more intense in their concern in discussing the importance of not hurting others, children were more likely subsequently to be sympathetically aroused and helpful in response to others' distress. Then too, she finds that toddlers with close, affectionate relations with their siblings show an earlier development of the ability to role-play, to act as conciliator and to cooperate with others.

Thus, family members' concern about others and their feelings for the child are instrumental in introducing the child to a sense of membership in the larger moral community. The family's interest in providing moral education is an important feature of the child's moral development *from infancy*. A philosophical perspective on child development that focuses on a child's learning and using moral language will hold that a child comes to apprehend moral meaning through observing and using moral language in action, a process that can only take place through its *entering into* relationships of mutual concern in the moral community. It must learn what it means to share and to wait one's turn. The evidence of attachment theory and of other observers support this view. Attachment theory evidence suggests, contrary to much of the psychological opinion of the past, that a child's earliest human relationships (as well as its subsequent learning) are made possible by its concern for others and its awareness of their concern and their intentions both for itself and for others. ²⁷ Other psychologists observing child development now report that a toddler exhibits the responsiveness that moral relations require—in the ability to see itself as like others, as a person among persons. It is worth noting that the toddler can do so because members of its family have insisted on it entering into moral relationships; by insisting that it not hurt others, that it share, that it wait its turn, that it respect others' rights.

On the other hand, the fact that abused and neglected infants often fail to develop (if they survive) or develop into violent and aggressive children indicates that the process of moral development is a fragile one, one where timing is all important.

One of the most essential elements of family life is the caretakers'

26. Judy Dunn, *The Beginnings of Moral Understanding*, in *THE EMERGENCE OF MORALITY IN YOUNG CHILDREN*, *supra*, note 11, at 91-110.

27. See generally AINSWORTH, *supra* note 18 and accompanying text.

evident concern about others' rights and their fair treatment: their loving, consistent, and stable nurturing and their introduction of the child into their micro community of mutual respect and concern. As the development process is shown to be fragile and timing critically important, let us hope the law attends to those elements.

As I have no training in the law, I am not competent to proceed from these points to suggest specific changes which should be made in law or court procedure. But speaking broadly, I, or anyone, can mention some of the more important points which are indicated. The timing and fragility of a young child's moral development mean that we have stronger reasons for providing for its moral development than we have for either parent's custodial rights. The courts must work within a small window of time. Clearly it cannot postpone providing for the child's interests in favor of its parents whose claims are more forcefully presented by their lawyers.

Indeed, unless parents can provide the requisite consistent, loving, nurturing moral guidance, there is no reason they should be considered to be *eligible* for custodial rights. The foregoing implies that the family's importance to the child's best interests is its ability to provide the requisite conditions and the parents' biological relationship to the child is irrelevant to their being able to provide an acceptable claim to the custody of the child. It seems clear the law's definition of "family" should be shaped around that point.

As no prospective caretakers could produce decisive evidence that they would be able to provide such care on a continuing basis, there is no reason for treating custody decisions as single, final decisions. Rather, they are matters which require monitoring and continuing review. Moreover, the monitoring can only be intelligently reviewed by someone who understands the complexity of the developmental process and its relation to family life. Thus, special qualifications of education and training should be attached to the position of family court judges or to whatever court officer is empowered to review and decide such cases: we require a whole new set of criteria of eligibility for family court judges or the court officers to whom such authority is delegated.²⁸

28. I do not propose that these are all of the changes which need to be made, but they are the substantive ones. These changes are essential to providing for the well-being of children whose destinies are affected by courts' decisions.

