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Children are at risk for many reasons. As Professor Straus has reported to this Symposium, most adults in the United States accept the degrading violence of corporal punishment, with its dangerous potential for escalation, as a routine aspect of discipline and socialization.[1] Overwhelming numbers of children live in poverty.[2] Parental resources are sorely strained by unemployment and disability.[3] The parental role is devalued[4] and often assumed with-

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1. Murray A. Straus and Carrie L. Yodanis, *Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children*, 2 U Chi L Sch Roundtable 35, 38 (1995) (finding that nearly all parents frequently use corporal punishment on toddlers and that over half continue the use of corporal punishment into adolescence).

2. See Donald J. Hernandez, *America's Children: Resources from Family, Government and the Economy* 265 (Russell Sage, 1993) (finding that in 1988 22.3 percent of white children and 52.6 percent of black children lived in relative poverty and that 14.3 percent of white children and 14.6 percent of black children lived in near-poor frugality); Manhattan Borough President's Advisory Council on Child Welfare, *Failed Promises: Child Welfare in New York City; A Look at the Past, A Vision for the Future* 24 (1989) (finding that one-third of all New York City children live below seventy-five percent of the poverty line).

3. See Hernandez, *America's Children* at 357 (cited in note 2) ("Changes in fathers' employment or disability status for white and black children were associated with 39-40 and 15-25 percent, respectively, of the transitions into or out of official poverty, while changes in mothers' employment or disability status were associated with 16-22 and 27-33 percent, respectively, of transitions in the rates of official poverty."); The William T. Grant Foundation Commission on Work, Family and Citizenship, *The Forgotten Half: Pathways to Success for America's Youth and Young Families* 15-22 (1988) (documenting a "new depression" among America's young families).

4. See Maxine L. Margolis, *Mothers and Such: Views of American Women and Why They Changed* 184 (California, 1984) (arguing that child care and homemaking account

out preparation[5] or planning.[6] Alarming numbers of parents are impaired by addiction[7] or mental illness.[8] These problems are exacerbated by the absence of universal health care[9] and the absence of an effective social safety net.[10] Moreover, some adults whom children encounter are sexually irresponsible[11] or simply cruel.[12] Government has a legitimate obligation, if not a constitutional duty,[13] to protect the youngest members of the national community

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for twenty-five percent of the gross national product but are devalued by government agencies and courts). See generally Jessie Bernard, *The Future of Motherhood* (Penguin, 1974).

5. Parenting training is, for the most part, provided only after parental failure rather than as a regular part of elementary and secondary school curricula. The Carnegie Task Force on Meeting the Needs of Young Children, *Starting Points: Meeting the Needs of Our Youngest Children* 36 (1994).

6. See Charlotte F. Muller, *Health Care and Gender* 176 (Russell Sage, 1990) (reporting that for women interviewed in 1982-83, "39.6 percent of all births [to married or previously married women] were either not wanted at conception or came sooner than wanted").

7. See The Vera Institute of Justice, *The Vera Institute Atlas of Crime and Justice in New York City* 41 (1993) (finding that in New York City "babies born to women admitting cocaine use increased from 625 in 1985 to 3,168 in 1989" and fell to 2,239 in 1991).

8. See Linda Whobrey Rohman, Bruce D. Sales, and Mimi Lou, *The Best Interests of the Child in Custody Disputes*, in Lois A. Weithorn, ed, *Psychology and Child Custody Determinations* 59, 90 (Nebraska, 1987) (finding that two-thirds of divorced parents suffered moderate to severe psychological problems during marriage).

9. See Hernandez, *America's Children* at 256 (cited in note 2) (finding that in 1986 thirty-five percent of the poor, twenty-two percent of the near-poor, and seven percent of the middle class were without health insurance); Permanent Judicial Commission on Justice for Children, *Report to Chief Judge Sol Wachtler* 2 (1992) (finding that twenty percent of poor children in New York are not covered by Medicaid or other health insurance).

10. See Manhattan Borough President's Advisory Council on Child Welfare, *Failed Promises* at 34-35 (cited in note 2) (finding that the number of treatment programs for addicted parents is inadequate); id at 46-47 (documenting the inadequacies of social services for families at risk for foster care placements); id at 32-33 (reporting foster care placements as a result of homelessness); Permanent Judicial Commission, *Report to Judge Wachtler* at 2 (cited in note 9) (finding that sixty percent of poor three to five year olds receive no publicly-funded preschool services).

11. See, for example, Barbara Snow and Teena Sorenson, *Ritualistic Child Abuse in a Neighborhood Setting*, 5 J Interpersonal Violence 474 (1990) (describing incest and ritual sex rings in which children were victimized by religious and community leaders); Max Sugar, *Abuse and Neglect in Schools*, 44 Am J Psychotherapy 484 (1990) (documenting cases of sexual abuse of students by teachers); James Rosenthal, et al, *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 Child Abuse & Neglect 249 (1991) (documenting sexual abuse in foster homes, group homes, residential treatment centers, and institutions); Leslie Margolin, *Sexual Abuse by Grandparents*, 16 Child Abuse & Neglect 735 (1992).

12. Jane Morgan and Lucia Zedner, *Child Victims: Crime, Impact and Criminal Justice* 23 (Oxford, 1992) (reporting that from 1982 to 1984 Americans aged twelve to nineteen experienced 3,700,000 thefts and 1,800,000 violent crimes per year, experiencing victimization rates approximately twice as high as those of the adult population).

13. See *DeShaney v Winnebago County*, 489 US 189 (1989) (holding that states have

against neglect and abuse.

Nonetheless, most children thrive in parental care and suffer harm if that care is significantly interrupted.[14] Moreover, the liberty, personal autonomy, and diversity that are the human centerpiece of democracy in the United States are compromised whenever government intrudes excessively in the lives of families.[15] Paternalistic efforts of classical republicanism to develop ideal citizens[16] and statist measures like the Chinese government's one-child policy,[17] or the French government's announced intention to forbid post-menopausal in-vitro fertilization,[18] strike the American sensibility as excessive governance. The human capacity to make moral and social meaning implies a human right to be socialized to moral autonomy in the intimate and relatively flexible context of family rather than molded to norms imposed by an impersonal, homogenizing, and all-powerful state.[19] As the Supreme Court announced in *Pierce v Society of Sisters*,[20]

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . The child is not the mere creature of the State; those who nurture . . . [the child] and direct . . . [its] destiny have the right, coupled with the high duty, to recognize and prepare . . . [it] for additional obligations.[21]

It is "cardinal" in the United States that the "care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[22]

When the state assumes a child-protective function, it takes on the exqui-

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no affirmative constitutional duty to protect children against abuse).

14. The immediate trauma that a child experiences upon separation from its family is undeniable. Long-term effects are assessed differently by different child development specialists. The most influential, and one of the most extreme, statements on the effects of separation can be found in Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* 32-34 (Free, 1979).

15. See Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv L Rev 1348 (1994); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of* Roe v. Wade, 28 Harv CR-CL L Rev 299, 393 (1993).

16. See Davis, 28 Harv CR-CL L Rev at 333 (cited in note 15).

17. For a balanced description of China's policy, see Pi-Chao Chen, *Birth Planning and Fertility Transition*, 476 Annals Am Acad Pol & Soc Sci 128 (1984).

18. See Melinda Beck, et al, *How Far Should We Push Mother Nature?*, Newsweek 54, 54-55 (Jan 17, 1994); Catherine Ford, *Reproductive Debate Masks Contempt for Women*, Ottawa Citizen B2 (Jan 9, 1994) (describing a bill before the French Senate and National Assembly that provides that IVF and other medically assisted pro-creation techniques be used only by pre-menopausal women).

19. For a fuller discussion of the concept of meaning-making, see Davis, 107 Harv L Rev at 1361-67 (cited in note 15).

20. 268 US 510 (1925).

21. Id at 535.

22. *Prince v Massachusetts*, 321 US 158, 166 (1944).

sitely difficult task of deciding when intervention is reasonably necessary to the physical or emotional well-being of a child and when it is destructive, both of the bonds upon which the child depends for healthy nurturance and of the child's right to grow in a community that is open, flexible, and self-defining, rather than state-controlled. Every formal charge of child neglect or abuse presents this difficulty in vivid microcosm.

The custodial decisions that judges make in these cases are, then, vitally important to the well-being of children and to the character of the culture. It is contended by many critics of child welfare systems that these decisions—and the analogous decisions of clinicians, child care professionals, and child welfare lawyers—are systematically biased. Some argue that a "child-saver" mentality, institutional arrogance, and class and race prejudice create a bias in favor of intervention, while others argue that excessive libertarianism, indifference to the plight of children, and carelessness create a bias against intervention.[23] As the Supreme Court has suggested, the truth is undoubtedly between these two uncharitably described poles.[24] In the difficult and almost always well-intentioned business of protecting children from abuse, decisionmakers sometimes fail to intervene when they should and sometimes intervene when they should not.

When a child dies or is severely injured at the hands of people against whom complaints of neglect or abuse have been lodged, the child welfare system and the general public become painfully aware of regrettable[25] failures to intervene. To take a notorious example, when Joshua DeShaney was permanently and severely brain-damaged at the hands of an abusing father, a shocked public learned that a state agency had failed to act upon strong evidence of violent abuse—evidence that was reported by family members, emergency room personnel, and neighbors and chronicled in twenty home visits by a child welfare caseworker.[26]

Regrettable interventions come less easily to light. The sequelae of family disruption are rarely visible to the court or to the public. Yet, they are sometimes documented. Thus, we know that a child was removed from his home because of a parental decision to send him to an all-black school, that parental rights were terminated because a mother's uncomprehending anger when her child was removed as the result of a single spanking was interpreted

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23. Contrasting positions as to the wisdom of intervention are set out in *Smith v Organization of Foster Families*, 431 US 816, 833-34 (1977).

24. Id at 838 n 41 ("[N]either [side] represents the whole truth about the [foster care] system.").

25. The word "regrettable" is carefully chosen. A decision will be regretted when it has bad consequences. Regrettable decisions are not, however, necessarily wrong decisions. The rightness or wrongness of a decision can only be judged in terms of considerations that the decisionmaker could or should have been aware of and relied upon. In an area as complex as child welfare, efforts to avoid all regrettable decisions will necessarily be futile. Efforts to avoid wrongful decisions are, however, appropriate and necessary.

26. *DeShaney*, 489 US at 208-09 (Brennan dissenting).

by agency mental health experts as a symptom of instability, and that a family was separated for more than three years because a mother's poverty, a common law marriage, and a speech impediment caused by a severe automobile accident were taken for unfitness or incapacity.[27]

We lack empirical data that would tell us which kind of error is more frequent. Both kinds are tragic, and both may be attributable in part to systemic bias in child custody decisionmaking.

Our critique of decisionmaking regarding children at risk is more charitable than that of the critics described above. We do not imagine decisionmakers as thoughtless libertarians or as arrogant paternalists. Rather, we imagine that subtle, systemic factors are responsible for at least some of the costly errors that at times leave children to face unacceptable risks and at other times impose upon children the trauma of unnecessary family disruption.

In the hope of identifying error-producing factors in child welfare proceedings, we create a simplified model of judicial decisionmaking. After describing our simplified decision model, we identify a "sequentiality effect" that is present when, as in most child protective proceedings, the ultimate question before the decisionmaker is anticipated in one or more preliminary or pre-trial proceedings. We also identify four factors that are likely to produce bias in child protective decisionmaking: the perceived status quo at the time of custodial choice; a heightened emphasis upon risks associated with decisions in favor of the party (usually the respondent) with fewer litigation resources; the fact that the litigation is understandably and inevitably focused upon the possibility that the respondent has caused harm to the child; and the judge's special vulnerability to negative feedback in the event of adverse consequences from a failure to intervene. We then demonstrate the ways in which the sequentiality effect interacts with bias factors to compound errors made in the early phases of decisionmaking.[28] Finally, we suggest measures that might be taken to guard against systemic bias and against the reinforcement of error by the sequentiality effect.

I. The Decision Framework

Our model of judicial decisionmaking is extremely simplified. The many complex and difficult decisions that judges make in child protective proceedings are "boiled down" to a choice between intervention and non-intervention. This simplified model is, of course, highly artificial. A judge does not choose directly between intervention and non-intervention. S/he makes hundreds of minor judgments of law and fact, culminating in temporary and final orders

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27. These cases are described more fully in Peggy C. Davis and Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 Harv Blackletter J 9, 10-14 (1987).

28. The focus of this Article is upon child protective proceedings, but the sequentiality effect that we identify is of equal or greater importance in other contexts, like matrimonial and adoption proceedings, in which custodial decisions are made on both temporary and permanent bases.

that authorize or preclude intervention. The identification of systemic bias in our simplified model is nonetheless suggestive of systemic bias in actual adjudications. This is so because a great many of the separate decisions that comprise an adjudication of this kind conspicuously lead to, and are consciously perceived as a step toward, intervention or non-intervention.

An example will make the point more clearly. In an action alleging child neglect on the basis of an unreasonable failure to provide necessary medical care, the child protective agency might be required to prove the apparent severity of the child's condition, the need for treatment, and the respondent's ability to secure treatment. In particular, the agency might attempt to show that the child manifested certain symptoms, that a certain diagnosis was probable or later confirmed, and that the respondent had access to emergency room services. The respondent might offer conflicting evidence concerning the nature or conspicuousness of the symptoms, the diagnosis, and the feasibility of obtaining treatment. Virtually all findings of fact and conclusions of law in such a case will point, in obvious ways, toward intervention or non-intervention. Each of these decisions can be affected, therefore, by a bias in either direction. If, for example, there is bias in favor of intervention, it will be harder to convince the judge that the child's symptoms were masked; if there is bias in favor of non-intervention, it will be harder to convince the judge that the child's symptoms were conspicuous. If systemic biases are sufficiently strong, and if they lead disproportionately in the same direction, their sum will be a biased outcome.

We assume that the rule system under which the judge operates has the intended function of maximizing the well-being of children by minimizing risks of physical and psychological harm. The decision structured by this rule system takes the form of a choice between intervention and non-intervention in a process in which the risks to the child of each course are as fully considered as is feasible.[29] In its definition of factors warranting intervention, the rule system suggests a level of exigency below which intervention is likely to be harmful and above which intervention may be beneficial.[30] To return to the example employed above, a statute that defines child neglect to include an unreasonable failure to provide necessary medical care suggests that interven-

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29. These assumptions will not reflect reality in all jurisdictions. In some, the governing rule system will dictate greater tolerance of harms associated with one outcome than of harms associated with the other. That sort of rule system would reflect legislative biases analogous to the decisionmaking biases that we describe as risks for judicial decisionmakers.

30. New York statutes defining abuse require, for example, that adjudications of abuse be premised on findings that the respondent has inflicted serious physical injury, allowed such injury to be inflicted, created or allowed a substantial risk of serious physical injury, or committed or allowed a sex offense against the child. NY Family Court Act § 1012(e) (McKinney 1983 & Supp 1994). Those defining neglect require that adjudications be premised on findings that the child's condition has been impaired as a result of the respondent's failure to exercise a minimum degree of care with respect to specified needs. NY Family Court Act § 1012(f).

tion will, in at least some cases,[31] be beneficial when a parent has unreasonably failed to provide necessary medical care. In the establishment of reasonable and fair procedures, the rule system assures that arguments for and against intervention will be equally available to the court—that each side has the means and the opportunity to persuade the court with respect to the facts and the law.[32] In its constitutional requirements of procedural due process[33] and family autonomy,[34] the rule system reinforces the requirement of fair procedures and protects against unjustifiable criteria for intervention.

We regard as ideal decisionmaking that is objective or "unskewed." An unskewed decision is one that takes appropriate account both of the risks to the child of non-intervention and of the risks to the child of intervention, responding equally to risks of equal magnitude.[35] Since our model assumes a rule system in which equal consideration is required of equally serious risks of each kind, the ideal of unskewed decisionmaking is built into the rules although, as we later argue,[36] unskewed decisionmaking is not guaranteed by the rules.

II. The Sequentiality Effect

In most child protective proceedings, custodial choices occur in series. The judge must first choose whether to remove the children pending final adjudication or to leave them in their home.[37] When the case has been tried, the judge must decide whether the evidence warrants an assumption of jurisdiction

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31. The typical statute will avoid a more inclusive suggestion by providing that even in the face of such a finding the court has discretion to suspend judgement or to dismiss the petition if dismissal is found to be in the best interests of the children. See, for example, NY Family Court Act § 1052(b)(i)(A).

32. For a discussion of the appropriate scope of such laws, see Robert A. Burt, *Forcing Protection on Children and Their Parents: The Impact of* Wyman v. James, 69 Mich L Rev 1259 (1971).

33. See *Lassiter v Dep't of Social Services*, 452 US 18 (1981) (holding that there is a due process right, in sufficiently complex cases, to counsel in proceedings to terminate parental rights); *Santosky v Kramer*, 455 US 745 (1982) (holding that the termination of parental rights must be justified by clear and convincing evidence).

34. See text accompanying notes 20-22.

35. A state may also choose to take account of the risk of harm or injustice to parents. We believe that it is more desirable that child protective matters be decided exclusively in light of the child's interests, with principles of family integrity and autonomy considered in terms of the risks to the child of their compromise. Moreover, we believe that the personal and political benefits of family autonomy are benefits that flow to children as well as to parents. See Davis, 107 Harv L Rev at 1371-72 (cited in note 15). Our model is, however, easily adaptable to take account of parental interests.

36. See text accompanying notes 42-46.

37. The first judicial decision follows administrative and private decisions that are equally difficult and equally subject to bias and error. Although the decisions of private reporters and government child protective workers are outside the scope of this Article, they too can embody and exacerbate the risks identified here with respect to judicial decisionmaking.

or a dismissal. If there is an assumption of jurisdiction, the judge must decide whether the children should be in placement or in their home pending final disposition. The dispositional decision will, then, represent in the usual case the last of several decisions respecting custody. As we show more fully below,[38] custodial decisions made at one stage of a child protective proceeding are likely to influence decisions at the next stage. An error at one stage is more likely to be maintained or exaggerated than reversed. Hence, an error that is made in the pre-trial custody decision, whichever way it goes, will tend to be self-strengthening, so that the decision in the final stage of the case is more likely to go in the direction of the initial decision. We will call this phenomenon the "sequentiality effect."

In theory, the sequentiality effect could be a factor in any kind of litigation in which an interim decision is entered. In the context of custodial decisionmaking, the sequentiality effect is doubly potent. In the ordinary case, it is driven only by the status quo bias that is endemic to human decisionmaking.[39] In cases concerning custody, the status quo bias is reinforced by the child development principle that custodial change becomes inherently and increasingly detrimental as the existing custodial arrangement becomes more longstanding.[40]

In light of the existence of the sequentiality effect, more is required of the ideal decisionmaker than objectivity with respect to the ultimate decision. S/he must also take the sequentiality effect into account and make efforts to avoid its error-producing consequences. As we will show, reducing the error-producing consequences of the sequentiality effect can be achieved by (a) taking care that early decisions are as balanced and accurate as possible (thus reducing the risk of compoundable error) and by (b) taking care that a final disposition is reached as expeditiously as is possible consistent with an appropriate standard of thoroughness and care (thus minimizing the secondary compounding effect of the maxim against custodial change).

The impact of the sequentiality effect varies across cases. If ultimately there is very strong evidence supporting a decision that is contrary to the initial custody award, the original decision will usually be reversed. This will be the result unless the case has been protracted and the judge is convinced that the child's bond to the interim custodian is so strong that the ultimate determination must be based upon continuity of care rather than upon parental fault.[41]

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38. See text accompanying notes 67-68.

39. See text accompanying notes 47-56.

40. For the most influential statement of this principle, see Goldstein, Freud, and Solnit, *Beyond the Best Interests* at 40-42 (cited in note 14).

41. In these cases, an original error has been compounded even if a *correct* final decision has been made. This is so because the interests of the child vary across time as the nature of the child's attachments varies. One should not conclude from the fact that the final decision is correct (in the sense of minimizing prospective harm to the child) that there is no harm done by the commitment and the reinforcement of the initial error. The best decision from the child's perspective is a decision that avoids error altogether.

Most child protective proceedings are significantly protracted. Moreover, in the typical case the evidence is less than overwhelming. The overall impact of the sequentiality effect upon child protective proceedings is therefore considerable.

Errors caused by inattention to sequentiality can go either way. In the absence of other sources of decisionmaking bias or error, we would expect that such errors would be distributed more or less symmetrically around the "unskewed decision." However, as we will show, other sources of bias exist in child abuse decisionmaking, and the effects of these biases are sustained by the sequentiality effect.

III. Sources of Bias

We now turn to the factors that can cause deviations from the "unskewed decision" defined above. We assume that the judge is not so rigidly bound by legal rules that there is *no* room for the play of extra-legal influences. At each decision point, the judge will have a wide range of discretion, for charges of neglect and abuse are adjudicated within relatively flexible rule systems. It may be that the judge will be required to assume jurisdiction or to order a placement on the basis of something as concrete as a laboratory finding that a child was born with a narcotic drug in its veins,[42] but it is more likely that decisions about jurisdiction and about preliminary and final disposition will be loosely guided. In New York, for example, a preliminary disposition may be based on a determination that there is or is not imminent danger to the child's life or health.[43] The jurisdictional decision may be based on a determination that the child has or has not suffered impairment as a result of the respondent's failure to exercise a "minimum degree of care."[44] The final disposition is based upon the classic and notoriously vague "best interests" standard.[45]

We anticipate the play of extra-legal influences without implying improper behavior on the part of the judge. We simply acknowledge that rule systems are not sufficiently rigid to predetermine all cases and that factors not referenced in the rules will affect decisionmaking in those cases which are not predetermined by the terms of the governing rule system. In acknowledging the play of extra-legal influences, we abandon abstract and ideal models of judging in favor of a behavioral model.

There are reasons to expect that the judge in a child abuse case will make

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42. See Fla Stat Ann § 415.503(9)(a)(2) (West 1993); Ill Ann Stat ch 705, § 405/2-3(1)(c) (Smith-Hurd Supp 1994); Ind Code Ann § 31-6-4-3.1(1)(B) (West Supp 1994); Mass Gen Laws Ann ch 119, § 51A (West 1993); Nev Rev Stat § 432B.330(1)(b) (1991); 10 Okla Stat Ann § 1101(4)(a)(3) (West Supp 1995). See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 Harv L Rev 1419 (1991).

43. NY Family Court Act §§ 1022(a)(ii), 1027(b).

44. NY Family Court Act § 1012(f)(i).

45. NY Family Court Act § 1052(b).

optimal decisions despite the looseness of the rule system in which s/he operates. First, judicial decisionmaking concerns the welfare of a person other than the decisionmaker.[46] We expect, and the legal system seems to assume, that the detachment associated with the judicial perspective will result in more nearly optimal behavior. Moreover, as a result of legal training and socialization in a professional culture, judges have developed what we call a "professional stance." This professional stance requires not only adherence to the rule systems that structure and guide judicial decisionmaking, but also a self-conscious effort to remain objective and to balance competing concerns fairly and dispassionately.

Notwithstanding judges' relative objectivity and professional stance, certain biasing effects seem endemic to the judicial system in general and to the adjudication of child protective matters in particular.

A. Status Quo Bias

Empirical evidence concerning choice behavior shows that people fail in two seemingly related contexts to make choices that maximize gains. Kahneman and Tversky identify (a) an endowment effect, such that people demand more to give up something than they would offer to acquire it and (b) a status quo bias, such that people prefer a current state to a more advantageous change.[47] They argue that both the endowment effect and the status quo bias are driven by loss aversion—an asymmetry of valuation such that losses are more painful than foregone gains.[48] The disutility of giving up a status or an object is higher than the utility associated with acquiring it. The legal system has long recognized this fact of human nature. Oliver Wendell Holmes described what has come to be called loss aversion:

> It is in the nature of a man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.[49]

Other scholars have offered different explanations for the endowment effect

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46. There is one qualification to this assertion. See text accompanying notes 63-65.

47. Amos Tversky and Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q J Econ 1039, 1041-44 (1991).

48. The literature on loss aversion and status quo bias is summarized in Daniel Kahneman, Jack L. Knetsch, and Richard Thaler, *Anomalies: The Endowment Effect, Loss Aversion and Status Quo Bias*, 5 J Econ Perspectives 193 (1991). A theoretical consumer choice model capturing these ideas is presented in Tversky and Kahneman, 106 Q J Econ at 1039 (cited in note 47). See also Daniel Kahneman and Amos Tversky, *Choices, Values and Frames*, 39 Am Psychologist 1325 (1984).

49. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv L Rev 455, 477 (1897).

and the status quo bias. In experimental research building on the work of Kahneman and Tversky, Ritov and Baron have produced evidence that people avoid a change of circumstance when, but only when, the change requires (or is characterized so that it seems to require) action rather than passive acquiescence.[50] This research, taken together with the theoretical insight that choice entails evaluation of the risks of *regret* as well as the risks of loss,[51] suggests that the endowment effect and the status quo bias are motivated less by aversion to loss than by aversion to feeling, being, or seeming to be *responsible* for a negative outcome. This conclusion is consistent with experimental findings suggesting that people are more risk-averse when they expect to learn the outcome of their choices than when they expect to be protected from knowledge of their mistakes.[52] However irrational it may be, people feel more responsible for their actions than for their omissions. They may, therefore, avoid actions but fail to avoid omissions that subject them to the risk of known failure.[53]

The status quo bias has potentially significant consequences in child welfare decisionmaking. The existence of status quo bias implies a tendency to maintain the current state against changes in either direction, even in a category of cases in which change would be optimal. To the extent that judges in child abuse cases are vulnerable to this bias, they will be inclined to continue an existing custodial arrangement, and they will be inclined to do so in at least some cases in which a custodial change is warranted.

We can flesh out this tendency by reference to the explanatory theories described above. The concept of loss aversion suggests that if the child has been removed on an emergency basis in advance of the first hearing, the judge is likely to value—and want to hold on to—the perceived safety of the intervention. S/he will therefore manifest a bias in favor of maintaining the status quo of intervention. The responsibility hypothesis suggests that if the child has experienced a pre-trial removal, the judge is likely to shun responsibility for the risk associated with the action of returning the child. S/he will therefore manifest a bias in favor of the seemingly more passive course of leaving things as they are.[54] If the child

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50. Ilana Ritov and Jonathan Baron, *Status-Quo and Omission Biases*, 5 J Risk & Uncertainty 49 (1992).

51. See Graham Loomes and Robert Sugden, *Disappointment and Dynamic Consistency in Choice Under Uncertainty*, 53 Rev Econ Stud 271 (1986); Graham Loomes and Robert Sugden, *Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty*, 92 Econ J 805 (1982).

52. See Robert Josephs, et al, *Protecting the Self From the Negative Consequences of Risky Decisions*, 62 J Personality & Soc Psych 26 (1992).

53. See Ritov and Baron, 5 J Risk & Uncertainty at 60 (cited in note 50).

54. Legislators, litigators, and judges should be aware that the extent to which an order such as continuing a remand to placement is perceived as active or passive is largely governed by the ways in which the action is characterized in the discourse of the proceeding. See Ritov and Baron, 5 J Risk & Uncertainty at 61 ("[S]tatus quo biases can be counteracted by changing the way in which options are presented to a decision maker.") (cited in note 50). For a thorough analysis of the effects of narrative framing upon legal decisionmaking, see Anthony G. Amsterdam and Randy Hertz, *An Analysis of Closing*

is the subject of a proceeding but has not been placed in care, we believe that the status quo is ambiguous. On the one hand, the judge may perceive a state of intervention and associate with that state a condition of safety from whatever risks might exist in the child's home. On the other hand, the judge may perceive a state of potential intervention and associate with that state a condition of custodial stability. If the judge perceives a state of relative safety, s/he may be unduly reluctant to forego that safety for the child (or to take action that will put the child again at risk). If the judge perceives a state of relative stability, s/he may be unduly reluctant to forego that stability for the child (or to take action that will disrupt that stability). The factual details of the case and the characterizations of competing advocates may be particularly influential in these more ambiguous cases. If we are correct about the ambiguity of the status quo in cases in which a judicial proceeding has been initiated, judges are never called upon to decide custody in the context of an unambiguous status quo of custodial stability.[55] The status quo bias is therefore more likely to skew decisionmaking in the direction of intervention.[56] As we show below, the effects of the status quo bias, or of any other bias operating at this stage, will be magnified in later stages of the proceeding by the sequentiality effect.

B. Skew in the Assessment of Risk

Skew in the assessment of risk in child protective proceedings has two principal sources: (a) problems of focus and emphasis that limit consideration of some risks and exaggerate consideration of others and (b) special vulnerabilities that make judges averse to some, but not all, risks.

1. Problems of focus and emphasis.

Resource disparities often affect the extent to which the attention of the court is called to facts and theories relevant to risk assessment in child protective proceedings. The overwhelming majority of respondents in child protective proceedings are indigent,[57] and while they are usually entitled to court-appoint-

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Argument to a Jury, 37 NY L Sch L Rev 55 (1992).

55. It does not follow that there are no neglect or abuse cases in which judges confront a status quo of custodial stability. If the petitioning agency does not seek interim custodial change, then the child may appear at the moments of fact-finding and disposition to enjoy custodial stability. However, the appearance of stability conveyed in a case in which there is no application for interim placement may be mitigated for the same reasons that the appearance of stability conveyed in a case in which there has been no emergency placement is ambiguous: the judge may (but, of course, may not) regard the child as in a state of imminent or potential intervention.

56. This skew may not exist in decisionmaking by child welfare professionals at the level of fieldwork. In the fieldwork context, decisionmakers are more likely to perceive a state of custodial stability and may, therefore, be influenced by a status quo bias against intervention. If this difference exists, and if it is substantial, it may suggest that judges are more prone than caseworkers to erroneous interventions, but caseworkers are more prone than judges to fail to intervene when necessary.

57. See Randy Hertz, Martin Guggenheim, and Anthony G. Amsterdam, *Trial Manual*

ed counsel,[58] the quality of that representation is likely to be poor.[59] On the other hand, the resources of wealthier parents can overwhelm those of the public agencies that prosecute cases of neglect and abuse. Where the resources of the prosecuting agency are greater, it is likely that risks of non-intervention will be exaggerated. Where the resources of the parents are greater, it is likely that risks of intervention will be exaggerated. Since most respondents in neglect and abuse proceedings are poor, the former circumstance is substantially more likely to occur.

Consideration of the risks of intervention and of non-intervention can be skewed even in cases in which resources are equal. A child protective proceeding is brought for the purpose of considering the risk that a child will be harmed by the respondent, usually a parent. It is inescapably in the nature of such a proceeding that the possibility of past and future neglect or abuse within the respondent's home will be explored. The proceeding, by its very nature, highlights the dramatic and tangible risk that a child will be harmed at the hands of a person who has been identified as a possible risk to that child. Weighing such a risk is anxiety-provoking; fear of an error that causes harm to a child is deep, appropriate, and disquieting. Judges cannot fail to take account of the risk of neglect or abuse in the respondent's home, but they may neglect to take account of the not-insignificant risk that the child will suffer harm as a result of being in official care.[60] Moreover, even in cases in which litigation resources are constant, it is possible that the more dramatic and tangible risks of abuse or neglect by the respondent will overshadow the less dramatic and tangible risks of family separation and substitute care. This overshadowing is appropriate where the severity and probability of harm in the parental home are both great, but inappropriate where these factors are small and the probability and severity of psychological or developmental harm as a result of family separation are great.[61]

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for Defense Attorneys in Juvenile Court § 41.02(b) at 956 (ALI, 1991) (finding that the vast majority of child protective proceedings involve children of the poor). It is not clear, of course, how much this fact has to do with differing levels of neglect and abuse and how much it has to do with differing levels of official supervision. For an exploration of the thesis that the poor experience more intense and invasive supervision, see Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 Stan L Rev 257 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 17 Stan L Rev 614 (1965).

58. See Hertz, Guggenheim, and Amsterdam, *Trial Manual for Defense Attorneys in Juvenile Court* § 42.01 at 969 (cited in note 57).

59. See American Bar Association Criminal Justice Section, *Ad Hoc Committee on the Indigent Defense Crisis* 1 (1993) (citing Department of Justice statistics to demonstrate that of seventy-four billion dollars spent on the justice system nationwide, only 2.3 percent was expended for attorneys representing indigent defendants).

60. These harms include the harm of familial separation, the disruption of school, friendship, or community ties, the risks of multiple placements, and the risks of neglect or abuse in foster care.

61. The psychology of the judge can also skew focus, and with it the analysis of risk. An unconscious identification with the child, or with the presenting agency, may cause a

2. Feedback vulnerabilities.

We have observed in the context of our discussion of status quo bias that decisionmaking is affected by human reaction to the prospect of learning that one has been responsible for a negative outcome.[62] The prospect of learning whether one of two alternative courses will turn out to be unfortunate will cause a bias in favor of the course that poses less risk of regret. Adverse consequences of failures to intervene are often conspicuous, and sometimes notorious, whereas adverse consequences of interventions are rarely measured or made known to the court or to the public at large. Decisionmaking in child protective proceedings is therefore subject to skew, for decisionmakers have great reason to fear that they will be made to regret a wrongful decision not to intervene and little reason to fear that they will be made to regret a wrongful decision to intervene.

The child welfare decisionmaker who opts against intervention is, then, vulnerable to the personal pain of knowing that s/he has been—however indirectly—responsible for harm to a child. S/he is also vulnerable to public exposure and reprisal. Judges are public figures who receive feedback that allows them to gauge the extent to which they are perceived, within and without the legal community, as responsible, competent, and respected decisionmakers. Both the careers of judges and the viability of the judicial system depend upon the quality of that feedback. Media attention and the informal criticisms that come from advocates, lay observers, and human service professionals are important sources of this feedback in the culture of the family court. Just as judges are more likely to learn of a regrettable failure to intervene than of a regrettable intervention, they are more likely to receive negative informal and media feedback as a result of a decision to leave a child in an allegedly neglectful or abusive home. In some communities there may be feedback in reaction to family interventions,[63] but the specter of a headline announcing that a child has suffered injury or death as a result of being returned to its parents looms more realistically for most judges and may cause some to deviate from the norm of unskewed decisionmaking.

IV. The Interaction of Bias and Sequentiality

We have said that the final custody decision may depend, in an indirect but important manner, on the initial custody decision. We rely upon our description of status quo bias to clarify the bases of that assertion. To the extent that a decisionmaker irrationally prefers the status quo, that decisionmaker will fail to correct errors where correction requires deviation (or action to deviate) from the

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judge to overestimate risks of parental abuse, whereas an unconscious identification with the parents may cause a judge to underestimate those risks. Since we have no basis for predicting the direction of this bias, we assume that it operates randomly.

62. See text accompanying notes 50-53.

63. See, for example, Dana Mack, *Kids, Cops, and Caseworkers: America's Newest Parent Traps*, Wash Post C3 (Jan 30, 1994) (arguing that there is "an epidemic of over-reporting" of child neglect and abuse).

status quo. Each of the biases we have described, including the status quo bias, has an impact on the litigation identical to that of an increase in the "regret (or utility) matrix" of the decisionmaker: it increases the quantity of proof necessary to produce a decision against the direction of the bias.[64] As a result, it produces errors.

This process is illustrated in Figure 1.

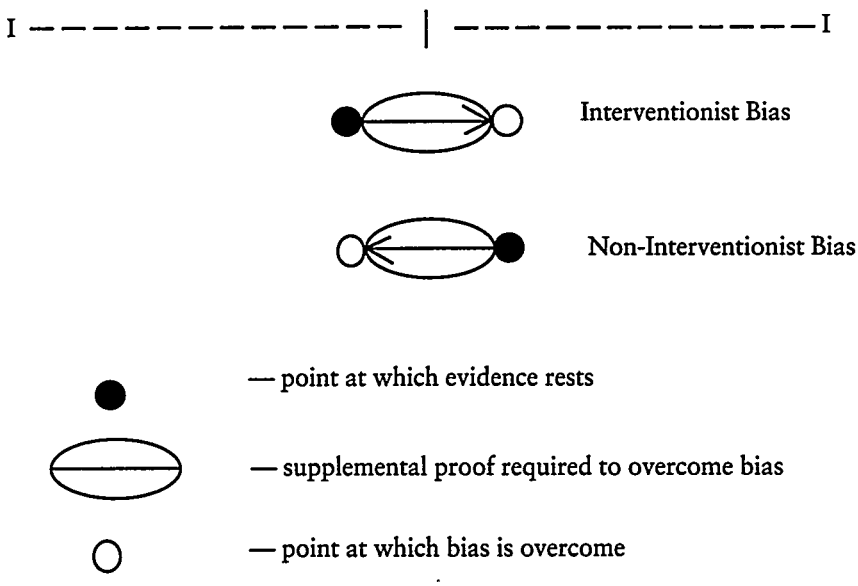

Fig. 1. The effects of bias

The line represents the series of points at which the sum of the evidence might rest. At the center point, the evidence for and against intervention is equal. At points left of center, the evidence increasingly favors non-intervention; at points right of center, the evidence increasingly favors intervention. The solid dot represents the point at which the evidence rests in a hypothetical case. The oval represents the effects of bias; it marks the amount of supplemental proof required to overcome a bias. An open dot represents the point at which a biased decisionmaker will decide as if the evidence rested at the solid dot. In order to persuade a biased decision-maker, a litigant must present evidence that surpasses the requisite quantity of proof by the amount represented by the oval.

In Figure 2, it is assumed that the evidence slightly favors non-intervention and that the decisionmaker is biased in favor of intervention. This hypothetical decision-maker will decide to intervene even though the evidence does not warrant intervention.

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64. See generally Richard Lempert and Stephen Saltzburg, *A Modern Approach to Evidence: Text, Problems, Transcripts and Cases* 219 (West, 1977); John Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan L Rev 1065, 1071-77 (1968).

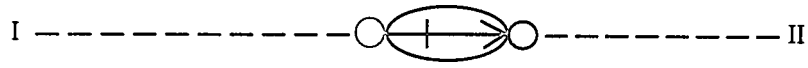

Fig. 2. Error producing interventionist bias

Figure 3 represents a decisionmaker with an interventionist bias in a case in which the evidence overwhelmingly favors non-intervention. This decisionmaker will make a correct decision despite the presence of bias.

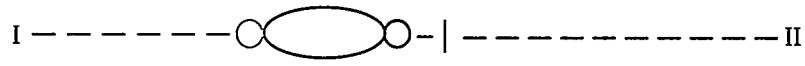

Fig. 3. Harmless interventionist bias

When bias causes error in an interim custodial decision, that error is compounded by an independent bias—the status quo bias in favor of continuing the interim custodial arrangement. It is this compounding that we have described above as the sequentiality effect. An erroneous decision to place the child under protective custody will enhance the likelihood of a final judgment of placement; an erroneous interim decision to leave the child with its parents will enhance the likelihood of a final judgment of dismissal or limited supervision.

Figure 4 illustrates this point. In stage one, a biased and erroneous decision to intervene produces a status quo bias in stage two that combines with the pre-existing bias to cause an intervention that is substantially against the weight of the evidence.

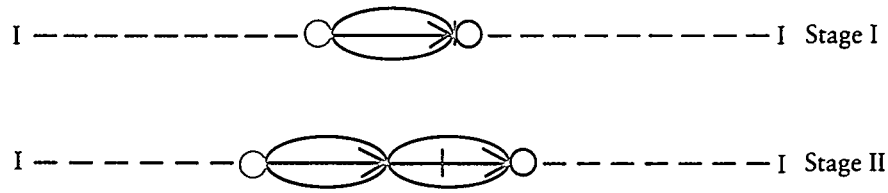

Fig. 4. Bias compounded between periods—an example

As we have said, in cases involving custodial decisions, the effect of arguments against custodial change will, over time, augment the effect of the status quo bias. The sequentiality effect is therefore especially potent in any protracted and less-than-conclusive case.

Each source of bias identified above has the potential of being compounded by the sequentiality effect.[65] To the extent that loss aversion causes a trial judge

65. Even the status quo bias itself can be compounded by the sequentiality effect,

to err in the preliminary phases of a proceeding on the side of preserving the safety of intervention or the stability of non-intervention, that error is likely, in marginal or protracted cases, to persist despite evidence that exposes it as error. To the extent that resource disparities cause judges acting in the early phases to examine more closely the risks of intervention or of non-intervention, resultant errors are likely to persist through disposition. To the extent that the obscure quality of the risks of intervention mutes early inhibitions against family disruption, those inhibitions are likely to be entirely silenced. To the extent that the risk of informal and media criticism makes a judge averse in the early stages to the risk of intervention or of non-intervention, that aversion is likely to persist.

V. Recommendations

Decisionmaking in child protective proceedings is thought to be alarmingly bad, leading at times to calamitous failures to intervene and at times to hurtful and patently unwarranted family disruptions.[66] We have undertaken to formalize, in a very modest way, the decisionmaking process of judges in child protective proceedings. We have done so because the process of modeling facilitates identification of systemic risks of bias. Our analysis has uncovered a greater number of risks of unwarranted intervention than risks of unwarranted non-intervention. We realize that other students of the process, with perspectives and insights different from ours, may well identify other systemic risks and may find that the balance of risk tips in the other direction. It is important that judges, practitioners, and commentators continue the analytic process begun here to uncover sources of unwitting bias in child welfare decisionmaking. However, it is also important to develop consciousness-raising strategies with respect to the risks that we have been able to identify in this initial effort. We first present recommendations to minimize the error-producing consequences of the sequentiality effect as it interacts with the status quo bias. We then offer recommendations to minimize the risks of bias from resource disparities, from the respondent-centered focus of proceedings, and from the feedback vulnerabilities of decisionmakers.

A. Managing the Sequentiality Effect

We have said that judges should protect against the sequentiality effect's error-compounding potential by (a) taking care that early decisions are as balanced and accurate as possible and (b) taking care that a final disposition is reached as expeditiously as possible. Each of these recommendations warrants elaboration.

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magnifying the effects of a judicial focus on the custodial status of the child at the time the case is first considered.

66. See the text accompanying notes 23-27.

1. Balance and accuracy in early custodial decisionmaking.

Our analysis of the sequentiality effect and the status quo bias suggests that errors at the early phases of child protective proceedings are likely to be self-reinforcing. When a judge errs on the side of intervention, that intervention becomes the status quo from which deviation will be difficult in later phases of the proceeding. When a judge errs on the side of non-intervention, relative[67] custodial stability becomes the status quo from which deviation will be difficult.

Several steps can be taken to avoid the error-producing consequences of the status quo bias and the sequentiality effect. First, the attention of the judge can be called to the need to make what we refer to as a "non-myopic" decision.[68] If a judge is myopic—if s/he fails to look beyond the preliminary decision s/he is asked to make—s/he may consider that decision correctable and relatively unimportant. S/he will therefore have little reason to resist a bias in favor of perceived safety or stability. If, on the other hand, the judge appreciates the effect that an initial decision is likely to have upon subsequent decisions, s/he will have reason to inquire more deeply to avoid a self-reinforcing error. This non-myopic stance can be encouraged in a variety of ways. Direct discussion of the sequentiality effect will make judges and litigators aware of the consequences that can flow from cutting corners in the adjudication of applications for interim interventions.

This same message can be conveyed or reinforced by the terms and structure of laws authorizing interim interventions. Interim hearings must be held expeditiously and need not await the quantity and quality of proof that would be appropriate at a final hearing. Moreover, placement may be appropriate as an interim measure, on a lesser or different showing than is necessary for a finding of neglect or abuse. Nonetheless, a statute authorizing interim intervention might require a standard of proof at least as great as that required for a final determination.

Authorizing legislation can also serve to frame the issue of interim custody in a way that calls attention to both the negative and the positive possible consequences. Interim placements can protect children from ongoing or imminent abuse or gross neglect, but they can also harm children by breaking the perceived security of the family home, by forcing the child to forge new bonds that may or may not survive final disposition, by exposing the child to the risks and inadequacies of institutional or foster care, and by increasing the likelihood of an unnecessary and erroneous final order of placement. These competing risks may be better balanced in the context of a statutory requirement that placement be

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67. For an explanation of the notion that pre-trial custodial stability is a more ambiguous situation than interim placement, see note 55.

68. In using the term "non-myopic," we do not wish to incorporate from multi-level decision theory the notion that a correct or rational outcome can be discerned by taking into account known contingencies at later stages. The fact of sequentiality in this context bears no implications as to the correct decision; the sequentiality effect simply alerts us to the importance of avoiding error at the early stages.

ordered only where the harms to the child of family disruption, the risks associated with substitute care, and the risks of facilitating a final order of foster placement are substantially outweighed by the risk of harm to the child in the respondent's home. These same points can, of course, be made by advocates for the parents or for the children even in the absence of such legislation.

Evidence that decisionmakers are minimizing their regret when they expect to know the consequences of their actions suggests that judges will make better interim decisions if they are routinely informed of the consequences of interim decisions, whichever way they go. If there are reports to the court concerning any adverse reactions a child might have, either as the result of remaining at home or as the result of interim placement, then bias will be minimized by the expectation that regret will be possible whether the perceived status quo is maintained or disrupted.

Our analysis of the status quo bias suggests that interim decisions are more likely to err on the side of intervention. The foregoing recommendations are neutral in that they protect against the error-producing consequences of sequentiality regardless of the direction of decisionmaking bias. The more specific tendency to err preliminarily on the side of perceived safety can be countered by providing the judge with interim alternatives that seem safer than outright denial of the request for placement but do not have the self-reinforcing potential of interim placement. Thus, legislation might require consideration of less drastic interim dispositional alternatives, such as family supervision, home visits, or services for children and families at risk as the result of inadequate resources.[69]

We have said that the status quo bias may be most potent when change requires action and when the decisionmaker expects to know the consequences of that action.[70] The judge who is called upon to order an interim intervention will, in some sense, be required to act in response. S/he must either grant or deny the motion. However, the extent to which the judge senses that the grant or denial of an application for an interim intervention is an action rather than an acquiescence in an existing or developing state of affairs is a matter of perception and characterization to which the skilled litigator will attend with care. Whether or not the child has been removed in advance of the court appearance, the requested action may be characterized as authorization of a family disruption or as validation of an ongoing state of rescue. If, as we suspect, the judge is likely to regard the agency actions preceding the first court hearing as the beginning of an intervention (and therefore more likely to experience a status quo bias in favor of placement), then the bias may be offset by characterizations—both in official terminology and in the arguments of counsel—that stress the active nature of an interim order of placement. If, for example, a respondent's children

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69. In 1986, 13,329 children entered foster care in New York City as a result of lack of food, clothing, or shelter. Manhattan Borough President's Advisory Council on Child Welfare, *Failed Promises* at 25 (cited in note 2). A 1988 survey of foster children in that same city found that nearly four hundred children could be returned home immediately if their parents were able to secure adequate housing. Id at 33.

70. See text accompanying notes 50-53.

have been removed on an emergency basis without prior hearing, that respondent will in all jurisdictions have an opportunity to be heard with respect to the appropriateness of the pre-trial intervention. The issue at such a hearing might be characterized as a decision whether to *order* placement pending trial (assuming the expiration of the emergency placement) or it might be characterized as a decision whether to *continue* placement pending trial (assuming that the emergency placement does not expire). Overcoming the inclination to maintain the status quo may be easier if the respondent argues against an order authorizing pretrial placement (upon the expiration of a fixed-term emergency placement) than if s/he argues for a return of the children. These issues of framing should be taken into account in the drafting of authorizing legislation.

2. Expeditious decisionmaking.

A custody proceeding should be as expeditious as possible, consistent with thorough and balanced consideration of competing risks to the child. This recommendation reinforces those of countless commentators who have argued for promptness in the determination and review of child custody matters.[71] The sequentiality effect produces a potential for error or injustice[72] that is most potent in protracted proceedings in which there has been an interim order of placement. In those cases, the bias in favor of continuing an interim order is compounded by operation of the maxim in favor of continuity. The family bond has been disrupted, the perceived safety of intervention has become the status quo, and the child has begun the process of becoming dependent upon new bonds. Trial and appellate courts should therefore regard these cases as emergencies requiring priority and expedited decision.

It will sometimes happen that pre-trial investigation reveals facts that call into question an interim award of placement. Our recommendation that judges be provided feedback concerning the consequences of interim custodial orders (or denials thereof) would make revelations of this kind more likely. Action to correct a self-reinforcing error should not be delayed. When final disposition is not possible within a prescribed period, courts should revisit the question of interim custody to ensure that placement remains consistent with the weight of available evidence.

B. MANAGING SKEW IN THE ASSESSMENT OF RISK

1. Avoiding or compensating for resource disparities.

Risk assessment can be improved by the avoidance of litigation imbalances

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71. See, for example, Goldstein, Freud and Solnit, *Beyond the Best Interests* at 42 (cited in note 14) (recommending that "decisionmakers . . . act with 'all deliberate speed' to maximize each child's opportunity either to restore stability to an existing relationship or to facilitate the establishment of new relationships").

72. As we have shown, injustices may occur as a result of the sequentiality effect even though the ultimate decision is correct in terms of the prospective interests of the child. See note 41.

and by judicial efforts to compensate for those that do occur. The complexities and difficulties of successful advocacy in child protective proceedings are often underestimated.[73] Judges should be sensitive to the opportunities for enlightenment—both about case facts and about theoretical insights relevant to the interpretation of facts and legal standards—that good advocates can provide.[74] Moreover, they should seize these opportunities in the service of revealing the risks associated both with intervention and with non-intervention. Legislators should ensure that it is within a judge's power to provide resources for the investigatory work, expert assistance, and case preparation that the seriousness and consequences of a child protective proceeding appropriately command.

2. Ensuring balanced and child-centered decisionmaking in a respondent-focused proceeding and in the face of vulnerability to feedback and regret.

We have met the risk of bias in interim decisionmaking with recommendations that decisionmakers be required to give explicit consideration to factors relevant to intervention and to non-intervention. Risk assessment can be improved by the same means: the risks of intervention and of non-intervention should be given explicit attention at every stage at which custody is determined or continued. The ideal of non-skewed decisionmaking requires that rule systems facilitate balanced consideration of competing risks by forcing explicit review of each set. This can be accomplished through requirements of written findings with respect to specified risks associated with placement and with continued custody by the respondent.

This recommendation is neutral in form and should work to address bias in either direction. We have observed that child protective proceedings are formally focused upon the possible wrongdoing of the respondent rather than on the welfare of the child. We have also observed that the decisionmaker is vulnerable to negative feedback and regret as the result of a failure to intervene, but not as a result of intervention. To the extent that these two factors leave decisionmakers biased in favor of intervention, the required canvassing of risks of intervention will provide a useful check against bias. In the case of a judge whose deliberations might be affected by the greater strength of the respondent's advocates or by an identification with the parents, the required canvassing of risks of non-intervention will provide a similarly useful check.

None of these recommendations is a panacea. Nonetheless, we believe that their selective application to particular child welfare systems, together with ongoing analyses of the kind modeled above to identify and counter systemic bias, will take us closer to the goal of child welfare decisionmaking that is balanced, non-myopic, and child-focused.

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73. See Peggy Cooper Davis, *A Woman's Challenge (A Tribute to the Honorable Judith Kaye)*, 1994 Ann Surv Am L xxxiii, xxxiv-xxxvii (discussing the complexities of family court litigation and the tendencies of courts to deny or avoid those complexities).

74. See Peggy C. Davis, *"There is a Book Out . . . ": An Analysis of Judicial Absorption of Legislative Facts*, 100 Harv L Rev 1539, 1594-1600 (1987).