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## Painter v. Bannister: Still

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## *Painter v. Bannister*: Still

Carol Weisbrod\*

In 1996, writing in the *Journal of Legal Education*, Lee Teitelbaum wrote that American family law “is at some stage”—the precise stage was yet to be determined—of a “dramatic course of development.”<sup>1</sup> Law was, he suggested, “among the most conservative of social institutions,” given to glacial movement.<sup>2</sup> But, at the same time, “it would not be wrong,” he said, “to talk of a revolution in family law over the last two or three decades.”<sup>3</sup>

Three decades back from 1996 gets us to 1966, the year of the decision in *Painter v. Bannister*,<sup>4</sup> a well-known family law case from the Supreme Court of Iowa. The case concerns a struggle between a widower and the parents of his deceased wife over the custody of a child. The result of the most famous part of the litigation was that a bohemian father lost custody to conventional midwestern grandparents. This Essay uses the case as a historical marker to describe aspects of the revolution<sup>5</sup> Lee Teitelbaum was talking about. The Essay builds on Lee Teitelbaum’s interest in history and the changing shape of the family.

Lee Teitelbaum was one of those who thought seriously about the questions raised by interdisciplinary work in law, and who also did interdisciplinary work. His work on interdisciplinary scholarship illuminated the strengths and weaknesses of various enterprises. And his own research, which drew on several disciplines, did so again. Thus, his thinking about law and social science strengthened his own empirical work. He also pursued serious historical inquiries, enriched by his understanding of the contribution of historical studies.

The suggestion of this Essay is that *Painter v. Bannister* may have a certain utility as a benchmark for the history of the family. The case says something not only about the law of custody, but also something about the shape of the American family at one moment in time. It can serve as a point of entry for a discussion of the modern history of the family and law of marriage. It was in connection with a project on the history of the family that Lee Teitelbaum and I first met, as participants in the Wisconsin program on the Legal History of the Family. In the paper he prepared for that program,

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\*Ellen Ash Peters Professor of Law, University of Connecticut. This is an expanded version of a discussion of *Painter* in *GROUNDING SECURITY: FAMILY, INSURANCE, AND THE STATE* (forthcoming). I would like to thank Anne Dailey for useful comments on a draft of this Essay.

<sup>1</sup>Lee E. Teitelbaum, *The Last Decade(s) of American Family Law*, 46 J. LEGAL EDUC. 546, 547 (1996).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

<sup>4</sup>140 N.W.2d 152 (Iowa 1966).

<sup>5</sup>The sexual revolution can be dated from three years earlier. See Philip Larkin, *Annus Mirabilis*, in *HIGH WINDOWS* 34, 34 (1994).

Teitelbaum used a quotation from William Dilthey describing a dream.<sup>6</sup> The dream was a search for truth in which Dilthey describes his frustration at looking for unity.<sup>7</sup> Finally, Dilthey described truth as broken rays of light.<sup>8</sup> In general, Lee Teitelbaum saw the contribution of other disciplines to law as rays of light on law and legal problems; each could make a contribution, none was to be used uncritically.<sup>9</sup> Again, *Painter v. Bannister* can be used to illustrate.

## I. TEITELBAUM ON INTERDISCIPLINARY WORK: OVERVIEW

Lee Teitelbaum was part of a generation of legal academics heavily committed to empirical research in law. At the same time, he acknowledged that empirical studies would not resolve difficult issues. "It is surely true," he wrote, "that empirical studies are rarely conclusive of the issues they address."<sup>10</sup> And he also agreed that "theoretical questions can always be raised about the focus of social research and that methodological questions can often, perhaps always, be raised about the ways in which data were gathered and analyzed and about the generalizability of results."<sup>11</sup> But the important point for Lee Teitelbaum was that empirical research had a method and was a discipline. It was not simply free association or impressionism. He wrote:

What is distinctive about empirical research, however, is precisely that there are canons on which one can draw to evaluate and criticize statements about the world. The alternative is a kind of hyper-rationalism that is common among, if not distinctive to, the discourse of lawyers and other policy makers. They too make statements about the world, and often vast statements about people and events. Those statements, however do not flow from research subject to any recognized methodological constraints.<sup>12</sup>

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<sup>6</sup>Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1136 [hereinafter Teitelbaum, *Family History and Family Law*] (quoting William Dilthey, *The Dream*, in *THE PHILOSOPHY OF HISTORY IN OUR TIME* 36, 40 (H. Meyerhoff ed., 1959)); Lee E. Teitelbaum, *Rays of Light: Other Disciplines and Family Law*, 1 J.L. & FAM. STUD. 1, 12 (1999) [hereinafter Teitelbaum, *Rays of Light*].

<sup>7</sup>Teitelbaum, *Family History and Family Law*, *supra* note 6, at 1136.

<sup>8</sup>*Id.*

<sup>9</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 1.

<sup>10</sup>*Id.* at 11. This point has been made in other contexts, by other people. See, e.g., James J. White, *Phoebe's Lament*, 98 MICH. L. REV. 2773 *passim* (2000) (noting similar problems in commercial law).

<sup>11</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 11. Teitelbaum himself did empirical research. See, e.g., Teitelbaum et al., *Gender, Legal Education and Legal Careers*, 41 J. LEGAL EDUC. 443 *passim* (1991) (describing study investigating impact of gender difference in law school and practice of law).

<sup>12</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 11.

The difference was that if one does empirical research, “honesty requires an author to concede the limits of his or her population, confront questions of the size and composition of one’s sample, the relative desirability of various research strategies, and the adequacy of one’s method for the conclusions drawn.”<sup>13</sup>

But Lee Teitelbaum was also sure that disciplines that are not quite so formally scientific or quantitative had a contribution to make. Thus, he wrote that “[a] different kind of context for considering the family is supplied by disciplines such as history, sociology, and anthropology.”<sup>14</sup> His own work gave him a keen understanding of the issues of time and change. In family law, legal history “has provided, among other things, a sense of movement from patriarchal to more egalitarian conceptions of family structure and function.”<sup>15</sup> And there were other insights it would offer. History “has also provided a sense of the nuances and limits of that shift through studies of changes in conception of spousal relations, in the rules for marriage and divorce, in the struggle for control over procreative decision making, and in policies and practices regarding custody and adoption.”<sup>16</sup>

Teitelbaum also recognized extraordinary changes in the family in the recent past, and changes in our conventional understanding of the nature of the family. He saw the innovations as particularly dramatic in the last few decades, and was concerned about reversals of traditional policies—like the recognition of joint custody—that had been adopted without adequate study. The particular modifications he identified related to grounds for divorce, custody, alimony and spousal support, and marriage.<sup>17</sup>

One of Lee Teitelbaum’s major points about the history of the family was that the family was not merely a structure that functions for the emotional benefit of the individuals associated with it.<sup>18</sup> A family was not to be altogether defined by its capacity to provide individual satisfaction or happiness, as much contemporary theory saw it:

Although it is often said that the modern family has lost all but an affective function, that view seems extreme and inaccurate. Families still serve in significant ways as economic, moral, and educational systems; they remain important agencies for the distribution of goods in our society.

Take, for example, the family as an economic system or “unit.” Although wealth is no longer produced within the home and the

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<sup>13</sup>*Id.* at 11–12.

<sup>14</sup>*Id.* at 7.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.* at 7–8.

<sup>18</sup>Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 544.

methods of acquiring wealth are largely in the control of public and “private” corporate employers (and hence of even more anonymous “markets”), family members still largely control the consumption of wealth. The importance of these consumptive decisions is, in an odd way, revealed by the literature on divorce, which makes clear the often catastrophic consequences of dissolution for a household. . . . Moreover, a family makes crucial decisions about the generation, consumption, and distribution of its wealth as the family goes along. How many family members will work is ordinarily decided by husband and wife, and that decision defines the level of consumption available to them.<sup>19</sup>

Thus, he thought that “when family members generate excess wealth, they typically decide, how to spend it.”<sup>20</sup> And it was the family, and particularly the nuclear family, that “will determine at least the child’s original religious definition. . . . [P]arental conduct and attitudes have much to do with the strength of the child’s attachment to a religious organization.”<sup>21</sup>

Finally, he had a view of the family’s role in the social and political structure that seems consistent with ideas of decentralization, and also a view of the family as the smallest unit of government. “Families have much to do with social control as well, although they no longer provide the principal mechanism for that purpose. Crime, delinquency, and mental illness are, to a very great extent, social phenomena, and families participate directly in their creation and categorization.”<sup>22</sup> Thus, he was clear that violence in the home is often, in the first instance, evaluated in the home. “A blow by one spouse to another is an act, but the actor will only be treated as a spouse abuser if the victim defines the conduct as intolerable and communicates that view to an official agency.”<sup>23</sup> Further, “[w]hat counts as deviance by children within the home is, in very great part, defined within the home.”<sup>24</sup> The kinds of conduct that may be defined as disobedient “are virtually infinite because the particular commands that parents may give, and that children may disobey, are virtually infinite.”<sup>25</sup>

A deeper question was also raised by Lee Teitelbaum in his research on the family: when we say that the “family” has this importance or this power,

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<sup>19</sup>*Id.* at 550; see also Lee E. Teitelbaum, *Placing the Family in Context*, 22 U.C. DAVIS L. REV. 801, 813–18 (1989) (describing central role of family in society).

<sup>20</sup>Teitelbaum, *supra* note 18, at 550.

<sup>21</sup>*Id.* at 551. Lee Teitelbaum’s thoughts about the internal aspects of family decision making are set out in his discussion of *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953). See Teitelbaum, *supra* note 18, at 551.

<sup>22</sup>*Id.* at 550.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 550–51.

<sup>25</sup>*Id.* at 550 (quoting Lee E. Teitelbaum, *Juvenile Status Offenders*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 983, 984 (Sanford H. Kadish ed., 1983)).

what sort of entity are we talking about? He noted the difficulties involved in this question in a piece published in 1985: urging careful descriptive research on families, he noted that such work “can also explore less conventional questions about the structure, place and even the meaning of ‘family.’”<sup>26</sup> We tend, he wrote, “to include certain relationships under that category but to exclude others, such as unmarried cohabitants or divorced couples. Yet the relationships among members of the excluded groups may be more extensive and significant than those between adult brothers and sisters or between parents and their adult children.”<sup>27</sup> He suggested that “specification of those relationships invites fuller exploration of the contingency of rules, politics and discourse concerning the family than is possible when ‘family’ is understood as a natural phenomenon with universal characteristics.”<sup>28</sup>

*Painter v. Bannister* is useful to the consideration of this idea. It is still featured in several family law casebooks.<sup>29</sup> For some, I suspect that it seems to remain a point of reference for our thinking about the traditional shape of the family. The next section identifies some elements in that reference point.

## II. *PAINTER V. BANNISTER*: WANDERING BETWEEN TWO WORLDS

It seems that for some in law teaching, it is hard to forget *Painter v. Bannister*.<sup>30</sup> It is a case that does not go easily into the old-chestnut, no-longer-required-reading file. We are still thinking about it, and for obvious reasons. We recognize the people to an unusual degree: the unhappy child, the conventional grandparents, the bohemian father, the all-knowing psychologist. Even the evocations of the dead wife are memorable; a woman who somehow got from Iowa to Alaska to marry and have children in a world very different from that of her parents. It is a case about social engagements and conflicts played out in the lives of individuals whose stories stay with us. They are interesting individually, and perhaps also they are interesting politically. The case reminds us of episodes in which parents lost their children because of the policies of discriminatory or racist or genocidal political regimes, such as children removed from the gypsies, Indians, or aboriginals in the “best interests of the child.”

A young mother died with her daughter in an automobile accident; a son was at home at the time because he was sick.<sup>31</sup> The son was sent to live with his grandparents by a father who would not deal with the child for that

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<sup>26</sup>Lee E. Teitelbaum, *An Overview of Law and Social Research*, 35 J.

LEGAL EDUC. 465, 468 (1985).

<sup>27</sup>*Id.* at 469.

<sup>28</sup>*Id.*

<sup>29</sup>E.g., LESLIE JOAN HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, *FAMILY LAW* 623–27 (3d ed. 2005); WALTER WADLINGTON & RAYMOND C. O'BRIEN, *DOMESTIC RELATIONS* 993–99 (4th ed. 1988).

<sup>30</sup>140 N.W.2d 152 (Iowa 1966).

<sup>31</sup>*Id.* at 153.

moment.<sup>32</sup> The father, Hal Painter, was bohemian, artistic, interested in comparative religion, trying to find himself as a writer.<sup>33</sup> The parents of Jeanne, the mother, were Dwight and Margaret Bannister, described as traditional, and very highly regarded in their community.<sup>34</sup> Upon his remarriage, the father attempted to retrieve his son, but the grandparents would not give him up even after a trial court judgment in the father's favor.<sup>35</sup> The trial court's consideration of the case includes the points that the Bannister's were good people, Hal Painter was a fit parent, and the child psychologist who testified at the trial made comments that were exaggerated.<sup>36</sup> The appellate judge was, as an individual, sympathetic to the lifestyle of the grandparents, preferring stability to intellectual stimulation.<sup>37</sup> He was supported in a position in favor of the grandparents by the child psychologist; the father had no expert psychiatrist on his side.<sup>38</sup> Despite a presumption of parental preference, the Iowa Supreme Court, after an extensive description of the competing lifestyles and a long quotation from the testimony of the psychologist, gave custody to the grandparents.<sup>39</sup>

Married parents with children, and grandparents in the background, are the "family" in *Painter v. Bannister* that can be used to represent the traditional family in the law. The case can be read as involving a victory of the conventional Midwest over the bohemianism of the cities, of the staid "cold"<sup>40</sup> personality over the unconventional expressive personality, even of the old over the young. It is almost a case involving archetypes more than individuals.

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<sup>32</sup>*Id.*

<sup>33</sup>*Id.* at 154–55; see also HAL PAINTER, MARK, I LOVE YOU *passim* (1969). Hal Painter also published THE CAPTAIN NEMO COOKBOOK PAPERS: EVERYONE'S GUIDE TO ZEN & THE ART OF BOATING IN HARD TIMES ILLUSTRATED (1986). The publisher described the book as a "'hippy' classic." *Editorial Reviews of The Captain Nemo Cookbook Papers: Everyone's Guide to Zen & the Art of Boating in Hard Times Illustrated*, <http://www.amazon.com/gp/product/1892590522/103-7803982-9145444?v=glance&n=283155> (last visited March 23, 2006).

<sup>34</sup>*Painter*, 140 N.W.2d at 154.

<sup>35</sup>*Id.*

<sup>36</sup>*Id.* at 154, 158. Among other things, the psychologist, Dr. Hawks, said that "'the chances are very high (Mark) will go wrong if he is returned to his father.'" *Id.* at 158.

<sup>37</sup>*Id.* at 156.

<sup>38</sup>*Id.* at 156–57.

<sup>39</sup>*Id.* at 157–58. The appeal to the Supreme Court of the United States was denied, despite the efforts of some liberal groups (including the ACLU and the New York branch of the Methodist Church) to argue that there were First Amendment issues in the case. See *Painter v. Bannister*, 385 U.S. 949, 949 (1966). The State of California also wanted review. *Id.* The case was reported or discussed in a number of newspapers and magazines, and it was also the subject of a movie, *Mark, I Love You*, based on Hal Painter's book. See PAINTER, *supra* note 33. For a review of the state of the question of law and social sciences in family law in 1963, see Robert J. Levy, *Perilous Necessity: Non-Legal Materials in a Family Law Course*, 3 J. FAM. L. 138, 151–56 (1963).

<sup>40</sup>PAINTER, *supra* note 33, at 143.



But *Painter v. Bannister* is a case “wandering between two worlds.”<sup>41</sup> We read it sometimes as an expression of unapologetic subjective judicial decision making. An appellate judge rejects the ruling of a trial court and substitutes a decision in favor of a financially comfortable and entirely conventional Midwest family understood as “better” than the artistic and unstable family offered by the biological father; on another reading, it is an early product of the world of psychologically influenced decision making in the best interest of the child. As Carl Schneider put it, the case is “usually taken as an example of Iowa stubbornness and invincible provincialism.”<sup>42</sup> He notes, however, that a careful reading indicates the significance of the psychological testimony.<sup>43</sup> The expert’s opinion is given a great deal of weight, even at the expense of the fit biological parent.<sup>44</sup>

As is clear from the earlier discussion, Teitelbaum commented on a number of disciplinary interactions.<sup>45</sup> His comments on psychology are particularly relevant to *Painter v. Bannister*; he begins with the openness of rules in family law, rules that must, of course, be applied—as is true of all legal rules—but that present the special problem that their content is peculiarly indeterminate. The rules need substance, and law looks, at times, to other disciplines to provide that substance. “To take only the most obvious example,” Teitelbaum wrote, “child psychology is a common source of content for determining a child’s best interests.”<sup>46</sup> Some psychologists had unusual influence. “[J]udicial acceptance of the importance of continuity in child-raising, most famously (although not originally) set out in Goldstein, Freud and Solnit’s *Beyond the Best Interests of the Child*, has powerfully affected custodial practices in this country and abroad.”<sup>47</sup> He illustrated with *Painter v. Bannister*: “In one much-discussed case, the Iowa Supreme Court left a child with his grandparents despite presumptions favoring his fit biological father,”<sup>48</sup> and then cited a California Supreme Court case that “emphasized the importance of continuity over virtually any other factor.”<sup>49</sup> Evidence of the significance of continuity “is found in the willingness of some courts to recognize for non-parent care givers who have formed a bond with a child

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<sup>41</sup>Matthew Arnold, *The Grande Chartreuse*, in THE PORTABLE MATTHEW ARNOLD 151, 151 (Lionell Trilling ed., 1962) (“Wandering between two worlds, one dead, the other powerless to be born.”).

<sup>42</sup>Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1854 (1985). For more on the cultural issues here, see generally PETER DE VRIES, I HEAR AMERICA SWINGING (1976); and STEVEN BLOOM, POSTVILLE: A CLASH OF CULTURES IN HEARTLAND AMERICA (2000).

<sup>43</sup>Schneider, *supra* note 42, at 1854.

<sup>44</sup>*Id.* at 1855.

<sup>45</sup>See *supra* pp. 136–39 (reviewing Lee Teitelbaum’s approach to interdisciplinary scholarship).

<sup>46</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 2.

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

claims nearly or fully equivalent to those of biological parents, and in the widespread use of a presumption favoring custody in the parent who was the primary care giver before divorce.<sup>50</sup>

In *Rays of Light* Lee Teitelbaum referred to *Beyond the Best Interests of the Child* and showed outstanding delicacy in dealing with that work.<sup>51</sup> He directed the attention of the reader to a highly critical article.<sup>52</sup>

In fact, Mark Painter, the subject of the custody dispute in *Painter v. Bannister*, returned to his father after the Iowa legal proceedings.<sup>53</sup> In the summer of 1968, when Mark was in California, Hal Painter, Mark's father, petitioned a Santa Cruz court for guardianship and the Bannisters did not oppose.<sup>54</sup> Guardianship was awarded on August 28, 1968.<sup>55</sup>

The decision in *Painter* is sometimes viewed as one that overturned a presumption in the law for the natural parent, at least the natural marital parent.<sup>56</sup> Sometimes it is viewed as an example of pure subjectivity on the part of judges, or perhaps a legal approach involving deference by judges to experts to a degree that would lead to social engineering by experts backed by judges.<sup>57</sup> The case can be taught with the problem that was used by Goldstein, Freud, and Solnit to explore an extreme case that might use the psychological parent theory: the case of the Dutch Jewish orphans in the Second World War.<sup>58</sup>

The largest benchmark institutional issue here is the specific form of the marital nuclear family. We have a three-generation family centered on a marital couple, a marriage ended by death, and a grandparent generation

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<sup>50</sup>*Id.*

<sup>51</sup>See, e.g., *id.* at 2 n.8 ("JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). This volume, with its successors BEFORE THE BEST INTERESTS OF THE CHILD and IN THE BEST INTERESTS OF THE CHILD, have been published together in JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996). In their emphasis on continuity, Goldstein, Freud, and Solnit draw on an earlier and important literature, initially developed in connection with the separation of English children from their parents during the Blitz. E.g., John Bowlby, *Maternal Care and Mental Health* [sic] (1951).").

<sup>52</sup>See, e.g., *id.* ("For an English commentary on Goldstein, Freud & Solnit, see [sic] Michael Freeman, *The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?*, 11 INT. J. OF L., POLICY AND THE FAMILY 360 (1997).").

<sup>53</sup>See PAINTER, *supra* note 33, at 216.

<sup>54</sup>See *id.* at 217–19.

<sup>55</sup>*Id.*

<sup>56</sup>See HARRIS, TEITELBAUM & CARBONE, *supra* note 29, at 623–34.

<sup>57</sup>*Id.*

<sup>58</sup>JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 107–08 (1973). The historical events were not an obvious illustration of the theory of psychological parenting. The children of Dutch Jews were returned to surviving parents because of an unbroken claim of parental authority. See CAROL WEISBROD, EMBLEMS OF PLURALISM 164–65 (2002). Further, it is doubtful that the strong psychological bonds that the authors attributed to the foster parents and children could be assumed in the circumstances in which the relationship was created. *Id.* These comments are based on a presentation that Professor Madzy Roode-de Boer gave to my family law class in 1988.

actively involved in the background. This is only one of several family patterns today. The first two editions of the family law casebook authored by Leslie Harris and Lee Teitelbaum opened with a section on "The Importance of Marriage."<sup>59</sup> The third edition opens with a section that flags the change by calling the material "Marriage and Its Alternatives," beginning with "When are Adult Partners a Family," and continuing with "The Importance of Being a Family."<sup>60</sup> Here we see a version of the changes that had concerned Lee Teitelbaum in his recent pieces on the shape of the family in the United States, and particularly the importance given to the nonmarital family.<sup>61</sup> He saw that our understanding of who was and was not in a family was best treated now as a question, rather than clear set of answers.

To some degree, with the perspective of several decades, we can say that Hal Painter shared at least one value with his in-laws. He felt that he should remarry so that he could provide and be seen to provide a conventional home for his son, with a wife and mother.<sup>62</sup> On other values, there was much less agreement. Margaret Bannister summarized the objections by talking about Hal Painter's lack of realism: his deficiencies as a father included his "inability to face reality and see things in the light as they really are" and his "inability to repudiate his fanciful, fantastic schemes."<sup>63</sup> The grandparents had opposed the marriage, as the judge points out.<sup>64</sup> The opinion also makes clear that the grandparents were particularly concerned about Hal Painter's financial history, his inability to handle money, and his spending the money they had given their daughter for the education of the grandchildren.<sup>65</sup>

Certainly the reading of *Painter* as subjective, imposing the opinions (here conservative) of a judge on a family dispute, did not represent a "national" law of custody at the time. When the State of California filed to intervene in the proceedings on the side of Hal Painter, it argued the prior claim of the fit parent, citing a concurring opinion by Justice Traynor.<sup>66</sup> California also argued that both father and son were both domiciled in

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<sup>59</sup>LESLIE JOAN HARRIS, LEE E. TEITELBAUM & CAROL WEISBROD, *FAMILY LAW* 3 (1st ed. 1996).

<sup>60</sup>HARRIS, TEITELBAUM & CARBONE, *supra* note 29, at 1–33.

<sup>61</sup>Imagine Hal Painter as an unmarried father. Is he also then unfit? And, similarly, can one speculate on what the absence of a marriage might have meant to the Bannisters? See *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972). This opinion is commonly understood as the foundational opinion on the rights of unmarried fathers. See also *Moore v. City of East Cleveland*, 431 U.S. 494, 503–06 (1977) (describing alternative family patterns with focus on minority communities in United States).

<sup>62</sup>PAINTER, *supra* note 33, at 122–26.

<sup>63</sup>Transcript of Record at 492–93, *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966) (No. 11-51974).

<sup>64</sup>*Painter*, 140 N.W.2d at 154–55.

<sup>65</sup>*Id.*

<sup>66</sup>Application of the State of California for Leave to Intervene as Plaintiff-Appellee at 5, *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966) (No. 11-51974) (citing *In re Guardianship of Smith*, 265 P.2d 888, 891–93 (Cal. 1954) (Traynor, J., concurring)).

California and that California law should be applied.<sup>67</sup> The case cited by California involved the custody claim of a natural father who had not legitimated the child whose custody he sought, following the death of the mother.<sup>68</sup> Justice Traynor's opinion noted that the father of an illegitimate child was in a questionable position and that he would want an explanation of why the father had not legitimated the child under the various mechanisms available for doing this.<sup>69</sup> There was no doubt, however, that the father had a claim, as a fit parent, to custody, even when unmarried.<sup>70</sup>

It is also the case that the judgments of the psychologist did not represent the state of the expert opinion of psychologists at the time. Additional material was submitted in the requests for a rehearing that made that plain. And today we are (and may have been then) entirely familiar with the idea that there are schools of psychology as there are schools of most other disciplines. But the combination of the unqualified professional opinion of the psychologist and the individual judicial preference for stability and convention resulted in a decision for the grandparents.<sup>71</sup>

Painter attempted to appeal to the Supreme Court of the United States.<sup>72</sup> Several amicus briefs filed with the Court at that time urged that fundamental rights had been violated in a decision in which a fit parent lost custody because of his lifestyle, religious beliefs, and general unorthodoxy.<sup>73</sup> But, in 1966, certiorari was denied.<sup>74</sup>

If today we were asked to name an important case involving a contest over grandchildren between parents and grandparents, we would probably not mention *Painter v. Bannister*,<sup>75</sup> but would more likely cite *Troxel v. Granville*.<sup>76</sup> *Troxel* is sometimes linked with *Painter* in doctrinal discussion since *Troxel* vindicated the biological parent (over the claims of the grandparents seeking visitation) in a way that *Painter* did not. As the third edition of the Teitelbaum casebook puts it:

The *Bannister* court noted that the presumption of parental preference had been weakened in the past several years. In 2000, however, in *Troxel v. Granville*, . . . the U.S. Supreme Court found the court-ordered grandparent visitation in accordance with a best-

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<sup>67</sup>*Id.* at 2.

<sup>68</sup>*Smith*, 265 P.2d at 889.

<sup>69</sup>*Id.* at 892–93 (Traynor, J., concurring).

<sup>70</sup>*Id.* (Traynor, J., concurring).

<sup>71</sup>*See id.* at 890.

<sup>72</sup>*See Painter v. Bannister*, 385 U.S. 949, 949 (1966).

<sup>73</sup>*See id.* This had, of course, once been the law; Percy Bysshe Shelley, for example, lost custody of his children because of his atheism. *Shelley v. Westbrook*, (1817) 37 Eng. Rep. 850, 851 (Ch.).

<sup>74</sup>*See Painter*, 385 U.S. at 949.

<sup>75</sup>140 N.W.2d 152 (Iowa 1966).

<sup>76</sup>530 U.S. 57 (2000).

interest standard in that case to be an unconstitutional infringement of the mother's fundamental right to make decisions concerning the custody, care, and control of her child.<sup>77</sup>

For present purposes, however, this description of the *Troxel* case is not the most important point. Rather, the significant feature of *Troxel* is that the Court did not make an issue of the fact that the parental couple never married.<sup>78</sup> The Court affirmed that the right of the mother to her child—as the biological parent—and her new spouse, was of foremost weight in the visitation question.<sup>79</sup>

The “family” in *Troxel* was complicated. To start with, Tommie Granville was married and the primary caretaker of three children born of her marriage.<sup>80</sup> Following her separation from her husband, she lived with Brad Troxel “sporadically,” beginning in 1989.<sup>81</sup> She had a child with Brad, born in November 1989, and when the couple “separated” in June 1991, she was pregnant with a second child of Brad’s, who was born in December 1991.<sup>82</sup> Brad killed himself in May 1993.<sup>83</sup> By October 1993 Tommie was living in a “new blended family” with Kelly Wynn, a businessman with two children from a previous marriage.<sup>84</sup> They married in the course of the state court proceedings and Kelly Wynn adopted Brad’s two daughters in 1996.<sup>85</sup> The Wynns then had eight children.<sup>86</sup> Tommie identified a total of five sets of grandparents in her blended family.<sup>87</sup>

The narrative of *Painter v. Bannister* presents a conflict between a biological father and maternal grandparents. Even if we include Hal Painter’s parents and foster parents in that narrative, we get nothing that looks like the five sets of active grandparents we see in *Troxel*, each set in contact with the family on a monthly basis.<sup>88</sup> A recent Ohio case on grandparent visitation describes a pattern like *Painter v. Bannister*, except that the parental couple was not married.<sup>89</sup>

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<sup>77</sup>HARRIS, TEITELBAUM & CARBONE, *supra* note 29, at 631.

<sup>78</sup>The Supreme Court uses the term “separate” when describing the end of the relationship. *Troxel*, 530 U.S. at 60. The brief for the respondents uses the term “broke up.” Brief for Respondents at 8, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138), 1999 WL 1146868. Both terms can be used to signify the end of marital and nonmarital relationships.

<sup>79</sup>*Troxel*, 530 U.S. at 72.

<sup>80</sup>Brief for Respondents, *supra* note 78, at 8.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Troxel*, 530 U.S. at 60.

<sup>84</sup>Brief for Respondents, *supra* note 78, at 9.

<sup>85</sup>*Id.* at 10.

<sup>86</sup>*Id.* Tommie and Kelly had a seven-month-old daughter at the time of the trial. *Id.*

<sup>87</sup>*Id.*

<sup>88</sup>*Id.*

<sup>89</sup>See Harrold v. Collier, 107 Ohio St. 3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, at ¶¶ 1–4.

We are not certain about how to think about grandparents.<sup>90</sup> Our curiously limited definition of the patriarchal idea does not help us to think about this. Historically, the figure of the patriarch was a powerful old man. In current feminist discussion, it is common to have the husband represent patriarchy in action. This reinforces a nuclear two-generational family as the basic unit, ignoring the parents of the parents who are, in some instances, still playing important roles. These are roles we recognize when we speak of grandmothers raising the children of addicted or disabled children. But they are equally important roles when the grandparents are providing babysitting, down payments, bridge loans, and substantial gifts. And, if there is a considerable amount of support, can influence be far behind? The decision making in the nuclear family may involve more influence from the “outside” than we acknowledge. And perhaps we are wrong, in fact, in thinking of the grandparents as “outside.”

Other issues are evident in *Painter* that would become large later. In *Painter*, what Hal Painter saw as “the high cost of jurisprudence”<sup>91</sup> was clearly operative and hindered his obtaining legal relief. He could not afford experts on his side. In *Troxel*, the sensitivity of the court to this issue was clear when the court issued a final decision rather than sending the proceedings back to the state court for additional review.<sup>92</sup> There was no remand, but rather a final judgment in this case because the judge felt the parties had already spent enough money.<sup>93</sup>

Our whole vocabulary for this sort of question has changed in the decades since *Painter* through the influence of law and economics. At the same time, we know that the idea of costs “is not an economist’s monopoly.”<sup>94</sup> A book on law and the behavioral sciences notes that various contributors to that book “have taken up the problems of externalities, transaction costs, secondary effects—usually undesired and unplanned—of legal intervention, problematic primary effects (legal impact studies), and occasional secondary gains.”<sup>95</sup> The point made in this book applies more generally to writing in the law reviews. Under the impact of law and economics, we use bargaining and economic language for much of our discussion of what goes on in the family.

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<sup>90</sup>There are differences between various religious and ethnic traditions on this point. These differences presumably have considerable impact on how generations view the issue of adult children supporting elderly parents. See Lee E. Teitelbaum, *Intergenerational Responsibility and Family Responsibility: On Sharing*, 1992 UTAH L. REV. 765, 778.

<sup>91</sup>PAINTER, *supra* note 33, at 196.

<sup>92</sup>*Troxel v. Granville*, 530 U.S. 57, 75 (2000).

<sup>93</sup>*Id.*

<sup>94</sup>Leon Lipson & Stanton Wheeler, *Introduction to LAW AND THE SOCIAL SCIENCES* 1, 9 (Leon Lipson & Stanton Wheeler eds., 1986).

<sup>95</sup>*Id.*

But we insist on the relative unimportance of money when we say that money should not be a factor in decisions relating to children's custody.<sup>96</sup> (We deny that the large comfortable home is about money, of course.) Here, literature can provide contrary ideas.

### III. SOME ADDITIONAL QUESTIONS

One vehicle for research in the description—or descriptions—of the family has been, in recent years, the approach (I am reluctant to call it a method) known as law/literature. It may be that “reading, anecdote, and conjecture” are not, as Lee Teitelbaum urged, particularly good ways of grounding policy,<sup>97</sup> at least when used alone. But if they are not ways of reaching conclusions, they may open questions. Lee Teitelbaum's comments on the changing structure of the family are central to our current situation.<sup>98</sup> And we can go back for a moment to his view of the contribution of other disciplines to family law in particular.

Lee Teitelbaum suggested that we use other disciplines to fill in the content of certain standards in family law.<sup>99</sup> We are accustomed to the idea that writers of fiction use the law they know in their work; the presentation of law in literature is one of the possible relations between law and literature, and it tells us something about what (some) people think about law.<sup>100</sup> We may also use other material, from literature or popular culture, to fill in our sense of who the parties are and what they are concerned about. For example, we have a fairly good sense of the father, Hal Painter, through the attacks on him by other people and through his own writing.<sup>101</sup> We can fill in our sense regarding the Bannisters from the trial record and Hal Painter's descriptions, supplementary

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<sup>96</sup>AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 (2002). In the context of orders relating to parenting plans, the American Law Institute principles say:

§ 2.12 Criteria for Parenting Plan—Prohibited Factors

(1) In issuing orders under this Chapter, the court should not consider any of the following factors: . . . ;

....

(f) the parents' relative earning capacities or financial circumstances, except the court may take account of the degree to which the combined financial resources of the parents set practical limits on the custodial arrangements.

*Id.*

<sup>97</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 11.

<sup>98</sup>*Id.* at 3–5.

<sup>99</sup>*Id.* at 3.

<sup>100</sup>For an overview, see Thomas Morawetz, *Law and Literature*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 451, 455 (Dennis Patterson ed., 1996).

<sup>101</sup>Hal Painter's description of the work of the Iowa court was that it reflected values that “negate love and the biological affinity of father for son, and replace love not with anything so ruthlessly sophisticated as computerized predeterminism but with heavy-handed provincialism that mulishly insists it shall have its own way.” PAINTER, *supra* note 33, at 205.

material raising their own problems.<sup>102</sup> But we also, I suspect, fill them in from some literary material that gives additional substance to the kind of person Painter saw himself engaging. We find in the character of Dwight Bannister the midwestern authority figures we have run into in books and movies, responding with the insights of our own generations.<sup>103</sup> Clearly, the continuity argument of Dr. Hawkes, the doctor who testified at the *Painter* trial, was premised on the idea that the biological connection was all but trivial.<sup>104</sup> But he had great respect for the idea of a father-generation and a child-generation.<sup>105</sup> Thus, Dwight Bannister was taken to be the father figure of a child in need of one.

What sort of father figure? We know that Dwight Bannister, for example, was taken by everyone to be a good person, a fine man.<sup>106</sup> A leader of the community and a respected figure.<sup>107</sup> A churchgoer who taught Sunday school.<sup>108</sup> A successful man, owner of a number of newspapers, and, at the time of the litigation, associated with Iowa State University.<sup>109</sup> But what was he actually like? What did he like? We may fill in the characters with what we know from movies. Thus, we may associate him with someone like Jack Nicholson's Schmidt, or even, through the coincidence of names, with Dwight Babcock in *Auntie Mame*, a well-intentioned square who should find better things to do than endlessly attempting to stifle the exuberance of Rosalind Russell. In the first association, he becomes somewhat tragic, in the second comic. And perhaps one should not be too quick to draw conclusions about how entirely conventional the Bannister home actually might have been. It is not a surprise that Dwight Bannister's father was a doctor.<sup>110</sup> It is more of a surprise that his mother was a lawyer.<sup>111</sup> (Would that grandmother have recognized something in a granddaughter who left Iowa to go to Alaska?)

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<sup>102</sup>Some of Painter's recollections fit quite well with the Bannisters' testimony. Margaret Bannister found dealing with Hal Painter's second wife "not pleasant[]" because she had introduced herself and not waited to be introduced. Transcript of Record, *supra* note 63, at 509. Painter's new wife was judged "effusive and intrusive." *Id.*

<sup>103</sup>Wilhelm Dilthey has identified a generational issue here, noting that the word "generation" has two meanings. See WILLIAM STRAUSS & NEIL HOWE, GENERATIONS 438 (1991) (quoting Wilhelm Dilthey). First, is the time that lasts from "birth until that age when, on the average, a new life is added to the generational tree." *Id.* The second was the "relationship of contemporaneity between individuals, that is, between those who had a common childhood, a common adolescence, and whose years of greatest manly vigor partially overlap." *Id.*

<sup>104</sup>See *Painter v. Bannister*, 140 N.W.2d 152, 157 (Iowa 1966). It can also be noted in this connection that Goldstein, Freud, and Solnit viewed the search for biological parents by adopted children as a phase in development. See GOLDSTEIN, FREUD & SOLNIT, *supra* note 58, at 23.

<sup>105</sup>*Painter*, 140 N.W.2d at 157.

<sup>106</sup>*Id.* at 154.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.*

<sup>109</sup>*Id.*

<sup>110</sup>PAINTER, *supra* note 33, at 89.

<sup>111</sup>*Id.* Women were admitted to the bar in Iowa in 1869; Hal Painter described the mother as a lawyer, good with finances and business. *Id.*



Some of these readings resonate with Painter's description and the testimony of the Bannisters themselves in the trial record. Dwight Bannister said of Hal Painter: "I can't say that I like this little guy. He is helpless himself. He had defects. If he would give anybody a chance to help him he might not be completely worthless, but as it is now there is no reaching him. We have no hope."<sup>112</sup> (Is this spoken from the position of a man without defects?) The Bannisters might have encouraged a positive attitude in the child toward the father, but it seems that they did not. Mrs. Bannister had testified that "[t]here was no occasion to tell this boy [about good qualities of his father] and I could not have made such an occasion. I never made any attempt in any way to tell him about his good qualities."<sup>113</sup> One issue here is the effect these positions might have on visitation. Another one, quite different, is what it means to a child to grow up with people who think his biological father is worthless and not to be discussed positively or, indeed, at all. To make the point most generally: what happens if we read the case against Jonathan Franzen's *The Corrections*<sup>114</sup> or Garrison Keillor's "ninety-five theses"?<sup>115</sup> These descriptions raise questions beyond those suggested by a judicial account in which the only problem with placement in this stable, conventional, middle-class, midwestern family is that it was not intellectually exciting. One gets a sense of the rigidity of the Bannister position (and personality?) from some pieces of the trial record. Their age was taken into account. Their inflexibility was ignored. At the time of the decision, Hal Painter was thirty-five years old, and Dwight and Margaret Bannister were about sixty years old.<sup>116</sup> The court considered whether the ages of the grandparents would matter to the raising of the child, and concluded that it would not.<sup>117</sup> The Iowa Supreme Court, which ruled for the Bannisters, said, "we do not believe we have the moral right to gamble with this child's future," and then added by way of conclusion, "[h]e should be encouraged in every way possible to know his father. We are sure there are many ways in which Mr. Painter can enrich Mark's life."<sup>118</sup> This might have been the point at which to consider in detail issues relating to the Bannisters' view of Hal Painter, but this is not a part of the opinion. Stressing these possibilities, one ends up saying that there were downsides to both placements in the case.

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<sup>112</sup>Transcript of Record at 561, *Painter v. Bannister*, No. 11-51974 (Iowa Sup. Ct. Sept. 27, 1965).

<sup>113</sup>*Id.* at 499.

<sup>114</sup>JONATHAN FRANZEN, *THE CORRECTIONS* (2001). Enid is the wife and mother at the center of this commentary on an American family that is falling apart. *Id.* at 3. She liked things and people to match, at weddings in particular. *Id.* at 118. See also *id.* at 23 (describing text and subtext in Enid's questions when she meets new people).

<sup>115</sup>GARRISON KEILLOR, *LAKE WOBEGONE DAYS* 253-74 (1985).

<sup>116</sup>Transcript of Record, *supra* note 112, at 23, 476, 555.

<sup>117</sup>*Painter v. Bannister*, 140 N.W.2d 152, 156 (Iowa 1966).

<sup>118</sup>*Id.* at 158.

The brief to the United States Supreme Court requesting review of the Iowa Supreme Court decision referred to several of these points, including the “rosy view” of the Bannister household that ignored “factors that cast doubt upon their fitness to direct Mark Painter’s upbringing”<sup>119</sup> and the implications of giving custody of a child to people who would undoubtedly try alienate him from his father.<sup>120</sup> The firm of Covington and Burlington were among the attorneys for Painter when he petitioned the Court for certiorari review.<sup>121</sup> Their description of Hal Painter had a quite new sound: “It is perfectly plain that Harold Painter, who has some uncommon aspirations and some all-too-common faults, does not satisfy respondents’ concept of the ideal human being.”<sup>122</sup> The reply brief notes that Painter was working at home as a freelance writer and photographer, and “[i]n respondents’ strange lexicon this presumably makes Painter ‘unemployed’. . . but in fact he is doing just what he has always wanted to do and is making a financial and professional success of it.”<sup>123</sup>

The arguments made by the Bannisters repeatedly stress the issue of Hal Painter’s failures with money. This financial irresponsibility might have been treated as “financial abandonment,” they said.<sup>124</sup> And they themselves are repeatedly described as, if not rich, at least comfortable.<sup>125</sup> We say that this does not matter. Literature opens some other questions on this point. De Maupassant, for example, has a story in which a child put up for adoption lives to see wealth from his new family.<sup>126</sup> Another child is kept at home. He then complains.<sup>127</sup> He asks, in effect, “Why didn’t you put me up for adoption?”<sup>128</sup>

The focus on money—and the entanglements of home and money—does not seem altogether strange. If anything, this entanglement is central to the history of the family and to its role as a provider of security. The desire for wealth is all but ubiquitous in American culture. Should we be surprised if this value impresses itself, for example, on a child in a custody dispute? Would that child vote for being rich, in effect?<sup>129</sup> Discussing the contrasts between the

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<sup>119</sup>Brief of Petitioner at 31, *Painter v. Bannister*, 385 U.S. 949 (1966) (No. 518).

<sup>120</sup>*Id.* at 32.

<sup>121</sup>Reply Brief for Petitioner at 1, *Painter*, 385 U.S. 949 (No. 518).

<sup>122</sup>*Id.* at 8–9.

<sup>123</sup>Reply Brief for Petitioner, *supra* note 121, at 9 (citing Respondents’ Brief in Opposition at 4–5, *Painter*, 385 U.S. 949 (No. 518)).

<sup>124</sup>Respondents’ Brief in Opposition at 28, *Painter*, 385 U.S. 949 (No. 518). The Iowa courts made plain that there was no abandonment. *See Painter v. Bannister*, 140 N.W.2d 152, 156 (Iowa 1966).

<sup>125</sup>*See Painter*, 140 N.W.2d at 154–55.

<sup>126</sup>GUY DE MAUPASSANT, *In the Country*, in *THE COMPLETE SHORT STORIES OF GUY DE MAUPASSANT* 819, 819–22 (1903).

<sup>127</sup>*Id.* at 822.

<sup>128</sup>*See id.*

<sup>129</sup>*See* Michael Freeman, *The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?*, 11 INT. J.L. POL’Y & FAM. 360, 364, 385 n.8 (1997) (noting international standard requiring opinion of child in custody cases).

Painter and Bannister households in a way that ignores money seems strange, but we probably continue to do it. Here, characterizations of the households sometimes attempt a kind of neutrality so that the issues are posed as “stability and security” as against “intellectual stimulation,”<sup>130</sup> or conventionality as against bohemianism. Not rich as against poor, though presumably that was also involved.<sup>131</sup> A Bannister brief cites a custody case in which inability to handle money is cited as a negative factor.<sup>132</sup> Perhaps the problem for the Bannisters and the court was not so much that Hal Painter did not have money, but that he did not have enough respect for or interest in money. (And perhaps, then, that he did not have enough respect for Dwight Bannister?) At one point, Bannister said that Hal Painter had not offered to return the stocks that Bannister had given to Jeanne.<sup>133</sup> Does this say something about the conditions which were, perhaps mentally, attached to these gifts? Why wasn’t this simply a parental wish or hope? How did Dwight Bannister see the transaction so that it became part of his grievance?

As noted, the *Painter* court used psychological materials and showed a heavy deference to the expertise of a psychologist who was himself of the school we have come to identify with Goldstein, Freud, and Solnit. As to the specific experts, it is likely that, today, judges understand (and perhaps, in general, understood in 1966) that there are many kinds of psychologists and that one can be deferential to experts generally in principle but that, in fact, one is likely to be choosing a particular kind of expert. But the real point here is that the kind of science we are talking about has become much more extensive. Lee Teitelbaum was interested in the science of paternity. Presumably, he would have become interested in the science of new birth technologies and, as that becomes a legal question (or will become that), of cloning. Will the answers to these questions be decided through deference to experts?<sup>134</sup>

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<sup>130</sup>Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975).

<sup>131</sup>When Jeanne went to Anchorage, her colleagues described her as being from a well-off family. PAINTER, *supra* note 33, at 8–9.

<sup>132</sup>Respondents’ Brief in Opposition, *supra* note 124, at 28 (citing *Carrere v. Prunty*, 133 N.W.2d 692, 695 (Iowa 1965), which involved significantly different facts).

<sup>133</sup>Transcript of Record at 555, *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966) (No. 11-51974). Painter said that shortly after his wife’s death, Bannister was not “overly concerned about [his] having inherited Jeanne’s stocks.” PAINTER, *supra* note 33, at 96–97. Painter was “greatly relieved” when, after being asked if he should return them, he says Bannister told him “the stocks were [Painter’s] to use as [he] saw fit.” *Id.*

<sup>134</sup>We might also note here the American Law Institute’s Principles of the Law of Family Dissolution, as these relate to custody. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18 (2002). The new proposals emanating from the American Law Institute move away from the idea of a standard normal case, based on biological parenting, to the idea that there are various ways to establish parenthood, including parenthood by estoppel, de facto parenthood, etc. *Id.* These proposals are, of course, recommendations, and it remains to be seen whether they will be followed in the state legislatures. Cf. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 5.02 cmt. e (2000) (noting position of Uniform Marriage and Divorce Act

We can recall that Lee Teitelbaum's criticism of certain research was, in effect, that it had no method and no constraints. He noted:

A scholar can say, if he or she is so minded, that mandatory arrest will, or probably will, deter spousal violence. She may claim that no-fault divorce laws will, or probably will, help children because they allow disputing spouses to separate and spare their children participation in those disputes. By "will deter" or "will help" and by "probably will deter" or "probably will act," the author means exactly the same thing—the ascribed result makes sense intuitively or on some rational basis that flows entirely from the author's theory of how the world works constructed from reading, anecdote, and conjecture.<sup>135</sup>

Along the same lines in privileging empirical knowledge, Jon Elster, expanding on Robert Mnookin's concern about the uncertainties of the best interest standards, noted on the point of lack of empirical grounding that the professionals he had asked agreed that they had no empirical basis for what continued to be their position that the primary caretaker had a claim beyond that of the secondary parent.<sup>136</sup>

But if we need more empirical work directed to questions of decision making, we also need work directed to compliance or noncompliance. Self-help is sometimes discussed in family law, but probably not enough. (Hal Painter himself thought about kidnapping his son, but found that he was not much good at it.)<sup>137</sup>

One view of self-help considers it an option only for elites. For example, Philip Pullman's *The Golden Compass* sees law as involving a power struggle between the law and those theoretically subject to it.<sup>138</sup> The court decides a custody issue; the child is to be placed in a priory. "But Lord Asriel wouldn't stand for that . . . he just rode in one day and carried you off . . . he took you to Jordan College, and dared the law to undo it."<sup>139</sup>

In fact, the pattern is familiar in family law and not limited to the Lord Asriels of the world. We can call it parental kidnapping or self-help. It raises

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on fault and maintenance orders, and adding additional point that half of states nonetheless retain fault as consideration). For discussion of the American Law Institute's work on marriage in a volume intended as a student review book, see WALTER WADLINGTON & RAYMOND C. O'BRIEN, *FAMILY LAW IN PERSPECTIVE* 97 (2001). For another such discussion focused on children, see DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW*, 151–80 (2000).

<sup>135</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 11.

<sup>136</sup>See JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATION OF RATIONALITY* 134–39 (1989) (concerning the use of randomness as decision-making device in both very easy and very hard cases).

<sup>137</sup>PAINTER, *supra* note 33, at 161.

<sup>138</sup>See PHILIP PULLMAN, *THE GOLDEN COMPASS* 122–23 (1995).

<sup>139</sup>*Id.* at 123.

issues of the enforcement and limits of law. Of course in fiction, as in fact, the law would have to choose and decide how to react to this very familiar scene. "Well," the Pullman narrative concludes on this point, "the law let things be."<sup>140</sup>

But, self-help may also be available by way of avoidance. William Gibson offers a vision of law and society that we may recognize:

"You move in with this guy, he starts hitting you, what do you do?"

"Move out."

"That's right. You move out. You don't take a meeting with your lawyers."

"I don't have any lawyers," Chevette said.

"I know. That's what I mean."

"I don't like lawyers," Chevette said.

"Of course you don't. And you don't have a reflex to litigation."<sup>141</sup>

Hal Painter's foster mother had told him not to send the child to the Bannisters because they would never let him go, but he did not listen to that advice.<sup>142</sup> Possibly he thought that a legal idea would protect him. Or, possibly he wanted the security of the Iowa farm for his child enough that he did not think much about future issues. In contrast, a different decision at that early stage would have been an example of self-help and avoidance. (Do we think the Bannisters found him so unsuitable as a father that they would have challenged him even without his temporary arrangement with them? Much of their evidence and argument relating to his unsuitability dealt precisely with that arrangement,<sup>143</sup> but perhaps other evidence might have been found.)

The judge who said "we are here setting out the course for Mark Wendell Painter's future"<sup>144</sup> was wrong in thinking that. As noted above, Mark Painter returned to his father after the decision in the Iowa court.<sup>145</sup> As to this, the question is raised in the Harris and Teitelbaum casebook: what can we learn from this?<sup>146</sup> Perhaps the answers include such points as: the trial court was right and the decision was wrong; let us remember that we cannot predict the future; moderation in all things is a better operational principle than following one idea—for example, continuity—to its furthest point; justices should not give deference to the experts when common sense is offended; and when experts are called, they should be available for both sides.

The legal system is looking at people who are looking back at the legal system, commenting on it, critiquing it. We have in cases like *Painter*, as we

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<sup>140</sup>*Id.*

<sup>141</sup>WILLIAM GIBSON, *ALL TOMORROW'S PARTIES* 68 (1999).

<sup>142</sup>PAINTER, *supra* note 33, at 118.

<sup>143</sup>*See, e.g., Painter v. Bannister*, 140 N.W.2d 152, 153 (Iowa 1966).

<sup>144</sup>*Id.*

<sup>145</sup>*See supra* text accompanying note 53.

<sup>146</sup>*See HARRIS, TEITELBAUM & CARBONE, supra* note 29, at 631–32.

have in many families, a child among you taking notes.<sup>147</sup> Perhaps it reminds us of the human being looking at the legal system that deals with them. Marilynne Robinson captures this in the novel *Housekeeping* when the narrator and her sister are “alarmed” at the realization that the state had an interest in its children’s welfare.<sup>148</sup> Recalling *Painter* and the way the legal system dealt with the complexities of that three-generational family, we understand the alarm.

Some of Lee Teitelbaum’s work was a caution against insufficiently examined change, the natural experiment, the risk taking of some of our current approaches. But if he worried about unintended or unknown consequences, he also analyzed the defects of the existing situation. Lee Teitelbaum’s contribution to the history of family law was substantial, and his caution in dealing with inadequately grounded solutions notable, particularly in a field in which normative solutions are viewed, in general, as obligatory. He had a very clear sense of the changes over thirty years, and this Essay simply attempts to use a well-known case in family law to provide a point of entry against which some of those changes can be examined.

One of these relates to the new shape of the family and how this change has affected the ability of the family to relate to the security of its members over time. That is, of the various functions that Lee Teitelbaum identified as being significantly performed by the family, how many are being done by the “blended family,” and is the way in which they are done the same as the way in which they were done in a more unified family, whether or not “nuclear”?

There are many questions to be considered with reference to the new blended family. It seems we do not yet know much about it. The many people loosely associated with each other following divorce and remarriage, for example, may stand in emotional relation to each other more than economic relation. Or, there may be more economic connections than we think. It may be that the multiple grandparents of the blended family will contribute to the education of the grandchildren, but they may not. And they stand in an unclear relation to each other. They may or may not share family holidays. It may be that they offer themselves as alternatives, each presenting the picture of a three-generation nuclear family, a snapshot in time, which ignores the fact that there are other similar pictures. Or they may all stand together in the same picture. This kind of pillarization in the blended family should be distinguished from pictures of individualism. It is much more genealogical than that, rooted in bloodlines. It may invoke that story of group identity we sometimes call tribalism.<sup>149</sup> Are grandparents conceived of as victims of granny dumping,

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<sup>147</sup>See Robert Burns, *On the Late Captain Grose’s Peregrinations Thro’ Scotland*, in THE COMPLETE ILLUSTRATED POEMS, SONGS AND BALLADS OF ROBERT BURNS 230, 230 (Samuel Carr ed., 1990) (“A chield’s amang you takin notes.”). A chiel is a young fellow.

<sup>148</sup>MARILYNNE ROBINSON, *HOUSEKEEPING* 68 (1980).

<sup>149</sup>Lee Teitelbaum thought that the three-generation family was unusual in America, though perhaps *Troxel* suggests another way of looking at the situation. See Teitelbaum, *supra* note 90, at 777–78. He also thought that economic relations even between parents and adult

poor, eating cat-food? Or are they the wealthy beneficiaries of decades of public programs who are now helping their somewhat less fortunate adult children? Our images are very mixed.

One question is, however, how much of this is true as to the nuclear family and how much of it is true as to the "blended family" or even, in language once associated with anthropology, the kinship network. It may be that the complex families in which many now live are stronger at providing emotional support and weaker at providing economic support than the traditional family, or it may be that "blended" and "extended" are quite different. Using the word "family" as though the underlying thing was the same will not help us to explore this.

If we see *Painter* as existing between two worlds, we can say that the first world is one in which a judge finding for the grandparents could assume a shared system of moral values throughout the country. This world of uniform values was unquestionably gone by 1966, assuming that it had ever, in fact, existed.<sup>150</sup> This is not to say that those values were dead, but simply that there were other ideas very much alive and growing. The second world of *Painter* is one in which the values of science and social science contribute a solid basis for decision making. This world does not, in fact, exist either. At the same time, we are forced to wonder where the deference shown by the judge in *Painter* might take us. We can recall the sentence in *Beyond the Interests of the Child* to the effect that the state assigns the newborn child at birth to its biological parents.<sup>151</sup> Can one imagine a line of development in which there is deference to experts who thought for some reason that some other assignment was more appropriate?<sup>152</sup> What, in short, is the status of the two worlds some decades later? Are we still wandering between two worlds? Possibly yes. A traditional world is reflected in the resistance to gay marriage and the opposition to the American Law Institute standards. The impact of science and experts so evident in *Painter* will be reflected in the cases we have only begun to see dealing with new birth technologies.

There is an ambiguity in the title of the 1996 paper in the *Journal of Legal Education* that evokes Lee Teitelbaum's stance in relation to the many changes he saw: the title is *The Last Decade(s) of American Family Law*.<sup>153</sup> What was meant, I think, was the recently past decades. The article was an update on the state of family law. But somehow, as one reads the article, the title can turn into something else, something more like the Last Days of Pompeii, as if those last decades were really the end of American family law as we knew it and were opening something else altogether, something that he said "loom[s]"

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children were fairly attenuated. *Id.* at 778–79. These are questions that require further exploration, as things may have changed since Teitelbaum wrote on these issues in 1992.

<sup>150</sup>See generally Schneider, *supra* note 42, at 1805.

<sup>151</sup>GOLDSTEIN, FREUD & SOLNIT, *supra* note 58, at 22.

<sup>152</sup>The question comes up in the context of parents who have abused one child and have another. We now ask whether we have reason to fear for the safety of the second child.

<sup>153</sup>See Teitelbaum, *supra* note 1.

before us.<sup>154</sup> “Looms” is, of course, a word of apprehension and concern referring to unknown, but menacing, possibilities. He was not sure that the developments were “encouraging.”<sup>155</sup>

Some who think this way have in mind some sort of golden age of the family. But as Lee Teitelbaum’s own research made plain, that age probably never was. While women, to take one of his examples, in an earlier period had clear expectations of what they might expect upon divorce, it is also true that there was not much alimony awarded in fact.<sup>156</sup> And Lee Teitelbaum made a further comment that showed how alert he was to the danger of false images of the past. He was very much aware of the different forms of the family at different times and of the influence of certain ideas of the family:

While there is much to be said for discussion of family values, some forms of that discourse seem to assume the existence of an ideal time (sometime around 1957, when they made the best Chevrolets): divorce was essentially unknown, spouses happily allocated responsibilities along clear and uncontroverted lines, and children did their homework and did not use drugs.<sup>157</sup>

History could, he thought, help us move away from that version of reality, and consider detailed questions. “Historical and sociological work may help us consider whether, if divorce was rare, marital breakdown was also rare, and whether acceptance of the ‘family ideal’ entailed the masking of behaviors that we now call domestic abuse.”<sup>158</sup> “History from any disciplinary source has a further important function,” he said, “as a prophylaxis against nostalgia.”<sup>159</sup> This Essay on *Painter v. Bannister*, reading this case as a marker on the shape of the family, does not intend to describe a golden age, but rather to show the simplifications that nostalgia requires.

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<sup>154</sup>*Id.* at 556.

<sup>155</sup>*Id.* at 552.

<sup>156</sup>*See id.* at 551.

<sup>157</sup>Teitelbaum, *Rays of Light*, *supra* note 6, at 8.

<sup>158</sup>*Id.*

<sup>159</sup>*Id.*