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Beyond the Best Interests of the Child

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BOOKS

BEYOND THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud and Albert J. Solnit. New York: The Free Press (MacMillan Publishing Co.), 1973. Pp. xiv, 170. \$7.95 hardcover; \$1.95 paperback.

Identifying just principles for minimizing and resolving disputes over child custody remains one of the law's knots. King Solomon's renowned gambit for resolving the claims of two women to a newborn child¹ was in fact the easy case: only one of the two contenders had a just claim; only one of the two contenders was prepared to be responsible; and in that first of reported cases, the judge had the advantage of surprise. Yet where each potential custodian has a claim, where each is equally prepared (or unprepared) to sacrifice his interests for the child, and where the rules of decision are known in advance and thus susceptible to manipulation, justice for adult and child is much harder to achieve. Only with difficulty has the law advanced the rules regarding child-possession beyond the law of land-possession or slave-possession. Even in acknowledging that the "best interests of the child" are its central concern, the law has made false promises, both beyond its capacity and camouflage for rules that most strongly respond to the presumed interests of the competing adults.

In *Beyond the Best Interests of the Child*, three distinguished social science professionals have crafted out of evident compassion for the child a brief yet subtle program for the law's resolution of these difficult cases. Anna Freud and Albert J. Solnit are pre-eminent figures in child psychoanalysis and psychiatry, respectively, who insist that law recognize both what is known about child development and, as importantly, what is not known and cannot be predicted with certainty. Joseph Goldstein, a distinguished professor of law who has also acquired professional psychoanalytic training, seems ideally placed for the arduous task of smelting sound legal policy from the social science ore. Their book, warmly hailed by an impressive array of judges, child welfare professionals and others concerned with children, insists that the child's perspective must be controlling in any judicial proceedings to decide custody issues.

Even if the full force of their recommendations does not prevail, the symbolic importance of their commitment to the child's side and the fresh view that they give of the law's impact and failings are sufficient to require that their book be read. Yet their commitment carries with it possibly unavoidable overstatement. The book views child development from a questionably narrow

1. I KINGS 3:16-28.

stance. As a plan for concrete action, it is compromised by partisanship and apparent failure to relate its insights to the realities of an operating legal system; it fails to consider the way in which radically new rules may shape parental behavior and the incidence of litigation, and takes insufficient account of the limited capacity of a legal system staffed by fallible humans to administer them.

The beginning chapters describe with elegant brevity the existing psychiatric understanding regarding child-parent relationships and child development, and define a variety of concepts important to the authors' themes. The central thoughts are that the child's development depends upon the continuity and character of his relationship with the adult he perceives as his parent, *and that this perception rather than the fact of biological parenthood is the basis of their relationship*. This adult is described by the authors as the child's "psychological parent"—one who wants a relationship of enduring character with the child, and who through a course of continuing care and concern for the child comes to be regarded by him as "parent" and thus serves as the touchstone for his maturation and development.

Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be. (P. 19.)

Once such a relationship is formed, it ought not to be disturbed absent the most serious provocation.²

From this conjunction of need for continuity and importance of perceived relationships, the authors develop guidelines of major force for all child placement decisions. First, such decisions must safeguard the child's need for continuity of existing relationships. This need varies in character as the child grows but is always present in an intensity unlikely to be appreciated by adults; adults' formal relationships are not ordinarily subject to severance by others, their dependence on those relationships is not usually pervasive, and their capacity for rational manipulation of the environment and postponement of gratification is usually high. That prior relationships should be given significant force is no doubt unsurprising, but in the authors' view such a relationship once established must be made controlling. As importantly, they view the

2. Thus, when a child of divorce has been placed with one parent and, over time, is integrated into a new home, death of the custodial parent ought not entitle the surviving biological parent automatically to assume custody of the child as against the surviving step-parent. The potential for harm to the child (and the family in which it has been living) is transparent. Students of Professor Goldstein developed this aspect of the idea some years ago in a widely cited note, *Alternatives to "Parental Right" in Child Custody Disputes Including Third Parties*, 73 YALE L.J. 151 (1963), but it is still far from universally accepted. See, e.g., *Quaresmo v. Schwab*, 44 App. Div. 2d 568, 353 N.Y.S. 2d 48 (1974).

anxiety engendered by the prospect of legal interference as equally objectionable; "each child placement [must] be final and unconditional and . . . pending final placement a child must not be shifted to accord with each tentative decision." (P. 35.) And, consequently, the child should not be subjected to legal regimes, such as enforceable rights of visitation, which increase the likelihood of future legal actions. Placement orders must be absolute, subject neither to modification nor to conditions enforceable by courts. For a divorcing couple, this would require sole custody to be given one of the two parents, with the other retaining no legal right to the child's company nor voice in his upbringing.

Second, placement decisions must reflect the child's, not the adult's, sense of time. Unlike adults, children can not readily manage delay; a delay of one month for a two-year-old corresponds in relative terms to perhaps a year's time for a young adult. The younger the child, the quicker the process by which memory of prior relationships is suppressed in favor of replacement relationships—whose loss, in turn, would compound the emotional harm uprooting has caused. "[T]o avoid irreparable psychological injury, placement, whenever in dispute, must be treated as the emergency that it is for the child." (P. 43). The consequences: limited time for the hearing of disputes; sharply limited and expedited appeals; and the suggestion that success on appeal should entitle the appellant to no more than an opportunity to show that intervention in the child's *current* placement is required at the time of rehearing.³

Finally, the authors strike a cautionary note: child placement decisions must take into account the law's incapacity to supervise interpersonal relationships and social science's incapacity to make behavior predictions. Law "may be able to destroy human relationships, but it does not have the power to compel them to develop" (p. 50); psychoanalysis can identify existing capacities for parenthood, assess existing relationships, and demonstrate the harm often wrought by interruptions in continuity or extended uncertainty, but it cannot predict the future of any particular relationship. Consequently, the law should take an openly modest stance in resolving child placement disputes, letting well enough alone unless the need or inevitability of change is made clear and then—for such a child is "already a victim of his environmental circumstances [and] . . . greatly at risk" (p. 54)—selecting "that placement which is the least detrimental among available alternatives for the child." (P. 62.) Rather than make the unattainable false promise of "best interests," the authors choose to focus our attention on "the need to salvage as much as possible out of an unsatisfactory situation," our limited capacity to make valid predictions, and the limited choices generally open to us for achieving our goals. (p. 63).

These guidelines (if not all the conclusions drawn from them) are the

3. Cf. *State ex rel. Lewis v. Lutheran Social Services*, 405 U.S. 1051 (1972).

work's contribution. They have not previously been stated, at least with such cogent force. And they warrant the most careful attention by legislators, judges and lawyers. Modesty in intervention, speed and finality are all qualities presently lacking from the law's endeavors in child placement.⁴ There is ample demonstration here of the need and basis for each in the learnings of psychoanalytic science. Limited and controversial as some of the propositions made in the name of behavioral science may be, the findings relied upon here are bedrock, not seriously disputed among the contending schools and camps, or by skeptical outsiders.⁵

The emphasis on psychological rather than biological relationships in disputed cases seems equally sound, provided that the importance of environment and the possible psychological advantages of biological relationships are not overlooked. The losses that a child faces through removal from his accustomed home are imperfectly accounted for if only the "parent" is looked to; the change may equally involve siblings, friends, community, house, toys, clothes—every aspect of his existence—and a change in parent figure that did not also involve these changes would not present as intense a threat. So, too, biological ties, if not interfered with, encourage the development of psychological relationships. A mother's hormonal response to childbirth may foster attachment; mother and father both are prepared for attachment by the unfolding of pregnancy, and may be aided by their realization that the child is their biological continuation. This sense of continuity and heritage is valuable from the child's perspective, if it strengthens parental ties.

We doubt the authors would disagree with these observations, although their stress on cases in which biological cues have failed tends to submerge them.⁶ Similarly, the success of adoption—prime evidence for the "psychological parent" notion—ought not be permitted to obscure the greater risk faced by any child whose psychological and biological parents are not identical. Such a child will seek (or ignore, or reject) roots in more than one family. Even well-adjusted adopted children yearn to know their natural parents as part of their developing sense of identity. And their adoptive parents may experience attachment to them somewhat differently than to a natural child. For instance, emotional problems frequently arise when parents adopt a child and subsequently succeed in having one of their own; often they try to maintain an

4. While the book and this review are chiefly directed to legal roles, the point has equal bearing on child welfare workers. Speed and urgency are radical notions for a placement bureaucracy. Cf. N.Y. State Assembly Committee on Social Services, Report of the Temporary Sub-Committee on Adoption Practices (1970).

5. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC. REV. 167 (1969).

6. To return for a moment to the Solomonic judgment: on reflection it seems irrelevant to the justice of the result whether the woman who volunteered to give up the child to avoid its dismemberment was its biological mother or the competitor; common sense acquaintance with human behavior prepares us to believe that she was its mother, but the important point lay in her present and probable future relationship with the child, shown by her willingness to sacrifice herself for it.

identity of feeling towards each child which is not possible or realistic to have. Obviously, these considerations are not arguments against adoption. The differences are subtle, vary from person to person in unpredictable ways, and in any event are not susceptible of management by law. But they do suggest that the basis for recognition of the natural parent's claim to initial custody of his child is stronger than mere convenience, as the authors at times appear to suggest.

To take the argument one step further, we think that the authors introduce political premises which receive no support from the findings of psychoanalysis or psychiatry when they insist that the natural parent has no claim independent of his child's interests, that he has no "right." The point is strikingly made by repetitive characterization of the birth certificate as an "allocation," as if it were more than an (optional) record-keeping device and as if placement at birth involved a social judgment that *could* be made in any way. This characterization is effective only as a rhetorical device. The parents' claim is honored, not only out of concern for the child or even diffidence regarding present ability to determine its interests, but also in recognition of interests that the biological parents enjoy, which must somehow be compromised before any intervention can be justified. The failure to acknowledge this independent parental, perhaps more properly custodial, claim flaws the analysis.

Anticipating this criticism, the authors assert a value preference for abstention, "to safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect⁷ and abandonment"

7. The concept of neglect is central to the authors' thesis, since it defines one of the few circumstances in which state intervention into family life is authorized. Perhaps the most regrettable of the omissions of this book is its failure to bring the authors' perceptions and knowledge to bear on defining this most troublesome term. Although in some respects they seem to believe that wide ranges of "parental" behavior disserve the developing child (pp. 15-21), they contribute no more toward a definition of neglect than the observation that the present definition is unsatisfactorily diffuse. (P. 105). It is hard to imagine a question for which the risk of judicial misadventure is as high. See Burt, *Forcing Protection on Children and Their Parents*, 69 MICH. L. REV. 1274-81 (1971); cf. *In re Raya*, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967). Portraying the child as they do—a fragile creature, particularly subject to parental influence in determining his future for good or for ill—the authors risk encouraging such misadventures.

For example, suppose a state agency exercising both child protection and adoption placement functions brings a neglect proceeding against the impoverished, unwed mother of a recently born child, proposing to place the child for adoption in a suburban, childless, two-adult home. Under the authors' scheme, the state need establish only that the child is "unwanted" and that its current placement is not the least detrimental available. "Unwanted" is not defined, but a wanted child is one who receives continuous affection and nourishment and "feels . . . valued . . ." (p. 10); the least detrimental alternative is the one that maximizes the opportunity for being wanted and maintaining on a continuous and permanent basis a relationship with an adult who will "through interaction, companionship, interplay and mutuality fulfill the child's psychological need for a parent as well as the child's physical needs." (P. 10.) The authors are emphatically for non-intervention; but picture this language as the subject of litigation, or in the hands of any ordinary judge. Its indefiniteness requires the most excruciating inquiry in every case and risks decision on the basis of prejudice rather than rational judgment; precise rules, at cost to *some* children, would at least make clear the cases in which intervention was not to be sought.

(pp. 7, 105 ff.), but purport to found this preference upon the child's need for continuity rather than any independent claim that the parent may have. That does not suffice. The point is a subtle, but important one. The authors assert the primacy of the state and its planning function, which for them is hedged by "preferences" for privacy and recognition of limitations on our present capacity to plan. But government is more effectively limited by recognizing that the parents' claim is not a mere derivation of what the interests of the child require or what is least detrimental to the child. Rather, the parents' claim reflects an independent assertion of personal rights and instinct, of a liberty which a state subject to constitutional restraint is required to recognize.⁸ While we agree with the authors' view that children's claims are to be preferred to adults' in situations of balanced conflict, it does not follow that the adults have no respectable, independent legal claim. To substitute blind adherence to "children's right" for blind adherence to "natural parents' right" would mark little improvement, and in hands less sophisticated or self-effacing than the authors' could easily unloose rather than contain the floods of state intervention.⁹ Indeed, children have an interest in their parents' claims. For parents truly to give to an infant or small child, they must also be given to; emphasizing only the child's interests or rights may lead in the end to poorer care. That the children have claims is indisputable, and the importance and nature of those claims is forcefully revealed by the analysis; that the adults concerned have none involves different judgments, unrelated to behavioral science analysis and not at all necessary to this work.

For the child who has two existing or probable future relationships, the child of divorcing parents, the case for rejecting parental claims seems especially weak. Referring to asserted Japanese practice,¹⁰ the authors propose that the courts act only choose the single parent who will have entire control over the child's life, finally and without possibility of modification save in cases of established abuse or neglect. (P. 38 and note). In legal perspective,

8. *Stanley v. Illinois*, 405 U.S. 645 (1972). See also *Wisconsin v. Yoder*, 405 U.S. 205 (1971).

9. See note 7 *supra*.

10. The reference is an example of legal documentation which too often seems slight. The authors quote a Japanese custody statute that limits judicial authority in contested cases to assigning custodial authority to one or the other parent. The statute is presented, however, without an explication of development or context that would help to understand its full meaning. Thus, no indication is given of the effect, if any, of parental *agreement* on visitation or other custodial matters of joint interest. Professor Michiko Ariga, a respected authority on Japanese law, has stated to one of us conversationally that although such agreements are not directly enforced, they are available for defensive use—for example, to resist enforcement of a claim to child support payments withheld because visitation has been denied, or to resist prosecution for asserted "trespass" in exercising visitation privileges. Such recognition of contractually-established visitation rights would be an incentive to agreement, but would apparently be unacceptable to the authors.

Further, even if our understanding of the legal rules were complete, we could hardly believe those rules importable without change unless we first understood the cultural and social context within which they operate. Japanese attitudes towards family relations and the importance of conciliation in interpersonal dispute are probably different enough from our own to make transplantation risky.

the other parent would become a stranger to his child, save, perhaps, for an obligation of support the nature or justice of which is nowhere examined.

We are entirely unpersuaded, both for parent and for child, that the law must turn its face from one of the divorcing parents. Even assuming the child's interests should control, the social science data to support the proposition that a single official parent is preferable to two seems remarkably weak. The authors simply observe:

Unlike adults, children lack the capacity to [maintain positive emotional ties with unrelated or hostile adults]. They will freely love more than one adult only if the individuals in question feel positively to one another. Failing this, children may become prey to severe and crippling loyalty conflicts. (P. 12.)

To be the child of a mother and father who dislike one another is, to be sure, an unfortunate life experience; and parents who would subject their children to conflicting loyalties, whether or not they remain married, are less than adequate to their task. Nonetheless, given a child with existing relationships to *both*, we know of no studies which show that the legal death of one parent, the complete subordination of the child to the other's possibly distorted view, is invariably the preferable step for its future development.

Undoubtedly, the particular facts of some cases make it unwise to provide for visitation rights.¹¹ A judge who has read this book will be aided in identifying those cases. But there are also cases in which such factors as the child's age, the non-custodial parent's other strengths, the importance of providing an opportunity for tempering the distortions likely in the custodial parent's household, or the custodial parent's demand for occasional "time off," may counsel provision for regular visitation despite the risks. In an era of increasing incidence of divorce, the child has many models available to him for coping with the strains. The non-custodial parent, and the child's relationship with him, cannot be wished away by the law,¹² particularly with respect to the increasing number of families in which both parents have been actively involved in day-to-day child care; the risks in permitting one parent the power to impose that wish may be at least as severe for the child as the risks in legal recognition of the continuing relationship.¹³

11. Cf. *Kessler v. Kessler*, 10 N.Y. 2d 445, 180 N.E. 2d 402, 225 N.Y.S. 2d 1 (1962).

12. The difficulty of "banishing" a natural parent has long been recognized. *E.g.*, J. BOWLBY, *CHILD CARE AND THE GROWTH OF LOVE* (1965 ed.). An example encountered by one of us in practice was Tony, a bright but disturbed twelve-year-old who had lived in several foster homes. Although his current foster parents cared deeply for him, he could not tolerate separation from his mother—even though she openly resisted the agency's efforts to maintain a thread of contact between them. (Tony's father had completely disappeared.) He often ran away from his foster parents and found his way to her; she returned him within a day or two each time. No court order could have kept Tony from his mother, as long as he could hope to find her.

13. A child of divorce deserves the chance to build on whatever strengths exist in his relationships with both parents. Even in cases in which a child can salvage little or nothing positive for his development from the non-custodial parent, direct coping with the

The authors state that their proposition is simply one of legal controls—a preference that legal process not be invoked more than the bare minimum necessary to resolve the initial dispute. Where neither parent is clearly more qualified, they suggest, the choice should be made by lot or any other impartially arbitrary means. The point is to keep the uncertainties and strains of litigation to a minimum; and the underlying belief is that parents otherwise disposed to be civilized will work these matters out privately, without need for judicial determination or enforcement. As a technique for selection, the proposal is striking in its originality, and if limited to the cases of actual litigation out of which the authors' concerns arise would merit serious consideration. How better to dramatize to the contending parents the disfavor with which such disputes are viewed and law's limited tools for resolving them?

At just this point, unfortunately, the authors commit compound failures of analysis. They take multi-hearing litigation about custody and visitation as paradigmatic, although such trouble cases are clearly exceptional; and they do not consider the impact of their proposals beyond those cases, on the future shape of planning and litigation in matters which do not presently rise to contest. Their reliance on agreement is unquestionably sound; many lawyers insist that their first duty in any case in which custody might become an issue is to keep their clients out of court. But what would the effect of an agreement be under the authors' scheme? Would it confer a private right of visitation, as it apparently does in Japan, unenforceable by injunction but available as a defense against trespass actions or against claims for support when visitation has been withheld?¹⁴ Or, as seems likely, do they envision an entirely precatory document?

Our guess is that litigation about custody is more likely to rise than fall with the adoption of rules favoring an either/or regime. The emotional hurts attending divorce have not disappeared with the wide-spread acceptance of no-fault divorce laws; and there is some basis for belief that the wounded spouse and his lawyer-champion, deprived of the direct if unedifying revenge of a fault divorce contest, are repairing to child custody as the remaining

reality of his parent may serve him better than the unrealistic fantasies he might otherwise substitute. Kapit, *Help for Child of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE 214 (I. STUART & L. ABT eds. 1972). Moreover, the parent who would deny the non-custodial parent visitation privileges may not be as strong or well-qualified as he imagines; the relief that visitation provides can as easily forestall serious difficulty as its strains can engender it. A good example is Mrs. B, whose husband was treated by one of us. According to her husband, she was disinterested in making arrangements for him to visit their children. Her psychological strength to cope with them, however, was limited. On occasion she felt overwhelmed, and would then call him and ask for a few days relief, lest she harm them. However, she would not accept regular visitation privileges for him without a court order. See also, C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 866-895 (1965).

14. See note 10 *supra*.

"fault" battlefield.¹⁵ The temptation for viciousness is surely increased when the odds are heightened by narrow restriction of the possible outcomes; it strains human capacities to trust a spouse accorded custody in such a context voluntarily to permit her former spouse's relationship with their child to continue. Law may not influence human behavior much; but when it places an efficient instrument for revenge at hand, it is hard to believe that the instrument will not be both used and feared, with unfortunately predictable impact on litigation incidence and character.

One case of which we are aware provides a concrete example. Mrs. C's first husband was a devout and orthodox practitioner of their mutual religion who agreed to their divorce and Mrs. C's custody of their children only on the conditions that he could exercise frequent visitation rights (including all important religious holidays) and that she would rear them in strict adherence to religious precepts. Mrs. C would not herself have chosen such an upbringing, which included a parochial education for her children, but she agreed, and both she and her former husband have honored that agreement, which is enforceable in its major parts. Especially now that she is remarried to someone who shares her beliefs, she would prefer to change these arrangements; she finds them inconvenient and fears that her children's view of the world is being restricted. At the same time, however, she acknowledges that the children are fundamentally healthy, and have strong and apparently successful relationships with both their parents, and with their new step-father as well. And since litigation to change the conditions of custody might be more disturbing to the children and their present relationships, even if success were assured, she and her new husband have permitted matters to remain as they are. The reader of domestic relations cases will recognize in this situation the scenario for a bitter and destructive custody dispute. Mrs. C and her first husband avoided that outcome, we are persuaded, *only* because compromise of the deeply held feelings of both was available and enforceable. Were Mrs. C now free to abandon her undertaking, she would do so; and Mr. C, aware of that, would never have accepted her custody voluntarily. Whichever parent had received sole custody in a contest under the authors' scheme,¹⁶

15. Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 S. DAK. L. REV. 629, 650, 652 (1973) (Questions 4 & 5).

16. Not to be overlooked is the possibility that the more responsible parent, faced with an either/or situation most likely to be resolved by bitter dispute, will "responsibly" attempt to prolong the marriage or withdraw from litigating custody rather than impose that harm. Prolongation of the marriage could be more damaging to the children's well-being than a divorce; "almost every serious researcher in American family behavior has suggested that the effects of continued home conflict might be more serious for the children than the divorce itself." W. GOODE, *WOMEN IN DIVORCE* 309 (1956, paperback ed.). Nor is withdrawal from conflict clearly for the best; the modern-day parent, eschewing litigation, would be acting as the victor in King Solomon's court did, but without the advantage of having the judge present to reward his self-sacrifice. Even a parent unprepared to take custody may forward his children's interests by asserting his presently recognized claim to visitation. For example, Mr. A, seen in therapy by one of us, considered his wife to be psychotic and believed that he stayed with her as long as

and putting aside the destruction done by its searing if momentary bitterness, their children would have lost a strong relationship, one which has benefited them despite their parents' differences. Legal recognition of the claim may be more important for such parents and their children than the gains to be achieved by curbing that fringe of parents willing to tear their children apart in public feuding.

All the foregoing is wholly apart from the claim each parent has, unless somehow forfeited or overcome, to continued association with his child. Where both parents meet the (quite properly) limited standard for fitness for their parental role, and the child has an existing relationship with both at the time of divorce, nothing the authors suggest comes close to establishing a basis for disregarding that claim. The child cannot be cut in half; it must go to one parent at a time and for a variety of reasons that usually means more time with one than the other. But that the second parent has no claim for time does not at all follow. One must know the incidence of abuse of visitation rights before the judgment can be confidently made that they must be abolished.

This criticism, we should stress, does not impair other conclusions bearing on the custody process—in particular, that custody proceedings be treated as emergency matters, independent of the underlying divorce; that any decree or agreement be made final, subject to modification only by the voluntary action of the parties or on a showing of facts which would warrant intervention as an original matter; and that the principal determinant of the custody award be the least detrimental alternative, stressing strength and continuity in the psychological relationships the child enjoys.¹⁷ While not forbidding judicial enforcement of visitation rights or other rights of control conferred upon the second parent, the law might with less harmful effect discourage judicial recourse, as by penalties for obvious harassment or inhibitions upon repetitive suits. Perhaps, in truth, these remedies would not be very effective; few invoke them even now, whether out of respect for their children or for the expense involved one cannot say. Yet the analysis to support casting them aside simply has not been made.

If one turns to settings, like King Solomon's, in which only one of the contending adults makes a claim characterized by an existing or probably future psychological relationship, the work's insights become more successful.

he did to protect their son's life. Although he stated that she was negligent in caring for the boy, whose school reported that he seemed extremely fearful of her, Mr. A feared court action and even withdrew from visitation when his wife made that difficult during their initial separation. He looked forward to divorce as an occasion that would define his visitation rights and permit him to resume his protective role. While Mr. A had neither the desire, the strength, or the resources for custody, his child faced greater risk to his emotional health without some input from his father. Mr. A felt he needed court support to enable him to continue his involvement with his son against his wife's opposition, and she needed to know that visitation was his *right* in order to be able to tolerate it.

17. Detriment inheres in food supply and living conditions, too; in close cases, a decision for economy might be the most appropriate.

Painful as the conclusion may be for his prior caretakers, a child who has established himself in a new and "fit" household, and signals his wish to remain, will often be disserved by removal from that setting. The time taken for this establishment varies with age, a few months for an infant, longer for a school age child; but every child will reach a point at which he regards his present environment as "his," from which he can be separated only at a severe cost. The authors bite the bullet on this one: even where the child's placement is entirely involuntary, the product of wartime coercion, hospital error—or, one surmises, sale of a kidnapped child on the "black market"¹⁸—they deem it impermissible for the law to interfere with the existing custodial relationship. And more: to foster psychological parenthood, the law must insist upon speed and finality in such matters as adoption, so that adults concerned are not tempted to regard custody decisions as provisional and so withhold from the child the emotional commitment that will best foster his growth.

Here, too, we believe that substantial risks are created to legitimate interests of children and adults by concentration on the fringe case, and by disregard for the impact of new rules on adult conduct. For instance, the authors devote considerable space to a poignant series of decisions involving Stacey Rothman, whose mother gave her up to foster care at the age of one and then, when the child was eight, sought to reclaim her. The court at first ordered Stacey's return, although it noted that her mother agreed to a program of gradual transition; after the transition provided for did not take hold, the court, in a second decision, restored the right of custody to Stacey's foster mother. The authors insist that the right of the foster mother ought never to have been questioned. Granted the mother had the best of reasons for initially severing her relationship with her child—a mental illness that required hospital care—clearly the result is the right one. It requires no great psychological insight to see that after spending seven-eighths of her life in another family, Stacey would view the woman of that household as her mother and removal to Mrs. Rothman's care as a terrible threat; particularly so if her foster mother, encouraged by the passage of time and a darling "daughter," had promoted those views.¹⁹

18. Cf. PEOPLE MAGAZINE, March 18, 1974, at 38.

19. *Rothman v. Jewish Child Care Ass'n.*, 1 N.Y.L.J. Nov. 5, 1971, and Nov. 1, 1972 (N.Y. Sup. Ct.). This effect is unavoidable and essential for the emotional health of a child in long term foster care. Removal of a child in long term foster care from her foster parents because they are acquiring emotional ties is indeed barbaric, as the authors state (pp. 24, 39 & nn.); see also Note, *The Rights of Foster Parents to the Children in Their Care*, 50 CHI-KENT L. REV. 86 (1973). We note, however, that in cases which do not now get litigated in courts—say, long term care by uncles and grandmothers in cultures typified by family relationships more extended than common for middle class whites, or care by boarding schools and nannies—children seem able to maintain relationships with usually absent parents and to return comfortably to their care when the occasion arises. To what extent these seemingly healthy adaptations are supported by a legal regime in which the child is the parent's by "right" is, again, a question the authors do not address.

More to the point from our perspective are cases like *Painter v. Bannister*.²⁰ There, Harold Painter, overcome for the moment by the sudden death of his wife, asked her parents to look after their five-year-old son Mark for a time. In some respects the Bannisters may not have been the best choice—they disapproved of Mr. Painter and his way of living, and were themselves upset by their daughter's death, as they had been by her marriage. But they were nonetheless family, and it is to family that people are accustomed to turn in such moments. Professional foster care, Mr. Painter knew from personal experience, was likely to be more traumatic for Mark. With his grandparents, Mark would not suffer a *complete* change of environment; Mark knew them and what their part of the world was like. Just as children find babysitting in their own home less threatening than a night without their own parents in a strange house, Mark could adjust to a painful situation more easily with the Bannisters than in any other substitute home.

Unlike Mrs. Rothman, Mr. Painter kept in contact with Mark; unlike Stacey, Mark was five, when placement was made; and "only" a year-and-a-half intervened before Mr. Painter returned to reclaim Mark for his home. As is well known, the Bannisters resisted; they produced credible psychiatric testimony that Mark now regarded Mr. Bannister as his psychological father and would be set back by removal "at this time"; and whether because it believed that testimony or preferred Midwestern solidity to West Coast bohemianism, the Iowa Supreme Court directed that Mark remain.

To our view, this victory for the psychological parent theory is problematic. Two years after this litigation was begun, Mark returned to his father at his own wish, with his grandparents' acquiescence, if not agreement.²¹ Mark's relationship with his father was not dead and, indeed, it would have been a sign of mental illness, not health, had Mark regarded Mr. Bannister as his *real* father, however much strength he drew from their relationship. Had the Iowa Supreme Court purported finally to sever Mark's legal relationship with his father by decreeing an adoption, as it did not, it would have been taking a course that was *not* the "least detrimental" to the child.²²

The authors make their problem too simple, indeed almost a caricature, by the unstated assumption that their proposed rules would have no influence either on the conduct of parents placing their children in foster care or on the conduct of foster parents in carrying out that high responsibility. Determining the "least detrimental alternative" for the child is in fact a highly

20. 258 Iowa 1390, 140 N.W.2d 152 (1966), *cert. denied*, 385 U.S. 949 (1967). The authors discuss the case briefly in a footnote.

21. C. FOOTE, R. LEVY & F. SANDER, SUPPLEMENT TO CASES AND MATERIALS ON FAMILY LAW 59 (1971).

22. In *Rothman*, too, the court did not sever the child-parent tie, but merely awarded the present right of custody to the foster parents. Query the justice to the child of the further step, once her present custody is safeguarded from involuntary change. See note 12 and accompanying text, *supra*.

complex matter. On the one hand, the present rules may make it too easy for parents to initiate separations from their dependent children: Harold Painter's separation from Mark may have been unnecessary. The introduction of some measure of insecurity for the parent could be defended on the ground that that would give him pause before acting, and thus force him to examine more closely his resources for coping and the possible harms of separation.²³ On the other hand, this book's recommendations seem to make that insecurity complete.

If Harold Painter had known in advance that he would be unable to protect his relationship with Mark, even after the most agonizing appraisal of the need for interim separation, we fear the outcome would have been poorer care for Mark. One result might have been to force him to keep Mark, although virtually disabled as a father. Or, concluding that Mark's placement was unavoidable, he might have felt forced to look elsewhere than to the Bannisters for aid. He could no longer have put his trust in an agreement for return, even one which responsibly set a time limit for return and specified contacts to be maintained in the interim; he would fear that if psychological relationships developed between Mark and his foster parents the "conditions" on the agreement would become unenforceable. That rule strikes us as an invitation to ugly litigation, if not to deliberate choice for placement of homes where psychological relationships are unlikely to develop. We wonder whether other grandparents or temporary custodians who now work to maintain their charges' real or imagined relationship with absent parents, and promptly return the children when the parents reappear, would be tempted by the "psychological parent" rule to impose themselves upon the children and to resist returning the children when that demand was made. Tempted not only because the rule promises that often seductive result, but more importantly, because it makes full emotional commitment to the child—the effort to adopt him in the psychological sense—seem the only moral course to take.²⁴

23. This argument was suggested to us by our friend Professor Robert A. Burt of the University of Michigan. Letter of May 16, 1974. We owe thanks, too, to Professor David Rothman of Columbia University and his wife Sheila for their many helpful comments.

24. The authors view as encouraging, and a welcome link to the past, *Chapsky v. Woods*, 26 Kan. 650 (1889), a decision written by Mr. Justice Brewer while he was still sitting on the Kansas Supreme Court (pp. 82-85). The case sustained a child's surrogate parents against her father's claim for custody many years after he had placed her with them. Putting aside the aura of indenture surrounding the father's action and the court's general disapproval of his conduct and character, the case might be read—as the authors read it—to support a psychological parenthood theory. Tracing the decision down through the pages of Sheppard's, however, one is struck by the vehemence with which this reading of Kansas law has been rejected; and, more, by the impression, which would be interesting to try to confirm, that in the years since this decision Kansas has seen more, and more bitter, child custody litigation than other states whose rules are more clearly protective of parental right. See, e.g., *Re Vallimont*, 182 Kan. 334, 321 P. 2d 190 (1958); *In re Jackson*, 164 Kan. 391, 190 P.2d 426 (1948); *Jones v. Jones*, 155 Kan. 213, 124 P.2d 457 (1942); but see *Hodson v. Shaw*, 128 Kan. 787, 280 P. 761 (1929) (ten

At the least, one would expect an assessment of these possibilities. And the trouble cases generated by the present rules are not the place one would look for that data. Psychoanalytic science has often been criticized for the skewed character of its data base. Such criticisms probably do not apply to the very basic developmental propositions put forward in this book, and in many respects the authors seem commendably aware of the limitations on knowledge in this area. But the criticisms do apply to the legal data base the authors have chosen. The trouble cases are indeed extreme, and with lawyers' craft can be met without impairing the smooth flow of transactions which now never reach litigation and would not so disturb us if they did. How much of an incursion on parental right can be sustained without harming children who, as a consequence of the authors' proposed rules, will not be placed, or who will be placed (as Mark Painter might have been) into inferior settings, requires more subtle analysis than this work sustains.

It would have been interesting, in this light, to know the authors' views of some recent changes in New York law regarding adoption and foster care, changes which they must regard as pointing in a welcome direction.²⁵ For the preceding several decades, New York had been an extraordinarily strong adherent of the "natural parent's right" theory of child placement. Unless proved unfit, a difficult showing to make, a parent was entitled to the custody of his child against all comers. Even after seven years of foster care, as the first decision in the *Rothman* series held, a fit parent was entitled to the return of her child upon demand. The second *Rothman* case arose, indeed, only because Mrs. Rothman was willing—foolishly or wisely—to undertake gradual change; at law, she might have demanded, and would have received, immediate custody of her child. Similarly, under New York's prior law, foster parents had no interest in the custody of their foster child; their relationship with the child was subject to summary termination by the agency (or themselves), and they would be afforded no standing to participate in any judicial proceedings concerning placement. Adoption rules were equally one-sided; the natural parent's right to retract her consent before final entry of the decree was virtually unfettered. To be sure—again, a point very easy to miss in one's horror at the few cases in which the option *was* exercised—these rights were rarely availed of. Still, under pressure of the belief that the parent's interest rises to important constitutional status, the New York courts

years in custody; father a former felon). This withdrawal from Justice Brewer's sweeping words might be explained by the hypothesis that his successors were less sensitive to children's claims than he; but if the pace and bitterness of litigation did increase, his successors may equally have been responding to that.

25. It is unrealistic to expect much attention to the detail of the law in a brief and Olympian work such as this, but the omission is a regrettable one. These changes were occurring just as the *Rothman* case was proceeding through the courts and seem a direct response to the authors' concerns. Compare note 10 *supra*.

had invariably held for the natural parent or against the foster parent in those few cases in which the issue was presented.²⁶

The past few years have seen the emergence of a complex network of statutes all apparently intended to increase the likelihood that a child placed for adoption or foster care will remain in that setting despite its parents' subsequent change of heart. The new laws provide mechanisms by which consent to adoption may be made irrevocable and, in addition, sharply limit the circumstances in which consent may be revoked when those mechanisms are not used. Consent becomes final thirty days after the child is placed for adoption (in the case of a private placement) or with an agency; even during that period, the law now requires, attempted revocation merely raises the question of what custody arrangement will be in the child's best interests. The statute explicitly states that no preference is to be given the natural parent in that determination. If he is able to establish fraud, coercion, or duress, however, these rules do not apply.²⁷ The overall impact is certain to reduce still further the already limited incidence of attempted revocation; while not fully satisfying the authors' tests, the laws surely tend in that direction and, in practical terms, may well suffice.

The New York law regarding foster care has been steadily moving in the direction of recognizing parental interests in foster parents and facilitating severance of formal connections with absent natural parents. Thus, while New York still does not permit severance of child-parent relationships immediately upon a finding of neglect or abuse,²⁸ a subsequent action to terminate the relationship no longer requires a showing that the responsible child-care agency worked diligently but unsuccessfully with the parents to repair the relationship; a sound reason for determining not to work with them toward that end now suffices as an alternate ground.²⁹ More importantly, once a

26. See, e.g., *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465 (1953) (custody); *People ex rel. Scarpetta v. Spence-Chapin Adoption Serv.*, 28 N.Y.2d 185, 269 N.E.2d 787, 321 N.Y.S.2d 65 (1971) (adoption consent); *In re Jewish Child Care Ass'n*, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959) (foster care).

27. N.Y. DOM. REL. LAW § 115-b (McKinney 1964); N.Y. SOC. SERV. LAW § 384 (McKinney Supp. 1973).

28. N.Y. FAM. CT. ACT § 1051. The authors appear to believe that this relief should be available, and invoked, whenever removal is the "least detrimental alternative." They appear to consider that termination would almost invariably be *less* detrimental than temporary removal during which the parents undergo some form of rehabilitation. To be sure, their view is that removal should rarely if ever occur at all; and it is probably true that family therapy will work best for a family that remains together, rather than one from which the source of stress has been removed. Yet, it seems to us, this is another situation in which disregarding the parental interests is simply too brutal. More important, the situation is one in which the risks of unchecked arbitrariness run very high. In a human world, decisions regarding neglect and abuse too often threaten to reflect class prejudices or personal background rather than assessment of a child's needs. See note 7 *supra*. Permitting parents a last clear chance to reform is, in the circumstances, a wise legislative judgment. It both respects the parent's interests, reduces somewhat the consequences of an erroneous finding of neglect, and, so far as the law can, denies the court the simple solution of "capital" punishment.

29. N.Y. FAMILY CT. ACT § 614 (McKinney 1963); see note 25 *supra*.

child has been with the same foster parents for two years, they acquire a quasi-parental interest that grants them priority in adoption, standing in any proceedings concerning the child's custody, and the right to seek initiation of proceedings to terminate the natural parents' custody.³⁰

One suspects the authors would find these latter provisions insufficient, a compromise sacrificial of children's interests and hence unacceptable. The uniform time period the legislature has provided, two years, is too long for young children; perhaps, in their view, for all. They would object to the suspense in which foster parents must wait while the initial period runs, and the resulting harm to the developing child. And they would surely protest the possibility that children might be returned, even after that period had elapsed.

Yet even this mild statutory change should permit studies of the sort we find lacking in this work, and subsequent assessment of the impact of its proposals. One area for study should be the statutes' impact on parents' use of foster care: as the risks to the parent of putting his child in foster care increase, will resort to foster placement diminish? That would not in itself be a regrettable effect, if less detrimental alternatives are chosen; but some parents, still unable to avoid giving their child up for a time, might be expected instead to seek congregate care, usually inferior for the child. Informal (non-agency) foster care, to which the New York statutes do not presently apply, might also be expected to increase.

A second area of research should be the effect of the change on foster parents. The authors distinguish between foster care anticipated from the outset to be long-term, and foster care for brief, emergency periods and apparently feel, as we do, that the latter serves valuable functions that should be preserved. The two-year period under the New York laws seems intended to mark the line between the functions, however crudely; the authors suggest no similar test. Rather, they seem to ask individually, and after-the-fact, whether the particular child in question formed a psychological attachment to its foster parents before return was sought. If the cut-and-dry New York provision encourages foster parents to promote formation of psychological relationships even during the initial period,³¹ thus interfering with the emergency rationale, we would suppose the authors' proposal to have an even stronger effect. It then seems important to know (1) whether the New York provisions are seen by foster parents as a back road to adoption, (2) what impact their view of possible future adoption has on the progress of their relationship with the foster child, and (3) what, if any, techniques can successfully be used to protect the designedly emergency placement. Again, this inquiry must be undertaken not only for the natural parents but for their

30. N.Y. Soc. SERV. LAW § 392 (McKinney Supp. 1973).

31. The authors would agree that while psychological relationships inevitably form at *some* time for the child, manipulation by adults can delay or promote their growth.

child, who might be placed at serious risk if they concluded that the dangers of placing him in foster care were too high.

A related question is the impact of the new laws on child welfare agencies, which for some populations are encountering severe difficulties in securing children to meet the demand for adoption. Do they now more freely encourage would-be adoptive parents to undertake foster care, the reverse of the earlier practice of insisting that foster placement forbid eventual adoption of the child placed? In their dealings with parents seeking foster care, are they able to expose and handle adequately what are now possibly conflicting interests? Finally, down the road a little, is the effect of the change to quiet or to exacerbate the problems of transfer? The prior rule against adoption by foster parents, misguided as its application may have been to relationships long-term in fact, was defensible as an inhibition to destructive litigation. The new statutes encourage foster parents and natural parents to fight, and the authors' proposals—pregnant with expert dispute regarding the existence and quality of asserted "psychological parenthood"—offer an even stronger incentive. Is it clear, in King Solomon's sense, who will be acting for the child in this case? We fear that it will be the responsible parents who are tempted to withdraw; when they do not, the want of clarity in the outcome will encourage litigation.

The problem is compounded, in our view, by failure of an unarticulated premise that long and short term foster care can be reliably distinguished at the outset. Regrettably, that is not the case. The major cause of child placement is poverty or some condition related to it; and the intention of the placing parent is frequently only to seek temporary relief from the (often unshared) burdens of child-rearing in the face of some emergency. These parents cannot afford the wages of a housekeeper who might maintain the children in their familiar environment and thus reduce the risk of psychological harm or major new attachments, even in the parents' absence. Provision of in-home services to avoid the necessity of foster care would be a more satisfactory step than termination of parental rights in many cases where foster care is now sought, and would avoid the risk of unconscious discrimination against the poor that seems to us inherent in the authors' prescriptions. Nor is it enough to make homemaker services available at low or no charge; ways must be found to bring them to the attention of the community and to make use of these services realistic for one-adult or two-worker families, whose schedules may appear too inflexible for the demands of the welfare bureaucracy.

One possible response to some of these questions lies in counsel for the child, a procedural measure that the authors strongly (and rightly, in our

view) favor. The child has an indisputable interest in the outcome of the proceedings: since his liberty is at stake, in a significant sense, our traditions command that he be represented, independently of others whose interests may conflict with his. It would be a mistake, however, to put too much hope in this measure. In the first instance, it will not prevent litigation. It may tend to aggravate it, since counsel, in order to justify himself, will feel called upon to make his own contribution to the proceedings, enlarging the issues and hence the opportunity for crossfire and delay. Most important, how will counsel inform himself of his role? Counsel qualified for such delicate proceedings are scarce and expensive. The proposal seems to require that counsel in effect duplicate the entire inquiry to determine the "least detrimental alternative"—his litigating position. And counsel will encounter difficulty in taking any kind of instructions from his "incompetent" client.³² Perhaps the most appropriate form of assistance would be provided by a social agency associated with the court—a measure many courts already employ, but without consistent success given the development over the long term of inevitable resource deficiencies and closer relationships between court and reporting agency than between the agency and its "clients." Uncomfortable as we are in the role of nay-sayers to the authors' high-minded arguments, something is to be said for the simplifying virtues of presumptions and of legislative categories for avoiding destructive litigation *in the large*. We grant, however, that unfortunate spill-over may occasionally occur, and that some flexibility must remain to account for it.

One other measure strikes us as central: steps must be taken at the moment children enter another's care to assure that the consequences of that transition are known, and the bargain must then be enforced. Assume that temporary foster care is to remain available, but that parental vacillation or long-term commitment to another's care will not be tolerated; that neglectful parents whose child is removed from their home may be given a chance at rehabilitation, but only that, at which they must succeed. It then becomes essential to identify at the outset of foster care what conditions parents must meet if their children are to be returned to them, by what time they must be reclaimed, *and* that return is a matter of right if these conditions are met. The authors, coming to the trouble cases long after foster care began, never really focus on the transactions with which it begins. They seem to assume that a case will cleanly identify itself as long-term or emergent at the outset, after which solution is simple. But that identification will not occur without

32. In the juvenile delinquency setting, serious commentators have been so impressed by the potential conflicts between determination of a client's best interest and representation of them as to suggest that each child must have *two* representatives, a guardian as well as a litigating counsel. Paulsen, *Juvenile Courts and the Legacy of '67*, 43 *IND. L.J.* 527, 536-540 (1968).

procedures, and with the risks of overreaching and undercomprehension that inhere in agency and court relationships with the poor and ill who are the usual clients of foster care services, those procedures must be straight-forward and certain. A system that creates a reasonable plan for continuing parental contact and hinges the custody outcome upon the parents' adherence to that plan is, in our view, far more acceptable than one that only asks, at a later time, whether dependency relationships have in fact been formed.

All of the foregoing, like the book under review, assumes that willing foster parents, interested in adoption or its equivalent and fully qualified for child rearing, are in the wings. Regrettably, this is infrequently the case. The proportion of foster parents who fail to behave responsibly towards their wards is substantial; nor are they legally obliged to continue their relationship with a child even after it has matured into psychological dependency. Agency supervision of the quality of foster care is too often deficient. When foster parents have been unavailable or unsuccessful, return of a child to his biological parents who want him will be the least detrimental for him. The authors seem to suggest imposing responsibility as well as opportunity on foster parents; the idea warrants the most serious consideration. Again, the process of identifying foster parents who will accept this expectation of them underscores the importance of early and rigorous definition of the circumstances in which a child may be returned to his original home. One would wish neither to waste such a resource, nor to condemn these adults to the hurt of removal from their homes of a child they had expected to keep.

In sum, we view much of what the authors say as extraordinarily helpful. The exhortation that courts would ordinarily do best to leave well enough alone—to distrust their capacities for bettering even apparently harmful family situations, and consequently to follow a policy of repose—is forcefully grounded and long overdue. But lawyers who understand and accept the authors' imperative concerns, whose highest value now in custody matters is keeping their clients out of court, may come to question this book for its failures to consider both the values—values *to children* as well as to their parents—of planning and compromise, and the impact of changed law upon behavior that does not presently come to court or find reflection in trouble cases.³³ The book takes only the first, creative step towards important legal growth. So understood, its insights may mark the spot from which further analysis will occur. But initial creativity, the bold shift of perspective, must

33. These failures are sharply reflected in the proposed model child placement code, said to embody the "concepts, guidelines, and conclusions" of the work, and which forms its penultimate chapter. The authors themselves seem to acknowledge its difficulties by their failure to refer to it or illustrate its workings, even once in any other part of the book. It is hard to imagine that others will take it seriously if they do not.

be channeled and refined before effective legal regimes can be shaped from it. That job remains to be done.

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HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM. By Paul M. Bator, Paul J. Mishkin, David L. Shapiro and Herbert Wechsler. Mineola, New York: The Foundation Press, Inc., 1973. Pp. lxxvi, 1657. \$22.00.

In one of the uniformly laudatory reviews that greeted this unique assemblage of legal materials when it first appeared 20 years ago, Professor Philip Kurland called attention to the standards for judging a law book that had earlier been articulated by one of its authors:

To work out hard answers, what you want is a book which deals with the reasons for rules—with the materials of thought and argument. You want a persistent search for the rationale of statutory provisions, court rules, and judicial decisions alike, and persistent efforts to lay bare competing considerations.¹

What gave peculiar distinction to the efforts of Professor Hart and his talented colleague, Herbert Wechsler, to provide for others these materials—historical background, constitutional texts, statutes, cases, penetrating analyses, and, above all, searching questions—was their faithful adherence to these exacting criteria. Consequently, the result of their labors was more than a mere teaching instrument for law students encountering for the first time the challenging problems generated by the co-existence of dual court systems exercising judicial power derived from different sovereignties.

The veteran practitioner, the perplexed judge, the conscientious legislator—all have been able to turn to this book for help in overcoming their diverse difficulties. They have not found pat answers; the innate complexities of a federalist form of government infrequently admit of that. Instead, they have found the relevant information conveniently brought together, and, more importantly, the right questions to ask themselves and to answer as best they can. Whether or not the readers of the first edition have arrived at answers

1. Hart, Book Review, 27 *IND. L.J.* 145, 149 (1951), *quoted in* Kurland, Book Review, 67 *HARV. L. REV.* 906, 917 (1954).