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Before the Best Interests of the Child

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BOOK REVIEW

BEFORE THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud, and Albert J. Solnit. New York: The Free Press, 1980. Pp. xii, 288. \$12.95.

*Reviewed by Douglas J. Besharov**

This reviewer has always felt that *Beyond the Best Interests of the Child* is one of the most masterful books he has ever read and studied. It argued that children develop strong bonds of trust with their longtime caretakers and that these bonds, rather than the "custody rights" of parents, should guide court decisions on the placement of children. The breadth and brevity of the book's argument made it a stunning attempt to raise and resolve an important public policy issue. Whether or not they agree with the book's propositions and provocative method of presentation, child welfare professionals have been compelled to pay attention to this slim volume.¹ *Beyond the Best Interests of the Child* has now been re-issued with a short epilogue added, emphasizing the authors' position that "simplicity is the ultimate sophistication" for decisionmaking guidelines.²

The occasion of this review, however, is the publication by the same three authors of a new book, *Before the Best Interests of the Child*. Going back to before where the first book began, the authors present their opinions about what should be established before the best interests of the child can be inquired into for child placement purposes. The book includes chapters on (1) the civil liberties and child development problems raised by state intervention to protect children, (2) a framework for analyzing child protective issues, (3) proposed grounds for state interventions, (4) the child's need for legal assistance, and (5) some suggested provisions

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1. See, e.g., Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

2. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 113 (2d ed. 1979). The first edition was published in 1973.

of a "Child Placement Code."

To place their proposals in context, the authors accurately describe a world

where parental authority is frequently abusive, harmful, and detrimental to the child; where the child's essential tie to his parents ceases to be beneficial in families torn internally by parental violence or indifference; where state interference, under the cloak of the child's best interests, is sometimes no more than the wielding of power by authoritarian figures who try to impose their own standards on differently minded parents; and where well-intentioned rescue attempts may serve merely to destroy remaining family attachments while failing to provide children with the necessary substitutes.³

Because of the weaknesses of existing child protective programs, the authors conclude that the grounds for state intervention to protect "abused" and "neglected" children must be severely cut back. Briefly stated, the circumstances under which they would permit intervention are:

(1) When a *parent requests state intervention*; that is, (a) when a separating parent requests that a court determine custody, or (b) when a parent seeks to relinquish rights in a child.

(2) When there is a *familial bond between a child and longtime caretakers* who are not the child's biological parents; that is, (a) when longtime caretakers refuse to return a child to parents who originally gave them custody on an informal basis, or (b) when longtime caretakers refuse to return a child to the agency that placed the child with them.

(3) When there is a *gross failure of parental care*; that is, (a) when a parent dies or disappears without making provisions for the child's custody and care; (b) when a parent is convicted (in a criminal proceeding) of a sexual offense against the child (or is acquitted by reason of insanity); or (c) when a parent inflicts serious bodily injury on the child, or attempts to do so, or repeatedly fails to prevent the child from suffering such an injury.

(4) When a *parent refuses to authorize medical care* for a child. The care must be non-experimental, must be necessary to prevent death, and must "reasonably be expected to result in a chance for the Child to have normal healthy growth or a life worth living."⁴

In addition, although not discussed in the text of the book, the authors' proposed "Child Placement Code" includes two other grounds for intervention: (1) "refusal of parents to comply with generally applicable immunization, education, and labor laws;" and (2) commission by a child of a criminal offense.⁵

Clearly, the inadequacies of the present child protective system are disturbing; no one would dispute the authors' position that

3. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 134 (1980).

4. *Id.* at 193-96 (quoting Article 30. *Grounds for Intervention* of the authors' proposed CHILD PLACEMENT CODE).

5. *Id.* at 193.

"[a]s *parens patriae* the state is too crude an instrument to become an adequate substitute for flesh and blood parents."⁶ Likewise, no one would quarrel with their two proposed remedies: less state intervention but, when it occurs, more decisive action. The authors surely point in the direction of needed reform.

Unfortunately, the specific solutions proposed by the authors are greatly deficient. Instead of proposing more precise definitions, they have proposed many arbitrarily narrow—and yet equally imprecise—definitions that exclude many forms of serious harm to children. Instead of proposing more objective criteria for case handling, they have sought to deny workers and judges all discretion by proposing rigid and overly severe rules. Ironically, if their proposals were adopted, the occasional overbreadth of their definitions coupled with the inflexibility of their decisionmaking rules would often cause unwarranted and overly harsh intervention by the state.

I. OVERNARROWNESS

The authors would not allow the state to intervene to protect children from many forms of serious harm. Specifically, they would severely limit state intervention in cases of abandonment, physical neglect,⁷ medical neglect, sexual abuse, and emotional maltreatment. Because of space limitations, it is possible to discuss only three of the more extreme exclusions that they would make.

A. *Medical Neglect*

Citing a case in which, over the objections of both the child and his mother, a judge ordered cosmetic surgery because of the emotional harm he thought the child's disfigurement might cause, the authors assert that this traditional ground for state interven-

6. *Id.* at 12.

7. Although many readers will notice the absence of the word "neglect" in the authors' grounds for intervention and may therefore conclude that the authors do not think that it should be a basis for intervention, much of what is traditionally considered "child neglect" is covered by the authors' grounds. For example, although not discussed in the text, the authors' suggested provisions for a Child Placement Code include the ground of the "Refusal of Parents to comply with generally applicable immunization, education, and labor laws so far as they apply to their Children." *Id.* at 193. Furthermore, although the elucidating example relates to the failure to provide medical treatment, it seems reasonable to assume that the ground ambiguously described as the "repeated failure of parents to prevent their child from suffering" serious bodily injury, *id.* at 72, would include parental failures to provide food, clothing, shelter, or other necessary care—provided that the failure is (a) repeated, and (b) causes serious bodily injury.

tion is widely abused.⁸ While the case is in many ways troubling, it is not a sufficient basis for concluding that the state's power to provide medical care must be restricted to situations in which its denial would lead to the child's *death*. This extreme position would exclude many situations in which medical care is needed to prevent a permanent disability, such as blindness and paralysis. For example, children with congenital glaucoma, congenital cataracts, and severe strabismus will eventually develop blindness or suppression amblyopia in the involved eye if surgery is not performed. Additionally, children with congenitally dislocated hips will eventually acquire a permanent hip abnormality and limp if treatment is not permitted. Moreover, children with certain congenital heart diseases will develop irreversible pulmonary hypertension if corrective surgery is delayed beyond a specific age. These statements are medical facts. That the authors ignore them is puzzling.

B. Sexual Abuse

A very troubling restriction that the authors would place on this ground for intervention is that they would require a *successful criminal prosecution* (or an acquittal by reason of insanity) before authorizing state child protective intervention. Putting aside the very real procedural and evidentiary obstacles to successfully prosecuting parents for the sexual abuse of their children, the adoption of this ground would delay for months action to protect a child while the criminal proceeding took its slow course. During this time the child would have to stay in the parents' custody because the sole ground the authors give for emergency placement arises when a child is "threatened with imminent risk of death or serious bodily harm. . . ."⁹

Furthermore, this reviewer is disheartened to see the authors advocate a return to a more punitive response to what, in most cases, is fundamentally a social problem of family dysfunction. One of the real advances of the past five years has been the widespread realization that most forms of sexual abuse, like most other forms of child maltreatment, are more successfully dealt with through the provision of supportive and therapeutic social services. There are, of course, cases that call for criminal prosecution, but they are

8. *Id.* at 101-04 (citing *In re Sampson*, 65 Misc. 2d 658, 317 N.Y.S.2d 641 (Fam. Ct. 1970)).

9. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 190 (emphasis added).

a very small proportion of the total.

The authors say that prior successful criminal prosecutions should be required because of their "high standard of evidentiary proof,"¹⁰ their "goal of reinforcing society's moral position,"¹¹ and the more specific definitions of "sexual abuse" found in penal statutes.¹² This being the case, the authors could have avoided placing on parents the stigma and trauma of criminal prosecutions by recommending that these salutary aspects of criminal prosecutions be incorporated into civil child protective proceedings.¹³ That they do not do so, and that they later state that "no consensus exists about the proper treatment or about what disposition would be less harmful" to the child than continued sexual abuse,¹⁴ reveals the authors' true purpose in requiring precedent criminal prosecutions. They simply would prefer that society not intervene in most situations of sexual abuse.

C. Emotional Maltreatment

Although the authors "recognize that emotional disorders are serious threats to any child's healthy progress toward adulthood,"¹⁵ they reject emotional maltreatment as a ground for state intervention because (1) the concept is "too imprecise,"¹⁶ (2) it is difficult to attribute a child's emotional problems to parental conduct,¹⁷ and (3) there is "little consensus . . . about treatments."¹⁸ The authors carry the undisputed ambiguities of dealing with many forms of emotional maltreatment to the indefensible extreme of excluding *all* forms of emotional and cognitive harms to children, even the most egregious and the most easily provable. For example, unless the child also suffers serious bodily injury, the authors would exclude children tied to bedposts for days on end, children locked in closets for hours and even days, children forced to stand, squat, or walk for hours, and children forced to eat unpalatable and loathsome substances, such as black pepper and soap. Most Americans would insist on state action in such cases and, one suspects, so

10. *Id.* at 64.

11. *Id.*

12. *Id.* at 65-66.

13. For example, a number of states incorporate penal law definitions of sexual abuse into their juvenile codes. See, e.g., N.Y. FAM. Ct. ACT § 1012(e)(iii) (McKinney 1975).

14. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 64.

15. *Id.* at 76.

16. *Id.* at 75.

17. *Id.* at 76-77.

18. *Id.* at 77.

would the authors.

II. CONTINUED IMPRECISION

While the authors claim that their proposed grounds will limit state intervention, their grounds are as imprecise and occasionally overbroad as the existing definitions that they criticize. For example, in order "to give fair warning to parents," the authors restrict intervention in cases of physical assault to situations in which there is "serious bodily injury."¹⁹ The closest they come to defining this phrase seems to be in this passage: "[s]erious damage to any part of the child's body surface, his bone structure, or his organ system . . .".²⁰ Unfortunately, as other commentators have noted,

'Serious' can mean anything from a slight bruise to death; its ultimate meaning depends on the circumstances of individual cases—such as the age of the child (the younger the child, the more serious the same injury) and the location of the injury (injury to the head and the genitalia being ordinarily more serious than to an extremity)²¹

Without a further definition of the phrase "serious bodily injury," an injury that one person considers "serious" may be considered "minor" by another person.

Moreover, since the authors' definition, like most others, seeks to protect children who face an "imminent risk of death or serious bodily harm,"²² this ground for intervention adds a new dimension of subjectivity—assessments of the degree of "threatened harm" to the child. Richard Bourne illustrates the degree to which the concept of "seriousness" is thus diluted: "The word 'serious' becomes even more problematic given the fact that, without appropriate intervention, minor injuries are likely to increase in severity over time. A minor injury thus forewarns of more dangerous trauma and should cause professional concern."²³ As Joan Fitzgerald concludes, "[t]erms such as 'appropriate,' 'serious,' 'imminently,' and 'substantial' are not self-defining. There is still enormous room for judicial discretion."²⁴ Michael Wald, who also proposed that inter-

19. *Id.* at 74.

20. *Id.*

21. U.S. National Center on Child Abuse and Neglect, Model Child Protection Act, Commentary to § 4(c)(i), at 6 (Aug. 1977 draft).

22. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 190.

23. Bourne, *Child Abuse and Neglect: An Overview*, in CRITICAL PERSPECTIVE ON CHILD ABUSE 3 (R. Bourne & E. Newberger eds. 1979).

24. Fitzgerald, *Rights of Neglected Children and Attempts by the State to Regulate Family Relationships*, in U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, CHILDREN'S BUREAU, CHILD WELFARE STRATEGY IN THE COMING YEARS 371, 381 (1978).

vention be limited to cases of "serious injuries," acknowledged the extent of this residual imprecision when he warned that "intervention is inappropriate in many cases which fall under [bis] proposed definition."²⁵ Consequently, the authors' effort to narrow the concept of physical assault by adding the one word qualifier, "serious," is at best a partial solution to a more fundamental problem, and, at worst, a cosmetic change that gives the illusion of greater specificity while in reality merely substituting one imprecise term for another.

III. RIGIDITY AND SEVERITY

While more helpful decisionmaking guidelines are desperately needed, the rigid, one-dimensional rules proposed by the authors purchase more decisive action at the price of overly severe societal responses to parental inadequacies. For example, satisfaction of their longtime caretaker rules makes termination of parental rights "automatic,"²⁶ even though it is easy to envision situations in which the mere lapse of the specified time has not resulted in the creation of familial ties between the child and foster parents. In the New York case of *In re Sanjivini K.*,²⁷ the court found that during the child's twelve years of foster placement, the mother's regular visitation had preserved parental ties, and that because the child was now past puberty, "she is likely to be able to handle the transition [of return to the mother] in stride."²⁸ Thus, contrary to the authors' assumption, regular and frequent visitation coupled with the encouragement and support of the foster parents may result in the maintenance if not the strengthening of the emotional tie between the child and his biological parent. At a minimum, the authors could have shaped their rules as presumptions rebuttable by appropriate evidence.²⁹

Furthermore, because the genesis of the caretaking relationship is not taken into account under this ground for termination of parental rights, parents who make informal child care arrangements with friends, neighbors, and even relatives, would, if the designated periods of time are established, be in jeopardy of losing their children. In fact, they would "automatically" lose their chil-

25. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 988 (1975) (footnotes omitted).

26. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 195.

27. 47 N.Y.2d 374, 418 N.Y.S.2d 339, 391 N.E.2d 1316 (1979).

28. *Id.* at 383, 418 N.Y.S.2d at 344, 391 N.E.2d at 1321 (Fuchsberg, J. concurring).

29. See, e.g., Md. ANN. CODE art. 16, § 75 (Supp. 1980).

dren if the longtime caretakers refused to return them. This rule would have its most telling impact on minority and disadvantaged groups for whom "informal foster care" has become a necessary method of coping with modern American life.³⁰

While the authors recognize the need for more refined decisionmaking for older children, no such flexibility is permitted in cases in which a child who has been physically assaulted is removed from his parents. For, although removal of such children from their parents does not seem to be required, *once they are removed*, their return is prohibited.³¹ This provision ignores the reality that many parents, even those who have had their children temporarily removed from them, can be helped to become adequate caretakers. Given the success many communities have had in establishing effective treatment programs for parents, one is struck not only by the absoluteness of the authors' suggestion but by its obsolescence—it is from a time long past. When child abuse first began to receive increased attention, some states flirted with this kind of draconian approach. New York, for example, had a similar provision on its books for a time in 1969-70, but professional outrage and legislative temperance led to its repeal.

Moreover, even if the parents' child-rearing abilities have not improved with treatment, return of the children may be in their best interests. For example, in the famous case of *Alsager v. District Court of Polk County*,³² all the parties, including the parents, assumed that return of the children would not be in their best interest. Yet on remand it was revealed that the conditions of the children's foster home placements had so deteriorated that return to the parents appeared to be the most appropriate disposition.

The authors' first book was often criticized for being more of a polemic than a balanced analysis.³³ In *Beyond the Best Interests of the Child*, the authors proposed a thematic conception, that of the psychological parent and the child's need for continuity, which served as the underlying rationale for the various proposals they made. In doing so, they proved a theoretical construct that others could use in their own decisionmaking. In this second book, the authors try to do the same thing, using the policy of "minimum state intervention" as the underlying principle. There are several reasons why the approach that worked so well in the first book

30. See, e.g., R. HILL, INFORMAL ADOPTIONS AMONG BLACK FAMILIES (1977).

31. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 191.

32. 518 F.2d 1160 (8th Cir. 1975).

33. See generally Crouch, *supra* note 1.

does not work in the second.

First, the authors unsuccessfully seek to distinguish between physical and emotional harm to children—asserting that only physical harm, or exposure to it, should be a ground for state intervention. This distinction oversimplifies the parent/child interactions involved. Physical battering, for example, is merely the most visible form of child maltreatment. It occurs along with a whole range of other interactions, the totality of which *may* or *may not* be emotionally or cognitively harmful to the child. Anyone who has watched children at play in sports has witnessed them receive countless physical and emotional traumas. While only a few are major—and most are minor—a large number of these injuries would fall within the definition of “serious bodily harm” proposed by the authors if the injuries were caused by parents. Yet, in the context of active sports, these injuries have little or no long-term consequences for the child. What happens on the playing field can also happen at home—contextual issues can aggravate or mitigate the significance of the same objectively measured injury. Hence, to reflect the nature and seriousness of the harm to the child, the authors should have focused on the total harmfulness of the child-rearing situation to see whether it justified state intervention and could be proven with the requisite certainty.

Second, the authors fail to apply their own analytic framework, which emphasizes that *different levels of harmfulness justify different levels of intervention*.³⁴ They did not differentiate between interventions designed to impose supportive services while the child remains at home and those that require the removal of the child, not to mention those that require termination of parental rights.³⁵ Instead, each proposed ground for intervention authorizes the full range of intervention—from the most mild to the most extreme. Because the proposed grounds authorize the full gamut of interventions, they are unavoidably overnarrow for some purposes and overbroad for others.

Third, the authors’ negative assessment of child protective capabilities is only partially accurate. Interventions that result in foster care often do greater harm than good, but more than eighty percent of all cases are handled without recourse to either court

34. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 23-25.

35. For example, while most forms of emotional maltreatment are not of sufficient harmfulness to justify removal or termination, many are undoubtedly sufficient to justify in-home counseling and supervision, even if involuntarily imposed.

action or foster care.³⁶ In many of these cases, the parents received real, if only limited, assistance. While partial success in some cases is not justification for wholesale intervention, it does suggest that intervention in the form of in-home support is more easily justified. Moreover, as Michael Wald has proposed, it also suggests that standards for intervention might vary from community to community, based on the availability and quality of services.³⁷

In the defense of their proposals, the authors assert that it is "fantasy" to think that

only the most competent, most skilled, and most sensitive lawyers, judges, doctors, social workers, foster parents, family helpers, and other personnel will implement the grounds for intervention under the laws of child placement. There will always be a substantial number in authority who will prevent this fantasy from becoming a realistic expectation.³⁸

The authors fall prey, however, to an equally seductive "fantasy"—that the problems of avoided and inappropriate decision-making are susceptible to the quick fix of rigid, one-dimensional rules. Successful reform requires an approach that acknowledges and reflects the relativity and diversity of harmful child rearing situations and the consequent complexity of decisionmaking issues. It is a shame that the authors did not address these realities more directly.

Disappointment, then, is the genesis of this reviewer's criticism. The authors would have made a major contribution toward the development of better standards for state intervention into family life if they had proposed a method for assessing the harmfulness of child-rearing situations, and if they had shown how the specific degree of harmfulness and the utility of the proposed intervention justify or fail to justify state action. Instead the authors avoided the tedious process of understanding and articulating these multi-dimensional factors in favor of short cut solutions. As a result, their proposals likely will be rejected as yet one more effort to restrict state intervention without systematically coming to grips with these fundamental issues. Perhaps the most important lesson to be learned from this book is that developing more precise standards for state intervention to protect children will be a long and tortured process.

36. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 36 (1980).

37. See, e.g., Wald, *supra* note 25, at 1007.

38. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 18.

IV. CONCLUSION

This book has been hard to criticize for one who, like this reviewer, agrees with its basic premises: (1) that the weakness of child protective capability requires a policy of minimum state intervention into family life, and (2) that when intervention occurs, it should be much more decisive. Yet, application of the rules that the authors suggest would be at great cost, not only to the endangered children whom they exclude from protection, but also to our own view of ourselves. Society cannot turn its back on the real and present suffering of children and still retain its sense of humanity, and society cannot deny workers and judges the discretion to make intervention fit the needs of the children and families involved without losing its sense of justice.

Many people will brush aside this book's excesses because of their deep concern about the need to curtail governmental intervention into family life. Certainly, it helps to have this message reiterated by three such prominent persons. Unfortunately, the authors' simplistic approach and the criticism that it has already begun to generate³⁹ will obscure the child protection system's true deficiencies and the urgent need to remedy them.

39. See Chambers, *The Children's Cause: Drawing the Battle Lines*, N.Y. Times, Mar. 9, 1980 (Book World), at 4.

