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Review Article

Parents' Rights and Juvenile Court Jurisdiction: A Review of *Before the Best Interests of the Child*

Stanley Z. Fisher

Introduction

This new book[1] by the authors of *Beyond the Best Interests of the Child*[2] also makes a major contribution to the field of family law. Concentrating this time on the subject of child neglect and abuse, the authors mount a powerful attack on state intrusion into families under current child protection laws. Like *Beyond the Best Interests,* this book has attracted wide attention and provoked intense controversy. It should be read by all those concerned about the law's impact on children and families.

In *Beyond the Best Interests,* the eminent lawyer-and-psychiatrist team of Goldstein, Freud, and Solnit proposed a set of guidelines, based on psychoanalytic theory, to govern child placement decisions in the legal system. Hailed by reviewers as an "intellectual event,"[3] the book contributed such concepts, now widely invoked in the child custody field, as the "psychological parent," the "child's sense of time," and the "least detrimental alternative" placement. In *Beyond the Best Interests* the authors argued that child custody decisions should protect, first and foremost, the child's psychological needs, particularly the need for continuity of relationships. According to the authors, the relationship deserving most protection is not necessarily that between children and their biological

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1. Joseph Goldstein, Anna Freud, & Albert J. Solnit, Before the Best Interests of the Child (New York: Free Press, 1979) (hereinafter cited as Before).

2. Beyond the Best Interests of the Child (New York: Free Press, 1973), republished in 1979 in a new edition with epilogue. All references in this review are to the 1979 edition (hereinafter cited as Beyond).

3. Daniel Katkin, Bruce Bullington, & Murray Levine, Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action, 8 Law & Soc'y Rev. 669 (1974).

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parents. Rather, on a theory of "common law adoption," the law should protect the psychological ties between a child and whoever plays the primary parent role. In a custody fight between a child's biological parent and a foster parent or other "temporary" custodian who has become the child's "psychological parent," the latter must prevail, even if the psychological ties arose in circumstances casting no doubt on the biological parent's fitness. Further, the psychological parent-child relationship cannot flourish unless the child perceives the parent as powerful and autonomous. This fact, and the state's inability to regulate the child's intimate environment successfully, led the authors to advocate a policy of "minimum state intervention" in the family. The authors therefore proposed that custody awards not be conditioned by any visitation rights in the noncustodial parent; custodial parents should have total discretion to allow or prevent visiting.

Beyond the Best Interests' proposals, embodied in a model Child Placement Code, were as widely criticized as they were praised.[4] On both scientific and policy grounds, writers attacked the authors' preference for the child's interest in continuity of psychological attachment over the biological parents' independent interest in custody. Critics also worried about the book's impact on coercive state intervention in families. This concern had three elements. First, Goldstein *et al.* conceded the propriety of state intervention in cases of "neglect" but offered no definition of the term. Given the notoriously vague standards of neglect in existing law, the authors' failure to confront the definitional issue seriously undermined their professed goal of permitting the parent-child relationship "to unfold free of coercive meddling by the state."[5] Second, the authors proposed to permit a "temporary" custodian (such as a foster parent) who formed adequate psychological ties with the child to cut off the biological parents' rights entirely. In view of how often and how easily the state compels "temporary" removal of "at risk" children from their parents, and how subjective the standard of "psychological parent" is, the "common law adoption" doctrine seemed quite ominous, particularly for poor and minority families. Finally, critics accused Goldstein *et al.* of ivory tower naiveté. According to one review, *Beyond the Best Interests* reveals a "failure to relate its insights to the realities of an operating legal system; it fails to consider the way in which . . . rules may shape parental behavior and the incidence of litigation, and takes insufficient

4. For a survey of the review literature see Richard Edelin Crouch, An Essay on the Critical and Judicial Reception of *Beyond the Best Interests of the Child,* 13 Fam. L.Q. 49 (1979).

5. Beyond, *supra* note 2, at 115.

account of the limited capacity of a legal system staffed by fallible humans to administer them."[6]

These alleged faults were partly sins of omission. While the book's proposals were said to apply to all "child placement" decisions, including proceedings involving "neglect, abandonment, battered child, foster care, adoption, delinquency, youth offender . . . and custody in annulment, separation, and divorce,"[7] the book actually focused on custody disputes originating in private, "voluntary" family disruption, such as in divorce; it did not focus on state intervention in the "going" family. *Beyond the Best Interests*, then, virtually required a sequel dealing with the processes leading up to the custody decisions it considered, before "a child's placement becomes the subject of official controversy" (p. 5).[8] *Before the Best Interests of the Child* is the book for which readers have been waiting.

Like its predecessor, *Before the Best Interests* is concise and readable. Its central concern is to define the substantive grounds that should justify coercive state intervention in families. Its proposals, which are presented as additions and amendments to their previously proposed Child Placement Code, would radically change existing law.

Restricting Intervention to Protect Children

The book's major argument is that grounds for intervention under current child protection laws are dangerously broad. There was a time, before the Supreme Court's 1967 decision in *In re Gault*,[9] when we readily assumed that coercive intervention in family life, if benignly motivated, would have a benign effect. Ironically, even while the Court was weaning us away from that assumption in the delinquency field, lawmakers were blanketing the country with a new child-saving device: child abuse reporting laws. Subsequently, owing largely to federal financial pressures under the Child Abuse Prevention and Treatment Act of 1974,[10] the states expanded the scope of those laws, so that now teachers, nurses, social workers, and in some states even clerics and attorneys are legally obliged to report suspected incidents not only of physical abuse but also of amorphously defined "neglect" as well. These reports trigger investigations into the home and family. Because "cracking down on child abuse" is as

6. Peter L. Strauss & Joanna B. Strauss, Book Review, 74 Colum. L. Rev. 996, 997 (1974).
7. Beyond, *supra* note 2, at 5.
8. Quoting from Beyond, *supra* note 2, at 105.
9. 387 U.S. 1 (1967).
10. Pub. L. No. 93-247, 42 U.S.C. § 5101 *et seq.* (1976 & Supp. III 1979). The regulations are at 45 C.F.R. pt. 1340 (1980).

difficult to oppose as motherhood and apple pie, lawmakers have not been sensitive to the costs of this expansion of state intervention in the family. As resource-starved state welfare agencies begin to grapple with the huge administrative burden of processing reports and as the federal aid carrot shrivels, we can expect more legislative restraint. *Before the Best Interests of the Child* will also contribute to this process. Although the noninterventionist lobby has been growing, it has so far had little effect on the law. Its most influential expression, the draft ABA Standards Relating to Abuse and Neglect, was widely criticized as too radical.[11] In this book, Goldstein, Freud, and Solnit enter the debate in support of narrowing state intervention far more drastically than would the rejected ABA draft. Building on the arguments of *Beyond the Best Interests*, the authors stress the psychological harm to children of every form of coercive intervention, from investigation through removal. Taking into account the need for standards objective enough to control official discretion, the paucity of scientific knowledge and resources to improve the lot of children once the state intervenes, and the unfortunate fact that the laws will not always be administered by competent, sensitive people, the authors conclude that only a policy of minimum state intrusion and "least intrusive" measures at each stage of the intervention process will protect the child's interest. Much of this brief book is devoted to stating and defending the substantive grounds that alone would justify coercive intervention.

The authors' proposed grounds for intervention would drastically narrow existing law. This is particularly true of intervention for "gross failures of parental care," which the authors would limit to four categories: abandonment, physical injury, sexual abuse, and failure to provide medical care. Even within those categories the authors would strictly limit the occasions for intervention. Thus, the state would be able to intervene when a parent dies, disappears, or goes to prison only if the parent has not made other custodial arrangements for the child. Physical harm is a ground only when there is "serious bodily injury inflicted by parents upon their child, an attempt to inflict such injury, or the repeated failure of parents to prevent their child from suffering such injury" (p. 72). Sexual abuse would trigger intervention only if a parent were convicted (or acquitted by reason of insanity) of sexually abusing the child. And in-

11. Institute of Judicial Administration–American Bar Association, Juvenile Justice Standards Project: Standards Relating to Abuse and Neglect (Cambridge, Mass.: Ballinger Publishing Co., Tent. Draft 1977). While 21 other volumes of draft Juvenile Justice Standards have been submitted to the ABA for approval, the Abuse and Neglect volume was not. It is currently being redrafted. IJA-ABA Juvenile Justice Standards Update, 13 Clearinghouse Rev. 667 (1980).

tervention for medical neglect could occur only if denial of treatment would result in the child's death, the experts agreed the treatment was nonexperimental and appropriate, and treatment would give the child "a chance for normal healthy growth or a life worth living." Under these proposals the state would no longer have power to intervene to protect children from the mere risk of physical harm, from emotional or psychological harm, from lack of "proper care necessary for their health or welfare," from immoral environments, and from want of medical care for nonfatal illnesses. Indeed, intervention in those situations would give rise to a new cause of action in tort for injury to family integrity. The authors also support repeal of juvenile court jurisdiction over "status offenders," such as truants, runaways, and "incorrigibles." They do not make clear whether they would repeal or merely narrow the child abuse-reporting laws, but they do criticize them strongly.

The authors of *Before the Best Interests* recognize that narrowing the grounds for state intervention will mean that some children will suffer who might, under broader statutes, have been saved. Yet, because "harm is inherent in every violation of family integrity, [they] decided to err on the side of non-intrusiveness" (pp. 136–37). Many will question the balance they have struck. Michael Wald, architect of the draft ABA standards, has already questioned both the book's method and its conclusions.[12] He points to the authors' failure to cite any evidence in support of the proposition that state intervention—particularly when it takes the form of in-home services rather than removal of the child—will always harm the child or will always do more harm than various kinds of neglect and abuse for which the authors would forbid intervention. A child kept locked at home in a closet, a boy forced by his mother to wear a dress to school, a child whose parent refused to authorize safe medical treatment to avoid blindness or loss of a limb—are all examples. Wald argues, and many will agree, that the authors of *Before the Best Interests* have carried the principle of nonintervention to extremes, ignoring both scientific data and public consensus favoring broader intervention. Wald prefers, correctly I feel, the somewhat less radical brand of noninterventionism expressed in the draft ABA standards.

The authors' stand on sexual abuse of children by their parents is particularly difficult to fathom. Coercive intervention in these situations is risky, they suggest, because it is usually unclear that state intrusion can improve matters for the child. As sexual abuse in the family is a secret

12. Michael S. Wald, Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of *Before the Best Interests of the Child,* 78 Mich. L. Rev. 645 (1980).

matter, investigation will necessarily be very intrusive. This will aggravate any original harm. Also, they argue, there is no consensus on the appropriate response to sexual abuse; removing either the child or the offending parent from the home might harm the child more than leaving things alone. But under the authors' scheme, "the authority to assume the risks of intervention, including the termination of parental rights, arises only after the parent-child relationship has been severed by the criminal process" (p. 65). This is unconvincing. The criminal process will not necessarily "sever" the parent-child relationship—the offender is often permitted to continue his parenting relationship, subject to supervision. Also, the prosecution of intrafamily sexual offenses is virtually always influenced by child protection considerations; conditioning neglect jurisdiction on prior criminal conviction may simply pass the buck to district attorneys, without any guidance concerning a proper intervention policy. The authors' proposal would also invite evasion through plea bargaining: pleading guilty to assault, for example, would bar the civil remedy. Finally, because juvenile courts are relatively private, have relatively more expertise in family problems, and do not threaten to punish the parents, requiring deference in the first instance to criminal prosecution is more likely to traumatize the child and arouse his/her guilt than the present system. In sum, the proposed rule might actually increase the disruptive impact of state intervention.

Protecting "Psychological Parenthood"

So far I have discussed the authors' proposed grounds justifying coercive intervention under the juvenile court's neglect jurisdiction. Goldstein *et al.* would also permit intervention on other grounds,[13] including three that require the child's caretaker to request court action. These grounds are: (1) a separating parent's request for the court to determine custody; (2) one or both parents' request for the court to terminate their rights in the child; and (3) a request by the child's "longtime caretakers" to become his parents, or their refusal to relinquish him to a state agency. A "longtime caretaker" is defined[14] as an adult with whom a child has been placed and who has continuously cared for the child at least one year if the child was under three at the time of placement, or for at least two

13. These include the child's commission of criminal acts, and the parents' refusal to comply with generally applicable immunization, education, and labor laws so far as they apply to their children.

14. In their first book the authors rejected the feasibility of objectively defining the point at which a temporary caretaker becomes a "common law adoptive parent," because "[t]he process through which a new child-parent status emerges is too complex and subject to too many individual variations for the law to provide a rigid statutory timetable." Beyond, *supra* note 2, at 48. The definition of "longtime caretaker" in *Before* represents a significant change.

years if the child was three or older at placement. An exception is made for children who were over five years old at the time of placement: under certain circumstances the parents may have a chance to prove that they are still the child's psychological parents and that his/her return to them would be the least detrimental alternative. Otherwise, a long-time caretaker's petition would result automatically in termination of the parents' rights and a grant of adoption.[15]

Permitting "temporary" caretakers such as foster parents to acquire full parental rights after one or two years serves important interests. As the authors state, the long-time caretaker ground is meant to "prevent child care agencies and long-absent parents, natural or adoptive, from keeping their children in limbo or from forcing them to separate from psychologically real parents who wish to care for them" (pp. 39–40). This is salutary, but it also increases the risk that in the name of child welfare the state will unnecessarily destroy families. The authors respond to this concern in several ways. First, as described above, they would severely narrow the grounds for intervention and would require "probable cause" that a ground existed before allowing even an investigation. Second, they would forbid casual "emergency removals" of children from allegedly neglectful homes: pretrial removal would be forbidden unless the child were threatened with imminent risk of death or serious bodily harm.

Third, they assert that the long-time caretaker provision should "reduce the number of so-called 'temporary' placements and . . . promote continuity of care by encouraging the use of supportive services within a family" (p. 39). Given the way the child care system actually operates, this seems a dubious conclusion. An example can be drawn from the pages of *Before the Best Interests*. Donald, age 10, had a diabetic disease that required proper diet and medication. Because of the mother's "repeated failure, *despite her cooperative spirit and good intentions*, to manage his need[s]" (p. 90, emphasis added), the court placed Donald in foster care. The authors point out that the least intrusive disposition would have been to provide a family helper, who could have assisted the mother in caring for Donald at home. "Unfortunately," the authors remark, "that disposition was not an available alternative" (p. 90). As practitioners everywhere know, costly supportive services are frequently unavailable to the court, and children are frequently removed because society, through the courts and legislature, is unwilling to bear the

15. Long-time caretakers who do not wish to adopt the child would be designated the child's foster parents "with tenure." That status would permit the foster parents to prevent intrusion by former parents or the state. Before, *supra* note 1, at 49.

economic and political costs of making such services available to low-income families.

There are no easy answers to the question of how the law should define and enforce the "right to services" in the child protection system. Others have proposed requiring service plans, periodically reviewed by courts and enforced by community grievance officers;[16] Goldstein *et al.* hardly acknowledge the dimensions of this problem. They therefore fail to consider the likely impact of their long-time caretaker proposal.

Preventing Unnecessary "Voluntary" Placements

The authors offer a fourth safeguard against unnecessary removals that also demonstrates little feel for the practical operation of the child protection system. I am referring to the proposed ground authorizing intervention when one or both parents ask the court to terminate their rights in a child. The authors view the court's function in such cases as essentially protective: to ensure that the parents' decision is truly voluntary and not the product of state deception or coercion or of the state's failure to offer "available supportive services which might make it possible for them and their child to remain together" (p. 35). True, we need to monitor the circumstances of voluntary surrenders of custody, especially in a system of prompt, semiautomatic termination such as the authors propose. But unless judges or other officials screen initial, temporary surrenders of custody to child care agencies, safeguards at the stage of the petition to terminate will come too late. In most cases, by the time termination proceedings are brought, the biological parents' rights will long ago have been lost to some long-time caretaker. Most state intrusion into the family takes place outside of court with the "voluntary" acquiescence of parents. The authors' failure to consider those transactions seriously undermines their attempt to create rules that will give fair warning to parents and restrain the power of state officials. The draft ABA standards, by comparison, include detailed regulation of out-of-court voluntary placements.[17]

Delinquency Proceedings as Part of the "Child Placement" Process

A minor, yet troubling, aspect of this book is its treatment of delinquency proceedings as part of the child placement process, subject to the same rules the authors would apply to state intervention in contexts such as divorce, adoption, and neglect. The book's discussion of the child's right to counsel is an example. In their first book, the authors proposed

16. IJA-ABA, *supra* note 11, pt. VII.

17. *Id.* pt. X. See also Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.), § 475.

that the child should be made a party and given independent counsel in all child placement litigation. But *Before the Best Interests* rejects that position. Giving counsel to a child without parental consent, the authors now argue, is itself a serious state intrusion into the family. Unless coercive intervention is first justified by means affording both the child and parent due process, the state has no right to interpose counsel between parent and child. The authors therefore propose to permit court appointment of independent counsel for the child only in three situations: (1) if an indigent parent so requests; (2) if the child has been subject to an emergency placement; or (3) if a ground for modifying or terminating the parent-child relationship has been established. Of these situations, the first involves parental consent and therefore no coercive intrusion. The second justifies appointment because, by definition, the state has already intruded by removing the child and for urgent reasons has temporarily disqualified the parents to represent his/her immediate interests. In the third situation the parents' unsuitability to represent the child has been proven in accord with due process. This justifies imposing independent counsel for the child at the disposition stage.

In the context of child protection proceedings, this position is certainly defensible. In many cases "appointment of counsel for a child without regard to the wishes of parents is a drastic alteration of the parent-child relationship. . . . It intrudes upon the integrity of the family and strains the psychological bonds that hold it together" (p. 112). Given the limited nature of the intrusion in both time and scope, one might argue that Goldstein *et al.* exaggerate the damage counsel's appointment would cause. After all, the law coercively interposes other third parties—such as school teachers and guidance counselors—between parent and child without intolerable damage to family integrity. On the other hand, counsel for the child often plays only a marginal role in custody and neglect cases: usually the two major adversaries (parent/parent, parent/state) will bring out all the relevant facts and viewpoints. And giving party status to the children is expensive, often resulting in delay. Some cases require a roomful of lawyers: one for the state, one for the mother, one for the father, one for the child, and more, perhaps, for various siblings. I sympathize, therefore, with the authors' argument that the state should not impose counsel for the child until the disposition stage of child protection proceedings.

But applying these principles to the delinquency context, as the authors do, raises different questions, most of which they simply ignore. First, may legislatures treat legal representation as merely one of a child's needs, like clothing and medical care, rather than as an independent right mandated by the due process clause of the Constitution? Although courts

and commentators have overwhelmingly understood *Gault* to recognize the delinquency defendant's independent right to counsel,[18] Goldstein *et al.* call that a "misconstruction." "There is no hint in *Gault*," the authors say, "and it would run contrary to its tenor, that an attorney could independently represent the child over the parents' objection and prior to their disqualification as the exclusive representatives of his interests" (p. 129). Rather, they argue, "*Gault* reaffirms the right of a child to have his own parents make decisions about what he needs" (p. 129).

Although it stretches *Gault* to read the decision as a "reaffirmation" of parental autonomy, neither does *Gault* affirm juvenile autonomy. In fact, notwithstanding assorted dicta in the opinion, *Gault* neither presented nor decided any issue of parent-child conflict; the question remains open. The authors therefore perform a valuable service in focusing attention on an unresolved issue of critical importance. It is, in turn, part of a still larger unresolved issue: who may exercise the range of a delinquency defendant's due process rights, including the privilege against self-incrimination and the right to trial?[19] Recent Supreme Court decisions such as *Carey v. Population Services International*,[20] *Bellotti v. Baird*,[21] *Parham v. J.R.*,[22] and *Fare v. Michael C.*[23] suggest both the complexity of the required analysis and the doubtful constitutionality of the rules proposed in *Before the Best Interests*. Unfortunately, the authors' treatment of the issues is oversimplified and one-sided.

Extending the rules on appointment of counsel to the delinquency context also raises nonconstitutional issues relevant to constitutional analysis. Goldstein *et al.* ultimately premise their rules on the child's incompetence to make decisions and on the assumption that by appointing counsel the state would weaken family integrity. When this occurs, the child's "needs

18. Even strong defenders of parental prerogatives appear to accept that view. See generally Bruce C. Hafen, Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights," 1976 Brigham Young U.L. Rev. 605.

19. Indeed, it seems the authors would permit parents to waive their child's right to trial, simply by asking the court to make a disposition based on a charge of delinquency. See authors' proposed Child Placement Code, ¶ 20.1(c), in Before, *supra* note 1, at 192.

20. 431 U.S. 678 (1977) (striking down New York's prohibition on sale or distribution of contraceptives to minors).

21. 443 U.S. 622 (1979) (state law may not condition minor's abortion on parent's consent; if court finds minor is mature and fully informed, court may not deny minor permission for abortion). See also H.L. v. Matheson, 3 Fam. L. Rep. 3021 (Mar. 24, 1981) (upholding statute requiring notice of abortion to parents, as applied to unemancipated dependent minor who claimed neither that she was mature nor that parental notice would conflict with her best interests).

22. 442 U.S. 584 (1979) (applying only minimal due process protections to parent's "voluntary" commitment of child to mental hospital).

23. 442 U.S. 707 (1979) (upholding 16-year-old murder suspect's waiver of *Miranda* rights, despite police refusal to honor suspect's request for presence of probation officer). See also Lassiter v. Dep's of Social Servs., 49 L.W. 4586 (June 2, 1981) (indigent parent has no automatic due process right to counsel in proceeding to terminate her parental rights).

are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely" (p. 9). This may be true of the young children who are typically the subjects of neglect proceedings, but the authors themselves point out that the child's need to "experience his parents as his lawgivers—safe, reliable, all-powerful, and independent" (p. 25) decreases with age. This limited state intrusion could hardly be very harmful to the typical adolescent charged with delinquency. Also, as the law generally recognizes, adolescents are more competent than younger children to make important decisions; indeed, gradual freedom from parental control is one of the adolescent's needs.[24] In light of this, the authors' unwillingness to distinguish children of 16 from those of 6 seems overly rigid.

Delinquency proceedings also differ in important ways from the civil disputes with which both *Beyond the Best Interests* and *Before the Best Interests* are primarily concerned. In child protection cases, for example, the state is alleging the parent's unsuitability to control the child; in a sense, granting the child party status and independent counsel before the allegations have been proved does beg the question by accomplishing the desired intervention before proof of its justification. Furthermore, usually the parent can be relied on to present the best possible case for keeping the child in the family; adding the child as a party complicates the case for a marginal payoff. Delinquency proceedings, on the other hand, focus on the child's deviant act rather than on the parent's fitness. Although the authors describe delinquency cases as "child placement proceedings," other goals, such as retribution, deterrence, and community protection, are more central. That may be why the child, who risks criminal stigma and loss of liberty, has traditionally been a party and the parent, while given some rights, has not.[25] Treating the family or the parents as a party, which Goldstein *et al.* seem to propose, would complicate rather than simplify the proceedings.

Furthermore, if one believes (as I do and the authors do not) that the views of at least older defendants deserve representation and that many of them would oppose intervention, then their parents should not be expected to speak for them. Frequently parents look to the delinquency process as a means to impose discipline on the child. Their interests may also conflict with the child's for other reasons: an unwillingness to pay the expense of counsel, their belief (possibly erroneous) that "cooperation is the best policy," or an embarrassed wish to "get it over with." Giving the parent

24. Beyond, *supra* note 2, at 11.

25. While it would be hard to say whether the parent or the child risks more in a neglect proceeding, it seems clear in delinquency proceedings that the child has the most to fear. In part that is because delinquents typically are adolescents, whose bond with their parents is already somewhat loosened.

control over the child's defense might then deprive the child of an advocate and the tribunal of valuable evidence and arguments against intervention. Goldstein *et al.* are not unaware of possible conflicts of interest between children and parents; they make passing reference to the risk. But they do not seriously confront the issue by asking how frequently conflicts might exist or what procedural safeguards might be necessary to detect and remedy conflicts. Nor do they cite or discuss competing positions on the parents' proper role in delinquency proceedings, such as those of the draft ABA standards.[26]

In other respects, too, the differences between child protection and delinquency proceedings make the authors' monolithic approach questionable. For example, they would impose independent counsel for the child once he/she had been removed temporarily pending trial or had been adjudicated delinquent. Because emergency removal of abused children does presuppose the existence of grounds for "disqualifying" the parents from speaking for the child, the rule makes sense in that context. But pretrial detention of alleged delinquents may signify nothing more than the court's wish to "teach the child a lesson." In many cases the court does order detention because it lacks confidence in the parents' ability to control the child's criminality, but why should that "disqualify" the parent from representing the child's interest in court? The same question might be asked about the reason for appointing independent counsel to represent adjudicated delinquents at the disposition stage. This makes little sense unless the delinquency finding is somehow equivalent to a judgment of parental unfitness. That view, if it is the authors', requires some substantiation.

One of the thorniest problems facing attorneys who represent children in juvenile court is who should make client decisions. Are any children competent to instruct counsel? If not, should the lawyer decide client questions himself/herself according to his/her view of the child's best interests or some other criterion? Or should he/she take instruction from the child's parent? Or request the appointment of a guardian *ad litem*? The authors of *Before the Best Interests* take this position: if counsel for the child is employed by the parents or appointed at their request, then regardless of the child's age or maturity counsel should take instruction from the *parents*. If, on the other hand, the court appoints independent counsel for the child, for example, following an adjudication of neglect or delinquency, then counsel should take instruction from the *court*.

In support of their position, the authors explain that if the parents

26. Institute of Judicial Administration–American Bar Association, Juvenile Justice Standards Project: Standards Relating to Pretrial Court Proceedings pt. IV (Cambridge, Mass.: Ballinger Publishing Co., 1980).

have been disqualified to speak for the child and the child is (by definition) incompetent to determine his/her own best interest, some third person must assume the role of autonomous parent in instructing counsel. Permitting counsel to instruct himself, as often occurs in current practice, simply permits the attorney to impose "his personal child-rearing preferences . . . upon his 'client' without regard to the state's notion of what is best for children" (p. 122). Therefore the court, bound by statutory criteria and subject to counsel's power to appeal, should have power to "advise" counsel in their duties and even to dismiss counsel who fail to perform them (p. 122).

The court can generally be relied on to serve in this role because in "a disposition proceeding, unlike other legal proceedings, the court knows prior to the introduction of any evidence . . . which party it will favor. The court is obligated by statutes, *except in some delinquency proceedings,* to make the child's interests paramount—to favor the child" (p. 123, emphasis added). I find this reasoning unsatisfactory. First, the authors do not make clear who would instruct court-imposed counsel at trial following the child's emergency removal. The court? If so, according to what principle—surely not the child should "win"? Second, even in child protection cases judges frequently experience conflicts of interest at the disposition stage. Budgetary constraints, relations with the child care bureaucracy, even political philosophy, all may influence decisions. Should the judge really have power to dismiss a lawyer who insists on advocating a disposition that the lawyer, but not the judge, believes would best serve the child? Finally, it is unclear what subclass of delinquency proceedings the authors refer to as "exceptional." Elsewhere the authors state that the goal of child placement decisions, with "the possible exception of the placement of violent juveniles" (p. 5), is to assure the child membership in a family where he/she is wanted. The authors cite no support for that proposition, and I know of none. To quote Chief Justice Burger, it is "simply too late in the day" to conclude that delinquency proceedings are not "essentially criminal."[27] Yet the authors' view of delinquency proceedings seems hardly touched by the Court's decisions since *Gault,* much less by the current legislative trend toward giving delinquents their "just deserts."

Overall the authors' scanty but sweeping treatment of delinquency as part of the child placement process is frustrating but valuable. By considering the grant of due process protections to children from the parents' perspective, Goldstein *et al.* force us to confront a basic conceptual anomaly. In civil proceedings, such as tort suits, minors have long

27. Breed v. Jones, 421 U.S. 519, 528, 529 (1975).

been treated as juridical incompetents. Incapable of assuming party status, they require the protective "insulation" (p. 123) of court-appointed guardians in order to appear in court and exercise a litigant's rights. But in criminal proceedings we have treated them as capable of being parties (defendants) and of exercising due process rights. Until now, we have applied most of the criminal process assumptions about minors to delinquency proceedings. In questioning those assumptions, the authors of *Before the Best Interests* challenge us to explain or rectify the discrepancy between the civil and criminal views of minority.

The implications of their challenge are far-reaching. If children are incapable of exercising due process rights in delinquency proceedings and if their parents should therefore speak for them, is that not equally true for juveniles who are transferred for prosecution in criminal court? And also for minors beyond the age of juvenile court jurisdiction, who are prosecuted criminally in the first instance? If, on the other hand, at least some class of minors should be treated as able to exercise due process rights independently, must we rethink the contrary assumptions that have long governed the status of minors in ordinary civil litigation?

Normally, the question of "whose right—parent's or child's?" only arises in situations of parent-child conflict, which generally means parent-adolescent conflict. As the nuclear family continues to suffer distress and adolescent-parent conflict increases, we can expect increasing pressure on the legal system to clarify the boundaries between adolescents and their parents. As its recent opinions demonstrate, the Supreme Court is far from having a set of coherent principles to apply.[28] In *Before the Best Interests*, Goldstein *et al.* contribute provocatively to that process.

Conclusion

This book is likely to make readers cheer and weep at the same time. Those who wince, as I do, at the extent to which our society has indulged its "rescue fantasies" will applaud the authors for supporting the noninterventionist cause. At the same time, they may feel some discomfort at the authors' apparent embrace of another extreme position: that parents should control all major decision making by minors, including adolescents. Opponents of "children's liberation," on the other hand, are likely to applaud the authors' stance on parental supremacy, but to deplore their minimalist approach to the state's role in child protection. Perhaps we really cannot have it both ways; Goldstein *et al.* are at least consistent. If our concern is to reinforce parental authority over teen-agers, we must

28. See Robert A. Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329.

renounce liberal state intervention in child rearing. If we treat the young like state treasures in the hands of untrustworthy keepers, we are bound to have difficulty asserting parental authority when our babies reach adolescence.

Of course, treating children as ultimately more important than their parents is a solid American tradition. As sociologist Philip Slater has shown, all state intervention in the family to protect children elevates their status at the expense of their parents' authority.[29] The basic historical reason for this nation's cultural and legal "child-centeredness"—our devotion to constant change—is undoubtedly even more vital today than it was in colonial times, when our present pattern of state-family relations originated.[30] Therefore, it would be quixotic to expect any drastic curtailment of state supervision of child rearing or any major reversal of the trend toward expanding the legal rights of minors. This society probably wants more state intervention in child rearing and greater emancipation of adolescents from their parents than Goldstein *et al.* recommend. Yet many of the authors' criticisms of existing law are valid, and their other criticisms illuminate difficult questions. Even though the specific proposals in *Before the Best Interests* will probably not appeal to most decision makers and members of the public, the book's arguments and its conceptual framework should strongly influence our future thinking about coercive intervention in the family.

29. Philip E. Slater, Social Change and the Democratic Family, *in* Warren G. Bennis & Philip E. Slater, The Temporary Society 20, 37 (New York: Harper & Row, 1968).
30. *Id.* at 37 ff.