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LAWYERS AND CHILDREN: WISDOM AND LEGITIMACY IN FAMILY POLICY

Carl E. Schneider*

IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY. By Robert H. Mnookin, Robert A. Burt, David L. Chambers, Michael S. Wald, Stephen D. Sugarman, Franklin E. Zimring, and Rayman L. Solomon. New York: W.H. Freeman & Co. 1985. Pp. xii, 572. Cloth, \$22.95; paper, \$15.95.

In the Interest of Children is a fine book. It is a fine book because it embodies an admirable idea and executes it ably. Its fault, if it has one, lies in doing so excellently what it does that it cannot do a little more. To entice you to read *In the Interest of Children*, I will summarize it, criticize it briefly, and then discuss its themes.

I. WHAT DOES THE BOOK SAY?

The Introduction

The book's admirable idea is to answer the question whether "test-case litigation [is] a sensible way to promote the welfare of children" (p. ix) by anatomizing five examples of test-case litigation, not just in terms of their doctrinal bases and implications, but also by investigating how they came to be litigated; what tactical, ethical, social, and institutional issues they raised and how they resolved them; and what social and legal consequences they had. Professor Robert H. Mnookin, of the Stanford Law School, provides an extensive introduction which describes the setting and importance of these questions and proposes ways of addressing them. He begins by emphasizing the special difficulties of making policy for children:

Two fundamental problems typically confront a policymaker trying to make a rational decision about the best interests of children. The first, *the prediction problem*, is that it is often exceedingly difficult to predict the consequences of alternative children's policies. The second, *the value problem*, arises from the difficulty of selecting the criteria that should be used to evaluate the alternative consequences. [pp. 16-17; emphasis in original]

Professor Mnookin suggests the prediction and the value problems are so frequent and severe that "easy cases are the exception, not the rule" (p. 24). The identity of the decisionmaker thus becomes crucial. Since

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this book studies test-case litigation, it investigates the role of the judge not just in deciding cases, but in writing policy. The power of American judges to make public policy was exemplified and made glorious by *Brown v. Board of Education*.¹ Yet how far judges *should* write policy, Professor Mnookin notes, depends on their capacity and on the legitimacy of their power:

The capacity question is essentially a practical issue: is the adversarial process of litigation an effective way to make sound policy decisions and create and enforce remedies? The legitimacy issue poses a fundamental question of political theory: can policymaking by courts in a democracy be squared with majority rule and popular control? [p. 25]

Professor Mnookin shows how these two questions of judicial authority interact with the prediction and value problems to make test-case litigation about children specially troubling. He cites, for example, the indeterminacy of the constitutional status of children, the uncertainty whether children's political powerlessness justifies judicial activism on their behalf, and the disagreement over what policies any such activism should prefer.

Professor Mnookin argues that the role of the child's lawyer is hardly less problematic than the role of the judge: "Children need advocates because, in most circumstances, young persons cannot speak for and defend their own interests. And yet, because children often cannot define their own interests, how can the advocate know for certain what those interests are?" (p. 43). Not only can lawyers for children not rely on clients to define their own interests; lawyers in test-case litigation represent whole classes of children whose interests may conflict. The lawyer thus has both the benefit of an unfettered choice of policies to advocate for children and the burden of making that choice.

The Case Studies

Professor Mnookin's introduction having posed the problem of test-case litigation for children, the book embarks on its five case studies. Because these are intrinsically interesting, because they are the heart of the book, and because I will shortly attempt to generalize about them, they deserve to be summarized here.

The first case study is of *Smith v. Organization of Foster Families for Equality and Reform (OFFER)*² and is by Professor David L. Chambers, of the University of Michigan Law School, and Professor Michael S. Wald, of the Stanford Law School. *OFFER* began with a real client, Madeleine Smith, who had a real problem — that child-welfare authorities in New York City wished to remove her foster children from her home. Ms. Smith persuaded Marcia Lowry, a lawyer

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1. 347 U.S. 483 (1954).

2. 431 U.S. 816 (1977).

with the Children's Rights Project of the New York Civil Liberties Union, to represent her and her foster children. Ms. Lowry's complaint argued that foster parents who have cared for a child for at least a year have a constitutionally protected interest in the child such that he may not be moved (even to be returned to his natural parents) without a prior hearing more complete than those then provided for by New York State and New York City. Louise Gans, a lawyer on the staff of Community Action for Legal Services, intervened on behalf of the class of natural parents with children in foster care; Helen Buttenwieser, a lawyer whose clients included private agencies that handled foster care, was appointed by the three-judge district court to represent the class of foster children. After a one-day trial, the court held that foster *children* have a constitutional right to a hearing before a transfer, that the foster parents could not waive the right, and that therefore such a hearing must precede *any* transfer. The Supreme Court reversed, holding that it did not have to decide whether foster parents and children have a constitutionally protected interest in their relationship because New York's procedures already met the standard of due process required where such an interest is governmentally infringed.

Doctrinally, *OFFER* was anti-climactic. Practically, *OFFER* had some immediate effects: Early in the litigation, the authorities decided not to remove Ms. Smith's foster children; later in the litigation New York City (but not New York State) instituted formal hearings for foster children being transferred to another foster home. Ultimately, however, Professors Chambers and Wald conclude that

the new rules do not appear to have brought substantial change to the system either directly or by inspiring changes elsewhere. . . . Each year since 1975, there have been more than one thousand . . . transfers, but, for only twenty or thirty of them were hearings held. It is nonetheless true that in about 45 percent of the hearings that are held, the agency decision is reversed. [p. 115]

In the Interest of Children's second case study is of *Bellotti v. Baird* and is by Professor Mnookin. In 1974, Massachusetts enacted a law that required any unmarried minor seeking an abortion to have the consent of her parents or, if her parents denied consent, of a judge. Bill Baird, who operated a Boston abortion clinic,³ filed an action claiming the statute violated the equal protection clause. A group of parents intervened in favor of the statute. A three-judge district court held a three-day hearing and, with one dissent, found the law unconstitutional, but the Supreme Court remanded the case to the Massachusetts Supreme Judicial Court for an "authoritative construction"

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3. Baird had also operated the first abortion and birth control clinic in the country, and he may be remembered as the defendant in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

of the statute.⁴ After receiving that construction, the federal district court held a second brief trial and again found the law unconstitutional. During that proceeding, a coalition including the Planned Parenthood League of Massachusetts was allowed to intervene as a plaintiff. The Supreme Court affirmed the district court's result with only one dissent, but it split 4-4 over its reasons.⁵ Justice Powell's opinion for one bloc advised states that they may require parental consent to a minor's abortion if the minor can, without notifying her parents, seek a judicial finding that an abortion is in her best interests or that she is "mature" enough to decide for herself whether to have an abortion. The Massachusetts legislature passed such a statute, and, after nearly seven years of litigation, it went into effect.

Professor Mnookin reports that hearings under the statute are prompt, brief, and informal. But his most striking conclusion is that "[e]very pregnant minor who has sought judicial authorization for an abortion has secured an abortion" (p. 239; emphasis in original). In the statute's first two years, some 1300 girls sought such authorization. Ninety percent of them were found mature enough to decide for themselves to have an abortion; an abortion was found to be in the best interests of ten percent; and five girls were originally denied an abortion, of whom four were granted one on appeal and one had her abortion in another state. Whether more teenagers benefit or suffer because of the statute is a question Professor Mnookin discusses searchingly but believes cannot be answered.

The third study is of *Halderman v. Pennhurst State School and Hospital*⁶ and is by Professor Robert Burt, of the Yale Law School. Pennhurst is a Pennsylvania state institution for the retarded. In the 1960s Pennsylvania began to "deinstitutionalize," but by 1974, 1400 people still lived in Pennhurst in "hellish" conditions. Winifred Halderman, the mother of one of its residents, brought suit seeking both institutional improvements and monetary damages against state officials. In 1975, the Pennsylvania Association for Retarded Citizens intervened as a plaintiff, and in 1976 it asked that Pennhurst be closed and its inmates transferred to small residences. In 1976, a federal district court held a thirty-two-day trial and heard eighty witnesses, including experts, parents of Pennhurst residents, former Pennhurst residents, and Pennhurst staff. In 1977, the court ordered Pennhurst closed, saying that "all the parties in this litigation" had agreed that Pennhurst residents "should be living in the community."⁷ In 1979, the Third Circuit affirmed; in 1981, the Supreme Court reversed; in 1982, the Third Circuit reaffirmed on different grounds; and in 1984,

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4. *Bellotti v. Baird*, 428 U.S. 132 (1976).

5. *Bellotti v. Baird*, 443 U.S. 622 (1979).

6. 446 F. Supp. 1295 (E.D. Pa. 1977).

7. 446 F. Supp. at 1312.

the Supreme Court again reversed. Later in 1984, the state agreed to close Pennhurst by July 1, 1986. In the meantime, however, a group of parents of Pennhurst residents had asked the court *not* to close Pennhurst, and they won a ruling that no one could be removed from Pennhurst without a hearing. These parents did not join in the settlement reached in 1984.

The consequences of *Pennhurst* are unclear, since the settlement was agreed upon while the book was in production. However, Professor Burt describes a common element "in the relations among all the *Pennhurst* parties: [a progression] from initial efforts to find common ground by overlooking potential conflicts to ultimate discord and re-crimination" (p. 289). Mrs. Halderman and her lawyer eventually disagreed about which of them spoke for Terri Lee, the Pennhurst parents eventually disagreed about whether Pennhurst should be closed, the experts eventually disagreed about deinstitutionalization, and the plaintiffs and defendants eventually disagreed about how Pennhurst should be administered. Professor Burt argues that the

basic question for our inquiry is whether litigation can be conducted in ways that at least do not feed this [erosion of mutuality]; and whether, at best, litigation might interrupt and redirect this impetus in order to build a firmer communal foundation from the evident impulse among all parties toward initial mutual support . . . [pp. 324-25]

The fourth case study is of *Roe v. Norton*⁸ and is by Professor Stephen D. Sugarman, of the University of California at Berkeley School of Law. In 1971, responding to its own inclinations and to pressure from the federal government, Connecticut passed a statute threatening with jail for contempt of court any mother receiving Aid to Families with Dependent Children who refused to identify the father of any of her children who were AFDC beneficiaries. Two legal-aid lawyers had clients who wished not to provide that information, and cases they filed were consolidated before a three-judge district court. The court, *sua sponte*, appointed a former legal-aid lawyer to represent the class of children of such mothers. In 1973, after a one-day trial, the court upheld the statute. On appeal, the American Civil Liberties Union, the Children's Defense Fund, and the Welfare Law Center contributed amicus briefs. However, the Supreme Court remanded for reconsideration in light of new federal legislation withholding benefits from uncooperative mothers. In 1975, that legislation was amended to excuse mothers who had "good cause for refusing to cooperate . . . in accordance with standards prescribed by [HEW], which standards shall take into consideration the best interests of the child . . ." (p. 418). HEW's standards were not proposed until August 1976 and were not final un-

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8. *Doe v. Norton*, 365 F. Supp. 65 (D. Conn. 1973), *vacated sub nom. Roe v. Norton*, 422 U.S. 391 (1975), *on remand sub nom. Doe v. Maher*, 414 F. Supp. 1368 (D. Conn. 1976), *vacated*, 432 U.S. 526 (1977).

til December 1978, after long lobbying and legislative and administrative debate.

Professor Sugarman concludes that "[t]he rules governing coerced maternal cooperation in Connecticut today resemble those before 1969" (p. 429). The class of exceptions is narrow. True, "[t]he exceptions are more clearly spelled out today than in 1968 and only the mother's share of AFDC is at risk." Yet Professor Sugarman believes "these differences are largely irrelevant in practice" (p. 429). He argues that we cannot tell whether more children are helped than hurt by these standards.

The final study is of *Goss v. Lopez*⁹ and is by Professor Franklin E. Zimring, then of the University of Chicago Law School, and Mr. Rayman L. Solomon, of the American Bar Foundation. In 1971, after racial disturbances, a number of black students in Columbus, Ohio, were suspended from school without a hearing. At the instance of the local NAACP, and with the help of a federally funded Center for Law and Education, a suit was filed challenging the Ohio statute that permitted suspensions without a hearing. In 1972, after a one-day trial, a three-judge district court held the suspensions unconstitutional. Although the Columbus school board had meanwhile instituted procedures close to those ordered by the district court, the defendants appealed. The Supreme Court affirmed by a five-to-four vote, but it held only that "students facing suspension [for ten days or fewer] and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some kind of hearing*."¹⁰

Professor Zimring and Mr. Solomon argue that the consequences of *Goss* have been much exaggerated: The due process now required for short-term suspension is hardly more than a conversation between administrator and student and is thus hardly more than commonly existed before *Goss*. They contend that, if school life has become "legalized," the change has primarily to do with mainstreaming and desegregation and the judicial participation in school affairs those reforms have brought.

The Final Observations

Professor Mnookin concludes *In the Interest of Children* with some brief but probing final observations. He sees the case studies as raising the question of how power over children's lives should be allocated among children, parents, and the various branches of government. More particularly, the cases dealt "primarily with the needs of poor children, minority children, and children with special handicaps" (p. 514). He proposes that "the dilemma of legitimacy . . . is perhaps less

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9. 419 U.S. 565 (1975).

10. 419 U.S. at 579 (emphasis in original).

troublesome when courts intervene on behalf of children with extraordinary needs" (p. 514), since such children both need more from the state and are less likely to have parents politically able to help them get it. Nevertheless, the prediction and value problems remain, and — exactly because such children and their parents lack power — the problem of the advocate's accountability is intensified.

Turning to the judicial role, Professor Mnookin finds that "the litigation process is not always a deliberative, methodical, rational way of arriving at a decision" (p. 517), and he reminds us that the choice of the judicial forum shapes the way a policy question is framed, the influence of the possible actors, and the nature of the answer. However, he observes that, in these five cases, courts often looked for compromises or for ways of transmuting substantive disputes into due process solutions. "In sum these studies suggest that the courts have been very modest in what they are willing to do" (p. 521). They are neither the imperial judiciary of their critics' fears nor the bold reformers of their enthusiasts' hopes.

II. HOW WELL DOES THE BOOK SAY IT?

One feature of legal scholarship as irritating as any other is its long-standing, long-deplored resistance to investigating how legal doctrine is actually formulated and to studying empirically the consequences of legal doctrines. Happily, in family law, such a literature has begun to develop, as variously exemplified by Barbara Nelson's *Making an Issue of Child Abuse*, Jeanne Giovannoni and Rosina Becerra's *Defining Child Abuse*, Gilbert Steiner's *The Futility of Family Policy*, Kristin Luker's *Abortion and the Politics of Motherhood*, and David Chambers' *Making Fathers Pay*. *In the Interest of Children* is a welcome and estimable addition to that literature from some of family law's most distinguished students.

The book's successes are manifest and manifold. At the simplest level, it tells good stories. (The intricate unfoldings of *Smith v. OFFER* and of *Bellotti v. Baird* are limned with special craft and grace.) More significantly, the book serves well its original purpose of investigating how "child advocates" function. (Professors Wald and Chambers have especially thoughtful things to say about the ethical and practical problems of lawyers who represent children in test cases.) Absorbing as such lawyers will find *In the Interest of Children*, a general audience will find much to admire as well. The book sets each case in a social and a legal context, so that we may see why it developed and how it looked to the litigators and the judges. (Professor Zimring and Mr. Solomon's exposition of the social context of *Goss v. Lopez* is particularly illuminating.) The authors are sensitive to the ways courts interact with legislatures and bureaucracies. (Professor Mnookin and Professor Sugarman provide notably enlightening de-

scriptions of how social policy emerged from diverse political institutions.) The book examines the actual consequences of the holdings in the cases, and in virtually every instance those examinations are startling and provocative. Finally, Professor Mnookin's lucid and insightful introductory analysis and concluding observations provide the kind of broad-ranging view of family law problems that the literature so much needs.¹¹

All this being so, it seems churlish to ask for more. But since I hope this book will inspire imitation, I must mention a few disappointments with it. The authors are flatly uninformative about method. Much of their information obviously came from interviews, but we never learn who was interviewed or how, what questions were asked, or what the relationships were between the authors (about whom nothing can be discovered from the book) and the people they studied. We are told virtually nothing about how the cases studied were selected, about their typicality, or about kinds of public interest litigation involving children which are not represented in the book. Indeed, "test-case litigation to promote the welfare of children" may not be an entirely usual, or even useful, category. Certainly each of these cases might readily be categorized differently: *OFFER* as an administrative hearings case, *Bellotti* as an abortion case, *Pennhurst* as a large-institutions or handicapped's rights case, *Norton* as a welfare-rights case, and *Goss* as a race or school case. And, although a large literature has grown up relating to a number of the book's topics — public interest litigation, institutional litigation, class actions, due process fetishism, foster-care programs, deinstitutionalization, and so on — little of it is discussed. Perhaps the most disappointing aspect of the book is its reluctance to generalize from the cases. Considering the length of the book, this reluctance is quite understandable. Nevertheless, the reader is left anxious to know more about what the authors make of the case studies as a whole. Professor Mnookin's final observations are sensible and sensitive, but they make hungry where most they satisfy. In the rest of this review, then, I will proffer some speculations the book might stimulate — recognizing, of course, that any conclusions based on only five cases must be tentative, but also recognizing that the proverbial journey begins with a single step.

III. WHAT CAN WE MAKE OF WHAT THE BOOK SAYS?

In the Interest of Children is about how well and how legitimately family law policy can be made through constitutional "test-case" litigation. As Professor Mnookin observes, both judicial success and judicial legitimacy depend on judicial capacity to identify standards for

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11. See Schneider, *The Next Step: Definition, Generalization, and Theory in American Family Law*, 18 U. MICH. J.L. REF. 1039 (1985), for an argument that such studies have not been, but should be, written.

measuring the "best interests" of children and to apply those standards to particular cases. In constitutional litigation, these questions of capacity depend on the clarity of the constitutional text, on the litigants' ability to identify and articulate their own interests and thereby provide the court information it needs with which to make policy, and on the court's ability to analyze and remedy the problems a case raises. *In the Interest of Children* raises doubts about each of these three factors.

The first factor — the clarity of the constitutional text — is important as one method of resolving what Professor Mnookin calls the "value problem," the problem of deciding what criteria should be used in choosing between policies for children. In this respect, the cases described in *In the Interest of Children* may usefully be compared with *Brown v. Board of Education*. However many complexities the Court may subsequently have encountered in its school-desegregation travails, it was guided in *Brown* by a constitutional provision widely understood to make a basic moral and social statement about government and race. While that statement could be implemented in many ways, its importance, strength, and (relative) simplicity gave unity and direction to the Court's labors. None of the authors of *In the Interest of Children*, on the other hand, really suggests that genuine guidance can be inferred from the various texts that have been thought relevant to children's issues, and even Professor Mnookin's intimation that children might be a "discrete and insular minority" (pp. 41-42) seems half-hearted and perhaps not intended to convince. In any event, since much has been written before about these controversies, little need be said here.

As to the other questions of judicial capacity, however, the book provides evidence from which some generalizations might be inferred, particularly about the interaction of what Professor Mnookin calls the "prediction problem" — the difficulty of predicting the consequences of alternative children's policies — with questions of judicial capacity and legitimacy. Each of the book's authors stresses the complexity of the social problems at issue in each case. Each author demonstrates tellingly what is therefore hardly surprising — that systematic empirical information and skill in analyzing it are needed for understanding the social problems each case concerned. Each author also demonstrates that the complexity of these problems, obvious as it seems, is either unperceived or disregarded by the makers of judicial family policy. What inferences can be drawn, then, from *In the Interest of Children* about the success and legitimacy of test-case litigation in light of the fact that lawyers and judges need this kind of information and skill?

A. *The Independence of the "Child Advocate"*

Judges learn about the social problems a case presents primarily from the lawyers who argue it. Judges depend on lawyers to identify accurately the interests of their clients and to relate fully the information that supports the policies that are in the interests of those clients. Lawyers, in turn, depend on their clients, whom we expect to know their own situations and to bear the consequences of ignorance. And ordinarily lawyers are constrained, if not controlled, by their clients: they need clients before they can bring suit, they are ethically required to serve the client's interest as the client understands it, they learn about the client's problems through the client, and if the client wishes to settle the case, the lawyer is obliged to oblige. But in test-case litigation involving children, it is exactly the problem that children cannot speak for themselves. (Indeed, it is the fact that children lack a voice in government that, in the minds of many of its practitioners, justifies such litigation.) Thus what is perhaps most striking about the litigation described in *In the Interest of Children* is that, in each case, lawyers were in a meaningful sense not constrained by clients: the hand was the hand of the client, but the voice was the voice of the lawyer.

What is the nature of this independence? How does it affect the choice of interests and policies to be urged on the judge? How does it affect the provision of information to the judge? To these questions we now turn.

The "child advocates'" independence of their clients in test-case litigation has, as *In the Interest of Children* reveals, many sources. The first of these sources is one Professor Mnookin emphasizes: the clients are children and therefore cannot make decisions or speak for themselves. Children's decisions are usually made by their parents, and thus children's lawyers are ordinarily instructed by children's parents. But in cases like *OFFER*, *Bellotti*, *Norton*, and, as it developed, even *Pennhurst*, the question whether the parent was serving the child's interest was itself at issue. Furthermore, even where, as in *OFFER* and *Norton*, lawyers represented adults, those adults often did not control the lawyer: Not only did someone other than the client pay the lawyer, but the named clients in each case except *Pennhurst* dropped out of the case fairly early, their individual problems having been solved. Indeed, some named clients were hardly in the case at all, since, as happened most conspicuously in *OFFER* and most questionably in *Bellotti* (pp. 172-73), they were recruited by the lawyers expressly to allow the lawyers to represent particular points of view.

The lawyers described in *In the Interest of Children* were, then, generally not controlled by named clients. The lawyers' freedom was enhanced by the facts that, in each case, at least some of the lawyers represented either a class or a group of clients and that, in each case,

the interests of the members of the class conflicted. (Even in *Pennhurst*, where the parents had formed an unusually active and sophisticated association, some parents eventually moved to intervene to oppose the association's attempt to close the institution.) The diversity of the class' interests helped free the lawyers to pick for themselves the interests to be urged upon the court. Thus, for instance, one lawyer in *OFFER* declined even to meet her named clients on the ground that "it would be a 'trap' to become embroiled in arguing about the fates of a few children when the real issues at stake were so much broader" (p. 93).

Similar problems with the lawyers' role appear in many, perhaps most, kinds of public interest litigation. Often, however, such litigation is paid for and controlled by organizations whose members are themselves members of the group whose ill treatment the lawyers hope to correct. Those interest groups may have some ability to instruct and supervise their lawyers. Even such groups, of course, can have real difficulties overseeing lawyers, partly because lawyers sometimes claim exclusive expertise in deciding whether and how to litigate.¹² But what is striking about the lawyers described in *In the Interest of Children* is that so many of them initiated suits and conducted litigation quite without genuine supervision from their organizational clients.

In short, in each of the cases studied at least one of the lawyers operated quite independently. In *OFFER*, *Norton*, *Goss*, and *Bellotti*, clients neither employed nor supervised lawyers. In *Pennhurst* the client — the parents' organization — does appear to have supervised its lawyers, but its decisions provoked some of the parents to oppose the original suit. And *Pennhurst* provides one of the most disturbing examples of the problems of deciding for whom a lawyer speaks. *Pennhurst* had begun when Mrs. Halderman, concerned about her severely retarded daughter's treatment at Pennhurst, hired a lawyer who filed suit on behalf of "Terri Lee Halderman, a retarded citizen, by her mother and guardian, Winifred Halderman" (p. 284). Later, however, the lawyer announced that his client was Terri Lee and that he would not accept instruction from Mrs. Halderman, on the grounds that parents and institutionalized children have inherently conflicting interests (p. 286).

If these lawyers are often neither instructed by their clients nor supervised by their employers, how do they decide what the public interest is and what policies to advocate for children? *In the Interest of Children* says little about this question, possibly because the lawyers themselves seem hardly to have considered it. One would suppose

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12. For an illuminating discussion of how interest groups decided to participate as *amici* in *Bakke* and of the influence of lawyers over those groups, see T. O'NEILL, *BAKKE AND THE POLITICS OF EQUALITY* (1985) (reviewed in this issue).

(and the book sometimes intimates) that lawyers' policy preferences are drawn from their experiences with other clients and opponents, informed by their ideological opinions and their law school training. But given the inexperience of many of these lawyers, given the incapable narrowness of their training, given the lawyer's necessarily limited perspective on a client's problems, and given the prejudice with which lawyers come to view their opponents' positions, the lawyer's experience seems a disconcerting basis for making policy choices in so complex an area as family law. Nevertheless, the lawyers who were asked seemed sanguine about relying on it. One of the NYCLU's lawyers in *OFFER*, for example, thought that children's rights litigation does not "raise such sophisticated issues that you need development experts" (p. 136). And none of the lawyers in that difficult case "saw any need for expert advice for guidance regarding the positions to advance" (p. 133).

The independence of the child's advocate from the child and even from those who hire him raises, then, two kinds of questions. First, how well can the child advocate inform courts? Second, how does the child advocate's independence affect the legitimacy of judicial decisions that purport to evaluate the constitutional adequacy of a legislative policy or to compensate for the child's nonrepresentation in the elected branches of government? The seriousness of these questions will depend in part on the capacity of courts to understand and solve problems of public policy for children, and we will now ask what light *In the Interest of Children* sheds on that capacity.

B. *The Capacity of Courts*

However troubling it is that lawyers who are freed to formulate positions on public policy seem ill-suited to do so, the adversary process and judicial insight might nevertheless flush out all that judges need to know to make wise policy. *In the Interest of Children*, however, suggests reasons to doubt that this happens. We begin with the set of reasons that has to do with a court's ability to collect and interpret information in test-case litigation.

The first kind of problem in this respect was that these proceedings too often lacked the virtues and yet had the faults of an adversary system of justice. For example, an adversary system depends on a rough equality between the lawyers for each side. But in each of these cases, the government's lawyers seem to have been badly outmatched: The public interest lawyers tended to come from better law schools and to have greater resources — money, time, research services, and the like — than their opponents. Thus, the state's position often seems to have been, relatively, weakly presented. An adversary system, particularly one relied on to formulate social policy in a large and baffling area, also depends on some genuine adverseness between the parties to

generate evidence and sharpen argument. In these cases, however, the evidence presented to the courts was limited by the fact that, at some point in each of the cases, the parties had only slight differences. In *Goss*, for instance, the school committee early in the litigation adopted disciplinary procedures somewhat more favorable than those the Supreme Court eventually ordered, and throughout the litigation the defendants "perceived the case as having only one issue: did Ohio law grant them autonomy in maintaining discipline in the schools?" (p. 473). The defendants (and concomitantly the plaintiffs) therefore introduced virtually no evidence to the court. Even in *Pennhurst*, the defendants said they wanted and intended to do what the plaintiffs asked — close the institution. Consequently, "there was virtually no controversy about institutional closure until some considerable time after the trial had ended" (p. 273).

Not only were some of the adversary system's advantages for collecting information absent in these cases, but some of its impediments were present. In each case, for example, the lawyers seem not to have believed that representing the public interest obliged them to depart from the usual practice of exploiting every ethical litigational advantage. Thus lawyers for children opposed the appointment of additional lawyers who might have represented more fully the interests of all the children in the class (p. 141), attempted to limit the witnesses and issues presented to courts (p. 141), and used technicalities to prevent a case from being heard on appeal (p. 378).

This brings us to the second kind of limit on the court's ability to collect information in test-case litigation involving children: The hearing in each of the cases was stunningly inadequate. In none of the cases was there a genuine trial of the major issues at stake; except for *Pennhurst*, hearings lasted from only one to three days. This brevity was sometimes commanded by the court¹³ and sometimes caused by the parties. In either event, the court learned little about the named parties, the class, the immediate problem, or the larger social issues. Much of the evidence presented related to the named plaintiffs, partly for tactical reasons and partly, one suspects, because that is what lawyers customarily do. Yet in test-case litigation, anecdotes about a few individuals can rarely be enlightening and are often misleading. And little though the trial judges could have learned from these hearings, the appellate judges who finally decided those cases surely learned even less, since it is unlikely that they read the full trial record.

The third limit on the judicial capacity to collect information is that to ask lawyers in "social policy" cases to be genuinely and thor-

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13. One reason the hearings were brief was apparently that each case except *Pennhurst* was originally heard by a three-judge federal district court, an institution whose clumsiness and composition may deter prolonged trials. The virtual abolition of that institution may have eliminated one cause of perfunctory hearings.

oughly illuminating is to ask a great deal. Each author of *In the Interest of Children* devastatingly shows the inadequacy of the social information presented in these cases. To some extent, systematic evidence was simply unavailable. To a considerable extent, the lawyers failed to grasp the relevance of what was available or to use experts to inform themselves and the court. Where systematic evidence was available and where lawyers tried to use it, its complexity and ambiguity prevented lawyers from effectively gathering, analyzing, and presenting it, and courts from assimilating it.¹⁴

Judicial understanding of the social problems presented by test-case litigation for children seems, then, to be hampered by severe problems in acquiring information and ideas. These problems are simultaneously exacerbated and eased (or evaded) by a set of judicial (and lawyer's) attitudes that might be called hyper-rationalism.

Hyper-rationalism is essentially the substitution of reason for information and analysis. It has two components: first, the belief that reason can reliably be used to infer facts where evidence is unavailable or incomplete, and second, the practice of interpreting facts through a set of artificial analytic categories. The first component of hyper-rationalism has three related aspects. In its first aspect, it is the assumption that systematic evidence is generally superfluous to understanding social problems, since the behavior of people and institutions can be logically inferred from a general understanding of how people and institutions work.¹⁵ In its second aspect, it is the assumption that, in the absence of a general understanding of how people and institutions work, anecdotal evidence is generally sufficient, since the behavior of people and institutions can be logically inferred from a few

14. Much of Professor Mashaw's work is to a similar point. Consider his discussion of the Supreme Court's treatment of procedural due process:

An attempt to address the cost-benefit question in a relatively rigorous fashion has demonstrated our (and any reviewing court's) inability to obtain the necessary data to refute that presumption [of administrative regularity] convincingly. Analysis . . . must proceed on the basis of rough judgments, assumptions, and case comparisons. And, if the post-*Eldridge* Supreme Court cases are any guide, those approaches have produced dramatic variance in judicial judgments and a nearly incomprehensible jurisprudence. The Court in *Eldridge*, ignorant of the facts, affirms the legislative-administrative judgment. Its only alternative seems to be the *Goldberg* approach—an approach that, similarly uninformed, merely affirms a different, more interventionist, vision of the judicial function.

J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 134-35 (1985).

15. Professor Donald Horowitz describes one version of this aspect of hyper-rationalism in his important *The Courts and Social Policy*, where he talks of

deriv[ing] behavioral expectations from what might be called the logical structure of incentives. . . . [C]ourts may consciously formulate rules of law calculated to appeal to the interests of "legal man" in rather the same way as the marketplace is thought to appeal to the interests of "economic man." . . . The problem with this, of course, is that it is deductive rather than empirical. There is no assurance that the judge has correctly formulated the structure of incentives: his logic and the logic of the actors affected by rules of law may begin from different premises.

D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 49 (1977).

examples of their actual behavior under the relevant circumstances.¹⁶ In its third aspect, it is the assumption that a description of social reality articulated in one case may be taken as demonstrated fact in subsequent cases; it is, in other words, the application of *stare decisis* to evidence about social behavior.¹⁷

All three attitudes recurred in the cases described in *In the Interest of Children* and are manifest in the evidence presented to and recited by the judges.¹⁸ These attitudes are not, of course, uniquely judicial; they are probably common among public officials, who must formulate policy quickly and who are often temperamentally disinclined to learn about an issue through systematic reading. However, these attitudes are more problematic when held by judges, who lack the general administrative experience and the particular subject-matter expertise that officials can use in interpreting sketchy information and who are ill-situated to revise a policy as experience with it teaches new lessons.

The second component of hyper-rationalism is the practice of analyzing social problems in terms of a small set of legal categories. Legal categories are troublesome and necessary for the same reason — they are a limited set of abstractions from social reality. Legal categories may be specially awkward when the law makes policy for families, since many of the values of family life are notoriously nonlegal and extra-rational. But even aside from this difficulty, drawbacks of analyzing a social problem in terms of the legal categories available abound in *In the Interest of Children*. For instance, judicial policymaking was repeatedly impaired by the fact that each of the five cases concerned (and the plaintiffs' lawyers and many of the judges were primarily interested in) a perplexing social problem, but the legal issue the cases presented was rarely an apt means of addressing that problem: The legal issue often spoke only indirectly to the social problem; to resolve the legal issue in a way that contributed to resolving the social problem often would have required a remedy far beyond judicial authority; and to define the legal issue so as to give a court scope in solving the social problem often risked creating legal doctrines with unanticipated and unwanted consequences. This point is

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16. This attitude also helps explain judicial willingness to accept as "proof" the conclusions of one or a few social science studies. Cf. *id.* at 274-84.

17. Professor Mashaw neatly describes this third attitude:

As precedent accretes, and as it is manipulated without reference to the particular circumstances from which it emerged, judicial activity may become increasingly insular. Rather than pursuing empirical inquiry into the social world, the legal culture may take on a life of its own—one in which cases stand for social facts and manipulation of formal categories replaces factual inquiry as the basis for decision making.

J. MASHAW, *supra* note 14, at 59 (footnote omitted).

18. I discuss this attitude toward evidence in a different context in Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. (forthcoming). See also Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302 (1984).

made with particular clarity by Professors Wald and Chambers in their discussion of *OFFER*, but it was or could have been made by each of the authors. *Bellotti* is centrally about the dilemmas of adolescent pregnancy; *Pennhurst* about the best ways of treating the extraordinarily various handicaps of the retarded; *Norton* about how the interests of mothers and children receiving welfare can be reconciled and served; *Goss* about how schools should handle the difficulties caused by integration and by changes in social attitudes towards discipline and education. Yet the legal issue in each case was defined in terms of (usually procedural, sometimes substantive) due process, and each case was in part resolved by a provision for some kind of hearing.

Due process devices were prominent in these cases not only because due process is the most convenient and plausible category for judicially addressing problems of family policy; due process also allows judges to hope that the social complexity which escapes their immediate understanding and reach will be taken into account in the newly revised process of decision. Yet, on the evidence of these cases, that hope seems unfounded. Few foster parents have used the hearing assured by *OFFER*; virtually every girl who sought judicial authorization for an abortion after *Bellotti* received it; hardly any mothers have fully pursued the procedural rights they secured in the process of which *Norton* was a part, and Professor Sugarman questions whether the fight over the *Norton* regulations "has made any important difference" (p. 429); and Professor Zimring and Mr. Solomon conclude that "what many commentators have called 'proceduralism' did students very little good but even less palpable harm" (p. 505). These results accord with Dean Yudof's conclusion that "[e]xperience with recent federal acts creating procedural rights for parents suggests that few take advantage of these statutory rights"¹⁹ and with Professor Mashaw's observation that "[t]he *Goldberg* requirement of extensive pretermination hearings has not produced a huge, or even very substantial, increase in the number of hearings held."²⁰

The difficulties presented by both components of judicial hyper-rationalism can be seen by examining another common feature of these cases. Each case, with the possible exception of *Bellotti*, has centrally to do with a bureaucracy. In each case, a court was asked to make a bureaucracy work "better." Few judges are equipped by training, experience, or temperament to understand bureaucracies. Nevertheless, their hyper-rationalism allows them to believe that their experience with conducting or evaluating trials makes them expert in governmental procedure of all kinds.

The quality of bureaucratic work depends on the characteristics of

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19. Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1981 WIS. L. REV. 891, 906.

20. J. MASHAW, *supra* note 14, at 251.

the particular bureaucracy, of its staff, and of its leaders. But because judges believe they can understand how all bureaucracies work through *a priori* reasoning, they resist inquiring into the individual character of a bureaucracy. Further, because judges are bound to use a limited number of legal categories in dealing with bureaucracies, it is hard for judges to interpret the law in a way that allows for variations between bureaucracies and within a single bureaucracy over time. The upshot of this, as we have just seen, is that judges try to improve bureaucracies by imposing on them procedures that are, at best, *pro forma* or unused. The judicial cure for the ills of bureaucracy is more bureaucracy.

Not only does hyper-rationalism lead courts to impose on bureaucracies and their clients procedures which are, like the hearings described above, unused or meaningless. It also allows courts to underestimate greatly both the difficulties of persuading a bureaucracy to act in the way a court wishes and the resourcefulness of recalcitrant bureaucrats. In other words, because courts substitute anecdote for evidence and legal categories for social analysis, they do not ask why bureaucrats think and act as they do. And because courts do not understand the assumptions of and pressures on bureaucrats, courts are ill-fitted to win their cooperation (and, because of the paucity of judicial remedies and the scarcity of judicial time, ill-equipped to coerce it).

OFFER exemplifies many of these features of the hyper-rational approach to bureaucracies. In that case, the social problem was to ensure that foster children are wisely treated, and thus a central question was whether hearings would improve the bureaucracy's decisions. That question was to be answered for the whole country on the basis of evidence about only two bureaucracies and of a small set of legal assumptions about how hearings generally affect bureaucratic decisions. But it depends on an almost endless number of considerations, many of which will vary from one bureaucracy to another and within a single bureaucracy over time. Will a hearing officer make a better decision than a case worker? Can anything systematic be learned about the comparative sensitivity, training, experience, energy, or judgment of those two bureaucrats? Is the hearing officer a worn-out caseworker or a caseworker whose ability has been rewarded by promotion? Is a caseworker's personal acquaintance with the people involved a help or a hindrance? How important is speed in making a decision? How will hearings affect the morale of caseworkers? Their attitudes toward their clients? Their willingness to take necessary risks? Will the prospect of hearings encourage the caseworker to think more carefully, or merely to avoid making reviewable decisions? To follow rules more faithfully, or to doctor the paper record? Will hearings lead to the formulation of clearer standards for the removal of children? Are clearer standards better standards, or is it preferable to

use vaguer standards that preserve a measure of discretion? Is the cost of hearings worth the price? Would the money have been better spent hiring another caseworker? Hiring another supervisor? Improving training programs? Improving record-keeping? Raising salaries to attract abler caseworkers? Does the usefulness of hearings vary with the size of the bureaucracy? Will hearings affect a bureaucracy's ability to recruit and retain foster parents? Its ability to persuade natural parents to put children in foster care? And so on and on.

In these two sections, we have been examining how judicial understanding of public policy affecting children may be limited by judicial problems in acquiring and analyzing evidence. We have seen that for structural and attitudinal reasons, judges are exposed to only a fraction of the information that they need and that they rely on an analytic framework which is often incomplete and ill-fitting. An obvious source of both information and analysis is the social sciences, and these cases often do indicate that the social sciences need to be better used. But I am not arguing that courts should simply shift the burden of decision onto the social sciences. For familiar and understandable reasons, social science evidence is too incomplete, social science theory is too fragile, and social science value choices are too problematic to justify such a tactic.²¹

Nor does my criticism of the incompleteness of the information, analysis, and remedies in these cases imply that the only good policy is a global one, one that tries conclusively to understand and finally to solve the whole problem all at once. On the contrary, there is much to be said for incrementalism, for what Professor Lindblom, in a famous article, called "the science of muddling through."²² Because incrementalism is a relatively cautious and modest approach to social policy, it seems plausible that courts might be able to make workable contributions to child welfare through incremental changes in policy. But even an incrementalist approach ought to be informed by the best available evidence and the most appropriate analytic framework. It is the apparent failure to achieve that level of understanding that raises questions about whether, even used incrementally, "test-case litigation [is] a sensible way to promote the welfare of children."

Incrementalism is less promising a method of judicial child welfare reform than it might first seem for another reason. Incrementalism requires flexibility and a close and constant attention to the problem being addressed, so that changes can be made as successes and failures emerge. In some ways, courts seem well suited to those requirements. Indeed, the traditional explanation of common law development neatly fits the incrementalist model. That explanation sees courts as deciding a long series of cases each dealing with a small part of a social

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21. See, as one example of many, C. LINDBLOM & D. COHEN, *USABLE KNOWLEDGE* (1979).

22. Lindblom, *The Science of "Muddling Through,"* 19 *PUB. AD. REV.* 79 (1959).

problem. From the series of holdings courts gradually induce a principle which is itself susceptible to gradual change as further holdings are assimilated.

As a description of how courts actually decide cases, this theory obviously has many deficiencies; but it may help direct us toward two impediments to successful incrementalism in test-case litigation over children's policy. First, such litigation is constitutional, not common law, litigation, and as such it tends to be deductive, not inductive. The Constitution provides not only a text to apply, but embodies principles of importance. This makes it easier for courts to feel they are equipped to deal with whole problems and not just increments of problems (since the text and principles presumably pre-empt many of the aspects of a problem that might otherwise be addressed incrementally) and it makes it harder for courts to respond flexibly (because it is harder to back down over an issue of principle and because of the need to maintain consistent application of a principle over the entire range of assimilable problems). Second, there may simply be too few cases to generate real familiarity with many of the problems children's policy raises and to allow for frequent small adjustments of policy. From this point of view, test-case litigation involving numerous enforcement cases (like *Brown*) ought, *ceteris paribus*, to produce better judicial policy than litigation (like *OFFER*, *Bellotti*, *Norton*, and *Goss*) resolved in relatively few cases. Similarly, test-case litigation involving institutions (like *Pennhurst*) ought to produce better judicial policy than other such reform efforts (again, like *OFFER*, *Bellotti*, *Norton*, and *Goss*), at least to the extent that the intensive interaction between court and institution which is thought to typify institutional litigation forces the court to learn in detail about the particular entity it seeks to change. Yet even these instances of better judicial policy (if such they be) import their own limits: only a greatly expanded judiciary could afford such attention to more than a very few areas of litigation, and it is exactly the intensity of judicial involvement that has provoked criticism of the school desegregation and institutional cases.

IV. CONCLUSION

I have devoted much of this review to what *In the Interest of Children* suggests about the difficulties judges have in acquiring the information needed to write policy for children and in interpreting the information they acquire, and I have inferred from the book that those difficulties may be both systematic and severe. Whether they are disabling, whether they are worse than similar difficulties encountered by other branches of government, and whether they are curable are not questions that can be answered here. They are, however, questions not just of judicial capacity, but also of judicial legitimacy. Judicial policy ought not be weighed in the same scales as legislative and executive

policy, for the latter comes with the added legitimacy that democratic institutions have in a democratic system. Of course the question of judicial legitimacy in children's test cases can no more be resolved here than can the question of judicial competence. But it seems to me a danger that, in our appreciation for the successes of judicial policy which are symbolized by *Brown v. Board of Education*, we may forget its limitations, exaggerate its virtues, and become unduly contemptuous of the democratic branches of government. This danger arises not so much from the debate over judicial review (a debate which has attracted a good deal of intelligent, careful, and subtle thought) as from a less-considered but powerful attitude toward courts and legislatures which seems to underlie a good deal of what is described in *In the Interest of Children* and which I believe — and here I am partly relying on my own observations — has worked itself deep into the assumptions and preferences of much of the elite legal community. The attitude comes in part from the reluctance of lawyers to consider that some of our enthusiasm for the kind of litigation described in this book undoubtedly comes from the fact that the "access" to government such litigation provides is access for us. For, seen in its bleakest light, *In the Interest of Children* suggests that that access is offered to a small group of lawyers unconstrained by the people they purport to be advocates for, by the organizations that employ them, or by clients of any kind. They come from a group that already has disproportionate power — the upper-middle-class graduates of elite law schools. They are suspicious of politics. They are at point after point (particularly on family law issues) resolutely out of sympathy with much of the population. They prefer the rational style of courts to the emotive, demotic style of politics. In revealing, if surely not characteristic, moments, one hears them say things like, "No good was ever done by a statute, since only courts are capable of nuanced decisionmaking." In revealing and less uncharacteristic moments, one sees them decide that facts about social policy — for instance, about a public institution's experience with affirmative action programs — ought to be kept secret because the public cannot properly understand those facts.

Much of the attitude I have described is simply the natural concomitant of devoting oneself to social reform. It is thus logical that, as Professor Mnookin notes, today's children's advocates often remind one of their Progressive predecessors. They are similar in class background, similarly suspicious of politics, similarly convinced that political decisions should be transferred to experts, and similarly confident of their own expertise. The irony of the comparison is that today's reformers are often attacking the institutions and ideas of the Progressives — in *OFFER*, the foster care system and its faith in informal decisions; in *Bellotti*, moral and social views about adolescent pregnancy; in *Pennhurst*, the mental hospital; in *Norton*, restrictions on

welfare recipients; and in *Goss*, beliefs about the proper relationship between schools, children, and the community.

Yet the lessons of modesty and doubt this irony would seem to teach are widely resisted. This is apparent in the way lawyers in this kind of litigation call themselves or are called "public interest" lawyers or "advocates for children." The statutes and programs that were challenged in these cases are surely vulnerable to many criticisms and may well be wrong. But many, perhaps most, Americans approve of them exactly in the belief that they serve both the public interest and children, and each of the cases is at least ambiguous enough to make that belief plausible. The ambiguities of *OFFER* are made amply clear by Professors Wald and Chambers and by the presence of public interest lawyers and children's advocates on three different fronts. *OFFER*'s ambiguity becomes yet plainer when we recall that foster parents are, among other things, government employees who, in the suit, sought to inhibit government supervision of themselves. The statute in *Bellotti* was in part intended to reduce the number of abortions that took place in Massachusetts; but its supporters also believed that pregnant children benefit by discussing their situation with their parents. The statute in *Norton* was partly meant to save tax money, but its supporters also thought that fathers should support their children and that children need that support. The defendants in *Goss* believed that informal discipline is better for the children being disciplined and that it helps administrators protect undisruptive children. *Pennhurst* may be an exception.²³ But given the complexity of the problems surrounding asylums of all kinds, given 150 years of unsuccessful struggles to make asylums work and to find alternatives to them, and given the weakening enthusiasm for the deinstitutionalization movement,²⁴ it is as difficult in *Pennhurst* as in the other cases confidently to allot to one side in the dispute exclusive understanding of the public welfare or unique insight into what children need.

The failure to appreciate the lessons taught by the resemblance to the Progressives is also notably apparent in Professor Burt's criticism of the trial judge in *Pennhurst*. That judge, Professor Burt says, failed to understand his role as a moral teacher who "forces the defendants to reconsider their actions by raising the moral costs of those actions. . . . This is a considerable judicial power," Professor Burt writes, "akin to the force wielded by the greatest moral teachers from Gandhi to Christ to Socrates: making visible the vulnerability of those who suffer harm at the hands of wrong-doers" (p. 342). The judge

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23. Possibly because it is the only "institutional" case in the book, *Pennhurst* is the most frequent exception to the generalizations I have drawn from these case studies.

24. See Richardson, *Institutionalization and Deinstitutionalization of Children with Mental Retardation*, in 1 CHILD DEVELOPMENT RESEARCH AND SOCIAL POLICY 318 (H. Stevenson & A. Siegel eds. 1984).

should employ that power to teach not only the litigants, but all of society; he must "reach out even beyond the immediate parties to this dispute, to show others that they had a stake in the just resolution of this dispute . . . , even though these others may not previously have defined themselves as parties to the dispute" (p. 328).

The cautious judge may wish to remind himself what happened to Gandhi, Christ, and Socrates. He may wish to ask himself what qualities of character, training, or experience equip him to use this kind of moral force. He may wish to ask himself what consequences this kind of moral ambition has for most people.

One might recommend many other questions a judge confronted with Professor Burt's suggestions would want and have to ask. Let me confine myself, then, to two observations. First, a Gandhi is able to effect social change only against an opponent who shares basic moral views with him, and even then only where there is a single, overriding, and relatively simple moral issue. But the problems discussed with such richness in *In the Interest of Children* are exactly not such problems. They are problems of genuine difficulty, and to think of them as simple conflicts between the vulnerable and "wrong-doers" is both unkind to those on the "wrong" side and conducive to the scanting of social complexity that plagues judicial policymaking. My second observation responds to Professor Burt's image of the judge orchestrating social debate and negotiation over social issues. There is already a word for what Professor Burt wants the judge to create: the word is politics.