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In the Interest of Children

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BOOK REVIEW

IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY. Written by Robert H. Mnookin*, with contributions by Robert A. Burt, David L. Chambers and Michael S. Wald, Stephen D. Sugarman, and Franklin E. Zimring and Rayman L. Solomon. New York: W. H. Freeman and Company, 1985. Pp. 572, $15.95 (paperback).

*Reviewed by Samuel M. Davis***

I. THE AUTHORS

One of the strengths of *In the Interest of Children* is that it brings together such a great wealth of talent and experience in family law generally and, more particularly, in children's law, the vaguely defined body of law that examines the relationship of law to children in our legal system. Most readers will agree that this talented group of writers has made a significant addition to an already rich collection of literature on children and their interaction with parents and the state.[1] Interestingly, Professor Robert Mnookin and his collaborators have not examined these relationships in the abstract. Rather, they present an in-depth analysis of five cases in an effort to determine the efficacy of test-case litigation as a means of protecting the well-being of children.

The book is divided into sections that present the factual backgrounds, legal settings, case histories, and impact of five law reform cases chosen by the authors as vehicles through which to examine the utility of test-case litigation as a means of raising and protecting children's interests. In addition to the considerable expertise the authors bring to their separate studies, their field research is impressive. They have talked to the lawyers on both sides in all of the cases and, in most instances, have talked to the parties as well. While presenting informative character studies of the lawyers and parties, the writers of this book also paint revealing portraits of the presiding judges. As a result, the reader receives a dual benefit, gaining an insider's perspective from revelations of lawyers' strategies, parties' expectations, and judges' perceptions of the legal and policy issues involved, while

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[1] *See, e.g.*, WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT (W. Gaylin & R. Macklin eds. 1982); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979); R. MNOOKIN, CHILD, FAMILY AND STATE (1978); W. WADLINGTON, C. WHITEBREAD & S. DAVIS, CHILDREN IN THE LEGAL SYSTEM (1983); W. WEYRAUCH & S. KATZ, AMERICAN FAMILY LAW IN TRANSITION (1983); F. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982); Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984); Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983); Keitner *Privacy, Children and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1983).

enjoying the leavening effect of the authors' objective evaluations of the impact of these cases on decision-making in the best interests of children.

II. The Cases

The five cases selected for separate study by the authors are *Smith v. Organization of Foster Families for Equality & Reform*,[2] analyzed by Chambers and Wald; *Bellotti v. Baird*,[3] analyzed by Mnookin; *Pennhurst State School & Hospital v. Halderman*,[4] analyzed by Burt; *Doe v. Norton*,[5] analyzed by Sugarman; and *Goss v. Lopez*,[6] analyzed by Zimring and Solomon. One might question selection of these particular cases. One *might*, except Mnookin acknowledges that no attempt was made to find a representative sampling of cases. Rather, the authors sought to use test cases, in which courts were asked to change policies affecting children adopted by other branches of government. Moreover, the authors chose difficult cases that raise serious questions of whether the best interests of children were truly served by the decisions.[7]

Smith v. Organization of Foster Families For Equality & Reform was a class-action suit by a foster parents organization that challenged the authority of New York social agencies to remove children who had been in the same foster placement for over a year. Such removals were alleged objectionable because they were imposed without hearings and over the objections of the foster parents. Although the federal district court's mandate for hearings in such cases was unanimously reversed by the Supreme Court, the case nevertheless resulted in the desired goal of requiring a hearing before the transfer of a child from one foster family to another.

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[2] Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) *rev'g sub nom.* OFFER v. Dumpson, 418 F. Supp. 277 (S.D.N.Y. 1976).

[3] Bellotti v. Baird, 443 U.S. 622 (1979).

[4] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). The case had been to the Supreme Court once before. Halderman v. Pennhurst State School & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd*, 612 F.2d 84 (3d Cir. 1979), *rev'd and remanded*, 451 U.S. 1 (1981). Following remand, the Third Circuit once again reaffirmed the district court's closure order. Halderman v. Pennhurst State School & Hosp. 673 F.2d 647 (3d Cir. 1982). Once again the Supreme Court reversed and remanded to the appeals court in *Pennhurst*, 465 U.S. 89. Judge Raymond Broderick's opinion in the district court remains the fullest treatment of the issues in the case.

[5] Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973), *vacated and remanded sub nom.*, Doe v. Norton, 422 U.S. 391 (1975). On remand the issues were now different, and both sides could claim a victory of sorts. By the time the case reached the Supreme Court again, the court successfully avoided deciding the issues involved. Doe v. Maher, 414 F. Supp. 1368 (D. Conn. 1976), *vacated and remanded*, 432 U.S. 526 (1977).

[6] Goss v. Lopez, 419 U.S. 565 (1975).

[7] R. Mnookin, R. Burt, D. Chambers, M. Wald, S. Sugarman, F. Zimring, R. Solomon, In the Interest of Children: Advocacy, Law Reform, and Public Policy 4, 12 (1983) [hereafter cited as R. Mnookin, In the Interest of Children].

In *Bellotti v. Baird*, an abortion activist and various public interest groups challenged a Massachusetts statute that allowed unmarried minors to obtain abortions only with parental consent or where parental refusal had been overruled by a court. Although the Supreme Court held the statute unconstitutional, more importantly, it initiated the proposition that a state offer to a pregnant unmarried minor the following choices; obtain parental consent *or* seek approval by a court on the alternative bases that she is a mature minor or, if immature, that the abortion would be in her best interests.[8]

Pennhurst State School & Hospital v. Halderman began as an effort by a parent to improve living and treatment conditions at the Pennsylvania state institution where her retarded daughter was housed. This effort eventually evolved into a law suit in which a large number of plaintiffs sought to have the institution closed and its residents transferred to smaller, community-based facilities. While the federal district court ordered closure of Pennhurst, the Supreme Court twice reversed and remanded the case. The final word remains to be spoken.

In *Doe v. Norton*, public interest lawyers brought suit to prevent Connecticut welfare officials from compelling the cooperation of unwed mothers in establishing paternity of their illegitimate children to recoup costs incurred by the state in supporting the children. The plaintiffs lost in federal district court. By the time the case reached the Supreme Court, congressional legislation requiring states to compel cooperation of mothers in order to continue receiving federal AFDC funds largely mooted the cause of action. The Supreme Court vacated and remanded for consideration in light of the recent legislation.

Goss v. Lopez challenged the practice of the Columbus, Ohio, school system of suspending and expelling students without notice and hearings under circumstances involving implications of racial discrimination and harassment. The Supreme Court ruled that notice and a hearing are required before suspension or expulsion of a student from school.

III. THE BOOK

Another strength of *In the Interests of Children* is that the authors are by no means sanguine about whether these cases resulted in victories for children's rights. The authors achieve credibility as scholars and not merely advocates of a preconceived conclusion when, in the introductory chapters, they indicate (per Mnookin) that in some cases they suspect the test case litigation might have harmed rather than helped children's best interests.

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[8] More recent cases in which this view was strengthened are City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476 (1983); Simopoulos v. Virginia, 462 U.S. 506 (1983).

For example, although the *Smith v. OFFER* litigation resulted in a *voluntary* change in policy by the other governmental branches, Chambers and Wald point out that (1) hearings, because of the delay they often entail, might not improve the process and might even result in harm to some children, and (2) the right to a hearing (as opposed to the hearing itself) might be harmful in some situations because it will prompt and perhaps even encourage bad decision-making by caseworkers seeking to avoid a hearing.[9]

The reader is prepared for this dichotomy (some might say ambivalence) by Mnookin's well-designed, well-written introductory chapters in which he creates the analytical framework to measure and evaluate the five cases. He tells us that three "distinct, but interrelated, puzzles" make definitive assessment of the value of test-case litigation in furthering the welfare of children very difficult, or at best tentative.

> The first puzzle is an enigma: How does one know what policies best serve the interests of children?[10]. . . .The second puzzle is a dilemma, and it concerns the legitimate role of courts in our governance: In a democracy, how much policy-making power should be exercised by judges who are largely insulated from electoral politics and not subject to direct popular control?[11]. . . .The third is a paradox, and it concerns the proper role of the child advocate.[12]

In the next three chapters Mnookin discusses the enigma of determining the best interests of children, the dilemma of the legitimate role of courts, and the paradox of child advocacy. By the time one finishes these three chapters, one is thoroughly imbued, as Mnookin warned, with the notion that the footing is treacherous when dealing with children's rights. There are no easy answers. In the final introductory chapter Mnookin concludes:

> Both the critics and defenders of judicial policy-making will find evidence in the case studies to support their positions. As with our three puzzles, there is no simple straightforward answer. The case studies should inform the debate by showing, in often dramatic detail, how complex the issues really are.[13]

On the whole, the book is highly informative and well-written. Some might find that it is too lengthy, that it says more than it needs to say about only five cases, and that a book of this length would have provided more benefit to the reader by discussing more cases and detecting common threads and trends evident

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[9] R. MNOOKIN, IN THE INTEREST OF CHILDREN 122-25.

[10] The question was the subject of an excellent article by Professor Mnookin. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

[11] The question has been addressed by others. *See, e.g.*, R. NEELY, HOW COURTS GOVERN AMERICA (1981).

[12] R. MNOOKIN, IN THE INTEREST OF CHILDREN 11-12.

[13] *Id.* at 65.

in judicial decision-making involving children.[14] As mentioned earlier, one might also criticize the case selection. However, in terms of the authors' stated objectives, one is hard pressed to find fault with their analytical approach.

While some readers may find the diversity of emphasis and opinion in a book authored by different writers distracting, others will find the approach refreshing. The thinking here is not monolithic, preconceived, or dictated by Mnookin, the lead author. Indeed, one would not expect authors of this stature to tolerate such a stultifying approach. What is present in the work is a well-defined objective commonly established and perceptions and conclusions independently reached.

In the Interests of Children is presented as a trial itself. Mnookin makes the opening statement to the jury, the readers, stating what he intends to show. The case studies themselves constitute the evidence in the case. Then Mnookin makes his closing argument telling the reader what he has witnessed but, as earlier promised expressing caution about what conclusions he should draw from the evidence. Therein lies the final strength of the book: its quality stems not from the conviction of the answers it furnishes, but rather from the depth and breadth of the questions it raises.

[14] Shorter studies have used this approach. *See, e.g.*, Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255 (1979); Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 SO. CAL. L. REV. 769 (1978).