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THINKING ABOUT PUBLIC POLICY TOWARD ABUSE
AND NEGLECT OF CHILDREN: A REVIEW OF
BEFORE THE BEST INTERESTS OF THE CHILD

Michael S. Wald*

BEFORE THE BEST INTERESTS OF THE CHILD, By *Joseph Goldstein, Anna Freud, and Albert J. Solnit*. New York: The Free Press. 1979. Pp. xii, 288. \$12.95.

Children are a problem. Helpless at birth, long in maturing, prohibited by biology, custom, and law from providing for themselves, they need protection, nurturance, and education for a substantial period of time. Even in a society like ours, which extols individual liberty and responsibility, special provisions must be made for children.¹

Who should provide this protection, guidance, and control? In our society a child's biological parent or parents have the primary right and responsibility to raise children.² Aside from the obvious reason that any other policy would be unacceptable to virtually everyone, our preference for parental autonomy is based on the assumption that children develop best when raised by their biological parents. The ties of blood are thought to generate the concern and commitment essential to childrearing. Our deference to parents also reflects a commitment to diversity of life style and thought.³ In contrast, we question the capacity of state institutions to rear children.

Yet parents do not always live up to our expectations. They sometimes injure and even kill their offspring. More often, they fail to provide love, guidance, and concern. Because the quality of care children receive substantially influences their capacity to function as adults,⁴ as well as the quality of their childhood, and because many

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1. The needs of children are commonly accepted. However, not everyone agrees with our society's protective attitude toward children. Some writers assert that children need liberation, not protection. See R. FARSON, *BIRTHRIGHTS* (1974). For a discussion of the tension between children's welfare and children's liberation, see Wald, *Children's Rights: A Framework for Analysis*, 12 U.C.D. L. REV. 255 (1979).

2. This is not the only possible system. In some countries the state plays a greater role. In other cultures the extended family plays a large role.

3. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (relying on the first and fourteenth amendments, the Court upheld the rights of Amish parents to withdraw their children from school following the eighth grade).

4. See note 93 *infra* and accompanying text.

adults seem to do a less than adequate job of childrearing, it is generally accepted that parents should not be totally free to rear their children as they see fit. The state clearly has some role in insuring the adequacy of care a child receives. The critical questions are how much of a role should the state have, who should exercise this role, and what powers should the state have to alter parental care.⁵ In a system that starts with a preference for family autonomy, it must be decided, in the words of Goldstein, Freud, and Solnit, "What ought to be established . . . before the 'best interests of the child' can be invoked over the rights of parents to autonomy, the rights of children to autonomous parents, and the rights of both parents and children to family privacy?" (p. 14).

In the past twenty years, many professionals, from every discipline, have been advocating increased state intervention on behalf of children. Likening the children's cause to that of the civil rights movement for minorities and women, these advocates have recommended a greater state role in monitoring the adequacy of parental care, an expansion of the legal grounds for coercive intervention to protect children from maltreatment, and a greater state role in child-rearing.⁶ Proponents of increased intervention have led every state to adopt legislation establishing reporting schemes to improve the state's ability to find abusing parents.⁷ In addition, a large number of publicly-funded programs have been developed to deal with the problems of abuse and neglect.

Support for increased coercive intervention is not unanimous, however. A number of writers, myself included, have questioned the wisdom of increased coercive state intervention on behalf of children.⁸ In general, these commentators fear that coercive interven-

5. The state historically played a minimal role in protecting children. This has been gradually increasing. For a good historical overview see Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894-910 (1975).

6. See, e.g., S. KATZ, *WHEN PARENTS FAIL* (1971); R. KEMPE & C.H. KEMPE, *CHILD ABUSE* (1978); Areen, *supra* note 5; Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972) ("a child has a moral right and should have a legal right . . . to receive parental love, affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult").

7. See A. SUSSMAN & S. COHEN, *REPORTING CHILD ABUSE AND NEGLECT* (1975).

8. My views are expressed in two articles, Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975), and Wald, *State Intervention on Behalf of Neglected Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976) [hereinafter cited as Wald I and II respectively]. I also served along with Robert Burt as draftsman for the American Bar Association Juvenile Justice Standards Project, *STANDARDS RELATING TO ABUSE AND NEGLECT* (tentative draft 1977) [hereinafter cited as ABA STANDARDS]. For other criticisms, see Mnookin, *Foster Care — In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Symposium, *The Relationship Between Promise and Performance in State Intervention in Family Life*, 9 COLUM. J.L. & SOC. PROB. 286 (1972).

tion frequently does more harm than good for the child. Therefore, they want the grounds for intervention carefully specified and limited to situations where intervention is likely to be useful.

Before the Best Interests of the Child marks the entrance of three internationally known experts on child development into the debate over when coercive intervention is appropriate to protect children from inadequate parental care. The book is an important event. An earlier work of these authors, *Beyond the Best Interests of the Child*,⁹ which proposed policies to govern cases where two "fit" adults were vying for custody of a child, has had an enormous influence on the legal and social work systems.¹⁰ Because of the unquestioned reputation of the authors as people concerned with children, because the trio comprises a lawyer, a psychiatrist, and a psychoanalyst¹¹—thus bridging the discipline gap¹²—and because of the influence of the earlier book, this book should receive careful attention.

Before the Best Interests discusses those harms to children that should constitute a statutory definition of "abuse and neglect," warranting investigation of, and coercive action against, the parents.¹³ It also proposes standards for deciding what action to take after a finding that a child has been abused or neglected. Finally, it makes a few suggestions regarding procedures in adjudication.

To tell the end of the story first, these authors, whose earlier work is often cited in support of increased coercive intervention,¹⁴ advocate the most restrictive grounds for intervention of any persons yet to speak. In fact, despite my concern over coercive intervention,¹⁵

9. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter cited as *BEYOND*] (citations to 1st ed. paperback).

10. The influence of *BEYOND* was recognized by the publication of an entire article reviewing its impact in the American Bar Association's *Family Law Quarterly*. See Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 *FAM. L.Q.* 49 (1979).

11. Joseph Goldstein, a lawyer and lay analyst, is Sterling Professor of Law at Yale Law School and a professor at Yale's Child Study Center. Anna Freud is the Director of the Hampstead Child Therapy Clinic in England and author of numerous books on psychoanalysis and child development. Albert Solnit is Sterling Professor of Pediatrics and Psychiatry at Yale Medical School and Director of the Yale Child Study Center.

12. It is often asserted that problems in communication among professional disciplines lie at the core of policy conflicts. See J. GIOVANNONI & R. BECERRA, *DEFINING CHILD ABUSE* (1979).

13. Current laws dealing with abuse and neglect are summarized in Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 *FAM. L.Q.* 1 (1975); the actual operation of the present system is described in Wald I and II, *supra* note 8.

14. See, e.g., Hammell, Book Review, 53 *CHILD WELFARE* 189 (1974).

15. The ABA Standards for which I was draftsman have been criticized by many persons as not providing enough protection for children. See, e.g., Bourne & Newberger, "Family Autonomy" or "Coercive Intervention"? *Ambiguity and Conflict in the Proposed Standards for Child Abuse and Neglect*, 57 *B.U. L. REV.* 670 (1977); Driscoll, *ABA's Proposed Standards Unrealistic*, *AM. HUMANE MAG.* April 1978, at 34. Judge Driscoll is a former president of the National Juvenile Court Judges Association. Dr. Newberger is head of Family Development Study at Children's Hospital in Boston. Mr. Bourne is an attorney with the Trauma-X Group

their grounds for intervention seem too narrow to me. Moreover, their basic premises supporting non-intervention are often unpersuasive. This review analyzes both their proposals and the mode of approach they adopted in addressing the issues. Part I presents the premises of the authors' recommendations. Part II presents their proposals. The rest of the review critiques their proposals and discusses ways of thinking about child abuse. In several earlier works I have proposed a set of standards regarding intervention on behalf of abused and neglected children.¹⁶ Since I still basically adhere to those proposals, I will not discuss here alternatives to those proposed by Goldstein, Freud, and Solnit (GFS).

I. THEIR BASIC PREMISES

This book is concise. Much of it is devoted to describing case studies that illustrate negative aspects of the present system. The authors sometimes write elliptically and do not always fully develop a point. Their arguments are interwoven in complex fashion. These same qualities marked *Beyond the Best Interests*, and consequently many people have misread several of the arguments in that book.¹⁷ Therefore, I will develop at some length my understanding of Goldstein, Freud, and Solnit's arguments and the way in which they relate their premises to their substantive proposals. Even then, I cannot fully repeat their arguments. The book demands and deserves careful reading by anyone interested in public policy toward children.

Two developmental themes provide the underpinnings for these authors' noninterventionist stance. First, they assert that a child needs unbroken continuity with an adult who is his or her "psychological parent" (pp. 8-10). This proposition, developed at length in *Beyond the Best Interests*,¹⁸ leads them to be extremely wary of any state actions that might disrupt this relationship. They believe that it is worth risking a break in this continuous relationship only if the child is suffering from extreme dangers.¹⁹

Second, the authors believe that an adequate psychological relationship between a child and a parent can only be maintained in "the privacy of family life under guardianship by parents who are

at Children's Hospital. They probably represent the majority position on the intervention/nonintervention issue.

16. See note 8 *supra*.

17. As indicated, that book has often been cited by proponents of more extensive state intervention. See Hammell, *supra* note 14.

18. BEYOND, *supra* note 9, at 17-20, 31-34.

19. This relationship may be with someone other than the biological parents if the child has been in the continuous care of an adult other than the biological parent for a lengthy period of time. GFS assert that once a "psychological parent" relationship is established with someone other than the natural parent, it should be safeguarded by law. See note 21 *infra* and accompanying text.

autonomous. . . . When family integrity is broken or weakened by state intrusion, [the child's] needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is *invariably detrimental*" (pp. 8-10) (emphasis added). Therefore, they assert, the family should be free from "state intrusion" in order to safeguard the integrity of family ties crucial to the child's development.

Preservation of family autonomy means more to GFS than just the maintenance of continuous physical care, although they believe that continuous physical care is generally essential to maintaining an adequate psychological relationship. They contend that any interference with family privacy, including placing the family under court supervision, is detrimental to the child, since he or she will not see the parents as "omniscient and all-powerful." Therefore, they are as wary of intervention leading to supervision of the family as they are of intervention removing the child.

These two notions form the core of the authors' psychological theories. To the degree that their views deserve deference due to their special expertise in child development, it is these propositions which require scrutiny. However, their arguments do not rest entirely, perhaps not even primarily, on developmental premises. GFS distrust state intervention for several other reasons. First, "[a] policy of minimum coercive intervention accords . . . with [the authors'] firm belief as citizens in individual freedom and human dignity" (p. 12). Second, they are concerned that the "law [legal system?] does not have the capacity to supervise the fragile, complex interpersonal bond between child and parent" because it does not have the "resources [or] the sensitivity to respond to a growing child's ever-changing needs and demands" (pp. 11-12). This problem exists whenever the child is at home under supervision, in a foster family home that is not autonomous, or in a residential institution. They assert that the legal system cannot deal with the consequences of its decisions or act with the speed required to meet a child's needs. They also point out that available alternatives to parental care too often fail to offer the child an opportunity for a psychological relationship with an adult and thus deprive the child of being wanted and valued. Thus, even when a child is endangered by an inadequate home environment, intervention may do more harm than good.

Goldstein, Freud, and Solnit further specify that any system of intervention must give parents fair warning of what constitutes a breach of their child care responsibilities (p. 17). They are opposed to the vagueness of existing abuse and neglect laws, which generally permit intervention if the child is in an "unfit home," is "denied proper care," or is suffering from "emotional harm." They believe

with other critics that vague laws encourage intervention in cases where it is likely to do more harm than good.²⁰ Since for GFS every intervention creates a substantial threat to the child, they want laws that specify those situations where intervention is likely to do more good than harm.

The authors also adhere to the views expressed by other commentators that vague, discretionary laws encourage intervention by many well-intentioned persons who ignore the negative consequences of their acts. They assert that vague laws should not be justified on "[t]he fantasy . . . that only the most competent, most skilled, and most sensitive lawyers, judges, doctors, social workers, foster parents, family helpers, and other personnel will implement the grounds for intrusion under the laws of child placement. There will always be a substantial number in authority who will prevent this fantasy from becoming a realistic expectation" (p. 18).

But their reasons for preferring fair warning go beyond child-oriented premises. Fair warning is valued in and of itself, as a protection for individual liberty and as a means of preventing discrimination against "poor, minority, and other disfavored families" (p. 17). Specific statutes are needed to "prevent judges, lawyers, social workers, and others from imposing their personal, even if professional, preferences upon unwilling parents" (p. 14). These principles are important to them, regardless of impact on the well-being of children. In this regard, GFS are speaking as lawyer and citizens, not as experts in child development.

Finally, the authors assert that all laws authorizing intervention should assume that the system will operate at its worst and should guard against the worst abuses. Because of their concern that every intrusion is harmful, they believe that a policy that always errs in the direction of nonintervention is most likely to benefit children.

II. SPECIFIC PROPOSALS

Having laid out these principles and developmental theories, the authors devote the remainder of the book to answering three questions:

1. What should constitute *probable cause* for inquiry by agents of the state into individual parent-child relationships, and what should they be required to *find* before being authorized to seek modification or termination of a specific parent-child relationship? (p. 19).
2. What should constitute *sufficient cause* for the state to modify or terminate a parent-child relationship? (p. 20).
3. If there is sufficient cause for modification or termination, which of the available alternative placements is the least detrimental? (p. 20).

20. See, e.g., Wald I, *supra* note 8, at 1004-07.

Because the authors want to delineate every occasion in which state intervention may be appropriate to modify or terminate a parent-child relationship, the book discusses three grounds for intervention that do not directly concern parental abuse and neglect. They would allow courts to intervene in contested custody cases (p. 31), they would authorize *and require* a court to assume care of a child whose parents wanted to relinquish custody (p. 33), and they would authorize intervention on "the request by a child's longtime caretakers to become his parents or the refusal by longtime caretakers to relinquish him to his parents or to a state agency" (p. 39). The remaining grounds they discuss would constitute a statutory scheme for intervention on behalf of abused or neglected children. Since the abuse and neglect provisions are the most novel and are likely to be the most controversial proposals, I shall limit my synopsis and evaluation to those sections of the book.²¹

21. I am in full agreement with the proposals regarding contested custody cases and relinquishment, although the issues are somewhat more complex than the authors' brief treatment indicates. Both standards are also consistent with the practices of most courts and agencies, although there are exceptions.

In custody cases, GFS would allow court review only if the parents cannot agree on custody. They would not allow courts to review whether a custody arrangement satisfactory to both parents, including a joint custody arrangement, was in a child's "best interests" (pp. 31-32). They believe that when the parents agree, courts should defer to them, thus preserving family autonomy. *Id.* I concur in their judgment, if not their reasoning. Although some parents may reach what seems like an "undesirable" solution, and one parent may be "coerced" into accepting an agreement he or she does not like, forcing parents to accept an arrangement neither wants often will do more harm than good. Moreover, review in uncontested cases unduly burdens an already overworked judicial and social work system. Our resources would be more properly devoted to contested cases.

GFS's proposal with regard to relinquishment seems quite sensible as long as procedures are developed to insure that the relinquishment is really voluntary. The authors stress that every effort should be made to offer the parents services which might make it possible for them to keep their child (p. 35).

GFS's third standard, pertaining to long-term caretakers, is far more controversial. In *Beyond the Best Interests*, the authors recommended that whenever custody was in issue the child should be given to the "psychological parents," even if they were not the biological parents. For example, if a child is in foster care for a period of time, or left by the parents with a grandparent or other relative, and the new caretaker did not want to return the child, they would give custody to whomever was the "psychological parent," even if the natural parent were competent to care for the child. They envisioned a case-by-case determination of who was the child's psychological parent. *BEYOND*, *supra* note 9, at 51. In *BEFORE* they modify this position. They still assert that the refusal by a child's long-time caretaker to give up custody, regardless of how the caretaker got the child, should be a grounds for intervention (p. 39). However, rather than case-by-case determinations of who is the psychological parent, they have adopted presumptions based on the length of time that the child has been with the caretaker. A person would be the presumed psychological parent after 12 months' custody of a child under three and after 24 months' custody of a child over three at the time of placement. They also provide for special hearings in the case of older children who had lived with their parents for a lengthy period prior to placement (p. 46).

These proposals are complex and I will not discuss them in depth in this review. Although I agree with GFS's general position, I still find many problems with the specifics of their proposal, especially the application of the same test for children in foster care as a result of a court finding of abuse or neglect and children in foster care because of parental placement. I would be more reluctant to terminate the natural parent's rights in the latter situation. In any case, I believe that any change in the law making termination easier must be accompanied by changes

A. *Substantive Proposals*

GFS would limit state intervention to four situations:

1. The death or disappearance of both parents, the only parent or the custodial parent — when coupled with their failure to make provision for their child's custody and care . . . [p. 59].²²

As stated by the authors, "This ground . . . is designed to provide the state with the authority to discover and to safeguard children for whom no day-to-day care arrangements have been made by parents who die, disappear, are imprisoned or hospitalized" (p. 59). Most state statutes now allow intervention if a child has been "abandoned" or the "parent is unavailable." The proposed standard is unusual mostly because it authorizes intervention only if the absent parent failed to make provision for the care of the child. A parent's absence, incarceration or hospitalization would not justify intervention other than a check to see that arrangements have been made to care for the child. Further intervention would only be allowed if the actions of the new custodian came within another ground for intervention.²³

2. Conviction, or acquittal by reason of insanity, of a sexual offense against one's child. . . [p. 62].

"This ground . . . is concerned with . . . children whose parents use them as sexual partners. It applies primarily to the seduced child, not to children who suffer physical harm at the hands of sexually assaulting parents" (p. 62).²⁴ Under this standard, protective in-

making removal of children more difficult and by programs alleviating the need of parents voluntarily to place their children and by programs facilitating return of children. For a somewhat different scheme on termination, see Wald II, *supra* note 8, at 660-700.

22. In an appendix to the book the authors propose "suggested language for statutory provisions to codify some of [their] proposals." *Id.* at 187. On occasion, the language in this code varies from that proposed in the text of the book. For example, they use the term "absence" rather than "disappearance" in the appendix (p. 193). Many parents are absent without disappearing. It is unclear whether the difference in language is intentional or inadvertent.

23. GFS do not discuss whether any special rules would apply if the parent requested state aid in finding a temporary placement or if the caretakers chosen by the parent needed state aid, such as AFDC or foster care allowances, in order to provide for the child. Most children in out-of-home care enter through such state-aided "voluntary placements." *See* Wald II, *supra* note 8, at 626 n.4.

Because such placements often subject the child to a number of different caretakers, because many parents "voluntarily place" their children several times, thus destroying their need for continuity, and because such placements often lead to conflicts between the parents and the new custodian, the whole area of voluntary placements needs far more consideration than the brief treatment given it in *Before the Best Interests of the Child*. I certainly agree that intervention is necessary under the circumstances covered by this standard. I also agree with the authors that when the child has been left in voluntary placement for a substantial period of time, termination of parental rights may be in order. *See* note 21 *supra*. However, in order to minimize the harms of placement, and to prevent situations requiring termination to develop, we need to devise new programs that will sustain ties between parents and children in placement or that will prevent such placements initially.

24. GFS offer another standard for children suffering severe physical harm at the hands of their parents. *See* text at note 27 *infra*.

intervention would be authorized only *after* a conviction of the adult in criminal proceedings.

This standard proposes a major change in the law of every state. While all states allow intervention when a child has been "sexually abused" (indeed, sexual abuse is the fastest growing basis for intervention), no state restricts intervention to cases involving criminal convictions. Generally, intervention takes place through juvenile court proceedings, although there may be simultaneous criminal proceedings. If this proposal were adopted, no steps could be taken to protect the child until criminal proceedings were completed, unless the sexual acts resulted in severe physical harm to the child. Although the adult might be removed from the home by arrest, he or she could post bail and return.

The proposal also limits intervention to criminal sexual offenses committed by parents. Juvenile court intervention would not be authorized if the activity occurred with relatives, boyfriends, or other members of the child's household. GFS state that "[a]s their child's representatives, parents are relied upon to meet and manage any problems stemming from their children's sexual relations with each other, with other members of the household, and indeed with outsiders" (p. 66). While these persons might be criminally prosecuted, even the repeated exposure of a child to people who involve the child in sexual relations would not be a basis for protective intervention.²⁵

The authors do not clarify what would be at issue in the juvenile proceedings following a criminal conviction. I assume that the court could terminate the parental rights of the offending parent, order that the family undergo therapy, or remove the child from the home if it felt that the nonoffending parent could not protect the child.

GFS are quite concerned over the harm to the child from sexual activity with a parent. They state that premature sexual activity, especially with one's parent, will invariably have detrimental consequences for the emotional and sexual development of the child, either immediately or when the child reaches adulthood and must develop sound personal and sexual relationships (p. 63). However, they would limit intervention to the criminal process, because the "harm done by the inquiry may be more than that caused by not intruding." Moreover, "since no consensus exists about the proper treatment or about what disposition would be less harmful, there is no justification from the child's point of view for dragging the matter into the open by invoking the child placement process" (p. 64).²⁶ Fi-

25. Intervention might be possible under another of the authors' standards — repeated failure to protect the child from serious physical harm. See note 27 *infra* and accompanying text.

26. The authors do indicate that they would encourage parents to seek treatment on a voluntary basis and would insure that treatment services are available.

nally, the criminal law serves to define the grounds for intervention, thus filtering out cases requiring juvenile court attention.

3. 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].

This ground constitutes GFS's proposal for intervention in cases which would generally be covered by the terms "physical abuse," "neglect," "unfit home," or "inadequate supervision" under most existing statutes. Rejecting the provisions of all existing statutes, they argue that no intervention should be based solely on "neglect" or "emotional harm" and that intervention to protect a child from physical abuse should occur only when the parent, through acts or omissions, causes or tries to cause *serious bodily injury* to the child.

The authors define serious bodily injury quite narrowly. "It is meant to give the state the authority to identify and to provide protection to children who are brutally kicked, beaten, or attacked by their parents. It is meant to safeguard children whose parents may have attempted to injure them, for example, by starvation, poisoning, or strangling. Finally, it is designed to safeguard children from parents who prove to be incapable of preventing their child from repeatedly suffering serious bodily injury or from being exposed to such harm" (p. 72) (footnote omitted).

Although the authors restrict intervention to extreme cases, when intervention is necessary GFS call for an extreme response. In what is certain to be one of their most controversial recommendations, they propose that when a parent has inflicted or attempted to inflict serious bodily harm on the child, parental rights should always be permanently terminated.²⁷ They contend that "[p]arental maltreatment leaves psychological scars which endure long beyond any physical healing and preclude a child from regaining the feeling of being safe, wanted, and cared for in his parents' presence — the very emotions on which his further developmental advances need to be based" (p. 73). Therefore, the child should be placed for adoption in the hope that a new relationship can be established.

The authors would not permit intervention in what are now the great bulk of physical abuse cases (beatings that result in bruising or minor injuries) unless such beating was an *attempt* to inflict more serious injuries. Nor would they allow intervention because a home is dirty, the child is unsupervised, or the parent is not providing adequate food or clothing to the child, unless such lack of care resulted in repeated serious physical injuries to the child.

Finally, they would not allow any intervention solely to protect a

27. This position is stated several times in the book. However, they do not provide for automatic termination in their model statute in the appendix. See note 22 *supra* for a discussion of inconsistencies between the text and appendix.

child from emotional harm. The question of whether to permit intervention for emotional harm has been a major dividing point between "interventionists" and "noninterventionists."²⁸ GFS take the strongest noninterventionist stand of any commentators. While they "recognize that emotional disorders are serious threats to any child's healthy progress toward adulthood" (p. 76), they believe that the concept of emotional neglect is "too imprecise, in terms of definition, cause, treatment, and consequences, to ensure fair warning and thus adequate control over judges, lawyers, police, social workers, and other participants in the child placement process" (p. 75). They also assert that we cannot know if any emotional problems evidenced by a child are a result of the attitudes, actions, or inactions of the parent. In addition, they argue that psychological treatment of the child will be unsuccessful if the parents are uncooperative. Therefore, the authors conclude that "even if 'emotional neglect' could be precisely defined, recognition of how little we know about the 'right' treatment, and how little consensus there is about treatments, should caution against using the power of the state to intrude" (p. 77).

4. Refusal by parents to authorize medical care when (1) medical experts agree that treatment is nonexperimental and appropriate for the child, and (2) denial of that treatment would result in death, and (3) the anticipated result of treatment is what society would want for every child — a chance for normal healthy growth or a life worth living. . . [p. 91].

GFS's final ground for intervention hinges on failure to provide medical care. Most state statutes allow intervention if the parents fail to provide "adequate medical care"; but no statute defines or provides standards for assessing what is adequate care. GFS would reject such statutes. Instead, they propose a specific standard, one that defines adequate medical care in the narrowest way possible: the child must be faced with death, there must be medical community agreement on the type of intervention, and, in a standard designed primarily to deal with "defective newborns" — children with severe birth defects²⁹ — treatment could only be ordered if the child had a chance to live "a normal life or a life worth living" (p. 92). Thus, GFS would leave to the parents questions ranging from

28. Compare Wald I, *supra* note 8, at 1014-20, with Areen, *supra* note 5, at 927-28; KATZ, *supra* note 6, at 67-68; and NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, PREVENTION AND TREATMENT PROGRAMS AND PROJECTS III-5 (March 1978) [hereinafter cited as FEDERAL STANDARDS]. The National Center on Child Abuse and Neglect recommends intervention to protect children from mental injury which is defined as "an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in his ability to function within a normal range of performance or behavior, with due regard to his culture." *Id.*

29. While the standard would apply primarily to children born with substantial birth defects requiring special medical procedures to preserve their lives, it also applies to an older child whose life must be sustained through special medical procedures, such as placement on a dialysis machine.

whether a child should have tonsils removed or braces put on his or her teeth to whether a child should live with facial or other deformities or in blindness.

In cases involving "defective newborns," they would require that when the state overrules a parental decision to let the child die, the state must be willing to provide, at no cost to the parents, all the medical care and other services necessary to guarantee the child a life as a "wanted" child. This responsibility would include finding adoptive parents or another caretaker who can meet the child's need for "affectionate relationships and emotional and intellectual stimulation" (p. 97). Moreover, the state could not fulfill its obligation by placing the child in an institution (p. 98).³⁰

The authors' reasons for limiting medical intervention are similar to those expressed throughout the book for limiting all intervention. They do not want the views of judges, doctors, or social workers substituted for those of parents. They find no reason to believe that judges or professionals can make a better decision than the parents. Indeed, they believe that decisions other than life and death are only "preferences for one style of life over another" (p. 92) and that neither law nor medicine provides "the ethical, political, or social values for evaluating health care choices" (p. 93). Although they recognize that parents may have varied motives for giving or withholding medical care, they believe that these motives should not be evaluated by agents of the state.

This restriction would not necessarily preclude intervention to force medical care that a statute requires all parents to give their children. For example, GFS do not take any position regarding laws that require parents to provide children with immunizations. The authors also might leave some decisions to the child, once the child reaches a certain age.³¹ However, any decision delegated to children would have to be given to all children once they reached the chosen age; moreover, the minor's decision would not be subject to review by judges or social work agencies.

The limits on medical intervention are modified, to a degree, by the authors' third ground for intervention — where parents allow their children to suffer serious bodily injury. However, GFS do not clarify how these standards mesh. They may merely mean that par-

30. The authors imply that appropriate care could not be provided in an institutional setting that merely houses and feeds children. It is not clear whether they believe satisfactory institutional care is possible.

31. GFS would give decisions to children only in the most extreme circumstances. They strongly believe that parents should make decisions for children. "[T]o be a *child* is to be at risk, dependent, and without capacity or authority to decide free of parental control what is 'best' for oneself" (p. 7) (emphasis original). Moreover, even in these limited cases they would only allow the child to decide if the state assumed responsibility for all care; they would not require the parents to pay for medical care desired by the child in order to stay alive when the parents feel that the child should not be kept alive (p. 100).

ents who injure their children cannot also deny them medical care. Or they may contemplate that some medical problems (such as diabetes) could result in serious bodily injury to a child (blindness). Without any elaboration, it is impossible to know the implications of this exception.

B. *Procedural Suggestions*

These four standards, all requiring extreme harm to the child to justify intervention, constitute the book's substantive proposals. Unless state officials have a reasonable belief that the child's situation comes within one of these grounds, they would not be authorized to investigate the family. The state would have to prove one of these grounds before it could take actions on behalf of the child.

While most of their suggestions relate to these substantive standards, the authors do propose some procedures for investigation, adjudication, and disposition. For the most part, these suggestions are stated briefly, without extensive explication of their reasoning. However, several of the suggestions raise fundamental questions about current procedures and should not be overlooked.

First, GFS suggest that even where it is alleged that a child is endangered in one of the ways they have specified, the state should investigate in the least intrusive way possible. To minimize the chance of unnecessary investigations, to preserve doctor-patient relations, and to encourage parents to get care for their children, the book seems to propose that there be no mandatory abuse reporting laws (p. 71). All states now have mandatory reporting laws. In fact, such laws are mandated by federal law if the state wants federal child abuse money, and the National Center on Child Abuse and Neglect is urging expansion of the types of harms for which reports should be mandated.³² Yet a number of child welfare professionals are now having second thoughts about the value of reporting laws and their concerns are seconded in this book.³³

Second, the authors would curtail severely the power of the state to remove children prior to an adjudicatory hearing. Despite criticism from many sources, pretrial removal remains the norm in many jurisdictions.³⁴ GFS would limit removal to emergencies involving a risk of serious bodily injury to the child.

Third, the authors propose that even when a child comes within

32. See FEDERAL STANDARDS, *supra* note 28.

33. For a presentation of various views on reporting, see PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: ISSUES ON INNOVATION AND IMPLEMENTATION 279-305 (1978). See also sources cited at pp. 243-44 n.19.

34. See ABA STANDARDS, *supra* note 8, at 78-81; Burt & Balyeat, *A New System for Improving the Care of Neglected and Abused Children*, 53 CHILD WELFARE 167 (1974).

their standards, the state should use the least intrusive disposition possible, except in cases of inflicted injuries where GFS would terminate parental rights. In all other cases, primarily cases where parents repeatedly fail to protect the child from physical injury, they advocate making all possible efforts to leave children with their parents.³⁵ Moreover, the authors stress that a child should never be removed unless the state has resources to provide a less detrimental alternative environment. When the state intervenes to provide medical care, it should do so as quickly as possible and should only authorize the medical care, without imposing any restrictions on the rest of the parents' childrearing prerogatives.

Finally, again going against the national trend, they propose that during the investigatory and adjudicatory stages the child should not have separate counsel unless the child has been removed from the home pending adjudication. This reveals a change of heart since *Beyond the Best Interests*, where they argued that a child should be represented whenever custody is at issue.³⁶

The authors reverse their position because of their concern with state infringement on parental autonomy. They state that

an integral part of the autonomy of parents is their authority and presumed capacity to determine whether and how to meet the legal care needs for their child. . . .

The 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. Therefore it cannot take place until the presumption of parental autonomy has been overcome — until the protective insulation that parents give children from the law has been broken by the establishment at adjudication of a ground for intervention [p. 112].

The authors would follow this policy in all legal proceedings involving children, including delinquency proceedings.

Counsel for the child would be appointed if the parents requested such counsel or at the dispositional stage of proceedings, since at that point the parents have been declared incompetent to represent their child or the parent-child relationship has been broken by intervention. In addition, in cases of alleged severe physical abuse, a child removed from the parents pending adjudication would have separate counsel. This maneuver is intended to "assure that the state provides the child in an emergency with adequate care until the placement process has run its course" (p. 115). Counsel would also be provided in contested divorce custody cases since the parents "[b]y failing to agree on a disposition . . . waive their claim to parental autonomy

35. It is not clear, however, what type of dispositions GFS recommend in juvenile court proceedings following the conviction of a parent for sexual abuse.

36. See *BEYOND*, *supra* note 9, at 65-67.

and thereby their right to be the exclusive representatives of their child's interests" (p. 115).³⁷

In sum, the authors call for a very limited system of coercive intervention,³⁸ one restricted primarily to abandoned and seriously abused children. As applied, intervention would generally result in termination of parental rights, although services would be provided in the repeated neglect situation and possibly in sexual abuse cases. The system would be designed to get the state in and out of the child's life as quickly as possible, leaving the child in the exclusive care of the existing parents or a new set.

III. EXAMINING THE PREMISES

As indicated above, I approached this work as a person with grave reservations about the utility of coercive state intervention on behalf of abused and neglected children. I found in the book a set of clearly articulated propositions that provide support for positions taken by many people who have been concerned with the potential harm to children from increased state intervention.

Yet I find myself troubled by the extreme stance taken in this book. Ultimately, I do not support many of their specific standards, despite my agreement with their general spirit. I find the authors' reasoning for adopting the specific standards unpersuasive and in conflict with many of the premises articulated in *Beyond the Best Interests*.

In the following sections I identify those proposals that seem to me to be correct and those premises and conclusions that seem more questionable. My emphasis is primarily on the authors' basic premises. I believe that both friends and critics of their proposals should undertake such an examination. The precise boundaries of intervention will always be somewhat fluid, and it is not essential that agreement be reached on every word in every standard. However, it is important to accept or reject the underlying premises regarding state intervention.

My analysis also examines the type of evidence that should be relied on in developing a sensible policy in this area. For the most part, interventionists and noninterventionists have talked past each other. In general, proponents of more intervention have been "doers" — people in the field working with children, in hospitals, social work agencies, courts and police departments. They base their claims to expertise on their practical experience and on their desire to help the children they see. Noninterventionists, on the other

37. The book does not address other procedural questions, such as levels of proof required, the conduct of hearings, or whether the parents should be entitled to counsel. For a discussion of these issues, see ABA STANDARDS, *supra* note 8.

38. The authors do believe that voluntary services should be widely available.

hand, have come primarily from academic settings. If academicians, even ones with substantial clinical experience, are to persuade legislators and practitioners of the merits of a less interventionist stance, they must do so through persuasive methods of analysis, compelling data, and a process of reasoning that overcomes the practitioners' desire to "do something" to help a child whom they feel is not being protected. I doubt that this book will meet that test. Yet many of its points deserve careful consideration by those who favor increased intervention.

A. *Areas of Agreement — The Need for Specific Laws and Limited Intervention*

In 1978, over one-half million families were reported to state agencies under abuse reporting laws.³⁹ Many more families come under agency supervision without any report. Over one hundred thousand families are involved in abuse and neglect court cases each year,⁴⁰ and over 30,000 children are removed from their homes by court or agency action.⁴¹ Yet no state has a clearly stated, well-developed set of legislative or administrative guidelines specifying when coercive state intervention is appropriate or what should happen when such intervention occurs. Present laws allow state officials substantial discretion in deciding when and how to invoke the child protective process. Other than limited budgets, legislatures impose almost no controls upon the activities of agencies seeking to intervene to help the child, and judicial proceedings are generally invoked to support, not control, agency actions.

This statutory vagueness and consequent broad grant of discretion is usually justified as necessary to help children. Who could oppose helping children? The justification assumes that state action will always benefit the child.

It is this assumption that GFS attack. In part, they reiterate the concern of many others that the state often does a bad job when it intervenes. Although they present little data to support this claim, others have demonstrated the costs of present interventionist policies. Numerous studies document that children removed for their own good are frequently left in the limbo of foster homes, subject to multiple placements and poor care.⁴² It is also well documented that many children are removed from home unnecessarily, sometimes be-

39. AMERICAN HUMANE ASSOCIATION, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1978 ANNUAL REPORT 9 (1979). The number of reported cases increased by 47.7% between 1976 and 1978.

40. U.S. DEPT. HEALTH, EDUCATION & WELFARE, JUVENILE COURT STATISTICS 1973, at 12-18 (1975).

41. See sources cited in Wald II, *supra* note 8, at 626 n.4.

42. Much of the data is reported in Wald I and II, *supra* note 8. See also CHILDREN'S DEFENSE FUND, CHILDREN WITHOUT HOMES (1978).

cause the state does not offer services that would enable their families to provide adequately without removal and sometimes where the state was wrong to believe the child was endangered in the first place.⁴³

The deficiencies of existing institutions have not deterred calls for greater intervention.⁴⁴ Interventionists argue that the lack of funding to provide better programs, not the idea of intervention, is the problem. With more money, they claim, the system could do a better job of protecting children.

I am skeptical that such funding will ever be forthcoming. Moreover, my experience leads me to concur with GFS that we cannot assume that the system will always be administered by people as competent as we would wish for. For numerous reasons, including constraints imposed by lack of funds, civil service requirements, union policies, and the difficulty of attracting professionals to work in public agencies and juvenile courts, the system will not always be administered by people trained for, and dedicated to, the difficult and often unrewarding efforts needed to make intervention a beneficial process. For these reasons, I believe that we should try to intervene less, but do it well, rather than intervene more and do it poorly. While I do not believe that policies should be based on assuming the worst will happen, they should at least be realistic. Realism would encourage planners to define more carefully the situations that justify intervention.

These concerns are practical ones. But GFS go beyond debating the quality of services. Their central argument is that no matter how good the services, state intervention disrupting parent-child bonds is inherently harmful to the child. In both this book and *Beyond the Best Interests*, they forcefully and persuasively argue that the law has not placed sufficient weight on the importance of children's psychological ties to their parents, even not-so-good parents, and the degree to which disruptions of such ties can be devastating to children. All too often intervention is premised solely on parental behavior, without any concern about the impact of that behavior, or the intervention, on the psychological well-being of the child. GFS apply their knowledge of child development to show that there are substantial reasons to be concerned about the impact of intervention on a child. They point out that parent-child relations are extremely complex and that it is difficult to predict the likely consequences of any intervention on that relationship. They are so concerned about the po-

43. Children are removed because their parents are unmarried or living in a manner which meets a social worker's disapproval. See Wald I, *supra* note 8, at 1033-34.

44. See ABA STANDARDS, *supra* note 8, at 181-86 (dissenting views of Commissioners Wilfred Nuernberger and Justine Wise Polier).

tential harm of intervention that they restrict it to situations involving extreme danger to the child.

For reasons I will develop later, I do not agree with GFS that all intervention involves some harm. I believe that many children and families benefit from good intervention programs. However, I find persuasive their claim that intervention carries the potential of disrupting important psychological relations for the child. Since even good intervention programs may have negative consequences, coercive intervention should be limited to situations where there is reason to believe that the benefits will generally outweigh any harms. To ensure that intervention will generally be beneficial, I believe that we should favor a policy against intervention and require the law to specify the types of harms that justify risking intervention.

I also strongly support the authors' suggestion that removal of the child prior to adjudication should be limited to cases of extreme physical danger. We now often disregard the child's need for continuity by removing children for days, weeks, or months while checking out the adequacy of the parental home. Although many allegations turn out to be unfounded, present law frequently assumes that it is better to err on the side of short-term removal rather than leave the child in a home that may be detrimental. Yet that assumption overlooks removal's incalculable harm to children. Even when placed in good environments, which is often not the case, they suffer anxiety and depression from being separated from their parents, they are forced to deal with new caretakers, playmates, school teachers, etc. As a result, they often suffer emotional damage and their development is delayed. Recognizing this harm, we should not only change the substantive standards permitting removal, but also develop programs such as sending in emergency caretakers to look after unattended children, that would eliminate the need to remove many children.⁴⁵

I also share the authors' concern over the capacity of the "law" — as personified by judges and child welfare agencies — to supervise the care a child receives over a period of time. Courts rarely review the consequences of their decisions and certainly do not check to see that a child is receiving the day-to-day care and nurture that intervention is designed to ensure. Courts are not capable of such supervision, even assuming judges wanted such a role.

45. When removal is necessary, it is essential that it be done in the least harmful way possible. Many children are placed in facilities which do not even protect their physical safety, let alone provide a good psychological environment. Children are separated not only from their parents, but their toys, security blankets, siblings, and other amenities of home. In fact, institutions frequently make no effort to find out if their boarders have medical problems, food allergies, or sleep problems. The state appears to assume that children can be moved from environment to environment without harm. Anyone pursuing the best interests of children should address these problems before attempting to expand intervention.

Perhaps realizing the inadequacy of court supervision, most states make supervision the province of agencies to whom the child is entrusted following intervention. However, there is a substantial body of literature documenting the inability of agencies to ensure the well-being of children under their supervision. Even under the best of circumstances, the agency worker will play only a minimal role in the life of the child. Although a few agencies do have the resources to provide full-time homemakers or other sources of help and supervision *to a limited number of families for a limited period of time*, such services are rare and, given their enormous cost, not likely to be expanded significantly. More likely, the worker will be a shadow figure, dropping in on the family occasionally, but providing little help to the parent or child.

Therefore, it is essential that intervention policies recognize the limits on the state's ability to protect children. As GFS state,

The legal system has neither the resources nor the sensitivity to respond to a growing child's ever-changing needs and demands. It does not have the capacity to deal on an individual basis with the consequences of its decision, or to act with the deliberate speed that is required by a child's sense of time. Similarly, the child lacks the capacity to respond to the rulings of an impersonal court or social service agencies as he responds to the demands of personal parental figures [p. 12].

Recognizing this, all intervention should be designed to provide the child with a living situation in which he or she is protected by a family, not the state, as quickly as possible. Decision-making and supervision should not drag on for months and years, as often happens now. In general, officials should determine within a year to eighteen months whether the parents are capable of providing care.⁴⁶ If not, the child should be made part of a new family, one free of state supervision. Otherwise intervention will continue to harm children by guaranteeing them a state of emotional limbo rather than the psychological security that comes from being an accepted and cared-for member of a family.

Similar concerns lead me to agree with the authors' general principle that all intervention should be done in the least intrusive way possible. Wherever possible, children should not be removed from their homes. Supervision should continue only as long as it is needed to insure that the child is protected from the harm justifying intervention. If we can just achieve this, we will do better than we do now.

46. I have proposed time frames which are designed to meet a child's needs. *See* Wald II, *supra* note 8, at 675-700. GFS adopt similar provisions. *See* pp. 39-51.

B. *Areas of Disagreement — Balancing Costs and Benefits of Intervention*

Throughout the book, GFS emphasize the costs of intervention. Nowhere do they discuss its benefits. They seem to assume that the best one can do is minimize harm to a child and that intervention generally will not make a child better off. This leads them to conclude that intervention should only occur to protect children from the most extreme forms of harm, since only then are the benefits likely to outweigh the costs.

However, one can agree that a state should weigh both the costs and benefits of intervention without arriving at the balance they suggest. In deciding whether to follow their suggestions, it is necessary to determine whether they have accurately assessed both the harms and the benefits. I think that they have not.

Several years ago, Peter and Joanna Strauss reviewed *Beyond the Best Interests* and voiced a number of concerns about its conclusions. They wrote “[GFS’s] commitment [to certain principles] carries with it possibly unavoidable overstatement. The book views child development from a questionably narrow stance. As a plan for concrete action, it is compromised by partisanship and apparent failure to relate its insights to the realities of an operating legal system. . . .”⁴⁷

In many ways these criticisms are even more applicable to *Before the Best Interests*. The authors propose a set of sweeping principles and carry them to their extreme. Yet the scientific and clinical data regarding several of the major psychological theories are sparse at best; in fact, there is a fair body of data, not addressed by the authors, that supports opposite conclusions. In addition, the authors’ method of argument in the book — application of their principles to a series of case studies where the legal system erred — is a highly questionable one. In many respects, the book is an advocate’s brief, not an effort to weigh competing considerations in a difficult area. The cases chosen demonstrate the worst aspects of the existing system, problems everyone would like to eliminate. Yet it is far from clear that the restrictive set of standards proposed in the book is necessary to prevent such abuses. Moreover, virtually any set of standards will lead to errors — the inappropriate inclusion of children or the exclusion of children who need help. The question thus becomes one of whether it is best to minimize error or maximize benefits.

As in *Beyond the Best Interests*, the authors mix developmental principles with value judgments. Many of the positions they take seem to be primarily concerned with promoting their view of how the legal system should work, rather than with helping children. For

47. Strauss & Strauss, Book Review, 74 COLUM. L. REV. 996, 996-97 (1974).

example, the goal of fair warning is often presented as an end in itself and a means of limiting judicial discretion, not as a means of protecting children. While the authors acknowledge that they consider value premises, it is important to distinguish their suggestions based on value premises from those based on developmental principles. Their positions regarding children's needs deserve special weight due to their expertise in child development. When they rest their conclusions on value premises, however, they have the burden of persuading each reader of the merits of those premises.

Moreover, many of the authors' proposals ignore institutional realities, so that in practice some of the proposals would undermine rather than promote their goals. Finally, despite the authors' concern with statutory vagueness, it is often difficult to know exactly when the authors' own standards would apply. The book describes in detail the cases which should be excluded, but it does not tell us much about how to handle cases in the gray areas.

My critique is organized to illustrate the problems with the authors' premises and approach. I will not discuss each substantive ground independently. Nor will I present here an alternative set of statutory standards; I have proposed such standards elsewhere and remain reasonably content with those proposals.⁴⁸ As I indicated previously, I believe that the principal problem facing persons interested in developing policy toward abuse and neglect should be how to think about the costs and benefits of a given policy, not on what to think.

1. *The Validity of the Psychological Premises*

The authors' theories about the psychological needs of children form the core of this book. From these theories, they develop their claims about the harm of intervention and the limited benefit of coercive treatment. The book's central developmental premise is that children need a continuous relationship with an adult who is their "psychological parent" and that the damage to the child in disrupting this relationship, either through removal or the imposition of state supervision of the family, is likely to be greater than any harm a child may suffer other than severe physical injury, criminal sexual acts by the parent, and death.

Thus, to take a few examples of harm from some cases with

48. See note 8 *supra*. I no longer subscribe to all views stated in those articles or the ABA Standards, however. For example, I recommended elimination of criminal proceedings in sexual abuse cases. I now think that such proceedings, used in conjunction with juvenile court proceedings, may be appropriate. I am presently uncertain about the recommendations regarding termination after a child has been in voluntary placement. I would probably follow GFS and allow termination only if requested by the long-term foster parents, not automatically as the ABA Standards propose.

which I am currently involved, GFS believe that it would be too risky to intervene in the following cases:

(a) Where a child has been physically disciplined by a parent using a paddle in a manner sufficient to leave bruise marks and to cause the child pain in walking, but where it cannot be shown that the parent was attempting to cause more severe injuries.

(b) Where a child is locked in a room every day (chained to a bed to make it more gruesome) and not allowed contact with any people, including the parents, but the child is fed and not severely beaten.

(c) Where a parent, due to mental illness, leaves young children unattended, with minimal food or clothing, in a home that has broken glass and exposed wires, but the children have not suffered repeated serious physical injuries.

(d) Where two preteen children are afraid to live at home because their mother believes that they are about to be kidnapped and, in order to prevent the kidnapping, she never allows them to leave the house.

(e) Where a young boy is frequently absent from school, and when he attends school he sits alone in the corner because the parent makes him wear dresses.

(f) Where a mother allows a young child to have sexual relations with the mother's boyfriend.

Admittedly, each of these cases is unique and unusual. Yet each represents a type of harm to children, physical and emotional, that occurs quite frequently and which, I believe, would not be covered by the proposed standards. Additional illustrations could easily be given of harms not covered by the proposed standards. GFS would not permit intervention in these cases, because they believe that the harm of intervention is likely to be greater than the harm being imposed by the parent. To evaluate this proposition, one must carefully analyze the harms they see from intervention.

In essence, their views rest on the assertion that state intervention disrupts the parent-child relationship and that such disruption always harms the child, since it threatens parental autonomy and deprives the child of continuity. The central issue therefore is whether the harm from such disruptions is greater than the harm from inadequate parental care, such as was described in the examples above. In addition, it must be determined whether intervention offers benefits that may outweigh the harms.

Although the whole question of the importance of a child's attachment to a single individual is open to some debate,⁴⁹ no expert in

49. GFS often seem to argue that the relationship must be with a single adult, or if to more than one adult, the adults must not be hostile to each other or competing for the child's loyalty. This is part of their reason for recommending that a custodial parent have the right to exclude

child development disputes the importance of some continuous attachment. However, despite the acknowledged importance of continuity, there is no evidence supporting the claim that children need continuity above all else.⁵⁰ GFS recognize this, to a degree. They are willing to risk discontinuity if the child is severely beaten, sexually abused or about to die due to lack of medical care. The critical question is whether these are the only harms that justify disrupting parental autonomy or depriving the child of a continuous relationship. GFS assume that they are. This assumption requires careful scrutiny.

In focusing solely on continuity, the authors seem to ignore many other things that developmental psychology teaches us about children's needs.⁵¹ For example, many studies demonstrate a child's need for nurturance, cognitive stimulation, limits, adequate nutrition, and basic medical care.⁵² While the exact level of such needs is

visits by the noncustodial parent following a divorce. See BEYOND, *supra* note 9, at 38. This view has been challenged by many critics of *Beyond the Best Interests of the Child*. See Strauss & Strauss, *supra* note 47, at 1001-05, and the reviews cited in Crouch, *supra* note 10.

50. They cite almost no data in support of their proposition regarding the importance of continuity or that the psychological harm from disrupting continuity outweighs any possible benefits. They do cite the extensive literature demonstrating the importance of attachment to children and indicating the short-term trauma and potential long-term detriments of separating children from adults to whom they are attached. There is little doubt that the development of children who are not given the opportunity to form close attachments to an adult or adults is substantially impaired. See M. RUTTER, *MATERNAL DEPRIVATION REASSESSED* (1972). However, the exclusive focus on continuity is questionable. Many children seem able to form multiple attachments or to handle discontinuity without any long-term harm. *Id.*

Moreover, the research does not deal with situations where the children are attached to parents who are harming them physically or emotionally. It may well be that there are harms greater than breaking attachments, if the child is provided new attachment figures or if the separation is time limited and parental ties maintained. It is also possible that the type of attachment between abused or neglected children and their parents is not of sufficient quality to be worth preserving. See Hyman & Parr, *A Controlled Video Observational Study of Abused Children*, 2 *CHILD ABUSE & NEGLECT* 217 (1978). Moreover, as discussed in the text at note 62 *infra*, children who are abused or neglected may not, in fact, be attached to their parents, in which case the attachment literature would not be relevant.

51. In fact, they recognize that children need more than just continuous physical care. See notes 59-62 *infra* and accompanying text. However, they ignore these other needs in arguing for continuity.

52. See H. BIRCH & J. GUSSOW, *DISADVANTAGED CHILDREN: HEALTH, NUTRITION AND SCHOOL FAILURE* (1970); *THE DRIFTERS* (E. Pavenstedt ed. 1973); Werner & Smith, *An Epidemiologic Perspective on Some Antecedents of Childhood Mental Health Problems and Learning Disabilities: A Report from the Kauai Longitudinal Study*, 18 *J. CHILD PSYCHIATRY* 2926 (1979); Bullard, Glaser, Heagarty & Pivchik, *Failure To Thrive in the "Neglected" Child*, 37 *AM. J. ORTHOPSYCHIATRY* 680 (1967). See also sources cited in note 62 *infra*. The literature linking specific failures in parental behavior with problems in children has many gaps, however. As one researcher who reviewed the literature relating parental behavior to child development concluded:

This review of the literature on prediction from childhood characteristics to adult outcomes has, hopefully, indicated the general state of the art. We believe it is somewhat rudimentary. Nevertheless, there is substantial scientific and popular belief that events occurring in childhood have a significant formative effect on the development of the child. Undoubtedly this is true. However, if we take out of consideration certain obvious kinds of disaster, and consider the range of variation of the normal home and the normal fam-

subject to debate, there is little doubt that if parental care falls below certain minimums in meeting these needs, a child's physical, social, emotional, and intellectual development is jeopardized. If we allow intervention to protect children from emotional abuse, less serious physical abuse and lack of medical care, are we likely to do more harm than good? In order to test the validity of GFS's assumption, it is necessary to distinguish intervention leading to removal of the child from intervention leading to supervision of the family. Although GFS equate these two types of intervention, it seems highly unlikely that supervision of the family carries the same risk as removal.

The strongest case for GFS's assertions is when the child is removed from the home. All of the evidence on the need for continuity comes from studies of children separated from their parents. Separation obviously involves the greatest discontinuity for the child. It also subjects children to the possibility of multiple placements or placement in environments no better than their own homes.

However, in the case of abused and neglected children, the evidence is not clear that children fare worse in foster care than at home. Several years ago in reviewing the literature on foster care, I concluded,

The evidence [on the harm of foster care] is not all one-sided, however. Several studies have found that children who grew up in foster homes have a similar incidence of criminality, mental illness, and marital success as the general population. Thus any harms from foster placement may not have long-term consequences, at least in these respects. Moreover, one recent study of over 500 neglected children found significant improvement in the children's well-being with respect to their physical health, behavior control, ability to cope in school, and peer relations following foster home placement. In addition, clinical reports provide evidence that some children want to remain in placement rather than return home.

The critical problem with such studies is that they do not tell us how these children would have fared had they been left in their own homes, especially if their parents were provided social services. On the other hand, we do not know whether some of the negative impact of foster care could be mitigated if children were better prepared for placement, if better foster homes were available, and if parents were given a more active role in helping the child adjust to placement.⁵³

Although I am aware of no further evidence on this issue,⁵⁴ sev-

ily, then it seems that we know quite little about what the specific effects of early events are on the later adjustment and success of the child.

I S. WHITE, FEDERAL PROGRAMS FOR YOUNG CHILDREN: REVIEW AND RECOMMENDATIONS 256 (1973). It is hard to separate the effect of parental behavior from that of environmental conditions. See, e.g., M. RUTTER & N. MADGE, CYCLES OF DISADVANTAGE (1976). Thus, one should be cautious before intervening on the basis of parental behavior.

53. Wald II, *supra* note 8, at 646-47.

54. One major study, referred to in the earlier article, has been completed. David Fanshel

eral recent research projects have demonstrated that abuse and neglect not as severe as that required by GFS can severely handicap the physical health and social development of children.⁵⁵

Therefore, it is difficult to determine the costs and benefits of intervention in cases of "lesser" physical abuse or "emotional neglect," *even if the intervention leads to removal*. While the substantial evidence on the negative effects of foster care and the intuitive attractiveness of GFS's psychological theories regarding the child's need for continuity should make one cautious in supporting any policies allowing removal, I do not find that they have made a convincing *psychological* case that removal should be limited as strictly as their proposed standards would require.

Whatever the strength of GFS's psychological premises regarding continuity, I seriously question the validity of their propositions regarding the effects of intervention that does not entail removal. It is a great leap from the theory that a continuous psychological relationship is important to a child to the propositions that such a relationship can be maintained only if the parents are totally autonomous and that the costs from imposing state supervision on parents in order to keep them from acting inadequately are likely to be greater than the benefits of such intrusions.

To bridge this gap, the authors assert, "Children, on their part, react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control" (p. 25). They state further that "[w]hen family integrity is broken or weakened by state intrusion, [the child's] needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental" (p. 9).

I am not aware of any data supporting these assertions.⁵⁶ More-

followed, for a period of five years, 600 children placed in foster care in New York. His findings, reported in D. FANSHIEL & E. SHINN, *CHILDREN IN FOSTER CARE* (1977), are complex. However, it appears that many of the children in foster care showed gains in physical health, school performance, and social development. Many of those who remained in foster care looked "better" at the end of five years than did the children returned home.

I am presently involved in a two-year follow-up of 80 abused and neglected children, 40 of whom were left in their own homes as a result of special services, the other 40 were placed in foster care because the services were unavailable. I hope that this study will provide some data on the different outcomes, in terms of the child's physical, social, and emotional development, related to home versus foster care. Many of these children would not come within GFS's proposed standards.

55. See note 93 *infra*.

56. The authors cite no evidence supporting the first assertion. In a footnote, p. 199 n.10, they try to defend the second statement. They first attempt to distinguish the research cited by authors in opposition to their claims, especially the work of Michael Rutter. See M. RUTTER, *supra* note 50. GFS state that many

behavioral psychologists emphasize the resilience of cognitive functions, claiming that intellectual performance is relatively resistant to differing social environmental stimuli and deprivation in early childhood. Building their theory of child development not on emo-

over, they seem intuitively incorrect. Although children rely heavily upon their parents and need to trust them, only very young children are likely to see their parents as omnipotent. Older children, who spend hours in school with teachers and peers, and still more hours in front of the television, certainly live in a world where parental values and views are challenged. Children learn that parental authority is limited by the school, by employers and by the state. There is no reason to believe that the impact of this knowledge is "invariably detrimental."

Yet on the basis of this claim the authors equate coercive intervention subjecting the family to state supervision with coercive intervention in which the child is removed. In fact, they believe that just an investigation creates the same risk. As a result, they draw extremely narrow standards for intervention to respect the need for autonomy. Although the authors support home supervision or foster care aimed toward quick reunion in some cases, they advocate that in most instances intervention occur only where it will lead to termination of parental rights.

tional but mainly on cognitive or group social assessments, they question the detrimental impact on a young child of being separated from or not having a primary psychological parent. However, their reliance on the resilience of cognitive function as evidence of the child's well-being is simplistic [p. 200].

GFS claim that these works ignore the enormous emotional problems caused by "environmental deprivations, disruptions, and losses."

They go on to state,

Scientific findings reinforce our conviction that young children, as well as adults, deserve a decent quality of life; and that it is essential to provide them with a continuity of both affectionate [emotional] care and cognitive stimulation. Only such care can prepare them to move ahead soundly to the next phase of their development [p. 201].

They cite numerous studies as supporting this statement (p. 201).

The footnote arguments are faulty in several respects. First, Rutter and others do not base their conclusions solely on research on cognition and group social assessments. They examine many development characteristics of children, including delinquency, adult behavior, and mental health problems. See M. RUTTER, *supra* note 50, at 79-82, 84-86. Moreover, the works GFS criticize do not dispute the importance of continuity of affectionate care and cognitive stimulation. Rutter and others assert only that not every disruption of continuity entails dire consequences, at least if old attachments can be preserved or new attachments formed. These researchers are committed to continuity, but not to continuity at all costs.

In addition, I do not read the scientific findings cited by GFS as reinforcing their convictions nor supporting their assertions in the text. While I am not familiar with every one of the cited works, most of the studies cited demonstrate the harms of institutional care — especially where there are multiple caretakers, the short-term trauma children suffer from separation (trauma which may last as long as six months and be reflected in hostile behavior by the child toward the parent), the need of children for *some* attachment figures during childhood and the possibility that repeated separations will impair a child's ability to form new attachments. They do not contain evidence that any form of state intervention is likely to thwart a child's belief in his parents' omniscience, that it is important for a child to have such feelings in the first place, or that any such harm is greater than physical or emotional abuse.

Finally, one must keep in mind that many interventions occur in homes which do not provide a "decent quality of life," where the parents do not provide continuous emotional care or cognitive stimulation. There is no evidence demonstrating the harms from state intervention in these circumstances as long as the child is not removed and the intervention is by competent, concerned people. On the other hand, the evidence of benefit is not very strong either. See notes 57 & 62 *infra*.

Their calculus is hard to accept. First, there is no reason to believe that, even if children needed to see their parents as autonomous, supervision of the family would interfere with this belief. Second, even if supervision did interfere with a child's views of his or her parents, it is hard to believe that this harm is likely to be greater than the harm from physical injury, severe emotional abuse, or the failure of a parent to provide medical care to prevent a child from going blind. Moreover, a substantial body of literature indicates that intervention can benefit many children, both by preventing reabuse and helping parents develop positive means of childrearing.⁵⁷ These benefits come to children who would not fall within the authors' proposed standards. It seems unlikely that these benefits are negated because the children see parents as less autonomous.

The authors give no recognition to this evidence or to the literature supporting intervention.⁵⁸ Instead they argue that intervention should be rejected on the basis of claims that children need parents who are completely autonomous. In light of the harms to the child and the evidence that intervention can help the child and parent, more is needed than the mere assertion of this claim if we are to accept their policy recommendations.

My concern with GFS's application of their psychological premises is substantially increased by the apparent inconsistency between some of the premises of this book and statements in *Beyond the Best Interests*. In *Before the Best Interests* GFS seem to equate physical

57. See, e.g., R. KEMPE & C.H. KEMPE, *supra* note 6, at 88-127; Harris, *Evaluating New Modes of Treatment for Child Abusers and Neglecters: The Experience of Federally Funded Demonstration Projects in the USA*, 1 CHILD ABUSE & NEGLECT 453 (1977); Bourne & Newberger, *supra* note 15, at 678-83. The research on intervention contains several flaws. The literature consists primarily of clinical studies conducted by people offering the services. Most studies do not describe the condition of the child at the time of intervention nor do they contain objective measures of success. Moreover, most studies either lump abuse and neglect together or fail to describe the level of abuse the child has suffered. Therefore, it is extremely difficult to determine whether intervention is useful in cases other than the severe cases where GFS would allow intervention.

Thus I do not think enormous weight can be placed on these or other studies. However, the sheer number of reports of success by respected researchers and clinicians is sufficient reason not to discount these reports. In the absence of data on the harms from intervention, it seems sensible to try to protect a larger group of children than GFS would protect.

58. Part of their reason for rejecting intervention is the assumption that successful treatment must be done on a voluntary basis. They question the utility of any services to unwilling parents. One of the criticisms voiced by many reviewers of *Beyond the Best Interests of the Child* was that GFS often fail to cite any data for their principles regarding child development. Their proposals are derived largely from psychoanalytic theory. While there is nothing wrong with relying on psychoanalytic theory, the authors have not responded to the evidence that is contrary to their theories. Vast literature on abuse and neglect is now available. Many people working with abusive families contend that "coercive" treatment can be successful. They believe that some parents will start out hostile, but eventually come to value the services. They also believe that children can benefit from services which their parents do not want. See, e.g., Bourne & Newberger, *supra* note 15, at 680. GFS give no recognition to these claims. It is unlikely that GFS will persuade "interventionists" without recognizing and dealing with the data and literature on which interventionists rely.

custodianship with psychological parenthood. However, in *Beyond the Best Interests* the authors defined the psychological parent-child relationship as encompassing much more than continuous and autonomous physical custody by the parent. First, they told us that continuous physical care alone does not create a "psychological parent" relationship. This relationship develops only if the parent provides "day-to-day attention to [the child's] needs for physical care, nourishment, *comfort, affection, and stimulation.*"⁵⁹ The relationship is one where the child feels "valued" and "wanted." An adult becomes a psychological parent by "reliably and regularly" answering the child's "emotional demands for affection, companionship, and stimulating intimacy."⁶⁰

Moreover, in *Beyond the Best Interests* the authors articulated specific reasons for wanting to preserve a child's ties with his or her psychological parent. It is not the relationship *per se* which is valuable. Rather, the authors wanted the law to foster or preserve this relationship because through it the child develops self-esteem, acquires the basis for forming attachments, learns impulse control and acquires social skills.⁶¹

Thus GFS recognized, indeed strongly argued, that a child has many needs other than being free from sexual abuse or serious physical harm. They also recognized that many parents do not meet these other needs. Yet, in developing their standards in *Before the Best Interests*, they seem to ignore these needs of a child.

This equation of physical care with psychological parenthood seems contrary to a great deal of evidence about the type of parents currently labeled abusive or neglectful. Numerous studies report that many such parents do not provide their children with a "psychological parent" figure. These studies show that many parents are not nurturing, dependable, stimulating, or affectionate. They are present physically, but not emotionally. Their children are frequently exposed to multiple caretakers, periods of voluntary placement, and inconsistent or haphazard care. They may actively reject their children or, more frequently, they are withdrawn into their own world due to mental illness, alcohol or drug addiction.⁶² Although good research is distressingly absent, there is evidence that the intellectual

59. *BEYOND*, *supra* note 9, at 17 (emphasis added).

60. *Id.* at 18.

61. *Id.* at 13-14.

62. See, e.g., N. POLANKSY, R. BORGMAN & C. DE SAIX, *ROOTS OF FUTILITY* (1972); THE DRIFTERS, *supra* note 52; Sowder & Burt, *Children of Addicts: A Population in Need of Coordinated Comprehensive Mental Health Services* (paper presented at American Association of Psychiatric Services for Children, November 1978); Lagerberg, Nilsson & Sundelin, *Life Style Patterns in Families with Neglected Children*, 3 *CHILD ABUSE & NEGLECT* 483 (1979); Burgess & Conger, *Family Interaction in Abusive, Neglectful and Normal Families*, 49 *CHILD DEV.* 1163 (1978); Egeland, *Preliminary Results of a Prospective Study of the Antecedents of Child Abuse*, 3 *CHILD ABUSE & NEGLECT* 269 (1979).

and social development of such children is substantially impaired.⁶³ In fact, this is exactly what one would expect, based on GFS's claims in *Beyond the Best Interests*.

What is the harm of intervention in these cases? Is it that we cannot know whether a psychological relationship exists and the risk in finding out is so great that we ought to conclusively presume that a psychological parent relationship exists unless the child has suffered severe physical injury or sexual abuse?

Such a policy seems too drastic in light of the limited evidence GFS provide to support their psychological assertion. As I have indicated, there is reason to doubt the quality of the psychological relationship in many cases. In addition, GFS are willing to run the risk of psychological evaluations to determine whether a "psychological parent" relationship exists in contests between longtime caretakers and natural parents for custody of the child.⁶⁴ The case for intervention is just as strong when children are threatened with physical damage or severe emotional harm.

The elevation of autonomy over intervention seems particularly questionable with regard to physical abuse. Granted, drawing a line for appropriate intervention is certainly difficult. So long as our society permits corporal punishment by parents (can a society committed to family autonomy do anything but permit it?), the line between severe discipline and abuse will always be hard to discern. It is all too easy to intervene to protect a child from bruises, which are manifest, while ignoring the emotional trauma to the child from intervention, especially intervention leading to removal.

Yet, if the state has to wait until a child has been brutally kicked, beaten or attacked, we will leave many children at substantial risk. Good evidence suggests that physical abuse is a recurring phenomenon and that children who receive minor injuries one time may be killed the next.⁶⁵ Thus, a *somewhat* broader definition of physical danger to the child seems appropriate. In addition, despite the enormous difficulty in defining emotional abuse, I believe that a limited basis for intervention in such cases can be devised. For example, there is every reason to believe that a parent who locks a child in a closet every day after school is not providing the child with a "psy-

63. See the sources cited in note 62, *supra*. See also Rutter, *Maternal Deprivation, 1972-1978: New Findings, New Concepts, New Approaches*, 50 CHILD DEV. 283 (1979).

64. BEYOND, *supra* note 9, at 46-48.

65. The literature on abused children is filled with references to the fact that many such children upon examination show signs of numerous previous injuries. Two studies presenting reinjury rates are Taw, *The Issue of Reinjury: An Agency Experience*, 3 CHILD ABUSE & NEGLECT 591 (1979); Herrenkohl & Herrenkohl, *Foster Care of Abused Children: What Happens After Placement* (paper presented at 5th National Conference on Child Abuse and Neglect, October 1979) (study of 248 abused children returned home from foster care; 108 were reabused).

chological parent” relationship. Neither is the parent who refuses to provide treatment to a child manifesting severe emotional disorder.⁶⁶

In most such cases, intervention would not require removing the child. Rather services could be provided to help parents meet the child’s emotional needs and to provide the parents with ways of handling the child that do not involve physical harm. Such help can take many forms: financial support, provision of support services such as day care or homemakers, or therapy for the parent. Since, in my experience, the families who would come under these standards are doing a minimal job, at best, of meeting the child’s psychological needs, it seems unlikely that state intervention will harm children by making their parents appear less autonomous. In fact, intervention may help the many parents who are far from autonomous become more autonomous. By providing parents with useful services, economic support, and viable ways of dealing with their children, services can improve the parents’ self-confidence and esteem. The child’s view of the parents is likely to improve as well.

Again, I want to stress that my support of broader grounds is not a justification of existing standards or of any standards that grant substantial discretion to state agencies. At present, most abuse reports involve situations where the child *has received* no injury or where medical treatment is unnecessary.⁶⁷ In many neglect cases there is no danger to the child.⁶⁸ Yet between these thousands of cases and the small number of cases that come under GFS’s standards, there are many cases where intervention might be justified. The goal should be to draft standards encompassing these cases without going too far.

2. Reasoning from Extreme Cases

To support their conclusions in *Before the Best Interests* GFS do not rely exclusively on the psychological principles just discussed. They support limited intervention because they believe that broad

66. The authors reject the ABA Standards which would allow intervention if the child manifested a serious emotional problem *if the parents refused to provide treatment*, because they believe that “psychological therapy for a young child is not likely to be useful and sustained without the parents’ willing, not forced, cooperation” (p. 77). It is not clear that this is so, even for young children. Parents may come to see the benefit of such treatment and become cooperative. Moreover, abuse and neglect does not only occur with young children. Nearly half of all validated reports involve children over eight. See AMERICAN HUMANE ASSOCIATION, *supra* note 39, at 23. GFS often seem to be drafting standards based on the needs of very young children. For example, they justify intervention in physical abuse cases because young children cannot protect themselves (p. 72). Although GFS claim that the harm of sexual abuse is premature arousal of genital response (p. 63), many children involved in sexual abuse are already sexually active. Moreover, even though the authors are certainly conscious of developmental changes in children, their proposals do not always recognize the different needs of older and younger children.

67. See AMERICAN HUMANE ASSOCIATION, *supra* note 39, at 34-35.

68. See Wald I, *supra* note 8.

standards will allow intervention in inappropriate cases where there is little or no evidence of harm to the child. In addition, they point out that we often intervene in a fashion that ignores the needs of the child and fails to provide the child with a better environment. Because of these problems, they may believe that any broader standards than the ones they propose would allow over-intervention.

However, in criticizing existing intervention, GFS again overstate their case. They tend to focus on the extreme cases and, as a result, devise standards and policies which may not be appropriate for the majority of cases. In their quest to carry through their principles, they seem to ignore or reject policies that might satisfy most of their goals without incurring quite so many costs.

The authors' tendency to overstate their case is especially evident in their treatment of existing intervention procedures. Throughout the book they illustrate how their principles would apply by referring to actual cases that would have come out differently if their standards had been in effect. Indeed, they devote the bulk of several chapters to describing these cases. They believe that their standards are the only way to protect against the state actions demonstrated in these case studies.

Most of the cases represent egregious failures of the present system. If they were typical cases, no one could dispute that the lines drawn by GFS are needed to prevent inappropriate interventions. For example, the authors support their claim against intervention based on "neglect," "emotional harm," or "inadequate homes" by referring to three cases in which their standards would have barred intervention (p. 77-85). In the first case a young boy was removed from his white mother because she was living with a black man in a black neighborhood. In the second case the state intervened because the mother fed her baby "by leaning over the crib side and breastfeeding with the baby in the supine position" and avoided diaper changes by cutting a hole in the mattress with a pail below and not using diapers. In addition, the neighbors were upset with the mother because she had been throwing all the knives from her apartment into the trash. The neighbors feared she would harm the baby with a knife. In the third case six children were removed from their home by a social worker who did not see five of the children, who visited the parents' home for only twenty minutes, and who based her removal on neighbors' complaints that the children were nuisances and improperly cared for.

In all of these cases, the system also functioned badly after removal. In the first case, the young boy was taken from his home at night by two policemen prior to any court proceedings, despite the fact that there was no evidence that he was being harmed and despite his pleas not to be taken away. In the second, the infant was

removed from the mother, placed in a hospital, not with a family, and the mother was not told where the child was. In the third, the five children were, in the four years following intervention, placed in fifteen separate foster homes and eight juvenile institutions.

Unfortunately, such actions by agencies occur too frequently. Yet there is little reason to believe that such cases constitute even a significant proportion of interventions in most states.⁶⁹ Moreover, states need not adopt GFS's extremely narrow standards to prevent such abuses. Cases like these occur because of the vagueness of existing statutes, the failure to provide for judicial hearings before children are removed, the lack of counsel for parents, the lack of training of social workers, as well as the inevitable miscarriages of justice in any system that gives agencies and courts a degree of discretion.⁷⁰

However, any standards that required a specific showing of harm to the child, limited pretrial removals to cases of imminent physical danger, and required that in-home services be used in lieu of removal wherever possible would have prevented such gross abuses. While cases of inappropriate intervention may still occur under any standards broader than those proposed by GFS, it is certainly possible to draft standards preventing egregious mistakes. Again, the proper goal is to find standards that will minimize over-intervention without leaving too many children at risk. In devising such standards, policymakers must take into account the problems of limited competency, limited resources, and the "rescue fantasies" of many people. But should they assume that most systems will normally operate in the worst way possible?

The authors' recommendations for physical abuse cases demonstrate a quite different consequence of pushing policies to their extreme. GFS assert that whenever a parent is found to have physically abused a child, parental rights must be terminated. They state that to do otherwise would constitute "state abuse" of the child. To justify this policy, they refer extensively to the Maria Colwell

69. There are no published studies categorizing or describing the different types of cases handled under abuse and neglect statutes. Appeals are rare and may reflect the most unusual, unjustifiable actions by courts. Obviously, data on the type of cases currently being prosecuted would be very helpful. It should also be noted that, in several of the cases they discuss, the actions of the agency were not totally unreasonable. For example, the mother in case two had initially expressed a desire to have the child adopted. Her unusual behavior might well have justified an offer of services although not coercive intervention. Moreover, the reasons for not interfering in this case cannot rest on psychological ties between the mother and child. Almost all evidence indicates that a child's need for a continuous caretaker starts when the child is four to six months old. The reasons for nonintervention derive from notions of parental autonomy, not child development.

70. Although any revision of the substantive law must be accompanied by procedural change if the substantive goals are to be effectuated, GFS do not discuss most of the procedural questions relating to handling of abuse and neglect cases. For a set of proposed procedures, see ABA STANDARDS, *supra* note 8.

case (pp. 141-86), where a young English girl was killed because the government failed to remove her from her mother, despite substantial evidence that the child was being treated brutally. The authors further support this recommendation with the psychological claim that "[physical] maltreatment leaves psychological scars which endure long beyond any physical healing and preclude a child from regaining the feeling of being safe, wanted, and cared for in his parents' presence. . ." (p. 73).

The Colwell case is another egregious, but unfortunately not isolated, example of the failure of social agencies and courts to protect a child, in this case by not intervening, rather than by over-intervening. Cases like this make a policy of automatic termination attractive, especially if intervention is limited to the extreme cases envisioned by GFS. In addition, there are other good reasons to re-analyze our current policy of always attempting to help the battering parent. Despite substantial expenditure of funds to develop model treatment programs for child abusers, recidivism rates remain disturbingly high.⁷¹ Moreover, children are frequently left in foster care for extended periods of time while rehabilitation efforts are undertaken. It is usually impossible to test the success of such efforts without returning the child and exposing him or her to further abuse. In many cases the psychological scars will never heal, especially if the child remains with the parents. Thus, a policy that leans in the direction of immediate termination, particularly in cases of severe abuse of very young children, has some merit.

Yet even if one adopted GFS's standard for intervention, termination would often be inappropriate. For example, one of the cases in a research study I am conducting involves a nine-year-old boy who came under court jurisdiction because he was abused. His mother had hit him on the buttocks with a paddle, leaving bruises and causing him to limp at school the next day. Whether this beating would constitute serious bodily injury for these authors is unclear. Perhaps they could label it an attempt to inflict such injuries. In any case, one can easily envision a similar situation where even more serious injuries occurred. In this case, the mother frequently disciplined the child that way because he soiled his pants during the daytime.

Although the boy feared these beatings, he was attached to his mother and did not want to be removed. Perhaps GFS would say that such attachments are harmful to the child and not worth preserving. Yet in this case, parental rights were not terminated. Instead, services were offered to the family, the mother stopped using

71. See note 65 *supra*; Harris, *supra* note 57 (reporting success and failures of various projects).

physical discipline, the child received medical treatment and stopped soiling, and the family is now functioning relatively well.

If intervention had not occurred, the boy might have suffered more serious injuries in a future beating. He would not have received medical care for his soiling problem, since the mother did not know how to get such care and probably would not have sought it without some coercion. On the other hand, had termination been automatic, the child's situation might well have worsened. It is not easy to find adoptive placements for older children, and many abused children display emotional problems that make placement even more difficult. In this case, the boy had emotional ties to his mother, to his siblings, and to some special neighbors. From his perspective, I doubt that termination would have been the least intrusive intervention.

Perhaps GFS are basing their proposal on the assumption that most severe abuse happens to very young children, who do not have a strong attachment to the parent and who can be provided a new family. But children of all ages are physically abused, often seriously. Such abuse may be a one-time event or a repeated means of discipline or behavior control. Yet these children may still be deeply attached to their parents. They often are hard to place. The authors cite no evidence for the proposition that children can never establish an adequate psychological relationship with a parent who has severely beaten them; a policy of automatic termination would hardly protect their need for continuity. On the other hand, not intervening at all endangers the child. Thus, intervention followed by supervision and treatment of the family is often the best alternative. While a case-by-case system may make errors, I doubt that it would be worse than an automatic policy of termination.

Regardless of how one comes out on the specific issues, Goldstein, Freud and Solnit's method of analysis should concern those weighing their proposals. Individual case studies can help focus issues and clarify implications of abstract doctrines. Moreover, as GFS and I have shown, they can demonstrate that specific problems do occur.

But policies with significant implications for all of society,⁷² as well as individual children, should not be based on a collection of single case studies. Single case studies are just that; they do not give any idea of how the system in general operates. Just as hard cases make bad law (sometimes), egregious examples lead to bad policy

72. Intervention in abuse and neglect cases raises fundamental questions about the appropriate role of state and parent in childrearing. Termination of parental rights constitutes the most extreme sanction the state imposes upon a parent. There is always a chance of error on whether the injury was inflicted. It is questionable whether we want to risk such consequences in every case.

(sometimes). They can lead one to believe that the problems identified are common rather than isolated. Consequently, they can result in policies that prevent the worst case, but make things worse in most situations.

Moreover, reliance on extreme cases invites complementary horror stories from the other side. This is a favorite mode of reasoning by supporters of extensive intervention, who constantly use examples like the child in the closet to justify broad standards.⁷³

To develop sound policies we must rely on a broader data base. Although sound data are scarce and hard to obtain, enough exist to warrant further discussion than GFS have presented.

3. *Emphasis on Value Premises About the Legal System Rather Than Child Protection Concerns*

Because GFS represent a unique combination of experts from different disciplines, their work is of special interest to people concerned about legal policy toward children. Such integration of disciplines is far too rare today. As a result, legal policy often reflects the values of the legal system rather than the needs of children. For example, cases involving child custody often drag for years through the courts. GFS show how protracted litigation creates uncertainty, conflict, and discontinuity for children. Recognizing the child's needs, they call for quick decisions.⁷⁴

But the authors do not always base their legal recommendations on principles of child development. They often express value judgments about the proper allocation of authority in society. They are concerned with promoting "individual freedom and human rights" as well as protecting a child's developmental needs.

For the most part, the authors' value judgments and psychological insights coalesce, and they propose policies that accord with both their political and professional judgments. For example, their reluctance to grant courts and agencies broad discretion to intervene stems from their belief that such discretion not only undercuts individual freedom, but also is frequently used in a way harmful to children.

73. Professor David Chambers has suggested another problem caused by focusing on extreme cases. In so doing, the authors avoid dealing with harder cases and issues, such as cases where there is substantial debate over the utility of intervention. For example, they do not discuss whether intervention is justified where one child has been severely beaten in order to protect the other children in the family, where a mentally ill parent is involving the child in a delusional system, or where a 13-14 year-old parent seems incapable of providing nurture, stimulation or guidance to her child. By not discussing the harder cases, they deprive the reader of the opportunity to think through the costs and benefits of alternative policies in such cases. Advocates of intervention will concede that intervention was inappropriate in the more egregious examples used by GFS. However, unless the hard cases are specifically addressed, it is unlikely that an "interventionist" will be persuaded by GFS's analysis.

74. See BEYOND, *supra* note 9, at 40-49.

Often, however, the authors' recommendations seem to be based primarily on their views of how the legal and political systems should operate rather than on the implications of the recommendation for the welfare of children. They seem especially concerned with granting any discretion to judges or other officials. This concern is only partially based on the fear that such discretion will be used unwisely. To a much greater extent it seems to rest on hostility to discretion *per se*, even if discretion would generally help children.

The most troubling application of their value judgments is their proposals regarding intervention to provide medical care. Their recommendation that intervention be limited to life and death situations precludes intervention to protect children from other substantial harms. They would not intervene, for example, to order an operation to prevent a child from going blind or to prevent the loss of a limb, no matter how safe or simple the operation and regardless of the parents' reasons for opposing medical care.

The authors contend that no societal *consensus* supports intervention in situations other than life and death matters. Therefore, intervention in other situations is merely a "preference for one style of life over another" (p. 92). They are extremely concerned that judges will substitute their personal value judgments for those of parents, since the law "cannot find in medicine (or, for that matter, in any science) the ethical, political, or social values for evaluating health care choices" (p. 93). They assert that "a prime function of law is to prevent one person's truth . . . from becoming another person's tyranny" (p. 93) (emphasis added).

By adopting this position, the authors have abandoned their commitment to children's needs in order to protect values they deem more important. Although they claim that there is no societal consensus about health care issues other than those pertaining to life and death, I would be surprised if there were not consensus that a child's eyesight or ability to walk is of great developmental importance and that court intervention is justified to protect the child's development, if the operation is of low risk. There is certainly as much consensus on these issues as on the need to protect children from physical abuse or intra-family sexual relations. Indeed, it seems extraordinarily inconsistent for these authors, in the name of child development, to be concerned with harms as speculative as the impairment of a child's belief in a parent's "omniscience" and yet to ignore the substantial harms that can result from inadequate medical care. Such a position can be maintained only if one is concerned with values other than a child's best interest.⁷⁵

Perhaps they would contend that even if consensus exists about

75. This does not mean that other values should never be given precedence over a child's best interest. The Strausses make several persuasive arguments on why the law should some-

specific examples, it is impossible to draft a statute clearly defining such instances. Since a broad statute could lead to intervention in cases where children would not benefit, legislators should draft statutes that cannot open the floodgates for intervention.

If this is their argument, I find it unpersuasive on two counts. First, I find the authors' desire for certainty inconsistent with their willingness to allow courts or doctors to decide whether the child's "life is worth living" or "the child will live a relatively normal life" in cases where the child's life is endangered. Such a standard is inherently vague.

More importantly, while I too am concerned that laws be drafted so that they limit intervention to situations where children will generally benefit, the problem of over-intervention is relatively minimal in the medical care area. Drafting a narrow standard for medical intervention should not be too difficult; a statute could even require the judge to find a societal consensus on the value of intervention.⁷⁶ In addition, doctors have historically intervened to order medical care only sparingly. Most cases that reach the point of controversy are cases involving serious disabilities.⁷⁷ Moreover, the case law in most states requires judges to act cautiously, even where the statutes are quite broad.⁷⁸ My experience in the system leads me to believe that in medical care cases judges are more likely to lean toward non-intervention than over-intervention. Thus, it is likely that children would generally benefit from intervention. Finally, since intervention for medical treatment does not entail removal, the harm from overuse of authority is mitigated.⁷⁹

Of course, abuses will occur. GFS discuss one case where they felt a court intervened improperly (pp. 101-05). In the case of *In re Sampson*, a judge ordered an operation to remove a large facial

times give primary weight to such other interests. See Strauss & Strauss, *supra* note 47, at 100-01.

76. For alternative statutes, see ABA STANDARDS, *supra* note 8, at 60-62. See also Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974). Like GFS, I would oppose the broad mandates for intervention suggested by many commentators, such as the proposed Federal Standards, which speak only in terms of failure to provide "adequate medical care." FEDERAL STANDARDS, *supra* note 28, at III-5.

I also agree that intervention is inappropriate where the dispute is over what constitutes proper medical care, such as the laetrile-chemotherapy controversies, where the proposed medical procedure involves substantial risk, or where there is little hope of success from a prolonged treatment.

77. Of course, there are exceptions, which may increase as doctors become more concerned over malpractice suits for failure to report child abuse or as advances in medical science facilitate medical intervention in more instances.

78. In general, the case law permits intervention only where death or extremely serious permanent impairment is likely. See Wald I, *supra* note 8, at 1028-33.

79. It should also be considered that in many cases the parents' refusal to provide medical care is grounded on religious beliefs and the parents are willing to go along with the treatment if ordered to do so by the court.

growth from a 15-year-old boy, despite the fact that there was no evidence that the boy was impaired physically or emotionally. However, even if one agrees that the child in *Sampson* would have been better off without intervention, one need not conclude that nonintervention is the best overall policy. More importantly, it is not clear to me that GFS really are interested in whether an operation would have been beneficial to Kevin Sampson from a physical or developmental perspective. Their argument is not cast in developmental terms. They do not discuss the harms to Kevin's development from the operation or from the fact that his parents' views were disregarded.

Their concerns here, and elsewhere in the book, center on questions of institutional competencies. Their arguments relate to value preferences regarding the allocation of power among parent, state, and child. They are not opposed to judicial discretion solely because it may lead to inappropriate intervention. Nor do they really oppose discretion because it will lead to intervention in instances where there is no societal consensus on the value of intervention. GFS are willing to adopt other policies despite societal views. For example, they show no reluctance to permit intervention to enable a long-term caretaker to retain custody of a child, even if the natural parent is adequate and wants custody. There is certainly no consensus that it is harmful to break a child's ties with a long-term caretaker in order to return the child to a natural parent. In fact, most people might prefer a policy of protecting "parental" rights.⁸⁰

Yet in the areas of medical care and emotional neglect, they require consensus. Their reasons have more to do with providing parents with "fair warning" and with preventing judges from exercising value judgments than they do with protecting children.

One may agree or disagree with the value premises expressed.⁸¹ However, unlike their claims that are based on a child's needs, which are derived from their extensive experience and special training, no

80. GFS recognize that courts often refuse to accept this harm. That is why they propose a new standard to deal with this situation. See text preceding note 21 *supra*.

81. I generally agree with GFS's desire to limit discretion, both because it leads to unfairness and because giving judges discretion often harms children. See Wald I, *supra* note 8, at 1000-02. However, as discussed later I believe some discretion is desirable. Moreover, I would not elevate parental autonomy to the place given it by GFS. It is one thing to allow autonomy as a means of protecting children. It is quite another to protect a parent's autonomy to allow a child to die. Thus, I have many reservations with GFS's conclusions on "defective newborns." I believe that a strong case can be made that state policy should lean heavily in the direction of preserving life. See, e.g., Note, *Birth-Defective Infants: A Standard for Nontreatment Decisions*, 30 STAN. L. REV. 599 (1978). In any case, I would not accept this application of their standard in cases involving older children. They would allow parents to make life and death decisions contrary to their child's wishes. Although I have reservations about how much autonomy to give children, I believe that the total parental control envisioned by GFS is not necessary for the child's development and ignores important policy concerns. See Wald, *supra* note 1, at 270-81.

special weight should be given to the authors' value premises. Instead these premises should be identified as such and subject to the same type of analysis and scrutiny given the values of any commentator.

4. *Ignoring Negative Effects*

As the discussion in the previous sections emphasizes, many of the proposals in this book are based on the limited capacities of existing institutions to act consistently in a child's best interests. The authors recognize that even the soundest policies can be implemented in a fashion that negates the goals of the policy. If one assumes that the system will often function at its worst, it may be sensible to adopt policies that provide the clearest guidelines and allow for the least discretion, thereby minimizing harmful interventions.

Yet in several significant areas the authors seem to ignore the likelihood that implementing their proposals may actually cause the system to operate in a manner contrary to their goals. In addition, they overestimate the capacity of the existing system to carry out their proposals. Their suggestions for dealing with sexual abuse, for example, are especially likely to cause more harm than good. GFS believe that sexual relations between parents and children are inherently harmful to the child. They also seem to believe that some state action to protect children is justified. Indeed, they support criminal prosecutions. The question is how to provide protection, an issue that has inspired substantial debate. All commentators, including GFS, recognize that the process of intervention can itself harm the child, often more than nonintervention. Intervention subjects the child to numerous interviews, court testimony, pressure from parents, public exposure of the relations, and the risk of unwarranted removal from home. The insensitivity of many police and social work agencies in dealing with abuse cases heightens the concern over the impact of intervention.

Some commentators, believing that these problems are minimized if the case is handled in the juvenile court system, argue that criminal penalties should be completely eliminated.⁸² Others suggest that criminal sanctions are needed to ensure the success of the juvenile court process.⁸³ They believe that family treatment is helpful, but that the offending parent often will participate only under the threat of criminal prosecution.

GFS stand alone in recommending exclusive reliance on the criminal system. They reject juvenile court intervention until there

82. See ABA STANDARDS, *supra* note 8, at 59-60.

83. See, e.g., Giarretto, *Humanistic Treatment of Father-Daughter Incest*, 1 CHILD ABUSE & NEGLECT 411, 423 (1977).

is a criminal conviction. I have some difficulty following their reasoning with respect to this proposal. Although they are clearly concerned with the harm from intervention, they believe that, "since no consensus exists about the proper treatment or about what disposition would be less harmful, there is no justification from the child's point of view for dragging the matter into the open by invoking the child placement process" (p. 64).

In light of the harm from intervention, one would expect the authors to oppose all intervention, since we cannot be certain of the benefit to the child. But rather than arguing for total nonintervention, they state that, because intervention may be harmful and non-beneficial, "justification for separating the child and offending parent seems best left to the criminal law — to its high standard of evidentiary proof and its goal of reinforcing society's moral position. After a conviction or an insanity acquittal, there is no longer any reason for not incurring the risks of disposition, of determining the least detrimental alternative" (p. 64).

For reasons expressed elsewhere, I have doubts that sexual "abuse" is invariably harmful to children.⁸⁴ I also believe that in those cases where it is harmful, treatment of the family may be helpful, although those who claim treatment successes have not supported their claims with any convincing data.⁸⁵ But even granting that the sexual acts are harmful and coercive treatment is unlikely to be successful, GFS's total reliance on the criminal system seems contrary to all their goals. First, if children are harmed by such acts, and need protection from the offender, why use a system where proof is difficult and conviction unlikely? Criminal convictions are hard to obtain. Very young children — often the victims of abuse — may not be adequate witnesses to meet the reasonable doubt standard of proof. Even older children may not withstand difficult cross-examination. Where parents may have moved frequently, the child may not be able to tell where the acts occurred, thus raising jurisdiction or venue problems. In addition, a parent who can post bail will return home, and the child will have to deal with that parent until trial.⁸⁶

More importantly, the criminal process is likely to harm the child

84. See Wald I, *supra* note 8, at 1024-25.

85. One of the most troubling aspects of federal and state programs to combat child abuse is the willingness of agencies to adopt programs without any evidence of their benefit. With the encouragement of the National Center on Child Abuse and Neglect, many agencies are implementing sexual abuse treatment programs based on the model described by Giarretto, *supra* note 83. Yet that program has not been adequately evaluated to determine if it is worth adopting. Giarretto's idea may be wonderful, but we cannot know. And we cannot develop sound standards for intervention until we learn more about the impact of current intervention programs.

86. It may be that the criminal court can condition bail on a "no contact" basis. On the other hand, perhaps GFS are not concerned with further contact.

far more than the juvenile process. Juvenile proceedings can take place quickly and in private; juvenile court judges can interview in chambers. The parent, not facing imprisonment, is much less likely to contest the matter and force the child to testify. The criminal process, on the other hand, is often protracted and, given institutional and constitutional constraints, is likely to remain that way. By requiring criminal proceedings in sexual abuse cases, the authors seem to abandon their arguments in *Beyond the Best Interests* that children need quick decisions.⁸⁷ Protracted proceedings leave children in a state of uncertainty that hinders their development. In addition, both parents are likely to pressure the child not to testify in a criminal trial. Many children will experience further conflict since they will fear responsibility for sending their parent to prison. Finally, a child will probably be subjected to repeated questioning by police and district attorneys and be required to testify in open court, perhaps before a jury, and at preliminary hearings as well as at trial.

Perhaps the major goal of the authors is to eliminate virtually all intervention, except in the relatively rare and haphazardly discovered cases where criminal conviction is possible. Despite their strong statements about the harm from sexual relations, they illustrate the need for their standard by presenting a case study where intervention was handled crudely and turned out to be inappropriate (pp. 66-71).⁸⁸ They may believe that many cases now brought to juvenile court under abuse and neglect laws would not be brought in criminal court with its higher standard of proof. However, I doubt that this is true. If juvenile proceedings were not available, social workers would undoubtedly request many more criminal prosecutions. Thus, children are likely to be worse off, not better off.

Several other proposals evidence a similar disregard for how institutions will respond to the proposed standards. For example, if intervention for physical abuse automatically resulted in termination of parental rights, courts would undoubtedly be reluctant to intervene in such cases. GFS have been among the most prominent critics of judges and social workers for their unwillingness to terminate parental rights even when a child has been in long-term foster care and developed a psychological relationship with the foster parents (pp. 51-57). Judges will be even more reluctant to terminate before less drastic alternatives, such as counseling, have been attempted.

87. See note 74 *supra*.

88. This case took place in a family court. Yet the same problems could arise had the parent been charged with criminal conduct. Perhaps they hope to eliminate all intervention. Despite the widespread horror over sexual abuse, the case of intervention is not really clear. Sexual abuse has become a major focus for intervention in the past five years. With state and federal support, there are now numerous sexual abuse treatment projects. The jury is still out on their worth. If GFS want to challenge the value of these efforts, it would make for an interesting debate.

Thus, under the authors' proposal courts will interpret the already narrow standard even more stringently and refuse to intervene in close cases, especially those where the parent only attempted to injure the child. As a result, the child may face a second, more successful attempt. In addition, parents will be much more prone to contest jurisdiction, since they will face the equivalent of capital punishment if convicted. And since abuse cases, especially those involving young children, are difficult to prove, more contests will increase the risk to all children.

Termination will not meet the needs of all children. As I mentioned above, the proposal assumes that adoptive placements can be found for all abused children, an unwarranted assumption. The only potential stable placement may be with the original parents. In other cases, the best placement may be with relatives to whom the child has psychological ties, but who are opposed to termination. Finally, a policy of termination may put non-abused siblings at risk. Counseling services for the family might reduce such risk, by monitoring the parents and helping them to develop non-abusive child-rearing techniques. If parental rights are terminated, however, the court has no jurisdiction over the family.⁸⁹

All of these considerations may be outweighed in any given case by the need to protect the child from further abuse, by the fear the child has of the parents, or by the small likelihood of success in rehabilitation. I am not certain that the legal system has the capacity to make sound decisions on a case-by-case basis. Certainly errors will be made. But I remain unconvinced that a system of automatic termination is the best way of meeting the needs of most children.

I also doubt that courts will be able to apply their physical abuse standard. I assume that courts and agencies, concerned with leaving children at risk and having a death on their hands, will interpret the term "serious bodily injury" broadly, more broadly than GFS probably intend. Thus the standard itself may not be too restrictive. Furthermore, the "attempt to inflict" provision will be quite difficult to apply. An attempt requires an intent. How is a court to know whether a parent who beats a child with a cord or a paddle without causing any serious injuries "intended" to cause more serious injury? What type of injury? The criminal law presumes that persons intend to cause the reasonably likely consequences of their acts. If that test applied in abuse cases, the standard will be expanded far beyond the authors' desire. If not, intent may be impossible to prove. And should it matter what the parents intended, if they acted in a manner

89. It might be acceptable to the authors to include a ground which allows supervision of a family if a child has been removed as a result of physical abuse and there are other siblings in the home. Such jurisdiction is especially necessary when the abuse is related to a parent's mental illness, drug or alcohol addiction. See note 73 *supra*.

that created a substantial risk to the child and are likely to act that way again?

It may even be difficult to prove that the parent inflicted any injury at all. Medical personnel can usually determine whether an injury was accidental, but they have no way of telling who inflicted the injury. If the parent denies causing the injury, must the proceedings be dropped?

These are difficult issues. There are good reasons for limiting intervention to cases where the parent caused the injury. I believe we should presume that parents are able and willing to protect their children from injuries by others. GFS's "repeated failure to protect from serious harm" standard also provides a basis for intervention when a parent is failing to provide such protection. Nevertheless, given the problems of proof, we should expect a fuller analysis of these issues than the book provides.

GFS's proposals regarding counsel also ignore the way the system operates. They would provide counsel for the child only at the dispositional phase of a proceeding or if the child is removed on an emergency basis. Prior to that point, the parents are to be the child's representatives.⁹⁰ This proposal, whatever its merits from a psychological perspective, assumes a system in which the investigatory, adjudicatory, and dispositional stages are always totally separated. In practice, that is rarely true. Abuse and neglect cases, like criminal cases, are often plea bargained. The parents admit to charges in return for an acceptable disposition.

Perhaps GFS think such a system is bad. Their standards do not leave much room for bargaining. They may believe that plea bargaining may coerce innocent parents into agreeing to some form of intervention, harming them and their children. On the other hand, plea bargaining may allow some abuse cases to be compromised, leaving children in dangerous homes.

Yet there are costs to a system that sends everything to trial. It greatly increases the likelihood that children must testify, with all the concomitant pressures. And trials delay final disposition and give parents less opportunity to use helping services.

If there is to be a negotiating process, it may be useful to have the

90. GFS would apply this standard in delinquency as well as abuse and neglect cases. Despite their efforts to distinguish *In re Gault*, 387 U.S. 1 (1967), I doubt that their position is constitutional. In any case, it is certainly bad policy in delinquency cases. Among the many reasons why counsel for the minor is needed in delinquency proceedings are that many parents do not know the value of counsel for their child. Some parents often assume that the probation department and juvenile court are only interested in helping their child (when, in fact, punishment and community protection are major goals of these agencies). Other parents incorrectly assume that the judge will follow the parents' wishes. Thus, many parents would not request counsel despite the fact that the minor would benefit greatly by being represented. In addition, genuine parent-child conflicts may exist. Indeed, it is often the parent who has initiated court action.

children represented at all stages of the proceedings. Since the disposition is part of the negotiation, separate counsel for the child may be needed to protect the child's interest. The child's counsel could also perform many other functions, such as facilitating agreement between the parent and the social service agency. In addition, in contested cases counsel for the child may be able to present evidence that counsel for the state or parents cannot or will not present.⁹¹ Thus, before accepting GFS's proposals on counsel, legislators should carefully consider the effects on the entire process that the proposals would entail, as well as the psychological premises on which it rests.⁹²

These are just a few of the likely consequences of the proposals. Because the system suggested by GFS differs dramatically from the present system, numerous changes would have to be made in the way cases are investigated and prosecuted. Federal and state funding programs would have to be altered. There might be a considerable reduction in services available on a voluntary as well as coercive basis. Some of the ways in which the system will respond cannot be anticipated; however, many can. GFS do not discuss the likely impact of most of their proposals; legislators considering their adoption must.

IV. THINKING ABOUT ABUSE AND NEGLECT

A. *Focusing the Debate*

In the final chapter, GFS discuss the agonizing decisions that must be made about state intervention. The competing positions each are attractive. Physical and sexual abuse are just two of the harms parents inflict upon children. Many parents do not provide

91. Counsel for the parents seek only to protect the parents. Counsel for the state often allow bureaucratic considerations, such as the desire to avoid trial or preserve confidentiality, to interfere with their protection of the child.

92. The issue of counsel for children in abuse and neglect proceedings is a complex one, although mainly for reasons other than those expressed by GFS. A full analysis of the issue would require a long paper itself. While I have questions about the utility of separate counsel for children in abuse and neglect proceedings, I find unpersuasive the authors' assumption that parents can represent their child's interests and that imposing counsel between parent and child "strains the psychological bonds that hold [the family] together" (p. 112). In state agencies that do an adequate screening job, most parents charged with abuse or neglect will, in fact, have injured their children. There is little reason to believe that these parents really can serve as representatives of their children. On the contrary, they are understandably hostile to any intervention even when it may benefit the child.

Moreover, there is little reason to think that providing children with representation will, in the majority of cases, interfere with parent-child relationships. For very young children — those three and under — who represent the bulk of serious physical abuse cases, the attorney will probably not even see the child, and if the attorney does, counsel's role will be incomprehensible to the child. (The argument cuts both ways — perhaps incomprehensibility is a reason not to have attorneys in these cases!) With older children a rupture in parent-child relations may be unavoidable. Even where the relationship is not severed, the attorney is often helpful to the parents as well as the child.

their children with the psychological relationship GFS believe is essential for adequate intellectual, social, and moral development. Many parents also fail to provide regular medical care, take no interest in their children's schooling, and may even hinder the child's functioning at school. Many parents are oblivious to the emotional needs of their children; others use their children to satisfy their own emotional needs, disregarding the children's well-being. Despite GFS's frequent assertions that there is little societal consensus about proper childrearing, I believe that few persons would disagree that parents must do more than just refrain from brutally beating or sexually abusing their children.

Moreover, there is a growing body of evidence correlating abuse and neglect with later delinquency, school and mental health problems, as well as abuse and neglect of future generations.⁹³ In light of this evidence, and assuming the beneficence and utility of state programs, "interventionists" are not concerned with defining more clearly the occasions that justify intervention. On the contrary, they are seeking ways to identify problem families earlier and, ultimately, to establish systems for monitoring the care-giving of all families. For example, some leaders in the child abuse field advocate using home visitors to check on all families and screening devices to identify potential abusing or neglecting parents at the time a child is born.⁹⁴ A substantial amount of federal funds is being expended to support such efforts.

The urge to intervene is great. As GFS state, in approaching the problem of abuse and neglect, they found themselves "constantly aware of a pressure within [themselves] to use the legal system to meet every situation in which a child needs help" (p. 133). That three persons so committed to children's welfare chose not to accede to these pressures testifies to the magnitude of the considerations militating against intervention. The frequent harms of intervention cannot be ignored. Nor can the fact that abuse and neglect laws are used most frequently to intervene in the lives of poor families.⁹⁵ To some degree, this disparity may reflect genuine need: very poor peo-

93. See, e.g., ALFARO, THE RELATIONSHIP BETWEEN CHILD ABUSE AND NEGLECT AND LATER SOCIALLY DEVIANT BEHAVIOR (N.Y. Senate Select Committee of Child Abuse, March 1978); V. FONTANA, SOMEWHERE A CHILD IS CRYING 112-16 (1973). See also sources cited in note 62 *supra*; R. KRUGEL & M. PARSONS, CHILDREN OF DEPRIVATION (1967); Fanshel, *Parental Failure and the Consequences for Children*, 65 AM. J. PUB. HEALTH 604 (1975).

94. See, e.g., Gray, Cutler, Dean & Kempe, *Prediction and Prevention of Child Abuse*, 1 CHILD ABUSE & NEGLECT 45 (1977); Kempe, *Predicting and Preventing Child Abuse: Establishing Children's Rights by Assuring Access to Health Care Through the Health Visitor's Concept*, in PROCEEDINGS OF THE FIRST NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT (HEW 1976). See also Daniel, Newberger, Reed & Kotelchuk, *Child Abuse Screening: Implications of the Limited Predictive Power of Abuse Discriminants from a Controlled Family Study of Pediatric Social Illness*, 2 CHILD ABUSE & NEGLECT 247 (1978).

95. See Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608 (1978).

ple probably do physically abuse children more frequently than the general population. In addition, many poor parents lack the resources — personal as well as financial — to cope with children.⁹⁶ Yet, there is little doubt that a double standard exists.

Society must also recognize that abuse and neglect constitute only two of the disadvantages faced by children from poor families. As Richard DeLone has recently argued,⁹⁷ economic inequality in society probably subjects many more children to increased risks of delinquency, poor school performance, and mental health problems than do abuse and neglect. These risks persist even when the parenting is outstanding. It is all too easy for society to label bad parents as the problem, rather than economic inequality, poor housing, discrimination, and other societal conditions. It is still easier, and probably more politically appealing, to spend several hundred million to “protect” children from bad parents, than to spend the much greater amounts needed to provide children with more optimal conditions for development.

Unfortunately, proponents of each position rarely directly address the arguments of the other side. Value premises are often substituted for data on the likely impact of intervention. For example, Goldstein, Freud, and Solnit choose to err on the side of non-intrusiveness, “leaving out some children whom we would wish to protect” (p. 136), not only because they are concerned with the harm of intervention, but also because “[t]o do otherwise would have required — because of the inherent ambiguity of words alone — the inclusion of many children and families that it would be arbitrary, if not harmful, to cover. Over-inclusion would have meant leaving agents of the state with too much discretion” (p. 163). Thus, they appear to be concerned more with preventing arbitrariness than with ensuring the well-being of the child, although they see the two issues as related. Moreover, they reject the present system on the basis of their value judgments without providing any convincing data that the system is now doing more harm than good.

On the other hand, proponents of extensive intervention assume that erring on the side of intrusiveness, even if it results in some arbitrariness, is necessary in order to protect children. They assume, without demonstrating, that most intervention is helpful, not harmful, to children. They generally do not address the value question of whether the cost of some arbitrariness, inherent in a system that provides discretion to judges and social workers, might outweigh the value of protecting more children.

Unfortunately, the literature is almost devoid of reliable data

96. For the parents' perspective, see S. JENKINS & E. NORMAN, *BEYOND PLACEMENT* (1975).

97. R. DELONE, *SMALL FUTURES* (1979) (especially chs. 1 and 2).

about the consequences of intervention in *most* cases where it currently occurs. To a very large degree, all parties to the debate are proceeding on the basis of clinical experience, untested theories, and faith. I have already indicated my concerns over the data base and developmental theories on which GFS rely. They stand virtually alone in asserting that *all* interventions involve some harm. Moreover, even if this were true, GFS present no data supporting their conclusion that intrusion will be more beneficial than injurious to the child only in the limited categories of cases they propose. There may be many other situations where the benefits of intervention outweigh the harms.

On the other hand, interventionists have also failed to present good evidence that broad discretionary standards will benefit more children than they will hurt. They attribute any harm from existing actions to inadequate funds or poorly conceived programs, ignoring the harms caused by the psychological intrusions that are the central concern of GFS.

There is virtually no longitudinal research measuring the impact of various types of intervention and no research comparing intervention to nonintervention. The people allocating millions of federal dollars each year to combat abuse and neglect seem to assume the value of intervention. Research funds are expended primarily to establish new treatment programs, to develop new means for predicting who will become an abuser, or to further studies describing the characteristics of an abusing family. While all the research probably has some value, it cannot answer the basic issues posed by GFS.

The needed research is not easy to do. There are financial and methodological constraints. Longitudinal research requires a time commitment that many researchers and funding sources will not make. Moreover, agencies are suspicious of such research and reluctant to participate in a meaningful way. Without such research, however, we will not be able to develop sound policy.

B. *Policies That May Work*

For the present, we must formulate policy without vital data, on the basis of far-less-than-perfect knowledge. Although I agree with the value premises of GFS and assume with them that intervention is often harmful, I question whether they have reached the best possible standards in light of existing knowledge. Their position places too much weight on the harms and gives too little credit to the possible benefits of intervention. We need not choose between a system that permits intervention in virtually every home and one that excludes intervention except in a few extreme situations.

While it is difficult to draft standards that insure an "optimal" amount of intervention, I believe that more finely-tuned standards

are possible.⁹⁸ Recognizing my bias on the issue, I remain persuaded that the proposals made in the ABA Juvenile Justice Standards Project offer a better approach. Using the information that psychology and common sense give us about the needs of children, we should adopt standards that specify which harms to children justify intervention — standards broader than those proposed by GFS, but more narrowly focused than existing law. In addition to new substantive standards, it is essential to develop procedural rules designed to lessen the likelihood that the standards will be misapplied. Such rules would require high standards of proof, presumptions in favor of not removing children from their homes, and specific findings of fact as to the harm that justifies intervention and the way in which intervention will alleviate the harm.

Of course, any such standards will be abused, allowing both under- and over-intervention. But the goal is to benefit the majority of children, recognizing that the limits of law, knowledge, wisdom, goodwill, money, and competence prevent the creation of a system that always acts correctly. And if, in addition to adopting a more limited basis for intervention, legislators were willing to fund high quality services, we should be able to *really* help and protect more children and families than we now do.

I believe that broader standards will benefit most children. Moreover, while this may not concern GFS, it is highly unlikely that any state legislature would ever adopt their standards. Despite the assertions in the book, there does exist widespread consensus that children should be protected from more than death, severe physical harm or sexual assault.⁹⁹ I have dealt with numerous state legislators in the past few years and find it exceedingly difficult to persuade them to adopt even the standards proposed in the ABA Juvenile Justice Standards, which are generally noninterventionist but which do not go nearly as far as GFS. Faced with the opposition of judges, social workers, police, and other professionals, proponents of GFS's standards would lack credibility and be unable to achieve more limited revisions of existing law.

CONCLUSION

Despite the criticisms made in this review, I find *Before the Best Interests* a valuable contribution. By forcefully articulating a set of principles to guide policy, the authors force the reader to evaluate and reevaluate basic premises and values. The book should chal-

98. In fact, GFS demonstrate that "finely tuned" provisions can be drafted. They have established an interesting and elaborate system for determining when a child should be left with a long-term caretaker and when such a child should be returned to a natural parent (pp. 34-51).

99. See J. GIOVANNONI & R. BECERRA, *supra* note 12.

lenge everyone working with children and families who do not request services to defend for themselves and for society the value of their actions. This is a painful process, one which few of us like to undertake in any endeavor. It is especially hard when we believe we are protecting helpless children.

Unfortunately, the weaknesses of the book — the extreme nature of the authors' proposals, the untested basis of some of their theories, the mode of argument — may make it too easy for people to reject GFS's assertions out of hand, in the belief that if one's motives are good, the results will be also. Hopefully, readers will avoid this temptation. One does not have to accept GFS's specific standards to recognize that intervention can be harmful and must be justified. The book demands that all intervenors ask themselves, "Am I really doing more good than harm?" No one should close his eyes to this question. Nor can supporters of more extensive intervention close their eyes to the fact that there is so little data demonstrating the benefits of intervention.

If the book succeeds in getting people to ask these questions, it will have accomplished its aims. For as GFS perceptively note, the exact standards a legislature adopts are not ultimately important. Judges and social workers can get around any statutory standards. The critical requirement is "that those who are empowered to intrude must understand as well as share the philosophy . . . of minimum coercive intervention" (p. 18).