

THE POLITICAL AND LEGAL IMPLICATIONS OF THE PSYCHOLOGICAL PARENTING THEORY

MARTIN GUGGENHEIM*

In theory, laws designed to protect children from harm apply equally to all members of American society. In reality—and to a considerably greater degree than in the application of the criminal laws—child protective laws are applied only to the poor and nonwhite.¹ The state uses child protective laws, if not as a pretext, then as a justification, for the seizure of children from those people who have the least political power in the United States and are the least involved in traditional forms of our culture.

The seizure of children from poor and minority parents occurs in two ways. First, many children are “voluntarily” placed in the temporary custody of child welfare officials by destitute parents in crisis situations. By contrast, families with adequate economic means manage to cope during crises without resorting to public institutions for support. State officials

*Clinical Professor of Law, New York University. A.B., 1968, State University of New York, Buffalo; J.D., 1971, New York University. Professor Guggenheim has litigated a number of important termination of parental rights cases in the state and federal courts, including *Santosky v. Kramer*, 455 U.S. 745 (1982) and *Lehman v. Lycoming County Children's Services Agencies*, 458 U.S. 502 (1982). He is co-author of *The Rights of Parents* and *The Rights of Young People* and author of numerous articles on the rights of children, juveniles, parents, and families in legal proceedings.

1. “Nationwide data on the income of families placed in foster care do not exist, but statewide studies indicate that at least eighty to ninety percent of such families are below the poverty line and the majority receive public assistance.” McCathren, *Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect*, 57 B.U.L. Rev. 707, 711-12 & n.16 (1977) and authorities cited therein. See also *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-34 (1977); S. Jenkins & E. Norman, *Filial Deprivation and Foster Care* 2, 25-30 (1972); S. Katz, *When Parents Fail* 28-29 (1971); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 Geo. L.J. 887, 892-93 (1975); 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, 691 (1977); Jenkins, *Child Welfare as a Class System*, in *Children and Decent People* (A. Schorr ed. 1974); Kay & Phillips, *Poverty and the Law of Child Custody*, 54 Calif. L. Rev. 717 (1966); Mnookin, *Foster Care—In Whose Best Interest?*, 43 Harv. Ed. Rev. 599, 603 (1973); Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 Calif. L. Rev. 694 (1966); Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 Am. J. Orthopsychiatry 608 (1978); Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Fam. L.Q. 245, 262 (1974); ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. 1 & 2), 16 Stan. L. Rev. 257, 900 (1964), (pt. 3), 17 Stan. L. Rev. 614 (1965); 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. 625, 692 & n.269 (1976); Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 Mich. L. Rev. 645, 689 (1980).

never question the right of these parents to regain custody of their children once the crisis ends. Such arrangements normally are not even viewed as custody changes; the parents have never relinquished custody and thus have nothing to "regain." Indeed, the state is unaware of the crisis or the private child care arrangements undertaken in the first place. For example, if a wealthy single parent required hospitalization and a long period of convalescence, she might hire a governess to assure that her children's needs were met during her illness. After full recovery, she could terminate the services of the governess at will and provide for any arrangement she wished. The poor have fewer choices. Often, reliance on public officials and public institutions is their only choice.

Second, the overwhelming percentage of families who are involved in child protective proceedings—proceedings whose purpose it is to "involuntarily" separate children from parents to "help the children"—are poor and nonwhite. This is not to say that only the poor and nonwhite abuse or neglect their children. Middle- and upper-class people simply are not hauled into court to account for their behavior as parents. This is hardly a new development; the use of laws to separate children from downtrodden outcast parents can be traced back to the English Poor Laws of 1601.² Although the complete explanation for the phenomenon lies beyond the scope of this paper, some of the reasons are readily apparent. The poor are far more visible than the rich. They live in crowded, urban settings. They often receive public assistance benefits overseen by public welfare officials and social workers who may visit their homes at any time without a search warrant; welfare recipients may refuse entry only at the risk of losing benefits.³ In addition, the vagueness of child protective laws gives public officials an undue degree of discretion to determine what type of parental behavior comes within the reach of the laws. Indeed, the laws of most states are written so broadly that *all* parents occasionally come within their reach.⁴ This administrative discretion leads to a discriminatory application of the laws that is a function of cultural and class bias.⁵

My principal concern here, however, is not how children initially become separated from their parents, but what happens to them once they come into the state's care. At least one point is clear: children who are in the state's care needlessly remain separated from their parents for too long a

2. See generally ten Broek, *California's Dual System of Family Law: Its Origins, Development, and Present Status* (pt. 1), 16 *Stan. L. Rev.* 257 (1964).

3. *Wyman v. James*, 400 U.S. 309 (1971).

4. See, e.g., Fla. Stat. § 827.04(2) (1983); La. Rev. Stat. Ann. § 13:1569 (West Supp. 1983); Tenn. Code Ann. § 37-202 (1977 & Supp. 1983).

5. See *Santosky v. Kramer*, 455 U.S. 745, 763 (1982); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-55 (1977); P. Murphy, *Our Kindly Parent—The State* 153-63 (1974).

time. Too often, child care workers embark on a conscious policy of prolonging a placement because they take a dim view of the natural parents and this frustrates parents' efforts to regain their children. Regretfully, Goldstein, Freud, and Solnit's psychological parenting theory as espoused in their book, *Beyond the Best Interests of the Child*,⁶ provides unintended incentives for agencies to prolong the separation of parent and child. Once children have developed bonds with their foster parents that, for psychological purposes, have replaced the bonds they had with their natural parents, the psychological parenting theory advocates maintaining the newer relationship. For proponents of the psychological parenting theory, time is always on the side of the current caretaker. The result is that a politically neutral theory about human behavior works untold harm in actual practice.

The disproportionate impact on a particular social class of an experiment that results in the banishment of parents must arouse our moral and political concern. Opponents of the psychological parenting theory are less disturbed with its theoretical aspects—though it has been soundly criticized on this basis⁷—than they are upset by how it is used. Implementation of the theory has destroyed parent-child relationships only among the poor.

Before parent and child are separated, the law presumes that parents are fit to raise their children. Coercive state intervention is proscribed unless it is clearly necessary.⁸ By contrast, after separation, many lawyers and other professionals propose that the state should do whatever is in the child's "best interests." They consider it appropriate for courts or social workers to make decisions about such matters as with whom children should reside or whether parental rights should be terminated solely on the basis of the child's "best interests." This shift from a restrictive compelling state interest test to an open-ended best interests test demands closer examination.⁹

To a remarkable degree, the psychological parenting theory has been responsible for this shift. Courts have always had difficulty attempting to balance the rights of natural parents, children, and foster parents. However, since the publication of *Beyond the Best Interests of the Child* in 1973, courts have seized upon the psychological parenting theory as an easy solution to their problem.¹⁰ In the past decade, they have increasingly been willing to terminate parental rights when doing so is "best" for children.¹¹

6. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (1973) [hereinafter *Beyond the Best Interests*].

7. See, e.g., Strauss & Strauss, Book Review, 74 Colum. L. Rev. 996 (1974).

8. See, e.g., *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976).

9. The compelling state interest test has been applied to child protective schemes in *id.* at 779.

10. 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. See, e.g., *In re J.S.R.*, 374 A.2d 860 (D.C. App. 1977); *In re New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (1975); *In re William L.*, 477 Pa. 322, 383 A.2d 1228, cert. denied sub nom. *Lehman v. Lycoming County Children's Serv. Agency*,

They accept as an immutable truth that children are best served by remaining with their long-term caretakers, because a psychological parent-child relationship has developed. Previously, courts permanently destroyed parent-child ties only when no alternative was available.¹²

To whom can poor parents turn for redress? The suggestion that they turn to the legislature to prevent certain abuses in applying the psychological parenting theory ignores the fact that poor nonwhites do not have equal access to power in this country. The sorry fact is that we do not have a national commitment to help children in this country. We permit far too many of our children to grow up in substandard living conditions, and force far too many parents to subsist on inadequate income.

Courts have traditionally respected political judgments in this area and have chosen not to intervene, even in cases where children clearly would benefit from judicial intervention. For example, poor children have been unable to persuade courts that poor local school districts should be assured the same amount of public tax money as wealthier school districts.¹³ Courts have also refused to require that all children in need receive a minimum amount of public assistance benefits.¹⁴

It is impossible to separate the legal from the political issues in this area. If the judiciary cannot be counted on to protect the poor from the disadvantages of being poor, it exacerbates the problem when courts step in to help children in the limited way they choose. Courts choose to permanently destroy family ties, while declining to review the political judgments of the legislature with respect to poverty. For the poor, and particularly for poor families, courts rarely are instruments of help or protection; but they are powerful destructive forces.

Wholesale adoption of the psychological parenting theory is not merely wrong for the reasons already discussed. It is also wrong because it loses sight of the fact that the psychological parenting theory is just that—a theory. There is real danger in attaching so much significance to a theory about human development. One need only cite the example of adoption between the 1930's and 1960's to underscore the tenuous nature of expert advice in the area of human behavior. During that period the overwhelming weight of the literature advocated keeping the truth from the adoptee and pretending that the adopted child was the natural offspring of her adoptive parents. Nearly all of the major social work schools and child care agencies

439 U.S. 880 (1978). But see *In re Custody of a Minor* (No. 1), 377 Mass. 876, 389 N.E.2d 68 (1979), expressly overruling *Little Wanderers*.

12. See, e.g., *In re Clark's Adoption*, 38 Ariz. 481, 1 P.2d 112 (1931); *People ex rel. Portney v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952); *In re Appeal of Rinker*, 180 Pa. Super. 143, 117 A.2d 780 (1955).

13. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

14. *Dandridge v. Williams*, 397 U.S. 471 (1970).

followed suit and two generations of adoptive parents and adopted children suffered. Current wisdom, based largely on the clinical observation of adoptees' reactions to the earlier theory, has repudiated it. Adoptive parents today are advised strongly not to hide the fact of adoption from their children. The point of this example is not that a particular theory is the better one. The point is to underscore the human costs of experimentation especially when this experiment is being carried out exclusively on the children of poor and minority parents.

It is virtually certain that theories about human behavior will change. Involuntary termination of parental rights was unknown to American law in the nineteenth century. Today it is considered almost a panacea in some quarters. The psychological parenting theory will, in legal parlance, be "overruled"—if not ten years from now, then fifty and if not fifty, then one hundred—because it is social experimentation in its grossest and grandest form.

There is widespread disagreement in the social sciences with respect to child rearing. Indeed, when parents try to figure out how to raise their own children and what to do in a particular situation, two different experts are likely to give them two different answers. If they go to ten experts, they may get ten or eleven answers. We hardly know what we are doing. We try our best. When our experiments lead us to attempt permanent destruction of family ties we are obligated to be wary. This does not mean, of course, that we should ignore social science theory. We can learn much from psychiatrists and psychologists, but the state of the art is not such that we can unflinchingly embrace current wisdom.

The most serious problem in this area is that we are moved by our good faith and do not retain the kinds of checks and balances applied to other forms of state intervention. Justice Brandeis warned in a 1928 Supreme Court decision that "experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent."¹⁵ We are less likely to worry about the consequences of our behavior when we believe that we are here to do good. That is true for the social worker, for the social scientist, and for the judge.

Protecting the "best interests" of the child is a noble goal, but the vagueness and subjectivity inherent in this standard make it inappropriate as a guidepost. We have better guideposts firmly embedded in our law, which have kept us well on course for most of the two hundred years of this country's history. Normally, the state has no right to tell parents how to raise their children, what to teach them to believe (whether politically or religiously), how to dress, what to eat, what values to hold.¹⁶ It is none of

15. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

16. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

the state's business. The state has a very modest, minimal interest in protecting children from gross forms of harm, but no more than that. Without setting out in detail the constitutional law perspective that leads to this conclusion, let me briefly note that when this country was founded, it was founded on the principle that the government is to have limited powers, that people are free to grow up and think and feel and express views and behavior free from governmental control and intervention. Generally, we do not have affirmative rights in this country. Rather, we have rights to protect us from over-reaching on the part of the creature that we have collectively established, the state. More than any other area of the law, child protection legislation risks creating a Frankenstein-type monster that can become larger than we are as the people. Our society has a child rescue fantasy of which we are all somewhat enamored. We like the thought that it is our role to help children in need. But by not forcing ourselves to have very modest goals, we do a great deal of harm in the name of doing good.

With this much as background, it is useful to reconsider the two major issues in child welfare decision-making. First, when should the state intervene coercively in an ongoing parent-child relationship in order to help the child? From what I have said thus far about the extent of parental prerogative and the limited role of the state, the answer should be clear: rarely. Coercive intervention should occur in the fewest cases possible. In order to define the rarest and most minimal circumstances that can lead to intervention, let me propose a definition that is intended to be directional rather than inclusive. We should intervene only to protect children from imminent risk of death or disfigurement. This standard is designed to correspond to society's minimal interest in being assured that parents raise their children adequately. The state plainly has a legitimate interest in making sure that children survive their childhood. We can add to that definition, but when we do, the language necessarily becomes broader and more vague. For example, when we add neglect, or when we add psychological harm, we are feeding into the serious problem of class and cultural bias. Broad definitions of neglect—the type used throughout the country—invite the state to judge for itself how parents are doing. Subjective and arbitrary enforcement are assured. The awesome power of the state is set in motion in its most pernicious form: state officials are authorized to act as they wish, intervening in one family while choosing to leave a second, similar family alone. I reiterate that we should intervene only in the rarest circumstances. This is an important question of policy that society needs to settle so that it can move on to creating definitions that prevent needless intervention and needless separation.

After settling when to intervene, the question becomes what to do once we have intervened? It is much easier to prescribe limitations on the state's proper reach when intervening in an on-going family relationship than it is to suggest limitations once parents and children have been separated. The

question is more complex simply because after intervention there is no longer a family living together on a regular basis. The state already is involved in monitoring both child and parent and even if many of us agree that minimal intervention is best before a family is separated, there is less agreement on what policy to follow after separation. What constitutes minimal intervention at this stage? Should the state return all children to their parents on demand? Should it do so regardless of the number of years the child has been away from the parent, regardless of the progress the child has made and the relationship he or she has developed? Should the child be returned even if there is some residual concern about the parent's current fitness? Who should bear the burden of proof in a placement decision? Should the parent have to show that he or she is presently fit, or should the state have to show unfitness?

Before we permanently destroy family relationships we ought to remember our first premise concerning intervention. Just as we initially intervene only in the grossest forms of problems, we should permanently destroy biological ties only when there is well-nigh universal agreement that such action is the appropriate remedy. Otherwise, we permit the state to exercise its most awesome power, short of capital punishment, without an appropriate showing of necessity. Though there are some risks attendant with the failure to terminate parental rights, they are not nearly as great as risks on the other side.

Under our government of limited powers, people should be deprived of sacred constitutional rights only in drastic circumstances when we are compelled to take such action. Good intentions in child protection laws have taken us off the course in recent years. The wisdom of our founders, however, is perhaps nowhere more apparent than here. We must judge governmental conduct not by its purpose, but by its effect. The involuntary separation of parent and child is a solemn act which the law should permit only sparingly.

