URGING RESTRAINT IN TERMINATING THE RIGHTS OF PARENTS OF CHILDREN IN FOSTER CARE

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The effort to develop empirical underpinnings for understanding the relationship between children and their dysfunctional parents and to develop a corresponding public policy is a task of enormous proportions. Those of us who have spent a good part of our adult lives trying to fathom an equitable approach to the problem are often discouraged. I am reminded of a story about one of Albert Einstein's students. The student visited his professor and found him in deep torment because his general unified theory of gravity was not emerging as he had hoped. The student begged Einstein not to drive himself so, and Einstein replied, "I can't believe that God would be so malicious that He would organize the universe without some underlying principle." A year later the student came to visit Albert Einstein again, and still found him very distressed, and laboring with his theoretical problem. He again remonstrated with him and urged him to consider that he had already made a stunning contribution to science. Albert Einstein replied "Who knows, perhaps He is a little malicious."[1] It is an arduous task to distill a collective wisdom out of the enlightenment offered by the findings of psychoanalysis, and by the wisdom of my own profession, social work. We may well be left with a feeling that there is a malicious force at work.

I am mindful of the fact that the vicissitudes of the current period are such that broken families are increasingly common. A study by the Children's Policy Research Project at the University of Chicago concludes that four out of five black children and one out of three white children will be living in single parent homes at some time in their lives.[2] Such homes do not reflect exotic situations; more and more they are becoming the norm, and that raises the question of whether the solutions posed by *Beyond the Best Interests of the Child*[3] have not in fact become outdated by the rapidly moving demographic changes that we face.

I think most experts can agree about how to deal with the cases that come out on the shoulder of the curve, because we are all humanists and we

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1. See generally R. Clark, Einstein: The Life and Times 613 (1971).
2. N.Y. Times, April 29, 1983, at A12, col. 1.
3. J. Goldstein, A. Freud & J. Solnit, Beyond the Best Interests of the Child (1973) [hereinafter Beyond the Best Interests].

all want to do what is right. Where responsible parents are victimized by temporary circumstances, we probably agree that as soon as the parents can get back on their feet, the child should be returned to them. On the other shoulder of the curve are extremely brutal situations where there is almost no humanity left in the relationship of the parent to the child. It is easy to agree that we should move expeditiously to save the child from such a situation. Where the experts are in disagreement is in the great middle range of cases that often involve a beleagured parent with an uneven track record. These "hard" cases raise complicated questions concerning legal and civil rights.

Two theoretical orientations are in tension in such cases; both relate to the child's need for continuity. On one side of the conflict is the child's need for continuity with the somewhat abstract human being called the "psychological parent." From the point of view of research, it is hard to define this term since parenting tasks are being divided more and more between working parents. Moreover, parents under pressure are often asking grandmothers, and uncles and aunts and neighbors, to pitch in and help with child care. On the other side of the conflict is the child's need for a different form of continuity, a connection with her past and her "biological parent." In many cases the practical consequence of the psychological parenting theory is to destroy this continuity by banishing the biological parent. Although psychoanalytic theory delves creatively and deeply into the nature of the human being and the psyche, it does not adequately inform us about a fundamental conflict faced by the child in this situation: How can it be that the biological parent who gave me life doesn't exist for me, that she cared so little for me that she absconded? What does this mean for me?

More than forty percent of the more than twenty-eight thousand children in care in New York City no longer see their parents.[4] The child's profound need to know who her parents are, where they came from, the conditions under which they could not take care of her, is not addressed by the psychological parent. There is daily continuity for the child with her "psychological parent," but what about her continuity with her origins?

Another problem with psychological parenting theory, as I see it played out, is that it does not respect diverse family forms. Just as vernacular speech in the minority community is not respected as a language governed by complex rules, so the family forms that have developed in situations of extreme adversity or economic oppression are not respected in the courts. Instead these family forms are too often dismissed as negative influences in the child's life.

I also find it difficult to accept the fact that the decisions of the psychological parent are given paramout importance, sometimes to the

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4. Fanshel, Parental Visiting of Foster Children: A Computerized Study, 13 Soc. Work Research & Abstracts, No. 8, at 2-10 (1977).

exclusion of the biological parent. If a foster parent complains that the biological parent's visits are followed by soiling on the part of the child, and that a child is upset when she sees her mother, then very often visiting privileges will be terminated. Indeed the mother may come late, she may be bizarre, she may make promises to the child and be inconsistent, she may sometimes be loving and sometimes not. When the theory is played out, however, its result is to spare the child exposure to this human being, who is admittedly flawed, but who is, nonetheless, her mother. Too often the resolution of this complex interplay of factors is the banishment of the biological parent. It may be true that emotional upset, soiling or anxiety follow her visits, but what of the deeper layers of anxiety, the child's internalized questions about who she is and why she no longer sees her biological mother? Might it not be easier for the child to see her when she is drunk, to see her in her inconsistency, rather than to have her disappear entirely? The disappearing act which is a behavioral consequence of the psychological parenting theory is destructive to the child's developmental needs and utterly disrespectful of the frailties of the human situation under conditions of poverty.

The psychological parenting theory is carried to its ultimate conclusion when Goldstein, Freud and Solnit advocate in divorce cases that "the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits."[5] If the father or the mother lacking custody is disruptive in visiting the child, the feelings and needs of the psychological parent should be paramount. The phenomenon of the "disappearing act" is thus extended to children of divorced parents, a much larger class of children than those children who are in foster care. But this disruptive parent is an essential part of the child's life. While noise and static may accompany the biological parent's visits, this is a small price for the child to pay in order to gain clarity about her parents' identity. Having experienced the breakup of her family, the child has to come to grips with who she is, what makes her parents tick and how she is connected to them.

The exclusion of the biological parent gets worked out in even more questionable ways in the foster care area than in the divorce area. Foster parents have asserted a right to participate in hearings as to the future plans for the child because they have cared for the child for one year. In *Smith v. Organization of Foster Families for Equality and Reform,*[6] the Supreme Court decided unanimously against the principle of involving these foster parents. The mental health professionals who testified in the case were divided.

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5. Beyond the Best Interests, supra note 3, at 38.
6. 431 U.S. 816 (1977).

Under the banner of "best interests of the child" the foster parent group who initiated the suit as plaintiffs regularly published in their own organizational newsletter discussions of particular cases of children in care under the rubric of "horror stories." Invariably these stories portrayed the stark failure of a biological parent and condemned the actions of the system in respecting the rights of the biological parent.

The orientation of these "horror stories" reflects a meanness of spirit that fits all too well with our times—just as we resent people who are on public assistance, just as we resent people who, because of their problems, get in the way of our well ordered lives, so do we resent failing parents. They become the targets of groups who feel that they can do better for the children, who believe that the best way to deal with very flawed parents is to write them off.

This meanness of spirit must be fought in the courts. It affects not only the rights of the child, but also the rights of the mentally ill. Consider the parent who is in a mental hospital for two years. She is not in a position to care for her child. The child develops an attachment to the substitute caretaker who wishes to keep the child and who brings an action to terminate parental rights on the grounds of the child's need for continuity of care.

Terminating this mother's parental rights will have far-reaching ramifications. One must question whether this is the right way to treat the mentally ill. Is any civil right more important than the right to one's child? Should one lose one's child because of mental illness? Such a result must be based on more than psychoanalytic theory. I question whether we really know that children cannot adapt to change, that continuity of care must be preserved at all costs. We may wish that children did not have to be exposed to changes in caretakers but even with all the noxious things that go on in the lives of poor children, the children learn to survive. They know that one caretaker replaces another and that there are grandparents, aunts, and cousins, an extended social network that will also look after them.

One cannot hold the authors of *Beyond the Best Interests of the Child* responsible for the simplified way in which their theory is applied, but when its simplified form is applied in the courtroom, judges are allowed to vent their hostility toward poor and uneducated women. These women are desperately trying to play some role in their children's lives and they find themselves faced with the threat of banishment. In one case where I was brought in as a consultant, the attorney and I struggled hard against the theory that all rights should go to the psychological parent. While we did not win custody for the biological parent, when we left, the judge was wondering why it would not be possible for the child to continue to have contact with the biological mother even though he was going to be adopted by his foster mother. Like this judge, we must struggle to be open, we must not close doors on children and leave them to wonder about people they cannot see, but who they know are their biological ancestors.