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Book Review

The Kindness of Strangers*


Patricia M. Wald†

—Sons of the thief, sons of the saint
Who is the child with no complaint1

—Suffer the little children . . . .2

This short book, recently issued in paperback, is the third in a controversial series designed to revolutionize the "[child] custody business."3 The first and second books, *Beyond the Best Interests of the Child* (BBIC) and *Before the Best Interests of the Child* (BBIC II),4 dealt with the incendiary questions of what principles should govern child custody decisions and when the state has the right to intervene in private family arrangements. This last volume deals with the problems and responsibilities arising in the many disciplines that become involved in the placement of a child when her biological family fails.

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† Chief Judge, United States Court of Appeals for the District of Columbia Circuit. Yale Law School LL.B., 1951.
2. Mark 10:14 (King James).
4. J. Goldstein, A. Freud & A. Solnit, *Beyond the Best Interests of the Child* (new ed. with epilogue 1979) [hereinafter BBIC]; J. Goldstein, A. Freud & A. Solnit, *Before the Best Interests of the Child* (1979) [hereinafter BBIC II]. It is puzzling why, after debunking the "best interests" formulation for child custody decisions in their first book, BBIC, the authors went on to immortalize the phrase in their next two books, BBIC II, and J. Goldstein, A. Freud, A. Solnit & S. Goldstein, *In the Best Interests of the Child* (1986) [IBIC; hereinafter by page number only].
I. The Psychological Parent

In 1974, BBIC offered bright-line principles based on psychoanalytic theory to guide social agency workers and juvenile court judges in custody fights over children. Four principles stood out. First, it is best to permit minimal state interference in functioning family life—"leaving well enough alone."5 The authors stress the limits of law as a tool for correcting dysfunctions in the family unit: "At best and at most, law can provide a new opportunity for the relationship between a child and an adult to unfold free of coercive meddling by the state."6 Second, in cases of irreconcilable interfamily or intrafamily disputes, award sole custody to the "psychological parent" or "primary caretaker." Third, preserve continuing relationships between the child and the psychological parent. Fourth, allow the child's time frame to govern; if the relationship between a young child and a parent is interrupted for more than two years, presume it no longer exists. At all times the child's need for a steady primary caretaker should control custody decisionmaking. Whether parents are to blame for not being there is irrelevant. Quick and final placement of a child into a family setting is paramount.7

The implications of such principles are profound. Custody decrees between divorcing parents would be final and not subject to modification for "changed circumstances." Neither joint custody nor compulsory visitation rights would be awarded. The parent in charge of the child would have absolute control over that child's contact with the other parent. A prospective mother who signed her child away for adoption would thereafter have no opportunity to recant, and qualified adoptive parents would not need wait out any trial period before becoming the child's legal parents. In addition, a mother returned from prison or parents who have helped a child to escape tyranny by sending him abroad could not automatically claim the child back if in the interim the child had forged psychological bonds to others.

BBIC became a storm center.8 Feminists criticized it for downplaying the nurturing roles of mothers and the maternal preferences that had been

5. BBIC, supra note 4, at 8.
6. Id. at 115.
7. See, e.g., id. at 40-42, 48-49, 79.
8. The reader of BBIC will understand the immediate appeal of many of its tenets. For example, BBIC argues that after a change of mind, parents should not be able solely on the basis of biological ties to wrench a happy child away from foster or adoptive parents who have won the child's love and affection. Neither should they be able to hang on to the name, but not the obligations, of parenthood by refusing to let their children escape the limbo of foster homes. But the same reader may find it more difficult to accept corollary theses like the absolute prerogatives of one natural parent to control the other's contact with a child or the notion that the state may not interfere where both parents agree on a custody arrangement even if neither party is cast in the role of the psychological parent. Thus, parents may consign a child to boarding school or to a mental institution so long as they agree. If they disagree on Sunday visits by an absent father, however, the caretaker parent wins. Is it a tidy scheme, but is it always in the interests of the child?
used to guide custody decisions for children of tender years. Fathers’
groups who worried about visitation rights were vehement.9 Natural par-
ents viewed their rights as threatened. Juvenile court judges and juvenile
agency personnel worried that their powers to decide the “best interests of
the child” would be drastically limited in favor of a mechanical applica-
tion of the BBIC rules.10

Despite conflicting responses, BBIC quickly became “that which every-
one must mention or risk being seen as an ignorant provincial.”11 Its
guiding principles worked their way into just about everything from the
reports of national planning commissions to the handbooks for social
workers.12

The second book in the trilogy, BBIC II, appeared six years later. Fo-
cusing on when the state may legitimately intrude upon a family relation-
ship, this book was, if anything, even more controversial.13 The authors
declared themselves one hundred percent behind “parental autonomy”
and “family integrity.”14 Before the state should intervene, they said, the
child must be in serious physical danger, the parents must be irreparably
at odds with one another over the child’s custody, or one family must be
fiercely vying with another (usually natural versus adoptive or foster par-
ents). BBIC II’s message was consistent with BBIC’s thesis that con-
tinuity of care is paramount. State officials must err on the side of ex-
treme caution in taking a child from his present caretakers. Only a
certifiably insane parent or one convicted of a sexual offense against a
child should provide sufficient grounds for state intervention.15 Only a
threat of severe bodily injury justifies a neglect proceeding. Emotional rav-
aging, no matter how severe, is not justification for intervention.16 Parents
may do anything they want with their children that is not strictly forbid-
den by law. The only circumstances in which lifesaving medical care
should be provided for a child over parents’ objections are those in which

10. Davis, “There is a Book Out . . .”, An Analysis of Judicial Absorption of Legislative Facts,
100 HARV. L. REV. 1539, 1553–59 (1987) (documenting tendency of some but not all courts to
eschew simple application of formulae in favor of more thorough analysis of facts of each case).
11. Crouch, An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the
(citing NAT’L COMM’N ON CHILDREN IN NEED OF PARENTS, WHO KNOWS? WHO CARES? FOR-
GOTTEN CHILDREN IN FOSTER CARE 10 (1979) and V. PIKE, S. DOWNS, A. EMLEN, G. DOWNS &
D. CASE, PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE: A HANDBOOK FOR SOCIAL
WORKERS 14 (1977)).
13. Some criticized the book for its “very restrictive standards for state intervention into the fam-
ily, [compared to] . . . standards for termination of parental rights for children in foster care.” Id. at
449 n.126; see also Wald, Book Review, 78 MICH. L. REV. 645, 648 (1980) (authors’ grounds for
state intervention are too narrow, and “basic premises supporting nonintervention are often unpre-
scriptive”).
15. Id. at 62.
16. Id. at 75.
The treatment is nonexperimental, the child would die without it, and the care would give the child the prospect of a reasonably good life. Outside of a neglect proceeding, psychiatric treatment should never be imposed on a child against the parents’ wishes.\footnote{See, e.g., id. at 62, 72, 77, 91; cf. id at 33.}

The BBIC II formula for intervention would in general allow, indeed require, legal representation for a child when the parents wanted it, but not when they resisted it. Thus, legal representation presumably would be unavailable to a child if the parents were willing to side with the state against the child in cases of removal from school (“let him be expelled, it will teach him a lesson” or “we’re embarrassed by this deformed child, we don’t want him in school”) or in cases in which they agreed on institutionalization of the child (“take him away, we can’t stand it any longer”). The authors would even deny children the right to counsel during a neglect proceeding prior to an adjudication against their parents.\footnote{Id. at 112-14. The authors argue that appointment of an independent counsel for the child will change the parental relationship. Of course, they are right. As parents well know, every authority figure with whom a child enters into a relationship—teacher, coach, doctor, high school counselor—does just that. Yet, can the child neglect system have any integrity if a child suspected of being neglected has no independent representative in the proceeding? I would opt to have counsel appointed more frequently than the authors suggest—when there is a reasonable probability of neglect. Sensitive counsel would quickly evaluate the situation. If it is not one of child neglect, counsel will side with the parents, and there will be no state interference. But if counsel perceives child neglect, she has an important function to perform in protecting the child’s best interests. I also find it interesting that the authors do not discuss at greater length the troubling PINS (persons in need of supervision) jurisdiction of juvenile courts under which children may be institutionalized at the request of their parents for noncriminal conduct, sometimes simply because the parents cannot get along with or control the child. See IJA-ABA JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 1, 74 (Tent. Draft 1977). Parents certainly should not dictate a child’s right to counsel in that situation. See BBIC II, supra note 4, at 28 n.29.}

Behind this extreme pro-family stance is the authors’ first principle that family integrity deserves every benefit of the doubt. In marginal cases it is better to impose on the child risks of nonintervention, such as emotional havoc, unnecessary institutionalization, and loss of education, rather than risks of over-intervention, i.e., family disruption.\footnote{In this respect, the supposed lessons of the case studies in BBIC II are not self-explanatory. The authors defend the exclusion of emotional injury in their “serious bodily injury” standard through case studies that supposedly illustrate “the strange paradox which characterizes child placement law,” BBIC II, supra note 4, at 85, with regard to overintervention in some cases and underintervention in others. Yet, the case studies cited there do not favor making a distinction between physical and emotional damage. See id. at 86-90. Rather, they emphasize the risks of underintervention and overintervention when state agents are overworked and have incomplete information about family situations. One case involved alleged emotional harm where, in hindsight, it was clear that intervention was unnecessary. See id. at 83-85 (Alsager case). Another case involved physical abuse where, again in hindsight, it was clear the state should have intervened earlier to protect the child. See id. at 144-82 (murder of seven-year-old Maria Colwell by her parents). Physical harm is probably more easily ascertainable than emotional harm, and thus the ascertaining leaves less room for state error and abuse. However, the fact that the state made bad choices in these two cases has little or nothing to do with whether the state should intervene in cases of emotional abuse.}

And, indeed, among some commentators, there was agreement that BBIC II’s aggressive defense of parental rights might be justified as a long...
overdue corrective against bureaucratic intrusion into family life.20 But others complained that the authors went too far, drew too bright a line, closed too many doors against help for a child caught in an abusive family situation.21 Critics worried about the extreme cases. While dutiful, caring parents of a gravely ill child were better life-and-death decisionmakers than a distant state apparatus, not-so-dutiful parents who left a child in the hands of a succession of transient caretakers hardly seemed as deserving of the right to make those decisions. Readers were left with a gnawing doubt: If psychological parenting was the keystone of family jurisprudence, should not parents forfeit the right to family autonomy when they ceased functioning as parents, either through de facto abandonment or psychologically abusive behavior? While precise rules might make sense in a specific instance of a child teetering between life and death, they do not always work so well for the multitudinous situations arising in the everyday life of a healthy child.

20. A capsulized and necessarily oversimplified history of pre-BBIC theory may be in order here. The “parental rights” theory of child placement came first, developing from “an almost mystical belief in the superiority of biological parents.” Recent Development, Jurisdiction, Standing, and Decision Standards in Parent-Nonparent Custody Disputes, 58 WASH. L. REV. 111, 116 (1982) (citing Behn v. Timmons, 345 So. 2d 388, 389 (Fla. Dist. Ct. App. 1977)). Later on, even in the face of growing concern for the child’s welfare “and the disappearance of the concept of the child as property,” the parental rights doctrine often was justified by “the assumption that a natural parent will most adequately fulfill his child’s needs.” Note, Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties, 73 YALE L.J. 151, 155 (1963).

The “best interests of the child” doctrine appeared early in the nineteenth century. In 1824, Justice Story relied on the “best interests” standard in a custody dispute between a child’s father and grandfather. See United States v. Green, 26 F. Cas. 30, 31–32 (No. 15,256) (D.R.I. 1824) (court must look to “the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes”). The Supreme Court applied the best interests test in 1906. See New York Foundling Hosp. v. Gatti, 203 U.S. 429, 439 (1906) (habeas corpus proceeding involving custody of child decided upon court’s view of “best interests” and “welfare” of child).

Jurisdictions that applied the parental rights doctrine focused entirely on the “fitness” of the parent. Even if a child had been in third-party custody for years, courts in these jurisdictions tended to return the child to a “fit” parent, notwithstanding the disruption caused to the child. See Recent Development, supra, at 116. The “best interests” jurisdictions took a broader view, often permitting wide judicial discretion as to by whom and under what conditions the child would best be nurtured. That discretion allowed judges to award custody based on their social policy views about the parents’ sometimes controversial lifestyles. Wald, State Intervention on Behalf of “Neglected” Children, 28 STAN. L. REV. 623, 639–41 (1976) (coercive intervention often harmful to both children and parents).

Custody law in different jurisdictions (and even within the same jurisdictions) often careened back and forth between the two standards. BBIC’s goal was to define with more precision and predictability what the “best interests” of the child were, as an alternative to ad hoc judicial decrees. While rejecting absolute “parental rights,” BBIC retained a vigorous presumption in favor of current caretakers’ rights.

II. Parameters of Professional Conduct: Compartmentalization of Roles and Values

Published in 1986, *In the Best Interests of the Child* (IBIC) explores and instructs on the ways in which professional participants in child custody proceedings should conduct themselves, regardless of the substantive laws or rules which govern. The book emanates from clinical material gathered from the authors' own experiences and from their discussions of case reports. This reliance is, in my view, a healthy one. By contrast to the previous books in the trilogy, IBIC gleans patterns and even principles from accumulated experience and empirical data, rather than announcing first principles and then proving or applying them. In addition, the authors claim "not [to] reopen questions addressed in the earlier volumes." Their concern "is more with the practices of professional persons than with the substance of their recommendations or decisions."

The authors' advice to participants in the child placement process at first seems unexceptionable. Social workers, psychiatrists, lawyers, and judges alike should remain aware that they cannot individually or collectively replace an "ordinary devoted parent." They must engage in constant self-examination to distinguish between beliefs based on professional training and field experience (which are permissible) and beliefs based on personal values (which are not). The authors would have professionals coordinate with other experts in the process but refrain from exceeding their own competence or authority. And professionals must avoid the dangers of playing dual and potentially conflicting roles vis-à-vis the child or his parents. Judges must not try to be psychiatrists; placement agency personnel must not let their predictions about what the judge will do guide their actions; lawyers must not predict what will happen psychologically to the child under varying home scenarios. The book does indeed provide chilling examples of how a little knowledge of another's expertise can be a dangerous thing and can corrupt a professional's best use of her own expertise.

Yet, just as no child escapes his genes, throughout IBIC the reader is pulled back to the hard-line starting assumptions of the first two books: Each person in the process is a usurper of parental authority who must act conservatively, drawing only on well-established doctrine in her own

22. P. 11.
23. Id.
25. Ch. 2.
27. Ch. 5.
29. See, e.g., pp. 72–74.
30. See, e.g., pp. 31–34.
field, and not on instinct or personal experience outside that field (and particularly not on personal experience as a parent). Once family integrity is rent, it is rent for all time. When "the all-encompassing parental task" is broken up and temporarily divided among specialists from law, medicine, child development, child care, social work, education, and other professions, the sum of the parts can never equal the whole of a parent.\textsuperscript{32}

IBIC warns child placement professionals of the dangers attendant on letting personal values color opinions that ought to be based solely upon professional knowledge and experience.\textsuperscript{33} But boundaries between "facts" learned in years of experience with troubled families and "values" learned in years of living are, as the authors concede,\textsuperscript{34} hard to define. They do not explain how professionals can keep personal and professional values compartmentalized. In fact, the authors themselves mingle the two. They freely admit their own personal preferences for minimal state intervention into family life and for making the child's interests paramount in the placement process, values that are the heart and soul of their first two books.\textsuperscript{35} They also conclude that their professional training as child development specialists points them in the same direction as their personal preferences, towards the conclusion that children need continuity of care above all else.\textsuperscript{36} I wonder how many other placement participants similarly will find in their untidy disciplines the ideas and empirical data to bolster their own preferences. Especially when professional training and personal values reinforce one another, it is not easy to tell where one ends and the other begins. For instance, it is unclear whether it is personal preference or professional training that leads the authors to find that physical injury of a child is justifiable cause for state intervention but emotional injury is not.

The authors also caution participants in the child placement process not to exceed the limits of their professional training.\textsuperscript{37} There is no place, they say, for instinct, hunch, or life's seasoning in their jobs. While some professional leaders are prescribing a return to a view of the doctor or lawyer as holistic counselor, IBIC advocates a more fragmented view of the roles of the participants in the child placement process.

This principle may be sound, but the authors do not apply it consistently in all their illustrations. Paradoxically, the authors find it acceptable

\textsuperscript{32} Pp. 4-5.
\textsuperscript{33} See supra text accompanying note 25. The caution to professionals here is similar to the persistent cry for judicial restraint: Judges must in no way let their personal views of preferences intrude upon decisionmaking. This is impossible! The truth lies on the mid-ground. If the law is clear, then a judge's views cannot change it. If it is unclear, then the judge must balance equities, predictions, past precedent, and other things to arrive at a result (it is, after all, her job to make decisions); personal philosophy rarely can be kept entirely out of it.
\textsuperscript{34} Pp. 15-19.
\textsuperscript{35} See pp. 10-12.
\textsuperscript{36} Id.
\textsuperscript{37} Ch. 3.
for other parent substitutes in the child's world, such as teachers and day
care workers, to act as surrogate parents so long as the parent has con-
sented. But a child may not be able to distinguish between parentally ap-
proved and disapproved surrogates. According to their prescription, the
authors rightfully criticize the judge who told the child to come see him if
she had any problems in her new placement and then was unavailable
when she did. Why then do they applaud the young doctor who com-
forts a frightened child fighting anesthesia by drawing on the soothing
techniques of the doctor's own mother, something certainly not taught in
medical school?

The child from a torn family may need to rely on the kindness of stran-
gers. Lines between professional courtesy and parent-like solicitude are
not easy to draw, and in a pinch it may be better to err on the side of
parent-like generosity than to insist on professional restraint. Isn't it a
more important criterion for a professional to follow through on a com-
mitment to a child even if it means occasionally overstepping disciplinary
fences? Besides, implementing a minimalist philosophy for professionalism
may deprive children of honest affection felt by the professionals with
whom they have contact during the placement process.

Some of the authors' most valuable advice to professionals concerns
avoidance of conflicting roles in the placement process. IBIC wisely urges
that a therapist should not simultaneously try to treat a troubled family
and conduct an investigation of child care in that family; a child psychia-
trist treating a child should not advise the court with which parent he
should be placed; a therapist treating an abusive parent should not advise
the court about the dangers of returning the child to that parent. In my
view, however, two prominent participants in the placement process defy
compartmentalization: the child's lawyer and the juvenile court judge.

A. Child Advocate as Mini-judge or Amicus Curiae?

Although there is near unanimity that potential conflicts abound in the
lawyer's role in the child custody process, the authors are not daunted. In
IBIC they apply to the role of child advocate principles originally set out
in BBIC. The lawyer, they assert, should not merely respond to the child;
he should whenever possible take instructions from the child's parents.
Where the parents are themselves under scrutiny (as in neglect, abuse, or
custody cases), the lawyer should on his own decide what is in the best
interests of the child. Where the lawyer encounters particular difficulty
in assessing the psychological implications of the child's asserted desires or

40. See pp. 81-87.
41. See BBIC, supra note 4, at 65-67.
behavior, he should consult a child development specialist or psychologist. In essence, the advocate, despite his purportedly adversarial role, must become a mini-judge of the child's best interests.

One of the most important byproducts of the Supreme Court's groundbreaking decision in *In Re Gault* was to secure a child's right to a real lawyer dedicated to his interests, not merely access to a counselor to the court. More traditional schools of thought would tell a child's lawyer to "behave as a lawyer whose client simply happened to be a child." Admittedly, a traditional lawyer-client relationship with a five-year-old may not always make much sense; a very young child alone cannot entirely dictate the position of the lawyer. Thus there is some merit to the authors' suggestion of a more integrated, discretionary role for lawyers.

Some aspects of the recommendation, however, may need further thought. Indeed, on balance, it is unclear exactly what function IBIC would have the child's lawyer serve. For example, it seems that an amicus curiae appointed by the court could do just as well in performing the advisory duties that the authors recommend. More importantly, limiting the input of a child advocate to legal expertise may shortchange the child. With older children, the child's perceived desires should always be given primary consideration, and counsel should remain especially alert to potential conflicts between a young client's welfare and her parents' agenda. In short, IBIC downplays too much the child's input into his counsel's decision.

For instance, I believe the authors have fundamentally misread *Gault* to guarantee counsel to a child who has been threatened with incarcera-

42. See pp. 31-34, 51.
45. The legal issue of "children's rights" rose to prominence in the 1970's. Lawyers representing children litigated most of the important issues. See, e.g., *Youngberg v. Romeo*, 457 U.S. 307 (1982) (institutionalized child's right to receive decent care and enough training to curb violent behavior); *Bellotti v. Baird*, 443 U.S. 622 (1979) (adolescent girl's right to abortion without parental consent); *Parham v. J.R.*, 442 U.S. 584 (1979) (child's right not to be committed to mental institution without due process and representation); *Goss v. Lopez*, 419 U.S. 565 (1975) (child's right not to be suspended or expelled from school without due process); *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part) (child's right to go to school); *In re Winship*, 397 U.S. 358 (1970) (child's right to beyond a reasonable doubt standard in cases of law violations); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (child's right to peacefully protest on political issues in school); *In re Gault*, 387 U.S. 1 (1967) (child's right not to be committed to delinquency institution); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (handicapped child's right to receive publicly-funded education). Of course, in many of these cases, the interests of the parents and children were allied; examples are *Gault* and *Tinker*. In others, however, they clearly were not. See, e.g., *Yoder*, 406 U.S. at 241-46 (Douglas, J., dissenting in part) (religious views and educational goals of child may diverge from parents'); *Bellotti*, 443 U.S. at 647 (parents may obstruct child's right to abortion and access to court); *Parham*, 442 U.S. at 631-32 (Brennan, J., concurring in part) (commitment context signals disruption in family unit).
tion only if his parents request counsel. This is an interpretation of the case which, to my knowledge, no juvenile court in the country has followed. Nor can I find any support in the Constitution for the authors' contended right of a child "to be represented by his parents before the law." That formulation seems a case of a reasonable principle taken to an unreasonable extreme.

B. The Judge's Dilemma: No Place Else To Go

The judge's role is the most enigmatic piece in the IBIC scheme for keeping all professionals in their proper place. She remains the ultimate decisionmaker. Yet, under a strict application of the IBIC code, a judge, like the other players, must downplay her value preferences, parenting experience, and all bits of knowledge accumulated from other disciplines over the years. Thus, the IBIC formula leaves the judge as naked as the storybook emperor whose helpers prove incompetent at their jobs or desert her outright. As the authors themselves point out, sometimes there is no clear answer for the judge, no matter whose principles she uses, particularly in cases lacking explicit statutory directives or adequate expert witnesses.

The authors' desire to stamp out judicial discretion takes odd turns. The authors suggest that, if experts cannot, or should not, agree on the psychological parent, the judge may supervise a tiebreaker lottery. Is it so clear, though, that a child lottery is preferable to letting a judge use her own judgment based on cumulative knowledge from whatever sources? Of course, when even those experts happy to render an opinion on who is the psychological parent disagree, the judge must choose between them. Similarly she must be ready to puncture pretensions to expertise the experts do not possess. How does the judge pick between jousting experts except by evaluating their persuasiveness and demeanor, the validity of their observations, and the comparative weight of their credentials? And how can she evaluate these except by using her worldliness, extradisciplinary knowledge, and even personal experiences?

The call for a diminished role for judges in all three of the "Best Interests" books reflects a wider movement in this country to limit judicial

46. See BBIC II, supra note 4, at 128-29 (rejecting Gault as authority that "attorney could independently represent the child over the parents' objection").
47. Id. at 114; see also id. at 128-29.
48. The authors do, however, "expect these professional persons to reflect wisdom based on their experience not only as specialists but as human beings possessed of ordinary knowledge." Pp. 120-21.
49. In one case, the authors commend a child psychiatrist for refusing to give an expert opinion on who was the "psychological parent" in a case in which two young boys had grown up with their mother in a war-torn country, had been separated from her for almost eighteen months when she sent them to live with an American couple, and had apparently formed no "psychological parent" ties with their foster parents. The psychiatrist said only that the children needed permanency, but not with whom. The judge had to render a decision without help from the experts. See pp. 39-44.
50. P. 68 n.25.
discretion. Increasingly we hear calls—often strident—for judicial restraint and demands for heightened deference by the courts to other political agencies, and we see rigid grids drawn within which judges must mete out sentences for criminal offenders. Some cabining of judicial discretion may be justifiable, especially in the family court arena, where until recently very few such limits existed. But my own reaction to these books is that the authors’ urge to rein in judges’ inevitable discretion in child placement decisions has become a goal almost equal to that of the best interests of the child. Unfortunate examples of judges intruding too far into family life, and on occasion substituting their own values and judgments for those of parents do not prove that all judicial discretion should be wiped out, even if it were possible to do so.

The most internally contradictory aspect of IBIC’s treatment of judicial discretion is the authors’ belief that judges as well as legislatures should codify the trilogy’s rules of law and preference schemes for placement decisions. They appended to their second book a model statute and a model judicial decision. In IBIC they commended a judge for basing his decision on “Best Interests” principles. The authors used the case as an example of “the way in which expert knowledge—here about a child’s need for continuity—can gradually enter case law and in a limited way, as precedent, become a part of the professional equipment of judges and lawyers.” The authors are content that such “precedents” allow judges henceforth to invoke them as the centerpiece of decisionmaking. Thus, through the gradual adoption by legislatures and courts of preferences for primary caretaker and psychological parent in place of former gender or blood tie preferences, “the law may come to reflect explicitly in judicial precedent or in statute the ‘current’ state of knowledge from child development.”

Yet, advocating that judges be wary of making judgments on their own about the best interests of a particular child is inconsistent with encouraging them to be adventurous in remaking the fabric of the law itself by adopting the “Best Interests” books as the governing principle for deciding all child custody cases. By what professional standard or knowledge does a judge make so global a change in the law, affecting not one but all children?

The authors seem to say that if a prevailing statute is not in conformity with those principles, the judge need not abide by it. How does a judge avoid a statute he does not like? The authors suggest an interesting formulation: Would the application of the precedent or statutory provision in this case serve the purpose for which it was fashioned? This, however, is

52. P. 60.
53. P. 69.
hardly a prescription for judicial restraint or an answer to their call elsewhere for limits on judicial discretion. At the end of the day, the authors seek to curb individual judicial discretion in order to substitute universal judicial adoption of their tenets of child custody. It takes a Founding Father's confidence to impose a constitution-like framework on a field of law which, once ratified, thereafter drastically limits the power of all participants in the process.

III. A Fallible World

The authors surely have rendered a service to the various professions they treat by heightening our awareness of the errors to which members of those professions too easily fall prey. Those are errors this reviewer knows from courtroom experience. Experts from a variety of disciplines commonly rely on personal biases and casually attained knowledge, unconsciously overestimating their own role.

The authors' sound, sensible advice, however, must be evaluated against the backdrop of the principles enunciated in the first two books of the trilogy. The authors still understandably believe that adherence to the key tenets of the first two books will avoid many of the situations they describe in the third book, in which child care professionals and judges find themselves overreaching or conflicted. IBIC abounds in examples that show that even if good judges and mental health professionals keep to their limits, they make wrong decisions if the governing legal rules are wrong. If the rules are wrong, does it make a difference how straight you play?

That is not to say that even professionals who keep within their limits never err. Professionals are fallible and will not always act according to the standard of prudence that these books prescribe. Some will inflict injury to the child in the first round of contact between the child and the state. Thus it is disturbing that, as examples in IBIC illustrate, BBIC and BBIC II commandments on finality and absoluteness of initial decisions would prevent a court from setting some of those wrongs right the second time around. 54

54. Although the authors adhere in the main to their promise to make judgments on the professional wisdom of the participants in their case studies based on the principles enunciated in IBIC rather than on the principles of custody placement discussed in the other two books, inconsistencies between roles and rules confront the reader of the entire trilogy. One instance is the Rose case, prominently featured as an example of an eminent judge making a custody decision on the basis of his own psychological analysis of the parents. See pp. 21–28. Although a reader may readily agree with the authors' criticism of the judge's attempt at amateur psychiatry and its unfortunate aftereffects on the child, she must also take note of the fact that the judge corrected the custody decision four years later, based upon unanimous expert testimony that the child had not thrived in the meantime. Thus, even if the case was initially decided wrong, the error was eventually corrected. But the authors' insistence on finality in custody decrees laid out in BBIC and BBIC II would have prevented any reopening of the decree (in the absence of physical neglect or abuse), and presumably the child would have continued to suffer. What then is worse for the child, the first mistake of the judge stemming from his misguided psychiatry, or the failure to rectify that mistake due to the presumption that continuity of care must predominate over all else?
I am also concerned that the authors, and decisionmakers of all kinds, should recognize that strict adherence to conflict of interest concerns and an acute awareness of the limitation of one’s own expertise, however desirable, could require that an ever-expanding number of disciplines be drawn into the child placement process. As the number of professionals involved grows, the time required for thoughtful decisionmaking enlarges, and the expense to society increases. At the same time the number of child custody cases grows ever more ominous: In 1987, the Legal Aid Society expected to handle 17,000 cases of child abuse and neglect in New York City alone (a seventy-five percent increase over the previous year). Strictures on the part any given discipline can legitimately play in the placement process and awareness of the dangers of going beyond one’s own professional territory inevitably lead to decisionmaking that is more thorough but slower and more expensive. Is society willing to pay the price? Or will the principles the authors espouse apply only to those private custody cases where both sides have money enough to play by the rules?

These are important questions, because these are influential books. The “Best Interests” trilogy is a striking example of how quickly legal doctrine can change to accommodate new information and, more problematically, new theories from other disciplines. We have only to look at the sources cited or argued in Brown v. Board of Education or Roe v. Wade, the prime examples of judicial lawmaking in our century, to recognize the influence on the law of ideas from outside the law. Yet the law cannot

In another case study, the judge, bound by a statute preventing the court from restricting a parent’s visitation right unless doing so would endanger the child’s emotional health, nonetheless did exactly what the principles in BBIC and BBIC II call for: he reduced the visits at the request of the primary caretaker parent. But he did so against the testimony of an expert witness that the child’s emotional health would not be endangered. Although the authors are faithful to the principle that two wrongs do not make a right for purposes of the third book, the reader is given distinctly conflicting messages. If the recommendations of the first two volumes controlled in this case, the judge would have been absolutely correct in upholding the mother’s absolute authority to regulate the father’s visits. Though the third book tries conscientiously to separate means and ends, a reader of all three works comes away with the notion that they are an integrated whole and that IBIC is an orphan abandoned by its natural parents. For the difference in approach between IBIC and its predecessor volumes, see supra text accompanying notes 22-23.

57. 410 U.S. 113 (1973).
58. In Brown v. Board of Education the Supreme Court rejected the “separate but equal” doctrine. In so doing, the Court relied on social science and psychological studies indicating that segregated public education has a detrimental effect on black children. See 347 U.S. at 494-95 & n.11 (“Modern” psychological authority, among other sources, indicates that “[s]eparate educational facilities are inherently unequal”).

In Roe v. Wade, the Supreme Court adopted the much-criticized “trimester approach” in an effort to balance the competing interests of the state and the individual. In identifying three incrementally important state interests, the Court related each interest to one of three stages of fetal viability. The Court drew on the accepted medical practice and technology of the time for its understanding of fetal viability. See, e.g., 410 U.S. at 148-49. Critics of the trimester approach, among them Justice O’Connor, have called this approach “completely unworkable” because our knowledge of fetal viability varies with “accepted medical practice” at any given time. See Akron v. Akron Center For Repro-
careen back and forth in its most fundamental principles as new and attractive theories emerge on the scene. Some commentators have suggested that new theories be put to proof stringently before they are allowed to influence the development of judge-made law in more than minimal ways. The differing sides of new theories, runs this line of argument, ought to be formally argued out in court by the parties or, if the parties are not qualified, by distinguished amici. The judge should not change direction in the law merely by judicially noticing a new theory. This proposed reform may be overkill, but some reform is needed. Right now we have no tenets for instructing judges in picking and choosing among ideas in the exploding world of information.

How then does the judicial marketplace select winners and losers among theories? What part do media advertising, clever packaging, or friendly reviewers play in determining which ideas and theories win out? The proverbial war of expert witnesses has now escalated into a war of Thought leaders who may influence the rules of law by which all cases—not just the immediate ones before the courts—are decided.

The “Best Interests” trilogy is a prominent example of the persuasiveness of Thought leaders. The authors are skilled lawyers, psychiatrists, child development experts, and communicators. They frankly admit that many of their ideas are rooted in one branch of psychoanalytic theory and are value preferences. Yet, they advocate that judges and agency personnel, with only scant qualifications to make the decision, freely adopt their ideas over other theories.

VI. CONCLUSION

These three small books illustrate how important the issue of child placement is and how fast and far the power of ideas can change the law. They illustrate as well the folly of theories that judges—at any
level—simply declare and interpret existing law rather than guide it toward new frontiers. Our current leaders worry about "judicial lawmaking" at the highest levels, the Supreme Court and federal appellate courts. In truth, much more important law may be made by judges in "people's courts" at the state trial level. That process, too, deserves close attention.

the grounds they were not authorized to change existing law on the basis of a book. Still, "judges convinced of the validity of psychological parent theory not only read ambiguous statutory language in ways that facilitated application of the theory, but also blinded themselves to statutory language that seemed to inhibit its application." Id. at 1569.