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BOOK REVIEW

In the Interest of Children: Advocacy, Law Reform, and Public Policy By Robert H. Mnookin.* New York: W.H. Freeman and Company (1985). Pp. 572.

*Reviewed by William S. Geimer***

It is a pity that the primary and secondary titles of this book were not reversed. The work of Professor Mnookin and his collaborators is a magnificent resource for learning about advocacy, law reform, and public policy. Cases involving children are simply employed as appropriate vehicles for exploring and evaluating those larger subjects.¹ I fear the book as titled will be perceived as a "juvenile law," "family law," or "children's rights" book and its readership thereby diminished. I hope not. The book has much more to say about the strengths and weaknesses of litigation and those who conduct it. The five cases studied in the book are presented in a way that illustrates lawsuits as examples of unified human drama, rather than disjointed events conducted only by members of the legal profession. In addition to court opinions, the case studies are drawn from interviews with parties, witnesses, judges, attorneys, and representatives of the many interest groups and organizations involved in the cases. The presentation of a lawsuit and its players in this manner breathes life into the accounts and is alone worth the book's price.

* Professor of Law, Stanford University. Also contributing original studies to the book are Professors Robert A. Burt, Yale; David L. Chambers, Michigan; Michael S. Wald, Stanford; Stephen D. Sugarman, University of California; Franklin E. Zimring, University of California; and Rayman L. Solomon, Project Director, American Bar Foundation, Chicago.

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1. The heart of the book consists of studies of five cases by Professor Mnookin and his contributing authors. They are *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (contributed by Chambers and Wald) (an action asserting the right of foster parents to a hearing before removal of foster children from their custody); *Bellotti v. Baird*, 443 U.S. 622 (1979) (contributed by Mnookin) (an action dealing with the right of pregnant teenagers to secure abortions); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (contributed by Burt) (an action seeking to close a Pennsylvania institution for the mentally retarded); *Roe v. Norton*, 422 U.S. 391 (1975) (contributed by Sugarman) (an action concerning efforts to coerce welfare mothers to identify absent fathers); *Goss v. Lopez*, 419 U.S. 565 (1975) (contributed by Zimring and Solomon) (an action claiming the right of students to a hearing before suspension from school).

The work has shortcomings. It is too long and occasionally is redundant. One can understand that editors would be reluctant to modify copy from such a distinguished group of contributors. More about the flaws later. Permit me to illustrate further that this is much more than a children's law volume.

Mnookin traces public interest "test case" litigation to the historic *Brown v. Board of Education*² decision. That case is not usually thought of as a children's case. Indeed, it was a children's case for reasons only secondarily related to the best interest of children. Because it is a children's case, conceding its importance in the battle to dismantle segregation, it illustrates serious problems in choosing litigation as a tool to right wrongs inflicted on the powerless. Some of the problems in *Brown* recur in the five cases studied in the book. They include:

1. *The need for "good facts."* Though test case litigation seeks to affect a large and often disparate class, lawyers understandably seek advantage by trying to bring cases on behalf of individual clients whose personal episodes are likely to be viewed with sympathy by the court. In *Brown*, children provided a group of sympathetic plaintiffs. This was a principal reason for the decision to attack segregation in its educational lair rather than in employment, housing, or transportation.³

2. *The influence of other people's values.* Because the case was not driven primarily by a desire to help Linda Brown, the wishes of her parents, attorneys, and the NAACP, informed by *their* values, guided the conduct of the action.

Mnookin says: "How many children were unconsenting foot-soldiers sent off to war by judges and parents fighting to save this nation's soul? Subsequent generations owe them a great deal."⁴

3. *Paucity of Data.* *Brown's* famous footnote,⁵ and the concerns expressed about it as a basis for concluding that black children were suffering educationally,⁶ exemplified the approach followed in the five cases studied with respect to social science data—lack of concern for it, or reliance on the

2. *Brown v. Board of Education*, 347 U.S. 483 (1954).

3. R. MNOOKIN, IN *THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY* 8, 10 (1985).

4. *Id.* at 10.

5. *Brown v. Board of Education*, 347 U.S. at 494 n.11 (1954) (citing several works on the psychological impact on black children of separate but equal facilities).

6. Richard Kluger suggests not only that the social science data in footnote 11 played no part in the *Brown* decision, but also that the Justices may not have consulted the works. R. KLUGER, *SIMPLE JUSTICE* 705-07 (1976).

generalized shorthand contained in expert testimony.⁷

The difficulties suggested by these matters, in turn, suggest others common to *Brown* and the cases studied. One is that intraclass conflicts often are ignored, papered over, or addressed only by appointing separate advocates for subclass members.

The problem with the latter device is that the advocate for an absent subclass almost necessarily represents simply her own view of the interests of that group.⁸ Another problem is that a resolution satisfactory to the individual client is not essential to the continuation of the case, nor does it end it.⁹

In spite of the problems indicated by this incomplete list, Professor Mnookin and his contributors do not suggest abandoning test case litigation. The book merely seeks to raise questions and provoke thought. In that purpose, they succeed admirably. It is obvious that the author and his contributors consider this type of lawsuit a proper and valuable tool for addressing social problems in some contexts. Readers, however, should not judge the device solely on the basis of this book. *In the Interest of Children* is accurate and insightful. It does not claim to be comprehensive.

Anyone seriously interested in evaluating test case litigation on behalf of the relatively powerless should move directly from *In the Interest of Children* to a reading of *How Courts Govern America*.¹⁰ Written by West Virginia Supreme Court Justice William Neely, the latter work complements the former in two important respects. From the other side of the bench, Neely first provides an intelligent matrix for judging the appropriateness of judicial intervention. Brushing aside, as anyone should, the notion that courts are to be interpreters rather than makers of law, he provides guidelines for when courts rather than legislatures should make law. Although counseling restraint in the use of the constitutional trump card, Neely finds judicial action advisable in two circumstances: first, when the victim group has virtually no hope of redress and the political process is not discernibly in motion and, second, when the issue can be influenced by judicial action that neither involves day-to-day administration of the remedy nor unduly invades

7. See, e.g., R. MNOOKIN, *supra* note 3, at 100-08 (*Smith*, 431 U.S. 816 (1977)), 177-82 (*Bellotti v. Baird*, 428 U.S. 132 (1976)), 302-03 (*Pennhurst*, 451 U.S. 1 (1981)).

8. The most complete illustration of these problems is the *Smith v. OFFER* study. The attorney for a foster parent with "good facts" initially contended that she should also represent foster children in the suit. Eventually the court appointed another attorney to represent the interests of the foster children. The court-appointed attorney, however, had close ties with private and public foster care agencies. R. MNOOKIN, *supra* note 3, at 86-87, 91-92.

9. The state abandoned its attempts to relocate Mrs. Smith's foster children in *Smith v. OFFER* and Mary Moe got the abortion she sought in *Bellotti* long before the litigation ended.

10. R. NEELY, *HOW COURTS GOVERN AMERICA* (1981).

the legislative function of allocating funds.¹¹ Using these guidelines, the 1962 one-man, one-vote case of *Baker v. Carr*¹² merits a ten on Neely's one-to-ten scale. Rural legislators simply were not going to vote themselves out of jobs. Neely also applauds the criminal procedure decisions of the Warren Court. Accused persons were being treated badly and had no political influence. The mandate of the Court—comply or we free the prisoners—was simple and inexpensive. It ultimately resulted in better trained and educated state judges and law enforcement officers.¹³

In contrast, the landmark *Roe v. Wade*¹⁴ decision would rank near the bottom of Neely's scale. Before the decision, both sides of the abortion controversy were competently and vocally represented. The political process was in motion at the time the Supreme Court intervened. *In the Interest of Children's* treatment of the abortion consent case, *Bellotti v. Baird*,¹⁵ confirms this view of the context. *Bellotti* is itself an illustration of the need for continuous court involvement in the refinement and administration of *Roe v. Wade's* command.¹⁶ Recent events also seem to validate Neely's analysis. The persistent, frenzied attacks on *Roe v. Wade* and the vulnerability of its constitutional underpinning suggest that the pro-choice cause might have been better served by legislatively achieving three-fourths of what it sought than by winning everything judicially, only to face the possibility that it will quickly become nothing.

Applying Neely's formula to the cases analyzed in *In the Interest of Children* strongly suggests that litigation was the inappropriate choice in *Pennhurst State School and Hospital v. Halderman*,¹⁷ the effort to close an institution for the mentally retarded in Pennsylvania. The mentally retarded were not a powerless group. The Pennsylvania Association for Retarded Citizens (PARC) was an influential voice, and the state agencies themselves were far from hostile to the plaintiff class. The political process was indeed working. PARC could count tangible victories in the legislature.¹⁸ The litigation, though, gained some reduction in the population of the institution at

11. *Id.* at 13-22, 145-49.

12. 369 U.S. 186 (1962).

13. R. NEELY, *supra* note 10, at 152-60.

14. 410 U.S. 113 (1973).

15. 443 U.S. 622 (1979).

16. *Bellotti* was not nearly the last word on the issue of a parental or judicial consent requirement for juvenile abortions. See *H.L. v. Matheson*, 450 U.S. 398 (1981) (Utah statute requiring notification of parents is valid unless minor demonstrates that she is "mature"). The case also illustrates the confusion that can result when class certification matters do not receive proper attention at the initial stages of litigation. See *infra* note 25 and accompanying text.

17. 451 U.S. 1 (1981).

18. R. MNOOKIN, *supra* note 3, at 296.

the cost of destroying relations between state officials and advocates for the mentally retarded.

Another reason to read Neely's book along with Mnookin's is that Neely's provides a more complete description of what it is like to take a problem to the legislature rather than to the courts. As Mnookin concedes, the desirability of test cases is not to be judged in the abstract. Rather, the option is to be compared with the ease, expense, and efficacy of pursuing other remedies. Only in Professor Sugarman's account of the impact of congressional intervention on the issue of coercing welfare mothers to identify fathers does *In the Interest of Children* inform about legislative approaches to a problem being addressed by the courts. Neely provides much more insight into the nature and operation of a state legislature.¹⁹ It is fair for Mnookin to declare detailed examination of alternatives to test case litigation to be outside the scope of the book. The insight into the court option provided by the case studies is a valuable contribution in itself. But readers should not decide about the option before examining lobbying, administrative approaches, and community action alternatives. Prospective public interest litigators should not do so either.

Having said that the value of such litigation should be neither assumed nor discounted, there are further limitations on this device, which are dealt with well in the book and should be mentioned here. Obviously, the need to cast every grievance in constitutional terms is unfortunate. It further complicates the tasks of addressing the real wrong inflicted on a victim class and fashioning any useful remedy. The latter hindrance is particularly acute because constitutional law currently favors procedural rather than substantive remedies. In *Smith v. OFFER*, the remedy sought was a hearing before depriving foster parents of custody of foster children. "Some sort of hearing" was sought for accused student misbehavers in *Goss v. Lopez*.²⁰

The last decade or so has revealed the weakness in procedural remedies. As wrongdoing entities have become more sophisticated, they have learned to absorb rather than confront. Schools, hospitals, and welfare agencies now can dispense reams of procedural due process and then do exactly what they had in mind in the first place. Nobody sets the dogs on you anymore. They give you a parade permit and ignore you. The lesson is that procedure is a poor substitute for substantive clout. The procedural protection afforded

19. R. NEELY, *supra* note 10, at 23-78. An even more useful tool for comparison is in the works. I have seen the draft manuscript of "Giantkillers? The Role of the Public Interest Lobbyist," scheduled for publication in fall 1986, by Norton and Co. The author is Michael Pertschuk, Fellow at the Woodrow Wilson International Center for Scholars in Washington, D.C., and former Chairman of the Federal Trade Commission.

20. 419 U.S. 565 (1975).

minors seeking abortion in *Bellotti* disappears if the substantive right granted in *Roe v. Wade* is eliminated.

Advocates currently face another obstacle when child-family-state conflicts are presented to courts. The present Supreme Court may be even less willing to disturb the status quo than the legislatures. Professor Burt, author of the *Pennhurst* case study, demonstrated this in another work. Apparently irreconcilable cases are properly explained by showing that they are decided in favor of the litigant (sometimes parent, sometimes state, never child) wherein resides, in the court's view, orthodoxy—legitimately constituted authority. Both liberal and conservative judges suppress conflict in this kind of case to further that orthodoxy.²¹ This situation may or may not prove temporary, but it is another caution flag to be heeded before choosing test case litigation as the means to address these kinds of problems.

Finally, the flaws in *In the Interest of Children* are few and not serious. Like almost everyone, the authors give insufficient attention to the potential for developing ways to increase the voice of children themselves in the decisions affecting their lives. Many of the troubling aspects of these lawsuits would be minimized if they were more client-centered, client-directed enterprises. As a general proposition, if the law must be determined according to the values of either officialdom or the child advocates, I choose the latter. Nevertheless, my real preference would be the values of the child. Certainly, the severely retarded in *Pennhurst* and the infant children in *Smith v. OFFER* and *Roe v. Norton*²² could not speak for themselves. But what about the older children in *Smith v. OFFER*, *Norton*, and *Goss*? They had no direct voice either. Ironically, only in *Bellotti* and the abortion consent cases is law developing that provides an opportunity at least for the child to demonstrate that she should be the decision maker.²³ Elise Boulding writes persuasively for reversing the presumption that children are unable to know and espouse their own interests. She seeks individual determinations of that capacity, wherever practicable, rather than arbitrary age distinctions. She seeks to grant children rights of participation, rather than rights of protection. I think she is correct.²⁴

An assessment of test case litigation for children also might have included some discussion of how to make improvements within existing procedure. For a start, courts and litigants might be more thoughtful about the precise definition of classes to be certified, the need for subclasses, and the adequacy

21. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329.

22. 422 U.S. 391 (1975).

23. This is ironic because most would agree that the abortion decision is far more significant than other life decisions society routinely denies children the right to make.

24. E. BOULDING, *CHILDREN'S RIGHTS AND THE WHEEL OF LIFE* (1979).

of attorney representation for each. Presently, Federal Rule of Civil Procedure 23 provides an adequate tool for obtaining this goal. Yet the case studies reviewed reveal an almost casual certification of broadly defined classes.²⁵ Likewise, no radical innovation is required for courts and parties to make more intelligent use of social science data. The law's practice of looking to social science, declining in recent years, appears to be increasing once again. This sign is a hopeful one.²⁶ At the same time, the cases reviewed in *In the Interest of Children* typify the many that display a cavalier willingness to decide important social issues with little or no information about what is really happening or what might be the consequences of a particular decision.²⁷

The teacher's manual accompanying a text book often contains "if you must omit" advice. Were there such a manual for this book it might suggest reading *either* the sixty-four pages of introductory material preceding the first case study *or* the seventeen pages of final observations following them. If a case study is omitted, it should be *Goss v. Lopez*. The case is insignificant because institutions rarely resist on principle anymore when they have little or nothing to lose by making cosmetic changes. In fact, every major point made in the book may be found in close readings of the *Bellotti* and *Pennhurst* studies. Professor Sugarman's cogent comments on *Norton*, however, contain the best discussion of the deficiencies in process remedies, the need for social science data (there is a section entitled, in part, "dancing in the dark"), and the comparison of legislative and judicial solutions. Although I think legislatures perform even more poorly than courts and I prefer litigation to lobbying,²⁸ Professor Sugarman seems to view the choice as an undistinguished draw.

Reading *In the Interest of Children* is in the interest of anyone desiring an accurate and integrated picture of public interest advocacy. It certainly should be read by those who would be advocates for children, or any other relatively powerless group. Professor Mnookin and his contributors demonstrate, as they promise, that distinguishing the good guys from the bad guys

25. See, e.g., R. MNOOKIN, *supra* note 3, at 354-55 (because defendants did not oppose certification of class as "all persons who . . . have been or may become residents of Pennhurst," the judge held no certification hearing).

26. A recent work addresses the continuing judicial practice of ignoring or minimizing empirical data and provides lawyers a readable primer in social science method. See J. MONAHAN & L. WALKER, *SOCIAL SCIENCE IN LAW* (1984).

27. The most pronounced example was *Bellotti*. See R. MNOOKIN, *supra* note 3, at 250-56.

28. This preference is not grounded in empirical data. Rather, it likely results from my experiences with the legislative option—lobbying Congress on behalf of migrant farmworkers and trying to keep the North Carolina General Assembly from reinstating the death penalty.

often is not easy. Equally difficult is determining whether the courtroom is the place to try to sort them out.