

THE CHALLENGE OF CHILDREN'S RIGHTS ADVOCACY: PROBLEMS AND PROGRESS IN THE AREA OF CHILD ABUSE AND NEGLECT

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I. INTRODUCTION

Thanks to Dean Neil Cogan, to Associate Dean Scott Wylie, to the Center for Children's Rights, and to all others who had a part in honoring me by inviting me to give your John A. FitzRandolph Lecture.

As I told Neil when first invited, it is nice to be honored instead of attacked for my work in this area of children's rights. I *have* been attacked rather vigorously for many of the positions I take, accused, for example, of taking positions that are racist, classist, and totalitarian in their implications. I don't want to revel in being controversial – actually I'd rather that my positions were more generally popular. But I do think that it is important that those of us who see ourselves as promoting children's rights be prepared to be unpopular, and to take positions that are not politically correct. Children's rights are sometimes in actual conflict with the interests of other groups, such as

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parents, and they are often *seen* to be in such conflict. Also, even those who think their goal is to promote children's rights have deep differences as to how to pursue the goal. Honest debate about the issues is important to making progress.

But even if it may be important to be willing to be attacked, it is more pleasant to be honored, and I take particular pleasure in being honored by a school that has developed such an impressive Children's Rights Center with its extensive classroom courses, clinical offerings, and fellowship program. Speaking as a member of the Harvard Law School Faculty I can say that your CRC program is *enviously* impressive, as we have nothing to compare with it.

I chose to title this talk "The Challenge of Children's Rights" to convey something of an upbeat message about what is essentially an uphill battle. It is *uphill* because children are children, voteless and largely voiceless, and consequently relatively powerless. It is particularly uphill in the United States, with our tradition of individual autonomy which keeps the government largely out of the family, limiting its role in protecting children. There's a reason that the U.S. stands alone among nations in refusing to adopt the U.N. Convention on the Rights of the Child.¹

But my message is *upbeat* because I do think that progress is being made. This is a new message for me. I used to talk about how overwhelmingly our system of law and policy was oriented towards adult rather than children's rights. And then I began to talk a handful of years ago about how there were conflicting trends, and a real potential for change in a more child-friendly direction, but at the same time a potential for moving in the exact opposite direction. But today I feel newly optimistic that we are moving, slowly, inching along really, but still moving in the child-friendly policy direction.

The world is moving in this direction, and the U.S. cannot operate entirely without reference to the rest of the world. This movement is illustrated by, for example, the universal adoption of the U.N. Convention on the Rights of the Child – universal but for us – and by the robust protection of children's rights provided in the new Constitution adopted by the Republic of South Africa. Barbara

1. G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 167 U.N. Doc. A/44/49 (1989); see Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. Pa. J. Const. L. 1 (1999).

Woodhouse, a justly renowned proponent of children's rights, discusses in a recent article how that Constitution embodies many of the progressive rights movements of recent years, including the movement to establish rights for children, "the newest competitors for a place at the table of rights"² While the U.S. lags behind Constitutionally speaking, we are moving forward on some important law and policy fronts.

Today I want to talk about the area of child abuse and neglect, my focus in recent years. I want to talk about some of the challenging issues we need to take on, and assess the halting yet still real progress, that is being made.

II. PARENTAL AUTONOMY VS. THE STATE AS *PARENS PATRIAE*

My position has been that we need to change the balance that our society has traditionally drawn between parental autonomy and the State's role as *parens patriae* so that the State plays a more significant role both in supporting families, and in intervening in those families that fall into dysfunction to the degree that the children become victims of child abuse and neglect.³ We need to recognize that what is often called "Family Autonomy" is really parental autonomy and definitely not child autonomy. My position has been that the state needs to play this more active role at two distinct stages:

(1) *Early Intensive Intervention*: We need to do more up front to support all families so that they have a better chance to succeed. Here the most promising intervention I have identified is Intensive Home Visitation.

(2) *Late-stage Intervention*: We need to move more aggressively to protect children when families demonstrate that they are failing and children are subject to severe forms of abuse and neglect. We need to place a higher value on children's rights to grow up in a nurturing home, and move them on to foster and adoptive homes early enough to give them a fair chance at life.

The challenge involved in making progress on these issues has to do with the fact that parental autonomy has a central place in our

2. Woodhouse, *supra* n. 1, at 7.

3. See generally Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (1999) [hereinafter *Nobody's Children*].

traditional value system. This is the reason that the U.S. stands out as the only country that has failed to sign the Convention on the Rights of the Child, that we provide less in the way of supportive social services for families than European countries do, and that our federal constitution fails to impose on governmental entities the kind of direct responsibilities to protect children against child abuse and neglect that South Africa imposes on its government in the new constitution, and that many other countries impose on theirs. The challenge has to do with how to provide greater protection for children without going too far. We value parental autonomy for good reasons – we don't want to move toward the kind of totalitarian state that was the inspiration in part for our parental autonomy tradition.

I want to discuss four issues that fall within this general area and address the challenge they pose in finding the right balance between parental autonomy and the state's *parens patriae* role.

A. *EARLY INTENSIVE HOME VISITATION*

1. *The Issue*

Early home visitation programs have developed in recent years as a way of addressing the problems of fragile families, typically first-time mothers whose children are identified as being at risk of child abuse and neglect because of the mothers' low socio-economic status and other factors. Inspired by Europe, where home visitation for young mothers is often provided as part of universal health care, some of the American programs have developed a more intensive visitation model better suited to a high risk population, with mothers visited on a regular basis both during pregnancy and through the first couple of years of the child's infancy.

2. *My Position*

I see this intensive form of home visitation as enormously promising.⁴ David Olds has demonstrated, through his careful research methodology, that his model, which uses nurse practitioners as the home visitors, works to reduce child abuse and neglect and is cost effective, at least when targeted to relatively high risk populations. His

4. See *Nobody's Children*, *supra* n. 3, at 163-75.

cost effectiveness research shows that his home visitation program saves the government money over the short term by reducing repeat pregnancies and helping to move young mothers into employment and off welfare.⁵ This is an extremely conservative measure of cost effectiveness, since it does not even take into account the long term savings anticipated from reducing child abuse and neglect, and the enormous social costs associated with it. A comprehensive recent report on home visitation program research by an independent group of experts assembled by the U.S. Department of Health and Human Services constitutes a powerful endorsement of home visitation's success in reducing child abuse and neglect. The report concludes: "On the basis of *strong evidence of effectiveness*, the Task Force recommends early childhood home visitation for the prevention of child abuse and neglect." The Task Force's highest standard of effectiveness was met.⁶ The Task Force recommended home visitation for all at risk populations, including all disadvantaged and low-birthweight infants. It found that home visitation reduced the incidence of child abuse and neglect by about 40%, as compared with control populations, and concluded, as has David Olds, that the impact on child abuse and neglect was likely even greater because of the "surveillance" effect – the fact that the very presence of home visitors increases the likelihood that child abuse and neglect will be observed. The Task Force also endorsed Olds' cost effectiveness research and his conclusion that programs using nurse practitioners appeared to work better than those using paraprofessionals.⁷

3. *The Challenge*

The kind of intensive *and expensive* home visitation programs which have actually been shown to be effective are the kind of general

5. David Olds et al., *Update on Home Visiting for Pregnant Women and Parents of Young Children*, 30 *Current Problems in Pediatrics* 107-41 (2000).

6. Centers for Disease Control and Prevention, *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Early Childhood Home Visitation and Firearms Laws: Findings from the Task Force on Community Preventive Services*, *MMWR* 2003; 52 (No. RR-14): 1-9 (assessing all research on variety of early home visitation programs according to careful scientific standards).

7. The Task Force found that paraprofessional programs tend to show benefits only after two years. Olds concluded that only his Nurse home visitation programs and a very few other home visitation models have any demonstrated success. See Olds et al., *supra* n. 5.

family support that our country has traditionally been reluctant to finance. Our politicians are all too ready to focus on the immediate expense of family support and ignore the horrendous long-term costs of child abuse and neglect – the costs associated with foster care and with the lives of crime, substance abuse, domestic violence, and unemployment that all too many victims of child maltreatment will live.

Also, our current early home visitation model is not likely to reach the families that are most at risk for child abuse and neglect. The model is voluntary not mandatory, offering home visitation to parents but not forcing it upon them. This is no surprise since the model has been built within the political realities of our deference to parental autonomy. The problem is that the parents who are most likely to be maltreating their children are those least likely to be willing to open the door to the home visitor who might witness the substance abuse and the child abuse and neglect that will put the parents at risk for criminal prosecution and child protective service intervention. Even the most enthusiastic home visitation advocates admit that a high percentage of parents refuse to participate and that the hard core problem parents are likely to be in this group. Yet as best I know I am virtually alone in advocating for mandatory home visitation,⁸ which seems to me essential if we are to reach the hard core group.

4. *Halting Progress*

Intensive home visitation programs have expanded with remarkable speed. David Olds is engaged in an effort to take his program to scale, with a national office ready to prove to local government entities that they will save money by introducing such programs, and ready to provide the training to help those local entities get new programs started.

The HHS Report, together with David Olds' research, helps make the case that home visitation is cost effective, a case that even the yet-more-cost-conscious politicians of the day *should* be willing to listen to.

And I was interested to discover when I spoke this past fall to a non-profit organization in Texas which has been running a traditional voluntary type of home visitation program, that it was in the process of

8. See *Nobody's Children*, *supra* n. 3, at 170.

developing a new mandatory home visitation model in cooperation with the local Care & Protective Services agency, to try to reach the hard core high risk families that they realized they were not reaching with their voluntary home visitation model.

B. RACE

1. *The Issue*

Traditional child welfare policy has placed huge emphasis on racial heritage and on matching children with same-race parents in foster and adoptive placements. Then in 1994 Congress passed the Multiethnic Placement Act (MEPA I) and in 1996 strengthened that Act (MEPA II), providing that race could not be used as a factor in making placement decisions.⁹

2. *My Position*

I have spent much of the last two decades fighting to eliminate what I call racial barriers to placement.¹⁰ I think that it is wrong to treat children as “belonging” to any particular racial group. I think that same-race matching policies are harmful to children because they prevent children from getting the nurturing homes they need, given that there are disproportionate numbers of black children in need of foster and adoptive homes, and disproportionate numbers of white parents eager to provide such homes. I think that same-race matching policies are also harmful to the larger society because they teach that we should all stay in our predestined racial categories. I pressed hard to help get MEPA passed in the form that it exists today by virtue of the 1996

9. *Id.* at 129-33.

10. See e.g. *id.* at 23, 26, 129-40, 186-88, 192-93; Elizabeth Bartholet, Book Review of Rachel F. Moran's *Interracial Intimacy: The Regulation of Race and Romance*, 33 *J. Interdisciplinary History* 320 (2002); Elizabeth Bartholet, Reply, *Whose Children? A Response to Professor Guggenheim*, 113 *Harv. L. Rev.* 1999 (2000); Elizabeth Bartholet, *Family Bonds: Adoption, Infertility, and the New World of Child Production* 86-117 (1999); Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 *Yale L.J.* 2351 (1998); Elizabeth Bartholet, *What's Wrong With Adoption Law?*, 4 *The International Journal of Children's Rights* 263 (1996); Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 *Duke J. Gender L. & Policy* 99 (1995); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 *U. Pa. L. Rev.* 1163 (1991)[hereinafter *Where Do Black Children Belong?*].

amendments, prohibiting altogether the use of race by state child welfare agencies.

3. *The Challenge*

The politics here, and the related emotions, are intense. Many see transracial adoption as one of the ultimate forms of exploitation of the oppressed by the oppressors. They see transracial adoption as the modern-day equivalent of selling black children away from their mothers on the slave block. They argue that we should be focusing our energies on solving the problems of social injustice that result in black children being disproportionately removed from their parents. I think we have to confront these arguments head on. We need to acknowledge that historic and ongoing social injustice is at the root of the problem, and commit to addressing that injustice. But we also need to insist on recognition of two basic realities. *First*, child welfare findings of child abuse and neglect and related decisions removing children from their parents cannot be explained as the result simply of “mere poverty” or of current racism: poverty and race are associated with child abuse and neglect and child removal, but careful statistical studies show they are not the immediate explanatory factors – those factors are instead caretaker characteristics like substance abuse, mental illness, and domestic violence.¹¹ *Second*, relegating African-American children to the exclusive care of the African-American community is not a way to solve historic issues of injustice – keeping these kids in their birth families or in inadequate foster or institutional care is not going to help the larger black community, and it is not going to help the kids. Indeed research demonstrates that kids at risk for child abuse and neglect will do far better in foster care than in their birth homes, and better yet in adoption.¹² Research has long shown

11. See e.g. Richard P. Barth et al., *Child Welfare and Poverty: Using the National Survey of Child and Adolescent Well-Being to Explore Child Welfare Services Involvement Among Very Poor and Other Families* (unpublished manuscript, Joint Center for Poverty Research Conference, *Child Welfare Services Research and Its Policy Implications*, Mar. 20-21, 2003) (available from the author).

12. See generally *Nobody's Children*, *supra* n. 3, at 97, nn. 132-34; see also *id.* at 83 (3X death rate where children once removed for child abuse or neglect are reunited with parents, as vs. general population, and 1.5X death rate for children reunited as vs. foster care, citing Barth). A recent GAO Report confirms the very low rate of child abuse and neglect in foster care, 0.60% and 0.49%, respectively, in '99 and '00 (*Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for*

that transracial adoption has only a positive impact on black kids – there is no evidence that placing kids in other-race homes has any adverse impact, and there is tons of evidence that placing kids as early as possible in some home where they can be appropriately nurtured is key to their chances for success.¹³

4. *Halting Progress*

It *has* been halting. Child welfare traditionalists and the National Black Social Workers Association have joined forces in their adamant opposition to transracial adoption. And there has been no significant non-profit organization committed to challenging race-matching as an illicit form of discrimination. So, despite the fact that MEPA made unlawful the systematic race-matching practices of 50 states, its passage was greeted with deafening silence. The federal government showed little enthusiasm for enforcing this law even though MEPA II *mandates* imposition of severe financial penalties for any single violation of the Act.¹⁴ So for years I have talked about the fact that there had not been a single enforcement action under this extraordinarily powerful-on-paper law.

But law does make a difference, even though it sometimes takes time. MEPA redefines the meaning of race matching, changing what was seen as good social work practice to equate it with other forms of illegal race discrimination. This law also changes the risk assessment enterprise for typically risk-averse bureaucrats. Doing illegal things can get you into trouble, especially if those illegal things can trigger millions of dollars of financial penalties. I have noticed recently in my travels around the country speaking to child welfare groups that social work practice has begun to adjust to MEPA's demands.

Dramatic proof of the difference law makes came with my reading this last week of the very first MEPA enforcement action taken by the federal enforcement agency, the U.S. Department of Health and Human Services (HHS) and its Office for Civil Rights (OCR). Indeed it is this reading that inspired me to give the first speech I have ever given on child welfare issues which has *progress* as its theme. On Oct. 20, 2003, at the close of a four and one-half year investigation the

Children, but Long-Standing Barriers Remain, GAO June 2002) [hereinafter GAO Foster Care 02].

13. See *Where Do Black Children Belong?*, *supra* n. 10, at 1207-26.

14. See *Nobody's Children*, *supra* n. 3, at 26, 133-40, 192-93.

HHS's OCR issued a Letter of Finding to Hamilton County, Ohio, determining that the county violated both Title VI of the 1964 Civil Rights Law and MEPA.¹⁵ HHS followed up by imposing a \$1.8 million fine, as mandated by law.¹⁶ In its extensive opinion HHS makes many important points:

- It reaffirms the fact that MEPA II entirely eliminated the limited discretion to consider race that MEPA I had allowed. While this should be clear from the face of the law, transracial adoption opponents had tried to argue otherwise.
- It reaffirms the meaning of the MEPA guidelines the federal government had previously issued, making "strict scrutiny" the standard for assessing any consideration of race.
- It reaffirms the illegality of agencies subjecting prospective transracial adopters to special "racial sensitivity" screening or special demands for the production of a transracial parenting plan, and the related illegality of making demands on transracial adopters that they change churches or sell their houses and move into different neighborhoods deemed more appropriate by agency workers.
- It describes one poignant case after another in which it found MEPA flagrantly violated, cases that help illustrate the delay and denial of adoption opportunities and the related harm to children inherent in race matching policies. For example, Leah, an African-American child, came into the Hamilton county agency's care in March 1994 when she was two; she was born with Fetal Alcohol Syndrome and a form of dwarfism. A white couple, the Atkinsons, with successful experience parenting several children with special needs, including a foster child with dwarfism, expressed interest in adopting Leah early on, but for racial reasons was not considered. The agency insisted that other options be pursued, finally matching

15. Department of HHS (OCR) Letter of Finding, Docket No. 05997026 (available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>) (Oct. 20, 2003).

16. Department of HHS (ACF) Letter of Notification imposing \$1.8 million fine (available at <http://www.law.harvard.edu/faculty/bartholet/mepa.php>) (2003).

Leah with a same-race single parent who, some weeks later, when Leah had been in the agency's care for a full year, refused the placement saying that she had no interest in adopting a child with dwarfism. The HHS letter describes in painful detail 16 such cases, in which black children were denied homes with apparently very suitable permanent parents for no reason other than agency workers' concerns that the parents were of the wrong race, or had the wrong racial attitudes, or hadn't prepared an adequate transracial parenting plan, demonstrating that they had the right friends, went to the right church, had the right artwork on their walls, and lived in the right neighborhood.

Other recent progress has been made in the less dramatic but desperately important area of research. Transracial adoption critics have often claimed that knocking down barriers to transracial adoption would make no difference because whites are not interested in adopting the older kids with significant disabilities that populate foster care. Careful social science research done in recent years helps refute this claim. Rick Barth has been responsible for some of the most impressive research in the child welfare area, both on his own individual account, and as the director of important key research institutes first at U.C. Berkeley and more recently at the University of North Carolina. With colleagues, he recently conducted a study designed specifically to examine the issue of whether whites were willing to adopt older, disabled black and brown kids from foster care – an issue specifically avoided by other researchers for years, presumably for political reasons. The study's conclusion is a resounding yes, they are willing in very significant percentages.¹⁷

The study focused on those whites who ultimately actually adopted from private or public systems, on the theory that expressions of interest from this group would be more indicative of actual willingness to adopt than expressions of interest from a more general population. The study found that this population of white adopters expressed willingness to adopt black children from foster care at the rate of 64% (with 27.5% slightly willing, 16.3% fairly willing, and

17. Devon Brooks, Sigrid James & Richard P. Barth, *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, *Social Service Review* 575-602 (Dec. 2002).

20.5% extremely willing).¹⁸ The study found 44% willing to adopt black children from foster care who were 3-5 years old and born drug-exposed, and that 31.4% were willing to adopt black children from foster care who were 6-12 years old and born drug-exposed.¹⁹

C. FAMILY PRESERVATION

1. *The Issue*

The issue here is related to the race issue. We treat children as belonging not just to their racial group but also, and first and foremost, to their birth parents. Our child welfare policies place a high priority on family preservation even after serious child abuse and neglect has been identified. The Adoption and Safe Families Act (ASFA) passed by Congress in 1997 constitutes a major attempt to rebalance our society's priorities, placing a higher value on children's interests in safety and in moving on to permanent adoptive homes if their birth parents can not demonstrate within a reasonable period of time that they are capable of providing a nurturing home. ASFA is paralleled by numerous state and local policy initiatives placing a higher priority on children's interests when they seem in conflict with family preservation, such as expedited termination of parental rights (TPR) programs, and concurrent planning.

2. *My Position*

I have been an enthusiastic advocate for ASFA, for expedited TPR in egregious cases of child abuse and neglect, and for concurrent planning.²⁰ I think we need to place a higher priority on children's interests than we have traditionally, and be more skeptical than we have traditionally as to whether those interests are always served by keeping them in their birth families. We need to recognize that what children victimized by child abuse and neglect, like battered women,

18. *Id.* at 585, tbl. 3.

19. *Id.* at 590, tbl. 6. The study also reviews an earlier Chandra (99) study of whites who had once taken steps toward adoption, showing that 73% would accept a black child. *See also National Adoption Attitudes Survey, 2002 Report*, Dave Thomas Foundation & Adoption Inst. of Americans generally, most say willing to adopt older and other-race (75% would consider other race, with 40% very likely to consider and 37% somewhat likely).

20. *See generally Nobody's Children, supra* n. 3, at 176-204.

often need is liberation from their families, rather than family preservation.

3. *The Challenge*

Critics of ASFA and other adoption-friendly policies argue that they are an unfair attack upon poor families. They are right that we don't do enough to enable poor families to succeed. We need to do more up front to support these families through intensive home visitation and other supportive programs. But once serious child abuse and neglect has been identified, many of the families at issue have fallen into such serious dysfunction that family support services are not likely to help create families that will really work for children. Research, including the most recent research, demonstrates that even well-funded, model family preservation programs have not succeeded in transforming dangerous family environments into ones that are safe and nurturing.²¹

4. *Halting Progress*

The critics of ASFA and other adoption-friendly policies are, like the critics of transracial adoption, both numerous and powerful. And ASFA leaves much discretion to state and other decision-makers: it is designed to set a new policy direction, but unlike MEPA it mandates relatively little, and it contains many loopholes providing opportunities for those resistant to ASFA's spirit. The evidence to date indicates that some important ASFA provisions are having little impact. States are making liberal use of the exceptions to ASFA's requirement that parental rights be terminated for children held in foster care for 15 of the prior 22 months.²² States are generally not taking advantage of the opportunity ASFA provides to move children in egregious child abuse

21. See generally *id.* at 109. A recent federally mandated research report confirms an earlier generation of skeptical family preservation research. John R. Schuerman, *Learnings from Studies of Family Preservation Programs*, 2/22/03 (unpublished manuscript, presented to Joint Center for Poverty Research conference, *Child Welfare Services Research and Its Policy Implications*, Mar. 20-21, 2003) (available from the author) (no evidence that intensive family preservation programs reduce child removal or improve family functioning beyond very short term).

22. The GAO *Foster Care Report 02*, *supra* n. 12, at 26 ff, shows that in most states a majority of all cases are exempted from the 15-22 months provision, and often much more than a majority, primarily through use of the kinship and best interest of the child exceptions.

and neglect cases onto a fast track to adoption, bypassing any family preservation efforts.²³ And after ASFA, as before, roughly one-third of all foster care children reunited with their birth families will reenter foster care,²⁴ a statistic that speaks volumes about the harm we are doing to children in our efforts to keep them with their birth families.

Nonetheless, careful observers of ASFA see in their research evidence that this law, together with adoption-friendly state and local initiatives, is making a difference. There has been a dramatic increase in the number of adoptions from foster care. And many child welfare experts testify that ASFA has helped create a new pressure to expedite cases to permanency and to focus more on child safety.²⁵

D. PARENTAL SUBSTANCE ABUSE

1. *The Issue*

Anyone familiar with child abuse and neglect issues knows that parental substance abuse is an overwhelmingly important issue. The statistics say a lot here. Somewhere in the range of 70-90% of all parents identified as maltreating their kids are abusing illegal drugs or alcohol or both. The conflicting time clocks of parent and child are a major piece of the problem: *for parents* the road to rehabilitation for

23. The GAO *Foster Care Report 02*, *supra* n. 12, at 24-26, shows the following for 2000:

<i>States</i>	<i>Kids entering care</i>	<i>Kids fast-tracked</i>
MD	3928	36
MA	7381	25
VT	788	0
W. VA	2392	41

See also Richard P. Barth, Speech, *Five Years After: Can We Tell What Difference ASFA Has Made in Achieving Permanency?* (The National Center for Adoption Law & Policy, Capitol Univ. Law School, Oct. 18, 2003) (concluding that 15/22 provisions largely unimplemented, and that reasonable efforts bypass used in relatively few cases).

24. See GAO *Foster Care Report 02*, *supra* n. 12, at 20 (33% reenter foster care within three years); see also *Nobody's Children*, *supra* n. 3, at 97 (for pre-ASFA data).

25. See e.g. GAO *Foster Care Report 02*, *supra* n. 12; Speech, *Five Years After*, *supra* n. 23; Fred H. Wulczyn, *Leaving Foster Care: Old Myths and New Realities* (unpublished manuscript, Joint Center for Poverty Research conference, *Child Welfare Services Research and Its Policy Implications*, Mar. 20-21, 2003) (available from the author) (showing state law and policy together with ASFA changes produce throughout 1990s an increase in adoptions and a decrease in reunification rates).

most who get there is long and tortured, with many false starts and relapses, and many will never even get on that road, and many who do will never make it to the end; *for children*, parenting is something they need today and tomorrow, and if too many months go by without adequate nurturing, irreparable damage can be done.²⁶

2. *My Position*

I think we need to go by the child's timeclock. We need to tell substance abusing parents that they have a limited period of time – a year at most – to demonstrate that they are complying with treatment protocols, they are clean of drugs, and they are able to parent. If they cannot meet this deadline the children should be freed for adoption. And I think that we need to test children at birth for evidence that they have been born affected by their mother's substance abuse during pregnancy, so that we can intervene early to protect these children and insist that their parents get into treatment.²⁷

3. *The Challenge*

Critics argue that such policies will unfairly penalize parents who themselves are victims. They are right in worrying that many many parents would lose their children under any regime guided by the child's timeclock, since relatively few succeed in making such serious progress in drug rehabilitation within a year. But if we go by the abusing parent's timeclock we write off a generation of children, locking them into childhoods spent in foster care, and dooming too many of them to the lives of homelessness, crime, domestic violence, unemployment, and, of course, substance abuse, that overwhelming numbers of foster children go on to lead. Testing children at birth, and faulting mothers for substance abuse during pregnancy, triggers outrage by many committed to reproductive freedom, and many who worry that these policies will adversely impact the poor and racial minority groups. But if we don't intervene at birth we send fragile, drug-affected infants home with drug-abusing parents, a prescription for disaster.

26. *See Nobody's Children*, *supra* n. 3, at 67-81.

27. *See id.* at 207-32.

4. *Halting Progress*

In recent years many jurisdictions in this country have moved to adopt the kind of policies that I am advocating. Family drug courts are an increasing phenomenon, with rules that keep parents on a tight rehabilitation deadline, conditioning their parental rights on proof that they are staying drug-free. And drug testing at birth is increasing, with positive drug tests triggering CPS intervention for purposes at least of assessing the need for supervision of the family or removal of the child.

The most dramatic recent development is Congress's passage of the Keeping Children and Families Safe Act of 2003, which amends CAPTA (the Child Abuse Prevention and Treatment Act) to require states to implement policies and procedures to ensure that health care providers report infants identified as being affected by prenatal drug exposure to child protective services.²⁸

III. CONCLUSION

Progress is possible and it is happening. But we cannot afford to be complacent. The child welfare establishment is still significantly committed to parental autonomy, and is still all-too-ready to equate children's interests with those of their parents and their racial groups. Continued progress will depend on the energy and commitment of people like you.

28. See *Keeping Children and Families Safe Act*, Pub. L. No. 108-36, 117 Stat. 800 (2003).