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## Are We Protecting the Wrong Rights?

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## NOTICE

### Are We Protecting the Wrong Rights?

*Jennifer L. Saulino\**

NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE. By *Elizabeth Bartholet*. Boston: Beacon Press. 1999. Pp. 304. Cloth, \$28.50; paper, \$17.50.

Sabrina Green was found dead on November 8, 1997, at the age of nine years old. She was dead from untreated burns, gangrene and blows to her head which had fractured her skull. Her body was covered with sores, and the gangrene had spread through her right arm and hand, which was missing a thumb. In her final weeks of life she had been tied at night by the arms and legs to her bed to prevent her from stealing food, according to the half-sister who had been made her guardian . . . [p. 92]

As horrific as Sabrina's death sounds, her life was even worse. Sabrina was born to a cocaine-abusing mother who abandoned her at birth. When her mother was found two months later, Sabrina was sent home to her. Her mother continued abusing cocaine and died three years later (p. 93). For the next five years Sabrina lived with a family friend. When the friend died, Sabrina's half-sister petitioned the court to become her guardian (p. 93). But Sabrina's sister had ten children of her own and had already been investigated for failing to care adequately for them. The family court judge nevertheless approved the guardianship, because he only had limited information presented to him by the state agency. "Family members, neighbors, acquaintances, and school officials all realized later that Sabrina was in trouble. But no one intervened to prevent Sabrina's torture and death" (p. 93).

Elizabeth Bartholet,<sup>1</sup> in her book *Nobody's Children*, takes a strong step toward beginning a new kind of dialogue about abused and neglected children. She positions herself as a liberal who has come to terms with the fact that traditional liberal ideals are in conflict with the needs of abused and neglected children (p. 5). In doing so, she tries to convince her readers that, regardless of ideology, we all should have a

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\* The author would like to thank Professor Don Duquette for invaluable comments and encouragement and the child clients of the Michigan Child Advocacy Clinic for showing me why this particular windmill is worth tilting at.

1. Professor of Law, Harvard Law School.

different focus in the area of child abuse and neglect law.<sup>2</sup> She uses Sabrina as one of several examples of how programs for abused and neglected children that focus on keeping families and communities together, while well-intentioned, sometimes sacrifice the child. Bartholet's book, in that sense, is groundbreaking.<sup>3</sup>

Bartholet's argument begins with the history and politics of child protection programs and presumptions in favor of parents. It moves to outlining the modern day problems and the impact of substance abuse on children. She continues by demonstrating the pervasiveness of the philosophies that drove the old programs. Her analysis and examples show that the shortcomings of old programs are also present in programs purportedly designed to reinvigorate the system. She criticizes what she calls the family preservation bias and uses examples and statistics to show that the bias is unwarranted and probably detrimental. Through this format, Bartholet challenges traditional ideologies by demonstrating that they have not worked. She then takes the bold step of introducing theories most are afraid to verbalize — like the idea that interracial adoption should be widely utilized and that the legal system should aggressively separate children from drug-abusing biological parents. But she could have gone further.

All of Bartholet's arguments and evidence support the thesis that children have a *constitutional right* to be raised in a nurturing and loving environment — an environment that is in their best interests. This right would be a fully formed right equal to that of the parent to control the child's upbringing and guide her education. Thus, the law in this area should be focused on the conflict of rights and not, as it currently is, on the propriety of state interference on the parental right. Bartholet does not make that argument. She hints at it, and supports it, but does not defend it. She articulates her ultimate conclusion in the book as a need for a change in attitude and presents solutions such as more aggressive adoption and more state responsibility. Bartholet's book may seem radical, but her arguments do not take the debate in a new direction. They ultimately fall into the same child

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2. P.5. In discussing the case of Sabrina, Bartholet demonstrates the true conflicts of ideology faced by child advocates: "There has been an even greater reluctance to voice concerns about the potentially corrupting influence of [money given to foster parents] in this context than in the non-kin foster context. One risks being considered not simply antipoor, but antifamily as well, and hostile to the black family in particular, since kinship care providers are disproportionately African-American." P. 92.

3. See Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1717 (2000) (book review) ("*Nobody's Children* is an unprecedented and extremely radical critique of child welfare practice. The book takes issue with the first principle of child welfare — that children should, whenever possible, remain with their biological families.").

abuse mold that is focused on arguing about the successes or failures of programs and policies.<sup>4</sup>

This Notice advocates the redefinition of child law for which Bartholet lays the groundwork but ultimately never advocates herself. Part I presents the highlights of Bartholet's argument. Part II suggests that a thesis based on an articulation of child rights could provide the anchor that Bartholet's current proposals lack and points out weaknesses to both approaches. Part III demonstrates how a children's rights approach could provide a better platform for discussion of many problems facing this country's children. This Notice concludes that a constitutional rights approach to child law would provide sturdier support to Bartholet's policy proposals, and perhaps revitalize the entire field.

### I. BARTHOLET'S ARGUMENT

Beginning early in the book with her historical overview and continuing throughout, Bartholet criticizes the "family preservation" mindset that has permeated child protection law for the last few decades. She argues that the "entire child-protection system was shaped by the family preservation priority" (p. 39). Enforcement of child-protection laws was left, in the first instance, to child protection workers charged with keeping families together. The basis in legal history for the assumption that children are property of their parents is long held.<sup>5</sup> The family preservation movement came about because several writers in the 1970s and 1980s challenged the foster care system of that time by arguing that, while harm might come from emotional abuse or

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4. Compare Guggenheim, *supra* note 3, at 1733 (arguing that Bartholet's statistics are faulty based on one other researcher's studies and claiming that, "[t]o the extent that she believes children at serious risk of harm are left at home because of a widespread bias against removing them, she provides little evidence to support this claim"), with Elizabeth Bartholet, *Reply: Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999, 2002 (2000) ("Not only does Guggenheim ignore [the point that family preservation studies do not examine the children after families are 'preserved'], but his review exemplifies the problem I try to illuminate, as he too makes claims for the proven 'success' of family preservation programs in terms of their ability to prevent child removal."). The two authors resort to arguments over statistics rather than over the question of how actually to achieve some help for the children they both would protect. See Guggenheim, *supra* note 3, at 1750 ("Professor Bartholet and I may differ on exactly how the sentiments . . . ought to be manifested, [but] we are in full accord on the importance of recognizing the risks inherent 'in continuing to abdicate any community responsibility for our nation's children — in continuing to see the children suffering abuse and neglect as not belonging to all of us.") (quoting Bartholet, *supra*, at 243).

5. See, e.g., Guggenheim, *supra* note 3, at 1743 (citing numerous cases):

[T]he rights of Americans to choose their marital partner, to procreate, to keep custody of children, and to control the details of raising them are not accidentally or carelessly selected freedoms. . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected.

severe neglect, “more harm would come to children in the end from incursions on family autonomy” (p. 39). In attacking the family preservation mindset, she emphasizes the need for reconceptualization of theory and attitude.<sup>6</sup> She argues that we should focus on the state obligation to protect children from abusive parents, not individual social agendas having nothing to do with children. We can do that by recognizing that “parents who treat their children badly are themselves victims, and if we want to stop the vicious cycle, we need to create a society in which there is no miserable underclass, living in conditions which breed crime, violence, substance abuse, and child maltreatment” (p. 6).

Bartholet moves on to criticize “politics” for the staying power of the family preservation ideology. She criticizes the left because they use the removal of children from their homes as a proxy for racial or class injustice (p. 45). She criticizes the right because they do not want the government interfering in their own parenting rights (p. 45). She then makes a connection that few would notice: the politics of the left and the right combine with the recent movement to reduce welfare spending. The combination sends a stream of money to the poverty-stricken through the children. Thus, family preservation policies also provide a means of funding where welfare fails. Families that take more children get more money. Yvette Green, Sabrina’s half-sister, took in Sabrina saying, “that she wanted to keep her family together and that she would need the additional welfare and medical benefits that would come with legal custody.”<sup>7</sup>

Abused and neglected children are disproportionately children of poorer parents.<sup>8</sup> Family preservation policies keep the search for foster parents first within the extended family (satisfying the right) and then in the immediate neighboring community (satisfying the left) (p. 47). Foster parents are paid a stipend. Bartholet demonstrates that as welfare funding has fallen in the last few years, arguments for *child*

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6. P. 122:

Nor has there yet been any fundamental change in the mindset of most of those who make and implement child welfare policy — the judges who interpret and apply laws, the social workers who make decisions whether or not to remove children, the bureaucrats who run federal and state child welfare agencies, the private foundation administrators who have provided essential funding for family preservation programs, the not-for-profit agency people involved in child welfare issues, and the lawyers who represent the parties in court, including those assigned to represent children’s interest. These people have enormous power to determine whether new laws and policies intended to change the system actually have any significant impact.

7. P. 93 (quoting Joe Sexton & Rachel L. Swarns, *A Slide into Peril, with No One to Catch Her*, N.Y. TIMES, Nov. 15, 1997, at A17); see also *supra* note 2.

8. P. 234. Bartholet disputes those who argue that the data is skewed and that child protection agencies simply do not focus on more wealthy parents. She presents other data showing these children really are more at risk. She also points out the risk factors for becoming an abusive parent are more often found in poorer, younger, single parents.

welfare programs have gained support. Her worry is that these funds are really just going through the back door to replace the money the government took out the front, and they are not providing more support for children. Bartholet thus realizes that an increased focus on child welfare may not mean increased resources for the actual children.<sup>9</sup> Yet, her conclusion to the chapter weakly suggests that liberals need to worry about children as much as the exploited groups they worry child protection policies harm, and that conservatives should see the cost-effectiveness of early intervention (p. 55). Here she demonstrates a recurring penchant for suggesting through her evidence that she is heading toward a more fundamental change in thinking but failing to follow through.

Bartholet demonstrates that recent attempts at creating new programs still promote traditional ideals (Chapter Six). She uses as an example the Family Group Decision Making ("FGDM") model (p. 142). This new program directs child care workers to facilitate a family meeting of the extended family of the maltreated child and devise a plan for resolution. She notes that, as with old programs, a big part of the problem is measuring success: "Claims for the success of FGDM have been based almost entirely on demonstrations that state authorities have deferred to the plans developed by adult family members, and that those plans have reduced the number of foster and institutional placements . . ." (p. 144). Like the old programs, the new program measures success by how many children get returned to their families, not by how those children are doing. In fact, as Bartholet points out, in a program such as FGDM, children are likely to go "*unrepresented* in the . . . process" (p. 145).

One of the great strengths of Bartholet's argument is its identification of problems others have not noticed. Many argue that there are not enough adoptive parents to go around. She combats that argument with the recognition that the states are at fault for not looking harder for adoptive parents (p. 181-83). States create so many hurdles against adoption that middle and upper class couples are willing to pay more to go overseas to adopt babies just to avoid the red tape (p. 182). Further, she recognizes that in today's world, the need for parenting does not stop at age eighteen (p. 29). A system designed to turn these children out at eighteen without emotional and monetary support is truly naïve. Even the sitcoms joke that children are returning to "the nest" in great numbers these days.<sup>10</sup> Higher education takes longer and jobs

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9. "No studies have attempted to assess the risks for children posed by a system that pays people to provide parenting, recruiting for the job from among those in dire need, and largely excluding from consideration those who can afford to parent children in need without significant state support." P. 88.

10. See, e.g., *Empty Nest* NBC 1988-1995 (a story about a widower doctor whose two grown daughters take up residence in his house).

with real longevity are harder to find without upper-level degrees or refined skills. Without aggressive adoption leading to parents who will care for these children even as adults, we set the system up for failure. These kinds of problems will be present in any system. By acknowledging them, Bartholet demonstrates herself capable of taking the difficult positions.

## II. AN ALTERNATIVE TO BARTHOLET'S ARGUMENT

Bartholet has the opportunity in the book *Nobody's Children* to articulate the rights of children at the constitutional level. Yet, while her book provides ample support for such an argument, it fails to take the last step and actually make it. In the realm of criminal law, sometimes distance from the criminals and their crimes allows appellate courts a more objective view of the actual rights involved.<sup>11</sup> The opposite may be true in the realm of child abuse and neglect law. Without really looking at the kids involved — without really looking at what happens to them — it may be impossible for lawyers, judges, and law professors to understand the rights involved. Criminals gain rights from distance that they might not have without the appellate process. Children lose them — or, more appropriately, never got them in the first place.<sup>12</sup>

This Part first demonstrates how Bartholet's own arguments support the children's rights approach. This Part then follows with an explanation of why shifting the focus to an argument about rights is a better step to take. It finally points out the major shortcomings suffered by Bartholet's approach, acknowledging that these shortcomings may be insurmountable by any reform proposal.

### A. A Constitutional Rights Analysis — What Bartholet Could Have Said

In the process of making her explicit argument for more active and earlier state intervention, Bartholet repeatedly makes a case for the recognition of fundamental constitutional rights for children. Sometimes she even expressly notes the concept. Yet at every step she concludes her sections and chapters weakly and suggests that states should do more. This Section demonstrates the stronger conclusion

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11. See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977) (showing that even when the defendant's self-incrimination in a horrific murder of a child was accepted by state courts, federal appellate courts focused on the criminal procedure principle in finding coercion by the police).

12. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) ("Even when blood relationships are strained, *parents* retain a vital interest in preventing the irretrievable destruction of *their* family life. . . . When the State moves to destroy weakened family bonds, it must provide *the parents* with fundamentally fair procedures.") (emphasis added).

that Bartholet could have reached and argues why she should have gone that far.

Bartholet highlights the story of Joshua DeShaney, a four-year-old boy beaten to the point of severe brain damage by his father when social services should have known him to be in danger.<sup>13</sup> The Court held that culpability for Joshua's harm lay solely with his father, and not the state. In fact, the Court noted that if the state had removed Joshua, it might have been unconstitutionally intruding into the parent-child relationship.<sup>14</sup> Bartholet notes that even Justice Blackmun's impassioned dissent assumed the baseline that a state's ability to act would be subordinated to the ultimate parental right.<sup>15</sup> Bartholet criticizes this viewpoint because it fails to hold the state responsible for protecting children from their parents. She says this "shows the family autonomy model at work" (p. 36), implying that the Court's mistake was the presumption that family autonomy is the baseline. But, while she admonishes the state for denying direct responsibility for its children, she gives no real roadmap for achieving that goal. She is essentially arguing here that the Supreme Court is just wrong.

Yet here, in the first pillar of her argument that the state should take more and earlier responsibility for its children, she also provides the support for a riskier argument. What if we were to pit the rights of Joshua to be loved and nurtured against the rights of his father to parent him? Bartholet argues for more state responsibility, but has no claim of right to force the necessary policies. If the courts recognized the child's constitutional right to be free from harm by his parents, or to be loved and nurtured by his parents, then the state responsibility that Bartholet advocates would not be a political question, but a constitutional one. The policy arguments would then be focused on how to fulfill that responsibility and not as they are now on whether the state has the right or responsibility to intervene at all. The argument made by the Court, that the state could be charged with violating a parent's right for removing a child, would lose force in the face of the balance with the child's right not to have an abusive parent. The problem with *DeShaney* was that the question was parent versus state, not parent versus child.

Bartholet says that the state should be liable for harm to such a child without resort to Justice Blackmun's argument that the state has

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13. This case reached the Supreme Court as a case by Joshua and his mother against the State. See *De Shaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

14. *Id.* at 203.

15. *Id.* at 212 (Blackmun, J., dissenting) (arguing for state responsibility based on the state's assumption of responsibility by intervening through the child protection program and thus giving others the impression that Joshua would be protected, but then not ultimately keeping him from harm's way).

a responsibility if the state first intervenes (p. 36). But she does not give the Court a way to get there. If the child has rights equal to parents, then it is the state's responsibility to protect that right — the state does not simply have some nebulous duty to intervene, but a real duty to protect the rights of this part of its citizenry.<sup>16</sup>

Bartholet could have based her argument on the premise that it is time to stop seeing children as property of their parents. Actually, she does mention it, but she buries it. In this chapter, Bartholet says of the Supreme Court: “the rights of biological parents are the starting point for analysis, and usually the ending point also: these rights are so powerful that children's rights, or the rights of competing ‘social parents,’ don't count at all unless the biological parents are first demonstrated to be unfit” (p. 40).

Rather than bury this statement as an observation within a chapter discussing history and politics, Bartholet could have written a book centered on the conclusions this book buries. She could have used the same evidence to support the bolder thesis that it is time for a change in viewpoint and argued that what is needed is an exploration of the contours of the rights involved. The child's right might be a positive right to be nurtured and loved, allowing for positive development toward adulthood. Alternatively, it may be a negative right not to be stunted in development by abuse or neglect. But that dialogue, should it occur, will be long and contentious. So, right now, it would be impossible to articulate definite contours or boundaries to the child's rights.

While criticizing the United States Supreme Court for upholding the family preservation bias, Bartholet points to *Santosky v. Kramer*,<sup>17</sup> which mandates a higher burden of proof before a state may terminate parental rights. Here, she comes very close to making the argument advocated in this Notice. She actually says, “[n]ot surprisingly, in light of *DeShaney* and *Santosky*, the Court has failed to accord children any constitutionally protected rights to be properly parented . . .” (p. 40). But she concludes the chapter, and indeed the rest of the book, without ever making this failure of the Court to recognize children's constitutional rights her central theme. She does not argue, as she could, that children would gain power with rights — if not through the political process, then through courts.

In Chapter Five, Bartholet discusses traditional programs, beginning, again, with the concept of family preservation. Again, she notes

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16. Interestingly, children placed in state-regulated foster homes may in fact have a substantive due process right to personal safety there. See *Meador v. Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990).

17. 455 U.S. 745 (1982) (holding that before a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the state support its allegations by at least clear and convincing evidence).

the dichotomy between parents' and children's rights: "Federal constitutional law requires that states prove maltreatment by 'clear and convincing evidence' . . . . Federal constitutional law gives adults fundamental rights to parent their children, while giving children no rights to *be parented* in a nurturing way" (p. 113). In this chapter, she outlines existing programs and the difficulty in changing them because of the family preservation mindset. Here she also criticizes race matching as a method of community preservation. Yet, again, she concludes weakly without actually providing arguments that children *should* have rights.

Bartholet devotes Chapter Six to arguing that new programs suffer the same problems as the old because they follow the same traditional ideas — providing herself the ideal opening to argue for a complete change in viewpoint. She concludes the chapter with a few weak and general sentences about her views on what child protective services should be doing,<sup>18</sup> but not before emphasizing that, "when children have been subjected to severe forms of abuse and neglect, the state should not abdicate *its* responsibility" (p. 146). Bartholet presses for more active involvement by the state at every turn, but she has room in her argument for the question of *why* the state has the responsibility. Asking *whose right* is in question is a potentially more far reaching step than the basic articulation that the state has to do more. Her manner of describing FGDM suggests that she believes the lack of children's rights to be the major problem with this new proposal,<sup>19</sup> yet she does not come out and advocate children's rights as the solution. She leaves unanchored her call for state responsibility.

#### B. *What Would Children's Rights Do That Bartholet's Solution Does Not?*

With the gaining of their own constitutional rights, children have the chance to be taken seriously by scholars of all walks of constitutional theory. Children do not benefit from the full scrutiny of legal academy. Their plight is seen as subordinate to the rights of their parents. Family rights are debated, parents' rights are debated, but children's rights are ignored (or just not conceptualized).

As a part of its clinical program, the University of Michigan Law School offers a course on child advocacy. On the first day of class, Professor Don Duquette says to participants, "I've worked in this field

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18. P. 159 ("[I]t seems likely that children would do better if adoption was established as the presumptive placement for all children who could not live with their parents of origin, leaving child welfare workers and the courts to choose another form of permanency only on the basis of an individualized determination that it would better serve a child's interests.").

19. P. 146 (criticizing FGDM because "it is about giving *parents* accused of maltreatment, together with other *adult* family members, even greater power than they now have over the fate of children").

a long time, and there are a lot of really good people with really soft hearts who work in this field, but what these kids really need is people with soft hearts and hard heads, and that's what I hope you will be for them." Part of the problem with this field is that many of the power-houses of legal thought and advocacy think it a separate and distinct area of law that is guided more by family policy than by legal theory. There is nothing intellectually challenging in the abstract, because there is no abstract conflict of rights.<sup>20</sup>

With the reconceptualization of children's rights might come arguments of equal protection,<sup>21</sup> substantive due process ("fundamental rights"),<sup>22</sup> and other such stimulating possibilities for legal scholars. Once the rights of children directly conflict with those of parents, the academy might take notice. Children's rights should be taken seriously by all scholars — in reality and in the abstract.<sup>23</sup>

Bartholet does not completely miss (or bury) the point. She describes children as "hostages" in the political fight over family support services (p. 195). She notes "children who are surviving but not thriving

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20. See, e.g., DONALD N. DUQUETTE, MICHIGAN CHILD WELFARE LAW: CHILD PROTECTION, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, prepared for Michigan Family Independence Agency, FIA Publication No. 374 (2000) (acknowledging as a precursor, the one-way flow of rights: "The state can intervene coercively in family life only after due process of law. Protective services has very limited authority to override parental wishes in conducting its investigation or suggesting services.").

21. Children would not qualify as a suspect class justifying strict scrutiny under the Fourteenth Amendment. But perhaps programs such as FGDM would not seem so automatically rational if the child's right to be raised to his full potential, or loved and nurtured was well established.

22. Parents have long been presumed by the court to have the "fundamental right" to control the education and upbringing of their children. "The liberty interest . . . of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 US 57, 65-66 (2000) (chronicling the history of the Court's decisions in the area of parents' rights to "establish a home and bring up children" and "to control the education of their own" and "the fundamental liberty interest of natural parents in the care, custody and management of their child") (citing numerous cases). Disputes over that right have taken the form of how far the state may encroach on that right — when a child is a child and how far the parent's right extends until it meets the public interest. The opposing interest in these cases is assumed to be the public interest, not the child's rights. If children had a fundamental right to be raised without maltreatment, however, then the state and the courts in upholding the constitution might have a duty beyond simply the public interest. See *Harris v. McRae*, 448 U.S. 297, 312 (1980) ("[Q]uite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.' ") (internal citation omitted).

23. Ironically, although Guggenheim's review and this Notice take polar opposite approaches to Bartholet's work, they do agree in similar fashion that her approach is too narrow. See Guggenheim, *supra* note 3, at 1738:

The abysmal conditions of poverty and despair into which millions of poor children are born and are not immutable facts of life. It is essential that we determine the extent to which these conditions are caused by factors for which we may hold the larger society accountable and, therefore, could improve or eliminate. Nobody's Children fails to consider the extent to which these conditions are a product of various social forces influencing American society and policy.

ing” (p. 204) and reminds the reader that any system based on crisis is no help for them. Bartholet uses these middle-ground children as her best support for “taking adoption seriously”<sup>24</sup> while taking a stand on adoption in the book that is in itself a radical proposal. She advocates early and aggressive efforts at getting children adopted, and not necessarily by other members of the family or community. Highlighting the reality that drug abuse is a disease that takes a long time from which to recover, she makes the controversial suggestion that such a long time frame may be too long for children to wait — even if the parents may eventually recover.<sup>25</sup> Finally, she notes that the society needs to get beyond conceptions of racism and classism when talking about issues of how to help these children (p. 209). Bartholet does, obviously, take some risks with her book, and she fleshes out issues previously unnoticed.

Yet all of these points necessitate a more radical reconceptualization of rights. Merely pushing for more child protection money or better programs will not address these problems. In order to overcome the presumptions already present in constitutional law, children’s rights would have to be recognized equally.

Because Bartholet does not take the riskier path, the solutions she offers fall somewhat flat. Over and over, she advocates universal home visits for mothers of infants (Chapter Seven). Although she mentions the political difficulty of this solution, she does not give it the import it will necessarily have. Even the casual political observer will recognize that Members of Congress are generally members of the upper-middle class. Getting them to vote for a measure that would send a visitor into their own homes means probably compromising to the point where the visitor would not be much help to a child in danger. Yet instituting visitors only for the lower socioeconomic groups demonstrates bald-faced discrimination even with the statistics to show those children more at risk. A reconceptualization of children’s rights, however, takes the focus off the intrusiveness into the parents’ realm and puts it on the rights of the children to have some outside assistance.

Bartholet also proposes universal screening and neonatal testing to identify prenatal exposure to illicit drugs or alcohol (p. 222). She envisions reporting and immediate involvement by child protective serv-

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24. Pp. 203-04 (“Taking adoption seriously means being willing to remove children even if physical safety is *not* at issue. It means being willing to take action *immediately* upon removal to terminate parental rights and place children in adoptive homes. . . . We may be moving in this direction, but so far we have taken only the most modest first steps.”).

25. Bartholet also challenges the studies showing that crack babies can grow up normally. She rightly takes a bigger picture approach and notes that the babies that are hardest to care for — malnourished, addicted, premature, low-birth weight — can grow up normally, but only with parenting above and beyond the average effort. Yet these children are sent to the homes of addicts (or even recovering addicts) — likely people who are not on the upper end of the curve in patience, determination, and attentiveness with their newborns. P. 76.

ices. Then, drug-exposed infants might be removed from their parents at birth and placed on a fast-track for adoption (p. 223). She argues forcefully for quicker adoption and more aggressive efforts to find adoptive parents (pp. 180-83). If she had taken the position that children have a right to this kind of supervision, she may have been able to move the debate in a different direction — give it a new focus. Thus, the intrusiveness on the parent's right would be balanced with the child's right to be raised safely and securely. The political difficulties still exist, but the debate takes a different tone — and maybe opens some minds.

Bartholet acknowledges the risks inherent in arguing as she does, and tries to temper the resistance:

It does seem harsh to take from people who are typically the victims not only of their drugs but of difficult, and often tragic, life circumstance, the children who may be their only joy and hope. But it is also harsh to condemn children to lives ravaged by their parents' substance abuse during pregnancy, by maltreatment during their early months at home, and by the years spent on hold waiting for their parents to overcome their problems." [p. 227]

She demonstrates, through statements like this one, that she is willing to fight back against those who would immediately criticize (with great legitimacy) any argument that parents' rights should be balanced with those of children.

Yet if she is willing to go so far, why not take the final step of advocating the equal *rights* of children? The entire way of looking at children's problems could gain multifaceted depth if it were moved from a strongly political issue of parents' rights, discrimination of underclass or minority parents, and details of programs, to a question of the application of children's rights, how they are balanced, and whether they are respected equally with the rights of their parents.<sup>26</sup>

### C. *Some Shortcomings of Both Approaches*

Bartholet's proposed solution in the book is also missing some important elements. She fails to address the problem of who makes the decision of what is best for the child of a failing family and how we prepare them to do so; she fails to deal with the political realities of radical reform; and she fails to deal adequately with the children in the middle — the ones already in the system who will not be affected by

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26. Bartholet does recognize that rights change attitudes:

Mandatory home visitation does seem like a radical step in today's world. But compulsory education laws and childhood labor laws were once seen as radical interventions in the family. So were the abuse and neglect laws that took from parents the right they previously had to physically brutalize and to sexually violate their children.

P. 171.

reforms that start at the prenatal. But the book is a start, and a much needed one at that.

The most important question in any aggressive child protection system will be, who makes the decisions? In both a system that pushes for more aggressive early intervention and adoption such as Bartholet proposes, and a system that takes a deeper approach based on the rights of children, someone will necessarily have to make the hard choices at the personal, individual level.

Currently, foster care and child protective workers enjoy a great deal of autonomy in making such choices, but family court judges oversee the process. In many states, attorneys are also involved as representatives of the children in some capacity.<sup>27</sup> Yet, in most cases, all of these parties lack the training, time, and resources to make really informed, quality judgements. Social workers are at least as underpaid as teachers, and the burnout rate is high.<sup>28</sup> And comparative judgements between parents and prospective caregivers are difficult, if not in some cases impossible, to make without biases entering the picture.<sup>29</sup>

In fact, as Bartholet recognizes, without addressing both problems at once, more money may not necessarily help the situation. "Increasing the pay of child welfare workers, decreasing their caseloads, increasing funds for child protective service investigative or family preservation services, and other popular 'reform' proposals, won't necessarily improve child welfare at all if the system is sending its workers instructions that are systematically biased in a problematic direction" (p. 99). The instructions that the system sends the workers are also not necessarily coherent, thus leaving them room for interpretation based on their own values. Again, because the current system is

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27. See, e.g., MICH. COMP. LAWS ANN. § 722.630 (WEST 2001); 2001 D.C. Stat. § 6-2101(4); 705 ILL. COMP. STAT. 405/2-17 (1999).

28. This Notice disagrees with Professor Guggenheim's criticism of Bartholet on this point. He discusses Bartholet's argument that "[t]he problem is that the state typically does not provide adequate and timely reunification services. Child welfare agencies are notoriously underfunded and overburdened. Appropriate services are often unavailable." Guggenheim, *supra* note 3, at 1722 (citing *Nobody's Children*, p. 195). He then observes, "[t]hese statements contradict Bartholet's earlier assumptions that society has tried everything possible to improve the conditions of poor children who become victims of a dysfunctional foster care system." *Id.* Guggenheim does not make room for the argument that the two are not necessarily internally contradictory. Bartholet practically recognizes that the infusion of resources that would be necessary to remedy the first observation actually leads to the second. There is no realistic probability that the political system could do it, so we have tried everything within our power.

29. Carolyn Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Custody Disputes*, 99 MICH. L. REV. 216, 227-35 (2000) (arguing that biases inherent in the consideration of wealth in determining which parent would be a better placement for a child militate exclusion of its consideration from the process, and thus suggesting that some biases may be impossible to separate from the individual decisionmaker necessitating elimination of the factor altogether).

predicated on the state versus the parents' rights, many people's value systems automatically move them to the side of the parents. The reconceptualization of rights suggested in this Notice might change the value balance. But qualitative judgments at the ground level will always be a difficulty of an area of law where the individuals injured are not able to speak for themselves.

Bartholet advocates a radical approach for children of drug abusers and children who have been severely maltreated from birth. But she also acknowledges the difficulty with defining neglect (p. 27) — a problem that becomes more acute either with Bartholet's call for more aggressive action or the children's rights alternative presented here. The definitional distinctions will have to be made with great care and the discretion given only to those who are well equipped to make such weighty calls. The egregious cases are easy under such scenarios; cases of neglect are not. The neglect determination brings the question of who makes the decision at the ground level into sharper relief. If children have a right to be raised in a nurturing environment, where do we draw the line? And what will be the impact of cultural differences? These questions have arisen in this context before — for instance, whether spanking is appropriate as a punishment or teaching tool or whether it constitutes abuse. But if the more aggressive state intervention Bartholet advocates comes to pass, or if the conception of children's rights changes as the stakes get higher, these fine distinctions will need to be thoroughly debated.

Neither Bartholet's solution nor a reconceptualization of rights overcomes another series of roadblocks: children cannot lobby; they do not make political contributions; and they do not vote. In Chapter Six, Bartholet recounts the broad support the Multiethnic Placement Act of 1994 ("MEPA") and MEPA II enjoyed in Congress (p. 129-33). This legislation forbids states from considering race as a factor in child placement. She even acknowledges the role that Senator Metzenbaum played in the legislation. She admires his interest in the topic and sees the Congress's interest as significant (pp. 130-31). But she does not seem to recognize that with a Senator as well-respected as Metzenbaum was, many of the other Members probably supported the bill because it was important to him, not because the topic had finally been acknowledged. Without such a supporter, how will the topic gain notoriety? This is a problem that children's issues have faced for years. Bartholet herself acknowledges it elsewhere in the book: "People talk of a children's rights movement. But the brutal truth is that children are economically and politically powerless. They are dependent on adults, and adult political groups have generally not taken up their cause" (p. 50).

Finally, the children caught in the middle deserve a great deal of attention once any framework for discourse over children's rights is established. Even with perfect new programs that begin during preg-

nancy and catch falling children just as they begin to fall, there will always be children who entered the world, or the system, before the new program was established. No conscious advocate would be willing to write off these children, but they are, in many cases, the hardest with which to deal. Bartholet does not propose any real solutions to the children who are already too old for adoption, or who have been so damaged by continued efforts at reunification that parenting would take extraordinary effort.

### III. THE BROADER IMPLICATIONS OF A CHILD RIGHTS FOCUS

Lack of interest, political drive, and intellectual curiosity are not unique to child abuse and neglect law. They are pervasive in all types of law dealing with children. In education law, for instance, one member of Congress, himself a former teacher, repeatedly reminds us in speeches about education and school choice proposals that "what we are proposing is a widespread experiment in the lives of real children."<sup>30</sup> His statement is always true when legislators, politicians, and judges divorce themselves from the reality that their decisions will impact the children already in the system as much or more than the children they are attempting to help by reforming prospectively. Again, distance does a disservice to children. Recognizing the rights of children would involve a change in conceptualization of more problems than just child abuse and neglect. All areas of law dealing with children could be seen from a new viewpoint.

The debate over education laws in this country could be dramatically changed in focus and scope if the government were forced to grapple with more than just the political pitfalls of poor education systems. Children gained the right to be educated equally in nonsegregated environments years ago.<sup>31</sup> Yet children currently do not hold a constitutionally protected right to an *adequate* education.<sup>32</sup> Radical reconceptualization of children's rights might change the tone of debate over public education, school choice, and major education programs. Rather than arguing over parents' rights to "send" children to certain schools, the debate could be refocused onto the child's right to be educated to a certain standard. Jonathan Kozol's work in the bringing the plight of poor school districts to light would take on a new force.<sup>33</sup>

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30. See, e.g., 144 CONG. REC. H2654-55 (daily ed. April 30, 1998) (statement of Rep. Sawyer).

31. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

32. For instance, Jonathan Kozol observes that "the state, by requiring attendance but refusing to require equity, effectively requires inequality. Compulsory inequity, perpetuated by state law, too frequently condemns our children to unequal lives." JONATHAN KOZOL, *SAVAGE INEQUALITIES* 56 (1991).

33. *Id.*

Children would have the right not to be forced to attend schools where plumbing does not exist, or ceilings fall in.<sup>34</sup>

The rights of children could force the school choice debate to acknowledge the problem of children who do not receive vouchers, or whose parents do not apply for them.<sup>35</sup> If their rights became the focus, would Members of Congress continue to quibble over the political question of vouchers? Or would they begin to look for much larger, more radical approaches to reform of the whole system? Would they realize that even if vouchers cause gradual change in public education, children already in those schools cannot afford to wait for that change to occur?

The laws of evidence are a good example of a way even the legal establishment diminishes the rights of children. In a story of the horrors faced by a young boy during attempts to reunify him with his mother, Bartholet recounts that "he and his brother both accused their mother of abuse" (p. 107). This is not a new tale. Children make allegations of abuse. But the evidentiary system has grown up with the rights only of parents in mind, not of their children. Thus, it is inflexible to the special problems of children testifying. Yes, children are different. Questions arise as to their ability to testify in a truthful manner.<sup>36</sup> Children can be more susceptible to suggestion if interviewed without special care.<sup>37</sup> Testifying in court can, for them, be a traumatic experience in its own right.<sup>38</sup> Yet without their testimony, prosecutors are often at a disadvantage in proving what would be a cut and dry case of assault between two adults. The laws are beginning to change in some places.<sup>39</sup> But if children's rights were recognized as equal to their parents', courts would have to create methods that allow them to have their day in court. Interviewing techniques that are tailored to children could become standardized; *in camera* sessions with judges (rather than open-court testimony) could become standard practice;

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34. *See id.* at 26, 106.

35. For instance, as Kozol observes, "[t]he poorest parents, often the products of inferior education, lack the information access and the skills of navigation in an often hostile and intimidating situation to channel their children to the better schools, obtain the applications, and . . . help them to get ready for the necessary tests and then persuade their elementary schools to recommend them." *Id.* at 60.

36. *See* RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 71 (2d ed. 1998) (reviewing the history of child testimony and the competency requirement and recognizing that recent trends have been toward weakening and eliminating competency requirements for child witnesses).

37. *See, e.g.,* *State v. Michaels*, 642 A.2d 1372, 1376-79 (N.J. 1994) (cataloguing interview errors in highly publicized child sexual abuse case).

38. *See* JOHN E.B. MYERS, 2 *EVIDENCE IN CHILD ABUSE AND NEGLECT CASES* § 6.2 (3d ed. 1997) (reviewing research on effects on children of testimony in child abuse cases).

39. *See* FRIEDMAN, *supra* note 36, at 71.

and judges and attorneys could be educated in recent research on the truthfulness of child testimony.<sup>40</sup>

As the fledgling ideas in this Section demonstrate, a new debate about the inherent rights of children — positive or negative — has the potential to change the way we talk about a whole host of policies and programs dealing with children. Perhaps it is time to start looking at the field of children's rights as one coherent field rather than a policy problem common to many.

### CONCLUSION

As Bartholet says in her Introduction:

This book is . . . about the culture that makes it possible to see children as *Nobody's*, or *Somebody Else's*, and certainly *Not Ours*. It tells the story of how our child welfare policies came to place such a high value on keeping children in their families and communities of origin without regard to whether this works for children. [p. 2]

This book recognizes what most people find too difficult to face: some of this country's children need radical intervention — their parents are not fit and, without extraordinary measures, will not be made so. The problem with Bartholet's approach, however, is that she has articulated no anchor in constitutional rights for the reforms she proposes. Without one, the easy counterargument to all of her proposals is that parents' rights should be respected, and she is just a radical who wants the state to control family life. This Notice has sought to demonstrate that Bartholet does not have to subject herself to that kind of minimization.

On an even more fundamental level, shifting the focus to the rights of children might force this debate out into the light. The children for whom Bartholet and her colleagues advocate are not the type whose rights are normally a topic of open debate. No one wants to break up loving families because of differences of opinion over proper methods in raising children. But because of that risk, many people are too afraid even to broach the issue. A recent presidential debate demonstrates the problem:

MEMBER OF AUDIENCE: I've heard a lot about education and the need to hold teachers and schools accountable. . . . But . . . I have seen a lot of instances where the parents are unresponsive to the teachers or flat out uninvolved in their child's education. How do you intend to not only hold the teachers and schools accountable but also hold parents responsible?

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40. See MYERS, *supra* note 38, at 12 ("When the witness is a child, the assumption that traditional courtroom procedures elicit the most complete and reliable testimony is open to question. This is not to say, however, that traditional procedures should be abandoned. With relatively minor adjustments, most children can testify. Making room for children does not necessitate reinventing the legal wheel. Just add training wheels.").

BUSH: Well, you know, it's hard to make people love one another. I wish I knew the law because I would darn sure sign it. . . . I happened to believe strong accountability encourages parental involvement, though. I think when you measure and post results on the Internet or in the town newspapers, most parents say wait a minute. . . .

GORE: . . . I'd like to start by telling you what my vision is. I see a day in the United States of America where all of our public schools are considered excellent, world class. Where there are no failing schools, where the classrooms are small enough in size. . . . Governor Bush is for vouchers, and in his plan he proposes to drain more money, more taxpayer money out of the public schools for private school vouchers. . . .<sup>41</sup>

“How do you intend to . . . hold parents responsible?” was the question. This question was, at least in part, about the children Bartholet champions — the ones who have no chance of turning back time and regaining their lost prenatal care, nurturing in infancy and active teaching in early childhood. And both candidates quickly moved into realms of child advocacy for which they had ready answers. But these kids will not be helped by the programs that win presidential campaigns, and they should never be used as a springboard for a canned political message. These are the kids no one talks about. Maybe it's because there are no good answers for them. Maybe it's because they aren't an intellectually challenging topic. Or maybe it's because no one really knows how to help them. However difficult it may be to talk about a distressing problem for which there are no politically or intellectually sound solutions, it is time to start.

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41. Debate Transcripts: 2000 Debates, at <http://www.debates.org/pages/trans2000c.html> (Oct. 17, 2000).