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FOSTER CARE & ADOPTION REFORM LEGISLATION: IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT OF 1997

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I would like to begin by congratulating the St. John's Journal of Legal Commentary Symposium for not only devoting this day to the vital issues facing children in our society at the end of the century, but for providing a human rights perspective to that inquiry. The new tool of human rights which we now have is similar to the invention of the Juvenile Court in Chicago by the

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women of Hull House 100 years ago.¹ The development and spread of human rights for children has granted the opportunity to see children as full and complicated human beings. Despite being in need of special protection and care, children are nonetheless fully human persons. This nuanced recognition is centuries in coming and not to be taken lightly. By addressing three large issues of children's rights and children's needs in the framework of human rights, you are leading into the next century in a way that will, hopefully, enhance substantive rights and protects to benefit children and their families.

One-hundred and seventy-one nations have ratified the Convention on the Rights of the Child.² The United States and Somalia are the only two countries that have failed to ratify this Convention. Articles 19, 20 and 21 of the United Nations Convention on the Rights of the Child³ are devoted to child protection and child welfare. They create strong standards and a firm foundation to protect children from all forms of abuse and neglect, and mandate individual, civic, and governmental action to provide the necessary support for the child and for those who have the responsibility for the care of the child. These provisions, in addition to the prohibition of the death penalty for children, are among the reasons why the U.N. Convention faces so much controversy and organized opposition in the United States. Tragically, the language of the Convention authorizing fundamental underlying social and economic rights for children, is distorted and seized upon by certain forces in the United States to wage a vigorous campaign against joining the world community in this new legal and ethical dedication to human rights for children.

I have been asked to discuss concerns about new federal child protection legislation, the Adoption and Safe Families Act,⁴ which was passed in 1997 by Congress and therefore is fairly new. My concerns center primarily with the context in which the

¹ Steven A. Drizin, *Net of Automatic Transfer Growing too Wide*, CHI. DAILY L. BULL., Apr. 24, 1999, at 4.

² Convention on the Rights of the Child, G.A. Res. 44/25, 166 U. N. Doc. A/44/736 (1989) (reprinted in 28 I.L.M. 1448 (1989)) (with corrections at 29 I.L.M. 1340 (1990)) [hereinafter *Convention*].

³ *Convention*, supra note 2.

⁴ N.Y. SOC. SERV. L. § 358-a (McKinney's 1999) [hereinafter *New York ASFA*].

new legislation was adopted. Therefore, these worries may sound more negative than is warranted. I remain ever hopeful and Pollyana-ish about what can be done to protect and nourish children in society if we muster the social will to do it; how ASFA turns out in practice depends primarily on us.

Yet, just because prior practice was indefensible, the new legislation will not necessarily result in better outcomes for children. It is worth looking at five areas of concern. Ironically, first, the passage of this federal legislation came at the midpoint of a four-year decline in reporting and court intake of child neglect and abuse cases. Last year three million cases were investigated and just under one million were founded.⁵

In Chicago, for example, where child welfare is an enormous growth industry, there were 10,000 new abuse and neglect cases in 1994,⁶ filed into juvenile court; while last year, there were only 4,300.⁷ This year, the court is on track for 3,000.⁸ AFSA lands in an era of declining intake, locally and nationally. We need to ask why less cases are being founded, because in my view, it is not because there is less abuse or neglect of children. Today there are half a million children in foster care⁹ and more than one hundred thousand children are incarcerated.¹⁰ The interplay between juvenile justice and child welfare is profound. Most everyone who works in these systems acknowledges that foster children are more likely to be arrested and to land in the criminal justice delinquency systems than non-foster children. However, there are two distinct and separate legal and social systems, operating as if they were different universes.

The million children each year who have founded cases of

⁵ Barbara Bennett Woodhouse, *Meeting the Basic Needs of Children: Defining Public and Private Responsibilities*, 57 OHIO ST. L. J. 393, 409 (1996) (stating that "[t]hree million cases of child abuse are reported each year, and a large percentage, roughly one-third, are substantiated after investigation.").

⁶ Abdon M. Pallasch, *Juvenile Court: Three Years Later*, CHI. LAW., Feb. 1997.

⁷ Bruce Goldstein, Marc Linder, Lawrence E. Norton II, Catherine K. Rukelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 U.C.L.A. L. REV. 983, 1050 (1999) (discussing child labor cases).

⁸ *Id.*

⁹ PR NEWSWIRE, *Poll Finds Strong Support for Services to Help Teens Transition Out of Foster Care*, June 24, 1998.

¹⁰ *The Supreme Court and Pretrial Detention of Juveniles: A Principled Solution to a Due Process Dilemma*, 132 U. PA. L. REV. 95, 95 (1983) (indicating that half-million children are incarcerated in juvenile detention each year).

abuse and neglect does not include the other ways in which neglected children are labeled and pigeon-holed into other systems: delinquent children, homeless children, mentally ill children, retarded children, dropout children, expelled children. The criminalized universe of children are large and growing.

Second, AFSA was passed in a grim context for children regarding poverty. Any discussion of AFSA legislation which does not start and end with poverty is misplaced. Children are the poorest Americans. In the United States today, one-fifth of children are born into poverty.¹¹ That is 20.8 percent, or 14 million children. The younger you are, the more likely you are to be born into poverty and, of course, the rate of child poverty doubled in the last 30 years while the gross national product doubled.

As a people, we have made a series of social choices about the value of children in society, choices we make every single time we vote or fail to vote. Children from all walks of life and all income levels recognize the social choices made by adults. Child poverty is not inevitable; it is not a natural disaster. The U.S. is the wealthiest country in the world, and it galls me because the United States could decide today to eliminate child poverty. We could start with universal health care for children within two years. We could have universal, quality child care in three years, and so on. It is worth noting that Article 27 of the Convention establishes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.¹²

Third, is the inequality of poverty and the disproportionate representation of children of color in foster care. In the Cook County, Chicago child welfare system, 87.6 percent of families petitioned into juvenile court are African-American.¹³ The population in Cook County, however, is approximately 38 percent

¹¹ Janelle T. Calhoun, *Interstate Child Support Enforcement System: Juggernaut of Bureaucracy*, 46 MERCER L. REV. 921, 923 (1995) (indicating that recent studies show that more than one-fifth of American children live in poverty); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1316 (1993) (stating that more than one-fifth of nation's children live in poverty).

¹² Francis A Gabor, *Quo Vadis Domine: Reflections on Individual and Ethnic Self-Determination Under an Emerging International Regime*, 33 INT'L L. 809, 821 (1999) (discussing Article 27 of U.N. Convention).

¹³ John Gibeaut, *Nobody's Child*, 83 A.B.A. J. 44, 47 (1997) (discussing Chicago child welfare system).

African-American; African American children more than doubly represented in juvenile court.

Similarly, poverty is unequal. One in two African-American children are poor, two out of five Latino parents are poor. A volunteer lawyer who came to court with us last year was sitting, waiting to pick a case with one of our staff attorneys. After about 20 minutes watching juvenile court proceedings, he turned to our staff lawyer and asked, “[w]here is the white juvenile court?” I had just returned from an incredible visit to South Africa and was particularly struck by the fact that just six years ago in South Africa there *was* a white juvenile court and, of course, in Chicago there is no white juvenile court.

So the question of who AFSA was written to address should trouble us deeply when we consider its various provisions. It should also make us ask why many of the same forces who were involved in promoting and developing ASFA and federal welfare reform legislation – both of which constrict economic and procedural rights for parents – tend to be the same people opposing the ratification of the Convention on the Rights of the Child, because they say the convention fails to recognize parents’ rights.

Fourth, is the simultaneous passage of welfare reform and ASFA. Nothing in the legislative record recognizes that these two major pieces of federal legislation involving overlapping poor families and children were on simultaneous tracks through Congress for a three-year period. There was no recognition of dual involved families, concern about welfare children who may now enter child welfare or integration of these two systems.

The Department of Health and Human Services has published a new set of guidelines for the states concerning their local implementation of AFSA, which is a careful and useful document. It never mentions, however, welfare reform as the context in which this new federal legislation is being implemented. “Children” has disappeared from the titles of both pieces of legislation. Perhaps it was just a technical accident, but perhaps Congress was doing things other than looking out for the well-being of children when they changed Aid to Families with Dependent Children to Temporary Aid for Needy Families,¹⁴ and

¹⁴ 42 U.S.C.A. § 602 (West 1999).

revised the Adoption Assistance and Child Welfare Act,¹⁵ to the Adoption and Safe Families Act.¹⁶

Both welfare and child welfare systems have a social control and punitive aspect. These systems have long histories of regulating, punishing and coercing unworthy mothers under the auspices of a "save the children" rationale. We could have a lengthy and interesting discussion about that history, but Dorothy Roberts, Valerie Polakow, Linda Gordon, Martha Fineman and Lucy White have each written extensively about the child welfare system as a misogynist and punishing system.

In addition, drug policies in the United States bring certain mothers into the system for drugs and substance abuse and put certain fathers in jail due to punitive and mandatory drug sentencing laws. One could view this entire system as a concentrated attack on the African-American family, rather than as a child saving system.

Fifth, AFSA creates a more punishing environment for mothers and children. I will only reference this morning's panel on the kind of super-predator language, the kind of public anger directed against children, the increased popular discussion about caning, whipping, orphanages for children, the routine media use of children described as animals or diseases, the criminalizing of normal child behavior. The atmosphere in which this is taking place makes me fearful of how we think about children. People who work in child welfare have been historically clear that good kids who are victimized are not like that. Rather, it is the delinquent kids that are the bad kids. The demonization of youth in trouble with the law spills-over into child welfare. The public attitude is that these neglected or abused kids are so harmed and so damaged, so that whether they are actually harmed or harmful becomes secondary. The public willingness to invest resources into our common future is diminished by this vicious attitude toward children.

Finally, the massive efforts to reform child welfare systems in many states through sustained class impact litigation illustrates that the ability to appropriately implement child welfare

¹⁵ Pub. L. No. 96-272, 94 Stat. 500; 42 U.S.C.A. §§ 670-77 (1995) [hereinafter *Child Welfare Act*].

¹⁶ *New York ASFA*, *supra* note 4.

legislation is highly limited. We had 20 years to implement the provisions of prior federal legislation, which had some notable victories but which was ultimately quite unsatisfactory. There is also a legal climate where the courts have denied the ability to enforce children's rights through decisions like *DeShaney v. Winnebago County Dept. of Social Services*,¹⁷ which again make it harder for us to be confident that we will be able to implement a new legislation on behalf of children.

Beyond the context, specific legislative provisions are cause for concern. The shorter time frames in which a parent can recover and respond to alleged abuse and neglect; the erosion of the obligation of the state to make reasonable efforts to keep a family together in the first instance and to unify a family in the second instance; the new "no reasonable effort" standard, which may create confusion offers the state an ever-expanding list of cases where no reasonable efforts are required; the fast track of termination of parental rights; the wide open areas which states can add as grounds for termination of parental rights, such as a parent in prison, or a parent with a prior child protection history (even if it were ten or 15 years ago).

AfSA, as the title indicates, separates safety from "best interests of the child." These concerns will be addressed in practice. To date, much of the parallel state legislature is temperate.

However, I remain haunted by a vision that Martin Guggenheim offered a year ago in Chicago. Professor Guggenheim wondered if Martians landed and looked at what we are doing in Chicago, if they saw that in the last year child protection courts terminated parental rights on 8,000 - 9,000 African-American families, mainly mothers, and criminal courts have incarcerated 9,000 African-American men in Cook County jail, what would they think of our society? Would they think we were a child-loving, child-caring society? Would they look around and conclude that children are better off for state intervention? Or would they think something else was going on here?

There are four things which could be done differently. One is to make courts the last resort rather than the first line of defense for protecting children from the centuries of vicious abuse to

¹⁷ 489 U.S. 189 (1989).

which they're subjected, most often by their parents and their caregivers. The Netherlands, among other countries, do this. Their social systems are not in the business of law enforcement, and are neither regulatory nor punitive.

Second, we could immediately implement the kind of fundamental family and child supports that all fundamental to other industrial countries. These supports include: universal health care for children and families, free and accessible child care, paid parental leave, and child payments to families. The work that families do in rearing of children is the work of society; it is the work of our future.

Third, legislation will never accomplish what could be achieved by a massive public health campaign to stop child maltreatment and family violence. We have tools now for this kind of popular campaign, and we can lift it out of the child welfare system, reframe it as a public health campaign, and plan to use three years in which every sector of American society—religious, faith communities, ethnic groups, local communities – re-examine the issue of family violence, the interrelation of domestic violence, child abuse, elder abuse, inquire into traditions, decide who we want to be and decide what we can be, and then come together with some higher level of agreed-upon standards to reduce family violence. Popular teaching campaigns can be successful at changing human behavior; we have models from the last few decades, such as anti-smoking campaign, using seat belts, and designated /drunk driving behavior. The failure to do it here and the total reliance on sanctioning and state intervention puzzles me.

Finally, we need to build bridges to other forms of family violence. Addressing child abuse when the same families appear in a different court for domestic violence and a different system for elder abuse and another system for child support and another system for mental health is lethal for children and foolish for us. Thank you.