



# Exporting the 'Pursuit of Happiness'

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## BOOK REVIEWS

### EXPORTING "THE PURSUIT OF HAPPINESS"

AIDING DEMOCRACY ABROAD: THE LEARNING CURVE. By Thomas Carothers. Washington: Carnegie Endowment for International Peace. 1999. Pp. x, 412. \$39.95 (hardcover), \$19.95 (paper).

*Reviewed by William P. Alford\**

*I can understand "life." I can understand "liberty." But if only you Americans weren't so busy with the "pursuit of happiness," you might come to appreciate life and liberty even more.<sup>1</sup>*

#### I. INTRODUCTION

Serious authors generally can only dream that their work will earn the type of reception that *Aiding Democracy Abroad*, by Thomas Carothers, began to enjoy even prior to its December 1999 publication. Major scholars, such as Stephen Holmes of Princeton and Jack Snyder of Columbia, have richly praised it.<sup>2</sup> The *New York Times* commended the book on the paper's editorial page,<sup>3</sup> and later ran a full review<sup>4</sup> by an important academic figure whose critique was promptly denounced by the Undersecretary of State for Global Affairs.<sup>5</sup> And the financier/philanthropist George Soros lent his name to its dust jacket, describing Carothers's work as "a landmark book, of tremen-

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\* Henry L. Stimson Professor and Director, East Asian Legal Studies, Harvard Law School. As always, the comments of colleagues have enriched my work. In this instance, I am grateful to Jonathan C. Carlson, Jacques deLisle, Marsha Echols, Paul D. Gewirtz, Stanley B. Lubman, Makkau wa Mutua, John K.M. Ohnesorge, John C. Reitz, Arthur I. Rosett, Anne-Marie Slaughter, Henry J. Steiner, Matthew Stephenson, Richard Wasserstrom, Kenneth I. Winston, and the editors of the Harvard Law Review who worked on this piece, though I alone bear responsibility for the views herein expressed. I also want to thank the University of Iowa College of Law for inviting me to deliver the Ida Beam Distinguished Lecture through which I was able to develop ideas set out in this Review, and the Harvard interfaculty Seminar on International Ethics and the Professions. Finally, I thank the Harvard Law School for research support as well as Benedict Hur and the indefatigable staff of the Harvard Law Library for securing needed materials. This Review is dedicated to the memory of three dear faculty colleagues, Gary Bellow, Abe Chayes, and Jim Vorenberg, each of whom exemplified the best American law has to offer.

<sup>1</sup> Statement of a Chinese student at the China Center for American Law Study, Beijing, P.R.C. (July 1987).

<sup>2</sup> Holmes's and Snyder's praise appear on the book's dust jacket.

<sup>3</sup> See Tina Rosenberg, *Editorial Observer: America Finds Democracy a Difficult Export*, N.Y. TIMES, Oct. 25, 1999, at A30.

<sup>4</sup> See Michael Mandelbaum, *Civics Class*, N.Y. TIMES, Dec. 12, 1999, § 7 (Book Review), at 22.

<sup>5</sup> See Frank E. Loy, Letter to the Editor, N.Y. TIMES, Jan. 30, 2000, § 7 (Book Review), at 4.

dous value to . . . all . . . concerned with democracy's future," and lauding Carothers as "the ideal guide" to "one of the defining challenges of our time."<sup>6</sup>

*Aiding Democracy Abroad* owes its warm reception in important part to the salience of its subject matter. The United States has a long history of endeavoring to enlighten, if not save, our foreign brethren by exporting ideas and institutions that we believe we have realized more fully.<sup>7</sup> These include efforts to bring "civilization," principally in the form of Christianity, to age-old civilizations in Asia, Africa, and elsewhere;<sup>8</sup> to foster "modernization," especially as manifested through economic development;<sup>9</sup> and to expound a gospel of science and technology.<sup>10</sup> With the ebbing of the Cold War,<sup>11</sup> democracy promotion —

<sup>6</sup> Soros's quotation appears on the book's dust jacket.

<sup>7</sup> The United States is hardly unique in this regard. See generally, e.g., *A CENTURY'S JOURNEY: HOW THE GREAT POWERS SHAPE THE WORLD* (Robert A. Pastor ed., 1999) (examining the United States, Great Britain, France, Germany, Russia, Japan, and China as case studies).

<sup>8</sup> See generally *THE MISSIONARY ENTERPRISE IN CHINA AND AMERICA* (John K. Fairbank ed., 1974); DAVID J. BOSCH, *TRANSFORMING MISSION: PARADIGM SHIFTS IN THEOLOGY OF MISSION* (1991); PAUL A. COHEN, *CHINA AND CHRISTIANITY: THE MISSIONARY MOVEMENT AND THE GROWTH OF CHINESE ANTI-FOREIGNISM 1860-1870* (1963); ELIZABETH ISICHEI, *A HISTORY OF CHRISTIANITY IN AFRICA: FROM ANTIQUITY TO THE PRESENT* (1995); SUSHIL MADHAVA PATHAK, *AMERICAN MISSIONARIES AND HINDUISM: A STUDY OF THEIR CONTACTS FROM 1813 TO 1910* (1967).

<sup>9</sup> Building on longstanding ideas of convergence toward a Western model, "modernization theory" grew out of the structural-functionalism of the noted Harvard sociologist Talcott Parsons, who saw society as organized to address specific functions. See COLIN LEYS, *THE RISE AND FALL OF DEVELOPMENT THEORY* 9 (1996). Particularly as applied in the 1960s, modernization theory presumed that society would pass through stages of increasing modernity, and that the United States and other major Western nations represented the pinnacle of this progression. See generally WALT WHITMAN ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960). Some of its leading academic exponents, such as Walt Whitman Rostow of the Massachusetts Institute of Technology, endeavored to foster the application of these ideas through government service. Although modernization theory itself is now out of favor, many of its basic assumptions linger in developmental studies.

<sup>10</sup> For an example of this "gospel," see NATHAN ROSENBERG & L.E. BIRDZELL, JR., *HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD* 242-68 (1986).

<sup>11</sup> It is important not to overstate the break with the past. There are tens of millions of people in China, Cuba, North Korea, Vietnam, and even parts of Eastern Europe and the former Soviet Union to whom the conclusion of the Cold War would be news. See, e.g., John W. Garver, *Foreword* to *IN THE EYES OF THE DRAGON: CHINA VIEWS THE WORLD* at vii, x (Yong Deng & Fei-Ling Wang eds., 1999) ("[M]any Chinese believe that the very existence of the coalition of democratic countries is a 'remnant of Cold War mentality . . .'"). For example, some Beijing residents assumed that the accidental bombing by U.S. planes (under North Atlantic Treaty Organization command) of the embassy of the People's Republic of China (PRC) in Belgrade during the spring of 1999 was willfully undertaken to teach China a lesson. See Seth Faison, *China Honors 3 Killed in Belgrade, but the Street Protests End*, N.Y. TIMES, May 14, 1999, at A13. Moreover, even as many individuals in formerly Communist countries express deep gratitude for American support, doubts about the motivations of the United States persist in some circles, exacerbated at times by the difficulties of the adjustment to a new era. See, e.g., JANINE R. WEDEL, *COLLISION AND COLLUSION: THE STRANGE CASE OF WESTERN AID TO EASTERN EUROPE 1989-1998*, at 42-43

a capacious term used to encompass efforts to nurture electoral processes, the rule of law, and civil society, all broadly defined — has become a key organizing principle of American foreign policy, if not this nation's broader interface with the world (p. 3).<sup>12</sup> Political leaders extol it,<sup>13</sup> the federal government alone spends more than \$700 million annually on democracy promotion during a time of diminishing foreign assistance,<sup>14</sup> and a spectrum of other actors — including philanthropic bodies, nongovernmental organizations (NGOs), academe, business, and the practicing bar, not to mention multilateral entities and foreign governments and institutions — participate in it.<sup>15</sup> Amidst a burgeoning literature on democracy promotion, *Aiding Democracy Abroad*

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(1998); Patrick E. Tyler, *Russia's Communists, Still Active, Await an Opening*, N.Y. TIMES, Mar. 13, 2000, at A6 (describing ongoing support for the Communist Party in Russia); Lech Walesa, 'I see the Commies, I see the clever guys doing well', N.Y. TIMES, Nov. 7, 1999, § 6 (Magazine), at 81 (expressing doubts about Poland's parliamentary democracy and criticizing the failure of Western leaders to provide sufficient aid to Eastern Europe).

<sup>12</sup> American democracy promotion has extensive antecedents. Consider, for example, the case of China. A century ago, W.A.P. Martin and other missionaries coupled their religious message with a call for the Chinese to absorb Western legal principles. See W.A.P. MARTIN, *THE SIEGE IN PEKING: CHINA AGAINST THE WORLD* 142–70 (1900); see also Helen H. Kim, *The Ambiguities of Superiority: W.A.P. Martin and the Analog Between Introducing Christianity and International Law to China* (April 28, 1997) (unpublished manuscript, on file with the Harvard Law School Library) (discussing Martin's attempts to spread both Christianity and American ideas of legality in China). During the first half of the twentieth century, distinguished academics such as President Frank Goodnow of the Johns Hopkins University and Dean Roscoe Pound of the Harvard Law School endeavored to convince different Chinese governments of the need to remake themselves and their legal institutions along American lines. See Frank J. Goodnow, *Reform in China*, 9 AM. POL. SCI. REV. 209, 219 (1915); Roscoe Pound, *Problems of a Modern Judiciary* 21–31 (unpublished manuscript, on file with the Harvard Law School Library); Roscoe Pound, *Second Report for 1947* (1947) (unpublished manuscript, on file with the Harvard Law School Library); Roscoe Pound, *The Training, Mode of Choice and Tenure of Judges* 16–18 (unpublished manuscript, on file with the Harvard Law School Library).

Other countries, such as the Philippines, Germany, and Japan, furnish additional examples. See generally TONY SMITH, *AMERICA'S MISSION: THE UNITED STATES AND THE WORLDWIDE STRUGGLE FOR DEMOCRACY IN THE TWENTIETH CENTURY* (1994). The pertinence of this history for contemporary democracy promotion is discussed below at pp. 1698–99, 1704–09, 1710–11, 1714–15.

<sup>13</sup> See, e.g., Remarks to the United States Institute of Peace, 35 WEEKLY COMP. PRES. DOC. 591, 595 (Apr. 7, 1999) (praising programs that allow Chinese lawyers and judges "to come to America to study our system").

<sup>14</sup> This figure is roughly equivalent to 10% of "traditional nonmilitary foreign aid," or 0.01% of our gross national product as of 1997. Karen DeYoung, *U.S. Grows Stingier on Foreign Aid: Amid Prosperity, Country Is World's Least Generous in Helping Poor*, INT'L HERALD TRIB., Nov. 26, 1999, at 1. But cf. Doug Bandow, *The Capitol Eye: Isolationist Myths*, COPLEY NEWS SERVICE, Dec. 14, 1999, available in LEXIS, News Library, COPNWS File (arguing that the United States remains more engaged in the world than proponents of greater foreign assistance suggest).

<sup>15</sup> Larry Diamond chronicles such actors in *PROMOTING DEMOCRACY IN THE 1990S: ACTORS AND INSTRUMENTS, ISSUES AND IMPERATIVES* (1995). For a thoughtful overview of U.S. assistance concerning law, see Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT'L. ECON. L. 179 (1999).

is the first systematic study of the range of such programs that the U.S. government has fashioned or funded in the years since the collapse of the Soviet Union.<sup>16</sup>

Beyond timeliness, however, *Aiding Democracy Abroad's* ready reception is also a product of its author's stature and the manner in which he has cast his study. Thomas Carothers is a serious public intellectual who not only has written extensively about transitions in Latin America, Europe, and elsewhere,<sup>17</sup> but who also, as Vice President for Global Policy at the Carnegie Endowment for International Peace, is well-positioned to play an important role in influencing the direction of democracy promotion. In *Aiding Democracy Abroad*, he speaks to a variety of audiences — including those who shape scholarly and popular understandings of democracy promotion, those who make and execute policy regarding it, and those who foot the bill for it — drawing on case studies of his own devise emanating from four continents, hundreds of interviews, heretofore underutilized government documents, and a broad cross-section of the pertinent academic literature. Moreover, Carothers consistently displays an admirable judiciousness, confronting problems that have beset American democracy promotion with candor and suggesting ways to enhance the undertaking, as currently conceived.

The attractiveness of *Aiding Democracy Abroad* — especially for those seeking to redeem democracy promotion from the difficulties it has experienced — should be apparent. Yet the book's considerable strengths are also its most notable weaknesses. By hewing as closely as it does to democracy promotion's present parameters, defined in isolation from many of the broader political, philosophical, and ethical issues the endeavor implicates, *Aiding Democracy Abroad* does not provide as much guidance as it might, either to those seeking to understand this latest American effort at transforming the world or to those aspiring to play an active role in this venture. Ironically, even as *Aiding Democracy Abroad* argues persuasively that a principal failing of such programs has been their tendency to treat situations fraught with complex political and normative considerations as amenable to relatively formulaic solutions, Carothers's work does not delve as fully as

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<sup>16</sup> Other noteworthy works, representing an array of perspectives, include EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA: THEMES AND ISSUES (Abraham F. Lowenthal ed., 1991); JOSHUA MURAVCHIK, EXPORTING DEMOCRACY: FULFILLING AMERICA'S DESTINY (1991); WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, US INTERVENTION, AND HEGEMONY (1996); SMITH, *supra* note 12; and HOWARD J. WIARDA, CRACKS IN THE CONSENSUS: DEBATING THE DEMOCRACY AGENDA IN U.S. FOREIGN POLICY (1997).

<sup>17</sup> See THOMAS CAROTHERS, ASSESSING DEMOCRACY ASSISTANCE: THE CASE OF ROMANIA (1996); THOMAS CAROTHERS, IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS (1991); Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95.

it might into the many vexing questions that pervade democracy promotion. That may well be a product of the author's desire to deliver a clear message to those in whose hands the future of such programs rests, but it ultimately diminishes this noteworthy study's contribution.

The enthusiasm that has marked American efforts to spread the fruits of our experience abroad makes it difficult, especially at the apogee of such undertakings, to probe underlying assumptions, lest we appear to be dismissive of the worthiness of the objective in question, doubtful of the sincerity of its proponents, or indifferent to the fate of the would-be beneficiaries. This disinclination to appear to be raining (or even drizzling) on the parade may be particularly intense with regard to current efforts at democracy promotion. As perhaps most crisply articulated in popular discourse in Francis Fukuyama's notion of the end of history, there is a widely held perception that with the collapse of the former Soviet Union and the robustness of the American economy relative to those of France, Germany, and Japan, the forms of democracy, the rule of law, the market, and even civil society currently dominant in the United States have been irrefutably vindicated.<sup>18</sup> Although some in legal academe express disdain for Fukuyama's thesis,<sup>19</sup> there seems to be an all too common belief among American scholars of the law, cutting across conventional political divides, that our political and legal institutions singularly warrant the attention of nations in transition, if not of the rest of the world.<sup>20</sup>

The very pervasiveness of such sentiments suggests the value of raising even more fundamental concerns than does Carothers. We cannot allow our sense of faith in the value of the enterprise to divert us from inquiring into our motivations for democracy promotion and what our actions, whether as a state or a society, suggest about the depth of our commitment to assisting others in achieving democracy.

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<sup>18</sup> See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* at xi–xxiii (1992).

<sup>19</sup> See, e.g., BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 122 (1992); SMITH, *supra* note 12, at 369.

<sup>20</sup> See, e.g., Steven G. Calabresi, *An Agenda for Constitutional Reform*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 22, 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (“[T]he Federalist Constitution has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy.”). *But see* Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 634–40 (2000) (quoting Calabresi and disapproving of his overzealous promotion of the American constitutional system). With respect to cause lawyering, see Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3, 6 (Austin Sarat & Stuart Scheingold eds., 1998) (urging cause lawyers worldwide to focus on the American example). *But see* Stephen Ellmann, *Cause Lawyering in the Third World*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES*, *supra*, at 349, 356 (arguing that the contribution of developing country cause lawyers to “the world’s human rights culture” is more “original and substantial” than generally recognized in the West).

Inconclusive though it may prove, we need to ask difficult questions about matters such as the relationship between the various “goods” being promoted (that is, democracy, the rule of law, fundamental human rights, markets, economic development, and civil society) and the challenges inherent in discerning and measuring both the intended and unintended consequences of what we advocate. And throughout, we need to be mindful of the ethical implications of seeking to mold others in such basic ways, even as we are alert to the respects in which the experience may be shaping us.

At first blush, asking such questions may seem all too “academic” an exercise that threatens to enmesh those determined to foster democracy in a web of self-absorption and indecision for which they simply do not have time. To the contrary, however, this process has the potential to speak forcefully to problems such as the hubris and inattention to power that Carothers rightly argues have plagued democracy promotion efforts to date. That is not because ready answers loom on the horizon, for in many instances, they are simply not to be had or vary depending on one’s normative outlook, but rather because the exercise itself — with its sober reflection on ends as well as means — underscores the true complexity and gravity of attempting so fundamentally to influence others.

My examination of *Aiding Democracy Abroad* begins by setting forth in Part II the essence of Carothers’s argument. Part III then raises the type of questions that I believe should inform democracy promotion and that would, inter alia, have enabled Carothers better to justify and impart the lessons of humility and local fit he suggests are critical to the future of the enterprise. It is in the posing and consideration of such questions, I suggest in my conclusion, that academics may make their fullest contribution to what George Soros rightly has termed “one of the defining challenges of our time.”<sup>21</sup>

## II. PROMOTING DEMOCRACY ABROAD

### A. *A Short History of Democracy Promotion*

Carothers acknowledges at the outset of *Aiding Democracy Abroad* that America has long been in the business of endeavoring to make the world “safe for democracy,” as Woodrow Wilson phrased it,<sup>22</sup> but he suggests that it was only with the Kennedy administration that “the idea of giving aid specifically to promote democracy caught on among policy makers” (p. 19). To be sure, initial efforts, which were largely

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<sup>21</sup> Soros’s quotation appears on the book’s dust jacket.

<sup>22</sup> Woodrow Wilson, *Necessity of War Against Germany*, Address to Congress (Apr. 2, 1917), in *SELECTED ADDRESSES AND PUBLIC PAPERS OF WOODROW WILSON* 195 (1918).



funneled through the newly created United States Agency for International Development (USAID), took a long-term perspective on democratic development, having been shaped by the Cold War and by modernization theory as propounded by Walt Whitman Rostow and others.<sup>23</sup> USAID focused its resources chiefly on buttressing regimes friendly to American interests in the Cold War (which had varying commitments to democracy, to put it charitably) and on fueling economic growth which, according to modernization theory, would foster a middle class and otherwise contribute to the eventual flourishing of democratic institutions akin to our own. With little to show in the way of positive results through the 1960s, by the decade's end USAID began to alter its strategy. The agency sought, at least in a preliminary way, to nurture democratic development more directly through the promotion of sympathetic political parties, "civic education" (including support of American-style labor unions), "municipal development" (designed to strengthen local government), and law and development projects that aimed "to encourage lawyers and legal educators in developing countries to treat the law as an activist instrument of progressive social change" (p. 24).

In Carothers's account, the Carter administration's attention to human rights concerns in foreign policy lent support to the American government's still modest democratization programs, but it was not until the Reagan administration that the United States undertook an extensive "global program of democracy assistance" (p. 31). "The objective," as President Reagan would have it, was quite simple: "[T]o foster the infrastructure of democracy, the system of a free press, unions, political parties, universities, which allows a people to choose their own way to develop their own culture, to reconcile their own differences through peaceful means" (p. 31).

This emphasis on a more programmatic form of democracy promotion initially grew out of the Reagan administration's desire to stem Soviet influence and was directed toward governments, including those of Chile, Haiti, Paraguay, the Philippines, and South Korea, then better known for their anti-communism than their heartfelt commitment to democratic ideals. By the second Reagan term, however, democracy promotion came to be understood more broadly. It grew, Carothers tells us, to encompass assistance for electoral reforms in Latin America and, to a lesser degree, Asia, as well as support for dissidents and human rights groups chiefly concerned with the Soviet Union and its satellite states.

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<sup>23</sup> Carothers seems to confuse the two Rostow brothers — the political economist Walt Whitman Rostow and the legal scholar (and later Dean of the Yale Law School) Eugene Victor Debs Rostow — both of whom served in the Kennedy administration.

The 1990s witnessed a mushrooming of U.S. government-sponsored democracy assistance and of related efforts by other governments and by multilateral organizations, foundations, and NGOs.<sup>24</sup> Federal government expenditures on democracy assistance multiplied almost five-fold to nearly \$720 million annually over the course of the decade (p. 54). More than 100 countries now receive such assistance. And the target of such support has come to include not only such staples as electoral, legislative, and judicial processes, but also "civil society" as manifested in independent media, nonpartisan NGOs, free labor unions, small businesses, and general "civic education."

*B. Applying a "Democracy Template" Worldwide: The Mechanics of Democracy Promotion*

The principal vehicle through which the U.S. government directs democracy assistance continues to be USAID (pp. 48–53). That agency has had responsibility for some two-thirds of such assistance in recent years, totaling more than \$530 million in fiscal year 1998 (the last year for which Carothers provides comprehensive data) (p. 54). Other agencies involved in democracy promotion, either through direct appropriations or through funding provided by USAID, include the Departments of State, Defense, and Justice, the United States Information Agency (which has recently been reabsorbed into the Department of State), the National Endowment for Democracy, the Asia Foundation, and the Eurasia Foundation (p. 54).

From its inception, USAID's principal operating method has been to define a potential recipient nation's needs for assistance, design projects to meet those needs (alone or in conjunction with an American intermediary, which might be either a for-profit consulting firm, an NGO, or a university-related entity), and then fund such intermediaries to carry out the project, typically in cooperation with one or more local partners. Other federal agencies, including the Departments of Justice and Defense, have more routinely dispensed with intermediaries, carrying out project design and even implementation themselves. Of late, both aid providers and American intermediaries have discovered "localism" (p. 339), leading them to involve recipient country specialists at earlier and more important parts of the endeavor, and even to make occasional direct grants to host country NGOs.

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<sup>24</sup> For a depiction of the range of such efforts, see generally DIAMOND, *supra* note 15. Throughout *Aiding Democracy Abroad*, Carothers devotes little attention to nongovernmental programs. Instead, he scrutinizes U.S. government programs largely in isolation, even though one of his principal recommendations is that officials responsible for democracy promotion "should push to build a relationship between aid for democracy and the larger, more established world of aid for social and economic development" (p. 344). The implications of his treatment of U.S. government programs in relative isolation are discussed below at pp. 1698–99, 1704–06.

The approaches that the U.S. government and those working for it have pursued are "almost everywhere . . . strikingly similar" (p. 85), notwithstanding the enormous variety in recipient countries' standards of living, economic bases, literacy levels, ethnic unity/disunity, historical attitudes toward state authority, recent political experience, interaction with the United States, access to other foreign assistance, and a host of other variables. In part, this reliance on what is essentially a "democracy template" reflects the institutional needs and character of USAID, which has long been notorious as one of the most inflexible of Washington bureaucracies.<sup>25</sup> But this reliance on the formulaic also, Carothers tellingly indicates, incorporates both a substantive "model of democracy" and a procedural "model of democratization" (p. 85).

USAID and most other federal agencies involved in democracy promotion derive their model of democracy, not surprisingly, from a somewhat idealized sense of the American experience, suggests Carothers (p. 91). Nations should take as the centerpiece of their public life a largely fixed, written constitution that divides government into three separate but equal branches, while also ensuring the citizenry's rights, making the rule of law a cardinal principle, and placing the military in a position subordinate to civil authority. Elections are to be held at both the national and local levels, with electoral politics to be conducted via "a few major parties" of an essentially moderate nature organized around national policy issues, rather than regional, religious, or strong ideological divisions (pp. 86-87). And the model emphasizes a vigorous civil society, including an independent media, strong unions, and NGOs "involved in public interest advocacy" and unafraid to take the government to task (p. 87).

Whatever the differences between this idealized model and American democracy, Carothers argues that they pale in comparison to those between the methodical process of democratization promoted by U.S. governmental aid programs and the history of our nation's democratization (p. 91). Although our democracy came into being through revolution and was "deepened and broadened" through subsequent traumatic events such as the Civil War, the Great Depression, and the struggle for racial justice, U.S. governmental programs embrace a "technocratic, gradualistic conception of democratization" that assumes a well-modulated sequencing (p. 91). Essentially, this model presumes that an authoritarian regime (if for no other reason than to save itself) will open to the possibility of reform as its legitimacy fades and its populace presses for greater freedoms. With that opening, "opposition

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<sup>25</sup> See, e.g., WEDEL, *supra* note 11, at 34 (noting that USAID programs in Eastern Europe after the fall of communism "generally discouraged risk taking and allowed little flexibility"). Carothers discusses the limitations of USAID's reliance on an "external project method" (pp. 257-59) and criticizes its faith in "the false dream of science" (pp. 287-97). See *infra* pp. 1698-99, 1703-06.

groups and independent civic actors multiply" (p. 87) and interact with the state in such a way that the regime allows meaningful elections, the implementation of additional reforms, and eventually, the irreversible consolidation of new democratic institutions. To the extent that USAID has refined the model, it has been to divide recipient nations into three broad categories, with the chief difference in approach being USAID's relative emphasis on the promotion of ideas as opposed to direct action. The first category, Carothers suggests, includes "pre-transition" states such as China, Myanmar, Vietnam, and (before their recent openings) Indonesia and Nigeria (p. 95). A second is comprised of states said to be in the process of consolidating their move toward democracy, such as Guatemala, Mexico, Romania, and South Africa. And the third group consists of states "backsliding" into authoritarianism, such as Armenia, Cambodia, Kazakhstan, Peru, Russia, and Zambia (pp. 108-09).

Although Carothers acknowledges that the notion of a gradual, sequenced process of democratization bears some resemblance to ideas advanced in the scholarship of Guillermo O'Donnell and Philippe Schmitter, among others,<sup>26</sup> he seeks to dispel any suggestion that academic work has had more than a negligible influence "on democracy aid generally over the past fifteen years" (p. 93). There has, he asserts, "been little borrowing of concepts from the literature, nor has there been that much direct interchange of ideas" (p. 93). Those shaping and administering governmental programs have had little time for theory, he tells us, because they view scholarship as far removed from the concrete problems with which those in the field must deal, not to mention riddled with contradictions, excessively jargon-laden, and often ideologically ill-disposed toward the American government (p. 94). Nor, apparently, have such officials delved deeply into the histories of other mature liberal states such as Britain, Germany, or Japan; of jurisdictions that have made fairly successful transitions such as Chile, the Czech Republic, Korea, and Taiwan; or even, Carothers emphasizes, of the intended targets of American democracy promotion programs. Instead, they have tended to rely exclusively on their own experience concerning either the United States (in which much of the basic process of democratization occurred prior to their lifetime) or a small subset of nations that previously were major foci of American democracy assistance (pp. 97-98).

Carothers's assessment of the core strategy underlying American democracy promotion programs is incisive, even as it builds, in a tem-

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<sup>26</sup> See GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986); see also 4 *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA* (Larry Diamond, Juan J. Linz & Seymour Martin Lipset eds., 1989).

pered manner, on concerns of the type that David Trubek and Marc Galanter expressed in their celebrated 1974 study *Scholars in Self-Estrangement*.<sup>27</sup> At the most general level, Carothers identifies three major shortcomings. First, U.S. democracy promotion programs have drawn far too much and far too uncritically on idealized American models. Practices that may be quite understandable in one setting (such as “American-style legal activism”) may “have grown out of particular aspects of America’s social makeup and history — whether the immigrant character of society, the ‘frontier’ mindset, the legacy of suspicion of central government authority, or the high degree of individualism” (p. 98). As such, they may not map effectively even onto civil law democracies in Europe, let alone developing nations. Second, the core strategy seems remarkably, if not even willfully, inattentive to political, social, or economic power in recipient nations. This inattentiveness tends to lead to an undue and often naive emphasis on formal, as opposed to substantive, change. “Aid providers,” writes Carothers, “treat political change in a pseudoscientific manner as a clinical process to be guided by manuals, technical seminars, and flowcharts specifying the intended outputs and timeframes” (p. 102). The third general flaw in American thinking has been its assumption that there is an orderly and universally valid process of democratization. Experience, indicates Carothers, argues against this notion, suggesting that programs that are insufficiently supple and flexible may collapse of their own weight as events depart from the stages that methodical sequencing would seem to prescribe (pp. 108–13).

Heeding his own message about the importance of attention to context, Carothers elaborates his critique of the broad strategy underlying democracy promotion programs by interweaving case studies of Guatemala, Nepal, Zambia, and Romania into his principal discussion. The four nations, to be sure, share some features. Perhaps most significantly, “the recent transition [to democracy] had strong roots in [each] country’s past” (p. 82) — including efforts to liberalize prior to the imposition of autocratic governments during the Cold War years. Further democratization, however, remains far from complete in each instance. Indeed, according to Carothers, “[i]n all four, most of the core state institutions have remained citadels of corruption, incompetence, and inefficiency” (p. 81), while the public in each has come to take a somewhat skeptical, if not jaundiced, stance toward democratization after initially having viewed its potential benefits with considerable anticipation.

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<sup>27</sup> See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

Despite these similarities, Carothers notes several differences among the subjects of his case studies beyond the obvious ones of geography and ethnicity. These include the nature and provenance of the recent authoritarian past that each is struggling to leave behind (ranging from the right-wing dictatorship so long dominant in Guatemala to Ceausescu's repressive communist regime in Romania); their current political arrangements (Nepal, for instance, is a monarchy and Zambia is still, in effect, a one-party state); and the degree of attention accorded by the United States (which has run from massive involvement via the Central Intelligence Agency (CIA) in the case of Guatemala, to the turning of a blind eye toward brutality in Romania, to near indifference with respect to Zambia and Nepal). And although the United States has essentially adopted a common strategy toward each, the amount of funding that Washington has been willing to devote has varied. Guatemala, for example, has received approximately \$60 to \$80 million over the 1990s (for a population of 11 million), roughly double the amount allocated for Romania (with a population of 22 million), and three to four times that spent on Zambia and Nepal (with populations of 10 million and 22 million, respectively) (pp. 120-21).

*C. Your Society Can Be Civil, Too: The Elements of Democracy Promotion*

Within the four nations that Carothers highlights, and the hundred or so more that are recipients of American democracy assistance, USAID has concentrated its attention on three principal areas: institution building, electoral and political processes, and civil society — all, no doubt, worthy, but each of which, Carothers suggests, presents very complex challenges. By institution building, Carothers principally means work on national constitutions and the promotion of the rule of law, although he also includes in this category more modest attempts to improve legislative operations, devolve responsibilities from central to local units of government, and institutionalize civilian command of the military (p. 158). Support for constitutional development “is probably the form of democracy assistance best known to Americans,” (p. 160) taking such forms as the provision of direct advice by prominent American scholars and the convening of high-profile conferences involving key foreign draftspersons. Alas, observes Carothers, while such assistance may be “tremendously appealing to U.S. aid providers . . . its promise of great bang for the buck is seldom fulfilled . . . [as] most constitutional aid is very much on the sidelines when the writing or rewriting is going on” (p. 160). In an important sense, this is as it should be if a constitution is to be expressive of the experience and aspirations of the people to whom it is to apply and is to emerge from a drafting process in which they have been able to participate signifi-

cantly. The limitations inherent in attempts to play an active part in shaping another people's constitution may be even more pronounced in the case of American assistance, given the particular prominence of constitutionalism in our national history and civic life, and the belief of some specialists that, for all its virtues, the U.S. Constitution may be less well suited than Western European models for Eastern Europe and perhaps other regions (p. 162).<sup>28</sup> In fact, as Carothers illustrates with respect to Zambia, local authorities may even turn such assistance on its head, utilizing constitutional change to buttress one-party rule (pp. 162-63).

Rule of law assistance — within which rubric Carothers includes aid directed toward legislative drafting; judicial, prosecutorial, police, and prison reform; strengthening of the private bar, public providers of legal assistance, and advocacy groups “that use law to pursue social and economic goals” (p. 168); university-level legal education; and enhancing public familiarity with the law — has become a second focus of American programs designed to foster democracy through institution building. The first generation of these efforts, in which academics such as Trubek and Galanter were involved, concentrated chiefly on Latin America and Africa and was relatively low-profile. Over the course of the past decade, rule of law programs have been directed toward Eastern Europe, the former Soviet Union, and a variety of Asian venues, while being targeted for considerable attention both here and in recipient nations (pp. 163-64).

Indeed, notes Carothers in one of his more pointed observations, donors are increasingly advancing the rule of law as a remedy for most major challenges facing transitional countries (p. 165). As with the promotion of civil society, it has of late become a central part of the conventional wisdom regarding democracy assistance and is now seen as indispensable to the attainment of democracy, economic success, and social stability.

For all this new-found faith — not to mention a good deal of cash and a surfeit of American legal scholars and jurists — “what stands out about U.S. rule-of-law assistance since the mid-1980s,” concludes Carothers, “is how difficult and often disappointing such work is” (p. 170). In part, this difficulty results from the magnitude of the changes that are involved in promoting something approximating a rule of law in nations suffering from an inadequately trained and poorly paid judiciary, weak supporting institutions, and seemingly endemic corruption. In Nepal, for instance, “various aid efforts to improve the administration of the courts sank almost without a trace into a judiciary riddled with corruption and mismanagement” (p. 173). But the disap-

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<sup>28</sup> See, e.g., Ackerman, *supra* note 20, at 643-64.

pointing quality of work in this area is a result of more than just the size of the problem. In concentrating upon law drafting (which all too often has meant law drafting based on American models) and judicial assistance, even well-meaning American reformers have frequently demonstrated little appreciation of the ways in which law is rooted in a social context that may well vary among nations. And, contends Carothers, they have in all too many instances failed to discern the limits of support for such reforms, not only in political circles, but also among economic and social elites and even in the leadership of the judiciary itself (p. 174).

The second major prong of American democracy promotion programs concerns the electoral process and party politics. Efforts to promote electoral processes, suggests Carothers, take five principal forms. These include the design of electoral systems (with a preference for single member, rather than proportional, districts — because that is what American advisors know best), electoral administration, voter education, election observation, and the mediation of disputes arising from elections (pp. 125–28). The utility of such advice is ultimately very much dependent on the commitment of the host nation — and especially its ruling party — to an electoral process with the potential to dislodge those holding office. As a consequence, what Carothers characterizes as “intensive, generally well-conceived technical assistance” in Romania and Zambia essentially went for naught (p. 130), while more successful elections in Guatemala “[were] influenced by the surge of elections elsewhere in Latin America, but very little by U.S. officials, to whom the Guatemalan military was not in the habit of listening carefully” (p. 137). Beyond such obvious and fundamental issues, American and other providers of such assistance confront somewhat more subtle challenges. Election observers, he notes, find it more difficult than one might initially imagine to articulate standards for evaluating elections that are appropriate (given local circumstances) and yet also readily comprehensible to an audience abroad (p. 133). Of late, there have been so many observing missions afoot that there is a need to avoid tripping over other well-intentioned teams of observers (p. 134). Nonetheless, for all these and other difficulties, Carothers on balance seems to view democracy promotion efforts directed toward electoral processes more favorably than those aimed at the building of political parties. Notwithstanding USAID guidelines stressing nonpartisanship, the very nature of aiding partisan political parties makes it well-nigh impossible for foreign advisors to avoid at least the perception of intervening in the domestic affairs of another state, as apparently was the case in Romania (pp. 144–45).

Although of relatively recent origin as a consequential component of U.S. democracy promotion programs, “civil society” — which Carothers defines as “the space for a society between individuals and families, on one hand, and the state or government, on the other” (p.



209) — has become something of a watchword in the 1990s (pp. 207–09). An admittedly vague concept, civil society<sup>29</sup> is attractive for its open-endedness, as well as for its potential to redress the overly top-down nature of earlier programs, not to mention the opportunities it provides to engage important American popular constituencies in the work of democracy promotion. The principal focus of U.S. civil society assistance has been on so-called advocacy NGOs, although broad civic education, independent media, and free labor unions have also received considerable support (p. 210). Issue-oriented NGOs are seen as having the potential to stimulate greater citizen involvement in governance in a manner that is, at least in theory, relatively nonpartisan and distinct from religious entities, clans, or other predominantly ethnically-defined groupings (pp. 211–12).

Carothers has considerable unease about the extent to which democracy promotion has emphasized advocacy NGOs. In important measure, his reservations arise because he views advocacy NGOs as very much a product of the American experience. The notion that such bodies can readily bridge the gap between state and society may have been validated to some degree in Romania, but even there they evidence a “faddishness[] and opportunism” that he believes common in many countries (pp. 224–25). Reliance on advocacy NGOs has, moreover, been a dismal failure in Nepal, where the problem of “frantic politicization,” *inter alia*, belies the conceit that any socially active organization can eschew partisanship. Nor has the experience differed appreciably in Zambia, where much-vaunted popular participation has been achieved only through payments to local participants of more than they can earn from a day’s work. Carothers expresses further skepticism about the assumption, underlying the emphasis on such NGOs, that this type of advocacy will perforce “lead to the predominance of wholesome public interests” (p. 223). This, he suggests, has not necessarily been the case in the United States, where there is growing public concern regarding the ways in which monied lobbyists distort the legislative process. Moreover, there is the added complication that for all its statements of nonpartisanship, U.S. civil society assistance:

clearly often reflects the application abroad of the basic U.S. domestic liberal agenda — support for human rights, the environment, women, indigenous people, and so forth . . . . Aid providers say that the advocacy NGOs they support are pursuing the public interest, but the public interest is interpreted very much in accordance with the worldview of the U.S. NGO community from which come most U.S. enthusiasts of civil society promotion abroad. (p. 212)

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<sup>29</sup> The complexity of the term is discussed in ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992).

Money has also created its own problems. In Nepal, "bad NGO practices growing out of too many donor funds chasing too few worthwhile organizations in the capital have led many Nepalese to hold NGOs in contempt" (pp. 217-18). And in Zambia, the flow of USAID cash, coupled with a rhetoric of "partnership," left local NGO leaders with a "deep bitterness toward USAID . . . and feeling mistreated by the United States" when Washington's gravy train came to a halt (p. 220).

Carothers has many of the same concerns regarding efforts by the AFL-CIO, among other bodies, to promote unionization abroad. While believing that strong, independent unions can be a potential bulwark for a robust civil society and for development more generally, he is critical of the extrapolation of what he describes as an American-style contentiousness into labor-management relations abroad, especially given his view that "the model does not even seem to work well at home [where] the U.S. labor movement has been in serious decline for decades" (p. 246). Additionally, Carothers is bothered by what he describes as the secrecy and relative lack of accountability that surrounds the funding of such labor-based initiatives (which he, in turn, traces to the AFL-CIO's power base in Congress) and by their absence of strong links to other aspects of American programs intended to foster civil society.

Carothers takes a slightly more sanguine view of efforts to foster civic education and independent media. He suggests that the former has had some effect in Guatemala and the latter has, as an adjunct to domestic efforts, played a constructive, if modest role in the restructuring of certain media in Romania. Even here, though, Carothers underscores the need for sobriety. He points out that factors such as low literacy rates and host country governmental actions inconsistent with the message of civic education reduce its effectiveness, while the model of private ownership of media preferred by American aid givers raises difficult issues concerning matters such as commercialism and candidate access to the airwaves.

#### *D. Carothers's Conclusion: Realism About Idealism in Democracy Promotion*

For all his quite substantial criticisms of American democracy promotion programs, Carothers is of the opinion that those charged with responsibility for them have begun to address some of the aforementioned problems. He therefore focuses in his final chapters on how such gains might be consolidated. Perhaps most vitally, he concludes that those Americans shaping such programs would do well to approach their work with much more humility. Democracy assistance, Carothers believes, has a valuable, if ancillary, role to play in facilitating the efforts of those with a "will to reform" in the target nations. As such, Americans, whether at USAID or in the burgeoning ranks of

NGOs involved in democracy promotion, should move away from excessive utilization of formulaic templates based on the American experience and of associated modes of evaluation. In their stead, he urges that far greater attention be paid to tailoring assistance to local circumstances. In the same vein, even if the United States continues to bankroll such work, there needs to be a concerted effort to include local personnel far more readily and substantially in the undertaking. And expectations about what such programs might accomplish need to be scaled back as well.

Within this more realistic set of parameters, democracy promoters should, suggests Carothers, accentuate three substantive concerns that he believes have received insufficient attention. The first is the need to “build a relationship between aid for democracy and the larger, more established world of aid for social and economic development,” given that these two international assistance communities have operated with surprisingly little interaction, if not a good deal of mutual suspicion (p. 344). The desired linkage between these areas of development is far from clear, but there is no doubt in Carothers’s mind that they are inextricably interwoven. Second, greater attention should be paid to the role of women in democratization for, notwithstanding his earlier point about the influence of American NGOs, Carothers emphasizes that women continue to play a secondary role in all aspects of democratization — including new public institutions, reinvigorated electoral and political processes, and emerging civil society entities. Third, far more emphasis needs to be placed on helping “recipient countries better understand and use democracy aid” (p. 346). In something as vital as democracy, passivity among recipients and their agents is not desirable.

The changes that Carothers advocates in America’s efforts to promote democracy abroad will not, in the end, occur without changes in the United States. Some will entail institutional reform of the manner in which USAID conducts and evaluates its work, if not even of the structure or mission of the agency itself. But as difficult as it may be to imagine recasting such practices or reshaping so entrenched a bureaucracy, these proposed reforms pale in the face of the larger changes in public consciousness that Carothers proposes (if, at times, more by implication than direct statement). Americans should reverse the recent trends of sharply reduced foreign aid budgets and relative self-absorption<sup>30</sup> in order to provide the financial and political support needed to seize this extraordinary moment in history. At the same

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<sup>30</sup> See DeYoung, *supra* note 14 (noting the decline in American foreign aid since the end of the Cold War). *But cf.* Bandow, *supra* note 14 (expressing the view that it is the quality rather than the quantity of involvement abroad that matters).

time, though, the public must understand just how difficult the undertaking is. The very type of transformations this assistance is intended to foster will, by definition, be slow, painful, uneven, and capable at most of producing a hybrid rather than a replica of what we think is best about ourselves. And our role is likely to be an ancillary one for which both common sense and decency suggest we refrain from taking substantial credit. As Carothers puts it in concluding his book:

Americans are so used to debating foreign policy from positions of realism and idealism, in which America's interests and capabilities are either systematically understated or overstated, that it is hard to avoid discussing democracy promotion in those terms. A position based on idealistic aspirations tempered by deeply realist considerations makes both sides uncomfortable. For democracy promotion, however, it is the only real choice. (p. 352)

### III. FUNDAMENTAL QUESTIONS THAT SHOULD BE ASKED ABOUT DEMOCRACY PROMOTION

There is so much to commend about *Aiding Democracy Abroad* — it is hard to imagine a book on this general topic that might actually be read in Washington that better blends an awareness of theory, hands-on case studies, and policy — that one is loathe to voice criticisms of it. Yet the high standard that Carothers has established warrants that one not hesitate to do so.

Carothers himself reveals what is arguably *Aiding Democracy Abroad's* most significant shortcoming in his seemingly innocuous statement in the book's conclusion that “[t]he most common and debilitating weakness of democracy programs is the manner in which they are carried out — above all, the failure to fit activities to the local environment and to give people and organizations of the recipient country a primary role” (p. 344). This observation, no doubt, has a great deal of truth to it, as will be discussed below. Nonetheless, it also evidences Carothers's too ready acceptance of the current parameters of America's efforts at democracy promotion and his concomitant failure to ask at an even more fundamental level about the motivation for democracy promotion, the logic of the models it employs, the difficulties of measuring its intended and unintended consequences, and the ethical challenges the enterprise poses. This Part of my Review raises many such questions. It may well be unreasonable to expect *Aiding Democracy Abroad* to have explored them all, but Carothers would have fostered more considered — and more democratic — deliberation about democracy promotion both here and among potential aid recipients had he pursued such lines of inquiry.

### A. *Why Democracy Promotion?*

Carothers surely is right to urge a greater attention to “local environment” in countries receiving democracy assistance. Logic suggests, however, that he should as well have scrutinized the local environment of this and other countries providing the assistance. Whether from a scholarly or more policy-oriented perspective, questions regarding a country’s rationale for and degree of commitment to democracy promotion are vital to any meaningful assessment of such undertakings. *Aiding Democracy Abroad* has much to say (little of it favorable) about USAID, but it is surprisingly reticent about the genesis of the larger policies that the agency executes, either with respect to contemporary partisan politics or to longer-term theoretical issues, particularly given that the book calls on policymakers and the public to support democracy promotion even though the endeavor is unlikely to yield “rapid or decisive change” (p. 351). Nor does the book systematically examine how our broader conduct as a state and a society may reinforce or retard such programs, although such an inquiry would have illuminated the priority we accord democracy promotion.

The question of motivation is more complex than it might at first seem. One could imagine a number of different and perhaps simultaneous purposes at play in the American impulse to promote democracy abroad. For example, such efforts could result from a genuinely altruistic desire to share what we believe is best about our society; from a belief in the promise of a more peaceful world (premised on the Kantian notion that democracy restrains governments from going to war, save against tyrants);<sup>31</sup> or from a conviction that democracy is more conducive than any other political system to sustained economic growth.<sup>32</sup> Alternatively, American efforts may be more attributable to an unwitting hegemonism; to a need to vindicate our ideals (or the ways in which we aspire to realize them) by having others adopt them; or to the waging of domestic academic and ideological debates on foreign terrain.<sup>33</sup> Or perhaps the explanation owes more to realpolitik — as borne out in the solution democracy promotion may provide to

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<sup>31</sup> For a portrayal of the Kantian argument, see BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST COLD-WAR WORLD* (1993); and Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part I*, 12 PHIL. & PUB. AFF. 205 (1983).

<sup>32</sup> See, e.g., MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 89–100 (2000); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 146–59 (1999).

<sup>33</sup> One has the sense, more than occasionally, of scholars in the American academy seeking to vindicate signature theoretical positions through the invocation of foreign examples that purportedly bear out the wisdom of their views. The ways in which both American and Chinese scholars have done this vis-à-vis one another is the subject of RICHARD MADSEN, *CHINA AND THE AMERICAN DREAM: A MORAL INQUIRY* (1995). Unfortunately (or perhaps fortunately), Madsen’s subtle book does not encompass legal studies.

practical political battles;<sup>34</sup> in its potential for legitimating measures taken for American security, economic, and other interests;<sup>35</sup> or in the capture by some self-interested subset of actors (such as aid bureaucracies, consultants, developing country elites, etc.) of a policy in which most Americans have little direct stake.<sup>36</sup> What is the mix at any given point of these and other factors? How are tensions between them to be resolved? After all, it is conceivable that the goal of empowering others to elect governments that may better represent their views might simultaneously be at odds with the goal of using democracy promotion programs to advance specific American national interests (as, for example, when the Senate of the post-Marcos Republic of the Philippines voted to terminate the U.S. lease on Clark Air Base and the Subic Bay Naval Station that the ancien régime had been only too happy to allow the United States to hold).<sup>37</sup>

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<sup>34</sup> Consider, for example, the Clinton Administration's rule of law initiative for the PRC which Carothers discusses briefly in *The Rule of Law Revival*, *supra* note 17, at 106. Without downplaying either the importance of the PRC's developing greater respect for legality or the commitment of those in the United States involved in that undertaking, one might take note of its perceived potential to help the Administration navigate some very difficult domestic political shoals. Since the time of the Chinese government's violent termination of the occupation of Tiananmen Square by students and workers in 1989, the American business and human rights communities have been at odds over the U.S. government's approach toward China, with the former advocating a policy of engagement and the latter arguing that human rights considerations should be prominent even at the risk of offending Beijing. See William P. Alford, *MFN Fiasco Exposes Need for a Better China Policy*, CHRISTIAN SCI. MONITOR, July 8, 1994, at 19. A U.S. government program directed at helping the PRC build basic legal infrastructure not only spoke to a need identified by both the Beijing government and at least some Chinese dissidents, but also in the mid-1990s provided a rare way for an Administration facing reelection to reach out to business interests that had some wariness toward the Democratic Party while also taking steps that might over time advance the objectives of the human rights community. See William P. Alford, *In China, Respect for Law Must Come First*, L.A. TIMES, Feb. 2, 1995, at B7 (discussing the pertinence of legal development for both the business and human rights agendas). The considerable challenges confronting efforts to foster legal development in China are discussed below at pp. 1706-09. See also WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 112-23 (1995) (considering the interplay between human rights and property rights).

<sup>35</sup> As William Robinson suggests, the rhetoric of democracy promotion is rather more appealing than that of polyarchy or domination. See ROBINSON, *supra* note 16, at 4. Other oft-used terminology warrants scrutiny as well. For example, we need to guard against the assumption that "transitional" means that a nation is inexorably moving toward democracy or marketization.

<sup>36</sup> Carothers's generally well-researched book touches only fleetingly on the question of the economic and other interests of individuals and firms involved in the "democracy promotion industry" itself. Others have been somewhat less delicate about describing consultants feathering their own nests. See, e.g., WEDEL, *supra* note 11, at 45-82.

<sup>37</sup> Carothers speaks of U.S. democracy assistance at the time of the Philippine transition as providing "a crucial boost to the emergence of democracy aid generally" (p. 37). For an account of the termination of the military base lease, see DAVID JOEL STEINBERG, *THE PHILIPPINES: A SINGULAR AND A PLURAL PLACE* 176-80 (3d ed. 1994). A similar tension is arguably at play in the United States-Taiwan relationship, with Washington expressing irritation at statements by Taipei's political leadership that it views as needlessly provocative of Beijing. There seems insufficient appreciation on the American side of the need for the leaders of an increasingly democratic Taiwan to respond to and express popular sentiments. See Robert A. Manning & James Przystup, *Straits*

Unfortunately, Carothers does not address questions of motivation other than in a six-page "interlude for skeptics" (pp. 59–64). Even this interlude is little more than a cursory response to the most dismissive of critics. He seems instead to operate on the assumption that American motivations are so self-evidently positive and straightforward that they neither require explication nor pose any problems of internal consistency. This approach is unfortunate, not because those who doubt American motivations are necessarily correct, but because the tensions inherent in a complex democratic society's attempt to foster democracy abroad pose some of the most challenging issues such a book might explore. Carothers understandably bemoans the American public's broader lack of interest in democracy promotion programs. But it may be, even at a very mundane level, that this lack of interest and the impatience of most American political figures with democracy promotion programs that are unlikely to bear fruit quickly (or the concomitant tendency to overstate the immediate benefits of any such program)<sup>38</sup> are, in the end, simply democracy at work in a large, powerful nation with secure borders and pressing domestic concerns. Can taxpayers be expected to support something so remote, in every sense of the word, especially if there is a belief afoot that the international community has not been grateful for the contribution that this country has already made?<sup>39</sup> To what extent do domestic political concerns lead democ-

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*Jacket: The "One China" Problem*, NEW REPUBLIC, Sept. 27, 1999, at 13 (discussing Washington's difficulties in adjusting to the growth of democracy in Taiwan).

<sup>38</sup> By way of illustration, consider the ways in which the Clinton Administration has routinely oversold the significance of dimensions of its China policy concerning matters such as intellectual property protection, military cooperation, rural elections, and most recently, the PRC's accession to the World Trade Organization (WTO). See, e.g., Remarks at the Paul H. Nitze School of Advanced International Studies, 36 WEEKLY COMP. PRES. DOC. 487 (Mar. 8, 2000) (illustrating the President's tendency to overstate the certainty, extent, and speed of change that his Administration's policy vis-à-vis China will bring); see also Remarks at a Democratic Leadership Conference in San Jose, California, 36 WEEKLY COMP. PRES. DOC. 709, 715 (Apr. 3, 2000) ("[T]he narrow, or broad, economic consequences [of the PRC's accession to the WTO] are 100-0 in our favor."). Such exaggeration, perhaps believed necessary to generate public support for a policy toward which strong opposition has been voiced in Congress, is not without its baleful effects. It has the potential to raise undue expectations on the part of the American populace which, in turn, may foster a sense that the PRC has betrayed its obligations to the United States. Moreover, it may even weaken the position of our would-be allies in the PRC by overstating the concessions they may have made to the United States during negotiations or by accentuating the possibility that measures purportedly taken principally for economic reasons, such as accession to the WTO, may induce major political change. See James V. Feinerman, *Free Trade, To a Point*, N.Y. TIMES, Nov. 27, 1999, at A15 (urging sobriety in characterizing America's capacity to influence China); see also William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 146–52 (1996–1997) (discussing the formation of U.S. policy toward the PRC).

<sup>39</sup> Senator Jesse Helms expressed such sentiments, albeit in a rather exaggerated form, in a recent speech to the United Nations Security Council. See *In the Words of Helms: 'A Lack of Gratitude'*, N.Y. TIMES, Jan. 21, 2000, at A8 (containing excerpts from Senator Helms's speech).

racy promotion programs to advocate primarily the adoption of specific forms of governance derived from the American experience, instead of suggesting a broader panorama of possibilities or focusing on core underlying ideas and universal notions of human rights? And how does the effort to foster democracy abroad shape democratic life in the state rendering assistance?<sup>40</sup>

Carothers is equally terse in his consideration of what American behavior more broadly suggests about the motivation for democracy promotion (as well as its effectiveness). For example, Carothers mentions briefly that during the 1950s, 1960s, and early 1970s, the CIA “engaged in numerous covert efforts to bolster selected political parties, to tilt elections, and otherwise to influence political outcomes,” and that it sometimes sought to justify its actions “as support for the cause of democracy” (p. 25). Carothers is critical of this practice, noting that it “created a powerful legacy . . . with which democracy programs of the 1980s and 1990s have had to contend” (p. 25). But ultimately, even in his case studies, he does not illustrate the contemporary interplay between different government missions involving the world beyond our borders (such as the promotion of our ideals, economic interests, national security, and drug interdiction) and thus fails to illuminate the relative level of priority the American government accords democracy promotion in its foreign policy.<sup>41</sup> Nor, notwithstanding his praise for the philanthropy of George Soros (who “has contributed more democracy-related aid to many countries in Eastern Europe and the former Soviet Union than has the U.S. government or any other government” (p. 349)), does Carothers indicate what the activity of nongovernmental actors might suggest about the extent of state or societal commitment to democracy promotion.<sup>42</sup> Indeed, there seems little recognition in *Aiding Democracy Abroad* of the importance of viewing American governmental programs in the context of nonstate actors, whether from business, the NGO community, or civil society more broadly,

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<sup>40</sup> At times, Americans have used our government’s efforts abroad to press for a fuller realization at home of our stated ideals. In an intriguing recent study, Azza Salama Layton depicts how the leadership of the American civil rights movement used its “awareness of the nexus between U.S. racial policies and the government’s ability to sell democracy abroad, especially in Africa and Asia” during the early Cold War years to advance the cause of equality for African-Americans. AZZA SALAMA LAYTON, *INTERNATIONAL POLITICS AND CIVIL RIGHTS POLICIES IN THE UNITED STATES, 1941–1960*, at 73–74 (2000).

<sup>41</sup> The *New York Times* editorial page, for example, has recently argued that U.S. assistance for drug interdiction efforts in Colombia may have the effect of impairing democratic development there. See Editorial, *Dangerous Plans for Colombia*, N.Y. TIMES, Feb. 13, 2000, § 4, at 16.

<sup>42</sup> For example, *Aiding Democracy Abroad* does not contain an index entry for the Ford Foundation despite its extensive support for almost a half century of legal development in Asia, Africa, and Latin America. Ford’s role is recounted in THE FORD FOUNDATION, *MANY ROADS TO JUSTICE: THE LAW RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD* (Mary McClymont & Stephen Golub eds., 2000).



given how many areas of endeavor undertaken elsewhere by the state are addressed by society in the United States.

*B. Whose Model of Democracy and Democratization?*

Carothers's discussion, described earlier, of the models of democracy and democratization employed by American aid providers<sup>43</sup> is more extensive than his treatment of motivation and yet it, too, fails to push the inquiry as far as it might. These models, he suggests, have a pragmatic rather than an ideological or theoretical foundation that differs from European models, but is in keeping with what some observers term a deep-seated pragmatism in American life, especially among the legally trained.<sup>44</sup> The fact that USAID and other agencies may have an uneasy relationship with American academia, however, does not mean that they are acting in an intellectual vacuum. Scholars, in law among other fields, have been somewhat more involved in the shaping and execution of prominent parts of such assistance than Carothers acknowledges.<sup>45</sup> But even more importantly, there is operative in the models of democracy and democratization a vision of what a well-functioning democratic state looks like and how it is to be achieved. Such a vision, not surprisingly, is composed of ideas deeply rooted in American society. For example, in the case of democracy, it is one that, *inter alia*, places considerable emphasis on formal rights and embodies a wariness of state authority, generally favors individual rights over communal rights, and typically accords a higher priority to political and civil rights than to their economic and social counterparts. These preferences, in turn, presume a relatively constrained executive power, a strong and independent judiciary (in the American, as opposed to the civil law, ideal), a relatively weak civil service, a sizable and vigorous bar, and a vibrant civil society. At the same time, the accompanying model of democratization seems to exhibit great confidence in the capacity of a people, aided by law, rapidly to build a new

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<sup>43</sup> See *supra* sections II.B–C, pp. 1684–94.

<sup>44</sup> See Trubek & Galanter, *supra* note 27, at 1097 (noting American lawyers' preference for pragmatic problem solving). Carothers sees European models of democracy and democratization as having a more ideological or theoretical foundation than their American counterparts because a considerable portion of European (and especially German) democracy assistance has been channeled through party foundations and is "usually focused more on long-term party building than on specific campaigns" (p. 150). This results, he suggests, in certain "entrenched flaws," namely "dogmatic efforts to teach party ideologies, an overemphasis on ritualized exchange visits and conferences, and the often forced method of identifying and cultivating ideological partners" (p. 142).

<sup>45</sup> See, e.g., deLisle, *supra* note 15, at 199–200 (discussing the role of legal academics and law schools in law reform work in the former Soviet Union, Eastern Europe, and China). Although focused on a project funded by the United Nations Development Programme, the book *LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA* (Ann Seidman, Robert B. Seidman & Janice Payne eds., 1997) contains accounts by a group of American academics assisting legislative drafting in the PRC.

nation<sup>46</sup> while displaying relatively little concern about possible tensions between building state institutions and entrenching individual rights, or between economic and political liberalization. Finally, implicit in these models is the assumption that they are readily conducive to communication across linguistic, national, and cultural boundaries.

Fifty years after the promulgation of the Universal Declaration of Human Rights and a decade following the collapse of the Soviet Union, it is understandable why one might want to treat these models as vindicated. Nonetheless, *Aiding Democracy Abroad* would have been a richer book had it inquired more deeply into the models of democracy and democratization undergirding efforts of the American government to promote democracy abroad. Consider, for example, questions raised by the writings of two of our most eminent public intellectuals, Richard Posner<sup>47</sup> and Amartya Sen,<sup>48</sup> regarding the course that developing nations (and those who would aid them) should embrace. As Posner would have it, developing nations would do well to postpone plans to create a "first-class judiciary or an extensive system of civil liberties" in favor of a few clear rules regarding property and contract<sup>49</sup> and a relatively modest judicial, arbitral, or other enforcement apparatus.<sup>50</sup> For Sen, on the other hand, civil liberties and

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<sup>46</sup> This statement mirrors the self-perception of America, in the words of Seymour Martin Lipset, as "the first new nation." SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE 2* (1979) (internal quotation marks omitted).

<sup>47</sup> See Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 *WORLD BANK RES. OBSERVER* 1 (1998).

<sup>48</sup> See SEN, *supra* note 32.

<sup>49</sup> Posner, *supra* note 47, at 9. These rules, Posner suggests, might be borrowed "wherever possible from established foreign models," and adjusted, if necessary, for local conditions. *Id.* at 6.

<sup>50</sup> See *id.* at 7. The logic of Posner's position is that "an extensive system of civil liberties" and an elaborate judiciary absorb human and other resources that a developing society can ill afford to lose from more productive economic activity. *Id.* at 9. One need not move to the opposite extreme (that is, that all societies are or should be adopting the type and volume of laws that the economically advanced nations have) to note that Posner's argument is flawed, even were we to posit the centrality that he accords economic development. A modest system of civil liberties may impede economic development (if, for instance, the media and nongovernmental organizations lack the legal protections needed to report vigorously on corruption, mismanagement, or other sensitive information important to the operation of a marketplace). Moreover, it seems doubtful that limiting substantive law to a few clear rules regarding property and contract will adequately serve the needs of a nation undergoing rapid economic transformation (with attendant social dislocation and disruption of historic modes of dispute resolution), prevent harassment of those who might compete economically with those who are well connected, or satisfy the demands of the international business community, which is likely to seek a higher rate of return to compensate for the perceived heightened risk resulting from the absence of effective legal protections. In addition, we should guard against the assumption that the involvement of international business will necessarily lead to an overall improvement in public legal institutions. As I suggest elsewhere, foreign parties doing business in the PRC appear to be pursuing a variety of strategies to achieve their ends. These involve resort to arbitration (in effect establishing a private system of justice for multinational enterprises while doing little to enhance public institutions) and, less attractively, reliance at times on

associated freedoms are not only as desired an end of development as prosperity but also an indispensable precondition for prosperity.<sup>51</sup> The models USAID has been employing would seem hard put to accommodate both of these visions, particularly with respect to the relationship between political, economic, and legal development. Carothers's readers would have been well served had he provided a fuller account of the choices made, or at least implied, by the models USAID has been utilizing — for in the end, there is a normative foundation to whatever definitions of democracy and democratization one might employ.

A more concerted treatment of the models might also have addressed why “fit[ting] activities to the local environment” has proven so difficult, by raising the question of the relationship between democracy and the values and institutions that underlie it. This inquiry may be another way of asking just how much and what type of change different definitions of democracy may entail in current political, economic, social, and other arrangements — and what provides a basis of legitimacy for such change. Although Carothers does not describe it in this manner, one might think of the history of the programs with which he is concerned as an expanding circle in which, over time, those advocating the promotion of democracy abroad have regularly broadened the ambit of the assistance being transmitted. That is, they have gradually added elements such as support for the formation of political parties, the administration and monitoring of elections, the drafting of constitutions and legislation, the building of an independent judiciary, the strengthening of the bar, the liberation of the media, the buttressing of civil society, the expansion of civic education, the empowerment of women, and the creation of autonomous unions.

To some extent, this expansion has mirrored changes in the United States that have prompted us to rethink what constitutes democracy. But perhaps in even greater measure, it has been a response to the realization by aid providers that earlier, more skeletal exports too often fell short of fostering democracy (as, indeed, Carothers suggests has been the situation in at least three of his case studies). *Aiding Democracy Abroad* does not indicate whether the activities that currently

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extralegal measures. See William P. Alford, *The More Laws, the More . . . ? Measuring Legal Reform in China* 14–24, 33–34 (Jan. 2000) (unpublished working paper of the Center for Research on Econ. Dev. and Policy Reform of Stanford Univ., on file with the Harvard Law School Library) [hereinafter Alford, *The More Laws, the More . . . ?*].

Posner's work, incidentally, has been very influential in post-Maoist China, perhaps because it rings of economic determinism purged of redistribution.

<sup>51</sup> See SEN, *supra* note 32, at 35–53. Sen is not oblivious to the economic and social accomplishments of authoritarian regimes, but argues that history bears out that “the process of preventing famines and other crises is significantly helped by the use of instrumental freedoms.” *Id.* at 188.

constitute democracy promotion should be read as a final list (in effect, an "end of history" for such programs) or whether proponents of democracy promotion need to anticipate the prospect of further, perhaps ongoing, redefinition of the models with which they are working. Carothers, to be sure, did not intend *Aiding Democracy Abroad* to be a work in political philosophy, but by failing to focus more extensively on the conceptual wellsprings of the models of democracy and democratization he would employ, he ultimately leaves the reader wondering about their contours and base of legitimacy. If, as one suspects, Carothers believes that the vision of democracy that should inform American promotion programs is one principally grounded in universal norms of human rights as they have come to be articulated since World War II, it would have been helpful for him to have explained that. *Aiding Democracy Abroad* would have been stronger had he shown how the intellectual and moral climate these norms have fostered or the set of practical legal instruments in which they have found expression buttress his call for democracy promotion.<sup>52</sup> Carothers's study, however, makes scant mention of universal norms of human rights largely because, one fears, he sensed that such an argument might have undercut support in some Washington circles capable of exerting considerable influence over the fate of democracy assistance programs.

Greater scrutiny of the concepts of democracy and democratization at issue might also have led Carothers to focus even more on the recipients of democracy assistance. *Aiding Democracy Abroad* implores those who would craft such programs to "give people and organizations of the recipient country a primary role" (p. 344), but this call, however forcefully rendered, still leaves many important questions unanswered. Consider, for instance, the issue of representation. Who speaks for a society that has yet to undertake serious political reform? Who does so for a society that is in the midst of rapid reform, but not yet democratic by any meaningful definition?<sup>53</sup> What are the implica-

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<sup>52</sup> Carothers might, for example, have shown how scholars such as Henry Steiner and Thomas Franck have advanced the argument that the chance to participate in one's own governance is not just a preference, but a right. See Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988); see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 46 (1992) ("Democracy . . . is on the way to becoming a global entitlement . . .").

<sup>53</sup> At least by implication, Samuel Huntington suggests that it is better to concentrate attention on political elites, rather than the populace more generally. The rationale for this focus, he believes, is that apart from economic development, the key factor "affecting the future stability and expansion of democracy [is] . . . political leadership" whereas a society's culture itself changes much more slowly. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 315-16 (1991). As manifested in USAID and other American democracy promotion programs, legal assistance has predominantly taken the form of strengthening state in-

tions of working through NGOs in a society in which the state or ruling party is endeavoring assiduously to stay involved in all social organizations of any consequence (including unions, churches, media, advocacy groups, and the professions)?<sup>54</sup> Does attention to local NGOs, even in a relatively open society, run the risk of diminishing the voices of official representatives of the full populace in fledgling democratic institutions? How are we to treat a state that disenfranchises ethnic minorities as it embraces majority rule?<sup>55</sup> To his credit, Carothers recognizes the danger that aid programs may be captured by members of local elites adept at interfacing with foreign donors. Nonetheless, one longs for a further consideration of such questions, informed by an engagement of the work of scholars, survey researchers, and other observers from recipient countries that is more extensive than Carothers's bibliography suggests, even recognizing the limits on expression that typically exist in nondemocratic states.

### C. *What Are We Measuring and How?*

Carothers writes insightfully about the challenges that efforts to evaluate democracy promotion programs present. He is especially critical of USAID's espousal, growing out of the Clinton administration's "reinventing government initiative," of a "corporate-style managing for results system" (p. 288). This system presumes that "large elements of democracy, such as a well-functioning local government or an active civil society . . . [can be reduced] down to two or three extremely narrow quantitative indicators" (p. 293). When compounded by "evaluators [who] rarely have in-depth experience in the country in which they are doing evaluations," this methodology generates a "false dream of science" that is the evaluative counterpart to the rigid de-

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stitutions and associated elites (even if with a longer term objective of facilitating the empowerment of the populace).

<sup>54</sup> For example, my research regarding lawyers in the PRC (whose ranks have swelled from 3,000 in 1979 to approximately 175,000 in 2000) suggests that the national lawyers' association, if not the bar more generally, is appreciably less autonomous than most observers would indicate. American and other foreign actors seem all too ready to embrace putative counterparts in China, little recognizing how closely tied some such entities remain in a corporatist fashion to state and Communist Party authorities. See *infra* pp. 1706-08. The dilemma of the Chinese bar and the reasons it has not been better understood in this country are the subject of William P. Alford, *Of Lawyers Lost and Found: Liberal Legal Professionalism and the People's Republic of China* (December, 1998) (unpublished manuscript, on file with the Harvard Law School Library) [hereinafter Alford, *Of Lawyers Lost and Found*]. For an analysis of the ways in which the PRC's emerging business community has remained linked to the party, see MARGARET M. PEARSON, *CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM* 100-15 (1997).

<sup>55</sup> See generally Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 *YALE L.J.* 1 (1998) (discussing the difficulties that ethnic resentment may pose for efforts to foster democratic and market-oriented institutions). The capacity of a democratic majority to inflict harm on a minority should remind persons engaged in democracy promotion of the potential for tension between democracy and other values.

mocracy templates used by USAID and others in program design, and that is also enormously wasteful and potentially highly misleading (p. 287).

The question of assessment, however, poses a number of difficult practical challenges that *Aiding Democracy Abroad* might have examined more fully.<sup>56</sup> How are we to attribute success or failure to a particular democracy promotion effort, given that few foreign actors (beyond the aid community) experience such projects directly and that the more general impact of these programs is likely to be inextricably linked with a host of other influences? For example, it seems reasonable to think that factors such as the expectations of a populace that has long suffered under nondemocratic regimes, the collapse of the Soviet Union (as the chief provider of financial and ideological support for certain nondemocratic regimes), the behavior of neighboring states, and multilateral assistance or private philanthropy of the type represented by George Soros,<sup>57</sup> would be more likely to explain moves toward democracy than a modestly funded, fairly bureaucratized U.S. governmental undertaking. Indeed, it could be that such factors might even be strong enough to overcome an ill-conceived or poorly executed democracy promotion program; or perhaps that American and other bilateral assistance is more likely to flow to projects with a good possibility of success, rather than those with limited prospects, no matter how worthy the latter may be relative to the former. Conversely, one could imagine a well-designed, competently executed program of democracy assistance failing for a myriad of reasons, including local ethnic tensions, distrust of the United States resulting from support of the previous (or current) authoritarian regime,<sup>58</sup> the unwillingness of other

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<sup>56</sup> Elsewhere I discuss the difficulties of measuring legal development and its relationship to economic development, noting what I understand to be limitations in the work of economists such as Andrei Shleifer and Robert Vishny. See Alford, *The More Laws, the More . . . ?*, *supra* note 50, at 6-14. The question of how best to quantify the interplay between legal and economic development is a topic garnering increasing attention among from lawyers and economists. Two recent noteworthy studies are Katharina Pistor & Philip A. Wellons, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (1999); and Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect* (February 2000) (unpublished manuscript, on file with the Harvard Law School Library). For a thoughtful essay on the challenges posed by efforts to measure legal development empirically, see Matthew Stephenson, *The Rule of Law: Toward a Definition for Political Scientists* (Spring 1999) (unpublished manuscript, on file with the Harvard Law School Library).

<sup>57</sup> The massive involvement of donors beyond the U.S. government (including private philanthropists, foreign governments, and multilateral organizations) counsels caution in attempting to distinguish the impact of official programs. Indeed, donor competition, which some recipients work to great advantage, has become a problem. For a biting critique of the ways in which some aid recipients manipulate donors, see András Sajó, *Universal Rights, Missionaries, Converts, and "Local Savages"*, 6 *EAST EUR. CONST. REV.* 44, 48-49 (1997).

<sup>58</sup> Witness, for instance, the complex feelings toward the United States in South Korea, where considerable good will is tempered in some circles by memories of American support for the Chun

important democratic states to support a principled American call for sanctions, and the sheer frustration of a newly liberated populace with the adjustments and delay occasioned by any serious effort at democratization.<sup>59</sup> Moreover, there is the important question of the appropriate time frame for judging the effectiveness of the democracy promotion program in question. Although Brian Tamanaha may well have been correct in chastising Trubek and Galanter for their impatience in writing off earlier rule of law programs as a failure after less than a decade,<sup>60</sup> we might nonetheless be reluctant to adopt the perspective attributed to the late Chinese premier Zhou Enlai (1899–1976) who purportedly replied to a question about the significance of the French Revolution with the answer that “it is too early to say.”<sup>61</sup>

The point here is neither to expect of Carothers a comprehensive history of the world nor to belittle the potential contribution that skilled social scientists highly knowledgeable about the societies in question might make. Rather, it is first to underscore the practical difficulties of isolating the impact of U.S. governmental democracy promotion programs. After all, as Adam Przeworski of the University of Chicago, a prominent scholar of democratic transitions, concluded in a review of eighteen major studies concerning the relationship between regime type and growth: “The simple answer to the question with which we began is that we do not know whether democracy fosters or hinders economic growth. All we can offer at this moment are some educated guesses.”<sup>62</sup> And it is secondly to raise the possibility that in seeking to aid democracy abroad we may need to remain as vigilant about what our country does as what we would urge others to do.

Efforts at measuring democracy promotion programs also require recognizing that even the best delivered message will not necessarily ensure comparable results in different settings. Notwithstanding Nebraska Senator Kenneth Wherry’s famous declaration that “[w]ith God’s help, we will lift Shanghai up and ever up until it is just like

Doo-Hwan regime. See Heng Lee, *Uncertain Promise: Democratic Consolidation in South Korea*, in *THE POLITICS OF DEMOCRATIZATION: GENERALIZING EAST ASIAN EXPERIENCES* 148, 150 (Edward Friedman ed., 1994).

<sup>59</sup> See generally JON ELSTER, CLAUS OFFE & ULRICH K. PREUSS with FRANK BOENKER, ULRIKE GOETTING & FRIEDBERT W. RUEB, *INSTITUTIONAL DESIGN IN POST-COMMUNIST SOCIETIES: REBUILDING THE SHIP AT SEA* (1998).

<sup>60</sup> See Brian Z. Tamanaha, *Lessons of Law-and-Development Studies*, 89 AM. J. INT’L. L. 470, 473 (1995) (reviewing LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1992); and LAW AND DEVELOPMENT (Anthony Carty ed., 1993)).

<sup>61</sup> David Wallen, *Heseltine Is at the Centre of Power*, S. CHINA MORNING POST (Hong Kong), July 8, 1995, available in LEXIS, News Library, SCHINA File (quoting Zhou Enlai). For more on the issue of time, see Alford, *The More Laws, the More . . . ?*, *supra* note 50, at 10–15.

<sup>62</sup> Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSPECTIVES 51, 64 (1993).

Kansas City,"<sup>63</sup> the jazz band at Shanghai's Heping Hotel still leaves a good deal to be desired even before we get to the question of barbecue.<sup>64</sup> To make this point is not to lose sight of the good in search of the perfect. As Alan Watson has nicely chronicled, for centuries we legal types have been lifting ideas from our foreign compatriots, often benefiting from such legal transplantation even in the face of imperfect understanding, incomplete replication, and inapt application.<sup>65</sup>

To be sure, Carothers writes about the aberrant results generated by both the too rigid application of an American-derived template of success and the out-and-out misuse by some aid recipients of the tools we have put in their hands. His discussion is thoughtful, but he ultimately treats these problems as technical ones that could largely be resolved with more care (for example, through building more flexibility into one's template or selecting a nicer class of aid recipients), when such difficulties may well be endemic to the enterprise and require more attention, both for practical and normative purposes, to the possibility of unintended consequences.

Consider, for example, the case of the People's Republic of China (PRC),<sup>66</sup> although one could just as well substitute that of Russia,<sup>67</sup>

<sup>63</sup> *Dealing with China: The Barbarians at the Gate*, ECONOMIST, Nov. 27, 1993, at 21 (quoting Senator Kenneth Wherry). Wherry is the Senator who once referred to another part of Asia as "Indigo China." MARVIN E. STROMER, *THE MAKING OF A POLITICAL LEADER: KENNETH S. WHERRY AND THE UNITED STATES SENATE* 150 (1969).

<sup>64</sup> For an overarching account of how seemingly constant an expression of American life as McDonald's adapts to local conditions even as it shapes them, see GOLDEN ARCHES EAST: MCDONALD'S IN EAST ASIA (James L. Watson ed., 1997) (discussing the cultural impact of McDonald's in Beijing, Hong Kong, Seoul, Taipei, and Tokyo). Would that we had as nuanced a multijurisdictional study of legal transplantation.

<sup>65</sup> See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

<sup>66</sup> Carothers perceptively notes elsewhere the importance of applying lessons learned about democracy promotion to China:

These lessons [about democracy promotion programs focused on law] are of particular importance concerning China, where some U.S. policymakers and commentators have begun pinning hope on the idea that promoting the rule of law will allow the United States to support positive economic and political change without taking a confrontational approach on human rights issues. . . . Rule-of-law promotion should be part of U.S. policy toward China, but it will not . . . eliminate the hard choices between the ideals and interests that have plagued America's foreign policy for more than two centuries.

Carothers, *The Rule of Law Revival*, *supra* note 17, at 106. Unfortunately, his case studies in *Aiding Democracy Abroad* are limited to nations that are of relatively modest size and international political power. His choice may be understandable for reasons of feasibility, but it leads him to exclude what may be some of the most important test cases for the propositions he advances.

<sup>67</sup> See generally KATHRYN HENDLEY, *TRYING TO MAKE LAW MATTER: LEGAL REFORM AND LABOR LAW IN THE SOVIET UNION* (1996); STEVEN L. SOLNICK, *STEALING THE STATE: CONTROL AND COLLAPSE IN SOVIET INSTITUTIONS* (1998); Robert Sharlet, *Legal Transplants and Political Mutations*, 7 EAST EUR. CONST. REV. 59 (1998).



Indonesia,<sup>68</sup> or several African<sup>69</sup> or Eastern European<sup>70</sup> states. Since the end of the Great Proletarian Cultural Revolution in the mid-1970s, the PRC has been engaged in the most concerted effort in world history to construct a legal system, with assistance from the U.S. government and a veritable cavalcade of other governments, multilateral bodies, foundations, universities, and individuals. Thousands of laws and other legal measures have been enacted; the court system has been revamped; a host of new regulatory bodies has been established; and a bar that numbered 3000 in 1979 has already multiplied more than fifty-fold (with plans to expand to 300,000 over the next decade), facilitating citizen use of the legal system in unprecedented numbers.<sup>71</sup>

The conventional wisdom portrays such developments as bearing out the PRC's convergence, importantly influenced by the United States, toward the rule of law.<sup>72</sup> Such accounts, however, fail adequately to heed the ways in which these very developments may arguably be impeding, as well as advancing, liberal legality. The Chinese state, for example, is increasingly invoking the law to justify both at home and abroad its harsh treatment of dissidents and autonomous spiritual groups.<sup>73</sup> Corruption has mushroomed, facilitated by opportunities for rent seeking made possible by the bevy of new regulatory and licensing measures.<sup>74</sup> And evidence suggests that some among the

<sup>68</sup> See generally ADAM SCHWARZ, *A NATION IN WAITING: INDONESIA IN THE 1990S* (1994).

<sup>69</sup> See generally MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* (1997); Claude Aké, *The Democratisation of Disempowerment in Africa*, in *THE DEMOCRATISATION OF DISEMPOWERMENT: THE PROBLEM OF DEMOCRACY IN THE THIRD WORLD* 70 (Jochen Hippler ed., 1995).

<sup>70</sup> See generally Sajó, *supra* note 57.

<sup>71</sup> These developments are discussed in William P. Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction*, 11 *CULTURAL DYNAMICS* 193 (1999). The best overall study of contemporary Chinese legal development in English is STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (1999). For a fine study of the PRC's court system, see Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 *COLUM. J. ASIAN L.* 1 (1996).

<sup>72</sup> See, e.g., SHIPING ZHENG, *PARTY VS. STATE IN POST-1949 CHINA: THE INSTITUTIONAL DILEMMA* 189 (1997); Harry Harding, *The Halting Advance of Pluralism*, 9 *J. DEMOCRACY* 11, 12 (1998); Minxin Pei, "Creeping Democratization" in China, 6 *J. DEMOCRACY* 65, 68-71 (1995).

<sup>73</sup> See, e.g., *Abusing Rights According to Law*, CHINA RIGHTS FORUM, Winter 1999-2000, at 4; Elisabeth Rosenthal, *Spring Turns to Winter in Beijing*, N.Y. TIMES, Dec. 27, 1998, § 4, at 5. Some Chinese citizens have also begun to express concern about the Communist Party's use of legal reform to "maintain and safeguard its grip on power." Ding Zilin, Lin Mu, Jiang Qisheng, Jiang Peikun & Wei Xiaotao, *Declaration on Civil Rights and Freedom* (Sept. 28, 1998) (visited Apr. 21, 2000) <<http://www.hrchina.org/documents/english/freedom.html>> (on file with the Harvard Law School Library).

<sup>74</sup> See Jasper Becker, *Money Burns as Party Fiddles*, S. CHINA MORNING POST (Hong Kong), Aug. 21, 1999, at 15, available in 1999 WL 21937237 (reporting that China's Auditor General found that for the first six months of 1999, more than 117 billion yuan (roughly \$14 billion) in state funds, which is greater than the entire national economic stimulus package for that period, had been misused).

PRC's burgeoning corps of legal professionals, far from serving as a vanguard of legal and political reform, have much to gain from an economy that remains perched between plan and market, subject to the discipline of neither.<sup>75</sup>

To acknowledge the underside of legal reform is neither to be dismissive of the way in which Chinese legal development may be empowering the citizenry, irrespective of the Communist Party's intentions,<sup>76</sup> nor to make a blanket argument against foreign efforts to assist that development. Rather, it is to contend that serious attempts to assess democracy promotion must account for unintended and undesired consequences far more than they have. In the case of law, such an accounting would require that those shaping and executing democracy promotion programs embrace a more nuanced appreciation of the uses to which law may be put. Law has, in recent years, come to occupy an increasing role in democracy assistance because some proponents see it as promoting liberal values (at least in the minimal sense of fostering regularity, predictability, and constraints on the arbitrary exercise of state power). Paradoxically, however, a considerable number of democracy promotion advocates also tend to portray law as neutral and hence capable of being effectively deployed by a range of different regimes to achieve a broad spectrum of developmental ends.<sup>77</sup> This inconsistency may in part be due to the awkwardness of raising certain sensitive issues, or to the formal prohibition in the charters of some multilateral bodies on dealing in the political realm, but it also, I suggest, is indicative of a serious and largely unacknowledged tension in our thinking regarding democracy promotion. We are, in effect, extolling law as distinguishable from politics in that it rises above the instrumental at the same time that we are proclaiming its utility as an instrument for development (through promotion efforts that them-

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<sup>75</sup> See William P. Alford, *Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, 141 CHINA Q. 22, 32-34 (1995); Alford, *Of Lawyers Lost and Found*, *supra* note 54, at 19-20. As Joel Hellman of the European Bank for Reconstruction and Development has observed with respect to economic reform in the former Soviet Union and Eastern Europe: "[T]he winners can do far more damage to the progress of economic reform than the losers. As a result, the success of economic reform depends on creating winners and on constraining them." Joel S. Hellman, *Winners Take All: The Politics of Partial Reform in Postcommunist Transitions*, 50 WORLD POL. 203, 234 (1998). Of course, if legal professionals themselves exemplify this phenomenon, the utility of the legal system as a major potential source of constraints on winners in general may be impaired.

<sup>76</sup> Ways in which the law has been empowering are discussed in William P. Alford, *Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China*, DAEDALUS, Spring 1993, at 45.

<sup>77</sup> For a masterful treatment of the ways in which competing conceptions of the rule of law have been deployed in international development, see John K.M. Ohnesorge, *The Rule of Law, Economic Development, and the Developmental States of Northeast Asia*, in LAW AND DEVELOPMENT IN EAST AND SOUTHEAST ASIA (Christoph Antons ed., forthcoming 2000) (on file with the Harvard Law School Library).

selves might be described by some as highly instrumental). Perhaps we ought, therefore, not be surprised that political figures facing fundamental issues of power and state building, if not survival itself, would utilize law in ways other than those we might have hoped or envisioned.

*D. What Are the Ethical Implications of Democracy Promotion?*

As the foregoing suggests, embedded in democracy promotion are difficult ethical questions. Carothers does not raise them as such, perhaps because he is concerned that to do so might diminish receptivity to his recommendations in practical policy circles, but he is certainly cognizant of the gravity of the undertaking about which he writes. Even in the most practical of policy terms, however, *Aiding Democracy Abroad* would have been a more powerful and enduring work had Carothers more directly addressed ethical considerations that pervade the very enterprise of democracy promotion and that will, if his policy recommendations are adopted, move even more prominently to the forefront. For example, how does one weigh the introduction of what may be useful new notions of democracy to a people living under a repressive regime against the possible perpetuation of that regime by virtue of legitimating its rule and providing it with instruments that it might employ toward a repressive end? Without romanticizing the past, what are the implications, in terms of "traditional" social arrangements, of the introduction of a more rights-focused, marketized approach to life?<sup>78</sup> Are we proposing legal solutions to problems that might be better addressed through politics or other means?<sup>79</sup> Is our faith in highly rational, carefully sequenced evolutionary change ultimately so illusory as to be misleading, particularly for societies emerging from and needing to cope with searing national trauma?<sup>80</sup>

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<sup>78</sup> Although he does not focus on developing nations, Richard Pildes explores the costs of legalization in *Laws and Norms: The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055 (1996).

<sup>79</sup> The accentuation of law to the possible detriment of other concerns might take many forms. For example, Carol Jones argues that in Hong Kong, both British and Chinese rulers have sought to emphasize what each has described as the rule of law in lieu of allowing the populace more in the way of political outlets typically found in democratic states. See Carol Jones, *Politics Postponed: Law as a Substitute for Politics in Hong Kong and China*, in *LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS* 45, 46-48, 53-54, 56-62 (Kanishka Jayasuriya ed., 1999). Or, to take a different tack, literacy might need to be fostered as a precondition to the populace reasonably availing itself of its legal rights. See SUSMITA DASGUPTA & DAVID WHEELER, *CITIZEN COMPLAINTS AS ENVIRONMENTAL INDICATORS: EVIDENCE FROM CHINA* 14, 21 tbl.5, 22 tbl.6 (World Bank Policy Research Working Paper No. 1704, 1997).

<sup>80</sup> The dilemma of achieving justice while fostering reconciliation is treated eloquently in MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998). Ruti Teitel has also written with insight about the place of law

What degree of disclosure of our aspirations for the programs we promote do we owe to recipient regimes or their broader populace?<sup>81</sup> Before or while engaging in democracy promotion programs, what responsibility do we have to address other American governmental or private activities that may be impeding democratic development abroad? What responsibility do we have concurrently to address serious impediments to the fuller realization of our ideals at home? And, ultimately, no matter how much we cherish that which we impart, what do we believe entitles us to interject ourselves into the lives of others, especially if we are far more willing to provide advice than funding for basic needs? These and many other questions that one might raise defy ready answers, but their difficulty arguably makes it all the more crucial that they feature more prominently in the debate over democracy promotion.

The need for more open discussion of the ethical implications of democracy promotion is important, of course, not only because of the considerable effect such programs may have on those on the receiving end, but also because of their influence on those providing the assistance. One major illustration of the hubris that infuses the democracy promotion effort has been the near absence of serious scrutiny of what such undertakings mean for those on the transmitting end.

History suggests that the experience of endeavoring to shape others inevitably shapes us, both with respect to our thinking about our own society, the complexity of legal reform, and law more generally, and with respect to our reaction to exercising the quite considerable power these efforts frequently bestow. To take one cogent example from American legal academe, it is no exaggeration to say that the critical legal studies movement emerged in part from the disillusionment of David Trubek and others who, in attempting to utilize American models of liberal legality to transform Brazil while under contract to USAID, became profoundly skeptical about the claims of those models, even on their home terrain.<sup>82</sup> But the impact might well be felt in very different ways, as borne out, for instance, by Roscoe Pound who, after serving as a key advisor on legal reform to the government of the Republic of China during the Chinese civil war of the late 1940s, reacted to the failure of the measures he proposed to take hold in China by embracing the fervent anti-communism of Senator Joseph McCar-

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in building a new social order in Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

<sup>81</sup> As one could imagine, too candid a discussion of the presumed political import of democracy assistance might lead some governments to decline U.S. support, while too muted a treatment would raise questions both of duplicity and of a failure properly to inform the target public in what, after all, are programs designed to promote democracy.

<sup>82</sup> See Trubek & Galanter, *supra* note 27, at 1090-92.

thy following his return home.<sup>83</sup> And as recent attempts by foreign actors to influence our presidential elections suggest, some lessons, intended or otherwise, of our democracy promotion programs may have been absorbed only too well.<sup>84</sup>

#### IV. CONCLUSION

One response to the type of questions posed in this Review might be that practically minded people — whether situated principally in the public arena or academe — faced with what may be a narrow window of opportunity and a host of difficult real-world obstacles, simply do not have the luxury of pondering so many open-ended issues if they wish to advance the cause of democracy. As a distinguished legal philosopher now involved with issues of international development recently informed me, it is nice to play with different definitions of the rule of law, but at some point, one needs to decide what constitutes best practice internationally and to act on it. Indeed, Carothers himself, notwithstanding an impressive intellectual pedigree that includes service as an editor of this *Law Review*, ever so politely evidences a touch of this impatience when he sets forth reasons for what he describes as the “gap between theory and practice on democratization” (p.94).

Understandable though the desire to just get on with it may be, such a stance is ultimately no less problematic than the comparably understandable impulse of David Trubek, Marc Galanter, and other scholars a quarter century ago who chose to distance themselves from law and development studies because their experience with USAID and other government-funded democracy promotion work raised such serious questions of hypocrisy and illegitimacy as to leave them in a self-described state of “self-estrangement.”<sup>85</sup> There is no single easily reducible set of international best practices or “killer theorem” (to use the term that *Foreign Affairs* managing editor Fareed Zakaria employed in a recent review to describe what he finds lacking in Amartya Sen’s book *Development as Freedom*).<sup>86</sup> Nor, if one thinks seriously

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<sup>83</sup> Pound took up his consultancy in China at age 77. I am working on a study, with Dr. Xingzhong Yu of the Chinese University of Hong Kong, of Pound’s experience in China, its impact on him, and the ways in which his ideas have been used by Chinese scholars both in the Republic of China and the PRC.

<sup>84</sup> See, e.g., Marc Lacey & William C. Rempel, *Chinese Army Funds Went to Democrats, Donor Says*, L.A. TIMES, May 16, 1998, at A1; William C. Rempel & Alan C. Miller, *Chung Details Alleged Chinese Funding Scheme*, L.A. TIMES, May 7, 1999, at A1.

<sup>85</sup> See Trubek & Galanter, *supra* note 27, at 1063–64.

<sup>86</sup> Fareed Zakaria, *Beyond Money*, N.Y. TIMES, Nov. 28, 1999, at 14. If by “killer theorem,” Mr. Zakaria means something akin to the idea of “illiberal democracy” that he has promoted, the absence of such in *Development as Freedom* may simply be further evidence of Professor Sen’s fine judgment. To take issue with the notion that there is such a thing as “illiberal democracy” is not to

about it, could there be such a clear-cut answer regarding the fostering of democracy, given the broad spectrum of actual and potential recipients and donors; the vast, dynamic, and inherently disorderly array of issues encompassed worldwide under the fluid heading of democracy assistance; and the normative character of so much of the endeavor. Self-estrangement is, alas, no more tenable a position. The desire, on the one hand, of individuals living in difficult circumstances to transform their lives materially and politically and, on the other, of persons with the opportunity and resources to try to transform other societies, surely has not and will not abate merely because a group of well-intentioned American law professors have withdrawn in disgust from what they have come to believe are potentially unsavory dimensions of the effort.<sup>87</sup>

The foregoing criticisms may sound as if they constitute a round-about endorsement of a substantial role for academics either in providing the conceptual underpinnings of democracy assistance or in facilitating its execution, as if that were some type of panacea. But, to a considerably greater degree than Carothers suggests, that role has already been (and is still being) tried, with results that, in their own way, are not necessarily more attractive than those that (at least some) bureaucrats, politicians, and policy analysts have been able to achieve on their own.<sup>88</sup> More than a few exponents of the type of totalizing theory now dominant in American legal academe, whether from the right or the left, fail to appreciate just how much of what they present as universal, upon closer scrutiny, mirrors our own quite distinctive legal and political institutions. Consequently, they approach legal reform in other societies as if the past were little more than an encumbrance that the clear-minded should be only too ready to discard for a future remarkably akin to ours.<sup>89</sup> At times, even such basic differences as those between common and civil law systems are slighted, with the result that the lawmaking role of judges in the former system (who typically

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argue that governance in Asia need inevitably converge on an American or European model, but rather to underscore the conceptual and political danger of defining terms such as democracy in so attenuated a manner as virtually to strip them of any reference value.

<sup>87</sup> In fairness, the Trubek and Galanter piece may have been as much a dramatic plea for attention to an overlooked dilemma as a sounding of total retreat. The fate of subsequent law and development studies is discussed insightfully in Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC'Y REV. 93 (1998).

<sup>88</sup> See, e.g., deLisle, *supra* note 15, at 267.

<sup>89</sup> See, e.g., *id.* at 179 (discussing the phenomenon of the myopic American legal academic/consultant). For an example of sensitivity to the challenges that legal transplantation poses, see Edward L. Rubin, *Administrative Law and the Complexity of Culture*, in LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA, *supra* note 45, at 88. Practical difficulties of legal transplantation are addressed in Linn A. Hammergren, *Code Reform and Law Revision* (1998) (unpublished manuscript), available at <<http://www.worldlearning.org/pid/dfp/article5.html>> (on file with the Harvard Law School Library).

are drawn from the ranks of accomplished attorneys) is recommended for their foreign counterparts who, in some instances, are recent university graduates with limited legal experience working in an institutional context bearing many of the indicia of a civil service.<sup>90</sup> But if too great a distance from other societies is problematic, immersion in the minutiae of another society of the type that some area studies specialists have used to position themselves as brokers is clearly no substitute for a more richly theoretical, broadly comparative, and historically grounded understanding of democracy and the processes of political change.<sup>91</sup> Moreover, no matter how sound the advice academics provide, it is not necessarily cost-free. In measuring the gains registered by scholars' participation in democracy promotion (particularly if government-sponsored), we need to take account of the ways in which such involvement may color their perspective (by, for example, giving them a vested interest in a particular position) or lead others, even erroneously, to question the motivations behind their scholarly work.<sup>92</sup> Indeed, it may be that the most valuable contribution that academics, both in the United States and in recipient nations, have to make is their somewhat singular capacity to see (and critique) democracy promotion in a fuller and perhaps more detached sense than those who are more directly engaged in it.

My point here has to do with the ways in which those of us concerned with democracy promotion approach the endeavor. If we remain mindful both of the diverse challenges, intellectual and practical, that democracy promotion presents and of at least the stated goals of the enterprise (emphasizing such values as participation and accountability), the challenge for scholar and active promoter alike is a daunting one for which, by definition, there are no easy answers. In this context, it would, of course, seem vital to increase our under-

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<sup>90</sup> An analogous point might be made with respect to the legal profession (or, for that matter, legal education itself). American-style lawyering has been a prominent element of U.S. legal assistance projects, often put forward with relatively little attention to just how rooted it may be in a particular set of institutions, values, and practices and how its more adversarial mode of advocacy and broad definition of a lawyer's function may fare in a different setting. Without minimizing American lawyers' and legal academics' self-interest in replicating that with which they are familiar, this phenomenon also reflects the tendency of some of the most influential American theoretical writing about the sociology of legal profession to assume the backdrop of U.S. context, even when purporting to make statements knowing no geographic boundaries. For a further discussion, see Alford, *Of Lawyers Lost and Found*, *supra* note 54, at 5-15.

<sup>91</sup> Area studies done well, presumably, facilitate just this type of understanding by enabling one to move beyond glib generalities to an informed sense of how such processes have worked in the societies under study. An additional, perhaps less obvious advantage of an area studies background is the lesson of humility that the study of language may impart. The memory of studying a foreign language under the tutelage of a native speaker ought to be a constant reminder for those who would transmit their institutions abroad that learning runs in both directions.

<sup>92</sup> See generally *UNIVERSITIES AND EMPIRE: MONEY AND POLITICS IN THE SOCIAL SCIENCES DURING THE COLD WAR* (Christopher Simpson ed., 1998).

standing of the history of those we aspire to assist so that we might more fully discern their needs and circumstances. That, in turn, might better equip us to avoid supporting parties whose desire for our financial and other assistance runs deeper than their commitment to democracy, minimize unreasonable expectations both home and abroad, and reduce the likelihood that our involvement will lead to the type of undesired outcomes that Sun Yat-sen (1866–1924), the father of Nationalist China, bemoaned when he wrote: “China, too, must have a representative government! But the fine points of Western representative government China has not learned; the bad points she has copied tenfold, a hundredfold! China has not only failed to learn well from Western democratic government but has been corrupted by it.”<sup>93</sup>

But in addition to examining potential recipients more fully, the thoughtful study and practice of democracy promotion requires that we look inward, reflecting far more than has been the case both on prior efforts at democracy promotion (if not proselytizing more generally) and on the nature of the democratic experience in our nation and throughout the world. In reflecting on our own experience, for example, consideration of the work of our intellectual and practical predecessors in democracy promotion over the past century would reveal that a surprisingly large proportion of what is now being proposed has, at least in its broad outlines, already been tried — as evidenced by the experience of legal scholars as diverse as Pound and Trubek, among many others.<sup>94</sup> Understanding why such noteworthy figures, amply funded, buttressed by the reputations of leading American law schools, and with ready access to important governmental circles here and in recipient nations, found success elusive and were themselves molded by those they thought they would be molding has the potential to be illuminating. Indeed, such an understanding would be instructive both for us and for those we would assist, even if we take account of how democracy assistance programs and the world in which they operate have changed.<sup>95</sup> Further reflection on our own history might lead us, for example, to present it less as inevitably culminating in the finished product of our own current institutions and laws, and more as the result of ongoing and often hotly contested battles, the outcomes of which have by no means been assured. That reflection, together with

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<sup>93</sup> SUN YAT-SEN, *SAN MIN CHU I: THE THREE PRINCIPLES OF THE PEOPLE* 111 (Frank W. Price trans., China Publ'g 1927) (1925).

<sup>94</sup> See *supra* notes 12, 27.

<sup>95</sup> For a brief sketch of the phases through which rule of law programs have proceeded, see HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS* (U.S. Agency for Int'l Dev. Program & Operations Assessment Report No. 7, 1994), available at <<http://www.info.usaid.gov/democracy/techpubs/weighingin.pdf>> (on file with the Harvard Law School Library).



more concerted consideration of how other countries have dealt with such issues, might not only provide would-be aid recipients with a broader range of potential alternatives, but might also, by dispensing with the notion of a certain convergence along American lines, be empowering in the sense of sending the message that they might develop yet additional possibilities from which we, too, might in time learn.<sup>96</sup>

The foregoing suggests the value of a deep humility of the type both that Carothers expressly calls for and that nicely informs *Aiding Democracy Abroad*. In the end, this may be as close to a watchword for success as we can reasonably expect to identify for so majestic but difficult a venture as democracy promotion.

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<sup>96</sup> Professor Ackerman's recent essay in this *Law Review*, arguing that our thinking about constitutional arrangements should not be bound by the American trinitarian separation of powers, illustrates well the virtues of engaging systems other than one's own. Interestingly, one of the "modest proposals" he advances — that of an "integrity branch" that might be something of a watchdog over other branches of government, Ackerman, *supra* note 20, at 694–96 — has a nearly century-old antecedent in the Republic of China. In his *Three People's Principles (San Min Chu I)*, Sun Yat-sen proposed more than 75 years ago that China should adopt a five yuan (branch) system of government comprised of three borrowed from the West (the executive, legislative, and judicial) and two from China's past (an examination branch and a control or integrity branch). See SUN YAT-SEN, *supra* note 93, at 145–49. The proposed control yuan drew on the imperial Chinese institution known as the Censorate (*tu ch'a yuan*), a collection of well-trained, relatively independent officials outside of normal bureaucratic lines whose responsibility was to point out abuses and corruption within officialdom, even to the extent (at least in theory) of remonstrating with the emperor himself. Questions remain even to this day in Taiwan as to the effectiveness of the control yuan, its interaction with the political and judicial branches, and its larger implications for democratic government. See *Control Yuan Needs More Teeth — Departing President Wang*, CHINA NEWS (Taipei), Feb. 2, 1999, available in LEXIS, News Library, CHNWS File.

## SOMEBODY'S CHILDREN: SUSTAINING THE FAMILY'S PLACE IN CHILD WELFARE POLICY

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

*Reviewed by Martin Guggenheim\**

*(Professor Elizabeth Bartholet will respond to this Review in the June issue.)*

Virtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis. In particular, most observers of child welfare complain that too many children remain in foster care for too long.<sup>1</sup> Those hoping to reform the system approach this task from many different directions. Some propose vastly increasing the state's role in assisting families.<sup>2</sup> Others recommend sharply limiting the state's role to save scarce resources for those most in need.<sup>3</sup>

In *Nobody's Children*, Professor Elizabeth Bartholet articulates a different premise from which to examine why the child welfare system is in crisis. She asserts that current practice fails to protect children from parental abuse and neglect. As this Review elaborates, she recommends an aggressive policy of removing children from their biological families and placing them for adoption. The principal question I address is whether Bartholet's definition of the problem and her proposals for change are appropriate for the children whose lives are at stake. Although I agree with Bartholet's contention that aggressive measures are needed to serve children at risk of entering foster care, I believe her proposals would gravely harm these children and their

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<sup>1</sup> As of 1998, between 500,000 and 600,000 children were in foster care, the highest number in American history. See Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2291 (1998); Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 *J. CONTEMP. HEALTH L. & POL'Y* 243, 244 & n.6 (1999) (citing U.S. GEN. ACCOUNTING OFFICE, *GAO/HEHS-98-182, FOSTER CARE: AGENCIES FACE CHALLENGES SECURING STABLE HOMES FOR CHILDREN OF SUBSTANCE ABUSERS I* (1998)).

<sup>2</sup> See, e.g., Sheila B. Kamerman & Alfred J. Kahan, *Social Services for Children, Youth and Families in the United States*, 12 *CHILDREN & YOUTH SERVICES REV.* 1, 145-67 (1990).

<sup>3</sup> See, e.g., Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 *HARV. J.L. & PUB. POL'Y* 539, 554-56 (1985).

families. We must find ways to reduce reliance on out-of-home care for children so that their own families may successfully raise them.

Part I of this Review sets forth the core proposals in *Nobody's Children*. Part II examines the underlying premises of Bartholet's proposals: that the goal of family preservation is fundamentally flawed because keeping children with their families or returning them to their families after they have been in foster care is futile; that society is unwilling to commit sufficient resources to help families of children in foster care; and that families of children in foster care are so inherently inadequate that it is unwise to strive to fix them. Part III examines the validity of Bartholet's assumptions and concludes that although Bartholet is undoubtedly correct in her bleak assessment of our society's unwillingness to invest in families of children in foster care, she is unjustifiably dismissive of the potential for preserving and restoring such families in the event that the appropriate resources were to be made available. This Part also challenges Bartholet's formulation of the problem with child welfare. Part IV sets forth an alternative definition of the problem by arguing that the key issue is not the abuse and neglect of children, but rather the underlying social conditions endemic in these children's lives. In this Part, I also provide some proposals that seek to address the complex needs of the children and families who are the victims of a child welfare policy gone awry.

### I. THE PROPOSALS IN *NOBODY'S CHILDREN*

*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. According to Professor Bartholet, caseworkers and judges subject children to extreme hardship by choosing too frequently to leave them with their families rather than to place them in foster care.<sup>4</sup> She criticizes current child welfare policy for focusing on physical abuse or life-threatening neglect of children,<sup>5</sup> while disregarding other significant harms that children suffer by remaining with their families.<sup>6</sup> Current child welfare practice, Bartholet

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<sup>4</sup> According to Bartholet, "we try to avoid removing children from their families at all costs and to return children who are removed as quickly as possible" (p. 24). Near the conclusion of *Nobody's Children*, she expresses broad agreement with critics of family preservation, who argue that "the state [is] too reluctant to respond to serious child maltreatment with coercive measures, to remove children from harm's way, and to terminate parental rights so that children can be moved on to safe, nurturing families" (p. 235).

<sup>5</sup> Bartholet asserts that "[o]nly in the most serious of the serious maltreatment cases is there any reasonable likelihood that children will be removed to foster care" (p. 103).

<sup>6</sup> According to Bartholet, child protection investigators "will often simply not substantiate cases unless the maltreatment is particularly egregious or immediately threatening to the child's safety" (p. 62).

contends, "holds that so long as the parent is guilty of nothing more than poverty, or homelessness, or other victimization by societal injustice, they will not be found in violation of the abuse and neglect laws" (p. 234). This reasoning leads Bartholet to conclude that most children need to be in the foster care system to avoid serious maltreatment (p. 81). Believing that children deserve to be raised in conditions that many families currently cannot provide, Bartholet recommends that public officials "remove children even if physical safety is *not* at issue" (p. 204).

In addition to challenging the principle that children should remain with their biological parents, Bartholet questions the current system's presumption that children who *are* removed from their homes should be reunited with their biological families whenever possible.<sup>7</sup> She criticizes child welfare officials for allowing children to languish in foster care for long periods of time because of a reluctance to terminate parental rights.<sup>8</sup> This unsatisfactory situation, Bartholet asserts, derives from the current system's flawed "blood bias" (p. 7), which manifests itself in an unwillingness to remove children from palpably unfit homes and to sever familial ties so that children may be adopted.<sup>9</sup>

As the country's leading champion of transracial adoption,<sup>10</sup> Bartholet proposes a "simple" solution to these child welfare problems. Recognizing that the children in foster care (and those who would be if child welfare officials were appropriately vigilant) are overwhelmingly non-white,<sup>11</sup> Bartholet advocates abolishing all barriers to the adop-

<sup>7</sup> "Many children are being kept in their families and in foster care, and shuffled back and forth between the two, for whom adoption should be considered, but is not. The claim has been that adoption wouldn't be good for them — that children are almost always best off with their parents" (p. 177).

<sup>8</sup> According to Bartholet, the reason so many children in foster care are not adopted "is because we have a system that holds children too long in their homes of origin and in out-of-home care until they have suffered the kind of damage that makes it hard for them to adjust and to bond in a new family" (p. 241).

<sup>9</sup> See *infra* pp. 1721, 1742.

<sup>10</sup> See, e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 86–117 (1993); Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351 (1998); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

<sup>11</sup> In New York City, for example, the disparity between the probability of a child of color entering foster care and the probability of a white child entering foster care is staggering. One in every 29 children of color is in foster care, whereas only one in every 384 white children is in foster care. Of the 42,000 children in foster care in December 1997, only 3.1%, or 1,300, were categorized as "white" (not including children of Hispanic origin) by New York City officials. See NEW YORK CITY ADMIN. FOR CHILDREN'S SERVS., SELECTED CHILD WELFARE TRENDS 81 (1998). According to the 1990 census, of the 1,686,718 children in New York City, 29%, or 490,346, were "white" (not including children of Hispanic origin). Thus, of the white children in New York City, the percentage of children in foster care is 0.26%. In contrast, there were 1,196,372 children of color in New York City according to the 1990 census. Of this number, 40,700 were in foster care in 1997. Thus, the percentage of children of color in foster care was 3.4%. Children of color are 13 times

tion of foster children of color by white couples.<sup>12</sup> Under current practice, Bartholet argues, there is a surplus of both children of color who need adoptive homes and infertile white couples who are desperate to adopt.<sup>13</sup> Her solution is to join these two groups. This radical proposal would facilitate the immediate adoption of as many as 200,000 children.<sup>14</sup>

It is important to clarify the meaning of adoption in this context. None of the children encompassed by Bartholet's proposals is an orphan. They all have living parents, but their parents have often neglected or abused them, often in very serious ways. Despite the book's title, all of the children that Bartholet's book addresses are *somebody's* children.<sup>15</sup> In addition, the parents of these children would not voluntarily give them up for adoption. Although a significant number of children are adopted each year in the United States when parents voluntarily surrender their rights, *Nobody's Children* does not address these privately arranged adoptions occurring outside of the child welfare context. Instead, the children in *Nobody's Children* have parents who do not want to lose their relationship with their children.

Consequently, adopting these children entails many necessary elements. First, the state must remove these children from their biological families by coercive means, typically through civil lawsuits alleging parental unfitness. Then, judges must enter orders to place these children with non-parents over the objection of their parents. Finally, proceedings to terminate parental rights must be successfully litigated. Termination eliminates parental input in adoption procedures and also permanently banishes the parents from the child's life. Bartholet recognizes the radical nature of these proposals. In her own words: "Taking adoption seriously would involve a revolution in thinking and

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more likely to be placed in foster care in New York City than white children. See U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING: PUBLIC LAW 94-171 DATA — AGE BY RACE AND HISPANIC ORIGIN (1993), available at <http://tier2.census.gov/> (on file with the Harvard Law School Library).

<sup>12</sup> See *infra* note 19.

<sup>13</sup> "The potential pool of adoptive parents is enormous — it dwarfs the pool of waiting children. About 1.2 million women are infertile and 7.1 percent of married couples, or 2.1 million" (p. 181).

<sup>14</sup> Bartholet cites official estimates that as of 1998, about 110,000 of the nearly 500,000 children in foster care had been freed for adoption (pp. 82, 176). To this number, Bartholet would not only add the "[m]any children [who] are being kept in their families and in foster care, and shuffled back and forth between the two, for whom adoption should be considered, but is not" (p. 177), but she would also add a significant number of children who should be, but currently are not, in foster care. By way of contrast, the number of children in foster care adopted in 1995 was 20,000. See Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 112 n.2 (1999).

<sup>15</sup> Bartholet acknowledges that "[m]ost of [the children she is writing about] have parents in a technical sense, since their original parents' rights have not been terminated" (p. 81).

practice. It's a revolution that is needed if we care about children's well-being, rather than simply about their survival" (p. 203).

To those familiar with the demographics of the child welfare system, the racial and class implications of Bartholet's proposals are immediately apparent. Bartholet herself acknowledges these implications.<sup>16</sup> The children who are currently removed from their biological families — and those who would likely be removed under Bartholet's expansive vision — are disproportionately poor and non-white.<sup>17</sup> Most of the individuals who seek to adopt children are upper-class and white.<sup>18</sup> Not only does Bartholet accept the result of placing indigent children of color with white, wealthy families, but she would also take affirmative steps to facilitate this outcome by eliminating all systemic preferences for placing children with parents of their own race.<sup>19</sup>

Bartholet recognizes that her "positions [will] trigger claims that [she is] promoting racial genocide" (p. 5).<sup>20</sup> It is important to appreciate, however, as she herself points out, that Bartholet has devoted her career to civil rights work (p. 5). Of course, the author's impressive progressive credentials do not alter the racial and class implications of the proposals she advances in *Nobody's Children*.

<sup>16</sup> Bartholet recognizes the centrality of race to a discussion of child welfare in the United States, and she insists on discussing the issue directly, even when it is difficult to do so:

Race and class issues dominate policy in this area, although the issues are rarely addressed honestly in a way that illuminates for onlookers their power. Change is impossible unless we can face up to the issues. Debate has been silenced . . . by fear of opening up wounds and triggering rage, fear of proposing or taking action which would victimize already victimized groups, and fear of being accused of racism and classism. (p. 5)

<sup>17</sup> "The families in trouble, in which children are threatened with abuse and neglect, and from which children are removed to foster care, are disproportionately poor, and they come disproportionately from racial minority groups" (p. 4). Bartholet estimates that of the 110,000 children in foster care for whom adoption is planned, "[f]ifty-nine percent . . . are African-American, 29 percent are white, 10 percent are Hispanic, and 2 percent are of other races or ethnicities" (p. 177).

<sup>18</sup> Although Bartholet recognizes that "[t]here are good reasons to worry about transferring children in large numbers from relatively victimized groups to more privileged groups" (p. 236), she advocates that we "reach out to the entire community for adoptive homes" (p. 242). In this larger community, which includes financially successful individuals interested in becoming parents or expanding their families, "[m]ore than two million married couples are infertile, and most of them desperately want to be parents. Millions more are fertile, and most of them want to be parents too" (p. 242).

<sup>19</sup> "It is obvious that many whites would adopt from the foster care system if only we would eliminate the racial barriers . . . . If we were to affirmatively socialize whites to believe that they *should* consider adopting children of color we could expect to increase the numbers of potential adopters exponentially" (p. 182).

<sup>20</sup> In Bartholet's words:

Coercive intervention will predictably have more impact on poor and minority race parents than on more privileged parents. There are good reasons to limit state intervention in the family generally, and to worry in particular about intervening disproportionately in the families of the least powerful groups in the society. There are good reasons to worry about transferring children in large numbers from relatively victimized groups to more privileged groups. (p. 236)

## II. THE ANALYSIS IN *NOBODY'S CHILDREN* AND ITS UNDERLYING PREMISES

Given the drastic implications of permitting the adoption of several hundred thousand children over their parents' objections, it is important to recognize that Professor Bartholet makes contradictory assertions about current child welfare practices. The principal underlying premise of *Nobody's Children* is that the current child welfare policy of family preservation is flawed because, in spite of our best efforts to keep children with their families or to return them promptly from foster care, family preservation has proved to be futile. This empirical claim assumes either that current family preservation efforts have only a limited capacity to aid families,<sup>21</sup> or that families are so hopelessly dysfunctional that no amount of governmental assistance is sufficient.

All of the above supposes that after child welfare officials establish an allegation of child abuse, those officials put forth their best efforts to prevent the unnecessary placement of children in foster care and to reunify children with their biological families. Bartholet asserts that we must abandon futile family preservation efforts and attempt something radically different. In her view, we waste time, money, and most significantly, the lives and well-being of children by continuing to advance an agenda that has proved to be a failure.

Our tenacious commitment to "blood bias," Bartholet argues, drives us to persist in the futile policy of family preservation.<sup>22</sup> There are two principal manifestations of this bias in the context of child welfare. First, an extraordinary number of children who should be separated from their abusive or neglectful families are not removed. According to Bartholet, about three million children are subjected to "serious maltreatment" each year in the United States (pp. 25, 61). Second, even when children are removed from their families, the "blood bias" still influences child welfare agencies to provide services to patently unfit and unsalvageable families even though it is clear that these families do not deserve the privilege of having children: "[W]e try to avoid removing children from their families at all costs and to return children who are removed as quickly as possible" (p. 24).<sup>23</sup>

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<sup>21</sup> "Family preservation" refers to systematic efforts to assist families who have lost or are at risk of losing children to foster care so that children can quickly reunite or remain with their families.

<sup>22</sup> See *infra* p. 1742.

<sup>23</sup> In particular, according to Bartholet, at least through 1997, child welfare operated under the understanding that federal law "requir[ed] efforts to preserve families at all costs, regardless of whether the efforts were 'reasonable'" (pp. 25-26). Regrettably, Bartholet often caricatures efforts to preserve families by describing these efforts as occurring "at all costs" — implying that they are used even when no reasonable person would employ them.

Bartholet, however, contradicts her assumption that child welfare officials make their best efforts by articulating two additional premises. First, Bartholet reasons that, even if society has not given its best efforts to assist marginal families, we cannot reasonably expect significant change in the foreseeable future.<sup>24</sup> Bartholet thus occasionally acknowledges the inadequacy of society's efforts to change the terrible conditions in which poor children are raised:<sup>25</sup>

While our society espouses family preservation as the goal, we have failed to provide the resources to really make it work. We don't support families up front in ways designed to ensure their success, waiting instead until families are in such trouble that preservation efforts are often doomed. We are more generous by far in our talk about family preservation services than we are in the funding (p. 41).

...

The 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

... (p. 195)

These 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.<sup>26</sup>

Indeed, Bartholet lacks confidence that the situation will improve: "Sadly we can predict that profound social and economic reform is not on the horizon, and we can also predict that our society will continue to scrimp on the support services that it makes available to poor people . . ." (p. 238).

This, then, is a very different claim of futility. It is fundamentally a skeptical (although not necessarily false) claim; but it is not an empirical one. At its core, it is predictive. It suggests that foster children should not be held hostage to the fantasy that society will marshal the will or the resources to assist their families in meaningful ways.

Bartholet's third premise is that the families of children who end up in foster care are so inadequate that it is unwise to strive to fix them. Like her second premise, this position rests on the implicit assumption that child welfare has not done everything possible to keep

<sup>24</sup> In Bartholet's words, "whether or not increased support services are forthcoming . . . we need to act" (p. 239).

<sup>25</sup> "[W]e continue with the policy of doing 'too little too late,' providing only very limited support to families up front, and waiting to provide more until after children have been abused and neglected, when the still relatively limited services made available will be inadequate to what is now a far more overwhelming task" (p. 37). Bartholet makes similar observations at pages 99-100 and 238.

<sup>26</sup> Bartholet identifies "[t]he most effective prevention program" as "eliminating the social and economic conditions of poverty, unemployment, homelessness, and deprivation that produce dysfunctional families" (pp. 99-100).



children with their biological families. Bartholet believes that most children in foster care need such care to protect them from dangerous parents.<sup>27</sup> In addition to her negative assessment of the parents of children in foster care, Bartholet also criticizes the reliance of the child welfare system on "kinship foster care," whereby foster children are placed with their parents' relatives:

We should be willing to face up to the fact that child maltreatment is only rarely aberrational. It ordinarily grows out of a family and community context. Keeping the child in that same context will often serve the child no better than keeping him or her with the maltreating parent (p. 93).

Like the second premise, this claim about the families of foster children is both pessimistic and predictive: try as we might to help those families, we will fail.

It matters a great deal upon which of these premises *Nobody's Children* is actually based. Of the three, Bartholet spends the greatest portion of her book discussing the first, namely that the current crisis in child welfare is the product of an overzealous commitment to preventing the placement of children in foster care and to reunifying children with their biological families after an allegation of child abuse has been established. To the degree that Bartholet's adoption proposal is based on the premise that despite our best efforts, the families of foster children have proved themselves unfit to raise children, it is crucial to evaluate this premise. Because of the centrality of this premise to Bartholet's argument, I examine it thoroughly in Part III. In Part IV, I discuss Bartholet's proposed solutions to the current child welfare crisis and present an alternative that may more effectively advance the goal of bettering the lives of children who enter the foster care system.

### III. BARTHOLET'S CLAIMS REGARDING THE ENFORCEMENT OF CHILD PROTECTION MANDATES

If child welfare policy has failed to keep children safely with their families, despite valiant efforts to improve the conditions in which the children were being raised at home, then Bartholet's claim for preemptive adoption would have strong support. Though there still would be voices of concern about the propriety of advancing a program of "racial genocide," (p. 5) many would agree with Bartholet that children should not be held hostage to a fantasy that their families can be provided with adequate resources to rear them. To better understand and evaluate Bartholet's assumption, it is useful to examine the empirical data concerning child abuse and neglect.

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<sup>27</sup> "It is not at all clear that increased reunification rates benefit children overall. These are the parents who originally subjected the children to abuse and neglect" (pp. 82-83) (emphasis omitted).

### A. Low Rates of Maltreatment of Children in Foster Care

Contrary to Bartholet's assertion, studies have consistently found that the great majority of children in foster care could remain safely at home.<sup>28</sup> Professor Duncan Lindsey, a leading child welfare researcher, concluded that "studies clearly demonstrate that child abuse is not the major reason children are removed from their parents"; he found instead that "inadequacy of income, more than any other factor, constitutes the reason that children are removed."<sup>29</sup> In fact, when Lindsey evaluated placements of children in foster care, he found that 48% of the children did not require placement.<sup>30</sup>

A study of Boston placement decisions led one team of researchers to conclude that:

[A]mong a group of children referred for suspected abuse in the emergency and surgical units of a hospital, the best predictor of removal of the child from the family was not severity of abuse, but Medicaid eligibility, which we might interpret as a proxy variable for the income status of the family.<sup>31</sup>

Likewise, Lindsey found that "inadequacy of income increased the odds for placement by more than 120 times."<sup>32</sup>

The evidence also clearly suggests that many children regularly remain in foster care merely because their parents are unable to secure adequate housing without assistance from the state. This seems to be a regular practice in Chicago<sup>33</sup> and New York City.<sup>34</sup> The court-appointed administrator of the District of Columbia's foster care system also found that between one-third and one-half of the children in foster care could have been returned immediately to their parents but for a lack of adequate housing.<sup>35</sup>

In her recent book, Jane Waldfogel asserts that the current foster care population may be grouped into three categories. First, the most serious category, constituting about 10% of current caseloads, includes "serious and criminal cases."<sup>36</sup> The second group encompasses serious

<sup>28</sup> See *infra* p. 1730.

<sup>29</sup> DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 155 (1994).

<sup>30</sup> See *id.* at 141.

<sup>31</sup> Mitchell H. Katz, Robert L. Hampton, Eli H. Newberger, Roy T. Bowles & Jane C. Snyder, *Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect*, 56 *AM. J. ORTHOPSYCHIATRY* 253, 253 (1986).

<sup>32</sup> LINDSEY, *supra* note 29, at 153.

<sup>33</sup> See Rob Karwath, *DCFS Hit on Family Separation*, *CHI. TRIB.*, Jan. 19, 1990, § 2, at 2; Janita Poe & Peter Kendall, *Cases of Neglect May Be Only Poverty in Disguise*, *CHI. TRIB.*, Dec. 24, 1995, § 1, at 1.

<sup>34</sup> See *Martin A. v. Gross*, 546 N.Y.S.2d 75, 77 (App. Div. 1989).

<sup>35</sup> See Tamar Lewin, *Child Welfare Is Slow to Improve Despite Court Order*, *N.Y. TIMES*, Dec. 30, 1995, at A6.

<sup>36</sup> JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION* 124 (1998).

cases that do not require criminal justice intervention.<sup>37</sup> The final group of cases are those in which a child is at a relatively lower risk of serious harm, and the parents may be willing to work with an agency to secure needed services.<sup>38</sup> Together, the latter two groups comprise 90% of the caseload. Typically, these cases involve less serious physical abuse (for example, a single, minor injury such as a bruise or a scratch) or less severe neglect (such as parental drug or alcohol abuse with no other apparent protective issues, dirty clothes or a dirty home, lack of supervision of a school-age child, or missed school or medical appointments). Many of these lower-risk neglect cases are poverty-related, resulting from inadequate housing or inappropriate child-care arrangements while a parent works.<sup>39</sup>

Other data on entry into foster care are also inconsistent with the notion that our child welfare system carefully monitors foster children and insists upon a compelling reason to remove a child from his or her family. Specifically, placement rates vary widely from one state to another even in the absence of any material difference between known rates of abuse or neglect. For example, "[a] child is twice as likely to be placed in foster care in Vermont as in New Hampshire [and] [t]he placement rate in Minnesota is double the rate in Wisconsin."<sup>40</sup> There is also significant evidence to suggest that placements can reflect the politics of particular administrations and have little to do with child safety. States appear to use very flexible standards depending on the policy of local child welfare officials, which can change dramatically from one administration to the next.

For example, New York City's foster care population soared in the aftermath of a notorious and highly publicized case of child abuse.<sup>41</sup> In the four-year period from 1995 to 1998, the number of new child abuse and neglect petitions filed rose fifty-five percent, from 6658 to 10,395.<sup>42</sup> Even more significantly, the number of children removed from their families and placed in foster care over parental objection rose by nearly fifty percent between 1995 and 1997.<sup>43</sup> During this

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<sup>37</sup> See *id.*

<sup>38</sup> See *id.* at 125.

<sup>39</sup> See *id.*

<sup>40</sup> Richard Wexler, *Spies in the Living Room (and Other Problems with the Recommendations in "Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative")* 16 (1999) (unpublished manuscript, on file with the Harvard Law School Library) (citing CONNA CRAIG & DEREK HERBERT, *THE STATE OF CHILDREN: AN EXAMINATION OF GOVERNMENT-RUN FOSTER CARE* 9 (1997)).

<sup>41</sup> The New York press's prominent reporting of the death of Elisa Izquierdo dramatically affected placement rates. See Nina Bernstein & Frank Bruni, *She Suffered in Plain Sight but Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at A1.

<sup>42</sup> See *Aggressive Prosecutions Flooding the System*, CHILD WELFARE WATCH, Winter 1999, at 4.

<sup>43</sup> Removals rose from 8000 in 1995 to 11,958 in 1997. See *id.*

same period, however, there was no known change in the base rate of child abuse. This striking rise in prosecution suggests a change in the philosophy of the prosecutors rather than a change in the conditions of children's homes. One study found, for example, that "[i]ncreasingly in New York City, abuse and neglect proceedings are brought against battered mothers whose children are removed from them where the only allegation is their children's exposure to domestic violence."<sup>44</sup> This also suggests that family and juvenile courts "rubber stamp" agency recommendations to remove children from their parents, even in circumstances that do not constitute true emergencies.<sup>45</sup>

Further circumstantial proof that foster care has not been reserved for those cases in which children suffer extreme forms of abuse is the dramatic underutilization of the services established to prevent foster care placement. Studies consistently find that preventive and reunification services — services designed specifically to keep children out of foster care or to return them promptly to their homes after placement — are underused by child welfare agencies.<sup>46</sup>

### B. Child Welfare System Emphasis on Family Preservation

Bartholet claims that the family preservation bias in foster care runs so deep that agencies waste time and money trying to keep children with unsafe families.<sup>47</sup> In assessing any claim that child welfare is overly committed to family preservation, it is helpful to place child welfare in historical perspective. In the late 1970s, for the first time in American history, federal legislators became deeply concerned that too many children ended up in foster care and that many children remained in foster care for too long.<sup>48</sup> Once these legislators realized that the government's own spending formula was partly responsible for the high rate of out-of-home placement,<sup>49</sup> Congress passed the

<sup>44</sup> Karen Houppert, *Victimizing the Victims*, VILLAGE VOICE, June 15, 1999, at 42.

<sup>45</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD WELFARE LEAGUE OF AM., YOUTH LAW CTR. & NAT'L CTR. FOR YOUTH LAW, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 8 (1987) [hereinafter MAKING REASONABLE EFFORTS].

<sup>46</sup> See *infra* pp. 1728–30.

<sup>47</sup> See *supra* p. 1721.

<sup>48</sup> See *Public Assistance Amendments of 1977: Hearings on H.R. 7200 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 95th Cong. 59 (1977) (statement of Joseph A. Califano Jr., Secretary, Dep't of Health, Education and Welfare); *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong. 56 (1979) (statement of Sen. Cranston). Congress found that upwards of 500,000 children were in some form of out-of-home care in 1977. See S. REP. NO. 96-336, at 11 (1980), reprinted in 1980 U.S.C.C.A.N. 1448, 1460.

<sup>49</sup> The government's spending formula allocated federal child welfare money to the states only for out-of-home placement. See generally *Public Assistance Amendments of 1977: Hearings on*

Adoption Assistance and Child Welfare Act of 1980,<sup>50</sup> which drastically changed the formula. In particular, the Act allocated money for services aimed at preventing the separation of children from their parents and at speeding the return of children to their parents.<sup>51</sup> Furthermore, the Act required states to make "reasonable efforts" toward these same goals.<sup>52</sup>

This transformative plan required retooling the child welfare apparatus at the local level. In particular, the newly available federal money was supplied directly to at-risk families for the specific purpose of improving the living conditions of their children. The new scheme attempted to assess carefully which particular services and improvements in the home would obviate the need for out-of-home placement.<sup>53</sup> Despite the legislation, however, foster care populations soared from 273,000 in 1986 to more than 429,000 in 1991.<sup>54</sup> Nationally, the median length of stay in foster care increased to over two years, and more children than ever experienced multiple placements.<sup>55</sup>

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*H.R. 7200 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 95th Cong. 59 (1977) (statement of Joseph A. Califano Jr., Secretary, Dep't of Health, Education and Welfare); *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearings on H.R. 3434 Before the Subcomm. on Public Assistance of the Senate Comm. on Finance*, 96th Cong. 80 (1979) (statement of Sen. Cranston).

<sup>50</sup> Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 602 (1982)).

<sup>51</sup> See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2301-2321, 95 Stat. 357, 843-60.

<sup>52</sup> 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1994).

<sup>53</sup> The Act required that states take specific steps to prevent unnecessary separation of children from their parents, to ensure careful monitoring of children who are separated, and to provide services to the family so that it can more quickly meet the government's standards for returning children. First, the Act set strict conditions for removing children from their homes. Once children entered foster care, the Act required states to develop a state-wide information system (including the status, demographic characteristics, location, and goals for placement of every child) and to maintain a case review system for each child receiving state-supervised foster care.

Although the law aimed at reuniting children with families when possible, it also expressly provided for adoption if those efforts failed. If foster children could not be reunited with their families in 18 or 24 months, despite diligent efforts to bolster the family with appropriate services, the law called for freeing foster children for adoption while they were still young enough for their custodial arrangements to become permanent. In the words of the drafters, the Act sought "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." S. REP. NO. 96-336, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1450.

<sup>54</sup> See Toshio Tatara, *Some Additional Explanations for the Recent Rise in the U.S. Child Substitute Care Population: An Analysis of National Child Substitute Care Flow Data and Future Research Questions*, in 1 CHILD WELFARE RESEARCH REVIEW 126, 130 tbl.6.1 (Richard Barth, Jill Duerr Berrick & Neil Gilbert eds., 1994).

<sup>55</sup> See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 648 & n.64 (1999) (citing a California study that shows that "[forty-six percent] of infants living in nonkinship care will have four or more homes in six years").

A number of explanations exist for the increase in foster care placements in the late 1980s. One prominent explanation, suggested by Bartholet, is the rise of crack cocaine use by young mothers in the inner city (p. 207). But Lindsey suggests a more compelling explanation for the failure of the 1980 Act:

[T]he actual funds to achieve these reforms were never provided. Under the Reagan Administration, the 1980s were characterized by broad scale reductions in federal spending for social programs. . . . Child welfare services saw a virtual end to support for major demonstration programs, even though these represented a proven technology to facilitate permanency planning and reduce the number of children in foster care.<sup>56</sup>

Out-of-home placement continued to be the principal child welfare policy in the United States through the 1980s. Between 1981 and 1983, federal foster care spending grew by more than 400% in real terms, while preventive and reunification spending grew by only 14%, and all other funds available for social services to the poor declined.<sup>57</sup>

*Nobody's Children* ignores the numerous studies that have found state efforts to keep families together to be inadequate.<sup>58</sup> Three studies indicate that the 1980 Act was unsuccessful in reducing the number of placements. A 1987 study of foster care in New York conducted by the Child Welfare League of America found that, in 52% of the cases studied, the most pressing need was for day care or babysitting, but

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<sup>56</sup> LINDSEY, *supra* note 29, at 65-66; see also U.S. GEN. ACCOUNTING OFFICE, CHILD WELFARE: STATES' PROGRESS IN IMPLEMENTING FAMILY PRESERVATION AND SUPPORT SERVICES 3 (1997) ("By the early 1990's, over half the [child services] programs we surveyed reported that they were not able to serve all families who needed services primarily due to the lack of funds and staff.")

<sup>57</sup> See MARK E. COURTNEY, THE FOSTER CARE CRISIS 8 (Univ. of Wis. Madison Inst. for Research on Poverty Discussion Paper No. 1048-94, 1994). Bartholet criticizes reunification efforts, complaining that close to one-third of foster children reunited with their families will be removed again (p. 83). The actual rate of removal from families after reunification generally runs between 20% and 25%. See Richard P. Barth, *Family Reunification*, in 2 CHILD WELFARE RESEARCH REVIEW, *supra* note 54, at 219, 221-22, 225; Kathleen Wells & Shenyang Guo, *Reunification and Reentry of Foster Children*, 21 CHILDREN & YOUTH SERVICES REV. 273, 292 (1999). It is unclear, however, whether this re-entry rate proves that the reunification efforts are doomed to fail or whether they involve insufficient efforts to help a family meaningfully. As Dorothy Roberts points out, given the limited time and effort spent on family reunification, "[i]t is not surprising that 20 to 32% of children returned home in connection with family preservation plans end up back in foster care. . . . The ideology of family preservation is then blamed when inadequate efforts result in" a failed reunification. Roberts, *supra* note 14, at 123. Other studies support the conclusion that the need to replace children in foster care after they were returned home is highest when there has been a quick reunification and when few services have been provided. See Barth, *supra*, at 221-22; Wells & Guo, *supra*, at 290.

<sup>58</sup> Bartholet offers inadequate support for her claim that all children in foster care are there because no less restrictive measure was available to protect them. She cites one unpublished paper in which the author asserts that most removals involve "such serious threats to children's safety that one cannot risk leaving children in the home, even if intensive services were to be provided" and an early 1990s study in New Jersey finding that "there was almost no unnecessary placement" (p. 103).

the "service" offered most was foster care.<sup>59</sup> In the same year, the National Council of Juvenile and Family Court Judges concluded that far too many judges "remain unaware of their obligation to determine if reasonable efforts to preserve families were made" and that those who are aware "routinely 'rubber stamp' assertions by social service agencies . . . ." <sup>60</sup> In 1989, a third study concluded that courts make no "reasonable efforts" determination in 44% of cases.<sup>61</sup>

Thus, throughout the 1980s, researchers uniformly concluded: "[T]reatment services for the parents of children in foster care are largely nonexistent. In fact, the child's placement usually results in a reduction in the level of services parents receive."<sup>62</sup> Indeed, the 1980s can be characterized as a decade in which "the mood in society and government was turning increasingly skeptical toward social programs" and in which "expenditures for social programs were repeatedly cut."<sup>63</sup> These trends continued into the 1990s. One of the most prestigious child welfare study groups ever assembled, the National Commission on Children, came to the disturbing conclusion that despite the 1980 Act, as of 1991, children continued regularly to be removed from their families "prematurely or unnecessarily" because federal aid formulas give states "a strong financial incentive" to remove children rather than provide services to keep families together.<sup>64</sup>

This failure to implement meaningfully the "family preservation" requirements of the 1980 Act is even more disturbing considering that

<sup>59</sup> See MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 29, 64 (1987).

<sup>60</sup> MAKING REASONABLE EFFORTS, *supra* note 45, at 8.

<sup>61</sup> Wexler, *supra* note 40, at 4 (citing NATIONAL CHILD WELFARE RESOURCE CTR. FOR MANAGEMENT AND ADMIN., UNIV. OF SOUTHERN MAINE, PILOT EARLY REVIEW PROJECT, PRELIMINARY DATA ANALYSIS (Mar. 1989)).

<sup>62</sup> Douglas J. Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE 185, 198 (Douglas J. Besharov ed., 1988) [hereinafter PROTECTING CHILDREN].

<sup>63</sup> LINDSEY, *supra* note 29, at 97.

<sup>64</sup> NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 290 (1991). According to Dorothy Roberts, for example, during the very period that Bartholet characterizes as the height of family preservation emphasis (p. 25), such "[s]ervices for families in California . . . [we]re permitted to continue for a maximum of six months and, on average, end[ed] after only half this time." Roberts, *supra* note 14, at 124; see also Richard P. Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in 1 CHILD WELFARE RESEARCH REVIEW, *supra* note 54, at 323, 325 ("[F]amily preservation services are still not available for the vast majority of families in need."); Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1280 (1996) ("Caseworkers have been known to fail to assist parents in obtaining housing, to unreasonably oppose visitation of the child by the parent, to place children in homes that are not easily accessible to the parent, to fail to tailor the reasonable efforts to the specific problems facing the family, and, in some instances, to not do much of anything at all." (citations omitted)).

experimental family preservation efforts, initiated in the 1970s, have shown real promise. Bartholet harshly criticizes these efforts,<sup>65</sup> even though there is significant evidence to demonstrate that these programs are valuable. For example, Alabama,<sup>66</sup> California,<sup>67</sup> Michigan,<sup>68</sup> Minnesota,<sup>69</sup> Oregon,<sup>70</sup> Tennessee,<sup>71</sup> Utah,<sup>72</sup> and Washington,<sup>73</sup> among other states, have undertaken numerous family preservation initiatives. Although the findings are mixed, these programs achieved reductions in the need for placement of children in foster care without any increase in rates of maltreatment.<sup>74</sup> Despite this evidence, however, funding for these programs has ceased.

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<sup>65</sup> Bartholet writes: "[T]here is obvious reason for concern that the more IFPS [Intensive Family Preservation Services] programs 'succeed' . . . the more children will suffer. IFPS advocates regularly talk of children in these programs as 'at risk of placement,' yet placement is what many of these children desperately need" (p. 121).

<sup>66</sup> The Alabama approach calls for gradual, county-by-county change. In counties adopting a family preservation approach, foster care placements have declined by 30%. More importantly, an independent, court-appointed monitor concluded that children in Alabama are safer now than they were before the system switched to a family preservation model. The monitor wrote that "the data strongly support the conclusion that children and families are safer in counties that have implemented [these] reforms." Wexler, *supra* note 40, at 9 (citing IVOR D. GROVES, SYSTEM OF CARE IMPLEMENTATION: PERFORMANCE, OUTCOMES, AND COMPLIANCE 3 (1996)); see also BAZELON CTR. FOR MENTAL HEALTH LAW, MAKING CHILD WELFARE WORK 51-59 (1998) (explaining the way in which "partnerships" between Alabama departments of human resources and parents are aimed at preserving family relationships).

<sup>67</sup> A study in California found that 55% of children who did not receive family preservation services were placed in out-of-home care, compared to only 26% of the children who did receive such services. See LINDSEY, *supra* note 29, at 55; Sally Wood, Keith Barton & Carroll Schroeder, *In-Home Treatment of Abusive Families: Cost and Placement at One Year*, 25 PSYCHOTHERAPY 409, 411 (1988).

<sup>68</sup> Michigan's Families First program was evaluated by comparing children who received family preservation services to a "control group" that did not. Of children referred because of abuse or neglect, 36% in the control group were placed in foster care compared to only 19.4% in the Families First program. See Wexler, *supra* note 40, at 19 (citing CAROL BERGQUIST & GERALD H. MILLER, EVALUATION OF MICHIGAN'S FAMILIES FIRST PROGRAM (1993)).

<sup>69</sup> A study of Minnesota's program found that, in dealing with troubled adolescents, 90% of the control group children were placed, compared to only 56% of those who received intensive family preservation services. See Ira M. Schwartz, Philip AuClaire & Linda J. Harris, *Family Preservation Services as an Alternative to the Out-of-Home Placement of Adolescents: The Hennepin County Experience*, in FAMILY PRESERVATION SERVICES: RESEARCH AND EVALUATION 33-46 (Kathleen Wells & David E. Biegel eds., 1991).

<sup>70</sup> See LINDSEY, *supra* note 29, at 64.

<sup>71</sup> See *id.* at 53.

<sup>72</sup> An experiment in Utah and Washington also used a comparison group. After one year, 85.2% of the children in the comparison group were placed in foster care, compared to only 44.4% of the children who received intensive family preservation services. See Peter J. Pecora, Mark W. Fraser, Robert B. Bennett & David A. Haapala, *Placement Rates of Children and Families Served by Intensive Family Preservation Services Programs*, in FAMILIES IN CRISIS: THE IMPACT OF INTENSIVE FAMILY PRESERVATION SERVICES 149, 168 (Mark W. Fraser, Peter J. Pecora & David A. Haapala eds., 1991).

<sup>73</sup> See *id.*

<sup>74</sup> Bartholet's condemnation of these programs is particularly disturbing. Citing an unpublished paper prepared for the Kennedy School of Government, Julie B. Wilson, *Abused and Ne-*



The overwhelming conclusion in the scholarly literature is that family reunification efforts have never been adequate.<sup>75</sup> Although Congress concluded in 1997 that states were applying the "reasonable efforts" requirement in the 1980 Act too strictly,<sup>76</sup> this conclusion must be understood in context. In the 1990s, Congress reached a consensus

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glected Children: How Many? How Serious the Maltreatment? What Share Could Be Reached Only Through Coercive Intervention? 29-30 (May 16-18, 1996) (unpublished manuscript), Bartholet contends that these programs successfully diverted "only a limited portion" of the public child welfare caseload (p. 264 n.1). However, Bartholet's own description of Wilson's findings shows that as many as two-thirds of the families coercively handled by the state-run child protection system could safely be diverted to a voluntary system (p. 264 n.1).

<sup>75</sup> See, e.g., Mary B. Lerner, Carol S. Stevenson & Richard E. Behrman, *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, FUTURE CHILDREN, Spring 1998, at 15 ("State child welfare administrators surveyed in 1996 reported that, while two-thirds of the parents involved with the child welfare system needed alcohol and drug-abuse treatment, they could link fewer than one-third to services."); Leroy H. Pelton, *Resolving the Crisis in Child Welfare: Simply Expanding the Present System Is Not Enough*, 48 PUB. WELFARE, Fall 1990, at 19 ("The dearth of preventive and supportive services these agencies offer families in child protection cases has persisted over the decades."); Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, FUTURE CHILDREN, Spring 1998, at 29 ("The sweeping reforms envisioned in the law have not been fully implemented . . . The courts in many jurisdictions were not fully prepared for their new role, and child welfare agencies were hindered by having only limited budgets for services while they faced new administrative demands and increasing caseloads."); *supra* pp. 1728-29. Richard Gelles is one of the few scholars who agrees with Bartholet that the gravest problem of child welfare from 1980 through 1997 was that states tried too hard to keep children with families. See RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* 115-43 (1996).

<sup>76</sup> See, e.g., 143 CONG. REC. H10,788 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) (charging that reasonable efforts had become "every effort, [effectively] putting a child at risk"). Congress reached this conclusion in passing the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(ii) (Supp. III 1997)). ASFA excuses states from exercising reasonable efforts toward reunification in certain circumstances. For example, reasonable efforts are not required when a court determines that there are certain "aggravated circumstances" defined by state law, *id.* § 101(a), 111 Stat. at 2116, including when parents have been convicted of certain violent crimes against children. These crimes are murder, voluntary manslaughter, attempted murder or manslaughter, or felony assault resulting in serious bodily harm. See *id.* Additionally, ASFA suggests that reasonable efforts to return the child home shall not be required when the State has terminated parental rights to a sibling, but does not treat prior terminations as the sole ground to file immediately for termination. See *id.* § 101(a), 111 Stat. at 2116-17. In addition, the law was designed to increase the number of children moving from foster care to adoption. ASFA created an incentive program designed to increase adoptions of foster children. Under the program, states receive an additional \$4000 for every child adopted over the average number prior to the passage of the Act, and an additional \$2000 per additional foster child with special needs. See 42 U.S.C. § 673b(d)(1)(A)-(B) (Supp. III 1997). Congress authorized the expenditure of \$100 million over five years for the program, or enough to cover incentive payments for between 16,500 and 25,000 children over five years. The law substantially shortens the amount of time within which parents may regain custody of their children before the state is authorized to initiate proceedings to terminate parental rights. Under the new law, termination petitions ordinarily should be filed after a child has spent 15 out of 22 consecutive months in foster care. A termination of parental rights petition should be filed unless one of three exceptions applies: the child is in the care of a relative; there is a "compelling reason" to maintain parental rights based on the interests of the child; or the state has failed to provide mandatory "reasonable efforts." *Id.* § 675(5)(E).

that government had been doing too much to assist poor families and called for more modest and time-limited government assistance programs. In 1996, the 104th Congress abandoned the guarantee of basic economic support for families, which had been in place since the New Deal, and rejected the notion that government should bolster the capacity of poor families to raise children in a safe and healthy environment.<sup>77</sup> Against this backdrop, we can begin to appreciate the significance of the 105th Congress's concern that child protection officials were too assiduous in working to rehabilitate "broken" families. It is not surprising that legislators were troubled by federal policy that mandated substantial expenditures in an effort to rehabilitate families whose children had been removed from their homes because of child abuse.<sup>78</sup> In all events, the clear weight of the research refutes any claim that child welfare has been overzealous in its efforts to keep families together.

*C. Millions of Abused Children Are Left Unprotected  
by Child Welfare Officials*

If the evidence does not support Bartholet's contention that virtually all children in foster care have suffered serious forms of maltreatment, then what about her assertion that nearly three million additional children suffer from serious forms of abuse?

Research suggests that this claim is significantly overstated.<sup>79</sup> Indeed, Lindsey concluded in 1994 that "child abuse" is the "red herring" of child welfare.<sup>80</sup> According to Lindsey, although serious child abuse receives the attention of the media, the real problems in child welfare concern poverty and the related difficulties of raising children while poor.<sup>81</sup> Many of the points made in Part II.A are again relevant here. Bartholet estimates that there are three million abused children in the United States (p. 61). As is well-known, this figure is based only on

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<sup>77</sup> See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2110. By this law, Aid to Families with Dependent Children, Emergency Assistance, and the Jobs Opportunities and Basic Skills training program were grouped into the Temporary Assistance to Needy Families block grant.

<sup>78</sup> "[Then-]Speaker of the House Newt Gingrich . . . argued that government funds going to children born to welfare mothers should be diverted to programs that would put their babies up for adoption or place them in orphanages." Roberts, *supra* note 14, at 133.

<sup>79</sup> Even Bartholet's own citations do not support this claim. The only study that she cites estimates no more than 732,000 "serious maltreatment" cases (p. 61). ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3-13 tbl.3-2 (1996).

<sup>80</sup> LINDSEY, *supra* note 29, at 157.

<sup>81</sup> See *id.* at 161, 257-300.

the number of alleged abuse cases filed annually.<sup>82</sup> Some studies have shown that up to two-thirds of these reports do not involve serious charges.<sup>83</sup>

Bartholet does recognize that only one-third of these allegations are "substantiated" (p. 61 n.68). However, she does not clearly state whether these children are left unprotected because officials fail to enforce the law rigorously or because the law itself prevents rigorous enforcement. At times she emphasizes the discretion exercised by caseworkers "[o]nly in the most serious of the serious maltreatment cases" (p. 103). At other times she speaks critically of current laws that "are designed to exclude all but the more serious forms of maltreatment" (p. 64).

Bartholet relies on the high rate of cases dropped at the investigative stage as support for her proposition that officials irrationally dismiss claims of child maltreatment. For Bartholet, this high rate of dismissed allegations manifests a bias against intervention even when intervention is warranted. In her words, officials regularly fail to "substantiate cases unless the maltreatment is particularly egregious or immediately threatening to the child's safety" (p. 62). To 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.<sup>84</sup>

At other times, Bartholet focuses on the narrowly written laws<sup>85</sup> that require officials to dismiss allegations of serious maltreatment.

<sup>82</sup> See Douglas J. Besharov, *Introduction to PROTECTING CHILDREN*, *supra* note 62, at 3-4; see also WALDFOGEL, *supra* note 36, at 65 (noting that it is unclear how much of this three million is due to a rise in mistreatment or a greater awareness of what constitutes reportable abuse).

<sup>83</sup> Critics of child welfare policy have observed in recent years that the system has inappropriately transformed from an assistance program to an investigative one. Precious resources, including caseworker time, have been diverted from assisting marginalized families in need to investigating what are often spurious allegations of mistreatment. The result is that child welfare has changed into a quasi-police mechanism. Few critics feel this transformation has improved the lives of neglected children. On the contrary, because overworked caseworkers are obliged to investigate claims of little merit, verified cases of maltreatment are left unmonitored.

An important ancillary effect of this transformation is the corrosion of child welfare agencies' attitudes toward families whom they serve. As the decisionmaking framework of child welfare agencies changes from "assessment of need" to "investigation of abuse," single-parent and poor families, who form the core of the "investigated," are no longer perceived as families-in-need deserving support but instead are treated as potential child abusers deserving suspicion, reproach, and punishment. See LINDSEY, *supra* note 29, at 155-56.

<sup>84</sup> Bartholet cites to self-reporting surveys that indicate a much higher rate of abuse than the rates reported to officials (p. 62), but there is little evidence that officials fail to take action when they become aware of endangerment. In investigations in which the caseworker declined to take further action, the rates of maltreatment recurring in the investigated families are extremely low. See John D. Fluke, Ying-Ying T. Yuan & Myles Edwards, *Recurrence of Maltreatment: An Application of the National Child Abuse and Neglect Data System (NCANDS)*, 23 CHILD ABUSE & NEGLECT 633, 645 (1999).

<sup>85</sup> See *supra* p. 1732.

Although she never offers a substitute standard for removal, Bartholet clearly advocates that children be removed to protect their "well-being" (p. 27) far more frequently than is current practice. Because only a relatively small number of children are hospitalized or killed in the United States each year as a result of abuse,<sup>86</sup> Bartholet's call for a vast increase in removals must contemplate a significantly broader basis for removal — one focused on "well-being" or "best interests" rather than on serious harm. Regrettably, Bartholet fails to discuss or even to recognize the danger posed by aggrandizing state power in this way. Courts and commentators have long appreciated the relationship between broadly worded statutes authorizing coercive intervention in the family and the danger of arbitrary enforcement that disproportionately impacts the poor and racial minorities.<sup>87</sup> One virtue of tightly drawn statutes is the protection that they provide against wrongful intrusion.

Bartholet would likely reply that such risks are necessary if we are serious about the state's protecting children from harm. She would urge that, if we are to err, we should do so on the side of too much protection, not too little. However important this debate, by failing to demonstrate that children are harmed as a consequence of non-removal, Bartholet's argument becomes circular and unconvincing.

Even Bartholet's assertion that current laws are written too tightly to protect children from serious maltreatment is wholly unsupported. In Illinois, for example, intervention is authorized whenever officials conclude a parent has failed to provide "the proper or necessary support . . . for a child's well-being."<sup>88</sup> Even more telling, a report must be substantiated unless the investigator finds that there is "no credible evidence" of maltreatment.<sup>89</sup> In South Dakota, intervention is authorized merely upon an official's conclusion that the child's "environment is injurious to [his or her] welfare."<sup>90</sup> In most states, an un-

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<sup>86</sup> See *infra* p. 1742.

<sup>87</sup> See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 13-14, 16-18 (1979); Robert H. Mnookin, *Foster Care — In Whose Best Interest?*, 43 HARV. EDUC. REV. 599, 599 (1973); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1033 (1975); see also *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups . . . such proceedings are often vulnerable to judgments based on cultural or class bias.") (citations omitted); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833 (1977) (citing statistics of foster care incidents among the poor and minorities in New York City).

<sup>88</sup> 325 ILL. COMP. STAT. ANN. 5/3 (West 1993) (amended 1998).

<sup>89</sup> 325 ILL. COMP. STAT. 5/8.1 (West Supp. 1999); cf. *Cavarretta v. Department of Children and Family Servs.*, 660 N.E.2d 250, 258 (Ill. App. Ct. 1996) (holding that the "credible evidence" standard is too low to justify listing suspected child abusers in a state central register because the constitution requires a finding of a preponderance of the evidence).

<sup>90</sup> S.D. CODIFIED LAWS §§ 26-8A-2, 26-8A-6 (Michie 1999).

substantiated case means merely the absence of any “credible evidence” to believe a home is unfit.<sup>91</sup> For this reason, courts and government reports alike regularly conclude that the current scheme results in a bias toward over-reporting and over-labeling child abuse and neglect.<sup>92</sup>

In sum, neither Bartholet’s claim that only children who have been victims of serious familial abuse end up in foster care, nor her claim that millions of additional children who are victims of such abuse are kept out of child welfare, is supported by sufficient evidence. To the contrary, experts estimate that 40% to 70% of children currently in foster care have not been abused and need not be separated from their families if society sufficiently assisted poor families in raising their children at home.<sup>93</sup> Part IV considers whether Bartholet’s proposal to ensure the swift adoption of foster children is the best solution that American society can or should offer these children.

#### IV. IS ADOPTION REALLY THE BEST WE CAN OFFER POOR CHILDREN WHO END UP IN FOSTER CARE?

I suggest in Part I that Professor Bartholet may be cynical about the degree to which Americans care about the plight of poor children in the United States.<sup>94</sup> But such an assertion does not adequately capture the avowed spirit of *Nobody’s Children*. I am confident that Bartholet considers her book to be optimistic, even aspirational. Bartholet is striving to create a new America in which privileged citizens would come to regard the children in foster care as part of the larger community, even as belonging to them. She states:

What matters is that the children get into homes where they can thrive. But if we want to find truly nurturing homes for all the children in need, we have to reach out to the entire community . . . . Encouraging people who are in a position to provide good parenting to step forward, without regard to race or class or membership in the local village, encouraging them to see children born to others as children they are responsible for, can be painted as a form of vicious exploitation. But that’s not how I see it. It seems to me that if more members of the larger community thought

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<sup>91</sup> See N.Y. SOC. SERV. LAW § 422(5) (McKinney 1992). New York’s “some credible evidence” standard was found by the Second Circuit to “result[] in many individuals being [listed in a state central register of purported child abusers] who do not belong there.” *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994).

<sup>92</sup> One federal study found that investigators are more than twice as likely to “substantiate” a case erroneously than to mislabel a case “unfounded.” NATIONAL CTR. ON CHILD ABUSE AND NEGLECT, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT 6-5 (1988).

<sup>93</sup> See *supra* pp. 1732–33.

<sup>94</sup> See *supra* p. 1722.

of all the community's children as their responsibility, we'd have a much better chance of creating the just society that is our goal. (p. 6)

Thus, an important message of *Nobody's Children* is a call to invoke the Golden Rule for the poorest of American's children: Do Unto Others' Children as You Would Do Unto Your Own. Bartholet encourages us to re-imagine, for a moment, this society as one that regards all its children as equally important.

But Bartholet is far too unimaginative. This Part first challenges Bartholet's limited vision of a new corps of committed Americans providing adoptive homes to foster children, and then maps out a strategy that addresses the underlying societal tragedy endemic in foster children's lives.

### A. *The Artificial Narrowing of Child Welfare*

An important explanation for Bartholet's limited vision may be found in the history of child welfare reform. When the child welfare movement began in the United States during the late nineteenth century, it was broadly conceived; child protection was a piece of a larger movement to rectify social ills for children.<sup>95</sup> This larger movement was not to last; in the twentieth century, the federal government rarely furnished funds to ameliorate the effects of poverty on children. One exception was the Depression Era legislation providing Aid to Dependent Children.<sup>96</sup> Another was the short-lived War on Poverty in the mid-1960s. But with the election of Richard Nixon in 1968 and the prompt collapse of the War on Poverty agenda, "child welfare" policy was purposely shifted to a much narrower focus.

In the early 1970s, liberals seeking to improve the lives of poor children realized the importance of developing new strategies to secure bipartisan support for government spending toward that end. Chiefly the work of Senator Walter Mondale,<sup>97</sup> the new strategy found its home in the field of child abuse and protection. Mondale led the legislative effort that resulted in the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.<sup>98</sup> CAPTA directed a significant amount of federal money to states to fund efforts to protect

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<sup>95</sup> See WALDFOGEL, *supra* note 36, at 139.

<sup>96</sup> See Social Security Act of 1935, ch. 531, § 521, 49 Stat. 620, 633 (repealed 1968). This exception is, of course, a prominent one. Money was provided as an entitlement to poor families with children without regard to any allegation of abuse or neglect, representing a commitment that government would invest in families so that children could stay with them. But this very important program was strictly limited to providing money to parents; it did not address larger issues of poverty and its effects on children.

<sup>97</sup> See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15, 97-103 (1984).

<sup>98</sup> See Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247 (codified as amended at 42 U.S.C. §§ 5101-5107 (1994)).

children from harm.<sup>99</sup> As part of a conscious plan to prevent the proposal from being viewed as a disguised poverty program, Mondale emphasized that child abuse was a “national” problem, not a “poverty problem.”<sup>100</sup> Stressing that child abuse affected families of all classes<sup>101</sup> and that federal money would help children who were both rich and poor, Mondale won support for the proposal from politicians across party lines.<sup>102</sup> Ever since, “child abuse and neglect” in the United States have come to be seen and defined as an individual problem caused by individual sets of parents.<sup>103</sup> No longer a social problem, child welfare has come to be viewed as a matter of individual failure.<sup>104</sup> Much of the public debate has ignored or understated the evidence suggesting a correlation between abuse and neglect on the one hand and poverty on the other.<sup>105</sup> Indeed, a remarkable characteristic of the growth of support for child protection in the United States has been the deliberate claim that middle-class and upper-class children need child protective legislation just as much as do poor children.

The consequences of this strategy have been profound. In recent years, most observers have come to see child abuse primarily as a defect in a particular family, with limited or nonexistent societal roots.<sup>106</sup> The opportunity to examine such root causes has thus been overlooked. Duncan Lindsey suggests that the current “residual approach” to child welfare policy does a poor job of accounting for these problems. He observes:

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<sup>99</sup> See 42 U.S.C. § 5106a (1994).

<sup>100</sup> NELSON, *supra* note 97, at 107 (quoting *Hearings Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93rd Cong. 17–18 (1973) (internal quotation marks omitted) (statement of Sen. Mondale)).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.* at 93–94.

<sup>103</sup> Child welfare services are by their nature residual, serving only those children suffering or at great risk of suffering the gravest mistreatment, rather than the whole population of families in which children experience serious deprivation. Many scholars argue that the residual approach is doomed to be inadequate absent vast new investments in antipoverty programs. See COURTNEY, *supra* note 57, at 16; LINDSEY, *supra* note 29, at 4–5; LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 176–77 (1989).

<sup>104</sup> See WALDFOGEL, *supra* note 36, at 139.

<sup>105</sup> See PETER J. PECORA, JAMES K. WHITTAKER & ANTHONY N. MALUCCIO WITH RICHARD P. BARTH & ROBERT D. PLOTNICK, *THE CHILD WELFARE CHALLENGE: POLICY, PRACTICE, AND RESEARCH* 66–67 (1992) (tracing the correlation between poverty and child maltreatment); Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 609 (1978) (“Every national survey of officially reported child abuse and neglect incidents has indicated that the preponderance of the reports involves families from the lowest social economic levels.”); Pelton, *supra* note 75, at 19, 23 (noting the “abundant evidence that child abuse and neglect are strongly related to poverty”).

<sup>106</sup> Despite shifts over the years in perceptions of child abuse, “the dominant model continues to be one of child maltreatment as an individual problem.” WALDFOGEL, *supra* note 36, at 139.

The traditional residual approach to child welfare focuses on the problems in the parent/child relationship and the provision of services to ameliorate those problems. However, the broad social changes that affected families, especially those served by the public child welfare system, had little to do with that relationship. Further, the problems created by these major social changes are not amenable to solution through the residual perspective. The main service provided by the residual child welfare system is foster care . . . . The residual approach doesn't provide for developing policies and programs that would prevent these egregious problems from occurring in the first place.<sup>107</sup>

Although those hoping to improve child welfare once examined broader issues of poverty, a specific emphasis on abuse has replaced those socioeconomic concerns.

That one could propose the radical social re-engineering that lies at the core of *Nobody's Children* without first insisting that American society pay more attention to the social conditions that create the need for foster care testifies to the success of Mondale's strategy. That strategy narrowly defines the subject of child welfare as a problem of pathological child abuse. It is especially ironic that Bartholet endorses this extremely short-sighted view because she fervently aspires to transform the values and culture of "privileged" Americans.

Bartholet suggests that certain "local villages . . . are not going to have enough good homes to spare," such as Bedford-Stuyvesant and the South Bronx (p. 6). But we make a choice when we act as if the conditions in these villages no longer deserve serious attention from policymakers or activists. Surely the first step toward the creation of a more just society ought not to be cultivating the "larger community's" willingness to take foster children into their own homes and raise them as their own children.

The abysmal conditions of poverty and despair into which millions of poor children are born 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.

Herein lies the central unanswered question of *Nobody's Children*: If Bartholet is right that the core plight suffered today by America's foster children is that they are "nobody's children" (that is, the children of nobody particularly important), is Bartholet's proposal the morally appropriate response?<sup>108</sup> Let us briefly examine some facts

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<sup>107</sup> LINDSEY, *supra* note 29, at 79 (citations omitted).

<sup>108</sup> It is never clear precisely what Bartholet means by calling her book "Nobody's Children." Most of the children Bartholet writes about have families, including parents. It is inarguable,



about poor children in the United States today. If we could start over and conceive of child welfare as a public health or shared social problem, rather than focus on the “red herring” of child abuse,<sup>109</sup> we could develop policies that address directly and proactively those conditions that adversely affect the health and welfare of poor children in the United States.

1. *Poverty*. — About fourteen million children in the United States live below the poverty line.<sup>110</sup> Children are twice as likely as adults to live in such conditions.<sup>111</sup> Of all industrial nations worldwide, the United States has the highest child-poverty rate. This may be related to governmental policies and priorities: Britain, France, Sweden, and Canada each spend two to three times more on children and families than does the United States.<sup>112</sup>

The percentage of the United States population that falls below the poverty line is disproportionately composed of people of color. Close to half of the children who live in poverty conditions are African-American; only about 16% are white.<sup>113</sup>

In addition, the child-poverty problem is steadily getting worse. Since 1969, even as the GNP has risen 50%, child poverty has increased by 50%.<sup>114</sup> And poverty is increasing at an even more rapid rate as the effects of recent welfare “reforms” begin to take effect. In 1997, a year after welfare reform was enacted, there were 400,000 more children living below one-half the poverty line than there were in 1995.<sup>115</sup> A study of former welfare recipients in South Carolina found that one in ten could not afford medical care, one in six could not afford food, one in four could not pay the rent, and one in three had fallen behind in paying utility bills.<sup>116</sup>

2. *Housing*. — There is a drastic shortage of adequate housing for indigent children in the United States. In 1995, there were 4.4 million

however, that almost all foster children have parents who are without political influence and that, consequently, these children are not the concern of citizens with significant influence on social policy.

<sup>109</sup> LINDSEY, *supra* note 29, at 157.

<sup>110</sup> See RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 55 tbl.1 (1997).

<sup>111</sup> See Jim Weill, *The Convention on the Rights of the Child and the Well-Being of America's Children*, 5 *GEO. J. FIGHTING POVERTY* 257, 257 (1998).

<sup>112</sup> See GOLDEN, *supra* note 110, at 55.

<sup>113</sup> See *id.* at 68.

<sup>114</sup> See *id.*

<sup>115</sup> See ARLOC SHERMAN, CHERYL AMEY, BARBARA DUFFIELD, NANCY EBB & DEBORAH WEINSTEIN, *WELFARE TO WHAT: EARLY FINDINGS ON FAMILY HARDSHIP AND WELL-BEING* 51 (1998), available at [http://www.childrensdefense.org/fairstart\\_welfare2what.html](http://www.childrensdefense.org/fairstart_welfare2what.html) [hereinafter *WELFARE TO WHAT*].

<sup>116</sup> See *id.* at 2.

more low-income renters than there were affordable housing units.<sup>117</sup> As a result, a vast number of families settle for substandard housing; those who seek minimally adequate conditions are often forced to pay more than half their income in rent.<sup>118</sup> Here again, children feel the brunt of the problem: in a survey of thirty cities, children constituted 25% of the homeless population.<sup>119</sup>

This problem is also getting more serious every year. The average period of time spent awaiting Section 8 housing assistance rose from twenty-six to twenty-eight months between 1996 and 1998; in the nation's largest housing authorities, the average waiting period increased from twenty-two to thirty-three months during this same period.<sup>120</sup>

Welfare reform has further exacerbated the problem. With welfare benefits eliminated or substantially reduced, indigent families have less money to pay for housing and utilities. A Children's Defense Fund survey of former welfare recipients who were seeking services at non-profit agencies found that 23% of the families had been forced to move because they could not pay their rent, 25% had doubled up housing to save money, and 25% had had their heat shut off.<sup>121</sup> In one Wisconsin county, the number of homeless children increased by 50% after the implementation of welfare reform.<sup>122</sup>

3. *Health.* — More than eleven million children in the United States have no health insurance.<sup>123</sup> In 1997 alone, 400,000 children lost their insurance as a result of welfare reform.<sup>124</sup> Between 1996 and 1998, approximately 643,000 children lost Medicaid coverage.<sup>125</sup>

Life in the urban ghetto holds numerous, substantial health hazards for children. Data suggest that nearly two million children suffer from

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<sup>117</sup> See *id.* at 30.

<sup>118</sup> One study found that 5.3 million households pay more than half their income in rent, or live in substandard conditions, or both. See *id.* at 31.

<sup>119</sup> See U.S. CONFERENCE OF MAYORS, SUMMARY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES — 1998, at 2 (1988), available at <http://www.usmayors.org/uscm/homeless/hhsummary.html>.

<sup>120</sup> See *id.* at 87–89.

<sup>121</sup> See *id.* at 13.

<sup>122</sup> See *id.* at 16.

<sup>123</sup> See U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 1998, <http://www.census.gov/hhes/hlthins/hlthing8/hig8t2.html> (on file with the Harvard Law School Library); see also Weill, *supra* note 111, at 259 (reporting that there are now more than 10 million American children without health insurance).

<sup>124</sup> See Families USA Found., *Losing Health Insurance: The Unintended Consequences of Welfare Reform 2* (May 1999) (unpublished manuscript, on file with the Harvard Law School Library), available at <http://www.familiesusa.org/united.pdf>.

<sup>125</sup> See Jocelyn Guyer, Matthew Broaddus & Michelle Cochran, *Missed Opportunities: Declining Medicaid Enrollment Undermines the Nation's Progress in Insuring Low-Income Children*, at <http://www.cbpp.org/10-20-99health.htm> (on file with the Harvard Law School Library).

lead poisoning,<sup>126</sup> and those with lead poisoning are most often found in families in the lowest income brackets.<sup>127</sup> Indigent children suffer asthma at rates twice as high as children in higher-income families.<sup>128</sup> Every year, asthma attacks caused by cockroach infestation at home require hospitalization for 10,000 children between the ages of four and nine.<sup>129</sup> Asthma can adversely affect a child's essential well-being, ability to participate in sports and other activities, academic performance, and even life expectancy.<sup>130</sup>

Here again, the burdens and the suffering fall disproportionately on children of color. Twice as many black children as white children suffer from lead poisoning in the family income bracket of \$6000 or less; in the slightly higher income bracket of \$6000 to \$15,000, three times as many black children suffer from lead poisoning as white children.<sup>131</sup> The asthma rate for African-American children is 26% higher than the rate for white children.<sup>132</sup>

### B. *Who Is Responsible for Poor Children?*

When we recalibrate the lens of child welfare to include these basic issues within its view, the core proposal in *Nobody's Children* seems both inadequate and inappropriate. It is inadequate because it still will leave millions of children to suffer the consequences of being born into poor families.<sup>133</sup> It is inappropriate because, fully understood, Bartholet's proposal that privileged Americans adopt these children subverts, instead of advances, the Golden Rule by championing the unnecessary permanent destruction of familial ties.

In addition, when we widen the lens in this way, we quickly realize that, of the preventable conditions most threatening to children, maltreatment by parents is a relatively minor public health concern. Emergency medical accidents, for example, kill 22,000 children annu-

<sup>126</sup> See Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 468 (1999). Lead poisoning is defined as a blood level equal to or above ten micrograms per deciliter. See *id.*

<sup>127</sup> See *infra* note 131.

<sup>128</sup> See Weill, *supra* note 111, at 259.

<sup>129</sup> See MEGAN SANDEL, JOSHUA SHARFSTEIN & RANDY SHAW, THERE'S NO PLACE LIKE HOME: HOW AMERICA'S HOUSING CRISIS THREATENS OUR CHILDREN 6 (1999).

<sup>130</sup> See Bullard, *supra* note 126, at 470.

<sup>131</sup> In families with a yearly income of less than \$6000, 68% of black children and 36% of white children had lead poisoning. In families with a yearly income of less than \$15,000, 38% of black children and 12% of white children had lead poisoning. See *id.* at 467-68 (citing a 1988 study by the Agency for Toxic Substances Disease Registry).

<sup>132</sup> See *id.* at 470-71 (citing a 1994 CDC-sponsored study in Atlanta).

<sup>133</sup> In most cities, for example, we can predict the number of children that will end up in foster care by the single variable of their zip code. In New York City's Central Harlem, for example, one of every ten children is in foster care. See *Child Removals: Dislocating the Black Family*, CHILD WELFARE WATCH, Spring/Summer 1998, at 4.

ally in the United States;<sup>134</sup> “inexpensive injury prevention programs and emergency medical systems for children” could save an estimated 6000 to 10,000 of these children’s lives each year.<sup>135</sup> An additional 4205 children were killed by guns in 1997.<sup>136</sup> By contrast, child abuse fatalities appear to be a rare event (estimated to be between 1000 and 1200 annually).<sup>137</sup>

Imagine for a moment that we could achieve the goal of convincing all Americans to take responsibility for all children living in the United States. In such a world, two consequences would be readily apparent. First, we would find ways to make substantial improvements to the quality of life of poor minority children and to ameliorate most of the currently unacceptable conditions they experience. The children would receive better health care and live in cleaner, safer, and healthier communities and homes. They and their families would be treated with dignity and respect by the myriad adults with whom they interact on a daily basis. This change alone would obviate the need for taking these children out of their own communities and having them adopted into “better” ones.

Second, and even more crucial, once Americans started loving other people’s children as their own, they would find repugnant and abhorrent a systematic strategy of taking children from their families, permanently banishing their birth relatives from their lives, and sending them to live with strangers. Bartholet argues that:

At the core of current child welfare policies lies a powerful blood bias — the assumption that blood relationship is central to what family is all about. Parents have God-given or natural law rights to hold on to their progeny. . . . These beliefs are deeply entrenched in our culture and our law. And they are common to the thinking of people from one end of the political spectrum to the other . . . . (p. 7)

It is this aspect of Bartholet’s reasoning that I find astonishing. The power of government to permit the formation or continuation of a family is totalitarianism at its most basic level. American constitutional law rightly insists that any government attempt to regulate the intimate details of family life be subject to the strictest scrutiny and justified only by a compelling state interest. Thus, the rights of

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<sup>134</sup> See R. Christopher Barden, Robert Kinscherff, William George III, Richard Flyer, James S. Siedel, Debra Parkman Henderson & Harvard Law Sch. Law and Med. Soc’y, *Emergency Medical Care and Injury/Illness Prevention Systems for Children*, 30 HARV. J. ON LEGIS. 461, 462 (1993).

<sup>135</sup> *Id.*

<sup>136</sup> See Jill M. Ward, CHILDREN AND GUNS: A CHILDREN’S DEFENSE FUND REPORT ON CHILDREN DYING FROM GUNFIRE IN AMERICA 2 (1999), available at <http://www.childrensdefense.org/youthviolence/report.html>.

<sup>137</sup> See LINDSEY, *supra* note 29, at 93 tbl.5.2.

Americans to choose their marital partner,<sup>138</sup> to procreate,<sup>139</sup> to keep custody of children,<sup>140</sup> and to control the details of raising them<sup>141</sup> are not accidentally or carelessly selected freedoms. Properly understood, they form the core of our most sacred liberty. As declared by the Supreme Court, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”<sup>142</sup>

Justice Goldberg articulated this principle eloquently in his *Griswold v. Connecticut* concurrence:

“The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.” . . . 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.<sup>143</sup>

In this sense, Bartholet’s attack on the application of these core freedoms to child welfare must be seriously examined. The use of coercive state power to redistribute children from their biological parents to others deemed by the state to be superior caregivers is perhaps a necessary power to cede to government. But it must be given and utilized on an exceedingly spare basis. We protect liberty best by thwarting government power to redistribute children in accordance with the opinions of welfare officials or judges.

Bartholet’s dismissal of the value of the rights of biological parents is of great concern.<sup>144</sup> If we adhere to the Rawlsian principle of or-

<sup>138</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>139</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 162–64 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

<sup>140</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

<sup>141</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>142</sup> *Yoder*, 406 U.S. at 232.

<sup>143</sup> *Griswold*, 381 U.S. at 495 (quoting *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

<sup>144</sup> Bartholet’s disdain for our legal system’s preference for keeping children with their biological families is especially troubling in light of Peggy Cooper Davis’s important book *Neglected Stories: The Constitution and Family Values* (1997). In that book, Davis demonstrates that the drafters of the Fourteenth Amendment expressly intended to include family and personal autonomy — rights that slavery notoriously denied — within the freedoms that the Amendment was designed to protect. See *id.* at 214–21, 223–24. In this important sense, the American commitment to constitutional protection against government intrusion into the intimacy of the family (what Bartholet reduces to a “blood bias”) is considerably more than merely a reflection of a value system. It is born out of hard fought experience. Many commentators in the past generation, including Malcolm X,

dering society without knowing how the rules will be applied to each of us,<sup>145</sup> it is important to ponder the implications of a policy that would treat families without means differently from families with means.<sup>146</sup> In the case of the poor, we would tolerate the permanent separation of children from their families even though we have not seriously considered making meaningful efforts to ameliorate the conditions that precipitated their placement in the first place.

When we realize the society to which Bartholet and I both aspire, I am confident we will regard coercive adoptions of other people's children — somebody's children — as a necessary evil, not a desirable goal.

In addition to this basic principle, Bartholet's call for massive adoptions of children currently in foster care (and children who ought to be in foster care) is hopelessly impractical on several levels. First, the legal standard necessary for removal and termination of parental rights prohibits such an ambitious project. Although Bartholet advocates that many more children be removed from their families, placed in foster care, and subsequently adopted, she offers no details about the standards officials should use when deciding whether to remove children or to terminate parental rights. Without new standards, it is unclear whether or why more removals would occur. Second, an increase of cases by the factor Bartholet seeks would overwhelm the current child welfare system. We would need not only to quadruple the number of case workers and agency personnel responsible for placing children and monitoring their placements, but also to quadruple the number of judges and court personnel. These expenses are simply prohibitive. Third, even were we to expend these resources, we still would likely never achieve the results Bartholet advocates. She suggests that adults will come forward to adopt these children once all barriers to transracial adoptions have been eliminated (pp. 181-83). But she fails to address the timelines necessarily built into the process of adopting foster children. When children enter foster care, the planning goal for virtually all cases — and certainly for the non-life-threatening cases that Bartholet argues merit foster care — is to return children to their families. When children enter foster care, parents are given services and time to improve the conditions that led to the re-

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have compared the ease with which state officials in the child welfare system separate children from their parents, either temporarily or permanently, to slavery. See MALCOLM X, *THE AUTOBIOGRAPHY OF MACOLM X* 24 (Ballantine Books 1992) (1964).

<sup>145</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 12, 17-22 (1971).

<sup>146</sup> Marsha Garrison reminds us that in the area of custody and divorce, it is a truism that children deserve the right to maintain ties with biological parents but that, for some, this right is dramatically undervalued in the context of foster care. See Marsha Garrison, *Parents' Rights v. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 378-86 (1996).

moval. Under current federal law, a minimum of seventeen months must elapse before termination proceedings may even commence.<sup>147</sup> Commencing termination proceedings itself involves a time-consuming process of protracted trial proceedings of up to one year and appeals that can easily add an additional year. Moreover, the prospects of biological parents winning at the trial or appellate level are substantial.

Finally, Bartholet takes no account of the complexities of adopting a foster child. The infertile couples Bartholet expects to adopt these children want to form a permanent family. But these couples may be either unwilling or ineligible to become foster parents of newly placed children. They will be unwilling once they understand that there is neither a promise they will be able to adopt the child nor a commitment to strive for adoption. The most an agency can promise is that if the child becomes eligible for adoption, the foster parent will be permitted to adopt over anyone else. But the agency will be obliged to work assiduously with the birth family to assist it in overcoming the barriers to returning the child.<sup>148</sup> Reunion is success. Adoption is an option only when failure occurs — failure to reunite the child with his or her birth family. Under these conditions, the couples Bartholet talks about are likely to be unwilling (as they have been historically) to become foster parents (p. 180). Even if they would be willing, they would be ineligible unless they truly were committed to the idea of foster parenting; namely, that they are not striving ultimately to adopt the child, but instead, are offering their home and their love with the aim of eventually returning the child to his or her birth family.

For the foster care system to truly work, everyone connected with the child must be working toward the same goal rather than conflicting ones. The people Bartholet imagines becoming adoptive parents are not going to become foster parents. By the time the foster children are eligible for adoption — the time it will take to exhaust reunification efforts and the time it will take for the courts to order termination — children will almost certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt. Bartholet's proposal is thus utterly impractical unless we thoroughly change the rules of foster care and the process by which foster children become eligible for adoption. Of course, Bartholet could be proposing that whenever children are removed from

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<sup>147</sup> See 42 U.S.C. § 675(5)(E); see also *supra* note 76.

<sup>148</sup> See, e.g., *In re Sheila G.*, 462 N.E.2d 1139 (N.Y. 1984) (holding that only after the agency has proved by clear and convincing evidence that it has fulfilled its statutory duty to attempt to reunite the family may the court consider whether a parent has fulfilled his or her duties); *In re William*, 448 A.2d 1250 (R.I. 1982) (noting that the agency is obliged to do everything in its power to assist the family before termination will be permitted).

their parents because of suspicion of abuse or neglect, the children should be placed for adoption. However, such a proposal is so patently unlawful that it cannot be implemented. If she means to give parents some time to demonstrate that the children can be safely returned to their custody, then we are back in the current system and the book provides no hint of how things would be different.

### C. *An Alternative to Bartholet's Alternative Vision*

It is one thing to tolerate the radical social engineering that constitutes the core of Bartholet's proposals as a "least worst" alternative.<sup>149</sup> It is another to advance it before insisting that less drastic solutions be attempted. Regrettably, the reason Bartholet touts adoption of foster children remains unclear. Either it is because she anticipates that America will continue to fail to equip poor families with the resources necessary to keep their children at home, or it is because she so negatively assesses foster children's families and communities themselves.<sup>150</sup>

Since the 1970s, the concept of "child welfare" has been artificially narrowed to mean little more than protecting children from parental harm. During this same period, child welfare agencies have been transformed from programs that attempt to serve needy families to investigative bodies that follow up on often spurious allegations of mal-

<sup>149</sup> Joseph Goldstein and his colleagues coined the term "least detrimental alternative" as a substitute for "best interests of the child" as a reminder to judges obliged to make custody determinations that often it would not be possible for them to issue orders that were "best" for children; it would be wiser for them to recognize that their task frequently is to order what would be "least worst." JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 6 (1979).

<sup>150</sup> See *supra* pp. 1722-23. The impression one gets is that adoption will be very good for these children in their own right. Because they are poor, single parent families in urban ghettos need a broad range of services, from universal health care to universal, free child care. Bartholet suggests that the biological families of these children are so inappropriate as people, and their communities so inappropriate as neighborhoods, that the children deserve new communities and new neighbors:

[W]e need to recognize that children who are abused and neglected, children who are growing up in foster and group homes, are . . . victims. Like their parents, they are often black and brown-skinned victims, and most of them are poor. Keeping them in their families and their kinship and racial groups when they won't get decent care in those situations may alleviate guilt, but it isn't actually going to do anything to promote racial and social justice. It isn't going to help groups who are at the bottom of the socioeconomic ladder to climb that ladder. It is simply going to victimize a new generation. (p. 6)

Some of the book is regrettably reminiscent of a Connecticut Supreme Court decision written in 1883:

Next to intemperance, and generally accompanying it, a habit of idleness helps to fill our alms houses with paupers and our jails with criminals. By means of these two causes the burden is imposed on the public of maintaining a worthless class of humanity as well as the great expense of our criminal courts.

Reynolds v. Howe, 51 Conn. 472, 477 (1883); see also *Harrison v. Gilbert*, 43 A. 190, 191 (1899) (displaying a similarly disdainful view of poor people).



treatment.<sup>151</sup> As observed by Jane Waldfogel and others, “the problem is not just that CPS is the only door; it is also that CPS is ‘a door to an empty room.’”<sup>152</sup>

As we look to the near future, we can predict that child welfare personnel will be able to provide even less for poor families as changes in government policies require that they interact with increasing numbers of families.<sup>153</sup> We need to change this predictable path if we are to improve the lives of poor children. To accomplish this, it is critical that we restructure child welfare to include, for example, early intervention services for health care, child care, and education. Paradoxically, this vision requires that we find a way to narrow what now overwhelms the child welfare system — the investigative function of child welfare personnel. Although Bartholet proposes a mandatory home visitation program for all “highest-risk families” (p. 170), she stresses the value of surveillance of dysfunctional families as much as the benefits of service provision (pp. 163–75).<sup>154</sup>

There has been considerable ferment in the field during the past few years surrounding initiatives that would advance this specific and important agenda. Through the far-sighted efforts of the Edna McConnell Clark Foundation, among others, a number of communities have experimented with “community partnerships” that seek to change the function of child welfare from policing to helping. In these initiatives, the focus is on helping families rather than assessing blame.

<sup>151</sup> See *supra* pp. 1736–37.

<sup>152</sup> WALDFOGEL, *supra* note 36, at 119.

<sup>153</sup> Waldfogel states:

It is generally agreed that the safety net for children whose families cannot provide for them is the child welfare system, including foster homes, groups homes, or some other form of residential care. To the extent that reductions in cash assistance and food stamps increase the number of families who cannot provide for their children, such reforms are likely to increase the number of families referred to CPS. Thus, even as CPS agencies were trying to define their mission more narrowly to exclude lower-risk cases (such as poverty-related neglect), they might receive more referrals as a result of families' deteriorating economic circumstances. . . . Because so many more children are on welfare than are in CPS, the children affected by welfare reform could swamp the child protective services system, especially if they have to be placed in foster care or other out-of-home care. It is estimated that 1.1 million children will be made poor as a result of the welfare reforms. Placing one in five of those children in out-of-home care would add 220,000 children to the pre-welfare reform foster-care population of some 450,000 and constitute a nearly 50 percent increase in the foster-care caseload.

*Id.* at 130.

Bartholet implicitly acknowledges the relationship between dwindling governmental support for poor families and an increasing reliance on foster care: “In the 1980s new emphasis was placed on preserving the family, but with . . . other social and economic problems came an increase in the number of . . . child removal rates” (p. 154).

<sup>154</sup> This proposal is even more radical than Bartholet's adoption proposal, and she acknowledges that it is unlikely to be implemented (pp. 174–75).

The simple fact is that government agencies alone cannot protect children. Thus, efforts to organize networks of neighborhood and community support that reach out to families at risk provide great hope for the future. The goals are to reach these families before a crisis occurs and to expand the scope of those who receive services well beyond the category of "unfit families."

This transformation is exceedingly difficult to accomplish because there is no single formula that works for all communities. But the core goal is to make the "local villages" work well for their children by seeking to accomplish precisely what I understand to be Professor Bartholet's ultimate aspiration: to make the adults in the community feel responsible for all the children within it. Regrettably and surprisingly, Bartholet reserves her strongest condemnation for the community partnership programs, which she very broadly calls "family preservation" efforts (pp. 141-42). Critical of virtually all projects designed to identify the specific needs of families and to redress them with intensive support services, she is particularly skeptical of broader efforts to improve conditions within the communities from which foster children disproportionately come. Her major criticism of community partnership initiatives is the following:

Community Partnership advocates argue for putting responsibility in the "village" for raising the child. But they fail to address the realities of today's villages. Child abuse and neglect take[] place disproportionately in the poorest, most dysfunctional communities in our society — in communities which are the least likely to have the healthy organizations which are seen as central to the Community Partnership concept. (p. 153)

This is a circular complaint. It is precisely because so many children in foster care come from identifiable dysfunctional communities that these new initiatives seek to improve them. It is hardly legitimate to point out that these communities should not be targeted because they are dysfunctional.<sup>155</sup>

It is vital to acknowledge the disorganization of the communities from which the disproportionate number of foster children come. Efforts to improve those communities deserve our full support, unless those efforts result in inadequate protection of children. But the most

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<sup>155</sup> Bartholet describes some of these efforts:

[Family Group Decision Making] advocates have chosen the feel-good phrase *family empowerment* to describe the essence of what their movement is about. In fact 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 their children. It is about limiting the state's power to intervene to protect these children, and limiting the larger community's sense of responsibility for them.

It is important to support and empower families and to encourage extended family members to take responsibility for their youngest members. But when children have been subjected to severe forms of abuse and neglect, the state should not abdicate *its* responsibility. (p. 146)

Bartholet can say about community partnership efforts is that "it's not so clear that they will reduce child abuse and neglect" (p. 49).<sup>156</sup> Although no definitive evidence has yet been obtained that demonstrates the effectiveness of community partnerships, these efforts are allowing earlier interventions to identify at-risk families, revealing strengths in communities, and filling gaps in services for parents.<sup>157</sup>

## V. CONCLUSION

"Child welfare" as defined in the United States during the past thirty years is a social construct that deliberately excludes larger, more pressing issues affecting the well-being of children. This narrow definition — protecting children from parental abuse — not only excludes from its focus extremely important problems that policymakers concerned about children must address, it also contributes to proposals by well-meaning advocates that actually worsen the plight of many children.

Duncan Lindsey, who has pondered these problems for many years, concludes as follows:

The problem of poverty among lone-parents and their children has become the core social problem in North America. The problem has been cast as the collapse of the family, a plague of illegitimacy, an epidemic of child abuse, and a crisis for children. At the core all stem from the same problem, child poverty. Child poverty will not end without intervention. Yet, there has not been a broad commitment to solving this problem, in part because the problems facing these mothers and their children have been defined within a residual perspective.<sup>158</sup>

The narrow picture of child welfare policy that is currently accepted primarily focuses on children harmed by their own families and the apparatus and policies of state action that aim to find and protect those children. However important the issue of children being harmed by their parents, it is far from the most pressing issue in child welfare. Those of us who care most about children need to develop strategies that broaden the lens of problems facing children so that states with

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<sup>156</sup> Bartholet suggests that residents of these communities may not be reliable because there is "a risk that neighbors and trusted community representatives will be unduly reluctant to intervene to protect children for fear of alienating their parents" (p. 152).

<sup>157</sup> Bartholet never quite explains her opposition to these initiatives. At one point she provides the following clue, to which I am reluctant to give much weight: she once attended a conference at which one of the advantages listed for community partnerships was their instrumental role in preventing transracial placements (p. 144). I recognize, of course, that Professor Bartholet is the country's leading advocate of transracial adoptions. However, I am most reluctant to believe that Professor Bartholet has come to regard transracial adoption not as a tolerable solution, but as a preferred one. I cannot easily conclude that Professor Bartholet sees adoption as good for children, when a caring society could have prevented the need for adoption by helping families stay together.

<sup>158</sup> LINDSEY, *supra* note 29, at 327.

the will to ameliorate or avoid these problems can do so. Most important, this strategy must find a way to maximize the chance that children will be raised by their own willing families.

There will, of course, be occasions when it is necessary to separate children from their families and even to sever permanently all legal ties between children and their families to protect them from harm and to permit them to be raised by new families who will love and guide them. But a child-friendly child welfare policy certainly will regard the forcible removal of children from their families, and particularly the permanent banishment of birth relatives from their lives, as a necessary failure, rather than an outcome worthy of celebration.

The last words of *Nobody's Children* are ideal ones with which to end this review. Although Professor Bartholet and I may differ on exactly how the sentiments of these last words ought be manifested, 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" (p. 243).

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