

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

1996

Parents' Rights and Parents Wronged

Emily Buss

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Emily Buss, "Parents' Rights and Parents Wronged," 57 Ohio State Law Journal 431 (1996).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Parents' Rights and Parents Wronged

EMILY BUSS*

Professor Woodhouse¹ gets no argument from me about the failings of the proposed Parental Rights and Responsibilities Act.² I share her view that the proposed Act is poorly conceived, dangerously overbroad, and relies on standards that would be impossible to apply without resort to burdensome and costly litigation. Unlike Professor Woodhouse, however, my biggest complaint about the Act is not with the language of the legislation itself, but with its target: The Act is designed to give the most help to parents who need that help the least.

The cases and concerns cited by Professor Woodhouse as the inspirations for the proposed Act make clear that the Act is intended to help middle class parents to exercise their authority on issues that are, for most parents, at the margin of parenting responsibilities. The Act's sponsors want to ensure that parents can control which books their children take out of the library, whether and how their children are home schooled, and whether their children have access to condoms and abortions. The amount of control parents have over these matters will certainly affect *how* some parents fulfill their responsibilities to their children, but it will not affect *whether* any parents can fulfill their most basic parenting obligations.

This distinction between the expansive "how" and the minimal "whether" of parenting helps to draw out a distinction between the concepts of parental rights and parental responsibilities, which are so often collapsed into one phrase as they are in the proposed Act. The responsibility we ask parents to assume is relatively basic: We ask parents to see to it that their children receive some minimum level of care, supervision, and education. The rights we offer parents, on the other hand, protect their interest in providing this care, supervision, and education in the manner that they choose. Most of the issues addressed by the Act, while marginal to the assumption of parental *responsibilities*, lie at the heart of the discourse on parental *rights*.

I leave to Professor Woodhouse the analysis of why the proposed Act does a poor job of furthering parental rights as they should be construed. I choose, instead, to focus on the "Parental Responsibilities" side of the Act's equation to challenge some of the assumptions Professor Woodhouse makes about how the state serves its parents and particularly how it helps parents to assume parental

* Deputy Director, Juvenile Law Center, B.A., 1982, J.D., 1986, Yale University.

¹ Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996).

² H.R. 1946, 104th Cong., 1st Sess. (1995).

responsibilities.

While most of the issues intended to be addressed by the Act have little relevance to the assumption of parental responsibilities (again, as contrasted with the preservation of parental rights), there is one glaring exception: The Act sets standards for determining whether and when the State's child welfare system³ can intervene in a family, which goes to the core of a parent's performance of her parenting duties. When the child welfare system intervenes, the question is not whether parents can scrutinize books, or shield their children from access to condoms, but whether the state will allow parents to raise and care for their children *at all*.

Professor Woodhouse is right to criticize the Act's proponents for misconstruing the child welfare cases cited to maximize their shock value and obscure important facts.⁴ For the reasons she states, neither *In re Sunney*⁵ nor *In the Matter of Ray*⁶ provides a good example of intrusive intervention with successful parenting. There are, however, countless cases in which the state *does* abuse its power when it intervenes with parenting—with drastic consequences for children. These cases are not cited by the Act's proponents, nor attended to by the public, by legislatures, or by reviewing courts. These cases are exclusively the stories of the poor.

The child welfare system is a system that, in dramatic disproportion to their numbers, affects poor people. There are some very sensible reasons for this overrepresentation: To the extent poverty can be linked to drug addiction, violence, a hazardous living environment, and, most of all, stress, being poor will increase the likelihood that a child will be abused or neglected. But the poor are not overrepresented in the child welfare system simply because their child-rearing problems are greater or more widespread. Even in factually similar circumstances, a poor family is much more likely than a middle or upper income family to be suspected of, and reported for, abuse and neglect. Poor families live in close quarters with thin walls that expose them to the scrutiny of neighbors. Their welfare checks and food stamps bring with them the surveillance of income maintenance workers; their visits to public health clinics expose them to the subset of medical professionals most trained and oriented toward looking for abuse and neglect. Moreover, poor families lack

³ Professor Woodhouse uses the term "Child Protective Services" or "CPS" to describe this system. Because some states use the term CPS to refer only to the process of initial abuse and neglect reporting and investigation rather than to the entire system of state intervention in response to problems of abuse and neglect, I prefer to use the more inclusive "child welfare system" to describe the system as a whole.

⁴ Woodhouse, *supra* note 1, at 402–05.

⁵ 621 P.2d 108 (Wash. 1980).

⁶ 408 N.Y.S.2d 737 (1978).

the resources to buy private help (whether it be a drug rehabilitation program, a baby sitter, or a therapist) that can get them through the difficult times by helping them to reduce their abusive conduct or by keeping the abusive conduct out of the public eye.

More distressing by far, however, than the overinclusion of the poor (or the overexclusion of the more wealthy) from the child welfare system altogether, is how parents are treated once the system determines, rightly or wrongly, that it should get involved. This system, designed, as Professor Woodhouse notes, to help parents to parent and to protect children from dangerous parenting,⁷ serves most families abysmally.⁸ In this essay I will paint a picture, inspired by my own experience and the experience of other lawyers for children and parents, of how the system treats parents.⁹ It is against the backdrop of this picture that we should measure whether we want to give parents more clout in defending against state intervention.

I. THE EXTRA-JUDICIAL PROCESS

Professor Woodhouse's description of the substantive and procedural protections offered to parents is premised on the assumption that there is a court process in place whenever the child welfare system becomes involved in a family's life. In fact, however, much of the child welfare system, and some of its greatest exercises of power, occur outside the judicial system. Investigations of abuse and neglect reports are routinely done by case workers with little or no specialized training in how to approach the families, how to conduct an effective and appropriate investigation, and how to assess the information uncovered. These investigations are inherently coercive because parents know that whether or not they can keep their children hangs in the balance. Cooperation is therefore at a premium. In this context, it is not surprising that parents who under most circumstances would never consent to a strip search of their children by a stranger, would give their consent to an abuse investigator,¹⁰ for fear that failure to agree would translate into an admission

⁷ Woodhouse, *supra* note 1, at 393-95, 405-06.

⁸ There are, of course, many cases in which states have intervened in a manner that has provided real assistance to struggling parents. In my own experience, however, and in the experience of many lawyers for parents and children throughout the United States with whom I have consulted, these cases represent the exception rather than the rule.

⁹ Mindful of the limitations of conclusions based on such experiences, I nevertheless offer these experiences as a sobering counterweight to the idealized view of statutory and judicial systems constructed from text and underlying intent.

¹⁰ See *E.Z. v. Coler*, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff'd sub nom. Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986).

that they had something to hide. Parents are forced to respond to these coercive investigations without the assistance of lawyers or the supervision of judges.

While an investigator's determination that a child has, indeed, been abused or neglected could eventually bring the case before a judge, there is no guarantee of this judicial review. In many cases, an investigator's determination of child maltreatment leads to a "voluntary" arrangement, where a parent is required to accept certain services or even to agree to the placement of the child with an extended family member, in order to avoid what parents fear most: placement of their child in foster care. Under such arrangements, the parent feels forced to accept a considerable level of state intrusion in her family life without recourse to lawyers or the court. This intrusion brings considerable additional scrutiny to the workings of the family, with the inevitable cost in family disruption and the undermining of parental authority.

The same coercive pressures often produce "Voluntary Placement Agreements," under the terms of which children are placed in foster care for up to six months¹¹ without court review. Again, parents are prompted to "volunteer" for fear that failing to do so will only add the curse of "uncooperative" to the list of their sins when the case comes to court. While these cases will eventually be reviewed by a court, the damage to the parent and child of an inappropriate removal will already have been done. At a minimum, the families will have suffered up to six months of inappropriate separation. At a maximum, the removal will accelerate whatever problems the parents were having¹² and undermine an already troubled relationship between parent and child.

II. THE JUDICIAL PROCESS

A. *The Courts*

Even if and when a parent makes it into court, she probably will not find herself embraced by a protective process. In many jurisdictions, particularly

¹¹ Federal foster care reimbursement is only available for extra-judicial voluntary placements lasting six months or less. 42 U.S.C. § 672(e) (1988). States are, however, free to continue such placements for much longer periods with exclusively state funds.

¹² Parents whose children are removed immediately lose the cash assistance on which they depend to pay for housing, utilities, and transportation. Moreover, the despair engendered by the loss of their children often exacerbates problems they already have, such as drug and alcohol dependence or mental illness.

Even the few days that separate an emergency, involuntary removal (in some states done without court review) and the "shelter care" hearing at which the emergency removal is reviewed may be enough to begin this destructive process.

those in large urban areas, the courts are overwhelmed by the size of their caseloads: Overtaxed judges hear "lists" of up to 100 cases a day, giving each case a maximum of five minutes. Families are sworn in *en masse* at the bar of the court, with little sense that what they say to the judge thereafter constitutes sworn testimony, rather than a free-for-all conversation. Judges bark at the parties, calling parents "Mom" or "Dad," rather than by their names. Orders typically are entered without any articulation of findings of fact, conclusions of law, or even a recitation of the relevant legal standards in justification. If a party determines that she needs more than five minutes of the court's attention to resolve a disputed issue—even an issue as important as whether a child should remain in foster care, whether a parent should be allowed to visit her child, or whether the state should be required to provide the parent with supportive services—she will have to wait months to get a new date in court.

Even when the court process works as it is intended, and a judge resolves a disputed issue after hearing testimony and argument, there is no guarantee that the court's decision will be put into effect. Child welfare agencies routinely ignore court orders directing them to provide various forms of assistance to parents and their children in the name of fiscal or administrative constraints. When this lack of compliance with its orders is brought to the attention of the court, the court's own lack of resources and its sympathy for the parallel plight of the child welfare agency often makes the court unwilling to enforce (or even reassert) these orders.¹³

A lack of court resources also makes it difficult for parties to take appeals from unfavorable decisions. Courts rarely issue written opinions in connection with their decisions, and the record of proceedings is often difficult to retrieve.¹⁴ Moreover, this lack of resources and the failure of the court system to give priority to the resolution of appeals addressing matters essential to the functioning of families, forces families to wait months, even years, for a decision about where their children will live or what assistance they will receive with parenting. These delays, harmful in many legal contexts, are devastating when the lives of children hang in the balance.¹⁵

¹³ In one case in which I represented a teenager in the custody of the child welfare agency who needed a place to live, the court was unwilling to order more than that "the agency shall find a place for her to live, *if it can.*"

¹⁴ For example, in one jurisdiction where I have practiced, proceedings were taped, but the tape almost always proved inaudible. In another jurisdiction, certain proceedings were not recorded at all, and others were recorded by stenographers who were not compensated by the court (nor could they be by the indigent parties) to transcribe the record until *after* an appeal was filed.

¹⁵ While Professor Woodhouse cites to the cases of Babies Richard and Jessica to illustrate a different problem, in my view the most serious failing of the legal system

B. *The Lawyers*

Professor Woodhouse also suggests that parents' ability to protect their interests are bolstered by the provision of legal representation in most jurisdictions when their cases come to court. Here, again, the difficulties parents have in securing competent counsel belies the promise of legal representation offered by the states' statutory schemes. While states routinely recognize parents' right to be represented in all proceedings where the custody and control of their children is at stake and to have counsel appointed when they cannot afford to retain counsel themselves,¹⁶ in practice, parents are often persuaded not to request counsel, in the name of judicial efficiency. Parents are told that a request for counsel would require everyone to extend their already long wait in court, or return to court on an additional day, and are advised that counsel is really unnecessary if the parties have reached an "agreement."

It is worth pausing here, a moment, to say a word about these agreements. Professor Woodhouse champions the prevalence of non-adversarial resolutions in these cases as a sign that the current process is often a collaborative one, where the State, the parties, and their lawyers reach a mutually satisfactory conclusion about how to resolve family problems and meet children's needs.¹⁷ In fact, however, most agreements are presented to parents to accept or reject, again with the threat that rejection will signal uncooperativeness and will inspire the state to adopt a more aggressive posture before the court. Most typically, parents agree to meet a variety of conditions (some much more related to their ability to parent than others) before their children will be returned. The parent does not generally agree that satisfaction of the conditions should precede the return of her children. Her agreement with the agency is limited to the general goal of having her children returned. Her acceptance of

implicated by these cases is the failure of the judicial system to reach *some* final resolution in these cases quickly. Cf. Woodhouse, *supra* note 1, at 415-16 (arguing that these cases have a chilling effect on adoption by allowing unwed fathers to challenge adoptions and, if successful, take children from the adoptive parents, often the only parents these children have ever known).

¹⁶ While *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), held that the Due Process Clause of the Fourteenth Amendment did not require that counsel be appointed to represent indigent parents in all cases addressing whether parental rights should be terminated, it noted in dictum that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel . . . in dependency and [termination] proceedings. . . . [and] 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases." *Id.* at 33-34 (citations omitted).

¹⁷ Woodhouse, *supra* note 1, at 418-19.

the conditions attached to the achievement of that goal signals her belief that her only chance of getting her children is tied to the satisfaction of these conditions, whether she agrees with their relevance or not.

Perhaps this belief is well founded, and her acceptance of the conditions reflects a good legal judgment about her chance of greater success through an adversarial process or the harm that might come to herself and her family in the pursuit of that adversarial process. But ordinarily clients have the benefit of counsel when they make such assessments. Parents facing the loss of, or continued separation from, their children, however, are asked to make these decisions on their own. Without the benefit of counsel to help them identify their rights, to discuss the strengths and weaknesses of their case, and to assist them in asking the state agency for supportive services, parents are called upon to decide whether to agree to what that powerful state agency demands. In many jurisdictions, only the parent with adequate presence of mind and legal sophistication will withstand the tremendous pressure exerted by the state's request for cooperation and agreement to speak with a lawyer at all.

Moreover, the appointment of counsel in name often does not translate into the provision of zealous representation in fact. While many parents are represented with tremendous competence by public defender and legal services offices and by private attorneys, many others are appointed lawyers who only accept these cases because they are the only cases they can get. Non-paying clients involved in the family or juvenile court system because they have been accused of abusing or neglecting their children are among the lowest-status clients a lawyer can have. The hourly rate paid for this work is at the bottom of the scale and is capped at a level too low to allow for effective representation in many cases. While these cases attract their share of dedicated, zealous advocates, they attract more than their share of lawyers who are merely desperate for work.

Among these lawyers, I have witnessed a startling lack of professionalism. The low pay and the lack of commitment to the work inspires these lawyers to give little or no attention to the cases. They rarely make an effort to speak with their clients out of court, even those clients, such as incarcerated clients, who may not be readily available for consultation in court. They often show up after a hearing is over, so that they can receive credit (and therefore pay) for an appearance, regardless of their lack of actual participation. They readily confess their open dislike for their clients to their adversaries, and their satisfaction with court decisions strongly opposed by their clients. In their frustration, many parents declare that they would have done better to represent themselves. While they would not have done well, they might, indeed, have done better.

III. THE SERVICES PROVIDED BY THE SYSTEM

In addition to the procedural protections of the system, Professor Woodhouse suggests that parents are also protected by a range of substantive legal obligations imposed upon the State. One such substantive protection is offered by the Adoption Assistance and Child Welfare Act¹⁸ which requires that, in order to get federal funding, states must show that they have made "reasonable efforts" to keep families together and to provide the services to families to allow families to remain together, or be reunited, in a manner that protects children from harm.¹⁹ Many states have incorporated similar protections in their own statutory structure, transforming the requirement from a condition of funding to a direct mandate that such services be provided.²⁰ But, again, the practice tells a different story. Overwhelmed, underfunded, highly bureaucratic child welfare agencies provide little if any useful assistance in solving the real problems that face these families: These agencies trot out "parenting classes" and referrals to generic therapy for every parent, regardless of her particular problems. But where the safe return of children comes down to provision of affordable housing, or drug treatment that allows women to remain with their children, the agencies generally have nothing to offer.

Child welfare agencies do, as Professor Woodhouse notes, engage in a comprehensive planning process, as required by federal law.²¹ And while the intention of this process is to involve agency and family in a collaborative process to establish goals and intermediate objectives and to allocate responsibilities among the parties, this process, in practice, is little more than a charade. Families are informed of a pre-set meeting time, without being consulted about which dates and times are convenient to them. Once notified that the meeting will occur (perhaps only a day or two before the scheduled meeting date), parents are penalized if they fail to show up. Far from being developed as the product of a group process, these case plans are generally drafted ahead of the meeting by child welfare workers for the parents' and children's consent. Where parents, children or their attorneys raise concerns or suggest changes to the plan, whether or not this discussion is reflected in the final version of the plan depends on the will of and competence of the agency

¹⁸ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§ 608, 620-28, 670-76 (1988 & Supp. V 1993)).

¹⁹ 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1988).

²⁰ *See, e.g.*, IOWA CODE ANN. §§ 232.95(2), 232.102(4) (West 1994) (requiring a court finding that reasonable efforts were made to prevent the need for removal of the child from his home in all cases where removal is ordered).

²¹ 42 U.S.C. §§ 671(a)(16), 675(1) (1988). Again, the statute links satisfaction of this case plan requirement to the state's receipt of federal foster care funds.

representative, who holds the exclusive editor's pen. At the end of the meeting, a signature page is passed around (often detached from the substance of the agency's document) which parents are urged to sign. Under heavy pressure to show their cooperative commitment to retaining or regaining custody of their children, parents rarely refuse.

IV. THE EFFECTS OF THE SYSTEM ON CHILDREN

As a lawyer for children, the focus of my concern is how these systems' failures affect the children of the parents in question. To state one of Professor Woodhouse's points in cruder terms, I would be much less concerned about how the process treats parents, if I believed that the process produced good results for children. But sadly, the abysmal process I have described plays out abysmally for children: The courts' failure to engage in a rigorous application of the relevant legal standards means that children who should be removed from their homes are not, and children who are removed should not have been. Whether the original decision to place children is justified or not, the children's subsequent treatment in the child welfare system often constitutes abuse and neglect of its own: Children are separated from their siblings, moved from home to home (and therefore school to school and community to community). Children often feel mistreated: At best, they feel unloved, at worst, they are physically and sexually abused. Children are provided with short, infrequent visits with their parents in uncomfortable surroundings. The slow pace of court proceedings means that children will remain in limbo for years, neither belonging to a birth family, or a new, permanent family through a transfer of custody or adoption.

The system's treatment of children's parents (as well as of the children themselves) also has more subtle, psychologically destructive effects on children: Children's observation of the disrespect shown to their parents by the system undermines their own developing self-esteem. Their observation of the unfairness and ineffectiveness of the system encourages them to develop a distrust of public institutions and a perception of their parents as the victims of an aggressive bureaucracy. All of this, of course, has a profound effect on a child's ability to grow into a well-adjusted, participating citizen.

In sum, for many children involved in the child welfare system, the only thing worse than being "owned" by their parents is being owned by the public system.²² While I agree with Professor Woodhouse's assertion that, in design,

²² A child is necessarily "owned" to some extent by someone or some thing, for he is not permitted to exist and function independent of some attachment to a custodian. In most circumstances, children cannot get jobs, sign leases, go to school, or consent to medical treatment without the authorization and involvement of a supervising adult. Moreover,

state schemes for dealing with problem parenting are generally good, I cannot agree that, in practice, the schemes generally work. The cases of my child clients and their families, and those of my colleagues throughout the country, have convinced me that the practice does serious injury to families, while providing them little of the promised assistance.

But these cases are not the ones we hear about in congressional testimony about the need to protect parents rights and foster their responsibility. Nor are they the cases that make their way into the common discourse. These families are essentially invisible to the national conscience about how we, as the collective public, treat our families in need.

V. CONCLUSION

The fact that public systems do such a bad job of taking over parenting suggests to me (and here I agree with the Act's proponents) that the state will do better to give parents the *means* to be good parents themselves. But, as Professor Woodhouse notes, it is precisely this kind of assistance that is targeted for cuts by some of the same constituencies who seek to protect parental authority through the proposed Act: The entitlement to cash assistance and medical coverage; funding for preventive services including education and job training programs, family therapy services, and drug treatment; and funding for child care are all vulnerable to congressional reduction or elimination, in the name of shrinking government and shifting responsibility for children to their parents. Ironically, one of the predictable products of this "shrinkage" will be the bloating of that very part of government that does so poorly at replacing the care, love, and authority provided by parents. A true interest in helping parents to do their job unencumbered by government intervention should inspire support for precisely the kind of public assistance that allows as many parents as possible to avoid the greatest conceivable intrusion on family autonomy—the intrusion inevitably caused by the intervention of the child welfare system.

while Professor Woodhouse and I both balk at the sound of parental "ownership," we cannot avoid embracing much of what is included within that concept: namely the parental nurturing, attachment and authority that are so central to a child's healthy development. Children who have been removed from their families often speak of wanting to find a place where they feel they belong. The ownership connotations implicit in "belonging" are not, I think, insignificant.