William & Mary Bill of Rights Journal

Volume *14 (2005-2006)*
Issue 3

Article 4

2-1-2006

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James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 Wm. & Mary Bill Rts. J. 843 (2006), https://scholarship.law.wm.edu/wmborj/vol14/iss3/4

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A CHILD-CENTERED APPROACH TO PARENTAGE LAW

James G. Dwyer*

This symposium issue of the *William & Mary Bill of Rights Journal* collects the papers from the second in a set of conferences devoted to the topic of state control over children's family relationships. In the first conference, held in spring 2002, the organizing question was the normative one of what rights children should have against the state when the state makes any decisions as to who will be members of a child's legal family and as to who will be legally guaranteed an opportunity for a social relationship with a child. Participants in that conference considered whether children should have some legal right that constrains the state when it establishes statutory rules for, or makes individualized decisions about, who a child's legal parents will be (i.e., paternity, maternity, and adoption rules and decisions), who will possess rights of custody and visitation following divorce, when legal parent-child relationships will be suspended or terminated because of abuse or neglect, and whether courts will require parents to allow a child to spend time with third parties such as grandparents. The excellent papers produced for that first conference were published in April 2003 in Volume 11, Issue 3 of this journal.

The organizing question for this second conference was a more empirical and topically narrower one. This conference focused on the state's selection of a child's first legal parents at the time of birth, presupposed that the state's aim in establishing statutory rules for parentage and in making any individualized decisions about parentage should be exclusively to serve the best interests of each child, and asked participants to opine on what an ideal parentage law would look like, in light of that aim and in light of what empirical research to date tells us about how particular parental characteristics impact the welfare of children. Specifically, in my invitation to participants, I asked them to

> propose and explain/defend specific statutory language that they believe would serve children's welfare better than current prevailing rules for maternity and paternity. This could include particular facts that would create a presumption in favor of certain people becoming the legal parent of a newborn child (e.g., being the birth mother or being married to the birth mother), that would rebut such a presumption (e.g., being under a certain age or having committed acts of violence against the birth mother), or that would

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> disqualify certain people up front (i.e., rather than making them parents and then going through termination proceedings) from the role of legal parent for a child (e.g., drug use, imprisonment, termination of parental status as to prior child). It could also include factors for making a best-interests determination in individual cases when it is appropriate to do so (e.g., availability of financial and other resources, mental health).[1]

In addition, I endeavored to constrain the participants to a purely child-centered analysis of parentage laws. I asked that "participants not [] consider at all any interests or supposed rights of adults" and "that we not debate whether it is appropriate to focus exclusively on the welfare of children."[2] In a new book, *The Relationship Rights of Children*,[3] I present an extensive theoretical argument for attributing to children a right that state decisions about their family relationships, including the crucial decision as to who their legal parents will be after birth, be based exclusively on what is in the children's best interests. Whether or not the participants agreed with that normative position, I wanted them to think about what parentage laws would look like if that were a controlling normative assumption. "The idea," I explained, "is to see what sorts of rules people would devise if it were accepted that the well being of newborn children is all that matters to the state's forming of initial parent-child relationships."[4] The scholars who participated in the conference relished this challenge, finding it an intriguing intellectual exercise to imagine what a purely child-centered set of rules for attributing legal parenthood would look like. My observation was that it proved difficult to retain such an exclusive focus on children's interests, rather than slipping into arguments reflecting concern for the impact on parents — for example, concern that poor adults would disproportionately be denied an opportunity to raise their biological offspring. Nevertheless, we succeeded in always coming back around to the question of what would be best for the children.

A further ground rule to which I requested adherence was that participants "not talk about what they would do to change the circumstances in which people live (e.g., give them all the resources and assistance they need to succeed as parents) instead of changing the laws for creation of parent-child relationships."[5] It seems to me a realistic assumption that our society is not anytime soon going to make a substantially greater financial commitment to alleviating poverty, eradicating substance abuse, or otherwise lessening economic and social inequalities and disadvantages that play

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[1] Email from James Dwyer, Professor, William & Mary School of Law, to Karen Czapanskiy, Professor, University of Maryland School of Law (Mar. 15, 2005, 10:35:00 EST) [hereinafter Symposium Invitation] (on file with author).

[2] *Id.*

[3] JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006).

[4] Symposium Invitation, *supra* note 1.

[5] *Id.*

a role in child abuse and neglect. If that assumption is correct, then I believe it morally irresponsible to respond to the concern that a child born today to biological parents who are suffering from addiction or terrible circumstances could suffer great deprivation, if the state placed the child in a legal parent-child relationship with such biological parents, solely by arguing that the state should fix whatever problems and disadvantages those biological parents have. We might think the state should do that, but the reality is that it has not done so and is not going to do so, at least not soon enough to help a child born today. Similarly, it would be irresponsible to take no steps to protect an adult victim of domestic violence from future harm on the grounds that the state should eradicate the underlying social conditions that generate such violence. Some children are being born today to biological parents who are quite unprepared to be good social and psychological parents and caregivers, and we need to think seriously about what we as a society owe such children at the time of birth, in terms of whether we place them in the care of those adults, given the way those adults are, or instead place them in a legal parent-child relationship with adults who are much better prepared to be good parents.

And so, I challenged the conference presenters "to think about what would be best for newborn children in today's real world if we assume there will not be a major new commitment to public support for parents anytime soon"[6] (even though we probably all believe there should be such a new commitment). This challenge proved the hardest of all to meet, in my judgment, because all or nearly all of those involved do wish that the state would do much more than it currently does to eliminate the social circumstances that give rise to dysfunction and to help biological parents who are struggling with addiction, mental illness, and other personal difficulties, and they understandably feel great sympathy for those adults. Certainly readers should not fault any of the contributors to this symposium for not focusing more on additional remedial programs; the ground rules for the conference asked them not to consider that alternative. Importantly, though, there is no inconsistency or incompatibility between fashioning rules for conferral of parentage on purely child-centered grounds, excluding consideration of the interests or sufferings of adults, on the one hand, while on the other hand also advocating for a greater societal commitment to lessening poverty, addiction, and other social ills that impact families. We can do both, and in fact, a change in parentage laws to prevent any children from being placed in the worst circumstances, and accordingly denying legal parent status to some biological parents, might bring public attention to the plight of those biological parents and trigger a greater public commitment to helping them.

In short, the papers in this symposium issue respond to a narrow, but immensely important, legal and social question, and to varying degrees succeed in adhering to two externally-imposed constraints — namely, that no consideration be given to the interests of any persons other than the newborn child whose parentage must be decided,

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[6] *Id.*

and that the authors focus on what is best for children born today in the real world and not consider what new social programs might help biological parents in the future. The results are quite interesting and could trigger stimulating debate among family law scholars and among many other scholars and professionals whose work is connected to this topic.

By way of background, for those unfamiliar with the various aspects of the law that play a role in a newborn child's relational life, I will briefly explain what current parentage laws do and what other legal rules come into play when children are born to biological parents who appear likely to commit child abuse or neglect. Current statutory rules for maternity, with rare exception, confer legal mother status on the woman who gives birth to a child.[7] There is no possibility of the state's denying initial legal parent status to a birth mother on the grounds that she is unfit to be a parent. Current statutory rules for paternity are more complex, but as a general matter they ultimately tie legal father status to biology — that is, to being the biological father of a child. Biological paternity is usually established either by a genetic test or by a legal presumption of biological paternity that is based upon a man's being married to the birth mother, formally acknowledging biological paternity, or otherwise manifesting a belief that he is the biological father.[8] Rarely is paternity decided on the basis of a man's fitness for parenthood.[9] No states provide that a man may not become a legal parent to a child if he has certain characteristics or if he has a certain history, such as having previously killed or seriously abused another child. Thus, one way of understanding the question presented in this symposium is whether states should amend their maternity or paternity statutes to prevent some biological mothers or fathers from becoming legal parents in the first instance to their biological offspring.

Excluding some people from legal parenthood is not so radical an idea as it might at first seem. All states have adoption laws and regulations that exclude a substantial number of people from becoming legal parents to children who are not their biological offspring. Such exclusion might be based on age,[10] on a criminal history or past findings of child maltreatment, on lack of financial resources, or on other circumstances or characteristics that correlate highly with poor parenting.[11] State agencies and courts thus regularly pass judgment on people who seek to become parents and, in a significant percentage of cases, deny such people the opportunity to become parents.

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[7] *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 859–60 (2003).

[8] *See id.* at 865–81.

[9] *See id.* at 876–77.

[10] For example, in the United States, applicants for adoption generally must be adults — that is, at least eighteen years old. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/2 (LexisNexis 2005); MD. CODE ANN., FAM. LAW § 5-345(b)(1) (LexisNexis 2006); TEX. FAM. CODE ANN. § 102.005 (Vernon 2005). In some European countries, the minimum age is twenty-one. *See* DWYER, *supra* note 3, at 36, 315 nn.39–40.

[11] Dwyer, *supra* note 7, at 882–83, 885–88.

In addition, states routinely remove newborn children from the custody of biological parents with characteristics that suggest a high likelihood of abusing or neglecting a child, most commonly birth mothers addicted to drugs.[12] After removal, state agencies typically place the child in foster care and then try to secure services for the parents that would help them eliminate the conditions that led to the need for removal of the child.[13] In a high percentage of cases, those efforts to rehabilitate biological parents fail, with the result either that, after a child is returned, neglect or abuse occurs or that the state must petition for termination of parental rights instead of transferring a child from foster care to the custody of the biological parents.[14] Given that context, what participants in the conference were asked to consider is whether there is some set of cases in which children would be better off if the state decided not to confer legal parent status on biological parents in the first place, based on a judgment that the prospects for rehabilitating those adults were very poor, and instead immediately after birth conferred initial legal parent status on some adults who are well-prepared to be good parents.

Also significant is that states today authorize termination of parental rights immediately after a child's birth on the basis of past conduct by biological parents in relation to another child.[15] The federal Adoption and Safe Families Act of 1996 required states, as a condition for receiving a share of certain federal funds, to give child protection agencies the authority to petition for, and courts the authority to grant, such immediate termination in cases where a biological parent has previously had rights terminated as to another child, has committed certain serious criminal offenses against another child, or has seriously abused another child.[16] What was under consideration in this conference, therefore, was effectively whether the same result might be accomplished through parentage laws, which might make placement with other parents more expeditious, and whether there should be additional factual predicates for placing children immediately after birth into a legal parent-child relationship with adults other than the biological parents.

In my book on children's relationship rights, in a final chapter intended to illustrate the potential real world implications of my theoretical arguments, I offered a proposal for a model parentage act.[17] Some of the participants responded to that proposal, and so it will be useful to afford some sense of it here, though I would direct readers to the book itself for further details, explanation, and supporting citations to the empirical literature. My proposal, unlike any of the iterations of the Uniform

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[12] *Id.* at 944–45; *see also* DWYER, *supra* note 3, at 255, 343 n.3.

[13] Dwyer, *supra* note 7, at 959–61.

[14] *See* DWYER, *supra* note 3, at 255–57, 343–44 nn.3–9.

[15] *See, e.g.*, VA. CODE. ANN. § 16.1-283(E) (West 2001 & Supp. 2005).

[16] *See* Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.); *see also* Dwyer, *supra* note 7, at 962.

[17] *See* DWYER, *supra* note 3, at 258–63.

Parentage Act that the National Conference of Commissioners on Uniform State Laws has promulgated,[18] would allow courts to deny legal parenthood in the first instance to some biological parents on the grounds of unfitness. I structured the model so that legal parenthood ordinarily would be automatically conferred on any birth mother, with limited exceptions. Any biological parent, including a birth mother, would not *automatically* become a legal parent, but rather would have to *petition* for legal parenthood of a child, only if he or she:

1) is below eighteen years of age at the time of the child's birth;
2) at the time of the child's birth is imprisoned or has been sentenced to serve a prison term following the birth;
3) has harmed the child before birth through voluntary conduct, including but not limited to committing acts of violence toward the gestational mother during pregnancy and ingesting [specified illegal drugs or legal drugs in excessive quantities] or [a specified quantity of alcohol] while knowing one is pregnant;
4) has previously been found by a state child protective agency or court to have abused, neglected, or committed a crime against any child;
5) has previously allowed a child to suffer substantial pain or die by willfully failing to secure medical care when it was needed;
6) has previously been found in a civil or criminal legal proceeding to have committed acts of violence toward or sexual offenses against any person;
7) is already a legal parent to four or more children and is receiving [specified forms of public assistance];
8) has been diagnosed with a mental illness that would, even with treatment then being received, endanger the safety of a child in his or her care;
9) has an IQ of less than 70.[19]

Legal fatherhood automatically would be conferred, without need for a court or administrative hearing, upon a man who is married to the birth mother, without regard to his biological paternity, so long as the birth mother consents to his becoming the legal father and so long as none of the things in the list above is true as applied to him. There would be no automatic conferral of legal fatherhood in connection

[18] Text of these acts can be found at the Conference's official website through the University of Pennsylvania Law School. *See* Nat'l Conference of Comm'rs on Unif. State Laws, Drafts of Uniform and Model Acts, http://www.law.upenn.edu/bll/ulc/ulc.htm (last visited Feb. 15, 2006).

[19] DWYER, *supra* note 3, at 260.

with a child born to an unmarried woman. Rather, any man wishing to become a non-marital child's legal father would need to petition for parenthood. Further, under my proposal, when a given child does not have a legal mother and father automatically at the time of birth, anyone may petition to become a legal parent to the child.[20] I would establish a strong presumption that a child is to have no more than two legal parents, but allow petitioners to overcome that presumption with clear and convincing evidence that it would be best for the child to have more than two persons recognized as legal parents.[21]

A family court would decide whether to grant any petition for legal parenthood on purely child-centered grounds; it would make a "substituted judgment" for the child, which would effectively amount to a best-interests determination.[22] In making that surrogate choice for the child, the court would not focus exclusively on the biological connection, but that connection would be relevant. I recommend that the court consider all of these factors:

1) the nature and extent of any existing personal relationship between the petitioner and the child;
2) the nature and extent of any personal relationship between the petitioner and any other petitioner or legal parent, including any expected positive or negative impact on a child arising from the nature of that relationship, and the likely future duration of that relationship;
3) the age and maturity of the petitioner;
4) any interest previously shown by the petitioner in the child, as evidenced by such behavior as providing material support to the mother during pregnancy, securing prenatal medical care, and preparing to care for the child after birth;
5) the attitudes of the petitioner's family members, of any co-petitioner, or of any existing legal parent toward the child and toward the petitioner's participation in the child's life, and their willingness to support the parenting of the petitioner;
6) any special needs of the child;
7) the parenting abilities and knowledge of the petitioner;
8) the mental and physical health and abilities of the petitioner, taking into account, in the case of illness or disability, treatment or compensatory measures that are currently available and that the petitioner is willing to use;

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[20] *See id.* at 259–60.

[21] *Id.* at 262.

[22] *Id.* at 261. For a discussion of the relationship between "substituted judgment" and "best interests," see *id.* at 206–08.

9) the living circumstances of the petitioner, including home environment, financial resources, the petitioner's ability and desire to spend time with the child, other personal relationships of the petitioner insofar as they might enhance or inhibit the petitioner's ability to parent, and threats to the child's welfare that might exist in or around the petitioner's residence;
10) any past conduct by the petitioner that suggests a potential for harm to the child, including but not limited to any prior acts of violence against family members or other persons and any prior findings of a state child protective agency or court that the petitioner abused or neglected any child;
11) the petitioner's level of commitment to securing a good education, health care, and positive socializing experiences for the child;
12) any biological relationship between the petitioner and the child;
13) the desire of other adults to serve as legal parents; and
14) any other considerations relevant to the welfare of the child.[23]

In offering this proposal, I did not labor under an illusion that it would be politically viable. Nor did I assume courts would find such an approach to parentage constitutional, though they might very well do so. I offered it as an illustration of what a purely child-centered approach to state creation of legal parent-child relationships might look like. And in this conference, participants were able, if they wished, to respond to it on those grounds. I am very gratified that some chose to do so. In addition, several offered intriguing proposals of their own that merit close consideration.

In the first symposium paper, David Meyer describes the constitutional framework in which courts would assess the permissibility of any revisions to parentage laws.[24] Professor Meyer concludes that "states enjoy considerable latitude to reorient parentage law in a child-centered direction," while cautioning that something more than "a bare 'best interests' showing" might be required to exclude any biological parents from parenthood, because of the continued societal consensus that procreation gives rise to a legitimate expectation of legal parent status.[25] Meyer draws an important distinction between terminating a legal parent-child relationship after it is created *and* after a social relationship and psychological bond has formed between parent and child, on the one hand, and on the other hand denying someone the opportunity to become a legal parent and to form a relationship, suggesting that the constitutional bar might

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[23] *Id.* at 261–62.

[24] David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857 (2006).

[25] *Id.* at 858.

be lower in the latter case.[26] Significantly, past behavior by a biological parent that most people would find condemnable, such as having seriously abused or neglected another child or having abused drugs or alcohol during pregnancy, might be sufficient grounds for denying such an opportunity, both as a matter of societal attitudes and as a matter of constitutional doctrine.[27] None of the cases in which the Supreme Court has articulated the substantive due process rights of biological parents to be recognized as legal parents involved biological parents with such histories.

Next, in a joint paper, Brad Wilcox and Robin Wilson present and analyze the voluminous empirical research on the relevance of parents' marital status to child well-being.[28] Their paper informs all of the other papers and proposals. Their conclusion that children clearly fare better when raised by married rather than single parents, while "living in a cohabiting household is fraught with risk for children," supports the continued privileging of married fathers over unmarried fathers in my proposal and in that of other contributors.[29] Importantly, Wilcox and Wilson conclude that parents' marital status is more significant for a child's well-being than is a biological connection between parent and child.[30] This, coupled with their description of the numerous obstacles single parents face to successful parenting,[31] would seem to challenge the widespread view that the state should always confer legal parent status on birth mothers as an initial matter, regardless of their circumstances, rather than immediately seeking adoptive parents for children who are born to mothers in the worst circumstances or with troubling histories. The empirical account Wilcox and Wilson provide also supplies a factual basis for some of the distinctions the courts have drawn in establishing the constitutional framework in which legislators craft parentage laws, such as a preference for the unitary family of husband, wife, and child relative to a child's relationship with a biological father who is not married to the mother.[32]

In their contributions, Nancy Dowd and Karen Czapanskiy presuppose that birth mothers will generally become legal parents automatically at birth and focus on the question of who else will become a legal parent.[33] As I do in my proposal, Dowd and

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[26] *See id.* at 879.

[27] *See id.* at 880.

[28] W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883 (2006).

[29] *See id.* at 884.

[30] *See id.* at 891–904.

[31] *See id.* at 892–94.

[32] *See id.* at 890–91,897–99; *see also* Meyer, *supra* note 24, at 872 (discussing Michael H. v. Gerald D., 491 U.S. 110 (1989)).

[33] *See generally* Karen Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are in Poverty*, 14 WM. & MARY BILL RTS. J. 943 (2006); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006).

Czapanskiy treat the mother-child relationship as the core relationship in a child's life and add other parents with an eye to supporting and not disrupting that core relationship. In my proposal, I do this by giving the birth mother a veto over automatic conferral of parental status on her husband if she is married, and in the case of non-marital births requiring anyone other than the birth mother to petition for legal parent status to a court and directing courts to take into account the likelihood of a petitioner's successfully co-parenting with the mother.[34] Similarly, Professor Dowd would require maternal consent to paternity in some cases, while also requiring that a man seeking legal parenthood demonstrate a commitment to nurturing the child and to supporting the mother's parenting.[35]

Professor Czapanskiy goes farther, putting the birth mother, except in exceptional cases, entirely in control of who a child's legal parents will be.[36] She would empower birth mothers to designate another legal parent, without court review of whether making that person a parent would be in the child's best interests.[37] She would allow only a limited class of persons to petition for parenthood in the absence of a maternal designation,[38] and she would authorize a court to make such a petitioner a parent over the objection of the birth mother only in very limited circumstances.[39] A question Professor Czapanskiy's proposal left me with is how strongly supported is her empirical assumption that birth mothers are in the best position to choose a co-parent. While it might be that a mother's objection to a particular other person's becoming a parent should be respected regardless of her reasons, simply because her objection in and of itself makes harmonious co-parenting with that person unlikely, my concern is that many birth mothers would designate someone whose legal parenthood would not be in a child's best interests. As Czapanskiy notes, the children her proposal would most affect, relative to current law, are children born to unmarried mothers.[40] As she also notes, unmarried mothers are disproportionately poor, uneducated, and susceptible to partner abuse.[41] While we more often hear about men trying to avoid attribution of paternity in order to avoid a child support obligation, there are likely also men who would pressure a birth mother to designate them as the father or whom a birth mother might freely choose to designate as a parent in the hopes of cementing her relationship with him rather than because he is prepared to be a good father. And once a man becomes a legal parent, it will not be so easy to get rid of him if the mother ultimately wants him out of her life and out of her child's life. As Wilson and Wilcox show, relationships between unwed mothers and their partners

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[34] *See* DWYER, *supra* note 3, at 259–61.
[35] *See* Dowd, *supra* note 33, at 925.
[36] *See* Czapanskiy, *supra* note 33, 943.
[37] *See id.* at 945–46.
[38] *See id.* at 946–47.
[39] *See id.* at 947.
[40] *See id.* at 949–50, 961.
[41] *See id.* at 950, 953–54.

are quite unstable, and they also entail a heightened risk of child abuse.[42] Yet current law places great obstacles in the way of terminating a legal parent-child relationship once it is created, and it does not authorize co-parents to initiate termination proceedings.[43]

In the final paper of the symposium, Jane Murphy focuses on selection of mothers and principally defends the status quo.[44] She opposes a weakening of the rights of birth mothers, on the grounds that the interests of mothers and children are intertwined, that poor mothers often lack the personal and financial resources to negotiate legal proceedings, and that the child welfare system operates on the basis of race- and class-based biases.[45] Her arguments for this position, however, rest entirely on experience with state removal of children from the custody of mothers after they have become legal parents and after a parent-child relationship has formed between a birth mother and her child. A question her paper raises, therefore, is whether any of this experience is relevant to the question of whether certain birth mothers should become legal parents of and form relationships with their biological offspring in the first place. If one assumes, as Professor Murphy does, that the current state reaction to abuse and neglect is woefully inadequate and causes a lot of harm to children because it severs relationships and does too little to restore them,[46] then should one not wish, from a child welfare perspective, to avoid placing children in a legal relationship with and in custody of a birth mother who is highly likely to abuse or neglect a child? Is it not best for a child born to a mother with one of the characteristics in my first list above to be placed in the first instance with parents who have demonstrated to an adoption agency their preparedness to parent? Murphy notes that many children linger in foster care after termination because there are not enough alternative parents who wish to adopt them,[47] but those are children who are less desired because they have already been abused or neglected. The demand to adopt healthy newborns now exceeds the number available.[48]

This conference was designed as a thought experiment. As noted above, the legal rules establishing parent-child relationships developed historically principally to serve the interests and perceived rights of adults. It is somewhat radical to propose reforming parentage laws with the sole aim of serving the lifetime well-being of each newborn child. I selected for participation in the conference scholars who are especially receptive to child-centered ways of thinking about family law. In addition to those who have submitted papers for this issue, the following scholars

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[42] *See* Wilcox & Wilson, *supra* note 28, at 903–04.

[43] *See* Dwyer, *supra* note 7, at 953–62.

[44] *See generally* Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969 (2006).

[45] *See id.* at 974–75.

[46] *See id.* at 976–79.

[47] *See id.* at 974, 981–82.

[48] DWYER, *supra* note 3, at 264, 346–47 n.24.

also participated in the discussions: Professor Elizabeth Bartholet, Harvard Law School; Professor Barbara Bennett Woodhouse, University of Florida, Fredric G. Levin College of Law; Dr. Susan Orr, Associate Commissioner of the Children's Bureau in the Administration on Children, Youth and Families, United States Department of Health and Human Services; Maurice Jones, former Commissioner of the Virginia Department of Social Services; and Howard Davidson, Director of the ABA Center on Children and the Law. The discussions were very fruitful.

One recurring source of resistance to reform proposals was the perception that they would entail denying legal parenthood to some people on the basis of a prediction. It seemed anomalous and improper to some participants to make such momentous decisions on the basis of predictions about whether someone would be a good parent or would instead abuse and neglect a child. This objection or concern, however, rests on several false premises. One is that the law is generally averse to making decisions about parent-child relationships based on predictions. That is not at all true. Decisions to terminate a parent-child relationship under current law are based not on a desire to punish parents for past abuse or neglect but rather on a prediction that persons with a history of abusing or neglecting a child are likely to abuse or neglect that child again in the future. Custody decisions at divorce are supposed to be based not on an aim of rewarding a parent for past caregiving but rather on a prediction of which parent is likely to be the better caregiver in the future.[49] Another false premise underlying this objection is that a child-centered defense of the status quo is not founded upon predictions. But to say that legal parenthood should be tied to biological parenthood because biological parents are likely to be the best parents for a child is to rest a recommendation on a prediction.

The crucial question, therefore, is not whether a reform proposal is based on predictions, but rather whether it is based on sound predictions or better predictions than those underlying alternative recommendations. And if one focuses reforms carefully and narrowly on those biological parents who have, through past conduct, demonstrated a high likelihood of abusing or neglecting a child, while allowing those persons an opportunity to show that their circumstances and inclinations have changed, then the concern about predictions should disappear. There is a strong belief in redemption in our culture, and in many contexts it might be appropriate to give more and more chances to individuals who have failed in the past to live up to moral and legal expectations. However, when the fate of newborn children is at stake, we need to rein in our sympathy and our hopes for adults who have troubled pasts. We need to be realistic and decide for children based on our best judgment about how particular persons are likely to act as legal and social parents.

Significantly, the downside risk for children appears much worse with a prediction that biological parents all will be adequate parents than with a prediction that biological parents with the sort of characteristics or histories in my list of "red

[49] *See* Dwyer, *supra* note 7, at 909–10.

flags"[50] will not be good parents, if one assumes that the alternative caregivers in the latter case will be parents who qualified for parenthood through an adoption agency. What was entirely missing from our discussions at the conference was any suggestion that there would be horror stories *for children* resulting from denial of legal parenthood to some biological parents. In contrast, we have thousands of horror stories every year that result from conferral of legal parent status on biological parents,[51] a substantial percentage of whom no doubt presented clear warning signs at the time of their children's birth. If one approaches the matter of assigning children to parents from a child-centered perspective, one must ask what is the danger *for children* posed by increased state scrutiny of biological parents, and is any such danger greater than the danger posed by the current failure to be more circumspect? If what is most important for children is not a biological connection with their parents but rather consistent and loving care, then it would seem that children can be harmed by a "mistaken" denial of legal parenthood to a birth mother or father, under reform legislation of the sort I propose, only if being raised by the biological parents who were denied legal parent status would actually have been significantly better for the child, all things considered, than being raised by the alternative parents with whom the child was placed. While only practice would bear this out, I believe that occurrence would be exceedingly rare.

I hope others will now join in the conversation, on the same terms that the authors of the papers in this symposium graciously agreed to abide by. I am very grateful to all the conference participants for helping to initiate the conversation.

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[50] *See supra* note 19 and accompanying text.

[51] *Cf.* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2003, at xiii, xvii (2005), *available at* http://acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf (reporting that in 2003, child protection agencies in the United States in the aggregate found approximately 906,000 children to be victims of abuse or neglect, and approximately 1,500 of those children died as a result of the abuse or neglect); NAT'L CLEARINGHOUSE ON CHILD ABUSE & NEGLECT INFO., U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT FATALITIES: STATISTICS AND INTERVENTIONS 1 (2004), *available at* http://nccanch.acf.hhs.gov/pubs/factsheets/fatality.pdf (estimating 1,400 child fatalities due to abuse and neglect in the United States in 2002 and stating that such deaths are likely greatly underreported).