William & Mary Bill of Rights Journal

Volume *24 (2015-2016)*
Issue 3 *Symposium: The Liberal Dilemma in Child Welfare Reform*

Article 2

March 2016

Diagnosing Liberal Resistance to Needed Child Welfare Reforms

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DIAGNOSING LIBERAL RESISTANCE TO NEEDED CHILD WELFARE REFORMS

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The symposium[1] from which this Issue emanates was highly unusual in design and realization. In a typical law school conference, speakers analyze substantive issues, citing legal sources, social science, and perhaps some theoretical work, and then the audience challenges them on interpretation of those sources, conclusions they draw from the sources, and so forth. The focus of this conference was instead on the role that ideology plays in arguments and positions that people (scholars, government officials, social workers, etc.) take with respect to child welfare law, policy, and practice. Moreover, speakers were asked to focus specifically and narrowly on "prevailing liberal thought," which I and some other conference participants have come to see as a great obstacle to positive child welfare reform, especially for children in the most impoverished families and communities, which happen to be disproportionately of minority race.[2]

This concern about liberal policy is not, however, the familiar complaint about excessive welfare spending creating permanent dependency. Nor, importantly, is this focus on liberal thinking meant to imply anything about any other group of people involved in policy-making or practice regarding child welfare. There is also a familiar complaint against conservatives—that they cold-heartedly oppose spending on programs that could lift people out of poverty and help them recover from adverse experiences—but that complaint was also simply not intended to be part of the conversation. Whatever truth there might be to either of these familiar ideology-targeting criticisms, they are simply not what the conference was about, and there was no intention to compare different groups and determine whether one is better than another on child welfare issues.

The aim was instead simply to figure out what is going on with "most liberals" who participate in the policy or practice of child welfare and protection. Some of us

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[1] *The Liberal Dilemma in Child Welfare Reform Symposium*, co-sponsored by the *William & Mary Bill of Rights Journal*, the Institute of Bill of Rights Law, and Professor James G. Dwyer, was held at William & Mary Law School on March 20, 2015.

[2] *See* YANG JIANG ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 6 YEARS, 2013 (2015), http://www.nccp.org/publications/pdf/text_1097.pdf [http://perma.cc/G9WD-RKLK] (showing that, whereas 15% of white children under age six live in poverty, 44% of black children under age six, 41% of Native American children under age six, and 35% of Hispanic children under age six live in poverty in the United States).

proponents of child welfare reforms, probably most of whom self-identify as liberals, have been repeatedly frustrated in our child welfare advocacy by resistance from other liberals. For those of us who are liberals, this conference therefore amounted to a kind of "in-house critique" of liberal policy. To be clear, though, not all participants identified as liberals, and the selection of speakers was not based on political affiliation; invitations were issued to people who, regardless of their politics, could be expected to take an objective, child-centered view of what children need in order to have healthy development and avoid harm. They were asked to speak about the kind of resistance they encounter to their views, with particular focus on how most liberals react.

I would characterize the some of us, who are not "most liberals," as pragmatic child advocates. My brand of pragmatic child advocacy proceeds from several assumptions:

1. America, in general, has little appetite for increased welfare/social services spending.[3]
2. In any case, more spending would do little or nothing for children born today into the worst circumstances—that is, those whose birth parents are incapable of adequate parenting and live in areas of concentrated poverty, because social reform programs take years to effect change and there are some problems that money cannot overcome.[4]
3. We do not know how to fix deeply damaged people, at least not within a time frame consistent with children's developmental needs.[5]
4. Children, like adults, are entitled to the best among options available to them in the world as it is.

These realities create a dilemma for liberals. We are committed to: (1) substantive equality of opportunity; (2) liberty; and (3) corrective justice. We believe that the existence today of impoverished, dysfunctional communities and a large number of unfit birth parents is a result of great past and ongoing injustices;[6] however: (1) giving all adults an equal opportunity to parent means denying some children an equal opportunity for adequate parenting (which, unlike being a parent, is truly a fundamental

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[3] *See* RICHARD J. GELLES, THE THIRD LIE: WHY GOVERNMENT PROGRAMS DON'T WORK—AND A BLUEPRINT FOR CHANGE 128 (2011) (explaining why "residual programs" of assistance entailing wealth transfers to targeted needy groups cannot muster sufficient political support).

[4] *Id.* at 127 (stating that there is no proof that more money will help residual programs succeed).

[5] *See* Eris F. Perese, *Stigma, Poverty, and Victimization: Roadblocks to Recovery for Individuals with Severe Mental Illness*, 13 J. AM. PSYCHIATRIC NURSES ASS'N 285, 285 (2007) (citing stigma, poverty, and victimization as significant roadblocks to positive outcomes for individuals with severe mental illness).

[6] *See* Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 639 (2015) [hereinafter Bartholet, *Differential Response*] (acknowledging the link between maltreatment, poverty, and social injustice).

interest); (2) giving priority to the liberty of damaged people who have children in their custody puts those children at serious risk of becoming badly damaged themselves; and (3) treating children as compensation for past injustice itself constitutes an injustice.

In short, given the political and social realities, there is a conflict of interests between some children and their birth parents and the parents' community because of poverty-related dysfunction (parental or community). This is not to say that children in the worst circumstances have no interests in common with their birth parents or other adults in their community, but rather that some measures to spare children from developmental damage—and perhaps the best or most effective measures—would likely increase the suffering or restrict the liberty of adults (for example, terminating parent-child relationships or coercing adults' behavior as a condition for remaining in a relationship with children), so there is, to a significant extent, a conflict of interests. But most liberals refuse to acknowledge this conflict.[7] Liberals do not want to have to choose between children and adults, so they insist, with no valid research to support their position, that the best, perhaps only, way to help at-risk children is to focus on helping biological parents and their communities.[8]

Importantly, this is not the only way to deny the conflict of interest. One could, conversely, focus on doing what is best for each child and contend that it will incidentally be best for parents and communities. One could tell a plausible story, for example, about benefits to drug-addicted parents from having their newborn children placed immediately for adoption, such as avoiding the stress of child rearing in difficult circumstances, being spared the profound guilt that would likely follow if they were put in a position that led to them seriously damaging their child, and being better able to focus on rehabilitation.[9] That the uniform response to the plight of children at high risk of maltreatment and adverse neighborhood effect is instead that we must keep helping parents and communities and that we need to keep experimenting until

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[7] *See id.* at 581 (noting that some advocates of family preservation view child protective services intervention as victimizing parents).

[8] One example that I wrote about recently is the urging, by advocates for women prisoners, that more states create prison nurseries, where babies born to inmates live for months or years incarcerated with their mothers, with no consideration whatsoever of adoption as a potentially better life choice for many such children. *See generally* James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465 (2014). Elizabeth Bartholet has addressed the phenomena of family-preservation extremism and the current "differential response" movement. *See, e.g.*, Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323 (2012); Bartholet, *Differential Response*, *supra* note 6. A similar impulse among liberals is driving hostility toward international adoption. *See* James G. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT'L L. 189 (2013).

[9] *Cf.* Bartholet, *Differential Response*, *supra* note 6, at 599, 604–05 (indicating that addict parents who maltreat their children are likely to continue despite available recovery services until or unless they overcome their addiction problems).

we find the magic program of parent and community rehabilitation suggests a dominant, adult-first mindset in this context.[10]

Indeed, most liberals adopt a very defensive posture protective of adults, quick to hurl epithets at anyone who proposes more separations of children from parents, more separations of children from communities, or greater restrictions on adults' liberties for the sake of a child's well-being.[11] Interestingly, liberals do not do this in all contexts. If the issue were, for example, parents' religious objections to their children learning about evolution, liberals would more likely be dismissive of the parents' interests.[12] Underlying the adult-protective mentality in the poverty context lies, I think, a liberal hypersensitivity about class and race. In his book, *Quixote's Ghost*, David Stoesz uses the term "liberati" to signify post-modernist liberals in the social work profession who are obsessed with perceived neo-colonialist exploitation and cultural imperialism, critiquing social policy based on ideology rather than scientific evidence.[13] This phenomenon is not limited, however, to the social work profession; it is also quite pronounced in the legal academy and among organizations that lobby on behalf of the poor and historically subordinated groups.

In law, social work, other social sciences, and politics, there is a great deal of denial among liberals about what children need and the conflict of interest that this often creates between children and adults.[14] The denial is manifest in stock rhetorical responses to recommendations from pragmatic child advocates, especially those that entail more proactive protection of children. Because real prevention generally must entail either (1) severing biological parents' legal ties with children sooner rather than later; or (2) restricting the liberty of adults, because of their status as biological or legal parents, in ways the law might not otherwise restrict adults' liberties.

Here are some stock aphorisms of the liberati:

1. *"You think the state is good at raising children?"* This anti-statist jibe typically rests on an exaggerated view of the failings of the foster care system, but, more importantly, implicitly supposes that the only options

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[10] *See generally* Richard J. Gelles, *Why the American Child Welfare System Is Not Child Centered*, 24 WM. & MARY BILL RTS. J. 733, 738–43 (2016) (explaining why parents are considered the client in the child welfare system).

[11] *See, e.g.*, Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD & FAM. ADVOC. 1, 4–7 (2014) [hereinafter Bartholet, *Creating a Child-Friendly Child Welfare System*] (explaining that child welfare research is skewed in an adult-rights direction).

[12] *See* Peter Slevin, *Battle on Teaching Evolution Sharpens*, WASH. POST (Mar. 14, 2005), http://www.washingtonpost.com/wp-dyn/articles/A32444-2005Mar13.html [http://perma.cc/7LF9-8MJJ].

[13] *See* DAVID STOESZ, QUIXOTE'S GHOST: THE RIGHT, THE LIBERATI, AND THE FUTURE OF SOCIAL POLICY 102–20 (2005) (describing the "liberati").

[14] *Cf.* Bartholet, *Differential Response*, *supra* note 6, at 581 (noting the conflict that arises when Child Protective Services' (CPS) intervention is viewed as a form of parental victimization).

for a child are foster care and being in the custody of biological parents, when in fact there is a third option of creating parent-child relationships with different adults at the outset so that the child never has to experience growing up in state custody.[15] A rational person might conclude from the shortcomings of foster care systems that the state should be both more reluctant to use them when they must remove children from parental custody and more inclined to act earlier in children's lives to place them with fit adoptive parents, but the liberati never want to go there.[16]

2. *"I'm not a big fan of Big Brother."* This boogeyman reflects a fundamental misconception that most people, of any political view, have about the state's role in children's lives. It supposes that the state is not involved in children's lives unless, and until, some agency interferes with what parents want to do. The undeniable reality is that the state is inevitably and profoundly intervening in the life of every single child from the moment of birth through laws that dictate who a newborn child's first legal parents will be and what powers those people will have.[17] And the state does such a bad job with this that I am not a big fan of Big Brother either. I believe the government should be held accountable for the damage it does to many children by forcing them to be in a legal relationship with, and in the unsupervised custody of, birth parents it knows to have personal histories or current circumstances that suggest those children are at very high risk of both maltreatment and attachment failure.
3. *"Kids want to be with their parents no matter what."* Apart from the obvious problem with equating what young children want with what is best for them, this assertion applies, at best, only to children old enough to comprehend the alternatives of living with or not living with people they identify as parents, and so it says nothing useful about decision-making for children at birth. The liberati rarely acknowledge the different positions that children are in at various points in their lives and development.[18] Yet,

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[15] *See, e.g.*, ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 154–57 (1999) (arguing that permanency for children can be achieved successfully through adoption).

[16] *See id.* at 155 (explaining that many advocates "call for keeping some children in permanent foster or guardianship homes" because this "eliminate[s] the bouncing from home to home").

[17] *See, e.g.*, Lois A. Weithorn, *The Legal Contexts of Forensic Assessment of Children and Families*, *in* FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 11, 13 (Steven N. Sparta & Gerald P. Koocher eds., 2006) (explaining that "parents have substantial discretion in raising their children"; however, this autonomy is not absolute and is subject to state regulation).

[18] *See* Janis E. Jacobs & Paul A. Klaczynski, *The Development of Judgment and Decision Making During Childhood and Adolescence*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 145, 148 (2002) (detailing how decision-making ability changes throughout childhood development).

it is obvious that terminating parental rights as to a newborn is vastly different, in terms of the child's experience, from terminating parental rights as to a ten-year-old child.

4. *"We're not going to make predictions about people."* I was astonished to hear the former director of a New York City child welfare agency say this at a conference in discussing fast-track termination of parental rights as to newborns.[19] Making predictions about people is what Child Protection Services (CPS)—along with many other government agencies—does on a daily basis. Every time they substantiate maltreatment, they have to decide whether to remove based on a prediction about the parents' future conduct.[20] Every foster care review hearing is essentially a discussion of what to predict parents would do if the child is returned. Every petition for termination of parental rights is based on a prediction that parents will not change ever or soon enough.
5. *"Heroically, we never give up on parents."* The director of CPS for a large city in Virginia once said this to me, explaining why her agency would never use fast-track termination of parental rights authority that the Adoption and Safe Families Act had required Virginia law to authorize. Because "you never know." I have heard other CPS directors say the same in different words. The reality is that continuing to try to change deeply damaged adults is the easy thing for CPS to do. It is not the cheapest thing to do, but it is psychologically easiest, because the people hurt in the process—the children—do not complain. There is nothing heroic about that. It takes *real* courage to say to a parent: "Your child needs for the relationship with you to end (or never come into existence)."
6. *"Most maltreatment reports are merely for neglect."* The suggestion here is that CPS routinely overreacts, which flies in the face of common sense. In the poorest communities, where the child protection agency is especially underfunded, social workers are not out looking for more children to add to their caseloads. They remove children because they feel forced to do so to prevent serious harm, and the reality is that neglect can cause serious harm.[21] Neglect can kill.
7. *"Cultural imperialism!"* This is the Kruschev's shoe of child welfare debates—an inarticulate, baseless, bullying effort to silence. I have been

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[19] *But see* Terry V. Shaw et al., *Child Welfare Birth Match: Timely Use of Child Welfare Administrative Data to Protect Newborns*, 7 J. PUB. CHILD WELFARE 217, 219 (2013) (indicating that child protective services can, and should, make reasonable predictions based on the risk of future harm to a child).

[20] CHILD WELFARE INFO. GATEWAY, DECISION-MAKING IN UNSUBSTANTIATED CHILD PROTECTIVE SERVICES CASES: SYNTHESIS OF RECENT RESEARCH (2003), https://www.childwelfare.gov/pubPDFs/decisionmaking.pdf [http://perma.cc/A656-UGAZ].

[21] *See* Bartholet, *Differential Response*, *supra* note 6, at 599 (detailing the serious risks of harm associated with neglect).

hearing about the cultural bias of child protection workers for decades now, and I still have no idea what it means. I still cannot discern, for example, what aspect of African American culture explains and excuses what CPS workers conclude is maltreatment. The charge is always so amorphous that one is left guessing. Is it something about "it takes a village"? But CPS workers don't remove a child because he or she is staying with an aunt or a friend of the mother instead of with the mother. That child would not even be reported as neglected. CPS takes a child into custody if *no one* is supervising and protecting the child from harm *and* if someone *in that community* sees it and thinks the child is in danger.[22] Is it the extreme beatings passed down since slave days? I would not insult African Americans by ascribing to their culture a celebration of violence toward children. It damages children, and if a parent says "that's what I learned growing up," the proper, and presumably standard, CPS response is, "OK, but now you know it's illegal, so stop doing it." A parent who cannot stop does not have a cultural problem, but a self-control problem.

8. *"The whole system is infected with racial bias."* Apart from "you don't get their culture," this seems to be about social workers having a lower opinion of minority race parents, so viewing their behavior as worse and their prospects for change less.[23] Yes, there is racism in this country, and it is inevitable that some people in the child welfare system have racial biases; however, reliable research shows that the actual incidence of maltreatment in black families closely tracks rates of CPS findings and removals.[24] Maltreatment is highly correlated with poverty, and black families are disproportionately living in poverty.[25] In addition, although this appears not to have been studied, my experience suggests that CPS agency personnel generally mirror the population they serve, in terms of race. In a predominantly black city, most of the CPS workers are black. They are not living in poverty, but they are lower middle-class, not so far

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[22] *See, e.g.*, Richard J. Gelles, *Protecting Children Is More Important than Preserving Families*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 329, 329–30 (Donileen R. Loseke et al. eds., 2d ed. 2005) (noting the general conditions under which state authorities remove children from homes).

[23] *See* Bartholet, *Differential Response*, *supra* note 6, at 584 (discussing an organization's efforts to promote "racial equity" in child welfare systems).

[24] *See* Bartholet, *Creating a Child-Friendly Child Welfare System*, *supra* note 11, at 11–12 (noting a statistically significant difference in maltreatment rates between black and white children).

[25] *See* Bartholet, *Differential Response*, *supra* note 6, at 639 (linking maltreatment with poverty); SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011 (2013), https://www.census.gov/prod/2013pubs/acsbr11-17.pdf [http://perma.cc/2QY8-L7RB] (indicating that blacks have the highest national poverty rate).

> removed in socio-economic status from the population they predominantly serve, and likely many have come from poor families. Moreover, this charge of racism, like that about Big Brother, can be turned on its head. Why is it so easy for so many liberals to oppose stronger child protection measures in poor communities? Could it be because the children who would be protected are disproportionately of minority race? Is it easier for some to accept high maltreatment rates among children who are not white? Is it easier for some to treat black children as compensatory goods for adults than it would be for them to treat white children that way? I would not presume to answer those questions for other people.

That is a short list of the rhetorical moves that pragmatic child advocates encounter over and over. My hope is that by calling attention to the pattern of pro-parent positions and the rhetorical nonsense, we might jar the liberati into rethinking their views. If the liberati cannot be jarred, then pragmatic child advocates might need to bypass them by either addressing legislative proposals primarily to conservative legislators or going to courts instead of legislatures.

The first article to follow provides helpful background, describing the phenomenon of inter-generational transmission of poverty and attendant dysfunctions and describing the politics and ideologies of child welfare reform. Following that are articles that each address a stage of life for young persons and reforms that could spare some children from incurring lifelong damage because of parental and/or community dysfunction—the prenatal period, the time immediately after birth when the state decides initial parentage, and the state's response after children have incurred maltreatment.