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Journal of Family Issues 2008; 29; 983 originally published online Apr 2,
2008;

DOI: 10.1177/0192513X08316548

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Transforming the Discussion About Diversity, Policies, and Law

An Introduction to the Special Issue

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The impact of laws and policies on diverse families are vital to transformative discussions held in our journals, classrooms, conferences, and local, state, and federal communities. To this end, transformative discussions serve as a reminder about our values as U.S. citizens—life, liberty, and the pursuit of happiness; equal protection; and social justice. One aspect of this transformative discussion may include how laws place some families in the margins of society while privileging others. In this special collection, the authors lay a foundation for a transformative discussion, unveiling and highlighting some of the negative consequences of child welfare laws, family laws regarding marriage and family, and criminal laws. The collection closes with an example of an action-oriented article on how to conduct a policy analysis.

Keywords: *family policy; family law; diversity; diverse families; policy analysis*

On one hand, laws are enacted by policy makers to balance individual rights while protecting the entire nation. On the other hand, citizens may challenge laws or advocate for modifications of laws. Be it policy makers or citizens, societal changes, needs, and concerns sometimes are reflected in policies and laws made to manage the behaviors of citizens. For example, family law has shifted from viewing women and children as property (Mintz, 1992; Pyle, 1994) to creating rights for children, adults, and parents (Mintz, 1992; Mnookin & Weisburg, 2005; Pyle, 1994). We enacted the 5th and 14th Amendments to ensure procedural and substantive *due process of law*, the

Author's Note: I would like to thank all the reviewers for this special collection (see appendix). Please address correspondence to Tammy L. Henderson, PhD, CFLE, Associate Professor in HDFS, 233 HES Building, The Oklahoma State University, Stillwater, OK 74078-6122; e-mail: tammy.henderson@okstate.edu.

principle that governments—both federal and state—must, as a rule, respect the legal rights of individuals. We also enacted the Equal Protection Clause as part of the 14th Amendment; this constitutional amendment requires similar treatment of any person, prohibits the denial of personal rights, precludes wrongs, and allows compensation for wrongs (Henry et al., 1991).

In the area of family law, we have established fundamental rights, explicitly or implicitly guaranteed rights under federal or state constitutions, to include the right to life, marriage, procreation, child rearing, association, expression, equal treatment, religion, and more (*Harvard Law Review* [HLR] 1980; Henry et al., 1991). Likewise, we have honored the personal privacy of citizens in the areas of procreation, abortion, and contraception (HLR, 1980) and liberty interests, such as child rearing. Liberty interests and fundamental rights incorporate personal and family relationships and associations. Prior to the ruling of *Moore v. the City of East Cleveland* (1977), the traditional nuclear family, two heterosexual parents with children, received the greatest legal protections. The U.S. Supreme Court determined that extended families deserve some form of legal protection, requiring policy makers to protect the rights of children, parents, and other family members who function like the traditional family (Coontz, 1992). Yet challenges to current laws and policies have required the government to balance the legal rights of parents, children, and sometimes third parties, such as stepparent rights (Fine, 1989; Fine & Fine, 1992) and grandparent visitation rights (Henderson, 2005; Hill, 2001, 2000).

Throughout the years, the government has moved to address the injustices experienced by diverse groups that have had a history of discrimination, such as regarding access to public facilities for Blacks, voting rights for Blacks and women, the lack of procedural due process for those accused of committing a crime, and more. As a nation, we have and continue to struggle with balancing and/or acknowledging the individual rights of less visible and valued citizens or groups. Elsewhere, I attempted to acknowledge how laws directly and indirectly shape and/or act toward diversity by taking a historical journey to briefly summarize laws that focused on race, ethnicity, gender, and disability (Henderson, 2007). In this manuscript, I argue that the impact of laws and policies on diverse families must be part of the transformative discussion held in our journals, classrooms, conferences, and local, state, and federal communities. This transformative discussion must serve as a reminder about our values—life, liberty, and the pursuit of happiness, equal protection, and social justice.

Our transformative discussions must be seasoned with a call to action to identify and challenge laws that prevent diverse groups from having full access

to their rights as citizens, including the fundamental rights to marriage, parenting, personal relationships, and all rights enjoyed by those privileged in this society. Because some laws continue to place some families in the margins of society, this special collection was designed to engage in a transformative discussion, unveiling and highlighting some of the negative consequences of child welfare laws, family laws regarding marriage and family, and criminal laws. This special collection supports action-oriented scholarship by providing a tool for conducting policy analysis to strengthen the critical debate regarding the intersection of laws, policies, and diversity.

Authors in this special collection disclose some of the challenges faced by a few diverse groups, such as grandparents parenting grandchildren, African American families, and families involved in Virginia's foster care system. Following these three areas, readers are able to scrutinize the legal disconnect between the fundamental right to marriage and same-sex couples. Additionally, the influence of criminal laws on father involvement was placed in the collection to demonstrate how these laws affect parent-child interactions. The special collection closes with an applied work, as two authors delineate how to conduct a family impact analysis on China's open-door policy, appropriately steering our scholarship and practice toward international concerns.

The Negative Consequences of Child Welfare Policies

Generally, the government is not willing to intrude on fundamental rights (HLR, 1980; Skinner & Kohler, 2002) unless there is a compelling reason—threat of harm to a child or unfit parents. Policing poorer families or families experiencing multiple risks has existed since colonial times, beginning with the poor laws and use of orphanages and apprenticeships for incorrigible children by colonial communities (Davidson, 1994). Contemporary child welfare laws have been legal expressions of these historical practices and are demonstrated in the findings or analyses found in the first three manuscripts on child welfare: grandparent caregivers, Black families and kinship care, and foster care decisions in Virginia. The unintended consequences of child welfare laws are identified in three manuscripts.

Using family history interviews, Letiecq, Bailey, and Porterfield explore the legal challenges faced by 26 grandparent caregivers who reside in Montana. Family crisis explained the reason for grandparents' rearing grandchildren and hindered their ability to transition into their new role and to effectively learn about the legal issues, such as guardianship or legal custody. To make health and educational decisions or to secure social services

(Generations United, 2005; Perez-Porter & Flint, 2000), grandparent caregivers learned the legal limitations of informal caregiving, kinship care, and personal responsibility by private citizens. Grandparent caregivers not only distrusted and feared the child welfare system, but they also were keenly aware of the differential treatment given to relatives involved in formal and informal caregiving. The findings from this study continue to show how the current welfare system penalizes families who work to take care of their own (HLR, 1999; Henderson & Cook, 2005).

Harris and Skyles present a critical review of the intersection of kinship care traditions by Black families and child welfare policies. Kinship care, a protective factor and historical tradition, has been overused by the child welfare system, and it has overburdened caregivers who are poorer or aging adults, such as grandparents. Family reunification is an unintended consequence of the overuse of kinship care placements, undermining the parental rights doctrine that holds that biological parents have a fundamental right to parenthood via U.S. Supreme Court rulings and as protected by the 1st, 5th, 9th, and 14th Amendments (for a summary, see Skinner & Kohler, 2002). Furthermore, racial disproportionality in the child welfare system, while offering alternative viewpoints and approaches for practitioners and researchers, is exposed by Harris and Skyles. Care must be taken to (a) address the developmental needs of children, (b) prevent child maltreatment, (c) minimize the overuse of kinship care placements that overburden familial households, and (d) omit policies and programs that undermine family reunification as we seek to balance the rights of children and parents.

For families facing multiple risk factors and who find themselves in the child welfare system, other negative consequences emerge. McWey, Alexander, and I studied foster care decisions made in Virginia across three policy periods: 1980 to 1993, 1994 to 1997, and 1997 to present. Quantitative analyses revealed significant differences in the rates at which parental rights were terminated during the first and last policy periods; differences also existed in termination rates for parents with mental health issues and limited IQs, mimicking the findings of other researchers who found that the mental health of parents significantly predicted the loss of parental rights (Azar, Benjet, Fuhrmann, & Cavallero, 1995; Zuravin & DePanfilis, 1997). A negative consequence of the current child welfare law is that it ignores the needs of parents with mental and cognitive disabilities by using a one-size-fits-all approach to preventing child maltreatment. As expected, the best-interests-of-the-child standard and clear and convincing evidence were used to determine whether to legally sever parental rights or to reunite families. Justices rendering foster care decisions did not use the strict scrutiny test, which had

been used in other U.S. Supreme Court decisions about fundamental rights (HLR, 1980; Henderson, 2005; Henderson & Moran, 2001; Skinner & Kohler, 2002). Using a lower bar—a lower legal test—makes children and parents involved in the foster care system more vulnerable, especially families headed by parents with cognitive and mental challenges.

Historically, the government has intruded on parental rights when children lived in homes with single parents or homes without fathers, in poor families, and in families incapable of educating their children (Abramovitz, 1996; Davidson, 1994; Mintz, 1992). The U.S. Supreme Court has intruded on the rights of parents to protect the health and welfare of the child (e.g., *Jacobson v. Massachusetts*, 1905; *Prince v. Massachusetts*, 1944), which somewhat coincides with the current foster care law. Yet the child welfare system intrudes on the rights of parents who are facing multiple risk factors, such as mental and cognitive impairments or substance abuse issues, with little consideration of how these illnesses and the respective treatment plans manifest themselves.

The Adoption and Safe Families Act (ASFA) of 1997 authorizes removing children from their homes, terminating parental rights, allocating social support services to foster care parents, and placing children in permanent foster and/or adoptive homes. In an effort to protect children's well-being, the act mandates that concurrent plans for children be established earlier and that permanency hearings occur at 12 months instead of at 18 months. Child welfare policies provide only 22 months for parents with infants, and 12 to 15 months for parents with older children, to demonstrate that they are capable of caring for their child and have remedied any circumstance that would hinder their ability to do so. During a regular week, remedying their situation may include mental health counseling, parenting classes, a part-time or full-time job, regular parent-child visits, and other tasks. In summary, the foster care law needs to address inappropriate, punitive practices that hinder family reunification.

The negative consequences of ASFA continue. ASFA has not reduced the number of children in foster care, nor has it increased the number of children adopted or moved into permanency planning (Roberts, 2000, 2002). Some have questioned the influence of the foster care system on children's quality of life (Leathers, 2003; McWey, 2000). The conflicting values of ASFA are illuminated in the simultaneous goals of permanency planning through adoption and family reunification (Moye & Rinker, 2002). Additionally, this law provides financial incentives for agencies to move children into adoption and allocates funds for technical assistance to expedite adoption rather than family support (Roberts, 2000). Furthermore,

ASFA reflects a shift in policy, from family preservation to family dissolution, which is signified in the first line of ASFA, which states the goal of the act is to promote the adoption of children in foster care.

Summary

These three articles—on grandparent caregivers, kinship care for Black children, and foster care in Virginia—examine historical approaches used for families needing some additional assistance, the negative consequences of laws, and the missing links in child welfare policies and healthy individual and family development. The current child welfare laws fail to effectively assist grandparent caregivers who voluntarily parent their grandchildren, and they overburden kinship care practices used in Black families. ASFA does not allow sufficient consideration to be made for parents with cognitive and mental health challenges. These are the issues that social scientists and students must address to ensure the healthy growth and development of children, youth, adults, and families.

Fundamental Rights and Same-Sex Couples

If U.S. citizens have a fundamental right to marriage, parenting, and personal relations, then it is reasonable for lesbian and gay adults to desire to exercise these rights. Oswald and Kivalanka delineate the legal challenges facing same-sex couples into the following categories: (a) not legalized, (b) partially legalized or informal, and (c) partially legalized or institutional. Using Ewick and Silbey's (1998) paradigm of legal consciousness, the authors identify family-court interactions that are "before the law," "with the law," and "against the law." For example, domestic partnerships laws and civil unions represent how same-sex couples participate in partially legalized practices and work with the law. By the same token, domestic partnership and civil unions stand against the law, such as the Defense of Marriage Act (DOMA; 1996), which asserts that states do not need to recognize marriage between individuals of the same sex even if a civil union or marriage was performed and unions are legally recognized in another state. The federal government does not recognize same-sex or polygamous marriages, according to DOMA.

Same-sex couples are penalized much like poor families and single women in colonial times. These diverse groups had to adhere to rigid rules and regulations that were designed to regulate moral and gender norms (Abramovitz,

1996; Mintz, 1992). Although researchers have found healthy growth and development in lesbian and gay parents (e.g., Lambert, 2005; Meezan & Rauch, 2005; Patterson, 2000) and the children of lesbian gays (e.g., Patterson, 1992, 2000, 2001; Wainwright, Russell, & Patterson, 2004), some family laws continue to manifest heterosexist constructs of oppression and legal disengagement. Heterosexism is tightly woven in policies and laws that largely prohibit same-sex couples from enjoying their fundamental rights. In fact, heterosexism has resulted in a lack of research on family structures and processes (Allen & Demo, 1995). Furthermore, few researchers investigate how laws, policies, and programs continue to undermine families of lesbian and gay individuals. The inability to enjoy the legal privileges given to U.S. citizens is as deadly a blow to democracy as hate crimes against racial or ethnic groups—killing the human spirit one person at a time until a community of individuals becomes wounded and disengaged.

Criminal Law and Father Involvement

Negative consequences of laws also were found in the work on White, Black, and Latino incarcerated fathers. Swisher and Waller provide a brief overview about the laws associated with the war on drugs, “mandatory minimums,” and child support laws that have had a direct impact on father involvement. They found that Black and Latino fathers were more likely to have formal child support orders against them than White fathers. Black and Latino groups were more likely to have informal support agreements with mothers. After the authors review the complex relationships of race, incarceration, and father involvement, they offer some policy recommendations, such as reentry and parent reunification programs for incarcerated fathers, which move families from the self-fulfilling prophecy of failure to one that builds on familial strengths.

In spite of this research that illuminates the strengths and challenges of incarcerated fathers, the missing link in legal decision making is an understanding of the contextual, structural, and cultural factors that shape fatherhood, incarcerated fatherhood, and father involvement in diverse families. Black men will continually need to tackle and take personal responsibility for poor educational and economic attainment, high incarceration rates, paternal absence, and family deterioration (White & Cones, 1999); however, Black men, laws, programs, and scholars must build and focus on their strengths and adaptive behaviors—taking advantage of what Black men can and do offer their children and families.

Although economic, educational, and social disparities undermine some Black men's ability to pay child support, Black fathers provide other forms of support, such as taking on more egalitarian practices, making informal payments, providing child care while the mother attends to other things, and more (Edin, 1995; Furstenberg, 1995). White and Cones (1999) acknowledged Black fathers who are "strong quiet heroes." These strong quiet heroes are not found in media depictions and research studies, which leaves a skewed picture of Black fatherhood. Greif, Hrabowski, and Maton (1998) found, for example, that well-educated Black fathers of sons who were high achievers were very involved fathers. They attended to their sons' homework and participated in their educational experiences, engaged in positive parent-child interactions, and worked to help their sons develop a strong sense of identity.

Researchers, practitioners, and students have an opportunity to put their research to work by conducting innovative studies and then informing policy makers and program leaders. Researchers must reduce our use of secondary data and intragroup comparisons to the dominant culture (Demos, 1990; Hunter & Taylor, 1998) and measuring race, class, and gender as categorical variables. We must be willing to include racism, a social and oppression-related construct, in our scholarship, action-oriented research, and instruction (Thomas, 2000). Likewise, challenging sexism, classism, and other injustices can be addressed by social scientists. For example, McAdoo (1993) suggested that the ecological perspective allows researchers to unmask the adaptive approaches to parenting or fathering used by Black fathers in the face of economic and educational disparities. I believe that the combined use of innovative methodological approaches, multiple theoretical frameworks (i.e., cultural variance, symbolic interaction, critical race theory, and ecological perspective), and other processes (i.e., examining race, ethnicity, culture, socioeconomic status, and multiple contextual environments) may contribute to empirically sound research on diverse families and Black fatherhood. In short, I believe that scholars may use our work to challenge laws that undermine fatherhood and paternal involvement.

Family Impact Analysis and International Families

Finally, Quach and Anderson demonstrate how to conduct a family impact analysis (Bogenschneider, 2006) using China's open-door policy (ODP). The ODP, in principle, holds that all nations should have equal

commercial and industrial trade rights in China, and it was designed to address the economic depression in China (Campbell, 1911; Swaine & Zhang, 2006). In their review of the literature on the ODP, Quach and Anderson report some interesting findings. The ODP improved trade and industry, enhanced job opportunities for women and men, and made some gains in reducing family poverty. In a study regarding gender and parental care, parental involvement increased; however, boys were favored to girls.

After the eight steps and six basic principles associated with family impact analysis are provided, the authors furnish readers with the historical context that influenced the Chinese government's decision to draft and enact the ODP. Using the most applicable principles, Quach and Anderson offer findings regarding the impact of the ODP and share the research needed to effectively complete an impact analysis. Family impact analysis can be used to inform policy makers, assist authors in drafting policy implications, and engage students in a critical analysis of policies and laws. Family impact analyses allow educators, researchers, and practitioners to systematically inform, deconstruct the myths about diverse families, and challenge injustices faced by diverse families.

Summary

Policy makers are responsible for balancing individual rights against the collective good. Citizens are responsible for holding government accountable. The purpose of this special collection is to engage readers in a transformative discussion about the negative impact of laws on diverse groups and to shed light on the ways in which laws and policies influence families of diverse groups. The intersection of diversity and law is mapped out in these articles on child welfare, same-sex couples, and incarcerated fathers. The call to action is supported by including an overview of family impact analysis, moving the transformative discussion from research to practice. Our scholarship can transform the legal precedence used to render family law decisions. For example, the use of guiding decisional frameworks about the best interests of the child, the best interest of families, and codified exceptions based on research and best practices must be tested in our research and implemented by programs and policy makers. Our scholarship must challenge the negative consequences of laws in a society that believes that "all people are created equal and endowed with certain inalienable rights."

Appendix

Reviewers of Special Collection

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