

Child Advocacy Program  
Art of Social Change:  
Child Welfare, Education, & Juvenile Justice

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READING PACKET for Session #1

January 25, 2018

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**Readings:**

**Pages \***

- Syllabus (available on [Canvas](#) and in the Copy Center)
- Bartholet, *Nobody's Children* NC 1-29, 33-55, 98-110
- Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 Harv. L. Rev. 1716 (2000) (excerpted) 1-9

\* NC refers to Nobody's Children pages: all other page numbers refer to this Reading Packet

Harvard Law Review  
May, 2000

Book Review

\*1716 SOMEBODY'S CHILDREN: SUSTAINING THE FAMILY'S PLACE IN CHILD  
WELFARE POLICY

Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative. By Elizabeth  
Bartholet. Boston: Beacon Press. 1999. Pp. viii, 304. \$28.50.

Martin Guggenheim [FN1]

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(Professor Elizabeth Bartholet will respond to this Review in the June issue.) Virtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis. In particular, most observers of child welfare complain that too many children remain in foster care for too long. [FN1] Those hoping to reform the system approach this task from many different directions. Some propose vastly increasing the state's role in assisting families. [FN2] Others recommend sharply limiting the state's role to save scarce resources for those most in need. [FN3]

In *Nobody's Children*, Professor Elizabeth Bartholet articulates a different premise from which to examine why the child welfare system is in crisis. She asserts that current practice fails to protect children from parental abuse and neglect. As this Review elaborates, she recommends an aggressive policy of removing children from their biological families and placing them for adoption. The principal question I address is whether Bartholet's definition of the problem and her proposals for change are appropriate for the children whose lives are at stake. Although I agree with Bartholet's contention that aggressive measures are needed to serve children at risk of entering foster care, I believe her proposals would gravely harm these children and their \*1717 families. We must find ways to reduce reliance on out-of-home care for children so that their own families may successfully raise them.

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IV. Is Adoption Really the Best We Can Offer Poor Children Who End Up in Foster Care?

I suggest in Part I that Professor Bartholet may be cynical about the degree to which Americans care about the plight of poor children in the United States. [FN94] But such an assertion does not adequately capture the avowed spirit of *Nobody's Children*. I am confident that Bartholet considers her book to be optimistic, even aspirational. Bartholet is striving to create a new

America in which privileged citizens would come to regard the children in foster care as part of the larger community, even as belonging to them. She states:

What matters is that the children get into homes where they can thrive. But if we want to find truly nurturing homes for all the children in need, we have to reach out to the entire community . . . Encouraging people who are in a position to provide good parenting to step forward, without regard to race or class or membership in the local village, encouraging them to see children born to others as children they are responsible for, can be painted as a form of vicious exploitation. But that's not how I see it. It seems to me that if more members of the larger community thought \*1736 of all the community's children as their responsibility, we'd have a much better chance of creating the just society that is our goal. (p. 6) Thus, an important message of *Nobody's Children* is a call to invoke the Golden Rule for the poorest of American's children: Do Unto Others' Children as You Would Do Unto Your Own. Bartholet encourages us to re-imagine, for a moment, this society as one that regards all its children as equally important.

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

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

An important explanation for Bartholet's limited vision may be found in the history of child welfare reform. When the child welfare movement began in the United States during the late nineteenth century, it was broadly conceived; child protection was a piece of a larger movement to rectify social ills for children. [FN95] This larger movement was not to last; in the twentieth century, the federal government rarely furnished funds to ameliorate the effects of poverty on children. One exception was the Depression Era legislation providing Aid to Dependent Children. [FN96] Another was the short-lived War on Poverty in the mid-1960s. But with the election of Richard Nixon in 1968 and the prompt collapse of the War on Poverty agenda, "child welfare" policy was purposely shifted to a much narrower focus.

In the early 1970s, liberals seeking to improve the lives of poor children realized the importance of developing new strategies to secure bipartisan support for government spending toward that end. Chiefly the work of Senator Walter Mondale, [FN97] the new strategy found its home in the field of child abuse and protection. Mondale led the legislative effort that resulted in the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974. [FN98] CAPTA directed a significant amount of federal money to states to fund efforts to protect \*1737 children from harm. [FN99] As part of a conscious plan to prevent the proposal from being viewed as a disguised poverty program, Mondale emphasized that child abuse was a "national" problem, not a "poverty problem." [FN100] Stressing that child abuse affected families of all classes [FN101] and that federal money would help children who were both rich and poor, Mondale won support for the proposal from politicians across party lines. [FN102] Ever since, "child abuse and neglect" in the United States have come to be seen and defined as an individual problem caused by individual sets of parents. [FN103] No longer a social problem, child welfare has come to be viewed as a matter of individual failure. [FN104] Much of the public debate has ignored or understated the evidence suggesting a correlation between abuse and neglect on the one hand and poverty on the other. [FN105] Indeed, a remarkable characteristic of the growth of support for

child protection in the United States has been the deliberate claim that middle-class and upper-class children need child protective legislation just as much as do poor children.

The consequences of this strategy have been profound. In recent years, most observers have come to see child abuse primarily as a defect in a particular family, with limited or nonexistent societal roots. [FN106] The opportunity to examine such root causes has thus been overlooked. Duncan Lindsey suggests that the current "residual approach" to child welfare policy does a poor job of accounting for these problems. He observes:

\*1738 The traditional residual approach to child welfare focuses on the problems in the parent/child relationship and the provision of services to ameliorate those problems. However, the broad social changes that affected families, especially those served by the public child welfare system, had little to do with that relationship. Further, the problems created by these major social changes are not amenable to solution through the residual perspective. The main service provided by the residual child welfare system is foster care . . . . The residual approach doesn't provide for developing policies and programs that would prevent these egregious problems from occurring in the first place. [FN107] Although those hoping to improve child welfare once examined broader issues of poverty, a specific emphasis on abuse has replaced those socioeconomic concerns.

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

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

The abysmal conditions of poverty and despair into which millions of poor children are born are not immutable facts of life. It is essential that we determine the extent to which these conditions are caused by factors for which we may hold the larger society accountable and, therefore, could improve or eliminate. Nobody's Children fails to consider the extent to which these conditions are a product of various social forces influencing American society and policy.

Herein lies the central unanswered question of Nobody's Children: If Bartholet is right that the core plight suffered today by America's foster children is that they are "nobody's children" (that is, the children of nobody particularly important), is Bartholet's proposal the morally appropriate response? [FN108] Let us briefly examine some facts \*1739 about poor children in the United States today. If we could start over and conceive of child welfare as a public health or shared social problem, rather than focus on the "red herring" of child abuse, [FN109] we could develop policies that address directly and proactively those conditions that adversely affect the health and welfare of poor children in the United States.

1. Poverty.--About fourteen million children in the United States live below the poverty line. [FN110] Children are twice as likely as adults to live in such conditions. [FN111] Of all

industrial nations worldwide, the United States has the highest child-poverty rate. This may be related to governmental policies and priorities: Britain, France, Sweden, and Canada each spend two to three times more on children and families than does the United States. [FN112]

The percentage of the United States population that falls below the poverty line is disproportionately composed of people of color. Close to half of the children who live in poverty conditions are African-American; only about 16% are white. [FN113]

In addition, the child-poverty problem is steadily getting worse. Since 1969, even as the GNP has risen 50%, child poverty has increased by 50%. [FN114] And poverty is increasing at an even more rapid rate as the effects of recent welfare "reforms" begin to take effect. In 1997, a year after welfare reform was enacted, there were 400,000 more children living below one-half the poverty line than there were in 1995. [FN115] A study of former welfare recipients in South Carolina found that one in ten could not afford medical care, one in six could not afford food, one in four could not pay the rent, and one in three had fallen behind in paying utility bills. [FN116]

2. Housing.--There is a drastic shortage of adequate housing for indigent children in the United States. In 1995, there were 4.4 million \*1740 more low-income renters than there were affordable housing units. [FN117] As a result, a vast number of families settle for substandard housing; those who seek minimally adequate conditions are often forced to pay more than half their income in rent. [FN118] Here again, children feel the brunt of the problem: in a survey of thirty cities, children constituted 25% of the homeless population. [FN119]

This problem is also getting more serious every year. The average period of time spent awaiting Section 8 housing assistance rose from twenty-six to twenty-eight months between 1996 and 1998; in the nation's largest housing authorities, the average waiting period increased from twenty-two to thirty-three months during this same period. [FN120]

Welfare reform has further exacerbated the problem. With welfare benefits eliminated or substantially reduced, indigent families have less money to pay for housing and utilities. A Children's Defense Fund survey of former welfare recipients who were seeking services at nonprofit agencies found that 23% of the families had been forced to move because they could not pay their rent, 25% had doubled up housing to save money, and 25% had had their heat shut off. [FN121] In one Wisconsin county, the number of homeless children increased by 50% after the implementation of welfare reform. [FN122]

3. Health.--More than eleven million children in the United States have no health insurance. [FN123] In 1997 alone, 400,000 children lost their insurance as a result of welfare reform. [FN124] Between 1996 and 1998, approximately 643,000 children lost Medicaid coverage. [FN125]

Life in the urban ghetto holds numerous, substantial health hazards for children. Data suggest that nearly two million children suffer from \*1741 lead poisoning, [FN126] and those with lead poisoning are most often found in families in the lowest income brackets. [FN127] Indigent children suffer asthma at rates twice as high as children in higher-income families. [FN128] Every year, asthma attacks caused by cockroach infestation at home require hospitalization for 10,000 children between the ages of four and nine. [FN129] Asthma can adversely affect a child's essential well-being, ability to participate in sports and other activities, academic performance, and even life expectancy. [FN130]

Here again, the burdens and the suffering fall disproportionately on children of color. Twice as many black children as white children suffer from lead poisoning in the family income bracket of \$6000 or less; in the slightly higher income bracket of \$6000 to \$15,000, three times as many black children suffer from lead poisoning as white children. [FN131] The asthma rate for African-American children is 26% higher than the rate for white children. [FN132]

## B. Who Is Responsible for Poor Children?

When we recalibrate the lens of child welfare to include these basic issues within its view, the core proposal in *Nobody's Children* seems both inadequate and inappropriate. It is inadequate because it still will leave millions of children to suffer the consequences of being born into poor families. [FN133] It is inappropriate because, fully understood, Bartholet's proposal that privileged Americans adopt these children subverts, instead of advances, the Golden Rule by championing the unnecessary permanent destruction of familial ties.

In addition, when we widen the lens in this way, we quickly realize that, of the preventable conditions most threatening to children, maltreatment by parents is a relatively minor public health concern. Emergency medical accidents, for example, kill 22,000 children annually\* 1742 in the United States; [FN134] "inexpensive injury prevention programs and emergency medical systems for children" could save an estimated 6000 to 10,000 of these children's lives each year. [FN135] An additional 4205 children were killed by guns in 1997. [FN136] By contrast, child abuse fatalities appear to be a rare event (estimated to be between 1000 and 1200 annually). [FN137]

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

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

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

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

interest. Thus, the rights of \*1743 Americans to choose their marital partner, [FN138] to procreate, [FN139] to keep custody of children, [FN140] and to control the details of raising them [FN141] are not accidentally or carelessly selected freedoms. Properly understood, they form the core of our most sacred liberty. As declared by the Supreme Court, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.” [FN142]

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

“The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.” . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of a similar order and magnitude as the fundamental rights specifically protected. [FN143]

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

Bartholet's dismissal of the value of the rights of biological parents is of great concern. [FN144] If we adhere to the Rawlsian principle of ordering\*1744 society without knowing how the rules will be applied to each of us, [FN145] it is important to ponder the implications of a policy that would treat families without means differently from families with means. [FN146] In the case of the poor, we would tolerate the permanent separation of children from their families even though we have not seriously considered making meaningful efforts to ameliorate the conditions that precipitated their placement in the first place.

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

In addition to this basic principle, Bartholet's call for massive adoptions of children currently in foster care (and children who ought to be in foster care) is hopelessly impractical on several levels. First, the legal standard necessary for removal and termination of parental rights prohibits such an ambitious project. Although Bartholet advocates that many more children be removed from their families, placed in foster care, and subsequently adopted, she offers no details about the standards officials should use when deciding whether to remove children or to terminate parental rights. Without new standards, it is unclear whether or why more removals would occur. Second, an increase of cases by the factor Bartholet seeks would overwhelm the current child welfare system. We would need not only to quadruple the number of case workers and agency personnel responsible for placing children and monitoring their placements, but also to quadruple the number of judges and court personnel. These expenses are simply prohibitive. Third, even were we to expend these resources, we still would likely never achieve the results Bartholet advocates. She suggests that adults will come forward to adopt these children once all barriers to



transracial adoptions have been eliminated (pp. 181-83). But she fails to address the timelines necessarily built into the process of adopting foster children. When children enter foster care, the planning goal for virtually all cases--and certainly for the non-life-threatening cases that Bartholet argues merit foster care--is to return children to their families. When children enter foster care, parents are given services and time to improve the conditions that led to the removal.\*1745 Under current federal law, a minimum of seventeen months must elapse before termination proceedings may even commence. [FN147] Commencing termination proceedings itself involves a time-consuming process of protracted trial proceedings of up to one year and appeals that can easily add an additional year. Moreover, the prospects of biological parents winning at the trial or appellate level are substantial.

Finally, Bartholet takes no account of the complexities of adopting a foster child. The infertile couples Bartholet expects to adopt these children want to form a permanent family. But these couples may be either unwilling or ineligible to become foster parents of newly placed children. They will be unwilling once they understand that there is neither a promise they will be able to adopt the child nor a commitment to strive for adoption. The most an agency can promise is that if the child becomes eligible for adoption, the foster parent will be permitted to adopt over anyone else. But the agency will be obliged to work assiduously with the birth family to assist it in overcoming the barriers to returning the child. [FN148] Reunion is success. Adoption is an option only when failure occurs--failure to reunite the child with his or her birth family. Under these conditions, the couples Bartholet talks about are likely to be unwilling (as they have been historically) to become foster parents (p. 180). Even if they would be willing, they would be ineligible unless they truly were committed to the idea of foster parenting; namely, that they are not striving ultimately to adopt the child, but instead, are offering their home and their love with the aim of eventually returning the child to his or her birth family.

For the foster care system to truly work, everyone connected with the child must be working toward the same goal rather than conflicting ones. The people Bartholet imagines becoming adoptive parents are not going to become foster parents. By the time the foster children are eligible for adoption--the time it will take to exhaust reunification efforts and the time it will take for the courts to order termination--children will almost certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt. Bartholet's proposal is thus utterly impractical unless we thoroughly change the rules of foster care and the process by which foster children become eligible for adoption. Of course, Bartholet could be proposing that whenever children are removed from \*1746 their parents because of suspicion of abuse or neglect, the children should be placed for adoption. However, such a proposal is so patently unlawful that it cannot be implemented. If she means to give parents some time to demonstrate that the children can be safely returned to their custody, then we are back in the current system and the book provides no hint of how things would be different.

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

It is one thing to tolerate the radical social engineering that constitutes the core of Bartholet's proposals as a "least worst" alternative. [FN149] It is another to advance it before insisting that less drastic solutions be attempted. Regrettably, the reason Bartholet touts adoption of foster children remains unclear. Either it is because she anticipates that America will continue to fail to

equip poor families with the resources necessary to keep their children at home, or it is because she so negatively assesses foster children's families and communities themselves. [FN150]

Since the 1970s, the concept of "child welfare" has been artificially narrowed to mean little more than protecting children from parental harm. During this same period, child welfare agencies have been transformed from programs that attempt to serve needy families to investigative bodies that follow up on often spurious allegations of maltreatment.\*1747 [FN151] As observed by Jane Waldfogel and others, "the problem is not just that CPS is the only door; it is also that CPS is 'a door to an empty room.'" [FN152]

As we look to the near future, we can predict that child welfare personnel will be able to provide even less for poor families as changes in government policies require that they interact with increasing numbers of families. [FN153] We need to change this predictable path if we are to improve the lives of poor children. To accomplish this, it is critical that we restructure child welfare to include, for example, early intervention services for health care, child care, and education. Paradoxically, this vision requires that we find a way to narrow what now overwhelms the child welfare system--the investigative function of child welfare personnel. Although Bartholet proposes a mandatory home visitation program for all "highest-risk families" (p. 170), she stresses the value of surveillance of dysfunctional families as much as the benefits of service provision (pp. 163-75). [FN154]

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

\*1748 The simple fact is that government agencies alone cannot protect children. Thus, efforts to organize networks of neighborhood and community support that reach out to families at risk provide great hope for the future. The goals are to reach these families before a crisis occurs and to expand the scope of those who receive services well beyond the category of "unfit families."

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

Community Partnership advocates argue for putting responsibility in the "village" for raising the child. But they fail to address the realities of today's villages. Child abuse and neglect take[] place disproportionately in the poorest, most dysfunctional communities in our society--in communities which are the least likely to have the healthy organizations which are seen as central to the Community Partnership concept. (p. 153) This is a circular complaint. It is precisely because so many children in foster care come from identifiable dysfunctional

communities that these new initiatives seek to improve them. It is hardly legitimate to point out that these communities should not be targeted because they are dysfunctional. [FN155]

It is vital to acknowledge the disorganization of the communities from which the disproportionate number of foster children come. Efforts to improve those communities deserve our full support, unless those efforts result in inadequate protection of children. But the most \*1749 Bartholet can say about community partnership efforts is that "it's not so clear that they will reduce child abuse and neglect" (p. 49). [FN156] Although no definitive evidence has yet been obtained that demonstrates the effectiveness of community partnerships, these efforts are allowing earlier interventions to identify at-risk families, revealing strengths in communities, and filling gaps in services for parents. [FN157]

## V. Conclusion

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

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

The problem of poverty among lone-parents and their children has become the core social problem in North America. The problem has been cast as the collapse of the family, a plague of illegitimacy, an epidemic of child abuse, and a crisis for children. At the core all stem from the same problem, child poverty. Child poverty will not end without intervention. Yet, there has not been a broad commitment to solving this problem, in part because the problems facing these mothers and their children have been defined within a residual perspective. [FN158]

The narrow picture of child welfare policy that is currently accepted primarily focuses on children harmed by their own families and the apparatus and policies of state action that aim to find and protect those children. However important the issue of children being harmed by their parents, it is far from the most pressing issue in child welfare. Those of us who care most about children need to develop strategies that broaden the lens of problems facing children so that states with \*1750 the will to ameliorate or avoid these problems can do so. Most important, this strategy must find a way to maximize the chance that children will be raised by their own willing families.

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

The last words of Nobody's Children are ideal ones with which to end this review. Although Professor Bartholet and I may differ on exactly how the sentiments of these last words ought to be manifested, we are in full accord on the importance of recognizing the risks inherent "in continuing to abdicate any community responsibility for our nation's children--in continuing to see the children suffering abuse and neglect as not belonging to all of us" (p. 243).