

REDEFINING THE BASELINE: REASONABLE EFFORTS, FAMILY PRESERVATION, AND PARENTING FOSTER CHILDREN IN NEW YORK

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Adolescents in New York's foster care system are having children at higher rates and at younger ages than other teens. As one of the largest municipal foster care systems in the United States, New York City's Administration for Children's Services (ACS) is grappling with the challenge of responding to the particular needs of young parents who are raising children within the state foster care system (whom this article will refer to as parenting wards),¹ rather than within an extended family.

Although New York does not track either the number of foster children who are parents² or the age of respondents to removal petitions, the office of the Public Advocate for the City of New York has reported that one in every six girls in foster care in New York City is either pregnant or parenting, a statistic that is likely an underestimate.³ The high frequency of

* J.D. Columbia Law School; B.A. Duke University. I am infinitely grateful to Zabrina Aleguire for all of the time that she spent editing, discussing, and advising me during the course of my work on this Note and for sharing some of her passion for this topic with me. I would also like to thank Gloria Bruzzano for introducing me to this issue, Professor Craig Levine for his insights, comments, and advice on this Note and on broader child welfare issues, Chris Gottlieb for her thought provoking comments, Carrie Lebigre for a year's worth of editing and discussion, Jane Spinak and my colleagues in the Child Advocacy Clinic who allowed me to see some of these issues in practice, and of course my friends who have put up with endless discussions about parents in foster care. Lastly thank you to my family for their endless encouragement and love.

¹ This term appears in Eve Stotland & Cynthia Godsoe, *The Legal Status of Pregnant and Parenting Youth in Foster Care*, 17 U. FLA. J.L. & PUB. POL'Y (2006) [hereinafter *Legal Status*]; statutes and agencies use a variety of terms to refer to parenting teens in foster care.

² YOUTH ADVOCACY CENTER, CARING FOR OUR CHILDREN: IMPROVING THE FOSTER CARE SYSTEM FOR TEEN MOTHERS AND THEIR CHILDREN 4 (1995) [hereinafter CARING FOR OUR CHILDREN], available at <http://www.youthadvocacycenter.org/pdf/CaringforOurChildren.pdf>.

³ JILL E. SHEPPARD & MARK A. WOLTMAN, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CHILDREN RAISING CHILDREN: CITY FAILS TO ADEQUATELY ASSIST PREGNANT

parenting among teens in the foster care system is representative of national trends.⁴ Teen girls in foster care are two and a half times more likely to become pregnant before their nineteenth birthdays than teens that are not in foster care.⁵ Parents under eighteen years old are also more likely to be charged with child abuse or neglect than those who wait until they are older to have children, and they are more likely to have their children removed by the state.⁶ The complicated reality behind these numbers is that because of state failure to provide the placements, services, and support necessary to function successfully as a family, parenting wards and their children are often denied the opportunity to remain together. This failure is avoidable. The state should articulate and implement the idea that, as the caretaker of foster children and the enforcer of child welfare laws, it has a heightened duty to families of parenting wards before and after removal proceedings begin.

Legally, parenting wards have the same rights as other parents.⁷ Yet, in many ways they are still children in the eyes of the law.⁸ Teen

AND PARENTING YOUTH IN FOSTER CARE 7 (2005) [hereinafter CHILDREN RAISING CHILDREN], *available at* <http://pubadvocate.nyc.gov/policy/documents/FosterCareSurveyReportFinal.pdf>. This number is likely an underestimate because only sixty percent of those surveyed responded.

⁴ THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, TEEN PREGNANCY AND CHILD WELFARE 1, http://www.thenationalcampaign.org/why-it-matters/pdf/child_welfare.pdf (last visited Dec. 23, 2008) (citing L.A. Bilaver & M.E. Courtney, SCI. SAYS NO. 27, FOSTER CARE YOUTH (2006), *available at* http://www.findyourreason.org/Science%20Says%20Research%20Briefs/ScienceSays27_FosterCare.pdf).

⁵ *Id.* Teen pregnancy in foster care is a topic that merits its own in-depth discussion, and although preventing pregnancy would moot the problems that parenting wards face within the foster care system and with removal proceedings, the causes of teen pregnancy in general and specific suggestions for its prevention are outside of the scope of this Article. Additionally, the author is not arguing that pregnancy prevention should be one of the goals encompassed in ACS's mandated "reasonable efforts" to prevent removal.

⁶ Teen mothers between eighteen and nineteen are one-third more likely to have a child put in foster care and are nearly forty percent more likely to have a case of abuse or neglect reported against them than women who waited until age twenty or twenty-one to have their first child. THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 1 (citing S.D. HOFFMAN, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY WASHINGTON, DC, BY THE NUMBERS: THE PUBLIC COSTS OF ADOLESCENT CHILDBEARING (2006)).

⁷ N.Y. COMP. CODES R. & REGS. tit. 18, § 430.10 (2008).

⁸ *Legal Status*, *supra* note 1, at 2-3 (providing a detailed and in-depth discussion of the legal status of parenting foster children).

parents remain dependent on adult guardians because in many instances they are not permitted to make decisions about their own custody, education, and medical care. They are not emancipated by virtue of their parenthood. Ironically, adolescent parents are responsible for making decisions for their own children that they are not entitled to make for themselves.⁹ Teen parents need to be supervised and cared for while simultaneously being given the ability and freedom to be parents to their own children. This duality of roles creates a corresponding double standard for teen parents; they are expected to fulfill adult responsibilities without being provided all of the benefits and freedoms of being an adult.¹⁰ Caseworkers for these teens do not always understand the difficulty of being a parent while still maturing as an adolescent.¹¹

Like other parents, parenting wards have a constitutionally protected right to raise their own children.¹² Furthermore, federal law has espoused an intent to keep parenting wards with their children and provides federal funding to do so under the scheme established by the Federal Adoption and Safe Families Act.¹³ State law provides the same legal protection to parenting wards as to other parents in removal proceedings. However, some advocates in New York City are concerned that the current application of abuse and neglect proceedings to teen parents in foster care in the New York City system may impermissibly interfere with their exercise of these constitutionally and statutorily protected rights.¹⁴ They have

⁹ *Id.* The example given by Stotland and Godsoe is in the medical context: such parents can consent to medical procedures for their children but may not always be permitted to do so for themselves.

¹⁰ While the issues raised in this Article are relevant to teen parents who have aged out of the foster care system, this Article only addresses suggestions for teen parents who are currently in the foster care system.

¹¹ See CARING FOR OUR CHILDREN, *supra* note 2, at 31-32 (recounting the experiences of mothers in foster care who felt that rules were rigid, punishments were harsh, and independence was discouraged by the regular practices in the day to day to live of parenting wards, but which is nonetheless expected of them).

¹² See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (reiterating the strength of parents' interest in "the care, custody, and control of their children" (citing *Meyer v. Nebraska* 262 U.S. 390, 399, 401 (1923))).

¹³ 42 U.S.C. § 675(4) (2006) (defining foster care assistance payments to include payment for children of parenting wards, if the parenting wards and their children are housed together).

¹⁴ Letter from the Fordham Interdisciplinary Parent Representation Project to John B. Mattingly, Comm'r of the N.Y. City Admin. for Children's Servs.; Michael Bosnick,

expressed concern that ACS and some family court judges may be too quick to determine that a neglect or abuse case is warranted against these young parents, holding them to a higher standard than non parenting-ward parents.¹⁵ These advocates believe that the “safety and wellbeing of the children of young parents is inseparable from the safety, wellbeing, and support of those young parents,” and that “in New York . . . the agencies responsible for them too often take a policing approach toward [parenting wards] that is adversarial and punitive, rather than supportive, educational, and preventative.”¹⁶

This Article examines the various issues that come into play when an abuse and neglect petition is filed against a parenting ward in New York. It argues that the Child Welfare Commissioner and ACS have a heightened duty to make efforts to keep the family together when the respondent parent is a foster child. It argues that except in cases of clear imminent harm or where aggravating factors make it impossible to mitigate the risk of harm, it is unethical and improper for the state to file removal proceedings against parenting wards without first considering how further assistance from ACS could prevent the perceived necessity of such filings.

This Article argues that before initiating a removal petition New York should be required to examine the living conditions provided to the minor parent; the foster care agency’s impact on any allegations made; the state’s fulfillment of its responsibility to provide preventive services to avoid removal; and whether there are further steps that could be taken to prevent removal and strengthen the family unit as required under *Nicholson v. Scopetta*.¹⁷ The “reasonable efforts” preventing removal required of

Deputy Comm’r of the Div. of Policy & Planning; Ronald Richter, Deputy Comm’r of the Div. of Family Court Legal Servs.; Eric Nicklas, Assoc. Comm’r of the Div. of Family & Permanency Servs. (Nov. 27, 2007) (on file with author). The Fordham Interdisciplinary Parent Representation Project includes representatives from the Fordham Interdisciplinary Center, Brooklyn Family Defense Project, The Door’s Legal Services Center, the Brooklyn Young Mother’s Collective, the Legal Aid Society’s Juvenile Rights Practice, Lawyers for Children, the Center for Family Representation, and the NYU School of Law Family Defense Clinic.

¹⁵ *Id.*; Telephone Interview with Zabrina Alegruie, Staff Attorney, Brooklyn Family Defense Project, in New York, N.Y. (Apr. 14, 2008).

¹⁶ Letter from the Fordham Interdisciplinary Parent Representation Project, *supra* note 14.

¹⁷ 820 N.E.2d 840, 851-52 (N.Y. 2004) (stating that the court must consider means other than removal to eliminate risk to a child).

ACS before filing removal petitions¹⁸ should be heightened where the potential respondent is a parenting ward and such efforts should come into play well before a removal petition becomes likely. In essence, such efforts should be standard procedure where the parenting ward so desires or where the agency believes it is necessary.

Part I of this Article examines ways in which the current system fails to adequately address the needs of minor mothers in foster care. It presents a case study of the experiences of a minor parent in New York's foster care system in order to illustrate many of the concrete problems typically encountered. Part I will look at the inherent problems of having the same entity upon which the parenting ward is dependent also be responsible for removal of that ward's children. Part I will also address the unique tension between a parenting ward's need for thorough assistance with parenting and her need for some level of familial privacy, a tension which is exacerbated by ingrained visions of childhood, motherhood, race, and class that put a parenting ward at an even greater disadvantage in removal actions. The nature of the legal relationship between the state, the parenting ward, and the parenting ward's child will also be compared to the relationship between a grandparent, a teen mother, and the child in situations where the foster care system is not implicated.

Part II examines the current laws and procedures that are implicated in removal proceedings against parenting wards. It looks briefly at parental rights in America and the legal status of minor mothers¹⁹ in foster care. It

¹⁸ N.Y. FAM. CT. ACT § 1022(a)(iii) (McKinney 2005) ("In determining whether temporary removal of the child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child and where appropriate, whether *reasonable efforts* were made prior to the date of application for the order directing temporary removal to prevent or eliminate the need for removal of the child from the home.") (emphasis added).

¹⁹ Although many of the arguments in this Article might also apply to minor fathers in foster care, discussion of their rights is outside the scope of this Article. The majority of removal cases reported and analyzed in the literature concern mothers, and the 1995 Administrative Directive reported no cases of minor fathers in foster care placed with their children. Admin. Directive, 94 ADM-12, N.Y. Dep't of Soc. Servs. (July 7, 1994), available at <http://www.ocfs.state.ny.us/main/policies/external/1994/ADMs/94-ADM-12%20Minor%20Parent-Infant%20Foster%20Care%20and%20Adoption.pdf>. See also *Legal Status*, *supra* note 1, at 8 n.20 (explaining that the rights of mothers and fathers are different and noting that the importance of biological fathers has been diminished in legal precedent); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in Child Protection Proceedings*, 48 S.C. L. REV. 577, 584-85 (1997) [hereinafter *Protecting Children*] (discussing the greater likelihood that mothers will be those held accountable in the child protective system). Practitioners like Gloria Bruzzano and Zabrana Alegruie,

will argue that federal law, the state policy implementing it, and ACS's duties provide support for, and even require, the implementation of procedures that are less punitive and more focused on ensuring the success of such families.

Part III will suggest potential improvements that can be made to the foster care system to better align the interests of the state, the minor parent, and the child. It argues for more individualized analysis in cases of minor parents accused of abuse or neglect. Part III argues for recognition of a heightened duty for child welfare agencies to ensure that minor parents in their care have a fair chance to be parents before proceedings are initiated against them. Part III will also look to the California model, which provides judges and case workers with more explicit instructions as to how to handle these cases than New York's system does. This section will argue that improvement requires examining the individual hardships faced by the minor parent. Such hardships might include family histories of physical abuse or drug abuse, lack of financial resources, lack of exposure to good parenting, lack of education, and the general potential harms of being in foster care. The responsiveness and dedication of the individual parent should also be evaluated. ACS must then respond appropriately, taking into account these additional obstacles and factors. Part III will also suggest that providing increased preventative services, resources, and counseling to families in foster care would better prevent Article 10 removal petitions.

I. A SPECIAL OBLIGATION TO PARENTING WARDS: ACS'S DUTIES AND PROBLEMS WITH THE CURRENT SYSTEM

The right to be a parent and to control the upbringing of one's children is deeply rooted in the substantive due process rights of the Fourteenth Amendment.²⁰ However, in failing to adequately take into account the particular needs and status of parenting wards, New York jurisprudence denies parenting wards a fair opportunity to enjoy these rights.²¹ ACS procedures are not always in accord with the expressed intent

contacted in connection with this Article, indicate that a vast majority of removal petitions that they dealt with were filed against mothers.

²⁰ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

²¹ Telephone Interview with Zabrina Alequire, *supra* note 15 and accompanying text. See also, N.Y. FAM. CT. ACT § 1022 (2005) (stating that a court ruling on a temporary removal should consider whether "reasonable efforts" were made prior to removal to prevent or eliminate the need for removal). "Reasonable efforts," as noted by the Supreme Court in

of both federal law and state regulations to keep these parents and children together.²² When a respondent parent is a parenting ward, the fundamental nature of the rights at stake, the immense vulnerability of these parents and children, along with ACS's duty to protect the best interests of both minors, create a situation in which instituting removal proceedings without a higher burden on ACS to prevent them is likely to lead to an unjust cycle of separations without any real progress towards family preservation. While the state does not necessarily have an affirmative duty to help people become parents, when the state acts as *parens patriae* there *is* an affirmative duty to provide for the welfare and wellbeing of the minor children in its custody.²³ Once a child in the care of ACS becomes a parent, it is the duty of ACS and the state to protect and foster the parent-child relationship, which includes reasonable efforts to keep the family together.

However, this duty has not been prioritized in the ACS and foster care systems. Instead, parenting wards have historically been viewed as inherently inadequate parents because of their age and foster care status, and they have often been separated from their children.²⁴ In New York, and

Suter v. Artist M., is a fairly vague term and there are few reported appellate opinions that construe it. 503 U.S. 347, 359-60 (1992) (finding that under the federal Adoption Assistance and Child Welfare Act there is no statutory guidance on how to measure "reasonable efforts" to maintain an abused or neglected child in his home and that the states were left to determine how to comply with that directive). Rather, the term, and thus the services and efforts required of ACS, are highly discretionary and tend to be decided on a case-by-case basis. Though the author is in favor of tailoring "reasonable efforts" to the particular case and family at hand in order to best provide for the family's specific needs, this Note argues that in cases where the respondent is a minor parent in the care and custody of the State, "reasonable efforts" should be interpreted stringently by courts to include the utmost efforts to keep a family together and should include in-depth consideration of how ACS and the particular foster placement has affected the ability of the parent to provide for her child.

²² See *supra* notes 14-15, and accompanying text; *infra* note 230 and accompanying text.

²³ See *infra* section I.B; *Legal Status*, *supra* note 1.

²⁴ See *In re C.*, 607 N.Y.S.2d 1014, 1015-16 (Fam. Ct. 1994) (discussing *inter alia* the various problems with mothers "voluntarily" agreeing to surrender legal rights to their children because of lack of financial choice, not being allowed to re-enter their foster homes until they had surrendered their legal rights to their children, and lack of understanding of their legal rights); *In re Tricia Lashawnda M.*, 451 N.Y.S.2d 553, 554 (Fam. Ct. 1982). *In re Tricia Lashawnda M.* detailed the "lightning quick maneuvers" used to separate mother and child immediately after fourteen-year-old Catherine Linda M., previously held by the court to be a neglected child, gave birth. Her child was retained as an adoptable ward of the State, while Catherine Linda M. was removed from the care of the agency who had taken her child, thereby separating them without first making efforts to keep them together. See also CARING FOR OUR CHILDREN, *supra* note 2, at 4, 7-9 (examining the struggles pregnant and parenting

in other states, “voluntary” separation of parenting wards from their children is frequently the result of coercive measures; specifically young mothers have been pushed into giving up their children because of a lack of available services and funding.²⁵ Foster care staff may threaten removal of their children, coercing these mothers into following strict rules and into not complaining about inadequate care.²⁶ Prior to the amendment of Title IV-E of the Social Security Act, parenting wards did not even receive funding for children who remained in their care because these children are not considered foster children themselves.²⁷ Thus, mothers in foster care who were financially unable to care for their children were often left no choice but to surrender their children.²⁸

The mission of ACS is “to protect children and keep families together;”²⁹ it is also the role of ACS to ensure that all children, whether in or out of the system, are safe from abuse and neglect. Although it is important for ACS to remove children when there is an imminent and serious risk to life or health,³⁰ the fact that parents who have been in foster care are more likely to have a child removed³¹ and to “fatally abuse or neglect” their children³² does not mean that every parenting ward should

girls face as foster children, including unwanted separation from their children, negative treatment, and prejudices by child welfare employees); YOUTH ADVOCACY CENTER, THE FUTURE FOR TEENS IN FOSTER CARE 9, 22-24 (2001) [hereinafter THE FUTURE FOR TEENS IN FOSTER CARE], available at <http://www.youthadvocacycenter.org/pdf/FutureforTeens.pdf> (discussing the various social prejudices facing teens in foster care and the focus on controlling or reprimanding foster children instead of concentrating on their futures).

²⁵ See *C.*, 607 N.Y.S.2d 1014; *Tricia Lashawnda M.*, 451 N.Y.S.2d 553.

²⁶ *Legal Status*, *supra* note 1, at 23 (stating that advocates for parenting wards in all the states surveyed (Illinois, California, New York, and Florida) noted threats of removal by foster care staff if parenting foster children failed to follow rules or service plans, despite a lack of behavior constituting abuse or neglect under state law).

²⁷ Admin. Directive, 94 ADM-12, N.Y. Dep’t of Soc. Servs., *supra* note 19.

²⁸ *Legal Status*, *supra* note 1, at 17.

²⁹ New York City Administration of Children’s Services, Mission & Organization, <http://www.nyc.gov/html/acs/html/about/mission.shtml> (last visited Mar. 2, 2008).

³⁰ N.Y. FAM. CT. ACT § 1022(a)(ii) (McKinney 2005); N.Y. FAM. CT. ACT § 1027(b)(i) (McKinney 2005).

³¹ See THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 1.

³² CHILDREN RAISING CHILDREN, *supra* note 3, at 4.

have her child removed or even that most or many should. As the Public Advocate points out, it is at least as essential to improve the circumstances in which the parenting ward is parenting. Specifically, the Public Advocate's Report noted that parenting wards are often not provided with training to prepare them to be adequate parents; they are not taught about "prevention of childhood fatalities, proper sleeping position, Sudden Infant Death Syndrome [or] about community, social service, or governmental resources" available to them and their children.³³ Such information and related services are necessary for the safety and wellbeing of the parenting ward's child. Parenting wards' particular need for such assistance, as well as their dependence on ACS to provide them assistance, underscores ACS's stated duty to keep the family together and to protect both sets of children. ACS controls parenting wards' access to the information and assistance that might help them to keep their families together or protect their children. In many cases, it may be that moderate intervention and a commitment to improving the circumstances in which foster children parent would prevent physical or emotional harm due to mistakes, misinformation, and lack of support, as well as prevent the harm caused to both parenting wards and their children by removal.

A. Ariella: A Case Study³⁴

The story of Ariella, a parenting ward who was served with a removal petition, is an illustrative example of the problems with the foster care system, as well as the need for a change in the way ACS and the courts perceive and handle parenting wards. Many of Ariella's experiences reflect systemic problems expressed by other parenting wards.³⁵ These problems—caused or exacerbated by ACS's inability or refusal to effectively provide training, parenting services, and an adequate home life—make parenting extremely difficult.

My conversations with Ariella occurred in the summer and fall of 2007. When I first met her, she was involved in two legal actions. One concerned a removal petition against her regarding her son, and the other was against Ariella's abusive husband. One of the things that stood out the

³³ *Id.* at 8.

³⁴ "Ariella" is a pseudonym.

³⁵ See CARING FOR OUR CHILDREN, *supra* note 2; see, e.g., Telephone Interview with Gloria Bruzzano, Former Director, The Child Protection Program at Sanctuary for Families in New York, N.Y. (Mar. 5, 2008); Telephone Interview with Zabrina Aleguire, Staff Attorney, Brooklyn Family Defense Project, in New York, N.Y. (Nov. 7, 2007).

most about Ariella was how mature and positive she was. She had taught herself English and was always put together, well spoken, and thoughtful. Although she had not yet been signed up for GED classes as she desired and as was discussed at various hearings, she talked about wanting to be a good mother, about school, and wanting to be a lawyer one day. She was bubbly and positive and saw success as a real possibility. All of this was in spite of the fact that Ariella had experienced severe domestic violence throughout her life, including rape resulting in her motherhood, forced marriage to her rapist, sexual abuse by family members, beatings, and burnings. She was finally able to escape her husband when he beat her and left her for dead. After that incident, as a minor with no family in the country, Ariella was placed in foster care.

When I met Ariella, she was facing the beginning of what would become a long removal process. ACS had filed a removal petition against her despite continuously failing to meet its burden to provide for her and to prevent her separation from her son. Ariella had barely any resources outside of her attorney and her attorney's agency. Ariella's attorney frequently discussed what she felt was the hypocrisy of a situation in which ACS's inability to provide for its wards seemed to play no role in its decisions to punish parenting wards for not living up to ACS's standards for their own children. For example, Ariella did not receive adequate medical care over the course of her time with ACS and its contract agencies. Despite a long history of physical, emotional, and sexual abuse, the distress of having a child at a young age, and especially having a child conceived from rape, Ariella did not receive psychiatric care until her attorney's agency provided it. ACS did not provide her with psychiatric care even though it was eventually court-ordered. ACS also did not provide Ariella with medical or mental health assistance when she again became pregnant by her rapist/ex-husband. Ariella's attorney and her attorney's agency, rather than ACS, helped Ariella secure the medical attention that she requested and provided her with continuing mental health services.

Ariella was also denied appropriate foster placement. She was placed in a home without a separate bed for her child. Ariella's various foster mothers consistently treated her poorly and violated welfare rules. One of her foster mothers, for example, withheld funding designated for Ariella and her child. She then demanded payment for babysitting Ariella's son while Ariella worked to meet her family's resulting financial needs. A succession of foster parents allowed Ariella to work in a bar, a job that, beyond being inappropriate and illegal for a minor, required her to leave the house in the middle of the night and left her exhausted all day. Any of these issues, individually, would make life difficult for a teenager. Any of them

would make being a teen parent infinitely more burdensome. All of them together seemed unimaginable. Ariella seemed more like a neglected child than her son. Neglect and lack of services were pushing Ariella farther and farther from her son.

After Ariella allegedly attempted suicide in front of her son, he was taken from the home and a removal petition was filed. Ariella's "suicide attempt" was not, in fact, done in front of her son and her doctor felt that it was not a serious attempt on her life, but was rather a cry for help: the incident resulted in small cuts on her wrist that only required a cold compress and band aids. Nevertheless, ACS made the determination that the risk to her son was great enough to remove him from his mother's care. Following this incident, ACS did not attempt to provide more (or any) support services to Ariella and her baby. It is indisputable that this act of self-injury was concerning. This gesture was further evidence of Ariella's serious and increasing need for therapy, services, and a supportive home environment. However, it was not, in this Author's opinion or in Ariella's attorney's opinion, an adequate reason to take her son away. The family court seemed to agree; at the 1028 hearing to continue the child's temporary removal, Ariella's attorney successfully argued to have Ariella's children returned to her, however the proceedings against Ariella continued.

Ariella was accused of being disruptive and hostile, and of fighting with another resident in her group home. Again, she did not receive mental health care. Although the judge in Ariella's case asked repeatedly whether the caseworker and foster mother had discussed their concerns with Ariella, ACS did not require a meeting among the caseworker, Ariella, and the foster mother to discuss Ariella's behavior (e.g., the suicidal gesture, working late nights in a bar, and her problems with the other girls in the group home) or to ask Ariella to leave her job at the bar. Instead, ACS used the foster mothers' complaints about Ariella's work place, work attire, and late hours against her in the removal proceedings. Several times, the judge asked what services were being provided to Ariella, whether she had received a psychiatric evaluation, and what was being done to address her job situation. Yet, the agency charged with Ariella's care had repeatedly failed to provide her with child care, parenting classes, and other required services located near her home placement. Ariella's caseworker had also failed to discuss Ariella's job with her and her foster mother. Moreover, much to the judge's dismay, Ariella's court-mandated psychiatric evaluation remained postponed for months because of a lack of available appointments.

Every aspect of the system failed Ariella. She was not provided with the resources to take care of herself or her son even though she, her

lawyer, her child's lawyer, and the judge requested them. As time progressed and the trauma that Ariella had faced was repeatedly ignored, it seemed less likely that Ariella would be able to keep her son, and she began to abandon hope of ever doing so. She began to show up late to her court dates, communicated less with her attorney and therapist, and consequently, she seemed more detached from the process and less empowered. Ariella stopped smiling as much. She stopped trying to make her appointments. She did not seem to care what happened because she seemed to feel there was little hope within the system. This progression was all the more heartbreaking given the fact that at the outset there seemed to be so much hope for this family. Both children seemed to be victims of their treatment by the foster care and family court systems, because with enough care and support Ariella had the potential to be a good mother. Both Ariella and her child were denied the opportunity to be together in a stable and loving home when ACS failed to adequately provide for Ariella's general and individualized needs. As a result of this failure, Ariella's family was separated.

B. *Parens Patriae* and Tort Liability of Parents for Harms Caused by Their Children

At the heart of the argument for requiring ACS to implement heightened efforts to keep parenting wards and their children together before filing removal petitions is the fact that ACS stands in a *parens patriae* relationship to the respondent parent.³⁶ *Parens patriae* "is the principle that the State must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents."³⁷ As custodian and guardian of these minors, the state is responsible for their welfare and must ensure that decisions about them are made with their best interests in mind. The state is meant to stand in place of parents, who may not be present or may have been deemed unfit. It should therefore bear the burden that a parent in a similar situation would

³⁶ ACS has acknowledged that it has such a relationship to the children in its care. The New York State Constitution places an affirmative duty on the State to provide for the needy. N.Y. CONST., art. I, § 17; *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 21 (App. Div. 1986) ("The State then has a *parens patriae* burden of meeting that duty for children requiring foster care" (citing *O'Rourke v. Kirby*, 54 N.E.2d 85 (1981))) ("Through the Commissioner of the New York City Human Resources Administration (HRA) . . . the City is 'responsible for the welfare of children who are in need of public assistance and care, support and protection,' residing in New York City." (citing N.Y. SOC. SERV. LAW Art. 6, Tit. 2, §395)).

³⁷ *In re Lawrence*, 768 N.Y.S.2d 83, 88 (Fam. Ct. Kings County 2003).

bear. In New York, parents in foster care and their children consistently face obstacles unique to their foster care backgrounds and are left particularly vulnerable to separation.

In analogizing the *parens patriae* relationship between foster children and the state to the relationship between a child and his or her natural parents, it is arguable that in certain circumstances, ACS should be responsible for harms caused to the children of teens in foster care.³⁸ It is more sensible that ACS should be liable when harms to the parenting ward's child are caused by ACS's failures; at the very least, ACS's role in the parenting ward's "failure" should be closely examined before any liability can befall the parenting ward.

By failing to provide a suitable home environment to the minor parent, ACS contributes to the likelihood that such parents will be unable to appropriately care for their children.³⁹ For example, Ariella's lack of appropriate childcare and the fact that she was working at an inappropriate job were used against her without examination of ACS's contributory actions or unfulfilled duties toward Ariella. As a custodial parent has a responsibility to prevent reasonably foreseeable harm caused to a third party by his or her child,⁴⁰ ACS has the duty to provide an environment in which a parenting foster child can safely and effectively parent. In order to create such a situation, ACS should be held to an affirmative duty to provide parenting wards and their children with services and programs fostering the healthy development of parenting skills, if they need or request them. ACS "should make every effort to help teen parents in foster care become able parents."⁴¹

In some situations, caseworkers responsible for the care and welfare of the parenting wards fail in their duty in such a way as to contribute to the alleged negligent actions of the respondent parent towards her own child. The court in *Lawrence* suggests that in these cases a "neglect finding" and subsequent removal is a particularly harsh solution.⁴² Poor case

³⁸ *Lawrence*, 768 N.Y.S.2d at 90.

³⁹ CHILDREN RAISING CHILDREN, *supra* note 3, at 4.

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 316 (1965).

⁴¹ CHILDREN RAISING CHILDREN, *supra* note 3, at 4; *see also id.* at 3-4, 8-9.

⁴² *In re Lawrence*, 768 N.Y.S.2d at 90 (citing *In re Tricia Lashawnda M.*, 451 N.Y.S.2d 553 (Fam. Ct. Queens County 1982) (dismissing termination proceedings based on abandonment against minor parent in foster care when the agency had obstructed regular contact between mother and child)).

management, deplorable group home living conditions, and hostility from case workers have been well-documented by advocates for adolescent parents in foster care.⁴³ In one placement, Ariella was forced to share a room with her son and two other children. Further, she was forced to share a bed with her son because there was no crib for her child, resulting in the “incorrect sleeping position” of which the Public Advocate complained in her case.⁴⁴ She was also denied the funds to cover her own and her son’s expenses and was charged for babysitting by her foster mother, making it difficult for her to provide adequate supervision and necessities for her child. These difficult living conditions to which she was subjected, along with the fact that she was working in a bar to cover her expenses, were subsequently used against Ariella during removal proceedings. If Ariella’s inappropriate living conditions and circumstances were the result of a custodial parent’s conduct, they could be considered abuse or neglect toward *Ariella*. Yet when these conditions exist in foster homes where minor parents and their children are living, they do not trigger liability for ACS. Instead, they are cited *by* ACS during Article 10 proceedings, as examples of the parenting ward’s neglect.⁴⁵

The state foster care system already uses the *parens patriae* doctrine to strictly limit or restrict a parenting ward’s decisions (for example, when and where to go with her child, which medical provider to use, who can

⁴³ Dale Margolin, *Case vignettes from the JCCA, the Door, the Brooklyn Family Defense Project, the NYU Family Defense Clinic, and the Legal Aid Society’s Juvenile Rights Practice* (May 2008) (on file with author) (documenting ACS’s coercive tactics to convince mothers to relinquish custody, unsanitary and dangerous conditions in group homes, improper discharge planning, discouraging relationships with parents, inappropriate punitive measures, illegal separation, filing neglect petitions to control behavior, and unmet service needs leading to improper removals). See generally CARING FOR OUR CHILDREN *supra* note 2; CHILDREN RAISING CHILDREN, *supra* note 3. In one Brooklyn case, ACS alleged that a teen mother residing in a mother-child group home had neglected her children by bringing them to their father’s home. Upon investigating the group home where the mother lived with her children, however, her attorneys discovered mouse droppings in cribs, exposed electrical wires within reach of small children, and learned that abscesses were common among the young women and children in the group home due to the unsanitary conditions. This situation is not uncommon. E-mail from Zabrina Alegruie, Staff Attorney, the Brooklyn Family Defense Project, to author (Apr. 17, 2008, 09:45:20 EST) (on file with author).

⁴⁴ See CHILDREN RAISING CHILDREN, *supra* note 3, at 3.

⁴⁵ See CARING FOR OUR CHILDREN, *supra* note 2, at 8 (recounting the placement of one girl whose foster father was frequently drunk).

visit with the baby, and even what the baby should be fed).⁴⁶ Given this high level of control exerted by the state over the mother's choices, it defies logic that state agencies subsequently place all of the responsibility on the mother for "neglect" of the child, particularly in cases when the neglect arises largely out of the conditions or setting of the mother's foster care placement.

In tort law, custodial parents may be responsible for the actions of their children toward third parties, including siblings and grandchildren:

A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent a) knows or has reason to know that he has the ability to control his child, and b) knows or should know of the necessity and opportunity for exercising such control⁴⁷

Although much of the litigation surrounding this issue in New York involves the use of a dangerous instrument—typically, parents providing weapons or allowing access to them—these cases also concern a lack of supervision or control. For example, in one early New York case, a father was held liable for harm to a third party because the father knew that his child had an air rifle and therefore, the father's "negligence made it possible for the child to cause the injury complained of and probable that the child would do so."⁴⁸

Similarly, in *Costa v. Hicks*, the New York Appellate Division found that a father was liable for harms caused to a third party by his

⁴⁶ Telephone Interview with Zabrina Aleguire, Staff Attorney, Brooklyn Family Defense Project, in New York, N.Y. (Apr. 17, 2008). The Youth Advocacy Center also documented the experiences of mothers in foster care, including feeling that they were discouraged from working but were not provided with enough money to provide for basic needs, and that they were forced to follow rigid rules that they did not always feel were best for themselves or their children, including those about medical care or how to feed their children. For example, one young mother complained that she was not allowed to use regular baby bottles or beginning baby food despite her daughter's growing appetite. Other teens stated that they were not allowed to go to medical appointments with their children, not given access to prescribed medications for themselves or their children, and were not able to choose the doctors they felt comfortable with. CARING FOR OUR CHILDREN, *supra* note 2, at 17, 31-33.

⁴⁷ RESTATEMENT (SECOND) OF TORTS § 316 (1965).

⁴⁸ *Kuchlik v. Feuer*, 267 N.Y.S. 256, 257 (App. Div. 1933), *aff'd*, 264 N.Y. 542 (1934).

fourteen-year-old son's dangerous use of a motorcycle.⁴⁹ In that case, the court found that there was evidence that the minor had been careless in the past, the father had created restrictions to prevent dangerous use, the father was aware of the son's tendency to break the restrictions placed on his use of the motorcycle, and that the father would have been able to prevent future violations, but did not do so.⁵⁰ In finding liability, the court noted that "children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly."⁵¹ Cases of abuse or neglect by parenting wards will often involve "childish instincts and impulses" that might be prevented with a supportive home environment, or adequate supervision and education about the dangers and responsibilities of being a parent. As the party "chargeable with a duty of care and caution" toward parenting wards, ACS must recognize the potential for childish instincts and take precautions. ACS should be at least partially responsible for preventing foreseeable harm to the child of the parenting ward. This is especially true in cases when the harm results from the failure of ACS to support or provide for the parenting ward, such as where ACS fails to provide decent living conditions or basic necessities for the care of the parenting ward or her child. However, this theory of liability is also applicable when the parenting ward acts irresponsibly towards her child, if this behavior could have been corrected or prevented with supportive services. As a result of its responsibility for bringing removal proceedings, ACS will know of the potential harm and the history of alleged neglect or abuse in every potential removal case. In cases where prevention is at all possible, failing to prevent the harm to the third party should result in liability similar to that suggested for parents in the Second Restatement of Torts.

Several New York cases look to the parents for liability when one sibling abuses another, rather than to the minor abuser.⁵² In *Catherine G. v. County of Essex*, a mother sought to sue the school district for failing to

⁴⁹ *Costa v. Hicks*, 470 N.Y.S.2d 627 (App. Div. 1983).

⁵⁰ *Id.* at 633.

⁵¹ *Id.* at 632-33 (citing *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 277 (1894) (internal citation omitted)).

⁵² See *Catherine G. v. County of Essex*, 818 N.E.2d 1110, 1111 (N.Y., 2004) (stating that a fourteen-year old half brother is not a person legally responsible within the meaning of the Family Court Act, such that his half sister would qualify as an abused child for reporting purposes).

report sexual abuse by her son against his half sister, thereby failing to prevent further harm.⁵³ The Court noted that, because the brother was not “a person legally responsible” for his sister, the school was not required to report anything, but the mother had some responsibility for preventing the abuse. Specifically, the court stated that

[O]rdinarily, the State would not need to intervene when a minor is abusing a sibling. Parents would usually be the ones to take action. Petitioner never suggested that she was so bereft of control that she was unable to stop her 14-year-old boy from harming his siblings. . . . If there were evidence [that the mother was not taking responsible measures to protect her daughters], the officials involved would have been obligated to report her as a person who “allows to be committed an offense against [a] child.”⁵⁴

While a sibling is not legally responsible for her sister or brother in the same way that a parent is responsible for his or her child (regardless of the parent’s own minor status), the reasoning in such cases is similar in that in both cases the adult parents are responsible for controlling the behavior of their children, to prevent foreseeable harm to a third party, whether that third party is another child or a grandchild.

This Article does not argue that the state should be responsible for all harms committed by all foster children, or even that the state should have greater control over the actions and choices of parenting wards toward their children, as this would violate their constitutional rights as parents and perhaps further restrict their choices. However, because of the state’s assumption of parent-like duties and responsibilities with respect to foster children,⁵⁵ it is worth examining the analogous responsibilities of parents toward third parties that may be injured by the actions of children under their care and control. Given the statistics known about parenting wards and the high frequency of removal petitions filed against them, the foster agency and, through it, the state knows or should know of the need for assistance and supervision of parenting wards in order to prevent harm to their children. The state should have a heightened responsibility for harm prevention and for protection of a third party that is visible, immediately available to it, and under the control of one of its wards.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *supra* note 1 and accompanying text.

A similar argument for state liability where a ward is accused of doing harm was rejected in *Sebastian v. State*, a suit brought after a juvenile delinquent escaped from a Division for Youth Facility and harmed a third party.⁵⁶ However, the state's relationship with parenting wards is meaningfully distinguished from its relationship with juvenile delinquents. In *Sebastian*, the claimants argued that the State stood in loco parentis to the juvenile and thus had a duty to supervise and restrain those in its care in the same way a custodial parent must to prevent harm to third parties.⁵⁷ This argument was rejected because of the state's immunity when performing governmental functions.⁵⁸ The Court of Appeals found that "when a court orders [placement in a juvenile delinquency facility] it must consider not only the best interests of the youth, but also the need to protect the community as a whole." Thus, the placement of juveniles in facilities for delinquents is not only rehabilitative, but also meant to protect the community, a "quintessentially governmental activity."⁵⁹ However, the Court of Appeals did note that in cases alleging negligent care of a mental patient who harms a third party, the state *can* be liable under tort theory, and that this liability "flows from the State's negligence in providing services that traditionally have been supplied by the private section."⁶⁰

The community protection element is present when a minor is incarcerated is absent in removals on the basis of abuse and neglect, where the goal is protection of the minor's child. In fact, Section 1011 of the Family Court Act, the "Purpose section," specifically states:

This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional wellbeing. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.⁶¹

⁵⁶ *Sebastian v. State*, 93 N.Y.2d 790, 792 (1999).

⁵⁷ *Id.* at 792-93.

⁵⁸ *Id.* at 795-96.

⁵⁹ *Id.* at 795 (citing N.Y. FAM. CT. ACT §301.1, 352.2 (McKinney 2005)).

⁶⁰ *Id.* at 795 (citing *Schrempf v. State*, 66 N.Y.2d 289, 294 (1985)).

⁶¹ N.Y. FAM. CT. ACT § 1011 (McKinney 2005).

Even if these goals incidentally benefit the community at large, they pertain to the privacy of the home and the family, and they are not punitive or even rehabilitative goals. In its plain language, this Act seeks to protect individuals, not the community at large. In this individual-focused context, the state actually does stand in as a parent for children in the New York foster care system and should not be able to pass this responsibility onto those very children. Further, if the state's liability in cases involving mental patients flows from its takeover of a traditionally private enterprise⁶²—medical care—then, although *parens patriae* is a doctrine of traditional state involvement when a citizen is in need of care, there is an argument to be made that liability should also attach in cases involving foster care, as the care and upbringing of one's children is the most private of services.

Along with the *parens patriae* duty to the minor ward, the state also has a duty to provide preventative services to all families who may need them to avoid removal.⁶³ The Supreme Court held in *DeShaney v. Winnebago County Department of Social Services* that a state does not have an affirmative duty to protect a child from private violence.⁶⁴ However, in that same case, the Court noted that their jurisprudence has recognized “that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals.”⁶⁵ For example, the state must provide incarcerated prisoners with adequate medical care,⁶⁶ and it must provide services necessary to ensure the “reasonable safety” of involuntarily committed mental patients.⁶⁷ Here, the Court reasoned that these cases indicate that a state may not institutionalize someone or deprive him of his liberty, such that he is rendered totally dependent upon the state, and then deprive him of his basic human needs; “e.g. food, clothing, shelter, medical care, [and] reasonable safety.”⁶⁸ Even if not technically “institutionalized,” parenting wards have been taken from the people originally responsible for meeting their basic

⁶² *Sebastian*, 93 N.Y.2d at 795 (citing *Schrempf*, 66 N.Y.2d at 294).

⁶³ N.Y. FAM. CT. ACT § 1022(a)(iii) (McKinney 2005).

⁶⁴ 489 U.S. 189, 197-98 (1989).

⁶⁵ *Id.* at 198.

⁶⁶ *Id.* (citing *Robinson v. California*, 370 U.S. 660 (1962)).

⁶⁷ *Id.* (citing *Youngberg v. Romeo*, 457 U.S. 307 (1982)).

⁶⁸ *Id.* at 199-200.

human needs, rendering them wholly dependent upon the state for services, shelter, and care.⁶⁹ Because parenting wards *are* in the care and custody of the state, the state has an affirmative duty to protect them on top of its general duty not to impinge on their parental rights.⁷⁰ The state does not have this same duty to a child of a parenting ward because the child is not him or herself in foster care. However, because that child is dependent on the parenting ward, the affirmative duties of the state to the parenting ward, along with analogous parental duties under tort law, should be interpreted to establish a duty for the state to work with the parenting ward to prevent harm to the child.

There is an interplay between the state's duty to all parents who are potential removal respondents, the specific duties to the parenting ward, and the general duty of parents (extended by analogy to ACS as *parens patriae*) "to exercise reasonable care so as to control his minor child . . . as to prevent it from so conducting itself as to create an unreasonable risk of bodily harm to [others]."⁷¹ This interplay leads to the conclusion that the state should have an increased duty to provide preventative services to parenting wards—even before they are deemed "preventative services" and so associated with removal action—if the parenting ward desires or appears to need them. The state should also have an increased duty to ensure that the placements and care that it provides, as well as the restrictions it places on the parenting ward's parenting choices, do not cause harm to the parenting ward's child or cause the parenting ward to harm the child. The state should not punish minor parents who are stranded in situations in which the agency had the opportunity to prevent the circumstances that warranted a removal petition. Additionally, the state should be accountable

⁶⁹ The Supreme Court in *DeShaney* did recognize this possibility. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 201 n.9 ("Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect."). In New York, the state may be liable for due process violations when it fails to protect a foster child from harm by his or her foster parents. *Doe v. N.Y. City Dept. of Soc. Servs.*, 649 F.2d 134, 141-42 (2d Cir. 1981).

⁷⁰ *Sinhogar v. Parry*, 427 N.Y.S.2d 216, 223 (App. Div. 1980) (quoting the lower court's opinion: "once a State assumes the burden of *parens patriae* and places or commits a child to some custodial setting, [it] has an obligation to provide the necessary and proper care and treatment for the child," 412 N.Y.S.2d 966, 974 (Sup. 1979), but rejecting its finding; the lower court's articulation supports the idea of the State's duty to the parenting ward); see *infra* II.D.

⁷¹ RESTATEMENT (SECOND) OF TORTS § 316 (1965).

for neglect or harm that befalls the parenting ward's child because of an inappropriate or harmful foster care placement for the minor parent, restrictive agency measures limiting the minor's ability to make appropriate choices for her child, and ACS's failure to provide appropriate preventative services and support.

C. The Harms of Removal

Removal of a child in conjunction with a finding of neglect is a harsh punishment, not only because of the obvious separation of mother and child, but as the Court in *Lawrence* pointed out:

Even though ACS has authority to proceed against a minor parent in foster care pursuant to *Article 10*, it should recognize that a neglect finding has significant deleterious impact upon the parent. Among other things, it means that the report made to the State central registrar of child abuse and maltreatment upon which the case was based will remain on file until the 28th birthday of the youngest subject child and will not be subject to expungement. That imposes a stigma upon the respondent which could effectively prevent her from becoming a foster parent, adoptive parent, child care worker, or teacher. In view of the act that records of many serious crimes committed by a minor may be sealed or expunged this consequence of a neglect finding can only be considered exceptionally harsh, notwithstanding petitioner's characterization of *Article 10* proceedings as "remedial rather than punitive" Plainly, in its role of the minor's caretaker, even if it is lawful, ACS should not wish the result to obtain under such circumstances.⁷²

Further, under the Adoption and Safe Families Act and the New York Family Court Act, a parent who has had her rights terminated as to one child is not entitled to "reasonable efforts" by ACS to prevent removal of another child.⁷³ Instituting such proceedings against a minor parent

⁷² *In re Lawrence*, 768 N.Y.S.2d 83, 90 (Fam. Ct. Kings County 2003) (internal citations omitted).

⁷³ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116-17 (1997) (Reasonable efforts are not required where "the parental rights of the parent to a sibling have been terminated involuntarily"). Reasonable efforts are also not required where the parental rights of the parent to a sibling of the child at issue have been involuntarily terminated, unless the court determines that provision of reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child,

whose situation could be remedied with assistance, or whose “failings” as a parent are in large part caused by the ACS’s failings, is particularly harsh.

In considering whether or not removal petitions are appropriate, it is necessary to examine the potential effects of foster care on both the minor parent and her child. Removal and placement in foster care may have a worse impact on the child than neglect,⁷⁴ not to mention that removal leads to yet another generation in foster care, which the public must support financially. Just as neglect can contribute to cognitive, social, and emotional problems,⁷⁵ removal may also cause emotional problems by disrupting a child’s ability to bond with his or her caregiver.⁷⁶ Children in foster care may be mistreated,⁷⁷ and those who remain in the system and age out of foster care are more likely to be on welfare, to be homeless, and to go to prison.⁷⁸ In a study of the effects of foster care on children who had been in Casey Family Programs (a Seattle-based provider of foster care direct services and advocacy) nationwide,⁷⁹ researchers found that rates of homelessness for Casey foster care alumni were higher than for the regular population.⁸⁰ Casey alumni had low personal and household incomes, and a long-term follow up study found that twenty-six percent were on public assistance.⁸¹

and would likely result in the reunification of the parent and the child in the foreseeable future. N.Y. FAM. CT. ACT § 1039 (McKinney 2005).

⁷⁴ Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 780-83 (2001) (discussing and comparing the various harmful effects of poverty, neglect, and removal on children).

⁷⁵ *Id.* at 781.

⁷⁶ *Id.* at 782.

⁷⁷ *Protecting Children*, *supra* note 19, at 589-95 (using three case studies to examine the failure to provide for the needs of the children removed from their parents and noting the harm that befell the children while in foster care).

⁷⁸ *Id.*

⁷⁹ This study focused on long-term family foster care delivered by Casey Family Programs from 1966 to 1998. For more on Casey and its methods, see PETER J. PECORCA ET AL., *ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY* 18-20 (2003), [hereinafter *CASEY STUDY*] available at http://www.inpathways.net/casey_alumni_studies_report.pdf.

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 35.

A study by the Youth Advocacy Center focusing on foster children in New York found similar results documenting the ways in which the foster care system fails to prepare teens to be self-sufficient participants in society.⁸² In New York and other locations, foster care alumni were less likely to complete high school.⁸³ Only fifty percent of those who aged out of the foster care system had finished high school or earned a GED two to four years later, and only nine percent entered college.⁸⁴ Only fifty percent maintained consistent employment two to four years after leaving foster care, and one-third ended up on public assistance within fifteen months of aging out.⁸⁵ One quarter had experienced at least one night of homelessness, and several studies showed high levels of incarceration, lack of medical care and medical insurance, and extremely high occurrences of depression or psychological distress.⁸⁶ Constant movement from home to home and staff turnover made it hard for foster children to focus on life after foster care because their day-to-day situations were so unstable, leaving them feeling unsupported and disconnected.⁸⁷ Foster children were punished for breaking the rules of the group home, even if they did so for legitimate reasons, such as ensuring they were on time for work, and they were not supported in seeking education services independently of their caseworkers.⁸⁸ Importantly, the New York Youth Advocacy Center noted that although New York child welfare placement policy favors placement with family members when possible, in practice these relationships are neglected or even actively prevented.⁸⁹ It is imperative that the realities of

⁸² For more information on the Youth Advocacy Center and their methodology, see *THE FUTURE FOR TEENS IN FOSTER CARE*, *supra* note 24, at 2-6 (2001).

⁸³ *CASEY STUDY*, *supra* note 79, at 26 (citing a 65.2% high school graduation rate for children in care versus a 70.8% rate for the general population in New York in 1980).

⁸⁴ *Id.* at 17.

⁸⁵ *Id.*

⁸⁶ *Id.* at 17-18.

⁸⁷ *Id.* 21-22.

⁸⁸ *Id.* at 29. Ariella also experienced a great deal of resistance from her caseworker in her attempts to get enrolled in the GED program that she told her lawyer she was interested in. She was also repeatedly reported for leaving the house late at night, not spending enough time with her son, and for being tired all day, despite the fact that she was working or participating in various services during the hours she was not home.

⁸⁹ *THE FUTURE FOR TEENS IN FOSTER CARE*, *supra* note 24, at 30 (explaining the practice of ignoring family relationships and failing to search for adoptive placements once

foster care be taken into account when evaluating whether to bring a removal proceeding against a parenting ward and whether to grant such a petition. This is true in terms of evaluating the level of support provided to the parent and how this has affected her ability to parent, as well as how removal will affect the child of the parenting ward. Providing additional resources to help these families function safely and productively should be ACS's primary response for several reasons. As previously noted, ACS has a duty to the parenting ward as a foster child and a duty to her child as part of a family it is investigating. Furthermore, keeping a family together, if possible, is likely to have both emotional benefits for the family and the financial benefits of preventing a continuous cycle of foster care.⁹⁰

D. Adversarial Placement Environments: Heightened Scrutiny, Harsh Punishment

Teen mothers in foster care are likely under more stringent and more constant scrutiny than other parents because they live with mandated reporters⁹¹ and may live in group homes with very strict rules.⁹² Because foster parents and ACS contract agencies are mandated reporters, they have little flexibility in dealing with any perceived problematic parenting by the minors in their care.⁹³ As a result, parenting wards have little flexibility in how they choose to raise their children.⁹⁴ This is not to imply that there should be no rules or guidance on how foster children should parent. On the contrary, as children with troubled backgrounds, parenting wards likely need more guidance than other parents. They cannot be expected to be

the stated placement goal for the teen becomes independent living, and that instead, the agency may withhold contact with families as punishment and discourage the teen's relationships and associations outside the system).

⁹⁰ See THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 2 (the costs to the public of child welfare were 2.3 billion dollars in 2004).

⁹¹ N.Y. SOC. SERV. LAW § 413 (McKinney 2007). Foster parents and ACS contract agencies are mandated reporters meaning that they are required by law to report anything that seems like child abuse or neglect.

⁹² See CARING FOR OUR CHILDREN, *supra* note 2, at 16-19 for more on problems within maternity residences including denial of education, lack of funding for basic needs while discouraging work, and negative attitudes towards residents. The rigidity of rules is also discussed. *Id.* at 31-33.

⁹³ N.Y. SOC. SERV. LAW § 413 1(a) (McKinney 2007).

⁹⁴ CARING FOR OUR CHILDREN, *supra* note 2, at 31-33.

perfect or to act like adults.⁹⁵ They need support and education about how to be good parents, and they need the flexibility to make mistakes and learn from them. However, they are also entitled to raise their children as they see fit.⁹⁶

The scrutiny that parenting wards are subjected to is often exacerbated by adversarial relationships within their placements. Punishments for even minor transgressions of rules can be extreme,⁹⁷ bordering on illegal,⁹⁸ and may include the frequent use of police intervention to handle any incidents occurring at the foster home.⁹⁹ For example, the testimony of one of Ariella's foster mothers during Ariella's son's removal proceedings revealed a judgmental and accusatory relationship with Ariella.¹⁰⁰ Ariella had complained frequently that her foster mothers made her life particularly difficult, refusing to help her with basic tasks and needs, always ready to accuse her of bad behavior and report her to her caseworker. This sort of adversarial, rigid, rule-and punishment-oriented environment makes it difficult for a parenting ward to form a trusting relationship with her foster parent. It also puts teen mothers living in these foster care placements at a high risk of being reported for

⁹⁵ *In re Lawrence*, 768 N.Y.S.2d 83, 85 (Fam. Ct. Kings County 2003).

⁹⁶ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

⁹⁷ See CARING FOR OUR CHILDREN, *supra* note 2, at 31-32 (documenting complaints by mothers in foster care about the rigidity of the rules governing their placements and the harshness of punishments for violations).

⁹⁸ *Id.* at 22-24 (2001) (discussing the frequent focus in foster care on maintaining control including rules violating state law and policy such as withholding family visits because of getting easily angered, having foster children arrested for being thirty minutes late for curfew, and running the home as if it were a prison).

⁹⁹ THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 22 ("ACS teens are more likely to be arrested in their homes as a result of incidents in placement . . . [O]ver an 11 month period, one facility had called the police almost 40 times.").

¹⁰⁰ I attended a hearing in Family Court in which Ariella's previous foster mother was required to testify about Ariella's job at a bar. The foster mother did not look at Ariella and stated that Ariella had strange men calling, coming to the house, and picking her up in the middle of the night. She also insinuated that Ariella was involved in prostitution. Ariella vehemently denied all of these charges. She blamed Ariella repeatedly for working at a bar but could not explain why she had never made attempts to go to the bar and stop Ariella, or arrange a meeting with Ariella, the caseworker, and herself in order to address and remedy the situation. The foster mother had refused to babysit for Ariella's child, but criticized Ariella for sleeping so much and leaving the baby alone.

even minor incidents. With caseworkers, staff members, and foster parents always on hand and willing to get authorities involved in even slight behavioral issues, minor parents in foster care are more likely to be over-scrutinized and less likely to have a chance to learn from their mistakes. Instead, they are often precipitously separated from their children illegally or through removal proceedings.¹⁰¹

E. Failure to Provide for Basic Needs of Parenting Foster Children

On top of the initial harms of removal, there is also a systemic failure to meet the basic needs of foster children and in particular parenting foster children. In 2005, the New York Public Advocate's Office documented the failings of the foster care system in serving minor parents. The report documented a lack of support for parenting foster children beginning in pregnancy and continuing after birth.¹⁰² Problems included waiting lists for services for pregnant women in foster care¹⁰³ and lack of funding for maternity residence beds, meaning there are more pregnant minors in foster care than there are spaces for them in maternity residences.¹⁰⁴ At the time of the Public Advocate's survey, three quarters of mothers in foster care and their children were not in mother/baby foster care. Further, only three out of thirty organizations that responded had designated funding for mother/baby foster care, with the subsequent result that only one-third of girls with children could be accommodated with appropriate placement. Perhaps more importantly, over fifty percent of the responding agencies did not provide training for foster parents to help them prepare parenting foster children to be able parents.¹⁰⁵ Further, according to a study of sixty pregnant or parenting teens in foster care in New York City, no special training beyond a high school diploma was required for employees at maternity residences who care for and supervise residents.¹⁰⁶ However, the Public Advocate's Report noted the necessity of increased

¹⁰¹ See *infra* note 112 and accompanying text; see *supra* note 4 and accompanying text.

¹⁰² See generally CHILDREN RAISING CHILDREN, *supra* note 3 (documenting the problems found with New York's provision of services and inattention to parenting wards).

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.*

¹⁰⁶ CARING FOR OUR CHILDREN, *supra* note 2, at 18.

training.¹⁰⁷ Foster children interviewed in these residences all complained of negative treatment by the childcare staff and of punitive attitudes toward them as pregnant teens.¹⁰⁸

Ariella's case illustrates many of the trends concerning lack of services that both I and New York service providers observed. Services like parenting classes, counseling, and educational programs are not adequately provided or scheduled, or, alternatively, services are located extremely far from the minor mother's foster home, making it difficult or impossible for her to make use of the services without support and transportation.¹⁰⁹ Teen mothers may be moved from foster home to foster home because of placement difficulties, making necessary services and any kind of stability even more problematic and difficult to obtain.¹¹⁰ Parenting wards lacked stable adult figures to look up to and learn parenting skills from. They had trouble getting to school and work because they did not have adequate childcare for their children.¹¹¹

¹⁰⁷ CHILDREN RAISING CHILDREN, *supra* note 3, at 8.

¹⁰⁸ *Id.*

¹⁰⁹ See CARING FOR OUR CHILDREN, *supra* note 2, at 12 (noting that young women are also often placed far from friends or family, and that one young woman had to commute from the Bronx to Staten Island to attend a nursing program). Ariella's services were in Brooklyn, but her foster home was in Queens, about two hours away by public transportation. The author also received information on two similar cases:

Crystal was placed in [Long Island], but services are in Manhattan. She is not in educational or mental health programs, but has 2 children. She has been in 15 different foster homes and although she is sent instructions on how to get foster care vouchers, she is not sent car fare to access them. . . . Layla, a 17 year old mother, ACS filed a neglect petition and the family court remanded her child. Layla left the foster care system when she was not placed with her child. She is currently pregnant. ACS would like her to engage in mental health services, parenting classes, as well as batterer's intervention. She lives in the Bronx but a referral was made for services in Jamaica, Queens. Layla was able to articulate the following at a court conference: "I'm 17 years old and I'm nine months pregnant. How can I be running around from the Bronx to Jamaica, when the baby is going to come at any day now?"

E-mail from Jillian Cohen, Soc. Work Supervisor, Ctr. for Fam. Representation, Inc. in New York, N.Y. to author (Jan. 3, 2008, 09:37 EST) (on file with author).

¹¹⁰ CARING FOR OUR CHILDREN, *supra* note 2, at 30.

¹¹¹ *Id.* at 8. One parenting ward continuously complained to her lawyer about the difficulties of getting to work, school, and services when the foster mother in her home

In addition, ACS has a history of threatening minor parents and separating them from their children either voluntarily or forcibly.¹¹² Many mothers in foster care are separated, at least temporarily, from their children at birth because of the agency's failure to plan for placement in advance of childbirth and because of its failure to provide an appropriate home where both can live together.¹¹³ There are few beds available in mother-child group homes and few placements for pregnant or parenting wards.¹¹⁴ Misconduct and lack of planning or resources sets the stage for removal. Whether because of mistrust of their abilities as parents or because of their lack of resources, parenting wards are treated as if they have less parental rights than other parents, while the difficulties and lack of flexibility inherent to being in foster care may be ignored. Aside from being contrary to federal and state law and the policy directive on the subject,¹¹⁵ this is problematic for more obvious reasons. Separation is emotionally difficult for the mothers,¹¹⁶ it may prevent bonding with the child, and it violates the rights of both mother and children to be together.¹¹⁷

The argument that infants are better off separated from teenage mothers in foster care ignores the fact that the baby is subsequently subjected to the same difficulties its mother faced. Except in cases of imminent risk of serious harm to the life or health of the child, removal without a true attempt to rehabilitate the minor parent or address any of the

refused to babysit. She frequently had difficulty finding childcare and was not always assisted by the agency charged with her care when she complained.

¹¹² *Id.* at 25-59 (documenting widespread illegal separation of foster youth from their new children at birth because of lack of planning and placement availability); *see supra* notes 11-13 and accompanying text.

¹¹³ *See generally* CARING FOR OUR CHILDREN, *supra* note 2 (providing interviews and analysis of the placement difficulties facing pregnant and parenting teen girls in foster care).

¹¹⁴ *See generally* CHILDREN RAISING CHILDREN, *supra* note 3, at 12-13.

¹¹⁵ Admin. Directive, 94 ADM-12, N.Y. Dep't of Soc. Servs., *supra* note 19.

¹¹⁶ CARING FOR OUR CHILDREN, *supra* note 2, at 25-27.

¹¹⁷ *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("Here we are concerned with the most essential and basic aspect of familial privacy the right of the family to remain together without the coercive interference of the awesome power of the State. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent . . . and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent." (citing *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977))).

issues causing concern perpetuates a cycle of removal and does harm to all of the parties involved. Though in some cases removal may be the only option for protecting the baby, given the lower baseline of support and success for foster children, the state should do everything possible to help the parent face these obstacles and prevent another generation from experiencing them, too.

The law recognizes that children are different from adults;¹¹⁸ they are tried in juvenile court and may face less severe penalties for their crimes.¹¹⁹ The law accepts that children have different capacities for understanding and action, evidenced, for example, by minimum age requirements for drinking, driving, and buying cigarettes,¹²⁰ and by the evaluations of reasonableness in tort cases.¹²¹ Though this Article does not argue that minor parents should have greater rights as parents than adults,¹²² children, and particularly foster children, are in need of greater care and support¹²³ if they are to successfully raise their own children. The law

¹¹⁸ For further discussion of the legal status of adolescents generally, see Elizabeth Scott, *The Legal Status of Adolescents*, 29 HOFSTRA L. REV. 547 (2000).

¹¹⁹ See, e.g., N.Y. FAM. CT. ACT § 302.1 (McKinney 1983) (establishing that all juvenile delinquency cases are heard in Family Court); N.Y. FAM. CT. ACT § 301.2 (McKinney 2007) (“‘Juvenile delinquent’ means a person over seven and less than sixteen years of age, who, having committed an act that would constitute a crime if committed by an adult, (a) is not criminally responsible for such conduct by reason of infancy, or (b) is the defendant in an action ordered removed from a criminal court to the family court pursuant to article seven hundred twenty-five of the criminal procedure law.”).

¹²⁰ Brief of Juvenile Law Center, et al. as Amici Curae Supporting Respondent, Appendix B, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-0633), available at <http://www.jlc.org/File/briefs/simmons-brief.pdf>.

¹²¹ “The standard of conduct to which a child must conform to avoid being negligent is that of a reasonable child of like age, intelligence, and experience under like circumstances.” *Banks by Banks v. United States*, 969 F. Supp. 884, 893 (S.D.N.Y. 1997) (“It has long been settled in New York that ‘an infant is expected to exercise a level of care commensurate with his age, experience, intelligence and ability.’” (quoting *Republic Ins. Co. v. Michael*, 885 F. Supp. 426, 433 (E.D.N.Y. 1995))).

¹²² For exploration of an argument that minor parents should perhaps not be treated the same as adult parents see generally Emily Buss, *Parental Rights of Minors*, 48 BUFF. L. REV. 785 (2000).

¹²³ In allowing limitations on minors’ abortion rights that are not placed on adults, the Supreme Court has recognized that minors are unable “to make critical decisions in an informed, mature manner, that they are particularly vulnerable, and that their parents play an important role in raising them.” *Bellotti v. Baird*, 443 U.S. 622, 634 (1979). This Article does not suggest that limiting the parental rights of minors would be a desirable means of preventing abuse or neglect against minors’ children. However, the recognition and emphasis

regarding negligence recognizes that children are not similar to adults in all respects, so in determining whether they have been negligent, their age must be taken into account.¹²⁴ As the Court in *Lawrence* points out, “[minor parents] cannot be expected to provide the same level of care to a child, in every respect, as an adult. He or she cannot be penalized for not acting like an adult. . . . It is questionable whether a just society should require a minor parent to emancipate him or herself as a condition for forestalling the termination of such minor’s parental rights.”¹²⁵ Yet, that is often what happens when removal proceedings are initiated against foster children without first ensuring the adequacy of their placements.

Parenting wards are held responsible for the failings of the system; they are expected to be exemplary parents without necessarily having had an example of good parenting or the resources to be good parents themselves. In addition, parenting wards are often victims of abuse or neglect. Given the lack of resources provided to them and their own experiences of family, it is not shocking that parents who were foster children under the ACS’s care are more likely to fatally abuse or neglect their children than parents who were never in agency care.¹²⁶ However, insufficient services, increased scrutiny, prejudices, and the illegal initial separation of parents from children indicate and contribute to the large part agency failures play in foster children’s supposed lack of capacity to parent. If agencies focused on turning foster youth into the type of parents that New York deems fit, there would be fewer incidents of abuse and neglect among that population and subsequently less family separation.¹²⁷ Instead,

on children being more vulnerable and needing adult participation and support in their upbringing is a key element in the argument that ACS needs to take on a greater role in supporting minor parents in the particularly difficult endeavor of childrearing.

¹²⁴ Similar to tort cases, in order to find negligence and trigger Article 10 proceedings, the court must objectively evaluate whether “a reasonable and prudent parent would have so acted (or failed to act) under circumstances then existing.” *In re Lawrence*, 768 N.Y.S.2d 83, 92 (Fam. Ct. Kings County 2003) (citing *In re Katherine C.*, 471 N.Y.S.2d 216, 218 (Fam. Ct. Richmond County 1984)); *In re Melissa U.*, 538 N.Y.S.2d 958 (App. Div. 1989); Douglas Besharov, *Practice Commentaries*, N.Y. FAMILY CT. ACT § 1012, at 317-18 (McKinney 2008).

¹²⁵ *Lawrence*, 768 N.Y.S.2d at 92-93 (citing *In re Barnett*, 450 A.2d 1356, 1362 (Pa. Super. Ct. 1982)).

¹²⁶ CHILDREN RAISING CHILDREN, *supra* note 3, at 4.

¹²⁷ See generally CARING FOR OUR CHILDREN, *supra* note 2, at 5. Although the Public Advocate illustrates many of the dangers associated with parenting wards and lays out the negative statistics cited above, the blame is not placed on the child. Rather the Public

parenting wards are left without the resources to change their circumstances. This results in insufficient care for them and obstacles to caring for their children, creating a continuing cycle of foster children and costing the state a large amount in continuing care.¹²⁸

As minors and, in particular, as foster children, parenting wards are in greater need of services and will need different assistance than non-foster children or non-parents in order to have a chance to be effective parents themselves. "The hardships faced by foster children—often including abuse or neglect in addition to removal from the care of their parents—make the task of raising children of their own as young parents all the more challenging."¹²⁹ Though in theory, New York's system for dealing with pregnant and parenting juveniles in foster care echoes the federal intent to keep these mothers and children together where possible,¹³⁰ the implementation and interpretation of these laws are ineffective and problematic. New York's child welfare system has problems meeting the needs of the vast numbers of children and families in need,¹³¹ and as a result, mothers in foster care often have not received adequate supervision or services.¹³² Even the most basic needs of families in foster care are often not met, leaving mothers in foster care without many of the resources they need to be good parents themselves.

Advocate acknowledges that the responsibility lies with the City to begin to ameliorate the foster care system and to relieve some of the difficulties facing Parenting Wards due to their circumstances. *Id.*

¹²⁸ See THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 2 (stating that the costs to the public of child welfare were 2.3 billion dollars in 2004).

¹²⁹ CHILDREN RAISING CHILDREN, *supra* note 3, at 4.

¹³⁰ *Legal Status*, *supra* note 1, at 15.

¹³¹ See MADELYN FREUNDLICH, TIME RUNNING OUT: TEENS IN FOSTER CARE 5 (Children's Rights Inc., Juvenile Rights Division of the Legal Aid Society, Lawyers for Children eds. 2003) (documenting and analyzing the experiences of foster children, foster care providers, and parents in New York City with the foster care system and permanency).

¹³² CARING FOR OUR CHILDREN, *supra* note 2, at 16-19 (discussing denial of appropriate education, lack of adequate training for staff, and failure to provide for the needs of clients with special needs in maternity residences); see *supra* notes 110-118 and accompanying text.

F. Race, Class, Age, and Visions of Motherhood

Another serious problem in the current system is that race and class bear a troubling correlation to the determinations of which mothers are subjected to removal proceedings.¹³³ Women who do not conform to the typical vision of motherhood are punished, stigmatized, and assumed to be bad mothers before they have had a chance to prove themselves.¹³⁴ Teen mothers in foster care face the triple threat of being minors, foster children, and often single.¹³⁵ Further, in New York, many foster children are African American or Latino and are from poor backgrounds, adding two other grounds for potential prejudice and suspicion.¹³⁶ This set of circumstances and stereotypes is compounded by the pervasive public questioning and intervention into the lives of mothers who are poor, minorities, or single.¹³⁷

¹³³ Telephone Interview with Zabrina Aleguire, *supra* note 46; Interview with Gloria Bruzzano, Former Director, The Child Protection Program at Sanctuary for Families, in New York, N.Y. (Nov. 7, 2007).

¹³⁴ See generally Dorothy Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1 (2003) [hereinafter *Racism and Patriarchy*] (exploring common stereotypes of black women as inherently unfit mothers and examining the social, economic, and legal forces and reactions toward “women who fail to meet the ideal of motherhood”). Unwed mothers, unfit mothers, and women who do not become mothers are stigmatized for violating the dominant norm and considered deviant or criminals. Martha Fineman, *Images of Motherhood in Poverty Discourses*, 1991 DUKE L.J. 274 (1991) (critiquing social and legal demands and expectations of a traditional family and the ramifications when women violate these norms: “if they are not single as a result of death (or perhaps divorce), poor, single mothers are deemed ‘bad’ mothers.”); *Protecting Children*, *supra* note 19 (discussing the ways in which child welfare proceedings focus too much on traditionally skewed visions of good and bad parenting and not enough on the needs of the children at issue).

¹³⁵ See, e.g., Buss, *supra* note 122, at 788-92 (2000) (discussing the societal perception that teenage pregnancy is a negative occurrence for the teens, society, and their families).

¹³⁶ THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 9.

¹³⁷ *Racism and Patriarchy*, *supra* note 134, at 13-14; see also Dorothy Roberts, *Is there Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125-31 (1999) [hereinafter *Critique of Federal Family Preservation Policy*] (critiquing the Adoption and Safe Families Act because of its focus on adoption rather than on the growing number of children removed from their homes to begin with, and exploring the race- and class-based disparities inherent in this system); Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 685-87, 758-59, 765-87 (2001) (examining parental rights, privacy, and the ways in which poor, minority, and traditionally vulnerable families are undermined and continually under

A vision of African American women as incapable of controlling their fertility and as incompetent mothers is manifest in government policies such as welfare laws punishing childbearing while failing to address lack of affordable birth control, and the use of biased standards by social workers.¹³⁸ Black childrearing patterns are often mistaken for neglect because they do not conform to traditional white childcare norms.¹³⁹ Parenting that falls outside of these norms is considered suspect and may result in a parent's inability to survive scrutiny.¹⁴⁰ Like minorities, poor women are often blamed for their circumstances, and in particular blamed for perpetuating the cycle of poverty by reproducing without the resources to adequately provide for their children without state help.¹⁴¹

The idea that poor or minority parents are presumably unfit is widespread and influences decisions regarding removal.¹⁴² A review of the Minnesota foster care system and the connection between poverty and removal cited various studies finding that "family income, not severity of maltreatment, was the most predictive factor of child placement in foster care."¹⁴³ It also found that although the number of children placed in foster care because of maltreatment rose between 1977 and 1997, the number of services provided to these children had decreased during that time period.¹⁴⁴ These figures indicate the predicament that teen mothers in foster care often face: the presumption that their families are intrinsically unfit results in and

suspicion while the dominant vision of family and motherhood—married, white, heterosexual, middle class—is privileged).

¹³⁸ *Racism and Patriarchy*, *supra* note 134, at 13-14.

¹³⁹ *Id.* at 13.

¹⁴⁰ Appell, *supra* note 137, at 780-81.

¹⁴¹ Fineman, *supra* note 134, at 282-83.

¹⁴² See *Protecting Children*, *supra* note 19, at 584-87, 589-96 (detailing the ways in which class, race, and vulnerability of the mother play a role in child welfare removals, including a case study of a minor parent in foster care whose child was removed).

¹⁴³ Charlow, *supra* note 74, at 784.

¹⁴⁴ *Id.* at 785 ("Overall children with non-physical injuries were more likely to be removed from their homes. Foster care placement as treatment for child maltreatment has risen dramatically from thirty percent of children in the system in 1977 to fifty percent in 1997. However, the number of children receiving services has dropped substantially since 1977, when 1.8 million children received services, to approximately 1 million children in 1997.").

coincides with agency failure to provide services,¹⁴⁵ further exacerbating the existing vulnerability of these families. The mutual mistrust between agencies and teen mothers is especially dangerous when the mother is dependent upon the agency that expects and anticipates her failure. The implication is a perpetual cycle of removal that most severely affects and discriminates against poor single women and minorities.

The age of parents in foster care is another factor that often works against them. As teenagers, the law gives them some flexibility to make mistakes, but as parents they are responsible for the welfare and wellbeing of another person.¹⁴⁶ Institutions that deal with teen parents typically operate under the assumption that teen parents have made a "mistake;" treating them as inherently irresponsible. There are strong cultural and institutional forces meant to discourage minors from having children before they reach adulthood, which subject them to ongoing punishment or scorn if they do.¹⁴⁷ People working with parents in foster care are not exempt from these assumptions. They often express a negative attitude towards their clients, reinforcing the idea that teen parents are inherently unfit, thereby discouraging these mothers.¹⁴⁸ Foster children often cannot depend on child welfare workers to be invested in their futures and dedicated to helping them to mature into capable adults.¹⁴⁹ When the adults responsible for aiding them believe "that teens are interested in nothing but sex and drugs," teens and their advocates become convinced that "fear and dislike of teenagers, particularly minority teens, pervade the system."¹⁵⁰ This is exacerbated by "an accompanying lack of understanding of the developmental stages and particular needs of adolescence,"¹⁵¹ which is the type of understanding and relationship-building that would be helpful for teens in need of guidance and role models. This age-appropriate consideration is also necessary when evaluating whether or not to remove a parenting ward's child.

¹⁴⁵ *Protecting Children*, *supra* note 19 at 596-99.

¹⁴⁶ See generally Buss, *supra* note 122 (arguing that the parental rights given to minors do not coincide with the legal and societal limitations placed on them in other areas).

¹⁴⁷ *Id.* at 787-92.

¹⁴⁸ CARING FOR OUR CHILDREN, *supra* note 2, at 18.

¹⁴⁹ THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 15-16, 20-22.

¹⁵⁰ *Id.* at 9.

¹⁵¹ Charlow, *supra* note 74, at 785.

Parenting wards often lack family support and the resources to provide for a child. As children, parenting wards are in need of care and adult supervision. Further, the events leading to a parenting ward's placement in foster care herself, as well as her removal from her family, will likely have caused emotional or physical trauma. She will have greater need for services and intervention than parents who are not, and have never been, foster children.¹⁵² At the same time, she is as accountable as an adult parent is for proper care and supervision of her children.¹⁵³

This incongruity presents a variety of problems in evaluating the ability of foster children to be parents. It requires balancing the level of responsibility and blame that can fairly be placed on a child who may lack adult support, guidance, and parenting skills, with the necessity for protecting the parenting ward's children who may be at risk, as well as the independence and parental rights of the parenting ward. This balancing must also take into account the state's responsibilities and actual involvement in caring for the parenting ward. Further, it requires a serious look at the current child welfare system, its effects on children, and how best to assist and protect multiple generations of children. If, as statistics suggest, foster children are substantially more likely to become teen parents than their peers, and are also subsequently more likely to have their children removed, the implications go beyond the needs and welfare of the children immediately at issue in each proceeding. They indicate a cycle of removal that will affect generations and cost the state an enormous amount.¹⁵⁴

¹⁵² See, e.g., CASEY STUDY, *supra* note 79 (discussing data on Casey Family Programs foster care alumni across the country including types of experiences leading to removal, medical and psychological conditions while in foster care, and services received in care); The Foster Care Alumni Studies, *Assessing the Effects of Foster Care: Mental Health Outcomes from the Casey National Alumni Study 2*, available at http://www.casey.org/NR/rdonlyres/CEFB1B6-7ED1-440D-925A-E5BAF602294D/303/casey_natl_alumni_study_mental_health.pdf (last visited Mar. 2, 2008) (noting that, as compared to the general public, mental health outcomes for foster care alumni are disproportionately poor); Charlow, *supra* note 74, at 780-83, (examining potential harms of removal as compared with the harms of neglect); see generally FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24 (detailing various obstacles facing foster children during and after care).

¹⁵³ *Legal Status*, *supra* note 1, at 2-3.

¹⁵⁴ See THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 2 (the costs to the public of child welfare were 2.3 billion dollars in 2004); see generally THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24 (summarizing and analyzing the obstacles foster children face in terms of education, finances, crime rates, homelessness, and health, and the difficulties they have once they leave foster care).

II. THE STATE OF THE LAW: ARTICLE 10 AND IV-E OF THE SOCIAL SECURITY ACT

A. The Constitutional Right to Parent

One of the oldest and most deeply entrenched fundamental rights in America is a parent's right to raise his or her children as he or she sees fit.¹⁵⁵ The Supreme Court has held that "the right to conceive and to raise one's children [are] essential basic civil rights of man and rights far more precious than property rights."¹⁵⁶ In *Troxel v. Granville*, a case involving a trial court overriding a mother's decision about child visitation by a grandparent, the Supreme Court reaffirmed this right under the Due Process Clause of the Fourteenth Amendment.¹⁵⁷ Although the case was decided by a plurality, a majority of the Justices agreed on "the right of the custodial parent . . . to determine, without undue interference by the state, how best to raise, nurture, and educate the child."¹⁵⁸ The Due Process Clause does not allow the state to abridge or deprive someone of a fundamental right simply because it believes a better decision could be made.¹⁵⁹ Rather, as Justice Thomas points out in his concurrence, a compelling government interest is required.¹⁶⁰ While a parent's ability to retain control over the upbringing of her children is contingent upon the parent adequately caring for the child,¹⁶¹ the state cannot interfere with the privacy of the family by questioning the parent's ability to make the best decisions for the child or by overriding child rearing choices,¹⁶² unless a court has found that the parent has violated this duty.

¹⁵⁵ See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (all emphasizing the historically recognized parental interest in determining and controlling the upbringing of one's children).

¹⁵⁶ *Stanley*, 405 U.S. at 651.

¹⁵⁷ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁵⁸ *Id.* at 95.

¹⁵⁹ *Id.* at 72-73.

¹⁶⁰ *Id.* at 80 (Thomas, J., concurring).

¹⁶¹ *Id.* at 68 (2000) (citing *Reno v. Flores*, 507 U.S. 292, 304 (1993)).

¹⁶² *Id.* at 68-69.

The Court has recognized “the interest of a parent in the companionship, custody, and management of his or her children.”¹⁶³ This right includes the ability to control the education¹⁶⁴ and upbringing¹⁶⁵ of one’s child, as well as a parent’s right of the companionship of her child.¹⁶⁶ Thus when a child is removed from the care of his or her parent, a parent’s substantive due process rights are implicated. In *Duchesne v. Sugarman*, the Second Circuit recognized that the right of a family to be together without coercive state interference encompasses the reciprocal rights of both parents and children.¹⁶⁷ *Duchesne* involved the removal and assumption of custody of two children by the Bureau of Child Welfare, without their mother’s consent and without any proceedings or judicial authorization, when the mother became an inpatient at a mental hospital.¹⁶⁸ The court in *Duchesne* found that the continued lack of notice and opportunity to be heard was an unconstitutional violation of the mother’s right to parent, focusing sharply on the reciprocal rights of parents and children, including the rights of children to maintain the “emotional attachments that derive from the intimacy of daily association with the parent.”¹⁶⁹ Further, the court recognized that “breaches in the familial bond will be detrimental to a child’s well being [C]ourt or agency intervention without regard to or

¹⁶³ *Id.* at 66 (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

¹⁶⁴ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto [The teacher’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.”).

¹⁶⁵ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (“We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”).

¹⁶⁶ *Stanley*, 405 U.S. at 651 (Frankfurter, J., concurring) (“The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children ‘come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.’” (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949))).

¹⁶⁷ *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

¹⁶⁸ *Id.* at 822-23.

¹⁶⁹ *Id.* at 825.

over the objection of parents can only serve to undermine the familial bond which is vital to a child's sense of becoming an adult in his own right,"¹⁷⁰ a finding that again emphasized the importance of keeping a family together whenever possible.

Violation of these constitutional rights can give rise to a cause of action for wrongful and unlawful separation under Section 1983 of the Civil Rights Act if "the wrongdoer is clothed with authority of State law."¹⁷¹ *Duchesne* included such a right of action pertaining to a removal.¹⁷²

B. Removal Proceedings in New York: Article 10 of the Family Court Act, Neglect Findings and Petitions for Removal

Under the laws of New York, a child protection agency may file a petition to have a child removed from his parents on the grounds of abuse and neglect.¹⁷³ New York courts have held that ACS is free to file against parents in foster care if ACS is concerned that the parent is abusing or neglecting his or her child.¹⁷⁴ In most cases,¹⁷⁵ the agency is required to have made "reasonable efforts . . . to prevent or eliminate the need for

¹⁷⁰ *Id.* at 825 n.19 (quoting Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649-50 (1977)).

¹⁷¹ *Id.* at 829.

¹⁷² *Id.*

¹⁷³ N.Y. FAM. CT. ACT § 1022(a) (McKinney 2005); *see also* *Suter v. Artist M.*, 503 U.S. 347, 359-60 (1992); discussion of *Suter supra* note 21 and accompanying text.

¹⁷⁴ *In re Tyriek W.*, 628 N.Y.S.2d 615 (1995).

¹⁷⁵ N.Y. FAM. CT. ACT § 1039(b) (McKinney 2005). Reasonable efforts are not required where the court determines that the parent of such child has subjected the child to aggravated circumstances (i.e., where the child is severely or repeatedly abused as defined in Section 384(b)(8) of the Social Services Law), or where the parent has been convicted of the following: murder in the first or second degree, manslaughter in the first or second degree while acting voluntarily, an attempt to commit any of the foregoing, or criminal solicitation, conspiracy, or facilitating of any of the foregoing crimes, assault in the first or second degree or aggravated assault upon a person of less than eleven years old, or the parent was convicted in any jurisdiction of an offense which includes all of the essential elements of any of the foregoing crimes, where the victim or intended victim was the child at issue or another child of the parent. *Id.* Reasonable efforts are also not required where the parental rights of the parent to a sibling of the child at issue have been involuntarily terminated, unless the court determines that provision of reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future. *Id.*

removal of the child from the home.”¹⁷⁶ The New York Court of Appeals addressed reasonable efforts and removal proceedings in *Nicholson v. Scoppetta* and emphasized that removal is not to be taken lightly.¹⁷⁷ Acknowledging the harms associated with removal, the Court of Appeals recognized that risk of serious harm is not, alone, enough to justify removal and identified other factors that a court must consider in determining whether removal is appropriate. It stated:

The court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child’s best interests. Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim.¹⁷⁸

The Court of Appeals clearly acknowledged the risks inherent in removal and the importance of seeking to mitigate the risk of immediate harm in the family situation. However, New York courts have not yet found that the duties of ACS and its contract agencies change when the respondent is a foster child.¹⁷⁹ In other words, the same rules, procedures, and requirements that apply to all adult parents apply to parenting wards in New York State. Courts should recognize the heightened importance of the search for potential mitigating options in removal cases concerning parenting wards because of the dependence of the parenting ward upon ACS for her baseline of resources as a parent, as well her status as a child herself and ACS’s dual duty to the family.¹⁸⁰

¹⁷⁶ N.Y. FAM. CT. ACT § 1022(a)(iii) (McKinney 2005).

¹⁷⁷ *Nicholson v. Scoppetta*, 820 N.E.2d 840, 851-52 (N.Y. 2004).

¹⁷⁸ *Id.* at 852.

¹⁷⁹ *In re Ta Fon Edwards J.B.*, 774 N.Y.S.2d 821, 821 (App. Div. 2004) (“[N]othing in the Family Court Act or Social Services Law lessens, increases, or otherwise changes the responsibilities of either ACS or its contract agencies when faced with caring for the offspring of a foster child.”).

¹⁸⁰ See *infra* notes 199-207 and accompanying text.

In *In re Lawrence*, the court refused to find that there was an inherent conflict of interest necessitating a special prosecutor when ACS sought a neglect finding against a parent in its care.¹⁸¹ However, the court in *Lawrence* did point out that the potential negative effects of a neglect finding against such a parent can be “excessively harsh . . . particularly . . . if a lack of supervision of the respondent by her caretaker contributed to the commission of the neglectful act.”¹⁸² The court also stated that the parent’s age must be taken into account in determining whether there has actually been neglect, because a minor cannot be expected to care for a child as well as an adult might, and a minor also “cannot be penalized for not acting like an adult.”¹⁸³ The *Lawrence* court did accept that these cases were not like other abuse and neglect cases in that the agency responsible for the welfare, supervision, education, and protection of the respondent parent was the same party responsible for instituting the proceedings.

However, it is still the case that New York Family Courts hold that ACS has no special duty to a parenting ward in removal petitions.¹⁸⁴ This means that despite its role as the minor’s caretaker and its direct responsibility for the baseline environment in which the parenting ward parents, ACS does not have to make heightened efforts¹⁸⁵ to keep a family together before a removal petition is filed. Ariella’s case illustrates the misguided results of this logic. ACS determines what resources parenting wards will have. It determines who their support system will be and what services they will be provided. To some extent, the success of a parenting ward is dependent upon the success of ACS in adequately providing for that ward’s welfare and wellbeing. In *Lawrence*, the court suggests that in cases where caseworkers fail parenting wards in such a way as to contribute to their allegedly negligent actions, removal is a particularly harsh solution and counsels ACS to use discretion.¹⁸⁶ In such a case, the guidance of

¹⁸¹ *In re Lawrence*, 768 N.Y.S.2d 83, 85 (Fam. Ct. Kings County 2003).

¹⁸² *Id.* at 90.

¹⁸³ *Id.* at 91-92.

¹⁸⁴ *In re Ta Fon Edwards J.B.*, 774 N.Y.S.2d at 821.

¹⁸⁵ N.Y. FAM. CT. ACT § 1022(a)(iii) (McKinney 2005) (providing that ACS must use “reasonable” efforts to keep a family together before attempting to remove a child).

¹⁸⁶ *In re Lawrence*, 768 N.Y.S.2d at 90 (citing *In re Tricia Lashawnda M.*, 451 N.Y.S.2d 553 (Fam. Ct. Queens County 1982)) (dismissing termination proceedings based on abandonment against a minor parent in foster care when the agency obstructed regular contact between mother and child).

Nicholson also indicates that removal would be particularly inappropriate because of the clear potential for the mitigation of risk.¹⁸⁷

While it makes sense to be particularly careful when the parenting ward's caseworker's action or inaction directly leads to the allegations against the parenting ward, less direct problems in the foster care system can also be problematic. As evidenced by Ariella's situation, it is difficult to be a good parent when the baseline home environment does not include the guidance or support needed for a teenager to learn to be a good parent. The dependence of parenting wards and their children on ACS to provide appropriate home environments means that New York should recognize and enforce a heightened duty to these respondents and their children.

C. Title IV-E: Funding for Parents in Foster Care and Their Children

Federal legislation supports this vision of ACS' responsibilities to these parents by stressing the desirability of keeping such families together when at all possible. Despite the Adoption and Safe Families Act's increased focus on adoption,¹⁸⁸ the amendment of Title IV-E of the Social Security Act shows federal intent to prevent the separation of parents in foster care from their children by making it more financially feasible for a parent in foster care to care for her child. The law provides that, when a child in foster care resides with her own child, foster care maintenance payments (including food, shelter, daily supervision, school supplies, personal incidents, clothing, and reasonable travel for visitation)¹⁸⁹ for the parent must include the amount necessary to cover the same costs for the foster child's son or daughter.¹⁹⁰ Further, section 472(h) of the Social Security Act provides that children whose parents are in foster care and are covered by IV-E are also eligible for Medicaid and social services.¹⁹¹

¹⁸⁷ See *supra* notes 177-178 and accompanying text.

¹⁸⁸ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 201-203 (1997). This Act, which amended Title IV-E of the Social Security Act, 42 U.S.C. § 1305 (2006), reaffirmed the importance of providing reasonable efforts to preserve and reunify families while also placing new emphasis on permanency planning and adoption.

¹⁸⁹ 42 U.S.C. § 675(4)(A) (2006).

¹⁹⁰ 42 U.S.C. § 675(4)(B) (2006).

¹⁹¹ Admin. Directive, 94 ADM-12, N.Y. Dep't of Soc. Servs., *supra* note 19, at 18. For further discussion of the federal regulations in place to encourage states to keep Parenting Wards and their children together where possible, including when the minor mother is freed for adoption, see *Legal Status*, *supra* note 1, at 10-14; ADMIN. OF CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH AND HUM. SERVS., CHILD WELFARE POLICY MANUAL, ch.

A 1994 New York Policy Statement discusses the implementation of these federal funding rules on the state level.¹⁹² It provides that when it is in the best interests of both the minor parent and her child to be together, the minor parent should retain custody of her child.¹⁹³ This policy directive states that “factors such as the minor parent’s age, previous history, and perceived abilities, among other things, should never be the sole criteria for taking legal custody of the child of a minor parent in foster care.”¹⁹⁴ Further, it is possible for the state to seek to obtain temporary legal custody of the parenting ward’s child while still allowing the parent in foster care and the child to remain together in the same placement,¹⁹⁵ again placing emphasis on making it possible to keep these families together. New York also discourages the voluntary relinquishment of custody by a parenting ward, and in non-protective situations, it directs caseworkers to determine what preventative services the parenting ward needs to retain custody and then to make reasonable efforts to provide them.¹⁹⁶ New York Family Courts have also found that voluntary agreements to give up custody by minor mothers in foster care are questionable and can be dismissed after the change in the law,¹⁹⁷ a ruling that was affirmed by the New York Court of

8.3A.5, available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=53 (last visited Feb. 29, 2008).

¹⁹² See generally Admin. Directive, 94 ADM-12, N.Y. Dep’t of Soc. Servs., *supra* note 19.

¹⁹³ *Id.* at 3.

¹⁹⁴ *Id.* at 4.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 4, 7. “[T]he role and purpose of the preventative services in these cases is to keep the minor parent and his or her child together, and includes facilitating a custody arrangement that maintains custody of his or her child with the minor parent.” *Id.* at 7. It also indicates that individualized analyses should be used in determining what each family needs.

¹⁹⁷ See, e.g., *In re C.*, 607 N.Y.S.2d 1014, 1016 (Fam. Ct. N.Y. County 1994) (stating that courts previously found voluntary agreements valid because minor parents had no other choice, and because of the change in the law, these agreements may be dismissed because “the Commissioner, the mother, and the baby have a right to have the baby out of foster care.”); *In re Tyriek W.*, 613 N.Y.S.2d 146, 147 (App. Div. 1994), *aff’d* 652 N.E.2d 168 (N.Y. 1995) (holding that the amendments to New York regulations permit Parenting Wards to retain custody of their children and receive services without “voluntarily” placing their children in foster care, “achieving the desirable and worthy goal of keeping these children out of foster care.”).

Appeals.¹⁹⁸ Though the Administrative Directive also briefly discusses the balance of responsibilities between the foster parent and the minor parent in foster care and recognizes the potential conflicts, it does little to provide concrete suggestions or requirements for ensuring an efficient and beneficial solution.¹⁹⁹

D. The Role and Duty of ACS

In New York, ACS must provide preventative services to families in need, such as case planning and management, day care, homemaking services, family planning, home management, clinical services including psychotherapy, parent aide services,²⁰⁰ day care services to children,²⁰¹ parent training,²⁰² transportation services, emergency cash or goods, emergency shelter, and housing services.²⁰³ ACS is responsible for “providing financial support to parenting wards, personal counseling and support services to ensure stability, and assistance in achieving the highest

¹⁹⁸ *In re Tyriek W.*, 652 N.E.2d 168, 169, 170-71 (N.Y. 1995) (holding that “the individual children and their minor parents should be treated as a family unit for purposes of financial support, case planning, and preventative services. Accordingly, these children receive the full range of supervision, assessment, documentation and other social work services that are available to their parents” and that “the Commissioner always has had a right to discharge a child to a parent without court approval.”).

¹⁹⁹ Admin. Directive, 94 ADM-12, N.Y. Dep’t of Soc. Servs., *supra* note 19, at 7-8.

²⁰⁰ 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (10) (2008). These services are “defined as those services provided in the home and community that which [sic] focus on the need of the parent for instruction and guidance and are designed to maintain and enhance parental functioning and family/parent role performance.”

²⁰¹ 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (11) (2008). Day care services to children are defined as a “combination of services including at least: social services, psychiatric, psychological, education and/or vocational services and health supervision and also including, as appropriate, recreational and transportation services, for at least three but less than 24 hours a day and at least four days per week, excluding holidays.”

²⁰² 18 N.Y. COMP. CODES R. & REGS. § 423.2(b)(12) (2008). Parent training is “[d]efined as group instruction in parent skills development and the developmental needs of the child and adolescent for the purpose of strengthening parental functioning and parent/child relationships in order to avert a disruption in a family or help a child in foster care return home sooner than otherwise possible. Parent training may include child-parent interaction groups formed to enhance relationship and communication skills.”

²⁰³ 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (1-16) (2008).

possible degree of economic independence.”²⁰⁴ It must provide daycare vouchers for child care when the parent is in school or at work,²⁰⁵ and services such as “educational counseling, training, vocational training and rehabilitation, employment counseling, medical care, health counseling and maintenance, . . . legal, [and] housekeeper/chore . . . services.”²⁰⁶ ACS also has a duty to protect and provide for the wellbeing of the children in its care.²⁰⁷ As respondent parents in these removal cases are both children in foster care and parents of families in need,²⁰⁸ they are entitled to both sets of

²⁰⁴ CHILDREN RAISING CHILDREN, *supra* note 3, at 4.

²⁰⁵ *Id.* at 5.

²⁰⁶ *Id.* (citing 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (2008)).

²⁰⁷ See generally 18 N.Y. COMP. CODES R. & REGS. § 441.12 (2008) (explaining the right of foster children to receive an allowance not to be used for basic needs and to possess personal items in addition to toiletries and clothing); 18 N.Y. COMP. CODES R. & REGS. § 441.9 (2008) (prohibiting corporal punishment, room isolation, and deprivation of meals, snacks, visits with family, and mail); 18 N.Y. COMP. CODES R. & REGS. § 441.11 (2008) (making child-care agencies responsible for the religious and moral welfare of every child in their care, mandating that children attend services and receive instruction in their religious faith unless the parent or legal guardian says otherwise, and providing that the religion of the child shall not be changed except on written request of the parent or legal guardian); 18 N.Y. COMP. CODES R. & REGS. § 441.13 (2008) (providing that child care agencies are responsible for taking necessary steps to ensure that all children in care receive appropriate education in compliance with education law, and that the agencies must maintain an active and direct liaison with any school providing education for their wards and make sure that each child receives appropriate educational and vocational guidance); 18 N.Y. COMP. CODES R. & REGS. § 441.14 (2008) (explaining that child care agencies may not accept children for care until a determination has been made that the placement can meet the needs and interests of the family); 18 N.Y. COMP. CODES R. & REGS. § 441.15 (2008) (providing that psychological and other essential services must be made available if appropriate to the needs of the children in care); 18 N.Y. COMP. CODES R. & REGS. § 441.19 (2008) (designating the responsibility for the safety of foster children to the agencies in whose care they are in and mandating particular prohibitions on residential staff, employees, volunteers, and consultants); 18 N.Y. COMP. CODES R. & REGS. § 441.22 (2008) (discussing the duty of each agency to provide comprehensive medical and health services for every foster child in its care). Though these are not the only indications of the duties of ACS and their contract agencies to children in their care, they illustrate the range of areas that they are responsible for. Note that under 18 N.Y. COMP. CODES R. & REGS. § 441.1 (2008), these regulations apply to “all child-care agencies, facilities, and programs, public and private, subject to visitation inspection and supervision by the Department of Social Services.”

²⁰⁸ 18 N.Y. COMP. CODES R. & REGS. § 430.9 (2008). (Provision of services defined in 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) is considered mandated when “such services are considered essential to improve family relationships and prevent the placement of a child into foster care.” This occurs in a variety of situations listed in the code, including, but not limited to, when the health of safety of the child is at risk, the parents have refused to

services. The state, in its capacity as the guardian and the party responsible for preventative services, has a dual duty to assist and protect these family units. The current laws and policies of New York focus on making efforts to help the minor parent stay with her child where possible, but the practical reality is that the law is not specific enough in addressing parenting wards, and ACS fails to meet its burden toward parenting wards. These parents begin with built-in disadvantages that must be taken into account by individually analyzing the strengths and weaknesses of their families and then determining how best to help, protect, and prepare them to be independent and productive members of society.

III. SUGGESTED REFORMS TO THE SYSTEM

Part I of this Article described the unique problems that arise when removal proceedings are initiated against parenting wards. Parenting wards are discriminated against because of their age and often their race or class status,²⁰⁹ are over-scrutinized but under-cared for,²¹⁰ and they are entitled to some element of privacy in their families and in making parental decisions even though they are dependent upon public services.²¹¹

Such problems, as well as the strength and historical importance of parental rights, and the multiple and conflicting roles the state must play with regard to these families, indicate that there are real reasons to reconsider the way abuse and neglect laws affect parenting wards. In order to address this, the “reasonable efforts” required of ACS under New York law should be specifically tailored to meet the needs of parenting wards.²¹²

keep the child in the home and have expressed the intention to surrender the child for adoption, the parents or caretakers become unavailable due to hospitalization, death, imprisonment, arrest, detention, or the parents or caretakers are missing.)

²⁰⁹ See *supra* Part I.F.

²¹⁰ See *supra* Parts I.D and I.E; *Protecting Children*, *supra* note 19, at 597 (exploring the ways in which the State fails to provide for and assist parents in need, including a minor parent in foster care).

²¹¹ See *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (discussing the right of the family to be free from coercive State interference as the “most essential and basic aspect of familial privacy.”).

²¹² N.Y. FAM. CT. ACT §1022(a)(iii) (McKinney 2005); see *Protecting Children*, *supra* note 19, at 582-83, nn. 29, 30 (citing 42 U.S.C. § 675(1)(B) (2006)) (briefly discussing what goes into reasonable efforts and case planning and noting that the “efforts” provided are often generic and not discussed with the mother). The federal statute cited is further indicative of this vagueness in that it calls for ensuring that the child receives “proper care” and that “services are provided to improve the parents’ home, facilitate return of child to his

Practically and in accordance with the law, every family must be assessed and baseline services needed for the prevention of removal²¹³ must be provided before removal proceedings occur.

Yet, for parenting wards, more is required in terms of “reasonable efforts” than simply ensuring that mandated services are provided effectively, although that is a necessary first step. ACS and its contract agencies, due to their in loco parentis role toward parenting wards, should function like parents or grandparents, mentoring and supporting parents in their care, rather than as adversarial investigators or distant administrators.²¹⁴ Like parents or grandparents, they should “assist with childcare, provide resources and problem-solve with [foster] children in a supportive and caring manner.”²¹⁵ Like parents or grandparents, they should assume responsibility for harm to third parties, such as the children of parenting wards, caused by their failures or by actions that they could reasonably have prevented. Practically, this means that caseworkers and the court should go further than they might with other respondents in attempting to determine and address the causes of the parenting ward’s alleged failures as a parent.

When courts are faced with removal petitions against respondents who are parenting wards, they should be required to determine whether or not ACS has met their obligation to the minor parents as foster children and as parents. Because the respondent is a parent, significant parties in the proceedings, such as judges, caseworkers, and advocates, may forget that the respondent is a child, specifically a foster child, and has a different set of needs that must be provided for and requirements that she must fulfill.²¹⁶ Courts should require an inquiry into ACS’s duties to the respondent as both a foster child and as part of a family facing removal, and then an enumeration of how, specifically, ACS met these burdens. This would serve to remind the participants that when the state fails to adequately provide for

own home” or permanent placement, and to “address the needs of the child while in foster care.” While this vagueness could indicate flexibility in making case-by-case basis determinations, the reality, as Appell points out, is that minimal and generic services are often provided.

²¹³ 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (2008).

²¹⁴ Letter from the Fordham Interdisciplinary Parent Representation Project, *supra* note 14.

²¹⁵ *Id.*

²¹⁶ See *Legal Status*, *supra* note 1, at 3, 26-34.

the foster child as a child, even when some preventative services for the family have been provided, these parents will be operating with a significant impairment in their baseline of support, care, and general wellbeing, which will likely affect their ability to parent.²¹⁷

It may be that improving services to the parenting ward as a foster child will improve the overall family situation. For example, nurturing relationships that are important to the parenting ward could be helpful in providing stability for both children,²¹⁸ or that ensuring that the parenting ward is able to balance school, child care, and her financial responsibilities (by providing transportation, services close to her placement, and increased individualized attention) will keep her from breaking curfew, from being considered “AWOL,” and from being unable to spend adequate time with her child.²¹⁹ It may not be a question of increased provision of services, or better services, but rather of time and attention spent ensuring that parenting wards are able to attend classes, work or budget for their families, and do the practical things required of parents and teenagers. Prior to considering removal actions, ACS should be required to inform parenting wards of their rights as parents as well as what is required of them. Subsequently, ACS must then assist them in meeting these requirements in order to claim that “reasonable efforts” have been provided. Courts, in assessing removal proceedings, should first look to whether ACS fulfilled this burden by asking whether the teenager was fully informed of her responsibilities, whether these requirements were reasonable, and whether adequate efforts were made to ensure that the parenting ward had the opportunity to succeed.

²¹⁷ See *Protecting Children*, *supra* note 19, at 595-595, 597 (discussing the case study of removal action against Dee Dee, a parenting ward, and the notion of first addressing the mother’s needs before deciding to remove the child).

²¹⁸ See, e.g., *Protecting Children*, *supra* note 19, at 595-97 (Parenting ward was prevented from and penalized for maintaining a relationship with the father of her child. Another parenting ward was successfully placed with the family of her child’s father).

²¹⁹ See, e.g., Margolin, *supra* note 43. (Parenting ward lacked support from her foster family and childcare provider and thus had difficulty balancing her various responsibilities. She was also penalized for going “AWOL” by having her child removed for “medical neglect,” despite having taken her son to the emergency room with abscesses three times in one month. This same mother was subsequently able to fulfill all of her obligations with some support from the Brooklyn Family Defense Project). Ariella’s situation was similar in that some of the allegations against Ariella involved her being away from her foster home late at night and failing to spend enough time with her son. However, Ariella was frequently out late because she was working to make ends meet due to inadequate provision of funds owed to her and lack of childcare.

The agency and the court should be required to take greater consideration of the best interests of the family as a unit and the proceedings should be less adversarial and more rehabilitative where possible. This heightened duty of “reasonable efforts” should include increased attempts to address the underlying circumstances causing concern, rather than immediately making motions for removal.²²⁰ Further, in interpreting “reasonable efforts,” courts should be required to consider whether and how action or non-action by ACS has contributed to any allegations against the minor parent in its care. While the state has an interest in the safety of the parenting ward’s child and a duty to prevent harm, the state should not be allowed to abandon the best interests of the ward by removing her child without having compelling reasons and significant evidence that its own action or inaction did not exacerbate or create the circumstances leading to the removal petition.

Parenting wards have their children removed more frequently than other parents, at least in part because they have more interaction with social services, making it more likely that social services will see them making mistakes other parents regularly make in private.²²¹ They are also likely to be impoverished or minorities, bringing existing biases into play.²²² Thus, changes to the foster care system would likely have an impact on the parenting skills of parenting wards such that moderate intervention—as opposed to removal—would change the statistics associated with being a

²²⁰ This resembles “alternative response” programs that have been instituted in other states, sometimes under the title “Dual Track” or “alternative track” programs. For in-depth information on alternative response, see GILA R. SHUSTERMAN ET AL., U.S. DEP’T. OF HEALTH AND HUMAN SERVS., *ALTERNATIVE RESPONSES TO CHILD MALTREATMENT: FINDINGS FROM NCANDS* (2005), available at <http://aspe.hhs.gov/hsp/05/child-maltreat-resp>. Alternative response, as opposed to investigations generally, is aimed at determining the needs of the family in order to prevent future problems. It does not require a formal determination of abuse or neglect. It does not exist in all states and states that do have it vary on what exactly their procedures and policies are. Typically, alternative response is used for cases with less immediate safety concerns, where the abuse alleged is not sexual abuse, and where the reports are from nonprofessionals. The U.S. Department of Health Findings cite studies indicating that families on the alternative track receive more services in addition to case management than those in the investigation track, and that the services may differ from families under investigation. *Id.* This includes greater assistance meeting basic needs as well as counseling, parenting classes, and substance abuse treatment. Further, the findings cite studies indicating that “child safety is not compromised by alternative response and that children involved in alternative response systems are less likely to experience a subsequent report of investigation.” *Id.* at 6.

²²¹ See *supra* I.D.

²²² See *supra* Part I.F.

minor parent and with being a parent who has been in foster care. In addition, changes in what constitutes reasonable efforts would not require that children whose lives or health are in imminent and serious danger be left in dangerous situations. New York law makes room for situations where it is unnecessary or dangerous for “reasonable efforts” to be made prior to removal.²²³ In accord with that principle, heightened reasonable efforts would simply require that the situation and risk be assessed on a case-by-case basis, allowing cases of less serious abuse and neglect to be dealt with using community-based services, instead of using harsh punishments and involving law enforcement.

Improving the system requires improvement in the conditions of foster care. The lack of education and training for foster parents, providers, and foster children²²⁴ exemplifies the lack of support and special services provided for pregnant and parenting foster children. Punitive attitudes toward parenting wards are indicative of a preconceived notion that parents who have been in foster care, or who are minors, are inherently unworthy or incapable parents.²²⁵ However, it is difficult to justify this attitude when the people responsible for the welfare and upbringing of the parenting wards do not provide an adequate foundation for their success as parents. Except in extreme cases, given the opportunity and the assistance that they frequently require, parenting wards should be able to successfully raise their own children, thus furthering the best interests of both parties.²²⁶

A. Best Practices

ACS must prioritize planning for placement of pregnant and parenting teens in its care, and in doing so, should consider recommendations that have been made by organizations and individuals with experience on all sides of foster care and removal procedures. As noted by many mothers in foster care as well as by the Public Advocate’s

²²³ N.Y. FAM. CT. ACT § 1039(b) (McKinney 2005).

²²⁴ See *supra* Part I.E.

²²⁵ See *supra* Part I.D.

²²⁶ S.B. 1178, 2004 Leg., Reg. Sess. (Ca. 2004). Surveys, such as CARING FOR OUR CHILDREN, *supra* note 2, and discussions with practitioners about their clients, all indicate that the majority of teen parents in care want to remain with their children and express an interest in greater assistance in order to be able to provide the best care possible for their children. However, as discussed in Part II of this Article, lack of services and support infrastructure often makes this difficult.

office, a lack of advance planning and a dearth of appropriate placements often lead to the illegal separation of mother and child while placement for them is being sought.²²⁷ Appropriate placement must include a reasonable baseline of living conditions in which the parenting ward is able to raise her child without worrying about funds to cover her child's basic needs, the sanitation of the home environment, lack of available childcare, or inattentive or abusive foster parents. Once the conditions under which the ward is parenting have been raised to a suitable level, ACS must provide services and support enabling parenting wards to parent to the best of their ability while still taking into account their status as minors.

In a study on permanency planning in foster care situations, parents whose children had been placed in foster care expressed their views on what would improve the system, and many emphasized preventative and individually tailored services.²²⁸ Specifically, they mentioned "therapy, babysitting, financial help, educational services, and emotional support."²²⁹ One parent of a child in foster care explained the importance of parenting education: "they need to have [parenting] classes on what's right and what's wrong, because if you are raised getting beatings and things, and you beat your child, [you ask,] 'What did I do wrong?'"²³⁰ As this parent made exceptionally clear, it is hard to know what is right or wrong if one has never experienced good parenting. Therefore, it is especially important to provide parenting education and services for children in foster care, because of their potential lack of appropriate role models. A cycle of punishment and removal, without this kind of intervening education and support, leads to generations of families being separated and placed in foster care. Such an outcome is not favorable for the state, the parents, or the children involved.

In planning and considering the efforts that should be made, ACS and New York courts should take into account practices aimed at promoting self-sufficiency. Practitioners who work with parenting wards have

²²⁷ CARING FOR OUR CHILDREN, *supra* note 2, at 12-13, 20-33 (discussing mother/child placements and what they are meant to provide generally, noting the lack of appropriate placement, service provision, and advance planning, and critiquing problems with the mother/child placements that are provided); CHILDREN RAISING CHILDREN, *supra* note 3, at 5-6.

²²⁸ FREUNDLICH, *supra* note 131, at 71.

²²⁹ *Id.* at 67.

²³⁰ *Id.* at 71.

formulated a set of best practices.²³¹ An increased duty to teen parents in foster care should incorporate some of these practical recommendations in order to strengthen and preserve the teen parent family unit.²³² Some of these suggestions include seemingly obvious things: better planning prior to birth, including keeping the mother and child together when the child is born as opposed to keeping the child in the hospital;²³³ providing parenting wards with parenting training;²³⁴ childcare allowing the parents to work or go to school;²³⁵ making education more feasible through on-site childcare, flexibility in scheduling and courses, and convenient locations;²³⁶ education on family planning and reproductive healthcare including contraception;²³⁷ services for fathers;²³⁸ and discharge planning for when the wards age out of the system, including homelessness prevention, independent living services, and prevention of premature discharge.²³⁹ Similarly, the Casey Study found that life skills preparation, completing a high school diploma or GED program, scholarships for college or job training, participation in clubs and organizations, homelessness prevention, better usage of family support, and consistency of placements were all indicators of success for foster care alumni.²⁴⁰

Recommendations by these groups focus on services that may improve the teens' future once they leave foster care.²⁴¹ The Casey study suggested providing better preparation for leaving the system, giving more

²³¹ E.g., *Legal Status*, *supra* note 1, at 22-28; CASEY STUDY, *supra* note 79, at 41, 45; THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 4; CARING FOR OUR CHILDREN, *supra* note 2, at 34-37.

²³² CAL. WELF. & INST. CODE § 16501.25(b)(3) (West 2008).

²³³ *Legal Status*, *supra* note 1, at 45-46.

²³⁴ *Id.* at 47-48.

²³⁵ *Id.* at 48-49.

²³⁶ *Id.* at 49-51.

²³⁷ *Id.* at 52.

²³⁸ *Id.* at 53-54.

²³⁹ *Id.* at 55-60.

²⁴⁰ CASEY STUDY, *supra* note 79, at 40-45.

²⁴¹ *Id.* at 46-50; THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 41-47.

control to youth over their circumstances, and developing better training.²⁴² The Youth Advocacy Center²⁴³ recommended policy changes shifting the focus from temporary placement and behavior management to supporting teens in long-term planning for education, employment, and fitting into the greater community, as well as training to be better self advocates.²⁴⁴ Beyond practical measures to improve conditions for those who are currently in the system, future planning for long term self-sufficiency is imperative if the goal is to prevent another generation of children from entering foster care. As repeated over and over by practitioners dealing with these clients, individualized planning, services, and concern for the living situation of the minor parent may be the best means of keeping these families intact, protecting parental rights, and preventing the children of foster children from ending up in their parents' situation.²⁴⁵

B. California as a Model System

California is unique for having passed substantive law explicitly dealing with teen parents in foster care and the ways in which their particular needs must be taken into account. In 2004 and 2005, California passed laws calling for greater attention to parenting wards and for consideration and services to be tailored to the specific needs of that population. California's legislation concerning teen parents in foster care is worth considering in addressing the problems of parenting wards and removal in New York because of its particular focus on the population and because the language of the law seems to address many of the best practice concerns discussed previously. Furthermore, the bill introducing the legislation explicitly identified many of the problems that practitioners are finding in New York in dealing with parenting wards as a basis for the subsequent changes in the law.²⁴⁶ These include an increased likelihood of

²⁴² CASEY STUDY, *supra* note 79, at 48-50.

²⁴³ The Youth Advocacy Center was started by lawyers who worked in the family court system. It is a New York organization that works with children in foster care to assist them in taking greater control over and preparing for their futures. They run a seminar called "Getting Beyond the System" (meaning, the foster care system) and provide informational trainings for professionals in education and social services.

²⁴⁴ THE FUTURE FOR TEENS IN FOSTER CARE, *supra* note 24, at 41-42.

²⁴⁵ *E.g.*, Telephone Interview with Gloria Bruzzano, *supra* note 35; Telephone Interview with Zabrina Aleguire, *supra* note 35.

²⁴⁶ S. 1178, 2004 Leg., Reg. Sess. (Ca. 2004).

removal; less access to traditional support systems available to other minor and first time parents; unrealistic expectations placed on parenting wards that are inconsistent with their age and developmental level; and shortages in placements for parenting wards and their children resulting in separation, “disrupting the parent-child bond and potentially severing family ties.”²⁴⁷ The Bill also stated that it is the intent of the Legislature to:

[P]reserve the continuity of the family unit and ensure the maintenance and strengthening of family relationships between a dependent minor parent and his or her child by ensuring that the courts and responsible agencies shall, whenever possible, protect the best interests of a dependent minor parent and his or her child as a unit, and shall make diligent and active efforts to maintain relationships between minor parents and their children, including, but not limited to, placement of the minor parent and the child together in as family-like a setting as possible.²⁴⁸

This focus on ensuring that courts protect the best interests of both the parenting ward and her child together as a family unit is unique in part because it takes for granted the understanding that both children are generally better off when they are together, and that “dependent teen parents, their children, and society at large all benefit when these young families are given a reasonable opportunity and assistance to form and remain a family.”²⁴⁹

The California laws as enacted have a number of provisions dealing with the specific needs of foster children who are parents. First, the law explicitly discusses parenting wards (called dependent minor parents) and their children as well as the legislature’s intent to keep these families together by supporting the parent-child relationship and facilitating the parent’s ability to provide for his or her child.²⁵⁰ The law states that, “to the

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* These ideas are particularly important as this sort of unit-based best interests analysis could play a large role in ensuring that children are not removed from their dependent minor parents without first looking to the child welfare agency for the provision of a reasonable baseline of support and services to make good parenting possible.

²⁵⁰ CAL. WELF. & INST. CODE § 16002.5 (West 2004) (“It is the intent of the Legislature to maintain the continuity of the family unit and to support and preserve families headed by minor parents who are themselves dependents of the juvenile court by ensuring that minor parents and their children are placed together in as family-like a setting as possible, unless it has been determined that placement together poses a risk to the child.”).

greatest extent possible,” parenting wards and their children shall be provided with services and resources specifically aimed at keeping the family together,²⁵¹ thus essentially mandating that service providers and those responsible for the parenting wards do everything in their ability to help the parenting ward and his or her child succeed as a family. In 2006, California amended the Welfare and Institutions Code to address teen parents in foster care and to better align itself with federal policy, by adding a section defining “teen parent” and the requirements for a “Shared Responsibility Plan,” as well as to amend existing funding schemes for foster children to make the children of foster children eligible for funding.²⁵² Second, the law recognizes that minor parents are in fact still children with specific non-parenting related needs. The law mandates that the minor parents have the opportunity to attend school and participate in activities that are not related to parenting,²⁵³ and requires that efforts be made to facilitate contact between the child and both the custodial and non-custodial parents if that is in the best interest of the child.²⁵⁴

The third, and maybe most notable feature of the California model, is that the law explicitly recognizes the shared responsibilities of the parent and child in the welfare system and mandates planning to assure that supportive services will be available. The shared responsibility concept is a key element to facilitating a supportive care environment where the minor parent does not have to shoulder the entire burden of caring for herself and her child with the constant fear of being blamed or punished for her

²⁵¹ CAL. WELF. & INST. CODE § 16002.5(a) (West 2004) (“To the greatest extent possible, dependent minor parents and their children living in foster care shall be provided with access to existing services for which they may be eligible, that are specifically targeted at supporting, maintaining, and developing both the parent-child bond and the minor parent’s ability to provide a permanent and safe home for the child. Examples of these services may include, but shall not be limited to, child care, parenting classes, child development classes, and frequent visitation.”).

²⁵² Dep’t of Social Servs., All County Letter No. 06-04, *Minors’ Dependent Parents in Foster Care* (June 20, 2006), available at http://humanservices.ucdavis.edu/pdf/sb500_ACL.pdf.

²⁵³ CAL. WELF. & INST. CODE § 16002.5(b) (West 2004).

²⁵⁴ CAL. WELF. & INST. CODE § 16002.5(d) (West 2004). This addresses the concerns about lack of facilitation of contact between foster children and their families discussed in *THE FUTURE FOR TEENS IN FOSTER CARE*, *supra* note 24, at 30-32, and FREUNDLICH, *supra* note 131, at 84-85 (presenting the suggestions of young adults concerning permanency planning and the importance of their biological families and reunification). It may also allow the foster child to maintain and strengthen a stable support system though potentially being moved from placement to placement.

mistakes. Though it does not specifically address removal proceedings, the law requires that the people responsible for the minor parent (such as a caregiver, a representative of the child welfare agency or probation department, or the caregiver's supervisor in a certified home) meet with the minor ward and create a plan outlining the "duties, rights, and responsibilities of both the teen parent and the caregiver with regard to the child, and identify supportive services to be offered to the teen parent by the caregiver."²⁵⁵

Additionally, foster care providers must show "a willingness and ability to provide support and assistance to dependent minor parents and their children."²⁵⁶ Other features of the California Shared Responsibility Plan²⁵⁷ address the duality of responsibility of the Child Welfare agency as a guardian of the parenting wards and a protector of her child. The aim of these plans is to "facilitate a supportive home environment for the teen parent and child, and to ultimately enable the teen parent to independently provide a safe, stable, and permanent home for the child."²⁵⁸ A further purpose of the plan is to reduce conflict and misunderstandings between the teen parent and her caregiver,²⁵⁹ thus avoiding the adversarial feeling that Ariella and many of the young mothers surveyed in New York noted by increasing understanding of each person's responsibilities and reiterating

²⁵⁵ CAL. WELF. & INST. CODE § 16501.25(b)(3) (West 2004). This is perhaps the most striking element of California's law regarding these parents because it explicitly discusses the share of the various parties' responsibilities in the minor parent's and her child's lives. At least in theory, it also creates a baseline of understanding between the parties that could help decrease adversarial feelings and increase the minor parent's feelings of independence and capability. The level of detail concerning what must be included is also admirable.

²⁵⁶ CAL. WELF. & INST. CODE § 16002.5(c) (West 2004). Addressing the attitude of the program is key because of the importance of a non-adversarial environment where foster children do not feel that they are in an inflexible situation and under constant scrutiny. See *supra* Part I.D.

²⁵⁷ The plan must be updated to account for changing circumstances (such as school, employment, or outside responsibilities), it cannot conflict with the case plan for the parent, and it should include feeding, clothing, hygiene, the purchase of necessary items, health care, transportation, provision of child care, and babysitting, discipline, sleeping arrangements, visits among the child, non-custodial parents, and other appropriate family members, and the responsibilities of the caregiver in facilitating these visits.

²⁵⁸ CAL. WELF. & INST. CODE § 16501.25(b)(2), *Guidelines for the Shared Responsibility Plan* (West 2008).

²⁵⁹ CAL. WELF. & INST. CODE § 16501.25(b)(3) (West 2008).

that the young mother is not without support and is not individually responsible for all of the needs of her child.²⁶⁰ This also takes into account the constitutional rights of the minor parents and their need for some level of autonomy and independence in raising their families,²⁶¹ as well as the reality that these parents are minors still in need of care and support themselves.

The New York foster care system's analogous caretaking plan provision, at Section 430.12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, describes information that should be included in the risk assessment and service plan under certain circumstances, and it describes the various people who should be involved in permanency planning.²⁶² It also mentions foster children with children specifically.²⁶³ However, it is not as directed to the particularized needs of foster children with children or as explicit in its goals for such families as the California legislation is. In contrast to California, New York's discussion of case planning is more vague. It refers only to services that should generally be referred,²⁶⁴ rather than a comprehensive, individualized, and mandated plan detailing which areas must be discussed with minor parents, which services are needed or desired, and explaining and allocating responsibility between the parent and the service providers she is working with. This current policy is insufficient to deal with the specific and intensive needs of parenting wards. Like the California model, reasonable efforts should take into account the heightened needs of these parents, the welfare of their children, and the state's responsibilities to both

²⁶⁰ CARING FOR OUR CHILDREN, *supra* note 2, at 31-32.

²⁶¹ The law specifically states that "the plan shall in no way limit the teen parent's legal right to make decisions regarding the care, custody, and control of the child." CAL. WELF. & INST. CODE § 16501.25(b)(2) (West 2008).

²⁶² 18 N.Y. COMP. CODES R. & REGS. § 430.12 (2008).

²⁶³ *Id.* at (c)(1)(ii)(e) (2008) ("If a minor parent is in foster care and has residing with him or her his or her child or children, and such child or children are not in the care and custody or custody and guardianship of the local commissioner of social services, the assessment and service plan required by the uniform case record must show that the needs of the child or children of the minor parent have been assessed and that goals or outcomes necessary to meet these needs must be contained in the assessment and service plan required by the uniform case record.").

²⁶⁴ 18 N.Y. COMP. CODES R. & REGS. § 423.2(b) (2) (2008).

generations.²⁶⁵ Something similar to California's Shared Responsibility Plan²⁶⁶ should be required in order to best align the various interests involved, minimize conflict, and ensure that teen parents in foster care receive all of the support and care they need. This plan would effectively achieve the intent of federal and New York law recognizing the need to keep these families together, while not removing decision-making power and authority from the parent.

CONCLUSION

When the state fails to provide the care and resources needed by minor wards to be adequate parents, and especially when the parent is illegally separated from her children, the minor's constitutional parental rights become virtually meaningless. The minor parent may not have an adequate starting point for taking care of herself, let alone her children.²⁶⁷ Foster children are in need of and entitled to care provided by the state. This care must include financial assistance, education, emotional and psychological support, and other tools necessary to allow them to be fully functioning citizens.²⁶⁸ While support and services are imperative for all foster children, when the foster child at issue has a child of his or her own, these services and support systems will play a significant role in whether the minor parent will have the opportunity to be a "fit" parent.²⁶⁹ While it may not be possible to provide these minors with the ideal situation—a safe and stable home with loving parents—it is imperative that New York and its child welfare agencies, as the stand-in guardians for these children, provide them with a basis of care so that they can learn to be good parents who are self-sufficient.

Increasing the efforts considered "reasonable" for this population comports with the federal goals for states to provide community-based family support and family preservation services to prevent child

²⁶⁵ CAL. WELF. & INST. CODE § 16002.5 (2004); CAL. WELF. & INST. CODE § 16501.25(b)(2) (West 2008).

²⁶⁶ CAL. WELF. & INST. CODE § 16501.25(b)(2) (West 2008).

²⁶⁷ See *supra* notes 125-127 and accompanying text (explaining the difficulties faced by children in foster care during and after their time in care).

²⁶⁸ Interview with Gloria Bruzzano, *supra* note 133; Telephone Interview with Zabrana Alegrure, *supra* note 35; see *supra* Part III.A.

²⁶⁹ Interview with Gloria Bruzzano, *supra* note 133; Telephone Interview with Zabrana Alegrure, *supra* note 35.

maltreatment in families at risk, assure children's safety within the home and preserve families in which children have been maltreated, when it is possible to effectively address underlying problems.²⁷⁰ Although federal law also expresses the intent to promote adoption and provide support to adoptive families,²⁷¹ this is a secondary option to be used when promoting reunification and addressing the family's problems is impossible. Efforts required of ACS should include continuity of placement, support in the form of improved services such as parenting classes, mental health evaluation and management, and child care; greater accountability by those in charge of the foster care placement, facilitating and ensuring that clients can easily reach their services; and greater communication and less hostility in foster care placement to comport with both ACS's duty to minors in its care and the reciprocal rights of parents and children to be together. Such efforts may also help prevent the further costs to the public of continuing foster care for yet another minor. If New York chooses to not address the needs of parenting wards and their children, as noted by the Public Advocate, "there is a good chance the City will have to care for them at a later point when services are much more costly and challenging to provide."²⁷²

Therefore, there should be a focus on the conditions under which the minor parent is functioning before filing removal petitions. In a system where judges, social workers, and advocates often forget their duties to these parents as minors,²⁷³ the best way to align the interests of the parenting ward, her child, and the state is to conduct this sort of analysis prior to removal proceedings, by forcing ACS to provide the minor parents with the protections they are entitled to as minors while fulfilling its duty to protect the parenting ward's children.

The solution to this problem is in improving the environment in which these parents raise their children, rather than removing the children

²⁷⁰ 42 U.S.C. § 629 (2006).

²⁷¹ *Id.*

²⁷² CHILDREN RAISING CHILDREN, *supra* note 2, at 4: *see, e.g.*, THE NATIONAL CAMPAIGN TO PREVENT TEEN PREGNANCY, *supra* note 4, at 2 (the costs to the public of child welfare were 2.3 billion dollars in 2004); THE ROBIN HOOD FOUNDATION, KIDS HAVING KIDS: A SPECIAL REPORT ON THE COSTS OF ADOLESCENT CHILDBEARING 8, 19 (REBECCA A., MAYNARD, ED. 1996), *available at* <http://www.robinhood.org/approach/KHK.pdf> (discussing the costs of putting the children of adolescent parents into foster care and generally the costs associated with adolescent pregnancy).

²⁷³ *Legal Status*, *supra* note 1, at 2.

from the home and exposing them without their parents to all of the potential harms of foster care.²⁷⁴ While it may be true that all parents could be better parents if they had greater support and improved home lives, in these cases the state is directly responsible for the care, custody, and best interests of minor parents, and therefore has an obligation to ensure that the environments in which they grow are conducive to achieving success as parents. Since ACS is also responsible for providing reasonable efforts, including preventative services, to keep the family intact, a finding that the state's duty in removal cases is no different in these cases than in all others simply does not fulfill the state's burden to parenting wards and their co-existent duty to serve the best interests of both children involved. Insisting that ACS provide better support for parenting wards both as children and as parents would better allocate accountability to reflect the dependence of the minor without removing all of their responsibilities as parents than the system currently in place. Recognizing and enforcing such a heightened duty also better allocates ACS's scarce resources by preserving the family relationship, preventing the necessity of providing foster care services to another generation, and avoiding the social and emotional harms of removal and foster care to the parenting ward and her child.

²⁷⁴ See *supra* Part I.E (Discussing a general lack of stability and services, and the occurrence of separation and abuse).

