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TOWARD COMMUNITY CONTROL OF CHILD WELFARE FUNDING: REPEAL THE CHILD ABUSE PREVENTION AND TREATMENT ACT AND DELINK CHILD PROTECTION FROM FAMILY WELL-BEING

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The Child Abuse Prevention and Treatment Act mandates reporting, investigation, and prosecution of allegedly abusive and neglectful parents. Commonly known as child protective services (CPS), this family policing system uses the government's police power to disrupt, surveil, control, and destroy hundreds of thousands of Black families based on conditions of poverty framed as neglect.

Centering a Black mother's five-year long ordeal with New York City's family policing system, we examine the carceral roots of CPS and its destructive impacts on Black families. We call for abolishing the CPS family policing system; diversion of the billions invested in the foster industry to investment in quality-of-life resources de-linked from so-called "child protection"; and monetary reparations for generations of CPS violence against Black families.

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I. INTRODUCTION

Slavery didn't end in 1865, it just evolved.

—Bryan Stevenson¹

Amid increasingly vigorous calls to abolish carceral systems like the police and prisons, the equally devastating violence wrought under color of law against Black families by the so-called “child welfare” or “child protection” system is being brought into sharper focus. Convened to celebrate the twentieth anniversary of Professor Dorothy Roberts’ influential book, *Shattered Bonds: The Color of Child Welfare*,² this Symposium, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, offers a platform to highlight the lived experience of Black families terrorized by the family policing system and to propose concrete steps toward its abolition. Featuring the personal reflections of co-author Angeline Montauban on her five-year long battle to rescue her son from New York City’s foster system, this Article recognizes the connection between American chattel slavery and the present system of child-taking, and traces the system’s harmful impact on Black families directly to the philosophy and design of the “child protective services” system (CPS) created by the federal Child Abuse Prevention and Treatment Act of 1974 (CAPTA).³ This Introduction provides important context to orient the reader and set the stage for Ms. Montauban’s personal reflections.

CPS is marketed to the public as a system “designed to promote the well-being of children by ensuring safety, achieving

¹ Emma Seslowsky, *Bryan Stevenson Says ‘Slavery Didn’t End in 1865, It Just Evolved’*, CNN: AXE FILES (Dec. 7, 2018, 7:45 PM), <https://www.cnn.com/2018/12/07/politics/bryan-stevenson-axe-files/index.html> [<https://perma.cc/Q8LD-KDGQ>].

² DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*].

³ 42 U.S.C. §§ 5101–5116i. Originally enacted in P.L. 93-247, CAPTA has been amended numerous times, most recently on January 7, 2019 by the Victims of Child Abuse Act Reauthorization Act of 2018 (P.L. 115-424). CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., *ABOUT CAPTA: A LEGISLATIVE HISTORY* (2019), <https://www.childwelfare.gov/pubPDFs/about.pdf> [<https://perma.cc/UNB8-L6V2>].

permanency, and strengthening families.”⁴ To the contrary, data from the federal Children’s Bureau’s periodic review of state child welfare systems’ performance,⁵ indicates that CPS is an utter failure even by its own standards.⁶ Moreover, as discussed below, in addition to its carceral nature as a tool of social control, CPS actively and demonstrably makes Black children less safe, destabilizes their living situation, creates debilitating physical and mental health challenges, and diminishes their life chances. Thus, the Article’s central thesis is that abolishing CPS must be a top priority within the movement to defund and abolish all carceral institutions.

The Article will sometimes use the term “family policing system” instead of commonly used terms like the “child welfare system,” “child protective services,” and “foster care.” As Professor Roberts observes, “this system is not about child or family welfare, protection, or care.”⁷ For her, “[p]olicing captures what this system does. It polices families with the threat of

⁴ CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 2 (2020), <https://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<https://perma.cc/CK3V-48ZJ>].

⁵ CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., FACT SHEET: CHILD AND FAMILY SERVICES REVIEWS, https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_general_factsheet.pdf [<https://perma.cc/Y7FQ-8N4L>] (last visited June 30, 2021) (describing federal review process of state child welfare systems);

⁶ See generally CHILD’S BUREAU, CHILD AND FAMILY SERVICES REVIEWS AGGREGATE REPORT: ROUND 3: FISCAL YEARS 2015–2018 (2020), <https://www.acf.hhs.gov/cb/report/child-and-family-services-reviews-aggregate-report-round-3-fiscal-years-2015-2018> [<https://perma.cc/Y66S-KNRB>] (describing results of federal examination of the strengths and areas needing improvement in state child welfare systems); CHILD’S BUREAU, CFSR ROUND 3 REPORT FOR LEGAL AND JUDICIAL COMMUNITIES (2021), <https://www.acf.hhs.gov/cb/report/cfsr-legal-judicial-communities-report> [<https://perma.cc/MN98-ZKFW>].

⁷ *Abolition Is the Only Answer: A Conversation with Dorothy Roberts*, RISE MAG. (Oct. 20, 2020) [hereinafter *Abolition Is the Only Answer*], <https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts/> [<https://perma.cc/J57Z-ZEX6>] (interview with Dorothy Roberts). Others have challenged the conventional terminology of the so-called child welfare system as well. See, e.g., Emma Williams, ‘Family Regulation,’ Not ‘Child Welfare’: *Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), <https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586> [<https://perma.cc/J76W-REVZ>]; Molly Schwartz, *Do We Need To Abolish Child Protective Services? Inside One Parent’s Five-Year Battle with the ‘Family Destruction System’*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/> [<https://perma.cc/H7N2-7BJ4>].

taking children away. Even when its agents don't remove children, they *can* take children and that threat is how they impose their power and terror. It is a form of punishment, harm and oppression."⁸ Child-taking and the threat of child-taking is the operative through line from American chattel slavery to the present-day family policing system.⁹

In *Shattered Bonds*, Professor Roberts highlights Black mothers' particular vulnerability to entrapment by the family policing system. Exposing the system's racialized and gendered impact, she challenges us to identify "steps that we can take to transform the system toward respecting the integrity of Black families," while providing resources necessary for Black children to thrive.¹⁰ Today, Professor Roberts calls for abolishing the system altogether.¹¹ This Article joins in that call and seeks to contribute to its success by spotlighting important structural features at the root of the system we seek to dismantle.

In 1974, with the enactment of CAPTA, Congress created CPS, the nationwide "child protective services" program of reporting, investigation, and prosecution of allegedly abusive or neglectful parents.¹² In tandem with doctors, teachers, police, providers of essential social service supports (such as domestic

⁸ *Abolition Is the Only Answer*, *supra* note 7. See also Leroy H. Pelton, Commentary, *How Can We Better Protect Children from Abuse and Neglect*, 8 FUTURE CHILD. 126, 126–27 (1998) ("The fundamental structure of the public child welfare system is that of a coercive apparatus wrapped in a helping orientation. Agencies ostensibly having the mission to help are mandated to ask whether parents can be blamed for their child welfare problems, and these agencies have the power to remove children from their homes.").

⁹ For an excellent exposition connecting the current family policing system to chattel slavery and the mass displacement of Native American children, see Emma Peyton Williams, *Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition*, 22–44 (Apr. 27, 2020) (B.A. thesis, Oberlin College). See also LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* (2020).

¹⁰ ROBERTS, *SHATTERED BONDS*, *supra* note 2, at viii.

¹¹ Dorothy Roberts, *How the Child Welfare System Polices Black Mothers*, SCHOLAR & FEMINIST ONLINE, (2019) [hereinafter Roberts, *Black Mothers*], <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/> [<https://perma.cc/8N9M-GXRZ>].

¹² See CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., *HOW THE CHILD WELFARE SYSTEM WORKS* (2020), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf> [<https://perma.cc/72LC-FG6E>] (describing reporting and investigation processes of CPS and potential outcomes for families).

violence, child care, public housing, emergency and temporary shelter, mental health, substance abuse, and other services), and other professionals legally mandated to report suspected maltreatment (“mandated reporters”), CPS polices families in accordance with carceral principles of surveillance, social control, and punishment. CAPTA’s foundational requirements of mandated reporting and cross-systems collaboration dictates a “stop-and-frisk” type referral system¹³ that feeds hundreds of thousands of Black families into the parasitic public/private foster industrial complex—a highly lucrative, “self-protecting ecosystem” fueled by “taking other people’s children.”¹⁴

When we think of the prison industrial complex, we think of massive spaces that employ some people to keep thousands more in bondage. Like the prison industrial complex, the foster industrial complex reflects principles associated with American slavery: it is a large operation and network of systems, organizations, and individuals that depends on a steady recruitment of bodies for its existence—disproportionately the bodies of Black children. States take a staggering number of Black children into “protective custody” every year. In 2018, over 400,000 children were in the foster system.¹⁵ Comprising about 14% of the total United States child population, in 2018, Black children were 23% (97,520) of the foster system population.¹⁶ By age 18, an astounding 53% of Black children will have been subjected to a CPS investigation as compared to 37% of all United States children.¹⁷

¹³ Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124 (2019).

¹⁴ TedX Talks, *Rethinking Foster Care: Molly McGrath Tierney at TEDxBaltimore 2014*, YOUTUBE, at 4:45–5:15 (Feb. 27, 2014), <https://www.youtube.com/watch?v=c15hy8dXSps> [https://perma.cc/7YUK-7RNG].

¹⁵ See CHILD.’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., *THE AFCARS REPORT 1 (2020)* [hereinafter AFCARS Report], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf> [https://perma.cc/Z6T6-EBB2].

¹⁶ *Black Children Continue to Be Disproportionately Represented in Foster Care*, KIDS COUNT DATA CTR. (April 13, 2020), <https://datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity> [https://perma.cc/G9YD-66FJ].

¹⁷ Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017).

The racist slave era ideology, which Bryan Stevenson calls the “presumption of dangerousness and guilt,” brands Black people as inherently inferior, violent, and dangerous.¹⁸ In the family policing system, parents are presumed dangerous and guilty from the moment an allegation of abuse or neglect is made against them.¹⁹ This presumption of parental dangerousness is a powerful factor in how street-level government agents (CPS caseworkers) exercise governmental police power in their interactions with Black families.²⁰ Despite its carefully-crafted public image of providing “services” to protect children and promote their well-being, many families experience CPS as a coercive and punitive intervention that leaves children less safe and families worse off.²¹

Most CPS cases involve neglect only—over 60% in 2018.²² “Neglect” is a nebulous, inconsistently-defined concept associated with parenting while poor and parenting while Black.²³ A

¹⁸ Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, NEW YORKER (June 1, 2020), <https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests> [<https://perma.cc/K7SD-26MG>] (interview with Bryan Stevenson, founder of the Equal Justice Initiative).

¹⁹ Burrell, *supra* note 13, at 127 (observing that there is “an automatic stigma that attaches when someone’s ability to parent is called into question, and the presumption that follows is that removals of children from households having child protective intervention are always justifiable and in the best interests of children and families. This belief is fueled by the reality that the media primarily covers stories of child death and serious abuse, which are only a small percentage of what is being investigated” (citations omitted))

²⁰ See, e.g., Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME (March 17, 2021, 9:00 AM), <https://time.com/5946929/child-welfare-black-families/> [<https://perma.cc/5K6E-YS8A>] (noting that low-income Black and brown parents who are disproportionately targeted by CPS explain that “fearmongering about child abuse has empowered child protective authorities to unfairly target their communities and invade their homes with virtual impunity. . . . Caseworkers routinely demand entry into homes in the middle of the night without warrants. The interrogations are frightening; the strip searches degrading. Far too often, they end with the trauma of children pulled from their parents’ arms”).

²¹ See, e.g., Darcey H. Merritt, *Lived Experiences of Racism Among Child Welfare-Involved Parents*, 13 RACE & SOC. PROBS. 63, 69 (2021) [hereinafter Merritt, *Lived Experiences*]; Kelly Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610 (2020); Darcey H. Merritt, *How Do Families Experience and Interact with CPS?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 203 (2020).

²² AFCARS Report, *supra* note 15, at 1.

²³ See, e.g., Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, CHILD’S BUREAU EXPRESS (Jan. 2020),

“coercive apparatus wrapped in a helping orientation,”²⁴ the system treats poverty-related circumstances of families as criminal wrongdoing, focusing its front-end activities primarily on investigating parents “to see whether they should be blamed for their children’s harmful environment and whether their children should be removed from it.”²⁵ Family defense scholar Vivek Sankaran observes that while a few cases might involve parents “who intentionally withhold” basic necessities such as food, clothing, and shelter from children, “the vast majority will be parents who were simply too poor to provide them. Combine such a broad definition of neglect with racial bias, and you get a system full of children of color traumatized by family separation inflicted in the name of ‘saving’ them.”²⁶ This needlessly accusatorial and punitive system creates an extremely wide front door through which Black families are disproportionately funneled into the highly lucrative foster industry for reasons of poverty.

Foster care agencies and contract service providers are the system’s frontline “family probation” officers, and are generously paid to surveil and manage the daily lives of CPS and court-involved families. In 2019, 53% of the roughly 8,000 children in the New York City foster system were Black.²⁷ Additionally, in 2018, under the rubric of “prevention services” the families of another 44,542 New York City children were under the surveillance of private agencies contracted by the city’s family policing agency, the Administration for Children’s

<https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=212§ionid=2&articleid=5474> [<https://perma.cc/Z4J9-CGVR>]; Dorothy Roberts and Lisa Sangoi, *Black Families Matter: How The Child Welfare System Punishes Poor Families of Color*, APPEAL (March 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/> [<https://perma.cc/FK5P-FQC7>].

²⁴ Pelton, *supra* note 8, at 126.

²⁵ See ROBERTS, SHATTERED BONDS, *supra* note 2, at 148.

²⁶ Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, IMPRINT (June 12, 2020, 11:00 PM), <https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616> [<https://perma.cc/UP5B-RZYS>]. See also Diana J. English et al., *Toward a Definition of Neglect in Young Children*, 10 CHILD MALTREATMENT 190 (2005).

²⁷ N.Y. STATE OFF. OF CHILD. & FAM. SERVS., 2019 MONITORING AND ANALYSIS PROFILES WITH SELECTED TREND DATA: 2015–2019, at 7 (2019), <https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20City.pdf> [<https://perma.cc/7A5X-WES4>].

Services (ACS).²⁸ The parents of these children are routinely subjected to oppressive, intrusive, and often disrespectful oversight of their parenting and inspection of the intimate details of their lives by employees of these private agencies.²⁹ The 2021 budget for ACS totals \$2.69 billion.³⁰ The “children’s services” provided by the 7,424 ACS employees consist of investigations, child removal, and “case work,” to the tune of \$537.5 million,³¹ with more than half of the total—\$1.53 billion—paid to the 573 private contractors of preventive, foster, and adoption services.³²

[These private agencies] are involved in a lucrative business that depends on keeping children in the system. The more children placed in foster care and the longer they are kept there, the more money the agencies make. There is no financial incentive, on the other hand, to reunite children quickly with their parents. . . . “They can’t make money if the children are returned home.”³³

Abuse of children in state “protective custody” is common,³⁴ especially in placements managed by private

²⁸ ADMIN. FOR CHILD.’S SERVS., CHILDREN* SERVED BY CHILD WELFARE PREVENTION SERVICES BY HOME BOROUGH/CD, CY 2018 (2018), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2018/CWChildrenReceivingPreventiveServicesCY2018.pdf> [<https://perma.cc/9C5B-5JQF>].

²⁹ Merritt, *Lived Experiences*, *supra* note 21, at 69–70.

³⁰ THE COUNCIL OF THE CITY OF N.Y., FIN. DIV., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2021 PRELIMINARY FINANCIAL PLAN, FISCAL 2021 PRELIMINARY CAPITAL BUDGET, FISCAL 2021 PRELIMINARY CAPITAL COMMITMENT PLAN, AND THE FISCAL 2020 PRELIMINARY MAYOR’S MANAGEMENT REPORT FOR THE ADMINISTRATION FOR CHILDREN’S SERVICES 1 (March 23, 2020), <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/04/068-ACS.pdf> [<https://perma.cc/V9RD-8BUP>]. According to this report, ACS spending on “core ACS responsibilities like investigating child abuse and placing children into foster care, has increased by approximately \$150 million since Fiscal 2017, in direct response to a series of tragic child fatalities in 2016.” *Id.* at 3.

³¹ *Id.* at 1.

³² *Id.* at 4. The top four largest individual ACS program areas in child welfare are foster care services(\$579.5 million); preventive services(\$335.3 million); protective services(\$321.4 million); and adoption services(\$273.5 million). *Id.* at 9.

³³ ROBERTS, SHATTERED BONDS, *supra* note 2, at 73 (quoting Anita Rivkin-Carothers).

³⁴ See, e.g., ANDREW C. BROWN, USING EFFICIENCY AUDITS TO IMPROVE CHILD WELFARE (2020), <https://files.texaspolicy.com/uploads/2020/09/01134412/Brown-Efficiency-Audits-Child-Welfare.pdf> [<https://perma.cc/TG4J-UTV5>];

contractors.³⁵ A 2015 report of the Senate Finance Committee of the United States Congress found that many children under management by state-contracted private foster system agencies are “abused, neglected, and denied services,” and that private companies “too often failed to provide even the most basic protections, or to take steps to prevent the occurrence of tragedies.”³⁶ Also in 2015, federal judge Janis Jack ruled in a class action lawsuit, *M.D. v. Abbott*,³⁷ that children in the custody of the Texas Department of Family and Protective Services were put at an unacceptable risk of physical and sexual abuse, and that those children leave the system “damaged, institutionalized, and unable to succeed as adults.”³⁸ After years of abuse, neglect, and inappropriate placements, the judge said, “the State has created a population that cannot contribute to society.”³⁹ In 2019, Black children were just 11% of the state’s total child population but accounted for 20% of children in the Texas foster system.⁴⁰ In addition, children in the foster system are particularly vulnerable to sex trafficking,⁴¹ putting Black children at higher

KRISTEN JOHNSON ET AL., IMPROVING CHILD SAFETY AND WELL-BEING IN FOSTER AND RELATIVE PLACEMENTS: FINDINGS FROM A JOINT STUDY OF FOSTER CHILD MALTREATMENT (2014); RICHARD WEXLER, NAT’L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING (2015). For more reporting and data on mistreatment, see *id.* at 2 nn.1–17.

³⁵ See, e.g., Mandi Eatough, *Foster Care Privatization: How an Increasingly Popular Public Policy Leads to Increased Levels of Abuse and Neglect*, 34 SIGMA J. POL. & INT’L STUDS. 51 (2017).

³⁶ STAFF OF S. COMM. ON FIN., 115TH CONG., AN EXAMINATION OF FOSTER CARE IN THE UNITED STATES AND THE USE OF PRIVATIZATION 2 (Comm. Print 2017).

³⁷ *M.D. v. Abbott*, 152 F. Supp. 3d 684 (2015).

³⁸ *Id.* at 718.

³⁹ *Id.* at 823.

⁴⁰ Kate Murphy, *Racial Justice Requires Improvements to the Texas CPS System*, TEXANS CARE FOR CHILD. (Sept. 14, 2020), <https://txchildren.org/posts/2020/9/14/racial-justice-requires-improvements-to-the-texas-cps-system> [<https://perma.cc/BV4W-7JS8>].

⁴¹ See e.g., Dawn Post, *Why Human Traffickers Prey on Foster-Care Kids*, CITY LIMITS (Jan. 23, 2015), <https://citylimits.org/2015/01/23/why-traffickers-prey-on-foster-care-kids/> [<https://perma.cc/RVT4-YCT4>]; *Preventing and Addressing Sex Trafficking of Youth in Foster Care: Hearing Before the Subcomm. of Hum. Res. of the H. Comm. on Ways and Means*, 113d Cong. 38 (2013) (statement of John D. Ryan, Chief Executive Officer, National Center for Missing and Exploited Children); FIRAS NASR ET AL., HUMAN TRAFFICKING SEARCH, FOSTER CARE AND HUMAN TRAFFICKING: A STATE-BY-STATE EVALUATION 4 (2017), <https://humantraffickingsearch.org/wp-content/uploads/2017/09/Foster-Care-Report.pdf> [<https://perma.cc/D78W-26ZW>].

risk of falling victim to commercial sexual exploitation than their counterparts in the general population.⁴² Equally as tragic, Black children are also disproportionately subject to the well-documented over-prescription and inappropriate use of psychotropic drugs on children in the foster system.⁴³

Compounding these shameful system abuses, Black children bear the brunt of the poor life outcomes associated with being raised by the state.⁴⁴ “Across a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement, these former foster youth are faring poorly as a group.”⁴⁵ The poor outcomes and trauma suffered by government raised Black children indicate that they need protection from the system, not from their parents.⁴⁶ “They

⁴² KATE WALKER & FIZA QURAIISHI, FROM ABUSED AND NEGLECTED TO ABUSED AND EXPLOITED: THE INTERSECTION OF THE CHILD WELFARE SYSTEM WITH THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 9 (2014), <https://www.thorn.org/wp-content/uploads/2015/02/CSEC-Child-Welfare-Report.pdf> [<https://perma.cc/28PM-RR2L>].

⁴³ See, e.g., *Psychotropic Medications: Research and Reports*, CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., <https://www.childwelfare.gov/topics/systemwide/bhw/medications/reports/> [<https://perma.cc/K48G-Q4LQ>] (last visited June 30, 2021) (compiling research and reports regarding psychotropic medications, with a focus on children and youth involved with the child welfare system); Angela Olivia Burton, “*They Use it Like Candy*”: *How the Prescription of Psychotropic Drugs to State-Involved Children Violates International Law*, 35 BROOK. J. INT’L L. 454 (2010).

⁴⁴ See, e.g., Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, PEDIATRICS, Nov. 2016, at 1; *Study Shows Foster Care Is Bad for Your Health*, CHILD’S HOME SOC’Y MINN. & LUTHERAN SOC. SERV. MINN. (Oct. 19, 2016), <https://chlss.org/blog/study-shows-foster-care-is-bad-for-your-health/> [<https://perma.cc/R3FS-GS3W>]; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007).

⁴⁵ MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 6 (2011). See also Laura Gypen et al., *Outcomes of Children Who Grew Up in Foster Care: Systematic-Review*, 76 CHILD. & YOUTH SERVS. REV. 74 (2017).

⁴⁶ See, e.g., Stephanie Ledesma, *The Vanishing of the African American Family: ‘Reasonable Efforts’ and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 35 (2014) (citing Ruth McRoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL’Y & L. 475, 487 (2005)) (children removed from their parents by CPS referred to their experiences as having been taken because they thought police had targeted them rather than having been rescued from unfit parents); Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What’s*

call themselves child protection services,” says abolitionist Joyce McMillan, “but, to be honest, the only thing I see them protecting children from is success.”⁴⁷

This Article proceeds as follows. In Part II, Ms. Montauban relates her experience as a Black mother who overcame countless injustices and indignities to successfully reunite with her son after a five-year battle with New York City’s foster system. Part III examines the role played by the ideology of parental dangerousness in the design of the family policing system created by the federal Child Abuse Prevention and Treatment Act of 1974 and draws connections between Black parents’ experiences with CPS and key provisions of the law. Part IV of the Article maps what Professor Roberts calls the “racial geography of child welfare,”⁴⁸ the insidious presence of CPS in virtually every aspect of the lives of Black families in New York City’s under-resourced neighborhoods, and shines a spotlight on the parasitic multi-billion-dollar public/private foster industry that commodifies impoverished Black families for government revenue and private profit. Part V is a call to action to abolish the punitive and oppressive CPS system of reporting, investigation, and prosecution of families for alleged child maltreatment, to divest funding from the foster industry and invest in community resources de-linked from the family policing system, and for monetary reparations for damages inflicted by the system on generations of Black children and their families.

II. THE FAMILY EXPERIENCE: STUCK IN A LABYRINTH

Most people have a distorted view of the so-called child welfare system in America; their views are limited to the idea that CPS exists to protect orphaned children or children with unfit parents. The general public has not grasped the depth and magnitude of the destructive operations of an industry that has from its inception produced the worst outcomes for children and

Going On? Examining Children’s Lived Experience of the Transition into Foster Care, 32 CHILD. & YOUTH SERVS. REV. 437, 440 (2010).

⁴⁷ Joyce McMillan, *Poverty Framed as Neglect*, FRANKNEWS (Aug. 12, 2020), <http://www.franknews.us/interviews/425/poverty-framed-as-neglect> [<https://perma.cc/6M82-9SPB>].

⁴⁸ Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 126 (2008) [hereinafter Roberts, *Racial Geography*].

their families. “Child Protective Services”—more accurately described as the family police—intersects with virtually every aspect of the daily experience of many Black families, especially—but not exclusively—those living in under-resourced communities. The child protection or “child welfare system” feeds Black families into the foster industry, a confusing web of interconnected and interdependent government agencies, private foster care organizations, and government-funded and government-controlled community-based service providers. Once entrapped in this labyrinth, parents find it hard to get out.

I came into contact with the family destruction system in New York City when my son was two years old, at a tender age when children are bonding with their parents. It wasn’t long before I came to realize that it would be extremely hard for me to get out, which is what most parents want after the full realization that their children are trapped in a system that is not designed to meet their needs. I was a victim of domestic violence, and as a result of my outreach to Safe Horizon, a widely-advertised domestic violence abuse hotline, a CPS specialist from ACS knocked on my door. Once I opened the door, my criminalization began. I had reached out to Safe Horizon for help, and without my knowledge or permission, Safe Horizon called in a report against me to CPS. I later learned that Safe Horizon not only received funding from the ACS, but that Linda Fairstein,⁴⁹ the prosecutor in the Central Park Jogger case, was on its Board of Directors for years and was only recently forced to resign after the premiere of the film *When They See Us*,⁵⁰ directed by Ava Duvernay, in 2019. From the New York County Prosecutor’s Office to Safe Horizon, Linda Fairstein was afforded many opportunities to do harm to Black families.

When my son was placed into foster care, the first foster care agency involved was Edwin Gould Services for Children and Families—which in 2018 was acquired by Rising Ground (formerly known as Leakes & Watts), in a deal which, according to Rising Ground’s CEO, was motivated by “the shrinking foster

⁴⁹ Tanasia Kenney, ‘*She Has to Pay for Her Crime*’: Staffers at Non-Profit Organization Demand Linda Fairstein be Removed from Board, ATLANTA BLACK STAR (June 4, 2019), <https://atlantablackstar.com/2019/06/04/she-has-to-pay-for-her-crime-staffers-at-nonprofit-organization-demand-linda-fairstein-be-removed-from-board/> [https://perma.cc/58FG-JXHU].

⁵⁰ *When They See Us* (Harpo Films May 31, 2019).

care population.”⁵¹ During the first six months navigating the foster care system in New York City, the first two case planners assigned to my case resigned. Frequent turnover in case planners is common and contributes to delays in children returning home. The first case planner resigned in 2013, two weeks after my son was placed in foster care. The second case planner was assigned to my case in January 2014, three months later. She resigned two months later. This meant that my child’s needs were not met, and my concerns were not addressed. The foster care unit at Edwin Gould Services for Children and Families was extremely mismanaged. For example, my son, a native English speaker, was placed in a Spanish-speaking home with a foster parent who did not speak English.

After my numerous complaints about Edwin Gould’s operations and practices, my case was transferred to Children’s Village, another foster care agency. Children’s Village, a colossal complex with a massive plantation-sized campus in Dobbs Ferry, New York, is where my case remained for the next four years. From the beginning, I wanted my legal rights as a parent to be acknowledged and respected. Children’s Village decided to go to war with me for exercising my legal rights as a parent. Children’s Village made it difficult for my son to see a pediatrician of my choice and to attend a school that I selected. My supervised visits were suspended on many occasions without just cause, and the foster care agency was not responsive to my concerns. The most severe retaliation: their refusal to reunify and to return my son to my care. Because I raised concerns, filed grievances, and complained to my local elected officials about the abuse of power, mismanagement, and the neglect and abuse of children in foster care that I personally encountered, I experienced various forms of backlash meant mostly to silence me and break me down.

It took five years for my son to return to my care. Once my case was transferred to Children’s Village, it became obvious to me that I was a target. My son was placed with a foster parent who was promised that the child would be free for adoption. Her desire to adopt my child conjured up many conflicts. I pursued dyadic parent-child therapy at the Jewish Board of Family

⁵¹ Jonathan Lamantia, *Two Human-Services Nonprofits Join Forces*, CRAIN’S N.Y. BUS., (Aug. 20, 2018, 12:00 AM), https://www.crainsnewyork.com/article/20180820/HEALTH_CARE/180829989/two-human-services-nonprofits-join-forces.

Services to avoid supervised visits at the foster care agency, which became more and more hostile. But that foster mother—whose lies were partly responsible for many suspended visits—made some mishaps that prompted the dyadic therapist to call the NYC Central Registry on her. And because she was a foster parent, the ACS's Office of Special Investigations conducted an investigation. As a result, my son was placed in another home with a new foster parent. In 2016, Children's Village petitioned the court to terminate my parental rights. My son had a new foster father, who was not "evil" like the previous foster mother. He was instrumental in my son coming home. Children's Village wanted him to adopt my son, but due to his age and health issues, he was not interested. He testified on my behalf during the Termination of Parental Rights (TPR) hearing and affirmed that my son wanted to be returned to his mother. Still, he was pressured to adopt my son, even after his numerous refusals.

Extending the stay of children in foster care is a common retaliatory tactic used by foster care agencies to torment and control parents. I came to learn that the first year of foster care placement is crucial; if a child stays in foster care for over a year, reunification becomes even more difficult. Although in reports submitted to family court, the foster care agency claimed that the permanency goal was reunification, I discovered that the first social worker assigned to my case was titled an "adoption social worker." At my family court appearances, the foster care agency produced reports that were infested with gross misrepresentations. Most of the court reports and permanency hearing reports were infested with lies claiming that the agency was making reasonable efforts while the agency instead was making efforts to terminate my parental rights and deem my son a ward of the state in retaliation for my growing advocacy in exposing the injustices that parents like myself faced. Rather than working towards reunification, the agency instead engaged in continued harassment and retaliation that took many forms like suspending my visits, refusal to make reasonable efforts, and dismissing numerous legitimate concerns.

Once a case ends up in family court, not only does the clock start ticking toward termination of parental rights, but the probability also increases that the judge will order foster care placement, especially if the parent is poor and Black. After five years of stepping in and out of the New York County Family

Court, I can safely say that the court system plays a major role in extending the stay of children in foster care and works a great injustice on many families. In New York City, not only do Black children enter foster care at an alarming rate, they also stay in foster care longer than children of any other race.⁵² The obvious explanation is the lack of regard and respect for Black people in the United States. Black people are dehumanized by all systems they come into contact with, from the public school system, to the juvenile justice system, and to the criminal justice system. I cannot imagine white children unnecessarily lingering in foster care for five to ten years without great efforts being made to reunify them with their families or to ensure they have a better childhood.

Foster care is a dead-end for children and their families. Once a family enters the foster care system, it is extremely hard for them to get out of the system because of the network of the so-called professionals working against the best interest of families. This network of people employed by the foster care agencies are: the senior staff (including dozens of vice presidents and endless executives at the administrative level), then the staff at the local site levels which includes caseworkers, social workers, supervisors, managers, medical professionals, and other professionals. These professionals are at many levels working synergistically to keep children in the system as wards of the state. It is their survival mechanism and business model. This is indeed one of the main reasons that many children remain in foster care for years.

The power dynamics between parents and the foster care agency are very important to analyze because they provide a deeper understanding of some of the reasons why Black children stay in foster care longer than children of any other race. This antagonistic relationship between parents and the system has many roots, but is due primarily to the amount of disrespect that parents experience. In my case, there were many examples of disrespectful behavior of agency workers toward me: parent-child

⁵² Associated Press, *Many Say Now is the Time to Fight Racial Bias in Foster Care*, U.S. NEWS & WORLD REPORT (April 14, 2021, 12:24 PM), <https://www.usnews.com/news/us/articles/2021-04-14/many-say-now-is-the-time-to-fight-racial-bias-in-foster-care> (“Bias and racism are widespread in the child welfare system. Black children are taken into foster care at a disproportionately high rate and languish longer before being adopted, reunited with their parents or aging out of the system.”).

visits cancelled without notice, constant misinformation, refusal to work with me, and informing the foster parent that my child would soon be available for adoption even though the permanency goal was reunification. Additionally, I was prevented from effectively planning for my son's education and prevented from participating in my son's doctor's and school visits. I objected to my son's seeing the agency's contracted pediatrician. I was adamant about my son seeing a pediatrician of my choice and fought to exercise my legal rights as a parent.

Even when I completed the mandated "reunification" services, the caseworker said that I did not gain any insight due to my continued criticism and resistance to the system in place. The foster care agency refused to acknowledge the positive reports and reviews from professionals that provided a second opinion. My experience mirrors Professor Roberts' observation that:

Friction between Black mothers and case workers often leads to bad outcomes for Black families. Caseworkers are instructed to treat the degree of parents' cooperation as evidence of the child's risk of harm. When reported families do not cooperate with the investigating agency, their case is more likely to be referred to court. . . . Parents are expected to be remorseful and submissive. Any disagreement with the agency's proposed plan is reported as evidence of unwillingness to reform.⁵³

I could not trust the social worker assigned to my case. When I inquired as to why an adoption social worker was assigned to my case when the goal was reunification, the social worker's title was immediately changed but she remained as my social worker. Additionally, she disregarded, invalidated, and undermined the positive reviews and reports that I received from independently certified providers. The bi-annual family team conference was more of a compliance dog-and-pony show rather than a discussion of what kinds of meaningful efforts needed to be made to meet the best interests of my child and making plans towards reunification. The meetings were about producing reports to show that they were making the legally-required

⁵³ ROBERTS, SHATTERED BONDS, *supra* note 2, at 66.

“reasonable efforts”⁵⁴ to reunify me and my son in order to justify their federal subsidy. Truly, that is the heart of the problem confronting families: the professionals put in place to support them, to guide them, and to engage them in case-planning cannot be trusted and are part of the larger systemic problem. There are many layers to this problem: case-planning is merely meeting basic mandates and producing reports for court, but the real work of engaging, motivating, and empowering families seldomly gets done. There are no opportunities for restorative relationship-building because of the antagonistic power dynamics: parent against foster care agency or parent against CPS. This antagonistic relationship exists because the foster care experience functions like prison for children and their parents; it is forced placement for parents and for children.

Looking back, it very much mirrors a “Behavior Modification Program.”⁵⁵ Dorothy Roberts has “used the term to describe welfare programs because their purpose is to change the behavior of recipients, not to provide them with assistance in caring for their children.”⁵⁶ Whether in the criminal policing system or the family policing system, there is a clear power structure: the guards have the power, and the prisoners do not. I was constantly reminded of my powerless place in the hierarchy and was expected to behave accordingly. I was expected to obey and comply, to be in agreement, to be silent, and to be agreeable. There are steep consequences for parents who dare to challenge or question the system. As Dorothy Roberts notes, “[p]erceptions of cooperativeness are greatly influenced by the parent’s race. Because of negative stereotyping, Black mothers are perceived as hostile and less amenable to rehabilitation.”⁵⁷ It is not long before parents come to realize that the professionals put in place to support them are instead working to undermine and misguide them to help build a documented case for why their children should remain in foster care.

⁵⁴ Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15).

⁵⁵ See, e.g., EDWARD P. SARAFINO, BEHAVIOR MODIFICATION: PRINCIPLES OF BEHAVIOR CHANGE (2d ed. 2004).

⁵⁶ E-mail from Dorothy Roberts, George A. Weiss Univ. Professor of L. & Socio., Raymond Pace & Sadie Tanner Mossell Alexander Professor of C.R., Professor of Africana Studs., Univ. of Pa., to authors (June 21, 2021, 8:30 AM) (on file with authors).

⁵⁷ ROBERTS, SHATTERED BONDS, *supra* note 2, at 66.

Parents are thrust into an environment where they are afraid to be vulnerable because vulnerability is seen as a disease that needs to be treated. In the family policing system, mental health evaluations are ordered to assess the extent of the alleged disease of “child abuse and neglect” and to justify removals and the need for CPS interventions. Their use in CPS interventions do not derive from a culturally-responsive framework for diagnosing and treating mental health issues. Instead, they are used as a prosecutorial tactic against families. Critiquing the CPS mindset that equates poverty with individual pathology, Diane Redleaf explains that “[c]hild protective workers typically come to homes armed with psychological assessment questionnaires, when what they should bring are housing vouchers and groceries. We seem to have a pathological need to pathologize families instead of helping them with their obvious needs.”⁵⁸ When CPS intervenes into a family, parents are thrust into an environment where they are afraid to express their needs because their declaration will likely be misconstrued and used as a weapon against them.

Psychological or mental health evaluations are commonly used to deem parents dangerous or unfit. Parents are manipulated, coerced, and forced to participate in myriads of mental health evaluations without just cause. As a parent, I was constantly forced to sign HIPAA forms waiving my protected rights to privacy, including by pressure from the family court judge. Foster care agencies and judges inappropriately use mental health evaluations as a tool not only to keep children in foster care but also to surveil and monitor families. Dorothy Roberts reports that “[o]nce under agency control, the mothers were subjected to increased scrutiny that included mandatory parenting classes, supervised visits with their children, and a battery of psychological evaluations.”⁵⁹ Indeed,

It is common for agencies to require parents to be evaluated and counseled by state-paid therapists throughout the time their children are in foster care and for therapist’s reports to figure

⁵⁸ Diane Redleaf, *Biden’s Child Welfare Focus Should Be Removing Poverty from Neglect*, IMPRINT (Dec. 21, 2020, 4:00 AM), <https://imprintnews.org/child-welfare-2/biden-child-welfare-focus-removing-poverty-neglect/50041> [<https://perma.cc/3PBT-H8AL>].

⁵⁹ ROBERTS, SHATTERED BONDS, *supra* note 2, at 39.

prominently in the parents' file. . . . The psychological evaluation also provides a surreptitious way of keeping custody of children without saying it.⁶⁰

The role of these psychological evaluations in prolonging children's stay in foster care play a crucial part in the expansion of the foster care industrial complex. The National Council on Disability has, for years, sounded the alarm about the inappropriate use of psychological evaluations in child protection cases. The Council reports that psychologists are often asked to provide judgments about their patients' parenting capacity and to testify about parental fitness even though they have only interviewed the parent for a couple of hours, and that even in the absence of formal evaluations, courts often rely on mental health professionals to make life-altering decisions that lead to the separation of children from their parents.⁶¹

A particularly pernicious form of state violence against Black families is the use of mental health evaluations as a mechanism to deem parents unfit and to justify removals, foster care placement, and termination of parental rights. To "treat" child abuse, one needs to determine the cause or "etiology" of behavior (symptoms) classified as abusive or neglectful. Yet, after decades of government and foundation-funded research, "searches for distinctive behavioral syndromes have proven elusive. Those factors that have appeared reliably are directly related to ability to cope with poverty."⁶² Nevertheless, the system, including judges, rely heavily on mental health evaluations as a tool not only to keep children in foster care, but also to prolong families' contact with the system. It is also important to note that these mental health evaluations are used as grounds to terminate parental rights, best known as the civil death penalty.

Canada is far ahead of the United States in recognizing and acknowledging the harms of these psychological evaluations

⁶⁰ *Id.* at 40.

⁶¹ NATIONAL COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 129–30 (2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [<https://perma.cc/96XS-Y64A>].

⁶² Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 11 (2004) (citations omitted).

and detrimental effects on marginalized groups. Similar to African-Americans in the United States, Indigenous people in Canada are also members of a marginalized group who are disproportionately experiencing family separation.⁶³ In Canada, the validity of these mental health evaluations is being challenged. In their response to family separation, the Canadian Psychological Association points out that “[p]sychological assessment has been misused to further the colonial agenda of cultural genocide through culturally-situated definitions of health including mental health and pathology.”⁶⁴ Despite the long-standing recognition that “[t]here are indeed reasons to believe that clinicians misinterpret problems of minority individuals in making diagnoses and in formulating overall assessments of mental health problems,”⁶⁵ the misuse of psychological evaluations in the United States child welfare systems remains unaddressed. While recent statements issued by the American Psychological Association (APA)⁶⁶ and the American Psychiatric Association⁶⁷ acknowledge the history and detrimental impact of racism in their fields, neither has issued statements specifically acknowledging the family policing system’s inappropriate use of psychological evaluations in child protective cases.

The harms resulting from improper use of psychological evaluations are compounded by their poor quality. Any validity

⁶³ Sara Miller Llana, Canada’s Indigenous Seek to Break Vicious Cycle Tearing Families Apart, CHRISTIAN SCI. MONITOR (June 5, 2019), <https://www.csmonitor.com/World/Americas/2019/0605/Canada-s-indigenous-see-to-break-vicious-cycle-tearing-families-apart> [https://perma.cc/Y2V4-7KTU]. See also An Act Respecting First Nations, Inuit and Métis Children, Youth and Families, S.C. 2019, c 24 (Can.) (“Parliament affirms the need . . . to eliminate the over-representation of Indigenous children in child and family services systems . . .”).

⁶⁴ CANADIAN PSYCH. ASSOC. & PSYCH. FOUND. OF CAN., PSYCHOLOGY’S RESPONSE TO THE TRUTH AND RECONCILIATION COMMISSION OF CANADA’S REPORT 15 (2018), https://cpa.ca/docs/File/Task_Forces/TRC%20Task%20Force%20Report_FINAL.pdf [https://perma.cc/LF9U-JZBZ].

⁶⁵ Lonnie R. Snowden, *Bias in Mental Health Assessment and Intervention: Theory and Evidence*, 93 AM. J. PUB. HEALTH 239, 241 (2003).

⁶⁶ Sandy Shullman & Arthur Evans, *APA’s Action Plan for Addressing Inequality*, AM. PSYCH. ASSOC. (June 2, 2020), <https://www.apa.org/news/apa/2020/action-addressing-inequality> [https://perma.cc/762C-5WKZ].

⁶⁷ *APA’s Apology to Black, Indigenous and People of Color for Its Support of Structural Racism in Psychiatry*, AM. PSYCHIATRIC ASSOC. (Jan. 18, 2021), <https://www.psychiatry.org/newsroom/apa-apology-for-its-support-of-structural-racism-in-psychiatry> [https://perma.cc/WA5D-TR3C].

that psychological assessments in child welfare cases might have is undermined by problems like case overload, inadequate capacity, and lapses in communication between evaluators, agencies, and courts. A 2017 investigation by ProPublica on the use of mental health evaluations in the New York City family court system reported that a 2012 “confidential review done at the behest of frustrated lawyers and delivered to the administrative judge of Family Court in New York City” found that the work of the primary provider of evaluations on behalf of ACS “was inadequate in nearly every way.”⁶⁸ The review found that none of the evaluations matched all of the criteria from the APA and other professional guidelines. “Some met as few as five [out of twenty-five]. The psychologists used by Montego [Medical Consulting, a for-profit contractor previously used by ACS,] often didn’t actually observe parents interacting with children. They used outdated or inappropriate tools for psychological assessments”⁶⁹ Yet, even after this damning report, many family court judges, ACS, and many foster care agencies continued to use the evaluator until ACS terminated their contract in 2015. The results of these defective and faulty mental health evaluations were for years used to keep Black and Brown New York City children in foster care and as grounds to terminate parental rights.

In 2015, Children’s Village tried to convince me to seek a psychological evaluation at Montego Consulting even after I paid the cost for independent mental health evaluations that produced positive reviews that were not considered. At the filing of the TPR, I was again pressured to have another mental health evaluation—again, I refused. My refusal was the best decision that I made and would play a major part in my son returning to my care in 2018.

The foster care industrial complex thrives on the medical diagnosis and subsequent treatment of the parent. Treatment of the “disease” of child abuse and neglect is a key focus of CAPTA. To place children in foster care, the agency must show proof of a problem with the parent. As a result, poverty and given circumstances are treated as an illness and parents are subjected

⁶⁸ Joaquin Sapien, *Dysfunction Disorder*, PROPUBLICA (Jan. 17, 2017), <https://www.propublica.org/article/dysfunction-disorder-nyc-family-court-flawed-mental-health-reports> [<https://perma.cc/X76U-S972>].

⁶⁹ *Id.*

to cheap, low-quality, and faulty evaluations done by for-profit contractors. The system benefits from this arrangement, especially the mental health professionals—psychologists, psychiatrists, licensed social workers, and other mental health workers. However, these evaluations do not have any real value in determining a child’s and family’s needs. The main purpose of forensic psychological evaluation is to provide a diagnosis for clinical purposes. Currently, in New York City, forensic psychological evaluations are used by ACS mainly for character assassination to demonize and criminalize a parent and to provide justifications for removals and termination of parental rights.

In many instances, these forensic psychological evaluations do not meet basic APA guidelines but have lasting detrimental effects such as long-term family separation and termination of parental rights. According to Claire Gilligan, Psy.D., a licensed psychologist who practices in the state of Vermont, “a useful evaluation should assess if a parent can meet the child’s basic needs.”⁷⁰ In particular, Dr. Gilligan utilizes a multi-method approach to evaluating parenting capacity consistent with forensic training and adhering to the APA Guidelines for Psychological Evaluations in Child Protection Matters.⁷¹ Dr. Gilligan’s approach is modeled after the work of Karen Budd, Ph.D.,⁷² which promotes the use of the “minimal parenting standard” in assessing a parent’s ability to meet their child’s basic physical, developmental, and emotional needs in the context or risk and protective factors across child, parenting/family, and social/environment domains. Claire Gilligan explains:

Unlike traditional clinical evaluations, parenting capacity evaluations employ a functioning

⁷⁰ E-mail from Dr. Claire Gilligan, Psychologist, to authors (Mar. 31, 2021, 8:15 AM) (on file with authors). Dr. Claire Gilligan is a certified psychologist licensed in Vermont and New York who specialize in family matters including parenting capacity and parenting plans. See *Dr. Claire E. Gilligan*, CLAIRE E. GILLIGAN, PSYD, <https://www.clairegilliganpsyd.com/dr-claire-gilligan> (last visited June 3, 2021).

⁷¹ Am. Psych. Assoc., *Guidelines for Psychological Evaluations in Child Protection Matters*, 68 AM. PSYCH. 20 (2013).

⁷² Karen S. Budd, *Assessing Parenting Competence in Child Protection Cases: A Clinical Practice Model*, 4 CLINICAL CHILD & FAM. PSYCH. REV. 1 (2001).

approach to assessment that focuses on daily caregiving skills and deficits. The goal of parenting capacity evaluation is to assess the unique fit between a parent's abilities and deficits and a child's needs, and most importantly provide recommendations that promote growth in parents for consideration for reunification.⁷³

III. CRIMINALIZING POVERTY:
THE CARCERAL ROOTS OF THE CHILD
ABUSE PREVENTION AND TREATMENT ACT
OF 1974

Like all other carceral institutions, the family policing system centers pathology, criminalization, and punishment. The concept of carcerality captures the ways in which white supremacy shapes and organizes society “through policies and logic of control, surveillance, criminalization, and un-freedom. . . . The carceral state, and its punitive processes of criminalization and control, operate in highly discriminatory ways and have both produced and reinforced massive inequalities along lines of race, class, gender, sexuality, and other identity categories.”⁷⁴ Ms. Montauban's experience with New York City's family policing system bears witness to Professor Roberts' observation that Black mothers are situated “at the epicenter of a multi-institutional apparatus of surveillance, social control, and punitive regulation.”⁷⁵

The heavy-handed, punitive, and antagonistic dynamics Ms. Montauban describes are baked into the DNA of the family policing system. Until the 1970s, “there were no official mechanisms to investigate allegations of child abuse” because

⁷³ E-mail from Dr. Claire Gilligan, *supra* note 70.

⁷⁴ Gabrielle French et al., *What Is the Carceral State?*, UNIV. OF MICH. CARCERAL STATE PROJECT (May 2020), <https://storymaps.arcgis.com/stories/7ab5f5c3fbca46c38f0b2496bcaa5ab0> (explaining that “the reach of carcerality extends far beyond formal incarceration itself,” and captures the many ways in which society and culture is organized “through policies and logic of control, surveillance, criminalization, and un-freedom. . . . that revolve around the ‘promise and threat of criminalization’ and the ‘possibility/solution of incarceration.’ The carceral state, operating through these punitive orientations, functions as an obstacle and a substitute for ‘humane solutions to social problems’ such as poverty, racism, citizenship status, and other forms of inequality and discrimination.”)

⁷⁵ Dorothy Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1706 (2019) (book review) [hereinafter Roberts, *Digitizing*].

lawmakers “did not perceive families as dangerous or harmful to children’s well-being.”⁷⁶ Enacted during a time of retrenchment from federal efforts to “redistribute wealth and ameliorate the effects of poverty,”⁷⁷ symbolized by President Lyndon Johnson’s War on Poverty, the Child Abuse Prevention and Treatment Act of 1974 pathologized and criminalized poverty and created an investigative and prosecutorial response that diverted attention and resources from anti-poverty efforts.⁷⁸ While neither the federal government nor the states have a legally enforceable obligation to operate child protective services systems,⁷⁹ by linking receipt of federal dollars to federal policy requirements “Congress has been able to persuade every state to conform its child welfare laws with federal law.”⁸⁰ Examining CAPTA’s history and provisions through the lens of carcerality allow us to more clearly see its central role in the criminalization of Black families for reasons of poverty.

A. Historical Background: A Pretextual Response—Conflating Poverty with Abuse

CAPTA’s central organizing principle is that “the most widespread threats to the safety and well-being of children stem from the misbehaviors of their parents.”⁸¹ As experienced by Ms. Montauban and hundreds of thousands of other parents, the intense, pathological obsession of the family policing system with psychological assessments, behavior modification programming

⁷⁶ MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 182 (2005).

⁷⁷ *Id.* at 184.

⁷⁸ *Id.* at 181–85 (observing that in the late nineteenth century “child protection was a small piece of a larger movement to rectify social ills for children,” but in the latter part of the twentieth century, the purpose “was dramatically narrowed to protecting children from harm inflicted upon them by their parents.”).

⁷⁹ See Jennifer Reich, *The Child Welfare System and State Intervention in Families: From Historical Patterns to Future Question*, 2 SOCIO. COMPASS 888, 892–93 (2008) (explaining that the United States Supreme Court’s decisions in *DeShaney v. Winnebago*, 489 U.S. 189 (1989), and *Town of Castle Rock, Colorado v. Gonzales*, 45 U.S. 748 (2005), taken together, “clarify that citizens do not have a right to protection and that state agencies that fail to protect individuals are free from liability. In fact, the less states do to proactively protect individuals, the safer they are from claims of negligence. Nonetheless, the child welfare system is predicated on a belief that children should be protected, even as the legal responsibility to do so is vague.”).

⁸⁰ GUGGENHEIM, *supra* note 76, at 184.

⁸¹ Pelton, *supra* note 8, at 128.

(“treatment and services”), and quasi-criminal prosecution is rooted in the origins of CPS as a system of mandatory reporting by physicians of suspected physical assaults on children by their parents.

Ostensibly enacted as a reaction to concern over widespread physical and sexual violence against children by their parents, the family policing system’s almost singular focus on reporting, investigation, prosecution, and “casework” (monitoring for compliance) is indelibly linked to Dr. C. Henry Kempe—a principal founder of the International Society for the Prevention of Child Abuse and Neglect, the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect, and *Child Abuse and Neglect: The International Journal*. In 1962, Kempe and several colleagues published an article entitled *The Battered Child Syndrome*, in which they introduced the empirically unsupported idea of parental violence against children as a diagnosable and treatable medical condition or mental illness. Kempe described “battered child syndrome” (BCS) as “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.”⁸² And, reminiscent of eugenics ideology,⁸³ Kempe further insinuated that BCS was also a serious mental illness almost exclusively afflicting marginalized groups. He speculated that:

Psychiatric factors are probably of prime importance in the pathogenesis of the disorder Parents who inflict abuse on their children do not necessarily have psychopathic or sociopathic personalities or come from borderline socioeconomic groups, although most published cases have been in these categories. In most cases[,] some defect of character structure is probably present.⁸⁴

⁸² C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS’N. 17, 17 (1962).

⁸³ See Roberts, *Digitizing*, *supra* note 75, at 1712–16 (arguing that “[p]rediction is a defining feature of the carceral state” and linking the modern use of predictive analytics to reinforce the state’s control over marginalized populations to the ways in which American eugenicists catalogued socioeconomic classes and races according to predictions of their social value).

⁸⁴ Kempe, *supra* note 82, at 24. See also BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 13 (1984).

Kempe pointed to reports by social workers that such parents were “of low intelligence,” and that “[a]lcoholism, sexual promiscuity, unstable marriages, and minor criminal activities are reportedly common amongst them,”⁸⁵ and that parents afflicted by BCS “are immature, impulsive, self-centered, hypersensitive, and quick to react with poorly controlled aggression.”⁸⁶ News reports fueled public outrage about this seemingly ubiquitous horror. Claiming that “at least two children a day” were “savagely assaulted by their own parents,” one article listed a litany of parental brutality, including beating, burning with matches, cigarettes, or electric irons, holding the child’s hands, arms or feet over an open flame, and deliberate scalding.⁸⁷ Others, the reporter wrote, “are strangled, thrown, dropped, shot, stabbed, shaken, drowned, suffocated, sexually violated, held under running water, tied upright for long periods of time, stepped on, bitten, given electric shocks, forced to swallow pepper or buried alive.”⁸⁸

During the four days of Congressional hearings on CAPTA in 1973, although some witnesses focused on the need to address alleged child maltreatment by attending to stressors associated with living in poverty, testimony was overwhelmingly about physical and sexual abuse of children by their parents.⁸⁹ In *Making an Issue of Child Abuse: Political Agenda Setting for Social Problems*, political scientist Barbara J. Nelson explains that in the wake of the outcry over Kempe’s “discovery” of battered child syndrome, lawmakers and others made addressing brutal abuse of children by their pathologically dangerous parents an urgent national priority. Even prior to the enactment of CAPTA—due in large part to Kempe’s influence—by 1965, all fifty states had adopted some form of mandated reporting of suspected child abuse for physicians and other health professionals.⁹⁰ With the enactment of CAPTA, Congress formalized and expanded mandatory reporting of physical abuse into a nationwide system of reporting, investigation, and

⁸⁵ Kempe, *supra* note 82, at 18.

⁸⁶ *Id.*

⁸⁷ NELSON, *supra* note 84, at 60.

⁸⁸ *Id.*

⁸⁹ *Id.* at 104–07.

⁹⁰ *See id.* at 13–14.

prosecution of child maltreatment applicable to both physical abuse and poverty framed as neglect.⁹¹

CAPTA's initial scope was both broad and vague, melding intentional acts and acts of omission into a singular phenomenon—child abuse and neglect. In the original version of CAPTA, “child abuse and neglect” was defined as “the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of any child under the age of eighteen by a person who is responsible for the child’s welfare under circumstances which indicate the child’s health or welfare is harmed or threatened thereby.”⁹² Just as broad and arguably more nebulous, CAPTA currently defines “child abuse and neglect” as “any recent act or set of acts or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act, which presents an imminent risk of serious harm.”⁹³ Each state can fashion its own definition in conformity with the federal definition.⁹⁴ The federal government and states generally define “neglect” in relation to parental omission to provide for a child’s basic needs, while “abuse” covers acts of commission, such as physical assault beyond legally permitted corporal punishment, sexual abuse, or emotional abuse.⁹⁵

By defining “child abuse and neglect” as a singular phenomenon, lawmakers knowingly created a false equivalence between intentional physical harm to children by their parents and conditions of poverty, effectively transforming child poverty from a social, economic, and racial justice issue into a problem of

⁹¹ *See id.*

⁹² Child Abuse Prevention and Treatment Act, P.L. 93-247, § 3 (1974).

⁹³ Child Abuse Prevention and Treatment Act, P.L. 93-247 (1974), as amended through P.L. 115-424, § 3(2) (2019).

⁹⁴ *See* CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT: FACT SHEET (2019), <https://www.childwelfare.gov/pubPDFs/define.pdf> [<https://perma.cc/DKL3-G4YT>] (compiling definitions from all fifty states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands).

⁹⁵ *Id.* at 1. *See also* N.Y. FAM. CT. ACT § 1012 (2021) (defining a “neglected child” as “a child less than eighteen years of age” whose “condition has been impaired . . . as a result of the failure of his or her parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter, or education . . . or medical . . . care” or “in providing the child with proper supervision”).

individual parental pathology and deviant behavior.⁹⁶ Conflating abuse and poverty-framed-as-neglect allowed policymakers to avoid addressing deeply entrenched structural, economic, and racial inequities affecting children’s wellbeing.

The family policing system “is inextricably tied to our society’s refusal to see a collective responsibility for children’s welfare. It is a society willing to pay billions of dollars a year on maintaining poor children outside their homes but begrudges spending a fraction of that on supporting families.”⁹⁷ Under the CPS regime, “the most serious problems facing children in the United States—all related to poverty”—were pushed aside as “outside of the proper boundaries” of child welfare.⁹⁸ In the years after CAPTA’s enactment, more federal funds became available to states for family separation, and by 1979, “approximately 75% of child welfare funds were devoted to foster care rather than on services to support or preserve families.”⁹⁹

With the creation of the CPS apparatus of reporting, investigation, and prosecution organized around the principle of parental dangerousness, Congress thus criminalized poverty and set in motion a nationwide family policing system focused on proving parental deviance and wrongdoing rather than on addressing children’s needs.

B. How CAPTA Shapes State and Local Family Policing Practices and Families’ Lived Experiences

CAPTA governs state and local CPS policy and practice,¹⁰⁰ and thus directly shapes Black families’ experiences of CPS. Founded on the presumption of parental dangerousness and guided by carceral principles, CAPTA’s requirements and protocols significantly influence how state and local CPS agencies and street-level CPS agents treat families. The federal Administration for Children and Families defines “[p]rotective

⁹⁶ See ROBERTS, SHATTERED BONDS, *supra* note 2, at 14–15. See also GUGGENHEIM, *supra* note 76, at 182–84.

⁹⁷ See ROBERTS, SHATTERED BONDS, *supra* note 2, at 89.

⁹⁸ GUGGENHEIM, *supra* note 76, at 185.

⁹⁹ REICH, *supra* note 79, at 896.

¹⁰⁰ See CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION.: FACT SHEET (2019) [hereinafter CHILD’S BUREAU, FEDERAL LEGISLATION], <https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf> [<https://perma.cc/3DTN-V7BK>].

services for children” as “services or activities designed to prevent or remedy abuse, neglect, or exploitation of children,” which may include “immediate investigation and intervention; emergency medical services; emergency shelter; developing case plans; initiation of legal action . . . counseling for the child and the family; assessment/evaluation of family circumstances; arranging alternative living arrangements; preparing for foster placement, if needed; and case management and referral to service providers.”¹⁰¹

Under CAPTA, states can apply for discretionary grants to support their “prevention and treatment” activities¹⁰² as well as their reporting, assessment, investigation, and prosecution activities.¹⁰³ Funds are available for, among other things, the intake, assessment, screening, and investigation of child abuse or neglect reports; cross-agency protocols to enhance investigations; delivery of “services and treatment” to children and families; case management and ongoing case monitoring; the use of risk and safety assessment tools and protocols; and promoting collaboration between CPS and the juvenile justice system, the education system, public health agencies, private community-based programs, and domestic violence services.¹⁰⁴ As illustrated by Ms. Montauban’s experience, these cross-systems collaborations mean that seeking help from a community domestic violence service, for example, can very quickly go very wrong, leading to entrapment in a system focused on “assessment,” “treatment,” and “casework” rather than on helping families in need.¹⁰⁵

CAPTA’s discretionary grant requirements defines the basic CPS infrastructure. States must submit a State Plan

¹⁰¹ *SSBG Legislation Uniform Definition of Services*, ADMIN. FOR CHILD. & FAMS., U.S. DEPT OF HEALTH & HUM. SERVS., (Jan. 1, 2009), <https://www.acf.hhs.gov/ocs/law-regulation/ssbg-legislation-uniform-definition-services> [<https://perma.cc/4NLW-9UXV>].

¹⁰² 42 U.S.C. § 5106a.

¹⁰³ 42 U.S.C. § 5106a(C) (creating grants to states for programs relating to investigation and prosecution of child abuse and neglect cases). *See also* KRISTINA ROSINSKY ET AL., CHILD WELFARE FINANCING SFY 2018: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 48 (2021), <https://www.childtrends.org/publications/child-welfare-financing-survey-sfy2018> [<https://perma.cc/F8Q9-EH52>]

¹⁰⁴ 42 U.S.C. §§ 5106a(a)(1)–(14).

¹⁰⁵ *See id.*

describing how funds received under the Act will be used,¹⁰⁶ and must include a certification by the state's governor that, among other things, "the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program" relating to child abuse and neglect which meets specified requirements.¹⁰⁷ The first and most consequential requirement is that the state have "provisions or procedures" permitting "an individual to report known and suspected instances of child abuse and neglect" and "a State law for mandatory reporting by individuals required to report such instances."¹⁰⁸ This requirement of mandated and permissive reporting is the "911" of the family policing system.

Although the particulars vary among states, typically a report is mandated or permitted when the reporter "suspects or has reason to believe that a child has been abused or neglected."¹⁰⁹ Family defender Michelle Burrell notes that "it is shocking how easy it is for child protective officials to invade someone's life. It only takes a simple phone call, which can even be placed by an anonymous citizen."¹¹⁰ Comparing how CPS agents "enter the lives of parents to investigate allegations of abuse and neglect" to the discredited "stop-and-frisk" tactics of the criminal policing system, Burrell observes that the "low and subjective standards of proof" for government intervention in both "have tremendous impacts on families' civil liberties and the fundamental rights of parents to raise their children. . . . Both practices occur outside the courtroom, out in the community, with little judicial oversight, creating a high likelihood of misuse and trauma."¹¹¹ This highly porous reporting system creates the very wide front door through which CPS feeds Black families into the foster industry.

Other features of state CPS systems mandated by CAPTA include: immunity from prosecution to individuals who report suspected child abuse and neglect or "who otherwise provide information or assistance, including medical evaluations or consultations, in connection with a report, investigation, or legal intervention pursuant to a good faith report of child abuse or

¹⁰⁶ 42 U.S.C. § 5106a(b)(1)(A).

¹⁰⁷ 42 U.S.C. § 5106a(b)(2)(B).

¹⁰⁸ 42 U.S.C. § 5106a(b)(2)(B)(i).

¹⁰⁹ CHILD'S BUREAU, FEDERAL LEGISLATION, *supra* note 100, at 3.

¹¹⁰ Burrell, *supra* note 13, at 130.

¹¹¹ *Id.* at 132–33.

neglect”;¹¹² “procedures for the immediate screening, risk and safety assessment, and prompt investigation” of reports;¹¹³ “triage procedures, including the use of differential response, for the appropriate referral of a child not at risk of imminent harm to a community organization or voluntary preventive service”;¹¹⁴ appointment of a guardian ad litem to represent the interests of a child who is the subject of a judicial child abuse or neglect proceeding;¹¹⁵ and “the cooperation of State law enforcement officials, court of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse and neglect.”¹¹⁶

As a result of CAPTA’s requirements, enormous amounts of human and fiscal resources are spent on activities that “usually result in significant disruption of family life but little if any benefit,”¹¹⁷ and often deter parents from seeking help because of legitimate fear that, as mandated reporters, helping professionals might report them to CPS.¹¹⁸ Once entrapped in the CPS system, as a condition of maintaining or regaining custody of their children, parents are subjected to oppressive oversight by CPS caseworkers under the rubric of child abuse services and treatment—so-called “preventive services” and foster care or reunification programming. Mandated parental participation in these programs, which consist primarily of behavior modification activities focused on parental functioning,¹¹⁹ is tantamount to “family probation” in which caseworkers monitor and control parents’ conduct and activities, including their interactions with

¹¹² 42 U.S.C. § 5106a(b)(2)(B)(vii).

¹¹³ 42 U.S.C. § 5106a(b)(2)(B)(iv).

¹¹⁴ 42 U.S.C. § 5106a(b)(2)(B)(v).

¹¹⁵ 42 U.S.C. § 5106a(b)(2)(B)(xiii).

¹¹⁶ 42 U.S.C. § 5106a(b)(2)(B)(xi). *See also* CHILD’S BUREAU, ADMIN. FOR CHILD. & FAMS., U.S. DEPT. HEALTH & HUM. SERVS., CROSS REPORTING AMONG RESPONDERS TO CHILD ABUSE AND NEGLECT (2016), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/xreporting/> [<https://perma.cc/8JDZ-G379>].

¹¹⁷ Melton, *supra* note 62, at 14 (2004).

¹¹⁸ *See, e.g.*, Fong, *supra* note 21, at 626; Merritt, *Lived Experiences*, *supra* note 21.

¹¹⁹ *See* ROSINSKY, *supra* note 103, at 50–51 (explaining the different types of “preventive” trainings parents receive).

their children, through the threat of prolonged, temporary, or permanent parent-child separation.¹²⁰

In 2018, 13% of federal and 15% of state/local child welfare funds were spent on “preventive services,” with the largest share of that funding (85% at the federal level and 77% at the state/local level) going to “parent skill-based” programs and caseworker visits (i.e., information and referral services and family team meetings); only 6% of federal and 7% of state/local preventive services funding went to financial supports for families.¹²¹ With regard to these “services and treatments,” parents face “an impossible dilemma,” either “engage in the services offered, accept responsibility for the allegations to be reunified with their children and receive positive settlements, or they can contest the allegations and face the possibility of being seen as difficult, lacking in insight, and potentially dangerous to their children.”¹²²

Requiring professionals like teachers, domestic violence providers, and health care providers to report families to CPS “has undermined a greater sense of community responsibility” by encouraging people to rely on an impersonal third party “rather than take an active, integrated role in the well-being of other community members.”¹²³ As Ms. Montauban explains below, family contacts with seemingly helpful community resources all too often lead to unwarranted and damaging government intrusion into the parent-child relationship, unnecessary and traumatic taking of children from their families, contrived reasons to prolong children’s status as wards of the state, and in

¹²⁰ See Merritt, *How do Families Experience and Interact with CPS?*, *supra* note 20, at 209 (explaining that once CPS opens a case on a family, a case plan with a “menu of services is then put into place with regular system oversight to assess progress. . . . Caseworkers visit families as often as needed according to the case plan (i.e., weekly, monthly). After a designated period of time, families are assessed to determine if there is an ongoing level of risk for harm that warrants continued, or sometimes elevated, involvement in CPS services”).

¹²¹ ROSINSKY, *supra* note 103, at 50–51.

¹²² Burrell, *supra* note 13, at 140.

¹²³ Natalie K. Worley & Gary B. Melton, *Mandated Reporting Laws and Child Maltreatment: The Evolution of a Flawed Policy Response*, in C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 103, 109 (Richard D. Krugman & Jill E. Korbin eds., 2013).

far too many cases, the civil death penalty—legal destruction of their families (“termination of parental rights”).¹²⁴

IV. TRAUMA PIMPING:
THE FOSTER CARE INDUSTRY EMBEDDED
IN BLACK COMMUNITIES

Children and their parents do not benefit from family separation, but the foster care industry benefits greatly. Molly McGrath Tierney, who spent ten years running the Baltimore City Department of Social Services, describes the foster care industrial complex as a “self-protecting ecosystem” fueled by the “taking of other people’s children.”¹²⁵ As a self-protecting ecosystem, the foster industry sustains itself through the forceful and aggressive act of separating children—disproportionately Black children—from their families and placing them into foster care as wards of the state.

In New York City today, child protection cases are concentrated in sections with large concentration of poverty: Harlem in Manhattan, the South Bronx, the Jamaica area in Queens, and the East New York area in Brooklyn. All of the zip code areas mentioned have a fully operational ACS office with a large staff ready to be dispatched to conduct investigations and to monitor families. CPS serves as the gateway for Black families into the foster industry through what Professor Roberts calls the “racial geography” of child welfare.¹²⁶ An ACS supervisor at a rally in Harlem explained, middle-class parents have doormen, so ACS has more difficulty knocking on their doors, but poor families live in apartment buildings where the entrances are unlocked.¹²⁷

¹²⁴ See, e.g., *In re Q.L.R.*, 54 P.3d 56, 58 (Nev. 2002) (“The bond between parent and child is a fundamental societal relationship. Termination of the parent-child relationship implicates fundamental liberty interests that are protected by the United States Constitution As this court has previously explained, termination of a parent’s rights to his child is tantamount to imposition of a civil death penalty.” (internal quotations omitted)).

¹²⁵ TedX Talks, *supra* note 14, at 4:45–5:15.

¹²⁶ Roberts, *Racial Geography*, *supra* note 48.

¹²⁷ Supervisor, Admin. for Child’s Servs., Black Children Matter March in Harlem organized by PLAN (Parent Legislative Action Network) (July 18, 2020). See also *Black Families Matter: Parents Protest ACS and Family Separation*, RISE MAG. (July 23, 2020), <https://www.risemagazine.org/2020/07/parents-rally/> [<https://perma.cc/WYQ9-NF8L>].

This easy access to intervene into the lives of Black families is facilitated by the interconnection between CPS and much needed community-based resources. For example, the well-regarded Head Start is a program funded by the United States Department of Health and Human Services that provides early childhood education and services to low-income families. The Head Start Program is an excellent pre-school educational program for low-income students. Up until July 2019, ACS administered the Head Start Program in New York City.¹²⁸ Go to any impoverished community in New York City, within a mile exists a foster care agency. These agencies are hotspots in some communities, and they provide all types of services—from preventive services, foster care services, and residential services, to in-school and after-school programs. As more community-based organizations struggle and go out of business, they are replaced with programs offered and funded by the local child welfare agencies. They have names like Children’s Village, Children’s Aid Society, New York Foundling, Graham Windham, MercyFirst, and Cardinal McCloskey. Unbeknownst to families, these foster care agencies are an extension of CPS. Rarely do parents foresee the danger, but foster care agencies’ larger-than-life presence in marginalized communities is government surveillance in poor communities. The employees of these agencies are all mandated reporters. Our communities are always under surveillance, whether from the New York Police Department or from ACS, better known as the family police.

Foster care agencies also operate after-school programs in many New York City Housing Authority (NYCHA) public housing developments. These social service programs only exist in low-income communities and in low-income housing developments where low-income families are the targeted clientele. Black children in New York City are always under the watchful eyes of mandated reporters. For example, Children’s Village receives funding to operate multiple programs in New York City schools and in NYCHA housing projects. At the Drew Hamilton Housing Project in Harlem, Children’s Village runs after-school and summer camp programs at the Drew Hamilton

¹²⁸ *Early Learn Transition from ACS to DOE: Family Child Care*, N.Y.C. DEPT OF EDUC., <https://infohub.nyced.org/docs/default-source/default-document-library/transition-one-pager-for-fcc-english.pdf> [<https://perma.cc/M4FU-QKLB>] (last visited June 4, 2021).

Community Center.¹²⁹ The Children’s Village website boasts, “[t]he Center is operated in conjunction with the NYC Department of Youth and Community Development (DYCD) and the [NYCHA].” Additionally, ACS plays a major role in the operation of the Family Enrichment Centers in the five boroughs of New York City. Most of these centers were in full operation during the closing of schools due to the COVID-19 pandemic and were a main source of childcare resources to essential workers. Essential workers who work low-pay jobs in hospitals and other industries presumably rely on these services for childcare.

This is a classic example of the foster care industrial complex—massive, influential, and intertwined in every aspect of the low-income Black experience in New York City. State and local government entities, along with private for-profit and not-for-profit organizations and service providers, comprise the foster care industrial complex, which operates as a modern-day slave system for Black families.¹³⁰ The system includes “public and private child protection and child welfare workers, public and private social services workers, state and local judges, prosecutors, and law enforcement personnel,”¹³¹ all working to maintain an infrastructure that operates primarily to separate children from their families. In his brilliant expose, *The Poverty Industry*, Daniel Hatcher¹³² succinctly explains how state governments and their private industry partners steal billions in federal aid and other funds from poor families and children in foster care:

Even before a child is taken into foster care, revenue goals and funding streams incentivize child welfare agency decisions about whether to provide assistance to keep a struggling family intact, or whether the child should be removed. Then, once a child becomes a ward of the state, numerous additional and overlapping revenue

¹²⁹ *Drew Hamilton Community Center*, CHILDREN’S VILLAGE, <http://childrensvillage.org/our-programs/community-programs/drewhamilton/> [<https://perma.cc/54GS-HR6P>] (last visited June 3, 2021).

¹³⁰ See Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Day Slavery*, 4 HARV. BLACKLETTER J. 9, 10 (1987).

¹³¹ CONG. RSCH. SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 1 (2018).

¹³² DANIEL HATCHER, *THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA’S MOST VULNERABLE CHILDREN* 66 (2016).

strategies come to life. The child is engulfed by revenue maximization efforts that all too often are not aimed at determining how to best meet the child's needs, but rather at how to best use the child to meet the fiscal needs of the agency and the state.

These revenue strategies play a major role in understanding why children are held hostage in foster care for years while their parents desperately attempt to bring them home. On many levels, I (Ms. Montauban) can relate to the feelings of being trapped in a system that I did not want to be part of and sensing that the professionals around me were working to keep my son in foster care for institutional incentives and self-interest. Without a doubt, federal funding is the root of the problem as cities and states look for ways to maximize their profit. Separating children from their families and making them wards of the state is far more profitable for governments and their private industry partners than reunification with the children's families. The commodification of Black children generates a steady stream of open-ended funding from federal taxpayers' dollars to state and local governments and agencies that are rewarded for removing children from their families, prolonging their stay in state custody, and terminating parental rights. In just under fifty years since the enactment of CAPTA in 1974 with an authorization of \$86 million to be spent over three years,¹³³ the child abuse and neglect industry has grown into a multi-billion-dollar conglomerate.

When *Shattered Bonds* was published in 2002, federal and state governments were spending more than \$10 billion a year on the child welfare system.¹³⁴ In 2018, that amount was about \$33 billion.¹³⁵ About 56% of the total came from state and local funds; the rest was supplied by federal funding authorized in Title IV-E and Title IV-B of the Social Security Act and CAPTA (26%), and from other federal programs not solely child welfare-focused (the Social Services Block Grant and Temporary Assistance for Needy Families) (18%).¹³⁶ In fiscal year 2021, the

¹³³ NELSON, *supra* note 84, at 2.

¹³⁴ ROBERTS, *SHATTERED BONDS*, *supra* note 2, at 269.

¹³⁵ EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (2021).

¹³⁶ *Id.*

federal government's contribution for federal programs wholly dedicated to child welfare totals about \$12.5 billion.¹³⁷ The vast majority of these federal funds are for foster care (\$5.796 billion) and adoption (\$4.073 billion), while the remainder is for child and family services (\$1.252 billion); services to older and former foster youth programs (\$586 million); and competitive grants, research, technical assistance, and incentives (\$253 million).¹³⁸

V. A REPARATIONS PERSPECTIVE ON BLACK CHILD AND FAMILY WELL-BEING

CAPTA created a nationwide family policing system which, in the words of Professor Roberts “devastates hundreds of thousands of families and . . . targets Black mothers by focusing on outcomes produced by unjust structural forces, in ways that are supported and amplified by political decision-making; harmful child welfare ideology; and intersecting race, gender, and class bias on the part of government agents.”¹³⁹ Having exposed the carceral roots of CPS and its destructive impacts on Black families, we offer the following recommendations in response to this Symposium's call for ideas “in support of abolishing the child welfare system and creating a radically new approach to child well-being.”¹⁴⁰

A. Abolish CPS

A primary goal of the defund and abolish movement should be to repeal CAPTA and end the system of reporting, investigation, and prosecution of parents accused of child maltreatment. In their call to “stop confusing poverty with neglect,” top federal Children's Bureau officials recently urged child welfare professionals to “rally around families that are vulnerable and struggling with poverty, rather than judging them, labeling that vulnerability as neglect, and pathologizing them.”¹⁴¹ They argued that “[i]f we truly care about children and

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Roberts, *Black Mothers*, *supra* note 11.

¹⁴⁰ *Call for Papers: Volume 11 Symposium Issue, Strengthened Bonds: Abolishing the Child Welfare System and Re-envisioning Child Well-Being*, COLUM. J. RACE & L. (May 7, 2020), <https://journals.library.columbia.edu/index.php/cjrl/announcement/view/317> [<https://perma.cc/V27W-EUBL>].

¹⁴¹ Jerry Milner and David Kelly, *It's Time to Stop Confusing Poverty with Neglect*, IMPRINT (Jan. 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> [<https://perma.cc/AR7W-V4T9>].

families, it's time to stop confusing poverty with neglect and devote ourselves to doing something about it."¹⁴²

Doing something about it means abolishing the CPS system. Professor Roberts says, “[a]bolition means completely dismantling this system of family policing—not reforming it or replacing the current system with a new and improved system. It means ending its philosophy, design, practices and policies and building a different way of caring for families.”¹⁴³

Acting in concert, and under color of law, government and private entities have used their power, influence, and considerable resources to perpetuate “unnecessarily sweeping, disrespectful, and debilitating” government intervention that is “often destructive to viable family systems.”¹⁴⁴ Abolition means advocacy by government officials and philanthropic organizations who say, “Black lives matter,” for repeal of CAPTA’s destructive system of reporting, investigation, and prosecution.

The myth of parental dangerousness as applied to Black families is a relic of the “dogma that supported four centuries of chattel slavery” which “has proven to be a continuing presence that affects major facets of life for many African-Americans.”¹⁴⁵ Abolition means government officials and private for-profit and not-for-profit organizations that have participated and continue to participate in the monetization of Black children must renounce the myth of Black parental dangerousness and the criminalization of Black families and make amends for the harms they have caused by their substantial investments in perpetuating the family policing system.

Abolition means a true reckoning with the shameful legacy of slavery manifested in commodifying Black bodies through the forcible taking and threat of taking Black children.

¹⁴² *Id.*

¹⁴³ *Abolition Is the Only Answer*, *supra* note 7.

¹⁴⁴ Davis & Dudley, *supra* note 130, at 10 (explaining that the paper “addresses the darker side of social responses to troubled and impoverished families: the risks that governmental interventions will be unnecessarily sweeping, disrespectful, and debilitating rather than supportive”).

¹⁴⁵ Jessica Dixon-Weaver, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR. AM. L. & POL’Y 109, 111 (2008).

B. Divest from Family Policing; Invest in Communities

Speaking from the perspective of a parent with lived experience in the system, I (Ms. Montauban) maintain that CPS comes into the lives of children after alleged abuse or neglect has occurred, so it has never been in a position to prevent abuse or to protect children. The best way to protect children is to have resources readily available to families in the community. Children do not exist independent from their families; they are just as impacted by social inequalities as their parents. The resources needed to support families are already available and so it is time to redirect those federal, state, local, and private funds to developing and maintaining creative and innovative ways to help people who need it. Families should not have to be subjected to surveillance and policing because they sought help. Rather, we need to invest in community-based organizations and resources to eliminate housing insecurity and food insecurity, and to provide whatever is necessary to help children and families thrive—whether it be clothing, educational support, domestic violence support, or child care and workforce development. Many of these community-based organizations are hard for struggling families to find. We need to raise the minimum wage to at least twenty dollars an hour and provide people with the opportunity to train for twenty-first century jobs with good benefits. We need to invest in providing rental assistance and home-buying grants for working-class families. This is the way to help families and to protect children. The result of seeking help should not be investigation and prosecution.

C. Reparations: Compensation for Generational Trauma

Reparations for the historical harms inflicted on Black families by the family policing system should be at the forefront of the abolitionist agenda. Those who say they are concerned with the well-being of Black children and Black families should renounce the family policing system as a part of the carceral regime and “child protection” as an incarnation of the racist ideology of Black parental dangerousness. With regard to Black families, as Malcolm X famously charged, the family policing system is “[n]othing but legal, modern slavery—however kindly intentioned.”¹⁴⁶ Child welfare abolitionist Latagia Copeland-

¹⁴⁶ ALEX HALEY & MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 21 (1965).

Tyronce says that the family policing system is “a system that is also rife with white supremacy and structural/institutional racism,” and:

[R]eparations are a way for governments to right past and present wrongs to an aggrieved group and as such the American child welfare system must be included both in the debate and in any monetary decisions and/or outcomes—it has been an oppressive system for that long and has caused that much harm.¹⁴⁷

Monetary reparations are appropriate for the cumulative impact of the family policing system on Black families over multiple generations. An example of reparations for government-sponsored wrongful child taking is Canada’s Indian Residential Schools Settlement Agreement (IRSSA), announced in 2006.¹⁴⁸ By the end of 2019, a total of \$1.6 billion had been paid to victims through a Common Experience Payment under IRSSA and an additional \$3.233 billion had been paid through an Independent Assessment Process to compensate for harms inflicted on generations of Indigenous children whom the government and churches ripped from their families and placed in residential, government-funded, church-administered “schools.”¹⁴⁹ Emphasizing the deep wounds government and churches inflicted on their child victims, the compensation committee recounts that Indigenous children “were separated from siblings, stripped of their belongings and given unfamiliar clothes and haircuts. Often children were given new names and a number. Living in an unfamiliar environment, they were forced to speak

¹⁴⁷ Latagia Copeland-Tyronce, *Child Welfare Is the One White Supremacist Institution that Is Left Out of the Reparations Conversation and It Shouldn’t Be!*, MEDIUM: TAGI’S WORLD (Nov. 4, 2019), <https://medium.com/latagia-copeland-tyronces-tagis-world/child-welfare-is-the-one-white-supremacist-institution-that-is-left-out-of-the-reparations-7bc66761d75e> [https://perma.cc/N8EN-VFZ5].

¹⁴⁸ All documents relating to the Indian Residential Schools Settlement Agreement can be found here: *Settlement Agreement*, RESIDENTIAL SCHS. SETTLEMENT, <http://www.residentialschoolsettlement.ca/settlement.html> [https://perma.cc/MB76-79TQ] (last visited June 9, 2021).

¹⁴⁹ INDEP. ASSESSMENT PROCESS OVERSIGHT COMM., INDEPENDENT ASSESSMENT PROCESS FINAL REPORT, 8, 22 (2021), <http://www.iap-pei.ca/media/information/publication/pdf/FinalReport/IAP-FR-2021-03-11-eng.pdf> [https://perma.cc/DE52-RQV4].

in a new language and to adopt a new religion.”¹⁵⁰ In operation from 1883 until the final federal residential school closed in 1997, Canada’s Indian residential school system “was profoundly negative and had a lasting impact on the children, on their families, and on their culture.”¹⁵¹ IRSSA is the culmination not only of litigation, but also of the collective and sustained efforts by survivor groups, other interested organizations, and individuals calling attention to the “legal, moral, and spiritual wrongs” inflicted on generations of Indigenous children.¹⁵² IRSSA is seen by some as a continuation of measures “on a protracted and ongoing path toward recognizing and healing the past.”¹⁵³ Similar efforts should be made toward calling attention to the need for redress for the damages inflicted by the American CPS system on generations of Black children and their families.

VI. CONCLUSION

Former New York City family court judge and constitutional scholar Peggy Cooper Davis, writing with Dr. Richard G. Dudley Jr., a professor of psychiatry and law, states that “[t]here is a line beyond which government cannot go without violating liberty interests that distinguish between the slave and the citizen.”¹⁵⁴ She reminds us that the Fourteenth Amendment to the United States constitution was “forged in the process of abolishing slavery.”¹⁵⁵ Indeed, some drafters explicitly acknowledged the destruction of Black families as an “incident” of slavery.¹⁵⁶ It is time for America to reckon with “the massive crime of slavery, and all that it has wrought.”¹⁵⁷ Dismantling the family policing system must be at the forefront of that reckoning.

Black Children Matter. Black Parents Matter. Black Families Matter.

¹⁵⁰ *Id.* at 10.

¹⁵¹ *Id.* at 7.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Davis & Dudley, *supra* note 130, at 14.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 15 (noting Senator Harlan’s statement that another “incident [of slavery] is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family”).

¹⁵⁷ ROBERTS, SHATTERED BONDS, *supra* note 2, at 271.