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HOW RACIAL POLITICS LED DIRECTLY TO THE ENACTMENT OF THE ADOPTION AND SAFE FAMILIES ACT OF 1997—THE WORST LAW AFFECTING FAMILIES EVER ENACTED BY CONGRESS

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This Article is part of a celebration of the magnificent work of Dorothy Roberts who, more than any other scholar, has brilliantly demonstrated both the highly destructive qualities of the United States' family regulation system and its relationship to the country's legacy of slavery. The most vicious feature of the current family regulation system is the almost routine destruction of families resulting from an overly zealous enforcement of the Adoption and Safe Families Act of 1997, through which the federal government pays states to permanently banish parents from their children and legally sever the parent-child relationship when children have remained in foster care for fifteen months. This Article tells some of the racialized history that led to the enactment of the Adoption and Safe Families Act.

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I. INTRODUCTION

I am pleased to participate in this Symposium commemorating the publication of Dorothy Roberts's ever-more-important *Shattered Bonds*. This Symposium is being held at a propitious time in American history when so many white Americans have shown a keen interest in reexamining the history of the United States through the lens of race and are discovering how different our institutions would be if we were not forever living in the recurrent consequences of the legacies of slavery. Since this apparent awakening by many white Americans, it has become commonplace to point out the many ways racism infects American society. It is unsurprising that most of these recent voices are not Black. That's because, of course, Black Americans have always understood the extent to which American society is impacted by racism. Accordingly, it should also be no surprise that the most prominent voices focused on the impact of racism in this country have, for most of American history, been Black voices. Dorothy Roberts has been writing about this her entire career.¹

I am sure that Professor Roberts would not object if I enlarge the group of vital voices deserving of high praise as part of this celebration. In addition to Professor Roberts, two of my personal heroes—Peggy Cooper Davis and Khiara Bridges—are exemplars of brilliant Black scholars of American law who have focused with a bead eye on the extent to which racism has gravely damaged America's "child welfare" system.² Any student of this

¹ Here are but a sample of her writings: DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Dorothy E. Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695 (2019) (reviewing VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018)); Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426 (2014); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012); Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125 (2008); Dorothy E. Roberts, *Punishing Drug Addicts who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997).

² Two years ago, N.Y.U. Law School's Family Defense Clinic convened a symposium featuring all three of these scholars. See *Elie Hirschfeld*

system, which in the rest of this Article will be called the “family regulation system,”³ is well-advised to know these writers’ work.⁴ Taken together, more than any other scholars in the field, their work connects the embedded relationship of the current family regulation system and America’s original sin of slavery.

Symposium on Racial Justice in the Child Welfare System Transcript, 44 N.Y.U. REV. L. & SOC. CHANGE 129 (2019).

³ After calling this system the “child welfare system” throughout my career, I am now convinced that this language is not neutral. It is not, and never has been, a “child welfare system.” Quite the contrary, child welfare is not even within the portfolio of any so-called “child welfare commissioner” anywhere in the United States. A “child welfare commissioner” would surely have in their portfolio the authority to investigate all situations in which children’s welfare are placed at risk. But no commissioner has the authority, for example, to address lead paint poisoning in public housing, or the rigging of lead levels in the public schools, whether in Newark, New Jersey; New York City; or Flint, Michigan. Harms inflicted in children by environmental racism are not things these commissioners may investigate or put an end to. Instead, they have authority only to investigate alleged harms committed on children by their families. Thus, renaming these systems “family regulation” is appropriate not only because it feels as if it is a family regulation system. It literally *is* a family regulation system, exclusively. Words matter. Permitting this system to continue to be called a child welfare system does a grave disservice to the poor families that get caught up in it. I apologize for taking so long to have gotten here. Henceforth, I will only be speaking about the family regulation system in the United States.

⁴ Here is an incomplete list of articles and books written by Professors Davis and Bridges. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Peggy Cooper Davis, *Loving v. Virginia and White Supremacy*, 92 N.Y.U. L. REV. ONLINE 52 (2017); Peggy Cooper Davis & Valeria Vegh Weis, *The Obama Presidency and the Confederate Narrative*, 60 HOW. L.J. 707 (2017); Peggy Cooper Davis et al., *The Persistence of the Confederate Narrative*, 84 TENN. L. REV. 301 (2017); Peggy Cooper Davis, “So Tall Within”—*The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451 (1996); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557 (1983). Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229 (2020); Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770 (2020); Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449 (2019); Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65 (2018); Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049 (2017); Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457 (2013); Khiara M. Bridges, *Poor Women and the Protective State*, 63 HASTINGS L.J. 1619 (2012); Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113 (2011); KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011).

In *Shattered Bonds*, Professor Roberts examines how racism shaped and formed the current family regulation system. My contribution to this Symposium will be to expand on the story (already well told by Professor Roberts) of how it came to pass that Congress enacted the Adoption and Safe Families Act in 1997⁵ (ASFA)—the most family destructive law ever enacted since slavery was abolished.

ASFA encourages states to sever all legal relationships between children and their parents whenever the children have been in foster care for fifteen months, without any requirement of a showing that the parents have harmed their children or that maintaining the relationship would be harmful to them. The law even goes so far as to pay a bonus for each additional child whose familial relationships with their family of origin were permanently destroyed and who were subsequently adopted by a new set of parents year over year.

ASFA represents the denouement of a calculated retrenchment in federal laws and policies to support families living in poverty that began in earnest in the 1970s. In this Article, I tell the background story of ASFA's passage by linking the actions of the 105th Congress to federal efforts to support families living in poverty. I do so primarily by exploring the important work of Michael Katz's *The Underserving Poor*, published in 1989, a definitive text detailing American policy shifts as it relates to supporting families living in poverty in the United States.⁶ These efforts began in the Great Depression and were driven to high hopes in the 1960s and 1970s. However, they were largely gutted by an increasingly hostile federal government through the 1970s and 1980s. By the time Newt Gingrich and Tom DeLay came to power in the mid-1990s, the Clinton Administration proved too willing to support ASFA.⁷

As we shall see, it is impossible to explain this history—the history of the United States' unique refusal to enact

⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

⁶ MICHAEL B. KATZ, *THE UNDESERVING POOR* (2d ed. 2013) [hereinafter KATZ, 2d ed.]

⁷ ASFA encourages states to terminate the parental rights of children who have been in foster care for at least fifteen months, regardless of the reason the children were placed in foster care and even when their parents never abused or harmed them.

legislation genuinely friendly to families living in poverty and designed to ensure that children born into poverty could nonetheless thrive—without understanding this country's racial history. It is the principal explanation for the kind of family regulation system currently used in the United States.⁸ At the end of this Article, I raise what I recognize is a controversial question: What is the most effective strategy for taking down the family regulation system?

II. ANTI-POVERTY EFFORTS FROM THE JOHNSON ADMINISTRATION TO THE END OF THE 1970S

ASFA's enactment was built on the ruins of the failed efforts since the 1960s to enact federal legislation calculated to ensure that children living in poverty could thrive. The story of that failure begins with the Johnson Administration's War on Poverty. Despite the high-aspiration language of Johnson's anti-poverty programs, his administration deliberately avoided the straightest route to attacking poverty: redistributing wealth. Instead, Johnson's centerpiece of the War on Poverty—the Economic Opportunity Act of 1964⁹—created the Community Action Program, Job Corps and Volunteers in Service to America (VISTA). He was also successful in having Congress enact the Food Stamp Act,¹⁰ the Elementary and Secondary Education Act,¹¹ and the Social Security Act of 1965,¹² which created Medicare and Medicaid.

It's important to appreciate that major economists at the time, including conservatives from the Chicago School such as Milton Friedman, understood that the “the most straightforward way to reduce poverty” was a negative income tax.¹³ The question then becomes why the Johnson Administration avoided the more

⁸ This is a different claim than one that claims the family regulation system currently employed disproportionately impacts Black and Brown families. That is also true. But, in this Article, I will focus on race to explain why we have the current system.

⁹ Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508.

¹⁰ Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

¹¹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

¹² Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

¹³ *Id.*

straightforward path and chose one calculated in advance to come up short. The answer, unsurprisingly, is race.

In a commencement address at Howard University in June 1965, Johnson told the audience the “great majority of [Black Americans] . . . are another nation . . . [Black] poverty is not white poverty . . . There are differences—deep, corrosive, obstinate differences—radiating painful roots into the community, and into the family, and the nature of the individual.”¹⁴ Johnson was riffing off of Daniel Moynihan’s report which included ideas such as, the “racist virus in the American blood stream” is causing “the [Black] family in the urban ghettos [to crumble].”¹⁵ Moynihan’s report called for “the establishment of a stable [Black] family structure.”¹⁶ Instead of giving money to families regarded by the federal government as pathological, the Johnson Administration went in other directions.

Even though the Johnson Administration is well known for waging its war on poverty, it was in the Nixon Administration that the hope for a guaranteed income in the United States reached its apogee. Unfortunately, the early years of Nixon’s Administration would prove to be the last great hope for progressive poverty legislation to this day. In those early years, Congress undertook “the first major attempt to overhaul the social welfare structure erected in the 1930s”¹⁷ by proposing the Family Assistance Plan, which included, at its center, guaranteed income for all Americans.¹⁸ As Michael Katz explained, the Family Assistance Plan “differed sharply from the service-based strategy of the War on Poverty.”¹⁹ In its most generous version, it would have guaranteed \$3,000 for a family of four without any requirement that a parent seek employment when raising children under the age of six.²⁰ In addition, it would have substantially expanded the food stamp program and

¹⁴ Lyndon B. Johnson, President of the United States, Commencement Address at Howard University (June 4, 1965).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ KATZ, 2d ed., *supra* note 6, at 136.

¹⁸ S. REP. NO. 91-1431, at 416 (1970); H.R. REP. NO. 92-231 (1971).

¹⁹ KATZ, 2d ed., *supra* note 6, at 136.

²⁰ *The Family-Assistance Plan—A Chronology*, 46 SOC. SERV. REV. 603, 605 (1972).

automatically linked raises in the guaranteed minimum wage and social security benefits to the rate of inflation.²¹

The effort founded on the shoals of racial politics, as the racial composition of Americans receiving AFDC benefits became more diverse. In 1960, 745,000 families received AFDC at a cost below \$1 billion; by 1972, it was 3 million families at a cost exceeding \$6 billion.²² Even before the term “welfare queen” was added to our national discourse by then-candidate Ronald Reagan in 1976,²³ federal legislators took note of the darkening complexion of the family members receiving AFDC funds over the course of the decade. As Michael Katz explained, an ever-increasing percentage of AFDC recipients through the 1960s were Black women who had never married which led to “southern states tack[ing] on punitive regulations, and a welfare backlash sweep[ing] northern cities.”²⁴ Even more, Katz captured political ideology in the early 1970s, explaining that “AFDC clients fused gender, sexuality, and welfare dependence into a powerful image that touched deep, often irrational fears embedded in American culture.”²⁵ The expansion of the welfare rolls—itsself a reflection of the diaspora of Black families from the South—made the cost of public assistance programs a political hot potato. As the perception became that too many Black families were the recipients of welfare, “poor unmarried women with children now became the undeserving poor.”²⁶

We are living with the failure of this legislation to this day. The extent to which the United States fell behind in federal investment for poverty reduction was staggering. Consider how different the country would look if Congress had committed itself to indexing public assistance benefits to the same extent it concluded that indexing social security benefits was sensible economic policy. In 1970, social security payments exceeded AFDC payments by about ten times (\$30 billion compared with about \$3 billion). But because social security was indexed to keep up with inflation and AFDC payments were not, by 1984, social

²¹ KATZ, 2d ed., *supra* note 6, at 136.

²² *Id.* at 140.

²³ See Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 244 (2014).

²⁴ MICHAEL B. KATZ, *THE UNDESERVING POOR* 68 (1st ed. 1989) [hereinafter KATZ, 1st ed.].

²⁵ *Id.*

²⁶ *Id.* at 69.

security payments exceeded \$181 billion, while AFDC payments rose only to \$8.3 billion.²⁷

III. THE REAGAN YEARS

As a direct consequence of racial politics, American laws ensured that children being raised by single mothers living in poverty would be unable both to take regular care of them and secure an income. They could do one or the other; but not both. Very bad things for families living in poverty followed. According to Marion Wright Edelman, “[c]hildren were slightly worse off in 1979 than in 1969. But from 1979 to 1983 the bottom fell out.”²⁸ By 1982 “the rate of child poverty soared to its highest level since the early 1960s.”²⁹

It was during the Reagan Administration that a number of theorists, including Charles Murray, emerged on the scene to enflame racial animus to a new level.³⁰ Murray resuscitated the ancient distinction of deserving and undeserving poor, arguing that giving money to the poor only increases poverty.³¹ By now, efforts to reduce poverty were more explicitly about race. In the 1980s, it became acceptable for Reagan officials to nefariously argue that “[w]elfare, it appeared, encouraged young [B]lack women to have children out of wedlock; discouraged them from marrying; and, along with generous unemployment and disability insurance, fostered indolence and a reluctance to work.”³² This invited a more direct way of talking about poor people, as “the underclass.”³³ In Michael Katz’s words, during this decade:

the mixture of alarm and hostility that tinged the emotional response of more affluent Americans to the poverty of [B]lacks increasingly clustered and isolated in postindustrial cities. What bothered observers most was not their suffering; rather, it was their sexuality, expressed in teenage pregnancy; family patterns, represented by

²⁷ *Id.* at 112–13.

²⁸ *Id.* at 88.

²⁹ *Id.*

³⁰ CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984).

³¹ KATZ, 2d ed., *supra* note 6, at 177 (citing MURRAY, *supra* note 30).

³² *Id.* at 167.

³³ *Id.* at 205.

female-headed households; alleged reluctance to work for low wages; welfare dependence, incorrectly believed to be a major drain on national resources; and propensity for drug use and violent crime, which had eroded the safety of the streets and the subways.³⁴

The Reagan Administration's practices and policies directly implicated family regulation policy a decade later. Reagan was keenly aware of the political value of racializing welfare.³⁵ Conservative welfare policy during the 1980s called for a requirement that women receiving public assistance participate in the remunerative work force.³⁶ According to Katz, "more than any other goal, conservative welfare reform stresse[d] 'workfare,' which usually means forcing women with young children into the workforce."³⁷ Most recipients of public assistance in this period, who in the minds of politicians were Black and Brown, were "modern paupers,"³⁸ identical to what the Connecticut Supreme Court said about 100 years earlier:

Next to intemperance, and generally accompanying it, a habit of idleness helps to fill our alms houses with paupers and our jails with criminals. By means of these two causes the burden is imposed on the public of maintaining a worthless class of humanity as well as the great expense of our criminal courts.³⁹

All of this meant that by the end of the 1980s, "children ha[d] become the most impoverished age group in America. Since 1974, their situation has worsened at an alarming rate. Between 1974 and 1986, the heart of the Reagan years, child poverty increased by 40 percent. More than four of every ten [B]lack children were living in poverty."⁴⁰

³⁴ KATZ, 1st ed., *supra* note 24, at 185.

³⁵ *See supra* p. 718 and note 23.

³⁶ KATZ, 2d ed., *supra* note 6, at 194.

³⁷ KATZ, 1st ed., *supra* note 24, at 73.

³⁸ KATZ, 2d ed., *supra* note 6, at 89.

³⁹ *Reynolds v. Howe*, 51 Conn. 472, 477 (1883).

⁴⁰ KATZ, 1st ed., *supra* note 24, at 126.

IV. BEHIND ALL OF THIS IS AMERICA'S
LEGACY OF SLAVERY

As Isabelle Wilkerson explains, the poverty America's children are forced to endure, "is the price we pay for our caste system. In places with a different history and hierarchy, it is not necessarily seen as taking away from one's own prosperity if the system looks out for the needs of everyone."⁴¹ Quoting Jonathan Chait, Wilkerson makes clear that:

Few industrialized economies provide as stingy aid to the poor as the United States. In none of them is the principal of universal health insurance even contested by a major conservative party. Conservatives have long celebrated America's unique strand of anti-statism as the product of our religiosity, or the tradition of English-liberty, or the searing experience of the tea tax. But the factor that stands above all the rest is slavery.⁴²

A. The 1990s and the Enactment of the Adoption and Safe Families Act of 1997

This history set the stage for the 1990s, when the Clinton Administration cooperated with the House and Senate Leadership of Newt Gingrich and Tom DeLay to make life even more difficult for families living in poverty. Two laws, above all, stand out. First, they replaced welfare as we knew it by enacting the Personal Responsibility and Work Opportunity Act of 1996.⁴³ This law ended the AFDC program that had its roots in legislation enacted in the 1930s. It was the law which caused Peter Edelman and Mary Jo Bane, two high-level officials in the Health and Human Administration to resign in protest because, as Edelman put it, "I have devoted the last 30-plus years to doing whatever I could to help in reducing poverty in America. I believe the recently enacted welfare bill goes in the opposite direction."⁴⁴

⁴¹ ISABELLE WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 353 (2020) [hereinafter WILKERSON, *CASTE*].

⁴² *Id.* at 354.

⁴³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

⁴⁴ Barbara Vobejda & Judith Havemann, *2 HHS Officials Quit Over Welfare Changes*, WASH. POST, Sept. 12, 1996, at A01.

The next year, in 1997 when the foster care population neared an all-time high,⁴⁵ Congress enacted the Adoption and Safe Families Act.⁴⁶ It would be difficult to overstate how radical ASFA is, a law that no other nation in the world has come close to embracing. ASFA encourages states to permanently banish parents from the lives of their children, even when the parents never abused their children or harmed them in any way. It authorizes the destruction of familial relationships for no better reason than a parent, regardless of circumstances, being incapable of securing custody of her child from foster care within a fifteen-month period.⁴⁷ A parent could lose custody simply for being hospitalized; imprisonment, even for nonviolent offenses, is also a very common reason.

The law is responsible for the unnecessary destruction of hundreds of thousands of families in this century. More than two million children's parents' rights have been terminated by American courts since ASFA was enacted.⁴⁸

The law was widely embraced by a bipartisan Congress, even celebrated by many as a prominent civil rights victory! According to Robert Gordon, "[a] few newspaper columnists . . . herald[ed] a children's 'revolution' that would be 'to the abused and neglected children in our nation's foster-care system what

⁴⁵ Between 1985 and 1997, the foster care population rose by nearly 50% from 276,000 to about 500,000 children. Shannon DeRouselle, *Welfare Reform and the Administration for Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 420 (1999). See also Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 135 (2001) (citing LEROY PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC WELFARE SYSTEM IN THE UNITED STATES 6 (1989)).

⁴⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

⁴⁷ 42 U.S.C. § 675(5)(E).

⁴⁸ It is not easy to obtain figures for the number of terminations ordered each year in the United States. The most recent data indicates that more than 71,000 children are in foster care awaiting adoption after their parental rights were terminated. The number of children awaiting adoption throughout the twentieth century has been well above 50,000 each year. That number is considerably smaller than the number of terminations ordered over that time because the total number would include children who were adopted. Using the figure 2 million terminations in this century is a very low estimate. See U.S. DEPT OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, THE AFCARS REPORT (2018), http://s3.amazonaws.com/ccai-website/AFCARS_26.pdf [<https://perma.cc/JMY9-ACQS>].

the Voting Rights Act was to [B]lack Americans in 1965.”⁴⁹ When he signed the bill into law, President Clinton promised that ASFA would “fundamentally . . . improve the well being of hundreds of thousands of our most vulnerable children.”⁵⁰

ASFA garnered bipartisan support built upon two different claims which buttressed each other in important ways. Both reveal a vital truth about how racism impacts beliefs and a community’s capacity to accept certain claims. The driving force behind both was Congress’s understanding that most of the children in foster care were non-white.

The first claim, advanced by Richard Gelles, was that the family regulation system was flawed because its ultimate purpose at the time was to preserve families, forcing children to remain in the custody of dangerous parents.⁵¹ Because of the degree to which the family regulation system had become so deeply racialized, members of Congress were highly persuadable that the parents who lost their children to foster care are dangerous child abusers⁵²—even though the overwhelming percentage of children who are separated from their parents and placed into foster care were never abused by their parents.⁵³ Facts no longer mattered. The falsehood that almost all of the children who enter foster care were removed from their homes

⁴⁹ Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 638 (1999) (citing Jeff Katz, *Finally the Law Puts These Kids’ Interests First*, MILWAUKEE J. SENTINEL, Dec. 28, 1997, at 1).

⁵⁰ *Remarks on Signing the Adoption and Safe Families Act of 1997*, 33 WEEKLY COMP. PRES. DOC. 1863, 1864 (Nov. 19, 1997).

⁵¹ See RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* 152 (1996) (noting “[t]he basic flaw in the child welfare system is that it has two contradictory goals: protecting children and preserving families”).

⁵² Scholars agree that Gelles’s inflammatory book, *THE BOOK OF DAVID*, *supra* note 51, which told the story of a child who was suffocated to death by his mother after having been allowed to remain with his parents after a child welfare investigation, played an outsized role in gaining Congressional support to enact ASFA. See Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 9 B.C. THIRD WORLD L.J. 223, 244 (2009). See also John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 460 (2008).

⁵³ U.S. DEP’T OF HEALTH & HUM. SERVS., *CHILD’S BUREAU, THE AFCARS REPORT 2* (2017). See also U.S. DEP’T OF HEALTH & HUM. SERVS., *CHILD’S BUREAU, THE AFCARS REPORT* (2018).

because their parents inflicted serious abuse on their children was simply more powerful than the truth.

The second claim that captured the support of federal legislators is that children deserve a “permanent home” even more than they deserve to remain part of their family of origin. The theoretical underpinning of this claim was a highly disputed social science theory advanced by celebrated theorists—Joseph Goldstein, Anna Freud, and Albert Solnit.⁵⁴

Their “psychological parenting” theory posited that children are harmed when the law recognizes more than one parent figure in their lives, except when the parent figures are collaboratively engaged in raising the children. As Sarah Katz describes it, “[t]he concept is that children form their primary attachment with a ‘psychological parent’—the person that provides day-to-day care for the child, whether or not that person is the biological parent—and their psychological and emotional well-being requires a continuous and positive relationship with that person.”⁵⁵ The theory was meant to apply to all court cases involving children—both the public child welfare system and the private family law field of divorce, custody, and visitation. In the private realm, it would have meant that when parents separate after jointly raising a child together, the law should assign full parental rights to only one of the parents and comfortably permit the other parent to be removed from the child’s life. Unsurprisingly, the private family law professionals categorically rejected the idea and no trace of it remains in that field. As Sarah Katz explains, “[t]his is because private custody law recognizes not only the value of a legal connection to both parents, but also recognizes that the child’s best interests may justify changes in the custodial relationship at different points in the child’s life.”⁵⁶ In the divorce and private custody field,

⁵⁴ JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) (asserting that continuity in children’s relationships with a caregiver is essential to normal psychological development and arguing that children separated from their parents who bond with “psychological parents” will suffer serious emotional harm if returned to their parents). Peggy Davis brilliantly critiqued their work in an influential article published in 1987. See Peggy C. Davis, *There Is a Book Out . . . : An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

⁵⁵ Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079, 1094 (2013).

⁵⁶ *Id.*

everyone continues to operate on the simple principle that children and their parents deserve to remain in each other's lives, even when one of the parents does not have physical custody of the child. That field, of course, is the one that more privileged people inhabit.

As applied to the families whose children get snapped up by the foster care system, however, very different rules apply. Federal law encourages states to permanently sever the legal ties between children and their parents, without regard to the strength of their relationship for no better reason than that the children have been in foster care for fifteen months. Everything we know about AFSA's implementation, including the voices of countless children who have been impacted by ASFA, is that this law has wreaked havoc on poor communities, resulting in the needless deracination of children from the parents who love them. Every year, tens of thousands of loving parents who would never harm their children are deprived of maintaining any kind of relationship. This harsh law would not be tolerated if it were to be applied to privileged communities.

The law was enacted even though Congress knew that these highly restrictive timelines meant it would be impossible for many parents to retain their parental rights when, for example, the parent was sentenced to a term of imprisonment longer than fifteen months. It also did not matter to Congress that it is often impossible to complete a drug rehabilitation program in fifteen months either because of the program's length or because of the lack of programs. Far too many communities lack treatment services capable of helping parents reach a place where they can regain their children's custody within fifteen months. Because federal law does not require that such services exist, it allows local officials to take advantage of their absence. As Jerry Milner, former Associate Commissioner at the Children's Bureau, and his Special Assistant, David Kelly, explain, some child welfare officials "weaponize our systemic shortcomings and use them against parents."⁵⁷

⁵⁷ Jerry Milner & David Kelly, *Top Federal Child Welfare Officials: Family Is a Compelling Reason*, IMPRINT (Apr. 6, 2020, 9:06 PM), <https://imprintnews.org/child-welfare-2/family-is-a-compelling-reason/42119> [<https://perma.cc/H78R-XNTF>].

How could it be that the fields of private and public family law went in such opposite directions?⁵⁸ Dorothy Roberts explains it simply enough: this could never have happened without racism.⁵⁹ This brutal law would not be tolerated if it were to be applied to privileged communities. Countries that are not contaminated by the legacy of slavery, in Michael Katz's words, are more likely to find "moral outrage at the persistence of hunger, homelessness, inadequate health care, and other forms of deprivation, than exists in the United States."⁶⁰

Enacting ASFA on the heels of welfare reform "corresponded with the growing disparagement of mothers receiving public assistance and welfare reform's retraction of the federal safety net for poor children. In the public's mind, these undeserving mothers—just like the unfit mothers in the child welfare system—are Black."⁶¹ Similar to arguments that suggested that poverty in the Black community was in part due to a reliance on welfare, the high number of children in foster care was painted as an inherent failure of family preservation programs, that could only be solved by pushing for quicker adoption of foster children.

These were not the only contemporary examples of the federal government rewriting laws with Black people as an unmentioned targeted audience. In 1986, Congress enacted the Anti-Drug Abuse Act of 1986, which punished users of crack

⁵⁸ See Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 244–45 (2004) (smartly revealing how Goldstein, Freud and Solnit's theories were selectively incorporated into the family regulation system in remarkable ways. As she expresses it: "[w]hile the psychologists advocated for an intervention strategy that reserved out-of-home placement for only the most high-risk cases, in practice, poor families are often disrupted without adequate attention to the harms of family separation Only once children have been removed from their natural families have the recommendations of Goldstein, Freud and Solnit been faithfully implemented in the child welfare context.").

⁵⁹ ROBERTS, *SHATTERED BONDS*, *supra* note 1, at 276 ("Why would Americans prefer a punitive system that needlessly separates thousands of children from their parents and consigns millions more to social exclusion and economic deprivation? Racism is at the heart of this tragic choice. Only by coming to terms with child welfare's racial injustice can we turn from the costly path of family destruction."). Robert's statement echoes Isabelle Wilkerson's straightforward explanation: "the factor that stands above all the rest is slavery." See WILKERSON, *CASTE*, *supra* note 41, at 354.

⁶⁰ KATZ, 2d ed., *supra* note 6, at 238–39.

⁶¹ *Id.* at 173.

cocaine 100 times more harshly than users of powder cocaine. Although the bill did not mention race, it was well-known that Black people disproportionately used crack and white people disproportionately used powder.⁶² This was the same decade when mass incarceration legislation also secured bipartisan support, without the need to mention race. John DiLulio's dangerous and false "The Coming of the Superpredators,"⁶³ published in 1995, dehumanized children of color and contributed to a legacy of mass incarceration.⁶⁴

It is unsurprising that during a decade when "experts" were telling legislators that Black and Brown children were too dangerous to be allowed to live freely, legislators would be inclined to regard these children's parents as inadequate caregivers. The racist stereotypes that fueled other social policies of the 1990s also fueled the idea that the state needed to intervene in Black families in order to save their children. The clear message that federal legislators embraced was the understanding that it was better for children who entered the foster care system to be adopted than return to live with their families of origin.

Professor Roberts goes further in *Shattered Bonds*, showing how, in the ASFA Congressional hearings, adoptive families and biological families were pitted against each other, with adoptive families repeatedly portrayed as the safe, stable, and supportive choice for foster children while birth families were virtually always painted in a negative light.⁶⁵ She tells the

⁶² Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

⁶³ John DiLulio, *The Coming of the Super-Predators*, WASH. EXAMINER, (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators> [<https://perma.cc/9MMX-PL8Q>].

⁶⁴ See David Garland, *The Road to Ending Mass Incarceration Goes Through the DA's Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office/> [<https://perma.cc/D5R3-X35G>] ("Mass incarceration came into existence when the nation abandoned the War on Poverty and chose to treat social problems and wayward lives as problems for police, prosecutors, and prisons. It is hard to see how it can be ended without a transformation of America's urban policy, its welfare state, and the political economy that underlies them.").

⁶⁵ ROBERTS, SHATTERED BONDS, *supra* note 1, at 114. See also *id.* at 119 ("Yet in supporting the federal adoption law, speaker after speaker referred to adoptive families as real and biological families as false. Representative Pryce urged her colleagues to support the legislation 'in the interest of thousands of children who need a true family to love and protect them.' Representative Shaw of Florida predicted that the law 'is going to bring about the joy of adoption and

story of a spokesperson for the Federation of Protestant Welfare Agencies comfortably telling federal legislators that “there is a fundamental problem with the [B]lack family . . . there are many people who believe that to save these children, they have to take them from their families. It is a sense that [B]lack families are already broken, and you’re saving these kids from broken [B]lack families.”⁶⁶

V. A QUESTION REMAINS: WHAT IS THE
MOST EFFECTIVE ARGUMENT FOR
DISMANTLING THE FAMILY REGULATION
SYSTEM?

I began this Article by emphasizing the importance of the scholarship of Dorothy Roberts, Peggy Cooper Davis, and Khiara Bridges, celebrating them for contributing to our understanding of the ubiquity of race and its influence on all things. White Americans can never, I believe, absorb enough of this history or the lessons these scholars, and others, including Isabelle Wilkerson, continue to teach people of all races. Two of the most important books I’ve read in the past several years include Isabella Wilkerson’s *Warmth of Other Suns* and *Caste: The Origins of Our Discontents*.⁶⁷ I believe every American should read these books and that they should be part of a required high school curriculum in every public school in the United States. As a white man who grew up in a largely segregated community in Queens, New York, I am ashamed of thoughts and feelings I’ve had in my lifetime and am genuinely grateful to have been made aware of the extent to which I was ignorant of fundamental truths about American history.

the bonding of a real family to so many kids.’ Senator Mike DeWine, on the other hand, referred to the homes of abused children as ‘households that look like families but are not.’); *id.* at 120 (“Senator Grassley defended the new measure on the grounds that foster and pre-adoptive parents ‘are the ones in the best position to . . . represent the children’s concerns. It is an important change to make as we seek to better represent the children’s best interests.”); *id.* at 114–15 (“President George W. Bush declared that ‘foster care ought to be a bridge to adoption.’ Surrounded by Black children in a Detroit center, he announced a plan to promote adoptions . . .”).

⁶⁶ *Id.* at 61.

⁶⁷ ISABELLE WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2010); WILKERSON, *CASTE*, *supra* note 41.

Poverty, and the maldistribution of wealth in the United States, are not random features of American life; nor are the politics of poverty an accident. They are inextricably bound up with race and racial politics. Poverty is what the family regulation system is really all about. Poverty and race, and family regulation and race, are intertwined at every level. This is true even when the family regulation laws enacted by Congress are applied in states with very tiny populations of African Americans. The racial politics of the United States harms all Americans, including white Americans.

That said, I end this Article raising what, for me, is an important question concerning advocacy going forward: How can we use this racial history to overcome injustice and eliminate it from our midst? On one hand, Professor Roberts has provided us with definitive proof that our family regulation system would not resemble its current version were the United States not impaired by the legacy of slavery. At the same time, there is virtually no institution in the country about which the same thing cannot be said.

As Wilkerson clarifies, it's not just the family regulation system that is pervaded by racism, quite the opposite. Family regulation is simply yet another instantiation of the problem. Wilkerson lists mass shootings; gun ownership; our incarceration rate; our maternal mortality rate, which is nearly three times higher than Sweden; our life expectancy rate, which is lowest among the eleven highest income countries; our infant mortality rate, which is highest among the richest nations; and our anemic student score rate in math and reading as some examples among many that are directly traceable to slavery and its legacy.⁶⁸

It is impossible to isolate American choices about how to finance public education, tax wage earners, or a myriad of other things our laws and practices allow, from our history of racism. We are infused with that history. It infects us all. To that extent, Professor Roberts's great work is less a revelation of something unique about the family regulation field than a brilliant exposé of its application to yet another institution that has been gravely damaged by our racist past and present.

My efforts as a critic of the family regulation system are to radically alter it. A question, at least for me, is whether that

⁶⁸ WILKERSON, *CASTE*, *supra* note 41, at 355.

goal is more easily reached by clarifying the extent to which our world-outlying practices are the consequence of America's racist present and history. I am unsure what the answer to that question is. In my long career, I have given many speeches highly critical of child welfare practices. My emphasis has always been on revealing how destructive our system is; how harmful it is to children and families; how unnecessary it is to be this way; how different we are from the rest of the world; and how un-child friendly it actually is. I emphasize how few of the children seized from their families have ever been abused; how easy our laws make it to forbid those children from ever living with their families again; how out of step we are from the rest of the world; and, most importantly, how it doesn't have to be this way.

I have given this speech in Maine, Idaho, Montana, Utah and West Virginia, to name some recent examples. Very few people in the room when I've given those speeches were Black. In percentage terms, very few of the families impacted by the child welfare systems in those states are Black. The families destroyed in those states are overwhelmingly white and Native American. There is no question that those states' laws and practices are shaped by the racism revealed by Dorothy Roberts. Their laws and practices are just as harsh and constitute just as much a violation of fundamental human rights as the laws and practices in Chicago, Detroit, New York, and Philadelphia.

But were I to tell West Virginians or people living in Idaho that their child welfare system is the product of America's racism, not only would the message be difficult for that audience to hear—it would be rejected. Let me be clear: the message is spot on. There is, as I say, no public aspect of American life that is not deeply infected by racism. Thus, as applied to child welfare the message is not unique; more importantly, it would not rouse the inhabitants of those states. Moreover, the families harmed by those systems in those states would be equally unimpressed to learn they are being so poorly treated because of our racist sins, both past and present.

So, for me at least, Dorothy Roberts's brilliant work is important for many to know and absorb. But I am unsure whether it is a platform upon which to build the abolition movement. That movement, instead, could be built on a thick description of what we are currently doing wrong and what we could do to right it. There are countless things to talk about when

that becomes our focus. I have some concern that some recently awakened progressive advocates committed to radical reform will fail in their efforts to achieve a radical overhaul of the family regulation system by having to carry the extra weight of persuading white people whose own system of child welfare impacts almost no Black Americans that it is a racist system that must be abolished. The argument is almost correct. But to the degree it is imperfectly right, I question whether it is wise to employ it.

A good deal of what makes this question so challenging for me to resolve is my awareness that avoiding any discussion of race finds company with far too many claims made elsewhere that race-based problems can be solved with race-neutral means, whether the subject is affirmative action or many other fields. I am unsure whether a special case can be made for the family regulation field that would allow me to ignore its racist connections when advocating for, say, AFSA's repeal. One thing is undeniable: tens of thousands of white families have been destroyed by ASFA and an even greater number of white families have had their lives gravely harmed by the family regulation system that would not exist without our legacy of racism in this country. Am I permitted to ignore *why* we have this system when striving to get rid of it when I conclude that the audience would be less receptive to a conversation about race? Or must I make clear to everyone just how deeply rooted racism is in the family regulation system employed in the United States?

Whatever the answer, we should appreciate that Roberts has so successfully and powerfully demonstrated how racism affects family regulation law and policy. As she asks in *Shattered Bonds*:

Can anyone honestly doubt that the modern acceptance of child removal as the system's chief function depends on the disproportionate demolition of Black families? If the rate of white children entering the foster care system began to approach the present rate of Blacks, we would certainly see more moral outrage over the level of state interference in families.⁶⁹

⁶⁹ ROBERTS, SHATTERED BONDS, *supra* note 1, at 92.

VI. CONCLUSION

Whatever proves to be the most effective message to achieve radical change in America's family regulation system, there's nothing more important than that we succeed in dismantling it. The day cannot come too soon when we repeal AFSA and end this system which needlessly separates children from their families. We must recognize that people living in poverty who become parents have the fundamental human right to raise their children and that their children have the reciprocal right to be raised by their families.