COLUMBIA JOURNAL OF RACE AND LAW

FIRST SYMPOSIUM ISSUE FOR THE COLUMBIA JOURNAL OF RACE AND LAW'S ELEVENTH ANNUAL SYMPOSIUM

STRENGTHENED BONDS: ABOLISHING THE CHILD WELFARE SYSTEM AND RE-ENVISIONING CHILD WELL BEING

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The *Columbia Journal of Race and Law* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. The Journal warmly invites submissions from scholars, practitioners, and policymakers. We also accept shorter, more timely pieces for our exclusively online companion, the *Columbia Journal of Race and Law Forum*. The *Journal* requires authors to submit pieces electronically, as provided through the Submissions page on our website.

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COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JULY 2021** **NO. 3**

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JULY 2021** **NO. 3**

CONTENTS

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JULY 2021** **NO. 3**

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JULY 2021** **NO. 3**

EDITOR'S NOTE

GROWTH IN UNPRECEDENTED TIMES

Nicolás Quaid Galván*

Our *Journal* has published in unprecedented times. This year, we have gone to the streets to declare what should be a universal truth: Black Lives Matter. We have chanted the names of unarmed Black persons who have been killed by the state. This time, our demands for justice were not lost. In fact, a form of justice was delivered by a jury in Minnesota. This jury found Derek Chauvin guilty for the murder of George Floyd.

This year, we've seen the United States Capitol sacked. We've seen the impact of propaganda, created and spread by those nefariously continuing to believe that the presidential election has been stolen. We have seen public officials—those sworn to protect the Constitution against both foreign and *domestic* threats—flirt with, fail to condemn, and endorse white supremacy, authoritarianism, xenophobia, and hate. All of this hidden under the guise of "states' rights," "liberty," "small government," and "freedom."

We've also experienced the new reality of living in a global pandemic. It completely changed how we interacted with each other. For example, while chanting in the streets, we wore something novel to many: a face mask. Some of us became caretakers during the pandemic. And over 650,000 American

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I wholeheartedly thank the entire Board and Staff of our *Journal*. Your drive and commitment to our *Journal* gives me strength. You are essential. I am also thankful for our Symposium Co-Chairs, Professor Jane M. Spinak and Professor Nancy Polikoff. Your vision, support, and work has resulted in a successful three-day symposium, and this fifteen-piece Issue you have in your hands—the largest Issue in the *Journal*'s history. You have been integral to our *Journal*'s success. I am especially grateful for the Managing Editors, Vinay Patel, Jennifer Romero, and Jacob Bryce Elkin. Thank you for accompanying me on this journey. Leading the *Journal* with you has been the honor of my time at Columbia Law School. Finally, I am grateful for my partner, Serengeti. I could not have made it through this year, and law school, without your unyielding support and love.

families lost a loved one. I lost my *Tío* George Antonio Silva,[1] a pillar of our family. Two Managing Editors and several other members of our Board also lost a family member this year. As vaccinations rates rise, many sense a return to normalcy. Yet, for others, going back to "normal" can never truly mean a return to our pre-pandemic lives.

The pandemic also placed a microscope on existing inequalities. In line with less access to health care and lower quality of care, Black and Latinx people have died at disproportionate rates from Covid-19 compared to any other group.[2] In our own New York City, Black and Latinx folks experienced death rates twice as high as white communities.[3] We've also seen a resurgence of hate crimes, particularly against the Asian and Pacific Islander community.

Inequalities exposed by the pandemic are also intersectional. At the peak of the pandemic, we've seen how the majority of "essential," front-line workers were persons of color.[4] Our society and institutions depend on the labor of the essential: our health care workers; our grocery, convenience, and drug store workers; our crop-pickers, agricultural, trucking, and logistical workers; our postal and delivery workers; our public transit workers; our janitors and building staff; our child and social services workers; and many of those in the "gig" economy. We depend on these workers. And when lawmakers delineated different types of workers, they designated their work as "essential." Despite this classification, many of these workers were paid less than a living-wage. Even now, after not receiving a fair base compensation to begin with, many have not received

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[1] May his soul rest in peace. Thank you for all you've taught me, and so many others.

[2] Carla K. Johnson et al., *As US COVID-19 Death Toll Nears 600,000, Racial Gaps Persist*, AP NEWS, https://apnews.com/article/baltimore-california-coronavirus-pandemic-race-and-ethnicity-health-341950a902affc651dc268dba6d83264 [https://perma.cc/Q54T-WR6S] (June 14, 2021).

[3] Jeffery C. Mays & Andy Newman, *Virus is Twice as Deadly for Black and Latino People than Whites in N.Y.C.*, N.Y. TIMES (June 26, 2020), https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html [https://perma.cc/3Q2M-JRJW].

[4] Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1, 10–19 (2021).

hazard pay for their increased, and necessary, exposure to the deadly virus.[5]

The *Columbia Journal of Race and Law* experienced this precarious reality in the context of a virtual reality. We could not ignore the world around us. Columbia Law School became a matrix of Zoom calls instead of our New York City campus; a grid of faces and superimposed backgrounds instead of the favorite chair in our professor's office; an empty room in a different city instead of a lecture hall. Studying, networking, outlining, internships, teaching assistantships, and sustaining our *Journal* all became an isolated series of events. Working from home blurred the distinction between relaxation and productivity. For many of us, the dining room replaced the law school library. And for some of us, we could not find silence while at home.

Our relationship with Columbia Law School and our *Journal* changed. Reading cases seemed irrelevant as we saw the death toll rise at home and abroad. Month after month in front of our screens and TVs, being separated by much more than six-feet became demoralizing, even paralyzing. For some of us, caretaker responsibilities took precedence over our coursework, and even our *Journal* responsibilities. All I wanted to do was to spend time with my family as we wrestled with the sudden loss of *Tío* George.

The demands of the legal profession did not change in these unprecedented times. Our law school exams were not postponed. Our legal externships and employers expected a work product. Even our *Journal* was complicit in these continued demands as we continued to publish. These demands tested our abilities. It tested our capacities. At one point, I even feared our ability to publish. I feared for the future of our *Journal*.

Yet, against these odds, we persisted. Like those who came before us—our parents and grandparents who have worked their entire lives so we could attend an Ivy-League legal institution—we persisted. And we succeeded.

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[5] Molly Kinder et al., *The COVID-19 Hazard Continues, but the Hazard Pay Does Not: Why America's Essential Workers Need a Raise*, BROOKINGS INST. (Oct. 29, 2020), https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise [https://perma.cc/RZ88-W882].

This year, we have published more than any other volume of the *Columbia Journal of Race and Lawx*. This year, we published twenty-six pieces, resulting in over 1,000 pages of original scholarship. This was only possible due to the commitment of our Editorial Board and Staff. Our Masthead was also the largest in the *Journal*'s history, comprising over fifty students, and spanning over three graduating classes of students. Among our achievements this year is a mention in *TIME Magazine*.[6]

We have also created an entirely new publication: The *Columbia Journal of Race and Law Forum*—our exclusively online companion to our traditional, printed pieces. The *Forum*, unlike our traditional print Issues, is dedicated to shorter, more timely pieces, and isn't constrained by the same financial and logistical demands of print scholarship.

Our first Issue proceeded with four pieces. First, Professor john a. powell and Eloy Toppin Jr., examines the "othering" that fuels the global rise of authoritarianism and proposes a "society of belonging" to combat racism.[7] Second, Professor Michelle Foster and Timnah Rachel Baker provide the first analysis of Article 1(3) of the International Convention on the Elimination of All Forms of Racial Discrimination and its consistency with the *jus cogens* prohibition on racial discrimination.[8] Then, in my Note, I analyze the Supreme Court's doctrinal methodologies of evaluating constitutional harm, and argue that what I call the "cumulative harm framework" is necessary to combat second-generation discrimination.[9] And, Jacob Elkin, our Managing Online and Symposium Editor, argues that a public trust duty imposed by the Pennsylvania Supreme Court should prohibit state actors from continuing to

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[6] Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), https://time.com/5946929/child-welfare-black-families [https://perma.cc/DFD5-66ST].

[7] john a. powell & Eloy Toppin, Jr., *Uprooting Authoritarianism: Deconstructing the Stories Behind Narrow Identities and Building a Society of Belonging*, 11 COLUM. J. RACE & L. 1 (2021).

[8] Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?*, 11 COLUM. J. RACE & L. 83 (2021).

[9] Nicolás Quaid Galván, Note, *Adopting the Cumulative Harm Framework to Address Second-Generation Discrimination*, 11 COLUM. J. RACE L. 147 (2021).

place environmental hazards in communities that already bear disproportionate environmental burdens.[10]

Our second Issue contained three pieces. It included the longest individual piece in our *Journal*'s history. In 103 pages, David H. Gans provides an in-depth historical and legislative account of the formation of the 14th Amendment, arguing that current Supreme Court doctrine falls egregiously short of the original intent of the Amendment.[11] Next, Avanthi Cole, in her Note, demonstrates how the Uniform Partition of Heirs Property Act, was designed to assist the "wealthy and legally savvy" in resolving issues with "heirs property," but does not provide the tools to help Black and low-income communities.[12] Finally, Alyson Merlin, our Symposium Editor, argues that unenforced but unabrogated treaty rights between Native Americans and the federal government may serve as a mechanism for Native nations to assert a greater role in the decision-making process regarding massive energy projects, such as oil pipelines.[13]

Our newly created *Forum* was also home to multiple pieces. There, Vinay Patel, our Managing Articles Editor, demonstrates that the FBI's new, facially neutral classification of "Racially Motivated Violent Extremism" is a façade to surveille Black Lives Matter protestors, and should not survive a challenge under the Fourteen Amendment.[14] We also used the *Forum* to memorialize our Keynote and Closing Remarks of Volume 10's Symposium, entitled *How the Law Underdeveloped Racial Minorities in the United States*, which was postponed due to the pandemic and hosted by Volume 11.

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[10] Jacob Elkin, Note, *Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 COLUM. J. RACE & L. 195 (2021).

[11] David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239 (2021).

[12] Avanthi Cole, Note, *For the "Wealthy and Legally Savvy": The Weaknesses of the Uniform Partition of Heirs Property Act as Applied to Low-Income Black Heirs Property Owners*, 11 COLUM. J. RACE & L. 342 (2021).

[13] Alyson Merlin, Note, *Unenforced Promises: Treaty Rights as a Mechanism to Address the Impact of Energy Projects Near Tribal Lands*, 11 COLUM. J. RACE & L. 373 (2021).

[14] Vinay Patel, Comment, *Racially Motivated Spying Pretext: Challenging the FBI's New Regime of Racialized Surveillance*, 11 COLUM. J. RACE & L.F. 1 (2021).

This Issue is unique. In this first of two Symposium Issues, we celebrate the 20th anniversary of Professor Dorothy Roberts' *Shattered Bonds: The Color of Child Welfare*.[15] Professor Roberts gave our Keynote, which is also memorialized here.[16] In this Issue and at our actual Symposium,[17] we call for the abolition of the child welfare system, more appropriately called the family regulation system,[18] and asked our participants and authors to reimagine child wellbeing. The Issue's *Foreword* provides a thorough summary of the thirteen subsequent pieces within this Issue and two pieces published online in the *Forum*.[19] This Issue and our Symposium was only possible through the devotion of Professors Jane M. Spinak and Nancy Polikoff, our Symposium Co-Chairs. Our *Journal* is grateful for your commitment, time, and energy. We cannot thank you enough.

Our *Journal* inhabits a unique space at Columbia Law School. We are exclusively devoted to combating racial inequalities, the only legal journal to do so at Columbia. Because of purpose, we cannot, and will not, be oblivious to the world outside Morningside Heights. We will continue to ask the difficult questions, and advance our cause. I, and the Editorial Board and Staff of the *Columbia Journal of Race and Law*, thank you for joining us. We thank you for engaging with the ideas of our authors. We hope this discourse helps, and that soon enough, these words ring true: "Equal Justice Under Law."

With gratitude, *y en solidaridad*,

Nicolás Quaid Galván
Editor-in-Chief
Volume 11

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[15] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

[16] Dorothy Roberts, Keynote, *How I Became a Family-Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

[17] Columbia Journal of Race and Law, *Strengthened Bonds Symposium Introductions, Keynote, and Responses*, YOUTUBE, (July 13, 2021), https://www.youtube.com/watch?v=NMZffrsE-b8 [https://perma.cc/C6XW-LG84].

[18] Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427 (2021).

[19] *Id.*

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11 **JULY 2021** **NO. 3**

FOREWORD

11TH ANNUAL SYMPOSIUM

FOREWORD: STRENGTHENED BONDS: ABOLISHING THE CHILD WELFARE SYSTEM AND RE-ENVISIONING CHILD WELL-BEING

Nancy D. Polikoff* & Jane M. Spinak†

The 2001 book, Shattered Bonds: The Color of Child Welfare*, by Dorothy Roberts, called out the racism of the child welfare system and the harms that system perpetrates on families and communities. Twenty years later, despite numerous reform efforts, the racism and profound harms endure. It is time for transformative change. In this foreword to the symposium Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being, honoring the 20th anniversary of* Shattered Bonds*, we highlight Professor Roberts' articulation of her development as a family policing abolitionist and summarize the articles and comments contributed from scholars in numerous disciplines and well as impacted parents, family defense advocates and system-change activists. These contributions help us learn from history and political theory; focus on the unique and shared circumstances of Native American families; critique, and call for repeal of, much of current law; condemn the punitive, and racially disproportionate, surveillance of families; and demand a new approach that diverts the massive funding of the foster-care industrial*

* Professor Emerita of Law, American University Washington College of Law.

† Edward Ross Aranow Clinical Professor of Law, Columbia Law School.

> *complex into support, services, and healing for families, tribes, and communities.*
>
> *We call for abolition of the family regulation system, the term we use as a more accurate description of what is commonly called the child welfare or child protection system. We situate this call in the context of the more developed movement for prison abolition. The current system is predicated on seeing individual parents as a risk to their children. It fails to see the strengths and resilience of parents and families; the harms of surveillance and removal; and the structural forces that harm children by failing to invest in adequate housing, income, child care, health and mental health services, and educational opportunities for all families. Abolition provides the transformative mind-set that will enable loving and strengthened families to raise happy, healthy, safe, educated, and imaginative children.*

I. INTRODUCTION

State removal of children from their parents is an act of violence and cruelty. That is why the Trump administration faced near universal condemnation for its 2018 policy of separating parents and children at the US-Mexico border.[1] With this symposium, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Imagining Child Well-Being*, we call attention to the enduring, devastating, American practice of separating parents and children through state agency and court procedures cloaked under the misleading name of the *child welfare* system. Those family separations are no less traumatic and consequential than the ones that were denounced at the US-Mexico border, and they will be harder to end. The Articles and Comments in this and the subsequent symposium issue seek to contribute to abolishing the system that allows those separations to continue, and to reimagining and replacing it with policies and practices that facilitate the flourishing of all children within their families, tribes, and communities.

Twenty years ago, in *Shattered Bonds: The Color of Child Welfare*, law professor Dorothy Roberts systematically dismantled any pretense that the child welfare system functions to serve the interests of children.[2] Through data, documentation, history, analysis, and family narratives, Professor Roberts called out the racism at the heart of a system that has destroyed hundreds of thousands of families. "If you came with no preconceptions about the purpose of the child welfare system," she wrote, "you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families."[3] Professor Roberts built on earlier analyses of child protection intervention that identified poverty as the leading reason for the state removing children from their families, and on the long legacy of early Progressive activists' efforts to assimilate immigrant families who were a threat to "American" norms by conditioning assistance on intrusive and punitive interventions

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[1] Maggie Jo Buchanan et al., *The Trump Administration's Family Separation Policy is Over* CTR. AM. PROGRESS (April 12, 2021), https://www.americanprogress.org/issues/immigration/reports/2021/04/12/497999/trump-administrations-family-separation-policy [https://perma.cc/G36T-K5KP].

[2] DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001).

[3] *Id.* at 6.

in their lives.[4] Even before this late 19th century Progressive effort began, the legally sanctioned destruction of Native American families was already operating—a systemic genocide that has yet to abate fully.[5] All of these practices are rooted in the idea of saving children from their families and communities.[6]

The *Strengthened Bonds* symposium honors the 20th anniversary of this groundbreaking book and showcases Professor Roberts' contemporary assessment, as articulated in her keynote address, *How I Became a Family Policing Abolitionist*, that family policing—the term she now uses in place of the child welfare system—is an arm of the racist carceral state and must end. We agree with Professor Roberts that new terminology is in order. The term *child welfare* system is misleading, as is the equally recognized *child protection* system. The system these terms denominate does not protect nor support child well-being, and too often perpetrates harm on children, families, and communities. While the term *foster care system* is equally problematic—as it elides the documented harms children have experienced upon removal from their families—it has been easy to replace the term foster care system with foster system and to refer to placement in foster homes rather than foster care.[7]

Scholars and advocates have had more difficulty coming up with terminology to replace the *child welfare* system. Professor Roberts, as noted earlier, has chosen *family policing*. The terminology we believe best captures the operation of this system is the *family regulation system*, a term first coined by Emma Williams in her Oberlin College honors thesis.[8] This term

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[4] Leroy H. Pelton, *The Role of Material Factors in Child Abuse and Neglect*, *in* PROTECTING CHILD FROM ABUSE AND NEGLECT 131 (Gary V. Melton & Frank D. Barry eds., 1994); BARRY C. FELD, THE EVOLUTION OF THE JUVENILE COURT 22–25 (2017).

[5] LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR, 46–75 (2020).

[6] *See* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (40th ed. 2009).

[7] *See generally* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

[8] *See* Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, IMPRINT (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/C45S-ZPH6]. The term is also

was quickly adopted by many advocates, system-involved parents, and academics.[9] *Family regulation* reflects the pervasive impact legally-constructed agencies and courts have on every aspect of the families they touch. From the school report that a child was hungry, to the knock on the door in the middle of the night to check the refrigerator, to further prolonged investigations, to agency or court mandated supervision, to removal of children temporarily or permanently, family behavior

consistent with Wendy Bach's use of the term *hyperregulation* to mean that "its mechanisms are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities." Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1073 (2015).

[9] *See* RISE, *'Abolition is the Only Answer': A Conversation with Dorothy Roberts*, (Oct. 20, 2020), https://www.risemagazine.org/2020/10/conversation-with-dorothy-roberts ("We've challenged terms that give a false impression of what the system does. Now, we are exploring different descriptions of it. One is 'family regulation' because the government is regulating families through laws and policies that address families' needs by threatening to take children away. Even when they don't take children away, they impose all sorts of requirements on families instead of support and providing for families."); Chris Gottlieb, *Black Families Are Outraged About Family Separation with the US. It's Time to Listen to Them*, TIME, (Mar. 17, 2021) https://time.com/5946929/child-welfare-black-families [https://perma.cc/XJN7-6JL5] ("It is time to call the 'child welfare system' what it is: a 'family regulation system.'"); Molly Schwartz, *Do We Need to Abolish Child Protective Services?"*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services [https://perma.cc/4H7W-DZ7X] (citing parent advocate and activist Joyce McMillan); Martin Guggenheim, *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*, 11 COLUM. J. RACE & L. 711, 714 n.3 (2021) ("It is not, and never has been, a 'child welfare system.' . . . [c]hild welfare is not even within the portfolio of any so-called 'child welfare commissioner' [who] would surely have in her 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 level in the public schools . . . It literally *is* a family regulation system, exclusively."); Ava Cilia, The *Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. AMICUS (Feb. 21, 2021) https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it [https://perma.cc/2PTW-VJ3H]. Other possible terms, all more accurate than *child welfare* system are *family destruction* system, see RISE *supra*, and *child removal* system, see Robert Latham, *A Starter Reading List on How Child Welfare Policies Harm Black People, Families, and Communities*, (June 12, 2020), https://robertlathamesq.org/a-starter-reading-list-on-how-child-welfare-policies-harm-black-people-families-and-communities [https://perma.cc/8J5Z-HFNK] ("The child welfare system has nothing to say about anti-Black state violence because the *child removal system* engages in it daily.").

is surveilled and regulated. This comes at great cost to families, generally with little or no benefit—indeed sometimes great harm—to children.

When we speak of the existing child welfare, or family regulation, system, we are referring to a regime of public, private, and faith-based agencies and institutions, courts, and individuals authorized by force of law to surveil and intervene in families, remove children from their parents temporarily or permanently, terminate the parent-child relationship, and create new legal families. Child removal is not the end result of all interventions by the family regulation system, but parental interaction with anyone in that system takes place under the specter of possible child removal and loss of parental rights. When children are removed from their families, they are generally placed in a massive foster system in which the state provides vastly more money and assistance to strangers to raise other people's children than it is willing to provide parents to raise their own children.[10] It is the coercive power of the state to intervene in and ultimately destroy families that distinguishes the so-called child welfare system and its actors from any other existing or envisioned system of providing assistance to families to promote the well-being of their children.

The current family regulation system is predicated on seeing the individual families who come within its grip as presenting the problems to be addressed. It purports to address those problems through surveillance, intervention in family life, deep reliance on removing children, and providing services to families that rarely support their complex needs. This approach fails to recognize or embrace the strengths of families and communities. The family regulation system has become an ineffective and harmful substitute for the more fundamental need to invest in families, communities, and tribes in order to ensure adequate housing, income, child care, health and mental health services, and educational opportunities for all families.

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[10] *Compare* ALI SAFAWI & IFE FLOYD, TANF BENEFITS STILL TOO LOW TO HELP FAMILIES, ESPECIALLY BLACK FAMILIES, AVOID INCREASED HARDSHIP, CTR. BUDGET & POL'Y PRIORITIES (Oct. 8, 2020), https://www.cbpp.org/sites/default/files/atoms/files/10-30-14tanf.pdf [https://perma.cc/W9NH-3YJP] ("Temporary Assistance for Needy Families" (TANF) payments), *with* Peeples, *Getting Paid to Be a Foster Parent: State-by-State Monthly Guide*, WE HAVE KIDS (July 23, 2020), https://wehavekids.com/adoption-fostering/What-does-being-a-foster-parent-really-pay [https://perma.cc/9HHD-WDPC] (foster care payments).

These investments strengthen communities so they have the ability to support and assist themselves.

Even the most recent federal legislation, the *Family First Prevention Services Act*, which purports to shift services for families into community-based agencies, applies only to children who are "candidates" for foster care but could remain safely in their homes with preventive services.[11] This means families cannot just appear at a community agency and say they need some assistance. They must first submit to state surveillance and obtain a determination that without services their child "would be at imminent risk of entering foster care," a condition that exposes them to continued state monitoring and that most families in need of some assistance would contest.[12] In other words, this law, widely heralded for its focus on keeping families together, actually requires a parent who wants substance abuse treatment, for example, to voluntarily submit to the very system that has the power to remove her children and ultimately terminate her parental rights. That is the essence of a family regulation system.

II. THE ROOTS OF THIS SYMPOSIUM

Since the very formation of a governmental family regulation system—first in the creation of the original juvenile court and later in the development of federally funded state child protection agencies—advocates, lawyers, judges, scholars, policy makers, activists, parents, and children have written and spoken about the defects in, and harms inflicted by, this system. Historic and current critics have identified myriad substantial and seemingly intractable concerns: the trauma of separating children and parents; vague standards of child maltreatment;

[11] 42 U.S.C. §671 (a) ("In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides for foster care maintenance payments in accordance with section 472, adoption assistance in accordance with section 473, and, at the option of the State, services or programs specified in subsection (e)(1) of this section for children who are candidates for foster care or who are pregnant or parenting foster youth and the parents or kin caregivers of the children, in accordance with the requirements of that subsection").

[12] 42 U.S.C. §675 (13) (defining a child whose family is eligible for Family First prevention services as one "who is identified in a prevention plan . . . as being at imminent risk of entering foster care . . . but who can remain safely in the child's home or in a kinship placement as long as services or programs . . . that are necessary to prevent the entry of the child into foster care are provided.").

misidentifying poverty as neglect; the impact of increasing income inequality and the ever-more-frayed safety net; misdiagnoses of child abuse; the failure to distinguish and address the far smaller number of serious cases of physical and sexual abuse from the vast number of cases based largely on poverty and inequities in families' lives; downsides of mandatory and anonymous reporting of suspected child maltreatment; devastating and unneeded consequences of child abuse registries; inadequate mental health and substance abuse treatment; failure to create effective and often material services; denying services that are legally mandated to prevent child removal or reunite families who have been separated; the demonization of mothers and the disregard of fathers; the role of the courts in perpetuating inequality and injustice; drawing families under court supervision to receive services; widespread due process violations; inadequate, untimely, and ineffective legal representation; inappropriate family reunification requirements; financial incentives for foster placements and adoptions but not for family reunification; the priority of adoption over other permanency options; the vast funding of the foster-care industrial complex while limiting support to families; mistreatment of, and bad outcomes for, children in foster homes; unrelenting, ongoing, structural racism, seen especially in the devaluing of the relationships between Black mothers and their children; and the failure to see and seek solutions within those communities most affected by family regulation.[13]

Since the publication of *Shattered Bonds* at the beginning of this century, there have been efforts to ameliorate these defects and reduce these harms. These efforts have been focused, for the most part, on making the current family regulation system work better without fundamentally challenging its

[13] *See generally* ROBERTS, *supra* note 2; MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM (2016); DON LASH, WHEN THE WELFARE PEOPLE COME: RACE AND CLASS IN THE U.S. CHILD PROTECTION SYSTEM (2017); MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY (2020); DIANE L. REDLEAF, THEY TOOK THE KIDS LAST NIGHT: HOW THE CHILD PROTECTION SYSTEM PUTS FAMILIES AT RISK (2018); VICTORIA LAW & MAYA SCHENWAR, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 115–140 (2020); JANE M. SPINAK, WHEN GREAT IDEAS FAIL: FAMILY COURT AND THE DANGERS OF DOING GOOD (forthcoming N.Y.U. Press) (provisional title) (on file with author).

premises. Meanwhile, state and federal funding for the current system has more than tripled.[14] *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being* has provided an opportunity to critique this approach and to consider radical change to re-imagine how society cares for and protects children while honoring their bonds to their families and communities. Most centrally, radical change recognizes the societal responsibility to invest in universal and mutual support systems in communities, tribes, and neighborhoods to enable families to flourish and thrive.

Less than three weeks after we issued the call for papers for this symposium, a Minneapolis police officer murdered George Floyd, a murder that 17-year-old Darnella Frazier captured on video and broadcast to the world. The mass protests and uprisings that followed, in cities and towns around the country, brought systemic racism to the forefront of American consciousness at a time when the Covid-19 pandemic was disproportionately devastating Black, Indigenous, and people of color (BIPOC) communities. The demonstrators also turned the demand for police and prison abolition—a movement decades in the making—into a serious topic of mainstream conversation. Reconsidering how systemic racism and white supremacy impact the purposes and practices of traditional institutions was legitimized in ways that hadn't been widespread throughout the country since the civil rights movement.

In our call for papers, we acknowledged the prison abolition movement. We commended its vision of replacing imprisonment, policing, and surveillance with alternatives that respond effectively to harm without putting people in cages or increasing the prison industrial complex, and that instead create and support healthy, stable families and communities.[15] We identified the parallels between the criminal legal system and the family regulation system. Most obviously, both systems trace their practices to colonization and slavery, mass immigration and displacement of Native populations, and the resulting and lasting inequities that have ensued and continue to

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[14] *Compare* ROBERTS, *supra* note 2 (placing the funding at $10 billion) *with* KRISTINA ROSINSKY ET AL., CHILD WELFARE FINANCING SFY 2018: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 1 (2021) [https://perma.cc/7GES-MBA3] (placing 2018 funding at $33 billion).

[15] *See Mission*, CRITICAL RESISTANCE, http://criticalresistance.org/about [https://perma.cc/R2ZZ-WCMC] (last visited June 20, 2021).

disproportionately target BIPOC communities, as well as predominantly low-income families. We also recognized that the prison abolition movement had produced a robust body of scholarship, and we stated our aspiration that this symposium would generate equally insightful, imaginative, and impactful scholarship in support of abolishing the family regulation system and creating a radically new approach to child well-being.

The response to our call for papers was overwhelming. We received more than 100 proposals, including from scholars in law, sociology, anthropology, political science, history, gender studies, public health, medicine, social work, and education. Equally impressive were the proposals from practicing lawyers, social workers, parent advocates, and clinicians; policy advocates, activists, and journalists; and from parents who had been regulated by and even lost their children to the state, and from young adults who had been foster youth. The Editorial Board of the *Columbia Journal of Race and Law* agreed with the importance of this initiative, and committed to dedicating two issues to symposium Articles and Comments, and, to capture as much of the interest as possible, we severely limited the length of submissions. Even so, we could accept only a third of the proposals we received. Most of the pieces accepted for the first issue are contained in this volume, while some appear in the *Journal's* exclusively online publication, the *Columbia Journal of Race and Law Forum*. We captured several additional voices in blog posts published on the *Journal's* website in the months leading up to the symposium.[16]

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[16] *See, e.g.*, Every Mother is a Working Mother Network et al., *Defund the Family Policing System: Fund Mothers and Other Primary Caregivers*, COLUM. J. RACE & L. BLOG (Feb. 13, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/309 [https://perma.cc/E7UX-TYPJ]; Maya Pendleton, *Making Possible the Impossible: A Black Feminist Perspective on Child Welfare Abolition*, COLUM. J. RACE & L. BLOG (Feb. 20, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/311 [https://perma.cc/7D3X-UCU2]; Brittney Frey, *Re-Envisioning the Child Welfare System with a Cup of a Science, a Spoonful of Law, and a Gallon of Love*, COLUM. J. RACE & L. BLOG (Feb. 21, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/312 [https://perma.cc/P6M3-6SGS; Shannan Wilber & Maribel Martínez, *SupportOUT: Promoting the Well-Being of LGBTQ Youth of Color in Their Homes, School, and Communities*, COLUM. J. RACE & L. BLOG (Feb. 25, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/315 [https://perma.cc/22FC-BPVW];

III. THE ARTICLES IN THIS ISSUE

Given the vast reach of the family regulation system and the breathtaking scope of the critiques, no symposium could address every systemic flaw or imagine every scenario for a future in which children are fully supported in their families, tribes, and communities.[17] The Articles and Comments that follow in this issue, and those that will appear in the second symposium issue, reflect an abolitionist stance that we hope will inform scholarship, advocacy, and activism to come. Several examine the historical context of family regulation, including the deep roots of slavery and Native American genocide. Without exploring those historical origins—as contributor Addie Rolnick notes—we suffer from a "failure of memory" that allows us to forget that "what we imagine as benevolent, helpful systems [were] originated as ways to control, eradicate, or confine disfavored populations."[18]

Dorothy Roberts, in her keynote address, *How I Became a Family Policing Abolitionist*, identifies the three developments that led her to advocate for abolition: the dismal track record of supposed reforms; the growth of the prison abolition movement;

Esther Anne & Penthea Burns, *Truth, Healing, and Change in the Dawnland*, COLUM. J. RACE & L. BLOG (Mar. 4, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/317 [https://perma.cc/73ZP-8G4C]; Leyda Garcia-Greenawalt, *Guilty: How Immigrating to the United States Became a Life Sentence to Child Welfare*, COLUM. J. RACE & L. BLOG (Mar. 19, 2021), https://journals.library.columbia.edu/index.php/cjrl/blog/view/319 [https://perma.cc/9ET6-SHSA].

[17] We also acknowledge previous law review symposia that have provided significant critiques of the current system. *See*, *e.g.*, *CUNY LAW Review's Spring Symposium: "Reimagining Family Defense"*, CUNY L. REV. (May 1, 2016), http://www.cunylawreview.org/cuny-law-review-spring-symposium/#more-2327 [https://perma.cc/HC37-UN5S]; *Elie Hirschfeld Symposium on Racial Justice in the Child Welfare System Transcript*, 44 N.Y.U. REV. L. & SOC. CHANGE 129 (2019). *Achieving Justice: Parents and the Child Welfare System*, FORDHAM L. REV., http://fordhamlawreview.org/symposiumcategory/achieving-justice-parents-and-the-child-welfare-system [https://perma.cc/25EJ-L3RQ] (last visited June 21, 2021); the Articles contained in 70 FORDHAM L. REV. 1–458 (2001) and 21 BROOK. J. L. POL'Y 1–153 (2012).

[18] Addie Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUM. J. RACE & L. 811, 823 (2021).

and the increase in organizing by parents and youth affected by the system.[19]

Twenty years of reform efforts, some of which Professor Roberts participated in, have taught her that trying to reform a system can legitimate and strengthen it without changing its punitive ideology or racist impact. She writes that "we can't tinker with the flaws of a system designed at its roots to police poor, Black, Indigenous and other marginalized families as a way of maintaining a racial capitalist system."[20] Professor Roberts draws extensively on the work of prison abolitionists, applying abolitionist analysis to family policing and concluding that the system cannot be fixed. "Instead," she writes, "we need a paradigm shift in the state's relationship to families—a complete end to family policing by dismantling the current system and re-imagining the very meaning of child welfare."[21] She cautions that funds divested from police should not go to enriching family policing, and she admonishes prison abolitionists who fail to recognize how the family policing system surveils and represses Black and other marginalized communities in ways that are similar to law enforcement systems. Finally, Professor Roberts has been influenced by the rise of parent and youth groups that have organized to demand and implement transformative change as well as the rise of multi-disciplinary, holistic parent defense offices to challenge family policing practices.[22]

Again borrowing from the reasoning of prison abolitionists, Professor Roberts advocates "non-reformist reforms," those that shrink the state's capacity to destroy families.[23] These can include ending mandatory reporting—the requirement that persons in certain occupations report any suspected child maltreatment to the states; providing high-quality, multidisciplinary legal defense to parents at every stage of the process, including before their children are removed; and organizing for community-based mutual aid. Professor Roberts' contribution to this symposium previews the history, analysis,

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[19] Dorothy E. Roberts, *How I Became a Family Policing Aboltionist*, 11 COLUM. J. RACE & L. 455 (2021).

[20] *Id.* at 460.

[21] *Id.* at 464.

[22] *Id.* at 465.

[23] *Id.* (citing Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (June 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/C55S-5GEL].

and arguments she develops more fully in her forthcoming book, provisionally entitled, *Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build A Safer World*.

Two Articles were crafted, in part, as responses to Professor Roberts' keynote themes. Gwendoline M. Alphonso, in *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare,* contrasts two distinctive standards applied to Black and white motherhood during the last two centuries: the Black economic utility standard versus the white affective family standard.[24] The ante-bellum period valued Black women for what they could contribute to the accumulation of white wealth but valued white women for what they could contribute to their own families. Post-bellum policies compelled Black women to work rather than care for their children and twentieth century financial supports first went only to white mothers. The later expansion of supports that included Black families came with punitive work requirements that to this day are implemented most coercively against Black mothers. Today's punitive child welfare and social welfare policies will not end, she argues, as long as we perpetuate this multi-century devaluation of the affective and nurturing labor performed by Black mothers.

Professor Laura Briggs, in *Twentieth Century Black and Native Activism Against the Child Taking System: Lessons for the Present*, recalls mid-twentieth century activism against state removal of Black and Native families.[25] In direct response to *Brown v. Board of Education*,[26] southern states implemented "suitable home" rules that resulted in the removal of tens of thousands of Black families from public financial assistance, a move specifically designed to get Black families to flee the south so that schools could remain segregated. Families who could not feed their children were then subjected to the possibility of child removal. In Louisiana in particular, this resulted in a National Urban League call to "Feed the Babies," both through mutual aid

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[24] Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471 (2021).

[25] Laura Briggs, *Twentieth Century Black and Native Activism Against the Child Taking System: Lessons for the Present*, 11 COLUM. J. RACE & L. 611 (2021).

[26] 347 U.S. 483 (1954).

and through state support.[27] But the Urban League pivoted from a radical call to support families to a reform approach through the Social Security Administration, resulting in a rule that states could not deny benefits to children in "unsuitable homes" unless it also removed those children and placed them elsewhere. Instead of funding family support, the resultant federal laws in 1961–62 funded foster homes for removed Black children. In the first year alone, 150,000 Black children were removed from their families.[28]

Turning to Native American families, Professor Briggs notes that child-taking was a feature of state policy against Native American tribes, both to extinguish land claims and to punish non-nuclear forms of child-rearing. Native activism sought tribal control of child welfare matters, and gained a victory—one under persistent attack[29]—in the passage of the Indian Child Welfare Act (ICWA) in 1978. Briggs sees the community control intrinsic to ICWA as a principle worth considering beyond the Native context, but she also cautions that widespread Native child removal endures, and that activists' contemporaneous call for support to families went unfunded.

Professor Brigg's call for caution is well heeded in the three articles that consider the sordid history of Native American family destruction in the name of child protection. While the authors pause to consider the potential in ICWA to reimagine the relationship between family regulation and Native American families, the first four decades of ICWA's existence have not undone that legacy of destruction.

In *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, Theresa Rocha Beardall and Frank Edwards calculate whether ICWA has diminished the prevalence and frequency of Native family separation after

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[27] *Id.* at 625.

[28] *Id.* at 627–29.

[29] *See* Braacken v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc). For an explanation of the history and impact of the decision, see Erin Dougherty Lynch & Dan Lewerenz, Brackeen v. Bernhard—*Indian Child Welfare Act*, NATIVE AM. RTS. FUND (Apr. 6, 2021), [https://perma.cc/KPF5-TSNK] and NATIVE AM. RTS. FUND, Brackeen v. Bernhard: *That One Big ICWA Case* (last visited June 21, 2021) [https://perma.cc/3LUC-CRWL] (graphic breaking down the impact of the decision on current cases).

centuries of systemic genocide under federal authority.[30] Their empirical analysis establishes that despite the intention of ICWA to "address and ameliorate" family separation of Native Peoples, Native children and families today remain at higher risk of separation than any other group in the country.[31] ICWA was intended to eliminate two practices. The first was the long history of removing Native American children from their families and tribes and sending them to Bureau of Indian Affairs "boarding schools" to strip them of their Native customs and beliefs. The second was federal adoption programs created specifically to have Native children adopted by non-Native families. Instead, "the magnitude of Native family separation through the child welfare system has substantially increased since the passage of ICWA."[32] They conclude that only funding that delinks federal regulatory authority, and prioritizes redirecting social and financial resources into the control of Native families and tribal communities, will stop the routine separation of Native children from their families.

In *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, Addie Rolnick evokes the voices of Native girls and women to humanize the terrible numbers Beardall and Edwards calculate.[33] Native families and tribes always resisted the kidnapping of their children. In the era of the boarding schools, they were fearful not only of the physical and emotional trauma of separation for families, but also the physical and psychological violence at the institutions intended to assimilate Native children away from Native culture and practices. When the boarding school era ended, its impact remained. Generations of Native families had been traumatized and their parenting practices devalued, leading to conditions that have enabled non-Native child protection and juvenile justice systems to police Native children. Rolnick believes a "failure of imagination" has permitted on-going punitive family regulation practices to retraumatize Native families rather than embracing

[30] Theresa Rocha Beardall and Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533 (2021).

[31] *Id.* at 550.

[32] *Id.* at 552.

[33] Rolnick, *supra* note 18.

Native family and tribal practices that can protect children and stop the criminalization of trauma.[34]

Lauren van Schilfgaarde and Brett Lee Shelton highlight one Native practice that can help transform current tribal child welfare systems in *Using Peacemaking Circles to Indigenize Tribal Child Welfare*.[35] Situating their concerns in the lasting impact of destructive federal "child saving" practices against Native families, they stress the differences between parental rights and parental responsibilities in Native and Western legal systems.[36] The extended family and community of Native peoples responsible for children are contrasted with the individual and adversarial nature of parental rights to children in the American legal system. The pressure on tribal child welfare systems to assimilate to Western forms of legal determinations has been reinforced by federal funding mechanisms which mandate substantial compliance with federal laws that continue to disrupt Native families. The authors, van Schilfgaarde and Shelton, herald an Indigenous family system that encompasses a world view of "responsibilities, relationships, reciprocity, and respect" which orients around duties owed to children.[37] They recommend the "collaborative and supportive problem-solving" Circle practices to augment resilience in children and parents and to involve extended family and community to create social and spiritual engagement and support.[38]

Although not represented in the scholarship in this issue, we chose to screen the film *Dawnland* as part of this symposium, highlighting additional Native experiences and practices.[39] *Dawnland* documents the work of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission (TRC), the first government-sponsored TRC in the United States. The Commission gathered testimony and issued a report on the impact of Maine's child removal practices on families in the state's Maliseet, Micmac, Passamaquoddy, and Penobscot tribal

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[34] *Id.* at 823.

[35] Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681 (2021).

[36] *Id.* at 688–90.

[37] *Id.* at 703.

[38] *Id.* at 708.

[39] *Dawnland*, UPSTANDER PROJECT https://upstanderproject.org/dawnland [https://perma.cc/Y8M5-THU5] (last visited June 21, 2021).

communities.[40] Wabanaki REACH, the Native organization that conceptualized the TRC process and supported the individuals and families who participated in it, continues to work for the self-determination of the Wabanaki people and to advocate truth-telling as a restorative process necessary for healing and change.[41]

Four Articles explore several of the principal federal statutes that structure the current family regulation system: the 1974 Child Abuse Prevention and Treatment Act (CAPTA), the 1997 Adoption and Safe Families Act (ASFA), and the 2018 Family First Prevention Services Act (Family First). The authors conclude that the first two laws must be repealed and that the most recent law—while laudably aimed at reducing child removals—continues investment in the current family regulation system.

Angela Burton and Angeline Montauban, in *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection From Family Well-Being*, place Montauban's story, as a mother whose child spent five years in the foster system, in the context of the larger foster care industrial complex, a multi-billion dollar industry that presumes Black parents are a danger to their children and perpetuates itself by the harmful practice of removing children from their families.[42] Montauban faced a child protective services investigation after she called a widely advertised domestic violence hotline for protection from intimate partner violence. Her son was removed to a foster home, and she faced retaliation for raising concerns about his care and the agency's actions. She was also subjected to unnecessary mental health evaluations, a direct outgrowth of the flawed underpinnings of CAPTA, which look to individual parental

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[40] BEYOND THE MANDATE: CONTINUING THE CONVERSATION: REPORT OF THE MAINE WABANAKI –STATE CHILD WELFARE TRUTH AND RECONCILIATION COMMISSION (2015) [https://perma.cc/25E3-WP6Q].

[41] WABANAKI REACH, *What We Do*, https://www.mainewabanakireach.org [https://perma.cc/T64T-R2WK] (last visited June 21, 2021). *See* Anne & Burns, *supra* note 16.

[42] Angela Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection From Family Well-Being*, 11 COLUM. J. RACE & L. 639 (2021).

deviance rather than structural inequities to explain children's circumstances.

Burton and Montauban extensively critique mandatory reporting, and they decry the harm of embedding agencies filled with mandatory reporters in Black communities. They call for an end to mandatory reporting, as well as the prosecuting of poverty by calling it neglect. Instead, they herald reparations in the form of redirecting the massive funding of the foster care industrial complex to social support programs and community resources.

Martin Guggenheim, in *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*, agrees with Burton and Montauban.[43] Guggenheim posits that current law reflects a pernicious belief that Black parents are an inherent danger to their children, and he describes the racism that littered the path to the enactment of ASFA. Proposals to end poverty through wealth redistribution failed in the Johnson and Nixon administrations because direct support to Black families—seen as pathological and undeserving—was politically unfeasible. Refusal to index welfare payments to keep up with inflation, as the government does with Social Security payments, further doomed efforts at poverty reduction. Racial politics became more explicit under Reagan, including the enactment of racially discriminatory drug laws, setting the stage for Clinton ending guaranteed public assistance and dehumanizing Black children as "superpredators."[44]

In that racially-charged context, ASFA was enacted by the Clinton administration in 1997, to mandate termination of parental rights when a child was in out-of-home care for more than 15 months. A parent's faults rather than the structural problems caused by poverty were identified as the reason behind the family's failure to reunify. Although private family law routinely maintains children's connections to noncustodial parents, ASFA permanently severs familial connections, a result Guggenheim argues was only acceptable because Black families were viewed as inherently dangerous. Although Guggenheim locates ASFA firmly within the history of American racism, he provocatively asks whether the efforts to repeal it should focus

[43] Guggenheim, *supra* note 9.
[44] *Id.* at 727.

on racism, or whether, given AFSA's destruction of vast numbers of white families as well, advocates pressing for repeal should focus instead on the Act's harms to all families.

A multi-authored Article from impacted mothers, community organizations, and allied advocates, *Ending the Family Death Penalty and Building a World We Deserve*, also demands repeal of ASFA, deemed the family death penalty for its mandated termination of parental rights.[45] Authors Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud, and Adina Marx-Arpadi center the voices of mothers organizing for transformative and lasting change. Their contribution highlights "the underlying oppressive ideologies which gave rise to such [a] violen[t]" law, and urges "engaging in a praxis of imagination, healing and building" to achieve transformation.[46] Their Article describes movement building, developing alliances with indigenous communities impacted by child removal, learning from the prison abolition movement, and looking toward individual healing as well as collective reparations. Most fundamentally, the authors ask us to embrace their ideas "not [as] prescriptive," but "as a time of thinking between a group of women envisioning and embodying change."[47]

Miriam Mack, in *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, critiques Family First, the recent law touted for its emphasis on family preservation.[48] Family First allows states to use federal funds previously earmarked for children in the foster system for services to families to prevent child removal. Mack argues that the law leaves in places the pillars of the family regulation system: pathology, control, and punishment. Specifically, Family First focuses on individual behavior modification, but does nothing to provide housing, food, and other material resources to families in need; it continues intense monitoring and supervision of families with the specter of child removal; and it perpetuates

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[45] Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE &. L. 861 (2021).

[46] *Id.* at 867.

[47] *Id.* at 868.

[48] Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767 (2021).

the foster system, termination of parental rights, and financially incentivized adoption. Mack acknowledges that it is too soon to know if Family First will reduce forced family separation. Although it will be an improvement if it does so, it is not a radical reordering of the family regulation system. That, she argues, will come from implementing principles adapted from the prison abolition movement to steer change in the direction of non-reformist reforms.

Surveillance in the family regulation system is a frequent theme throughout this volume, with the strongest critique reserved for mandatory reporting. Although only a small percentage of mandated reports are deemed credible, mandatory reporting subjects millions of parents to intrusive and traumatic investigations; over fifty percent of Black children are subjected to a family regulation investigation in their lifetime.[49] In *The Surveillance Tentacles of the Child Welfare System*, Charlotte Baughman, Tehra Coles, Jennifer Feinberg, and Hope Newton examine how mental health and social service providers, schools, and police feed families into the family regulation system.[50] They note the harm of removing a child to the foster system, but they emphasize that investigations and mandating services as an alternative to removal also harm families by disrupting them without providing the material support that families need. Ultimately, they call for increased cash assistance, access to safe and affordable housing, and other needed services and support outside the surveillance model of the family regulation system.

Mandatory reporting in schools and the medical profession are explored in two Articles. In *Reimagining Schools' Role Outside the Family Regulation System*, Brianna Harvey, Josh Gupta-Kagan, and Christopher Church scrutinize how educational personnel are the leading drivers of child maltreatment reports, yet these reports are least likely to need further investigation and, when investigated, least likely to be substantiated.[51] These reports overwhelm the child welfare system with unnecessary allegations of maltreatment and they

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[49] Charlotte Baughman et al., *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501, 509 (2021) (citing Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274 (2017)).

[50] *Id.*

[51] Brianna Harvey et al., *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575 (2021).

disproportionately affect Black children. The authors note that school personnel believe, mostly incorrectly, that a report will result in child protective services providing needed support to families. Instead, intrusive, unnecessary investigations focus on parental fault, creating a strained relationship between families and schools. They propose an alternative vision for schools, one in which only severe child maltreatment is subject to reporting and schools become hubs to link families to public benefits, legal services, and mental health care entirely outside of child protective service agencies.

Clara Presler, in *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, also urges an alternative to mandatory reporting, this time for medical providers and hospitals. Statutes and regulations explicitly guide medical professionals to report to the state any "reasonable suspicion" of child maltreatment but the reporter is not tasked with any further investigation or response.[52] In this way, hospitals defer to state officials to conduct the investigations and take action. There are legal and financial penalties for failure to report and there is immunity for making reports that turn out to be unfounded, all further incentivizing reporting. Clinicians' opinions vary widely on what level of likelihood of abuse amounts to reasonable suspicion, and they are often influenced by nonmedical factors that involve race and class bias.

Although the court must find "imminent risk" to the child to remove the child from the home, the judge making that initial decision routinely lacks any additional information, relying on the hospital's initial report and deferring to the medical provider's "reasonable suspicion."[53] This effectively turns "reasonable suspicion" into a finding of "imminent risk."[54] Pressler includes examples from her practice as a family defender, where families were separated as a result of this practice of mutual deference, causing lasting harm even though the families were eventually reunified. Similar to the call for ending mandatory school reporting, ending mandatory medical

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[52] Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733 (2021).

[53] *Id.* at 756.

[54] *Id.*

reporting, she argues, would realign the doctor-patient relationship, allow for referrals directly to supportive community programs, and redirect resources from state-sanctioned violence to therapeutic interventions.

The Articles in this issue have been supplemented by two Comments that appear in *The Columbia Journal of Race and Law Forum*, the exclusively online companion to the *Journal's* print pieces. Victoria Copeland furthers our understanding of the surveillance function of the family regulation system in her Comment, *"It's the Only System We've Got": Exploring Emergency Response Decision-Making in Child Welfare*, reporting the results of her qualitative research interviewing frontline investigative caseworkers in four urban counties.[55] Copeland examines the paradoxical role of caseworkers as helpers and investigators in surveillance practices that require multi-agency collaborations with law enforcement, schools and hospitals. The caseworkers acknowledge their discomfort in extending "government eyes" or additional demands on families, especially those that are resistant or uncooperative with investigations, because of their fear of missing something.[56] The caseworkers are also ambivalent about using historical and current data readily available to them from multiple government sources, which increases "cycle[s] of subjectivity" about families and further entrenches them in "a diffuse matrix of power."[57] Copeland warns that the increased use of predictive analytics and artificial intelligence by multiple government agencies in child protection decision-making must be tempered by increasing the caseworkers' abilities to find "alternative ways of supporting child safety without the surveillance and policing tactics."[58]

J. Khadijah Abdurahman, in *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration of Children's Services*, interrogates the relationship between the Family First prevention provisions and the use of predictive analytics by the NYC Administration for

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[55] Victoria A. Copeland, *"It's the Only System We've Got": Exploring Emergency Response Decision-Making in Child Welfare*, 11 COLUM. J. RACE & L. F. 59 (2021).

[56] *Id.* at 67–68.

[57] *Id.* at 87, 88.

[58] *Id.* at 89.

Children's Services (ACS).[59] Families First provides preventive services when children are "at risk of foster care."[60] ACS's predictive analytics presumes the "dangers to children and their families are located within them and their communities," while ignoring the structural forces that control those families, like police and housing authorities, which produce "conditions of unsafety through separation, surveillance, and investigation."[61] The "assumptions of Black pathology are rearticulated as risk management," leading to the maintenance and ultimate expansion of ACS into the lives of BIPOC families, even if children are not removed.[62] Abdurahman stresses that without reckoning with how predictive analytics is an "apparatus" we will falsely believe that prevention is a form of abolition.[63]

IV. SITUATING THIS SYMPOSIUM IN A LARGER CONTEXT

The authors of these symposium articles are not alone in seeking transformation rather than reform. The 2020 policy platform of the Movement for Black Lives calls for, among other things, an end to open-ended entitlement funding for the foster system; reinvestment in community organizations; and repeal of the Adoption and Safe Families Act.[64] Parents impacted by the family regulation system have been organizing since before the publication of *Shattered Bonds*—including the Child Welfare Organizing Project and the foundational work to establish *RISE*—[65]and their numbers have increased and they have begun making abolitionist demands. One of the leading parent organizations, *RISE*, has partnered with the International Parent Advocacy Network (IPAN) to create a Toolkit for Transformation, resources for an international parent advocacy

[59] J. Khadijah Abdurahman, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration of Children's Services*, 11 COLUM. J. RACE & L. F. 91 (2021).

[60] *Id.* at 108–10.

[61] *Id.* at 115.

[62] *Id.* at 102.

[63] *Id.* at 125.

[64] *Policy Platform: End the War on Black People*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-the-war-black-women [https://perma.cc/NT4H-8PSX] (last visited June 21, 2021).

[65] *Rise Timeline*, RISE https://www.risemagazine.org/timeline [https://perma.cc/9PUP-FZ36] (last visited June 21, 2021); Jane M. Spinak, *They Persist: Parent and Youth Voice in the Age of Trump*, 56 FAM. CT. REV. 308, 308–10 (2018).

movement.[66] The Shriver Center on Poverty Law's Strong Communities project calls for ending the harmful removal of children from their homes; its work this year has included webinars on the foster system as part of the carceral web and mandatory reporting as state surveillance.[67] Articles supporting abolition of family regulation appeared in the past year in *The Imprint*, the daily news publication about child welfare and juvenile justice,[68] and *Children's Bureau Express*, the monthly publication of US Department of Health and Human Services Children's Bureau.[69] Public policy organizations and media

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[66] *Toolkit for Transformation: Support Groups for Impacted Parents,* RISE (Feb. 23, 2021) https://www.risemagazine.org/2021/02/toolkit-for-transformation-support-groups-for-impacted-parents [https://perma.cc/7DWE-KJKW].

[67] *Foster System*, SHRIVER CTR. POVERTY L. https://www.povertylaw.org/issue/strong-communities/foster-system [https://perma.cc/F9JT-9VL2] (last visited June 21, 2021).

[68] Brianna M. Harvey & Kenyon Lee Whitman, *From a Moment to a Movement: Envisioning a Child Welfare System We Have Yet to See*, IMPRINT (July 8, 2020), https://imprintnews.org/child-welfare-2/from-moment-to-movement-envisioning-child-welfare-system-we-have-yet-see/45035 [https://perma.cc/ZS7Z-SFZG]; Alan Dettlaff et al., *What It Means to Abolish Child Welfare as We Know It*, IMPRINT (Oct. 14, 2020), https://imprintnews.org/race/what-means-abolish-child-welfare/48257 [https://perma.cc/5CHX-3MQQ]; Dorothy E. Roberts, *Abolishing Police Also Means Family* Regulation, IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/8V8L-YLQH?type=image]; Alan Dettlaff & Kristen Weber, *Now is the Time for Abolition*, IMPRINT (June 22, 2020), https://imprintnews.org/child-welfare-2/now-is-the-time-for-abolition/44706 [https://perma.cc/26T7-UF8Z?type=image]

[69] See the articles contained in the August/September Issue, *The Moment is Now*, 21 CHILD. BUREAU EXPRESS (2020), https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewSection&issueID=218&subsectionID=99 [https://perma.cc/F2YX-CCPX]. Jerry Milner, then Associate Commissioner of the Children's Bureau, and David Kelly, Special Assistant to the Associate Commissioner, wrote "We should not wait for harsh life conditions and imperfect systems to degrade parents' capacities and then deliver the blow of removing their children. If we commit to helping families thrive before child welfare is needed, and focus resources on child and family well-being, there is greater hope for families to realize their potential. . . . There remains a steadfast attachment to the existing way of operating. But it is time for a different approach. . . . We are calling for an approach that demonstrates that families matter, especially poor families and families of color. . . . Incrementalism of the kind we typically see is insufficiently bold to address the traumas we witness." Jerry Milner & David Kelly, *We Must Meet the Moment in Child Welfare*, 21 CHILD. BUREAU EXPRESS (2020), https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218&sectionid=2&articleid=5638 [https://perma.cc/CYR7-BBUL] (last visited June 21, 2021).

outlets reporting on this system have begun to question the efficacy of limited reforms.[70]

Two organizations are central in the abolition efforts, and are represented in this symposium: The Movement for Family Power (MFP)[71] and the UpEnd movement.[72] MFP centers the leadership of parents and families affected by the foster system. "We believe," they write, "in a total divestment from the foster system and investment in community. Thus, we will not advocate for reforms that simply recreate systems of surveillance, control and punishment of families."[73] In the past year, MFP published a landmark report in collaboration with the NYU Family Defense Clinic and the Drug Policy Alliance, *Whatever They Do, I'm Her Comfort, I'm Her Protector: How the Foster System Has Become*

[70] The National Coalition for Child Protection Reform (NCCPR) offers comprehensive analyses of every aspect of the child welfare system and produces extensive issue papers. NAT'L COALITION CHILD PROTECTION REFORM, https://nccpr.org [https://perma.cc/SSR3-CSQ7] (last visited June 21, 2021). Executive Director Richard Wexler prepares a must-read weekly news and commentary round-up from sources all across the country and writes a blog notable for both its breadth and depth that analyzes in real time the actions of local agencies; reports and scholarship; and media coverage. The National Center for Housing and Child Welfare works within the existing system to make housing funds available to parents once they have been subject to family regulation, but this year its Executive Director, Ruth White, wrote that "families should never be referred to child protective services (CPS) to access housing assistance or other poverty-related resources. NCHCW is committed to working with the U.S. Children's Bureau in the coming year to reimagine the training of mandated reporters so that families in need are not referred to CPS for reasons of poverty and are instead served by Community Action Agencies and other appropriate human services organizations." Ruth White, *Use Federal Child Welfare Funds to Prevent Family Housing Crises*, IMPRINT (Mar. 2, 2021), https://imprintnews.org/child-welfare-2/use-family-first-act-prevent-family-housing-crises/52373 [https://perma.cc/489J-SYWF].

[71] MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org [https://perma.cc/M3LP-CMPN] (last visited June 21, 2021). The Movement for Family Power is represented in Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, *supra* note 45.

[72] UPEND, https://upendmovement.org [https://perma.cc/EU9R-KRPQ] (last visited June 21, 2021). The UpEND Movement is represented in this Symposium through Bill Bettencourt and Kristen Weber, *Different Year, Different Jurisdiction, but the Same Findings: Reforming Isn't Enough*, 12 COLUM. J. RACE & L. ____ (2021) (forthcoming) which will appear in the second symposium issue.

[73] *Our Areas of Work*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/indexa [https://perma.cc/22SQ-R5EX] (last visited June 21, 2021).

Ground Zero for the U.S. Drug War.[74] The report lambasts the conflation of drug use with abuse and neglect and the way the drug war and the foster system intersect to the detriment of children, families, and communities. It calls for a radical reimagining of how to support children and families through a completely different system that does not rely on surveillance, control, and family separation.

The UpEND movement, launched in June 2020, is a collaboration between the Center for the Study of Social Policy and the University of Houston Graduate School of Social Work. It envisions a society in which "forcible separation of children from their families is no longer an acceptable solution for families in need."[75] It calls for abolition of the foster care and child welfare system and for implementation of anti-racist policies and practices that safely keep children with their families. The UpEND's call for abolition recognizes that the child welfare field has implemented numerous reforms centering on racial equity with insufficient improvement and persistent poor outcomes for Black, Native, and Latinx families and youths.

The Issue's scholarship, including the online-scholarship in the *Forum*, exists within this larger context of demands for change. The virtual *Strengthened Bonds Symposium*, featuring presentations from all the authors of both symposium issues, also has a larger context. Days before the virtual symposium, the Graduate Workers of Columbia-United Auto Workers Local 2101 called a strike to incentivize the university in bargaining negotiations. This led the symposium organizers to postpone the symposium until the strike ended. This decision was widely supported by the presenters and panelists, many of whom would not have crossed the virtual picket line to attend. Some presenters noted that the union's demands included not only increased wages but also child care and health care, supports that all families need and that are critical to avoiding family regulation system involvement. The Symposium proceeded on

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[74] MOVEMENT FOR FAM. POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR": HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf [https://perma.cc/DAE9-49M3].

[75] *About Us*, UPEND https://upendmovement.org/about [https://perma.cc/H39C-4N9A] (last visited June 20, 2021).

June 16–18, 2021, and we will report on the proceedings in the second issue of the *Columbia Journal of Race and Law* dedicated to the symposium.

As we finished writing this Foreword in late May, 2021, George Floyd's killer had been convicted of murder and a rising number of people in the country had been fully vaccinated against Covid-19. Perhaps the most optimistic news is that the new Biden administration's stimulus package is being hailed as "the most effective set of policies for reducing child poverty ever in one bill, especially among Black and Latinx children."[76] Reducing poverty is an essential step in dismantling the current family regulation system. But as the authors in this Issue and the legions on the ground have attested, more than money is needed. Rather, we must nurture a transformative mind-set that acknowledges the harm that the current system has perpetrated and invests in families, tribes and communities to raise happy, healthy, safe, educated and imaginative children within loving and strengthened families.

[76] Heather Long et al., *Biden Stimulus Showers Money on Americans, Sharply Cutting Poverty and Favoring Individuals Over Businesses*, WASH. POST (Mar. 6, 2021), https://www.washingtonpost.com/business/2021/03/06/biden-stimulus-poverty-checks [https://perma.cc/EW8M-M4A3](quoting Indivar Dutta-Gupta, Co-Executive Director of the Georgetown Center on Poverty and Inequality).

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KEYNOTE

11TH ANNUAL SYMPOSIUM

STRENGTHENED BONDS: ABOLISHING THE CHILD WELFARE SYSTEM AND RE-ENVISIONING CHILD WELL-BEING

HOW I BECAME A FAMILY POLICING ABOLITIONIST

Dorothy Roberts*

My book *Shattered Bonds: The Color of Child Welfare*, published in 2001, documented the racial realities of family policing in America. At the time, more than a half million children had been taken from their parents by child protection services (CPS) and were in foster care.[1] Black families were the most likely of any group to be torn apart. Black children made up nearly half of the U.S. foster care population, although they constituted less than one-fifth of the nation's children.[2] That made them four times as likely to be in foster care as white children. Nearly all of the children in the foster care system in Chicago, where I was living at the time, were Black.[3]

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I would like to thank Nancy Polikoff and Jane Spinak for organizing this Symposium and encouraging me to revisit *Shattered Bonds: The Color of Child Welfare* to celebrate the twentieth anniversary of its publication. This keynote is part of a larger book project, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World*. I am also grateful to my team of Penn Law students who provided excellent research assistance for my book project: Jacob Burnett, Vinita Davey, Lauren Davis, Madison Gray, Lindsay Grier, Allison Kruk, Bridget Lavender, Michelle Mlacker, Claire Samuelson, Victoria Sanchez, and John Santoro.

[1] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2001) [hereinafter ROBERTS, SHATTERED BONDS]. *See also Foster Care*, CHILD TRENDS DATABANK (May 24, 2018), https://www.childtrends.org/indicators/foster-care [https://perma.cc/KL2M-554N] (providing additional data and trends in foster care through 2017).

[2] ROBERTS, SHATTERED BONDS, *supra* note 1, at 8.

[3] *Id.* at 9.

I first became aware of foster care's racial dimension when I was working on my 1997 book *Killing the Black Body*. I had been researching the prosecutions of hundreds of Black mothers across the country for using crack cocaine while pregnant. Racist myths about them giving birth to so-called "crack babies"—described as irreparably damaged, bereft of social consciousness, and destined to delinquency—had turned a public health crisis into a crime.[4] I saw the prosecutions as part of a long legacy of oppressive policies, originating in slavery, that devalued Black women and denied their reproductive freedom.

That's when I discovered that thousands of Black mothers were having their newborns taken from them because of positive drug tests and realized that child removal was even more widespread and, in some ways, more devastating than the prosecutions. The system's racial divide was obvious to me as soon as I started observing child welfare proceedings in Chicago. As I later wrote in *Shattered Bonds*:

> Spend a day at dependency court in any major city and you will see the unmistakable color of the child welfare system. Dependency court is where judges decide the fate of children who have been taken into state custody because their parents are charged with abusing or neglecting them. Nearly every family in these urban courts is Black. If you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.[5]

Twenty years later, Black communities are still targeted for child welfare intervention. Although Black children were only 14% of children in the United States in 2018, they made up 23% of children in foster care.[6] More telling are recent data indicating

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[4] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 150–201 (1997).

[5] ROBERTS, SHATTERED BONDS, *supra* note 1, at 6.

[6] *Child Population by Race in the United States*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND.,https://datacenter.kidscount.org/data/tables/103-child-population-by-race#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/68,69,67,12,70,66,71,72/423,424 [https://perma.cc/KAM5-KH8Y] (last visited June 10, 2021); *Children in Foster Care by Race and Hispanic Origin in the United States*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND.,

children's chances of landing in foster care at some point while growing up. According to a 2014 study, about 15% of Native children and 11% of Black children could expect to enter foster care before their eighteenth birthday.[7] The rate for white children, about one in twenty, was remarkably lower, reflecting America's racial hierarchy, but still incredibly high.[8]

I spent time with Black mothers whose children had been taken from them and learned that what's called child protection is no social service system. It's a multi-billion-dollar apparatus that relies on terrorizing families by taking their children away or weaponizing their children with the threat of removal to impose intensive surveillance and regulation on them.

In my introduction to *Shattered Bonds*, I concluded:

> The color of America's child welfare system is the reason Americans have tolerated its destructiveness. It is also the most powerful reason to finally abolish what we now call child protection and replace it with a system that really promotes children's welfare. [9]

In this Keynote, I renew my call to abolish the family policing system. This time, however, I don't argue for replacing it with another reformed state system. We need to build a radically re-imagined way of caring for children and their families.

Three things happened since the publication of *Shattered Bonds* that solidified my abolitionist perspective. There were numerous reform efforts to reduce what became known as racial disproportionality in foster care; the prison abolition movement expanded; and organizing by parents and children impacted by the child welfare system strengthened.

Since I wrote *Shattered Bonds*, "racial disproportionality" has become a buzzword in child welfare research and

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https://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin?loc=1&loct=1#detailed/1/any/false/37,867,38/2638,2601,2600,2598,2603,2597,2602,1353/12992,12993 [https://perma.cc/EWB2-WA3B] (last visited June 10, 2021).

[7] Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, PLOS ONE, March 2014, at 1, 5.

[8] *Id.* at 5.

[9] ROBERTS, SHATTERED BONDS, *supra* note 1, at x.

policymaking. State child welfare departments and non-profit organizations have launched numerous projects across the nation to reduce the foster care population, along with its racial disparities.[10] Over the last two decades, I participated in many of these reform efforts to improve foster care.

I served for nine years on a task force to implement the settlement agreement in a class action lawsuit brought in 1998 by children's rights advocates against the Department of Social and Health Services (DSHS) in Washington state, *Braam v. State of Washington*.[11] The department's treatment of children in foster care was so horrendous that the children's lawyers claimed it violated the state constitution. The named plaintiff, Jessica Braam, had been tossed among foster homes more than thirty times.

In 2004, after six years of litigation, the children's attorneys reached an agreement with DSHS to resolve the lawsuit by handing the problems over to a panel of five mutually-agreed-upon national experts.[12] I accepted an invitation from the children's attorneys to be one of their choices. The Braam Oversight Panel worked with the DSHS Children's Administration and the children's attorneys to develop a complicated plan with outcomes, benchmarks, and action steps to improve health care for foster children, lower CPS worker caseloads, enhance foster parent training, and decrease the number of children who ran away from foster care.[13] Then for

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[10] *See, e.g.*, CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE (2011), http://centerforchildwelfare.org/kb/dispr/racial_disproportionality2011.pdf [https://perma.cc/GB7F-8YST]; *Disproportionality*, CHILD WELFARE LEAGUE OF AM., https://www.cwla.org/our-work/advocacy/race-culture-identity/disproportionality/ [https://perma.cc/H7TA-AQAS] (last visited June 10, 2021); ANNIE E. CASEY FOUND., DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE (2011), https://assets.aecf.org/m/resourcedoc/AECF-DisparitiesAndDisproportionalityInChildWelfare-2011.pdf [https://perma.cc/3QBN-WM6D].

[11] *Braam Settlement Agreement*, WASH. STATE DEP'T CHILD., YOUTH & FAMS., https://www.dcyf.wa.gov/practice/practice-improvement/braam-settlement-agreement [https://perma.cc/8SUZ-DLB9] (last visited June 10, 2021).

[12] *Id.*

[13] *See Braam Performance Dashboard*, WASH. STATE DEP'T CHILD., YOUTH & FAMS. (Mar. 31, 2017), https://www.dcyf.wa.gov/sites/default/files/pdf/braam0317Perdashboard.pdf [https://perma.cc/D892-4XMM]

nearly a decade, we monitored the state's progress in performing the action steps, meeting the benchmarks, and achieving the outcomes. After dozens of meetings with administrators and attorneys at a hotel across from the SeaTac airport, we calculated some progress on some of the measures.[14] But, we were unable to fix the long list of deficiencies that harmed children placed in the state's custody.

The *Braam* settlement is not exceptional. Over the last thirty years, states across the nation have been sued for running child welfare systems that severely harm children. The child welfare departments in numerous states are currently governed by court-monitored agreements arising out of class action lawsuits requiring them to make massive reforms. While some systems have failed for decades to live up to old settlement agreements, others have been brought to court recently for the same problems endemic to foster care. The Illinois Department of Children and Family Services is operating under more than ten consent decrees, one of which was filed in 1988.[15]

As child welfare departments around the country have shrunk their foster care populations in response to fiscal and justice concerns, they have simultaneously expanded their invasion into the private lives of marginalized communities through investigations and coercive service provision. Under federal law, every state must identify "mandated reporters," people who work in professions that put them in contact with children, such as teachers, health care providers, social services staff, and daycare workers, and require them, under certain circumstances, to report suspected child abuse and neglect to government authorities. CPS treats these reports like accusations to be investigated, not requests for help. Mandated reporting therefore drives parents from the very service

(listing some of the Braam Oversight Panel's outcomes, benchmarks, action steps, and goals).

[14] *See, e.g.*, *id.* (describing some of the progress toward the Braam Oversight Panel's goals).

[15] *Can You Share a Summary of Child Welfare Consent Decrees?*, CASEY FAM. PROGRAMS (July 10, 2019), https://www.casey.org/consent-decree-summary/ [https://perma.cc/DJ4Y-ESSX].*See also Reform Based on Litigation*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/management/reform/litigation/ [https://perma.cc/8QQN-KGCB] (last visited June 10, 2021).

providers that are most likely to support them.[16] Enlisting service providers in CPS surveillance deters families from seeking needed assistance and ruins their relationship with families, thereby weakening their capacity to improve children's welfare. Providing services within a punitive family policing system thwarts the potential for schools, health care clinics, and social programs to be caring hubs of community engagement that non-coercively help families meet their material needs.[17]

And the racial disparities in family surveillance persist. More than half of Black children are subjected to a CPS investigation at some point during their childhoods.[18] I learned that trying to reform the system can strengthen it. We can't tinker with the flaws of a system designed at its roots to police poor, Black, Indigenous, and other marginalized families as a way of maintaining a racial capitalist system.

Also in the twenty years since *Shattered Bonds* was published, the prison abolition movement expanded dramatically. Some activists mark its launch at an international conference and strategy session—*Critical Resistance: Beyond the Prison Industrial Complex*—held at the University of California at Berkeley in September 1998. Formed in 1997, the Critical Resistance organizing collective gathered more than 3,500 activists, former prisoners, lawyers, and scholars over three days "to address the alarming growth of the prison system, popularize the idea of the 'prison industrial complex,' . . . and make 'abolition' a practical theory of change."[19] Since then, the prison abolition movement has grown into an influential framework and network of organizing across the nation.

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[16] Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733 (2021); Brianna Harvey et al., *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & L. 575 (2021); Mical Raz, *Unintended Consequences of Mandated Reporting Laws*, PEDIATRICS, Mar. 2017, at 1; MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY (2020).

[17] Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785 (2018).

[18] Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017).

[19] *Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference,* CRITICAL RESISTANCE, http://criticalresistance.org/critical-resistance-beyond-the-prison-industrial-complex-1998-conference/ (last visited June 10, 2021).

This past summer, protests erupted around the nation and the world in response to continued police violence against Black people. The call to defund police and abolish prisons began to make sense to more and more people. The family policing system is part of the same carceral regime. Like the police and prison systems, family policing is designed to maintain racial injustice by punishing families in place of meeting human needs; it targets Black, Brown, and Indigenous families in particular and relies on racist beliefs about family disfunction to justify its terror; and it's entangled with police, criminal courts, and prisons, forming a coherent carceral machine. As I was drawn to prison abolition, it became clear to me that the movement to abolish police, prisons, and surveillance was profoundly connected to a less visible movement to end family policing.

I have found three central tenets that are common to formulations of abolitionist philosophy especially useful.[20]

First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained. Second, the expanding carceral system functions to oppress Black and other politically-marginalized people in order to maintain a racial capitalist regime. Third, we can imagine and build a more humane and democratic society that no longer relies on caging people to meet human needs and solve social problems. These tenets lead to the conclusion that the only way to transform our society from a slavery-based one to a free one is to abolish the prison industrial complex and create a world where, to answer Angela Davis's question, prisons are obsolete.[21]

Prison abolitionists have shown that the pillars of the U.S. criminal punishment system—policing, prisons, and capital punishment—all have roots in racialized chattel slavery. The first police forces in the United States were slave patrols.[22] Like overseers and slave patrols, Jim Crow police and private citizens

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[20] I discuss the importance of prison abolitionist theorizing and its relationship to abolition constitutionalism in Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019) [hereinafter Roberts, *Abolition Constitutionalism*].

[21] *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003) (making the case for prison abolition).

[22] *See, e.g.*, ALEX S. VITALE, THE END OF POLICING 45–48 (2017); Olivia B. Waxman, *How the U.S. Got Its Police Force*, TIME, https://time.com/4779112/police-history-origins/ [https://perma.cc/UHR9-5D3P] (May 18, 2017).

who abetted them used terror primarily to enforce racial subjugation, not to apprehend people culpable for crimes. Today, police serve to control Black and other marginalized communities through everyday physical intimidation and by funneling those they arrest into jails, prisons, and detention centers.[23]

Criminal law enforcement aims to control populations rather than judge individual guilt or innocence.[24] Criminal courts are primarily in the business of managing marginalized communities rather than adjudicating their residents' culpability.

Issa Kohler-Hausmann, for example, argues that New York City criminal courts that handle misdemeanors "have largely abandoned the *adjudicative* model of criminal law administration—concerned with deciding guilt and punishment in specific cases—and instead operate under . . . the *managerial* model—concerned with managing people through engagement with the criminal justice system over time," with no real regard for their culpability for crime.[25]

We can apply a similar analysis to family policing. The origins of the U.S. child welfare system lie in the forcible separation of enslaved families, the control of emancipated Black children as apprentices to former white enslavers, and removal of Indigenous children as an instrument of tribal genocide.[26] The whole point of the child welfare system has always been to regulate economically- and racially-marginalized communities.

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[23] *See generally* VITALE, supra note 22; PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017).

[24] Dorothy E. Roberts, Supreme Court Review, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 788 (1999). This does not mean that prison abolition applies only to innocent or nonviolent people; prison abolitionists aim to create a society where no one is caged.

[25] ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 4 (2018).

[26] ROBERTS, SHATTERED BONDS, *supra* note 1, at 233–36, 248–50. *See also* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020) [hereinafter BRIGGS, TAKING CHILDREN]; Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471 (2021); Laura Briggs, *Twentieth Century Black and Native Activism Against the Child Taking System: Lessons for the Present*, 11 COLUM. J. RACE & L. 611 (2021) [hereinafter Briggs, *Black and Native Activism*].

These families are targeted precisely because they are marginalized. Their status makes them vulnerable to state intervention because of the way child maltreatment is defined to blame them for the harms to children caused by societal inequities. Family policing helps to keep them in their subordinated status by disrupting their relationships and communities. And, more broadly, family policing implements an approach to child welfare that buttresses an unequal social structure.

Prison abolitionists have also taught us that the criminal punishment system's repressive outcomes don't result from any *malfunction*.[27] To the contrary, the prison industrial complex works so effectively to contain and control Black communities because that's precisely what it's designed to do.

Prison abolitionists have shown us that, therefore, reforms that correct problems perceived as aberrational flaws won't work. They only help to legitimize and strengthen carceral systems.[28] Reforming prisons results in more prisons. That's why they have to be abolished.

Despite numerous reforms, the family policing system has not changed its punitive ideology or racist impact. By the time I became aware of the family policing system in the 1990s, the political and demographic landscape of child welfare had shifted dramatically from earlier in the century. As a result of demands to be included in child welfare and other government programs, Black families were receiving greater attention from the welfare state. But as Black children began to fill the government caseloads in the 1960s, public agencies pivoted sharply from providing services to children in their homes to taking children from their parents.[29] The total size of the foster care population and the share of Black children skyrocketed simultaneously. The number of children in foster care more than doubled in less than fifteen years,[30] and federal funding for foster

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[27] BUTLER, *supra* note 23, at 5; MARIAME KABA, WE DO THIS 'TIL WE FREE US 13 (2021).

[28] KABA, *supra* note 27, at 12–13, 95–96; Dylan Rodriguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1601 (2019).

[29] ROBERTS, SHATTERED BONDS, *supra* note 1, at 176–78; BRIGGS, TAKING CHILDREN, *supra* note 26, at 29–45.

[30] Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseload to Grow?*, 43 DEMOGRAPHY 309, 310 fig.1 (2006)

care increased a whopping 20,000%, from $25 million to $5 billion.[31] Propelling the spike was the massive removal of Black children from their homes.

Given its foundational logic, centered on threatening politically-marginalized families with child removal, the system has absorbed efforts to mitigate its flaws and has continued reproducing its terror. The family policing system can't be fixed. Instead, we need a paradigm shift in the state's relationship to families—a complete end to family policing by dismantling the current system and re-imagining the very meaning of child welfare and safety.[32]

Prison abolition isn't just about tearing down the system. An essential aspect of prison abolitionist theory is that eliminating prisons must occur alongside creating a society that has no need for them.[33] As prominent activist Mariame Kaba explains, "[i]t's the complete and utter dismantling of prisons, policing, and surveillance as they currently exist within our culture. And it's also the building up of new ways of . . . relating with each other."[34] Prisons will only cease to exist when social, economic, and political conditions eliminate the need for them. Abolitionists are working toward a society where prisons are inconceivable.

(showing the foster care caseload increasing from less than 300,000 in 1985 to nearly 600,000 in 1999).

[31] MOVEMENT FOR FAMILY POWER, "WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR": HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S. DRUG WAR 18 (2020), https://www.movementforfamilypower.org/ground-zero [https://perma.cc/3XVW-YXKH] (showing an increase in federal funding from $25 million in 1982 to $5 billion in 2003).

[32] Briggs, *Black and Native Activism*, *supra* note 26; Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767 (2021); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-being*, 11 COLUM. J. RACE & L. 639 (2021); Kristen Weber & Bill Bettencourt, *Different Year, Different Jurisdiction, but the Same Findings: Reforming Isn't Enough*, 12 COLUM. J. RACE & L. (forthcoming 2021).

[33] ANGELA Y. DAVIS, ABOLITION DEMOCRACY 73–74 (2005).

[34] Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) (quoting *Episode 29—Mariame Kaba*, AIRGO (Feb. 2, 2016), https://airgoradio.com/airgo/2016/2/2/episode-29-mariame-kaba).

How can prison abolitionists take steps toward dismantling prisons without falling into reformist traps? They have resolved this quandary with the concept of "non-reformist reforms."[35] To be abolitionist, reforms must shrink rather than strengthen "the state's capacity for violence" and facilitate the goal of building a society without prisons.[36] By engaging in non-reformist reforms, abolitionists strive to make transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them.

For example: efforts to stop prison expansion by opposing prison construction or shutting down prisons that already exist; end police stop-and-frisk practices; and eliminate the requirement of money bail to release people charged with crimes.[37] Similarly, we can work to end mandated reporting; to give parents high quality, multidisciplinary legal defense at every stage of the process, including before children are removed; and to fund and engage in community-based mutual aid.

The third change that influenced my position on the child welfare system is that radical organizing by parents to end family policing grew, with Black mothers at the forefront. I opened *Shattered Bonds* with the story of my first meeting with a small group of mothers who called themselves Operation MOSES, for Mothers Organizing Systems for Equal Services.[38] I first met with Operation MOSES on a summer evening in 2000 at St. Stephen's Church in Englewood, one of Chicago's poorest, most segregated Black neighborhoods. After walking down the steps to the church basement, I found a half-dozen Black women sitting around a table. The women were strategizing about a city-wide campaign to call attention to the crisis of Black children being removed from their homes. They greeted me warmly, grateful to have the ear of an empathetic law professor. I was noticeably pregnant with my fourth child, who was due in September, and we instantly bonded as Black mothers concerned for the well-being of our children. At one end of the table was an expanding file stuffed with court papers, newspaper clippings,

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[35] Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/C55S-5GEL].

[36] *Id.*

[37] Roberts, *Abolition Constitutionalism*, *supra* note 20, at 115–17. *See also id.* at 115 n.716, 116 nn.717–721 (collecting relevant sources).

[38] ROBERTS, SHATTERED BONDS, *supra* note 1, at v.

and letters. I sat at the other end, so I could face everyone. Each woman told me about her battle with the family policing authorities to get her children back.

Operation MOSES struggled to offer mutual support to its members as each one fought an uphill battle against a seemingly immoveable behemoth. In the two decades since, parent-led organizations sprang up across the country and began networking with each other. Coupled with the rise of parent groups was the development of family defense—lawyers dedicated to representing parents in family policing proceedings.[39] Today, parents and youth who were involved in the family policing system are calling for transformative change across the nation.[40]

I think family policing abolitionists also have lessons to share with prison abolitionists. We help to show how carceral logics extend beyond prison walls and police stations—even to systems that ostensibly exist to serve people's needs, but actually exist to regulate poor, Black, Brown, and Indigenous people who rely on them. We also show how those systems resort to a variety of punitive measures to enforce compliance.

Like the police and prison systems, family policing is designed to serve white supremacy and maintain racial capitalism by punishing families in place of meeting human

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[39] *See, e.g.*, Kara Finck & Marcia Hopkins, *Families Matter: Constructing an Anti-Racist System from the Perspective of Youth Advocates and Interdisciplinary Collaboration*, 12 COLUM. J. RACE & L. (forthcoming 2021); Carla Laroche, *When the New Jim Crow and Jane Crow Intersect: Analyzing Right to Counsel Limitations in the Dependency System for Mothers Who Are Incarcerated*, 12 COLUM. J. RACE & L. (forthcoming 2021).

[40] *See generally DHS/DCFS: Give Us Back Our Children*, EVERY MOTHER NETWORK, http://www.everymothernetwork.net/philly/ [https://perma.cc/7Q6N-PCWA] (last visited June 10, 2021); JMACFORFAMILIES, https://www.jmacforfamilies.com/ [https://perma.cc/5ZK5-Q244] (last visited June 10, 2021); RISE MAG., https://www.risemagazine.org/ [https://perma.cc/ANF7-SMMY] (last visited June 10, 2021); WELFARE WARRIORS, http://www.welfarewarriors.org/ [https://perma.cc/K56Z-EXTM] (last visited June 10, 2021); *Meet Tymber Hudson: Antiracist Activist*, TYMBER HUDSON (Sept. 6, 2020), https://tymberhudson.com/2020/09/06/meet-tymber-hudson-antiracist-activist/ [https://perma.cc/EXL4-6MP5]. *See also* Ashley Albert et al., *Ending the Family Death Penalty; Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021); Bianca Shaw & Nora McCarthy, *Centering Parent Leadership*, 12 COLUM. J. RACE & L. (forthcoming 2021).

needs, and it is entangled with police, criminal courts, juvenile detention, and prisons, forming a coherent carceral machine.

Warrantless home investigations, intensive monitoring of families by state agents and civilians deputized to report on parents, forcible seizure of children followed by placing them in foster care, and permanent severing of family ties for failing to comply with agency dictates—these tactics all reflect a carceral logic with parallels in the criminal punishment system.[41] State CPS authorities increasingly use modern surveillance technologies and coordinate with law enforcement agencies to manage regulated populations more efficiently.[42]

Family policing is not just similar to the parts of the carceral regime abolitionists are working to tear down. Family policing *is* part of the carceral regime.

The most prominent demand emerging from the summer 2020 protests was to defund the police and reallocate the money to provide health care, education, jobs with living wages, and affordable housing, as part of the broader struggle to abolish the prison industrial complex. As I witnessed the protests, I became increasingly concerned that family policing was absent from most calls to defund the police. Some activists even recommended transferring money, resources and authority from police departments to health and human services agencies that handle child protection. These proposals ignored how the family policing system surveils and represses Black and other marginalized communities in ways similar to, and coordinated with, the law enforcement systems condemned by the protesters.

Diverting money and power to child protection agencies would result in even more brutal state intrusion in Black communities. Linking 911 to the Child Abuse Hotline would increase disruptive child maltreatment allegations and

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[41] *See* Matt Fraidin & Shanta Trivedi, Comment, *The State Is an Unfit Parent*, 12 COLUM. J. RACE & L.F. (forthcoming 2021); Tarek Z. Ismail, The Consent of the Compelled: Child Protective Agents as Law Enforcement Officers (July 7, 2021) (unpublished manuscript) (on file with author).

[42] VIRGINIA EUBANKS, AUTOMATING INEQUALITY 127–73 (2017) (describing how modern screening and assessment tools dramatically affect outcomes for children and families); J. Khadijah Abdurahman, Comment, *Calculating the Souls of Black Folk: Predictive Analytics in the New York City Administration for Children's Services (ACS)*, 11 COLUM. J. RACE & L.F. 91 (2021).

investigations. Even well-meaning recommendations to deploy social workers to conduct "wellness checks" in homes would likely result in increased reporting to CPS, expanding the state's monitoring and separation of families.[43] Residents of Black neighborhoods live in fear of CPS agents entering their homes, interrogating them, and taking their children as much as they fear police stopping them in the streets, harassing them, and taking them to jail.

Rather than divesting from one oppressive system to invest in another, we should work toward abolishing all carceral institutions and creating radically different ways of meeting families' needs. Prison abolitionists should support defunding the family policing system and be careful not to enrich it more with funds divested from the police.

We need a coherent political analysis of carceral systems and logics that integrates our understanding of criminal law enforcement and prisons with the state's surveillance, reassembling, and destruction of families. We need a common mission to bring down all these extensions of the carceral state and a common vision for meeting human needs, preventing violence, and caring for children, families, and communities.[44]

Rather than feel dejected by the lack of real change since *Shattered Bonds* was published, I am inspired by the confluence of these three developments that point to the need to integrate

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[43] Mack, *supra* note 32.

[44] *See e.g.*, Burton & Montauban, *supra* note 32; Lauren van Schilfgaarde & Brett Lee Shelton, Using Peacemaking Circles to Indigenize Tribal Child Welfare, 11 COLUM. J. RACE & L. 681 (2021); Victoria Copeland, Comment, *"It's the Only System We've Got": Exploring Emergency Response Decision-Making in Child Welfare*, 11 COLUM. J. RACE & L.F. 59 (2021); Andy Barclay et al., *The End of Foster Care: How New Orleans Became the First Major City to Eliminate Foster Care*, 12 COLUM. J. RACE & L. (forthcoming 2021); Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, and Mutual Aid*, 12 COLUM. J. RACE & L. (forthcoming 2021); Kele Stewart, *Re-Envisioning Child Well-Being: Dismantling the Inequitable Intersections Among Child Welfare, Juvenile Justice, and Education*, 12 COLUM. J. RACE & L. (forthcoming 2021); Michael Wald, *Beyond CPS: Building a System to Protect and Promote the Safety and Development of Children in Families Facing Multiple Adversities*, 12 COLUM. J. RACE & L. (forthcoming 2021); Melody Webb, *Taking a Multifaceted, Empowerment-Centered Approach to Entanglement in the Foster Care System that Focuses on Building Power to Tackle African-American Family Poverty*, 12 Colum. J. Race & L. (forthcoming 2021); Anna Arons, Comment, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L.F. (forthcoming 2021).

movements for abolition of all arms of the racist carceral state. We can work collectively to end family policing, re-imagine the very meaning of child welfare and safety, and build a truly caring world.

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ARTICLE

POLITICAL-ECONOMIC ROOTS OF COERCION—SLAVERY, NEOLIBERALISM, AND THE RACIAL FAMILY POLICY LOGIC OF CHILD AND SOCIAL WELFARE

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The Article argues that at the core of the American neoliberal policy regime, of which child welfare is a critical part, lies an enduring raced family policy logic of two racially stratified standards: a punitive Black economic utility family standard and a supportive white domestic affection family standard, whose policy roots and practices trace back to slavery in the antebellum South. Historically and contemporaneously, state regulation of poor Black families has been shaped by, and in turn perpetuates, the Black economic utility standard that normalizes and places political value above all else on the promotion of labor by Black mothers outside of their homes in service of a racially-discriminatory market order. By doing so, the state devalues the affective, nurturing labor that Black mothers perform within their households and towards their children. Long followed in Southern local policy practices and led by the efforts of congressmen from the South, the Black economic utility standard is shown to have been formalized nationally within the neoliberal policy regime through a repurposing of overtly racial ideas into

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behavioral values of work and self-sufficiency that are enshrined in social and child welfare reforms. The Article suggests that the deployment of the Black economic utility standard by the neoliberal policy regime pathologizes poor Black women's childbearing and motherhood as economically irresponsible, obscures centuries-long structural inequalities and racial family coercion, and serves to perpetuate and justify Black family disruptions in colorblind ways.

I. INTRODUCTION

Empirical research has amply documented the institutionalization of racial disproportionality and disparity in the child welfare system, as well as the disproportionate harm experienced by Black[1] children, families, and communities as a consequence of the system's practices.[2] The modern child welfare system's disruption, over-surveillance, and criminalization of the Black family has been embraced by the United States since the 1980s and is linked to the rise of neoliberalism—the political ideology that elevates free markets as critical to human wellbeing, characterized by private property rights, entrepreneurism, and free trade. [3] As a policy regime, [4] the neoliberal American state has been critiqued for the many unique ways in which it overly penalizes and coerces Black and Brown populations, produces racial marginality, and exercises a "racial authoritarianism" that has starkly limited the civic belonging of African Americans, in particular, after a period of democratic inclusion in the 1960s.[5]

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[1] The Article uses the term "Black" as a heuristic device to denote African Americans as a specific racially-constructed group, whose members share an identifiable historical past and ongoing common experience. In contrast "white" is treated as a looser racial category and so uncapitalized.

[2] For a representative summary of this literature, see Aland J. Dettlaff et al., *It Is Not a Broken System, It Is a System that Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 501–04 (2020) (discussing how the child welfare system disproportionately harms Black children and families).

[3] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2007).

[4] Policy regimes are specific governing arrangements designed to address policy problems, made up of three mutually-constitutive elements: ideas, institutional arrangements, and interests. *See* Peter J. May & Ashley E. Jochim, *Policy Regime Perspectives: Policies, Politics, and Governing*, 41 POL'Y STUDS. J. 426, 428 (2013).

[5] On the neoliberal state's melding of penal sanction and welfare supervision into a cohesive mechanism for behavioral control of marginal, raced populations, see LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (analyzing the strong link between neoliberal penal policies and neoliberal social policies toward marginal communities). *See also* JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE (2011) (analyzing the ways in which governments achieve the cooperation and contributions of marginal populations in politically viable ways). On the linkage of child welfare to prisonfare, welfare retrenchment, and rise of workfare in the late twentieth century, see Dorothy E. Roberts, *Complicating the Triangle of Race, Class and State: The Insights of Black Feminists*, 37 ETHNIC & RACIAL STUDS. 1776 (2014) [hereinafter Roberts,

Black child welfare has followed a similar historical trajectory. The proportion of Black children in public child protection caseloads increased after World War II as the system moved away from open segregation and outright exclusion of Black people. However, it was also only in the late 1980s when both the total size of the foster care population and the share of Black children within it exploded, marking the durable shift that Dorothy Roberts seminally described in *Shattered Bonds* as one that "cement[ed] the child welfare system's current relationship to Black Americans."[6] In later work, Roberts expressly placed the current system of child welfare within the larger political project of neoliberalism and highlighted the cumulative neoliberal reconfiguring of welfare, child welfare, and prison fare policies as commonly stigmatizing poor Black mothers and effecting their "systemic punishment" by "attributing social inequality to Black women's childbearing."[7] In addition to racial bias as a cause for the disproportionate removal of Black children from their homes, Roberts has stressed the significance of *political* choices in public policy that approach the pressing social problem of (Black) "child poverty by investigating [and blaming] parents," specifically Black mothers, rather than "tackling poverty's structural roots."[8]

This Article furthers Roberts's critical political framework and offers a new conceptual framework focused on family-centered policy logics that I use to explain why and how the American state came to choose its current, punitive, child welfare approach that normalizes the widespread removal of Black children from their homes despite claims of colorblindness. More specifically, the Article argues that at the core of the American neoliberal policy regime, of which child welfare is a

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Complicating the Triangle] (adding a focus on gender and experiences of Black women to Wacquant's triangle of race, class, and state); Derek Kirton, *Neoliberalism, 'Race' and Child Welfare*, 6 CRITICAL & RADICAL SOC. WORK 311 (2018) (analyzing the significance of race and ethnicity in the relationship between neoliberalism and child welfare in the U.K.). On "racial authoritarianism" as a recurrent pattern in US democracy after periods of democratic expansion, see Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, 369 SCIENCE 1176 (2020) (discussing the centrality of racial authoritarianism to American citizenship and governance in the 20th and early 21st centuries)

[6] DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2002).

[7] Roberts, *Complicating the Triangle*, *supra* note 5, at 1776.

[8] Dorothy E. Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426, 428 (2014).

critical part, lies an enduring raced family policy logic that has long permeated how Black and white families are disparately viewed (and treated) in public policy. The neoliberal policy logic of family is made up of two racially stratified standards: a punitive Black *economic utility* family standard and a supportive white *domestic affection* family standard, whose policy roots and practices trace back to slavery in the antebellum South. In previous work, I have shown how this bifurcated family policy logic was developed by the antebellum Southern state for Black and white families.[9] Through the construction of racial family policy standards, Southern courts and legislatures engaged in the political project of thwarting abolitionist attacks by upholding racial slavery as a legitimate form of market liberalism and liberal democracy and elevating the white patriarchal family as the bulwark of white social and political hegemony.[10] As discussed in this Article, historically and contemporaneously, state regulation of poor Black families is shaped by—and in turn perpetuates—the Black economic utility standard, which normalizes and places political value, above all else, on the promotion of labor by Black parents—particularly Black mothers—outside of their homes in service of a prevailing and racially discriminatory market order.[11] By doing so, the state devalues the affective, nurturing labor that Black mothers perform within their own households and towards their own children.[12] Long followed in Southern local policy practices and

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[9] Gwendoline M. Alphonso, *Naturalizing Affection, Securing Property: Family, Slavery, and the Courts in Antebellum South Carolina, 1830–1860*, STUDS. AM. POL. DEV. (forthcoming 2021) [hereinafter Alphonso, *Naturalizing Affection*].

[10] *Id.*

[11] The Article focuses on Black mothers (to the exclusion of Black fathers) insofar as enslaved Black mothers were central to the legal and ideological formulation of Black economic utility as a family standard in the antebellum period. Additionally, the historical focus on Black mothers in the policy treatment of Black families as demonstrated here, highlights the centrality of race and gender as intersectional sites in the construction of racial subordination and, arguably, challenges the contemporary political discursive focus on endangered Black males as pivotal to Black family vulnerability. On the intersectional vulnerabilities of Black women as obscured by the discourse of endangered Black males, see Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: The Intersectionality of Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1432, 1467–70 (2021).

[12] Dorothy Roberts alluded to a related logic when pointing to the racialized division of domestic labor into "spiritual" work expected by white women within their own homes and "menial" housework expected from Black

led by the efforts of congressmen from the South, the Black economic utility standard has been formalized at the national level within the neoliberal policy regime through a repurposing of overtly racial ideas into behavioral values of work and self-sufficiency that are enshrined in social and child welfare reforms. As a consequence of these policy reforms, poor Black mothers receive even less cash assistance than before and are increasingly, and with greater impunity, subjected to racial bias and disparate state intervention and sanctions. In turn, the discriminatory treatment of Black mothers significantly increases the risk of Black children's poverty, prompting increased assessments of their maltreatment, surveillance, and family removals. The deployment of the Black economic utility standard by the neoliberal policy regime pathologizes poor Black women's childbearing and motherhood as *economically* irresponsible in addition to being morally transgressive, obscuring centuries-long structural inequalities and justifying Black family disruptions in colorblind ways.

The following narrative will first discuss the Southern political-economic origins of racial family policy logic, in particular the coercive Black economic utility family standard, as developed by the antebellum slave state to apply to enslaved Black mothers. Second, it will demonstrate how and in what ways this standard informed the discriminatory policy treatment of Black mothers and their families throughout the twentieth century. In so doing, this section identifies and describes the political and economic conditions under which this raced family standard came to be formalized and upheld by the neoliberal welfare and child welfare policy reforms of the 1990s. By identifying the Southern political-economic roots of Black mother-family labor coercion, highlighting its foundations in slavery and its intensifying pernicious effects on poor Black families under the neoliberal policy regime, this Article

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female domestic workers, whose "spiritual" labor in their own households was consistently devalued by social policies designed to coerce Black women into performing menial household labor for others. Dorothy Roberts, *Welfare's Ban on Poor Motherhood*, *in* WHOSE WELFARE? 158, 158–63 (Gwendolyn Mink ed., 1997). For a comprehensive history of coercion of Black women to supply cheap labor in service of white economic interests and racially stratified economic orders, see JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985) (discussing the history of the commodification of Black women's labor in service of white economic interests).

highlights the urgent need for systemic reckoning and overhaul, underscoring calls to refocus policy attention away from punitive to redistributive social policies.

Much has been written on racial family policy frames such as "welfare queen" single mothers and "deadbeat" fathers—racially-coded dog whistles that include stigmatizing Black childbearing and sexuality—and the embrace of racial family imagery in twentieth-century neoliberal political ideology.[13] Missed in much of this discussion, however, is the enduring institutional significance of *family*, as a deliberate political racial institution constructed and maintained by the state, that perpetuates racial disparities and subordinates Black citizenship.[14] It is not only in the direct pathologizing of poor, Black mothers and families that the neoliberal state produces Black marginality, but also, more indirectly, in the kinds of racially disparate family coercions and discriminatory logics of motherhood and child wellbeing that the state *normalizes* and pursues through policies.

Several groundbreaking works identify deliberate political linkages between race, class, and civic marginality in

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[13] On racial policy frames, see DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 15–21 (1997) [hereinafter ROBERTS, KILLING THE BLACK BODY] (discussing the pervasive stereotypes of the "unwed Black mother," the "Welfare Queen," and the Black child "incapable of contributing anything to society"). *See also* WACQUANT, *supra* note 5, at 50. *See generally* DEBORAH E. WARD, THE WHITE WELFARE STATE: THE RACIALIZATION OF US WELFARE POLICY (2005) (analyzing how the institutionalization of race influenced and defined the American welfare system at the national level); KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR (2001) (defining welfare racism and its effects on all poverty-stricken families). On "Dog Whistle Politics," see IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014) (defining racial dog whistles as coded racial talk that is inaudible and easily denied on the one hand, and the cause of strong reactions on the other hand). On racial family-based assumptions in neoliberalism, see Tamara Metz, Obergefell*, Marriage, and the Neoliberal Politics of Care*, *in* STATING THE FAMILY: NEW DIRECTIONS IN THE STUDY OF AMERICAN POLITICS 45–71 (Julie Novkov & Carol Nackenoff eds., 2020) (arguing that the institution of marriage has obscured the consequences of the welfare state).

[14] As a notable exception to the overall overlook of family, see Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation*, 13 HYPATIA 62 (1998) (arguing that the traditional family acts as an exemplar of intersectionality in the United States).

neoliberal discourse and policy,[15] and Dorothy Roberts has significantly expanded this framework to include gender within that three-fold nexus.[16] Yet, the political construction and significance of *family* as an enduring prism that absorbs and converges multiple dimensions of coercion in the "matrix of oppression" of Black and Brown Americans is largely overlooked.[17] It is to this theoretical end that I direct this Article.

II. ECONOMIC UTILITY AND BLACK FAMILIES DURING SLAVERY

A. Legal and Ideological Foundations of Black Family Utility

In the antebellum South, the enslavement of Black people was upheld not as a pre-modern system of labor but as a form of modern market liberalism.[18] In contrast to the Revolutionary era when racial slavery was accommodated as a necessary evil, from the 1830s through the Civil War, it was defended as a positive good—as a legitimate property regime integral to a white male's right to accumulate property for the care and provision of his family. South Carolinian slaveholder Edmund Bellinger speaking in defense of slavery in 1835 gave voice to the prevailing Southern view, stating:

> [N]egro slavery . . . is our property, like other property, bequeathed to us by our parents, or earned by the sweat or our brow—by the hard efforts of honest industry . . . no authority on earth has the right, nor . . . the power, to strip us of that property or to crush the hope that we will be enabled to leave some small pittance to our children.[19]

In the three decades before the Civil War, the goal of providing for one's children came to be viewed as part of natural

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[15] WACQUANT, *supra* note 5; SOSS, FORDING & SCHRAM, *supra* note 5.

[16] Roberts, *Complicating the Triangle of Race*, *supra* note 5.

[17] On "matrix of domination," see PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT (2d ed. 2010) (referring to the organized intersection of oppression and its effects on Black women in particular).

[18] SLAVERY'S CAPITALISM: A NEW HISTORY OF AMERICAN ECONOMIC DEVELOPMENT (Sven Beckert & Seth Rockman eds., 2016) (arguing that American slavery was part of the national capitalist system and its evolution).

[19] EDMUND BELLINGER, A SPEECH ON THE SUBJECT OF SLAVERY 14 (1835).

paternal feeling, a form of domestic affection that was increasingly valued within the emerging family ideology of "domesticity" for white families.[20] When deciding family cases involving diverse subjects such as gifts, inheritance, wills, estates, alimony, property, and contracts, antebellum Southern courts constructed a new family standard to characterize and assess white family relations, centered on establishing affection as a natural norm practiced by white male slaveowners in their roles as fathers, husbands, and especially masters. In so doing the courts invoked the ideal of domestic affection to uphold the statutory regime of racial slavery as a benign, paternalist, familial system, elevating the white patriarchal family as deserving of special legal protections whilst condoning the brutality of the system by assembling the legal fiction of masterly, paternal affection towards enslaved workers. In this way, courts and legislatures engaged in the deliberate political project of constructing the Southern market order of racial human enslavement as a benign, familial enterprise in contrast to the abolitionist rendering of slavery as a brutal, inhumane system.[21]

At the core of the legal regime of racial slavery lay the construction of Black economic utility: the commodification and quantification of the market value of an enslaved Black person. Commodification of human beings into quantifiable economic value or price—what historian Walter Johnson has seminally called the "chattel principle"—was the very being of slavery.[22] For the enslaved, their economic value was inextricably tied to their bodies and their labor, which had distinct racial and gendered implications in the case of Black women. Unlike white

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[20] On the rise of affection-based domesticity in nineteenth-century United States, see STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 164–65 (2005).

[21] Alphonso, *Naturalizing Affection*, *supra* note 9. *See also* LACY FORD, DELIVER US FROM EVIL: THE SLAVERY QUESTION IN THE OLD SOUTH (2009).

[22] WALTER JOHNSON, SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET 19 (1999) (quoting J.W.C. Pennington, *The Fugitive Blacksmith: Or Events in the Life of James W.C. Pennington* iv–vii (1849)). For an excellent example of the emerging new economic history of American slavery that incorporates the voices of enslaved people to detail the commodification of enslaved people through every phase of their lives, see DIANA RAMEY BERRY, THE PRICE OF THEIR POUND OF FLESH: THE VALUE OF THE ENSLAVED, FROM WOMB TO GRAVE, IN THE BUILDING OF A NATION (2017) (demonstrating, through the perspective of enslaved persons, how commodification touched every aspect of an enslaved person's life).

women, whose child-rearing and contributions within their households were seen as integral to the reproduction of republican virtue and civic wellbeing,[23] Black women, free or enslaved, were only valued by the state for their economic productivity *outside* of their households. In colonial Virginia for instance, Black women were legally defined as "tithable" (taxable) labor. Whereas white women laborers were exempt from taxes, "the tax on an African woman had to be paid by her master (if she was a slave or servant), by her husband (if she was free and married), or by herself (if she was [free and] single)."[24] The law thus placed a public economic value on the labor of Black women alone, burdening only free Black households with levies on wives and daughters that impeded them from advancing economically and/or purchasing the freedom of loved ones.

The standard of Black economic utility was also, fundamentally, a family standard that centered on the body of the enslaved Black woman, whose reproductive labor was ascribed with distinctive economic value.[25] The practiced legal doctrine of *partus sequitur ventrem* (the legal status of the offspring, as free or enslaved, follows the condition of the mother) rendered enslaved Black childbearing as a source of wealth

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[23] Linda K. Kerber, *The Republican Mother: Women and the Enlightenment-An American Perspective*, 28 AM. Q. 187 (1976) (arguing that the Republican Mother in American culture defined how women might influence civic culture and the state).

[24] TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 9 (2017).

[25] Enslaved women's financial value increased during childbearing years. *See* Diana Ramey Berry, "*We'm Fus' Rate Bargain": Value, Labor, and Price in a Georgia Slave Community*, *in* THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADES IN THE AMERICAS, 1808–1888, at 55–71 (Walter Johnson ed., 2004) (demonstrating that enslaved women understood the monetary value assigned to their reproductivity and used this knowledge to negotiate their sale in order to maintain family ties). On enslaved women's reproductive labor and its centrality within Atlantic Slavery, see JENNIFER L. MORGAN, LABORING WOMEN: REPRODUCTION AND GENDER IN NEW WORLD SLAVERY (2004) (using the commodification of enslaved women's reproductive identities as the operative framework for comparing slavery in the Caribbean and in the American South); Jennifer L. Morgan, Partus Sequitur Ventrem*: Law, Race, and Reproduction in Colonial Slavery*, 22 SMALL AXE 1 (2018) (arguing that American slavery relied on a reproductive logic inseparable from race). More generally, on the social value of enslaved women wholly in terms of productive and reproductive labor for their enslavers, and their attempt to subvert that dictum upon emancipation, see TERA HUNTER, TO 'JOY MY FREEDOM 2–3 (1997); Jones, *supra* note 12, at 4, 13–29.

generation, commodifying enslaved children and divesting them of their humanity and familial belonging. Courts were apt to observe that, "our law . . . which declares that the issue shall follow the condition of the mother . . . applies to the young of slaves, because as objects of property, they stand on the same footing as other animals, which are assets to be administered . . . by the owner."[26] Black affective and physical familial bonds between enslaved children and their mothers were viewed wholly in terms of how much or little these bonds enhanced their productive and economic value for the benefit of their enslaver. As opined by a South Carolina court of equity, "the issue of a female slave would often be valueless but for her exertions and sufferings, all of which are at the risk of her master or owner." It was the master who was held to have "incur[red] the risk" and was thus "reasonably entitled to the gain" in terms of the value and labor of the enslaved Black child.[27]

The Black economic utility standard steadily rose to preeminence in the three decades leading up to the Civil War in 1861. Through a variety of commercial, accounting, and management techniques increasingly devised and sanctioned by law—such as using enslaved people as collateral for mortgages, as speculative futures, as the means for credit, or as payment of debt—the commodification of Black personhood into economic value progressed with increasing sophistication.[28] The cotton boom of the nineteenth century resulted in a 10,000% increase in cotton, propelling the United States to the top of the international market and generating an ever-increasing demand for enslaved labor in the industrializing cotton South.[29] Given

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[26] M'Vaughters v. Elder, 4 S.C.L. (2 Brev.) 307 (1809).

[27] Gayle v. Cunningham, 5 S.C. Eq. (Harp. Eq.) 124, 128 (1824).

[28] Bonnie Martin, *Neighbor-to-Neighbor Capitalism: Local Credit Networks and the Mortgaging of Slaves*, *in* SLAVERY'S CAPITALISM, *supra* note 18, at 107 (using neighbor-to-neighbor trade in slaves to illustrate slavery as a financial project of ordinary people); Joshua Rothman, *The Contours of Cotton Capitalism: Speculation, Slavery, and Economic Panic in Mississippi, 1832–1841*, *in* SLAVERY'S CAPITALISM, *supra* note 18, at 122 (arguing that slaves and slavery were both laborers and assets for a growing cotton capitalism); and Kathryn Boodry, *August Belmont and the World the Slaves Made*, *in* SLAVERY'S CAPITALISM, *supra* note 18, at 163 (arguing that the most important financial transactions in the history of slavery involved the transatlantic marketing of agricultural commodities produced by enslaved people under violent coercion).

[29] Edward E. Baptist, *Toward a Political Economy of Slave Labor: Hands, Whipping-Machines, and Modern Power*, *in* SLAVERY'S CAPITALISM, *supra* note 18, at 31, 40–41.

that the transatlantic slave trade was abolished in 1808, this meant that the very vitality and propagation of racial slavery rested on natural, encouraged, or coerced reproduction by Black enslaved women within America. In the antebellum period, "breeding" of enslaved women came to be viewed as a practice with the express purpose of wealth creation and profit. Speaking before the Virginia legislature in 1831, state representative James Gholson emphatically defended the practice of breeding for profit, stating that the "value of [breeding] property justifies the expense."[30] He continued, "I do not hesitate to say that *in its increase* consists much of our wealth."[31] By the 1830s, the purchase of a "breeding" enslaved woman implied economic investment that could potentially amplify over time.[32] A Black enslaved woman's monetary value increasingly came to be linked to her fertility, and traders, buyers, and sellers alike would make projections based on a woman's "increase," the same term they used for flocks and herds.[33]

The policy standard of Black economic utility legitimized and upheld coercion at the most intimate level, accommodating practices such as forced copulation and wet-nursing as well as widespread sexual exploitation of enslaved women by their enslavers.[34] It was during the antebellum period of slavery's capitalization that reproduction, sexual intercourse, childbearing and child nurturing, fundamental aspects of intimate family behavior constructed as inherently personal, affection-based, and familial in the context of white families, began to be seen by state policy wholly in terms of economic value in the case of enslaved Black people.[35]

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[30] BERRY, *supra* note 22, at 11.

[31] *Id.* (emphasis added) (original emphasis omitted).

[32] *Id.* at 19.

[33] *Id.* at 11–12.

[34] *Id.* at 78–83. For wide-ranging discussions on the rhetoric, experiences, memories, and contested historiography on the topic, see GREGORY D. SMITHERS, SLAVE BREEDING: SEX, VIOLENCE, AND MEMORY IN AFRICAN AMERICAN HISTORY (2012). *See also* NED SUBLETTE & CONSTANCE SUBLETTE, THE AMERICAN SLAVE COAST—A HISTORY OF THE SLAVE-BREEDING INDUSTRY (2016). On coerced wet-nursing, see Emily West & R.J. Knight, *Mothers' Milk: Slavery, Wet-Nursing, and Black and White Women in the Antebellum South*, 83 J.S. HIST. 37 (2017).

[35] STEPHANIE E. JONES-ROGERS, THEY WERE HER PROPERTY: WHITE WOMEN AS SLAVE OWNERS IN THE AMERICAN SOUTH 20–21 (2019). For differences in the financial valuation of "breeding" women in the antebellum

B. State Practices of Black Family Fragmentation & Coercion

Using the Black economic utility standard, antebellum courts and legislatures upheld widespread fragmentation of Black families. In the decades before the Civil War, slave traders made two-thirds of a million interstate sales, of which twenty-five percent involved the destruction of a marriage and fifty percent destroyed a nuclear Black family—many of these separating children under the age of thirteen from their parents.[36] Whether executing estates, disbursing inheritances, or in recuperating debts, creditors, executors, and public officials were required to break apart enslaved families as necessary in light of the fact that "slaves sell best singly," and officials who failed to act in this way were often held personally liable for failing their clients.[37] Similarly, in deciding bequests of enslaved women, courts were steadfast in upholding the principle that, unless specified by the testator, "a child does not pass under the bequest of the mother,"[38] not sparing even enslaved infants "to whom the care of the mother may still be necessary," holding therein that although "considerations of humanity might be of weight in a doubtful case . . . it is little that legal decisions can do to enforce humanity."[39]

Free Black families were similarly increasingly fragmented in the antebellum era. Free Black family members, many of whom had been free for all of their lives, were now under greater threat of kidnapping and enslavement and increasingly precluded from buying the freedom of enslaved kin.[40] In the attempt to reduce the population of free Blacks, seen as moral and physical threats to the institution of racial slavery, states in the 1850s also compelled previously freed slaves to leave the state. Faced with the unbearable prospect of being forever separated from their children, husbands, wives, and kin, some

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period, after the abolition of the African slave trade in 1808 as opposed to earlier periods, see BERRY, *supra* note 22, at 21.

[36] JOHNSON, *supra* note 22, at 19.

[37] HUNTER, *supra* note 24, at 71.

[38] Seibels v. Whatley, 11 S.C. Eq. (2 Hill Eq.) 605 (1837); Tidyman v. Rose, 9 S.C. Eq. (Rich. Cas.) 294 (1832).

[39] *Tidyman*, 9 S.C. Eq. at 301.

[40] IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH (1976).

free Black people even opted to be re-enslaved to be able to live with their families.[41]

Southern courts and legislatures continued to uphold the Black economic utility standard in their coercion of Black families after slavery. In 1865 and 1866, Southern states passed "apprenticeship laws" that were part of the region's Black Codes meant to restrict the rights of the newly freed. Purportedly to protect Black orphans, by providing them with guardianship and "good" homes until they reached the age of twenty-one, states took peremptory custody of children who were deemed "orphans," even when they had parents or relatives willing and able to take care of them. These children were then often forced to work uncompensated for their former owners.[42] The demands of the Southern political economy continued to dictate work as compulsory for free Black women, many of whom were employed as domestic laborers in white households, caring for white children and families instead of their own.[43] Whereas some married Black mothers, when they could afford to, went to lengths to avoid wage work in favor of taking care of their own families, white employers derided these efforts as "playing the lady," or as displays of false pretensions that jeopardized their own labor needs.[44] Repressive Black Codes and local laws attempted to enforce compulsory work for newly freed Black adults by defining quitting (of work) as "idleness" and "vagrancy," both of which were prosecutable offenses.[45] And the Freedmen's Bureau, established by the federal government in 1865, served to force Black women and men into accepting labor contracts with severely unfair terms with the directive that agents should "not issue rations or afford shelter to any person who can, and will not labor for his or her own support."[46] In 1870 in the rural South, more than forty percent of married Black women had jobs, mostly as field laborers, while over ninety-eight percent of white wives were homemakers; in Southern cities,

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[41] TED MARIS-WOLF, FAMILY BONDS: FREE BLACKS AND RE-ENSLAVEMENT LAW IN ANTEBELLUM VIRGINIA (2015); EMILY WEST, FAMILY OR FREEDOM: PEOPLE OF COLOR IN THE ANTEBELLUM SOUTH (2012).

[42] HUNTER, *supra* note 25, at 35–36.

[43] *Id.* at 3.

[44] *Id.* at 51–52.

[45] *Id.* at 29.

[46] *Id.* at 23–24.

Black married women worked outside the home five times more often than white married women.[47]

In the intervening century and a half since racial slavery, through Jim Crow and following the Civil Rights Movement, white hegemony ceased to be a state policy goal, and overt ideas of natural racial difference and hierarchy in political discourse gave way to color blindness. Nevertheless, racial ideas about Black family work, the primacy of Black mothers' productive labor, and disregard of the bonds of attachment and affection between Black mothers and their children endure in contemporary policy, notably so in the public policies and practices of social policy and child welfare. The rise of the South in national party politics since the late-twentieth century has elevated the political significance of family in American politics, embedding the longstanding discriminatory Southern family policy logic into national policy reforms. [48]

III. BLACK FAMILY ECONOMIC UTILITY IN NEOLIBERAL WORKFARE AND CHILD WELFARE POLICY

The history of child welfare policy in the United States is conventionally portrayed as a pendulum that swings back and forth between a child safety principle, which emphasizes preventing child maltreatment, and a family preservation principle, which emphasizes family unification as central to child wellbeing. The current child welfare system is described as deemphasizing reunification and intent on moving "more children into new homes faster than ever before."[49] However, by analyzing the twentieth-century policy development of child welfare *alongside* that of public assistance and from the perspective of Black family policy treatment, the following narrative alters the conventional story of a back-and-forth pendulum and instead highlights a pattern of growing formalization of policies that economically coerce poor Black

[47] ROBERTS, KILLING THE BLACK BODY, *supra* note 13, at 10–11.

[48] On the link between the "southernization" of American Politics and the rise of family in defining national policy debate and partisan agendas, see GWENDOLINE M. ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES: CONTESTING VALUES AND ECONOMICS IN AMERICAN POLITICS (2018) [hereinafter ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES].

[49] JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 54 (2012).

mothers and their families. Taken together, child welfare and public assistance reforms since the late twentieth century have increasingly mandated poor Black mothers' participation in low-wage labor markets by attaching work requirements to public benefits, increasing sanctions on Black childbearing by limiting cash assistance, enhancing state-level discretionary controls, and maintaining the ever-present threat of child removal. These developments highlight the current national policy iteration of the Black economic utility policy standard that was long used throughout the twentieth century by Southern local welfare agencies to overtly discriminate against and disadvantage poor Black mothers and families. The current therapeutic (individualist) behavioral framing of Black economic utility within the "color blind" neoliberal policy regime effectively obscures its racial character and conceals the structural deficiencies that sustain racial and gendered inequality.

A. Racial Family Foundations of Public Assistance & Child Welfare

The story of child welfare policy development is deeply tied to that of public assistance in that both share a common family policy ideal of affectionate, nurturing families, with associated meanings of home-centered motherhood and homebound maternal worthiness.[50] Between 1911 and 1920, forty states offered public assistance based on family need in the form of a cash-grant program called "Mothers' Pensions" to support "deserving" widowed mothers to stay home and care for their children.[51] Mothers' Pensions were then established at the national level in the form of the Aid to Dependent Children program (ADC, later renamed Aid to Dependent Families with Children or AFDC) by the Social Security Act of 1935, further institutionalizing government support for needy (female-headed)

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[50] *Id.* at 4, 8–9. For a summary of important literature that links child welfare and public assistance policies, see Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOCIO. REV. 575 (2016).

[51] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 93 (1994) (stating that from its inception, family public relief and cash assistance were not intended for morally dubious mothers, regardless of their need, instead a mother worthy of assistance was one who did not work outside of her home, devoted herself completely to her children, "and led a conspicuously virtuous life with no male companionship." Needy mothers deemed immoral did not receive benefits and their children were easily removed from their custody).

families on the principle that, "[f]amily life in the home is sapped in its foundations when the mothers of young children work for wages."[52] From the start, this principle and its programmatic assistance did not apply to Black mothers, their children, and families. In the Progressive and Great Depression eras, European immigrants received far more generous access to social welfare programs and were protected by social workers to ensure that non-citizenship and illegal status did not exclude them from assistance, whereas Black people were relegated to minimal, racist, and degrading public assistance programs, and Mexicans who asked for assistance were deported with the help of the very social workers to whom they turned for aid.[53] In a 1921 U.S. Children's Bureau study of Mothers' Pension recipients in eight counties, foreign-born white people were found to be vastly overrepresented, and only one Black family received Mothers' Pensions across the eight areas studied. In St. Louis, the foreign-born white population represented forty percent of the city's Mothers' Pension recipients even though they made up just thirteen percent of the population, and while Black people were ten percent of the city's population in 1920, only one "negress" was to be found on its Mothers' Pension rolls.[54]

Though in practice, Black mothers were often the last to apply for relief,[55] some southerners nevertheless expounded racist ideas of "natural" Black racial inferiority to pathologize Black families and construct Black family dependency. For instance, a professor at Paine College in Augusta, Georgia, claimed:

> We say, here in the South, that the mass of Negroes are thriftless and unreliable; that their homes are a menace to the health of the community; and that they largely furnish our supply of criminals and paupers . . . [M]ost of us believe that all this is the natural result, not of the

[52] JILL QUADAGNO, THE COLOR OF WELFARE 119 (1994).

[53] CYBELLE FOX, THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL (2012).

[54] *Id.* at 103, 115.

[55] *Id.* at 114.

> Negro's economic status, but of the Negro's being Negro.[56]

Black mothers and families, primarily because most lived in the South, were excluded from the efforts of social workers and from material programmatic support designed to address family needs.[57]

The Social Security Act of 1935 accommodated the racial distribution of ADC benefits and discriminatory labor-based practices. Key Democratic congressmen and committee chairs from the South predicated their support of the bill on retaining state control over establishing eligibility criteria and deciding who would receive benefits, enabling local welfare officials to direct the vast majority of ADC benefits to white, widowed women with young children.[58] Local control over welfare benefits had long been instrumental in maintaining a system of racial paternalism and a stratified racial economic order in the South. Since the end of the Civil War, the provision of certain benefits, including access to medical care and protection from violence, had been an important mechanism through which white planter elite maintained their control over mostly Black, but also poor white, agricultural workers.[59] In 1939, after Congress accommodated widows of industrial workers into the Old-Age Insurance program, ADC became the last resort for single, divorced, and deserted women, many of whom were Black. Southern states and some Northern ones in the 1940s and 1950s then further limited the eligibility criteria, now adding seasonal employment policies that local agencies in turn used to cut mostly Black ADC recipients off the welfare rolls during the cotton-picking season, maintaining the supply of cheap agricultural labor.[60]

Although the welfare rights movement succeeded in extending the ADFC program to Black families in the 1960s, benefits were further curtailed and burdened with behavioral

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[56] *Id.* at 115.

[57] LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 84–85 (1998).

[58] QUADAGNO, *supra* note 52, at 119.

[59] LEE J. ALSTON & JOSEPH P. FERRIE, SOUTHERN PATERNALISM AND THE AMERICAN WELFARE STATE: ECONOMICS, POLITICS AND INSTITUTIONS IN THE SOUTH, 1865–1965 (1999).

[60] QUADAGNO, *supra* note 56, at 119, 120.

regulations.[61] As late as 1970, the discriminatory local practices targeting Black mothers' labor in the Cotton South were described at a Senate Committee in the following terms: "welfare recipients are made to serve as maids or to do day yard work in white homes to keep their checks. During the cotton-picking season[,] no one is accepted on welfare because plantations need cheap labor to do cotton-picking behind cotton-picking machines."[62] Thus, despite the formal expansion of welfare support, Southern local practices continued to apply the coercive Black economic utility standard to poor Black mothers, and policymakers at all levels remained largely unconcerned with the wellbeing of Black children when their mothers were required to work, excluding Black families from the limited public daycare assistance programs.[63]

The post-war neglect of the children of working Black mothers and the Southern use of welfare to mandate labor from needy Black mothers starkly contrasted with the mid-century national state's efforts to positively support a child-centered, patriarchal (white) nuclear marital family ideal.[64] Multiple congressional committees focused investigations on issues of juvenile delinquency and child neglect and pressed for the urgent need to provide programmatic material and therapeutic support for married white mothers within the home.[65] Policymakers were also preoccupied with containing white out-of-wedlock births and redeeming the marriageability of white unmarried mothers through adoption placements of their babies. However Black out-of-wedlock children were not included in this policy discussion, and their policy neglect was justified again by racist ideas of

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[61] GWENDOLYN MINK, WELFARE'S END 52 (1998) ("[S]tates like Louisiana and Alabama evicting Black[people] from welfare in disproportionate numbers through moral fitness tests of one sort or another, with politicians denouncing never-married mothers as welfare chiselers, and with social scientists lamenting the structure of Black families needing welfare, the racial politics of welfare was clear.")

[62] QUADAGNO, *supra* note 52, at 128.

[63] REICH, *supra* note 49, at 11 ("[P]ublic assistance programs provide a source of (limited) economic freedom for women, poor women have experienced the state as oppressive and invasive. Recipients of public assistance have been subjected to 'unreasonable searches, harassing surveillance, eavesdropping and interrogation concerning their sexual activities' by state welfare agencies.")

[64] ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 11–12 (1995).

[65] ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES, *supra* note 48, at 82–88.

natural racial difference, maternal behavior, and worth. As Rickie Solinger states, several post-war policymakers "maintained that Black[mother]s had babies out of wedlock because they were Negro, because they were ex-Africans and ex-slaves, irresponsible and immoral, but baby-loving.[66]" Solinger also rightly notes that this policy ideation of natural Black sexuality and pathological Black maternal "culture" exonerated the state from public responsibility of Black illegitimate children, "since Blacks would take care of their children themselves. And if [they] did not, they were responsible for their own mess."[67] Policymakers' ideation of unwed Black childbearing as natural and thus undeserving of policy attention was soon to be reframed within neoliberal policy discourse.

B. Economic Pathologizing of Non-Marital Black Mothers and Neoliberal Policy Reforms

It was in the post-war era that unwed Black childbearing also began to increase in political salience as a key discursive site for the growing neoliberal vilification of Black mothers as threats to free-market values, paving the way for the economic framing of unwed Black motherhood as critical to the political project of dismantling the New Deal welfare state. The emerging economic pathologizing of poor Black motherhood, which continues into our time, is a testament to the endurance of the Black economic utility standard, in that unwed Black motherhood has been persistently framed in economic terms, viewed firstly as an economic problem with repercussions for the neoliberal market order, in contrast to unwed white motherhood that is politically framed as a social and moral threat to family integrity.

From 1945 to 1965, Southern Dixiecrats and their Northern allies pioneered the discourse of the marketplace to construct poor Black motherhood as an economic pathology and advocate for their punishment in the form of welfare benefit rescindment, sterilization, and even incarceration of "illegitimate mothers."[68] Drawing on the trope of "illegitimate child-as-commodity," Black unmarried mothers were constructed as "women whose business is having illegitimate children," as those

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[66] Rickie Solinger, *Race and "Value": Black and White Illegitimate Babies, 1945–1965*, *in* MOTHERING: IDEOLOGY, EXPERIENCE, AGENCY 287, 298 (Grace Chang et al. eds., 2016).

[67] *Id.*

[68] *Id.* at 298.

who commodified their reproductive capacities to violate basic consumerist principles by offering "bad value (Black babies) at a high price (taxpayer-supported welfare grants) to the detriment of society, demographically and economically."[69] In contrast to white mothers, whose extra-marital childbearing was attributed to their psychopathology and neuroses, the pathology of Black unwed motherhood was constructed in distinctly economic terms, as a drain on public resources that generated cycles of intergenerational Black dependency.[70]

Starting in the late 1970s and peaking in the 1990s, the economic pathologizing of poor Black motherhood and families came to a head as family emerged as a key political battleground on which conservatives waged war on liberalism, shifting the policy spotlight away from structural, economic needs of families to individual family values.[71] Black motherhood, childbearing, and child-rearing now rose to sudden political prominence, as a root cause of poverty and inequality.[72] The focus on family values added a moral dimension to the growing condemnation of poor Black mothers and their families that drew on previous Southern racist tropes that were now cast as colorblind judgments about immoral *behavior*, not racial traits.[73] Nevertheless, these tropes persisted in stigmatizing poor Black mothers as sexually-promiscuous "Jezebels," irresponsible child-bearers and "matriarchs," immoral "crackhead moms," and criminal "Welfare Queens."[74]

The wellbeing of Black children, their protection from abusive and neglectful mothers, and out-of-home placement also concurrently emerged as a newfound policy goal. In the mid-to-late 1980s, the focus on "crack babies" impelled large-scale child removals from Black families.[75] Almost all the women prosecuted

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[69] *Id.* at 300.

[70] *Id.* at 289, 300.

[71] ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES, *supra* note 48, at 38–44.

[72] The focus on Black matriarchal families as generating cycles of social and economic "pathology" is attributed to DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION, (1965). *See also* ROBERTS, KILLING THE BLACK BODY, *supra* note 13, at 8.

[73] ROBERTS, KILLING THE BLACK BODY, *supra* note 13, at 10–21.

[74] *Id.*

[75] REICH, *supra* note 49, at 38–45 (explaining that the landmark child protection legislation, Child Abuse Prevention and Treatment Act of 1974, had constructed child abuse, as a policy issue, in universal terms, as cross-class and

for drug use were Black, a pattern consistent with research that shows that even after controlling for poverty and other variables, Black women were far more likely to be reported for prenatal substance abuse than other women.[76] The public attention around "crack babies" and positive drug tests further justified greater agency interference in, and regulation of, the lives of poor women of color and their children.

Relying on the pathological construction of poor Black mothers as economic and moral threats, Southern Congressmen, first as Democrats, then as Republicans, successfully spearheaded the movement to reframe and repurpose social welfare in a colorblind way that limited cash assistance and sustained racially stratified labor markets.[77] The longstanding Black economic utility principle was now formalized in the behavioral requirement of "work" as a new policy goal of social welfare programs.[78] The landmark Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 eliminated the welfare safety net program and replaced it with block grants to states, enshrining state-level discretion over the new Temporary Assistance for Needy Families (TANF) program, requiring work from those receiving benefits, and increasing pressure on states to move participants from cash assistance to work.

Concurrent changes in child welfare policies hastened child removals away from poor Black mothers. The Adoption and Safe Families Act (ASFA), enacted alongside the PRWORA in 1997, limited the scope of "reasonable efforts" to prevent child removals, significantly tightening the previous timeline to six months within which reunification must occur and increasing the financial incentives to encourage states to increase their rates of adoption out of foster care.[79] Since the 1980s, Black children have remained vastly overrepresented in out-of-home placements, exceed the average number of years in foster care, have the lowest rates of adoption, and are least likely to be placed in

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cross-race, encouraging aggressive and increased intervention in favor of child protection, exponentially increasing the number of child removals from their homes and placements into foster care).

[76] *Id.* at 46.

[77] EVA BERTRAM, THE WORKFARE STATE: PUBLIC ASSISTANCE POLITICS FROM THE NEW DEAL TO THE NEW DEMOCRATS 28 (2015).

[78] *Id.* at 32.

families.[80] The Family First Prevention Services Act of 2018 continues to operate within the neoliberal policy framework that focuses on parental behavior regulation to the exclusion of structural remedies. The new legislation constructs "support to children and families" in individual, behavioral terms, calling on states to use Federal funding for enhanced "provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services."[81]

The overarching negative framing of Black mothers and families within neoliberal policy discourse is evident in the policy discussions of members of Congress. In their remarks during committee hearings on family-related policies for the period of 1980 to 2005, the period of formative policy change, Congresspersons referenced over 1100 real-life family examples of which 304 were identified by race and 110 were Black families. 52.9% of these Black family examples were invoked by members of Congress to highlight negative policy developments compared to the vast majority (63.1%) of white-identified family cases that were used to illustrate policy successes.[82] 30.3% of these real-life Black family examples referenced unmarried single-mother families as compared to 2.1% of such white family cases, suggesting the correlation of Black unmarried-mother families with negative policy perceptions.

The centrality of child abuse concerns to the policy construction of Black families is also demonstrated by the hearings data. The largest proportion (19.5%) of all Black family references invoked during committee hearings involved discussions of "child protection" policy, followed by the second largest proportions of Black family references (16% each) used as examples in policy discussions regarding "marriage/fatherhood"

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[80] *Foster Care*, CHILD TRENDS DATABANK (May 24, 2018), https://www.childtrends.org/?indicators=foster-care [https://perma.cc/4PH3-5TK8]. *See also Keeping Kids in Families: Trends in Foster Care Placement*, ANNIE E. CASEY FOUND. (April 2, 2019), https://assets.aecf.org/m/resourcedoc/aecf-keepingkidsinfamilies-2019.pdf [https://perma.cc/N4ZS-GN95].

[81] Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018).

[82] Data throughout the rest of this section has been computed by author; for methodology and case selection criteria, see ALPHONSO, POLARIZED FAMILIES, POLARIZED PARTIES, *supra* note 48, at 177–83.

and "housing/living conditions." Given that only a fraction of all family examples discussed in committee hearings were identifiable by their race, those that were racially-identifiable were especially suggestive of when and how race mattered and was expressly or indirectly referenced, and in which kinds of policy discussions. It is thus telling that Blackness, as a family characteristic, was highlighted the most by members of Congress when referring to policies pertaining to child abuse and protection, suggesting the close associative link between child abuse and Blackness of family in neoliberal policy discourse and logic as well as to marriage and fatherhood regulation. The whiteness of a family, on the other hand, was disproportionately identified in discussions focused on "women" (women's rights), "jobs," "elder care," "wealth," and "parental rights" (see Figure 1).

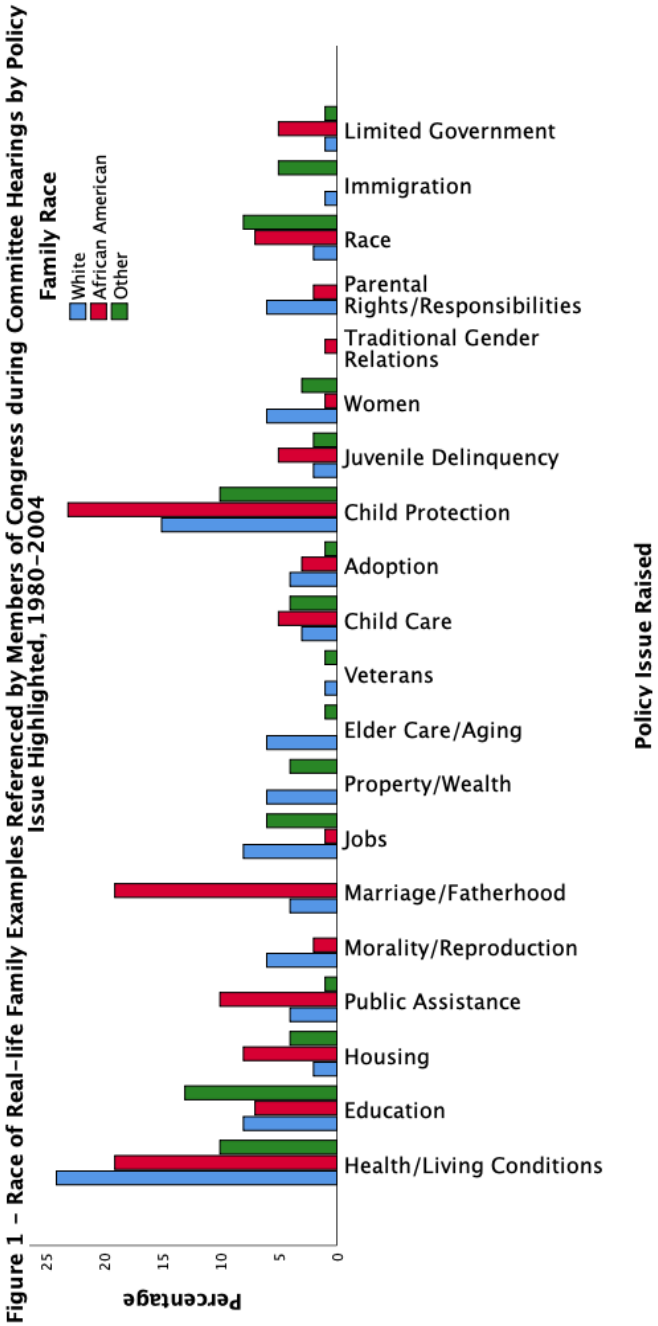
Figure 1 – Race of Real-life Family Examples Referenced by Members of Congress during Committee Hearings by Policy Issue Highlighted, 1980–2004
Family Race
White
African American
Other
Limited Government
Immigration
Race
Parental Rights/Responsibilities
Traditional Gender Relations
Women
Juvenile Delinquency
Child Protection
Adoption
Child Care
Veterans
Elder Care/Aging
Property/Wealth
Jobs
Marriage/Fatherhood
Morality/Reproduction
Public Assistance
Housing
Education
Health/Living Conditions
25
20
15
10
5
0
Percentage
Policy Issue Raised

Given the overwhelmingly negative policy perception of poor Black mothers and families and the formalization of the coercive Black economic utility standard into the TANF program of workfare and discretionary state practices, the most coercive compulsory work practices continue to be directed at Black mothers and their families. There is much evidence that states use their enhanced discretion over sanctioning, for example, to uphold racialized distribution of benefits.[83] States are found to use racial ideologies to justify and normalize higher rates of sanctioning of mothers of color by rescinding their benefits more often and more severely than white mothers.[84] Additionally, other research points to labor market discrimination that makes complying with work requirements more difficult for women of color, in turn justifying sanctions for their noncompliance.[85] One study found that racial inequities in states' administration of the TANF program contributed to the impoverishment of approximately 256,000 Black children per year from 2012–2014, also finding that states with larger percentages of Black residents are less likely to prioritize the provision of cash assistance, but more likely to allocate funds toward the discouragement of lone motherhood.[86]

Startling rates of economic insecurity now persist in Black households as do disproportionately high Black child removals from their families. In 2019, 40% of Black children had parents who lacked secure employment, compared to 20% of white children, with 31% of Black children living in poverty,

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[83] On the use of sanctioning to uphold racialized distribution of benefits, see Shannon M. Monnat, *The Color of Welfare Sanctioning: Exploring the Individual and Contextual Roles of Race and TANF Case Closures and* Benefit Reductions, 51 SOCIO. Q. 678–707 (2010); Richard C. Fording et al., *Devolution, Discretion, and the Effect of Local Political Values on TANF Sanctioning*, 81 SOC. SERV. REV. 285 (2007); Carolyn Y. Barnes & Julia R. Henly, "*They Are Underpaid and Understaffed": How Clients Interpret Encounters with Street-Level Bureaucrats*, 2018 J. PUB. ADMIN. RSCH. & THEORY 165 (Black people facing harsher sanctioning and negative encounters); Bradley L. Hardy et al., *Cash Assistance in America: The Role of Race, Politics, and Poverty*, THE R. OF BLACK POL. ECON. 306 (2019) (Black families as less likely to receive cash assistance).

[84] *See* Monnat, *supra* note 83, at 680.

[85] *Id.* at 681.

[86] Zachary Parolin, *Temporary Assistance for Needy Families and the Black–White Child Poverty Gap in the United States*, SOCIO-ECON. REV., May 2019, at 1, 24.

compared to 10% of white children.[87] For poor Black mothers seeking assistance, whose poverty runs counter to the expected policy standard of Black economic utility, their poverty engenders the constant threat of surveillance and child removals, far more than any other group. As opposed to any other racial group, it is far more likely that child removals for Black mothers resulted from poverty than maltreatment.[88] Moreover, economic status uniquely increases the vulnerability of Black women in family court systems; in addition to undermining their access to resources, poverty undergirds their stereotypical representation as bad mothers, justifying punishment and family separation as the preferred intervention.[89]

IV. CONCLUSION

This Article has outlined the policy development of the coercive Black economic utility policy standard as applied to poor Black mothers and their families since slavery, highlighting its Southern political-economic roots, its development through the twentieth century, and its colorblind framing within current neoliberal child welfare and social welfare policy regimes. By doing so, it has pointed to the underlying racial family policy logic to explain the persisting racial disparities and increasing punitive governmentality in the treatment of poor Black mothers and children and highlights the deliberate political choices that have come to embed this logic in national policies and state-level implementation. The racially-stratified family policy framework identified here, comprising of the punitive Black economic utility family standard and the supportive white affective family standard, provides us with new conceptual tools to evaluate proposals for reforms to the child welfare and social welfare systems and calls for a radical overhaul focused on federal anti-poverty assistance as opposed to state-level behavioral

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[87] *Children Whose Parents Lack Secure Employment by Race and Ethnicity in the United States*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND. https://datacenter.kidscount.org/data/tables/5064-children-whose-parents-lack-secure-employment-by-race-and-ethnicity [https://perma.cc/7HNZ-9986] (last visited June 4, 2021); *Children in Poverty by Race and Ethnicity in the United States*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity [https://perma.cc/63F9-T38M] (last visited June 4, 2021).

[88] Hyunil Kim & Brett Drake, *Child Maltreatment Risk as a Function of Poverty and Race/Ethnicity in the USA*, 47 INT'L. J. EPIDEMIOLOGY 780 (2018).

[89] Crenshaw, *supra* note 11, at 1427 nn.19 & 21.

regulation. The paper's historical policy analysis suggests that all reforms that devalue the affective and nurturing labor performed by Black mothers in favor of their economic regulation will perpetuate racially stratified family policy ideals, obscure the unique vulnerabilities of poor Black women and their families, and impede the goal of meaningful anti-racist family support and inclusion.

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ARTICLE

THE SURVEILLANCE TENTACLES OF THE CHILD WELFARE SYSTEM

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The family regulation system identifies families through the use of widespread, cross-system surveillance for the purported purpose of keeping children safe. But the system does not surveil all families equally, leading to the disproportionate impact of family regulation on Black, Brown, and Native families, and fails to protect while causing more harm to children and communities of color. We examine how institutions and professionals that are meant to provide necessary services to the community—medical providers, social services agencies, the police, and schools—act as tentacles of surveillance, entrapping families in the family regulation system. We argue that engineering service and community providers as surveillance agents perpetuates inequality and leads to unnecessary family separation and trauma, and that genuine support for families can only thrive outside of the family regulation system and its surveillance tentacles.

* Charlotte Baughman is a senior social worker, Tehra Coles and Jennifer Feinberg are litigation supervisors, and Hope Newton is a parent advocate at the Center for Family Representation (CFR). Parent advocates are parents who have been impacted by the system and are now working as advocates to support other parents caught in the family regulation system.

I. INTRODUCTION

The child welfare system, which we refer to throughout this Article as the family regulation system,[1] depends upon a system of surveillance to entrap low-income Black, Brown, and Native families within it. Mental health and social service providers, educational institutions, law enforcement, and the family regulation system itself, function as the surveillance tentacles of the family regulation system, drawing low-income Black and Brown families under the watchful eye and control of family regulation workers and courts. These tentacles seek out indications of neglect or abuse, which is often little more than evidence of poverty, and focus on reporting concerns and placing families under even greater levels of surveillance. By utilizing these tactics, the family regulation system causes greater trauma to impacted communities and fails to provide the support necessary to assist families living in poverty. In this Article, we explore how the family regulation system uses its surveillance tentacles to control families, without providing the assistance or protection to children it is purportedly designed to deliver. We argue that families need direct material support that is divorced from the threat of surveillance or family separation.

> Mary[2] is a 25-year-old Black mother who has been running late all week—late to pick the baby up from daycare, then late to get her to the pediatrician's office. She missed the appointment, for the third time. She was late to pick her son up from her mom's house and arrived at the shelter after curfew. Mary missed her recertification appointment at the public assistance office because her son's school bus didn't show up and she had to take him to school on public transportation. The knock on the door from the

[1] Throughout this Article, "child protective services" workers will be referred to as "family regulation" workers and the "child welfare" system will be referred to as the "family regulation" system to recognize that the system "is designed to regulate and punish Black and other marginalized people." Dorothy Roberts, *Abolishing Policing also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM) [hereinafter Roberts, *Abolishing*], https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/3VAJ-H8WP].

[2] This Article will include several client stories. These stories are meant to be reflective of our client's experiences but are not the stories of any one client.

> family regulation worker was the last straw. A shelter case worker overheard a heated argument between Mary and her husband and made a child maltreatment report. A family regulation worker told her that there would be a conference that same day to discuss the agency's concerns. In addition to the shelter caseworker who made the report, the family regulation worker had also talked to Mary's son's school and his pediatrician. Mary and her husband would have separate conferences because the report mentioned domestic violence. During the conference, Mary learned that a domestic violence consultant who had never met Mary or her husband had reviewed their case history and felt her children were unsafe. Mary sat at a table across from three strangers, looking down at the "service plan" and could not understand how she was going to get it all done without losing her children. The family regulation worker told her that she would have to enforce an order of protection against her husband and that he would have to find another place to live. She would be required to bring the children to the family regulation agency for supervised visits with their father, on top of enrolling in a parenting class, family therapy, domestic violence services, and complying with regular home visits from the family regulation worker. Mary could barely stay afloat, and now she was going to have to do everything on her own. She felt like she was being set up to fail, but she agreed to the plan. What other choice did she have?
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There is nothing new about the policing and surveillance of Black and Brown bodies. Parents like Mary are routinely assigned "service plans" by family regulation workers as means of addressing what the latter sees as deficiencies in their parenting. These plans are rarely tailored to the needs of the family but are instead cookie cutter solutions that often make matters worse and provide a pathway for the family regulation systems to watch the family more closely and control their

behavior. This control determines who is allowed to come in contact with their children, where they can live, what doctor they have to go to, what time they must be home, where and when they can work, and what services they must engage in.

Black and Brown families have been over-policed, over-surveilled, torn apart, and disrespected for hundreds of years. Black children were kidnapped and taken across the world to be enslaved. Black families were separated, and children were sold away from their parents as a means of control. Black women were considered more valuable to slave owners when they were in their "child bearing years."[3] Slave owners closely monitored the behavior of Black mothers to make sure that they were properly caring for their children.[4] In the 1960s, the government sanctioned the forced removal of Native children from their families and, in most cases, placed them in white homes far from their families.[5] By the 1970s, between "25 and 35 percent of all [Native] children had been placed in adoptive homes."[6] For the past several years, Brown children have been forcefully separated from their parents and detained at the border in an attempt to discourage immigration.[7] Today, the young mothers we represent at the Center for Family Representation (CFR), who are usually Black or Brown, are frequently denied favorable settlement offers because family regulation system prosecutors believe they will have more children in the future and want to retain an easier pathway to more surveillance through subsequent court involvement that often involves micromanaging the care of their children.[8]

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[3] Emily West & Erin Shearer, *Fertility Control, Shared Nurturing, and Dual Exploitation: The Lives of Enslaved Mothers in the Antebellum United States*, 27 WOMEN'S HIST. REV. 1006, 1006–07 (2018).

[4] *Id.*

[5] Christie Renick, *The Nation's First Family Separation Policy*, IMPRINT (Oct. 9, 2018, 5:05 AM), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431 [https://perma.cc/L254-9DLR] ("In its [1978] report to Congress, a task force said, 'The removal of Indian children from their natural homes and tribal setting has been and continues to be a national crisis.'").

[6] *Id.*

[7] Amelia Cheatham, *U.S. Detention of Child Migrants*, COUNCIL ON FOREIGN RELS (Oct. 29, 2020), https://www.cfr.org/backgrounder/us-detention-child-migrants [https://perma.cc/A4S5-46ZH].

[8] In New York, a court may either enter a finding of neglect or abuse against a parent or order an adjournment in contemplation of dismissal or a suspended judgement, which will allow the petition to be dismissed following a

The family regulation system, as the scholar Dorothy Roberts aptly describes the American child welfare system, is a continuation of this horrific American tradition.[9] This system is perhaps one of the most glaring modern-day attempts to destroy the Black family. It is one that identifies children and families believed to be in need of intervention, largely through institutions and professionals trained to detect and mandated to report signs of child maltreatment. But these systems—like law enforcement, social services, shelters, and public schools—are entrenched in low-income communities of color by design. They identify children "at risk" for maltreatment through cross-system surveillance—the "stop and frisk" equivalent to parenting[10]—that leads to a disproportionate number of Black and Brown families reported, investigated, and monitored for maltreatment.

To many, the violation of privacy and the various forms of surveillance that are forced upon low-income communities and people of color are justified as being in service of safety and support. In reality, surveillance has a negative impact on these communities. In our society, while everyone is susceptible to some level of surveillance, not everyone receives the same amount. The power of surveillance "touches everyone, but its hand is heaviest in communities already disadvantaged by their poverty, race, religion, ethnicity, and immigration status."[11] While privacy rights exist, people who are low-income do not have the same means to exercise them.[12]

Organizations like CFR employ attorneys, social workers, and parent advocates to represent parents when they are targeted by the family regulation system.[13] In New York City,

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period of supervision. N.Y. FAM. CT. ACT §§ 1039, 1051–52. N.Y. FAM. CT. ACT 1046(a)(i) allows a prior finding of neglect or abuse to be used as evidence of abuse or neglect of any other child.

[9] Roberts, *Abolishing*, *supra* note 1.

[10] 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, 130–38 (2019).

[11] Barton Gellman & Sam Adler-Bell, *The Disparate Impact of Surveillance*, CENTURY FOUND. (Dec. 21, 2017), https://tcf.org/content/report/disparate-impact-surveillance/?session=1&session=1 [https://perma.cc/28H4-KLPH]

[12] *Id.*

[13] CFR was founded in 2002 to dramatically improve outcomes for children and families and reduce reliance on foster care. CFR's largest, primary target population is low-income parents who are summoned to family court by

where CFR is based, the family regulation system disproportionately impacts Black and Brown families for both family separation and increased surveillance. Most of the allegations our clients face are poverty-related. They are issues that could be solved with money: children left at home because a parent could not afford to pay for childcare, insufficient food in the cabinets, unstable housing, lack of medical insurance to take children to the dentist or for routine checkups, etc.

Most families that come into contact with the family regulation system cannot afford to hire an attorney or social worker to help them navigate it. Many states, like New York, do not require that family regulation workers inform parents of their rights not to speak with investigators or share information. Whenever possible, CFR tries to connect with families during the investigation stage, but these resources are not available everywhere. The family regulation system works to prevent those it seeks to surveil and control from having access to legal support. In 2018, Monroe County, New York, turned down funds that would have paid for public defense attorneys for parents.[14] In New York City, the local family regulation system, called the Administration for Children's Services (ACS), has publicly opposed proposed city and state laws that would require parents to be informed of their rights during an investigation. Meanwhile, the family regulation system and its "surveillance tentacles" monitor families in low-income communities and increase their susceptibility to becoming entangled in the system.

This rampant surveillance is inextricably linked to mandated reporting. Laws in all fifty states enumerate which groups of people in each state are required to report suspected child abuse or maltreatment to each state's child maltreatment hotline.[15] School personnel and teachers, mental health

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the Administration for Children's Services (ACS) in Manhattan or Queens, when ACS alleges the parents have put their children at risk of maltreatment. CFR provides parents with holistic legal and social work support to enable children to live safely with their families and prevent the devastating consequences of foster care.

[14] Meaghan M. McDermott, *Family Advocate, Monroe County at Odds over Rejected Grant Money*, DEMOCRAT & CHRON. (Jan. 26, 2018, 1:55 PM), https://www.democratandchronicle.com/story/news/2018/01/26/family-advocate-monroe-county-nixing-grant-money-callous-political-expediency/1057855001/ [https://perma.cc/SFJ3-LFPM].

[15] While some states require *all* people to report suspected maltreatment (Idaho, New Jersey, Wyoming), most specify particular

professionals, drug treatment counselors, law enforcement personnel, and social workers are considered mandated reporters in most states. When a state's child maltreatment hotline receives a credible report alleging child maltreatment, the local department of social services must initiate an investigation. As a result of their investigation, a family regulation worker may decide to file maltreatment allegations against a parent in court, which can in turn lead to the removal of a child or court-mandated services, or the family regulation worker may request that a parent voluntarily participate in services to avoid court involvement or a removal. Each of these results leads to more surveillance and control over Black and Brown families' daily activities. A parent targeted by the family regulation system will be under the scrutiny of various mandated reporters, from the initial reporter of the case, to the family regulation worker investigating the case, to the various service providers, mental health counselors, drug treatment providers, and social services workers the parent must interface with to apply for housing and public benefits.

Mandated reporters make approximately two-thirds of all child maltreatment reports made in the United States.[16] The vast majority of reports to maltreatment hotlines are not substantiated. Nationally, 4.1 million cases were called into child maltreatment hotlines in 2019. Of the 4.1 million cases, 2.4 million were screened as potentially credible, with fewer than 400,000 (slightly less than 10%) determined to be credible upon further investigation.[17] This means that millions of families are subject to an intrusive and traumatic investigation with no benefit to child safety, the purported purpose of mandated reporter laws.

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professionals required to make reports. *See* ARIANE FROSH, THE ELEPHANT CIRCLE, MANDATORY REPORTING: A GUIDE FOR PRACTITIONERS 1 (2020), https://static1.squarespace.com/static/57126eff60b5e92c3a226a53/t/5f84b886d7a3130e832fa7e7/1602533514502/Mandatory+Reporter+Laws+by+State.pdf [https://perma.cc/W2ZZ-TNCN] (detailing professionals who are required to make reports by state).

[16] U.S. DEP'T HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018: SUMMARY OF KEY FINDINGS 2 (2020), https://www.childwelfare.gov/pubPDFs/canstats.pdf [https://perma.cc/6WVC-RWQH].

[17] FROSH, *supra* note 15.

Black and Brown families are disproportionately impacted by family regulation investigations.[18] 53% of Black children living in the United States experience a family regulation investigation during their lifetime.[19] The cumulative risk of experiencing an investigation is much higher for children living in low-income and/or non-white neighborhoods. This means that children living in low-income, non-white communities are much more likely than white children to experience multiple family regulation investigations throughout their childhood.[20] In New York City, the rate of investigations was about four times higher in the ten districts with the highest rates of child poverty than the ten districts with the lowest child poverty rates.[21] In districts with similar child poverty rates, districts with larger Black and Brown populations had higher rates of investigation.[22]

II. THE SURVEILLANCE TENTACLES

Families involved in the family regulation system often feel trapped or as though they have been set up for failure. In *Shattered Bonds*, Dorothy Roberts describes how a "family's fate becomes focused on a list of tasks a caseworker has typed or scribbled on a form" and failure could mean family separation.[23] The family regulation system relies on the "tentacles" in other systems to surveil and report families for investigation. Families are pulled into the family regulation system through systems that they are told to rely on for support: the public assistance office, substance abuse programs, mental health clinics, their child's school, the local police department, or a prevention services program. Families in need of assistance must accept

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[18] Hyunil Kim & Brett Drake, *Child Maltreatment Risk as a Function of Poverty and Race/Ethnicity in the USA*, 47 INT'L J. EPIDEMIOLOGY 780, 781 (2018).

[19] Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children,* 107 AM. J. PUB. HEALTH 274, 277 (2017).

[20] Kelley Fong, *Neighborhood Inequality in the Prevalence of Reported and Substantiated Child Maltreatment*, 90 CHILD ABUSE & NEGLECT 13, 14 (2019).

[21] ANGELA BUTEL, THE NEW SCH.: CTR. FOR N.Y.C. AFFS., CHILD WELFARE INVESTIGATIONS IN NEW YORK CITY NEIGHBORHOODS, 1 (2019), https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5d12746c3cdaa000017dfc2a/1561490541660/DataBrief.pdf [https://perma.cc/YK7B-4KHB].

[22] *Id.*

[23] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 80 (2002) [hereinafter ROBERTS, SHATTERED BONDS].

support from these institutions that come with a high level of control, surveillance, and risk of family regulation involvement. The tentacles feed families into the family regulation system, and once entangled, often make it more difficult for them to escape.

A. Surveillance Disguised as Support in Mental Health and Social Services

> Leslie is a 19-year-old Black woman who recently gave birth to her first child. When she was interviewed by a hospital social worker, she disclosed that she was diagnosed with a mental health condition and took psychotropic medication when growing up in the foster care system. She couldn't recall the specifics, other than that she stopped taking medication when she turned eighteen and voluntarily signed herself out of foster care. The hospital social worker made a report to the family regulation system, reporting a possible risk to the newborn due to Leslie's untreated mental health condition. The family regulation worker who responded to the report was able to review Leslie's records from her time in foster care. She noted that Leslie was diagnosed with Bipolar II Disorder when she was fourteen and was prescribed Depakote. Leslie agreed to cooperate with prevention services, who would monitor her engagement in mental health services, over the alternative of her newborn going into foster care. Because Leslie agreed to engage in services, her case was never filed in court; she did not have access to an attorney to inquire about her options. Leslie lost her housing because the family members she was living with were uncomfortable with the prevention services agency making regular home visits and entered a family shelter. Leslie had to quit her part-time job as she had no childcare options, and she could not place her child in daycare until he was at least six months old. Leslie struggled with enrolling in mental health services for the same reason, prolonging the length of time her family was monitored. Leslie started to feel depressed and

> anxious due to the laundry list of services she was required to engage in, the lack of support she had access to due to living in the shelter, and the constant visits to her unit by social workers. Leslie didn't disclose this to the preventive caseworker, as she knew the disclosure would mean more intervention and monitoring when all she wanted was to be able to make her own decisions for herself and her son.
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Mandated reporters surveil families in settings that provide essential resources like hospitals, homeless shelters, and public assistance offices, creating a dangerous conflict for families who need and seek out support, not family monitoring and regulation. Medical providers, mental health agencies, public benefits and emergency housing agencies all fall into the category of institutions and services that both surveil and provide essential material support.[24] The family regulation system positions staff from these institutions as surveillance agents, who are ready to report any *possible* sign of maltreatment, undermining any benefit or genuine support to the families they serve. The family regulation system does not surveil all families equally: the system's reliance on institutions that are designated to help those in need suggests that the family regulation system is only interested in regulating certain types of families and communities, while the private lives of more privileged communities remain out of view of mandated reporters. These surveillance tentacles, which are primary referral sources for the family regulation system, serve low-income families and marginalized communities by design.

Black and Brown communities are disproportionately targeted and reported for child maltreatment as a result of the over-surveillance and bias from mandated reporters. A family's race and socio-economic level significantly increase the likelihood that they will be reported to the family regulation system when all other factors remain the same. Low-income families and families residing in low-income neighborhoods are most likely to

[24] FROSH, *supra* note 15 (detailing the medical providers, mental health agencies, and other agencies required to make reports by state).

be reported for child maltreatment.[25] Low-income Black and Brown families are far more likely to be reported than white families in the same low-income neighborhood.[26] Bias also appears in how medical professionals identify abuse. Studies have found that pediatricians diagnose child abuse at a higher rate among low-income families.[27] When socioeconomic cues were reversed, doctors reversed their diagnostic decisions in forty percent of potential child abuse cases.[28] Another study showed that Black, Brown, and Native children are more likely to be reported for potentially abusive bone fractures.[29]

Low-resourced families can become entangled in the family regulation system when they try to access support or essential services from the surveillance tentacles comprised of mandated reporters. Medical personnel are the source of approximately 10% of national child maltreatment reports; mental health professionals make up about 6% of reports; and other social services personnel constitute a little under 11%.[30] Medical professionals may make a maltreatment report if a parent misses a child's follow up appointment, has a concern that a parent waited too long to seek treatment for a child, or if the doctor observed a bruise that the parent could not explain. Hospital staff also regularly report mothers who test positive for illicit drugs, even when the mother is already engaged in a substance abuse program or the substance is marijuana, which has not been linked to any detrimental effects or risk for the child. Mental health professionals may make a child maltreatment report when a parent discloses domestic violence in the home or if there is a concern for a parent's mental health due to missed appointments. Substance abuse treatment providers may report parents who test positive for illicit substances or who are not fully compliant with programs, even when there is no evidence of child endangerment. Parents who regularly interact with the surveillance tentacles are subject to

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[25] Fong, *supra* note 20, at 14.

[26] *Id.*

[27] Stephanie Clifford, *Two Families, Two Fates: When the Misdiagnosis Is Child Abuse*, MARSHALL PROJECT (Aug. 20, 2020, 6:00 AM), https://www.themarshallproject.org/2020/08/20/two-families-two-fates-when-the-misdiagnosis-is-child-abuse) [https://perma.cc/U8NW-EVAS].

[28] *Id.*

[29] *Id.*

[30] U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 16, at 9.

constant scrutiny by mandated reporters and are only a phone call away from family regulation system involvement.

Families experiencing housing instability are at greater risk for being investigated for child maltreatment and becoming entangled in the family regulation system.[31] Families who have no other option than to live in emergency temporary housing have reason to fear engaging and accessing natural supports which make them more vulnerable to the surveillance associated with the family regulation system.[32] While the relationship between housing instability and alleged child maltreatment is complex, a 2004 study posited that one possible explanation is the "fishbowl effect," due to the surveillance over families in shelters and increased likelihood of family regulation system involvement when a family experiences multiple shelter stays.[33] The fishbowl effect occurs when "families, once in the shelter system, are subject to heightened scrutiny from service providers in homeless shelters, and people are more likely to refer them to child welfare professionals."[34] The study also points to a link between the social and community isolation of homeless families on the increased likelihood of becoming involved in the family regulation system.

The family regulation system's vigilant and unrelenting surveillance of low-income Black and Brown communities disincentivizes parents from seeking supportive services. CFR's clients regularly express fear of the family regulation system in explaining why they did not seek immediate medical treatment after their child sustained a minor injury. Pregnant women who use substances may fail to obtain prenatal treatment due to concerns of surveillance. Reports by providers expose families to the added trauma of a punitive family regulation investigation and possible removal of a child. These reports also break down the treatment relationship: one study found that about

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[31] Katherine E. Marcal, *The Impact of Housing Instability on Child Maltreatment: A Causal Investigation*, 21 J. FAM. SOC. WORK 332, 332–35 (2018); Susan M. Barrow & Terese Lawinski, *Contexts of Mother-Child Separations in Homeless Families*, 9 ANALYSES SOC. ISSUES & PUB. POL'Y 157, 158 (2009).

[32] Jung Min Park et al., *Child Welfare Involvement Among Children in Homeless Families*, 83 CHILD WELFARE 423, 432–33 (2004).

[33] *Id.* at 433–34.

[34] *Id.* at 433.

one-fourth of families receiving mental health treatment will experience a disruption in treatment following a report.[35]

The COVID-19 pandemic, which disproportionately impacts people of color,[36] has also highlighted the negative effect of mandated reporting on marginalized communities. As a result of the pandemic, ACS publicly increased their reliance on surveillance from the Department of Homeless Services and the public hospital system, in addition to other tentacles that feed into the family regulation system, when reports from schools fell due to the switch to remote learning. ACS commented, regarding their 2021 budget, that "[i]n response to decreasing rates of reporting, ACS has strengthened collaboration with other mandated reporters, such as the Department of Homeless Services, Department of Education, and Health+Hospitals."[37] Families who already have little control over basic parenting decisions because they reside in family shelters or engage with public social service agencies should not be subject to unequal scrutiny during a global public health crisis. ACS increased their reliance on mandated reporters from surveillance tentacles who continued to engage with low-resourced families during the pandemic, like hospitals and homeless shelters, and appeared to encourage a heightened vigilance beyond the legal requirement for mandated reporters.

The family regulation system does not recognize the limitations imposed on homeless families as a result of shelter rules and regulations, and has prioritized surveillance over examining methods for reducing compounding stressors that homeless families face. The family regulation system focused public resources on surveillance, not direct assistance of food or clothing, child care or material support, during an unprecedented public health crisis. This decision reflects the system's deeply ingrained bias and disparate treatment towards low-income

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[35] Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 14 (2005).

[36] Don Bambino Geno Tai et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASES 705, 705 (2021).

[37] THE N.Y.C. COUNCIL, NOTE ON THE FISCAL 2021 EXECUTIVE BUDGET FOR THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) COMMITTEE ON GENERAL WELFARE AND THE COMMITTEE ON JUSTICE SYSTEM 1, 4 (2020), https://council.nyc.gov/budget/wp-content/uploads/sites/54/2020/06/ACS-Budget-Note.pdf [https://perma.cc/Y8FF-DWS9].

communities, primarily Black and Brown families, by suggesting that child maltreatment can be reduced through surveillance, not support. This prioritization goes against an abundance of research demonstrating that rates of child maltreatment are reduced when public assistance and Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) payments are increased, or when more child support dollars reach families.[38]

Families who need assistance—whether in the form of resources or clinical services and support—engage with service providers differently when they are aware of the service providers' obligation to report or their potential bias.[39] Many parents living in communities targeted by carceral systems understand that engaging with providers and institutions, while sometimes necessary, exposes them to additional risks. Some families find themselves in a catch-22 of needing to interact with certain institutions to avoid allegations of maltreatment—like schools and doctor's offices—despite those institutions increasing their risk of being reported for maltreatment. Research shows that parents who are conscious of this predicament change their behaviors and interactions with providers as a result.[40] The fear of surveillance can therefore prevent mental health, substance abuse, and medical professionals from connecting families with social services that could actually address the family's needs. If the families who are most in need of support do not feel comfortable or safe engaging with the institutions designed to service them, the efficacy and utility of these services, and the systems that fuel them, must be examined and fundamentally reimagined.

Institutions like public hospitals and clinics, family shelters, and public assistance offices are created with the intention to provide essential services to the communities they serve. But, the interplay between the family regulation system and institutions governed by mandated reporter laws prevents families in need from accessing genuine support and punishes communities targeted for family regulation. Parents living in

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[38] Maria Cancian et al., *The Effect of Additional Child Support Income on the Risk of Child Maltreatment*, 87 SOC. SERV. REV. 417, 429–30 (2013).

[39] Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 11–12.

[40] *Id.*

low-income communities and communities of color are familiar with the risks associated with these institutions—they might avoid or over-access services in an attempt to protect themselves and their children from a report to the family regulation system, or a neglect filing after the system has already become involved. In order for communities to benefit from these services, we must reimagine how these powerful systems support the families they serve. Institutions working in communities impacted by racially-oppressive systems must change their behavior so that symptoms of poverty are not categorized as maltreatment, and the responsibility to link families to resources is not passed on to the family regulation system. This behavior change must be informed by an understanding of the cultural identity of the community being served—not only through research, but through listening and collaborating directly with community members. Service provision must be both culturally sensitive and detached from the surveillance associated with the family regulation system in order to prevent further harm to marginalized communities. As a society, we must begin to invest in social programming that reaches all families who need support without the punitive function of the family regulation system. In order for these institutions to effectively connect families to the appropriate support, that support must be able to flourish within communities and outside of carceral systems.

B. Schools as Systems of Surveillance

> Paul is a 35-year-old Black single father caring for his son Jordan, who has special needs. Paul was en route to the pediatric emergency room psychiatric unit after receiving a call from his son Jordan's private school. This was not the first or second time he would receive a call at work. It was a pattern. Paul was at risk of losing his job but had no choice but to leave work early once again. The school told him they had not only sent his son to the emergency room, but they had called to make another child maltreatment report because Paul had missed too many days of school that month. Every time a family regulation worker visited their home, Jordan would have a meltdown the next day. The bus driver would refuse to allow him on the bus, and Jordan would

> miss more school. Even though the school staff were well aware of how Jordan's behavioral challenges were making it difficult for Paul to get him to school before going to work, they continued to report the family to the family regulation system and called the police when Jordan's behaviors became difficult to manage. When Paul arrived at the emergency room, Jordan was already calm. On the way home, Jordan quietly asked his father if he was a bad person. Shocked, Paul asked Jordan why he would think that about himself. Jordan looked away for a few minutes, then told his father, "because the police always come to get me."
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Educational professionals working in low-income Black and Brown neighborhoods make up one of the family regulation system's strongest surveillance tentacles. School personnel account for over 20% of all child maltreatment reports made nationally, the highest report rate of any professional group.[41] The family regulation system relies heavily on reports from school staff as they often have the most exposure to children outside of their families, making them uniquely situated to expose possible neglect. The family regulation system often directly partners with schools, encouraging school personnel to closely monitor students for signs of neglect or abuse, outside of excessive school absence or lateness. School staff that suspect a student may be hungry, unkempt, or experiencing mental health issues are mandated to address these types of concerns through a report to the family regulation system, rather than offer genuine assistance or support. But, the belief that schools are best suited to detect child maltreatment is largely unsupported: recent federal data shows that 90% of child maltreatment reports called in by teachers were not substantiated.[42]

Unsubstantiated reports of child maltreatment are not harmless; they can still pull parents into the tentacles of the

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[41] U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 16, at 6.

[42] Eli Hager, *Is Child Maltreatment Really Rising During the Pandemic?*, MARSHALL PROJECT (June 15, 2020, 5:00 AM), https://www.themarshallproject.org/2020/06/15/is-child-abuse-really-rising-during-the-pandemic [https://perma.cc/ARH5-XSCL].

family regulation system. In most states, unfounded reports of child maltreatment are documented and remain accessible to the family regulation system for many years following the report. Parents who are the subject of an unsubstantiated report called in by their child's school are subject to intrusion from family regulation workers during their investigation and may be pressured to participate voluntarily in prevention or other supportive services that place them under additional scrutiny from mandated reporters. A visit from a family regulation worker is often a traumatic experience for parents and children, and it can erode the family's trust and collaboration with the educational and school community.[43]

Just as the family regulation system depends on schools as surveillance agents, schools depend on surveillance from law enforcement and the family regulation system to surveil and control students and parents. Black children, Brown children, Native children, and children with disabilities often attend schools with fewer resources. Instead of providing supportive services to students or connecting families to resources in the community, these schools often turn to systems of surveillance, including the family regulation system, to control students in their classrooms. Inadequately trained school and support staff frequently request help from family regulation workers and law enforcement to address behavioral problems and other concerns. Parents often report that schools call the family regulation system when their child becomes a "problem" in school. In many districts, police are also embedded into the school system itself. Police are trained to detain, handcuff, and arrest. They are not trained to address behavioral problems or to prevent or de-escalate conflicts. Similarly, instead of working with struggling parents or attempting to connect them and their children with material support or services to address the needs that often arise for families living in poverty, schools report parents to the family regulation system and wipe their hands of the responsibility to assist.

Twenty years ago, mass shootings in affluent communities from Columbine to Sandy Hook and Parkland created a new market for surveillance to promote school safety

[43] Melton, *supra* note 35, at 12.

and security in schools across America.[44] Low-income Black and Brown students in urban communities that do not have a history of mass shootings experience the impact of greater surveillance quite differently than those in white affluent schools. [45] In low-income Black and Brown communities, schools turn to school resource or security officers trained and supervised by police to patrol the halls and the family regulation system to control parents. Schools use a zero-tolerance policy of punitive, exclusionary discipline that includes suspensions, expulsions, and a dependence on the court system to bring delinquency proceedings against children. In September 2019, a Florida police officer arrested and handcuffed a six-year-old Black girl for having a tantrum in class.[46] In 2014, a seven-year-old Black boy was handcuffed by a school resource officer in Missouri after yelling about being bullied.[47] These practices disconnect children from school and criminalize behavior related to disorderly conduct, which places them at greater risk of educational disengagement.[48] This all feeds into the school-to-prison pipeline, a pathway to the prison industrial complex.[49] The dependence on surveillance in public schools has wreaked havoc on low-income

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[44] J. William Tucker & Amelia Vance, *School Surveillance: The Consequences for Equity and Privacy*, 2 EDUC. LEADERS REP. 1, 7–8 (2016).

[45] *See* Interview by Ann Bradley with Peter Langman, Clinical Director, KidsPeace, and Katherine Newman, Professor of Sociology, Princeton University (Apr. 20, 2009), https://edweek.org/leadership/what-we-have-learned-about-school-shooters-10-years-after-columbine [https://perma.cc/GJD7-67JD] (describing these tragedies as "overwhelmingly happen[ing] in places with low levels of violence, and hence no violence prevention programs in place. The residents thing [sic] this sort of thing happens in New York and Chicago when, in reality, it never does. All kinds of violence goes down in big cities, but not this kind").

[46] Leonard Pitts Jr., *Leonard Pitts: Black Officer Arrests Black 6-Year-Old. It Doesn't Mean Racism Didn't Make Him Do It*, PRESS HERALD (Sept. 24, 2019), https://www.pressherald.com/2019/09/25/leonard-pitts-black-officer-arrests-black-6-year-old-it-doesnt-mean-racism-didnt-make-him-do-it/# [https://perma.cc/HDB2-U6HT].

[47] Rebecca Klein, *Family Sues After 7-Year-Old Gets Handcuffed at School for Crying*, HUFFINGTON POST (Sept. 15, 2016 6:17 PM), https://www.huffpost.com/entry/kaylb-primm_n_57d9b706e4b04a1497b23f1b [https://perma.cc/4UPV-67JM].

[48] *A Look at School Discipline: Zero Tolerance Discipline, Discrimination, and the School to Prison Pipeline*, N.Y. CIV. LIBERTIES UNION, https://nyclu.org/en/look-school-discipline#-ft_nref4 [https://perma.cc/P3FS-UF9E] (last visited Feb. 23, 2021).

[49] *Id.*

Black and Brown children, with little apparent benefit to school safety.[50]

The cross-system surveillance and partnership between schools, law enforcement, and the family regulation system play a significant role in traumatizing Black and Brown students, parents, and families living in marginalized communities. This trauma can negatively impact educational outcomes for children, along with their employment stability, physical health, and criminal justice involvement later in life. Educational institutions must begin to sever ties with law enforcement and create spaces for healing, restoration, and transformation in schools. Schools must divest from law enforcement and prosecution and invest in professionals trained to prevent and address trauma and behavioral issues, de-escalate crises, and resolve conflicts. In New York City, only 2,800 full-time guidance counselors work in public schools, compared to 5,511 New York Police Department school safety agents.[51] This call for a shift in resources must also extend to ending surveillance from the family regulation system and prioritizing material support.

The Healing-Centered Schools Workgroup in the Bronx, New York, is an example of how communities can reduce surveillance from the family regulation system and continue to support families.[52] The Workgroup is a coalition of parents, students, educators, mental health providers, and advocates who believe that when students are given a space to heal, learn, and

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[50] CHARLOTTE POPE, CHILD.'S DEF. FUND N.Y., "UNTHINKABLE": A HISTORY OF POLICING IN NYC PUBLIC SCHOOLS AND THE PATH TOWARD POLICE-FREE SCHOOLS (2019), https://www.cdfny.org/wp-content/uploads/sites/3/2019/10/CDF-NY-Report-History-of-Policing-in-NYC-Public-Schools.pdf?_ga=2.158663354.1266419985.1608165692-617824654.1608165692 [https://perma.cc/3E3F-25T6] (noting that between 1999–2000, there was a 101% increase of criminal court summons served on students, while 67% of principals reported there had been little change in school safety).

[51] URB. YOUTH COLLABORATIVE & CTR. FOR POPULAR DEMOCRACY, THE $746 MILLION A YEAR SCHOOL-TO-PRISON PIPELINE: THE INEFFECTIVE, DISCRIMINATORY, AND COSTLY PROCESS OF CRIMINALIZING NEW YORK CITY STUDENTS 2 (2017), https://populardemocracy.org/sites/default/files/STPP_layout_web_final.pdf [https://perma.cc/7R6C-D97J].

[52] NANCY BEDARD ET AL., COMMUNITY ROADMAP TO BRING HEALING-CENTERED SCHOOLS TO THE BRONX: A PROJECT OF THE HEALING-CENTERED SCHOOLS WORKING GROUP (Katrina Feldkamp ed., 2020), https://www.legalservicesnyc.org/storage/PDFs/community%20roadmap%20to%20bring%20healing-centered%20schools%20to%20the%20bronx.pdf [https://perma.cc/A68W-XGW7].

exist in community with one another, they are able to grow their strengths and build a foundation for success.[53] Healing-centered educational practices can produce positive outcomes for students' social-emotional well-being, staff wellness, parent/caregiver trust, and school structure.[54] The Workgroup recognized that social-emotional well-being as a necessary ingredient for learning,[55] and ensured that all students, parents/caregivers, and staff feel physically, psychologically, and emotionally safe in their school. Students, parents/caregivers, and staff are critical partners in creating a supportive school environment and are central to decision-making and community-building. School resource officers were also removed from the schools, and community members were hired to provide support and de-escalation when necessary.[56]

C. Law Enforcement and the Family Regulation System: Partners in Surveillance

> Kim is a 30-year-old Hispanic mother of two children. Kim was recently granted a full stay away order of protection against the father of her children and agreed to regular visits from the domestic violence unit at her local precinct, believing they would help her and her children stay safe. When Kim called the domestic violence officer and reported that her former partner had pushed her into a wall in front of their newborn, she never expected to become the subject of an investigation herself. Kim was struggling to make it to the WIC office that week because her toddler was sick, and she had allowed her former partner back in the home to drop off diapers and formula for the baby. The day after Kim called the police, a family regulation worker showed up on her doorstep. She was told to come to their office for a conference. The worker told Kim that they were concerned that there had been multiple instances of domestic violence in front of her baby and that she had not taken sufficient steps to protect her

[53] *Id.* at 3.
[54] *Id.* at 18.
[55] *Id.* at 22.
[56] BEDARD, *supra* note 52, at 84–85.

> children. Kim was told that they would file a neglect petition against her former partner, but she needed to enter a domestic violence shelter, submit to a mental health evaluation, and consent to supervision of her home by the Court and the family regulation system in order to avoid becoming a respondent as well. If she refused to agree to these terms, then the family regulation agency would seek to remove her children.
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Law enforcement and family regulation officials are two sides of the same racially-oppressive coin and work hand in hand to perpetuate surveillance and control over Black and Brown communities. In 2015, the police were the source of one-fifth of all family regulation investigations.[57] This number is significant given what we know about how Black and Brown people are disproportionately targeted by the police. Black men make up 13% of the total male population but are 35% of those incarcerated.[58] Targeting by the police feeds the family regulation system through increased surveillance of Black and Brown communities. Black people are more likely to be "stopped by the police, detained pretrial, charged with more serious crimes, and sentenced more harshly than white people."[59] A criminal court judge's choice to incarcerate a single parent is effectively a choice to place their child in foster care. When parents are incarcerated, their children may stay in care longer, especially if there are no family members to care for the child. Once behind bars, it is harder for the parent to plan for the return of the child, stay in communication with them, engage in services they need, and maintain their family bond. Many may lose their housing and employment while they wait for their criminal court case to proceed, making reunification even harder.

For parents like Kim, who are not even accused of a criminal offense, there is still a risk of an interaction with law

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[57] Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 CRIM. JUST. CONTACT & INEQ. 50, 50 (2019).

[58] ELIZABETH HINTON ET AL., VERA INST. J., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (Dec. 20, 2020), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/P7QD-5L2K].

[59] *Id.*

enforcement leading to more surveillance by the family regulation system. When families cannot rely on police for protection, they are less safe. As discussed above, families even face exposure to law enforcement in the school system. Black parents must be concerned about their, and their children's, physical safety during interactions with police in the community, at school, and in their homes. They must also be concerned that they will be reported to the family regulation system and risk separation. Parents like Kim recognize that they cannot rely on law enforcement for protection or the family regulation system for support. They know that there are eyes everywhere and that, unlike other mandated reporters, law enforcement requires an even more heightened level of awareness. Black and Brown parents may be less likely to call the police because they know it can result in involvement with the family regulation system, even when there may be a genuine concern for their personal safety.

In 2019, 32% of CFR clients had criminal court cases concurrent to their family court proceedings, 19% were domestic violence survivors, 19% were accused domestic violence perpetrators, 24% had allegations related to domestic violence, and 10% had allegations related to criminal activity. In many cases the allegations a parent faces in criminal court mirror those being made in family court. However, to the extent that the family regulation system is ill equipped to address the real needs of a family, the criminal court system is even worse. Parents in this situation often have to deal with conflicting family court and criminal court orders. The demands put on their time by the criminal court system and family regulation system often make it difficult to fully comply with both. Organizations like CFR offer wraparound services so that parents can be represented in multiple systems by one law office, with social worker support. Many parents do not have that option. As a result, miscommunications can occur between lawyers, or decisions are made without full access to information about the other case, leading to more delays to reunification.

A common refrain of the movement to defund the police is that the significant number of resources given to the police would be better served if they were invested in communities. The call to "defund" does not mean abolish policing. And even some who say abolish, do not necessarily mean to do away with law

enforcement altogether.[60] Rather, they want to see the rotten trees of policing chopped down and fresh roots replanted anew."[61] The role law enforcement plays in worsening the impact of the family regulation system on Black and Brown families is a part of a rotten system that needs replanting.

Black parents should not have more to fear from law enforcement involvement than other families. There are concrete steps that can be taken to address the destructive role that law enforcement plays in the family regulation system. Divestment from the American policing system by shifting "financing away from surveillance and punishment, and toward fostering equitable, healthy, and safe communities" would go a long way in addressing the problems of the family regulation system, which punishes poverty with family separation and surveillance.[62]

Beyond divestment, parents should be treated with respect during interactions with law enforcement. When completing an arrest, the police must be required to allow a parent to make alternative caretaking plans for their child, without interference from the family regulation system. Police must be sensitive to the presence of a child in their interactions with parents and families. The family regulation system should not rely on the assistance of law enforcement when a parent refuses access to a home absent a genuine belief that a child is in imminent risk of harm. Family regulation workers must be prohibited from using the fear of police brutality as a means of gaining access to children in their homes. Finally, in cases where a parent faces the same allegations in criminal court as they do in family court, the criminal court judge should be prohibited from issuing orders preventing a parent from contacting a child. These orders often tie the hands of the family court judge, who is best positioned to assess the appropriate level of contact. The American system of policing, like the family regulation system,

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[60] Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?,* BROOKINGS INST. (June 19, 2020), www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/U6NG-Y9MM].

[61] *Id.*

[62] Annie Lowrey, *Defund the Police: America Needs to Rethink Its Priorities for the Whole Criminal-Justice System*, ATLANTIC (June 5, 2020), www.theatlantic.com/ideas/archive/2020/06/defund-police/612682/ [https://perma.cc/3HE4-4MRL].

has its roots in white supremacy and racism.[63] The steps laid out above are by no means presented as a complete solution to the very real and deeply seated problems of both systems. They are steps that could easily be implemented via internal policy changes or passing appropriate legislation.

D. Surveillance Masked as Protection: The Family Regulation System

> Jasmine is a 40-year-old Black mother of four children. Jasmine is concerned that her oldest daughter, Amanda, might belong to a gang and has noticed cuts on her arms. Jasmine has tried to encourage Amanda to talk to a therapist, but every time she makes an appointment, Amanda refuses to go. A friend tells Jasmine to call the child maltreatment hotline and ask for help. If she doesn't, her friend warned, she could risk having a case called in regardless, and the family regulation agency could remove her younger children. Jasmine makes the call, and is relieved when the agency offers to help. During the initial home visit, the family regulation worker surveys Jasmine's home. He observes a wine bottle on the kitchen table and writes in his notepad. He asks Jasmine if she'll submit to a drug and alcohol test. The family regulation worker called Jasmine later that week and explained that the agency consultant is recommending intensive prevention services. The prevention worker will make three home visits a week and will send Jasmine for random toxicology tests. Since Amanda is turning eighteen in two weeks, it will be Amanda's choice whether to engage in the services. However, because Amanda is living in the home with Jasmine and the three younger children, Jasmine will still be responsible for getting Amanda into mental health services and addressing any safety concerns, including enrolling in drug and alcohol

[63] Paige Fernandez, *Defunding the Police Will Actually Make Us* Safer, AM. CIV. LIBERTIES UNION (June 11, 2020), https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer/ [https://perma.cc/T5YD-Z96P].

> treatment if any additional toxicology screens are positive for alcohol. Jasmine felt like telling the prevention worker she no longer wanted services but was afraid of what might happen next.
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Just as targeted policing leads to the disproportionate representation of Black and Brown bodies in criminal courts and prisons, the over-surveillance perpetrated by the family regulation system leads to a disproportionate number of Black and Brown children living under the supervision of the family regulation system, whether through a child maltreatment investigation, voluntary or court ordered services, or in the worst scenario, the placement of a child in foster care. Black children make up only 13.8% of the total national child population, but they make up 24.3% of children in foster care.[64]

A child who is removed from their parent by the family regulation system and placed in foster care can be exposed to significant risk of harm, which can be more detrimental than remaining even with a neglectful or abusive parent. The separation of a child from his parent is a trauma in and of itself that can have dire short- and long-term consequences on a child's behavioral and mental health.[65] Family separation can disrupt a child's brain architecture, harming a child's development.[66] Removal of a child from a parent can cause separation anxiety and attachment disorders, which manifest with immediate emotional and physical symptoms and can cause depression and aggression later in life.[67] Children also experience grief and confusion following the separation from their family, which can also have detrimental effects on the child.[68]

Numerous studies demonstrate that foster care itself is harmful to children and leads to poorer outcomes. Adults who were placed in foster care as children have substantially higher

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[64] CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 3 (2016).

[65] Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527 (2019)

[66] Julie M. Linton et al., *Detention of Immigrant Children*, PEDIATRICS, Apr. 2017, at 6.

[67] Trivedi, *supra* note 65, at 528.

[68] *Id.* at 532–34.

rates of mental illness when compared with other adults.[69] Even more disturbingly, adults who grew up in foster care are twice as likely to develop post-traumatic stress disorder than war veterans.[70] Children in foster care, particularly those who have had multiple placements, are significantly more likely to have contact with the delinquency system. By age seventeen, over half of foster youth had been arrested and over one-third had spent a night in a correctional facility.[71]

The harms of foster care are well documented and have been extensively researched, but communities most impacted by the family regulation system are also at risk of harm from cross-system surveillance, which can also lead to poor outcomes even when children remain at home with their parents. Investigations and services demanded by the family regulation system can be highly disruptive to families without providing the material support that could ameliorate the poverty-related concern that first brought the family in contact with the system. Investigations and service requirements can cause loss of housing, employment, and public benefits, which are often exacerbated by court intervention and/or the removal of a child from the household.

In some states, including New York, the family regulation agency may ask the court to give it the power to surveil a family, even when they are not seeking to remove a child. In these cases, the court may direct the family to cooperate with the agency, authorize the worker to make home visits, communicate with the family's therapists and mental health professionals, and report to the court regarding the compliance with any court orders and/or services.[72] Workers can make surprise home visits, and the family is legally obligated to cooperate. Courts often order parents to sign releases to disclose their family's private medical

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[69] FOSTER CARE ALUMNI STUDS., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY (2005), https://caseyfamilypro-wpengine.netdna-ssl.com/media/AlumniStudies_NW_Report_FR.pdf [https://perma.cc/SM7N-TGJ2].

[70] *Id.*

[71] MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (2004), https://www.chapinhall.org/wp-content/uploads/Midwest-Study-Youth-Preparing-to-Leave-Care-Brief.pdf [https://perma.cc/3347-3H5F].

[72] N.Y. FAM. CT. ACT §§ 1052, 1057.

information to providers working with the family. Parents are monitored and required to accept referrals from the same agency responsible for prosecuting the case against them in court. This court-sanctioned monitoring is an attempt to legitimize government surveillance as a necessity for keeping children safe.

The family regulation system expects parents like Jasmine to benefit from and engage in services with the threat of her children being removed looming over them. Family regulation workers threaten to remove children if the parent does not agree to engage in services and cooperate with their demands. The system views a failure to cooperate or reluctance to consent as safety concerns, leading to increased or prolonged surveillance. Sometimes the agency attempts to convince a parent to agree to additional services, without a court order, to avoid family separation or court intervention. The formal investigation ends, but the surveillance and monitoring continue through the service providers working with the family.

Some states have committed to focusing more of their resources on family preservation services as alternatives to removal and investigation, citing the family regulation system's disproportionate impact on low-income Black and Brown families. In 2018, there were approximately 1.3 million instances of children receiving "postresponse services" to prevent future instances of child maltreatment or after a child maltreatment investigation.[73]

The family regulation system claims that the expansion of services that purport to support families rather than separate them will benefit communities targeted for family regulation. However, because these services are offered through the family regulation system, increasing its reach and ability to monitor and surveil, they can also be coercive and harmful to marginalized communities. A number of evidenced-based models have been developed as a result of the increased need for family preservation services.[74] The family regulation system uses

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[73] U.S. DEP'T HEALTH & HUM. SERVS., *supra* note 16, at 70.

[74] The standard for becoming an "evidence-based" model varies depending on what clearinghouse or assessment criteria is used; however, these models all have some formal research component which "validates" that the model is effective with a given population. *See, e.g.*, CASEY FAM. PROGRAMS, IMPLEMENTING EVIDENCE-BASED CHILD WELFARE: THE NEW YORK CITY EXPERIENCE (2017), https://fpg.unc.edu/sites/fpg.unc.edu/files/

intensive evidence-based models to deliver clinical services in families' homes, making them more accessible for families who may otherwise struggle to access services. But, these services, which are contracted and funded by family regulation agencies, are also used as monitoring agents who have frequent access to the family and can report any potential safety concern.

Prevention agencies are required to document casework contacts in a system accessible by family regulation workers, regardless of whether a family has engaged voluntarily or has engaged pursuant to a court mandate. Information like psychotherapy notes, which would normally be restricted under privacy laws, are visible to the family regulation agency. These notes can be accessed after the case is closed if the agency becomes involved with the family in the future, keeping generations of impacted families tangled in the web of the family regulation system while also weakening family support and increasing the likelihood of family separation.

The federal government has prioritized increased funding for alternative responses to foster care through the passage of the Family First Prevention Services Act.[75] This federal legislation allows states to claim funds for prevention services that are supported by research. Similarly in New York City, ACS recently announced plans to expand the CARES program.[76] CARES is an alternative to investigation offered to families who are open to working with ACS and need support. In exchange for cooperating with service referrals, the parent will avoid a substantiated report with the child maltreatment hotline. These offerings are certainly preferable to investigations or removals; however, they fail to address the root causes for the majority of neglect allegations, and instead vastly increase the number of families

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resources/reports-and-policy-briefs/evidence-based-child-welfare-nyc.pdf [https://perma.cc/L38T-2JQC].

[75] *Family First Legislation*, NAT'L CONF. STATE LEGISLATURES (Jan. 15, 2021), https://www.ncsl.org/research/human-services/family-first-updates-and-new-legislation.aspx [https://perma.cc/W4ZQ-LN8B].

[76] Press Release, Admin. for Child.'s Servs., Administration for Children's Services Announces Citywide Expansion & Renaming of the 'Family Assessment Response;' Now Known as 'CARES,' Alternative Child Welfare Approach Works Hand-in-Hand with Families to Provide Support Without the Need for a Traditional Investigation or Court Involvement (Oct. 19, 2020), https://www1.nyc.gov/assets/acs/pdf/PressReleases/2020/ACSCARESExpansion.pdf [https://perma.cc/M3FF-PPQR]. CARES stands for Collaborative Assessment, Response, Engagement & Support. *Id.* at 1.

under government surveillance and supervision. Impacted families should not have to give up their privacy in exchange for genuine support and aid. As Dorothy Roberts points out, we cannot expect even the most intensive prevention services to fix the family regulation system—especially when services designated to keep families together operate within the same system that tears them apart.[77]

The family regulation system may appear less punitive when directing federal funds to programs that allow children to remain home with their parents with services instead of going into foster care. However, we must recognize how prioritizing family preservation in the form of services over financial support and concrete needs perpetuates harm to targeted communities. Family First increases funding for formal service provision instead of resources like safe housing, clothing, or food for needy families, contributing to the narrative that families are system-involved because they are unfit parents or have poor judgment. In reality, family regulation involvement is more likely explained by limited resources and the over-surveillance of low-income Black and Brown communities. The beneficial elements of prevention services, like housing subsidies and daycare vouchers, should be accessible to families who need them without a referral from the family regulation system and the surveillance that accompanies it.

It is imperative that interventions designed to keep children out of foster care reflect the indisputable relationship between poverty and allegations of child maltreatment. Despite numerous studies demonstrating that child maltreatment rates diminish when families receive increased cash assistance[78] and access to safe, affordable housing,[79] the family regulation system does not focus on reducing poverty or improving the economic conditions of impacted communities. We must make a significant financial investment in addressing child poverty over continued surveillance; prevention services should not only include home visits from social workers, monitoring, and clinical services.

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[77] ROBERTS, SHATTERED BONDS, *supra* note 23, at 148.

[78] Kristen Shook Slack, *Child Protective Intervention in the Context of Welfare Reform: The Effects of Work and Welfare on Maltreatment Reports*, 22 J. POL'Y ANALYSIS & MGMT. 517 (2003).

[79] Saahoon Hong & Kristine N. Piescher, *The Role of Supportive Housing in Homeless Children's Well-Being: An Investigation of Child Welfare and Educational Outcomes*, 34 CHILD. & YOUTH SERV. REV. 1440, 1440 (2012).

Anti-poverty legislation and reform must become part of the family preservation agenda, and prevention services must extend beyond an agency whose purpose is to surveil and prosecute low-income communities. Connecting families to public assistance and temporary housing is not sufficient when those services are inaccessible and do not adequately meet families' needs.

III. LOOKING FORWARD: SUPPORT, NOT SURVEILLANCE

We must reimagine the family regulation system to deliver material support to the low-income families it purportedly serves, without surveillance and prosecution. The family regulation system's dependence on surveillance and mandated reporting as a solution to child maltreatment is a fallacy.[80] Families must have access to concrete supports and services without interacting with mandated reporters. However, any "hotline" or referral service must not be staffed by anyone connected to the family regulation system. Interventions should be informed by parents and take into account the lived experiences of the families they serve, including the impact of ongoing surveillance and systemic racism.[81] The damage being done to Black and Brown families will continue unchecked "within all aspects of the [family regulation system] as long as we remain complicit in upholding the accepted racist conditions experienced by those most disenfranchised in our society."[82]

The family regulation system places a close watch on low-income Black and Brown families through the mobilization of mandated reporters, harming families and failing to produce positive outcomes for children. Provision of services and material support for the families who need it should be divorced from the family regulation system. Parents are experts on the needs of their families. They must be given the freedom to seek out

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[80] *See* Melton, *supra* note 35, at 10 (arguing the assumptions that guided the mandated reporting laws were erroneous).

[81] Darcey H. Merritt, *Lived Experiences of Racism Among Child Welfare-Involved Parents*, 13 RACE & SOC. PROBS. 63, 70 (2021) ("Future reforms to CWS interventions should be informed by parent's perceptions about the challenges related to ways in which racism and implicit bias appear in service delivery.").

[82] *Id.* at 8.

necessary supportive services without fear of separation or of being subjected to a debilitating level of surveillance and control.

Until the family regulation system is dismantled, and its tentacles of surveillance amputated, Black and Brown families, especially those from low-income communities, will continue to be punished for their poverty.

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ARTICLE

ABOLITION, SETTLER COLONIALISM, AND THE PERSISTENT THREAT OF INDIAN CHILD WELFARE

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Family separation is a defining feature of the U.S. government's policy to forcibly assimilate and dismantle American Indian and Alaska Native (AIAN) tribal nations. The historical record catalogues the violence of this separation in several ways, including the mass displacement of Native children into boarding schools throughout the 19th century and the widespread adoption of Native children into non-Native homes in the 20th century. This legacy eventually prompted the passage of landmark legislation known as the Indian Child Welfare Act of 1978 (ICWA). ICWA introduced federal protections against the unnecessary removal of Native children and affirmed the role of the tribe as an important

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Both authors are incredibly grateful to the organizers and journal editors that convened the *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being* Symposium. This symposium honors the 20th anniversary of Professor Dorothy Roberts' pathbreaking book, *Shattered Bonds: the Color of Child Welfare,* a scholar and advocate that continues to inform their empirical and theoretical work. The authors are indebted to the *Columbia Journal of Race and Law* editorial team for their careful and thoughtful reading of this text. They dedicate this project to the countless Native families who were unnecessarily torn apart by the state. Their experiences demand recognition and accountability.

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partner in child welfare proceedings. To what extent has the federal government honored the commitments of ICWA and reversed the trajectory of Native family separation since 1978? What can be done to reduce the threat of the current child welfare system on the well-being of Native families?

In this Article, we use administrative and historical data to statistically evaluate the magnitude of change in AIAN family separation since the passage of ICWA and locate the institutional pathways that funnel AIAN families into the child welfare system. We find that, despite long-standing treaty responsibilities to support the health and well-being of tribal nations, AIAN children remain at incredibly high risk of family separation. In particular, we find that the frequency of AIAN children's placement into foster care has remained relatively stable since the passage of ICWA and that the post-investigation removal decision by child welfare agencies is a key mechanism of inequality in family separation. We situate these findings within theories about settler colonialism and Indigenous dispossession to illustrate that the continuous removal of Native children from their homes is not an anomaly. Instead, we argue that the very intent of a white supremacist settler-state is to dismantle Native communities. Based upon these findings, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native and non-White children from their families by the state. We suggest that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive system remains. We conclude by envisioning an abolitionist approach that immediately redirects social and financial resources into the hands of Native families and works cooperatively with tribal nations to promote Indigenous communities of care.

I. INTRODUCTION

The enduring effects of the settler-state's targeted control of non-white families cannot be understated. Recent data indicate that about 15% of American Indian and Alaska Native (AIAN) children and 11% of Black children can expect to enter foster care at some point before their 18th birthday, rates that are remarkably higher than white children (5%).[1] Indeed, the family has long functioned as a site of state regulation. In the case of Native Peoples, two intertwining conduits of settler colonial violence facilitate this regulation: Indigenous land dispossession and the destabilization of Native families and tribes. The historical record catalogues this violence in several ways, including the mass displacement of Native children into boarding schools throughout the 19th century and the widespread adoption of Native children into non-Native homes in the 20th century. As a result, the child welfare system represents an early yet potent mechanism to reproduce the intentions of a white supremacist settler-state, namely the desire to displace and erase Native and non-white families that resist the settler project.

Throughout this Article, we argue that family separation constitutes a *defining* and continuing feature of the relationship between the U.S. government and American Indian tribal nations. We also underscore how separation reveals the state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources. This conclusion is evident in the high and long-standing rates of AIAN family separation that persist despite treaty responsibilities to support the health and well-being of tribal nations. In 1978, the federal government began addressing this separation crisis by passing the Indian Child Welfare Act (ICWA)[2] and acknowledging tribal jurisdiction over the welfare of Native children. These actions, however, did not stop the routine separation of Native children from their families because the law was left to operate within a much larger child protection system that prioritizes surveillance and separation over welfare

[1] Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLOS ONE 1, 5 (2014), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0092785 [https://perma.cc/3GM2-LWNY].

[2] Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963).

and support. The state also failed to implement a systematic way to track when and where Native families are pushed into the child welfare system. This lack of transparency created an inability to estimate the prevalence and frequency of family separation over time. It also made it more difficult for tribes and advocates to determine which stages of child welfare case processing are most precarious for AIAN children, which limits opportunities for increased tribal intervention.

In this Article, we step into this troubling federal gap and provide new empirical evidence about the enduring legacy of Native family separation. We do so within an important national moment of reckoning about the efficacy of the child welfare system, its harmful treatment of minority families, and its undeniable origins in federal policy to assimilate and eradicate Native Peoples. In Part I, we begin by introducing theories about settler colonialism and Indigenous dispossession to situate the social and historical context of Native family separation. We also catalogue key legal moments that illustrate that the continuous removal of Native children from their homes is not an anomaly. Instead, we argue that the very intent of a white supremacist settler-state is to dismantle Native families and tribal nations and that child removal is key to this goal. In Part II, we use administrative and historical data to isolate and illustrate the institutional pathways that lead AIAN families into the child welfare system and evaluate the magnitude of change in AIAN family separation since the passage of the ICWA. In Part III, we provide an overview of our empirical findings, examine their social and legal implications for contemporary Native family separation, and delineate their connection to the settler colonial context we examine in Part I. In Part IV, we suggest an abolitionist approach to address the state's ongoing efforts to dispossess Native communities of their children and homelands. In this section, we look to the AIAN family experience and consider why and how the child welfare system (not ICWA) must be *reimagined* and ultimately *abolished* to cultivate care and responsibility rather than discipline and punishment. An abolitionist approach requires a clear acknowledgment of the harms committed against a community. In the case of Native Peoples, this requires a moral reckoning of the state's allegiance to white supremacy and subsequent attempts to assimilate away the livelihood, values, and kin networks of Indigenous Peoples. From here, this approach would redirect social and financial

resources into the hands of Native families and work cooperatively with tribal nations to promote Indigenous communities of care, as defined by tribal nations. To this end, we urge lawmakers to transfer federal funds, made available through Title IV-E of the Social Security Act, directly to Native families who can provide for children in ways that align with their cultural practices and vision for intergenerational healing.

II. SETTLER COLONIALISM DRIVES FAMILY SEPARATION

Native family separation is an outcome of U.S. colonialism and settlement, made possible by the state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources. Three key Congressional measures illustrate these commitments via forced assimilation and Indigenous land dispossession: the Civilization Fund Act of 1819,[3] the Indian Removal Act of 1830,[4] and the General Allotment Act of 1887.[5] Taken together, these laws demonstrate governmental efforts to break up Native lands and families and fundamentally limit tribal sovereignty. This Congressional legacy provides critical context to current data on Native child removal, linking early histories of settler violence with later assimilationist programs including boarding schools and the adoption of Native children into non-Native homes. We suggest that this history constitutes the origins of the child welfare system generally and specifically led to Native resistance against family separation, most significantly through the Indian Child Welfare Act of 1978 which sought to end generations of abuse, mistreatment, and the forcible removal of Native children from their homes.

A. Colonialism, Settler Colonialism, and Indigenous Dispossession

Historically, colonialism is generally understood as an invasion by European powers onto foreign lands in an effort to exploit local resources to the detriment of the First Peoples living

[3] Civilization Fund Act of 1819, Pub. L. No. 15–85, 3 Stat. 516b.

[4] Indian Removal Act of 1830, Pub. L. No. 21–148, 4 Stat. 411.

[5] Dawes Act, ch. 119, § 5, 24 Stat. 389 (1887) (current version at 25 U.S.C. § 348).

and caring for these homelands.[6] To this end, colonialism encompasses an intentional set of political actions and policies designed to control, develop, and extract resources for the gain of the colonial nation-state located elsewhere. Settler colonialism is differentiated from colonialism. This social process involves settlers not only occupying and seizing resources for profit, but permanently settling in the territory, thereby displacing inhabitants in order to secure land to build their own homes and communities.[7] Settler colonialism is also differentiated from colonialism by its guiding philosophy, namely the logic of elimination, which seeks to physically and culturally eradicate local inhabitants[8] through violence, coercion, and the implementation of laws, policies, and organizations that fulfill its predatory objectives.

The U.S. is a settler-colonial state and early Americans eagerly removed Native Peoples from their homelands, often with the use of force and violence, to establish settlements, commerce, and statehood. Settler colonialism embodies a series of social processes, expectations, and organizing principles, all of which affect the lives of both settlers and Indigenous Peoples. One key outcome for settlers is the creation and manifestation of white supremacy, which is both a narrative of dominance and superiority[9] and a structuring process that affects race, space, and place—all of which inform how settlers rationalize their presumptions about entitlements to Indigenous lands and bodies.[10] Whiteness and white supremacy are inherent

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[6] Saskia Sassen, *A Savage Sorting of Winners and Losers: Contemporary Versions of Primitive Accumulation*, 7 GLOBALIZATIONS, 23 (2010).

[7] Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 SOCIO. RACE & ETHNICITY 52, 55 (2015); Alyosha Goldstein, *The Jurisprudence of Domestic Dependence: Colonial Possession and* Adoptive Couple v. Baby Girl, DARKMATTER, (May 16, 2016), http://www.darkmatter101.org/site/2016/05/16/the-jurisprudence-of-domestic-dependence/ [https://perma.cc/E84L-KWA3]; Margaret D. Jacobs, *Seeing Like a Settler Colonial State*, 1 MOD. AM. HIST. 257, 259 (2018).

[8] Glenn, *supra* note 7, at 57; Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 388 (2006).

[9] Dwanna L. McKay et. al., *Theorizing Race and Settler Colonialism Within U.S. Sociology*, 14 SOCIO. COMPASS 1, 3 (2020).

[10] Anne Bonds & Joshua Inwood, *Beyond White Privilege: Geographies of White Supremacy and Settler Colonialism*, 40 PROGRESS HUM. GEOGRAPHY 715, 724 (2016).

components of settler colonial structures; in the eyes of settlers, the social inclusion and exclusion of Native Peoples is incumbent upon their assimilation to the standards of the newly established white society.[11]

B. The Legacy of American Indian Family Separation

Here, we turn to a historical review of three key Congressional interventions that undergird the legacy of family separation and continue to threaten tribal sovereignty. The settler drive towards cultural dominance and land ownership has forcibly displaced tribes, separated them from vital resources including food and water, and prohibited the teaching of Native languages and worldviews. In recent decades, some settler tactics of cultural domination shifted in response to changing institutional reforms such as ICWA, but as the legislation below shows, the ideological origins are longstanding. Despite old and new efforts of erasure by the settler state, the continued, unassimilated existence of Native Peoples and cultures remains vibrant, innovative, and deeply rooted in Indigenous ways of knowing.

1. The Civilization Fund Act of 1819

In 1819, Congress passed the Civilization Fund Act for the "purpose of providing against the further decline and final extinction of the Indian tribes."[12] The Act allocated federal funds "to employ capable persons, of good moral character, to instruct [Native Peoples] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic."[13] The Act also formalized Congressional support of Christian missionaries who were already working and proselytizing among the tribes.[14] Together, linking church and state explicitly, Congress and the Christian missionaries sought to assimilate tribal members into European culture by removing

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[11] *See generally* MAILE ARVIN, POSSESSING POLYNESIANS: THE SCIENCE OF SETTLER COLONIAL WHITENESS IN HAWAI`I AND OCEANIA (2019); AILEEN MORETON-ROBINSON, THE WHITE POSSESSIVE: PROPERTY, POWER, AND INDIGENOUS SOVEREIGNTY (2015).

[12] Civilization Fund Act of 1819, Pub. L. No. 15–85, 3 Stat. 516b.

[13] *See id.*

[14] Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 280 (2012).

their tribal identities and worldviews.[15] Assimilation efforts came in many forms and the imposition of agricultural education was believed to be one way of pacifying tribal members and instilling a patriarchal social order.[16] For example, the missionary schools commonly taught boys husbandry, plowing, and planting, while girls learned housekeeping, spinning, and weaving.[17] This gendered educational schema, designed around manual labor, demonstrates how the Act was used to create a subordinate service class of persons for white families, composed primarily of Native children. Colonial paternalism of this kind eventually promoted the construction of off-reservation Indian boarding schools, where children could be further alienated from their social and cultural teachings.[18] While in boarding schools, children were rarely allowed contact with their family. Instead, Native children were subject to the demands of Christian missionaries who attempted to assimilate them into white culture, often using violence and manipulation.[19] The Indian Boarding Schools carried out the U.S. mission of assimilating Native children until the last school closed in 1973.

2. The Indian Removal Act of 1830

Roughly a decade later, and with a strong push from southern supporters, Congress signed the Indian Removal Act of 1830. The Act provided President Andrew Jackson with unrestrained authority to seize Native lands and relocate tribal nations west of the Mississippi River.[20] The intent and effect of the Act allowed white settlers to acquire desirable Native territory with the direct assistance of their government. Indeed,

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[15] Alia Wong, *The Schools that Tried—But Failed—to Make Native Americans Obsolete*, ATLANTIC (Mar. 5, 2019), https://www.theatlantic.com/education/archive/2019/03/failed-assimilation-native-american-boarding-schools/584017/ [https://perma.cc/N95E-FNGH].

[16] Alyosha Goldstein, *The Ground Not Given: Colonial Dispositions of Land, Race, and Hunger*, 36 SOC. TEXT 83, 87 (2018) [hereinafter Goldstein, *Ground Not Given*].

[17] *Id.* at 88.

[18] Carlisle Indian School was he first off-reservation boarding school founded by Captain Richard Henry Pratt in 1879. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892).

[19] Theresa Rocha Beardall, Adoptive Couple v. Baby Girl*: Policing Authenticity, Implicit Racial Bias, and Continued Harm to American Indian Families*, 40 AM. INDIAN CULTURE & RSCH. J. 119, 126 (2016).

[20] Indian Removal Act of 1830, Pub. L. No. 21–148, 4 Stat. 411.

"buttressed by the twin pillars of greed and racism,"[21] the Act's settler-colonial design secured Native lands and resources to establish homes and communities for white people. While Congress and the President were intent on forced removal, Chief Justice John Marshall's majority opinion in *Worcester v. Georgia*[22] suggested a different relationship with tribal nations was possible, one in which tribes were afforded territorial rights, Congressional representation, and nation-to-nation negotiations under the U.S. Constitution.[23] Under Marshall, the Supreme Court concluded that tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive." Despite Justice Marshall's understanding that tribes were being encroached upon by southern states,[24] the U.S. began forcing tribes to sign treaties and move west. Most famous to many Americans is the Trail of Tears (1831–1877) that removed many southeastern tribes, such as the Cherokee, from their homelands to what is now Oklahoma. Separating Native Peoples from their lands through the Indian Removal Act mirrors the eventual removal of Native Peoples from their tribes and families.[25]

3. The General Allotment Act of 1887

The General Allotment Act of 1887, a federal assimilationist tool commonly referred to as The Dawes Act, was designed to transform tribal lands into private property. The Act granted 160 acres of tribal land to each Native head of household and deemed all the remaining tribal lands as surplus.[26] The federal government allocated surplus lands to non-Native homesteaders, ultimately reducing the already limited acreage of Native land by two-thirds.[27] Unsurprisingly, white settlers were

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[21] N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 8 (2008).

[22] 31 U.S. 515 (1832).

[23] TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS 181 (2009).

[24] GARRISON, *supra* note 23, at 190; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

[25] John P. Bowes, *American Indian Removal Beyond the Removal Act*, 1 NATIVE AM. & INDIGENOUS STUD. 65 (2014).

[26] Dawes Act, ch. 119, § 5, 24 Stat. 389 (1887) (current version at 25 U.S.C. § 348).

[27] Cobell v. Babbitt, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff'd*, 240 F.3d 1081 (D.C. Cir. 2001).

granted the best allotments and Native Peoples were often forced onto land that was unsuitable to sustain farming or livestock.[28] Despite the disparate quality of land, Native land was held in a trust by the U.S. government; Native Peoples were stereotyped as incompetent, and thus vulnerable to unscrupulous whites who wished to buy or lease the land for cheap.[29]

In addition to a desire for land and resources, legal scholars note that The Dawes Act also sought to assimilate Native Americans into the Western practice of private land ownership and nuclear family households.[30] In effect, The Dawes Act forced Native Peoples to cease communal living, with each family being given an allotment of land only to be used by the individual to which it was allotted.[31] The dual desire for wealth and assimilation explicitly targeted the dissolution of the cultural bonds and kinship networks that are commonly used in child rearing, limiting the intergenerational transfer of language, traditions, cultural practices, histories, and worldviews to Native children. One way to frame the implications of this Act is that it constituted a critical phase of cultural and physical separation and set the stage for tribal members to be continuously disconnected from their Indigenous worldviews.

C. Adoption and the Indian Child Welfare Act of 1978

Native Peoples endured, and continue to endure, a systematic genocide at the hands of the federal government. From boarding schools to kidnapping and forced sterilization this violence included physical, sexual, and emotional abuse. Particular to the issue of family separation is the concerted use of non-Native adoption.[32] In 1958, the Bureau of Indian Affairs launched the Indian Adoption Project (IAP), a program designed to "rescue" Native American children from impoverished Native parents and tribes and place them in adoptive homes with white

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[28] Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609 (2011).

[29] Lauren L. Fuller, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison with the Dawes Act of 1887*, 4 AM. INDIAN L. REV. 269 (1976).

[30] *Id.*

[31] *See* 25 U.S.C. § 348.

[32] Brianna Theobald, "The Simplest Rules of Motherhood": Settler Colonialism and the Regulation of American Indian Reproduction, 1910–1976 (May 2015) (Ph.D. dissertation, Arizona State University) [https://perma.cc/YJS9-ZNF8].

families.[33] The IAP was considered to be a cost-effective and permanent solution to "the Indian problem," a term that describes the U.S. government's frustration with the presence of Native Americans on the land they desired.[34] In effect, the IAP sought to sever cultural ties between Native children and their tribes and families in order to fully assimilate them into white society. In contrast to the Indian Boarding Schools, the IAP cost very little to the taxpayers, as the financial burden of assimilation was placed solely on the children's adoptive families.[35]

In 1968, the IAP was incorporated into the Adoption Resource Exchange of North America (ARENA) in order to place even more children outside of their homes.[36] These adoptive efforts were disastrously successful. A 1976 report from the Association on American Indian Affairs (AAIA) provided grim findings: upwards of 25 to 35% of all Native children were being placed in out-of-home care and 85% of those children were placed in non-Native homes.[37] During the Indian child welfare crisis of the 1960s and 1970s, the Bureau of Indian Affairs often portrayed Native women as impoverished, unwed mothers who lacked the resources to support their families in order to justify placing their children into foster and adoptive homes.[38] For this reason, among others, these shocking AAIA data may be a serious undercount of the widespread reality of child removal.

The Indian Child Welfare Act (ICWA) was enacted in 1978 to address the AAIA's findings and end generations of abuse, mistreatment, and forcible removal of Native children from their homes. The Act clearly states its commitment to protect Native families and tribes by preventing the unnecessary removal and displacement of American Indian children.[39] This

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[33] MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 18 (2014) [hereinafter, JACOBS, GENERATION REMOVED].

[34] *Id.* at 19.

[35] *Id.*

[36] *Id.* at 20.

[37] Cheyañna L. Jaffke, *Judicial Indifference: Why Does the "Existing Indian Family" Exception to the Indian Child Welfare Act Continue to Endure?*, 38 WASH. ST. U. L. REV. 127, 130 (2011); Rocha Beardall, *supra* note 19, at 126.

[38] JACOBS, GENERATION REMOVED, *supra* note 33, at 52.

[39] Jaffke, *supra* note 37, at 131; Jason R. Williams et al., *Measuring Compliance with the Indian Child Welfare Act*, CASEY FAMILY PROGRAMS 4 (Mar. 2015), https://theacademy.sdsu.edu/wp-content/uploads/2015/06

comprehensive legislation was designed to promote the best interests of Native Peoples and children by creating minimum federal standards for removal. Further, ICWA stipulated that when possible, American Indian children should be placed with extended family or "foster or adoptive homes that reflect the unique values of Indian culture" in the event that child removal was unavoidable.[40] Unfortunately, some social actors may circumvent protective laws such as ICWA by exploiting loopholes that can diminish positive intent.[41] State and federal courts, for example, were inconsistent in their interpretation and compliance with the law,[42] and in some cases courts drew on the "existing Indian family" exception in order to avoid applying ICWA altogether.[43] The "existing Indian family" exception provided state courts the ability to circumvent ICWA if the child or parents cannot demonstrate the maintenance of a significant political, social, or cultural relationship with their tribe.[44] The federal government responded with new regulations in 2016 to address these profound compliance problems. Notably, these new regulations include more explicit requirements around active efforts to engage tribes, limitations on good cause to refuse transfer to tribal courts, limitations to deviations from placement preferences, and make clear that the "existing Indian family" is not a requirement.[45]

/measuring-compliance-icwa-brief.pdf [https://perma.cc/W3LL-V2SB]; Rocha Beardall, *supra* note 19; Lydia Killos et al., *Strategies for Successfully Recruiting and Retaining Preferred-Placement Foster Homes for American Indian Children: Maintaining Culture and Compliance with the Indian Child Welfare Act*, CASEY FAMILY PROGRAMS 4 (Mar. 2017), https://www.casey.org/media/icwa-recruitment-retention.pdf [https://perma.cc/9SFF-T5E7].

[40] Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963); GENERATION REMOVED, *supra* note 33, at 3; Williams et al., *supra* note 39.

[41] Mathew L. M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 888 (2016).

[42] Williams et al., *supra* note 39, at 6; Killos et al., *supra* note 39, at 4.

[43] Jaffke, *supra* note 37, at 129.

[44] *Id.* at 136.

[45] Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,779, 38,801 (June 14, 2016).

III. AN EMPIRICAL STUDY OF INDIAN CHILD WELFARE

Despite substantial efforts to address the ongoing crisis of Native family separation,[46] American Indian and Alaska Native (AIAN) children in the U.S. are still more likely to be separated from their parents and placed into foster care than children from any other racial or ethnic group.[47] With a sense of the social and historical context, and the settler-state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources, we turn to our empirical study of Native family separation. We use administrative and historical data to isolate and illustrate the institutional pathways that lead AIAN families into the child welfare system, evaluate the magnitude of change in AIAN family separation since the passage of the Indian Child Welfare Act (1978), and situate the child welfare system in the context of ongoing white-settler colonization. We estimate age-specific and lifetime risks of experiencing a child welfare system event for Native and non-Native children, drawing attention to the timing and geographic distribution of these risks.

Our research is motivated by a persistent concern that ICWA's expressed intentions, and desperately needed protections, may in fact be stymied by larger social forces. Namely, in contexts of structural inequality and institutional racism,[48] we are concerned that white supremacist desires to displace and erase Native Peoples persist in bureaucratic structures such as the national child welfare system. Given the size and influence of this system, and its predatory history among non-white families, the jurisdictional powers and placement preferences of ICWA alone are unlikely to eliminate the inequalities that drive Native family separation.

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[46] Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 CHILD. & YOUTH SERV. R. 1667 (2012).

[47] Youngmin Yi et al., *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011–2016*, 110 AM. J. PUB. HEALTH 704 (2020).

[48] Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253 (2020).

A. Quantifying Rates of Family Separation and System Contact

We estimate age-specific and lifetime risks of experiencing a series of child welfare system events for Native and non-Native children, then evaluate how likely cases are to move "up" the chain of more serious outcomes, conditional on experiencing a lower-level outcome. In doing so, we provide evidence that inequalities in child welfare system outcomes for AIAN children emerge at distinct stages of life and distinct phases of child welfare system case processing. We evaluate the following child welfare system outcomes: (1) investigations, (2) confirmed maltreatment cases, (3) foster care removals, (4) placement with non-kin and non-AIAN foster caretakers, and (5) termination of parental rights.

B. Data and Methods

We use three primary forms of data to chart AIAN family contact with child welfare systems. First, we rely on data compiled by the Association on American Indian Affairs (AAIA) to document the breadth and depth of American Indian family separation through a series of surveys in the 1970s.[49] These data formed a critical portion of the evidence presented by AAIA in support of the passage of ICWA and have become the most widely cited set of statistics on the crisis of Indian family separation in the years preceding the passage of ICWA. Second, we use data from the National Child Abuse and Neglect Data System[50] (NCANDS) child file for 2014–2018. NCANDS is collected by the U.S. Administration for Children and Families and documents all children who were the subject of a screened-in child welfare investigation. Lastly, we use the Adoption and Foster Care Analysis and Reporting System[51] (AFCARS), a federal data

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[49] *Hearing to Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 537–597 (1977) [hereinafter *Hearing to Establish Standards*].

[50] Children's Bureau, Administration On Children, Youth And Families, Administration For Children And Families, U. S. Department Of Health And Human Services. *National Child Abuse and Neglect Data System (NCANDS), child file* [dataset] National Data Archive on Child Abuse and Neglect (2019), https://www.ndacan.acf.hhs.gov/datasets/datasets-list-ncands-child-file.cfm.

[51] NATIONAL DATA ARCHIVE ON CHILD ABUSE AND NEGLECT, U.S. DEP'T HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., ADOPTION AND FOSTER

system that tracks all children in foster care or placed in state-sponsored adoption in the U.S., to chart the scale of Native family separation between 2014–2019.

Throughout the 1960s and 1970s, the AAIA collected data on the number of Native children that had been separated from their families through a variety of state and non-state institutions. In Table 1, we provide a summary of the AAIA data on the scale of child removal in the foster care and adoption systems in 13 states (in the early to mid 1970s),[52] as well as data on contemporary caseloads in those same states (from the 2019 AFCARS). To compare the scope of AIAN family separation in the 1970s and today, we compare point-in-time caseloads for the 13 states with complete data and proportional changes in these caseloads. A point-in-time caseload counts all children in a given system on a single date of the year. AAIA collected point-in-time caseloads for foster care and adoption for each of the surveyed states in the 1970s. Using AFCARS foster care files, we can identify the numbers of Native and non-Native children in foster care for each state and year on the final day of the annual reporting period. AFCARS adoption files only include *new* adoptions in each year's submission. To obtain a point-in-time estimate that is comparable to AAIA's count of children in adoptive households 21 years of age or younger, we aggregate data from 2010–2019, count all AIAN children adopted during this time period, then remove from the count those children who would be over 21 years of age in 2019.

Typically, we would prefer to compare the incidence of foster care through a comparison of per capita rates. However, changes in the composition of the AIAN population between 1976 and 2019 make such comparisons impractical. The magnitude of

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CARE ANALYSIS AND REPORTING SYSTEM (AFCARS), FOSTER CARE FILE [dataset] (2019), https://www.ndacan.acf.hhs.gov/datasets/datasets-list-afcars-foster-care.cfm [https://perma.cc/LYU5-MECM].

[52] The AAIA focused survey efforts on states with large AIAN populations. These 13 states with complete data on adoption and foster care are Alaska, Arizona, California, Michigan, Minnesota, Montana, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin. 6 states did not report complete data on adoption, but did report complete data on foster care. These states were Idaho, Maine, Nevada, New Mexico, New York, and Wyoming. The timing of responses to AAIA's agency surveys varied between 1972 and 1976 in these data, but consistently report foster care caseloads as point-in-time estimates of children in out-of-home foster care. They are comparable to contemporary point-in-time caseload counts from AFCARS.

change in the AIAN child population between 1976 and 2019 (243% growth) cannot be explained by population processes alone. Shifting practices of self-identification and Census data collection dramatically changed the scope of the AIAN population enumerated in the Census in decades following the 1960s.[53] In 1980, for example, the Census began asking respondents to self-identify their race, rather than relying on Census enumerator classifications. Coupled with an increase in American Indians and Alaska Native Peoples self-identifying as Native, there were dramatic increases in the enumerated Native population in the United States between 1970 and today. Because the population identified as AIAN in the 1970 census is qualitatively different from the population identified in later censuses,[54] direct population-based comparisons are inappropriate. We summarize the counts of cases and population figures from 1976 and 2019 in Table 1.

Population data are used to compute rates of exposure across groups for the contemporary child welfare system data (2014–2018). We rely on data from the U.S. Census Population Estimates Program (PEP). We use state-level estimates of all individuals identified as AIAN alone or AIAN in combination with any other group by age to measure the size of the AIAN population.[55]

Using AFCARS, NCANDS and Census population data, we compute 2014–2018 period life tables to estimate age-specific and lifetime risks (by age 18) of experiencing a range of child welfare system outcomes for AIAN children.[56] This period life table approach simulates a cohort life table by making two key assumptions: (1) the age-specific population distribution observed between 2014–2018 will remain constant, and (2) the age specific rates of first event incidence observed between 2014–2018 will remain constant. While these assumptions are likely

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[53] Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947, 950–53 (1995).

[54] Jeffrey S. Passel, *The Growing American Indian Population, 1960-1990: Beyond Demography*, 16 POP. RSCH. & POL. REV. 11 (1997).

[55] U.S. CENSUS BUREAU, ANNUAL COUNTY RESIDENT POPULATION ESTIMATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: APRIL 1, 2010 TO JULY 1, 2019 (2019), https://www2.census.gov/programs-surveys/popest/datasets/2010-2019/counties/asrh/cc-est2019-alldata.csv.

[56] SAMEL H. PRESTON, PATRICK HEUVELINE, & MICHEL GUILLOT, DEMOGRAPHY: MEASURING AND MODELING POPULATION PROCESSES (2001).

not realistic—since demographic, policy, and social changes are likely to change both population distributions and event incidence rates—we proceed in this manner in order to simulate lifetime risk of experiencing key child welfare system outcomes. While they provide valuable insight into contemporary rates of contact, caution should be used in interpreting these results to project future rates of contact.

C. The Historical and Contemporary Scale of Native Family Separation

ICWA initiated a dramatic series of changes in the jurisdiction and administration of U.S. child welfare systems. As discussed, the law was intended to address and ameliorate the crisis of family separation in Indian Country. Despite these efforts, however, Native children and families remain at higher risk of separation than any other group in the United States.[57] Table 1 displays the change in the counts of Native children in foster care or adoption as documented by AAIA's mid-1970s surveys and by AFCARS in 2019. These caseload numbers are point-in-time counts of the number of children in either foster care or adoption.

In 1976, AAIA found that about 5,687 AIAN children were in foster care in the 13 states for which they collected or estimated complete data (6,665 in the 19 states where some data were missing). In 2019, there were 17,241 AIAN children in foster care in these 13 states,[58] more than three times higher than the number in foster care in 1976. For comparison, there were about 53,364 non-Native children in foster care in these states, compared to about 109,374 in 2019, about double the total number of children. The foster care system has expanded dramatically for all children in the forty years since the passage of ICWA, but far more so for Native children than for non-Native children.

In the mid-1970s, AAIA estimated that 11,157 Native children were in state-involved adoptions, compared to 172,684 non-Native children in the 13 states for which they were able to compile complete data. In 2019, we estimate that there were

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[57] Yi et al., *supra* note 47, at 704.

[58] These are point-in-time caseloads. AFCARS estimates count children in foster care at the end of the annual reporting period, though more children may have entered and/or exited care than these point-in-time estimates describe.

19,221 Native children in state-involved adoptions (an increase of 72%) compared to 161,318 non-Native children in state-involved adoptions (a decline of 7%). While rates of non-Native adoption have slightly declined in these states since the 1970s, rates of Native adoption have increased substantially.[59]

Additionally, Native family separation has a distinctive geography. During advocacy for ICWA, AAIA researchers identified Maine, Minnesota, and South Dakota as having among the most inequitable foster care systems in the country.[60] Inequalities in these state systems persist to this day. To evaluate the magnitude of change in state foster care and adoption systems since the passage of ICWA, we display the growth in the numbers of Native children in foster care or adoption for those states for which we have historical data in Figure 1. Some states have seen modest declines in AIAN foster care caseloads over time. Idaho has seen the steepest decline. 83% fewer Native children were in foster care in 2019 than were in foster care in 1976. Maine, New Mexico, Utah, and Wyoming have also seen caseload declines since the passage of ICWA. However, most of these states have seen substantial increases in the numbers of Native children in foster care. Nearly nine times more American Indian children were in foster care in Oklahoma in 2019 than were in foster care in 1976. California saw more than 400% growth in the Native foster care population over this period, and many other states saw caseloads more than double.

[59] Note that for both foster care and adoption statistics, AAIA estimates from 1976 likely understate the true number of AIAN children affected by these systems. Some states records did not record whether a child was Native, and it is likely that true numbers of family separation in 1976 for AIAN families was higher than those reported. As with census population estimates, cultural practices of self-identification as American Indian/Alaska Native make cross-time comparisons difficult.

[60] *Hearing to Establish Standards*, *supra* note 49, at 538.

Table 1. Children in foster care and U.S. Census child population 21 year and under, 19 select states, 1976 and 2018.

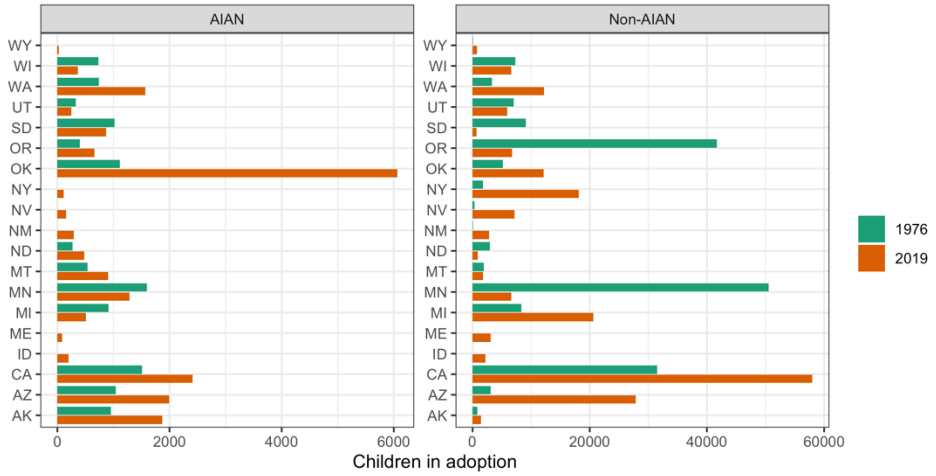
Group	Period	Foster Care (percent change)	Adoption (percent change)
AIAN	1970s	5687	11,157
	2019	17,241 (+203%)	19,221 (+72%)
Non-AIAN	1970s	55364	172,684
	2019	109,374 (+98%)	161,318 (–7%)

State-involved adoptions of AIAN children have also increased in most of these states since the passage of ICWA. While 5 states saw a reduction in the numbers of AIAN children in adoption between 1976 and 2019 (Wisconsin, Michigan, Utah, Minnesota, and South Dakota), 7 saw increases in the number of AIAN children in state-sponsored adoptions. Oklahoma saw the steepest increase, with about 5 times more Indian children in state-sponsored adoptions in 2019 than there were in 1976.

In the 13 states that had complete adoption and foster care data in the AAIA data collection, there were 16,884 AIAN children in either adoption or foster care, compared to 36,462 AIAN children in adoption or foster care in 2019. However, these numbers exclude children who were living in off-reservation Bureau of Indian Affairs boarding schools. In the 1970s, there were about 26,000 AIAN children in BIA boarding schools in 1974.[61] Inclusive of boarding schools, the magnitude of state-sponsored Native family separation has decreased since the passage of ICWA. However, the magnitude of Native family separation through the child welfare system has substantially increased since the passage of ICWA.

[61] *Id.* at 603.

Figure 1. Children in foster care and adoption, select states 1976 and 2019

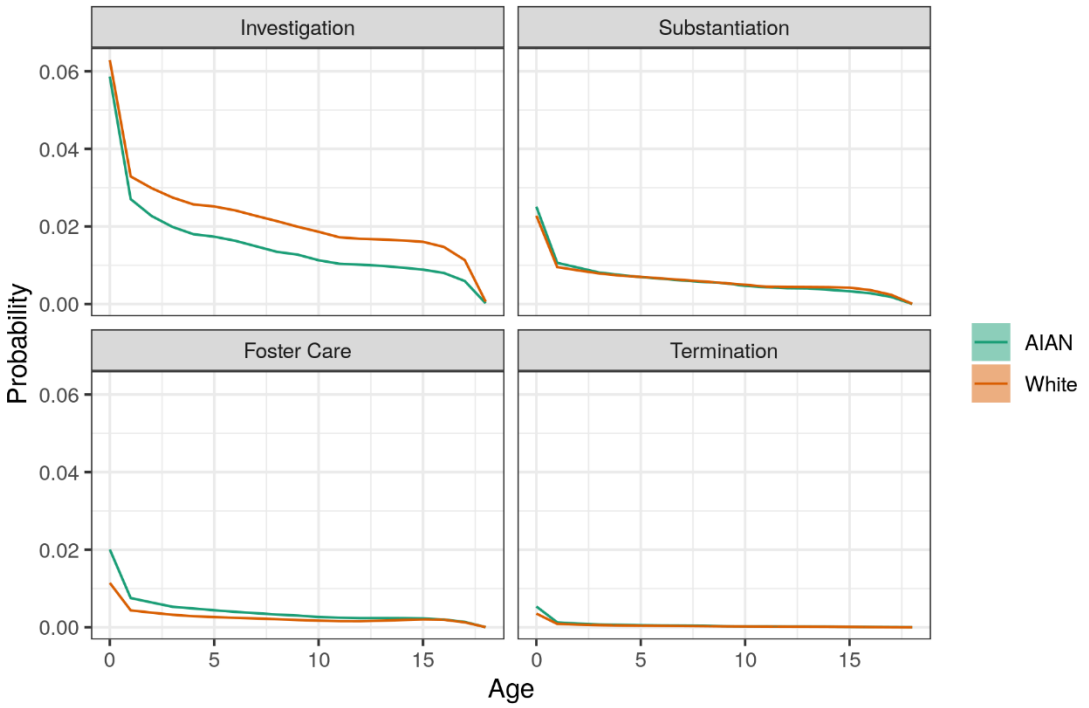


D. The Timing and Prevalence of Interventions

Across all groups, infants are most likely to be subjected to investigation and separation through the child welfare system. Figure 2 uses data from the 2014–2018 AFCARS and NCANDS to display the age-specific risks of experiencing four child welfare events for the first time in a child's life: CPS investigation; substantiation or confirmation of a CPS case; removal into foster care; and termination of parental rights. Risks for all outcomes are highest for infants. Mothers with prior history of CPS contact, and mothers subjected to high levels of surveillance while pregnant and during birth, are routinely subjected to intrusive investigations and family separations.[62]

[62] Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOC. REV. 610 (2020).

Figure 2. Probability of child welfare event incidence for AIAN children by age 18, 2014–2018 risk levels, US totals



Over the life course, and at the national level, at risk levels observed between 2014–2018, we find that 26% of AIAN children are ever investigated by a child welfare agency, 11% ever have an allegation of abuse or neglect confirmed by a child welfare agency, 8% ever are removed from their families and placed into foster care, and about 1.2% ever have their parents' rights terminated through the child welfare system. For white children, by contrast, about 35% are ever investigated by a child welfare agency, 11% ever have a substantiated case, 5% are ever removed into foster care, and 0.8% ever have their parents' rights terminated.[63]

[63] Note that these lifetime incidence rates for AIAN children differ from the author's prior published estimates. This difference is a function of the different population data used for computing risks. This study uses adjusted

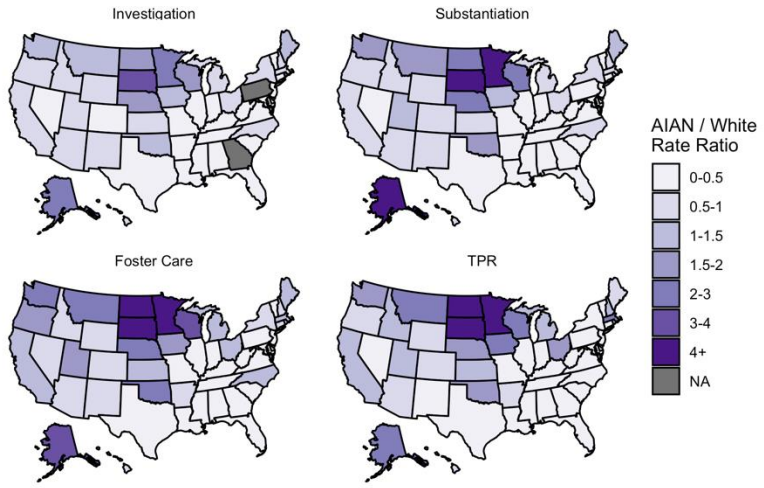
At the national level, AIAN children are 31% less likely than white children to ever be investigated by CPS, as likely as white children to ever have an agency-confirmed case of child abuse or neglect, 60% more likely than white children to ever enter foster care, and 46% more likely than white children to ever have their parents' rights terminated. However, these national averages obscure geographic variation in inequality risk.

E. The Contemporary Geography of Native Family Separation

As shown in the lower-left panel of Figure 3, there are 20 states where AIAN children are more likely than white children to enter foster care. In Minnesota, for example, AIAN children are 8.3 times more likely than white children to ever be separated from their families and placed into foster care. We estimate that about 44% of AIAN children in Minnesota will experience this form of family separation before the age of 18. AIAN children are more than twice as likely as white children to enter foster care in 10 states: Minnesota (8.3 rate ratio, 44% lifetime risk); South Dakota (7.0 rate ratio, 21% lifetime risk; North Dakota (4.3 rate ratio, 25% lifetime risk); Alaska (4.1 rate ratio, 23% lifetime risk); Wisconsin (3.8 rate ratio, 19% lifetime risk); Nebraska (2.8 rate ratio, 19% lifetime risk); Montana (2.8 rate ratio, 28% lifetime risk); Washington (2.4 rate ratio, 15% lifetime risk); Oklahoma (2.4 rate ratio, 17% lifetime risk); and Iowa (2.0 rate ratio, 22% lifetime risk).

AIAN alone or in combination data from the Census PEP, while most prior estimates (*See, e.g.*, Yi et al., *supra* note 47) use data from NIH SEER bridged-race population estimates. This approach is described in Section II.B, *supra*.

Figure 3. Inequality in lifetime risk of experiencing child welfare system events. Cumulative risk computed using 2014–2018 period life tables. Note missing investigations data in PA and GA.



States with high levels of foster care inequality for AIAN families also tend to have high levels of inequality in rates of investigation of AIAN families, the substantiation of investigations of AIAN families, and the termination of AIAN parents' rights. This geographic clustering shows the intensity of the involvement of the child welfare system. The mechanisms of inequality and rates of exposure for AIAN children are complex.

F. Institutional Sites of Inequality in the Child Welfare System

The production of a child welfare case begins with the surveillance of families[64] by mandated reporters of child maltreatment (primarily police, educators, and medical professionals)[65] and by family and community members. If participants in this diffuse surveillance network make an affirmative decision to report a child or family to a state or local child protection agency, that agency then makes a screening

[64] Fong, *supra* note 62.

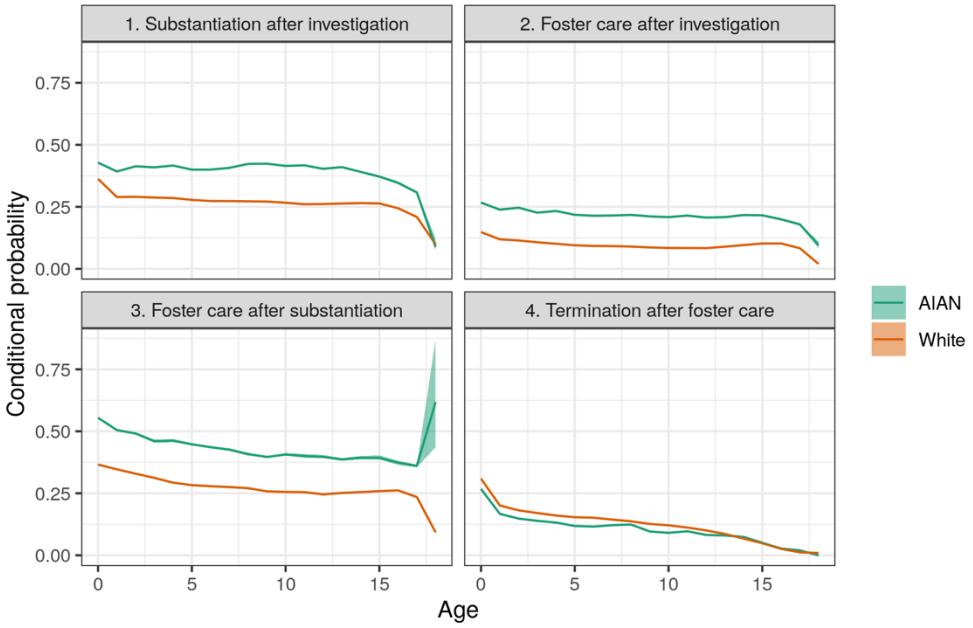
[65] Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 50, 52–53 (2019).

decision about whether to dispatch an investigator to evaluate the child and family. After the worker's investigation, the agency decides whether allegations of maltreatment could be confirmed or substantiated. At any point after an investigator initiates contact with a family, they can recommend that a child be removed from their family into foster care, subject to the oversight and approval of a family court. If an agency decides that reunification with their family is not in the best interests of the child, or certain timelines specified by federal law[66] have passed, the agency will often proceed with efforts to formally sever the legal relationship between a child and their family caretakers.

Below, we evaluate the likelihood that children transition from an earlier stage of case processing to a later stage of case processing. We ask, for example: among those children investigated by a child welfare agency, how many had at least one confirmed allegation of abuse or neglect? We conduct this analysis separately for white and AIAN children to reveal the stages in case processing during which inequalities for AIAN children emerge. We evaluate four decision points that are observable by joining the NCANDS and AFCARS data at the child-level: (1) substantiation after investigation; (2) foster care placement after investigation; (3) foster care placement after substantiation; and (4) termination after foster care. Note that children can be removed from their families into foster care without an agency substantiating a case of child maltreatment. Figure 4 displays these conditional probabilities for both AIAN and white children.

[66] For example, the Adoption and Safe Families Act of 1997 specifies that states should proceed with termination of parental rights after a child has been in foster care for 15 of the prior 22 months. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89.

Figure 4. Age-specific risk of child welfare system event, conditional on prior system event at 2014–2018 levels of risk



At nearly all ages, AIAN children are more likely than white children to have a case substantiated if they are investigated. At all ages, AIAN children are more likely to enter foster care than white children if they are investigated. Around 27% of AIAN infants who are investigated are placed into foster care nationally, compared to around 15% of white infants. Around 55% of AIAN infants that are the subject of a substantiated maltreatment allegation are removed into foster care, compared to about 37% of white children. Nationally, AIAN children in foster care are less likely than White children in foster care to see their parental rights terminated at nearly all ages. But higher levels of foster care placement do result in higher overall rates of termination of parental rights (TPR) for AIAN children than white children.[67]

[67] Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32 (2020).

Conditional on contact with the child welfare system, AIAN children are far more likely than their white peers to be removed from their families and placed into foster care.[68] While differential surveillance may explain some variation in removal, the removal decision itself, based on recommendations from child protection social workers and decisions by family court judges, explains a substantial proportion of the inequality in overall exposure to family separation through foster care for AIAN children.

IV. WHY DOES NATIVE FAMILY SEPARATION PERSIST?

We find that the crisis of Native family separation is ongoing. Despite the intent and breadth of the Indian Child Welfare Act, many jurisdictions have failed to fully implement its provisions and AIAN children remain far more likely than their non-Native peers to be removed from their families by the state.[69] With the closing of the boarding schools, there are now fewer total AIAN children in state custody than there were in the mid-1970s. However, there are dramatically more AIAN children in foster care and adoptive homes in the states for which we have complete data than there were in the 1970s. This transformation in social context, and to some extent a lack of public awareness about this shift, likely shapes how and why the rates of child separation among Native families remain disproportionately high.

Overall, our analyses strongly suggest that post-investigation decision making by child welfare agencies plays a crucial role in this crisis. Agencies are more likely to substantiate maltreatment of Native children once investigated, and more likely to separate them from their family conditional on initial contact. As a result, contact with the child welfare system prompts a crisis for Native families. Even with the necessary protections of ICWA, once AIAN families are the subject of child welfare system investigations, their children are far more likely to be removed from the home than non-Native children. To this point—and within the context of deep austerity, expansive surveillance, assaults on tribal sovereignty, and the ongoing

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[68] *Id.* at 35.

[69] Note that current federal data systems do not track a child's tribal affiliation or ICWA eligibility. American Indian/Alaska Native is included as a racial category in current versions of AFCARS.

failure to honor treaty obligations—the affirmative protections and active efforts of the Indian Child Welfare Act cannot end the crisis of Native family separation alone. For example, so long as the state fails to remedy the economic and social inequalities that drive referrals to the child welfare system, and continues to deem family separation an appropriate intervention when families are in need of care and resources, this crisis will persist. In the U.S., child welfare systems are broadly tasked with addressing poverty-related family crises—including eviction and housing precarity, routine contact with law enforcement, and a lack of critically needed medical and mental health resources. In the absence of a meaningful welfare state, family separation has become a central intervention to respond to child poverty, deepening already existing inequalities in the family separation crisis.[70] Set within this larger context, critically needed ICWA protections rightfully fight to keep families together. What these protections cannot do is directly impact the scope of state surveillance over Native children and provide resources to uplift and support Native children and families absent separation into the foster care system. It is likely the case that so long as state child welfare systems prioritize family regulation over care these inequalities will persist.

A. Land, Sovereignty, and Children

As previously described, the founding of the U.S. was predicated upon a desire to erase Native Peoples and their reciprocal relationships to one another and their homelands. To realize these goals, settlers forcibly enacted geographic displacement, separated tribes from vital resources, and prohibited the teaching of Native languages and worldviews. Given the current and ongoing struggles between tribes and the federal government, including legal battles for jurisdiction over children and land, we suggest that these historical logics of elimination and dispossession persist and must be taken seriously in ongoing research.

Treaties signed between early Americans and Native Peoples outlined federal responsibilities for Native health, safety, and well-being. Unfortunately, the continued violations of these binding legal agreements left a trail of broken treaties—and

[70] Dettlaff & Boyd, *supra* note 48.

subsequently broken families—across the nation.[71] As the spatial control of Native land solidified, and the material and symbolic function of the westward frontier waned, the fictive notion of the frontier was transferred to the control of the Native body. This is not to say that the control of Native lands and bodies was not already taking place simultaneously. But rather, we mark here a particular shift that manifested in a variety of ways, namely in assimilationist projects and the removal of Native children from their homes. Like the concept of *terra nullius*, or "nobody's land," we assert that the nation's child welfare system demands and creates the continuous "discovery" and claiming/taking of Native children as *filius nullius* or "nobody's child."[72] More specifically, we suggest that once physical removal was deemed successful, settlers turned toward the surveillance and management of the Native family as a site of social and cultural control. This nexus of land and body critically illustrates the coercive power of the state to harm Native Peoples[73] as well as all other communities that reject colonial intrusion into family well-being.

The dual and dehumanizing framework of "nobody's land" and "nobody's child" involves forced dependence and ultimately diminishes tribal sovereignty as a central goal.[74] Similar to the idea that a vast, untapped land was in need of stewardship and privatization, the concept of a child without a parent or a child without kin rationalizes settler-logics of discovery. That is, when the settler-state's reliance on cultural assumptions about the appropriateness of a nuclear family steeped in white, middle-class values is not visible, settler assumptions suggest that children have been abandoned, live without care and intention, and need rescue and stewardship, much like the Native lands from which the children were taken. Through this lens, Native kinship is seen as antithetical to settler family norms. Using slippery settler logics as validation, a community that is framed as incapable of appropriately rearing a child is also framed as incapable of producing land and community governance schemas that warrant respect as sovereigns. To undermine tribal sovereignty—which in effect reduces threats against settler

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[71] Fletcher & Singel, *supra* note 41.

[72] Goldstein, *Ground Not Given*, *supra* note 16, at 88.

[73] Frederick J. Turner, *The Significance of the Frontier in American History*, ANNUAL REPORT OF THE AM. HIST. ASS'N FOR THE YEAR 1893, 199 (1893).

[74] Goldstein, *Ground Not Given*, *supra* note 16, at 88.

claims on lands, resources, and children—there is an incentive for the state to continuously "discover" Native children in need of rescue. That is, to diminish the power and futurity of tribal sovereignty, the state manufactures and then rediscovers Native family members made vulnerable by the state, continuing the genocidal practices of removal discussed in Part I.

B. The Native Family as a Site of Settler Regulation

Despite systematic efforts to the contrary, Native families and communities continue to cultivate their relationships and responsibilities to Indigenous lands, waters, and non-human relations. As with any cultural community, the ability to pass on this knowledge to one's children is paramount to ensure cultural continuity and social cohesion. In Native families, children are also the key to ensuring that tribal communities can continue to exist as independent nations capable of exercising their tribal sovereignty. Unsurprisingly then, settler efforts to control Native lands and bodies highlight the family unit as a key site of settler regulation. Legal scholars Bethany Berger, Addie Rolnick, and Kim Pearson each explain that the practice of separating Native families—by way of child removal specifically—emerges from settler logics about land as well as racist logics about belonging, worthiness, and the family. Rolnick and Pearson unravel these racialized logics and suggest that:

> For, although Indians are not identically situated to other racial minority groups, the harm that ICWA was designed to counteract was a racial harm in the sense that the work of severing Native children from tribal communities was part of an effort to eradicate those communities (defined by law and social practice as racially inferior) by absorbing them via interracial marriage and cultural reprogramming.[75]

Armed with destructive racial logics informed by white supremacy, the settler-state has long regulated Native families to assist in its control of Native land, water, and resource rights.

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[75] Addie C. Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on* Adoptive Couple*, White Parenthood, and Constitutional Challenges to ICWA*, 4 MICH. ST. L. REV. 727, 732 (2017); Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295 (2016).

Parallel to attacks against anti-discrimination legislation, the state has also used racist logics to devalue the political import of indigeneity. Anti-ICWA organizations and supporters, for example, use these racist logics to devalue the political and sociocultural orientation of Indigenous Peoples and instead attack ICWA provisions as race-based and exclusionary. This harmful and inaccurate framing erases the political status of Native children and knowingly reduces a tribe's efforts to protect their community's children in the short term, and in the long term diminishes the strength and viability of tribal sovereignty. These anti-ICWA intentions and outcomes in and of themselves are settler colonial.

Scholarship on Native family regulation resonates with legal scholar Dorothy Robert's identification of the racist logics of U.S. child welfare systems. Following demands for Black inclusion in access to welfare policy systems in the early to mid-20th century, public child welfare systems became more intensely focused on surveillance, regulation, stigmatization, and removal[76]—an approach that disrupts and subordinates families. Roberts explains that Black motherhood has been systematically devalued and denigrated,[77] while Black children have been constructed as uniquely threatening and unworthy of the privileges of a nurturing childhood by white policy institutions.[78] Black mothers have been portrayed by policy makers as irresponsible, presenting imminent harms to both their own children and to the nation.[79] For Black and Native mothers alike, there is an invested interest in presenting them as inherently dangerous and deficient relative to white families. This framing allows child removal to become naturalized as a desirable and logical intervention. Taken together, these experiences demonstrate the state's willingness to intervene into Black and Native family life. This is the case despite our understanding

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[76] Michaela Christy Simmons, *Becoming Wards of the State: Race, Crime, and Childhood in the Struggle for Foster Care Integration, 1920s to 1960s*, 85 AM. SOC. REV. 199 (2020)

[77] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 65 (2002) [hereinafter ROBERTS, SHATTERED BONDS] ("Modern social pundits have held Black mothers responsible for the disintegration of the Black family").

[78] Simmons, *supra* note 76, at 216 ("Scholars have found that black children are often 'denied the developmental reality' of childhood that undergird protective policy and institutions").

[79] ROBERTS, SHATTERED BONDS, *supra* note 77.

that, "[i]n a liberal-democratic society that respects individual rights and highly values the family and its autonomy, child removal is one of the gravest and most intrusive actions that government can take."[80] These patterned actions against minority communities must not be taken lightly.

The manifestation of settler and racist logics in the surveillance of family life have myriad material implications for the health and safety of Native Peoples. For example, Native families have been marginalized and managed by economic dispossession, control of Native women's bodies and reproduction, and the intrusion of white women and mothers into the socialization of Native children. Each of these elements of social control sought to collectively address the nation's continued investment in managing the "Indian problem."[81] In some cases, economic troubles placed Native parents and families in impossible and impoverished situations where their only access to critical resources would be in the hands of the government.[82] Seemingly benevolent policies traumatized Native families while improving settlers' likelihood of securing greater control of Native lands and resources.[83] Efforts to secure Native lands have also been linked with the regulation of Native women's biological reproduction through the promotion of

[80] Leroy H. Pelton, *Separating Coercion from Provision in Child Welfare: Preventive Supports Should Be Accessible Without Conditions Attached*, 51 CHILD ABUSE & NEGLECT 427, 427 (2016).

[81] The "Indian problem" refers to the problem that settlers had with the existence of Native Peoples on land that settlers wanted to create their own homes and societies.

[82] JACOBS, GENERATION REMOVED, *supra* note 33, at 136.

[83] MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940, xxx (2009) [hereinafter JACOBS, WHITE MOTHER TO A DARK RACE] ("Australia's 'protection' policies and the U.S. government's 'assimilation' program, each of which included [I]ndigenous child removal as a key element, have often been characterized as more enlightened approaches, or at least well-intentioned if misguided efforts, that broke with earlier and more brutal methods of colonization. However, these policies shared the same fundamental goal of earlier strategies—that of dispossessing [I]ndigenous people of their land—and aimed to complete the colonization of the American West and Australia by breaking the affective bonds that tied [I]ndigenous children to their kin, community, culture, and homelands.").

hospital births over midwives, gendered policing of venereal disease, birth control, abortion, and sterilization.[84]

In addition to policy addressing land and bodies, white women played a critical role in securing the Native family as a site of settler regulation. White women constructed a comparative and gendered motherhood binary, where Native women were portrayed as deficient and ill-equipped to raise their own children based upon harmful, racist stereotypes about Native "barbarity."[85] In contrast, white women were situated as ideal caretakers and mother figures for Native children, a position that many white women were eager to take on.[86] In this way, white mothers and families were framed as liberal, caring, and "beyond race," willing to sacrifice any negativity they might receive from other white people as a result of welcoming non-white children into their home.[87] These intentions, and their attachment to a domesticity and mothering framed as unreachable by Native mothers, mirror how "the violent displacement of Indigenous nations and the calculated expansion of the U.S. imperial nation-state remained likewise perpetually entangled with more intimate forms of possession and extermination."[88] These interdependent connections between the nation and the home suggest a further need to reevaluate the continued reliance on state systems for Native child well-being and call into question any presumptions that Indigenous genocide is anything but ongoing.

V. NATIVE FAMILIES AND THE ABOLITION OF CHILD WELFARE

In this concluding section, we emphasize that routine and persistent intrusions in Native families and tribes are rooted in

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[84] Theobald, *supra* note 32, at 6 ("Native women's reproductive practices had long been a source of fascination for Euro-American colonizers, who used their perception of Indigenous reproduction to serve a number of purposes").

[85] JACOBS, WHITE MOTHER TO A DARK RACE, *supra* note 83, at 42 ("Colonial officials' rhetoric of rescuing and providing opportunity to [I]ndigenous children depended on harshly stigmatizing [I]ndigenous communities and families").

[86] *Id.* at 281–282 ("[T]he state became a legal or fictive guardian to the children, and then subcontracted many of its guardianship responsibilities—providing protection, education, discipline and punishment, affection and emotional support—to white women").

[87] Goldstein, *Ground Not Given*, *supra* note 16.

[88] *Id.*

the settler-state's longstanding investment in white supremacy. Settler desires to displace and erase are not gone but have manifested in a variety of institutional practices and policies that affect the health and safety of Native children and homes. Before transitioning into a summary of how our findings and framing might contribute to the visionary freedom work taking place in abolition collectives around the U.S., we begin with a brief overview of attempts to reform ICWA within the context of the settler-state's persistent attachment to family regulation. Most examples of such efforts focus on the need to ensure and increase ICWA compliance to provide Native families with the protections mandated by the law. Next, we examine the contributions of Black activists and communities at the forefront of the movement to abolish the child welfare system. We conclude by envisioning an abolitionist approach that redirects social and financial resources into the hands of Native families and works cooperatively with tribal nations to promote Indigenous communities of care. To this end, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native children from their families by the state. In so doing, we affirm that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive system remains.

A. Existing and Ongoing Reform

Tribal communities and Native family advocates understand the multi-dimensionality of state-violence against Native Peoples in the U.S. and fight to protect Native families from these harms using a variety of tools. In child welfare matters, Native families rely on ICWA to mitigate harms and promote cultural and social stability in the lives of Native families, even despite considerable compliance and resource obstacles. Efforts to enhance the power and reach of ICWA have grown in recent decades using education, public outreach, and collaboration-building between tribes and state and federal social services. To monitor and ensure national ICWA compliance with various systems and jurisdictions, advocacy groups including Casey Family Programs, recommend that ICWA performance measures be developed and integrated into tribal, state, and federal reporting systems such as the federal Administration for Children and Families (ACF) and Family Services Reviews.

Additional efforts focus on the role of judges and courts and emphasize enhanced training on ICWA's intent. Efforts include best practice guidelines and link ICWA compliance with courtroom dynamics and actors involved in child welfare cases. Intentional training would ensure, for example, that presiding judges ask on the record, if not already established, about a child's potential AIAN heritage.[89] In many jurisdictions, judges, social workers, and attorneys[90] already receive training to improve their understanding of ICWA compliance and sanctions, but other legal actors such as guardians ad litem and special advocates would also benefit from intentional, data-driven education.[91]

Related efforts call for increased empirical evaluation of ICWA compliance and outline a variety of methods to do so. These methods include court observations within and across child welfare cases, reviewing case records to ensure compliance over time,[92] and the use of qualitative methods such as focus groups to envision additional compliance efforts.[93] While we do not disagree with the merit and importance of such data collection, our quantitative findings indicate that the ongoing rate of Native child removal is persistent and may remain so in the event that the larger infrastructure of a punitive child welfare regime stays intact. It is the confluence of our own findings, the findings of tribes and advocates in decades prior, and the critical moment of institutional reckoning unfolding around us that underscore the need to rethink the end goal of compliance-based research. Instead, we suggest that compliance analysis would be greatly enhanced with a reorientation toward liberation and abolition.

B. Thinking with Liberation and Abolition in the Context of Child Welfare

Black activists and communities have long been at the forefront of the movement to promote abolition generally and

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[89] *Id.* at 4.

[90] *Id.* at 13.

[91] *Id.* at 6.

[92] ALICIA SUMMERS & STEVE WOOD, MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT: AN ASSESSMENT TOOLKIT, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 8 (2014), https://www.ncjfcj.org/wp-content/uploads/2014/02/ICWA_Compliance_Toolkit_Final.pdf [https://perma.cc/H8Z4-DH96]; Williams et al., *supra* note 39.

[93] SUMMERS & WOOD, *supra* note 92; Williams et al., *supra* note 39.

abolish the child welfare system specifically. A variety of scholars, including the work of critical geographer Ruth Wilson Gilmore, provide guidance on how to ground oneself in the collective learning, sharing, and service for a free and just future for all peoples. This abolitionist approach to social inequality involves a clear acknowledgment of the harms committed against a community, as well as the roots of that harm, visible.[94] Abolition subsequently dismantles oppressive systems and builds life-affirming institutions[95] and spaces that promote healthy communities in ways that resonate with local knowledge. In summary, an abolitionist perspective seeks to address the origins of social insecurity,[96] acknowledge structural harm,[97] dismantle institutions that are beyond reform, and reimagine possibilities that prioritize social justice. In the context of child welfare, abolitionists argue that the current child welfare system is flawed beyond repair and reform is insufficient.[98] Advocates call for a new framework that is fundamentally anti-racist and rethinks how and why society supports the well-being of children and families[99] above and beyond shifting funds from one social institution to another.

Critical legal scholar Dorothy Roberts and others explain that after being largely excluded from the child welfare system prior to the 1960s, Black children today are disproportionately represented in the surveillance and policing of family life.[100] Similar to the experiences of Native families, advocates for Black children and families note that poverty and single parent family

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[94] Lisa Sangoi, Co-Founder & Co-Director, Movement for Family Power, Keynote Address at upENDing the Child Welfare System: The Road to Abolition Conference, (Oct. 29, 2020), https://upendmovement.org/2020/10/29/keynote-address-upend-convening [https://perma.cc/KZ4F-R9NM].

[95] Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM, 224 (Gaye Theresa Johnson & Alex Lubin eds., 2017).

[96] Theresa Rocha Beardall, *Abolish, Defund, and the Prospects of Citizen Oversight after George Floyd*, SOC'Y FOR THE ANTHROPOLOGY OF WORK (Dec. 1, 2020); Ruth Wilson Gilmore, Keynote Conversation at the Making and Unmaking Mass Incarceration Conference (December 5, 2019), https://mumiconference.com/transcripts [https://perma.cc/9RZY-KV9V].

[97] Sangoi, *supra* note 94.

[98] Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System That Needs to be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 501 (2020).

[99] *Id.* at 502.

[100] Dettlaff et al., *supra* note 98, at 2.

structures are predictors of child removal,[101] and that even when controlling for poverty and family structure, racial disparities continue to be present.[102] Also salient to the Native experience, Black families receive differential treatment by child welfare workers who show a lack of cultural sensitivity, express judgment about Black parenting styles, and compare Black parenting against white and middle-class parenting perspectives.[103] The contemporary child welfare system acts as a racialized system of family regulation that blames Black and Native mothers for the structural conditions of poverty and inequality in which they live and parent. The system also blames mothers for the failures of an incredibly austere American welfare state. Instead of providing support to families in crisis, current systems prioritize the surveillance and punishment of Black and Native families. Abolitionists argue that these separation-oriented state family regulation systems do not, and in their current configurations cannot, advance the best interests of Black and Native families.

C. Reimagining Indigenous Communities of Care

Many advocates agree that the child welfare system is beyond repair because the system's disruptive and punitive intentions are antithetical to a support system that centers the dignity of family and extended kin networks. As with the issue of racially-biased policing in the U.S., the question of reform versus abolition relies upon measurable harm reduction and presumptions that more or less state intervention will keep families safe. Critics counter that social systems that are rooted in racism[104] must be abolished. We stand with this position and argue for an abolitionist approach to child welfare that

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[101] *Id.* at 21.

[102] MILLER, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE'S CHILD WELFARE SYSTEM, WASH. ST. INST. FOR PUB. POL'Y, DOCUMENT NO. 08-06-3901, at 1 (2008), https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf [https://perma.cc/CD32-TZYJ].

[103] Marian S. Harris & Wanda Hackett, *Decision Points in Child Welfare: An Action Research Model to Address Disproportionality*, 30 CHILD. & YOUTH SERV. REV. 199, 207 (2007).

[104] *What Does it Mean to Abolish the Child Welfare System as We Know It?* CTR. FOR STUDY SOC. POL'Y, (June 29, 2020), https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it [https://perma.cc/5Q3D-SD7K]; Dettlaff et al., *supra* note 98, at 501.

reimagines family safety in ways that center the active dismantling of racist policies.

We conclude by envisioning an abolitionist approach to child welfare in which researchers can play an important role. First, researchers can and must consider how their scholarly interventions can open up space for the fight for abolition to meaningfully grow. One way this may be possible rather quickly is through study design. For example, we rightfully situate our empirical findings within a theoretical framing of the state as a settler-state, a political and sociohistorical actor invested in white supremacist values that manifest in surveillance and family separation. We do so in order to call to account the structural violence that cannot be divorced from the stories the data tell about the effects of centuries of anti-Native subordination. Second, this empirical approach positions our findings and implications in service of the visionary freedom work taking place in abolition collectives and in service of tribes and advocates who continuously demand increased protections for their children and families. We affirm that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive and punitive child welfare system remains.

Third, poverty disproportionately burdens Native families and there is a clear relationship between poverty and involvement in the child welfare system.[105] We argue in favor of redirecting funding from the foster care system directly to families and communities;[106] the expansion of social safety net programs to mitigate mistreatment and neglect caused by financial precarity;[107] and a prioritization of increased access to affordable housing,[108] healthcare services, community infrastructure, and fresh food and water. We suggest that child welfare funding that further empowers state authorities, which historically have acted to separate Native families, must be reallocated into Native homes. These homes have often been deemed financially "unfit," acting as justifiable grounds for child

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[105] MILLER, *supra* note 102, at 21.

[106] Dettlaff et al., *supra* note 98, at 508.

[107] *What Does it Mean to Abolish the Child Welfare System as We Know It?* CTR. FOR STUDY SOC. POL'Y, (June 29, 2020), https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it [https://perma.cc/5Q3D-SD7K];; Dettlaff et al., *supra* note 98, at 510.

[108] CTR. FOR STUDY SOC. POL'Y, *supra* note 107.

removal for more than a century. These recommendations are attentive to the fact that financial circumstances within urban and tribal communities are complex.[109] Nonetheless, we suggest that resource allocation for Native children and families must be both equitable and reconciliatory as resource constraints remain a grave inequality in Native sovereign nations more broadly and in the administration of child welfare specifically. Importantly, we wish to highlight here that financial resources alone cannot appropriately remedy the problem of family separation. A recognition of and support for the effects of multigenerational trauma, honoring the care found within extended Native kin networks, and movements to revitalize community-centered values to strengthen families are all essential components of a path forward.

Additionally, we advocate for an abolitionist agenda that reimagines child welfare and supports the building of urban *and* reservation Indigenous communities of care led by and for Native Peoples and tribes. Indigenous care communities would prosper alongside the promotion of tribal sovereignty, adherence to treaty obligations, and a return of homelands, resources, and waterways to Native communities. Allies interested in supporting Indigenous communities of care must recognize that tribal autonomy is paramount, must continue to fight against efforts to prioritize family regulation over community support, and educate others about the historical significance of Native land theft and genocide. Some examples of how an abolitionist approach to child welfare might positively impact Native families include the immediate termination of the use of congregate care facilities such as group homes in favor of investing in Native community-based support and greater recognition of informal kinship networks.[110] Movements can look to existing programs including individual- and family-level ICWA efforts and the intentional recruitment of ICWA-compliant foster families. Recruitment requires the recognition and elimination of social and economic barriers for Native households to become a foster

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[109] *See generally* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

[110] CTR. FOR STUDY SOC. POL'Y, *supra* note 107; Dettlaff et al., *supra* note 98, at 510.

family[111] in ways that speak to the necessity of mutual aid in cultivating safe and affirming homes for all Native families. Similarly, efforts to radically rethink care outside of formal institutions and agencies need not look far as tribal communities in both urban and rural spaces have participated, and continue to participate, in mutual aid collectives that provide nourishment for one another in the face of institutional neglect.

VI. CONCLUSION

In 1978, ICWA introduced federal protections for Native children (enrolled and eligible for membership), families, and tribes against unnecessary removal and affirmed the role of the tribe as an important partner in child welfare proceedings. In this Article, we used administrative and historical data to statistically evaluate the magnitude of change in AIAN family separation since the passage of ICWA and locate the institutional pathways that funnel AIAN families into the child welfare system. We find that the frequency of AIAN children's placement into foster care has remained relatively stable since the passage of ICWA, that AIAN children remain at an incredibly high risk of family separation through the child welfare system, and that the post-investigation removal decision by child welfare agencies is a key mechanism of inequality in family separation. Based upon these findings, and our framing of family separation as an inherent element of white supremacist settler-state logics, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native children from their families by the state. We also suggest that ICWA has provided, and will continue to provide, a necessary and desperately needed intervention to protect Native families so long as this intrusive system remains. We are hopeful that abolitionist principles can intersect with the work of Native child welfare advocates committed to placing social and financial resources into the hands of Native families. Coupled with the

[111] Killos et al., *supra* note 39, at 12; In a recent pilot, Casey Family Programs purposefully sought to recruit and retain Native families interested in becoming foster families. They did so by working closely with Native families to prepare them for licensure and also by providing financial and material support directly to these families. The goal was to ensure that, in the end, Native children would be placed in foster homes that preserve their connection to their culture, traditions, and birth parents. Such efforts require meaningful collaborations between states and tribes as well as a centralized state application system for those interested in becoming foster families.

necessity of cultural respect and the centering of human dignity and family rights, these efforts can work cooperatively with urban and reservation communities to promote their vision of Indigenous communities of care. The time is now to make right on the nation's promise to end family separation among Native families and tribes.

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ARTICLE

REIMAGINING SCHOOLS' ROLE OUTSIDE THE FAMILY REGULATION SYSTEM

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The United States' family regulation system often begins with well-intentioned professionals making child protection hotline calls, jeopardizing their own ability to work with families and subjecting the families to surveillance. By the system's own standards, most of this surveillance leads to no meaningful action. Nowhere is this reality more present than in schools. Educational personnel serve as the leading driver of child maltreatment allegations, yet decades worth of data reveal educator reports of maltreatment are the least likely to be screened-in and the least likely to be substantiated or confirmed. In other words, education personnel—whether motivated by genuine concern, which may nevertheless be informed by implicit biases towards low-income families and families of color; fear of liability; or the desire to access services they believe families cannot acquire elsewhere—overwhelm our child welfare system with unnecessary allegations of maltreatment.

This reality has fundamentally transformed the relationship between families and schools. Carrying the heavy burden of mandated reporting laws, public schools disproportionately

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refer Black and low-income families to the family regulation system, abdicating schools' opportunity to serve these same families in the communities in which they reside. Rather than serving as the great equalizer, public schools increasingly contribute to the carceral state's regulation of families.

This Article argues that schools must shift their role away from the reporting and surveillance of these families, and instead directly provide and arrange for services for families. This change begins with sharply limiting or repealing mandatory reporting obligations (permitting voluntary reports in severe cases)—but that is only the start. Schools are well-positioned to create new pathways to the supports and services from which most families reported to the family regulation system might actually benefit. Schools are already a primary source of food for impoverished children, and can help ensure low-income families access all the public benefits to which they are entitled. Schools can largely refer children and families to the same services that the family regulation system can—such as mental health services and substance abuse treatment—but without that system's coercive authority and its associated problems. Where some services are tied to the family regulation system's involvement, the law should permit schools to refer families directly. Schools know which families need legal services to defend their housing, access benefits, obtain orders of protection—or any of the myriad of other supports that poverty lawyers can provide. This shift would tie schools to the families and communities that they serve and benefit those families and communities far more than the surveillance and policing they experience under the current family regulation system.

I. INTRODUCTION

America's public schools are an essential part of the present family regulation system,[1] the collection of public and private agencies and court systems which collectively intervene in and exercise coercive authority over largely low-income and disproportionately Black families in the name of protecting children. This system is triggered by allegations of abuse or neglect made to child protective services (CPS) agencies, and schools account for the largest single source of such allegations of child abuse and neglect. This Article focuses on schools' role in the present system, as they represent the worst of the problems in that system, yet hold great promise for a new approach to identifying and responding to family and community adversity.

The current system features an enormously large and largely ineffective legal and administrative apparatus. Pursuant to mandated reporting laws, millions of professionals report suspected abuse and neglect to CPS agencies. CPS agencies' primary response is to investigate those allegations to determine whether the child is a victim of maltreatment and what, if any, services the agency should offer. CPS agencies have authority to remove children from families, so any such intervention is inherently coercive and represents state regulation of families. The scope of that regulation has grown to the millions of children, and CPS agencies classify only a minority of those children as having been abused or neglected, and remove an even smaller

[1] The authors acknowledge the importance of language through the use of the "family regulation system," when referring to the multi-agency system of surveillance, policing, and control historically referred to as the "child welfare" or "child protection" system. We urge other scholars and professionals to interrogate the language used around this system and its actual functionality which has historically disproportionately harmed and oppressed BIPOC (Black, Indigenous, and people of color). For the purpose of this manuscript, we utilize the "family regulation system" in place of more frequently-used identifiers such as "child protective services" and "child welfare." We use "child protective services (CPS) agencies" to refer to the specific state and local agencies charged with protecting children from abuse and neglect—a role which, as argued throughout this Article, should be limited to severe cases. We credit Dorothy Roberts for the initial conceptualization of "family regulation," and recent scholarship from Emma Peyton Williams which further coined the phrase "family regulation system." Dorothy Roberts, *Feminism, Race, and Adoption Policy*, *in* ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS 234 (Sally Haslanger & Charlotte Witt eds., 2005); Emma Peyton Williams, Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition, 14–16 (Apr. 27, 2020) (B.A. thesis, Oberlin College).

minority of them into foster care. To the extent CPS agencies could provide effective assistance to the majority of these families, research demonstrates that the agencies largely miss the opportunity to do so.[2]

In the 1960s, pediatrician Henry Kempe's article "The Battered Child Syndrome"[3] galvanized states to pass laws requiring individuals working with children to report suspected incidents of physical abuse. Although Kempe's work focused on severe physical abuse that medical professionals could be trained to identify, mandated reporting statutes quickly suffered from scope creep, expanding to cover many more professionals, such as school personnel, and broad definitions of neglect. Mandated reporting's overbreadth problem is well-documented in decades' worth of child maltreatment administrative data, highlighting that CPS is overwhelmed with unsubstantiated allegations of maltreatment that, when investigated, harm children, families, and their communities. Schools stand out for contributing to this failure more than any other group of mandatory reporters: they report more allegations to CPS agencies than any other category of reporters, and schools' reports are less likely to be substantiated or lead to services for children. The flawed policy of mandatory reporting has not led to CPS agencies providing effective interventions to the vast majority of families subject to its investigations.[4] Moreover, it has failed to identify most of the actual child maltreatment that exists in communities. Four iterations of the U.S. Congress's National Incidence Study demonstrate mandated reporting's underreporting problem: "although CPS investigates a substantial number of maltreated children in the nation, these children represent only the 'tip of the iceberg.'"[5] This mandatory reporting and CPS investigation structure has for sixty years failed to achieve its core function and unnecessarily harmed families and communities, particularly families and communities of color disproportionately subject to the family regulation system. That failure has

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[2] *See infra* notes 35–36, 47.

[3] *See* C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASSOC. 17 (1962).

[4] A full accounting of the harms of unnecessary CPS interventions is beyond the scope of this Article. We rely on prior work which has established those harms in details. *See e.g. infra* notes 35–36, 47 and accompanying text.

[5] A.J. SEDLAK ET. AL, U.S. DEP'T OF HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE & NEGLECT (NIS–4), at 2-2 (2010).

incentivized schools and others to abdicate their moral responsibility to help children and families in need and instead created an adversarial relationship between schools and families. As such, the present CPS system is yet another manifestation of our nation's systemic racism, and public schools are complicit in that system.

A more hopeful story is possible. Schools can identify needs among children and families, and those needs largely can be addressed without CPS involvement. Schools can expand their use of social workers and counselors, and refer families to a range of voluntary supports and services, including public benefits, housing assistance, legal services, mental health care, and substance abuse treatment. Schools already identify and respond to most of these needs, and dramatically expanding existing efforts can achieve what six decades of mandatory reporting and investigation have not—improving the welfare of children and families.

II. WHY FOCUS ON SCHOOLS?

Public schools are an inextricable part of the family regulation system, accounting for the largest single source of referrals to CPS agencies of allegations of child abuse and neglect.[6] During 2018, school personnel were responsible for 20.5% of the 4.3 million child maltreatment reports received nationwide, nearly double the number of reports made by social services or medical personnel.[7] Although Black children represent roughly 14% of the overall child population,[8] 26% of allegations of child maltreatment from school personnel concerned Black children.[9] The disproportionate reporting of

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[6] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVICES, CHILD MALTREATMENT 2018, at 8–9 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf [https://perma.cc/569P-PWQ9].

[7] *Id.*

[8] *Child Population by Race in the United States*, KIDS COUNT DATA CENTER (Sep. 2020), https://datacenter.kidscount.org/data/tables/103-child-population-by-race [https://perma.cc/N3CA-S6YP].

[9] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVICES, NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (NCANDS) CHILD FILE, FFY 2018 (2019) [hereinafter 2018 FFY NCANDS DATASET], https://www.ndacan.acf.hhs.gov/datasets/dataset-details.cfm?ID=233 [https://perma.cc/LE72-GSN9]. Unless otherwise noted, data utilized in this Article were made available by the National Data Archive on Child Abuse and Neglect, Cornell University, Ithaca, New York. Data from the National Child Abuse and Neglect Data System (NCANDS) are originally collected by state

Black children also cumulates across childhood; 53% of Black children will be subject to a CPS investigation before turning eighteen, compared to 37.5% of all children.[10]

Of course, schools overreport and surveil Black families in many contexts outside of CPS. This section explores the intersection of schools and family regulation in those contexts, ultimately concluding that an expansive dissonance separates schools' core, philosophical underpinnings from the modern operationalization of our public schools.

A. Public Schools: The Great Equalizer or Part of the Carceral Web?

Public schools serve students from the most vulnerable and historically marginalized communities. Upon their inception, schools were poised to be the "great equalizer" where low-income families, people of color, immigrants, and those from other disenfranchised groups could gain access to opportunities and resources historically only available to individuals from non-minoritized groups.[11] However, today's schools, especially those in high needs and impoverished communities, are characterized by dismal student achievement rates, low graduation rates and standardized test scores, high rates of student truancy and drop-outs, large class sizes, and poorly

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child welfare agencies pursuant to federal reporting requirements. Authors and collaborators at Fostering Court Improvement have analyzed the data and analyses are on file with them. Neither the collector of the original data, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here. Data are reported for the Federal Fiscal Year (FFY), which runs from October 1st in the preceding year through September 30th in the referenced year.

[10] Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017). Disproportionate reporting of Black children by school personnel is consistent with other classes of reporters, such as law enforcement and medical professionals. *Id.* However, unlike law enforcement and medical professionals, children interact with school personnel consistently and routinely, in a non-adversarial manner within their community. Moreover, educational personnel make more CPS referrals than law enforcement and medical professionals.

[11] HORACE MANN, TWELFTH ANNUAL REPORT TO THE MASSACHUSETTS BOARD OF EDUCATION (1848), *reprinted in* THE REPUBLIC AND THE SCHOOL: HORACE MANN AND THE EDUCATION OF FREE MEN 79–80, 84–97 (Lawrence A. Cremin ed., 1957); PEDRO NOGUERA, CITY SCHOOLS AND THE AMERICAN DREAM: RECLAIMING THE PROMISE OF PUBLIC EDUCATION, at xii (2003).

trained or inexperienced teachers.[12] Often, the same schools experiencing these challenges further marginalize the students they serve by disproportionately exerting punitive and exclusionary discipline practices against low-income students of color, particularly Black students.[13]

According to data available from the U.S. Department of Education's Office of Civil Rights, Black children represent 15.2% of student enrollment nationally.[14] However, Black children missed a cumulative 4.6 million days of school due to suspensions, representing 41.9% of all suspension days.[15] Black children account for 28.7% of school referrals to law enforcement and 31.9% of school related arrests.[16] Even more, 32% of Black children eligible for special education services under IDEA were referred to law enforcement, and Black children with disabilities account for 35.3% of all school-related arrests of special education students.[17] Black children represent only 8.2% of children enrolled in a Gifted and Talented program[18] and only 9.3% of children enrolled in at least one Advanced Placement course.[19] Such disparities begin young; one 2021 academic study found that, even after controlling for various predictors of behavior challenges, Black elementary school children were 3.5 times as

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[12] *See* NOGUERA, *supra* note 11.

[13] Erica R. Meiners, *Ending the School-to-Prison Pipeline/Building Abolition Futures*, 43 URB. REV. 547, 550 (2011).

[14] OFFICE OF C.R., U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION (CRDC) FOR THE 2017–18 SCHOOL YEAR (2020), https://www.ed.gov/about/offices/list/ocr/docs/crdc-2017-18.html [https://perma.cc/PFK8-KDR8]. Of the 96,533 schools listed in the CRDC Enrollment dataset, all but 11 schools provided student enrollment data by race.

[15] *Id.* at CRDC Suspensions File Dataset. Of the 97,632 schools listed in the CRDC Suspensions dataset, all but 1,938 schools provided suspension data by race.

[16] *Id.* at CRDC Referrals and Arrests Dataset. Of the 97,632 schools listed in the CRDC Referrals and Arrest dataset, as many as 4,776 (approx. 4.8%) schools did not provide complete Referrals and Arrest data.

[17] *Id.*

[18] *Id.* at CRDC Gifted and Talented Dataset. Of the 97,632 schools listed in the CRDC Gifted and Talented dataset, 41,794 (approx. 42%) schools did not provide Gifted and Talented data by race.

[19] *Id.* at CRDC Advanced Placement Dataset. Of the 97,632 schools listed in the CRDC Advanced Placement dataset, only 14,752 (approx. 15%) schools provided advanced placement data by race.

likely as white children to receive a school detention or suspension.[20]

These inequities compound for Black students in foster care.[21] For example, within California, which has the largest population of youth in foster care in the nation,[22] Black foster youth are suspended, expelled, and placed in special education at higher rates than both their foster youth and non-foster youth peers of other races.[23] The disproportionate suspension, expulsion, and special education placement of Black foster youth in schools directly entraps them in what Erica Meiners describes as "less a pipeline, more a persistent nexus."[24] Unlike the "school to prison pipeline" which describes the ways that youth of color are linearly funneled into systems of incarceration from schools' overuse of punitive disciplinary practices, the nexus is made up of a "web of punitive threads," whereby youth are tethered to systems that perpetuate racialized surveillance and imprisonment within the carceral state.[25]

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[20] Matthew C. Fadus et al., *Racial Disparities in Elementary School Disciplinary Actions: Findings from the ABCD Study*, J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY (manuscript at 4) (forthcoming 2021) (on file with ScienceDirect and available at https://doi.org/10.1016/j.jaac.2020.11.017 [https://perma.cc/JN34-BCFE]).

[21] Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 63 (2010); Susan Stone, *Child Maltreatment, Out-of-Home Placement & Academic Vulnerability: A Fifteen-year Review of Evidence & Future Directions*, 29 CHILD. & YOUTH SERVS. REV. 139, 146 (2007).

[22] Mark E. Courtney et al., *Memo from CalYOUTH: Associations Between County-level Factors and Youths' Extended Foster Care Participation*, CHAPIN HALL AT THE UNIV. OF CHI. (Mar. 2019), https://co-invest.org/wp-content/uploads/Courtney-et-al.-2019-County-level-factors-and-youths-EFC-participation.pdf [https://perma.cc/J6YL-3PL9].

[23] CAL. DEP'T OF EDUC., 2018–19 SUSPENSION RATE: STATE REPORT DISAGGREGATED BY ETHNICITY (2020), https://dq.cde.ca.gov/dataquest/dqCensus/DisSuspRate.aspx?cds=00&agglevel=State&year=2018-19&initrow=Eth&ro=y [https://perma.cc/F3VS-PPWR]; CAL. DEP'T OF EDUC., 2018–19 EXPULSION RATE: STATE REPORT DISAGGREGATED BY ETHNICITY (2020), https://dq.cde.ca.gov/dataquest/dqCensus/DisExpRate.aspx?cds=00&agglevel=State&year=2018-19&initrow=Eth&ro=y&ro=y [https://perma.cc/EG24-ZMSR]; CAL. DEP'T OF EDUC., COUNT OF MATCHED FOSTER STUDENTS BY RACE/ETHNICITY AND GRADE: LOS ANGELES COUNTY REPORT (2020), https://dq.cde.ca.gov/dataquest/foster/fosterGrdRace.aspx?level=County&county=19&year=2018-19.

[24] ERICA R. MEINERS, RIGHT TO BE HOSTILE: SCHOOLS, PRISONS, AND THE MAKING OF PUBLIC ENEMIES 31–32 (2007).

[25] *Id.*

For Black children, public schools fall short of being the great equalizer.

B. Schools Illustrate How This System Is Family Regulation Not Child Protection

When schools call CPS agencies, do schools help children, or work in tandem with the family regulation system to surveil and investigate disenfranchised families? What impact do CPS reports have on children, families, and their communities? School personnel's entanglement in the family regulation system is a particularly strong illustration of a broader reality: the family regulation system features tremendous over-reporting of families to CPS agencies, with significant interference imposed upon and little or no benefits offered to these families.

The family regulation system operates a massive apparatus to gather child abuse and neglect allegations, investigate those allegations, and determine how, if at all, to respond to substantiated allegations. CPS agencies only substantiate a minority of maltreatment allegations and agencies remove children in an even smaller minority—5.3% of all investigated allegations.[26] This reality raises significant questions about the wisdom and effectiveness of our existing system.[27]

Decades of administrative child welfare data support this narrative. During the 2018 Federal Fiscal Year (FFY), CPS agencies received referrals of suspected child abuse or neglect regarding 7.8 million children, or 12.9% of the nation's child population.[28] Low-income and Black families are significantly overrepresented among those subject to these referrals.[29] CPS agencies screened out 36% of all referrals, meaning even if the allegations were true, they would not meet the state's statutory definition of abuse or neglect.[30] Of the remaining referrals, affecting about 4.3 million children, CPS agencies assigned about

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[26] 2018 FFY NCANDS DATASET, *supra* note 9.

[27] *See* Josh Gupta-Kagan, *Towards a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897 (2014).

[28] CHILD MALTREATMENT 2018, *supra* note 7, at 7–8. There were 4.3 million referrals, each involving an average of 1.8 children. *Id.* That figure is used throughout this section to calculate the number of children at each stage.

[29] *See supra* notes 8–10.

[30] CHILD MALTREATMENT 2018, *supra* note 7, at 6–7.

14% to a differential or alternative response track.[31] The remainder were investigated to determine whether the child is a victim. Agencies substantiated only 23% of investigated reports, meaning CPS investigated nearly 2.4 million children in 2018 that they either concluded were not victims or were unable to gather sufficient evidence to make such a determination.[32] Of these children deemed victims, about 39% (more than 270,000) receive no services after the CPS investigation.[33] The remaining receive some kind of service from CPS, and for about 22.9% of victims, that "service" included a removal from their families and placement in foster care.[34]

CPS interferes in the lives of millions of children each year on the basis of a single person referring their suspicion to CPS, and the vast majority of hotline calls lead to no provision of services. By the system's own logic, then, most reports do relatively little to protect children. And they do little to assist families; a longitudinal study of families reported to CPS agencies found that CPS intervention made no difference in families' social support, family functioning, poverty, maternal education, or child behavior, leading researchers to describe it as a "missed opportunity" to help families.[35] Commentators, accordingly, have advocated that it is time "to rethink the role of mandatory reporting," reducing the volume of reports and the unnecessary intervention most reports cause.[36]

That conclusion is even *stronger* for CPS hotline calls from schools. At every stage of the process, allegations from schools are *less* likely to protect children. First, reports from

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[31] *Id.* at 19. Alternative response tracks are typically used for low or moderate risk reports; they emphasize assessment of and offers of services to address a family's needs rather than making a formal determination of whether maltreatment occurred.

[32] 2018 FFY NCANDS DATASET, *supra* note 9.

[33] CHILD MALTREATMENT 2018, *supra* note 7, at 78.

[34] *Id.* at 80.

[35] Kristine Campbell et al., *Household, Family and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention*, 164 ARCHIVES OF PEDIATRIC ADOLESCENT MED. 943, 948 (2010).

[36] Mical Raz, *Calling Child Protective Services Is a Form of Community Policing that Should Be Used Appropriately: Time to Engage Mandatory Reporters as to the Harmful Effects of Unnecessary Reports*, CHILD. & YOUTH SERVS. REV., Jan. 2020, at 4 [hereinafter Raz, *Calling CPS*]. *See also* Abraham B. Bergman, *Child Protective Services Has Outlived Its Usefulness*, 164 ARCHIVES PEDIATRIC ADOLESCENT MED. 978, 978–79 (2010) (arguing voluntary services should replace many CPS investigations).

schools are significantly less likely than both other professionals' reports and non-professionals' reports to allege abuse or neglect.[37] That describes 17% of all screened in reports from education sources, compared with 12% for reports from medical and social service staff, 9% for legal and law enforcement, 6.9% for family friends, and 5.6% for anonymous reports.[38]

Second, CPS agencies are more likely to assign reports from schools to an alternative response track, indicating those reports contain less severe allegations—14% for reports from schools compared with 9.6% for medical and social service reports, and 9.4% for legal and law enforcement reports.[39] On this measure, reports from schools are on par with those from family or friends (14%) and anonymous sources (15%)[40]—two classes of reporters presumably with no formal training in the identification of child maltreatment.

Third, when CPS agencies investigate child maltreatment reports from schools, agencies substantiate significantly fewer cases than reports from other sources. CPS agencies conclude that only 15% of children reported by schools *and* subject to an investigation are actually victims of abuse or neglect.[41] That compares to 27% for medical and social service personnel reports and 39% for legal and law enforcement reports.[42] Substantiation rates for reports from school are on par

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[37] 2018 FFY NCANDS DATASET, *supra* note 9; Functionally, this conclusion operates like a decision by a CPS agency to screen out a referral. NCANDS does not report screened out cases, so we cannot compare those. We discuss data based on an analysis of referrals which CPS agencies have screened in but subsequently determine do not allege abuse or neglect, something which is equivalent to a screen out and which more frequently occurs for reports from schools than from other sources.

[38] *Id.* These results hold, albeit with tighter variance, when reports are limited to school-age children: 15% are screened out for failing to report any maltreatment, compared with 14% for medical and social service sources, 11% for legal and law enforcement sources, 7.4% for family friends, and 6.1% for anonymous sources.

[39] *Id.* The gap for school-age children is roughly similar: 15% of reports from schools are assigned to an alternative response track, compared with 11% from medical and social service sources and 9.9% of legal and law enforcement sources.

[40] *Id.*

[41] *Id.*

[42] *Id.*

with those from family friends (15%) and anonymous sources (13%).[43]

School personnel's child maltreatment allegations concerning Black children are especially unlikely to be substantiated. Only 11% of education personnel's maltreatment allegations concerning Black children are substantiated, compared to 22% from medical reporters and 30% from law enforcement.[44] This substantiation rate is the same for reports from family and friends.[45]

Fourth, when CPS agencies investigate and substantiate reports from schools, CPS is less likely to remove children from their families and place them in foster care than when the reports are from other sources. CPS agencies remove only 16% of victims reported by schools, compared with 24% for medical and social service reports and 18% for legal and law enforcement reports.

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[43] *Id.* Multiple studies have similarly discussed low substantiation rates from school reports. As Chapin Hall concluded, "[e]ducation personnel report the most cases of suspected maltreatment, but detect the smallest percentage of cases that reach the threshold for substantiation." DANA WEINER ET AL., CHAPIN HALL AT THE UNIV. OF CHI., CHAPIN HALL ISSUE BRIEF: COVID-19 AND CHILD WELFARE: USING DATA TO UNDERSTAND TRENDS IN MALTREATMENT AND RESPONSE 2 (2020), https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf [https://perma.cc/3LL8-YYVJ]. Chapin Hall's reported substantiation rates are lower than those we report in the text because we have removed screened-in reports coded as not reporting any form of maltreatment from the denominator. *See also*, Bryn King et al., *Examining the Evidence: Reporter Identity, Allegation Type, and Sociodemographic Characteristics as Predictors of Maltreatment Substantiation*, 18 CHILD MALTREATMENT 232 (2013). 14% of education staff reports are substantiated compared to 41% from law enforcement, 38% from medical professionals, and 35% from public social service agencies. John Kesner, *Child Protection in the United States: An Examination of Mandated Reporting of Child Maltreatment*, 1 CHILD INDICATORS RSCH. 397 (2008); Diana J. English et al., *Causes and Consequences of the Substantiation Decision in Washington State Child Protective Services*, 24 CHILD. & YOUTH SERVS. REV. 817 (2002); John E. Kesner & Margaret Robinson, *Teachers as Mandated Reporters of Child Maltreatment: Comparison with Legal, Medical, and Social Services Reporters*, 42 CHILD. & SCHOOLS 222, 227 (2002).

[44] 2018 FFY NCANDS DATASET, *supra* note 9. For reports from medical personnel and social services, 75% of screened-in reports were investigated, and 73% of investigations were unsubstantiated. *Id.* For reports coming from legal sources and law enforcement, 79% of screened-in reports were investigated, and 61% of investigations were unsubstantiated. *Id.* For reports from family and friends, 77% were investigated, and 85% were unsubstantiated. *Id.*

[45] *Id.*

This figure is lower than reports from family and friends (21%) and anonymous (23%) reports.

Altogether, CPS referrals from schools are particularly unlikely to lead to protective action by CPS. Only 10% of all children reported to CPS agencies by schools are confirmed victims, and only 1.7% of all children reported to CPS by schools are removed from their homes. While schools account for more than 20% of all child abuse or neglect allegations, those allegations account for only 12% of total removals.[46]

These data raise serious questions about schools' role in this reporting and investigation apparatus. That apparatus mostly harms the children and families the system is designed to protect through unnecessary coercive interventions that do little to actually protect children or improve their family situations. These coercive interventions are themselves harmful to children and families, including scaring children and parents through CPS agency investigation and missing opportunities to help families.[47] These harms result from our mandatory reporting and mandatory investigation legal structure which incentivizes professionals to, quite literally, phone it in when they have concerns about children's safety or families' needs for supportive services. In doing so, school staff usually forego opportunities to identify supports for a family directly, abdicating the responsibility to help the family to an adversarial, parental fault-based CPS agency that is unlikely to provide much assistance.[48] Such blithe reporting practices harm the family's trust in the school and thus the school's ability to help in the future.[49]

The harm of CPS investigations also extends to the communities in which families live. Children and families most often subject to CPS investigations are tightly clustered in small,

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[46] *Id.*

[47] Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome*, *in* C. HENRY KEMPE: A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 89, 95–96 (Richard D. Krugman & Jill E. Korbin eds., 2013).

[48] *See* Gary B. Melton, *Mandatory Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 14 (2005) (collecting research showing many mandatory reporters consider whether to call a CPS hotline but do not offer additional services to a family); Gupta-Kagan, *supra* note 27, at 934–35.

[49] Raz, *Calling CPS*, *supra* note 36; Natalie K. Worley & Gary Melton, *Mandated Reporting Laws and Child Maltreatment: The Evolution of a Flawed Policy Response*, *in* C. HENRY KEMPE, *supra* note 47, at 103, 104–105.

deeply impoverished and segregated neighborhoods, neighborhoods replete with environmental risk. Consider the Thomasville Heights neighborhood in Atlanta, Georgia. A single census block group in this neighborhood epitomizes the downstream effects of public policies that have deliberately concentrated minority families in adverse community environments. According to census estimates,[50] the 2,272 people who live in this block group are: 98% Black (compared to 32% statewide and 13% nationwide), 91% single mother families (compared to 28% statewide and 23% nationwide), 36% are unemployed (compared to 6% statewide and nationwide), 71% are living in poverty (compared to 17% statewide and 15% nationwide), and where the housing cost burden is 38% (compared to 28% statewide and nationwide).[51] The impact of public policies such as redlining, the war on drugs, and welfare reform are compounded by the impact of mandated reporting and resulting surveillance by CPS that has resulted in the concentration of Black families residing in adverse community environments.[52]

This tightly-clustered concentration of CPS activity, particularly unsubstantiated investigations, is a form of community disruption under color of state law. The current mandatory reporting system gives the disruption cover, shielding professionals from any responsibility for harming communities

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[50] U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY 2014–2018 5-YEAR DATA (2019), https://www.census.gov/newsroom/press-kits/2019/acs-5-year.html [https://perma.cc/HVD7-TV6W].

[51] *Community Opportunity Map*, CASEY FAM. PROGRAMS, https://caseyfamily.caimaps.info/cailive (last visited May 1, 2021). Authors used the "Search and Select" feature to navigate to Atlanta, GA and then used the "Custom Area Select" tool to explore the referenced neighborhood. Referenced data are on file with corresponding author.

[52] Proof of this claim is beyond the scope of this paper. However, one author (Church) has street address level data for NCANDS from a number of state CPS agencies, pursuant to institutional data sharing agreements. Consider one such county (not otherwise discussed in this paper) with a population of approximately 140K. The U.S. Census Bureau has defined 11,415 block groups for that county. Using 2018 FFY NCANDS data, only 5.8% of block groups in the county contained a child or children that were the subject of a CPS investigation. Only 2.3% of block groups in the county contained a child or children that were the subject of a substantiated investigation. By contrast, 35.5% of block groups contained children living in poverty and 28.6% contained children living in households with no employed parent. CPS reports are relatively rare events, but rare events that appear to be spatially concentrated.

in which they overreport concerns about disenfranchised families.

III. CPS AGENCIES ARE USUALLY NOT AND SHOULD NEVER BE THE GATEWAY TO SERVICES

Mandated reporters, including educational personnel, overwhelm the system with marginal cases that should not require CPS investigation and intervention.[53] Presumably, these reports result from well-meaning professionals' assessment of a child in danger or family in need of support. Indeed, a study conducted by Kelley Fong noted that many "professional reporters" see a report to CPS as a means for accessing support or services for families in need.[54] This section explains why CPS is ill-equipped to provide such support effectively, and thus why schools' reports to CPS require reevaluation.

A. The Mismatch Between Family Needs and CPS Agency Focus

There is a mismatch between what the law requires CPS agencies to do and the broader needs that reporters seek to address. Mandatory reporting is focused on identifying discrete allegations of child maltreatment tied to parental fault; without such a finding, there is no legal basis for coercive state intervention in families. But, much of the support families need results not from intentional acts of parental abuse or neglect but from chronic conditions and assorted adverse childhood experiences (of both parents and children), which often cannot, and should not, be tied to parental fitness. Adverse childhood experiences and other childhood traumas are compounded when they occur in oppressed communities that experience a concentration or chronicity of poverty, violence, racism, or other environmental conditions.[55] The relationship between adversity within a family and adversity within a community is well known, but CPS agencies' treatment of such conditions is wholly disconnected. CPS agencies respond to family adversity—such as

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[53] *See supra* Part II.B; Worley & Melton, *supra* note 49, at 106.

[54] Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AMER. SOC. REV. 610, 620–21 (2020).

[55] Wendy Ellis & William Dietz, *A New Framework for Addressing Adverse Child and Community Experiences: The Building Community Resilience Model,* 17 ACAD. PEDIATRICS 7 (2017).

parental substance abuse, domestic violence, or housing instability—as parental fault. However, the roots of these family adversities are steeped in systemic inequities that create generational community adversity.[56]

Consider Thomasville Heights, discussed above. There is little doubt that a child living in such less-than-ideal circumstances would benefit from some kind of intervention. However, child welfare staff, policy makers, and courts routinely fail to consider the conditions that caused such less-than-ideal circumstances. School personnel, like other mandated reporters, report adverse childhood experiences while ignoring the adverse community environments that played a role in producing them. CPS investigators remain indifferent to those community conditions because the law requires them to identify a perpetrator who can be held responsible for a substantiated allegation, not a complete set of factors contributing to challenging childhood circumstances.[57]

This focus on parental fault while ignoring community adversity is apparent in many common CPS contexts. Consider housing cases, where the power imbalance between landlord and tenants heavily favors the former, dwarfing the ability of low-income tenants to enforce their legal rights. Moreover, a troubling history of governmental housing policies has deeply segregated our nation into the adverse community environments described above.[58] Yet when CPS investigates children living in unsuitable housing, their charge is to try to substantiate the allegations by identifying a perpetrator that is responsible for the child's welfare, or more directly, a parent that can be blamed for the unsuitable housing. Domestic violence cases also fit the narrative. Often in child welfare cases, the perpetrator of domestic violence is not the child's caretaker. However, to intervene, CPS needs to frame the domestic violence issue as one of parental fault, which they do by accusing the victim of domestic violence of failing to protect his or her (usually her)

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[56] *Id.*

[57] *See, e.g.*, MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 5 (2020) (describing a system that "willfully ignores social and racial inequities, instead focusing myopically on the role of the individual").

[58] *See, e.g.*, RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (1997).

child.[59] Sadly, this occurs in cases where the caretaker has independently done much to protect their child.[60]

In the many contexts where an adverse childhood experience has little to do with intentional parental conduct, such as witnessing domestic violence or living in unsuitable housing, a fault-based investigative response falls short. As we discuss below, alternatives such as referring a family to a supportive service or legal aid lawyer would yield better results.

However, outside of alternative or differential response, CPS will often only provide services after an investigation is substantiated, making a CPS investigation a prerequisite for support and establishing an adversarial relationship with families. Even more, this interaction creates a legal record to be forever invoked as an indictment of the parent's fitness, stigmatizing families who may need support to overcome family and/or community adversity.

B. False Perceptions of Accessing Services Through CPS Agencies

This false perception of the family regulation system serving as a support to families is inconsistent with the historically documented harm, surveillance, punishment, and policing experienced by families entangled within the system.[61] It also ignores the reality that families and professionals can access services *without* CPS involvement.

Incorrect assumptions of the system's interactions with vulnerable families often ensnare them in a web of coercion and surveillance, one from which it is difficult to detach.[62] Following a report to CPS agencies and substantiated investigation, CPS agencies or family courts often require families to complete services such as therapy, parenting classes, drug treatment, and

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[59] *See, e.g.*, Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004).

[60] Eli Hager, *The Hidden Trauma of "Short Stays" in Foster Care*, MARSHALL PROJECT (Feb. 11, 2020), https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care [https://perma.cc/P42J-CWCP].

[61] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

[62] Fong, *supra* note 54, at 620.

domestic violence classes as a part of their service plan.[63] Many families and mandated reporters call CPS with the express purpose of accessing such services.[64] In reality, access to these services and supports is not predicated on the forced engagement with CPS and can easily be obtained from community organizations. These services are often free or low cost and could be accessed by the families directly or by direct referrals from schools and other community-based agencies.

Indeed, for the most frequent services from which families may benefit—mental health and substance abuse treatment—CPS need not be involved. These services are available through mental health and substance abuse agencies and funded through Medicaid.[65] Unnecessary CPS agency involvement only serves to risk negatively impacting the provider's engagement with the family.[66]

C. Narrow Cases When CPS Has a Monopoly on Services and the Risk that Monopoly May Grow

While most services that CPS agencies insist families participate in do not actually require CPS involvement, some discrete services currently require families to be referred to CPS. This requirement flows not from anything inherent in these services, but from flawed public policy requiring CPS involvement as a prerequisite to access services, creating perverse incentives to overreport families to the family regulation system.

Consider access to safe and affordable housing—an endemic problem for low-income families in America.[67] In 2018,

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[63] Amy C. D'Andrade, *Parents and Court-Ordered Services: A Descriptive Study of Service Use in Child Welfare Reunification*, 96 FAMS. SOC'Y 25 (2018).

[64] *See* Fong, *supra* note 54.

[65] Indeed, "Medicaid is the single largest payer for mental health services in the United States and is increasingly playing a larger role in the reimbursement of substance use disorder services." *Behavioral Health Services*, CTRS. FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/benefits/behavioral-health-services/index.html [https://perma.cc/2JMZ-Y8B7] (last visited Jan. 6, 2021).

[66] J.D. Berrick et al., *Partnering with Parents: Promising Approaches to Improve Reunification Outcomes for Children in Foster Care*, 11 J. FAM. STRENGTHS 1, 1–13 (2018).

[67] *See, e.g.*, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

child welfare agencies reported removing more than 25,000 children from their parents due in part to inadequate housing.[68] Recognizing that access to housing for families at risk of CPS involvement can prevent such unnecessary removals, the federal government's Family Unification Program (FUP) provides priority access to a Housing Choice Voucher for families that are at risk of foster care due to inadequate housing.[69] The federal government's own research has documented that the FUP and other housing subsidies result in fewer school disruptions and child behavior problems, less adult alcohol and drug problems and psychological distress, and significantly reduced intimate partner violence.[70] However, such housing services are "extremely scarce"[71] and CPS agencies exclusively control access to the FUP vouchers which do exist. By federal law, CPS agencies are gatekeepers for these scarce resources and must certify that the "lack of adequate housing is a primary factor in the imminent placement of the family's child or children in out-of-home care"[72] while collaborating with public housing agencies to identify eligible families.[73]

Consider this legal structure from the point of view of a school. A school social worker learns that a family has been evicted and is moving from place to place.[74] The social worker wants to help the family access housing options and knows the local housing agency just received a grant for FUP vouchers.[75]

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[68] 2018 FFY NCANDS DATASET, *supra* note 9. *See also* Ruth White, *Understanding the Nexus of Child Welfare and Housing in America*, *in* THE IMPACT OF HOUSING AND HOMELESSNESS ON CHILD WELL-BEING 4 (Traci LaLiberte et al. eds., 2017), https://www.cascw.org/wp-content/uploads/2017/04/CW360_Spring2017_WEB508.pdf [https://perma.cc/9S56-J2QF].

[69] *See* 42 U.S.C. § 1437(a)(1).

[70] *See* OFFICE OF POL'Y DEV. & RSCH., U.S. DEP'T OF HOUS. & URB. DEV., FAMILY OPTIONS STUDY: 3-YEAR IMPACTS OF HOUSING AND SERVICES INTERVENTIONS FOR HOMELESS FAMILIES (2016), https://www.huduser.gov/portal/sites/default/files/pdf/Family-Options-Study-Full-Report.pdf [https://perma.cc/NET3-55MP].

[71] TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 13 (2016).

[72] *See* 42 U.S.C. § 1437(a)(2).

[73] *See* 42 U.S.C. § 1437(a)(4).

[74] Variations on the basic fact pattern may apply. For instance, the parent may rely on an abusive partner for housing due to a lack of alternative housing options, but housing instability remains the central problem.

[75] There is limited funding, and local jurisdictions must apply for FUP vouchers. U.S. DEP'T OF HOUS. & URB. DEV., 2019 FAMILY UNIFICATION PROGRAM NOTICE OF FUNDING AVAILABILITY (2019),

The social worker cannot simply call the housing agency and explain how the children are at risk of harm due to housing instability. Rather, she must report the family to the CPS agency and hope that it will not only identify the housing need, but declare the children at imminent risk of foster care. The latter also requires CPS to identify the child's parent as being at fault for such imminent risk. Such a report to CPS comes with the risk that CPS agencies will do nothing, respond too coercively to it, or respond but fail to provide access to a FUP voucher.

The Family Unification Program is only one example. Some federal funds for "family preservation" services run through state CPS agencies.[76] State and local CPS agencies provide their own set of services not accessible elsewhere, and some states even codify this role for CPS agencies in statute.[77] We do not attempt a full listing of supports and services which are provided by and must be accessed through CPS agencies; that task is beyond the scope of this Article. Our point is to show that CPS agencies have a monopoly over accessing certain services, and that monopoly precludes other entities—like schools—from helping families access such services directly.

The most recent federal funding reform exacerbates these problems. The Family First Prevention and Services Act (FFPSA) explicitly seeks to incentivize states to spend money to prevent removing children from their parents to foster care, and thus shift spending from maintaining children in foster care to serving children in their families.[78] This shift is welcome, but it also risks expanding CPS agencies' control over services provided to families. Congress could have funded agencies distinct from CPS to provide essential services, but instead, it tied funding for evidence-based prevention services to CPS agencies and families

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https://www.hud.gov/sites/dfiles/SPM/documents/2019_FUP_NOFA_FR-6300-N-41.pdf [https://perma.cc/LR55-TS9F].

[76] Title IV-B of the Social Security Act provides a modest amount of such funds. 42 U.S.C. §§ 621–629h. "Family preservation services" are defined in § 629a(a)(1).

[77] *See, e.g.*, D.C. CODE §§ 4-1303.01a(7), 4-1303.03(a)(13) (2020).

[78] *See, e.g.*, *Family First Prevention Services Act*, NAT'L COUNCIL STATE LEGISLATURES (April 1, 2020), https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx [https://perma.cc/QM9M-5VZR] (describing Family First as encouraging states to "develop prevention-focused-infrastructure" and permitting states to use federal Title IV-E funds to support services to help children remain with their families).

reported to CPS agencies. FFPSA not only funnels prevention money through CPS agencies, but requires those agencies to identify children as "candidate[s] for foster care," defined as "being at imminent risk of entering foster care . . . but who can remain safely" out of foster care with the help of certain prevention services.[79] FFPSA funds can be used for specific services deemed to have some significant evidence base. So far, the federal government has certified several such services, including certain mental health and substance abuse treatments, as "well-supported," "supported," or "promising."[80] Notably, there is nothing specific to these services that should require CPS agencies to refer families to them; they should be Medicaid-eligible services open to families referred by themselves or any professional that knows them.

Again, consider this legal structure from a school's perspective. If a school becomes aware of significant child misbehavior and substance abuse, and has concerns about the effectiveness of a parent's response to these issues, it could reasonably refer the family for Functional Family Therapy, a family-based intervention found to achieve positive results responding to those issues.[81] FFPSA structurally incentivizes CPS agencies to become an access point for this service. Consequently, this encourages schools to refer the family to CPS, which will presumably investigate and determine if the child is a candidate for foster care, rather than refer the family directly to services. While we applaud FFPSA for directing funding to such services, we question why, in cases like this, schools should be pushed to use CPS agencies as a middleman and not pushed to refer families directly to Family First providers.

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[79] 42 U.S.C. §§ 675(13), 671(e).

[80] *Find a Program or Service*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/program?combine_1=&prograting%5B1%5D=1&prograting%5B2%5D=2&prograting%5B3%5D=3&page=0 [https://perma.cc/SK5H-WYBC] (last visited May 1, 2021). A complete list is available by filtering for "well-supported," "supported," and "promising" programs.

[81] *Id.*

IV. AN ALTERNATIVE VISION: SCHOOLS SERVING FAMILIES APART FROM CPS AGENCIES AND THE FAMILY REGULATION SYSTEM

The preceding sections support a demand for a new vision: CPS agencies certainly have an important role in responding to severe allegations of abuse and neglect where children are at imminent risk, but their forced foray into investigating and overseeing families living in abject poverty is misplaced. To address adverse childhood experiences that manifest in adverse community environments, public schools must have the autonomy and purpose to serve families outside the family regulation system.

The autonomy that schools need to serve children outside the family regulation system may require legislative and policy changes. Schools need access to the important services and funding streams currently monopolized by CPS, or the ability to refer families directly to such services without using CPS.[82] Mandated reporting statutes need to be limited; education personnel should report severe child maltreatment when state coercion is needed to protect children, but the majority of other reports need not go to CPS.[83] Definitions of maltreatment, particularly neglect, may need to be revisited to disentangle adverse childhood experiences, adverse community environments, and other social concerns from intentional and willful conduct by parents.[84]

Freedom from legal mandates to involve CPS will permit schools to reimagine their role in supporting families. Already, research demonstrates that reporters call CPS out of a desire to help families, not only because the law requires them to do so.[85] Thus, when that desire to help families can be satisfied without calling CPS, reporters should have no difficulty transitioning to this alternative vision, which we discuss more fully below.

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[82] *See supra* Part III.B–C.

[83] *See, e.g.*, Raz, *Calling CPS*, *supra* note 36; Abraham Bergman, *A Pediatrician's Perspective on Child Protection*, *in* C. HENRY KEMPE, *supra* note 47, at 63, 63–69 (2013); Wald, *supra* note 47; Worley & Melton, *supra* note 49.

[84] *See* Josh Gupta-Kagan, *Finally Time for Realistic and Determinate Standards in Family Court*, 68 JUV. & FAM. CT. J. 31 (2017).

[85] Fong, *supra* note 54, at 620.

A. Losing Coercion over Families

Building a stronger structure for schools to provide or refer services and supports directly to families, rather than forcing schools to work through CPS agencies, would circumvent CPS agencies' coercive authority over families. Reduced coercion is a feature of the alternative vision discussed herein, as it empowers parents to use the services and supports they desire, and increases their opportunities to do so. Avoiding school-induced CPS agency coercion also promotes schools and families working effectively together. Finally, it reflects a recognition of CPS agencies' primary tool—not new services, but coercion. As one school social worker remarked, "[When CPS is involved,] I think parents either hear it differently or out of nervousness and fear of 'what if I don't accept this service?'"[86]

This admission—that reporters who call CPS agencies are at least conscious of those agencies' coercive power—raises a range of concerns. It requires a subjective judgment that a family is obstinately refusing to comply with the school's recommendations—rather than legitimately disagreeing with those recommendations or facing obstacles to following them—and that exercising coercive power will lead to positive outcomes. It raises concerns that implicit bias in such judgments will contribute to racial and other disparities in reporting. Indeed, many CPS social workers express negative opinions of Black families;[87] a similar risk likely applies to school personnel.

We recognize that coercion is sometimes—albeit rarely—necessary to protect children from maltreatment: in those cases, reports to CPS are necessary and appropriate. However, reports to CPS simply to link families to voluntary services are unnecessary and inappropriate. Only when a professional or mandated reporter has suspicion of severe risk to a child should they report their suspicion to CPS.

We simultaneously recognize that even this alternative vision will raise concerns that any school-based services or referrals would come with too much surveillance and coercion. We respond in several ways. First, whatever coercive authority schools have over families is less than that of CPS agencies; that

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[86] *Id.* at 621.

[87] Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2011).

is why advocates for reforming the family regulation system call for investing in services through agencies separate from CPS.[88] Second, we recommend enacting these changes in the context of broader reforms which would limit the scope of CPS agency authority, such as narrowed definitions of abuse and neglect, narrowed mandatory reporting and mandatory investigation laws, and strengthened legal protections against unnecessary removals. Such reforms would limit the threat that schools would call CPS agencies to more severe cases. Third, we emphasize that many of the service referrals described below involve referrals to outside entities that would not have a duty to report families' confidential data to schools. Fourth, as described below, many of the individuals who schools could hire to interact with parents could be parents' peers and other community members.

B. Linking Children and Families to Services—Without CPS

When schools (and other reporters) use CPS to refer families to services, reporters and CPS risk a loss of trust and engagement with the family. CPS inherently has a "dual role"—surveillance and assistance[89]—and the former can undermine its effectiveness at the latter.[90] Reforms to the family regulation system should establish new pathways to access resources without requiring CPS; the more CPS agencies are limited to cases where coercive authority is necessary to protect children, the more the family regulation system's scope will shrink, leaving space for a new child and family well-being system to emerge.

Schools provide fertile ground for such a child and family well-being system. This section outlines how schools can identify families' needs for public benefits, legal services, and mental health care, and how reorienting resources away from CPS agencies supports such a system.

1. Public Benefits

Schools know which children and families require income supports and other forms of public benefits, and they can also

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[88] *See, e.g.*, *Parents to City Council: Fund Communities, Not ACS*, RISE MAG. (Nov. 3, 2020), https://www.risemagazine.org/2020/11/fund-communities-not-acs [https://perma.cc/7SV2-ATWM].

[89] LEE, *supra* note 71, at 89.

[90] Lucas A. Gerber et al., *Understanding the Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 116 CHILD. & YOUTH SERV. REV. 116, 125 (2020).

take on the administration of public benefits to which families may be entitled. Schools already manage financial eligibility for programs under the Richard B. Russell National School Lunch Act.[91] Schools already know[92] which children are homeless (broadly defined[93]) and must provide them with transportation to continue attending their home school[94] and with a "coordinated system" to help children and parents exercise their legal rights under the McKinney-Vento Homeless Assistance Act.[95]

Schools need not stop there. They could assist families with applying and accessing other government financial benefits[96] like Supplementary Nutrition Assistance Program (SNAP), Temporary Aid to Needy Families (TANF), Medicaid, Supplemental Security Income (SSI), and housing assistance. These services should not require involvement with the CPS agency. Where the law requires CPS involvement—as with the Family Unification Program described in Part III.C—the law should change to permit a more direct and less coercive path to that assistance.

2. Legal Services Referrals

Helping families obtain public benefits is important, but when a child is wrongfully denied Social Security disability benefits, when a landlord refuses to make repairs, or when the family encounters a range of other challenges, the family may benefit from and desire legal assistance. Legal assistance can address many of the underlying conditions that currently lead to CPS agency involvement, and thus can help prevent the need for such involvement, a point the federal Children's Bureau recently

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[91] School Lunch Programs Act, 42 U.S.C. §§ 1751–1769j.

[92] State education agencies report some of these data. *See, e.g.*, *New Data Show Number of NYC Students Who Are Homeless Topped 100,000 for Fifth Consecutive Year*, ADVOC. FOR CHILD. N.Y., (Dec. 3, 2020), https://www.advocatesforchildren.org/node/1675 [https://perma.cc/LW3W-MJ7K] (using state education department data to document number of homeless students).

[93] The legal definition is broad enough to include anyone doubling up with friends or family after an eviction. 42 U.S.C. § 11434a(2).

[94] 42 U.S.C. § 11432(e)(3)(C).

[95] 42 U.S.C. § 11432(e)(3)(E)(i).

[96] The examples used in this section are governmental benefits. However, the same reasoning applies to schools connecting families with community resources and organizations that have additional support to promote the social determinants of health.

emphasized.[97] Schools should establish relationships with legal aid organizations so families may have access to preventative legal advocacy.

The subject matter of preventative legal advocacy is the bread and butter of poverty law practice, helping parents defend against an eviction or take action against a landlord to improve housing conditions, obtain or maintain public benefits, obtain legal protection against an abusive partner, arrange for temporary care of a child while the parent is away for inpatient drug treatment, a military deployment, incarceration, or other reasons.[98] These legal needs make up America's well-documented "justice gap"—the inadequate or unavailable legal assistance for the millions of low-income families who encounter these or similar civil legal problems.[99]

School partnerships with legal services organizations can help fill that gap when legal needs affect children, and schools can identify and refer families who likely need legal services. This proposal echoes what medical providers do in medical-legal partnerships; medical personnel and social workers in their clinics or hospitals identify families who face some legal obstacle to improved health, such as poor housing conditions or access to

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[97] ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., CIVIL LEGAL ADVOCACY TO PROMOTE CHILD AND FAMILY WELL-BEING, ADDRESS THE SOCIAL DETERMINATES OF HEALTH, AND ENHANCE COMMUNITY RESILIENCE (2021) [hereinafter CIVIL LEGAL ADVOCACY].

[98] *See* VIVEK S. SANKARAN & MARTHA L. RAIMON, U. MICH. L. SCH. SCHOLARSHIP REPOSITORY CTR. CASE CLOSED: ADDRESSING UNMET LEGAL NEEDS & STABILIZING FAMILIES, 2 (2014), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1085&context=other [https://perma.cc/7H8V-FP2R] (noting several common fact patterns for legal services). *See also* AM. ACAD. OF ARTS & SCI., CIVIL JUSTICE FOR ALL: A REPORT AND RECOMMENDATIONS FROM THE MAKING JUSTICE ACCESSIBLE INITIATIVE 30 (2020) [hereinafter CIVIL JUSTICE FOR ALL], https://www.amacad.org/sites/default/files/publication/downloads/2020-Civil-Justice-for-All_0.pdf [https://perma.cc/EE2T-FELC] (noting family and housing law as accounting for 60% of all problems addressed by Legal Services Corporation-funded legal services organizations).

[99] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/2B2V-U973]. *See also, e.g.*, U.S. DEP'T OF JUST., CIVIL LEGAL AID 101, at 2 (2018), https://www.justice.gov/lair/file/828346/download [https://perma.cc/CBV4-MMXD] (reporting that a majority of low-income Americans seeking free civil legal aid "are turned away because of the limited resources available").

public benefits, and refer the family to a legal services provider. Some have identified such partnerships as mechanisms to keep children and families from being perceived as needing CPS involvement.[100]

Schools (and especially school social workers) can similarly flag potential clients for legal services organizations. Just as medical-legal partnerships feature formal agreements between medical clinics and legal services providers, schools and legal services providers would need to reach agreements. Indeed, the American Academy of Arts and Sciences recently recommended that legal services organizations partner with a variety of entities, including "educational institutions," building off the medical-legal partnership model, to address the yawning access-to-justice gap in this country.[101] Others have identified school-based legal services as a tool to fight against the school-to-prison pipeline.[102]

Such a structure would not be without some tension. Families might have claims against the school district in school disciplinary or special education matters, so schools might question whether referring families to lawyers could conflict with the school's interests. That tension is real, but resolvable. Patients may have medical malpractice claims against medical clinics, yet medical-legal partnerships have thrived. Family defenders providing pre-petition representation to parents investigated by CPS agencies for abuse and neglect have built-in tension with those agencies in every case, yet frequently agencies refer families for such representation, and pre-petition representation is an important and expanding practice.[103] If those models can overcome tension between partners, the same can occur with school-legal partnerships, and a new pathway to legal services can be built to provide services to keep children safe and away from CPS agencies.

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[100] Kara R. Finck, *Medical Legal Partnerships and Child Welfare: An Opportunity for Intervention and Reform*, 28 WIDENER COMMONWEALTH L. REV. 23, 24 (2019).

[101] CIVIL JUSTICE FOR ALL, *supra* note 98, at 21.

[102] Barbara Fedders & Jason Langberg, *School-Based Legal Services as a Tool in Dismantling the School-to-Prison Pipeline and Achieving Educational Equity*, 13 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 212, 229–35 (2013).

[103] *See infra* note 112 and accompanying text.

Indeed, several local examples have been developed. The Chicago Law & Education Foundation has grown since 2010 to partner with several schools to provide legal services to low-income children and families.[104] The Atlanta Volunteer Lawyers Foundation began a "Standing with Our Neighborhoods" initiative in 2016, which has grown to place lawyers in nine public schools to help families encountering housing instability.[105] In 2018, the Moran Center for Youth Advocacy in Evanston, Illinois, opened a school-based civil legal services clinic focused on family law, housing, public benefits, and immigration issues,[106] and operates that clinic alongside an existing program representing children and families in special education and school disciplinary matters,[107] demonstrating that such representation need not doom school-legal services partnerships. The School-Based Health Alliance has identified school-based health centers that are tied to their own medical-legal partnerships, effectively tying schools to legal services.[108] Other school-based legal clinics have operated in Connecticut,[109] New York,[110] and Los Angeles.[111]

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[104] *History*, CHI. L. & EDUC. FOUND., https://lawclef.org/about-us/history/ [https://perma.cc/P5S9-K5UT] (last visited Oct. 18, 2020); *Programs*, CHI. L. & EDUC. FOUND., https://lawclef.org/programs/ [https://perma.cc/2KJM-Z48H] (last visited June 2, 2021).

[105] *Standing with Our Neighbors*, ATLANTA VOLUNTEER LAWS. FOUND., https://avlf.org/standing-with-our-neighbors [https://perma.cc/98FC-5BL3] (last visited Oct. 14, 2020).

[106] *School-Based Civil Legal Clinic*, MORAN CTR. FOR YOUTH ADVOC., https://moran-center.org/what-we-do/school-based-civil-legal-clinic [https://perma.cc/E85D-3QJT] (last visited Oct. 18, 2020).

[107] *What We Do*, MORAN CTR. FOR YOUTH ADVOC., https://moran-center.org/what-we-do [https://perma.cc/YN2W-8T4T] (last visited Oct. 18, 2020).

[108] SCH.-BASED HEALTH ALL., SCHOOL-BASED HEALTH & MEDICAL-LEGAL PARTNERSHIPS (2018), https://www.sbh4all.org/wp-content/uploads/2018/08/School-Based-Health-and-Medical-Legal-Partnership.pdf [https://perma.cc/Y7BS-MNHK].

[109] Linda Conner Lambek, *Students Can Get Legal Help at School; Attorney Opens Clinic at Harding High*, CONN. POST (May 13, 2014), https://cca-ct.org/wp-content/uploads/2014/05/CT-Post-Harding-5-13-14.pdf [https://perma.cc/4J5D-FVL8].

[110] *Children's Project*, VOLUNTEERS LEGAL SERV., https://volsprobono.org/projects/childrens/#partnerschildren [https://perma.cc/E27D-UK38] (last visited Oct. 18, 2020).

[111] Linda Jacobson, *School-Based Legal Clinic Addresses Needs of Los Angeles Immigrant Families*, HIGHER ED DIVE (May 10, 2019)

Our suggestion for school-based legal referrals takes one of the most important trends in child protection law—calls for expanding "pre-petition" representation, in which child protection agencies refer parents to legal services organizations when the agencies identify a need for such services[112]—a step further. Like any other service, there is nothing inherent in it that should require parents to be referred to CPS agencies to access it. Thus, while we welcome the expanding focus on parent representation and pre-petition representation for families already referred to CPS, we seek an alternative pathway to provide such legal services before such CPS involvement occurs.

3. School-Based Health Supports

Schools are uniquely positioned in communities to serve as a conduit for services and resources for students and their families. This is best demonstrated through their ability to provide medical and mental health support, especially to students from historically marginalized backgrounds who often struggle to gain access to adequate medical services within their community.

Schools, especially those with a School-Based Health Center (SBHC), may serve as a primary point of access to health care for these youth.[113] SBHC's have expanded since they were initially started in the 1960s and are now located in over 2,300 schools. They are often composed of a collaborative team of professionals including medical doctors, dentists, mental health practitioners, health educators, social workers, nutritionists, and other support staff who work together to meet the needs of the

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https://www.highereddive.com/news/school-based-legal-clinic-addresses-needs-of-los-angeles-immigrant-families/554559/ [https://perma.cc/6SNK-JCGP].

[112] *See, e.g.*, Gianna Giordano & Jey Rajaraman, *Increasing Pre-Petition Legal Advocacy to Keep Families Together*, AM. BAR ASS'N. (Dec. 15, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/ [https://perma.cc/QV3F-RXXQ]; CASEY FAM. PROGRAMS, STRATEGY BRIEF: TRANSFORMING CHILD WELFARE SYSTEMS 2 (2020), https://caseyfamilypro-wpengine.netdna-ssl.com/media/20.07-QFF-TS-Preventive-Legal-Support.pdf [https://perma.cc/9TW3-3M6G] ("In some cases, families can also self-refer or be referred by other sources (such as the courts or community-based agencies)."). The "common elements" of such pre-petition legal services, however, involve CPS agency referrals.

[113] Michael Arenson et al., *The Evidence on School-Based Health Centers: A Review*, 6 GLOB. PEDIATRIC HEALTH 1, 3 (2019).

youth and families they serve.[114] School-based health services serve an integral role in addressing health disparities for youth and families from medically underserved communities which historically are more likely to engage with the family regulation system and to have their children removed and placed in foster care.[115] Partly due to environmental stressors and experiences with complex trauma,[116] foster youth commonly face mental health challenges, and they often go untreated due to lack of access to appropriate care. It has been widely documented that foster youth that have had numerous adverse childhood experiences are more likely to struggle academically in school and to experience substance use issues,[117] homelessness, incarceration,[118] and mental health challenges.[119] Schools have the opportunity to disrupt this cycle by providing foster youth and other students (especially students at risk of becoming foster youth) with necessary mental health and medical services to address these needs in a non-coercive manner outside of CPS agencies. Collaboratively, health professionals and schools can work together to invest in youth and communities while ensuring that those that experience the most systemic barriers thrive.

4. Peer Support Models

Peer support models are slowly expanding within organizations serving families in the family regulation system, as a result of the growing recognition of the power differential between CPS agencies and families.[120] Broadly defined, a peer

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[114] *Id.* at 2–3.

[115] Katherine Sanchez et al., *Fostering Connections and Medical Homes: Addressing Health Disparities Among Children in Substitute Care*, 32 CHILD. & YOUTH SERVS. REV. 286 (2010).

[116] Patricia A. Resick et al., *A Critical Evaluation of the Complex PTSD Literature: Implications for DSM-5*, 25 J. TRAUMATIC STRESS 241, 242 (2012).

[117] J.P. Mersky et al., *Impacts of Adverse Childhood Experiences on Health, Mental Health, and Substance Use in Early Adulthood: A Cohort Study of an Urban, Minority Sample in the U.S.*, 37 CHILD ABUSE & NEGLECT 917, 920 (2013).

[118] Youngmin Yi & Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, 28 FUTURE CHILD. 37, 39 (2018).

[119] Brenda M. Morton, *The Grip of Trauma: How Trauma Disrupts the Academic Aspirations of Foster Youth*, 75 CHILD ABUSE & NEGLECT 73, 74 (2018).

[120] *How Do Parent Partner Programs Instill Hope and Support Prevention and Reunification?*, CASEY FAM. PROGRAMS (June 4, 2019), https://www.casey.org/ parent-partner-program [https://perma.cc/D7TH-L9S8].

support specialist is a parent or child who has previously experienced and navigated a system, such as the family regulation system, and receives training to support someone currently navigating that system.[121] Peer support models have long existed outside the family regulation system, including some efforts in schools. Increased use of peer support models can both expand supports available to families and mitigate the risk that greater school involvement with families will become a new form of coercion.

Grassroots parent organizing efforts have brought together parents, schools, and community members to address inequality. Much of the parent organizing in underserved schools is developed out of the desire to address disparities in education and the local community.[122] Within Los Angeles, parents from underserved districts have joined together to advocate for the rights of their children through the formation of organizations such as the Community Asset Development Re-defining Education (CADRE) program. CADRE parents seek to disrupt the carceral logics within schools through policy change, community resiliency, base building, leadership development, campaigns and movement building, and coalition building.[123] This grassroots organization has increased parent involvement within their community schools and strengthened parents' ability to advocate for themselves and their children through know-your-rights trainings, legal clinics, and engagement in participatory action research. Their work has helped to pass policies that have aided in decreasing school suspension rates within South Los Angeles.

The efforts of parent-led organizations within schools are also a safety mechanism for families and children by providing them a voice and support to ensure that schools do not perpetuate further coercion over vulnerable families. Parents involved in these grassroots efforts are often more engaged in their children's education and are empowered to speak up about the injustices they see within their communities and schools. Schools can

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[121] *Id.*

[122] Kysa Nygreen, *Competing Paradigms of Educational Justice: Parent Organizing for Educational Equity in a Neoliberal Reform Context*, 49 EQUITY & EXCELLENCE EDUC. 202, 202 (2016).

[123] *Strategies*, CADRE, http://cadre-la.org/newhome/whatwedo/strategies [https://perma.cc/XZ8B-F23H] (last visited Feb. 25, 2021).

harness the power of these grassroots movements by bringing parents to the table as partners to build coalitions and networks of support.

Peer support models have a growing evidentiary base, with a diverse range of improved outcomes related to substance abuse, mental health, and family preservation.[124] Peer support models should be embedded in schools to ensure that parents in the community are formal school personnel that are charged with identifying and working beside peer families that are experiencing family or community adversity.

5. Increasing School Social Workers

Implementing the proposed changes will require a significant scaling up of work that schools already undertake to identify and address children's and family's needs. To achieve that scale, schools will need significantly more staff, especially social workers and other professionals and peer and community supports. The National Association of Social Workers recommends that schools have a ratio of one social worker for every 250 children, and one social worker for every fifty children with what they describe as "intensive needs."[125] Presently, schools fall far short of this measure—nationally, there is an average of 0.28 social workers per school, according to U.S. Department of Education's Office of Civil Rights,[126] and the ACLU has calculated the average national ratio to be 2,106 students to one social worker.[127]

Moving to the recommended ratios requires addressing concerns that more school social workers would funnel more children to the family regulation system. We emphasize that increasing the numbers of school social workers should occur as

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[124] CASEY FAM. PROGRAMS, *supra* note 120.

[125] NAT'L ASS'N OF SOC. WORKERS, NASW STANDARDS FOR SCHOOL SOCIAL WORK SERVICES 18 (2012), https://www.socialworkers.org/LinkClick.aspx?fileticket=1Ze4-9-Os7E%3D&portalid=0 [https://perma.cc/2PY4-YS99].

[126] U.S. DEPT. OF EDUC., OFFICE OF C.R., *supra* note 14 (demonstrating that of the 97,533 schools listed in the CRDC School Support dataset, all but twenty-one schools provided data on the number of full-time equivalent social workers on staff).

[127] AM. CIV. LIBERTIES UNION, COPS AND NO COUNSELORS: HOW THE LACK OF SCHOOL MENTAL HEALTH STAFF IS HARMING STUDENTS 13 (2019), https://www.aclu.org/report/cops-and-no-counselors [https://perma.cc/C4BU-FFHC].

part of broader reforms shifting away from the reporting and investigation status quo and limiting school reports to CPS agencies to more severe cases. Recognizing that such a shift will require significant legal changes to mandatory reporting statutes and cultural changes within schools, we recommend several additional steps to ensure that additional school social workers facilitate voluntary, and not coercive, supports and services for families. School social worker job descriptions should make clear that their role is to offer supports and services to families. While voluntary reporting to CPS agencies would remain even if our recommendation to limit mandatory reporting is adopted, job descriptions should make clear that such reporting is only appropriate when social workers (or other school staff) suspect severe abuse or neglect. Relatedly, expanding the number of staff to help families obtain useful supports should not rely entirely on school social workers. Peer and community supports, discussed in Part IV.B.4, should be used as well.

6. Paying for Reforms

Enacting the reforms proposed in this section would require addressing concerns about cost, especially costs of more school social workers and services provided by schools. Much, if not most, of additional funds needed for more school social workers can be obtained from reorienting funding from the existing family regulation system and school-to-prison nexus. Shrinking the scope of CPS to focus on protecting children from severe—but relatively rare—forms of maltreatment would free up many social workers and the public dollars used to pay them. That funding stream could be redirected from CPS agencies to school systems.

Relatedly, shrinking schools' financial contributions to the carceral web described in Part II.A would free up money for school social workers and other staff. Many school districts spend significant sums on policing students, even elementary school students, an activity shown to increase school-based arrests but not school safety. Nationally, public schools employ more police officers than social workers—more than 27,000 police officers compared to 23,000 social workers[128]—and students of color are

[128] U.S. COMM' ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 165 (2019),

particularly likely to attend schools with police but no counselors.[129] For instance, the Richland County School District One[130] spends more than $2.3 million annually to pay for a total of forty-nine police officers in its schools, twenty-eight of which are assigned to elementary schools.[131] Most of those funds could be redirected to school social workers without jeopardizing safety. School districts can also access alternative funding streams to help pay for this Article's proposals, such as Medicaid which can help support mental health and substance abuse services as well as case management in certain circumstances.[132]

The first step of covering the cost of services to families is to maximize funding from already existing sources. As noted above, Medicaid funds mental health services,[133] one of the primary services schools could provide. The federal Children's Bureau has catalogued a range of funding sources for civil legal services for impoverished families.[134]

These steps can cover much of the reforms we propose without requiring new funding. Some new funding may, of course, also be required, which we submit is justified as a moral imperative to serve children and families more effectively, and as a long-term investment to help children avoid harmful outcomes in the legal system, schools, employment, and beyond.

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https://www.usccr.gov/pubs/2019/07-23-Beyond-Suspensions.pdf [https://perma.cc/AJJ6-THUD].

[129] *Id.* at 51.

[130] This is the home district of Josh Gupta-Kagan in Columbia, South Carolina.

[131] Data on total cost and numbers of school resource officers (SROs) are taken from memoranda of agreement between the district and two separate local law enforcement agencies for the 2019–20 school year. RICHLAND CNTY. SCH. DIST. ONE & RICHLAND CNTY. SHERIFF'S DEP'T., MEMORANDUM OF AGREEMENT 2019–2020 & ADDENDUM 1; RICHLAND CNTY. SCH. DIST. ONE & COLUMBIA POLICE DEP'T., MEMORANDUM OF AGREEMENT 2019–2020, at 1. The District confirmed in a FOIA response that its expenditures for SROs came from general funds. RICHLAND CNTY. SCH. DIST. ONE, FOIA REQUEST RESPONSE (Aug. 10, 2020).

[132] *See, e.g.*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. & CTRS. FOR MEDICARE & MEDICAID SERVS., JOINT INFORMATIONAL BULLETIN: GUIDANCE TO STATES AND SCHOOL SYSTEMS ON ADDRESSING MENTAL HEALTH AND SUBSTANCE USE ISSUES IN SCHOOLS (July 1, 2019), https://www.medicaid.gov/federal-policy-guidance/downloads/cib20190701.pdf [https://perma.cc/QTZ3-99J7].

[133] *See* sources cited *supra* note 65 and accompanying text.

[134] CIVIL LEGAL ADVOCACY, *supra* note 97, at 7–13.

V. CONCLUSION

Schools' roles in the present family regulation system powerfully illustrate the failures of that system. Schools are the largest single source of child abuse and neglect hotline reports to CPS agencies, but their reports are especially unlikely to be investigated, substantiated, or lead to meaningful protective action. Instead, they lead to unwanted and largely unhelpful CPS agency intervention and coercive regulation of families. For families that could benefit from voluntary supports, this CPS agency involvement represents a missed opportunity to provide more effective and less coercive assistance.

Schools also represent the promise of a different approach. School staff are in a position to know when families are in need of assistance and to provide such assistance directly, through partnerships with legal services and other community providers. Such assistance would require both a significant change in law, so schools would not be legally required to report families to CPS agencies, as well as in culture, so school staff would work collaboratively with families, and significant personnel and funding changes. However difficult, these changes are possible, and would help usher in a profoundly more effective way to assist children and families currently poorly served by CPS agencies.

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ARTICLE

TWENTIETH CENTURY BLACK AND NATIVE ACTIVISM AGAINST THE CHILD TAKING SYSTEM: LESSONS FOR THE PRESENT

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This Article argues that the historical record supports activism that takes the abolition of the child welfare system as its starting point, rather than its reform. It explores the birth of the modern child welfare system in the 1950s as part of the white supremacist effort to punish Black communities that sought desegregation of schools and other public accommodations; and Native communities that fought tribal termination and the taking of indigenous land. Beginning with the "segregation package" of laws passed by the Louisiana state legislature in 1960, the Article shows how cutting so-called "illegitimate" children off the welfare program, called Aid to Dependent Children, (ADC) and placing those whom their mothers could no longer support in foster care was an explicit response to school desegregation. While the National Urban League initially mounted a formidable national and international mutual aid effort, "Operation Feed the Babies," its ultimate response—appealing to the federal government to reform the welfare and child welfare systems—backfired in disastrous ways. The Eisenhower administration responded by providing federal funds for a program it called ADC-foster care, giving states resources to dramatically expand the foster care system, resulting in hundreds of

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> *thousands of Black children in foster homes within a year. Native Tribal nations, in contrast, fought throughout the late 1960s and 70s to get states out of Indian child welfare. After a decade of activism, in 1978, they succeeded in passing the Indian Child Welfare Act, which put American Indian kids under the jurisdiction of tribal courts instead of the states'. Over the next decades, the number of Native children in foster care shrank dramatically. While history rarely offers clear guidance for the present, these two stories strongly suggest the limits of reform for state child welfare systems, and the wisdom of contemporary activists who call for abolition.*

I. INTRODUCTION

In her keynote for this conference,[1] Dorothy Roberts walks us through the arguments against reforming the foster care system, which are in many ways akin to those against continuing to reform the police. In doing so, she joins many scholars and activists voicing similar frustrations with what seems to be an entrenched, unmovable child welfare system that engages in racialized harm to families by disproportionately separating Black, Indigenous, Latinx, and impoverished white children from their parents, kin, and caregivers.[2] Roberts identifies the ways that efforts to rethink how we support and care for families mirrors activism for prison abolition and defunding the police. When we allow ourselves to be led by the inspiration of the radical, creative imagination of these movements, and how they have caught fire in recent years, we can dream bigger and imagine caring for children without the involvement of a racist state that has demonized impoverished families for generations. It is important, Roberts argues, to listen to the growing radicalism of the analysis of parents and activists involved with the system. They are not calling for reform, she argues; they are calling for an end to the system as we know it.

As we consider the current abuses of the child welfare system, it may be useful to know that Black racial justice and Native sovereignty activists have confronted the foster care system before in ways that offer powerful lessons for the present.

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[1] Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

[2] E.g., the Movement for Black Lives vision statement in 2020 includes a call to "[e]liminate the foster system's power to permanently and irreversibly destroy Black families through termination of parental rights," a political demand not present in the 2016 statement. *End the War on Black People: End the War Against Black Women*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/end-the-war-black-women, (last visited Jan 8, 2021); Erin Cloud, Rebecca Oyama, & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), http://www.cunylawreview.org/family-defenseblack-lives-matter/ [https://perma.cc/BE2M-79EX]; Michael Fitzgerald, *Rising Voices For 'Family Power' Seek to Abolish Child Welfare System*, IMPRINT (2020), https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141 [https://perma.cc/N5P5-KRGU]. See also the Center for Social Policy statement on its commitment to work "to create a society in which the forcible separation of children from their families is no longer an acceptable solution for families in need." CTR. FOR STUDY SOCIAL POL'Y, https://cssp.org/our-work/project/upend (last visited June 1, 2021).

This Article tells two stories. In the 1950s and 60s, the National Urban League confronted a child welfare system that was used as part of the white South's "massive resistance" to school desegregation, taking Black children away from their parents to terrorize communities fighting for civil rights.[3] While the Urban League's mass mobilization was extraordinary, its activists ultimately compromised with the system, and agreed to reform it instead of abolishing it. In doing so, the Urban League became complicit in supporting a federally funded, state-sanctioned child welfare system. Within a year, it was clear that this approach had been disastrous. The child welfare system grew in size and scope, resulting in a massive increase in the number of Black children entering foster care.[4] Reform, then, brought new money into the system, allowing states to take more children, particularly from impoverished Black single mothers. In contrast, activists for Native sovereignty largely refused reform, insisting that state child welfare workers get off reservations and out of Native families.[5] For at least a decade, the number of Native children in out-of-home care shrank. History confirms the intuition and experience of 21st century activists: working to end the child welfare system can accomplish a great deal, while every compromise with the child welfare system makes it stronger, and such reform leads it to break up more families.

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[3] *See*, Taryn Lindhorst & Leslie Leighninger, *"Ending Welfare as We Know It" in 1960: Louisiana's Suitable Home Law*, 77 SOC. SERV. REV. 564–84 (2003).

[4] Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, *in* SERVING AFRICAN AMERICAN CHILDREN: CHILD WELFARE PERSPECTIVES 9–30 (Sondra Jackson & Sheryl Brissett-Chapman eds., 1998). We are in a position to understand this acquiescence as never before, as it echoes the frustration and fury of current "defund the police" activists in the aftermath of the Obama-era police reforms in Minneapolis: never agree to anything that ends with more money for a system designed to uphold white supremacy. *E.g.*, Philip V. McHarris & Thenjiwe McHarris, Opinion, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html [perma.cc/39KV-S8GM]; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, Opinion, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/8H5C-HQK4].

[5] THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (Steven Unger ed., 1977).

While the child welfare system in the 1950s and 60s was dramatically smaller than the present one,[6] it was a commonplace site of political concern in Native and Black newspapers, and a subject of forceful political campaigns. The passage of the Indian Child Welfare Act in 1978 and the National Association of Black Social Workers 1972 "Preserving Families of African Ancestry" statement have been (mis)remembered for their impact on adoption and demonized by the political right—as well as liberals like Harvard Law Professor Elizabeth Bartholet. But viewed in their actual context, these actions were part of long campaigns against the operation of foster care systems.[7] This Article will focus on that earlier generation's fights, particularly their insistence that child "welfare" was a political project of white supremacy and disruption of Native sovereignty.

This piece begins with an unorthodox history of the civil rights era, focused on Black single mothers and their children. In the 1940s and 50s, as now, single mothers were particularly vulnerable to poverty, and Black and Native mothers exceptionally so. Indeed, the middle of the 20th century was worse than the current moment for single mothers, as post-war defense plant layoffs explicitly targeted women to make room for men coming home from war, and the Black women who had followed the economic expansion of World War II to get out of the apartheid South—with its lynching and other racial violence—were suddenly unemployed and unemployable in a racist job market.[8] New Deal and post-war government programs to raise up a middle class—such as housing loans, GI bill grants for a

[6] The child welfare system doubled in size in the late 1980s and 90s with the racially targeted invention of the "crack baby." *See* my account of this history in Laura Briggs, *Orphaning the Children of Welfare: "Crack Babies," Race, and Adoption Reform*, *in* Outsiders Within: Writing on Transracial Adoption 75-88 (Jane Jeong Trenka et al., 2006); Laura Briggs, Somebody's Children: The politics of Transracial and Transnational Adoption 97–105 (2012); Laura Briggs, Taking Children: A History of American Terror 106–12 (2020).

[7] *See, e.g.*, *Ensuring Equal Protection for Native American Children*, Goldwater Inst., (Mar. 15, 2021) https://goldwaterinstitute.org/indian-child-welfare-act [perma.cc/6GYM-8EKL]; Laura Briggs, *Somebody's Children*, 11 J.L. & Fam. Stud. 373 (2008). *See also* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163–256 (1991).

[8] Many historians have told this story. For a particularly clear and well-researched version, *See* ANNELISE ORLECK, STORMING CAESAR'S PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY (2005).

college education, the building of the suburbs—by design excluded African-American men and nearly all women of any racial group. Women were supposed to be dependent on a male breadwinner, Black folks were supposed to work in the fields picking crops or cleaning white folks' homes, and Indians were supposed to vanish.[9]

In this same period, federal recognition of many tribal nations was terminated, and Native people were relocated in nuclear family groups to cities as a result of the federal government's abandonment of its treaty obligations. Poverty in Native communities, federal policy-makers insisted, was not caused by centuries of settler colonialism and Indian wars, but rather that Native people lived far from meaningful employment opportunities in urban centers.[10] So while the post-war period saw unprecedented economic growth and prosperity for predominately white families as a result of government programs, the federal government's institutionalization of nuclear families and female dependency on male breadwinners, the rising tide of inequality left Black and Indigenous people under water. The growth of welfare programs to support widowed, divorced, and unmarried mothers with children initially excluded largely numbers of people of color. Once they were included, the political right attacked these programs viciously, arguing that the policies promoted laziness.[11] Arizona and Nevada refused to participate in the federal Aid to Dependent Children (ADC) program in order to evade paying benefits to Native mothers. State leaders justified refusing federal money by insisting Native people had no right to those dollars by insisting that those living on reservations were not

[9] A compact account of the whiteness of the post-World War II programs can be found in George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies*, 47 AM. Q. 369–387 (1995). On the gendered dimensions of postwar federal policy, *See, e.g.*, Melissa E. Murray, *Whatever Happened to G.I. Jane: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91 (2002). On the persistence and long durée of the vanishing Indian trope, *see* JEAN O'BRIEN, FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND (2015).

[10] Ted Jojola & Timothy Imeokparia, *Fitting a Square Peg in a Round Hole: The History of Tribal Land-Use Planning in the United States*, *in* THE WORLD OF INDIGENOUS NORTH AMERICA (Robert Warrior ed., 2014).

[11] WINIFRED BELL, AID TO DEPENDENT CHILDREN (1965).

U.S. citizens and didn't even speak English.[12] Conservatives also sought to shrink, and even eliminate federal and state programs that supported single mothers and children of color, saying that they were unworthy of community support, that mothers were immoral, and the children were, in the derogatory word of the period, "bastards"—fatherless.[13]

II. BLACK FREEDOM, WELFARE, AND ILLEGITIMACY

The context of the right-wing attacks on welfare and "out-of-wedlock" babies was *Brown v. Board of Education*.[14] The NAACP brought this case to the Supreme Court to end segregation in all public accommodations by focusing narrowly on Black children and schools. Seeking to overturn *Plessy v. Ferguson*,[15] lawyers for the group avoided using a Black man like Homer Plessy as plaintiff—always already damned in racist discourse as a would-be rapist—focusing instead on adorable children like elementary student Linda Brown. White supremacists responded by doubling down on their demonization of Black children as "bastards," the product of illicit sex. While much church-based civil rights activism cultivated the appearance of demonstrators in their "Sunday best" and a politics of respectability, white segregationists sought to draw attention to the most marginalized and least defended. U.S. Representative Robert Byrd, who coined the term "massive resistance" to refer to the white South's response to school desegregation, also gave us the phrase "welfare abuse" to refer to Black women supposedly grifting off the system. He claimed before Congress that 60% of welfare cases were fraudulent, offering evidence that women on welfare were working—as domestics, child minders, and sex workers—and that they had men ("paramours") in their homes and beds who should be

[12] Wilbur J. Cohen, *Public Assistance Provisions for Navajo and Hopi Indians: Public Law 474*, SOC. SEC. BULL. 8–10 (1950); Deanna M. Lyter, Domination, Regulation, and Resistance: The Impact of Aid to Dependent Children and Tribal law on White Mountain Apache Women, 1934–60 (Dec. 6, 2002) (Ph.D. dissertation, American University) (on file with author).

[13] REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945 (1993); RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1992); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (2nd ed. 1996).

[14] 347 U.S. 483 (1954).

[15] 163 U.S. 537 (1896).

supporting them and their "illegitimate" children.[16] The more African-Americans fought for civil rights, the more officials cut welfare for impoverished Black women and children. White supremacists used poverty and the desperate struggles of Black single mothers to keep children housed, clothed, and fed to try to break the community's revolt. According to one Black leader, "the white landlords are being overheard to say now more and more when Negroes ask for assistance, 'let the NAACP support you this winter.'"[17]

In 1954, within days of *Brown v. Board of Education* ordering the desegregation of schools, the state legislature of Mississippi attached a rider to an appropriations bill cutting children off welfare if their mothers failed to keep a "suitable home," decrying common law marriage—poor people's marriage—as "an illicit relationship or promiscuity" and a threat to "civilization."[18] According to the *Clarion Ledger-Jackson Daily News*, Mississippi used this law to deny 8,392 children welfare between 1954 and 1960.[19] A state legislator in Mississippi, backing a related, but failed legislation to sterilize mothers who had borne three illegitimate— explained that, "when the cutting starts, they [Black people] will head to Chicago."[20] The state legislature believed they could drive Black families out of Mississippi to Northern cities to prevent "bastard" children and their siblings from attending school. Those who could not gather resources to move, legislators hoped, would nevertheless be forced to keep their children home—without resources to afford shoes or school clothes. A study conducted by several colleges in Mississippi in 1957 found that the legislation had the intended racially differentiated effect: of the 323 families contacted, only three white families had been cut off for reasons of illegitimacy. The study also found that being denied welfare (alongside the larger context of Black poverty, poor health care, and substandard housing in Mississippi) had left mothers and

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[16] GWENDOLYN MINK & RICKIE SOLINGER, WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY 217–222 (2003).

[17] Lindhorst & Leighninger, *supra* note 3, at 15.

[18] BELL, *supra* note 11, at 96–100.

[19] MINK & SOLINGER *supra* note 16; SOLINGER, *supra* note 13.

[20] Student Nonviolent Coordinating Committee, *Genocide in Mississippi*, *reprinted in* PRINT CULTURE OF THE CIVIL RIGHTS MOVEMENT, 1950–1980, TUL. U. DIGIT. LIBR. (Mar. 15, 2021), https://digitallibrary.tulane.edu/islandora/object/tulane%3A21196/datastream/PDF/view [https://perma.cc/U3V9-B56B].

children in appalling situations. It also underscored the sexual violence that gave rise to "illegitimacy." As one of the authors of the Mississippi report noted in a case report on a mother who had been cut off from welfare:

> [One] former recipient of ADC [Aid to Dependent Children] is in very severe circumstances . . . Her house is located in the middle of a cotton patch, and as is typical of such houses, it is old, crudely constructed, and rotting away. Seven of her children are known to be illegitimate. The oldest child, one of the two legitimate ones, was raped at school and now has an illegitimate child of her own.[21]

It bears noting how hard the community worked to keep mothers and children fed, although everybody around them was impoverished, too. While this mother and her ex-husband were separated, he, a sharecropper, planted and worked a crop for her and the children. The caseworker also noted the mutual aid enabled them to keep body and soul together, "when [another] mother was in the hospital, some of her colored neighbors sent her an occasional fifty cents . . . She was not so worried about clothing [because her sister sent her hand-me-downs], but when the children cry for food, that does bother her."[22]

Within a few years, five other states–Georgia, Florida, Virginia, Arkansas, and Texas–followed Mississippi's lead. In Arkansas in 1957, at the height of the school desegregation crisis at Central High School in Little Rock, Governor Orville Faubus enacted a "suitable home" regulation to remove Black children from the welfare rolls. He argued that ADC "rewarded sin."[23] Looking back at his administration in 1960, he proudly asserted that "8,000 illegitimate children were taken off the welfare rolls during my term of office" as a result of the suitable home rule.[24] In Alabama, in the midst of Black Birmingham's rebellion, between 1957 and 1967, the city of Birmingham decreased its total expenditures on welfare from $31,000 to $12,000 a year.[25]

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[21] *See* BELL, *supra* note 11, at 107.

[22] BELL, *supra* note 11, at 103.

[23] BRIGGS, TAKING CHILDREN, *supra* note 6, at 37.

[24] *Id.* at 107.

[25] ROBIN D. G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 95 (1996).

III. TAKING CHILDREN

Some "suitable home" rules went further—not just leaving impoverished Black families to starve, but actively enabling courts and welfare workers to take children. In 1959 in Tennessee and 1960 in Florida, state legislatures enacted new "suitable home" statutes. In Florida, common law marriages previously recognized by the state became "illicit relationships," and children were retroactively made "illegitimate." Both statutes required welfare case workers to pressure mothers to "voluntarily" relinquish their children to a relative if they were denied ADC. If mothers refused, their cases were referred to juvenile court for child neglect.[26]

Florida social workers conducted a study in 1960 on the effects of the law. From it, we learn that state welfare workers challenged the "suitability" of 13,000 families, of which only 9% were white, even though white families made up 39% of the total caseload.[27] In the first year of the policy, 2,908 families were asked to place their children with relatives, while a similar number were given trial periods to reform the "moral environment" of their homes. To the surprise of welfare workers— reared on an old, self-justifying belief from slavery times that Black women had little maternal feeling, and that it was customary among African-Americans to circulate children among relatives—only 186 families being starved by the welfare system voluntarily relinquished their children. Of the 24 who had at the time of the study already been referred to juvenile court, only three lost their children,[28] suggesting that the children were not being abused or neglected, despite state efforts to punish mothers receiving state welfare checks.. Another 3,000 families "voluntarily" withdrew from the welfare program rather than lose their children.[29]

While we have fewer records of what happened in Tennessee, the "voluntary relinquishment" program worked the same way—mothers could keep their children by withdrawing

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[26] BELL, *supra* note 11, at 124–36.

[27] *Id.*, at 124–33 (citation omitted).

[28] This is certainly an undercount, since the pace of court hearings was glacial, and the report covered less than the first full year after the enactment of the suitable home rule.

[29] *Id.*, at 124–33 (citation omitted).

their applications for ADC.[30] While the situation in the first seven[31] states that enacted "suitable home" rules in response to *Brown* was dire for the families involved, the policies barely made the news. This is familiar; U.S. publics largely ignored the consequences of the termination of AFDC in 1996, despite studies that have shown increased rates of death, mothers scrounging in dumpsters to feed their children, and women pushed back into violent relationships with partners without the AFDC transitional safety net.[32] In the 1950s, too, stories of impoverished Black mothers pushed off welfare were of little interest, except to the case workers who pressured them to relinquish, or refer their families to juvenile court as neglectful, and the judges who took their children.

All of that changed, however, in Louisiana. The use of welfare restrictions in Louisiana to punish Black communities fighting to desegregate schools and public accommodations not only made the news, but also became an issue of national and even international concern. When confronted with a court order to desegregate schools in New Orleans in 1960, the governor of Louisiana, Jimmie Davis, and the state legislature, went into extraordinary session and announced a "segregation package" of new laws designed to stop the order, create chaos, and terrorize Black communities. Nearly all the bills were immediately struck down by a federal judge, including bills that aimed to: freeze school transfers; abolish the school board; deny accreditation to integrated schools; strip all teachers in integrated schools of their certification; eliminate the requirement that children attend school; grant state police special powers; and deny that the state of Louisiana was subject to federal law. Yet the "suitable home" rule designed to cut 23,000 "illegitimate" black children from the

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[30] *Id.*, at 124–25.

[31] Georgia, Florida, Virginia, Arkansas, Texas, Mississippi and Tennessee.

[32] Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 8, 2012), https://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html [https://perma.cc/UUV4-G8TH]; DÁNA-AIN DAVIS, BATTERED BLACK WOMEN AND WELFARE REFORM: BETWEEN A ROCK AND A HARD PLACE (2006); Jonathan Leonard & Alexandre Mas, *Welfare Reform, Time Limits, and Infant Health*, 27 J. HEALTH ECON. 1551 (2008); Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655 (2000); Elizabeth T. Wilde et al., *Impact of Welfare Reform on Mortality: An Evaluation of the Connecticut Jobs First Program, A Randomized Controlled Trial*, 104 AM. J. PUB. HEALTH 53 (2013).

welfare rolls was, alone, allowed to stand.[33] The "suitable home" rule cut nearly a third of the state's welfare caseload, and as in other Southern states, the overwhelming majority of those targeted were Black. Only 5% of those affected were white.[34]

Among Louisiana's Black residents, the suitable home rule was clearly understood as punishment for school desegregation, designed to push those who could to migrate. A Black child welfare worker described the legislature's mood as "vindictive," and they were clearly intent on hurting Black residents in retaliation for school desegregation.[35] It was, she said, a "tit for tat."[36] If Black children were to be the civil rights warriors who desegregated public accommodations, and if their mothers wanted to refuse second class status in exchange for inadequate charity from state officials, white supremacists sought to make them pay.

Even though the Louisiana law did not require welfare workers to take the children of those who lost their aid, as the Florida and Tennessee laws did, that was the outcome. As one Black child welfare worker remembered forty years later:

> We would get referrals [to take children into foster care] after public assistance cut them off, and they weren't able to feed their kids. I remember several families who were referred—the women had to give up their kids if they couldn't care for them. I never removed kids from their families because of poverty—but I know other workers who did. I remember one woman who loved her kids. She

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[33] *The Text of the Federal Court Ruling Invalidating Louisiana Integration Curbs*, N.Y. TIMES, (Dec. 1, 1960), http://timesmachine.nytimes.com/timesmachine/1960/12/01/99898337.html.

[34] *Louisiana Drops 23,000 Children On Relief Rolls as Illegitimates*, N.Y. TIMES, (Aug. 28, 1960), http://timesmachine.nytimes.com/timesmachine/1960/08/28/99951830.html; *Louisiana Explains Relief Cuts to U.S.*, N. Y. TIMES, (Sept. 14, 1960), http://timesmachine.nytimes.com/timesmachine/1960/09/15/99802841.html; *U.S. To Study Curbs in Louisiana Relief*, N. Y. TIMES, (Oct. 3, 1960), http://timesmachine.nytimes.com/timesmachine/1960/10/04/99958155.html.

[35] Lindhorst & Leighninger, *supra* note 3, at 568 (interviewing Gale Durham and Millie Charles).

[36] *Id.*, at 564–84. *See also* MINK & SOLINGER, *supra* note 16, at 195; Lisa Levenstein, *From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960-1961*, 11 J. OF WOMEN'S HIST. 10 (2000); BELL, *supra* note 10, at 137–51.

> didn't want to give them up, but ended up having to. Families didn't understand why this was happening. I am haunted by a woman who had to give her child up. The resolution for many families was that they gave their children away.[37]

The effect of suitable home laws, by design, was to allow welfare case workers to visit recipients, stop their checks, and refer families to the child welfare system once they had no means of support. The goal was to take children, coercively if necessary, and put them in foster care.

Through the work of activists, cutting "illegitimate" children off welfare in Louisiana became a national and international scandal in a way previous states' efforts did not. It became widely known simply as the "Louisiana Incident." While Governor Jimmie Davis was slandering welfare mothers as "prostitutes" and "promiscuous women," New Orleans Urban League president J. Harvey Kerns mobilized national and international networks to feed their children so they could keep their families together.[38] He travelled to New York and asked the National Urban League convention for help, and it launched Operation Feed the Babies. Calls for support for the children "cry[ing] for food in New Orleans" circulated through Black newspapers around the country as the newest front in the school desegregation battle.[39] Food, clothing, and cash flowed to destitute families in Louisiana, and welfare workers in Illinois alone donated almost $4,000. In New Orleans, the Urban League coordinated dozens of groups to mobilize to feed people, including community groups, local Black businesses, labor organizations, and Black churches, especially the Baptist Emergency Relief Committee. At its height, Operation Feed the Babies was helping 300 people a day and distributing thousands of pounds of food. Local activists brought groceries and clothing to single mothers, cooked food, and gave rent money to those who had lost their welfare assistance. The Urban League called on the federal government to address the widespread hunger and threatened to approach the United Nations if federal funds did not materialize. In a move that was particularly designed to embarrass the

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[37] Lindhorst & Leighninger, *supra* note 3, at 572 (internal quotations omitted).

[38] *Id.* at 572.

[39] *Kids "Cry For Food" in New Orleans*, CHICAGO DEF., 1 (Sep. 3 1960).

Eisenhower Administration—which framed welfare as a "states' rights" issue—those as far away as England airlifted food, money, and clothing to the "starving babies" of New Orleans. In Louisiana, the Urban League, social welfare activists, Black churches, and community groups pressured the state legislature to reinstate the "innocent children" to the welfare rolls.[40]

This campaign may have been the high-water mark of concern and activism for impoverished Black single mothers and children, and their ability to get welfare. Unfortunately, the National Urban League pivoted from this radical call to support Black families through mutual aid to push reform through the Social Security Administration.

This was more than a strategic mistake. Its results were devastating, inviting not just state governments, but the federal government to intervene in the lives of African-American children and mothers, and it created the modern foster care system. The National Urban League filed a complaint with the Social Security Administration, which administered the federal portion of welfare benefits. Social Security responded with a hearing to consider whether the state's suitable home provision was allowable under federal rules. The Urban League was joined by the American Civil Liberties Union, the Child Welfare League and even the American Legion, all of which filed amicus briefs.[41]

Unfortunately, they lost. The Department of Health, Education, and Welfare, having allowed virtually every other Southern state, and Michigan, to pass suitable home rules, could not find a reason to stop Louisiana's. However, the federal government was resistant to these shenanigans by states, at least when state policy was enacted in open defiance of federal initiatives, and when the federal government recognized the policies for what they were: punishment aimed at African-Americans, attempting to splinter the Black freedom movement. In a move subsequently made into law, Arthur Flemming, the

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[40] Reading the local Black press, especially the *Louisiana Weekly* and talking to community people in 2000 did important work in holding up these local efforts by the Urban League and New Orleans activists and community organizations, rather than just the attention-grabbing international stunt of British women sending aid that other historians of the Louisiana Incident have noted. Lindhorst & Leighninger, *supra* note 3. International attention did not happen without tremendous local groundwork.

[41] Lawrence-Webb, *supra* note 4.

Secretary of Health, Education, and Welfare—which then administered Social Security—issued a rule saying that states could not cut benefits to children in "unsuitable" homes, unless they were removed and placed elsewhere.[42] Louisiana's policy ending welfare to families turned into a policy of taking children. Isaac Abramson, in his testimony for the state of Louisiana, described the position that ultimately became the agreement between state and federal governments: "We just take the position that not every house is a home. A home means a respectable home in which a child may be brought up to become a respectable citizen. A child must be in that kind of a home to get Federal-state money."[43]

Thus, in trying to stop Southern states from evading their responsibility to provide eligible Black children with welfare, the Urban League's reform effort provided a vehicle for a bait and switch that poured federal money into state foster care systems, giving them license to engage in wholesale terrorizing of never married, divorced, and widowed Black mothers. As Secretary Flemming stated,

> Whenever there is a question of the suitability of the home for the child's upbringing, steps should be taken to correct the situation or, in the alternative, to arrange for other appropriate care of the child. It is completely inconsistent, however, to declare a home unsuitable for a child to receive assistance and at the same time permit him to remain in the same home exposed to the same environment.[44]

The following year, this rule, the Flemming Rule, was made into law, and Congress authorized funding for the program known as ADC-foster care, which provided federal matching funds to states to place children in out-of-home care. 150,000 Black children were placed in out-of-home care in 1961 alone. In subsequent years, the Flemming Rule (enacted as P.L. 87-31 and the 1962

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[42] *See* Cynthia P. Honoré-Collins, *The Impact of African American Incarceration on African American Children in the Child Welfare System*, 12 RACE, GENDER & CLASS 107 (2005); MINK & SOLINGER, *supra* note 16.

[43] Bess Furman, *U.S. to Continue Louisiana Relief As State Alters Child Home Law*, N. Y. TIMES, Dec. 16, 1960, at 16, http://timesmachine.nytimes.com/timesmachine/1960/12/16/99979358.html.

[44] BELL, *supra* note 11, at 147 (citations omitted).

Public Service Amendments) transformed ADC and foster care from a system that ignored Black children to one that acted vigorously to take them. Tens of thousands of mothers lost their children to foster care, and the federal government largely funded it. [45]

These policies were not limited to the South, either. Outside New York City, the City of Newburgh sought to displace Black residents and reduce their welfare costs by taking children, issuing rules that "prior to certifying or continuing any Aid to Dependent Children cases[,] a determination shall be made as to the home environment. If [the home] is not satisfactory[,] the city shall take such children and place them in foster homes in place of welfare aid to family adults."[46] So many Black children entered the child welfare system in the next decade that "some observers began to describe this decade as the 'browning' of child welfare in America."[47] While federal officials decried "the recurrent suggestion of asking the courts to take all illegitimate children away from their mothers and place them in foster care homes," in 1962, once Congress authorized federal funding, they could not stop local officials from doing just that.[48] In the course of a few years, as Dorothy Roberts argued in *Shattered Bonds: The Color of Child Welfare*, foster care went from being a system that ignored the needs of Black children, to one that seemed primarily designed to harm them and break up Black families.[49]

IV. THE INDIAN CHILD WELFARE ACT

As in the Black community in the South, Native people in the 1950s and 60s also fought state welfare workers who tried to

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[45] *See* HOWARD ALTSTEIN & RUTH G. MCROY, DOES FAMILY PRESERVATION SERVE A CHILD'S BEST INTERESTS? (2000); Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE CHILD. 23–38 (1998); Lawrence-Webb, *supra* note 4. This pattern was not limited to the South; in New York City, for example, the percentage of Black and Puerto Rican children (versus white children) also soared after 1960. *See* L. TREVOR GRANT, THE POLITICIZATION OF FOSTER CARE IN NEW YORK CITY (1996).

[46] Tom Blair, *The Newburgh Story*, *in* WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY, *supra* note 16, at 206; GRANT, *supra* note 45, at 31.

[47] Lawrence-Webb, *supra* note 4, 49.

[48] Bureau of Public Assistance, *Illegitimacy and Its Impact on the Aid to Dependent Children Program*, *in* WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY, *supra* note 16, at 188.

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

take their children. The federal government's goal was tribal "Termination" (the administrative term for reversing federal recognition of tribal status), and ongoing depredations of Native land, livelihoods, and people. Especially in the West, the federal government and states sought to "get out of the Indian business"—that is, they sought to evade their treaty obligations to support Indigenous nations, including those who had voluntarily in negotiations, or involuntarily in the context of Indian Wars, exchanged Indigenous land for promises of food, health care, and housing to supports generations in perpetuity.[50] As the early 20th century saw the federal renunciation of these commitments, Native nations that demanded reparations and insisted on their right to state support through the public welfare system instead saw state social workers come and take their children.

In contrast to the Urban League, the Association of American Indian Affairs (AAIA) and Native nations did not seek reform of the child welfare system in the 1960s and 70s, but freedom from it. Activists and attorneys confronted state welfare workers and insisted they had no authority on reservations or over Native people. When state welfare workers denigrated Native families and caregiving structures—insisting grandmothers were too old to care for children, and that leaving babies and young people with relatives evidenced a mothers' neglect—lawyers and members of tribal councils said they lacked understanding of Native kinship, culture, and community. When state officials criticized the absence of indoor plumbing, overcrowding, and poor housing as child neglect, Native activists argued that state social workers were trying to make life on the reservation itself a crime. Finally, tribal leadership and activists called for child welfare matters to be under the jurisdiction of tribal nations, rather than reforming state systems that had taken one-fourth to one-third of Native kids from their homes in many states. While this approach did not solve all the problems of the child welfare system's treatment of Native children, it reduced the presence of children in state child welfare systems; and at the very least, did not make things worse, as the Urban

[50] Stephen Wall, *The State of Indigenous America Series: Federalism, Indian Policy, and the Patterns of History*, 25 WICAZO SA REV. 5–16 (2010).

League's compromise with the federal government had for Black communities.[51]

Among the places where tribal nations were most resistant to termination included the Dakotas. There, state and federal officials displaced 150,000 people living on tribal land through the Pick-Sloan flood control plan that safeguarded Anglo communities at the expense of Native communities by building dams and putting reservation households under the Missouri River. Although fights over American Indian land in the Dakotas in the 1940s and 50s and "Termination" policy in general did not attract the national attention that school desegregation did in the South, they were no less bitter.[52] As Joseph W. Thompson, former chairman of the Lower Brule Tribal Council testified to a U.S. Senate subcommittee in 1959, the flooded bottom lands were "our heart lands. No similar lands are for sale. We depend on our land for our livelihood, it furnishes our income. To take our land is to take our homes and income, and a part of our history and heritage."[53] He demanded reparations, just as generations of Lakota people have fought for federal accountability for so many injustices, including the Plains Indian Wars; the taking of the Black Hills; the Wounded Knee massacre; the Ghost Dance "crisis" in the 19th century; the demand to end corrupt tribal leadership allied with the FBI and U.S. Marshal Service in the 1972–73 standoff at Wounded Knee in the 20th century; and, most recently, the "Water is Life" protests against the Dakota Access Pipeline.[54]

Child-taking was the front line in the Termination era. It repeated a deep history of separating Native children from their kin as a key tactic for the detribalization, thus extinguishing land

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[51] STEVEN UNGER, THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (1977).

[52] *See* NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE (2019).

[53] *Hoopa Valley Reservation Boundary Adjustment Act and the Lower Brule Sioux Infrastructure Development Act: Hearing on H.R. 79 and S. 156 Before the S. Comm. On Indian Affairs*, 105th CONG. 34 (1998) (statement of Joseph W. Thompson, Chairman, Lower Brule Sioux Tribe).

[54] *See* ESTES, *supra* note 52; ELIZABETH COOK-LYNN, THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY (1999); PETER MATTHIESSEN, IN THE SPIRIT OF CRAZY HORSE (1992); EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT (1999).

claims. This practice began with the military boarding school policy that ended the Indian Wars in the 1880s by essentially taking children as hostages and attempting to destroy the passing on of indigenous languages and ways of life.[55] Without a next generation, land claims would be extinguished in a handful of years. There was also a centuries-long conflict over the settler colonial demand that Native people adopt Anglo gender and family forms.[56] In the 1960s, as protests by the AAIA revealed, children were being taken if found in the care of a grandmother rather than a nuclear family, especially if the grandmother or an unmarried mother was receiving state welfare payments. As in the South, Western states, like North Dakota, passed a suitable home law that demanded the presence of a legally related father. If mothers did not pass this suitable home requirement, they were labeled as immoral, regardless of the actual harm this label and practice did to community kinship norms.[57]

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[55] *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928 (1995); MARGARET ARCHULETA ET AL., AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES, 1879–2000 (2000); Morton Beiser, *A Hazard to Mental Health: Indian Boarding Schools*, 131 AM. J. PSYCHIATRY 305–306 (1973); JOHN BLOOM, TO SHOW WHAT AN INDIAN CAN DO: SPORTS AT NATIVE AMERICAN BOARDING SCHOOLS (2000); BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 (1998); WARD CHURCHILL, KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS (2004); ESTHER BURNETT HORNE & SALLY MCBETH, ESSIE'S STORY: THE LIFE AND LEGACY OF A SHOSHONE TEACHER (1999); K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (Third Printing ed., 1995); RICHARD HENRY PRATT & DAVID WALLACE ADAMS, BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN, 1867–1904 (Robert M. Utley ed., 2004). The lived experience of a century of boarding schools was more complicated, as they became also a place of Native survival. However, as Pratt's autobiography and some of the more critical histories like Adams and Churchill make clear, their intention was the extermination of children's "Indianness."

[56] *See, e.g.*, Kim Tallbear, *Making Love and Relations Beyond Settler Sex and Family,* in MAKING KIN NOT POPULATION: RECONCEIVING GENERATIONS 145, 145–166 (Adele Clarke & Donna Haraway eds., 2018); Scott Lauria Morgensen, *Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities*, 16 GLQ: A J. OF LESBIAN & GAY STUD. 105–131 (2010); MARK RIFKIN, WHEN DID INDIANS BECOME STRAIGHT?: KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY (2010).

[57] *See* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES, *supra* note 4; Pauline Turner Strong, *To Forget Their Tongue, Their Name, and Their Whole Relation: Captivity, Extra-Tribal Adoption, and the Indian Child Welfare Act*, *in*

Indigenous communities used different tools to fight the use of the child welfare system than the Urban League. Rather than appeal to federal and state governments to treat their families fairly, they asserted a legal right to be left alone by demanding recognition of tribal sovereignty, and autonomous control of child welfare matters through tribal councils. Control over children became a fundamental issue in fighting the tribal Termination policy. In the 1950s, tribal nations used existing laws to demand that states cease policing their families, and by the late 1970s, began to petition Congress for a new law, the Indian Child Welfare Act (ICWA), that would relocate all Native child welfare matters to tribal courts, not state courts. It was a demand for autonomy from and self-determination in relation to a racist, anti-Native child welfare system. ICWA was finally passed by Congress in 1978 after years of hearings and lobbying. Since then, it has been the subject of unrelenting hostility by conservative groups like the Goldwater Foundation, which took a case to the Supreme Court as recently as 2013 that weakened ICWA, and a Texas attorney general who won a judgement in 2018 that the whole act was unconstitutional. While the Fifth Circuit ultimately reversed this holding, it is worth noting how fundamentally the effort of tribal nations to stand up to the states' child welfare systems continues to irritate conservatives and even many liberals.[58]

RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES 468–93 (Sarah Franklin & S. Mckinnon eds., 2001); Pauline Turner Strong, *What is an Indian Family? The Indian Child Welfare Act and the Renascence of Tribal Sovereignty*, 46 AM. STUD. 205–31 (2005). *See also*, INDIAN FAMILY DEFENSE: A BULLETIN OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC, ISSUES 1–11, (1974), which detailed case after case.

[58] Emma Platoff, *5th Circuit upholds Indian Child Welfare Act as Constitutional, Reversing Lower Court*, TEX. TRIB. (Aug. 10, 2019), https://www.texastribune.org/2019/08/10/5th-circuit-upholds-indian-child-welfare-act-constitutional-texas [https://perma.cc/34CQ-Q3CG]. For a liberal critic, *see* Randall Kennedy, who writes:

> ICWA's architects stressed the disparity between the numbers of non-Indian versus Indian children who were removed from the care of their biological parents . . . They did not negate the counterhypothesis that much of the purportedly 'racial' disparity was actually attributable not to individual discrimination but to some other cause—perhaps

Of all the Native nations that fought child removal, one of the earliest and most persistent was the Devil's Lake Sioux, known presently as the Spirit Lake Dakota. That nation took the state child welfare system to court repeatedly in the 1950s and 60s to resist losing their children to the foster care system in North Dakota.[59] They won an order from the state Supreme Court in 1963 that child welfare was to be adjudicated by tribal courts. Nevertheless, in 1968 state police came onto the reservation and arrested a grandmother, Mrs. Elsa Greywind, who stood in the doorway of her home to prevent a state welfare worker from taking her grandchildren and putting them in a white foster home. Another grandmother, Mrs. Fournier took her boy in her arms and refused to let go, even as the social worker grabbed him and tried to pull him away. Welfare workers took a child named Ivan Brown and placed him with a white foster family because they said that, at the age of 63, his grandmother was too old to be caring for a child. When social workers drove onto the reservation in their conspicuously new cars, children were hidden under beds, in the woods, or sent fleeing with their parents through the reservation's back roads.[60]

Despite the courage and toughness of women like these, and the high value Native peoples placed on cultural survival, including especially through the rearing of children, tribal nations continued to lose children to state welfare agents. Welfare workers disparaged the f of reservations, and shamed mothers, especially grandmothers, who cared for children.

> to the disproportionate impact of disease, unemployment, violence and family dysfunction on Native Americans

RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 498 (2003). In this, Kennedy is wrong. The many volumes of testimony for ICWA showed again and again that it was the particularities, not of "race," but of Native patterns of kinship and the conditions of reservation life themselves that were cited by case workers as they took children. Also, ICWA's architects did not rely on numbers in the 1974 or 1976 hearings on Indian child welfare; it was the failure of strategies of storytelling that pushed them toward relying on numbers in 1977.

[59] *AAIA and Devils Lake Sioux Protest Child Welfare Abuses*, INDIAN AFFAIRS, Aug. 1968.

[60] *Devil's Lake Sioux Resistance*, INDIAN FAMILY DEFENSE, Winter, 1974; MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 100 (2014); *The Destruction of Indian Families*, INDIAN FAMILY DEFENSE, Winter, 1974, at 1.

Spirit Lake tribal Chairman Louis Goodhouse went to the Association of American Indian Affairs, with whom the nation was working on another matter. They sent Bertram Hirsch, a young lawyer, to get Ivan Brown back to his grandmother. Over the months of filing motions and trying to extract Ivan from the white foster family, Hirsch went house to house and found that a quarter of the children born to families on the reservation were either in white foster or adoptive homes, or at off-reservation boarding schools. He continued gathering data until the mid-1970s, eventually producing the well-known statistic that 25 to 35% of Native children were in out-of-home care. He talked about the importance of understanding that this was a problem that was affecting a lot of people. When he began collecting statistics, he said:

> Native people thought, 'this is my problem. They didn't know that the family a mile down the road . . . or over the next butte . . . was experiencing the same thing. Everybody was feeling shame about it and was not talking about it. They thought it was their own personal circumstance . . . So people kind of kept it to themselves and they did not seek out assistance from their own tribes.[61]

Investigating further, he found that while Native people constituted less than 2% of North Dakota's population, their children were 50% of the state's foster population.[62]

In 1968, a defiant Devil's Lake Tribal Council passed a resolution prohibiting county officials from removing children from the reservation under any circumstances.[63] The county responded by halting all welfare payments to the tribe, despite a 90% unemployment rate, regardless of the fact that the money came, not from the state government, but from the Bureau of

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[61] JACOBS, *supra* note 60, at 103–04 (quoting Bertram Hirsch, interview by author, Sept. 30, 2011).

[62] See Bertram Hirsch, Keynote Address, in THE INDIAN CHILD WELFARE ACT THE NEXT TEN YEARS: INDIAN HOMES FOR INDIAN CHILDREN 18–26 (Troy R. Johnson ed., 1990); AAIA and Devils Lake Sioux, *supra* note 59; Devil's Lake Sioux Resistance, *supra* note 60; Native American Training Institute, "30 Years of ICWA; Native American Training Institute," conference poster, North Dakota (2008); William Byler, Sam P. Deloria & A. Gurwitt, Another Chapter in the Destruction of American Indian Familes, YALE REPORTS [RADIO PROGRAM] (1973).

[63] Devil's Lake Sioux Resistance, *supra* note 60.

Indian Affairs.[64] Over the next few years, another North Dakota group, the Three Affiliated Tribes (or Mandan, Hidatsa and Arikara Nation) of the Fort Berthold Reservation, and three Lakota tribal nations in South Dakota—the Sisseton-Wahpeton Sioux, the Standing Rock Sioux, and the Oglala Sioux—joined the organized resistance to state foster care. All five nations passed Tribal Council resolutions denouncing the manner and the rate at which Native children were being placed into off-reservation foster homes.[65]

The AAIA, unable to find justice in North Dakota or in Washington, D.C., through the Bureau of Indian Affairs, sought to halt the taking of Native children by jumping scales: they took it to the foreign press at the height of the Cold War.[66] Greywind, Fournier, and three other women who had become activists for the nation's children at Spirit Lake—Alvina Alberts, Annie Jane DeMarce Leftbear, and Genevieve Hunt Longie Goodhouse—were at the press conference.[67] Although we don't remember their names alongside the icons of the Red Power movement like Russell Means (Oglala Lakota) or Dennis Banks, nevertheless, the movement for the defense of Native children that these women launched was critical not only to the futures of Native kids, but also to the defense of sovereignty of tribal nations, their ability to conduct their own affairs and control their land without interference from state governments. While the fight for legal respect for tribes as sovereign entities with rights enshrined in treaties and the unceded sovereignty of autonomous nations to govern their own people was—and is—an ongoing struggle, a minimal requirement of self-government was surely what most white households expect as a baseline: the freedom to raise their own children.[68] Where North Dakota sought to punish the Devil's

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[64] 1961 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT U.S., https://www.census.gov/library/publications/1961/compendia/statab/82ed.html (last visited Aug 12, 2019).

[65] *Tribes Act to Halt Abuses*, INDIAN FAMILY DEFENSE, Winter, 1974, at 7.

[66] The concept of jumping scales from the local to the national and transnational is Maylei Blackwell's; *See* MAYLEI BLACKWELL, SCALES OF RESISTANCE: THE PRACTICE OF INDIGENOUS AUTONOMY IN THE AGE OF NEOLIBERALISM (forthcoming).

[67] *AAIA and Devil's Lake Sioux*, *supra* note 59.

[68] The best-known statement of this un-seceded sovereignty is FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW: WITH REFERENCE TABLES AND INDEX (1942).

Lake Sioux for their obstinate insistence on the right of the tribal nation to control the placement of their own children, these activists launched a political movement.

ICWA finally passed in 1978, after three sets of Senate hearings and the mobilization of Native communities, activists, and communication networks for a decade. Although it did not retroactively undo any adoptions that were already finalized, it contained procedural requirements that enshrined the notion of tribal sovereignty. Indian[69] child welfare cases were to be considered in tribal courts when children resided on the reservation. Even when children do not reside on the reservation state courts can, with good reason, exercise jurisdiction. There is a preference in the law for keeping Indian children with first, their own extended family, second, other members of their tribal nation, and third, other Native people. The Act sets the evidentiary standards higher than for non-Native children in dependency hearings or termination of parental rights. There is a requirement that the family be offered crisis intervention services before a child can be taken.[70]

Throughout the 1970s and early 80s, the number of Native children in out-of-home care declined. The AAIA and tribal nations successfully fought back the incursions of state child welfare agencies. Since then, however, it has not always been clear that tribal child welfare agencies have been overwhelmingly better than state ones, any more than that the 1970s dream that putting more Black cops on the streets would end racist policing. Religious-right forces within tribal nations can be as harsh to single mothers coping with alcoholism or children dealing with sexual violence as state-run child welfare agencies ever were, and several decades later, it was not clear that even the numbers of Native children in out-of-home care

[69] This Article employs the term "Indian" or "American Indian" for the purposes of accuracy. These are legal terms in U.S. government policy. ICWA protects those defined as "American Indians," but excludes many indigenous children (including those from Mexico, Canada, or Hawaii, or those from tribal nations recognized by states but not the federal government, or those from terminated tribes.)

[70] Indian Child Welfare Act, 25 U.S.C. §§ 1901–63.

have declined.[71] By leaving in place what was still essentially a new framework—the permanent and legal alienation of parents from their children—the drafters of ICWA unintentionally handed tribal social services a vicious tool that continued its existence, ready to be activated. This reactivation occurred in the late 1980s, when an unfounded argument that fetal alcohol syndrome was blighting the futures of as many as a third of Native children created a moral panic about maternal drinking and harm to children.[72] Its call for social services to support families in crisis was bureaucratic, and also unfunded, making it more of a remote promise than a realistic solution.

V. HISTORY'S LESSONS

Mid-20th century activists made a number of significant interventions that are worth thinking with. The National Urban League and religious and community groups in Louisiana articulated the principle of mutual aid to care for single mothers and children. Children and caregivers need rent money, food, and clothing that is not dependent on its donors' approval of family morality. Activists in Native and Black communities both

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[71] On conservative takes on mothers within Native communities, *see, e.g.*, Elizabeth Cook-Lynn, *The Big Pipe Case*, *in* READING NATIVE AMERICAN WOMEN: CRITICAL/CREATIVE REPRESENTATIONS (Inés Hernández-Avila ed., 2005), about an alcoholic, parenting teen who lost her child and was referred by tribal agencies to the FBI for "felony child abuse" after breastfeeding while drunk and did time at Leavenworth; and the documentary, *Kind Hearted Woman*, (PBS & Frontline, 2013), about Spirit Lake authorities who placed two children with a father who sexually abused one of them, seemingly because he came from a high-status family (the BIA subsequently put the child welfare agency in receivership). The number of Native children in out-of-home care declined from 1974 until 1988, then rose to rates higher than before. *See* MARGARET PLANTZ, INDIAN CHILD WELFARE: A STATUS REPORT: FINAL REPORT OF THE SURVEY OF INDIAN CHILD WELFARE AND IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT AND SECTION 428 OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 (1988).

[72] A book about Native children and fetal alcohol syndrome, MICHAEL DORRIS, THE BROKEN CORD (1989), a novelistic account that begins with the adoption of his son Adam, put it on the map as a national crisis. He is responsible for the claim that it affected one in three Native children, while other public health commentators put the figure one hundred times lower. *See* ELIZABETH M. ARMSTRONG, CONCEIVING RISK, BEARING RESPONSIBILITY: FETAL ALCOHOL SYNDROME AND THE DIAGNOSIS OF MORAL DISORDER (2003); JANET GOLDEN, MESSAGE IN A BOTTLE: THE MAKING OF FETAL ALCOHOL SYNDROME (2005). *See also* Elizabeth Cook-Lynn, *Review of The Broken Cord*, 5 WICAZO SA REV. 42–45 (1989), for a sharp response to Dorris's claims about the pathologies of Lakota peoples.

rejected the centrality of the nuclear family as a keystone of a "suitable" family. Lest this sound like an archaic problem, it bears noticing that when these questions were relitigated in the context of welfare reform in 1996, the preamble to that law centered on cutting off welfare to single mothers, starting with the words "[m]arriage is the foundation of a successful society," and continuing with the supposed benefits of nuclear families to children (a principle reiterated in gay marriage cases, too). It also made it much easier for those who applied for welfare to lose their children.[73] The argument by advocates of ICWA that tribal communities have a right to be left alone by social workers who neither understand nor respect the forms that caregiving and kinship take was powerful. The rejection of compromise or reform was, for a decade, much more successful than the Urban League's agreement with the federal government to reform what some have called, not a child welfare system but a "family regulation system."[74]

ICWA's demand for freedom from this family regulation system represents one model of what it could mean to abolish the child welfare system, allowing communities to articulate varieties of forms of care for children. ICWA also extended to impoverished communities the form of child welfare enjoyed by white middle-class families when parents are in crisis—children go to extended family members or someone known to the parents, not to a stranger, or at the very least, someone culturally similar to the parents. Tribal nations also demanded that foster care and adoption not be used in place of decent wages or other support for

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[73] Pub. L. No. 104-193 (1996). The most striking gay marriage case claiming the supposed benefits of marriage to children is the *Windsor* case—striking because it was a tax case involving a childless couple, so Justice Kennedy, writing for the majority, had to work hard to get to an argument that the absence of federal recognition of gay marriage "humiliates children." United States v. Windsor, 570 U.S. 744 (2013).

[74] Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15 S&F ONLINE (2019), https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system [https://perma.cc/4L9F-WFKH] (last visited Feb 17, 2021); Michael Fitzgerald, *Rising Voices For 'Family Power' Seek to Abolish Child Welfare System*, IMPRINT, (July 8, 2020) https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141 [https://perma.cc/R2QA-Q372]; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020) https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/7F24-37TQ].

poverty alleviation, as many case workers in the 1960s seemed to believe. Louisiana's activists enacted the principle of temporary supports for families in crisis, choosing rent parties (a social event where attendees contribute to help pay another's rent) and community kitchens for households with children facing houselessness or other adversity, such as grave illness, substance use disorders, sexual and domestic violence, rather than incarceration, or child taking. If these mid-century movements missed anything, we might say it was feminism and a reproductive justice politics that articulated an analysis of the feminization of poverty and violence to say why so many unmarried mothers lacked the resources they needed to safely raise their children. Still, they got a lot right. And that is worth paying attention to in this crucial moment.

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ARTICLE

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 Stevenson[1]

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

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[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

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[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

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[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 system[13] 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]

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[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

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[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

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https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=212&sectionid=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

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[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

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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

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[42] KATE WALKER & FIZA QURAISHI, 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

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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

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[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

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[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

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[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 disproportionally 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.

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[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

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[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 Association[67] 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

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[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-seek-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

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[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

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[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

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[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

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[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]

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[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]lcholism, 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

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[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

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[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" activities[102] 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

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[101] *SSBG Legislation Uniform Definition of Services*, ADMIN. FOR CHILD. & FAMS., U.S. DEP'T 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

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[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

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[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]

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[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

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[128] *Early Learn Transition from ACS to DOE: Family Child Care*, N.Y.C. DEP'T 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 Hatcher [132] 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

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[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

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[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

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[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.

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[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

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[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-tagi-s-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.

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[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.

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ARTICLE

USING PEACEMAKING CIRCLES TO INDIGENIZE TRIBAL CHILD WELFARE

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Historical child welfare policies explicitly aimed to exterminate Indigenous culture and disrupt tribal cohesion. The remnants of these policies form the foundation for the contemporary child welfare system. These policies view the child as an isolated and interchangeable asset, over which parents enjoy property-like rights, and in which the child welfare system is incentivized to "save" children from perceived economic, cultural, and geographic ills through an adversarial process. Extended family, community members,

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and cultural connections have minimal voice or value. These underpinnings inform federal policies that influence all child welfare systems, including tribal child welfare systems. The result is that tribal child welfare systems perpetuate the individual, rights-centric, adversarial child welfare system that harms Indigenous families.

Indigenous children have the right to maintain connections to their Indigenous family, tribal nation, culture, and cultural education. These rights translate into obligations the community owes to the child to ensure that these connections are robust. Tradition-based systems of dispute resolution—frequently called "peace-making," among other names, but which we will call "circle processes"—offer a hopeful alternative.

Circle processes are rooted in an Indigenous worldview that perceives an issue, particularly a child welfare issue, as evidence of community imbalance that directly impacts the community, and conversely, imparts an obligation on the community to respond. Through the circle, family and community can complete their natural reciprocal relationship.

Tribal child welfare has the potential to be a transformative system that promotes community, family, and children's health and the self-determination and sovereignty of tribes. This Article outlines the ways in which the modern tribal child welfare system has been structured to compartmentalize families and perpetuate historical federal policies of Indian family separation. This Article then suggests that circle processes are a framework for re-Indigenizing the tribal child welfare system to not just improve outcomes (for which it has the potential to do), but to also honor the interconnected, responsibility-oriented worldview of Indigenous communities. Ultimately, however, tribes should lead that re-Indigenization process, whether through a circle process framework or otherwise.

I. INTRODUCTION

COVID-19 has revealed a startling truth: the nuclear family cannot survive without the support of community and systems around it. For many Indigenous[1] communities, this truth is not so startling—it is obvious. The child's well-being is dependent on the community, and the community's well-being is dependent on the child. The connections and relationships between the child-parent nuclear family and the community should no longer be ignored; rather, they should be elevated and leveraged to once again support the family's survival.

Indigenous children have the right to maintain connections to their Indigenous family, to their tribal nation, and to their culture and education in that culture.[2] For Indigenous communities, these rights translate into obligations the community owes to the child to ensure these connections are robust. But, the child welfare system as applied to Indigenous communities originated with the goal to separate Indigenous children from their Indigenous parents and culture. The child welfare system today operates as a remnant instrument of colonization, prolonging outdated and misguided efforts to assimilate Indigenous children away from their own cultures. Moreover, continued utilization of adversarial and individual-centric principles in family matters tends to harm children more than help them, and this is true in both Indigenous and non-Indigenous settings. The result is additional unnecessary harms to the well-being of children that are already in harm's way. These harms could be avoided, and child welfare outcomes

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[1] We use the terms "Indigenous" and "Indigenous People" to refer to the American Indian, Alaska Native, and Native Hawaiian original inhabitants of what is now the United States of America. We additionally use terms such "Native," "Native American," and "Indian," particularly as they reference other documents and policies. We use these terms interchangeably, seeking to be inclusive and respectful of the Peoples and tribes that represent them. We note, however, that indigeneity is both a political and a racial status, with overlapping and distinct legal meanings. While federal policies frequently impact Indigenous children regardless of their political status, the ability of tribal child welfare systems to operate and respond depends on the political sovereignty of tribal nations.

[2] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, ¶ 12, (Sept. 13, 2007). *See also* Kristen A. Carpenter & Lorie M. Graham, *Human Rights to Culture, Family, and Self-Determination: The Case of Adoptive Couple v. Baby Girl*, *in* INDIGENOUS RIGHTS IN INTERNATIONAL LAW (Stefan Kirchner & Joan Policastri eds., forthcoming).

actually supported and enhanced, if tradition-based systems of dispute resolution—frequently called "peacemaking," among other names, but which we will call "circle processes"—were employed in the child welfare context.

Many tribes operate their own child welfare systems, and many are attempting to employ circle processes in child welfare cases within their jurisdictions. Generally, circle processes are facilitated family forums in which, because of an issue or incident, the impacted parties and their families gather to discuss the issue(s) and develop a resolution by consensus. The extended family and community are included in the forum to actively participate within the assessment and case planning process, providing substance to the active efforts families are owed in their effort to reunify. Circle processes are rooted in an Indigenous worldview that perceives an issue, particularly a child welfare issue, as evidence of community imbalance that directly impacts the community, and conversely, imparts an obligation on the community to respond. Through the circle, family and community can complete their natural reciprocal relationship.

Tribal child welfare has the potential to be a transformative system that promotes community, family, and children's health and the self-determination and sovereignty of tribes. However, rather than centering a circle-like process, or even providing space for its inclusion, the tribal child welfare system is compelled to mirror its non-tribal child welfare system counterparts. The typical modern tribal child welfare system tends to be an outgrowth of colonial systems aimed towards separation and removal, and is thus detached from Indigenous child welfare practices and approaches. Contemporary federal funding requirements exacerbate this poor fit because they further pressure tribal systems towards a model of adversarial, permanency-oriented processing, similar to non-tribal systems. This Article outlines the ways in which the modern tribal child welfare system has been structured to compartmentalize families and perpetuate historical federal policies of Indian family separation. This Article then suggests that circle processes are a framework for re-Indigenizing the tribal child welfare system to not just improve outcomes (which it has the potential to do), but to also honor the interconnected, responsibility-oriented worldview of Indigenous communities. Ultimately, however,

tribes should lead that re-Indigenization process, whether through a circle process framework or otherwise.

II. THE CHILD WELFARE SYSTEM IS AN EXTENSION OF ANTIQUATED AND ASSIMILATIVE COLONIAL POLICIES

A. Historical Federal Indian Child Welfare Policies

Government intrusion into Indigenous families is rooted in a long history of federal policies designed to separate Indigenous children from their families, communities, and cultures. The federal approach to Indigenous children either morphed or simply galvanized into a deep-seated perception that Indigenous parenting is problematic and should be liberally disrupted. The impacts of these policies are still being felt by Indigenous children today.[3]

Throughout the nineteenth and early twentieth centuries, official U.S. policy towards Indigenous communities, and more particularly their children, was forced assimilation,[4] save for occasional periods when extermination was the explicit goal.[5] As a component of assimilation, the U.S. Commission of Indian Affairs advocated for the forcible removal of Indigenous children from their tribes as "the only successful way to deal with the 'Indian problem."[6] Subsequently, of course, forcible removal of children from a group has been defined as genocide,[7] but it was

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[3] Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 48 (2008) (noting we are just one generation removed from the landmark enactment of the Indian Child Welfare Act. Under Haudenosaunee law, "we have six more generations to consider before we can truly understand the full impact of this law").

[4] *See* NATIVE AM. RTS. FUND, TRIGGER POINTS: CURRENT STATE OF RESEARCH ON HISTORY, IMPACTS, AND HEALING RELATED TO THE UNITED STATES' INDIAN INDUSTRIAL/BOARDING SCHOOL POLICY 5–17 (2019), https://www.narf.org/nill/documents/trigger-points.pdf [https://perma.cc/8KF6-5RV6] (encapsulating federal assimilation policies towards Native American children from 1618 through the 1970s).

[5] For an in-depth examination of extermination policies in just one region, see BENJAMIN MADLEY, AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE 1846–1873 (2016).

[6] H.R. REP. NO. 104–808, at 15 (1996) (citing an 1867 Report to Congress). *See also* NATIVE AM. RTS. FUND, *supra* note 4, at 6, 8–9.

[7] G.A. Res. 260 A (III), United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2 (Dec. 9, 1948); United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2, art. 7.2.

rationalized as the compassionate alternative to extermination in earlier times.

From early colonial missions to federally-sponsored boarding schools, education was the primary means of separating Indigenous children from their families and communities.[8] The explicit intent was to eradicate Indigenous culture, and it was accomplished through prohibitions on speaking Indigenous languages, practicing Indigenous religions, partaking in cultural practices, and visiting parents and families.[9] Cultural eradication was enforced through mandatory boarding school as well as through the creation of a separate court system, the Court of Indian Offenses, and the Department of Interior's promulgation of Civilization Regulations outlawing traditional cultural practices in 1884, 1894, and 1904.[10]

Conditions in the schools were frequently less than sanitary or humane, and efforts to disband them gained traction in the latter half of the twentieth century. However, rather than identify assimilation through the separation of families as a failed goal, schools were merely identified as a failed means. Assimilation transitioned to the realm of child welfare. The thinking was that Indigenous children would be better off in non-Indigenous households wherein they would be further exposed to American values, customs, and lifestyles. Their assimilation would thus be more successful.[11] Conversely, missing out on this Americanization opportunity by remaining in Indigenous communities and their attendant poverty was not just failed assimilation, but neglect. Between 1958 and 1967, the Children's Bureau, the Bureau of Indian Affairs, and the Child Welfare League of America facilitated the Indian Adoption Project.[12] Indigenous children were specifically identified and tagged for adoption, cultivating an adoption market specifically

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[8] Graham, *supra* note 3, at 51; NATIVE AM. RTS. FUND, *supra* note 4, at 5–13.

[9] Graham, *supra* note 3, at 52; NATIVE AM. RTS. FUND, *supra* note 4, at 5–6, 8–9, 12–13.

[10] MICHAEL MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 40–61 (2020).

[11] DAVID FANSHEL, FAR FROM THE RESERVATION 119 (1972).

[12] Press Release, U.S. Dep't of the Interior, Bureau of Indian Affs., Indian Adoption Project Increases Momentum (Apr. 18, 1967), https://www.indianaffairs.gov/as-ia/opa/online-press-release/indian-adoption-project-increases-momentum [https://perma.cc/ED3A-9GRZ].

for Indigenous children.[13] During this time, child welfare systems were shockingly successful in removing children from their parents and cultures.[14]

B. Child Welfare as Child Saving

Indigenous child-rearing is not the only cultural practice to be devalued, perceived as in conflict with the dominant society, and subsequently conflated with child neglect.[15] But for Indigenous families, the stage has been set for hundreds of years; outside institutions, with both nefarious and altruistic intentions, have scorned, scrutinized, interfered with, and dismantled Indigenous families. This systemic invasion is rationalized in part by the system's perceived obligation to "save" Indigenous children through ensuring their exposure to "American values."

The contemporary child welfare system unfortunately is an outgrowth of its assimilation-driven past—structuring a system that is largely operated by community outsiders, with a high tolerance for removals, and a bias against the culture and contexts of these families. As Susan Brooks and Dorothy Roberts note, this is because the system at large, and in line with its application to Indigenous children, continues to be guided by a hubristic drive for "child saving."[16] The driving force to "save children" presumes a set of conditions from which children must

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[13] *Id.* ("It was a record year for the project … Temporarily, because of increased interest, there are more prospective parents than there are Indian children referred to the project for adoption.").

[14] *Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 4 (1974) The Association on American Indians Affairs submitted their 1969 report showing that in most states with large American Indian populations, roughly 25 to 35 percent of Indian young people had been separated from their families, and that Indian children were much more likely to experience out-of-home placement than non-Indian children. *Id.*

[15] Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (May 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/ [https://perma.cc/WEM7-CJH3] ("Parenting choices, such as whether to co-sleep with an infant or whether to leave an older child unattended at home, are routinely questioned and held against Black mothers in family court.").

[16] Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002).

be saved. Today, those conditions are largely poverty-induced, which is used to justify taking children away from their families and communities, regardless of the extent of maltreatment or the trauma of removal (or the historical contexts that contribute to correlations between poverty, race, and tribal lands). The child welfare system often equates poverty with neglect, resulting in distressingly disproportionate removals.[17]

While the explicit goal of eradicating tribes might have dimmed by the time of the Indian Adoption Project, the underlying assumptions regarding Indigenous inferiority remain ingrained in child welfare to this day. Not only are Indigenous families most likely to live in poverty,[18] their customs and lifeways are also more susceptible to suspicion. Studies evaluating child welfare practices as applied to Indigenous children in the 1960s and 1970s found that the vast majority of removals were based on vague grounds like "neglect" or "social deprivation."[19] Congress noted in its 1978 legislative findings to support the Indian Child Welfare Act that non-Indian social workers were frequently not just culturally inept, but perceived Indigenous deviations from the nuclear family, including Western modes of parenting and discipline or even simply living on tribal lands, as grounds for removal.[20] Today, despite forty years of concentrated federal efforts to combat this bias,[21] removal of Indigenous children from their homes remains disproportionately and tragically high.[22]

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[17] *Id.*

[18] *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf [https://perma.cc/84J9-GWAS]. American Indians and Alaska Natives have a poverty rate of 26.2 percent, the highest rate of any racial group. *Id.*

[19] MORRIS K. UDALL, ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 1386 at 10 (1978).

[20] *Id.*

[21] *See* Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

[22] NAT'L INDIAN CHILD WELFARE ASSOC., TIME FOR REFORM: A MATTER OF JUSTICE FOR AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN 1 (2007) ("The over representation of AI/AN children can be two to three times the rate of other populations in some states.").

C. Parental Rights as Property Rights

After identifying a child in need of saving, the system has eased the justification for the extreme remedy of removal by divorcing the family from their community and context and instead viewing them as isolated actors. Families are recast essentially into "property owners." This framework not only dehumanizes children and dilutes our duties owed to them as people, but it also undercuts any potentially meaningful community or extended family support system that might have otherwise been available to parents.

In the legal roots of the American system, children were considered to have no rights.[23] Instead, parents, fathers in particular, were considered to exert full dominion over their children.[24] Under ancient Roman law, fathers had the right to kill their children,[25] and in the Massachusetts Bay Colony, children could be put to death for disobeying their parents.[26] The legal concept of "family" is rooted in a property construct in which the rights are exclusively held by the parents to provide "care, custody, and control."[27] While contemporary parental rights are no longer expressed in explicit property terms, they are nevertheless still approached within this framework. To remove a child from a parent's custody is to challenge the parent's *right*

[23] *See e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the right to marry, establish a home and rear one's children as one deems fit are among one's basic civil rights guaranteed by the Fourteenth Amendment); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (finding that parents' rights to direct the upbringing and education of children under their control is fundamental); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a parent has a fundamental constitutional right in directing the upbringing and education of their child).

[24] Samantha Godwin, *Against Parental Rights*, 47 COLUM HUM. RTS. L. REV. 1, 31 (2015).

[25] *Id.* (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (Edward Christian ed., 15th ed. 1809) ("The antient [sic] Roman laws gave the father a power of life and death over his children.")).

[26] *Id.* (citing ROBERT REGOLI ET AL., DELINQUENCY IN SOCIETY: THE ESSENTIALS 14 (2010)).

[27] Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. STATE U. L. REV. 645, 649 (2014) (citing Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing "care, custody, and control" as "perhaps the oldest of the fundamental liberty interests recognized by this Court.")). *See also Pierce*, 268 U.S. at 534–35 (holding that a statute requiring public school enrollment unconstitutionally and "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399–400 (holding that a statute barring foreign language instruction unconstitutionally violated parents' liberty interests).

to exert decision-making control over that child. Indeed, the child welfare system purports to assume that same decision-making authority in such instances.

Framing parental rights as property rights creates a number of challenges for child welfare. First, a focus on the child's well-being quickly transforms into an antagonistic polarity between parents and the system. The adversarial framework pits the parents against the court and service providers. Like the criminal justice system, parents are compelled to deny all allegations, frequently delaying the provision of services because parents deny having any problems. Worse, for parents to even access some of these programs, including ones they seek and would benefit from, they are often forced to first relinquish custody of their children.[28] Compounding the adversarial conundrum, social workers troublingly operate as both coercive investigators and the provider of services.[29] Their ability to offer support is undermined by their intimidating role in initiating removal.[30] For Indigenous families, the threatening perception of social workers is all too familiar, reinforcing generations of mistrust.[31]

Second, the child welfare system frames parenting as an isolated system, occurring solely within the privacy of the home. Western values of individualism and self-efficacy reinforce this notion.[32] Challenges that parents may experience are seen as compartmentalized and private issues, devoid of any systemic influences, and thus parents are left to attempt to remedy them on their own. Child welfare responses are therefore structured as "programs," "classes," and "choices" that parents can use to *earn* back the right to care and control their child again. If parents

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[28] Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 893 (2007).

[29] *Id.* at 886.

[30] *Id.* at 887.

[31] *See* Terry L. Cross, *Child Welfare in Indian Country: A Story of Painful Removals*, 33 HEALTH AFFS. 2256 (2014); Angela Sterritt & Paisley Woodward, *'Judged and Ashamed': Indigenous Parents Describe Scrutiny, Mistrust of Social Workers*, CBC NEWS, https://www.cbc.ca/news/canada/british-columbia/judged-and-ashamed-indigenous-parents-describe-scrutiny-mistrust-of-social-workers-1.5059294 [https://perma.cc/E4SE-FF23?type=image] (Apr. 9, 2019).

[32] Sheri Freemont, *Gold Standard Lawyering for Child Welfare System-Involved Families: Anti-Racism, Compassion, and Humility*, GUARDIAN, Winter 2020, at 1.

fail, they are perceived to lack commitment or willingness to do what it takes to get their children back, despite the lack of culturally appropriate services.[33] Removing the child is therefore not just in the child's "best interest": it is a punitive response to parents that no longer deserve the right to parent.

Third, by framing parental rights as property rights, the extended family and community are effectively barred from any role as relevant actors who might help the child. The tragedy of this shift stems from the fact that, in reality, communities impact children's development, well-being, and life chances.[34] Numerous Indigenous communities have codified the connection between children and the community as an explicit value.[35] Yet, the community is rarely considered when evaluating a child's removal or placement, or what responsibility the community has to the child, including ensuring a healthy placement and healthy reunification. Instead, social workers are often strangers to the community, and their cultural ignorance can lead to inappropriate removals.[36] Caseworkers exert extensive decision-making authority, with minimal accountability to the community they serve. Meanwhile, when children are removed, they tend to not just be removed from the family, but also from the entire community. Generations of systemic poverty, violence, and the myriad collateral consequences of these destructive cycles make

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[33] See, for example, the Family First Prevention Services Act of 2018, in which Congress seemingly acknowledged the inapplicability of evidence-based practices to Indigenous children by permitting tribal child welfare systems to operate "services and programs that are adapted to the culture and context of the tribal communities served." 42 U.S.C. § 679c(c)(1)(E).

[34] Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 26 (2005) [hereinafter Roberts, *Community Dimension*] (citing David B. Mitchell, *Building a Multidisciplinary, Collaborative Child Protection System: The Challenge to Law Schools*, 41 FAM. CT. REV. 432, 436 (2003)).

[35] *See, e.g.*, TULALIP TRIBES JUVENILE & FAM. CODE, ch. 4.05.020 ("The Tulalip Tribes endeavors to protect the best interest of Indian children by . . . maintaining the connection of children to their families, the Tribes, and Tribal community when appropriate); OGLALA SIOUX TRIBE CHILD & FAM. CODE, WAKANYEJA NA TIWAHE TA WOOPE § 401.4 (listing expressed purposes of the Child and Family Code, including "to provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation").

[36] H.R. REP. NO. 1386, *supra* note 19, at 10 ("In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.").

the availability of background check-proof households sparse in Indigenous communities.[37] This is exacerbated by the increased number of multi-generational, cohabitational households, further decreasing opportunity for community involvement by shrinking the pool of available foster care and permanent homes.

D. The Indian Child Welfare Act

These child welfare system deficiencies are not a mystery. In fact, Congress recognized these failings as they specifically applied to Indigenous people and enacted the Indian Child Welfare Act (ICWA). Stirred by the shocking extent to which Indigenous children were being removed, recognizing that cultural bias, the lack of a tribal role, and a systemic embrace for removal all converge to exacerbate this loss, and after years of advocacy by leaders from Indigenous communities,[38] Congress formally enacted ICWA in 1978.[39]

ICWA was a rare instance of the United States leading international evolution in legislation concerning Native affairs. Almost three decades later, the United Nations' 2007 Declaration on the Rights of Indigenous Peoples (the Declaration) called for not just preventing the removal of Indigenous children, but recognizing the right of Indigenous "families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child."[40] Thus, ICWA started the United States down a child welfare path that is now better illuminated by international normative guidance. That guidance provides that not only must the systemic removal of Indigenous children end, but Indigenous Peoples must be directly involved in the

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[37] Courtney Lewis, *Pathway to Permanency: Enact a State Statute Formally Recognizing Indian Custodianship as an Approved Path to Ending Child in Need of Aid Cases*, 36 ALASKA L. REV. 23 (2019).

[38] H.R. REP. NO. 1386, *supra* note 19, at 9 ("Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.").

[39] Indian Child Welfare Act, 25 U.S.C. § 1901.

[40] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2, at annex.

reunification process. Today, ICWA is considered the gold standard of child welfare policy.[41]

Through ICWA, Congress attempted two critical structural changes to state court proceedings: (1) it affirmed the importance of tribal control and decision-making in child welfare;[42] and (2) it attempted to slow the high rate of removals by raising the standards to be met before children could be removed and by increasing the amount and quality of services offered to parents. Countering the lack of a community role in typical child welfare, ICWA provides standing for tribes through exclusive tribal jurisdiction for Indian children located on tribal lands[43] and the right to intervene[44] or have cases transferred to tribal court for children located off tribal lands.[45] Providing for tribal participation is seemingly nominal—responsive to the child's dual citizenship and respectful for their legal and cultural ties to the tribal community. But, it is also revolutionary, providing tribes a meaningful opportunity to ensure their children are not lost and to communally care for them—both of which are in line with the calls of the Declaration.

Beyond tribal participation, ICWA embraces a groundbreaking philosophical shift for child welfare. For example, ICWA requires that before an Indian family can be broken up, the court must prove that staying with their family would result in "serious emotional or physical damage" to the child, regardless of any conflicting lesser state standards.[46] This combats potential impacts of "feelings" that an Indigenous child might be better off in a non-Indigenous setting. The court must then use "active efforts" to provide remedial services and rehabilitative programs *and* prove that they were unsuccessful before terminating any parental rights.[47] "Active efforts" has been repeatedly held to be a higher standard than the

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[41] Freemont, *supra* note 32, at 2 (citing Brief for Casey Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae Supporting Appellants at 2, 3, 5, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479) (en banc)).

[42] LYSCHA MARCYNYSZYN ET AL., AMERICAN INDIAN TITLE IV-E APPLICATION PLANNING PROCESS: TRIBAL PROGRESS, CHALLENGES, AND RECOMMENDATIONS (2012).

[43] 25 U.S.C. § 1911(a).

[44] 25 U.S.C. § 1911(c).

[45] 25 U.S.C. § 1911(b).

[46] 25 U.S.C. §§ 1912(e)–(f).

[47] 25 U.S.C. § 1912(d).

"reasonable efforts" required under most state laws for all other child welfare cases,[48] countering inclinations that parents bear the burden of proving they have earned back the right to parent. Further, should terminating parental rights be unavoidable, ICWA provides for adoptive and foster care placement preferences that prioritize maintaining the child's connection to their extended family, other members of their tribe, or, if those placements are not feasible, other Indians.[49] ICWA explicitly acknowledges and values the relationship between the child and their extended family and community. Like the parents, the extended family and community have standing and accompanying obligations baked into the law.

Even after over forty years, ICWA provides a useful, forward-looking, human rights framework for conceptualizing and structuring tribal child welfare. Removal should be situated as a dire last resort. Systems should shoulder the burden of actively servicing families towards reunification. Extended families and communities should be prioritized as the optimal placements. Critically, tribes and their communities should have an active role in case-planning and decision-making. In both ICWA's focus on reunification and its space for tribal participation, there are structural opportunities for Indigenous innovations, such as a circle process.

However, since ICWA philosophy does not reflect mainstream child welfare, the implementation of ICWA has been met with resistance. ICWA compliance has been and continues to be sporadic,[50] and state systems continue to poorly serve Indigenous communities.[51] Among numerous calamitous

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[48] *See, e.g.*, State v. Jamyia M. (*In re* Jamyia M.), 791 N.W.2d 343 (Neb. Ct. App. 2010) (holding that exceptions in the state's "reasonable efforts" statute did not apply in ICWA cases, where the "active efforts" standard governs); State *ex rel.* C.D., 200 P.3d 194, 205 (Utah App. 2008) (noting that "the phrase active efforts connotes a more involved and less passive standard than that of reasonable efforts").

[49] 25 U.S.C. § 1915(a)–(b).

[50] *See* DAVID E. SIMMONS, NAT'L INDIAN CHILD WELFARE ASS'N, IMPROVING THE WELL-BEING OF AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND FAMILIES THROUGH STATE-LEVEL EFFORTS TO IMPROVE INDIAN CHILD WELFARE ACT COMPLIANCE 2 (2014); Kathryn E. Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, N.Y. STATE BAR ASSOC. FAM. L. REV., Spring 2014, at 1.

[51] *See, e.g.*, Oglala Sioux Tribe v. Van Hunnik, 100 F.Supp.3d 749 (S.D. 2015) (holding that Pennington County, South Dakota, systematically violated

consequences, this means notice to tribes and tribal participation are also sporadic. In addition, ICWA faces constant and numerous legal attacks, including challenges to its constitutionality.[52] Almost as if ICWA does not exist, the child welfare system continues to disproportionately remove children of color and those in poverty and process their cases with cool neutrality.[53] Even when states do attempt to implement the Act,[54] the provisions of ICWA and the child welfare policy they embody must compete with other conflicting federal child welfare policies that more closely resemble typical "child saving" tendencies to intervene and remove. These conflicting policies trickle down to tribes, impacting the child welfare systems operated by tribes.

E. Pressures on Tribal Child Welfare Systems to Westernize

Tribal child welfare and court systems are operated by hundreds of tribes, and are continuously growing in quantity, size, and sophistication. Tribes have experimented with adjustments to the child welfare model, such as embracing customary adoption, extended family care, and guardianship as culturally appropriate paths to permanency.[55] Yet, much like Indigenous families, tribal systems have been heavily pressured to assimilate to Western forms, despite ICWA. In effect, because of various modern and historical federal structures designed to

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the rights of Indian parents and tribes in state child custody proceedings). *But see* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (dismissing the claims, holding that the district court should have abstained from exercising jurisdiction under principles of federal-state comity).

[52] *See, e.g.*, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479) (en banc).

[53] Roberts & Sangoi, *supra* note 15 ("Every day . . . [families are subject] to extraordinary scrutiny and vilification. These judges and officials use consequences of poverty . . . as evidence of child neglect. Family members who have prior criminal or family court involvement are deemed risks to their children, without any consideration for the well-documented overcriminalization of poor Black communities.").

[54] For example, while all states are mandated to comply with ICWA, several states have enacted their own versions of ICWA into state law. *See, e.g.*, Michigan Indian Family Preservation Act, MICH. COMP. LAWS § 712B.3 (2012); Nebraska Indian Child Welfare Act, NEB. REV. STAT. § 43.1503 (2015); Minnesota Indian Family Preservation Act, MINN. STAT. ANN. § 260.755 (West 2017); Washington Indian Child Welfare Act, WASH. REV. CODE ANN. § 13.38.040 (West 2017).

[55] Barbara Ann Atwood, *Permanency for American Indian and Alaska Native Foster Children: Taking Lessons from Tribes* (Ariz. Legal Studs., Discussion Paper No. 08-22, 2008).

maintain control, including funding streams, tribal child welfare systems often look more like federal systems operated by tribes rather than being tribal in nature. Tribes have had little to no choice in the matter.

Tribal governments were initially denied any recognition under U.S. law, the absence of which was used to justify the systemic dispossession of Indigenous land and sovereignty.[56] The modern advent of tribal courts was through the Court of Indian Offenses, which was originally designed to regulate away Indigenous culture.[57] After centuries of assault, removal, and diminishment, tribal self-government was finally acknowledged and encouraged under U.S. law in the 1934 Indian Reorganization Act (IRA).[58] The IRA promoted tribal self-governance, and often the reemergence of self-governance after centuries of assault. However, through template constitutions and model codes, the IRA promoted a particular Westernized flavor of tribal self-governance. It was thought that "legitimate" tribal governments should look like non-tribal local, state, and federal governments. Congress subsequently continued its pressure to Westernize tribal systems through statutes like the Indian Civil Rights Act of 1968.[59]

Tribal child welfare systems have similarly been pressured to operate in a palatable, Western format. Like many state systems, this pressure is most acutely felt when accessing federal funds. The federal government has a responsibility to assist tribes in meeting the service needs of tribal citizens pursuant to its federal trust responsibility.[60] The federal

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[56] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) (holding that because Indians are "fierce savages" they lack property interests in their land beyond occupancy rights, and that Europeans and subsequently Americans, by nature of discovery, possess legal title); Cherokee Nation v. Georgia, 30 U.S. 1, 33 (1831) (holding that because tribes "are in a state of pupilage," their sovereignty is tempered and does not rise to the level of foreign nation to satisfy diversity jurisdiction).

[57] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983); MCNALLY, *supra* note 10, at 40–61.

[58] Pub. L. No. 73-383 (1934) (codified at 25 U.S.C. § 461 *et seq.*)

[59] 25 U.S.C. §§ 1301–04.

[60] The origins of the federal-tribal trust responsibility are indirect, but generally stem from treaty obligations and the "guardian-ward" dynamic articulated in *Cherokee Nation*, 30 U.S. at 17, 33 (1831). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3)(a) (Nell Jessup Newton et. al., eds., 2019). It has subsequently evolved into a federal trust responsibility towards tribes that includes "exacting fiduciary standards." Seminole Nation v. United States, 316

government provides funding to tribal systems through a variety of different federal departments. In many ways, tribes are disproportionately dependent on federal funding, due in part to a lack of meaningful taxation revenues.[61] Tribal child welfare systems, predominantly via the tribal courts, have access to some funding through the Bureau of Indian Affairs[62] and the Department of Justice's Coordinated Tribal Assistance Solicitation.[63] But, these funds tend to be sporadic, minimal, and reserved for select federally-endorsed programming.

Beginning in 1975, in response to paternalistic and inefficient federal programs, the federal government altered its funding mechanism to allow for substantially more self-determination for tribes within select funding streams. The Indian Self-Determination and Education Assistance Act of 1975 and its progeny authorize the Department of Interior and the Department of Health and Human Services to contract directly with tribes.[64] Under these contracts, tribes use federal funds to operate the programs that federal agencies otherwise would provide, such as police departments and hospitals. Subsequent amendments allowed more flexibility in design of services delivered under the contracts. Known as self-governance, this federal framework allows for more localized control, and is considered to be a model for building culturally-responsive,

U.S. 286, 297, 297 n.12 (1942) (payment of money to agents known to be dishonest violated private trust law standards). The trust responsibility is a lens through which federal legislation and policy aimed towards tribes should be evaluated, including child welfare.

[61] *See, e.g.*, Urging the Secretary of the Treasury to Assist in Ending Dual Taxation of Economic Activity in Indian Country, Nat'l Cong. of Am. Indians Res. #ABQ-19-015 (2019) (noting that current case law creates "an intolerable burden of dual taxation on tribal economic activity").

[62] The Bureau of Indian Affairs provides limited tribal court funding through Tribal Justice Support tribal court assessments. *See Tribal Court Assessments*, U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFS., https://www.bia.gov/CFRCourts/Assessments [https://perma.cc/L7M2-X6VA] (last visited Feb. 27, 2021).

[63] The U.S. Department of Justice offers short-term, competitive grants to tribes for a variety of justice-related programs. None of the programs are child welfare-specific, though funds could be used for court services which could include a child welfare docket. *See Grants/CTAS*, U.S. DEP'T OF JUST., TRIBAL JUST. & SAFETY, https://www.justice.gov/tribal/grants [https://perma.cc/VXW4-HU56] (last visited Feb. 27, 2021).

[64] 25 U.S.C. §§ 5301–423.

efficient, and accountable systems that best serve tribal communities.[65]

Regrettably, though, tribes are not able to access federal funds for tribal child welfare through self-governance.[66] Instead, the limited funding that is provided in this area is dispersed primarily through Title IV of the Social Security Act.[67] Titles IV-B and IV-E of the Social Security Act[68] provide core funding for both state and tribal child welfare systems.

Title IV-E garners the far larger funding stream[69] and supports a behemoth bureaucracy for which tribes were likely an afterthought. As such, tribes did not have an opportunity to directly access funds in this system until 2008.[70] Even with this direct access, only one tribe has accessed funds and only seventeen tribal plans for access have been approved, leaving the

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[65] *See, e.g.*, Support for Tribal Self-Governance within the Department of Transportation, Nat'l Cong. of Am. Indians Res. MSP-15-016 (2015) (describing self-governance, in advocating for expanding self-governance to the Department of Transportation, as allowing "for greater tribal flexibility and effectiveness in the use of federal funds" and that "federal programs are more efficiently implemented and expended than when federal officials exercised oversight rather than direct administration").

[66] *See* 25 U.S.C. §§ 5381, 5399. Self-governance compacts with the Department of Health and Human Services (DHHS) are limited to programs administered through the Indian Health Service, and therefore do not include programs within the Children's Bureau. DHHS recommended a demonstration project to compact for these programs, but proposed legislation died after passing the Senate Indian Affairs Committee. *See* S. REP. NO. 108-412 (2004); *Hearing on Reforming the Indian Health Care System Before the S. Comm. on Indian Affs.*, 111th Cong. 8–10 (June 11, 2009) (statement of Valerie Davidson).

[67] BYRON L. DORGAN ET AL., ENDING VIOLENCE SO CHILDREN CAN THRIVE 147 (2014) (describing how states receive disproportionately more funding for prevention and child protection programs, while tribes receive minimal federal support). *See also* U.S. DEPT. OF HEALTH & HUM. SERVS. OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (2005).

[68] 42 U.S.C. §§ 620–29, 670–79.

[69] MARCYNYSZYN, *supra* note 42, at 9.

[70] The Fostering Connections to Success and Increasing Adoptions Act, 110th Cong., Pub. L. No. 110-351 (2008) The process for accessing Title IV-B funds is separate, and can be accessed directly, though after a tribe submits a five-year plan, annual progress and service reports, and meets mandated requirements. *See id. See also* BARBARA VAN ARSDALE ET AL., 17A FEDERAL PROCEDURE § 42:907 (2020). (Title IV-B funding is notoriously far less than Title IV-E funds.)

opportunity largely unrealized.[71] Tribes that have gone through the process have identified numerous barriers to accessing the funds.[72] Tribes are essentially required to substantially meet the same requirements as states.[73] This includes the massive bureaucracy necessary to monitor and operate child welfare systems across a state as captured in the "pre-print" Title IV-E plan.[74]

The vast remainder of tribes, if they access Title IV-E funds at all, access those funds through tribal-state agreements.[75] While tribes have had some success in obtaining these agreements, the historical foundation underlying tribal-state collaboration is fraught with challenges.[76] For example, tribes are not components of the state government, and so states may be clumsy in coordinating with tribes as sovereign entities rather than subservient branches of state government. They may face logistical barriers such as incompatible computer systems.[77] States may feel compelled to require tribes to report outcomes to the state, to adopt state requirements even beyond federal requirements, or to waive tribal sovereign immunity.[78] Notably,

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[71] *See Tribes with Approved Title IV-E Plans*, CHILDREN'S BUREAU, ADMIN. FOR CHILD. & FAMS. (Feb. 27, 2021), https://www.acf.hhs.gov/cb/grant-funding/tribes-approved-title-iv-e-plans [https://perma.cc/8HZG-Q67S]; MARCYNYSZYN, *supra* note 42.

[72] MARCYNYSZYN, *supra* note 42.

[73] EMILIE STOLTZFUS, CONG. RSCH. SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT 4–5 (2012).

[74] CAPACITY BLDG. CTR. FOR TRIBES, PATHWAYS TO TRIBAL TITLE IV-E: TRIBAL TITLE IV-E OPTIONS 5–6 (2017).

[75] As of 2008, there were approximately ninety tribes with tribal/state agreements, and seventy of these allowed for either one of a combination of maintenance, administrative, or training activities funded by Title IV-E. *Tribal Child Welfare Funding Findings*, NAT'L CHILD WELFARE RES. CTR. FOR TRIBES, http://www.nrc4tribes.org/Tribal-Child-Welfare-Funding-Findings.cfm [https://perma.cc/KFP9-PFPE].

[76] *See generally* JACK F. TROPE & SHANNON KELLER O'LOUGHLIN, A SURVEY AND ANALYSIS OF SELECT TITLE IV-E TRIBAL-STATE AGREEMENTS (2014).

[77] *Id.* at 6 (noting a delay in the Navajo Nation receiving payment from the State of Arizona because their computer system was not sufficiently updated).

[78] *Id.* at 5, 7 (noting all eleven tribal-state agreements in Alaska require federally recognized tribes to waive sovereign immunity and comply with state law and that California's "Tribal Child Welfare Services Plan" includes requirements beyond federal law).

Title IV-E includes a waiver provision for innovation demonstration projects (such as circle processes).[79] Yet, very few tribal-state agreements allow tribes to participate in such programs.[80] Tribal advocates have sought modifications to Title IV-E, largely unsuccessfully, to make the process more relevant to the realities of tribal characteristics and differences in structures of tribal governance.[81]

In addition to bureaucratic challenges, Title IV-E, far more than Title IV-B, requires the incorporation of a model of child welfare that prioritizes distant and urgent processing, which tends to expedite the termination of parental rights. For example, Title IV-E funding requires the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months.[82] While such a requirement helps ensure children do not languish in the child welfare system, it also artificially pressures families. Not only does this "fifteen-month rule" seemingly conflict with ICWA's philosophy of supporting reunification and numerous tribal policies that explicitly denounce termination,[83] but it is also contradictory to recent trends in child welfare that deprioritize the termination of parental rights.[84]

Rather than empower tribes to design their own systems, as is especially needed to counter the impacts of decades of disastrous Indigenous child welfare policy, Title IV generally restricts funding through overwhelming bureaucracy, requires significant federal and state oversight, and requires the adoption of antiquated child welfare policies. However, while the funding streams should most certainly be updated to better respond to

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[79] 42 U.S.C. § 1320a-9.

[80] TROPE & KELLER O'LOUGHLIN, *supra* note 76 at 44 (noting the Oregon-tribal agreements allow tribal participation in the state federally-approved waiver programs).

[81] MARCYNYSZYN, *supra* note 42.

[82] 42 U.S.C. § 675(5)(E).

[83] *See e.g.*, *Tribal Customary Adoption*, NAT'L CHILD WELFARE RES. CTR. FOR TRIBES, http://www.nrc4tribes.org/Tribal-Customary-Adoption-Resources.cfm [https://perma.cc/XL2U-83YS] (last visited Feb. 19, 2021) ("[T]raditionally, . . . tribes did not practice termination of parental rights. Tribal customary adoption is the transfer of custody of a child to adoptive parents without terminating the rights of the birth parents.").

[84] *See e.g.*, Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (2018) (authorizing for the first time the use of federal child welfare funding under Title IV-E for prevention services).

tribal needs, such as through self-governance, there are current opportunities. Tribes are already demonstrating the capacity to run their own child welfare systems. The direct Title IV-E funding stream, once accessed, allows tribes significantly more flexibility to design their own systems. For example, tribes can develop their own standards for when a child is in need of care, and create whatever tribal court structure works best for them.[85] But, tribes require meaningful access to funds to design such tribal systems that offer culturally relevant family services within a responsive tribal, rather than state or federal, bureaucracy.

III. INDIGENIZING CHILD WELFARE

A. A Different World View (Re)Emerging

In the logging industry, commercial clearcutting used to be considered the healthiest strategy for harvesting timber. "Without any competitors, the thinking went, the newly planted trees would thrive."[86] Instead, they were frequently more vulnerable to disease and climatic stress than trees in old-growth forests. It turns out, seedlings severed from the forest's underground lifelines are much more likely to die than their networked counterparts.[87] Much like a child welfare system rooted in an individual-centric, property-based framework, specialists had emphasized the perspective of the individual while failing to account for the influence of the community. Like an old-growth forest, Indigenous families are not isolated trees. They are part of a vast, ancient, and intricate society that is connected, communicative, and interdependent. These connections should be leveraged.

The view of the interrelatedness of the various inhabitants of a forest is reflective of an Indigenous approach to the world in general, and this worldview carries over with respect to children. The core focus is on connection, rather than individualism. Fortuitously, though likely not coincidentally, the reemergence of this Indigenous perspective coincides with

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[85] JACK F. TROPE, TITLE IV-E: HELPING TRIBES MEET THE LEGAL REQUIREMENTS (2010).

[86] Ferris Jabr, *The Social Life of Forests*, N.Y. TIMES MAG. (Dec. 2, 2020), https://www.nytimes.com/interactive/2020/12/02/magazine/tree-communication-mycorrhiza.html [https://perma.cc/2MSX-FGEE].

[87] *Id.*

burgeoning family systems theory.[88] Also like the forest, family systems theory requires the court to shift from viewing parents as isolated actors and instead see them as part of a living system, where members are its interacting parts. A family systems approach requires courts to take into consideration the whole family, broadly defined, in making decisions about a child.[89]

The very concept of rights can seem foreign to Indigenous thinking. Rather than based on rights, Indigenous worldviews[90] can broadly be described as based on four other "r-words": responsibilities, relationships, reciprocity, and respect. From an Indigenous perspective, rights are only relevant when there is a corresponding responsibility. That is, a "right" is really just what one might use to describe what should happen, if another person upholds a responsibility towards the first person. The responsibility is primary and rooted in the relationship between the parties. In fact, in typical Indigenous worldviews, the responsibilities are primary elements, while rights are derivative.

Increasingly aware of the ill fit and inherent flaws of the colonial social constructs and structures they have been encouraged to adopt for centuries, many Indigenous communities now seek to return to ways that reflect their own worldviews, cultures, and spiritual understandings.[91] This is true with

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[88] Similarly, the growth of restorative or therapeutic justice is coinciding with the reemergence of Indigenous traditional dispute resolutions. Scholars are just beginning to study the complex influences restorative justice movements are having on tribal systems, and vice versa. The development is promising for both Indigenous Peoples and non-Indigenous people alike. *See* JUSTICE AS HEALING: INDIGENOUS WAYS (Wanda D. McCaslin ed., 2005); Joseph Thomas Flies-Away & Carrie Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence+*, 2013 MICH. STATE L. REV. 403 (2013).

[89] Brooks & Roberts, *supra* note 16, at 455.

[90] It is, of course, impossible to distill a continent and millennia of Indigenous wisdom. It is not even desirable. Indigenous Peoples comprise thousands of distinct cultures, languages, and philosophical approaches. Nevertheless, particularly in contrast to Western values and norms, and after centuries of being lumped together, we endeavor to promote a "pan-Indian" child welfare perspective solely to argue for the opportunity for tribes to be allowed to further experiment with their own approaches.

[91] Tribes thread a difficult needle: they must build tribal law that is both responsive to traditional needs, customs, and traditions, while also relevant and tolerable to federal Indian law pressures. Tribes are nevertheless thriving. *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020).

respect to child welfare, perhaps most markedly. Rather than orient around rights to children, Indigenous systems orient around duties owed to children. These duties not only include ensuring children's safety, but also ensuring children's meaningful access to their families, tribes, and culture. Thus, what the colonial models frame as rights should be re-framed, through the recovering of Indigenous lifeways and worldviews, as responsibilities.

These responsibilities exist because we are connected. Kinship is one of the main ways that tribal duties and rights are expressed. An individual's relationships to the people in one's family, including extended family and sometimes clans, bring certain responsibilities and expectations. Extended family, such as grandparents, aunts, uncles, and cousins, often play a part in the life of a child. Further, tribal relations extend out to include clans, lineages, and tribe. Dispute and conflict among tribal members are often expressed as a violation of the norms surrounding the rights and duties they owe each other as kin.[92]

The Oglala Sioux Tribe's child protection code, *Wakanyeja na Tiwahe Ta Woope*, provides one example of these epistemological differences in practice.[93] In overhauling its own children's code, the Tribe replaced discussion of parental rights with sections comprehensively outlining "Traditional Children's Rights" and "Traditional Family Rights."[94] Closer examination reveals that those sections describe important relationships that are to be preserved, values to be applied, and responsibilities deriving from the values and responsibilities described.[95]

The important inquiry, in these efforts, is what is most needed by the child or children at issue. This Article proposes that a facet of this reorienting include a diversion away from the adversarial and coldly neutral court to a circle process addressing child welfare concerns. By allowing emphasis on the duties that parents, extended families, and communities owe to children, tribes can use systems that will prove more beneficial overall to their children, and provide models for states and other tribes to

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[92] JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 220–22 (3d ed. 2016).

[93] *See* OGLALA SIOUX TRIBE CHILD & FAM. CODE, WAKANYEJA NA TIWAHE TA WOOPE § 403 (2007).

[94] *Id.*

[95] *Id.*

consider. Such innovation will have the added benefit of facilitating the implementation of the rights conceived under the Declaration, including the child's right to their family, tribe, and culture.[96]

Critically, this same reorientation is not exclusive to Indigenous children and has already benefitted child welfare cases elsewhere. For example, out of home placements reduced significantly once a circle process program was implemented in Washtenaw County Court in Michigan.[97] This is hopefully only the tip of a continent-sized iceberg of promising potential.

B. Operationalizing Duties: The Circle

Removal of family and community from natural roles as decision-makers in matters of child welfare and replacing them with third parties with no relationship to the children involved is one of the more fatal flaws of the current child welfare system. Alleviating this flaw will result in more beneficial decisions, and more support for implementation of those decisions. Circle processes of various sorts—sometimes called, for example, peacemaking or family group decision-making—provide process alternatives to the federally-mandated succession of review hearings. Circle processes are quite simple in that the basic model is to gather people together to have honest discussions about difficult issues and seek resolutions. The goal is to achieve consensus about what should be done moving forward.[98] Because consensus is the basis of the final outcome, that outcome has full support of all involved.[99]

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[96] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2. *See also* CARPENTER & GRAHAM, *supra* note 2.

[97] *See*, *Selected KIDS COUNT Indicators for County in Michigan*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/customreports/3824/any [https://perma.cc/2U98-Z7AZ] (last visited June 14, 2021) (providing data for Washtenaw County, Michigan, compared to Michigan as a whole).

[98] Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 242 (1997).

[99] *Id.* at 243. *See also* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 108, 116 (Wanda McCaslin ed., 2005) ("The agreement reached in family and community forums are binding. The same interlocking obligations established in individual and community relationships compel participants to comply.").

Roughly put, a circle process can be seen as a restorative justice alternative to the "hammer" of the court. The circle process demotes court actors that are intentionally unfamiliar with the family and gives primacy back to non-neutral stakeholders who frequently are excluded from, or have diminished roles in, child welfare hearings—such as extended family and community members.[100] These stakeholders are naturally more motivated to look after their own relative's well-being, and more capable and motivated to hold others accountable to finalized decisions.[101] The circle provides those persons, along with the parent(s), the space to speak as a core component of the analysis and the process, rather than as ancillary parties. They, as opposed to the court, collectively design a case plan. Similarly, the circle, as opposed to the court, is empowered to hold itself accountable pursuant to their duties owed to the child.[102]

The hammer of the court can continue to exist, an opt-out option for cases when the circle is unsuccessful, and consensus decisions of circle processes can be adopted as court orders.[103] By allowing the circle process a chance to operate before formal court hearings, not every family issue is automatically treated as a

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[100] Incorporating the extended family and community is not just about leveraging the resources of the community, but comporting to an Indigenous worldview about how the community is impacted and the corresponding duties the community owes to the family. *See* Wanda D. McCaslin, *Introduction: Reweaving the Fabrics of Life*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 87, 89 ("Indigenous people tend to interpret hurtful actions less individualistically and more as signs of imbalances within the community as a whole—imbalances that affect everyone.").

[101] Melton, *supra* note 99, at 117 (noting the "distributive nature of this process engages the extended family as a resource for the offender, the victim, and the community. The community joins in the effort to resolve problems, to ensure compliance, to provide protection, and to retain ownership of the problems").

[102] *Id.* at 115 ("[I]n many tribal communities, parents and the extended family are expected to nurture, supervise, and discipline their children. When parental misconduct occurs . . . the family forum . . . extensively invokes the distributive aspect of responsibility to ensure the children's protection and to monitor and enforce proper parental behavior and responsibility, which the family regulates.").

[103] Judge L.S. Tony Mandamin, *Peacemaking and the Tsuu T'ina Court*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 349, 354 (noting "if an offender decides not to enter peacemaking, then the matter stays in court. If the matter is not accepted into peacemaking or if the offender fails to cooperate with the peacemaking process, then the peacemaker coordinator will return the matter to court.").

nail. When circle processes are implemented this way, the benefits to children are underscored by research establishing factors that promote childhood well-being.[104] Simply put, circle processes promote well-being.

Traditional Indigenous dispute resolution yields outcomes that are more sustainable in and of themselves.[105] The basis of outcomes is consensus—all those involved must agree to what will happen, including the parents.[106] This, in turn, provides an entire circle of support and accountability, which helps make sure responsibilities identified and assigned as part of a solution to a problem are indeed fulfilled. For example, grandparents and other extended family members, in a child welfare case, will have been part of the discussion of the problem and development of the solution. They are aware of the circumstances leading up to the failure to provide for the child, including the systemic and generational challenges pressing on the family. If the solution requires certain things of the parents to better serve the children, those other relatives are there to ensure that the parents uphold their responsibilities. Perhaps more importantly, those same circles of relatives are also there to provide support so that everyone, including the parents, can uphold their responsibilities to the children. And those support circles will have already been alerted to the heightened possibility that such support might be needed.

As connected components of the family, connected to and thereby owing duties to the child(ren), the participants of the circle are bound by the circle just like the parents. They are also more likely to be culturally competent, circumventing the explicit biases of the nineteenth century, and the more implicit but still harmful biases of the twentieth and twenty-first centuries. As an

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[104] Roberts, *Community Dimension*, *supra* note 34, at 28 (noting community-based initiatives that leverage the strengths of families and communities, that try to respect cultural norms, and engage in partnerships with neighborhood organizations, are taking hold in some pilot projects).

[105] Porter, *supra* note 98, at 255 ("Prior to contact with the European colonists, indigenous people had little choice but to accept and live by the norms established by their communities."). *See also* Majidah M. Cochran & Christine L. Kettel, *Rehabilitative Justice: The Effectiveness of Healing to Wellness, Opioid Intervention, and Drug Courts*, 9 AM. INDIAN L. J. 75 (2020).

[106] Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185 (1994) ("Consensus makes the process work. It helps people heal and abandon hurt in favor of plans of action to restore relationships.").

added process, serving an intermediary role in the otherwise still adversarial child welfare case, the circle is an opportunity with minimal risk. They manifest the active efforts that state courts so frequently dread providing.[107] The circle offers the community an opportunity to participate, and thereby leverage opportunities to ensure the child remains connected to the community. In line with the Declaration, the community is directly involved in the child welfare process.

In fact, the collaborative and supportive problem-solving focus on which circle processes are based likely augments resilience (that is, the ability to manage future challenges) in both child and parent. Commonly recognized resilience factors that might be fostered for parents in circle processes include emotional regulation, perception of control and ability to impact one's own life, self-efficacy, social and communication skills, and likely others. [108] These benefits, in turn, make the parent(s) better able to create resilience factors commonly recognized as beneficial within a child's family, including lower family stress, better parenting skills, and parental mental health. Finally, to the extent that circle processes involve others beyond the nuclear family, they can foster resilience factors for children and parents both that flow from the community, including supportive extended family engagement, close community, social support, possibly spiritual community connections, and others.[109] To summarize, then, employing circle processes can foster resilience factors in the lives of children and parents both, on multiple levels, and improvements for parents also flow through to the children.

IV. CONCLUSION

Allowing circles processes to operate with respect to tribal children is a natural continuation of momentum that resulted in

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[107] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§ 11.01, 11.07 (Nell Jessup Newton et al., eds., 2019) (noting state and federal courts have taken opportunities to interpret ICWA narrowly, such as through the judicially-created ICWA exception known as the "existing Indian family doctrine").

[108] *Parenting for Brain, Resilience in Children and Resilience Factors, 2021*, https://www.parentingforbrain.com/resilience/ [https://perma.cc/RK93-55SR] (May 15, 2021) (listing commonly recognized resilience factors).

[109] Phil Lane, Jr., et al., *Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 369 (noting personal and community healing journeys go hand in hand).

the enactment of ICWA. Moreover, this is actually part of a larger push, worldwide, to turn back colonial systems that have perpetrated genocide, sometimes cultural, sometimes full-scale, against any Indigenous Peoples that stood in resistance. Actions such as the Declaration reveal a push to correct what may be corrected among the impacts of the errant colonial policies. These errant policies have seeped into the entire child welfare system, pressing for a stranger-led, adversarial, individual- and rights-centric inquisition over the recognition of our connections. Tribes have been pressured into this Western format. The way out of the antiquated child welfare system is to allow tribes to lead. Tribes can, by reinvigorating their traditional child welfare systems, and thereby re-Indigenizing those systems, show others what a child welfare system premised on interrelationships, and on honoring responsibilities to children, can do. The need to throw out antiquated child welfare systems will be even more clear once more examples of success have developed. Such development can be nurtured through targeted funding and the dampening of conflicting policies. Laws such as ICWA demonstrate how these international human rights precepts might be implemented through domestic action.[110] Implementation of circle processes will be another step in the same healing direction.

[110] Graham, *supra* note 3, at 50.

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ARTICLE

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

Martin Guggenheim*

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

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[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 1997[5] (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 AFSA'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

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[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 1964[9]—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

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[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

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[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—itself 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

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[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

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[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]

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[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]

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[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

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[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. DEP'T 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 abusers[52]—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

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[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,

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[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]

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[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

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[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

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[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.

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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

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[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.

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ARTICLE

MUTUAL DEFERENCE BETWEEN HOSPITALS AND COURTS: HOW MANDATED REPORTING FROM MEDICAL PROVIDERS HARMS FAMILIES

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This Article explores the phenomenon of "mutual deference" between the medical and legal systems to show that placing mandated reporting responsibilities on clinicians results in lasting harm for families. On the medical side, clinicians are obligated to defer any "reasonable suspicion" that a child may be at risk to the legal system; their concern may be mild or severe, medical or non-medical in nature. But the legal system, comprised of lay-people in the field of medicine, is ill-equipped to evaluate a medical concern, and so defers back to the clinician's report when making critical decisions around family integrity. This deference often functions to elevate a clinician's "reasonable suspicion" to a finding of "imminent risk," justifying needless and prolonged separation of families. More systemically, mutual deference creates and reinforces medical and legal associations between low-income communities of color and notions of child maltreatment. Mutual deference insulates the medical reporter and the

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legal system from liability while imposing tremendous harm on the families caught in the middle. That mandated reporting laws discourage clinicians from considering this harm when deciding whether to report a family reflects the extent to which the family regulation system has prioritized prosecution over supporting families. Efforts to re-envision how society's support for and protection of families can move away from state-sanctioned violence and towards strengthening families within their communities, must begin with removing mandated reporter responsibilities from medical providers.

I. INTRODUCTION

Race disparities pervade the foster system: families forcibly separated by the state are primarily families of color; Black and Brown children spend more time in the foster system than white children.[1] Interrogation of the system that enforces this separation—historically referred to generally as "child protective services" and more recently as the "family regulation system"[2]—requires that we examine the mechanisms by which families come to the attention of the system in the first place. The hospital setting is one critical juncture,[3] and families' experiences there diverge along race and class lines. Many parents of color must weigh a child's need for medical attention against the real possibility that their decision to seek care will trigger an investigation and that they will leave the hospital without their child.

A parent brings a child to the hospital for medical care or advice. Something about the child's condition, the clinical history, or the parent's demeanor sparks a clinician's concern about the child's safety. A child may have a physical injury and

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[1] *See* Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 258 (2013) ("Studies repeatedly show that 'children of color are overrepresented at all decision points of the child welfare system: reporting, investigation, substantiation, placement, and exit from [foster] care.'") (citing ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, POLICY ACTIONS TO REDUCE RACIAL DISPROPORTIONALITY AND DISPARITIES IN CHILD WELFARE: A SCAN OF ELEVEN STATES (2009), http://www.antiracistalliance.com/PolicyActionstoReduceRacialDisproportionalityandDisparitiesinChildWelfare.pdf [https://perma.cc/8DJ4-345L]). For a robust review of literature citing data on race disparities, see Tina Lee, *Processes of Racialization in New York City's Child Welfare System*, 28 CITY & SOC. 276 (2016).

[2] Dorothy Roberts, *Abolishing Policing also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/N7F8-XU6M].

[3] 2018 data show that reports of suspected child maltreatment from medical personnel comprised 10.5% of those that were screened in for investigation. U.S. DEP'T HEALTH & HUM. SERVS., CHILD.'S BUREAU, CHILD MALTREATMENT 2018, at 9 exhibit 2-D (2020), https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf [https://perma.cc/4EF4-JSTB]. Physician reports of suspected maltreatment of children have been shown to be the most likely to be supported be subsequent child welfare investigation. *See, e.g.*, Jody E. Warner & David J. Hansen, *The Identification and Reporting of Physical Abuse by Physicians: A Review and Implications for Research*, 18 CHILD ABUSE & NEGLECT 11 (1994).

a parent does not know how it was caused or the hospital does not believe the explanation;[4] a child may have a medical condition and the parent has missed doctor's visits;[5] a newborn or their parent may test positive for an illegal substance at birth;[6] or a parent may disagree with the hospital's course of treatment for their child's medical condition.[7] The treating clinician may be concerned about the risks caused by the myriad challenges that financial and housing instability pose for a family.[8] The concern may be mild or severe, medical or non-medical in nature. To be on the safe side, or because the clinician is a mandated reporter of suspected child maltreatment, or because the clinician assumes that a child protective team will connect the family to supportive programs, the clinician reports this concern to the state.

What happens next is unimaginable for parents who have experienced hospitals primarily as safe and reassuring places: a caseworker, and possibly the police, interview the family at the hospital. These officials defer to the doctor's intuition and

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[4] *See, e.g.*, Jacqueline Kuruppu et al., *Tipping the Scales: Factors Influencing the Decision to Report Child Maltreatment in Primary Care*, 21 TRAUMA, VIOLENCE, & ABUSE 427 (2020). *See also* Jessica Horan-Block, *A Child Bumps Her Head. What Happens Next Depends on Race.*, N.Y. TIMES (Aug. 24, 2019), https://www.nytimes.com/2019/08/24/opinion/sunday/child-injuries-race.html [https://perma.cc/M44D-J49J].

[5] *See, e.g.*, Kristine Fortin, *When Child Neglect Is an Emergency*, 21 CLINICAL PEDIATRIC EMERGENCY MED. 100784 (2020).

[6] See, for example, Comprehensive Addiction and Recovery Act (CARA), Pub. L. No. 114-198, 130 Stat 695 (codified as amended in scattered sections of 42 U.S.C.), Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101–5116i, and 42 U.S.C. § 5106, requiring states to implement policies to "notify" child welfare agencies of babies who fall into one of the three categories: being "affected by substance abuse," affected by "withdrawal symptoms resulting from prenatal drug exposure," or having Fetal Alcohol Spectrum Disorder, which has led to hospitals implementing testing policies for birthing women. *See also* Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. REV. 77 (2016).

[7] *See, e.g.*, Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of "Medical Child Abuse"*, 50 U.C. DAVIS L. REV. 205 (2016).

[8] Effrosyni D. Kokaliari et al., *African American Perspectives on Racial Disparities in Child Removals*, 90 CHILD ABUSE & NEGLECT 139, 140 (2019) ("A corollary to the disproportionately high poverty rate among African American children, is the greater likelihood poor parents will face charges of neglect and possible child removal based on conditions related to their precarious financial standing such as poor food quality or lack of medical supervision—factors with which affluent parents are not confronted.").

medical knowledge. Relying on the clinician's report, the caseworker files a case in Family Court alleging the child is neglected or abused. The judge, needing to make an emergency decision, reluctant to weigh in on a medical condition, and trusting the word of a doctor over the parents, removes the child from the care of their parent. Unless the parent contests the removal, the clinician may never be consulted and may never know the effect of their call. Contesting the removal requires navigating hospital bureaucracies, competing schedules of clinicians, and over-clogged court systems. This can take weeks or months. During this time, the child is separated from their parents.

This common scenario represents a phenomenon that this Article names and will refer to as "mutual deference." Current mandated reporting laws require that certain professionals, including medical professionals,[9] defer any "reasonable suspicion" to the family regulation system. This low burden reflects the aspiration that a system of checks and balances will follow. But a clinician's concern cannot be effectively investigated and evaluated on an emergency basis because it is—or is perceived to be—based on specialized medical knowledge. Instead, the family regulation system and the court system (collectively, the "legal system")—comprised of lay people in the field of medicine—overly defers to the clinician's concern, making critical decisions affecting family integrity without a full medical context.

While mutual deference insulates each part of the system from liability, it devastates the families in the middle. Mutual deference is particularly harmful for Black and Brown families given studies showing the disproportional reports and investigations of children from low-income families of color from hospitals.[10] And there is an ominous circularity to it: individual

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[9] In New York, the original mandated reporting statute of 1964 required *only* physician and surgeons to report an incident of suspected abuse to a specified agency because they were considered to be reluctant to interfere with family affairs. Iris Ann Albstein, Note, *Child Abuse and Maltreatment: The Development of New York's Child Protection Laws*, 5 FORDHAM URB. L.J. 533, 536 (1977). Notably, it was enacted as part of New York Penal Law, but is now contained in New York Social Services Law. *Id. See also* N.Y. SOC. SERV. LAW § 491 (McKinney 2021).

[10] *See generally* Kathryn S. Krase, *Differences in Racially Disproportionate Reporting of Child Maltreatment Across Report Sources*, 7 J.

and collective biases influence mandated reporting and these biases are reinforced by the legal system. Data around which families are caught in the family regulation system then influence how medical institutions screen for potentially at-risk children.[11]

This Article argues that mandated reporting for medical providers, instead of protecting children, perpetuates the disregard for the bonds of Black and Brown families that characterizes the family regulation system as a whole. Parts II and III examine mutual deference on a systemic level. Part II traces the origins of "mutual deference" to statute and case law, revealing tensions between reporters' obligations on the one hand and the deference to medical concerns by the legal system on the other. Part III explains why mutual deference is particularly harmful for low-income families of color. Non-medical factors, including clinicians' individual biases and perceived social risk factors, have been shown to influence clinicians' reports, yet receive the deference of a medical diagnosis. Part IV illustrates how mutual deference harms families in practice. It describes the experience of three parents in the Bronx who were separated from their children after seeking medical care at a hospital. Concluding remarks propose that removing mandated reporting responsibilities from clinicians is a critical step towards re-envisioning support for families away from the family regulation system entirely. Further, eliminating mandated reporting would restore the primacy of the physician-patient relationship and permit a critical analysis of how child maltreatment has been diagnosed and adjudicated.

I offer this Article into the discourse about fundamental challenges to the family regulation system in my personal capacity. But, the experiences that give rise to this Article are rooted entirely in my role as a Family Defense Attorney in the Bronx. In that capacity, I represent parents charged with abuse and neglect of their children in Family Court. I have also delivered trainings at New York City hospitals on mandated reporting and have spent hours speaking with hospital staff—

PUB. CHILD WELFARE 351 (2013); Daniel Hirschman & Emily Adlin Bosk, *Standardizing Biases: Selection Devices and the Quantification of Race*, 6 SOCIO. RACE & ETHNICITY 348 (2020).

[11] See *infra* Part III.B (discussing studies showing racial disparities in reporting patterns among clinicians with more specificity).

residents, doctors, social workers—about the harmful effects of mandated reporting on families. This Article describes what I have seen.

II. MUTUAL DEFERENCE: WHY THE THEORY OF MANDATED REPORTING FAILS IN MEDICAL CASES

The theory of mandated reporting depends on a balance of power between the reporter, the investigatory branch of the government, and the court system.[12] Statutes and case law[13] instruct mandated reporters to *defer* investigation to the system under a theory of checks and balances. The system promises that caseworkers will investigate the concern and, where necessary, seek judicial review.

Critics of mandated reporting have cited its ineffectiveness and unintended consequences.[14] This section

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[12] For a robust history of the emergence and development of mandated reporting, see, for example, Albstein, *supra* note 9; Monrad Paulsen et al., *Child Abuse Reporting Laws—Some Legislative History*, 34 GEO. WASH. L. REV. 482 (1965); Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37 (2013).

[13] This Article examines primarily New York law around mandated reporting, but the concepts are transferrable to other states as well. Although by 1974, all states had some sort of mandatory reporting law, passage of the federal CAPTA fueled the expansion of state-wide systems. CAPTA aimed to systematize and strengthen existing programs by "provid[ing] financial assistance for a demonstration program for the prevention, identification, and treatment of child abuse and neglect" to establish a National Center on Child Abuse and Neglect, "and for other purposes." *See*, *Child Abuse Prevention Act of 1973: Hearings Before the Subcomm. on Children and Youth of the Comm. on Labor and Public Welfare*, 93d Cong. 137 (1973) [hereinafter *CAPTA Hearings*] (statement of Sen. Walter Mondale, Chairman, Subcomm. on Child. & Youth).

[14] For critiques of mandated reporting, see, for example, Richard Wexler, *Mandatory Child Abuse Reporting Belongs in Dustbin, New Research Shows*, YOUTH TODAY (Feb. 28, 2020), https://youthtoday.org/2020/02/mandatory-child-abuse-reporting-belongs-in-dustbin-new-research-makes-clear/ [https://perma.cc/K53G-CG5H]; Richard Wexler, *Increasing Mandated Reporting of Alleged Child Abuse and Neglect Will Hurt Children*, NAT'L COAL. FOR CHILD PROT. REFORM, https://nccpr.org/the-nccpr-evidence-base-brief-analyses-and-commentaries/ [https://perma.cc/NPB9-9LBG]; Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, PEDIATRICS Apr. 2017, at 1; Jill R. McTavish et al., *Mandated Reporters' Experiences with Reporting Child Maltreatment: A Meta-Synthesis of Qualitative Studies*, BMJ OPEN, July 2017, at 1; Mical Raz, *More Mandatory Reporting Won't Keep Children Safe from Predators*, WASH. POST (May 1, 2018, 7:00 PM),

shows how mutual deference in medical cases makes mandated reporting particularly problematic: when the issue is or appears to be medical, the court system does not function as the objective check the system envisioned it to be. Instead, the courts *defer* to the report absent a countering medical opinion—for practical reasons, such an opinion is unavailable at the time a call is made and often still unavailable when a child is removed from their parent. Deference obscures opportunities for the court to issue orders designed to keep children in their parents' care,[15] rendering the legal system both impotent and complicit in the resulting harm.

A. Mandated Reporting Laws Require and Incentivize Reporters to Defer Their Suspicions to the System, Promising a Process of Checks and Balances

The resounding message to New York's mandated reporters is to defer any suspicion a child may be at risk to the family regulation system. Passed in 1973, New York's Child Protective Services Act addressed the concern that child abuse was going undetected and acted on a legislative intent to increase reporting of suspected child maltreatment to the state.[16] The Act

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https://www.washingtonpost.com/news/made-by-history/wp/2018/05/01/more-mandatory-reporting-wont-keep-children-safe-from-predators/ [https://perma.cc/3JQ9-3W5J].

[15] Pursuant to New York's Family Court Act section 1028, prior to removing a child from a parent, a judge must consider whether any orders would mitigate the risk of harm. N.Y. FAM. CT. ACT § 1028 (McKinney 2021) *See also* Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004) ("The court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal.").

[16] N.Y. SOC. SERV. LAW § 411 (New York's Child Protective Services Act was designed "to encourage more complete reporting of suspected child abuse and maltreatment"). *See also* Diana G-D *ex rel.* Ann D. v. Bedford Cent. Sch. Dist., 33 Misc. 3d 970, 982 (N.Y. Sup. Ct. 2011), *aff'd*, 104 A.D.3d 805 (N.Y. App. Div. 2013) (reviews the legislative history of N.Y. SOC. SERV. LAW § 413 and states that "[a]ccording to a June 4, 1973 memorandum from the Department of Social Services in support of Assembly Bill 6514A, which includes enactment of Social Services Law § 413, the Department of Social Services believed that the law is intended to address the issue of the difficulty in obtaining an accurate measure of the [child abuse] problem. It believed there were more instances of child abuse than reported. The objective of the new legislation was to accurately report such abuse." (internal quotation removed)). *See also* Satler v. Larsen, 131 A.D.2d 125, 129 (N.Y. App. Div. 1987) ("The importance of rapidly detecting and addressing instances of an evil as pernicious as child abuse cannot be overstated.").

instructs medical professionals, teachers, counselors, social service workers, and many others to "report or cause a report to be made" whenever they "have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or mistreated child."[17] The system promises to investigate any concern and address a family's needs in a way that prioritizes keeping families together.[18]

"Reasonable suspicion" is a low standard, emphasizing that reporters are not meant to investigate or achieve a particular quantum of evidence before making a report. Instead, statutory and case law endorse reporting if a "reasonable person" could be concerned and even when maltreatment is just one of many possible explanations.[19] Nor should the reporter delay their reporting: the statute specifies that reports of suspected child abuse or maltreatment under the statute must be made "immediately."[20] The regulations under the statute reassure reporters that their suspicion will be investigated: "There may be times when you have very little information on which to base your suspicion of abuse or maltreatment, *but this should not prevent you from calling the SCR. A trained specialist at the SCR will help to determine if the information you are providing can be registered as a report*."[21]

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[17] N.Y. SOC. SERV. LAW § 413(1)(a).

[18] *See, e.g.*, OFF. CHILD. & FAM. SERVS., CHILD PROTECTIVE SERVICES MANUAL, ch. 6, § H (2020) [hereinafter OFF. CHILD. & FAM. SERVS., MANUAL], https://ocfs.ny.gov/programs/cps/manual/2020/2020-CPS-Manual.pdf [https://perma.cc/B594-RGHA] ("when a child has been assessed to be in imminent danger (i.e. unsafe), CPS should also consider a broad range of safety oriented responses other than removal."). *See also* N.Y. COMP. CODES R. & REGS. tit. 18, § 423.3; N.Y. COMP. CODES R. & REGS. tit. 18, § 430.9 (2021); *and* N.Y. SOC. SERV. LAW § 409-a (2019) (mandating that core preventative services must be made available to a child and the family when there is a danger that the child may be separated from the family and services may prevent such removal or separation).

[19] Isabelle v. City of New York, 541 N.Y.S.2d 809 (App. Div. 1989) (finding that required reporters were immune from civil liability for reporting a suspicion of child sexual abuse if there is no willful misconduct or gross negligence, even though the tests for venereal disease came back negative two days later, and commenting, "[m]andated reporters need not await conclusive evidence of abuse or maltreatment but must act on their reasonable suspicions and the law allows them a degree of latitude to err on the side of protecting children who may be suffering from abuse").

[20] N.Y. SOC. SERV. LAW § 415.

[21] OFF. CHILD. & FAM. SERVS., SUMMARY GUIDE FOR MANDATED REPORTERS IN NEW YORK STATE (2019) (emphasis added),

That the role of investigating the report is meant for the state officials and not the reporter is evident in the relatively sparse information a reporter is asked to provide in the report. The regulations request basic identifying information and the basis for concern.[22] Notably absent is any instruction that the source include alternative possible causes or mitigating factors for the investigating specialist to consider—for example, information about a child's special needs or a family's strengths that would encourage prioritization of family unity despite the reporter's concerns. Also absent from this list is information that would distinguish poverty or other financial instability from neglect.[23] This implies that such information—much of which is required information once a case comes to Family Court[24]—is within the realm of investigation, while the report is intended to provide the agency only the most basic information needed to begin an investigation.

New York incentivizes the reporting of any reasonable suspicion, no matter how minor, by attaching legal and financial penalties to a mandated reporter's failure to report[25] and

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https://ocfs.ny.gov/publications/Pub1159/OCFS-Pub1159.pdf [https://perma.cc/MS3S-YEY8].

[22] OFF. CHILD. & FAM. SERVS., MANUAL, *supra* note 18, at ch. 2, § A-3.

[23] Section 1012(f)(i)(A) of the Family Court Act distinguishes poverty from neglect by defining a neglected child as one whose "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education . . . , or medical, dental, optometrical or surgical care, *though financially able to do so*." N.Y. FAM. CT. ACT § 1012(f)(i)(A) (emphasis added).

[24] OFF. CHILD. & FAM. SERVS., MANUAL, *supra* note 18, at ch. 6, § H (obligating caseworkers to consider in-home safety measures before executing a removal of a child); *see also* N.Y. FAM. CT. ACT § 1028 (requiring the court to consider any orders that could ensure the safety of a child in order to avoid a removal).

[25] *See* N.Y. SOC. SERV. LAW § 420; N.Y. COMP. CODES R. & REGS. tit. 18, § 432.8. Most states identify a failure to report as a misdemeanor; some states have raised the penalties to a felony in certain circumstances, for example for a second failure or if the alleged offense is a criminal act. In New York, a mandated reporter's willful failure to report is considered a Class A misdemeanor, punishable by up to a year in jail or a fine of up to $1,000. For an extended discussion of penalties attached to failure of mandated reporters to report suspicions, see Brown & Gallagher, *supra* note 12, at 37, 63, 79 (providing state by state list of penalties for a mandated reporter's failure to report). *See generally* CHILD.'S BUREAU, CHILD WELFARE INFO. GATEWAY, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT

immunity for reporters who are later sued.[26] Reporters are presumed to be acting in good faith and any future liability for reports that turn out to be unfounded are predicated on a showing of actual malice.[27] Indeed, as long as they are acting on a reasonable cause to suspect maltreatment and in good faith, immunity attaches.[28]

In the face of statutory instructions to report immediately, civil and criminal penalties for failure to do so, and immunity for reports that turn out to be unfounded, "objectivity" emerges as the main check on "reasonable suspicion." In considering what reasonable suspicion means substantively, courts have commented that, "[w]hether reasonable cause exists to suspect child abuse is an objective question that must be answered in light of the information available to the reporter at the time of her report."[29] Invoking the "reasonable cause" standard in criminal law, courts have looked to what the "ordinarily prudent and cautious [person] under the

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(2018), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/report/ [https://perma.cc/HA5Y-LVSS].

[26] For example, in order to bring a libel case for a false report, a plaintiff has to show that the report was motivated by malice. *See, e.g.*, Dunajewski v. Bellmore-Merrick Cent. High Sch. Dist., 526 N.Y.S.2d 139 (App. Div. 1988). In order to bring a negligence suit, the plaintiff has to show willful misconduct or gross negligence. *See, e.g.*, Ervin v. Bronx Lebanon Hosp. Ctr., 794 N.Y.S.2d 41, 41 (App. Div. 2005); Estiverne v. Esernio-Jenssen, 581 F. Supp. 2d 335 (E.D.N.Y. 2008). *See generally* CHILD.'S BUREAU, CHILD WELFARE INFO. GATEWAY, IMMUNITY FOR REPORTERS OF CHILD ABUSE AND NEGLECT (2018) https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/immunity/ [https://perma.cc/8GPW-DEUV].

[27] N.Y. SOC. SERV. LAW § 419 (2019). In a libel suit, the plaintiff bears the burden of proving that the statement was motivated by malice. A plaintiff bringing a negligence suit must overcome qualified immunity and show that the reporter engaged in willful misconduct or were grossly negligent in making the disputed report in order to overcome qualified immunity. Finally, due process claims are contingent on whether the plaintiff can show that the mandated reporter was acting as a state actor. Caselaw has indicated that a hospital complying with the Social Services Law and communicating with Child Protective Services is not sufficient to prove that the reporter acted under the color of state law. *See* Thomas v. Beth Israel Hospital, Inc., 710 F. Supp. 935, 940 (S.D.N.Y.1989); Estiverne v. Esernio-Jenssen, 581 F. Supp. 2d 335, 345 (E.D.N.Y. 2008).

[28] Thomsen v. Kefalas, No. 15-CV-2668 (BCM), 2018 WL 1508735, at *17 (S.D.N.Y. Mar. 26, 2018) ("[E]vidence that the report was unfounded . . . does not–standing alone–undercut the existence of 'reasonable cause,' nor rebut the presumption of good faith." (quoting JC v. Mark Country Day Sch., No. 03-CV-1414 (DLI) (WDW), 2007 WL 201163, at *7 (E.D.N.Y. Jan. 23, 2007))).

[29] *Thomsen*, 2018 WL 1508735, at *15.

circumstances" would consider suspicious.[30] To establish objectivity, the reviewing court must parse "mere 'hunch' or 'gut reaction'" from objective knowledge that has "at least some demonstrable roots."[31] Therefore, in order for the system of checks and balances to work, the system—here, the investigating agency and the court system—needs the ability and the information necessary to act as an "objective" observer.

B. The System Is Unable or Unwilling to Provide a Check on a Medical "Reasonable Suspicion" and Instead Defers to the Clinician's Concern

When a reporter is a medical professional, the family regulation system fails to be the objective check on the low threshold of "reasonable suspicion." This is evident when comparing medical cases with cases coming from schools, another significant source of reports. The clinician's report carries the weight of a medical opinion rooted in specialized information; as such, courts' opinions are comparatively cursory, presuming the reporter's medical training provides the basis for concern.

To analyze "reasonable suspicion," courts ask whether a reporter acted in good faith when reporting a "reasonable suspicion."[32] In school cases, the facts are easily accessible—a child reports feeling uncomfortable at home or has excessive absences—so courts are able to engage with the information known at the time and consider what the reasonable person would have done.[33] For example, in *Vacchio v. St. Paul's United*

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[30] Vacchio v. St. Paul's United Methodist Nursery Sch., No. 001332/95, 1995 WL 17959412, at *5–6 (N.Y. Sup. Ct. Aug. 18, 1995) (the term "reasonable cause" is defined, as follows: "'Reasonable cause to believe that a person has committed an offense' exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it reasonably likely that such offense was committed and that such person committed it." (citing N.Y. CRIM. PROC. § 70.10)).

[31] People v. Sobotker, 43 N.Y.2d 559, 564 (1978).

[32] These cases are primarily liability or negligence cases against a reporter by a family. While this is not the posture that affects the removal of a child from their parent, the analysis in these cases illustrates courts' limitation in medical cases. Because decisions to remove a child from their parent are often emergency decisions made in summary or oral decisions, there is not a body of Family Court case law documenting judges' rationale.

[33] What is useful about this comparison is not the ultimate decision reached—the presumption that the reporter acts in good faith means that courts act largely as a rubber stamp in all cases—but the degree to which the court engages in a fact-specific analysis.

Methodist Nursery School, the court considered whether it was reasonable for a school to suspect a student had been abused when the child appeared with a black eye.[34] The court denied the school summary judgment, holding that the decision to report a black eye without conducting a preliminary inquiry might support a finding of gross negligence.[35] In doing so, the court weighed the presentation of the child with the paucity of other information available to the teacher at the time.[36]

Even when the court ultimately dismisses the plaintiff's case, courts do so after considering the underlying facts of the case. In *Cox v. Warwick Valley Cent. Sch. Dist.*, the court considered whether the behavior of a student was sufficiently concerning for the school to make a report of suspected neglect. In affirming summary judgment for the school district, the Second Circuit examined the information available to the school at the time of the report, detailing that the child's journal entries, misbehavior, and expressions of suicidal thoughts were—objectively—cause for concern and the school was not acting with actual malice.[37]

Reports by medical professionals receive far more deference and less analysis. Courts presume reports made by medical professionals are grounded in their professional

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[34] *Vacchio*, 1995 WL 17959412, at *7 ("[D]oes the presentation of a child with a blackened eye, without more, give rise to a reasonable suspicion of child abuse, or may such conclusion more appropriately be characterized as within the ambit of the term "hunch"?")

[35] *Id.* at *8–9.

[36] *Id. See also Thomsen* 2018 WL 1508735, at *14, where the court considered whether a teacher had reasonable suspicion to think a child may have been sexually abused by another teacher. In denying summary judgment to the teacher, the court considered facts that undermined the likelihood the abuse took place, such as presence of other adults on the day in question, as well as the defendant's history of making reports and possible motivations for making a false report.

[37] *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 276 (2d Cir. 2011) (finding that where the court affirms a reporter's decision not to report, the inquiry is similarly fact-specific). See Diana G-D *ex rel.* Ann D. v. Bedford Cent. Sch. Dist., 33 Misc. 3d 970 (N.Y. Sup. Ct. 2011), *aff'd*, 104 A.D.3d 805 (N.Y. App. Div. 2013), where the court dismissed a negligence claim against a school that did not report sexual abuse allegations concerning a student. The court examined the actions the school took when it became aware of the possibility of abuse and the information that was available to the teachers and administrators. The court considered the child's behavior, the answers she gave the teachers when she was questioned, and the content of a proximate parent-teacher conference.

expertise and therefore reasonable. They do not review the medical basis for the concern as they did in the school cases cited above; rather a professional's concern *is* the medical basis.

This circular reasoning is apparent in *Storck v. Suffolk County Department of Social Services*, where the court, in granting "good faith immunity" to doctors who had suspected a parent of neglect, commented, "Clearly, when the doctors reported their suspicions of abuse, they were acting 'in the discharge of their duties and within the scope of their employment.'"[38] In *Bowes v. Noone*, the Appellate Division even implied in dicta that the court should have no role in evaluating whether a doctor was acting within their professional judgment:

> To determine whether the act of a medical professional deviates from accepted medical standards, it must first be determined whether the act involves the exercise of professional judgment . . . . Here, the medical experts . . . testified that the issue whether a medical professional should report suspected child abuse to the central register involves the exercise of professional judgment.[39]

This deference leads to cursory reviews of a clinician's concern. For example, in *Kempster v. Child Protective Services*, the court found that a report by a hospital based on a baby's swollen nose was reasonable, citing broadly the "medical data and other available information." The court deferred to the hospital's assertion that the injuries were concerning and the mother's explanation did not explain them.[40] In *Miriam P.*, the court presumed the hospital acted in good faith when it reported that a child had a fractured leg the mother was unable to explain. This common theory—that a parent's inability to adequately explain the cause of an injury is a reasonable basis to suspect

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[38] Storck v. Suffolk Cnty. Dep't of Soc. Servs., 62 F. Supp. 2d 927, 946 (E.D.N.Y. 1999).

[39] Bowes v. Noone, 748 N.Y.S.2d 440 (App. Div. 2002).

[40] Kempster v. Child Protective Servs. of Dep't of Soc. Servs. of Suffolk Cty., 130 A.D.2d 623, 625 (N.Y. App. Div. 1987). *See also* Isabelle V. v. City of New York, 541 N.Y.S.2d 809 (App. Div. 1989) (The court examined a hospital's report of suspected sexual abuse based on the vaginal discharge of two children, despite their denial that any abuse had taken place, then when the cultures came back negative for any venereal disease, and the parents later sued the hospital, the court deferred to the hospital's concern about the symptoms.).

abuse—itself reflects deference to the medical profession's opinion about which explanations are adequate and which are suspicious.[41]

Similar to courts' deference to the professional judgment of clinicians is their instruction that caseworkers should rely on and defer to medical professionals' suspicions. In *V.S. v. Muhammad*, when plaintiffs argued that the caseworkers' reliance on a pediatrician known to give unreliable diagnoses in the field of child abuse was sufficiently unreasonable to remove qualified immunity, the Second Circuit disagreed. It commented, "to impose on an [Administration for Children's Services (ACS)][42] caseworker the obligation in such circumstances of assessing the reliability of a qualified doctor's past and present diagnosis would impose a wholly unreasonable burden of the very kind qualified immunity is designed to remove."[43] This is perhaps the most explicit acknowledgement of the family regulation system's inability to provide a check on what counts as "reasonable suspicion" when the reporter is a medical professional.[44]

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[41] Miriam v. City of New York, 163 A.D.2d 39, 43–44, 558 N.Y.S.2d 506, 509 (1990). *See also* Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382, 418 (2019) (discussing how a parent's lack of explanation for a child's condition is often erroneously transformed into a basis for an abuse charge).

[42] In New York City, the child protective agency is called the Administration for Children's Services (ACS).

[43] V.S. v. Muhammad, 595 F.3d 426 (2d Cir. 2010). *See also* Estate of Keenan v. Hoffman-Rosenfeld, No. 16-cv-0149 (SFJ) (AYS), 2019 WL 3416374, at *21 (E.D.N.Y. July 29, 2019), *aff'd*, No. 19-2730-cv, 2020 WL 6494881 (2d Cir. Nov. 5, 2020).

[44] Notably, when a lawsuit against a medical professional or hospital survives a motion to dismiss based on immunity, it tends to be for reasons other than the court looking at the basis for the clinician's reasonable suspicion. For example, in *Ying Li v. City of New York*, the court allowed discovery to proceed in a civil rights suit based on the fact that the doctor may have gone beyond reporting and instead taken an active role in the investigation and prosecution of the plaintiff. Ying Li v. City of New York, 246 F.Supp.3d 578 (2d Cir. 2017). In *Estiverne v. Esernio-Jenssen*, the plaintiffs survived a motion to dismiss a civil rights case when they pled information beyond the basis for the individual clinician's concern, including that the doctor knew the diagnosis to be false and that the clinician disregarded the contrary diagnosis of a colleague. Estiverne v. Esernio-Jenssen, 833 F. Supp. 2d 356 (E.D.N.Y. 2011). In other words, it was only when the court was presented with information that undermined the court's ability to defer to the professional judgment of the clinician that it found a triable issue as to a presumption of good faith. *See id.*

III. LACK OF SYSTEMIC GUIDANCE AROUND "REASONABLE SUSPICION" MEANS A CLINICIAN'S CONCERN MAY REFLECT NON-MEDICAL FACTORS, INCLUDING RACE AND CLASS BIASES

Certainly, the legal system cannot make decisions around medical issues without medical evidence. But the extent to which the legal system defers to the initial report from a clinician presumes that a clinician's "reasonable suspicion" is probative of imminent risk. In fact, studies show that it is largely an undescriptive metric. Clinicians report for a host of reasons that may provide little guidance to a court. The severity of a clinician's concern may be mild or severe. The possibility of maltreatment may be the leading diagnosis, or one of many possibilities. Further, studies show that a clinician's reasonable suspicion may be influenced by a range of non-medical factors, including race and class biases, that are invisible to—or shared by—the system that investigates and adjudicates. These biases gain the status of medical opinions and therefore define the course of a family's experience in the legal system.[45]

A. A Clinician's "Reasonable Suspicion" Is an Undescriptive Metric

A report of reasonable suspicion provides little description about the clinician's level of concern. One study found that a report may represent that the reporter perceives abuse to be "very likely" or simply "likely."[46] Additionally, when a clinician

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[45] *See, e.g.*, Cooper, *supra* note 1, at 252. Cooper refers to "critical junctures" in the foster care system, "where incentives reinforce interconnections or dynamics between players." *Id.* at 251. The many critical junctures described by Cooper, *id.* at 257–58, are consolidated into reporting of abuse, investigation, substantiation, placement, and exit from foster care. A medical professional's concern, therefore, dominates four of those critical junctures: the clinician is incentivized to defer any suspicion to the family regulation system, without examination of whether that suspicion is rooted in race or class-based assumptions. A court is incentivized to defer to the medical professional's suspicion, particularly in the absence of contrary information. The willingness to defer, which often means presuming a child is at risk in their parent's care, can be traced to the judicial system's own associations between maltreatment, race, and class. Mutual deference, therefore, is one reason why "children of color are overrepresented at all decision points of the child welfare system." *Id.* at 258 (citations omitted).

[46] Benjamin H. Levi & Georgia Brown, *Reasonable Suspicion: A Study of Pennsylvania Pediatricians Regarding Child Abuse*, 116 PEDIATRICS e5 (2005)

makes a list of differential diagnoses—the list of possible causes of a condition—a report of suspected abuse may indicate that it is thought to be the leading cause, or it may rank as low as tenth on a list of differential diagnoses.[47] In terms of the probability of abuse, the study found that twice as many clinicians thought that a report would represent a ten to thirty-five percent probability of abuse than a seventy-five percent probability.[48]

Further, studies show that a clinician's decision to report a reasonable suspicion can be influenced by non-medical factors. For example, "familiarity with the patient or family, including any previous involvement of the family with CPS[;] . . . reference to elements of the case history[;] . . . use of available resources; and . . . clinicians' perceptions of anticipated outcomes of CPS intervention" were significant factors in one study.[49] The study also found that clinicians were less likely to report when they had a significant relationship with the family,[50] and a clinician's

(indicating that the responding clinicians reported seventy-three percent of the children they considered likely or very likely to be abused; and twenty-four percent of the children they considered possibly abused). The influence of probabilistic language such as this in child abuse diagnoses is problematized by another scholar. *See* Steven C. Gabaeff, *Recognizing the Misuse of Probabilistic Language and False Certainty in False Accusations of Child Abuse*, J. RSCH. PHIL. & HIST., Dec. 2020, at 1.

[47] Levi & Brown, *supra* note 46, at e7 (finding that twelve percent of clinicians responded that abuse would have to rank first or second on the list of differential diagnoses before it would be considered reportable; forty-one percent indicated a rank of third or fourth; forty-seven percent reported a rank from fifth to tenth on the list of differential diagnoses).

[48] *Id.* (Thirty-five percent of pediatricians responded that, to report a suspicion, the probability of abuse would need to be ten to thirty-five percent; by contrast, fifteen percent required a probability of more than seventy-five percent. Further, any one individual pediatrician was not necessarily internally consistent in the level of certainty they required: the average pediatrician required fifty to sixty percent probability that abuse occurred, but responded that child abuse could rank as low as fourth or fifth on the differential diagnosis list and still merit a report.). *See also* Kuruppu et al., *supra* note 4, at 430 (finding that "each clinician seem[s] to have their own personal threshold of suspicion that would activate their reporting duty").

[49] Risé Jones et al., *Clinicians' Description of Factors Influencing Their Reporting of Suspected Child Abuse: Report of the Child Abuse Reporting Experience Study Research Group*, 122 PEDIATRICS 259, 261 (2008). *See also* Kuruppu et al., *supra* note 4, at 430 (citing "personal threshold of suspicion, knowing the family, having little faith in the system, and education" and training as significant non-medical factors influencing primary care physicians' decisions to report).

[50] This in itself can lead to disparate reports for low-income and Black families who are less likely to have a primary care provider and more likely to

decision not to report was influenced by doubt that it would benefit the family.[51] Further, past experiences of the clinician with the family regulation system lowered the likelihood that a suspicion resulted in a report.[52]

B. Hospitals' Use of Social Risk Factors and Screening Tools to Detect Maltreatment Embed Race and Class Disparities into Medical Opinions

The low standard of "reasonable suspicion" is vulnerable to personal biases influencing a clinician's decision to report. This leads to race and class disparities in reporting and has ripple effects on systemic views of child maltreatment. In turn, data about which children are reported by clinicians to be "neglected" or "abused"—whether or not they have been adjudicated legally as such—inform how clinicians are trained to look for signs of maltreatment, which in turn influence subsequent decisions to report.

Tracking of the use of skeletal surveys, full body x-rays that are often conducted when an injury is deemed suspicious of abuse, offers a clear example of racial disparities in medical investigations. Studies have shown that non-white children presenting with head injuries are more likely to receive skeletal surveys,[53] as are those who are uninsured or on public

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resort to an emergency room for medical care. Rick Hong et al., *The Emergency Department for Routine Healthcare: Race/Ethnicity, Socioeconomic Status, and Perceptual Factors*, 32 J. EMERGENCY MED. 149, 155 (2006) (finding that Black and Hispanic patients were approximately twice as likely as white patients to be routine ED users, probably because of coinciding socioeconomic factors, primarily lack of insurance).

[51] Jones et al., *supra* note 49, at 264.

[52] *Id. See also* Vernoica L. Gunn et al., *Factors Affecting Pediatricians' Reporting of Suspected Child Maltreatment*, 5 AMBULATORY PEDIATRICS 96 (2005) (finding that a decision not to report was independently linked to the following factors: men who have been in practice longer, have been deposed or testified in a related matter, or had been threatened with a lawsuit); McTavish et al., *supra* note 14 (providing qualitative feedback from mandated reporters, including clinicians, who cite negative experiences from reporting).

[53] Kent P. Hymel et al., *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. PEDIATRICS 137, 138 (2018) (finding skeletal surveys to be twice as likely to be ordered for non-white patients under three years old who presented with head injuries as white/non-Hispanic patients; here, "evaluated" referred to radiologic skeletal survey and/or retinal examination by an ophthalmologist). *See also* Wendy G. Lane, *Racial Differences in the Evaluation of Pediatric Fractures for Physical*

insurance.[54] Even though socioeconomic status is a significant factor,[55] the disparity in skeletal surveys between public and privately insured white patients has been shown to be greater than for Black and Latinx patients, who were more likely to receive skeletal surveys across the board.[56] This disparity did not correlate with a positive diagnosis for abuse.[57]

One way that clinicians have attempted to structure the diagnosis of child neglect or abuse is evaluation of so-called "risk factors." Risk factors refer to conditions that are considered to be correlated with abuse or neglect. The factors span medical and non-medical concerns: poverty; past history of social services involvement, housing instability, unemployment, and drug use; maternal smoking; and being born to an unwed mother, to name a few.[58] But because race is associated "to a shameful degree"

Abuse, 288 J. AM. MED. ASS'N 1603 (2002) (finding that the effect of race on ordering of skeletal surveys and reporting to CPS remains significant).

[54] Christine W. Paine & Joanne N. Wood, *Skeletal Surveys in Young, Injured Children: A Systematic Review*, 76 CHILD ABUSE & NEGLECT 237, 242 (2018).

[55] Antoinette L. Laskey et al., *Influence of Race and Socioeconomic Status on the Diagnosis of Child Abuse: A Randomized Study*, 160 J. PEDIATRICS 1003, 1003 (2012) (finding greater likelihood that physician would label a fracture as abuse in patients with low socio-economic status (SES) and remain unsure about the etiology in patients with high SES, but not finding an independent effect for race). *See also* Emalee G. Flaherty et al., *From Suspicion of Physical Child Abuse to Reporting: Primary Care Clinician Decision-Making*, 122 PEDIATRICS 611 (2008) (reviewing studies finding no racial differences in reporting when families did not have private insurance but finding also that having private insurance can protect white children from being reported).

[56] Joanne N. Wood et al., *Disparities in the Evaluation and Diagnosis of Abuse Among Infants with Traumatic Brain Injury*, 126 PEDIATRICS 408, 408 (2010) (The difference in skeletal survey performance for infants with public or no insurance versus private insurance was greater among white (82% vs. 53%) infants than among Black (85% vs. 75%) or Hispanic (72% vs. 55%) infants.).

[57] *See id.* (the probability that the survey would lead to a diagnosis of abuse among white infants was higher (61%) than among Black (51%) or Hispanic (53%) infants.); Paine & Wood, *supra* note 54, at 246 (noting that, although Black children and children with public or no insurance were evaluated with skeletal surveys more often than white infants and infants with private insurance, Black infants had similar likelihood of having a positive skeletal survey compared to white infants).

[58] *Risk Factors That Contribute to Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, https://www.childwelfare.gov/topics/can/factors [https://perma.cc/S882-L74B] (last visited May 22, 2021). *See also* Caitlin A. Farrell, *Community Poverty and Child Abuse Fatalities in the United States*, 139 PEDIATRICS (2017); Hillary W. Petska & Lynn K. Sheets, *Sentinel Injuries: Subtle Findings of Physical Abuse*, 61 PEDIATRIC CLINIC N.

with clinicians' perceptions of social risk factors, this leads to over-reporting and over-investigation of Black and Brown communities.[59] Reporting families exhibiting these risk factors at a higher rate perpetuates stereotypes around risk,[60] without providing an accurate assessment of risk. Moreover, one's approach to risk factors is itself subjective; broad use of risk factors to diagnose maltreatment can lead to significantly varying results.[61]

To reduce the role of personal bias and alleviate race disparities in reporting, some medical institutions use screening tools, or questionnaires, that aim to standardize identification of

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AM. 923 (2014) (citing young parental age, mental health disorders, exposure to domestic violence as risk factors for child physical abuse); Cindy W. Christian, *The Evaluation of Suspected Child Physical Abuse*, 135 PEDIATRICS 1337, 1339 (2015) (citing literature claiming that "[r]isk factors for infant abuse include maternal smoking, the presence of more than 2 siblings, low infant birth weight, and being born to an unmarried mother. Children with disabilities are at high risk for physical, sexual, and emotional abuse. Young, abused children who live in households with unrelated adults are at exceptionally high risk of fatal abuse, and children previously reported to CPS are at significantly higher risk of both abusive and preventable accidental death compared with peers with similar sociodemographic characteristics." (citations omitted))

[59] Daniel M. Lindberg, *Bias and Objectivity when Evaluating Social Risk Factors for Physical Abuse: Of Babies and Bathwater*, 198 J. PEDIATRICS 13, 13 (2018).

[60] *Id.* (arguing that clinicians are "ill-equipped" to apply social risk factors and instead "use their intuition to estimate social risk").

[61] Heather T. Keenan et al., *Social Intuition and Social Information in Physical Child Abuse Evaluation and Diagnosis*, PEDIATRICS, November 2017, at 1. This study bears mentioning for illustrating how use of risk factors and personal intuition lead to varying results in diagnoses. Keenan et al. used three scenarios to demonstrate how the diagnoses of child abuse pediatricians (CAPs) vary depending on the type of information that is available about a family. First, CAPs received all the information a clinician would get from meeting the family; the study labeled this the "gut reaction": social intuition, social information, risk indicators, and social cues, as well as a full medical report. Second, the CAP received the social information and the medical history, but none of the perceptions from meeting the family or information about race. Third, the CAP received only the medical history. The study found that the more information the CAP had about the family, the more diagnostic certainty CAPs reported. But agreement among CAPs dropped when social information was present. In one out of five diagnoses, knowledge of social information reversed the diagnosis when all other information held constant. Further, CAPs who met the family performed a less complete evaluation than the other two categories, suggesting that "meeting the family encourages an intuitive thinking pathway ('gut feeling')." *Id.* at 5–6. As the Article points out, if a CAP's intuition is based on social risk factors that are correlated with but not causative of child abuse, it leads to over-reporting for certain groups.

risk factors.[62] But, similar to risk factor evaluations, these tools can easily perpetuate the precise racial and class biases that they are designed to dampen.[63] For example, one study found that a screening tool used before administering drug tests to birthing parents inadvertently reinforced "the process of identifying more Black than white women."[64] The protocol mandated that women would be ordered to test based on factors that were more common among Black parents, "including no prenatal care, an earlier positive toxicology test during the pregnancy, current intoxication or signs of placental abruption[,] . . . limited/late prenatal care, having children out of care, past drug or alcohol problems, and previous negative birth outcomes.[65] These

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[62] *See, e.g.*, Lindberg, *supra* note 59; Mauricio A. Escobar et al., *Development of a Systematic Protocol to Identify Victims of Non-Accidental Trauma*, 32 PEDIATRIC SURGICAL INT. 377 (2016); Eveline C.F.M. Louwers et al., *Effects of Systematic Screening and Detection of Child Abuse in Emergency Departments*, 130 PEDIATRICS 457 (2012).

[63] Hirschman & Bosk, *supra* note 10, at 352 ("Because racial inequalities are best diagnosed as reflecting structural racism not (just) individual bias, efforts to reduce racial inequality through standardizing gatekeeping decision making may have little effect."); Flaherty et al., *supra* note 55, at 612, 617 (discussing "injury encounter cards" that clinicians would fill out when they diagnosed an injury). Among questions about the type of injury and its seriousness, are questions around social factors and questions that ask for a practitioner's individual opinion: parents appear to "have little social support," parents have a "history of drug or alcohol use," parents are a "victim of [child/spousal] abuse," parent/child interactions cause concern, prior involvement with CPS. *Id. See also* Louwers et al., *supra* note 62, at 458 (evaluating the effectiveness of a checklist, the list—labeled the "Escape Form" to be used in Emergency Departments—included questions that rely on the practitioner's intuition: "Is the behavior of the child/the carers and the interaction appropriate?" and "Are there any other signals that make you doubt the safety of the child or other family members?").

[64] S. C. M. Roberts et al., *Does Adopting a Prenatal Substance Abuse Use Protocol Reduce Racial Disparities in CPS Reporting Related to Maternal Drug Use? A California Case Study*, 35 J. PERINATOLOGY 146, 149 (2015). *See also Maternal Mortality and Morbidity in New York City: Hearing Before the N.Y. City Council's Comms. on Hospitals, Health, and Women & Gender Equity*, Dec. 7, 2020 (joint written testimony of Ancient Song Doula Services, The Bronx Defenders, Movement for Family Power, National Advocates for Pregnant Women, and the New York Civil Liberties Union) (providing additional background on the issue of testing of pregnant women leading to disproportionate outcomes).

[65] Roberts et al., *supra* note 64, at 147. Even with universal screening, Black women have been shown to be four times more likely to be reported for suspected maltreatment than white women, despite the fact that all women were screened. Sarah C.M. Roberts & Amani Nuru-Jeter, *Universal Screening for*

indicators are more common among Black parents, the last being a salient example of how measures like screening tools can perpetuate the cycle of the foster system.[66]

The law asks clinicians to make reports of suspected child maltreatment to a system that is unable—or unwilling—to decipher a clinician's reasonable suspicion at the pace necessary to avoid catastrophic harm to a family. The obligation to report and the instruction to defer all investigation to the system obscures critical information, such as the gravity of the concern; whether it is a medical diagnosis or a personal concern; the role of screening tools or hospital policies that triggered the report rather than an acute safety concern. Instead, all these issues receive the deference given to a medical opinion. The report may appear to the system as a medical diagnosis, but any diagnostic error that results from this report is not examined.[67] Instead, the process of reporting enhances the heuristic associations between abuse, neglect, race, and class.

IV. HOW MUTUAL DEFERENCE HARMS FAMILIES IN PRACTICE

Formally, parents' due process rights are strongest when facing the possible removal of their child from their care:[68] in New York, the state must prove that the child would be at "imminent risk" of harm in their parents' care, and the parent has a right to an emergency hearing to contest a removal.[69] Whether to a remove a child is first examined at the

Alcohol and Drug Use and Racial Disparities in Child Protective Services Reporting, 39 J. BEHAV. HEALTH SERV. & RSCH. 3, 3 (2012).

[66] *See* Ketteringham et al., *supra* note 6.

[67] *See* NAT'L ACADS. OF SCIENCES, ENGINEERING, & MED., IMPROVING DIAGNOSIS IN HEALTH CARE 56 (2015) ("Prolonged learning in a regular and predictable environment increases the successfulness of heuristics, whereas uncertain and unpredictable environments are a chief cause of heuristic failure. There are many heuristics and biases that affect clinical reasoning and decision making." (citations omitted)). *See also* Ruth Gilbert et al., *Recognizing and Responding to Child Maltreatment*, 373 LANCET 167 (2009) (commenting on the difficulty of understanding the meaning of a "substantiated" report, in that it can be a reflection of an agency's determination of risk of future harm rather than confirmation of the reporter's concern).

[68] *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (outlining parents' fundamental right to make decisions regarding the care and custody of their children).

[69] N.Y. FAM. CT. ACT § 1028 (establishing the state's burden and the right of a parent facing possible removal of a child to an emergency hearing to contest a removal or request the return of their child from foster care).

arraignment—the initial appearance in court when a judge makes a determination about a child's placement by considering the reporter's narrative, the caseworker's investigation, the parent's counter-narrative, and possibly the child's position. If a child is removed and a parent contests it, an emergency hearing commences in which the question of imminent risk is reviewed in more detail.[70]

But when faced with a report from a medical setting, judges routinely remove a child based on a clinician's "reasonable suspicion" alone. The investigation by the caseworker likely reiterates the clinician's report; the parent's defense alone is unlikely to nullify any medical concern. There are no medical records available yet and certainly no live testimony from the doctor to provide context to the report. In these cases, the removal effectively transforms the provider's "reasonable suspicion" into a finding of "imminent risk."[71]

This section illustrates mutual deference in practice, using three case examples from Bronx Family Court. In each case, the clinician's decision to report, concededly, falls squarely within the purview of "reasonable suspicion" contemplated by the statute. But in each case, the system interpreted the clinician's report in the most severe light possible, presuming the worst of the parents, all of whom are parents of color. The need, or perceived need, for countering medical information obscured the legal system's ability, or justified its unwillingness, to issue orders that would keep the family intact. Instead, these families were separated based on the initial report alone.

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[70] *See* Nicholson v. Scoppetta, 3 N.Y.3d 357, 378 (2004) ("The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests." (emphasis added)).

[71] Even in cases where the parent's attorney does have additional medical information at the arraignment, the judge must hear that evidence in the context of a formal hearing. That hearing will be scheduled on a different day and may take days, weeks, or months to complete, depending upon the congestion of the particular courthouse. Where medical concerns are at stake, these hearings are more prolonged than other hearings because of the delay of obtaining expert medical opinions.

A. A Clinician May Refer a Family to the Family Regulation System for Supportive Intentions; the Court Interprets the Report as Imminent Risk Pending a Hearing

> Anthony,[72] a seven-year-old child with sickle-cell anemia, missed seven appointments for his condition in two months. The hospital made a report of suspected neglect, stating that Anthony needed to be monitored closely because, if he developed a fever, he would need immediate medical attention. The report stated that Anthony had a fever the previous week, and his mother, Ms. Oros, did not bring him to the doctor.
>
> Based on this report, ACS removed Anthony from his mother on an emergency basis and filed a neglect petition against her in Family Court. The petition alleged medical neglect for the missed appointments and stated that Ms. Oros "admitted" to missing the appointments and that she found them "overwhelming." The petition alleged that, although Ms. Oros knew she should bring her son to the hospital immediately if he developed a fever, she did not do so for a week.
>
> At the arraignment, ACS asked the judge to continue the removal. The judge deliberated: "This is a difficult case because . . . it really depends on how . . . this child is doing medically." She further commented, "[h]ere's the problem I have. I don't have enough medical information."[73]
>
> The judge continued the removal of Anthony from his mother, and Ms. Oros requested a hearing. In the meantime, Anthony lived with his maternal grandmother while the court awaited further medical information. This arrangement remained in effect for almost two months.
>
> Two months after the filing of the petition and over twenty court appearances later, Anthony's

[72] The parent gave permission for these facts to be shared, but names have been changed to protect privacy.

[73] Transcript of Arraignment, Matter of A. (Bronx Cnty. Fam. Ct. July 6, 2017) (docket number withheld to protect client confidentiality).

> treating physician testified in Family Court about her concerns when making the report.[74] The testimony revealed that, although the hospital contacted ACS out of a concern that Anthony had a high fever, his doctor did not intend for the child to be taken from his mother's care. Instead, the doctor testified that one motivation for calling ACS was the hope they could help with "case management": assistance to the mother with the appointments and having in-home services put in place to help with medication management.
>
> The same day that the judge heard from the doctor, she found that there was no imminent risk to Anthony in his mother's care. He was sent home with an order that the child be taken immediately to the hospital if his temperature exceeded 101 degrees. Notably, these were the same orders the attorneys for Anthony's mother had requested at the arraignment.
>
> ***

Anthony's two-month separation from his mother, which was contrary to any medical advice, is a direct effect of mutual deference. That the clinician's concern resulted in a call of suspected child maltreatment in the first place is a response to the incentives on and guidance to mandated reporters to defer quickly to the state. That the court system received incomplete information from the treating physician reflects the failure of the family regulation system to adequately investigate medical concerns. The court's paralysis when faced with a medical report reflects the knee-jerk deference of the legal system to the clinical opinion.

Finally, that Ms. Oros is a single Black mother cannot be overlooked when understanding the legal system's prioritization of prosecution over supportive interventions in this case.[75]

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[74] Given the challenge of coordinating schedules between the court and the physicians, and the delay of obtaining medical records for all parties to review before a physician testifies, this amount of delay is typical.

[75] One month into this hearing, ACS revealed that it had yet to make a single referral to a supportive service to Ms. Oros, and did so only upon order of the court. That referral was for in-home medical preventive services, which had a significant waitlist.

Embedded in mutual deference is a willingness to disrupt the parent-child relationship pending investigation and the presumption that the state could address Anthony's condition better than his mother, a presumption that applies to parents of color at a far greater rate than white families.[76]

B. An Injury Is Severe, but the Doctor's True Concern is Non-Medical

> Rysheen Summers[77] brought his four-month-old daughter to the hospital with severe burns on her legs. Five days earlier, Mr. Summers had left the bathroom briefly while his daughter was in the bathtub with the water running and drain unplugged. The water temperature in his homeless shelter spiked and she was badly burned. Scared to go to the hospital for fear of losing their children, he and his girlfriend treated the burns themselves. When they did seek medical treatment, the hospital notified the police and ACS. The parents were arrested and charged with felonies; their baby and older child were removed from their care.
>
> The parents were charged with abuse—intentionally burning their baby—in Family Court. With no other information than the report from a hospital of the burn and ACS's allegations of abuse, the judge continued the removals and placed the children in kinship foster care.
>
> While the family remained separated, the attorneys for ACS maintained that they would call an expert witness at trial to prove abuse.[78]

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[76] *See* Cooper, *supra* note 1 at 258.

[77] Mr. Summers gave permission for these facts to be shared, and requested that his name be included.

[78] Discovery was not expedited because Mr. Summers did not exercise his right to an emergency hearing to request the return of his children, as is his right pursuant to N.Y. FAM. CT. ACT § 1028. This is because he faced felony charges in Criminal Court; any hearing in Family Court would necessarily require him to testify; defendants are often advised not to testify in open court right after serious criminal charges are filed. As a result, ACS was not immediately required to produce the medical records in discovery. Mr. Summers, through his counsel, obtained them, but for bureaucratic reasons this took

> But the medical records later revealed that the Child Abuse Pediatrician (CAP) who examined the baby at the hospital and who made the initial report believed the burns were accidental, as the parents had described. Instead, the basis of the call was her concern about the parent's judgment in leaving the baby unattended in the bathtub and declining to seek medical care earlier.
>
> Based on these medical records, ACS ultimately agreed to settle the case with a neglect finding based on parental judgment, withdrawing the allegation that the injury was intentionally inflicted. Once the court posture reflected the reality of the medical concern, the parents were able to move forward in their case, expanding their time with their children towards reunification.
>
> ***

Here, the family regulation system assumed that Mr. Summers, a Black man in his twenties, had intentionally burned his baby. The system rushed to remove the children and file abuse allegations without speaking to the source of the report about the true basis of her concern. The court took severe measures under the assumption that a doctor would testify to abuse.

Ultimately, the basis for the report was parental judgment—leaving a baby unattended in a bathtub, particularly with unpredictable temperatures, and delaying medical care. These are not medical issues. At worst, they reflect lack of foresight about potential dangers that come with leaving a baby unattended, even if the drain was unplugged, which it was. More accurately, they reflect inequity in housing safety and acute familiarity with the power of the state to remove children which discourages many from seeking prompt medical attention. While arguably these issues did not have to be prosecuted at all, once in front of a judge, orders could have addressed these issues. The conditions allowing for the children to be returned to their parents could have been issued from the start, including taking

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several months. This is another harm of over-inflation of charges in these cases: parents must navigate multiple court cases with conflicting incentives.

a first aid class, an order to seek timely and regular medical attention for future concerns, and a parenting class in the form of parent-child therapy. Here, the clinician's report was not only elevated to imminent risk, but also inflated to abuse, and this resulted in prolonged separation.[79]

C. Doctors Can Make Mistakes, and Critical Legal Decisions Are Based on Those Mistakes; Litigation to Resolve Them Results in Prolonged Separation of Families

> Ms. Tolbert[80] received a call from her partner that their four-month-old daughter, Beatrice, had rolled off their bed when he stepped away to take a work call. Beatrice had a bad bruise on her eye, and the parents rushed her to the hospital. At the hospital, Ms. Tolbert was asked to agree to a CT scan and then a full skeletal survey of her baby; she agreed, assuming it was for medical purposes. Subsequently, she learned Beatrice was being held for "investigation."
>
> When Ms. Tolbert learned from the CAP that Beatrice had a healing skull fracture and two healing rib fractures, she realized the hospital did not believe her daughter had fallen. They thought she had been abused—repeatedly. Once Beatrice was ready for discharge, ACS filed an abuse petition in Family Court requesting that she be removed from her parents' care and put in foster care.[81]

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[79] This case illustrates the ongoing harm of hospitals' close relationship with the police and the family regulation system. First, families that are familiar with the family regulation system avoid seeking medical care out of fear that they will lose their children. Second, the disproportionate legal response stifles adjudication. Faced with felony charges in criminal court, it was not advised for Mr. Summers to request an immediate hearing in Family Court, in which he would have to testify, before discovery had taken place in either forum. This resulted in unfortunate delay in obtaining the medical records that ultimately brought the true concern to light.

[80] Ms. Tolbert gave permission for these facts to be shared, but names have been changed to protect privacy.

[81] The application of ACS was for Beatrice to be in stranger foster care. But because Ms. Tolbert's mother was able to move to the Bronx from out of state, Beatrice was able to stay with her grandmother with her mother in the home. However, pending litigation, Ms. Tolbert was not allowed to be alone with

> Ms. Tolbert's lawyers provided the records and radiology to a neurosurgeon and a radiologist from different hospitals, who confirmed that the pediatrician's diagnosis was incorrect and in fact, the skull fracture did not exist. The radiologist also confirmed that the location and nature and appearance of the two healing rib fractures suggested that they had been caused accidentally, and that it was likely that they had been asymptomatic.
>
> Based on this alternative medical opinion, Ms. Tolbert and her partner asked for an emergency hearing for the return of their baby. They were ultimately successful in that hearing, but more than two months passed from the date of filing to the time they were reunified with their child.[82]
>
> ***

Ms. Tolbert's case illustrates three aspects of mutual deference. First, the system is unequipped to investigate a physician's reasonable suspicion. Here, ACS relied on the opinion of one CAP[83] who suspected that this child had been abused based on erroneous interpretations of radiology. Even though the court ultimately deemed the CAP's opinion a "rush to judgment," [84] her suspicion functioned as the basis of "imminent risk" for two and a half months while the case was litigated.[85]

Beatrice, and Beatrice's father was not allowed to be in the home at all, except for during scheduled visits.

[82] Because this hearing happened during the early stages of the COVID-19 pandemic and all doctors were able to testify virtually, two months was likely less time than the litigation would have taken in person.

[83] Child Abuse Pediatrics is a sub-specialty of pediatrics that emerged in 2009; in New York City, CAPs lead Child Advocacy Centers, which are institutes within hospitals that collaborate with law enforcement in child abuse investigations. Child Advocacy Centers were established by law in 2006 under New York Social Services Law sections 423 and 423-a.

[84] Matter of B.D. (Bronx Cnty. Fam. Ct. Aug. 7, 2020) (Passidomo, J.) (docket number withheld to protect client confidentiality).

[85] Although not the precise focus of this Article, this highlights the role of Child Abuse Pediatricians and the harm that flows from the deference that they receive. The ethical concerns flowing from CAPs are myriad. For a comprehensive review of the ethical concerns relating to the role of Child Abuse Pediatricians, see GEORGE J. BARRY & DIANE L. REDLEAF, MEDICAL ETHICS CONCERNS IN PHYSICAL CHILD ABUSE INVESTIGATIONS: A CRITICAL

Second, the distrust with which Ms. Tolbert, a Black mother, was treated at the hospital led to tangible medical harm.[86] Because the hospital considered the story of her baby rolling off the bed unlikely, Beatrice was subjected to unnecessary radiation exposure and two nights in the hospital at the height of the COVID-19 pandemic. These tests revealed findings that reinforced the hospital's suspicion and exacerbated the legal intervention, even though the findings turned out to be benign.

Third, Ms. Tolbert's only tool to challenge one doctor's suspicion was litigation. Even if a parent is assigned an attorney with the resources to retain experts, the cost of litigation is delay.[87] The over-clogged court system and doctors' demanding schedules result in significant scheduling challenges. Delay in these cases means children remain separated from their parents, resulting in lasting harm.[88]

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Unjustified elevation of a clinician's concern to evidence of imminent risk is the harm of mutual deference. At best, mutual deference fails to ensure that the players in the system—clinicians, caseworkers, lawyers, judges—have the information necessary to perform their job and make informed decisions at each stage of the case. At worst, mutual deference provides

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PERSPECTIVE (2014). What is most relevant and representative in Ms. Tolbert's case is that CAPs are afforded deference even when rendering opinions outside their training that can only be made reliably by radiologists, neurologists, orthopedists, and other medical specialists because "[t]he idea that the child abuse pediatrician's has greater expertise than other subspecialists has been more broadly accepted than is justified, especially if the child abuse pediatrician fails to fully consult with subspecialists in forming her abuse conclusions." *Id.* at 4. *See also* Rachel Blustain, *Doctors Say They Shook Their Baby. They Didn't*, DAILY BEAST (Apr. 13, 2017, 2:37 PM), https://www.thedailybeast.com/doctors-said-they-shook-their-baby-to-death-they-didnt.

[86] In public testimony delivered by Ms. Tolbert in an out-of-court setting referring to her experience at the hospital with Beatrice, she commented, "I have never felt more Black[]."

[87] *See, e.g.*, Horan-Block & Newman, *supra* note 41, at 410 (2019) (showing that even where early and aggressive litigation of suspected physical abuse results in reunification of parents and children, the delay is considerable). In 2019, litigation of cases of serious abuse shortened the length of separation from an average of 595 days without a hearing to 226 days with a hearing. *Id.*

[88] Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 210–13 (2016).

insulation to the players in the system who decline to examine the biases that inform their role in a traumatic intervention: why an investigation was triggered, why a removal was conducted, and why it was legally sanctioned by the courts.[89]

V. CONCLUDING REMARKS: RESISTING MUTUAL DEFERENCE

The relationship between the family regulation system and medical providers is historical; in fact, when mandated reporting was first established in law, many states labeled physicians as the *only* mandated reporters.[90] Since its inception, therefore, the family regulation system has depended on medical professionals to provide a pool of families to investigate and surveil. But if society values the therapeutic relationship, why would it delegate surveillance efforts to clinicians when that surveillance disrupts the patient-doctor relationship so fundamentally?[91]

A report of suspected child maltreatment carries immediate side effects and grave risks for the family and greater community. There is the medical harm—possible radiation, testing, and stress; the loss of trust from the family, the loss of confidentiality, and the loss of the patient's continuity of care. There is long-term harm, too—the lasting trauma of removal for

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[89] *See, e.g.*, Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995) ("Judges must be careful to distinguish cultural or value based differences in child-rearing practices from parental conduct that falls beneath minimally acceptable parenting standards and raises a legitimate concern about the health, safety, or welfare of the child.").

[90] Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 3 (1967) (citing the reasons the Children's Bureau placed the primary duty to report on physicians for three reasons: physicians were in a unique position of having access to information about abuse when a caretaker would seek medical attention for a child; the special skill and training of the physician to detect instances of child abuse; reluctance of physicians to report for fear of "meddling" or violating "professional confidence").

[91] The American College of Obstetrics and Gynecology comments: "Legally mandated testing and reporting puts the therapeutic relationship between the obstetrician-gynecologist and the patient at risk, potentially placing the physician in an adversarial relationship with the patient." *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist, Committee Opinion No. 473*, COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN (January 2011) https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist [https://perma.cc/SZ3A-G24N].

the child no matter how short the separation; as well as housing, medical, and educational disruption. More broadly, the fear of legal intervention at hospitals undermines the public policy interest in encouraging prompt medical attention for children. The systemic harm of mutual deference is the reinforcement of links between medical and legal terms that divert Black and Brown families into the family regulation system at disproportionately high rates.

With mandated reporting, these considerations are irrelevant to the instruction to report a suspicion. A clinician, tasked with the obligation to "do no harm," is forbidden from considering the potential harms of initiating this course of action. In this way, the clinician's obligation to the state supersedes its obligation to the patient. This tension can only be resolved by presuming that making the report does protect the patient, but there is no mechanism to ensure that the balance of harms weighs in favor of the patient. Mutual deference shows it often does not.

It is only through removing clinicians' reporting obligations to the state that clinicians can be empowered to reconceptualize a report to the family regulation system as an invasive treatment—one with risks and harmful side effects that often dissuade clinicians from choosing a particular course of treatment. Once seen as a dangerous intervention, mandated reporting can receive the critical examination that other diagnoses—and diagnostic errors—receive. Removing liability around reporting creates space for interrogation of the class- and race-based associations that medical and legal institutions have made between neglect, abuse, and the challenges endemic to low-income communities of color. More broadly, it can trigger—or even require—diversion of resources to therapeutic rather than prosecutorial methods of addressing the root causes of perceived and real challenges.[92] This strengthens community programs, rather than state agencies, towards the dissolution of the family regulation system entirely.

Efforts to re-envision how support for and protection of families can move away from state-sanctioned violence and

[92] *See* Cooper, *supra* note 1,at 251 ("[C]hanging the players or elements has the least effect on the system, but changing dynamics between elements and especially the ultimate purpose of the system has the greatest effect.").

towards strengthening families within their communities[93] must critically examine the role of hospitals in establishing the current system. Hospitals hold tremendous potential to support families by redirecting their resources and expertise back into the community and away from state surveillance. This begins with removing mandated reporting responsibilities.

[93] Dorothy Roberts & Lisa Sangol, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/ [https://perma.cc/WLR4-EG29]; Erin Miles Cloud, *Toward the Abolition of the Foster System*, S&F ONLINE, http://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/ [https://perma.cc/NGY6-VY7J].

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ARTICLE

THE WHITE SUPREMACY HYDRA: HOW THE FAMILY FIRST PREVENTION SERVICES ACT REIFIES PATHOLOGY, CONTROL, AND PUNISHMENT IN THE FAMILY REGULATION SYSTEM

Miriam Mack*

Fundamentally, the so-called "child welfare system"—more appropriately named, the family regulation system—is a policing system rooted in white supremacist ideologies and techniques. From its earliest iteration, the family regulation system has functioned to pathologize, control, and punish the families entrapped in its web, most especially Black families. Nevertheless, among many, the myth persists that the family regulation system is one of child protection and family support. This is especially true when discussing the Family First Prevention Services Act of 2018, which—for the first time since the establishment of the modern family regulation system—opens up federal funding streams previously reserved for the removal of children to the foster system to provide prevention services for families in which children have not yet been removed to the foster system. While the Act is a course change in federal family regulation policy, this Article traces how it leaves

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This Article would not be possible without, and humbly builds upon the decades of work, analysis, reflection, and thinking of folks who have been working to resist the family regulation system. I extend my deepest gratitude to those comrades and colleagues who have supported, guided, and shaped my thinking and given incredibly invaluable feedback on this article including Erin Miles Cloud, Megan Eardley, Michele Hall, Emma S. Ketteringham, Joyce McMillan, Clara Presler, Lisa Sangoi, and so many more.

> *undisturbed the pathology, control, and punishment central to the policies that preceded it.*

I. INTRODUCTION

Some frame the family regulation system not as a policing system, but rather as a gentler, non-punitive government intervention aimed at protecting children and supporting families. This framing is especially true when discussing the Family First Prevention Services Act of 2018. This act has been lauded by some as a reordering of the family regulation system through a more supportive, family-centered approach. Though undoubtedly the Family First Prevention Services Act is a shift in federal family regulation system policy, the Act is a recalibration of the old and familiar family regulation system, not a transformation. The Act keeps intact, and indeed reifies, the fundamental pillars of the family regulation system: pathology, control, and punishment, all of which uphold and further white supremacy. It leaves unchallenged the underlying structure of the family regulation system which works to pathologize Black parents, mostly mothers, and which allows Black communities and homes to be controlled and occupied by family regulation system workers. Despite tinkering at the system's edges, the Family First Act reinforces the notion that Black children remaining in their homes with their parents necessitates the watchful eye of family regulation system agents.

This article traces how the Family First Act leaves firmly in place the white supremacist roots of the family regulation system. Part I of this article explains how federal family regulation system policy is rooted in white supremacist ideologies and techniques, namely pathology, control, and punishment of Black mothers. Part II of this article analyzes how the Family First Act changes the family regulation system's mechanisms of action from removal to the foster system to in-home services, but in no way challenges the fundamental pillars upon which the family regulation system rests. And drawing from the prison abolition movement, Part III of this article humbly suggests some organizing questions and principles that can help guide us in dismantling the family regulation system and investing in self-determination, autonomy, care, and support.

II. PATHOLOGY, CONTROL, AND PUNISHMENT IN FEDERAL FAMILY REGULATION SYSTEM POLICY

Like the criminal legal system, the family regulation system is largely state-run. As such, no two states' family regulation systems are identical. That being said, state family regulation systems have certain unifying characteristics driven in part by federal policy, which this article refers to as "federal family regulation system policy." To understand federal family regulation system policy, we must look to where the federal government allocates federal monies to support state family regulation system services, programs, and costs.

Virtually all federal spending in support of state family regulation systems derives from the Social Security Act.[1] Federal dollars allocated to state family regulation system services, programs, and costs come from a variety of different funding streams—including Titles IV-B and IV-E of the Social Security Act, Temporary Assistance for Needy Families (TANF), Social Services Block Grant, Medicaid, and other funds.[2]

A. Early Federal Family Regulation System Policy

In its early iterations, federal family regulation system policy was bound up with federal anti-poverty programs imbedded in Social Security Act of 1935.[3] Building from states' "mother's pension" programs, Title IV-B of the Social Security Act of 1935 established the Aid to Dependent Children program (ACD), a means-tested entitlement program provided to certain low-income mothers who lacked financial support of the fathers of their children.[4] As noted by legal scholar Dorothy Roberts, an authority on the family regulation system, a guiding principle of federal family regulation system policy during the Progressive Era was that government funded financial support for single mothers living in poverty would help minimize the need for

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[1] ELIZABETH JORDAN & DANA DEAN CONNELLY, AN INTRODUCTION TO CHILD WELFARE FUNDING, AND HOW STATES USE IT, CHILD TRENDS 2 2016), https://www.childtrends.org/wp-content/uploads/2016/01/2016-01IntroStateChildWelfareFunding.pdf.

[2] *Id.* at 2–3.

[3] DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 173–200 (2002) [hereinafter ROBERTS, SHATTERS BONDS].

[4] JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 35 (2005).

children to be removed from their families and placed in orphanages and asylums.[5]

A second guiding principle, in tension with the first, was the notion that providing financial aid to those in need risked encouraging "dependency, moral degeneracy, and family breakdown."[6] Therefore—despite providing federal family assistance for the first time in American history—federal anti-poverty programs and child welfare policy were bound up with the moral construction of poverty: "demarcating the 'undeserving poor' and perpetuating the myth of racial inferiority."[7]

The ACD program functioned not just as an anti-poverty program focused on child welfare, but also as a means of social control of the "deserving" poor, a category that was largely restricted to poor, widowed, white women.[8] In distributing ACD aid, states were given wide discretion to define the criteria used to determine aid eligibility requirements.[9] With this discretion, jurisdictions imposed "suitable home" requirements to ensure that the women to whom funds were provided were "conform[ing]

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[5] ROBERTS, SHATTERED BONDS, *supra* note 3, at 175.

[6] *Id.* Early federal family regulation system policy was influenced by nineteenth and early twentieth century middle-class reformers, who were deeply concerned with "the behavior of the 'dangerous classes' (i.e. urban poor immigrant groups). Among these reformers, the urban poor immigrant groups were thought to be criminal, vicious, indolent, and intemperate," and thus beyond redemption. TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 19 (2016). Many reformers believed that children of the urban poor immigrant groups needed to be saved from their parents and formed private organizations to carry out these forced separations. Some states also passed laws allowing children to be removed from their parents to asylums and orphanages. *See id.* at 20–22. Private organization, such as Children's Aid Society, a foster agency that remains in existence today, was among these middle-class private institutions that coercively removed children from poor parents and sent them to work for white Protestant to families in the Western United States on "Orphan Trains." *See id.*

[7] *See* MOVEMENT FOR FAMILY POWER ET AL., WHATEVER THEY DO, I'M HER COMFORT, I'M HER PROTECTOR: HOW THE FOSTER SYSTEM HAS BECOME GROUND ZERO FOR THE U.S DRUG WAR 24 (2020), https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277 [https://perma.cc/8BTJ-48EM]. For a comprehensive analysis of the moral construction of poverty, see KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 37–64 (2017).

[8] *See* ROBERTS, SHATTERED BONDS, *supra* note 3, at 175. *See also* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 24.

[9] Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, FUTURE CHILD. 28, 29–30, (1997) [https://perma.cc/4EHG-QTHY].

to 'American' family standards."[10] Examples of "unsuitable homes" included homes where a child was born to an unwed mother, where a caretaker engaged in "promiscuous conduct," and where a child was being neglected, among other things.[11] With this discretion, many jurisdictions used "suitable home" requirements to preclude Black women from accessing the aid almost entirely.[12] Also excluded from ACD aid were Indigenous communities, who had long since been subjected to a federal policy of forced family separation and forced assimilation to white society and culture under the Indian Civilization Act.[13]

The Social Security Act of 1935 authorized a small allotment of funds to states annually to support "child welfare services."[14] The purpose of the allotment was to enable:

> [T]he United States, through the Children's Bureau, to cooperate with State public welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, public [child] welfare services . . . for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.[15]

In total, the Social Security Act authorized $1.5 million annually "for use by cooperating state public-welfare agencies on the basis

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[10] ROBERTS, SHATTERED BONDS, *supra* note 3, at 175. *See also* Blank & Blum, *supra* note 9 at 29–30.

[11] *See* LAURA MEYER & IFE FLOYD, CTR. ON BUDGET & POL'Y PRIORITIES, CASH ASSISTANCE SHOULD REACH MILLIONS MORE FAMILIES TO LESSEN HARDSHIP: FAMILIES' ACCESS LIMITED BY POLICIES ROOTED IN RACISM 8–9 (2020), https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf [https://perma.cc/257L-XTQR]; *The "Suitable-Home" Requirement*, 35 SOC. SCIENCE REV. 203, 203–204 (1961).

[12] *See* MEYER & FLOYD, *supra* note 11, at 8–9.

[13] *See* Heron Greenesmith, *Best Interests: How Child Welfare Services as a Tool of White* Supremacy, POL. RSCH. ASSOCS. (Nov. 26, 2019), https://www.politicalresearch.org/2019/11/26/best-interests-how-child-welfare-serves-tool-white-supremacy [https://perma.cc/N4PZ-FW8V].

[14] REICH, *supra* note 4, at 35.

[15] H. REP., COMM. ON WAYS & MEANS, GREEN BOOK, CHILD WELFARE LEGISLATIVE HISTORY, (2012) [hereinafter H. REP. GREEN BOOK LEG. HIST.], https://greenbook-waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/legislative-history [https://perma.cc/D944-LJZQ].

of plans developed jointly by the State agency and the Children's Bureau."[16]

B. Modern Federal Family Regulation Policy

While the early iterations of federal family regulation policy largely excluded Black families, successes of the sustained resistance of the Civil Rights Movement resulted in greater access to public assistance for Black Families.[17] With these wins came a parallel shift toward the federal government increasingly directing federal dollars to support punitive state interventions, namely the removal to the foster system. As more Black families became eligible for federal aid programs, the moral construction of poverty became an even larger part of the narrative of the family regulation system.[18] In turn, the commitment to government funded anti-poverty measures, such as ACD aid and the maintenance of public goods, diminished.[19]

So too did federal family regulation policy recalibrate itself by ushering in a string of amendments to the Social Security Act and new laws that allocated more federal dollars toward growing states' family regulation system infrastructures and the costs and programs associated with maintaining children placed in the foster system.

1. 1960s & 1970s Amendments to the Social Security Act

The 1960 amendments to the Social Security Act ushered in the modern-day foster system and increased family regulation system funding to $25 million.[20] A year later, the 1961 amendments provided that states could seek, on a temporary basis, federal reimbursement for part of the costs associated with placing and maintaining children in the foster system.[21] Thereafter, in 1974 the Child Abuse Prevention Treatment Act of 1974 (CAPTA) was enacted to provide financial assistance to states to establish a system for receiving and responding to allegations of child maltreatment, to support states in the

[16] Social Security Act, 42 U.S.C. § 521(a) (1935).

[17] *See* Greenesmith, *supra* note 13. *See also* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 24.

[18] MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 27–28.

[19] *Id.*

[20] *Id.*

[21] H. REP. GREEN BOOK LEG. HIST., *supra* note 15.

"prevention[,] assessment, investigation, prosecution, and treatment" of child maltreatment.[22]

2. The Adoption Assistance and Child Welfare Act of 1980

Then, in 1980, the Adoption Assistance and Child Welfare Act (AACWA) was passed into law and established a federal adoption assistance program as well as "strengthen[ed] the program of foster care assistance for needy and dependent children."[23] AACWA reflects yet another important recalibration of federal family regulation policy to ensure its continued existence.

With the number of children being separated from their families and removed to the foster system increasing, beginning in the 1970s,[24] Congress faced pressure to recognize and address the ways that federal family regulation policy incentivized family separation and the foster system.[25] To help disrupt the expansion of the foster system nationwide, AACWA introduced a "reasonable efforts" requirement and mandated additional case

[22] CHILD.' BUREAU, ABOUT CAPTA: A LEGISLATIVE HISTORY (2019), https://www.childwelfare.gov/pubPDFs/about.pdf [https://perma.cc/TYV2-TA5N]. Since 1974, CAPTA has been amended numerous times in the 1990s and the 2000s, building out the federal governments expansive financial support for state family regulation systems investigation and prosecution infrastructures and foster systems. *See* CHILD.' BUREAU, MAJOR FEDERAL LEGISLATION Concerned with Child Protection, Child Welfare and Adoption (2019) [hereinafter CHILD.' BUREAU, MAJOR LEGISLATION], https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf [https://perma.cc/M9FF-FHTQ].

[23] CHILD.' BUREAU, MAJOR LEGISLATION, *supra* note 22.

[24] This increase in children being removed to the foster system was due in part to Dr. C. Harry Kempe's theorization of "the battered-child syndrome" in 1962. In response the introduction of this "syndrome," between 1963 and 1967, all 50 states had passed laws establishing the creation of child abuse "hotlines" and other systems that allowed people to report suspected child maltreatment. *See* Lee, *supra* note 6 at 28. Moreover, Roberts points out that the medicalization of child maltreatment served another purpose. Failing to gain bipartisan support for family regulation legislation focused on poverty-related harms to children, instead, Congress promoted "a medical model of child abuse—'a distinguishable pathological agent attacking the individual or family that could be treated in a prescribed manner and would disappear.'" *See* ROBERTS, SHATTERED BONDS, *supra* note 3, at 14.

[25] *See* ROBERTS, SHATTERED BONDS, *supra* note 3, at 105.

planning requirements.[26] Yet the AACWA recalibration, like the recalibrations that preceded it, was not a repudiation of family separation or the foster system. Rather, it firmly embraced the foster system by establishing "[f]unding for foster care and adoption assistance," as a "permanent entitlement for assistance to eligible children" under the newly established Title IV-E of the Social Security Act.[27] And if the direction of federal dollars reflects federal policy priorities, then AACWA made clear the centrality of the foster system as a means to address issues faced by struggling families. For example, between 1981 and 1990, federal spending on family regulation system services went from $0.5 billion to $1.6 billion.[28] The vast majority of these dollars were allocated to support the programs and costs associated with children placed in the foster system rather than on family preservation.[29]

3. The Adoption and Safe Families Act of 1997

The next significant change to federal family regulation funding policy came with the Adoption and Safe Families Act (ASFA) in 1997. Enacted on the heels of the so-called "crack epidemic" of the 1980s and 1990s, and faced with massive increase in the number of children removed from their families to state foster systems—40% of which were Black children—federal family regulation policy doubled down on its reliance on family separation as the policy solution.[30] Under ASFA, federal

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[26] *See Id.* The AACWA made the receipt of federal funds contingent on state family regulation system agencies making "reasonable efforts" to prevent a child's placement in the foster system, except under circumstances where doing so would not be in the child's best interest. *See* H. REP. GREEN BOOK LEG. HIST., *supra* note 15. Neither the AACWA, nor later amendments to Title IV-E of the Social Security Act define "reasonable efforts." According to agency guidance, this was done intentionally, as defining "reasonable efforts" would "be a direct contradiction of the intent of the law," which calls for a case-by-case determination of whether "reasonable efforts" were made. *See* U.S. DEP'T SOC. SERVS., ADMIN. FOR CHILD. & FAMS., CHILD WELFARE POLICY MANUAL, 8.3C.4 TITLE IV-E, FOSTER CARE MAINTENANCE PAYMENTS PROGRAM, STATE PLAN/PROCEDURAL REQUIREMENTS, REASONABLE EFFORTS, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59 [https://perma.cc/KBB2-TX9M] (last visited Mar. 17, 2021).

[27] *See* H. REP. GREEN BOOK LEG HIST., *supra* note 15.

[28] ROBERTS, SHATTERED BONDS, *supra* note 3, at 142.

[29] *Id.* at 175.

[30] MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 16, 26. For an extensive discussion how both the news media and lawmakers racialized,

family regulation system spending emphasized permanency for children placed in the foster system by way of adoption over family reunification.[31] Specifically, ASFA required state family regulation system authorities to seek to terminate the rights of parents whose children have been in the foster system for 15 of 22 months.[32] In other words, ASFA introduced time limits on the reunification services and activities provided to families where children were removed from their home to the foster system to just 15 months.[33] ASFA also made incentive payments available to states that "increased adoptions from foster care, relative to a baseline number of adoptions."[34] As an incentive to "fast track" children to adoption, states were eligible to receive $4,000 for each child adopted out of the foster system over the established baseline for that state.[35] Beyond underwriting more expedient terminations of parental rights and adoptions, the federal government also placed limitations on the already vague "reasonable efforts" requirements.[36]

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gendered, and pathologized the use of crack cocaine, and devastating impact that the so called "crack epidemic" and the drug war had on the family regulation system, see also ROBERTS, SHATTERED BONDS, *supra* note 3; Nancy D. Campbell, *Regulating "Maternal Instinct": Governing Mentalities of Late Twentieth-Century U.S. Illicit Drug Policy*, 24 SIGNS: J. WOMEN IN CULTURE AND SOC'Y 895, 895–97 (1999); LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE (1997).

[31] *See* Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68, 84 (2017).

[32] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (absent certain exceptions, ASFA mandates, "in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate the parental rights of the Child's parents . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption).

[33] Among the services subject to the 15-month time limit was mental health services, inpatient substance abuse treatment programs, domestic violence assistance programs, and family and/or child therapeutic services, and transportation services provided for travel to and from family regulation system services. *See* CHILD.' BUREAU, MAJOR LEGISLATION, *supra* note 22.

[34] Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act* (*ASFA*), *in* INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 11 (Ctr. for Study Soc. Pol'y & Urb. Inst. ed., 2009), http://webarchive.urban.org/uploadedpdf/1001351_safe_families_act.pdf [https://perma.cc/YA85-DA4E]

[35] *Id.*

[36] Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 261 (2003).

C. Regulation Through Family Separation

The results of ASFA and the federal family regulation policies preceding it are striking. One need only look to Title IV-E of the Social Security Act, the largest federal funding stream for state family regulations systems.[37] In state fiscal year 2012,[38] the federal government spent nearly $13 billion supporting state family regulation system costs, programs, and services.[39] Title IV-E spending accounted for nearly $6.5 of the nearly $13 billion.[40] Of the nearly $6.5 billion, an astounding 51% went to the Foster Care Program, and 35% went to the Adoption Assistance Program.[41] The remaining 14% was allocated among the Chafee Foster Care Independence Program, the Guardianship Program, and Demonstration Waivers.[42] Importantly, key to all of these Title IV-E funding programs was the requirement that the children for whom the funds were allocated be removed from their home to the foster system.[43] In contrast, Title IV-B funding—which funds family support services, family preservation programs, and time limited reunification, among other programs and services—reflected just three percent (a little over $595 million) of federal family regulation system spending.[44] Not only did the federal government spending on maintaining states' foster systems and fast tracking adoptions dwarf spending on family preservation, it also dwarfed spending on programs addressing child poverty including the Special Supplemental Nutritional Program for Women, Infants, and Children (WIC), the Children's Health Insurance Program (CHIP), and the Supplemental Nutrition Assistance Program for Children (SNAP).[45]

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[37] JORDAN & CONNELLY, *supra* note 1, at 2.

[38] Generally, "state fiscal year" signifies a 12-month period running from July 1 through June 30 of the following year, and is named for the calendar year in which the state fiscal year ends. All but four states in the United States have fiscal years ending on June 30. *See Quick Reference Fiscal Table*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/research/fiscal-policy/basic-information-about-which-states-have-major-ta.aspx#fyrs [https://perma.cc/WT4F-EBGP] (last visited Mar. 17, 2021).

[39] JORDAN & CONNELLY, *supra* note 1, at 1.

[40] *Id.*

[41] *Id.* at 5.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 2.

[45] *See* MOVEMENT FOR FAMILY POWER, *supra* note 7, at 26.

The modern family regulation policy pathologization, control, and punishment of Black families is borne out by the numbers.[46] By the early 2000s, Black children were overrepresented in the foster system at a rate of more than twice their population in 36 states, and a rate of more than 3 times their population in 16 states.[47] In total, Black children were overrepresented in the foster system nationwide at a rate of 2.26 their general child population.[48] Moreover, data shows that between 2000 and 2011, one out of every nine Black children had been removed from their parents, as compared with one in 17 white children.[49] Black families and children also fare worse at every point within the family regulation system.[50] Black families are more likely to have maltreatment allegations made against them, more likely to be investigated by state family regulation system authorities, and more likely to have those cases

[46] The family regulation system also disproportionately targets indigenous families. While Indigenous children represent 2% of the children removed from their homes to the foster system, they represent just 1% of the overall child population in the United States. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL H.H.S. ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 73 (2007) [hereinafter GOA, AFRICAN AMERICAN CHILDREN IN FOSTER CARE]. Moreover, between 2000 and 2011, data show that one out of every seven indigenous children had been removed from their parents. *See* MOVEMENT FOR FAMILY POWER, *supra* note 7, at 12. As with Black families, there is a long history of the U.S. government targeting, pathologizing, controlling and punishing indigenous families and communities. *See* Greenesmith, *supra* note 13; Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533 (2021). This history and the particular way in which it is reproduced and reified today in the modern family regulation system warrants particular attention and further research. Given the limitations of this article's research, this paper focuses on the family regulation system as a cite of pathology, control, and punishment of Black families.

[47] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 46, at 73.

[48] *Id.*

[49] *See* MOVEMENT FOR FAMILY POWER, *supra* note 7, at 12.

[50] *See* Dorothy Roberts, *The Racial Geography of Child Welfare: Toward a New Research* Paradigm, 87 CHILD WELFARE J. 127 (2008) [hereinafter Roberts, *Racial Geography of Child Welfare*]. *See also* Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How The Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e [https://perma.cc/6HEG-R79G].

substantiated. Further, Black children are more likely to be removed from their homes to the foster system.[51]

As Black children entered the foster system, many have documented how ASFA and the federal family regulation policy increasingly incentivized regulation through family separation.[52] Roberts points out:

> [I]t is often forgotten that state agents forcibly remove most of these children and that the mothers are intensely supervised by child welfare authorities as they comply with the agency requirements to be reunified with their children. This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. But the need for this intervention is usually linked to poverty, racial injustice, and the state's approach to caregiving, which addresses family economic deprivation with child

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[51] *See* Roberts, *Racial Geography of Child Welfare*, *supra* note 50, at 127. *See also* Roberts & Sangoi, *supra* note 50.

[52] *See, e.g.*, MOVEMENT FOR FAMILY POWER, *supra* note 7; DON LASH, *When the Welfare People Come* 43 (2017); ROBERTS, SHATTERED BONDS, *supra* note 3; Rise Magazine, *"You Have to Get it Together": ASFA's Impact on Parents and Families*, *in* INTENTIONS AND RESULTS, *supra* note 34; Molly Schwartz, *Do We Need to Abolish Child Protective Services*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/ [https://perma.cc/2RBN-QFJC] (quoting numerous parents impacted by the family regulation system, activists, and advocates including, Joyce McMillan, Angeline Montauban, Martin Guggenheim, Emma Ketteringham, Teyora Graves, Chris Gottlieb, Erin Miles Cloud, and Lisa Sangoi); Erin Miles Cloud, *Unraveling Criminalizing Webs: Building Police Free Futures*, S&F ONLINE, https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/ [https://perma.cc/P5S6-QL9L] (last visited Mar. 14, 2021); Martin Guggenheim, *Let's Root Out Racism in Child Welfare, Too*, IMPRINT (June 15, 2020, 2:00 AM), https://imprintnews.org/child-welfare-2/lets-root-out-racism-child-welfare-too [https://perma.cc/9NGA-VAF8]; Elizabeth Brico, *Forced, Rapid Adoptions Are a Weapon of the Drug War*, FILTER MAG. (Dec. 21, 2020), https://filtermag.org/forced-adoption-drug-war/ [https://perma.cc/L4Q4-ZZ3E]; Chris Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, AMSTERDAM NEWS (Feb. 1, 2018, 9:28 AM), http://amsterdamnews.com/news/2018/feb/01/lessons-mass-incarceration-child-welfare [https://perma.cc/9DFY-74SW]; Emma Ketteringham, *Systems Built on Good Intentions are the Most* Dangerous, FRANK INTERVIEWS (Aug. 19, 2020), http://www.franknews.us/interviews/429/429 [https://perma.cc/4ATC-BEYK]; Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline*," 20 CUNY L. REV. 77, 95 (2016); Roberts & Sangoi, *supra* note 50.

> removal rather than services and financial resources.[53]

Central to federal family regulation policy is the pathologization of Black parents, largely Black mothers. Myopically focusing on alleged "parental defects," prevents the federal family regulation system from addressing the structural factors that produce marginalized families' adversities.[54] In other words, instead of focusing on structural issues of racism, poverty, housing- and food-insecurity, the family regulation system only focuses on the parent. [55]

Regulation through family separation also enables family regulation agents to exercise expansive control over families caught up in the system. As noted above, parents are subject to intense supervision by family regulation system agents who give parents compulsory "service plans" in order to have their family reunified. Often, these service plans consist of a written list of behavior modification services, including parenting classes, anger management classes, drug tests, drug treatment, counseling, psychological evaluations, and visitation with their children.[56] But the family regulation system monitoring goes beyond compliance with services. It also regulates with whom parents associate, where they go, and what they do.

Though family regulation system agencies often frame their interventions as "care" and "support," regulation through family separation is marked by coercion. For parents who—in the eyes of state family regulation agencies and courts—fail to modify their behavior within ASFA timelines, the court may terminate parental rights and fast track the child for adoption.

Pathologizing Black parents, particularly Black mothers, and using family separation as a means to control and punish Black communities is not new. The roots of these ideologies and techniques reach back to the brutal enslavement of Black people

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[53] Dorothy Roberts, *Prison, Foster Care, And the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1486 (2012).

[54] Dorothy Roberts, *The Dialectic of Privacy and Punishment in The Gendered Regulation of Parenting*, 5 STAN. J.C.R. & C.L. 191, 194 (2009).

[55] *See* LASH, *supra* note 52, at 43.

[56] Annett R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 582–83 (1997); ROBERTS, SHATTERED BONDS, *supra* note 3, at 78–81. *See generally* LASH, *supra* note 52.

in the United States and state-sanctioned white supremacy.[57] Again, Roberts' analysis is critical here. Roberts observes, "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care."[58] To this point, David A. Love notes:

> Women of color are more likely than [w]hite women to be monitored and supervised by the state, and more likely to experience state control over their bodies and their children. Call it a holdover from slavery, when Black women have no right to privacy, were violated at will, and could not make decisions regarding themselves, their bodies or their families.[59]

Historically and presently, justification for state-sanctioned family destruction and the devaluating of Black motherhood and Black children is based on images and narratives of "unfit and dangerous Black mothers" cultivated by American culture.[60] Fundamentally, white supremacy mandates the complete control of Black women.[61] As with the criminal punishment system, the moment a Black woman steps outside of the "controlling narratives developed in service of white colonialism and white supremacy," she is perceived as a threat justifying a punitive and violent response.[62]

With this framing, I now examine how the Family First Prevention Services Act—the most significant policy shift in federal family regulation system spending policy since ASFA—is situated along this continuum.

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

[58] Dorothy Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER. & L. 141, 146 (1995).

[59] David A. Love, *On the Criminalization of Black Motherhood*, BLACK COMMENTATOR (May 8, 2008), https://blackcommentator.com/276/276_col_criminalization_of_black_motherhood_printer_friendly.html [https://perma.cc/5SQ9-JDQH].

[60] *Id.*

[61] *See* ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 183 (2017).

[62] *Id.*

III. THE FAMILY FIRST PREVENTION SERVICES ACT OF 2018: A SHIFT IN FEDERAL FAMILY REGULATION SYSTEM POLICY

After decades of financially incentivizing the separation of Black families, the Family First Prevention Act of 2018 (Family First Act or the Act) reflects a change of course in federal family regulation system.[63] For the first time since the establishment of the modern day foster system, the purported goal was to prevent children from entering the foster system. To do so, the Family First Act opened up IV-E funding for state family regulation system agencies to provide prevention services and programs to families with children who are deemed are "candidates for foster care."[64] Unlike prior federal laws, under the Family First Act, family separation is no longer a prerequisite to states accessing Title IV-E funds.[65]

Focusing on the "prevention activities" elements, the Family First Act allows states to be reimbursed under Title IV-E for funds used "to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, [and] in-home parent skill-based programs . . . ."[66] To do this, the Family First Act amended the Title IV-E program to "authorize new support for services to prevent the need for children to enter foster care."[67] More specifically, under Title IV-E, states may seek federal reimbursement for part of the cost associated with providing "foster care prevention services,"

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[63] While this Article focuses exclusively on the Family First Act's provisions related to "prevention activities," the Act also ushers in new requirements for congregate/group care foster placements, provides more funding authority to improve processing systems for the interstate placement of children, and provides more financial support for kinship navigator programs and foster independence programs. *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, §§ 50701–82, 132 Stat. 64 (2018). *See also Family First Prevention Services Act*, NAT'L CONF. STATE LEGISLATURES (Apr. 1, 2020), https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx [https://perma.cc/S6WB-GB78].

[64] Bipartisan Budget Act of 2018.

[65] *Id.*

[66] *Id.*

[67] H. REP., COMM. ON WAYS & MEANS, GREEN BOOK, CHAPTER 11: PREVENTION, FOSTER CARE, AND ADOPTION (2018), https://greenbook-waysandmeans.house.gov/2018-green-book/chapter-11-prevention-foster-care-and-adoption [https://perma.cc/TL3Q-8EY2].

including evidence based "[m]ental health and substance abuse prevention and treatment services provided by a qualified clinician" and "[i]n-home parent skill-based programs."[68]

A state, however, may not seek unlimited reimbursement. The Act caps reimbursement for Title IV-E prevention services and programs at 12 months,[69] although funding can be extended on a "case-by-case basis."[70] The Act also establishes certain criteria in order to be eligible for Title IV-E reimbursement. Among other requirements, prevention services must be "provided in accordance with . . . practices" that are "promising," "supported" or "well-supported."[71] Importantly, the Act's reach, in terms of the families to whom states can provide Title IV-E prevention services is broad; it covers "children who are candidates for foster care or who are pregnant or parenting foster youth and the parents or kin caregivers of the children."[72] The Act defines a child who is "a candidate for foster care" as "a child who is identified in a prevention plan . . . as being at imminent risk of entering foster care . . . but who can remain safely in the . . . home or in a kinship placement"[73] with the provision of prevention services or programs.[74] Though states' access to Title IV-E prevention funds is not without limits,

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[68] Bipartisan Budget Act of 2018.

[69] *Id.*

[70] U.S. DEP'T HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., CHID.' BUREAU, STATE REQUIREMENTS FOR ELECTING TITLE IV-E PREVENTION AND FAMILY SERVICES AND PROGRAMS 4 (2018) [hereinafter ADMIN. FOR CHILD. & FAM., STATE REQUIREMENTS], https://www.acf.hhs.gov/sites/default/files /documents/cb/pi1809.pdf [https://perma.cc/29G9-DLNR].

[71] *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018). In broad strokes, a "promising practice," is "[c]reated from an independently reviewed study that uses a control group and shows statistically significant results". A supported practice "[u]ses a random-controlled trial or rigorous quasi-experimental design" and "[m]ust have sustained success for at least six months after the end of treatment". A well-supported practice "[s]hows success beyond a year after treatment. NAT'L CONF. STATE LEGISLATURES, *supra* note 63.

[72] Bipartisan Budget Act of 2018.

[73] The Family First Act defines a "prevention plan" as a written plan that must include certain components, depending on whether the child is "a candidate for foster care" or a "pregnant or parenting foster youth." Bipartisan Budget Act of 2018.

[74] *See* FIRST FOCUS CAMPAIGN FOR CHILDREN, FAMILY FIRST PREVENTION SERVICES ACT: SECTION BY SECTION 1 (2018), https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Section-by-Section-FFPSA.pdf [https://perma.cc/E3WM-8AJT].

federal agencies interpret the Family First Act broadly in order to allow states to provide prevention services early and proactively.[75]

At first glance, the Family First Act appears to be a repudiation of, and break from, federal family regulation policy that came before it. But, a more discerning look at the Family First Act suggests otherwise. First, we must consider both the impetus for the Family First Act, and the prevention paradigm upon which the Family First Act rests.

A. Impetus for the Family First Act

Though first introduced in 2016 jointly in the U.S. House of Representatives and the U.S. Senate, advocacy of key provisions in the Family First Act began as early as 2014.[76] But, to fully understand the reasons behind the shift in federal policy, we must start at 2013.[77] Following a peak of 567,000 of children in the foster system nationwide in 1999, the number of children entering the foster system steadily declined until around 2013—at which point the numbers of children being forcibly separated from their families and entering the foster system began to increase.[78] Even more troubling to lawmakers and policymakers

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[75] *See generally*, ADMIN. FOR CHILD. & FAM., STATE REQUIREMENTS, *supra* note 70. *See also The Opioid Crisis: Implementation of the Family First Prevention Services ACT* (*FFPSA*)*: Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Ways and Means*, 115th Cong. (2018) [hereinafter H. COMM. ON WAYS & MEANS, OPIOID HEARING] (testimony of Jerry Milner, Assoc. Comm'r of the Child.' Bureau & Acting Comm'r of the Admin. on Child., Youth & Families, U.S. Dep't of Health & Hum. Servs.), https://www.govinfo.gov/content/pkg/CHRG-115hhrg33873/html/CHRG-115hhrg33873.htm [https://perma.cc/3U7C-YK4E].

[76] Daniel Heimpel, *Inside Game: The Key Players Behind Washington's Biggest Foster Care Reform in Decades*, IMPRINT (Mar. 7, 2018, 6:17 AM), https://imprintnews.org/featured/inside-game-how-foster-care-changed-forever/30118 [https://perma.cc/924N-4A67].

[77] *See* H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; *see also Examining the Opioid Epidemic: Challenges and Opportunities: Hearing Before the S. Comm. on Fin.*, 114th Cong. 35 (2016) [hereinafter S. COMM. ON FIN., OPIOID HEARING] (statement of Sen. Robert P. Casey, Jr.), https://www.govinfo.gov/content/pkg/CHRG-114shrg23291/pdf/CHRG-114shrg23291.pdf [https://perma.cc/F9CC-U7SE].

[78] S. COMM. ON FIN., OPIOID HEARING, *supra* note 77, at 8; *see also About the Law: Family First Prevention Services Act*, FAMILYFIRSTACT.ORG, https://www.familyfirstact.org/about-law [https://perma.cc/X4LL-XW3U] (last visited Mar. 17, 2021) (noting a steady increase of children interesting the foster system beginning in 2012 after years of decline).

alike was that among this group the number of infants entering the foster system were at least double that of children of other ages.[79]

Coinciding with this increase was the national opioid crisis. The crisis resulted in 450,000 opioid overdose related deaths between 1999 and 2018.[80] Currently, no data exists establishing a specific causal relationship between the opioid crisis and the massive expansion of the nation's foster system.[81] Nevertheless, faced with increasing numbers of children entering the foster system and national data showing parental drug abuse as a key factor in child removal,[82] lawmakers and policymakers adopted the narrative that the opioid crisis was driving the rapid expansion of the foster system. For example, in a Senate Finance Committee hearing on the opioid epidemic, Republican bill sponsor Senator Orrin G. Hatch, warned:

> The current opioid epidemic is just the latest manifestation of an ongoing problem in child welfare. Whether it be the crack cocaine epidemic of the 1980s, the methamphetamine epidemic that has plagued many rural areas, or the current opioid crisis, we have seen time and again that the

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[79] *Id.* at 67 (prepared statement of Nancy K. Young, Ph.D., Director of Children and Family Futures, Inc.).

[80] *Opioid Overdose: Understanding the Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2020), https://www.cdc.gov/drugoverdose/epidemic/index.html [https://perma.cc/QF9D-C3VB].

[81] Sarah C. Williams & Kerry DeVooght, *5 Things to Know About The Opioid Epidemic And Its Effects on Children*, CHILD TRENDS (June 2, 2017), https://www.childtrends.org/publications/5-things-to-know-about-the-opioid-epidemic-and-its-effect-on-children [https://perma.cc/SP3T-LFAE].

[82] Between 2016 and 2019, so-called parental drug abuse, a subset of neglect, accounted for between 34% and 36% of child removals to the foster system. *See* CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES AS OF OCT 20, 2017 - NO. 24 (2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport24.pdf [https://perma.cc/E5CZ-BG6S]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 - NO. 25 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf [https://perma.cc/5SL9-DAQP]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2018 ESTIMATES AS OF AUGUST 22, 2019 - NO. 26 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf [https://perma.cc/3XGJ-9LL4]; CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 - NO. 27 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/6DR5-5235].

> child welfare system is ill-equipped to deal with families struggling with substance abuse.[83]

Also connecting the crisis in the foster system and the opioid crisis, Democratic bill sponsor Senator Ron. Wyden underscored the need for "better prevention, better treatment, and better and tougher enforcement."[84] Senator Wyden cautioned of "pregnant mothers giving birth to opioid-dependent babies," warning that "[a] parent's drug addiction is becoming a growing reason for removing children from their homes and placing them in foster care."[85]

Similarly, advocates and policymakers framed the opioid crisis as a "child welfare" crisis, noting that the "opioid crisis has drawn national attention to the challenges that substance misuse and addiction pose for children, families, and communities," and claiming that "opioid epidemic is placing new demands on child welfare caseloads."[86] Following the Family First Act's enactment, lawmakers reiterated the connection between the opioid crisis and the expansion of the foster system. For example, during one U.S. House of Representatives

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[83] S. COMM. ON FIN., OPIOID HEARING, *supra* note 77, at 2 (statement of Sen. Orrin G. Hatch).

[84] *Id.* at 4 (statement of Sen. Ron Wyden).

[85] *Id.* at 5. *See also Bipartisan Senate, House Leaders Announce Proposed Child Welfare Legislation*, S. COMM. ON FIN. (June 10, 2016), https://www.finance.senate.gov/chairmans-news/bipartisan-senate-house-leaders-announce-proposed-child-welfare-legislation [https://perma.cc/3HBR-ZMJA].

[86] CASEY FAM. PROGRAMS, WHAT IS THE IMPACT OF SUBSTANCE ABUSE ON CHILD WELFARE? 1 (2018), https://caseyfamilypro-wpengine.netdna-ssl.com/media/SF_Substance-Abuse-Resource-List_fnl.pdf [https://perma.cc/5Y2R-YG5E]. *See also*, *Opioid Use*, NAT'L CTR. FOR HEALTHY SAFE CHILD., https://healthysafechildren.org/opioid-use [https://perma.cc/DL83-TULG] (last visited Dec. 26, 2020) (noting the increase in children entering the foster system between 2014 and 2015 and concluding that "[t]he opioid epidemic has reached crisis proportions and is having a devastating impact on children and families in rural, urban, and tribal communities across the country."); Stephanie Pham, *How the Opioid Epidemic Harms Youth and Families*, IMPRINT (June 29, 2017, 3:00 PM), https://imprintnews.org/research-news/opioid-epidemic-harms-youth-families/27348 [https://perma.cc/R5XP-XF9P] (noting that "[t]hough federal child welfare data does not specify the type of drugs being abused, many officials have linked this surge [in the foster system nationwide] with the opioid epidemic."); Williams & DeVooght, *supra* note 81 (noting that though there is no available data directly linking the opioid epidemic to the expansion of the nationwide foster system, there are "many anecdotal reports linking the opioid epidemic to increases in the number of children in foster care").

committee hearing focusing specifically on the opioid crisis and implementation of the Act, Representative Adrian Smith opened the hearing by explaining that "[b]oth the data and the experience of those on the front lines indicate substance abuse, specifically opioid use and overdose, are a contributing factor."[87] As such, the opioid crisis was not viewed just a public health issue, but also a family regulation issue.

B. Prevention as the Solution

Faced with the opioid crisis and the rapid uptick of children entering the foster system nationwide, lawmakers and family regulation system policymakers called for a shift from a system that incentivized forced family separation and placement in the foster system to a system that incentivized prevention.[88]

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[87] H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; (opening remarks of Representative Adrian Smith, Chairman of the House Ways and Means Subcomm. on Hum. Res.).

[88] As noted above, the opioid crisis created, at least in part, among lawmakers and policymakers a perceived need for a different, prevention-oriented family regulation system response. As meticulously documented by various scholars, during so-called crack epidemic of the late 1980s and 1990s the narrative around use of smokable cocaine was pathologized and demonized, and the typical user was narratively constructed as a Black, urban, and poor. *See, e.g.,* GOMEZ, *supra* note 30; MICHELLE ALEXANDER, THE NEW JIM CROW (2010). On the other hand, many have observed that the narrative constructed around opioid crisis is notable for its whiteness. *See, e.g.*, Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 771, 789 (2020); Julie Netherland and Helena B. Hansen, *The War on Drugs That Wasn't: Wasted Whiteness, "Dirty Doctors," And Race in Media Coverage for Prescription Opioid Misuse*, 40 CULT MED PSYCHIATRY 664 (2016). According to a 2016 National Survey on Drug Use and Health, the prevalence of opioid use disorder was highest among white Americans (72.29%), with a lower prevalence along Black Americans and Latinx Americans (9.23% and 13.82%, respectively). *See* THE WHITE HOUSE, THE PRESIDENT'S COMM'N ON COMBATING DRUG ADDICTION AND THE OPIOID CRISIS (2017), https://www.hsdl.org/?view&did=805384 [https://perma.cc/VBD8-8VJC]. Of the 450,000 opioid overdose related deaths between 1999 and 2018, white Americans represented the largest proportion each year. *See Opioid Overdose Deaths by Race/Ethnicity*, KAISER FAMILY FOUNDATION (Nov. 14, 2020), https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/?currentTimeframe=3&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/LQ4S-YZZ5]. As observed by legal scholar Khiara M. Bridges, while the opioid crisis did not "disproportionately" affect white people, given that white Americans comprise 77% of the United States population, the sheer number of white people that died from opioid overdose led to the construction of the opioid crisis as being "fundamentally about" white people. *See* BRIDGES,

The Family First Act does not require states to use any specific prevention model. Nevertheless, examining the prevention paradigm is important because prevention is a significant guiding principle of the Family First Act.

Prevention is not a new concept within federal family regulation policy.[89] In the early 2000s, federal policy increasingly shifted its focus (though not necessarily through funding) to prevention efforts.[90] Specifically, it embraced prevention programming supporting "protective factors," deemed by some as "necessary to help families offset parenting stress and make children and families safer."[91] The federal Children's Bureau explains, "[a] protective factors approach to the prevention of child maltreatment focuses on positive ways to engage families by emphasizing their strengths and what parents and caregivers are doing well, as well as identifying areas where families have room to grow with support."[92]

Among the protective factors centered in federal family regulation policy are "[p]arental resilience," "[n]urturing and attachment," "[k]nowledge of parenting and child development," "[c]oncrete supporting times of need," "[s]ocial connections," and "[s]ocial-emotional competence of children."[93] Fundamentally, the protective factors prevention model focuses squarely on parental behavior modification, with the goal of helping "children, youth, and families build resilience and develop skills, characteristics, knowledge, and relationships that offset risk exposure and contribute to both short- and long-term positive outcomes."[94] With respect to parents, the federal Children's Bureau Child Welfare Information Gateway explains that

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supra note 88, at 789. Worth further exploration and research is the extent to which the perception of the opioid crisis as a "white crisis" created an imperative among lawmakers and policymakers to financially incentivize prevention-oriented family regulation system interventions rather than swift removal to the foster system.

[89] CHILD.' BUREAU, CHILD MALTREATMENT PREVENTION: PAST, PRESENT, AND FUTURE 4 (2017) 4, https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf [https://perma.cc/7WLN-G4JX].

[90] *Id.*

[91] *Id.*

[92] CHILD.' BUREAU, PROTECTIVE FACTORS APPROACHES IN CHILD WELFARE 2 (2020), https://www.childwelfare.gov/pubPDFs/protective_factors.pdf [https://perma.cc/XGV8-843G].

[93] *Id.*

[94] *Id.*

protective factors "can serve as safeguards, helping parents who otherwise might be at risk find resources, support, or coping strategies that allow them to parent effectively—even under stress."[95]

Absent from the prevention model and protective factors approach is any offering of concrete solutions to the structural obstacles facing Black and other marginalized people—including lack of access to affordable housing; child care; health care; jobs that pay a living wage; environmental injustice; food insecurity; and mass incarceration.[96] This omission is even more striking because many studies find that addressing these exact structural barriers, and lack of material resources, correlate with reductions of what the family regulation system considers "child maltreatment."[97] For instance, one study found that increases in minimum wage corresponded with a reduction in family regulation system involvement, particularly reports of neglect involving young children (aged 0–5) and school-aged children (aged 6–12).[98] Based on these findings, the researchers suggest that "[i]mmediate access to increases in disposable income may affect family and child well-being by directly affecting a caregiver's ability to provide a child with basic needs . . . ."[99] Yet another study examined the relationship between states' earned income tax credits (EITC) with rates of child maltreatment reports. The study found that availability of the EITC benefit corresponded with lower rates of reported child neglect.[100] The

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[95] *Id.* at 1.

[96] *See See* Darrick Hamilton, *Neoliberalism and Race*, DEMOCRACY J., https://democracyjournal.org/magazine/53/neoliberalism-and-race/ [https://perma.cc/XWF7-8RXQ] (last visited Mar. 18, 2021) (discussing the myriad factors that have prevented Black Americans from achieving economic inclusion in the United States).

[97] *See* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 39 (collecting studies). *See also* Kelley Fong, *"The Tool We Have": Why Child Protective Services Investigates So Many Families and How Even Good Intentions Backfire*, COUNCIL ON CONTEMP. FAM. (Aug. 11, 2020), https://contemporaryfamilies.org/cps-brief-report/ [https://perma.cc/ZG3V-H9S9] (collecting studies).

[98] *See* Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does The Minimum Wage Affect Child Maltreatment Rates?*, 72 CHILD. & YOUTH SERVS. REV. 60, 63–66 (2016).

[99] *Id.* at 65.

[100] Nicole L. Kovski et al., *Association of State-Level Earned Income Tax Credits With Rates of Reported Child Maltreatment, 2004–2017*, 20 J. CHILD MALTREATMENT 1, 1 (2021).

researchers found that the more generous the states' ETIC, the greater the decline in rates of reported child neglect.[101] Despite these findings, the federal family regulation system approach to prevention focuses not on eradicating poverty and adversities stemming from it, but rather on enhancing parents', children's, and families' capacity to cope with their living conditions and the "risk factors" that they face.

IV. THE FAMILY FIRST ACT CODIFIES THE FAMILY REGULATION SYSTEM'S INVESTMENT IN PATHOLOGIZING, CONTROLLING, AND PUNISHING BLACK MOTHERS

Having identified a prevention model as the solution to the opioid and foster system crises, the Family First Act was hailed as a "fundamental re-ordering of foster care."[102] Lawmakers proclaimed that the law was enacted to "fundamentally shift child welfare from separating families to strengthening them."[103] Indeed, the Act's core aim is to "prevent[] child abuse and neglect primarily through strengthening the resiliency and protective capacity of families."[104] Lauded by many for its sweeping changes to federal family regulation system's spending policy, little attention has been given to how the Family First Act codifies the family regulation's system reliance on pathology, control, and punishment.

A. The Family First Act: A Continued Myopic Focus on Perceived "Parental Defects"

Like the federal family regulation policy that preceded it, and in conformity with the prevention paradigm, the Family First Act embraces pathology and a behavior modification theory of change. In the three areas of time-limited prevention for which states may seek Title IV-E reimbursement, the Act focuses on shifting parental behavior, whether it be their mental health,

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[101] *Id.*

[102] Heimpel, *supra* note 76.

[103] H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75; (opening remarks of Representative Adrian Smith, Chairman of the House Ways and Means Subcomm. on Hum. Res.).

[104] Jerry Milner, *Trump's Top Child Welfare Official: Family First a Good First Step, but True Prevention is Key*, IMPRINT (Feb. 14, 2018), https://imprintnews.org/featured/trumps-top-child-welfare-official-family-first-good-first-step-true-prevention-key/29901 [https://perma.cc/8948-ZSUC].

substance use, or parenting skills. Indeed, to be eligible for Family First Act reimbursement, many programs—including in-home parenting skills, mental health, and substance abuse treatment—must contain a counseling or behavioral therapeutic component.[105] To understand the centrality of behavior modification, one need only look at the programs that have been approved thus far by the Prevention Services Clearing House. Consider a few of the prevention services that have been rated by Prevention Services Clearing House as "well supported":

- **Brief Strategic Family Therapy** uses "structured family systems approach to treat families with children . . . who display or are at risk for developing problem behaviors including substance abuse, conduct problems, and delinquency." The "intervention components" are: (1) counselors "establish relationships with family members to better understand and 'join' the family system"; (2) counselors observe the ways that family members behave together/interact with each other; and (3) "counselors work in the present, using reframes, assigning tasks and coaching family members to try new ways of relating to one other to promote more effective and adaptive family interactions."[106]
- **Motivational Interviewing** is a counseling program "designed to promote behavior change and improve physiological, psychological, and lifestyle outcomes." The Motivation Interviewing model seeks to "identify ambivalence for change and increase motivation by helping clients progress through five stages of change: pre-contemplation, contemplation, preparation, action, and maintenance."[107]

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[105] SANDRA JO WILSON ET AL., OFFICE OF PLAN., RSCH., & EVALUATION, ADMIN. FOR CHILD. & FAMS', TITLE VI-E PREVENTION SERVICES CLEARINGHOUSE: HANDBOOK OF STANDARDS AND PROCEDURES, VERSION 1.0 2–3 (2019), https://preventionservices.abtsites.com/themes/ffc_theme/pdf/psc_handbook_v1_final_508_compliant.pdf [https://perma.cc/937D-VGGR].

[106] *Brief Strategic Family Therapy*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/programs/251/show [https://perma.cc/5LSX-RHXV] (last updated Dec., 2020).

[107] *Motivational Interviewing*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/programs/256/show [https://perma.cc/DX5V-PZMU] (last updated Dec., 2020).

- **Healthy Families America** is a home visiting program where the goal is to "cultivate and strengthen nurturing parent-child relationships, promote healthy childhood growth and development, and enhance family functioning by reducing risk and building protective factors."[108]
- **Parents as Teachers** is a home visiting program that "teaches new and expectant parents skills intended to promote positive child development and prevent child maltreatment." The core components of Parents as Teachers are: "personal home visits, supportive group connection events, child health and developmental screenings, and community resource networks."[109]
- **Homebuilders – Intensive Family Preservation and Reunification Services** is an "in-home counseling, skill building[,] and support service[] for families," that uses intervention strategies such as "Motivational Interviewing, a variety of cognitive and behavioral strategies, and teaching methods intended to teach new skills and facilitate behavior change."[110]

Absent from all but one (Homebuilders) of the programs' descriptions is *any* reference to the provision of material resources as an intervention strategy. Consistent with the prevention paradigm, all of the programs center, and indeed several explicitly highlight, behavior modification as a core objective.

The Family Fist Act's focus on individual behavior modification suggests that a core ideology, like the federal family regulation policy that preceded it, is the notion that parents' behaviors and choices are to blame for the circumstances that led to their family's involvement in the family regulation system. In other words, under the Family First Act, it is still the choices of

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[108] *Healthy Families America*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/programs/253/show [https://perma.cc/PYG5-GWPF] (last updated Dec., 2020).

[109] *Parents as Teachers*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/programs/250/show [https://perma.cc/R9Z4-DEP8] (last updated Dec., 2020).

[110] *Homebuilders – Intensive Family Preservation and Reunification Services*, TITLE IV-E PREVENTION SERVS. CLEARINGHOUSE, https://preventionservices.abtsites.com/programs/254/show [https://perma.cc/2TA9-LHRD] (last updated Dec., 2020).

Black mothers, and their personal "deficits," rather than the structures that reinforce and reproduce privilege and disadvantage, that threaten Black children most.

But to place blame on individual character flaws as the reason for families being involved in the family regulation system is a political choice that has long been used to stymie critique of and challenges to the structures that uphold privilege and disadvantage. Many families impacted by the family regulation system, activists, scholars, researchers, and advocates have noted that poverty is an overwhelming and unifying characteristic of the families enmeshed in the family regulation system.[111] Neither the Family First Act, nor the prevention paradigm guiding it, contends with, nor reckons with the fact that these disproportionalities become all the starker for Black children. Neither the Act, nor its fundamental paradigm puts federal family regulation system dollars towards addressing the reality that Black people are overrepresented in the population of people living in poverty in the United States.[112] Rather than building out a radical anti-poverty program, the Family First Act builds out behavior modification program.

As a concrete example, "inadequate housing" was identified as a "circumstance associated with a child's removal" in 10% of children entering the foster system each year between 2016 and 2019.[113] Research shows that a lack of access to stable

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[111] Appell, *supra* note 56, at 583; CHILD.' BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (NSCAW) 8–32 (2005) [hereinafter CHILD.' BUREAU, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING], https://files.eric.ed.gov/fulltext/ED501301.pdf [https://perma.cc/X8SU-U8XS] (noting that of the families involved in the family regulation system, nearly 40% fall below the poverty line).

[112] JOSEPH DALAKER ET AL., CONG. RSCH. SERV., R44698, DEMOGRAPHIC AND SOCIAL CHARACTERISTICS OF PERSONS IN POVERTY: 2015 5–6 (2016), https://greenbook-waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/R44698%20-%20Demographic%20and%20Social%20Characteristics%20of%20Persons%20in%20Poverty%20-%202015.pdf [https://perma.cc/S6RR-FNGN].

[113] *See* CHILD.' BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES AS OF OCT 20, 2017 - NO. 24 (2017), *supra* note 82; CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018 - NO. 25 (2018), *supra* note 82; CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2018 ESTIMATES AS OF AUGUST 22, 2019 - NO. 26 (2019), *supra* note 82; CHILDREN'S BUREAU, THE AFCARS REPORT: PRELIMINARY FY 2019 ESTIMATES AS OF JUNE 23, 2020 - NO. 27 (2020), *supra* note 82.

and safe housing can have a range of negative effects on children's health, development, educational achievement, and emotional wellbeing.[114] Research also shows that stable housing plays an important role in people's recovery from substance use disorder, yet people with substance use disorders face myriad barriers to affordable housing.[115]

Housing insecurity is also linked to food insecurity.[116] In 2015, nearly 16 million households in the United States were food insecure.[117] And just as the family regulation system disproportionately affects marginalized communities, so too does food insecurity. Due to historic racialized policies that diminished resources in marginalized communities, food insecurity "disproportionately affects racial and ethnic minorities, low-income families, and households with children . . . ."[118] To this point, one study found that nearly one quarter of families enmeshed in the family regulation system had trouble paying for basic necessities.[119] Given the numerous impacts that housing and food insecurity has on people's lives, it is not surprising that various international organizations—including the World Health Organization and the United Nations Commission for Human Rights—have recognized the critical importance of adequate housing. Specifically, the World Health Organization advised that "[i]mproved housing conditions can

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[114] Veronica Gaitan, *How Housing Affects Children's Outcomes*, URBAN INSTITUTE (Jan. 2, 2019) https://housingmatters.urban.org/articles/how-housing-affects-childrens-outcomes [https://perma.cc/W6TQ-CN7S].

[115] *See* CTR. ON BUDGET & POL'Y PRIORITIES, MEETING THE HOUSING NEEDS OF PEOPLE WITH SUBSTANCE USE DISORDERS 1–2 (2019), https://www.cbpp.org/sites/default/files/atoms/files/5-1-19hous.pdf [https://perma.cc/AV26-W6GA]; SUSAN G. PFEFFERLE ET AL., U.S. DEP'T OF HEALTH & HUM. SERVS., CHOICE MATTERS: HOUSING MODELS THAT MAY PROMOTE RECOVERY FOR INDIVIDUALS AND FAMILIES FACING OPIOID USE DISORDER iv (2018), https://aspe.hhs.gov/system/files/pdf/261936/Choice.pdf [https://perma.cc/4SSN-KQEE] (noting the well-established association between Opioid Use Disorder and homelessness, and finding that lack of stable housing creates barriers to engaging in Medication Assisted Treatment, which is a well-documented evidence based treatment to treat Opioid Use Disorder).

[116] Kierra S. Barnett, Glennon Sweeney & Mikyung Baek, *Food or Shelter? An Introduction to Understanding the Connections between Housing and Food Insecurity*, MEDIUM (Aug. 1, 2017), https://medium.com/the-block-project/food-or-shelter-156928546a0e [https://perma.cc/ZHU9-AUNV].

[117] *Id.*

[118] *Id.*

[119] CHILD.' BUREAU, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING *supra* note 111.

save lives, prevent disease, increase quality of life, reduce poverty, [and] help mitigate climate change . . . ." among other things.[120] Recognized as a basic human right by international human rights law, the United Nations Commission for Human Rights takes an expansive view of the right to adequate housing and urges that the right be seen as "the right to live somewhere in security, peace and dignity."[121]

And although research shows that it is nearly impossible for families to achieve housing stability without access to subsidized housing, the subsidized housing stock decreased at the same time that need for subsidized housing has "skyrocketed."[122] Indeed, the United States' approach to housing insecurity and inequality is a political choice that continues to fuel the racial wealth gap.[123] Take for instance, housing policies like the mortgage interest tax deduction bestow the greatest benefits on wealthy families, and exclude in its entirety those who do not own a home.[124] As household wealth increases, so too do the benefits from the mortgage interest tax deduction.[125] The prioritization of wealth over the reduction of poverty is even clearer when comparing the housing subsidies. In 2015, the cost of the mortgage interests and property tax deductions was $90 billion dollars, while the cost for federal rental assistance programs was $51 billion, nearly $40 billion less.[126]

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[120] WORLD HEALTH ORGANIZATION, WHO HOUSING AND HEALTH GUIDELINES: EXECUTIVE SUMMARY 4 (2018), https://www.who.int/publications/i/item/9789241550376 [https://perma.cc/6758-XTY7].

[121] Office of U.N. High Comm'r for Hum. Rts., *The Right to Adequate Housing* 3 (2009), https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf [https://perma.cc/7VZB-HL8J].

[122] *Child Homelessness: A Growing Crisis*, U.S. DEP'T HEALTH & HUM SERV., SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/child-homelessness-growing-crisis [https://perma.cc/7MF2-B9M2] (last updated July 31, 2019).

[123] *See generally* INST. ON ASSETS AND SOC. POL'Y & NAT'L LOW INCOME HOUS. COAL., MISDIRECTED INVESTMENTS: HOW THE MORTGAGE INTEREST DEDUCTION DRIVES INEQUALITY AND THE RACIAL WEALTH GAP 5 (2017), https://heller.brandeis.edu/iasp/pdfs/racial-wealth-equity/racial-wealth-gap/misdirected-investments.pdf [https://perma.cc/KP6H-7BE2].

[124] *Id.*

[125] *See id.*

[126] Ezra Levin & David Meni, *The Biggest Beneficiaries of Housing Subsidies? The Wealthy.*, TALK POVERTY (June 30, 2016), https://talkpoverty.org/2016/06/30/biggest-beneficiaries-housing-subsidies-wealthy/ [https://perma.cc/F5G5-WBM6].

Federal housing policy, on the one hand, creates protective barriers around wealth and furthers wealth concentration. On the other hand, where the family regulation system reflexively pathologizes parents, housing instability among those within in the system is often attributed to personal "deficits." In fact, one study found that while families were more likely to identify needing assistance, such as housing, family regulation system case workers more readily identified and prioritized the needs related to perceived parental deficits.[127] Yet another study found that family regulation system case workers in Connecticut "could offer little to address families' chronic material needs."[128] Sociologist Kelley Fong notes, "[m]aterial hardship creates conditions that make child maltreatment more likely . . . but CPS is structured around addressing parents' abusive and neglectful behaviors, not meeting families' persistent needs."[129] Fong further points out that while for families in New Haven "housing needs were paramount," CPS lacked the ability to provide rental assistance or address this need in any sustained way.[130] Born out of a prevention paradigm—again, which is rooted in pathology—it is unsurprising the Family First Act is not structured to provide housing or the material resources necessary to secure safe, stable housing. The Act instead continues the tradition of behavior modification as *the* policy solution to the problems faced by system-involved families.

B. The Family First Act: A Continuation of The Family Regulation System Tradition of Expansive Control

As noted above, federal family regulation policy of the 1980s and 1990s exercised expansive control over parents caught up in the system. To engender compliance with therapeutic interventions, including intense monitoring and mandatory "services," federal family regulation policy funded coercive techniques—mainly the removal of children from their families to the foster system. The Family First Act does not disrupt

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[127] *See generally* Mark E. Courtney et al., *Housing Problems Experienced by Recipients of Child Welfare Services*, 83 CHILD WELFARE 393 (2004).

[128] Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 624 (2020).

[129] *Id.*

[130] *Id.*

federal family regulation system's embrace of expansive control over Black families. The Family First Act merely shifts the fundamental goal of coerced immediate removal of children to the foster system to the *threat* of removal to the foster system.

To exercise expansive control over families subjected to the family regulation system, the Family First Act relies on a familiar set of tools. As with the federal family regulation policy that preceded it, ongoing monitoring is central to the Family First Act. For instance, the Act requires ongoing, periodic risk assessments during the period in which prevention services are provided. To achieve this, the Act necessarily anticipates monitoring of families by family regulation system agency case workers.[131]

While few things approach the level of violence that is family separation, persistent, unconstrained government monitoring and supervision is not benign. And the threat of family separation to compel acquiescence can be equally traumatic. Family regulation system monitoring creates a level of surveillance that is unimaginable for those with racial and class privilege.[132] As Fong notes, "merged supportive and coercive capacities [of the family regulation system] yield an expansive, stratified, and distressing surveillance, with everyday system interactions—a doctor's visit, a child going to school—opening families up to the state."[133] Those under the family regulation system's critical and constant gaze are required to open their homes to family regulation system workers whenever those workers appear, answer far-reaching inquiries into their mental health, medical, sexual, and romantic histories. And they must

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[131] CHILDREN'S DEFENSE FUND ET AL., IMPLEMENTING THE FAMILY FIRST PREVENTION SERVICES ACT: A TECHNICAL GUIDE FOR AGENCIES, POLICYMAKERS AND OTHER STAKEHOLDERS (2020), https://www.childrensdefense.org/wp-content/uploads/2020/07/FFPSA-Guide.pdf [https://perma.cc/T76V-9DY6].

[132] *See also* We Be Imagining Podcast, *Minisode 4 - Mother's Day in the Trenches: Abolishing the Child Welfare System*, AM. ASSEMB. (May 10, 2020), https://americanassembly.org/wbi-podcast/minisode-child-welfare-ae7rh-84pj52-254c6-kxlej [https://perma.cc/Q33X-Y6Q7] (activist and organizer Joyce McMillan discussing the expansive surveillance of Back families in New York City by the Administration for Children's Services, New York City's family regulation system agency).

[133] Fong, *supra* note 128, at 628.

disclose this otherwise protected and deeply private health information.[134]

Implicit in the family regulation system intervention is the government's signal to children that their parent is no longer their protector. The government removes parents' ability to shield their children from the governments' equally invasive and traumatizing interventions, including far reaching family regulation system agency inquiries about the family's "functioning" and composition in both the home and at children's schools, and strip-searches. If parents do not acquiesce, they can be reported as "non-compliant," defiant, and meriting further suspicion and surveillance.[135] Nor are parents' family, friends, community members, or social service providers off limits. Rather, case workers seek information about the parent from parents' extended network, and indeed deputize parents' communities and social service providers as *de facto* extensions of the family regulation system monitoring and surveillance apparatus.[136] External entities upon which families depend for

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[134] *See id.* at 623 (noting that "CPS investigations are much more informationally invasive," involving multiple home visits, far reaching interviews of all household members and criminal background checks of all household members). *See also* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 518 (2005).

[135] *See* 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, 132, 138–139 (2019); Emma S. Ketteringham et al., *supra* note 52, at 95.

[136] Similar forms of commandeering are also apparent in the way that social service agencies operate with respect to Black, Latinx, Indigenous, and low-income families. Sociologist Kelley Fong explains, "Child welfare surveillance of families encompasses not only surveillance by child welfare authorities[,] . . . but also a more extensive monitoring by other entities *for* child welfare authorities," such as the health care system. Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1786 (2019). Fong's research reveals that parents identified risks in interactions with social service providers such as health care systems, and "acknowledged their vulnerability to [child welfare] reports because professionals could misconstrue their best efforts to parent their children." *Id.* at 1792. While in some extreme situations parents avoided social service systems all together, Fong found that most often parents engaged in "selective visibility, concealing personal details or behaviors as they interacted with systems." *Id.* at 1793.

vital services "not only broker resources[,] . . . but also broker surveillance."[137]

To fully appreciate the family regulation system's expansive reach, it is imperative to understand the system's shift from incentivizing and relying on separation of the family unit and removal of the child at the system's inception, to intensive monitoring and supervising of the family with the threat of family separation. These two mechanisms are a continuum rather than separate, unrelated systems of control. Given the Family First Act's reliance on intensive monitoring as a mechanism of control, one open question is whether the Family First Act will reduce the number of families enmeshed in state family regulation systems. Because of the Family First Act's recent enactment, there is not yet data available to know the outcome of the policy shift. New York, however, made a state-level policy change prior to the enactment of the Family First Act, and thus is an interesting frame of reference.

If the Act's implementation is anything like New York, the Family First Act will likely not reduce the number of families with the family regulation system. In the early 2000s, New York State redirected a stream of family regulation system funding toward prevention services.[138] Following this funding shift, New York City's foster population decreased from more than 40,000 to just over 8,000.[139] Coinciding with the decrease in NYC foster population was a massive increase in intensive monitoring and supervision by way of prevention services, which fall under the purview of NYC's family regulation agency, the Administration for Children's Services (ACS). As of 2019, over 45,000 families were under prevention services, administered by the NYC's Administration for Children's Services.[140] As such, in New York

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[137] Fong, *supra* note 128, at 629.

[138] NEW YORK STATE OFFICE OF CHILD. & FAM. SERVS., FINAL REPORT TO THE LEGISLATURE CHILD WELFARE FINANCING: DECEMBER 2006 2–3 (2006), https://ocfs.ny.gov/main/reports/CWF_12_2006.pdf [https://perma.cc/U6DV-4XT3]. *See also* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 50.

[139] MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, 50–51. It is also important to point out that also during this time period New York became home to the first institutional providers of family defense for parents in New York City. This shift to high quality parent defense very likely was a large contributing factor to the reduction of children in New York City's foster system.

[140] NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, CHILDREN* SERVED BY CHILD WELFARE PREVENTION SERVICES BY HOME

State, the family regulation system's controlling reach over Black families remains expansive.[141] Likewise, the Family First Act is likely to expand states' control over Black families. Further emphasizing this point is the Act's spending flexibility, allowing state family regulation systems to move more "upstream;" or in other words, enable earlier interventions into families' lives.[142]

Beyond ongoing monitoring, the Family First Act tethers eligibility for reimbursement for prevention services to the maintenance of a "prevention plan" that identifies "the foster care prevention strategy for the child so that the child may remain safely at home . . . ;" as well as the list of services provided "to ensure the success of that prevention strategy."[143] Among the services that will be more available as a result of the Act are drug treatment programs and mental health services. If the Act's goals are met, and families within the family regulation system have greater access to drug treatment and mental health programs, those families may avoid state-imposed family separation. To be clear, recognizing a greater availability of services may help some families does not mean that those families necessarily pose a risk of harm to their children. Nevertheless, engaging in services (regardless of the actual risk of harm to the child) *can, and often*

BOROUGH/CD, CY 2019 (2019), https://www1.nyc.gov/assets/acs/pdf/child_welfare/2020/ChildrenReceivingPreventiveServicesByCDCY2019.pdf [https://perma.cc/6X2F-V89T].

[141] Warranting further research are the parallels between the expansive reach of the family regulation system by way of monitoring and supervision and the criminal legal system by way of probation and parole. According to the Prison Policy Initiative points out that we must "understand[ ] correctional control beyond incarceration [as that] gives us a more accurate and complete picture of punishment in the United States . . . ." Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html [https://perma.cc/L4R5-437P]. She observes, "[t]outed as alternatives to incarceration, these systems often impose conditions that make it difficult for people to succeed, and therefore end up channeling people in prisons and jails." *Id.* Similar arguments can be made about family regulation system services, which in many circumstances function to enmesh families deeper within the family regulation system, rather than allow the family to escape it. Moreover, for families subject to non-court-ordered prevention services, failure to comply can lead to family court intervention, and for in-tact families subject to family court monitoring, failure to comply with service plans can lead to family separation.

[142] H. COMM. ON WAYS & MEANS, OPIOID HEARING, *supra* note 75.

[143] *See* Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 50711, 132 Stat. 64 (2018).

does, mean the difference between family unity and family separation. To the extent that the Act achieves less forced family separation, this will be an undoubtedly meaningful and important change.

We must question, however, whether greater access to substance abuse treatment and mental health services alone connotes that the family regulation system has shifted to a system of true support from a system rooted in expansive control. It does not. Instead, the Family First Act disguises "mandatory measures as compassionate rehabilitation" and "redefin[es] . . . coercion as compassionate pedagogy . . . ."[144] Sociologist Allison McKim has written expansively on mandated addiction treatment. This tool is heavily relied upon by the criminal system and the family regulation system, and carries with it carceral logics and techniques.[145] With respect to a mandated drug treatment program, McKim noted that although the program used "practices and therapeutic language" to conceal the program's coercive power, it compelled compliance by using the threat of incarceration or continued forced separation from one's child.[146] Dawn Moore, a law and legal studies scholar, has, through the lens of drug treatment courts, challenged the rigid distinctions often drawn between care and control. Moore notes that in drug treatment courts "control is eschewed as an explicitly state goal in favor of the ethic of care intended to 'cure the offender of her addictions."[147] In this space, care and coercion go hand in hand. And though drug treatment court is framed as having "more benevolent goals, the means to achieving those goals do not sit outside a system whose impact . . . is primarily exerted through a power hierarchy that governs those who come before it."[148]

Similarly, where the family regulation system is the oversight apparatus for parents' substance abuse treatment and/or mental health services, a lack of progress in treatment and relapses often serve as indictments on one's ability to parent their child, as basis for court intervention, to remove children,

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[144] Campbell, *supra* note 30, at 902.

[145] *See generally* ALLISON MCKIM, ADDICTED TO REHAB: RACE, GENDER, AND DRUGS IN THE ERA OF MASS INCARCERATION (2017).

[146] *Id.* at 66.

[147] Dawn Moore, *The Benevolent Watch: Therapeutic Surveillance in Drug Treatment Court*, 15 Theoretical Criminology 255, 256 (2011).

[148] *Id.* at 257.

and, in some cases, to terminate parental rights. Those who are tasked with treating parents—e.g., counselors, case workers, therapists—serve as arms of the family regulation system. They report not only on one's progress, but on every behavior that might assist the family regulation system worker in determining whether the parent is a fit parent. Thus, a counselor—in theory the parents' support—is also an extension of their investigator, prosecutor, and adjudicator. And as Angela Y. Davis, poignantly observes, "[i]ncreased punishment is most often a result of increased surveillance."[149] "Insight" and surveillance intrinsically become linked to control and coercion through the Act. The investigator, prosecutor, and adjudicator—the case worker in this instance—determine whether a parent benefits from, and complies with, the system's programs.

Activists, scholars, and advocates note that the prevention plans are determined with little more than a list of standardized services doled without any consideration of the families' individual needs, much less their material needs.[150] Often, parents feel that they have no other choice but to engage in the mandated services in order to protect their familial integrity.[151] Unquestioning "compliance" with family regulation system monitoring, and prevention plans, is most often the paramount concern. Thus, eliminating the parent's self-determination and autonomy within the state's treatment plan.

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[149] ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 29 (2005); *See also* Moore *supra* note 147, at 263 (observing that in drug treatment court, "the more contact, the more surveillance, the more chances [a person] will be observed making mistakes and thus more opportunities for punishment as part of [their] treatment").

[150] *See e.g.*, ROBERTS, SHATTERED BONDS, *supra* note 3, at 79–81 (observing that child services service plans generally bear little resemblance to a family's needs, and were often, rather a checklist of requirements parents had to complete in order reunite with their children); Burrell, *supra* note 135, at 138–139; Emma Ketteringham, *Live in a Poor Neighborhood? Better be a Perfect Parent.*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html [https://perma.cc/S22V-HW93]; Emma S. Ketteringham et al., *supra* note 52, at 95; Annett Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 775 (2001), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1458&context=mjlr [https://perma.cc/9FBD-FN35] (noting the routine failure of child service agencies to provide "meaningful and sufficient services to support or reunify the families"); Appell, *supra* note 56, at 597–599;

[151] *See* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 30, 95–97.

As Roberts observes, "[c]ompliance overshadows the child's needs or parent's ability to care for the child or even the truth of the original charges of maltreatment."[152] Thus, the family's fate—how long the family will be in the family regulation system's gaze, whether the family will be subject to court intervention, whether the family will be forcibly separated, and whether and when they will reunify—rests on whether the parent completed their class, attended treatment sessions, or submitted to evaluations and drug screens.[153] The same is likely to be true under the Family First Act for two reasons. First, the Act only authorizes reimbursement for children identified by state family regulation agencies as being "at imminent risk of entering foster care;" yet such children can remain safely at home with forced participation in prevention services.[154] And second, nothing in the Act eliminates removal to the foster system as a response for resistance to, and non-compliance with, family regulation system control.

C. The Family First Act Exists in an Ecosystem of Punishment

Finally, as noted above, the Family First Act, like preceding policy, utilizes coercion to engender compliance. Underpinning this coercion is the state's power to forcibly separate children from their parents. To be clear, the Act does not remove this coercive power. As such, whereas ASFA and preceding policy relied on the immediate removal of children to the foster system to compel compliance, the Family First Act forces compliance with the ever present *threat* of removal to the foster system.

ASFA, moreover, and its adoption imperative still remain firmly in place. It serves as an implicit reminder that failure to modify behavior and remedy perceived parental "deficits" through the Act's prevention interventions can still lead to removal to the foster system, termination of parental rights, and fast-tracked adoptions. In fact, the Family First Act reauthorizes the adoption and guardianship incentives program ushered in by the Preventing Sex Trafficking and Strengthening Families Act

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[152] ROBERTS, SHATTERED BONDS, *supra* note 3, at 80.

[153] *Id.*; *see also* MOVEMENT FOR FAMILY POWER ET AL., *supra* note 7, at 75 (noting, "[a] single positive drug test after a period of abstinence could topple the progress of a case, resulting in the removal of a child from a home . . . .").

[154] *See* FIRST FOCUS CAMPAIGN FOR CHILDREN, *supra* note 74, at 1; Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (2018).

of 2014, which created financial incentives for states to increase the adoption and guardianship of children, in particular older children, in the foster system.[155] Specifically, the Act authorizes $43 million for the program.[156] The Act also designates "[s]upporting and [r]etaining foster families" as a "[f]amily [s]upport [s]ervice," and makes available to states $8 million in competitive grants "to support . . . the recruitment and retention of high-quality foster families to increase their capacity to place more children in [foster] family settings . . . ."[157]

Clear from the Family First Act's provisions, and recent statements from some of the allegedly more liberal Children's Bureau leaders, is the firm belief that there will always be a need for a foster system.[158] Thus, the Act does not remove punishment as a pillar on which the family regulation system rests. Rather, under the Act, punishment by way of removal to the foster system, termination of parental rights, and adoption—all with varying financial incentives—continues to be available to state family regulation agencies.

V. RECOMMENDATIONS

Having identified how the Family First Act maintains the family regulation system's core pillars—pathology, expansive control, and punishment—the question remains, what do we do

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[155] CHILDREN'S DEFENSE FUND ET AL., *supra* note 131.

[156] Mary Boo, *The Family First Prevention Services Act Becomes Law*, N. AM. COUNCIL ON ADOPTABLE CHILD., https://www.nacac.org/resource/family-first-prevention-services-act-becomes-law/ [https://perma.cc/3MY7-S8U6]. (last visited Mar. 19, 2021).

[157] Bipartisan Budget Act of 2018 § 50751.

[158] David Kelly & Jerry Milner, *High-Quality Legal Representation is Critical to Creating a Better Child Welfare System*, A.B.A. (July 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/high-quality-legal-representation-is-critical-to-creating-a-bett/ [https://perma.cc/DYB3-YREZ] (noting the historic and current failing of the family regulation system, yet simultaneously affirming that "there will likely always be a need for child protective services and for foster care . . . ."); Daniel Heimpel, *In Era of Family Separation, a Top Administration Official Vows to Fight the Practice in Child Welfare*, IMPRINT (Apr. 17, 2019, 4:01 AM), https://imprintnews.org/politics/in-era-of-family-separation-a-top-administration-official-vows-to-fight-the-practice-in-child-welfare/34573 [https://perma.cc/X4AK-CUVV] (quoting David Kelly, special assistant to Children's Bureau Associate Commissioner, "[w]e're not asking you to engage in magical thinking. We know that foster care will likely always be necessary, but we're absolutely convinced — absolutely convinced — that it can be dramatically lessened.").

with the family regulation system? I humbly, and emphatically, echo the calls of families impacted by the system, activists, agitators, community organizations, advocates, and scholars to abolish the family regulation system.

There is no reforming a system that stems from anti-Black racism, classism, ableism, and patriarchy. There is no reforming a system that serves as a tool to uphold white supremacy. Yet, the family regulation system was neither erected in a day, nor will it be dismantled in a day. While progress toward abolition may at times be incremental, "[a]bolitionist steps are about gaining ground in the constant effort to radically transform society . . . ," and "chipping away at oppressive institutions rather than helping them live longer."[159] As Rachel Herzing explains, "[m]aking incremental changes to the systems, institutions and practices that maintain systemic oppression and differentially target marginalized communities is essential to shifting power."[160]

Guiding our imagination and struggle toward abolition should be the abolitionist principles developed by prison industrial complex (PIC) abolitionist movement leaders, organizers, and strategists. Adapted to the family regulation system context, I suggest we use the following guiding questions, developed by Survived and Punished New York:

> 1. Does the reform (as a whole or in part) legitimize or expand the policing system we are trying to dismantle?
>
> 2. Does the reform benefit parts of the family regulation system, industries that profit from the family regulation system, or elected officials who sustain the family regulation system?
>
> 3. Do the effects the reform creates already exist in a way we have to organize against? Will we, or others, be organizing to undo its effects in five years?

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[159] Critical Resistance, *Abolitionist Steps*, *in* THE ABOLITIONIST TOOLKIT 48, 48 (2004), http://criticalresistance.org/wp-content/uploads/2012/06/Ab-Toolkit-Part-6.pdf [https://perma.cc/TGB6-KUTS].

[160] Rachel Herzing, *Big Dreams and Bold Steps Toward a Police-Free Future*, TRUTHOUT (Sept. 16, 2015), https://truthout.org/articles/big-dreams-and-bold-steps-toward-a-police-free-future [https://perma.cc/58RN-8SQC].

> 4. Does the reform preserve existing power relations? Who makes decisions about how it will be implemented and enforced?
>
> 5. Does the reform create a division between "deserving" and "undeserving" people?
>
> 6. Does the reform undermine efforts to organize and mobilize the most affected for ongoing struggle? Or does the reform help us build power?[161]

With this framework, we are more likely to avoid the pitfalls of non-reformist-reforms,[162] and steer a clearer course toward abolishing the family regulation system.

And, because abolition demands not only dismantling, abolition requires our work to also include imagining and building true systems of community-based and community-defined support. I do not have the answer—nor do I think any one person should—to the question: what do we build in place of the family regulation system; or rather, the better question: how do we respond to, prevent, and heal harm within communities without causing more harm? My thinking on this question, however, is shaped by prison abolitionist activist, organizer, educator, and curator Mariame Kaba who explains that it is imperative to "transform the relationships that we have with each other so we can really create new forms of safety and justice

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[161] These guiding questions, developed by Survived and Punished NY, are in turn drawn from the thought leadership of abolitionist organizers and strategists including but not limited to, Mariame Kaba, Erica Meiners, Dean Spade, Peter Gelderloos, Movement 4 Black Lives and Law 4 Black Lives. SURVIVED AND PUNISHED NEW YORK, PRESERVING PUNISHMENT POWER: A GRASSROOTS ABOLITIONIST ASSESSMENT OF NEW YORK REFORMS 3 (2020), https://www.survivedandpunishedny.org/wp-content/uploads/2020/04/SP-Preserving-Punishment-Power-report.pdf [https://perma.cc/9HTL-26G5].

[162] A non-reformist-reform is a term coined by Andre Gorz and lifted up and expanded upon by Ruth Wilson Gilmore, mean "measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates." Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/6733-8VPC]. *See also* Mariame Kaba & John Duda, *Towards The Horizon of Abolition: A Conversation with Mariame Kaba*, NEXT SYS. PROJECT (Nov. 9, 2017), https://thenextsystem.org/learn/stories/towards-horizon-abolition-conversation-mariame-kaba [https://perma.cc/TPL8-FTEL].

in our communities."[163] Radical Black abolitionist activists, organizers, groups, and networks have long been doing, and continue to do, this work of visioning, demanding, and building a society without policing systems.[164] These visions lift up, and center, the need to transform the conditions that lead to harm—including demanding access to affordable housing, living wage employment, health care, education, and "universal, quality, and accessible childcare."[165] Additionally, examining mutual aid work—which has long existed within the abolition movement,[166] but which has become more visible during the COVID-19 pandemic and economic collapse—has been instructive. Legal scholar Dean Spade explains, mutual aid is "work to meet each other's survival needs that's based in a shared understanding that the systems we live under aren't gonna meet them and are actually causing the crises."[167] Mutual aid, meets immediate needs, builds movements and solidarity, and function as spaces "where we practice the world we're trying to live in."[168] Fundamentally, I believe that our rebuilding must be rooted in care and support that rejects rugged individualism and the stigmatization of interdependence, vulnerability, and need.

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[163] Kaba & Duda, *supra* note 162. *See also* We Be Imagining Podcast, *supra* note 132.

[164] *See Vision for Black Lives*, M4BL, https://m4bl.org/policy-platforms/ [https://perma.cc/Z55M-Y5S5] (last visited Mar. 18, 2021). *See also End The War on Black Women*, M4BL, https://m4bl.org/policy-platforms/end-the-war-black-women/ [https://perma.cc/BF27-8S6F] (last visited Mar. 18, 2021).

[165] *End The War on Black Women*, *supra* note 164; *see also End The War on Black Communities*, M4BL, https://m4bl.org/policy-platforms/end-the-war-on-black-communities/ [https://perma.cc/4BEM-ARW2] (last visited Mar. 18, 2021).

[166] One of the most famous mutual aid projects in the United States is the Black Panther Party's survival programs, including its health care clinics in the community and free breakfast program. *See* Darryl Robertson, *A Conversation with Prof. Alondra Nelson on the Black Panther Party's Fight for Health Care*, MEDIUM (Apr. 22, 2020), https://darrylrobertson3491.medium.com/a-conversation-with-prof-alondra-nelson-on-the-black-panther-partys-fight-for-health-care-126caedaf894 [perma.cc/57C5-8TQ9]. *See also* Dean Spade, *Mutual Aid is Essential to Our Survival Regardless of Who is in The White House*, TRUTHOUT (Oct. 27, 2020), https://truthout.org/articles/mutual-aid-is-essential-to-our-survival-regardless-of-who-is-in-the-white-house/ [https://perma.cc/XEA4-48G4].

[167] BARNARD CTR. FOR RSCH. ON WOMEN, WE KEEP EACH OTHER SAFE: MUTUAL AID FOR SURVIVAL AND SOLIDARITY 3 (2020), http://bcrw.barnard.edu/wp-content/uploads/2021/02/we-keep-each-other-safe-transcript.pdf [https://perma.cc/KF4W-HH5U].

[168] *Id.*

Finally, and most importantly, Kaba reminds us that "[t]he work of abolition insists that we foreground the people who are behind the walls—that we listen to them, that we take their ideas seriously."[169] Similarly, the work of abolishing the family regulation system must be centered on, and guided by, the families and communities that are caught up in it, resist it, and survive its violence and control.

VI. CONCLUSION

Enacted only in 2018, it is too early to tell precisely the impact the Family First Act will have on families enmeshed in the family regulation system. What is clear, however, is that the family regulation system is a policing system designed to uphold and further white supremacy. What is also clear is that the Act is, at its core, a continuation of prior federal family regulation policy. The ideologies and techniques that drove the modern foster system prior to the Act—pathology, expansive control, and punishment—are the very same ideologies and techniques that drive the Act. From its myopic focus on parental behavior and "deficits;" to the omission of structural factors that produce inequality; to the continued surveillance of families in the system; and to the state's power of forcing compliance and exercise expansive control, the Family First Act reflects yet another federal family regulation policy recalibration undertaken to ensure the system's survival. Given this reality, we must do what the Family First Act does not. Guided by PIC abolitionist principles, we must disrupt, dismantle, and ultimately abolish the family regulation system. Only then can we and build its place community-based structures that center dignity, self-determination, care, and support.

[169] Kaba & Duda, *supra* note 162.

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ARTICLE

ASSIMILATION, REMOVAL, DISCIPLINE, AND CONFINEMENT: NATIVE GIRLS AND GOVERNMENT INTERVENTION

Addie C. Rolnick*

A full understanding of the roots of child separation must begin with Native children. This Article demonstrates how modern child welfare, delinquency, and education systems are rooted in the social control of indigenous children. It examines the experiences of Native girls in federal and state systems from the late 1800s to the mid-1900s to show that, despite their ostensibly benevolent and separate purposes, these institutions were indistinguishable and interchangeable. They were simply differently styled mechanisms of forced assimilation, removal, discipline, and confinement. As the repeating nature of government intervention into the lives of Native children makes clear, renaming a system does not change its effect. The historical roots of these systems must be acknowledged, and the current systems must be abolished and replaced. To answer the question of what a non-punitive, non-assimilative system would look like, this Article looks to tribal courts and indigenous justice systems. It points to specific examples of how Native communities have reshaped ideas

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> *about caring for and disciplining children, including traditional adoption, kinship care, wellness courts, family group conferencing, and a "best interests" standard that emphasizes the link between individual and collective well-being.*

I. PROLOGUE: GHOST BUILDINGS

In the late 1800s, Fort Marion in Florida and Fort Sill in Oklahoma housed Native[1] prisoners of war, including Kiowa, Comanche, and Apache prisoners.[2] In 1886, a group of Apache prisoners were sent from Fort Sill to Florida; the men went to Fort Pickens and the women and children to Fort Marion.[3] Colonel Richard Pratt visited Fort Marion that year; he returned with a group of Apache children and an order that all children from the Florida prisons should be sent to his new school for Indian children in Carlisle, Pennsylvania.[4] Pratt, the architect of

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[1] This Article employs the word "Native" interchangeably with the word "indigenous" to describe the peoples indigenous to the territories that make up the present-day United States. Indigeneity is a political status and a racialized category. The "Indian" racial category (for example, on the census) includes people who are not legally considered Indians. The "Indian" legal category includes many people of mixed racial backgrounds. Neither is coextensive with the indigenous category, which may encompass anyone affiliated with colonized peoples. *See generally* Addie C. Rolnick, *The Promise of Mancari: Indian Civil Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967 (2011) (examining the relationship between the Indian legal and racial categories). Where this Article refers to specifically to the legal category of Indian (federally recognized Indian tribes and their members, a subset of indigenous people), it uses the terms "Indian" and "tribe."

[2] *See generally* ALICIA DELGADILLO & MIRIAM A. PERRETT, FROM FORT SILL TO FORT MARION, A DOCUMENTARY HISTORY OF THE CHIRACAHUA APACHE PRISONERS OF WAR, 1886–1913 (2013) (history of Apache internment at forts). *See also* Manu Vimalassery, *Antecedents of Imperial Incarceration: Fort Marion to Guantanamo*, *in* THE SUN NEVER SETS: SOUTH ASIAN MIGRANTS IN AN AGE OF U.S. POWER 350–367 (Vivek Bald et al. eds. 2103) (describing military imprisonment and torture at Fort Marion).

[3] Delgadillo & Perrett, *supra* note 2; Heather Shannon & Jeff Haozous, *The Youngest Prisoners: General Nelson A. Miles's Photographs of Apache Children*, NATIONAL MUSEUM OF THE AMERICAN INDIAN Blog (Apr. 17, 2013), https://blog.nmai.si.edu/main/2013/04/the-youngest-prisoners-general-nelson-a-miless-photographs-of-apache-children.html [https://perma.cc/VN4J-D6LT] (describing separation of Apache men, women, and children and eventual removal of children to Carlisle School); Jaime G. Vela, *Returning Geronimo to His Homeland: The Application of NAGPRA and Broken Treaties to the Case of Geronimo's Repatriation*, 1 AM. J. INDIGENOUS STUD, SI78, SI86 (2017) (describing imprisonment of Apache prisoners of war).

[4] Letter from R.H. Pratt to Comm'r of Indian Affs., Nov. 9, 1886 (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (documenting 1886 transfer of Apache children, including eight girls, from Fort Marion and noting instructions from Interior and War Departments that all children between 12 and 22 should be transferred from Fort Marion to Carlisle); Letter from R.B. Ayres to Asst. Adjutant General, May. 3, 1887 (on file with author)

the federal government's Indian boarding school program, had previously worked at Fort Marion, overseeing prisoners and creating and refining a program of assimilation that would later form the blueprint for the Carlisle School.[5] Carlisle was styled as an alternative to the strategy of killing Native people in order to solve "the Indian problem."[6] Pratt proposed instead to "kill the Indian in him and save the man."[7]

Carlisle was the first federal Indian boarding school. Pratt refined his assimilationist curriculum and disciplinary techniques on the Apache children and later generations of Native children. He employed methods developed during his time working as a prison guard at Fort Marion.[8] Carlisle's first generation of Apache children had been prisoners and then students, but the same approaches were used in the prison and the school and, indeed, the same person imposed them.

Pratt's Carlisle experiment would spawn a national network of boarding schools for Native children. The Chemawa Indian School is one of the many federally run boarding schools opened in Carlisle's image. Opened in 1880 in Oregon and then moved to a new building in 1885, Chemawa is the oldest

(avaliable at https://carlisleindian.dickinson.edu) (documenting 1887 transfer of 62 prisoners, including 32 children to Carlisle); Special Order No. 92, May. 10, 1888 (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (order from Assistant Adjutant General Whipple directing transfer of children from Fort Barrancas to Carlisle).

[5] Sarah Kathryn Pitcher Hayes, *The Experiment at Fort Marion: Richard Henry Pratt's Recreation of Penitential Regimes at the Old Fort and its Influence on American Indian Education*, 1 J. FLORIDA STUDIES 1, 2 (2018) (describing Pratt's work at For Marion and its influence on his education plan, and noting that his prison career is deemphasized by historians in favor of a focus on his work at Carlisle).

[6] For an explanation of the "problem" presented by the continuing presence of indigenous peoples on land sought by white settlers, see Nelson A. Miles, *The Indian Problem*, 128 N. AM. REV. 304 (1879).

[7] Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892). *See also* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 397 (2006) (describing Pratt's assimilationist philosophy).

[8] *See* Hayes, *supra* note 5, at 3–4 (discussing the prison's influence on Pratt's methods and his belief in the rehabilitative possibilities of a prison setting, including its architecture).

continuously operating boarding school in the United States.[9] Eight Puyallup boys who would become students at the school built it under the supervision of Lieutenant Melville Wilkinson, a friend of Pratt's; the school was initially called Forest Grove and served students from the Puyallup and Nisqually reservations in Washington.[10] Students were trained in gender-specific industries: blacksmithing, shoe making, carpentering, and wagon making for boys, and sewing and cleaning for girls.[11]

The assimilationist philosophy of boarding schools has long since been rejected, and the Bureau of Indian Education since the 1970s has pursued a goal of supporting self-determination and sovereignty.[12] But many of the children who attended Chemawa are still buried in unmarked graves around the building.[13] In 2003, a student named Cindy Gilbert SoHappy

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[9] CHEMAWA HISTORY, CHEMAWA INDIAN SCHOOL (Aug. 8, 2017), https://chemawa.bie.edu/history.html [https://perma.cc/M4MY-JENB]; Charles E. Larsen, *History of Chemawa Indian School*, WILLAMETTE U. ARCHIVES, 1–3, https://libmedia.willamette.edu/cview/archives.html#!doc:page:manuscripts/5408 (last visited June 1, 2021) (reporting on initial construction).

[10] Larsen, *supra* note 9, at 9 (reporting on 1880 construction).

[11] Larsen, *supra* note 9, at 3–4.

[12] *Health and Safety Risks of Native Children at Bureau of Indian Education Boarding Schools*: *Hearing Before the S. Comm. for Indigenous Peoples of the United States*, 116th Cong. (2019) (statement of Mark Cruz, Deputy Assistant Sec'y, Pol'y & Econ. Dev. Indian Aff., U.S. of the Dep't Interior), https://www.doi.gov/ocl/indian-boarding-schools [https://perma.cc/FP2Z-82UZ] (testifying about Chemawa student deaths and that Chemawa is one of four off-reservation schools directly operated by the Bureau today and describing that the schools' mission as "to provide Indian children with a high-quality, culturally-relevant education and, to build within our students the knowledge, skills, and character needed to address and overcome the challenges of adulthood, while giving them the educational foundation to pursue their dreams"). *See* Natalie Pate, *Student Deaths, Lack of Accountability at Chemawa Bring Heat From Congress*, STATEMAN J. (May 20, 2019), https://www.statesmanjournal.com/story/news/education/2019/05/20/salem-oregon-chemawa-indian-school-health/3686698002 [https://perma.cc/XLV8-4T6N] (describing hearing). *See also* Press Release, U.S. Dep't Interior, Bureau of Indian Affairs, Chemawa Indian School Old Spirits and a Fresh Beginning (Dec. 23 ,1976), https://www.bia.gov/as-ia/opa/online-press-release/chemawa-indian-school-old-spirits-and-fresh-beginning [https://perma.cc/Z8BT-SBP](press release describing Chemawa as "adolescent" in 1976).

[13] Marsha Small's research has revealed "multiple unmarked graves," many from the late 1800s. Telephone interview with Marsha Small, Ph.D. Candidate, Montana State University in Bozeman (Apr. 24, 2021) (on file with author). *See also* Marc Dadigan, *Unmarked Graves Discovered at Chemawa*

was found dead at Chemawa.[14] She died in a locked room that was one of four small cells used by the school as drunk tanks.[15] A subsequent Inspector General investigation blamed her death on poor supervision by school officials.[16] Cindy attended a school with a mission of supporting tribal self-determination, but her death amid by the unmarked graves on the campus reveals the carceral roots of the system—indeed, the building—in which she was being educated.

Around the same time the federal government opened Chemawa, the State of South Dakota opened the Dakota Reform

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*Indian Schoo*l, AL JAZEERA, (Jan. 3, 2016), https://www.aljazeera.com/features/2016/1/3/unmarked-graves-discovered-at-chemawa-indian-school [https://perma.cc/LW8D-AT5P] (describing Marsha Small's unpublished thesis, "A Voice for the Children of Chemawa Cemetery"); Erin Deitrich, Graduating Grandmother's Research Examines Painful Native American Boarding School History, Bozeman Daily Chronicle (May 9, 2015) (describing Small's work mapping the grave sites). Small explained that when she began mapping the cemetery, "it was unkempt. It was overgrown." Interview with Marsha Small, *supra.* She described the mapping project as "really heavy work" driven by a "responsibility to these children and families." *Id.* Her work links Chemawa's history to present policies; she notes that the removal of children to boarding schools "opens that door that you can just take our kids." *Id.*

[14] Suzan Shown Harjo, *A Native Child Left Behind*, INDIAN COUNTRY TODAY (Jul. 2, 2004), http://www.senaa.org/DOI/achildleftbehind.htm [https://perma.cc/J466-5QXU]; *Warm Springs: A Place Where Children Die*, OREGONIAN (2004).

[15] Although Chemawa is nominally a school, it appeared on the Bureau's inventory of juvenile detention facilities because it, in effect, had its own on-site jail. U.S. DEP'T INTERIOR, OFFICE INSPECTOR GENERAL, ASSESSMENT NO. X-EV-BIA-0114-2003, INTERIM REPORT ON INDIAN COUNTRY DETENTION FACILITIES 2 (Apr. 2004) (explaining that the school appeared on the Bureau's detention inventory because of the cells "used to temporarily detain unruly or intoxicated students").

[16] Federal officials determined that staff failed to check on Cindy every fifteen minutes as required. *See* Memorandum from Earl E. Devaney, Inspector General, U.S. Dep't Interior, to Secretary Dep't Interior (Nov. 1, 2005), https://www.doioig.gov/sites/doioig.gov/files/Chemawa081406.pdf [https://perma.cc/SAP6-MNX5]. The FBI also investigated, but declined to file involuntary manslaughter charges against staff members. Christopher Lee, *Report Cites BIA in Death of Teenager*, WASH. POST (July 26, 2006), https://www.washingtonpost.com/archive/politics/2006/07/26/report-cites-bia-in-death-of-teenager/194ef5ec-4af9-4ed8-ba6d-96ec5244925a [https://perma.cc/NF4K-KMDZ]. The U.S. later paid Cindy's family $1.8 million to settle their civil suit. Associated Press, *Oregon: Family Settles Lawsuit After Death at Indian School*, N.Y. TIMES (Sept. 16, 2006), https://www.nytimes.com/2006/09/16/us/16brfs-001.html [https://perma.cc/H8F4-RRL4].

School, later known as the South Dakota State Training School.[17] The building, located in Plankinton, S.D., served as a juvenile prison during the 1990s tough-on-crime era of juvenile justice[18] and then housed a juvenile boot camp for girls in 1998 and later a program for serious female juvenile offenders.[19] In South Dakota, Native children make up a large portion of the young people in state juvenile facilities[20]—a legacy of colonization, federal underinvestment in reservations, and federal efforts to relocate Indian people to cities.[21] Naturally, the training school housed many Native girls. In 1999, a resident named Gina Score died of heat exhaustion after being forced to run almost three miles in the sun as part of the school's program of harsh rehabilitative discipline.[22] Videos produced during a subsequent consent decree show staff with shields, handcuffs, and batons in combative encounters with Native girls, sometimes tying them down to beds to control them.[23] Juvenile facilities are ostensibly rehabilitative, but the use of shields and restraints against Native girls at the facility was a visual reminder of how the state and federal governments have long treated Native children as a problem to be contained and controlled, violently if necessary.

Fort Sill, where the Apache prisoners were first sent, was repurposed in the 1940s as an internment facility for Japanese Americans and then again as a military prison until it closed in

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[17] Opened in 1886 as the Dakota Reform School, the Plankinton site became the State Training School in 1905. Addie C. Rolnick, *Native Youth & Juvenile Injustice in South Dakota*, 62 S.D. L. REV. 705, 722 n.102 (2017) [hereinafter, Rolnick, *Native Youth & Juvenile Injustice*].

[18] Addie C. Rolnick, *Untangling the Web: Native Youth and Juvenile Justice*, 19 N.Y.U. J. L. & PUB. POL'Y 49, 74–75 (2016) [hereinafter Rolnick, *Untangling the Web*] (describing 1990s era of juvenile justice).

[19] Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.102.

[20] *Id.* at 720–22.

[21] *See infra* notes 66–71 and accompanying text (describing Termination Era policies); Kevin Abourezk, *Native Sun News Today: Tribal Takeover of Troubled Hospital Questioned*, INDIANZ (Nov. 30, 2018), https://www.indianz.com/News/2018/11/30/native-sun-news-today-tribal-takeover-of.asp [https://perma.cc/XN84-4DQ4] (describing the influence of relocation policy on Rapid City's Native population, even though the city was not an official target of federal relocation).

[22] *See* Bruce Selcraig, *Camp Fear*, MOTHER JONES (Dec. 2000), https://www.motherjones.com/politics/2000/11/camp-fear [https://perma.cc/5V6F-8886] (detailing Score's death and describing conditions at Plankinton).

[23] *See* Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.103.

2010.[24] Most recently, it was used briefly by the Trump Administration as a holding facility for migrant children.[25] The cell where Cindy Gilbert SoHappy died was removed from Chemawa after the Inspector General investigation that followed her death.[26] The larger question of why a boarding school had a jail inside it was not addressed in the reports. The school continues to house several hundred Native students a year. After multiple iterations, the former South Dakota State Training School is now Aurora Plains Academy, a privately run residential treatment facility.[27] Despite its name change, reinvention as a residential treatment facility, and private owners, it is still a place for confining delinquent children, many of them Native, and it is still plagued by allegations of abuse.[28]

The persistence of physical structures of confinement are a reminder that child welfare, education, and juvenile justice were created as systems of racial and gendered social control. Each wave of reform seems intended to leave behind the problems created by these systems, but the buildings tell a different story. The jail cell at Chemawa was a physical reminder of the roots of Indian education as a tool of assimilation achieved through removal, discipline, and confinement. The imposing jail building at Plankinton is a reminder that mental health treatment is being offered to young people only after they have entered a system where punishment hangs over their heads. The use of Fort Sill as a detention facility for migrant children was a reminder that the federal government removes and contains its problem populations, and that the country is dotted with

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[24] Gillian Brockell, *Geronimo and the Japanese Were Imprisoned There. Now Fort Sill Will Hold Migrant Children Again, Sparking Protests*., WASH. POST (June 23, 2019), https://www.washingtonpost.com/history/2019/06/12/geronimo-japanese-were-imprisoned-there-now-fort-sill-will-hold-migrant-children-again [https://perma.cc/5H9J-UWMP].

[25] *Id.*

[26] Harjo, *supra* note 14.

[27] Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.102.

[28] Bart Pfankuch, *Aurora Plains Academy: Unsafe Place to Live, Difficult Place to Work*, S.D. NEWS WATCH (June 5, 2019), https://www.sdnewswatch.org/stories/aurora-plains-academy-unsafe-place-to-live-difficult-place-to-work [https://perma.cc/2JZF-FJB4]; Bart Pfankuch, *Investigation: Residents Suffer Physical, Mental and Sexual Abuse at Aurora Plains* MITCHELL REP. (June 8, 2019), https://www.mitchellrepublic.com/news/4623167-investigation-residents-suffer-physical-mental-and-sexual-abuse-aurora [https://perma.cc/N8DE-6RWK].

buildings designed to serve that purpose, whatever they are called. A person observing the buildings over time might understandably have difficulty distinguishing between the prison, the school, and the treatment center.

II. INTRODUCTION

American law, historically, has been a tool of social control specifically directed at fixing, confining, and punishing communities of color. For Native girls, at least three separate institutions have functioned this way: education, child welfare, and juvenile delinquency. All these institutions had ostensibly benevolent purposes: to educate, protect, or rehabilitate children, respectively. But all have simultaneously functioned as sites of forced assimilation, removal, discipline, and confinement. This interplay is important in understanding the role of schools, courts, foster care, and secure confinement in addressing the needs of Native girls today. The history of Native girls and state intervention is also an origin story of the child removal practices that characterize modern child welfare and juvenile delinquency systems and affect all children.

This Article looks backward in order to look forward. Its ultimate conclusion is that modern education, child welfare, and delinquency systems cannot help Native girls unless they are fundamentally remade. Looking backward, it focuses on the historical period between the late 1800s and mid-1900s—a period in which Indian boarding schools, federal and state jurisdiction, juvenile courts, and state child welfare systems were created or expanded. It foregrounds the gendered nature of state interventions[29] in these areas and reveals how governmental power over children has been used to enforce gendered and racial hierarchies.

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[29] Child welfare, in particular, has been a site of gendered control over mothers. *See e.g.*, LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020) (arguing that child-taking has been used to punish women of color for resistance); DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (documenting the over-representation of Black children in the child welfare system and arguing that this reflects a political choice to address poverty by punishing, rather than aiding, Black mothers). In contrast to these texts, I focus here on how it has also functioned to control daughters.

This Article discusses the experiences of Native children, focusing specifically on girls whenever possible.[30] Centering the analysis on girls reveals the interrelationship between race and gender hierarchies in state and federal approaches to children. This dynamic is not unique to Native girls, but focusing on their experiences most clearly reveals the way the systems work. The Article takes an intersectional approach in order to highlight intersecting systems of oppression, "conceptualizing Native gender oppression as inextricably linked to settler colonialism and Western imperialism."[31] As Kimberlé Crenshaw has written, if we begin by "addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit."[32] Accounts of delinquency, in particular, typically follow an additive approach that begins with white boys, then engages in endless tweaks to theory and policy to account for the continued inequality of anyone whose experience differs. Instead, this Article employs an intersectional approach by centering multiply marginalized people (here, Native girls) when examining a system (here, child welfare and delinquency) to identify insights, criticisms, and proposals that benefit everyone.[33]

Intersectionality theory is also important for understanding how the experiences of Native girls (and Native children more generally) should be understood within the larger

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[30] Information on Native children's experiences is limited, and much of the existing research does not differentiate among genders.

[31] Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J. L. & FEMINISM 1, 6 (2019).

[32] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139, 167.

[33] *See* Angela Harris & Zeus Leonardo, *Intersectionality, Race-Gender Subordination, and Education*, 42 REV. RES. IN ED. 1 (2018). A similar approach was advocated by Mari Matsuda in her article *Looking to the Bottom*, which suggests assessing law and policy by attending to the voices of those at "the bottom" who are most impacted by it. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). While I do not wish to suggest there is one "bottom" of youth policy, Native girls have certainly borne its weight disproportionately.

conversation about child welfare and juvenile justice.[34] By providing a detailed picture of exactly how those themes were enacted upon Native girls, and how Native nations have responded, this piece underscores at least two important distinctions between Native girls' experience and that of other children. First, assimilation was an *explicit* goal of these systems for Native girls. Second, Native nations were, and continue to be, uniquely positioned to reimagine child welfare and juvenile justice because they operate independent justice systems recognized by federal and state courts. By identifying shared experiences, as well as specificities, intersectional analyses of subordination can facilitate coalitions between groups and strengthen those coalitions by highlighting differences between them.[35] Using the experiences of Native girls, this Article uncovers themes of state control that will resonate for many other children of color, including the method of separating children of color from their communities as a way to control them and the way that control includes gender-specific indoctrination.

The history of Native girls' involvement with federal and state government interventions clearly shows how the various systems that affect children are interchangeable. Despite the distinct histories and different purposes of the education, child welfare, and juvenile systems, these institutions were simply differently styled mechanisms of assimilation, removal, discipline, and confinement for Native youth. Overlap between these separate systems is sometimes framed as a new problem, as in discussions about the school-to-prison pipeline,[36] the

[34] The historical portion of this essay discusses education because of the centrality of the school model as the original vehicle for state intervention into the lives of Native youth. For Native youth, schools are the precursors to modern delinquency and child welfare courts as much as they are the precursors to modern schools. Because it is primary intended as a critique of the modern child welfare and delinquency systems, this essay does not focus on contemporary education policy; undoubtedly, a similar essay could be written about the present-day education system.

[35] Devon W. Carbado et al., *Intersectionality: Mapping the Movements of a Theory*, 10 DUBOIS REV. 303, 305–06 (2012); Dorothy E. Roberts & Sudatha Jesudeson, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DUBOIS REVIEW 313, 315–16 (2012).

[36] *See, e.g.*, MONIQUE W. MORRIS, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS, AFRICAN AMERICAN POLICY FORUM 2 (2012).

punitive turn in child welfare,[37] or the criminalization of welfare.[38] For Native children, there has never been a noticeable difference between the systems. Government interventions have been remade and renamed several times, but the central purpose—to assimilate Native children—has changed little. This consistency of purpose is evident in the physical buildings themselves, some of which have been recycled from prisons to schools to prisons, and back to schools again. The fact that these structures remain, even as governments have formally rejected their origins, speaks to a failure of memory and a failure of imagination. This Article directly counteracts the failure of memory by demonstrating that what we imagine today as benevolent, helpful systems originated as ways to control, eradicate, or confine disfavored populations.

Looking forward, this Article addresses the failure of imagination. Most people have come to expect, without question, that government intervention is necessary to educate, protect, and rehabilitate children. Even when the focus of these systems shifts nominally to helping parents and children and reunifying families, it is assumed that punitive threats of child removal and/or confinement will be necessary to force some parents and children to comply.

These assumptions are obviously problematic when applied to Native girls today. Academics and policymakers have highlighted the role of personal and intergenerational trauma in creating the conditions that disrupt education and call for child welfare and juvenile delinquency intervention.[39] Yet, proposals for addressing this trauma are still linked to the existing punitive systems. Why, if the core issue is trauma caused by past violent policies, should we fix it by sending girls back into the systems that created (and recreate) that violence? There is no one answer to the question of exactly how to re-envision (or even replace) these systems. To raise the possibility of transformation, this

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[37] *See, e.g.*, Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478 (2012).

[38] *See, e.g.*, KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) (documenting how modern welfare rules subject poor people to surveillance and regulation, treats them as presumptive criminals, and leads to entanglement in the criminal justice system).

[39] *See* Addie C. Rolnick, *Resilience and Native Girls: A Critique*, 2018 BYU L. REV. 1407, 1415–16.

Article briefly considers how some tribal courts have structured their child welfare and delinquency systems using traditional ideas about child-rearing, discipline, and communal responsibility.

III. ASSIMILATION, REMOVAL, DISCIPLINE, AND CONFINEMENT: BOARDING SCHOOLS, COURTS, REFORMATORIES, AND FOSTER PARENTS

Modern child welfare and juvenile courts were established during the late 1800s and early 1900s—the same period that assimilationist boarding schools were a centerpiece of Indian policy. These systems began as ways for white upper-class reformers to protect and retrain poor and minority children, first through private organizations, and eventually through state government systems. While assimilation was not the formal goal, this goal was assimilative in nature, and the key mechanisms used were removal and confinement. Early houses of refuge and training schools for children were subject to minimal judicial oversight, allowing caretakers to experiment with discipline, physical punishment, isolation, manual labor, and even resettlement of children in other communities.[40] For Native youth, it is significant that the dominant policy approaches to both misbehaving children and Native people in late 1800s and early 1900s favored removing children from home, sending them far away, and subjecting them to programming intended to mold them into race- and gender-specific roles.

Child welfare and delinquency systems underwent significant formalization in the mid-1900s. Also in the 1950s, Congress again embarked on a campaign to dismantle tribal sovereignty and to end the separate political status of Native nations and the special tribal-federal relationship. One of the primary tools of the Termination Era was the delegation of civil and criminal jurisdiction on reservations to a handful of states,

[40] By separating juvenile courts from adult criminal courts, juvenile delinquency professionals gained very broad authority about which children they could sweep into the system and how to treat them once there, including: the type of programming, whether to lock children up, whether and when to employ physical punishment, how long to keep them in the system, and whether and when to use delinquent children as labor. *See* Rolnick, *Untangling the Web*, *supra* note 18, at 72 (describing experimentation and lack of oversight in early juvenile institutions).

effectively handing over federal responsibility for law enforcement to those states. While there is no evidence that increased state power in Indian country improved reservation public safety, it opened state courts, jails, and prisons to a new population of Indian country offenders, including juveniles. During the same period, Native children were also being removed from their communities via state child welfare workers, foster care, and adoption. Child welfare removal—the heir to federal boarding school policy—was premised on the same assumption that Native families and communities were dysfunctional. By this logic of dysfunction, leaving children in the custody of their parents, or even their extended families and communities, would cause harm so severe that child welfare intervention was needed. As more and more Native children came under state jurisdiction through dependency or delinquency courts, they experienced removal and confinement at extraordinarily high rates.

Drawing from government documents and youth narratives, this Part highlights the themes of assimilation, removal, discipline, and confinement across multiple institutions. The goal of these institutions, described in Section A, was to assimilate. Federally run boarding schools were the centerpiece of the U.S. government's efforts to forcibly assimilate Native people.[41] Boarding schools were an entry portal for Native children into government systems, but the schools interacted with criminal courts, juvenile courts, and child welfare institutions—institutions that had assimilative tendencies of their own. Over time, these institutions continued the work of assimilating Native children even after the formal policy of assimilation was rejected. The primary means through which government actors accomplished the goal of assimilation was through removal, discussed in Section B. Because the goal of assimilation was to eliminate Native peoples by changing Native individuals,[42] the first step in changing children was to remove them from their families and communities. This removal usually happened under circumstances that scared children and parents; it is frequently described as kidnapping. Finally, as described in

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[41] *See generally* ANDREW WOOLFORD, THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES (2016) (comparative examination of U.S. and Canadian boarding schools that situates them as the primary means by which governments carried out assimilation policies).

[42] Wolfe, *supra* note 7, at 397.

Section C, assimilation policy relied on discipline and physical and architectural confinement in order to counter children's resistance. Once children were in these institutions, the formal curriculum was supplemented by rigid discipline, including everyday practices and egregious abuse. Locks, transfers, and recapture were used to confine the children when they tried to escape.

A. Solving "The Indian Problem": Erasure Through Assimilation

The boarding school heyday spanned from the late 19th century to the mid-20th century. Congress ended the policy of making treaties with Indian tribes in 1871, putting new emphasis on legislation geared toward civilization and assimilation. The goal of the policy included detribalization through the division of communally held tribal land[43] and indoctrination into a Western, capitalist way of life through individualized property ownership.[44] The federal government established a policy that Native children should be removed from their homes and placed in church or government-run boarding schools. Thousands of children were institutionalized in government-run schools, often far from their families.[45] Boarding schools introduced the American educational, child welfare, and

[43] The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.), authorized a policy of allotting tribal lands.

[44] Tribal land holdings were broken up into individual allotments, which allowed for "surplus" lands to be made available for sale to white settlers and facilitated a transition for Native people to the American system of individual property ownership and agricultural land use. The Allotment and Assimilation Era lasted from approximately 1871 until 1934. CHRISTINE BOLT, AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS 95–97 (1987) (discussing government policies and programs to assimilate Indians). *See generally* ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 30–36 (2005); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (giving 1928 as end of Allotment and Assimilation Era); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 959, 980 n.96 (2011) (describing assimilation policy).

[45] Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 139 (2013) [hereinafter Jacobs, *Remembering*].

juvenile justice systems to Native children as brutal instruments of acculturation designed to produce subservient Americans.[46]

The goal was to "civilize" Native children by forcing them to adopt the norms of Christian Anglo-American culture.[47] Children were often sent hundreds or thousands of miles away from their homes in order to separate them from the traditional practices of their people. Once they arrived, children were punished for speaking their languages and engaging in non-Christian spiritual practices. Native children were forced to cut their hair and were punished for speaking Native languages.[48]

The assimilation program was gendered. Margaret Jacobs describes the entire endeavor as "steeped in Victorian gender ideals" and explains that assimilation policy "imagined the assimilated Indian mother and the reconstituted Indian family" as essential for civilization.[49] Thus, while assimilation was encouraged generally, girls at the schools were encouraged to accept a subservient role. Katrina Paxton describes a separate curriculum for girls at the Sherman Institute.[50] Although some American women at the time pursued professional lives, Native girls were trained to accept a specific version of womanhood. They were taught domestic labor skills and discouraged from

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[46] *See* MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD xxxi (2014) (referring to the use of "military force to wrest children away" from their parents and "military-style regimens" and "manual labor" as instruments of acculturation within the schools).

[47] *See generally* Helen M. Bannan, *The Idea of Civilization and American Indian Policy Reformers in the 1880s*, 1 J. AM. CULTURE 787 (2004) (discussing 1880s policy reformers' focus on "civilizing" Indians).

[48] *See generally* BOLT, *supra* note 44; K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994) (relating Indian experience of assimilation through boarding school program); MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928 (1999) (discussing educational programs as a vehicle for assimilation of Indians). *See also* Patrick Gerald Eagle Staff, Settler Colonial Curriculum in Carlisle Boarding School: a Historical and personal Qualitative Research Study 117–18 (Ph.D. dissertation, Portland State University) (2020) (ProQuest) (describing the role of haircutting in the assimilation curriculum).

[49] Jacobs, *Remembering*, *supra* note 45, at 139.

[50] Katrina A. Paxton, *Learning Gender: Female Students at the Sherman Institute*, *1907–1925*, *in* BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES 174–86 (Trafzer et al., eds., 2006) (discussing gendered nature of the training and indoctrination experienced by Native youth).

other pursuits, leading to more limited opportunities than were available to boys.[51]

This gendered vision of assimilation had racial and religious overtones: Pratt believed that Black people and Native people were best suited to a second-class version of Americanness[52] and boarding schools impressed a Protestant vision of womanhood upon girls who attended the schools.[53] Native people were not U.S. citizens until 1924, but individuals were granted U.S. citizenship, usually in exchange for accepting allotments and agreeing to adopt an agricultural lifestyle. In these instances, U.S. officials administered an oath of citizenship that was different for men and women. Whereas men were told to exchange their bows and arrows for plows, women were handed a purse and told, "this means you have chosen the life of the white woman—and the white woman loves her home. The family and the home are the foundation of our civilization. Upon the character and the industry of the mother and homemaker largely depends the future of our nation."[54]

One of the federal government's other major tools of assimilation and control over Native people during this period was criminal law. The federal government used criminal jurisdiction to reeducate and control Native people and to remake indigenous ideas about justice. In 1885, the Major Crimes Act extended—for the first time—federal court jurisdiction over certain crimes committed by Indians against other Indians on reservations.[55] The push for federal jurisdiction came primarily from federal Indian agents, who argued that traditional justice

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[51] *Id.*

[52] Hayes, *supra* note 5, at 2.

[53] Paxton, *supra* note 50.

[54] *See* Nicole Montclair Donaghy, *The New Assimilated American*, LRINSPIRE (Apr. 28, 2016) https://lrinspire.com/2016/04/28/the-new-assimilated-american-by-nicole-montclair-donaghy [https://perma.cc/NX6M-B32S] (reproducing Ritual on Admission of Indians to Full American Citizenship); Jared Farmer, *Last Arrow Ceremony*, JARED FARMER BLOG https://jaredfarmer.net/curios/last-arrow-ceremony [https://perma.cc/N4SS-ZJA2] (describing citizenship ceremony). *See also* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 334 (2004) (describing men's and women's naturalization ceremonies).

[55] 18 U.S.C. § 1153 (2006). *See* Sidney L. Haring, *The Distorted History that Gave Rise to the "So Called" Plenary Power Doctrine: The Story of* Kagama v. United States, *in* INDIAN LAW STORIES 149, 150 (Carole Goldberg et al. eds., 2011).

systems were incapable of handling serious crimes in a manner that settlers would recognize as real justice.[56] For example, in the case immediately preceding enactment of the law, the Brule Lakota Council addressed a murder by ordering restitution, an outcome Indian agents and settlers viewed as insufficiently punitive.[57]

The federal government also supplanted traditional justice systems by addressing less serious crime in local administrative courts. Called CFR courts, these courts implemented a federal Code of Indian Offenses that prohibited cultural and religious activities as well as basic lifestyle choices.[58] When a woman arrested for adultery and convicted in a CFR court argued that Department of the Interior lacked authority to define offenses or try and punish offenders, a federal court upheld the constitutionality of CFR courts on the theory that criminal punishment was merely being used as a teaching tool, further blurring the line between punishment and education in federal Indian policy. The court described them as "mere disciplinary and educational instrumentalities" and pointed out that the reservation itself "is in the nature of a school" that gathers Indians "under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."[59] While rehabilitation is

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[56] *See generally* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994). The Supreme Court had already signaled that they did not regard Native nations' justice systems as real criminal systems when it held that a white Cherokee citizen could be prosecuted in federal court under federal enclave laws that exempted crimes between Indians. The Court viewed federal jurisdiction as necessary to "preserve the peace" and shield Indians from "mischievous and dangerous" settlers, never mind that the Cherokee authorities had arrested the defendant and expected to try him for his crime. Bethany Berger, *Power Over This Unfortunate Race: Race, Politics and Indian Law in* United States v. Rogers, 45 WM. & MARY L. REV. 1957, 1969, 1984–85 (2004).

[57] *See* Ex Parte Crow Dog, 109 U.S. 556 (1883). On the other hand, the Supreme Court had also reviewed a Cherokee sentence of death for murder. *See* Talton v. Mayes, 163 U.S. 376 (1896).

[58] *See* LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 18, 41–45 (1998) (describing how the codes criminalized religious activities, plural marriage, and the practices of medicine people as well as the use of more typical criminal laws to punish acts of resistance by Native people against settlers).

[59] *See* United States v. Clapox, 35 F. 575, 577 (D.C. Ore. 1888) (holding that these "CFR courts" did not violate Article I of the U.S. Constitution).

one of several justifications for criminal punishment in American law, it is arguably the most important reason for criminal punishment of Native people in the United States. The version of rehabilitation experienced by Native people bears more resemblance to the Quaker idea of moral reeducation than it does to more modern concepts of counseling and job skills.

Like the CFR courts, boarding schools focused on changing individual Native people by remaking their cultural, religious, linguistic, and familial identities until they resembled white Americans. Boarding schools, though, were the favored instrument of assimilation because they worked their experiment on children, who were seen as more malleable. The boarding school philosophy linked the idea of rehabilitation with the practices of removal, education, and punishment.

Boarding schools flourished during the same period that states were exploring methods to contain, control and reform poor children in cities through houses of refuge[60] and later juvenile courts.[61] The dominant policy approaches to both misbehaving children and Native people in late 1800s favored removing children from home, sending them far away, and subjecting them to a curriculum of reprogramming.[62] Although they were denominated schools, boarding schools were in this sense not much different from the nascent juvenile delinquency system.[63] The "child savers," who viewed crime as a result of incomplete moral and social development, shared a goal of

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[60] *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (describing houses of refuge as "schools" but upholding their use as prisons for "juvenile convicts").

[61] *See generally* DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 4 (2004) (tracing the movement to create separate juvenile courts to the 1888 efforts of Lucy Flowers); DAVID L. PARRY, ESSENTIAL READINGS IN JUVENILE JUSTICE 41–42 (2005).

[62] Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, *in* A CENTURY OF JUVENILE JUSTICE 3–4, 17 (Michael Rosenheim et al. eds., 2002).

[63] While children in cities were sent to training schools because they were deemed dependent or delinquent, Native children sent to boarding schools were deemed deficient solely on the basis of their Indianness. The doctrine of *parens patriae* was not necessary to intervene in the lives of Native children because the legal status of American Indians is premised in part on the *ward-guardian relationship*, in which the federal government functions as a guardian vis-a-vis its Indian wards. Although narrowly interpreted in its earliest iterations, and more limited today, this doctrine was broadly construed in the late 19th and early 10th century to justify massive intrusions into the lives of Native people, most in the name of assimilation.

rescuing and rehabilitating poor and minority children.[64] Each institution touted a rehabilitative goal in which the exercise of control over children was employed as a method of controlling a disfavored population.

This theme of solving the problem posed by the existence of an entire group of people by controlling and remaking their children also spurred the high rates of adoption and foster care placement experienced by Native children from the 1950s through the 1970s and beyond.[65] Again, the high point for child removal coincided with the dominance of a policy approach focused on eradicating separate Native communities by encouraging the physical, cultural, and political transformation of reservation-based Native nations into individual Americans.[66] Congress again embarked on a campaign to dismantle tribal sovereignty and to end the separate political status of tribes and the special tribal-federal relationship, but this time it used state power, rather than federal power.

This federal-to-state shift occurred in two areas significant to state control over children: child welfare and criminal/juvenile jurisdiction. Congress passed laws that effectively handed over federal responsibility for law enforcement to some states.[67] Congress formally terminated its government-

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[64] *See generally* ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 15–100 (2009). Platt's study emphasized the paternalistic roots of the child saving movement, noting that it "was essentially a middle-class movement, launched by the 'leisure class' on behalf of those less fortunately placed in the social order." *Id.* at 77. During this same period, federal Indian policy focused explicitly on "saving" Indian people, and a central tool of this was a network of federally sponsored boarding schools for Native children.

[65] In her forthcoming memoir, Wenona Singel describes two distinct waves of adoption. WENONA SINGEL, FIVE GENERATIONS REMOVED: A MEMOIR OF INDIAN CHILD REMOVAL IN MICHIGAN (forthcoming).

[66] This period, called the Termination Era, lasted from approximately 1940 until 1962. *See generally* Carole GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIVES AND THE FEDERAL SYSTEM 33–35 (7th ed. 2015); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 1.06 (discussing Termination Era from 1943 to 1961).

[67] Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 25 U.S.C. §§ 1162, 1360, 1321 (2006)). Public Law 280 automatically transferred Indian country jurisdiction to six states and permitted other states voluntarily to assume jurisdiction over Indian country within the state. The mandatory states were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. *See* CAROLE

to-government relationship with specific Native nations, leaving the citizens of those nations subject to state power on the same terms as any other people.[68] A corollary federal relocation program was also established to move Indian people from reservations to urban areas.[69] The justifications for state control were not as transparently assimilationist as were the justifications for federal power during the late nineteenth century. Instead, state power was viewed as necessary to protect and control reservation populations.[70] Finally, the Bureau of Indian Affairs (BIA) worked with private groups and state child welfare agencies to facilitate the removal and adoption of Native children.[71] This was, in some sense, just a different approach to financing the same goal of assimilation.

As Jacobs explains, "the B.I.A. longed to terminate the responsibilities it had taken over for the care of Indian children by privatizing its earlier child removal policies."[72] Indian boarding schools still existed, but the federal government had come to see them as a financial burden better passed on to the

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GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997) (discussing shifts in state and federal jurisdiction over tribal lands under Public Law 280). States voluntarily accepting jurisdiction over some or all reservations pursuant to § 1321 were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. In the voluntary states, the exact scope of state jurisdiction is defined by state statute, but delinquency and child welfare were popular areas for state jurisdiction. *See, e.g.*, Rev. Code of Wash. 37.12.010 (accepting jurisdiction over delinquency, dependency and adoption matters).

[68] H.R. Con. Res. 108, 83rd Cong. (1953) (urging termination of federal relationship with certain tribes "at the earliest possible time"); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (listing individual acts).

[69] The relocation program began in 1931 as a voluntary program to move returning veterans to cities, but by the 1950s, relocation of reservation residents to urban areas had become the Bureau of Indian Affairs' highest priority, resulting in a withdrawal of funding from other priorities. Participants received limited federal assistance—usually a one-way ticket and a subsistence allowance until they received their first paycheck. Once relocated, they were cut off from the federal services that had been available on reservations. The transition was financially and personally difficult, and many people eventually returned to reservations. *See generally* DONALD F. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960 (1986) (examining motives for enactment and effects of relocation program on Native people).

[70] *See* H.R. Rep. No. 848, 83rd Cong., 1st Sess. 5–6 (1963).

[71] Terry L. Cross, *Child Welfare in Indian Country: A Story of Painful Removals*, 33 HEALTH AFFAIRS 2256 (2014).

[72] Jacobs, *Remembering*, *supra* note 45, at 153.

states, like federal criminal law enforcement on reservations. Private and religious organizations advocated in favor of adoption as a benefit for Native children, but their advocacy was connected to the longstanding idea of how to solve the "Indian problem"—now recast as the burden Native communities placed on federal resources. Arnold Lyslo, a former Bureau employee who went on to head the Indian Adoption Project, framed the project as a financial benefit:

> It has been apparent for some time, from the reports of the Area and Agency Welfare State of the B.I.A., that many children who might have been firmly established in secure homes at an early age through adoption, have been passed from family to family on a reservation or have spent years at public expense in federal boarding schools or in foster care.[73]

State child welfare systems negotiated with federal officials about the terms upon which they would incorporate Native children into their foster care systems. For example, Minnesota reported to federal officials on the likely cost of caring for Native children, asking for more federal money and comparing foster care costs to the costs the federal government would save by closing a boarding school.[74] State officials explained the high proportion of Native children in need of foster care by noting that "[many] social, economic, and other factors contribute to the high incidence of hopeless family breakdown among Indians in Minnesota today."[75] As to why specific children had been placed in foster care, the report cited "three major problems . . . born out of wedlock, neglected or improperly supervised, or home situation otherwise unsatisfactory."[76] Proponents of the foster care solution were thus able to cite vague factors like "neglect" and "family breakdown" to explain the influx of Native children while obscuring the role of federal policy

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[73] *Id.*

[74] Minnesota Legislative Interim Committee on Indian Affairs, Statement Prepared for Senate Committee on Organization for Dep't of the Interior, Mar. 1957, at 3–4.

[75] Minnesota Dep't of Public Welfare, Foster Care of Indian Children, Mar. 15, 1957, at 1.

[76] *Id.*, at 6.

in instigating that breakdown and the way the foster care influx also benefitted the private adoption industry.

By the 1950s, child removal was no longer animated by an express intent to annihilate indigenous cultures and undermine group social and political cohesion. However, it was still premised on the assumption that Native families and communities were dysfunctional.[77] The rhetoric of child protection also camouflaged a governmental investment in white families as superior and the use of child placement as a tool of assimilation.[78] The role of assimilation in foster care policy is

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[77] LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 7–8 (2012) ("American Indian children, like African American children, became targets for child welfare removals after they began receiving state-financed welfare assistance in large numbers."). *See also* Jacobs, *Remembering*, *supra* note 45, at 148 (describing representations of Indian families as chronically dysfunctional and recounting the story of a visitor who took children and alleged that the mother was alcoholic); Bethany Berger, *In the Name of the Child: Race, Gender & Economics*, *as reprinted in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 343–45; Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 85 (1994) ("Congress was especially critical of the general standards employed by the child welfare system in determining the necessity of intervention. One survey cited found that ninety-nine percent of the cases involving the removal of Indian children from their families were predicated 'on such vague grounds as 'neglect' or 'social deprivation' and on allegations of the emotional damage the children were subjected to by living with their parents.' Congress was altogether dismayed at the lack of understanding non-Indian child welfare workers had of Indian family society."). Systematic removal of Indian children is not only a relic of the past; South Dakota child welfare officials were recently found to have adopted procedures facilitating easy removal of Indian children from their homes, violating the Indian Child Welfare Act and denying Indian parents their rights to due process prior to removal. *See* Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749, 754, 773 (D.S.D. 2015) (granting partial summary judgment), *judgment vacated by* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (holding that district court should have exercised *Younger* abstention and dismissed).

[78] Cross, *supra* note 71; Gallagher, *supra* note 77, at 85 n.27 (quoting H.R. REP. NO. 95-1386, 10 (1978)) ("Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers . . . . For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for

revealed in anecdotes: for example, one veteran of the Maine foster care system described being encouraged by foster parents to pass as white.[79]

B. Severing Ties Between Children, Families, and Nations: Removal as the Mechanism for Assimilation

Narratives of kidnapping and loss are central to the history of Indian boarding schools: parents were sometimes forced or coerced into giving up their children, who were sent to far away schools and not permitted to return home for long periods of time.[80] Boarding school narratives in history and literature often begin with allusions to kidnapping or stories of government raids. While some parents voluntarily sent their children to boarding school, many resisted, and their children were taken by force.

The people of Old Oraibi, a Hopi village, split into two factions when one group refused to cooperate with assimilation plans, including mandatory schooling. The non-cooperative group, called the Hostiles, were ejected from the village. The superintendent tried to convince the Hostile families to send their children to school, but the fathers refused, and seventy-five men were arrested and sentenced to ninety days hard labor. Helen Sekaquaptewa, a Hopi woman, describes the day the children were rounded up.

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terminating parental rights. Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians."). *See also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 520 (1984) (describing the role of biases and misunderstandings in facilitating removal of Indian children).

[79] ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION, BEYOND THE MANDATE: CONTINUING THE CONVERSATION 22–23 (2015), https://d3n8a8pro7vhmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf [https://perma.cc/ZJ8E-29XN].

[80] *See* KENNETH LINCOLN, NATIVE AMERICAN RENAISSANCE (1985) (referring to stories of kidnapping); Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 150–55 (2007) (detailing a history of government boarding schools for Indian children); Maureen Smith, *Forever Changed: Boarding School Narratives of American Indian Identity in the U.S. and Canada*, 2 INDIGENOUS NATIONS STUD. J. 57 (2001) (analyzing boarding school narratives).

> Very early one morning toward the end of October, 1906, we awoke to find our camp surrounded by troops who had came during the night from Keams Canyon. Superintendent Lemmon called the men together, ordering the women and children to remain in their separate family groups. He told the men it was a mistake to follow Yokeoma blindly; that the government had reached the limit of its patience; that the children would have to go to school. Yokeoma angrily defied them and refused to yield. He was taken to a house and put under guard. All the children of school age were lined up and registered to be taken to school . . . We were taken to the schoolhouse in New Oraibi, with military escort.[81]

Hostile children were not allowed to leave the school in the summer because their families would not agree to send them back in the fall.[82] Helen saw her mother only twice during her four-year tenure at the Keams Canyon school.

The conflict between the Hostiles and the superintendent was an especially dramatic example, but the idea of captured children is common among Native peoples. Kootenay parents hid their children from government agents.[83] Navajo elders told of a time when agents would "come through and steal the children." They told of children being kidnapped from their hogans or captured while they were out herding sheep. Navajo leaders had signed a Treaty with an education clause, never imagining the form such education would take. Boarding school recruitment was so much like theft that one Navajo father shot an agent for trying to steal his son.[84] In Leslie Marmon Silko's story *Lullaby*, a Navajo mother fled with her children as soon as she realized the agents meant to take them: "Ayah ran with the baby toward Danny; she screamed for him to run and then she grabbed him

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[81] HELEN SEKAQUAPTEWA ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA, AS TOLD TO LOUISE UDALL 91–92 (1969).

[82] *Id.* at 98–99.

[83] Janet Campbell Hale, *The Only Good Indian*, *in* REINVENTING THE ENEMY'S LANGUAGE 123, 141 (Joy Harjo & Gloria Bird et al. eds., 1997).

[84] Berenice Levchuk, *Leaving Home for Carlisle Indian School*, *in* REINVENTING THE ENEMY'S LANGUAGE, *supra* note 83, at 176, 179.

around his chest and carried him too. She ran south to the foothills of juniper trees and black lava rock."[85]

Later generations of boarding school students were not literally "taken" by the government, but many schools retained their reputations as dreaded places where bad children were sent. In his memoir, Basil Johnston describes a 1940s-era boarding school: "the word or the name 'Spanish' might seem to be no more filled with menace than any other word, but it inspired dread from the very first time we Indian boys heard it."[86] Mary Brave Bird (formerly known as Mary Crow Dog), a Lakota woman, is even more explicit in her description of children being taken to school.

> [I]n the traditional Sioux families, especially in those where there is no drinking, the child is never left alone. It is always surrounded by relatives, carried around, enveloped in warmth. It is treated with the respect to due any human being, even a small one. It is seldom forced to do anything against its will, seldom screamed at, and never beaten . . . And then suddenly a bus or car arrives, full of strangers, usually white strangers, who yank the child out of the arms of those who love it, taking it screaming to the boarding school. The only word I can think of for what is done to these children is kidnapping.[87]

Capture or kidnapping as the introduction to boarding school highlights the unwillingness of parents and children to succumb to the schools' mission to eradicate or change their cultures. Government and school officials pathologized tribal cultures and traditions, and boarding schools were seen as a tool to solve the "Indian problem." In the end, many children learned both academic and vocational skills at school, but any benefits remained tainted by the fact that schooling was forced upon them. Long after these students had been educated and perhaps returned to their communities, the omnipresent references to kidnapping are a constant reminder of the forced nature of their education.

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[85] LESLIE MARMON SILKO, *Lullaby*, *in* STORYTELLER 43, 45 (1981).
[86] BASIL Johnston, INDIAN SCHOOL DAYS 6 (1995).
[87] MARY CROW DOG & RICHARD ERDOES, LAKOTA WOMAN 29 (1990).

Boarding school stories focus not only on the physical experience of being taken, but also on the emotional trauma of forced separation. In *Lullaby*, Ayah saw her children only twice after they were taken from her. The first time, her son hid shyly and her daughter did not even recognize her. She hugged them, but the visit did not last long. They visited again that summer, when her daughter looked at her with fear "like she was a spider crawling slowly across the room," and her son did not remember enough Navajo to answer her questions.[88] In Ayah's case, the separation was permanent. Her children had effectively become strangers, and they never came home again. In the story, the loss of the children estranged Ayah from her husband and distanced them both from social supports, ending with the parents freezing to death in a ditch. Boarding school not only cut the roots of one generation, it also distanced their parents from family and community ties.

Mary Crow Dog views boarding schools as a last-ditch effort before complete extermination of Native people. Cultural annihilation was used as a substitute for murder, and this annihilation was accomplished by severing ties between children and their parents and communities. Children were "taken away from the villages and pueblos, in their blankets and moccasins." They were kept completely isolated from their families, with no contact allowed for years. When the children returned, some after as long as ten years, they were "caricatures of white people."[89] Even their clothing was constricting and unnatural: "their short hair slick with pomade, their necks raw from stiff, high collars, their thick jackets always short in the sleeves and pinching under the arms, their tight patent leather shoes giving them corns, the girls in starched white blouses and clumsy, high-buttoned boots . . . ."[90]

Crow Dog tells of a different ending than Silko, though. In her story, the children returned to the reservation only to discover that they were in limbo between two worlds. Native cultures and white culture had been completely juxtaposed against one another, so that the children were strangers in both worlds.

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[88] SILKO, *supra* note 85, at 48–49.
[89] CROW DOG & ERDOES, *supra* note 87, at 30.
[90] *Id.*

References to kidnapping and forced separation are more common in stories from the early boarding school era. The underlying sadness of separation, however, is still present in the stories of later generations, whose enrollment in boarding school seemed voluntary on the surface. Emma LaRocque, a Cree/Metis woman, writes about the wrenching sadness she felt every time the train took her away from her parents after a visit home. "I was leaving a culture, a familiar way of life, for a world that was, initially, foreign, frightening, and, at times, excruciatingly lonely."[91] Berenice Levchuk, a Navajo writer, also remembers "how devastated, frightened, broken-hearted, and lonely I felt when I arrived as a little girl in Ft. Defiance, Arizona." After nine months working and attending classes, three months at home was too short.[92]

State foster care systems had a similar disruptive effect, severing the ties between Native children and their communities.[93] The damaging effect of removal on children was separate from harm caused by abusive practices in foster and adoptive homes, and it was present even in homes that were not abusive. In a brief filed in *Adoptive Couple v. Baby Girl*, the Supreme Court's second Indian Child Welfare Act case, adults who were adopted before the Act's passage described their "shared sense of alienation and dislocation occasioned by being Indian children raised in families and communities apart from their tribes," an effect "common to those with happy and unhappy adoptive situations alike."[94]

The themes of removal and disappearance also surface in literary accounts of foster care. Vickie Sears' piece *Dancer* tells the story of a girl who appeared as a foster child. She came from out of nowhere; "they said her tribe was Assiniboin, but they weren't for certain."[95] The girl arrived "all full up with anger and

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[91] Emma LaRocque, *Tides, Towns, and Trains*, *in* REINVENTING THE ENEMY'S LANGUAGE, *supra* note 83, at 361, 364

[92] Levchuk, *supra* note 84, at 177.

[93] *See* Brief for Amicus Curiae Adult Pre-ICWA Indian Adoptees Supporting Birth Father and the Cherokee Nation at 14–20, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399).

[94] *Id.* at 14 (noting that "[e]ven loving and attentive adoptive parents may sincerely believe thathat they must, in the words of one adoptive parent, 'kill the Indian to save the man.'").

[95] Vickie Sears, *Dancer*, *in* TALKING LEAVES: CONTEMPORARY NATIVE AMERICAN SHORT STORIES 250 (Craig Lesley & Katheryn Stavrakis eds., 1991).

scaredness" and carried the baggage of her past in the form of vivid, screaming nightmares.[96] Inez Peterson, a Quinault woman, writes about how her own family was chopped up by adoption and foster care. Eleven siblings were spread out in different homes, beginning with the accidental adoption of one of her brothers. A church couple offered to care for him while her mother was in hospital delivering another baby. "She said yes, signed some papers, and the church people moved out of Taholah, off the reservation, out of our lives."[97] Her unknown brother was only the first step in the family's separation. Later, she rode in the back seat of a Dodge Dart, her arms around her little sisters, watching as the social worker dropped off brother after brother at different houses, waiting for her turn to be left behind. Similarly, legal scholar Wenona Singel describes the loss of multiple generations of girls in her family to foster care and adoption.[98]

Boarding school severed an entire generation of Native children from their families and communities. When Mary Brave Bird writes about the elders uniting with the younger generation during the genesis of the American Indian Movement, she notes a conspicuous absence. "Not the middle aged adults. They were of a lost generation which had given up all hope, necktie-wearers waiting for the Great White Father to do for them."[99] Beyond their effect on individual children, boarding schools disrupted family structures and intergenerational learning. As Jacobs explains, it "normalized Indian child removal and undermined the customary socialization of Indian children; several generations grew up without learning how to raise children within their own cultural contexts."[100]

C. Punishing Resistance: Controlling Children Through Discipline and Confinement

To supplement the assimilative educational curriculum, boarding school officials used violence, confinement, and outsourcing to control Native children once they arrived at the

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[96] *Id.*

[97] Inez Peterson, *Missing You*, *in* REINVENTING THE ENEMY'S LANGUAGE, *supra* note 83, at 104, 106.

[98] Singel, *supra* note 65.

[99] Mary Brave Bird, *We AIM Not to Please*, *in* REINVENTING THE ENEMY'S LANGUAGE, *supra* note 83, at 337, 342.

[100] Jacobs, *Remembering*, *supra* note 45, at 149.

schools. Children experienced sanctioned violence through formal punishment and military-style discipline, and unsanctioned violence through physical and sexual abuse. Federal policymakers highlighted this violent discipline as a reason to abandon the assimilationist schools. The 1928 Meriam Report found that "[t]he discipline in the boarding schools is restrictive rather than developmental. Routine institutionalism is almost the invariable characteristic of the Indian boarding school."[101] A 1969 report described the school environment as "sterile, impersonal and rigid, with a major emphasis on discipline and punishment, which is deeply resented by the students."[102] This emphasis on discipline is not surprising if one recalls that Pratt, who created the boarding school policy, developed his approach after experimenting on Apache prisoners of war when he was superintendent of a Florida prison.[103]

Children who attended boarding schools have told stories of being physically and mentally abused.[104] Former students have described harsh disciplinary practices that ranged from the everyday to the grotesque, often far more severe than the way physical discipline was employed at other schools during the same period.[105] Edith Young describes routine assimilationist discipline: "We were yelled at and slapped. In the third grade, I

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[101] MERIAM LEWIS ET AL., U.S DEP'T OF HEALTH, EDUC. & WELFARE, THE PROBLEM OF INDIAN ADMINISTRATION 13–14 (1928).

[102] COMM. ON LABOR & PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at 64 (1969).

[103] Hayes, *supra* note 5, at 2–4; R.L. Brunhouse, *Apprenticeship for Civilization: The Outing System at the Carlisle School*, EDUCATIONAL OUTLOOK, May 1939, at 30, 31 (account of Carlisle outing system describing how Pratt drew on his experiences at the prison) (account of Carlisle outing system describing how Pratt drew on his experiences at the prison). *See supra* notes 5–8.

[104] *See* LINCOLN, *supra* note 80, at 21, (referring to stories of kidnapping); Haag, *supra* note 80, at 153–54 (detailing a history of government boarding schools for Indian children); Maureen Smith, *supra* note 80, at 65–67 (2001) (describing incidents of abuse); Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR NEWS, http://wkar.org/post/survivors-indian-boarding-schools-tell-their-stories [https://perma.cc/45VW-UC3U] (recounting stories of abuse from various schools) (last visited Dec. 20, 2017).

[105] *See Native Americans File Lawsuit Against Boarding School Abuses*, VOICE AM. NEWS (Oct. 30, 2009) https://www.voanews.com/archive/native-americans-file-lawsuit-against-boarding-school-abuses-2003-08-10 [https://perma.cc/8UQU-AWHD] (describing litigants' claims of physical abuse and neglect in lawsuit against government-sponsored, church-run boarding schools); Millich, *supra* note 104.

asked the teacher why she was teaching that Columbus discovered America when Indians were here first. She came over and slapped me across my face. To be humiliated in front of the class, I'll never forget that."[106] While not official policy, sexual abuse occurred at boarding schools as well.[107] Boarding school residents have described how abusive physical discipline (often severe violence in the form of "beatings" and humiliation) was central to the schools' pedagogical approach and aimed at breaking children's spirits.[108]

Children resisted forced schooling and harsh discipline, often by running away. School officials responded by confining them in the system, using a creative combination of retrieval, transfer, and outsourcing. Children who resisted were labeled incorrigible or difficult. For example, Pratt's letters describe a group of Osage boys who were transferred by the Carlisle to Martinsburg after being labeled incorrigible by the visiting Martinsburg superintendent. At Martinsburg, they were made to work for farmers. According to news reports, they threatened the superintendent with guns, then ran away after they were disarmed by school officials. Pratt, however, disputed the "incorrigible" characterization and characterized the transferred students as "among the best" at Carlisle.[109] Girls were labeled

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[106] INDIAN SCHOOL: STORIES OF SURVIVAL (Films Media Group 2011).

[107] *See* Ewa Skal, *Civilization and Sexual Abuse: Selected Indian Captivity Narratives and the Indian Boarding School Experience*, 27 CROSSROADS 77, 84–85 (2019) (summarizing stories of sexual assault from boarding school narratives); MENDING THE SACRED HOOP TECHNICAL ASSISTANCE PROJECT INTRODUCTORY MANUAL, TRACING THE PATH OF VIOLENCE: THE BOARDING SCHOOL EXPERIENCE 5 (2003), https://www.peerta.acf.hhs.gov/sites/default/files/public/uploaded_files/Tracing%20the%20Path%20of%20Violence.pdf [https://perma.cc/CHY4-GX6W] (recounting stories of sexual abuse by boarding school survivors).

[108] *See* Patrick Gerard Eagle Staff, Settler Colonial Curriculum in Carlisle Boarding School: a Historical and Personal Qualitative Research Study, 121–23 (June 4, 2020) (Ed.D. dissertation, Portland State University) https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=6521&context=open_access_etds [https://perma.cc/D6AB-G9NH] (recounting interviews with boarding school survivors who described physical abuse as "a learning tool").

[109] *See* Letter from R.H. Pratt to Comm'r of Indian Affs. (Nov. 3, 1885) (on file with author) (avaliable at https://carlisleindian.dickinson.edu). *See also* Letter from Superintendent Perkins, Rice Station School, to Comm'r of Indian Affs. (May 5, 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (listing fifteen boys who "are obedient while

troublemakers for behavior that involved resistance or sexuality. For example, Ernie Newton, superintendent of the Phoenix Indian School, described what he saw as a need for separate reform schools for boys and girls:

> Two girls, retained as witnesses in a case against a white man, are now in the hospital, one being treated for gonorrhea, the other for gonorrhea and syphilis. Another girl, only fifteen, was held on a larceny charge. Upon examination, she was found to be mentally defective. A test for gonorrhea, also, showed positive. The grave question now is, what is to be the future of these girls? Many of our so-called incorrigibles are really defective, requiring special treatment and training.[110]

The officials' descriptions of students reveal the complicated construction of misbehavior and delinquency. The extensive rules and forced separation created the conditions for them to break rules by leaving. For girls, the "troublemaker" label was constructed by viewing individual behaviors through the lens of promiscuity, disease, and "mental defectiveness," transforming one incident into a permanent status.

Officials debated what to do with those students deemed incorrigible. Initially, they were disciplined in the schools.[111] Because Native children were not allowed to leave the school facilities, the boarding schools essentially operated as detention facilities.[112] In some instances, Indian schools partnered directly

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at school, but run away whenever they feel like it and stay until returned by the police. Their home surroundings are not calculated to be elevating, as they live in dirt and squalor, under the influence of medicine men and idle members of the tribe. A few will work while away and when they tired of work they quit."); Letter from R.H. Pratt to Comm'r of Indian Affs. (Mar. 16, 1894) (on file with author) [hereinafter 1894 Pratt Letter] (avaliable at https://carlisleindian.dickinson.edu) (describing Sibbald Smith as a discipline problem for running away and persuading others to accompany him).

[110] Letter from Ernie Newton to Cato Sells, Comm'r of Indian Affs. (Mar. 15, 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu).

[111] 1894 Pratt Letter, *supra* note 109 (recommending that Sibbald Smith be "continued under Carlisle restraint" against the wishes of his mother that he return home).

[112] *See generally* Haag, *supra* note 80.

with state-run juvenile reformatories.[113] In others, students considered disruptive were sent to specific off-reservation schools.[114] Some officials suggested designating one or more off-reservation boarding schools as reform schools, while others argued that it would be best to send these children to state reform schools.[115]

To boarding school officials, Native families and communities were the biggest obstacles in the assimilation campaign; boarding schools were criticized as unsuccessful because educated children "returned to the blanket."[116] The schools therefore attempted to keep children away from their parents for as long as possible. At Carlisle, for example, children came under a "contract," a promise that they would not return home for three or five years.[117]

Boarding schools, reformatories, and refuge houses—the nineteenth century precursors of schools, juvenile detention facilities, and child welfare—also employed a practice called "outings." Pratt wrote,

> [T]he outing principle, practised at the Reformatory, is by far one of the most hopeful

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[113] *See* Letter from R.H. Pratt to Comm'r of Indian Affs. (Jan. 4, 1892) (on file with author) [hereinafter 1892 Pratt Letter] (avaliable at https://carlisleindian.dickinson.edu) (confirming the process for "getting incorrigible Indian youth from the schools into the reformatories of the state").

[114] *See* Letter from R.H. Pratt to Comm'r of Indian Affs. (Nov. 3, 1885) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (describing and expressing regret over transfer of students from Carlisle to Martinsburg). *See also* Letter from O.H. Lipps to Cato Sells, Comm'r of Indian Affs. (Mar. 11, 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (describing Carlisle as "a dumping ground for incorrigibles").

[115] Letter from O.H. Lipps to Cato Sells, Comm'r of Indian Affs. (Feb. 17, 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (advocating for conversion of one federal boarding school into a reform school); Letter from Cato Sells, Comm'r of Indian Affs., to O.H. Lipps (Mar. 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (describing practical difficulty of creating an Indian reform school and suggesting sending children who violate state law could to state reform schools and handling others "beyond out easy control" through "a very high order of discipline" within the school or by sending them home); Letter from R.H. Pratt to Mr. Francis (Mar. 20, 1915) (on file with author) (avaliable at https://carlisleindian.dickinson.edu) (advocating for use of state reform schools).

[116] SZASZ, *supra* note 48, at 10.

[117] Levchuk, *supra* note 84, at 182.

> features. I may also add that recently there has sprung up in the state the system of taking children from alms-houses and placing them in country homes, and this promises to be a most advantageous method of decreasing pauperism. Both alms-house outing and the reformatory outing have sprung since we have made such success.[118]

This practice of loaning children out to live and work in the homes of rural families was part of the reform practices of early juvenile delinquency institutions.[119] The philosophies of all these institutions linked the idea of rehabilitation with the practices of removal, education, and punishment.[120] Boys were placed on farms or in places where could "learn trades," while girls were "placed in homes where they could learn the duties of the household."[121] Although conceived by Pratt as a reward, the outing system at Carlisle also served the school's overall assimilation goals and can thus be understood to serve a disciplinary function, as it did at the reformatories Pratt modeled it after.[122]

By placing children in private homes as a way to assimilate them, the outing system practiced by the boarding schools was also a direct progenitor of foster homes as tools of assimilation. Native adults who spent time in state foster care systems during the 1950s–1970s describe experiences of punishment and abuse that differ little from early boarding school accounts. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission highlighted accounts of mistreatment of Native youth in the Maine child welfare system. One person described punishment ranging from being locked in

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[118] 1892 Pratt Letter, *supra* note 113 (describing agreement to send Carlisle students to Pennsylvania reformatory for "violation of the laws of the State of Pennsylvania").

[119] PARRY, *supra* note 61, at 42; Grossberg, *supra* note 62, at 201–21 (describing the practice of sending East Coast offenders to live with families in the Midwest).

[120] Brunhouse, *supra* note 103, at 1 (explaining Pratt's belief that "Indian boys and girls should have an opportunity to live in private homes for a period of time in order to gain practical experience in self-support and to learn the ways of civilized living").

[121] *Id.* at 4.

[122] *Id.* at 4–6.

an attic to being submerged in a tub of icy water.[123] Another described a foster parent washing their mouth out with soap for speaking their Native language.[124]

Congress has explicitly rejected its goal of Indian assimilation and has acted to reverse its legacy when it comes to tribal criminal justice systems, child welfare, and education. Since 1968, Congress has affirmed and expanded tribal courts' inherent criminal jurisdiction.[125] Congress has also reiterated the federal government's commitment to protecting tribal sovereignty, recognized the importance of tribal courts to sovereignty, and directed significant fiscal and administrative resources toward supporting the very tribal justice systems that the federal government had previously and actively sought to dismantle.[126] Perhaps the most direct rejection of assimilation

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[123] ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N, *supra* note 79, at 22.

[124] *Id.*

[125] *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 201, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301–02) (affirming tribal "powers of self-government" and imposing certain due process requirements on tribal criminal courts). Section § 1301(2) was amended in 1990 to clarify that "powers of self-government" includes "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856 (1990); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991) (removing sunset date to make prior amendment permanent). The Tribal Law and Order Act, Act of Jul. 29, 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.), amended the Indian Civil Rights Act (ICRA) to increase the length of sentences and the size of fines that tribal criminal courts may impose. The Violence Against Women Act (VAWA), Pub. L. No. 103-322, tit. IV, §§ 40001–40730, 108 Stat. 1796 (1994) (codified in part at 42 U.S.C. §§ 13701–14040), restored tribes' power to prosecute and imprison certain non-Indian domestic violence offenders.

[126] The Indian Tribal Justice Act, Pub. L. 103-176, § 2, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601–3631 (2006)), recognized that that tribal justice systems "are an essential part of tribal governments," established a federal Office of Tribal Justice Support, and authorized the Secretary of Interior to enter into self-determination contracts "for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribal governments." The Indian Tribal Justice and Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651–3682 (2006)), recognized that "enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency" created the Department of Justice's Office of Tribal Justice; and, authorized grants to

policy was the Indian Child Welfare Act of 1978 (ICWA), which recognized and reaffirmed Native nations' primary authority over child welfare matters.[127] This affirmation of jurisdiction did not occur in a vacuum: Congress specifically acknowledged the role of federal[128] and state[129] governments in breaking up Native families and harming Native children. ICWA affirms the existence of tribal jurisdiction even outside Indian country,[130] and it recognizes that tribal authority over children within Indian country is exclusive.[131] Although ICWA applies only to dependency matters, its philosophical underpinnings regarding the importance of tribal control over children apply to juvenile delinquency as well.[132]

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tribes and non-profit organizations to improve tribal courts and provide legal services to civil and criminal litigants in tribal courts. Notably, the Act specifically provided that it should not be construed to "encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws," to "impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government," or "alter in any way any tribal traditional dispute resolution fora." *Id.* § 105. The Tribal Law and Order Act and the Violence Against Women Act also likewise increased funding to support tribal criminal justice systems.

[127] Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§§ 1901–63).

[128] REESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 95-1386, at 9 (1978) ("The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life . . . . In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social or cultural environment much different than their own.").

[129] 25 U.S.C. § 1901 (4)–(5).

[130] 25 U.S.C. § 1911 (a)–(b).

[131] 25 U.S.C. § 1911(a).

[132] *See* Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1209–15 (1996). As Polashuk explains, the specific injuries and interests cited by Congress to support passage of the Indian Civil Rights Act, including the importance of self-determination in general and the particular significance of retaining control over children, also apply in the context of delinquency proceedings. *Id.* at 1210 ("Because child-rearing includes punishment, the same reasons apply equally to children being separated for juvenile proceedings as for custody.").

IV. RE-ENVISIONING JUSTICE FOR CHILDREN

The history of Native girls under state control reveals that the conception of education, child welfare, and juvenile justice as three separate institutions with three separate purposes is a false one. For Native children, the choice to name a particular institution a school, a reformatory, or a treatment center means little because the goal (assimilation) and the means (removal, discipline, and confinement) have always been the same. This history simply demonstrates that federal and state actors have been endlessly creative in reforming and renaming their systems of social control, but the underlying truth of the system remains unchanged. This framework is also helpful in understanding government treatment of other children. As just one example, the Trump Administration's plan to house migrant children, allegedly for their own protection, and based on the insinuation that their parents were lawbreakers, was abandoned after commentators drew on the Fort's history as a place used to confine disruptive populations, beginning with Native prisoners and children.[133]

This history also makes clear that any effort to fix child welfare, education, or delinquency systems will require abolition of the old, intractable systems, and a new vision of the relationship between children and the government. In this regard, Native children—at least those affiliated with federally recognized tribes—are uniquely situated because federal law recognizes that tribes are separate governments with jurisdiction over child welfare and delinquency. This means that Native communities can remove them from the federal and state systems that have been so harmful and recreate new systems.[134]

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[133] Ken Miller, *Plan Halted to House Migrant Kids at Oklahoma's Fort Sill*, ARMY TIMES (July 28, 2019), https://www.armytimes.com/news/your-army/2019/07/28/plan-halted-to-house-migrant-kids-at-oklahomas-fort-sill/ [https://perma.cc/4PX9-HCEB].

[134] 25 U.S.C. § 1911(a) (recognizing tribes' exclusive jurisdiction over child welfare matters in Indian country). ICWA codified the Supreme Court's holding in Fisher v. District Court, 424 U.S. 382, 387–89 (1976), which affirmed inherent tribal jurisdiction over child welfare and adoption, exclusive of state jurisdiction for matters involving Indians in Indian country. Because tribes have jurisdiction based on both membership and territory, their jurisdiction over child welfare matters also extends beyond Indian country. *See* John v. Baker, 982 P.2d

As sovereign governments, Native nations have a unique power to reshape their child welfare and delinquency systems.

Of course, this recognition of jurisdiction is only the first step towards abolition and recreation. Disentangling tribal systems from the federal and state models that surround them is a difficult undertaking, especially because non-tribal courts must be willing to recognize and enforce tribal laws and decisions. As I have described in the context of tribal juvenile justice systems, the influence of federal policy and funding decisions can push tribes toward mimicking the very systems from which they seek to remove children.[135]

While tribal systems sometimes resemble state systems in key ways, they also depart from state systems to a significant degree. In these departures, seeds of a reimagined system can be found. This Part outlines three areas in which indigenous approaches to justice for children have led to fundamental changes in the relationship between government systems, families, and children. The approaches described here have the potential to serve Native girls in a way the systems described in Part III cannot. Their specific impact on girls cannot be fully captured because of the general absence of data on indigenous justice approaches and the failure of most research on youth to center girls as subjects. Their benefits are not specific to Native girls, however, and they are described here in general terms of how they reshape children's relationship to the legal system.

The purpose of this Part is to identify concrete ways that the experiences of Native children described in Part III have motivated specific interventions into contemporary child welfare and juvenile justice systems that reimagine central components of the systems. As an intervention into the conversation on child welfare and abolition, it aims to show how Native communities have been leaders in reimagining child welfare and juvenile justice. The approaches described below, however, are typically adopted in a context that largely resembles existing systems. In this sense, this Part does not describe abolitionist practices.

738, 755–59 (Alaska 1999). *See also* Rolnick, *Untangling the Web*, *supra* note 18, at 87–99 (describing tribes' inherent territorial and member-based jurisdiction over juvenile delinquency).

[135] Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RES. J. 55, 73–74 (2016) [hereinafter Rolnick, *Locked Up*].

Moreover, like the buildings described in the opening of this essay, these interventions are sometimes at risk of being coopted in service of the same disciplinary, assimilationist systems that they are intended to replace.[136] Each of them, though, somehow redefines the relationships between children, families, communities, and governments. It is this kind of shift—not cultural competency trainings, targeted programs, or rebranding of juvenile justice—that is necessary to abolish the old systems and replace them with systems that actually help children heal.

A. Customary Adoption and Kinship Care

At their worst, state child welfare systems pit struggling parents against their children's foster families. At their best, these systems offer help to parents, but continue do so under the threat of child removal should the parent slip up. Helping children is linked with removing them because state law recognizes a maximum of two parents. If a child needs additional care, the system provides that care through a substitute parent. A foster parent who desires a long-term relationship and legal decision-making rights must usually displace a parent in order to have those rights recognized.

Many indigenous legal systems recognize some form of customary adoption.[137] In this arrangement, a child gains additional parents, but does not lose any parents. In many communities, this practice of sharing children was common. This practice recognized that child care is a collective responsibility and allowed children to be redistributed among community members in a way that ensured families had the resources to care for them, and invoked the support of extended families and the community. By incorporating customary adoption into modern child welfare laws, Native nations are reimagining adoption as child-sharing instead of child-taking, fundamentally disrupting a central aspect of child welfare law. The child-taking model of

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[136] *See* Paura Moyle & Juan Marcellus Torri, *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*, 11 VICTIMS & OFFENDERS 87, 94–99 (2015) (drawing on Māori experiences to contest the "myth" that family group conferencing employs indigenous justice principles).

[137] *See, e.g.*, WHITE EARTH BAND OF OJIBWE JUD. CODE, tit. IV, §§ 1.05(32) and 11.12 (2017) (defining and authorizing customary adoption); NATIVE VILLAGE OF BARROW IÑUPIAT TRADITIONAL GOVERNMENT TRIBAL CHILDREN'S CODE, § 4-4-12 (2020) (defining a form of customary adoption called iñuguq).

termination and adoption also means that, even with early interventions aimed at reunifying families, the punitive threat of losing one's children looms over every step of the child welfare process. By adopting a non-taking model, customary adoption potentially removes the punitive threat, allowing government intervention to be premised on collaboratively helping children.

While tribal laws commonly recognize customary adoptions as a permanency option, it is a separate question whether state and federal authorities will treat it that way. This is significant because only a permanent placement will stop the timeline set in motion by the Adoption and Safe Families Act—which requires termination of parental rights as a step towards permanency in most proceedings once a child has been in foster care for a certain period of time. Some state laws now recognize customary adoption as a permanent placement. For example, California incorporated a customary adoption provision into its state court practice for Native children.[138]

Along with helping to redefine adoption, Native children's courts have also helped to redefine foster care. As it is practiced in most U.S. jurisdictions, foster care often means care by strangers. Children are removed from their homes and then disappear into a mysterious network of foster care placements. They may move around to the homes of different foster parents, and may lose contact with parents, siblings, and extended family as they enter the worlds of their foster families. In Native communities, foster care is more likely to mean placement with a relative. Vivien Olsen, a tribal attorney for Prairie Band Potawatomi Nation, describes tribal communities as "an extended family network;" and notes that "to place a child away from their relations, frequently prevents them from interacting with tribal elders including their own grandparents. Tribes traditionally generally provide deference and respect for their tribal elders. Grandparents and elders have the obligation to

[138] *See* JUD. COUNCIL OF CAL. ADMIN. OFF. OF CTS., CTR. FOR FAMS., CHILD. & THE CTS., JUDICIAL BRANCH REPORT TO THE LEGISLATURE: TRIBAL CUSTOMARY ADOPTION 4–5 (2013), http://www.nrc4tribes.org/files/lr-Tribal-Customary-Adoption-Report_123112.pdf [https://perma.cc/9WGW-6969] (describing customary adoption legislation and defining customary adoption as a tribal adoption that does not require termination of the birth parents' rights).

instruct tribal youth in the ways and customs of the Tribe."[139] In describing how tribal courts are better suited than state courts for maintaining the connection between children and their relatives, Olsen points to specific provisions in the Prairie Band Potawatomi code, including placement preferences that specifically include tribal relatives-by-blood, tribal relatives-by-marriage, tribal non-blood relatives,[140] and a grandparents rights provision that includes "a duty to provide instruction and training regarding tribal customs and traditions."[141]

Initially, the role of relatives as foster placements was not supported by federal laws that require permanency, nor by the laws of many states. A child in the care of a relative was therefore treated as one who needed a placement, not one who had a stable home.[142] Relatives who cared for children could encounter difficulties obtaining federal foster care payments if they were not separately licensed as foster parents, and some states required relatives to pass stringent licensing and background requirements. Federal law began to recognize relatives as caregivers with the Indian Child Welfare Act, and later amendments the Adoptions and Safe Families Act clarified that kinship care could count as a permanent placement and relatives caring for children could qualify for federal foster care payments.[143] States have increasingly eased requirements for relatives to take advantage of foster care benefits.[144] In this manner, Native nations have helped reimagine foster care as family caregiving instead of sending children into strangers' homes.

Viewed against the history of assimilative removal practices, this change is especially significant. For many

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[139] Vivien Olsen, After Adoptive Couple: ICWA from a Tribal Government Perspective (2014) (unpublished manuscript) (on file with the University of Kentucky).

[140] PRAIRIE BAND POTAWATOMI L. & ORD. CODE § 6-4-7.

[141] PRAIRIE BAND POTAWATOMI L. & ORD. CODE § 6-5-10.

[142] This approach recalls the height of state child welfare removals, where children being cared for in multigenerational homes or by relatives was treated as an indicator of parental neglect and cause for removal.

[143] U.S. DEPT. OF HEALTH & HUM. SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE (2000) (describing a growing practice of licensing relatives as foster parents and provisions of the Adoption and Safe Families Act that permit states to exempt children in foster care with a relative from its termination timelines).

[144] *Id.*

adoption advocates, assistance to Native children has been synonymous with replacing their families with new white families. Kinship foster care changes that. Instead of condemning a child's parents and entire family as dysfunctional, relative placements position the child's family as a solution, separating help for children from efforts to undermine Native families.

B. Wellness Courts and Family Group Conferencing

Native nations have taken a front seat in reimagining child welfare, supported by federal laws that recognize tribal control over child welfare and funding intended to help build stronger tribal systems. While the same support for tribal control over delinquency is lacking, Native nations and indigenous peoples have also helped to reimagine juvenile delinquency systems.

One specific form of this reimagining has taken place via Healing to Wellness Courts. The wellness court model was developed by Native communities to serve indigenous people and to address drug and alcohol use in a non-punitive setting. Wellness courts were loosely based on the non-Native drug court model and were federally supported beginning in 1997. A coalition of tribal courts and Native organizations developed and refined an approach, now called a Healing to Wellness Court, based on indigenous justice principles like community accountability and reconciliation.[145] These courts "utilize a nonadversarial approach, integrating traditional concepts of

[145] Patricia Riggs, *Tribal Healing to Wellness Court: Program Development Guide* 5 (Tribal L. & Pol. Inst., Draft Publ'n No. 5, 2002) (defining wellness courts as those that "administer justice in a manner that draws on tribal cultural components and strengths tribal traditions, spiritual healing practices, traditional dispute systems, and tribal fundamental beliefs and values"); Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts; Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 427–36 (2013) (setting forth detailed conceptual framework for wellness courts and therapeutic jurisprudence); Caroline S. Cooper et al., *Tribal Healing to Wellness Courts: Treatment Guidelines for Adults and Juveniles* 19–20 (Tribal L. & Pol. Inst., Draft Publ'n No. 3, 2002) (underscoring the importance of indigenous healing practices and a holistic approach). TRIBAL L. & POL. INST., TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS 1–2 (2003) (identifying community resources and indigenous justice approaches as core aspects of wellness courts).

healing and community involvement toward healing, rather than punishing, their addicted tribal members."[146]

Healing to Wellness Courts have been a cornerstone of Native nations' efforts to reduce juvenile detention and incarceration.[147] This is especially important because roughly one third of youth in tribal or BIA detention facilities came into contact with the juvenile system because of an alcohol or drug-related offense.[148]

In a similar vein, family group conferencing is another model used increasingly in U.S. jurisdictions to reshape juvenile justice. This model originated in New Zealand courts, where it was developed to reflect Māori understandings of children as belonging to an entire community. The family group conferencing model brings a child's extended family together to address the problems and make decisions.[149] One goal is to reduce government intervention into children's lives by directing state power toward assisting in family decision-making,[150] not replacing it, or wielding a threat of removal. It positions children's families as part of the solution rather than understanding families as part of the problem, and thereby defining separation from families as necessary to protect or rehabilitate children.[151] There is some evidence, however, that

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[146] JOSEPH THOMAS FLIES-AWAY ET AL., TRIBAL L. & POL. INST., OVERVIEW OF HEALING TO WELLNESS COURTS 10 (2d ed. 2014).

[147] *Id.* at 13 n.26 (describing three juvenile Healing to Wellness courts).

[148] Rolnick, *Locked Up*, *supra* note 135, at 65–66 (citing 2013 data from the Jails in Indian Country Report indicating that 33% of youth in detention at mid-year were there for drug and alcohol offenses, including 27% percent who had been charged with public intoxication).

[149] Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 687–89 (2014) (describing family group decision-making model).

[150] F.W.M. McElrea, The New Zealand Model of Family Group Conferences 2 (Mar. 1998) (unpublished conference paper), http://restorativejustice.org/am-site/media/the-new-zealand-model-of-family-group-conferences.pdf [https://perma.cc/VW6J-F6GF] (listing the transfer of power from the state to the community as one of the distinctive elements of the model).

[151] *See, e.g.*, Mary Mitchell, *Reimagining Child Welfare Outcomes: Learning from Family Group Conferencing*, 25 CHILD & FAM. SOC. WORK 211, 212 (2020) ("In child welfare, a child's right to participate is often at odds with his/her right to protection, and those parents with whom partnership is required are also those identified as being in need of support, direction, and correction. Families with care and protection needs are often caught in conflicting policy and practice expectations: parents are expected to take on responsibilities for

girls respond less positively than boys to family group conferencing. Researchers in New Zealand found statistically significant differences between girls and boys concerning whether they felt like others in the conference treated them with respect and whether they felt like they could say what they wanted.[152]

C. Best Interests

Indigenous communities have also helped redefine what it means to act in a child's best interest. The "best interest of the child" standard, central to most judicial proceedings involving children, is usually set forth in individual terms.[153] While state courts may also consider the rights of parents, extended family members, and even tribes, each of these are understood as separate entities with separate interests. Stated in individual terms, children's interests can easily seem to be in tension with the interests of their parents or their communities. For example, opponents of ICWA sometimes characterize protection of tribal interests as dangerous to the safety and well-being of Native children.[154]

A different formulation of children's best interests would acknowledge the link between individual and collective well-being.[155] Rather than pitting children's interests against tribal interests, such a standard would acknowledge that tribal

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care, while being positioned as failing. This dichotomous positioning can often be at odds with child welfare outcomes discourse, impacting on the way work with children and families is approached.") (citations omitted).

[152] Gabrielle Maxwell & Venezia Kingi, *Differences in How Girls and Boys Respond to Family Group Conference: Preliminary Research Results*, 17 SOC. POL'Y J. OF N.Z. 171 (2001).

[153] *See* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2–3 (2020) (collecting state and territorial statutes and listing factors used in determining best interests, including health, safety, resources for children, and child's relationship to parents).

[154] *See, e.g.*, Timothy Sandefeur, *Treat Children as Individuals, Not as Resources*, CATO UNBOUND (Aug. 1, 2016), https://www.cato-unbound.org/2016/08/01/timothy-sandefur/treat-children-individuals-not-resources [https://perma.cc/CF5L-U766] (characterizing ICWA as "making it harder to rescue [Indian children] from abusive families" by "[giving] tribal governments extraordinary powers" and "overrid[ing] the best interests standard").

[155] *See* Addie C. Rolnick, *Indigenous Children*, *in* OXFORD HANDBOOK ON CHILDREN'S RIGHTS LAW (Jonathan Todres & Shani M. King, eds., 2020). *See also* Lorie M. Graham, *Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law*, 15 UCLA J. INT'L L. & FOREIGN AFFS. 83 (2010).

continuity and connection to culture and community is *part of* children's best interests, along with physical safety, education, and food. Measured against such a standard, removal of children from their families and communities is presumptively not in their best interests. "[F]orcible removal of Indigenous children for education and for reasons of child protection are acts that undermine the ability of Indigenous peoples to pass on Indigenous knowledge, as well as violate the right of Indigenous children to an identity."[156] A reconceptualized best interests standard is a critical step in reshaping the relationship of state power to Native children because Native children's interests have so often been defined in opposition to their families and their communities. In the context of foster care and adoption, the exercise of state power to remove and assimilate children has been defended as necessary to protect the individual best interests of Native children.[157]

As Peter J. Herne, former Chief Judge of the St. Regis Mohawk Court, explains—contrasting the state law standard in New York with a standard crafted for Native children—one aspect of Native children's interests is a belonging, or the idea "that the best interests of an Indian child can only be realized when an 'Indian child' can establish, develop, and maintain political, cultural, and social relationships with their Indian family, community, and Nation."[158] While Herne points to tribal justice systems as the source of this standard, he notes that the Indian Child Welfare Act adopts this approach in that its "best interests" standard for children "is intertwined with the interests of Indian parents and Tribal Nations."[159] The laws of some Native nations incorporate a detailed best interests standard that recognizes that children's interests are intertwined with the

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[156] Allyson Stevenson, *Child Welfare, Indigenous Children and Children's Rights in Canada*, 10 REVISTA DIREITO E PRÁXIS 1239, 1247 (2019).

[157] See *id.* at 1242 (describing how an individualized best interests standard made possible the "sixties scoop" of indigenous children by Canada's adoption and child welfare system and noting that by doing so "Indigenous child removal logic operated against meaningfully addressing the economic and political conditions that made families vulnerable, and caused communities struggle to provide the necessary elements for healthy children and families.")

[158] Peter J. Herne, *Best Interests of an Indian Child*, N.Y. STATE BAR ASS'N J. 22, 23 (2014), https://www.srmt-nsn.gov/_uploads/site_files/Herne-Mar-Apr2014.pdf [https://perma.cc/RD47-7ZH5].

[159] *Id.*

interests of their families and communities.[160] Similar expressions can be found in the best interests standards developed by aboriginal and Torres Islander communities in Australia, another settler colonial country[161] that engaged in wholesale indigenous child removal as a tool of assimilation.[162]

Indigenous understandings of children's best interests have already reshaped international law on children's rights. Prompted by emphasis on collective rights and self-determination in the U.N. Declaration on the Rights of Indigenous Peoples, the Committee on the Rights of the Child issued a clarification to its "best interests" standard, explaining that "the best interests of the child is conceived both as a collective and an individual right, and . . . the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights."[163] The Committee still anticipated possible conflict between individual and collective rights, and privileged individual rights over collective, but cautioned that "considering the collective cultural rights of the child is part of determining the child's best

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[160] *See, e.g.*, YUROK CONSTITUTION & TRIBAL CODE § 13.25.010 ("A determination of the best interests of the child should include consideration of the rights of the child as a Yurok and the interest of the Yurok community and Tribe in retaining its children in its society; political membership in the Tribe and the attendant benefits such as hunting and fishing rights; the child's cultural heritage; and the opportunity to participate in the ongoing customary life of the Tribe and maintain the connection that each Yurok has with the Yurok territory and their extended family."); WHITE EARTH BAND OF OJIBWE JUD. CODE, tit. IV, §1.05(14)(a) (2017) (defining the best interests of the child to include consideration of "the ability of the tribe and reservation community to provide for the care of the child").

[161] Wolfe, *supra* note 7, at 397.

[162] Maureen Long & Rene Sephton, *Rethinking the "Best Interests" of the Child: Voices from Aboriginal Child and Family Welfare Practitioners*, 64 AUSTRALIAN SOC. WORK 96, 100 (2011) (study of aboriginal views of the best interests standard that identifies tensions between individualist standards and the importance of collective responsibility for children). *See also* Cindy Blackstock et al., *Indigenous Ontology, International Law and the Application of the Convention to the Over-Representation of Indigenous Children in Out of Home Care in Canada and Australia*, CHILD ABUSE & NEGLECT, June 2020, at 1.

[163] U.N. Comm. on the Rts. of the Child, *General Comment No. 11: Indigenous Children and Their Rights Under the Convention*, ¶ 30, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

interests."[164] The U.S. Supreme recognized the connection between children's interests and tribal interests in its first case involving ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,[165] although its most recent ICWA case, *Adoptive Couple v. Baby Girl*, fails to acknowledge the link.[166]

Some indigenous approaches to juvenile justice similarly recognize this alignment between children's interests and tribal interests. Judge Abby Abinanti, Chief Judge of the Yurok Tribe, described the Yurok Tribe's integration of cultural approaches to juvenile justice:

> We survived a horrendous/debilitating invasion that created many hardships heretofore unknown to the People, some of those hardships continue or new ones arise. However, the People have a core strength and a worldview that focuses on our responsibility to and for ourselves, our lands, all the beings in our world and our neighbors who also are struggling in a time of concern for all. We do not intend to walk away from any of those cultural responsibilities. We are stronger every year as we increase our cultural participation and return to our responsibilities in dance/language and stewardship.[167]

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[164] *Id.* ¶ 32. *See also* U.N. Comm. on the Rts. of the Child, Day of General Discussion on the Rights of Indigenous Children (Oct. 3, 2003), https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2003.pdf [https://perma.cc/722Z-S6TF].

[165] 490 U.S. 30, 49 (1989). *See* Addie C. Rolnick & Kim Hai Pearson, *Racial Anxieties in Adoption: Reflections on* Adoptive Couple*, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. STATE L. REV. 727, 744, 744 n. 65 (describing the *Holyfield* formulation of the connection between the child and the tribe).

[166] 570 U.S. 637, 656 (describing Indian father as "play[ing] his ICWA trump card at the eleventh hour to override . . . the child's best interests"). *But see id.* at 689 (Sotomayor, J., dissenting) ("As we observed in *Holyfield*, ICWA protects not only Indian parents' interests but also those of Indian tribes.").

[167] *Hearing Regarding Justice for Native Youth: The GAO Report on "Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency" Before the S. Comm. on Indian. Affs.*, 115th Cong. 1, 8 (2018) (Statement of Hon. Abby Abinanti, C.J., Yurok Tribal Court), https://www.indian.senate.gov/sites/default/files/Abby%20Abinanti%20Yurok%20Tribe%20Testimony%20Juvenile%20Justice%209_18.docx.pdf [https://perma.cc/Z97R-AT3D].

In this formulation, what is best for children is not a separate question from what is best for their communities. The Indian Child Welfare Act recognizes that tribal communities need children to survive,[168] but indigenous conceptualizations of children's best interests make this link bidirectional by emphasizing that children also need their communities to survive.[169]

The purpose of this Part has been to highlight the transformative efforts of indigenous communities when it comes to the government's role in caring for and raising children. Each of the innovations described above involves a fundamental reconceptualization of a core aspect of child welfare or juvenile justice, a reimagining of the relationship between child, parent, family, and government. A sustained examination of these specific interventions is beyond the scope of this Article, and my purpose here is not to suggest that any of these models work perfectly, or that Native nations have fully succeeded in restructuring child welfare and juvenile justice. They have, however, developed innovative models. Unfortunately, these models are most often discussed in national child welfare and juvenile justice circles as creative intervention programs—a framing that fails to acknowledge the way each intervention potentially alters the foundations of an entire system. Just as the history of Native girls under state control reveals themes that will echo for other children, the innovations tribes have created may also be useful models for other communities interested in abolition and reinvention.

V. CONCLUSION

Changing policies is important, but it does not relieve policymakers of the duty to understand the historical context in which today's institutional responses echo. For Native girls, abuse, neglect, and delinquency are in a very real sense a result of the policing of Native identity and the criminalization of

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[168] 25 U.S.C. § 1901(3).

[169] Brief for Amici Curiae Adult Pre-ICWA Indian Adoptees, *supra* note 93, at 16, 18, 20 (describing the the process of reconnecting with their communities as "becoming more complete" and the lack of a connection with their tribes as "a permanent hole in my soul" and explaining the significance of not having anyone "to show me who I was").

trauma.[170] Native girls come into contact with the child welfare and juvenile justice systems not merely because of the intersection of gender and race, but also the historical trauma that underlies the contemporary Native experience. Medical research has confirmed what Native women have been saying all along: inherited trauma can have physical and psychological effects for generations.[171] A system designed without awareness of this context will often respond in ways that retraumatize children.

For example, when Native girls who get into trouble are sent far from their communities and placed in military or prison-style facilities, these practices materially and theoretically echo the boarding school era. A close examination reveals that government intervention under any name—school, foster home, adoptive family, reformatory, boot camp, prison, treatment center—is just a continuation of the pattern of assimilation via removal, discipline, and confinement. While tearing apart the system is essential, abolition and deconstruction is practically difficult. Nevertheless, indigenous communities, especially those exercising child welfare and delinquency jurisdiction directly, have taken significant steps to reimagine these systems.

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[170] *See* LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 18, 41–45 (1998) (describing how Native women's criminality was manufactured by laws that criminalized behaviors associated with Native lifestyles or deemed inconsistent with Victorian morals); Rolnick, *Locked Up*, *supra* note 135, at 72.

[171] AM. ACAD. OF PEDIATRICS, ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA 2 (2014), https://www.aap.org/en-us/documents/ttb_aces_consequences.pdf [https://perma.cc/527U-QL7P]; Kathleen Brown Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 PROF. COUNSELING 117, 117–18 (2013). *See also* Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 AM. INDIAN & ALASKAN NATIVE MENTAL HEALTH RSCH. 56 (1998) (defining the concept of historical trauma); Dolores Subia BigFoot et al., *Honoring Children: Treating Trauma and Adverse Childhood Experiences in American Indian and Alaska Native Communities*, AM. PSYCH. ASS'N (Nov. 2018), https://www.apa.org/pi/families/resources/newsletter/2018/11/native-american-trauma [https://perma.cc/265J-NWW9] (noting that "[h]istorical trauma impacts populations who have experienced long term-term widespread trauma over the span of generations"); AMANDA LECHNER ET AL., ADDRESSING TRAUMA IN AMERICAN INDIAN AND ALASKA NATIVE YOUTH (2016), https://aspe.hhs.gov/sites/default/files/private/pdf/207941/AIANYouthTIC.pdf [https://perma.cc/P2W9-SCU6] (describing historical trauma in connection with boarding schools).

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ARTICLE

ENDING THE FAMILY DEATH PENALTY AND BUILDING A WORLD WE DESERVE

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[a] Ashley Albert is a parent advocate in the state of Washington. She was the first parent in Washington to legally enforce, and modify, an open adoption agreement after her child was taken away by Child Protective Services. Her work focuses on the needs of women and children with incarcerated loved ones.

[b] Tiheba Bain is Founder and Executive Director of Women Against Mass Incarceration, an organization empowering justice involved women and girls. Recently Ms. Bain was inducted into the Connecticut Hall of Change for her exemplary work in the state. She is a Yale Access to Law School Fellow and a public speaker. She sits on Connecticut's Lt. Governor Womens Commission of Health and Safety and the African American sub commission of Connecticut's General Assembly Commission. Tiheba co-hosted the first three #FreeHer conferences and is the former Coalitions Director of The National Council.

[c] Elizabeth Brico is a freelance writer and journalist, and a 2019–20 journalism fellow with TalkPoverty. She was also a 2019 Reimagining Communities fellow with The National Council for Incarcerated and Formerly Incarcerated Women and Girls, where she researched the use of predictive analytics by child services agencies. Her writing typically focuses on social justice, particularly as they relate to the drug war and the foster industrial complex. Her work has appeared in VICE, Vox, Talk Poverty, The Appeal, Filter Mag, Columbia Journalism Review, Undark, Politico, and more. In her free time, she can usually be found reading, writing, or watching speculative fiction. Check out her portfolio at eb-writes.com and follow her on Twitter @elizabethbrico

[d] Bishop Marcia Dinkins is the Founder and Executive Director of Black Women Rising a grassroots organization that centers the voices and stories of Black women using a trauma informed organizing approach for collective healing, power and transformation. Marcia has conducted multiple social justice workshops and organized multi-level campaigns to protect and defend women's rights. She is currently a Ph.D candidate at Union Institute & University studying Public Policy & Social Change with a specialization in Women & Gender Studies. She has certifications in Cultural Competency, Forgiveness Therapy, Restorative Justice Trainer, Trauma Informed Approach Trainer, Executive Management Leadership, and multiple certifications regarding Child welfare.

[e] Kelis Houston is Founder of Village Arms (VA), a Christ-centered organization that supports African American families impacted by child protection. VA was created in direct response to the over representation and disparate treatment of African Americans across the child welfare service continuum. Kelis' mission is to help eradicate these disparities through

Joyce McMillan,[f] Vonya Quarles,[g]
Lisa Sangoi,[h] Erin Miles Cloud,[i]
and Adina Marx-Arpadi[j]

U.S. history is rooted in the rationalization of family separation to benefit white supremacy, capitalism and mainstream U.S. values. Because of this dark history, the U.S. history has become the world's leader of legal destruction of families through termination of parental rights. It is the only country in the world that routinely pays people to adopt children whose parents, often women, very much want to be their parent. The Adoption and Safe Families Act, enacted in 1997, wildly changed the legal landscape of the family regulation system. At that time 47% of the children in the system were Black, and the drug war had

legislative action, family advocacy, and policy reform. She wrote, and is advocating for, the Minnesota African American Family Preservation Act to stop the arbitrary removal of Black children from their families and community. She also serves as cultural consultant and trainer to child welfare staff, students, and service providers.

[f] Joyce McMillan is a thought leader, advocate, activist, community organizer, and educator. Her mission is to remove systemic barriers in communities of color by bringing awareness of the racial disparities in systems where people of color are disproportionately affected. Joyce believes before change occurs the conversation about systemic oppression that creates poverty, and feeds people of color into systems must happen on all levels consistently.

[g] Vonya Quarles, a California native with southern roots, is a 3rd generation formerly incarcerated woman with lived experiences related to Child Protective Services, adoptions, and foster care. She is the co-founder and director of Starting Over Inc., a reentry service provider and civic engagement apparatus. She is a Women Organizing for Justice Fellow 2010, Women's Policy Institute fellow 2012/2013, J. Irwin Award recipient 2013, Eleanor Jean Grier Leadership fellow 2014, WKKF Fellow 2015, Rosenberg Fellow 2019. Vonya is a licensed and practicing attorney that blends her formal training with community advocacy, organizing, engagement, and action. A mother and grandmother, Vonya is grateful to the warrior women and men, the strategists, the doers, that have given so much to the fight for freedom. She recognizes that if it weren't for them, she would not have the examples to follow, or the shoulders to stand on. Because of them, she is, and because of them, we can and must WIN.

[h] Lisa Sangoi is the Co-Director and Co-Founder for Movement for Family Power.

[I] Erin Miles Cloud is the Co-Director and Co-Founder for Movement for Family Power.

[j] Adina Marx-Arpadi is a second-year law student at CUNY School of Law. She is a doula and lactation counselor, and a member of the Birthmark Doula Collective.

been targeting Black men for low level offenses, and labeling Black mothers as "crack moms". The result was an extreme attack on Black families, for which we have yet to recover.

Abolition teaches us to unroot oppressive structures, disrupt and dismantle them while simultaneously supporting a praxis of imagination, healing, and building. In this paper, we encourage people not only to work to repeal ASFA, but to interrogate the imagination which entrenched the legitimacy of ASFA. Part I centers the discussion in our imaginations—the world we want to build, and the demands we are making. Part II moves into a discussion about the counter imagination, the ideas and mythology that created ASFA—the legal framework. In this section, we isolate ASFA as a target for abolition and organizing. Part III moves into a practical discussion about ethical ways to mobilize around ASFA. This section is intended to invite the reader to learn, and question, together. It invites questions, thinking, and problem solving in lieu of providing a recommendation.

"It doesn't interest me
who you know
or how you came to be here.
I want to know if you will stand
in the center of the fire
with me
and not shrink back."

—The Invitation, by Oriah[1]

Jahmel Reynolds, Illustration of White Hands Destroying a Black Family Tree. Produced in collaboration with the authors. Reynolds's other work can be found on Instagram, using the handle @jahmelr.

[1] Oriah, The Invitation (1994), *in* ORIAH, THE INVITATION 1 (2006).

I. INTRODUCTION

We are directly impacted mothers, community organizations, and allied advocates across the country. We fight for family liberation. Many of us met for the first time in 2019 in Philadelphia. We participated in a convening called, "Fighting for Family," co-hosted by The National Council for Incarcerated and Formerly Incarcerated Women and Girls. Together, about 50 people—predominantly women, mothers and people of color—decided to deepen our relationships, leverage our expertise, gain momentum, develop coalitions, and build out solidarity against family separation tactics.

We understood, even before most mainstream institutions believed, that the criminal and foster systems work together to oppress marginalized genders, and that people who have been impacted by these systems are best positioned to lead change. That racism, capitalism, colonialism, ableism, sexism, classism, heteronormativity, etc., are just some of the dark forces which deprive us of the world we deserve, and that all forms of cages—physical, political, and spiritual—must be dismantled. That calling the system a "child welfare" system is disingenuous, because it is actually a family regulation and destruction device.[2]

In Philadelphia, we collaborated and brainstormed. We agreed that there were many ways to end the reliance on family policing, regulation, and destruction as a political tactic; even though few people were taking on the violence enacted by Adoptions and Safe Families Act (ASFA)—a law that dramatically changed the State's obligations to work with families, created financial incentives for adoptions, but not reunifications, and outlined strict timelines to terminate

[2] We give gratitude to Professor Dorothy Roberts, who built enormous scholarship and framing around the regulation of families and bodies through the child welfare system. This framing is not only seen in her foundational books, SHATTERED BONDS, THE COLOR OF CHILD WELFARE (2002), KILLING THE BLACK BODY (1997), but also in a wealth of scholarly articles, one of which became a foundational text for our convening in Philadelphia: Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012). We also appreciate the language development and framing in Emma Payton Williams, Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition (2020) (B.A. thesis, Oberlin College), https://digitalcommons.oberlin.edu/cgi/viewcontent.cgi?article=1711&context=honors [https://perma.cc/58GC-92J5].

parental rights (TPRs).[3] Far too many of us had known or witnessed the pain of TPRs—better known as the civil death penalty,[4] and agreed that it is not an exaggeration to liken them to family death. TPRs erased families, children's names were changed, and many parents were left wondering if they would ever get to hear the voices of their babies.[5] It was clear that we had to end this violent cycle of family destruction.

In building out the work, we grounded ourselves in abolition as a theory of change, because we understood abolition as a political home that asks us not to acquiesce to a narrow understanding of the future, but to stretch, twist, and wring out all the permutations of possibility, and fully embrace the capacity of potential. As students and curators of abolition, it would be our duty not only to disrupt ASFA as a policy, but to unroot the underlying oppressive ideologies which gave rise to its violence. We would have to engage in a praxis of imagination, healing, and building so that we could move away from subtle reform, and into a world of transformative solidarity.

Nearly two years later, we publish this Article about what we have done since meeting in Philadelphia, and how we are thinking about change. Our mission is to dismantle ASFA *and* to build a new world. We are asking for both ideas to exist simultaneously within the consciousness of the reader, as we argue that freedom must be our North Star, and as a consequence, ASFA will be dismantled.

Our Article's thesis is fluid and future leaning, because our work is fluid and future leaning. We wrote this Article in a voice and structure that we hope invites the reader to feel the culture of our work, which is as hopeful as it is urgent. We start with our demand and vision of the future instead of a history of the law. We then move on to a discussion of ASFA as an

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[3] *See infra* Part II.

[4] In re Smith, 77 Ohio App. 3d 1, 16, 601 N.E.2d 45, 54 (Ohio Ct. App. Aug. 30, 1991) ("The rights to conceive and to raise one's children have been deemed 'essential, basic civil rights of man,' and '[r]ights far more precious than property rights.'") (internal citations omitted). Stanley v. Illinois, 92 S.Ct. 1208, 1212 (1972). A termination of parental rights is the family law equivalent of the death penalty in a criminal case. *See also*, Elizabeth Brico, *The Civil Death Penalty Makes Hungry Ghosts of Mothers and Children*, BETTY'S BATTLEGROUND BLOG (Mar. 13, 2019), https://www.bettysbattleground.com /2019/03/13/the-civil-death-penalty [https://perma.cc/JSP9-43LY].

[5] Brico, *supra* note 4.

antagonist to our story of liberation, focusing on its stifling impact to political imagination and making clear that ASFA is a driver of white supremacy, family separation, and community destruction. We end the Article with invitations to build, learn, and create in lieu of recommendations. We end this way purposefully, because this Article is not prescriptive, but rather a memorialization of a time of thinking between a group of women envisioning and embodying change. We invite questions, community, and continued thinking. We do not have all the answers, but provide guiding questions and principles to find them.

We also write this Article at a time when our movement has suffered from isolation, the overwhelming oppressive reach of carceral systems, lack of funding and political access, racism and many more afflictions. We sit in a cold winter of activism, desperately awaiting a summer of change, reckoning and uprising. We implore you to struggle with us, be in community with us, and read the words that we have written with care and time. Let this Article sit deep in your soul—talk about it, disagree with it, agree with it, picture it, paint it, dance about it. Imagine and build freedom. We bare our lacerated hearts to you, and to anyone who cares to meaningfully share this vision and dream. We will be free, as will our children, and our children's children.

II. THE WORLD WE DESERVE: OUR VISION AND OUR DEMAND

> *"Do we get to live our life? That has been the fight for Black people for so long. Will we be able to express ourselves the way we want to express ourselves without demonization, without having to succumb to violence. Do we get to live our life?"*
>
> *—Bishop Marcia Dinkins*

Our demand:

We write this as mothers who have suffered the ineffable pain of losing a child to a system that came to us calling itself a savior. Mothers who had to silently watch—some of whom are still watching—as our children are raised by others under a set of values and principles different than our own. Mothers who could not watch our children grow up at all. We write this as children who were stolen from our families and told we were made from junk-genetics; the product of so-called broken mothers

and failed fathers, but who still had the courage to become mothers—only to have our motherhood terminated before it could bloom. We write this as survivors of physical and sexual violence who were punished for surviving; whom the system chose to teach the cruel lesson that surviving such violence made us unworthy of motherhood. We write this as mothers who used drugs, but still loved our babies. Mothers who used drugs, but still cared for our babies. Mothers who were incarcerated, but still loved, cared, and yearned for our babies. We write this as mothers who made mistakes. Mothers who asked for help without knowing our babies were the cost of our asking. We write this as Black mothers, Latina mothers, poor mothers, queer mothers, disabled mothers, single mothers, abused mothers, addicted mothers, loud mothers, and loving mothers. We write this as the allies of mothers and fathers and parents who are targeted by this system of family destruction. We write this as allies, defenders, and advocates who have witnessed the endless torment that results from child loss; who have tried to stop families from being separated forever, and who sometimes succeeded but many times failed. Not because we didn't try or care enough, but because the system is rigged against families. We write this as fighters for the sanctity of family integrity—and *we are no longer asking*.

We demand a world where the integrity of all families is valued and family ancestry is held sacred. In this world, families are supported and given the resources they need to thrive, and the family death penalty, or termination of parental rights, no longer exists. In this world, we are building healing space for families who have been forcibly separated, and we are collectively building a vision of how to hold families together through all our complexities and experiences. Our village resurrects, and the sound of communal joy resonates from home to home, person to person.

The world we demand is a world built for us. Black children can be children, and Black, Brown, and poor birthing people are trusted with decisions for the care of their bodies and families. It is filled with love, understanding, joy, and peace. It has fields of sunflowers, lilies and other flowers giving fragrance to the world. It feels like freedom and it tastes like *abuelita's congri*, my sister's fried chicken, fresh mango, and mama's macaroni and cheese. It tastes like home. When we look at

people's faces, they are happy, because for once, Black people are living without fear. They are not worrying about who is knocking on their door, or feeling a panic when they get a call from an unknown number, and they rest easy knowing their children are safe. Black daughters are safe.

We demand a world where people have time to spend with their family, going to museums, parks, vacations. It is a world without war, poverty, racism, hatred, or mayhem. Language is not a barrier, but a thread of understanding. This world utilizes a true barter system, without capitalism, with adequate housing for everyone, employment that suits all skill sets, and an education system where we are taught the truth about our heritage and about other people's heritage, not a colonized fantasy.

We demand a world where we are recognized for our actions and the substance of our beings—not judged for the substances that may sometimes be in our bodies; substances that we all use.[6] In this world, it is understood that healing is non-linear, and that old injuries can resurface afresh many years after the original wounding. The passage of time does not efface a person's need or deserving of care. The way someone copes with their pain is not a commentary on their love for their children. Asking for help is not an admission of incompetence, nor does it grant permission for the helper to take what is not offered. In this world, substance use is recognized as a normal part of human existence, and it does not transform into harm when it is done by a person of color or a poor person. In this world, those of us who live with addiction, or trauma are afforded the space, time, and support necessary to heal, and our children are allowed to be participants in that healing. In this world, our children learn that adversity can be overcome, that mistakes can be forgiven, and that the experience of suffering does not make permanent outcasts of us. In this world, we are not always perfect. We are not always liked. We do not always make good choices, but we still have the right to come home to our babies each and every day.

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[6] *See* German Lopez, *Black and White Americans Use Drugs at Similar Rates. One Group is Punished More for It*, VOX (Oct. 1, 2015), https://www.vox.com/2015/3/17/8227569/war-on-drugs-racism [https://perma.cc/PMH2-H4HT] (demonstrating how both Black and white Americans use illicit drugs at similar rates).

We demand a world where systems do not dictate the futures of families, nor are the complexities of human pain, love and need, reduced to checklists and algorithms; where there are numerous community-based alternatives to provide the rites of passage for healing. For example, when a person gives birth, there is a community member that can stay with the parent and children if so desired. Families stand together: babysitting each other's kids, giving each other breaks, honoring the need for time apart and together. We have eliminated the fatigue, grief, and death that are constantly imposed on Black women, birthing people, and caretakers. Neighbors become aunties, and strangers are now our extended families.

In this world, we govern our own communities, and have participatory policy making. Parents and community leaders support each other. We come together with our children, eat food, make decisions, and watch the babies play. Hate is buried. Love is a verb, and we see it in action. Our differences are no longer weapons used to divide us, but rather kindle for curiosity and unity. We build, and practice building, with the understanding that our liberation is intertwined. All top-down systems are eradicated. Instead, grassroots efforts anchor us and lead the fight for the health and well-being of families.

In the future there will be mistakes. But those mistakes will be allowed to fuel growth instead of being held over us as perpetual bludgeons named "shame" and "humiliation." We would be living in a world where practicing the skills to end harm, mediate conflict is an imperative. We would generate stamina to endure the ebbs and flows of disagreement, and understand this as a practice of joy, not a necessity born out of fear. It will be our duty to eliminate the pathology of anger. It will be our duty to develop and normalize the reflex to "step up" and "step in." What is now considered hard, will be considered routine.

We hear our world as clearly as we can see it. It sounds like flowing water, waves clapping against rocks, the crescendo of a waterfall, a breeze strumming its gentle tune through the autumn leaves. It sounds like birds chirping in the distance, their melodic banter a symbol of the peace we have achieved. But most of all, it sounds like the voices of our children.

In this world, all of us would wake up and hear our kids in the morning. We would call out to them and hear them answer,

"mom." Our grandparents, mothers, and children would be chattering, and laughing. Sometimes the words would be hard, and sometimes the words would be soft. We hear bickering in this future, over things like what to eat for breakfast, or what games to play, and what clothes are okay to wear. We reminisce about hard times—when we battled together and battled each other. Then we hear silence, sighs, laughter, and silence again. In this future, our days end with our eyes closing, and deep rest. We wake up and hear each other's voices again. There is a repetition in hearing each other; our families are the soundtrack of our future.

And if we must live in a world where we battle, it will be with an army united. Millions upon millions of people of all backgrounds, races, nationalities, professions, generations, orientations, and inclinations will stand together with the clarity, strategies and power necessary to dismantle the systems that once kept us apart, down to the very rubble of their foundations. When we fight, we will do so with the confidence and knowledge of our collective experience, with the power and endurance that comes from knowing we will accept no other outcome than to win. Then, when it is all over, we will breathe, we will rest, we will rejoice—and then keep building.

This is our demand. We are no longer asking.

III. THE VIOLENT ANTAGONIST: WHITE SUPREMACY AND ITS IMAGINED REALITY

> *"I often feel I am trapped inside someone else's imagination, and I must engage my own imagination in order to break free."*
>
> *—Adrienne Maree Brown*[7]

Our opportunities to grow and nurture our world vision have been suffocated by the imagination of others. These imaginations have built oppressive systems that have sucked nourishment from our world and traded domination for liberation, and personal responsibility for cooperative

[7] ADRIENNE MAREE BROWN, EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS (2017).

interdependence. They build and manipulate massive, faceless institutions—the prison, family regulation, immigration, and public assistance systems, to name a few. And they make them seem like the inevitable result of existence. They are not. They are the manifestation of white, colonial fantasies that become laws, that create smoke screens of noble purpose, and that cover dark realities of manipulation, oppression, and inequity.

When we consider the Adoption and Safe Families Act, we situate our analysis not only in the elements of the law, but also the dominant imagination that allowed it to exist and survive with very little opposition. One starting point is looking at Senator John Chafee (R-RI), a lead Senate sponsor for the legislation, who on the eve of the eve of the passage of the ASFA told the New York Times, "[i]t's time we recognize that some families simply cannot and should not be kept together."[8] He spoke these words when nearly half of the children in the family regulation system were Black, most were poor, and the federal government was rapidly draining social safety nets.

We believe that the families Chaffee imagined were not his own. He was from a family to which the entire power and might of the United States was dedicated to keeping together. In his direct ancestry were multiple governors, law professors, and senators. He attended the most elite institutions of the Northeast and went on to live the life he was predestined to live—ascending from congressperson to governor to secretary of the navy to senator.[9] He had been bequeathed generational wealth and social status from the blood, sweat and tears of our families—literally achieving social and political capital from the backs of our ancestors. He would likely utter the words that "some families should not be kept together" with a strong sense that his would continue to accumulate wealth and status, while we would inherit a devastating history with the foster system.

Unfortunately, Chafee was not alone in his imagination of deserving families. His speech was a regurgitation of mainstream political rhetoric that was seeded in racism, misogyny and capitalism, long manufactured by the pushers of chattel slavery, political borders, and other vile story tellers. He

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[8] Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. Times, Nov. 17, 1997, at A20.

[9] *E.g.*, *John Chaffee*, WIKIPEDIA, https://en.wikipedia.org/wiki/John_Chafee (last visited Mar. 22, 2021).

did, however, add the additional layer of neoliberal storytelling that would promote a narrative of "personal responsibility" over our families.

This specific narrative had been brewing for many decades but really became a pillar of political propaganda in the 1970s. With the specter of the Black liberation movement squarely before it, the United States deliberately abandoned[10] the belief that the government could, or should, play a role in leveling the playing field between the rich and poor, thereby making invisible decades of the U.S. government's segregated aid-giving strategies like the New Deal, and 1944 GI Bill—strategies that built a gold plated escalator devoted to the accession of whites to the middle class.[11] This erasure, in part, created fertile ground for neoliberalism to fill the gap with the notion of a "free market".

The "free market" would be the leading protagonist of the economic story told by the neoliberalists. This "free market" would be color blind, race blind, gender blind, and class blind. It would enter the final act of the 20th century with a bold message about "personal accountability"—a message that venerated the market and justified the government's abdication of its responsibilities to support their most marginalized members of society.

Many of us recall being told that the "free market" was the greatest arbiter of equality, and that we could leave access to basic life necessities in the hands of the "free market." That those who worked hard would get what they worked for. That those who did not work hard—well, they would not get what they did not work for. We came to learn that for our communities, for Black folks, for Brown folks, social mobility was in our hands, and ours alone. The free market neither gave a hand up nor beat

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[10] *See The Powell Memo: A Call to Arms for Corporations*, MOYERS ON DEMOCRACY (Sept. 14, 2012), https://billmoyers.com/content/the-powell-memo-a-call-to-arms-for-corporations/ [https://perma.cc/38SQ-42HW] (describing the United States' increased focus on businesses in the 1970s).

[11] *See, e.g.*, Darrick Hamilton, *Beyond Neoliberalism, Neoliberalism and Race*, DEMOCRACY: A JOURNAL OF IDEAS, Summer 2019, https://democracyjournal.org/magazine/53/neoliberalism-and-race/ [https://perma.cc/CM32-GSTG]; IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA (2006) (describing policies in the 1970s that were geared towards propelling white people out of the middle class).

a person down. If something bad happened in someone's life, the free market alleged that it was their fault. Glaringly absent from this grotesque fairy tale spun by racial capitalism were the inherited advantages and disadvantages of history, of decades of infusion of social and economic capital into white communities, and the political power that followed.[12]

From the 1970s on, the US would continue to privatize access to the basic life necessities—such as housing and higher education—the government provisions of which were otherwise the bedrock of the momentous buildup of wealth in white communities.[13] They would use language to pathologize us for accessing what little government assistance was left, and blame us for the harms of living under centuries of oppression, calling Black, Brown, and low-income mothers "crackheads" and "welfare queens." They would push them into systems, and turn their backs on families and communities. They would disappear adults into the prison system and children into the family regulation system.[14] When they put mamas in cages, mamas would send their children to live with their parents only to be told that their children could not live with their grandparents. The free market, white institutions, governments, pundits, the medical establishment, academia, and others, placed the blame for the fallout in our community squarely on those of us who suffered the most harm.

With this history and with these lies, it is unsurprising that ASFA passed with little political controversy or fanfare. For all intents and purposes, it embodies the sentiment, imagination, and consciousness of the moment—that the government does not have an ongoing responsibility to support families, that if something bad happens to our families it is solely our fault, and

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[12] Hamilton, *Beyond Neoliberalism*, *supra* note 11.

[13] The U.S., of course, continues to support and subsidize the accumulation of white wealth through many means, such as the tax code but has managed to make the massive government assistance that white and wealthy people receive invisible. Jocelyn Harmon & Jeremie Greer, *How the US Tax Code Drives Inequality—And What We Can do to Fix it*, FORD FOUND. (Apr. 13, 2017), https://www.fordfoundation.org/just-matters/equals-change-blog/posts/how-the-us-tax-code-drives-inequality-and-what-we-can-do-to-fix-it/ [https://perma.cc/CE5C-J5JE].

[14] Ingrid Archie, *Address at the #StopStealingOurBabies Virtual Town Hall of the Time for* Change, TIME FOR CHANGE FOUND., (Aug. 25, 2020), https://www.facebook.com/watch/live/?v=942945716197667&ref=watch_permalink).

that we—alone—are responsible for centuries of political neglect. The Adoption and Safe Families Act reflected these ideas by:[15]

> 1. Demanding that every child welfare system across the country move toward termination of parental rights proceedings after a child has been in foster care for fifteen of the past twenty-two months;[16]
> 2. Insisting that every child welfare system skip efforts to keep families together and move directly to termination of parental rights as soon as a child enters the foster system, if "aggravated circumstances" exist;[17]
> 3. Establishing unprecedented federal incentives to states to permanently separate families and terminate their legal ties, with no comparable financial incentive to reunify or keep families together.

The adoption of this law was swift. By July 1999, all states had laws that mirrored the federal legislation or were more stringent than the federal law.[18] A formerly incarcerated mother and ASFA activist in New York State, Christina Voight, reflects that at the time of the law's passage, everyone, from the mothers caged to the family regulation agents to the agencies themselves had no idea how ASFA would actually unfold.[19] The law was literally written on the backs of families.

Since ASFA was enacted, more than one million children have been permanently separated from their parents.[20] That is about the population of Rhode Island. It is more than the entire city of Boston. The annual number of family dissolution and

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[15] Adoption and Safe Families Act, 42 U.S.C. § 1305 (1997).

[16] There are limited exceptions to this timeline. One such exception is that the court can use its discretion when it serves the best interests of the child, to extend the timeline. As authors who have practiced for years in New York, and people who have directly experienced ASFA, we have not observed use of this provision.

[17] Aggravated circumstances range from past criminal convictions to the mere fact that a parent has lost their termination trial in the past.

[18] Foster Care: States' Early Experiences Implementing the Adoption and Safe Families Act, U.S. GOV'T ACCOUNTABILITY OFF. (Dec 22, 1999), https://www.gao.gov/products/hehs-00-1 [https://perma.cc/SUU3-RB6K].

[19] Interview with Christina Voight, Movement for Family Power (Dec. 21, 2020) (on file with author).

[20] Kim Phagan-Hansell, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, IMPRINT (Nov. 28, 2018), https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582 [https://perma.cc/VWM5-5BKQ].

adoptions have increased by 57 percent from the time ASFA was enacted through fiscal year 2004.[21] Moreover, between 1997 and 2019, because of ASFA, at least 121,000 more children aged out of the family regulation system with no permanent home than would have aged out had there been no ASFA, giving America the distinction of having the largest number of legal orphans out of anywhere in the world.[22]

Too many of us have believed what they told us about the system—the myth of personal responsibility creates false paths of redemption. Many of us were told that we were being selfless and doing something good if we gave up on our case, our children, and relinquished them to the system. Yet some of us have since found our children, spoken with our children who are adults now, and we have learned that this system was not good for them. It was not as some of us perceived it to be. It was not as the system described. It was certainly not redemption.

We publish this Article over 20 years after the passage of ASFA, 20 years into surviving and thriving in spite of the horror it has inflicted on children, families and communities. We write this and continue to be stunned by the amount of money this law has funneled into family regulation systems across the country. Money that was stolen from communities. In 2017 alone, states were projected to receive $2.658 billion in federal Title IV-E adoption assistance budget to fund other families to care for our children.[23] From 1999 to 2014 the federal government projected that it gave states $423,754,125 as an award for dissolving our families and adopting out our children.[24] Over the course of 20 years, the federal government (not including state governments) has spent tens of billions of dollars on paying other families to permanently raise our children and the children of the families

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[21] U.S. GOV'T ACCOUNTABILITY OFF., GAO-03-626T, FOSTER CARE: STATES FOCUSING ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 2 (2003).

[22] *ASFA: The Racist Child Welfare Law From the 1990s that Almost No One Talks About*, NAT'L COAL. CHILD PROTECTION REFORM, CHILD WELFARE BLOG (Nov. 8, 2020), https://www.nccprblog.org/2020/11/asfa-racist-child-welfare-law-from.html [https://perma.cc/9RDC-CKZC].

[23] CONG. RSCH SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 19 (Jan. 2, 2018).

[24] CONG. RSCH SERV., R43025, CHILD WELFARE: THE ADOPTION INCENTIVE PROGRAM AND ITS REAUTHORIZATION 19 (July 15, 2014).

we support.[25] These numbers far outpace the money or energy that as invested in us, our families, our communities, and our advocacy. Can you imagine what we could be doing for our families if we had that type of investment?

ASFA is a continuation of many troubling histories in the United States where normative judgements around who were worthy families and who were not, who were worthy communities and who were not. It used considerable resources and wreaked and continues to wreak havoc on so many communities.[26] It has trapped so many people's perspective of what is possible, and it must end.

IV. AN INVITATION FOR TRANSFORMATION

> *"The ending of one story is just the beginning of another. This has happened before, after all . . . . Old orders pass. New societies are born. When we say, "the world has ended," it's usually a lie, because the planet, is just fine. But this is the way the world ends. This is the way the world ends. This is the way the world ends. For the last time."*
>
> *—N.K. Jemison*[27]

We build a new world, not just by repealing laws, but through transforming and undoing oppressive social orders, actions and interactions. ASFA is a symptom of centuries of family separation policies that have relied on the degradation of Black, Brown, and poor bodies to legitimize their existence. It is kin to the Violent Crime Bill, cousin to the Personal Responsibility and Work Opportunity Act, sibling to the Illegal Immigration Reform and Immigration Responsibility Act, and heir apparent to all the laws that built up racial capitalism, chattel slavery, segregation, border control, reproductive injustice and U.S. war strategies. Its relationship to the history of punitive policies is a rationale for both its full repeal, and also

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[25] We estimate the total cost to be much higher, as these numbers do not include the cost of family investigation and child removal that proceed permanent dissolution.

[26] Latagia Copeland Tyronce, *Yes, the Adoption and Safe Families Act (ASFA) Can and Should Be Repealed!,* MEDIUM (Dec. 24, 2018), https://medium.com/latagia-copeland-tyronces-tagi-s-world/yes-the-adoption-and-safe-families-act-asfa-can-and-should-be-repealed-9c18ac391997 [https://perma.cc/CM35-BYDM].

[27] N.K. JEMISIN, THE FIFTH SEASON (2015).

a reason why a traditional legal/policy strategy, alone, will not bring us closer to our world vision.

We want to build transformative and lasting change. We believe there should be no termination of parental rights, no fast-tracked adoptions, no stringent timelines for reunification, and no financial incentives for separations and adoptions. We insist on the end of terminating parental rights during a global pandemic, because of parental incarceration or simply because someone has not achieved remission from a complex medical condition. We require a full repeal of ASFA. These are our demands, and they can be enacted immediately. However, even if we were to achieve these policy shifts, our work would not be done. We aim not only to eliminate ASFA but to uproot the culture of family policing and forced family separation. Our success will be measured by the shift in political alignment, imagination and transformation of our community, not by the legislative session.

We are building in collective struggle. We are learning together, and offer this final section as a glimpse into what that process looks like for us. We urge you to read this section not as a blueprint for organizing but rather a description of our time together. Maybe this will inspire imagination or invite accountability, regardless we share this space with you and hope to:

1. Invite movement building;
2. Invite memory sharing, imagination, and community building;
3. Invite learning from other movements;
4. Invite principled organizing strategies; and
5. Invite healing and reparations.

In each subsection, we have tried to cite some of our resources in the footnotes in each section and hope that it will serve as a conversation starter as we all work to build a new world.

A. An Invitation to Movement Building to End the Culture of Forced Family Separation

When we met in Philadelphia in 2019, we had the opportunity to work with AYNI Institute. AYNI is a small grassroots organization that, among many things, has studied

hundreds of movements over the last two centuries.[28] In Philadelphia, they learned from us and also taught us about the work they have been doing, especially as it pertained to thinking about the importance of social movements,[29] and their life cycles.

One of our main takeaways from AYNI is that we are all connected to the earth, and as a consequence we are all connected by universal laws of nature.[30] One example is that we all go through the cycle of life and death in various ways, and this cycle is not confined to a human experience, but is also seen in activism, social justice trends, organizations and movements.[31] This framing is a shift from the traditional linear trajectory that often directs legal, non-profit or traditional legal and policy strategies, and creates a circular pattern of planning that helps us orient our work, define our success and create stamina for the inevitable retrenchment.[32]

AYNI uses the metaphor of seasons to explain that social movements go through a winter, spring, summer and fall, and this cycle takes approximately 5–15 years.[33] We learned that in each season there are different opportunities.[34] In the winter of a movement, the work is internal; among other things it is a time of low activity and planning, which is the opposite of the

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[28] AYNI INSTITUTE, https://ayni.institute/ [https://perma.cc/4YC2-592B] (last visited Jan 8, 2021).

[29] There are many activists, scholars etc. that have been teaching and explaining about the importance of social movements which include but are certainly not limited to: Ella Baker, Black Panthers, Black Liberation Movement, Civil Rights Movement, Marsha P. Johnson, Dolores Huerta, adrienne maree brown, Law for Black Lives, Movement Law Lab, Black Organizing for Leadership and Dignity, New Georgia Project, ConMijente, Combahee River Collective, the Black feminists who proclaimed the need for Reproductive Justice, formations like Survived and Punished, No New Jails, and the countless international movement builders, activists, and theorists. We are humbled by so many before us and raise AYNI institute as they were a specific partner in the support of this work, and we learned a lot from their guidance and especially the specific support of Fhatima Paulino.

[30] Ayni Institute, *Movement Ecology Introduction Webinar*, YOUTUBE (Sept. 6, 2016), https://www.youtube.com/watch?v=pGWYaw3he2w&feature=youtu.be (last visited Mar. 23, 2021).

[31] *Id.*

[32] *Id. See also,* Jennifer Ching et al., *A Few Interventions and Offerings from Five Movement Lawyers to the Access to Justice Movement*, 87 FORDHAM L. REV. 186 (2018) (discussing strategies for building sustainable movements).

[33] Ayni institute, *3. Movement Seasons*, YOUTUBE (Apr. 16, 2019), https://www.youtube.com/watch?v=KSwnVINjYgI (last visited Jan 8, 2021).

[34] *Id.*

summer—an external, high activity time that may allow for large scale policy changes that can be supported by an accountable movement infrastructure and lead by people more directly impacted by social change.[35] They reminded us that many movements get stuck in the winter and never move to spring, explaining that this is because everyone wants to be in an eternal summer.[36] That there is a dominant summer culture of "do do do," that is projected by many organizations, institutions, and even ourselves, and that organizations do not respect people's winter.[37] They also said that we often get stuck in a "winter" because we lose sight of what is needed during a winter, retreating, deep thinking, learning, and relationship building. [38]

When we learned about the different traits of each season, we almost universally agreed that the abolition of the family regulation and destruction system was squarely situated in a winter. We saw the traits of isolation and low or little funding for activist leadership. We saw the blank stares when we told people we should end the child welfare system and questioned its efficacy.[39] We felt the frustration that many of our comrades and progressive colleagues confused our demands with one that asked for abuse and harm for children.[40] We observed the layers of shame, stigma, and oppression that surrounded communities, parents, and families resisting and activating.[41] We certainly were not in a summer.

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Many activists and directly impacted people have been arguing for a swift change with little to know support, funding or even serious consideration by mainstream media/lobbying efforts. *See, e.g.*, Latagia Copeland Tyronce, *supra* note 26. The resistance in Contra Costa County, some of which is captured in writing by Michelle Chan. *Michelle Chan*, SAN FRANCISCO BAY VIEW (2021), https://sfbayview.com/tag/michelle-chan/ (last visited Mar. 24, 2021).

[40] One representative example, is the fight by Elizabeth Brico for her daughters. She created her own petition to convince stakeholders that she should be with her child, exposing the very clear and real evidence that despite allegations of substance use there were no connections that her children were ever neglected. *See* Elizabeth Sparenberg-Brico, *Reunite the Brico Babies with their Mama*, CHANGE.ORG, https://www.change.org/p/florida-department-of-children-and-families-reunite-the-brico-girls-ages-5-and-6-with-their-mama (last visited Mar. 24, 2021).

[41] VOICES Keston Jones, *Episode 3 Dinah Ortiz: #Family, #Women's and #CriminalJusticeReform #Advocate. #VOICESKJ*, YOUTUBE (Nov. 25,

The opportunities during winter center on decreasing isolation around those most impacted, activism and organizations that are looking to direct their resources at the same target and deepening alignment around the political understanding of the target issue.[42] This means creating regular practices around meeting and creating community, developing coalitions with sustainable infrastructure, discussing how we want to be in relationship with each other, developing aligned targets and talking points, and sharing and building political education around the issues we want to tackle. It also means ensuring that resources do not consolidate and congeal within funded non-profits or carceral systems, but rather move towards community, leadership development, idea generation and innovation.

In the last year, our work around repealing ASFA was focused on the strategies we believe will pull our work from winter to spring. We organized a convening in Philadelphia, engaged in horizontal learning and political education and then isolated a particular element of the law we believe we can tackle, ASFA. From that Philadelphia convening, we started a steering committee that has now been meeting regularly for approximately a year. We were hoping to have another, smaller in-person convening in March of 2020—though COVID has impacted our ability to physically be with one another. We are hoping to invite people into working groups in 2021, and we want to take time to think through how to bring people together, how to organize and how our time together can be meaningful, healing, creative and generative.

Most importantly, we have built relationships with each other during this winter. We have learned together, deepened our value alignment and trust, and hopefully also built resiliency. This is the work of the winter, that we hope evokes a spring. We will have to change the outputs of our work as our movement shifts. This is a part of our strategy and what we believe it takes to truly support liberated policy demands.

2018), https://www.youtube.com/watch?feature=youtu.be&v=5Zz9Ku67Y-U&app=desktop (last visited Mar. 24, 2021).

[42] Ayni Institute, supra *note* 29.

B. An Invitation to Reimagine and Build Resilient Communities and Family Structures by Learning from Shared Memories

We aspire to center the experience, expertise, leadership and voice of the most directly impacted by ASFA. We strive to be accountable to both those within our movements and those in adjacent movements and be in constant practice of sustained community building. This intentional work is difficult and has proved even more difficult this year where a global pandemic shut down our ability to be in physical contact with each other. Nevertheless, we are reminded by the words of Adrienne Maree Brown, that we must "[m]ove at the speed of trust" and that, "[t]here is always enough time for the right work. There is a conversation in the room that only these people at this moment can have. Find it."[43]

One of the conversations we have started building is with indigenous communities, who, in response to the devastating impacts of the removal of their children, have pushed back on the family destruction system and the dissolution of their families. This has included fighting for tribal sovereignty and jurisdiction over child welfare cases to bring them into tribal courts, and implementing alternatives to termination of parental rights. Judge Bill Thorne, who is Pomo Coast Miwok, a former State of Utah Court of Appeals Judge and former tribal court judge, describes these efforts as "not just about reimagining, but about remembering how we used to do it in our communities."[44]

We have learned a lot, and have a lot more to learn. Professor Priscilla Day, an Anishinaabe tribal member enrolled at the Leech Lake reservation and a professor of social work at the University of Minnesota Duluth, explained to us that there is a belief among many tribes that children choose their parents, and that the parent-child bond cannot be severed.[45] Jeri Jasken, who has worked as the former Director of Child Welfare and Director of Behavioral Health for White Earth Nation tribe,

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[43] ADRIENNE M. BROWN, EMERGENT STRATEGY: SHAPING CHANGE, CHANGING WORLDS 20 (2017).

[44] University of Houston Graduate College of Social Work, *UpEnding the Child Welfare System: The Road to Abolition*, YOUTUBE (Oct. 21, 2020), https://www.youtube.com/watch?v=t7iZch9P504, at 13:01.

[45] Interview with Priscilla Day, Professor of Social Work, University of Minnesota, Duluth (Oct. 20, 2020) (on file with author).

described telling social workers in their training, "it's not your tie to break, not your right to break it."[46] Similarly, Judge Thorne explained that many tribal communities believe that to cut off a child from their family is an act of abuse, because it not only severs the parent-child relationship, but also severs the child's relationship with their extended family and relatives.[47] He said, "kids are not property, you don't cut them off. It's not like a car where you have a bill of sale and you can only belong to one person. Kids belong to the whole community and the extended family."[48]

Professor Day, Judge Thorn, and Jeri Jasken were all in leadership at the time ASFA passed. Jeri Jasken, the former Director of Child Welfare at White Earth Nation, described a deeply uncertain and scary period for her community, where the tribe was faced with an overwhelming number of fast-tracked TPR petitions occurring in state courts. Judge Fineday describes hearing two clear messages from the tribal elders. First, the elders described that the tribe had always had practices that involved taking in other people's children and there is no word for "orphan" in the Ojibwe language.[49] Second, the elders opposed the concept of termination of parental rights and believed that parents should always be able to have their children returned when they are ready.[50]

We learned that leaders had to rapidly respond to the cultural clash inflicted by ASFA on tribal customs. One form of

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[46] Interview with Jeri Jasken, Former Director, White Earth Nation Child Welfare and Behavior (Dec. 2, 2020) (on file with author).

[47] Interview with Judge Bill Thorne, Utah Court of Appeals, at 26:16 (Nov. 25, 2020) (on file with author).

[48] University of Houston Graduate College of Social Works, *supra* note 44, at 54:20.

[49] *History of White Earth*, WHITE EARTH NATION, https://whiteearth.com/history (last visited Mar. 24, 2021) ("All Indian tribes have names for themselves. The largest Indian group in Minnesota calls itself Anishinaabe, which means 'the original people.' Europeans named them Ojibwe. No one is exactly sure how this name developed. Perhaps it came from the Anishinaabe word 'ojib,' which describes the puckered moccasins worn by the people. Some Europeans had trouble saying Ojibwe, pronouncing it instead as Chippewa. But both these names refer to the same people. In Canada, the Anishinaabe call themselves Ojibwe. In the United States, many tribal members prefer the name Chippewa. So that is the name we will use in this history of White Earth Reservation.").

[50] Interview with Anita Fineday, Managing Director, Casey Family Programs' Indian Child Welfare Program (on file with author).

resistance included the use of traditional law in child welfare practice, such as "tribal customary adoptions," (TCAs)[51] which allows for a child to be adopted, with all of the legal recognitions that adoption entails, but without terminating the parental rights.[52] Traditional adoptions, or the making of relatives, is not new to tribal communities, in that it has been practiced for centuries. But what is unique is how this traditional practice is applied to a child welfare proceeding, and allows parents to continue contact with their children, as well as possible return of their children in the future. TCAs were developed in response to the specific harms created by ASFA and is based on historic and traditional practices held by many indigenous communities in which children were raised by extended family and by community.[53] TCAs have allowed tribes to prevent parental rights from being terminated, maintain contact and connections between children and parents.

Faced with the violence and swift nature of ASFA, the White Earth Nation tribe recognized the need to take rapid action for their community's survival.[54] When Anita Fineday became Chief Tribal Judge in 1997, she, along with Jasken and other leaders, embarked on a process to re-write their tribal code to include a child welfare code, in order to address the large numbers of White Earth children in foster care facing a TPR

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[51] Initially, the tribe relied on their traditional law and custom to practice TCAs in the context of child welfare cases in tribal court and refused to codify the practice. As Jeri Jasken explained, the tribe initially refused codifying it because "it's traditional law. It's a verbal, traditional, tradition and practice and shouldn't have to be written down. Any time you force a tribal nation to write those things down, you're expecting something that's not reasonable, that's more westernized . . . but we ultimately decided to put it in our own code because it was of benefit to our families." However, when the tribe lobbied for TCAs to be recognized by the federal government to make adoptive parents eligible for adoption assistance funding, the Social Security Administration demanded that TCAs be codified for it to be recognized for Title IV-E assistance. As a result, TCAs were written into the White Earth code in the early 2000s. White Earth has also been able to receive additional financial assistance from the state of Minnesota for their TCA adoptive families. Interview with Jeri Jasken, Former Director, White Earth Nation Child Welfare and Behavior, at 21:30 (Dec. 2, 2020) (on file with author).

[52] CALIFORNIA INDIAN LEGAL SERVICES, TRIBAL CUSTOMARY ADOPTION HANDBOOK 17 (2017) https://www.calindian.org/wp-content/uploads /2017/06/TCA-Handbook.-Final.pdf [https://perma.cc/62EG-TMU3].

[53] Interview with Jeri Jasken, Former Director, White Earth Nation Child Welfare and Behavior (Dec. 2, 2020) (on file with author).

[54] *Id.*

proceeding. They created a tribal family court for resolving child welfare cases in their own community, rather than in state court, where TPRs were filed at an alarming rate.[55] The process was done in consultation with tribal elders, who warned that the community would not accept the White Earth court if it terminated parental rights the way the state courts did.[56] They worked together to create a suspension of parental rights, which allowed parents to maintain a path back to their families.

We know these are not the only forms of resistance, and we have a long way to go to learn about, and contribute to, building our collective memory around how communities have resisted ASF. However, these conversations are instructive in many ways. First, they are a reminder that we are not alone in seeing this culture of parental destruction as an affront to our culture. That demanding a repeal of ASFA is not a demand for harm to children, and that people who hear our demand in that manner are likely centering their analysis in dominant white culture norms. It also reminds us that our communities have so much capacity to organize, and reorganize for the sake of family survival. That we have, for so long, taken care of each other, responded to harm, supported and nurtured each other. That we can build on the resiliency of relationship, hold nuance, and care for one another—and that we have to remember as much as we reimagine.

C. An Invitation to Learn from Movements Outside of the Family Regulation System

TPRs have disappeared so many parents from their children. Elizabeth Brico writes that "[e]quating this action to the death penalty is not hyperbole, in fact . . . it's not a strong enough comparison." [57]

> As far as I can tell, the dead don't wander among the living, constantly inundated with images of the lives and experiences they don't get to have.

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[55] Anita Fineday, *Customary Adoption at White Earth Nation*, *in* CW360º: A COMPREHENSIVE LOOK AT PREVALENT CHILD WELFARE, 28 (Traci LaLiberte et al. eds., 2015).

[56] *Id.* Jeri Jasken said that TPRs are simply "not allowable" in White Earth's practices, unless there has been some absolutely egregious harm, which is rare. Interview with Jeri Jasken, Former Director, White Earth Nation Child Welfare and Behavior, at 5:00 (Dec. 2, 2020) (on file with author).

[57] Brico, *supra* note 4.

> As far as we know, the dead don't miss themselves, don't mourn their lives; the dead don't remember the aspirations they never achieved. The dead are, if not at peace, then at least null. Mothers without their babies are neither at peace nor null. Mothers without their babies are Hungry Ghosts . . . The civil death penalty looks like hating Facebook because you post photos of your kids there. The civil death penalty sounds like shoving headphones deep into my earlobes so I don't have to hear the mom downstairs shout at her kid in a way I never would, but don't have the opportunity to do better than. The civil death penalty feels like the recirculated air of my apartment because going outside means seeing families walking together. Going to the grocery store means not buying goldfish and juice for my daughters while you buy snacks for yours. Going to the beach means the terrible freedom to swim without worrying about kids and wave and water and drowning. The civil death penalty means hating the mirror, where my belly will never be flat again and that was only okay because it gave me you and you but you're not here anymore. The civil death penalty means being conscripted to irreparable loneliness. It means living the mangled reality of mother without her children. The civil death penalty means hating everyone I know for having the audacity to live forward and move on while I remain dead and stuck for the rest of my life. I'd give anything to be granted clemency. [58]

TPRs are a violent legal mechanism that kill families, and ASFA is the civil death penalty that enacts the execution. As we learn more about how to repeal ASFA, we must think critically about how the family and criminal death penalties interact. Both purport to build safety at the expense of human life. Both normalize state violence as response to social concerns. Both politically justify their existence as a way to eliminate serious harm, and yet have disproportionately eliminated the existence

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[58] *Id.*

of Black and brown people. When determining our best path towards dismantling the family death penalty, we believe we can learn from activists who have worked to abolish the criminal death penalty. We have worked over the past two years to learn from comrades in all abolition movements, because learning from other connects our liberation to a longer freedom struggle.

We have learned a great deal from the movement to abolish the criminal death penalty. This movement is in many ways more mature than ours, in that it has gone through several life cycles. The longevity of this activism helps us understand both successes and struggles of the work and can provide context for how we may want to envision political strategies for our movement, and prepare for retrenchment. For example, there was a period of time when death penalty abolitionists advocated for Life without Parole (LWOP)[59] as a replacement to the death penalty, with devastating consequences. At the time there was a sense that this was a more humane option, and potentially a more moral option. However, it did not fundamentally challenge the callous disregard for life, or the culture of punishment that ultimately drives our reliance on the death penalty. Moreover, advocates have argued that the rhetoric used to win support of LWOP as a replacement to the death penalty, particularly tough-on-crime and cost-saving rhetoric, served only to reinforce the values underlying not only the death penalty, but the entire penal system.[60] By focusing on substituting one draconian policy for another, and by failing to put forth a narrative and vision that centers the dignity of people facing capital punishment, death penalty abolitionists failed to fundamentally alter the framework undergirding both LWOP and the death penalty. This leaves the

[59] Miller v. Alabama, 567 U.S. 460 (2012).

[60] Ross Kleinstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J.L. & SOC. CHANGE 185, 194 (2016). In addition, arguments about the fiscal savings of LWOP were similarly misguided, not only because these arguments reduced the value of human life to a dollar amount, but also because the costs "saved" by LWOP are actually the result of weakened legal protections and diminished procedural rights. The death penalty is more expensive because people receiving death sentences are afforded more legal protections than those who receive a sentence of life without parole; any argument relying on cost-savings is an implicit endorsement of reduced legal protections. *Id.* at 190–93. *See also* Rebecca Burns, *Is Life Without Parole Any Better Than the Death Penalty?*, IN THESE TIMES (Mar. 22, 2013), https://inthesetimes.com/article/death-penalty-abolition-life-without-parole [https://perma.cc/JP7F-VRB8].

movement with "nowhere left . . . to turn."[61] Once LWOP replaces the death penalty; the result is little more than a "Pyrrhic victory."[62]

In the winter of our work especially, we must wrestle with these difficult and often competing realities, and generate movement wide conversation to create alignment on how we remain faithful to the horizon of abolition. This is difficult. TPR abolitionists may consider the impact of alternatives to TPR, such as an indefinite suspension of parental rights, that prolong the uncertainty of reunification or the trauma of family separation just as the LWOP prolonged the trauma of death in prison. Any alternative that prolongs the process and ordeal of family separation may result in parents "volunteering" to have their parental rights terminated solely to find closure and put an end to their family's uncertainty and suffering just as people on death row will sometimes 'volunteer' for their execution to put an end to their uncertainty and suffering.[63] Moreover, powerful entities, such as judges and child welfare prosecutors, may use these ostensibly "humane options" to coerce families into separations and settle their termination trials.[64] It will be a struggle, but the ultimate goal must be to make the idea of killing a family through a TPR so offensive, that it is no longer an option for lawmakers, communities, or individuals.

We can also learn death penalty abolitionists about the importance of being faithful to language and narrative shift. In

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[61] Ross Kleinstuber et al., *supra* note 60 at 195.

[62] *Id.* at 195.

[63] For example, following the Supreme Court Decision in *Adoptive Couple v. Baby Girl,* Dusten Brown dropped his appeals to regain custody of his daughter. He said, "I cannot bear to continue it any longer . . . I love her too much to continue to have her in the spotlight." Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 360 (2015).

[64] This is not an abstract concern. Litigants facing TPR proceedings are often threatened with a termination conviction if they do not "volunteer" their rights. We see this occur often in New York termination proceedings where agencies "offer" conditional surrenders that purportedly allow for visitation between parents and children. These provisions are often unenforceable. These conditional surrenders offer parents a glimmer of hope, but no legal rights to their children. They give the foster – now adoptive – parent enormous power to determine whether the parent can visit, even though they are supposed to be in an agreement. They are often used to force settlements for parents that wish to litigate their termination trial and do little to actually substantively preserve the parent/child relationship.

the context of LWOP, we see the dominant narrative culture creates "humanity" around caging people for life versus state sanctioned murders. We can learn from our colleagues, about the pitfalls of adopting a narrative that prefers one inhumane treatment and disguises it as progress. We can also learn from our colleagues about the pitfalls of creating categories of deserving and undeserving people to justify reform, and how creating these types of exceptions do not eliminate the violent tactics of the government, but further helps legitimize and justify cycles of oppression. We absorb these lessons and work to end TPR for all families, not just the ones that society deems worthy.

Our analysis of the LWOP movement does not negate the humble awe and gratitude we also give to the many people who resisted the criminal death penalty. To the contrary, it is a reminder to learn from others, and help us be open to accountability of our own work. The inevitable cycle of movement means that new activists will be able to see our vulnerable mistakes, we accept this challenge and hope we will not do more harm than good.

D. An Invitation to Build Principled Organizing Strategies that Bring Us Closer to Our Goal of Liberation and Transformation

To analyze as to whether we are doing more harm than good, we think about different frameworks around abolitionist demands that are either "non-reformist reforms" or "abolitionist steps."[65] Abolitionists recognize that the world may not change tomorrow; however, we also reject incrementalism that reinforces the status quo and entrenches oppressive cultures. Longstanding organizations like Critical Resistance[66] and among many other liberation activists,[67] have collected and facilitated questions to help encourage pro-abolitionist policy changes that resist the tendency to tweak the system, but instead tug at the root of the policy. In the context of ending policing, and abolishing the prison

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[65] *If You're New to Abolition: Study Group Guide: Reformist Reforms vs. Abolitionist Steps*, ABOLITION J. (June 25, 2020), https://abolitionjournal.org/studyguide/#weekfour [https://perma.cc/8FTJ-532Y].

[66] CRITICAL RESISTANCE, http://criticalresistance.org/ [https://perma.cc/AZS6-GLNZ].

[67] We have been deeply influenced by the framings used by Law for Black Lives, Andrea Ritchie, and the Movement for Black Lives among many other teachings.

industrial complex (PIC), many activists think through questions like these before agreeing to a policy change:[68]

1. Does it reduce funding to the police?
2. Does it challenge the notion that the police increase safety?
3. Does it reduce the tools and tactics that police have their disposal?
4. Does it reduce the scale of policing?
5. Is there a material resource gain for communities?

While this is not an exhaustive list, nor does it encompass the scale of expertise that PIC abolitionists consider in framing and making their demands, it is an enormously helpful organizing tool that creates practical guideposts for building steps towards our new future.

As we consider demands around ASFA, and abolishing the family death penalty, we are thinking about how to incorporate non-reformist reforms into our analysis. Before committing to a policy agenda we ask—are the changes that are being proposed reducing funding to the child welfare industrial complex,[69] and increasing the funds to communities? Is the narrative around the policy shift pushing the dominant narrative that the family regulation system is an arbiter of safety? Are we

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[68] *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE, https://static1.squarespace.com/static/59ead8f9692ebee25b72f17f/t/5b65cd58758d46d34254f22c/1533398363539/CR_NoCops_reform_vs_abolition_CRside.pdf [https://perma.cc/AWN5-X3L7].

[69] This framing and definition was presented at "Dream-mapping adoption and foster care Abolition," Allied Media Conference 2020, and was created and presented by a collective of adopted and formerly fostered folks. *Welcome to the 21st Allied Media Conference*, SCHED, https://amc2020.sched.com/event/d8En/dream-mapping-adoption-and-foster-care-abolition [https://perma.cc/2DUA-EBJH]. They attribute this working definition of child welfare industrial complex (CWIC) to people who have offered analysis/ways of thinking about the prison industrial complex, military industrial complex, etc. acknowledging it as a working definition used explicitly to name the overlapping systems of public and private child welfare, across both foster care and adoption. A recognition that we noticed that some people have used the term, Child Welfare Industrial Complex, but mainly to reference one part of the system (e.g., public foster care system, foster care industrial complex, adoption industrial complex, orphan industrial complex). However, these have historically not included both public and private systems across foster care and adoption and the ways those systems overlap and function together.

supporting changes that decrease the size, power and scale of the family destruction system? Are we supporting a shift in material conditions and the politicization for our people? This is not an exhaustive list, but it is an important discipline in defining success, claiming victory, and keeping our focus on liberation. It is also an important process that must be convened with integrity, and ethical adherence to a liberatory framework, and a process that invites transparency and accountability.

We will not always have a perfect answer to each question, and we might agree to a policy change that is imperfect. These questions, however, help narrow where we must continue fighting. For example, on the one hand, if there were a change made to ASFA to end terminations for people who are incarcerated, that would be a victory, but it would not be the end of movement. It would be a victory because it would reduce funding to the family regulation system by ending the financial incentives that attach to those specific terminations and eliminate a tool that the family regulation system could rely upon. However, it still would leave out so many members of our community, the legal apparatus of ASFA still intact, and potentially entrench the legitimacy of ASFA as a valid idea. This does not mean we do not accept it as a victory, but we would know we still had more work to do.

On the other hand, it would not be considered an abolitionist step if we were asked to endorse a policy that funded agencies to do their own internal review of TPRs, and provide recommendations to the community. Here, we have vested more funding into the system, made the foster care agency the arbiter of success and the creator of the recommendations, and offered no guarantee to the material conditions of our people.

While these were two simple and short examples of how an abolitionist uses the framework of "non-reformist" reforms to make steps towards change—we hope this is constructive. We are continuing to learn, and are hopeful to build change.

E. An Invitation to Repair and Heal Histories of Harm

Abolitionists' steps towards change also demand a transformative repair, not only as we heal as individuals but as society becomes accountable to the harms it inflicted on our communities. Those of us who have suffered the harms of these systems, and in particular Black mamas, Indigenous mamas, and

Latinx mamas are owed the truth. We are owed reparations. We demand that the lies that feed that ideologies of these systems that have devalued our families and communities be exposed as lies. We demand that our families be supported to heal and repair, with the force of law and financial, political, and social capital that was invested in these systems. We look to both U.S. liberatory frameworks of reparations as well as international reckonings with truth and reconciliation to help guide our demands and understanding.

We recognize that the United States is not the only place where a dominant political, economic, social, and racial order was established in part through family separation. We have many examples of this across history and across time, and we are in a space of learning about the justice community has demanded. For example, the "Las Abuelas de la Plaza de Mayo" movement that formed in Argentina in response to the mass disappearance of children from families deemed subversive by the military dictatorship, began as a group of grandmothers and grew into a movement that forced a truth telling around the disappearances and the development of a DNA database so that parents could find their children.[70]

As we build momentum, we must also build a framework of reparations that exposes the centuries of violence inflicted on our families, and creates a pathway of true healing, shifts resources to our community, and builds accountable infrastructures to ensure that never again will any family be taken by the family death penalty.

V. CONCLUSION

> *"We are a people. A people do not throw their geniuses away. And if they are thrown away, it is our duty as artists and as witnesses for the future to collect them again for the sake of our children, and, if necessary, bone by bone."*
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> *—Alice Walker*[71]

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[70] Michele Harvey-Blankenship & Rachel Shigekane, *Disappeared Children, Genetic Tracing, and Justice*, *in* CHILDREN AND TRANSITIONAL JUSTICE 293, 302–04 (Sharanjeet Parmar et al. eds., 2010).

[71] ALICE WALKER, IN SEARCH OF OUR MOTHERS' GARDENS: A WOMANIST PROSE (1983).

Stop investing in the imaginations of white supremacy. Every day we see powerful people, industries and philanthropy invest more in the child welfare industrial complex than communities. These industries are so faithful to technical surveys like "ACES" that are supposed to address adverse childhood experiences, rather than actually building up Black women and children. They spend more time building out family regulation apparatuses like "prevention models" than advocating for housing, baby bonds, and universal basic incomes for our communities. They are obsessed over the idea of "permanency" instead of confronting the messy reality that family is complex, full of contradictions, and ripe for healing and accountability.

We demand those with power, means, and resources to stop voicing caution and hesitancy when the most oppressed in our society build power. We demand that those individuals with privilege, give unyielding, unrestricted, and unencumbered support. That this support be financial, but also intellectual and in the form of patience and time. For centuries the United States has devoted trillions of dollars and political capital to the imaginations that gave us slavery, genocide, prisons, and housing insecurity. We are deserving of at least that time, and more. We need ample space for creativity, inconsistency, mistakes, and conversation. We need space to dream, think, strategize, and implement.

Build with us and exist in principled struggle. We do not expect this to be linear or simple, it will be uncomfortable, there will be contradictions, mistakes, and need for deeper learning. There will be setbacks, harm, and indecision. However, there is no better time than now.