

INTRODUCTION

Facing the Racial Reality of Child Welfare

ONE SUMMER EVENING I DROVE TO ST. STEPHEN'S CHURCH in Englewood, one of Chicago's poorest neighborhoods, to attend a meeting of Black mothers whose children had been taken by the state child protection agency. They call their organization Operation MOSES, for Mothers Organizing Systems for Equal Services. A boy playing outside directed me to the church basement where I found a half dozen women sitting around a table. The women were strategizing about a citywide campaign to call attention to the crisis of children being removed from their homes. They greeted me warmly, grateful to have the ear of a sympathetic law professor. At one end of the table was an expanding file stuffed with court papers, newspaper clippings, and letters. They sat me at the other end so that I could face everyone.

Each woman told me about her battle with the child welfare system to get her children back. Jornell, the group's founder, lost custody of her one-month-old baby when hospital staff reported her for medical abuse. This is his fourth year in foster care. Valerie relinquished custody of her three children to the child protection agency when she was living in a cold, roach-infested apartment and had no means to support them.* She had told authorities that she wanted them back in six months, but the agency moved ahead with termination of her parental rights. Devon had cared for her four nieces and nephews since they were toddlers, devoting herself to meeting their special medical and educational needs. She had seen them only twice since they were taken from her more than a year earlier because her apartment was too small.

* Because she is challenging the termination of her rights in court, "Valerie" asked me to use a fictitious name for her.

These women's stories reflect the color of the U.S. child welfare system today. More than a half million children taken from their parents are currently in foster care. African Americans are the most likely of any group to be disrupted in this way by government authorities. Black children make up nearly half of the foster care population, although they constitute less than one-fifth of the nation's children. In Chicago, 95 percent of children in foster care are Black. Once removed from their homes, Black children remain in foster care longer, are moved more often, receive fewer services, and are less likely to be either returned home or adopted than other children.

The child welfare system is the focus of intense public scrutiny, condemned by conservatives and liberals alike. Everyone agrees that foster care is overburdened and often damages children more than raising them in either their biological families or adoptive homes. However, the public debate has failed to examine why Black children are removed from their parents in such large numbers or what the consequences are for Black families and communities. Public sentiment and policy have chosen to focus instead on solving foster care's problems by encouraging the adoption of more children.

The number of Black children in state custody—those in foster care as well as those in juvenile detention, prisons, and other state institutions—is a startling injustice that calls for radical reform. I would call it the system's ugly secret, except that it should be obvious to anyone who has spent a day examining the statistics, visiting a child welfare office, or watching who goes in and out of juvenile court. The fact that the system supposedly designed to protect children remains one of the most segregated institutions in the country should arouse our suspicion.

In 1972, *Children of the Storm: Black Children and American Child Welfare*, by Andrew Billingsley and Jeanne M. Giovannoni, traced the history of the government's discriminatory treatment of African American children. Three decades later, racial disparities in the child welfare system have only become worse, and policy makers have rejected the concern they professed in the late 1970s and early 1980s for preserving Black families. Child protection policy has conformed to the current political climate, which embraces punitive responses to the seemingly intractable plight of America's isolated and impoverished inner cities.

The new politics of child welfare threatens to intensify state supervision of Black children. In the past several years, federal and state policy have shifted away from preserving families toward “freeing” children in foster care for adoption by terminating parental rights. Welfare reform, by throwing many families deeper into poverty, heightens the risk that some children will be removed from struggling families and placed in foster care. Black families, who are disproportionately poor, have been hit the hardest by this retraction of public assistance for needy children. And tougher treatment of juvenile offenders, imposed most harshly on African American youth, is increasing the numbers incarcerated in juvenile detention facilities and adult prisons. These political trends are shattering the bonds between poor Black children and their parents. Recent developments make it imperative to confront the racial disparity in America’s child welfare system now. Only by examining the role that race plays in the child welfare system can we understand how it operates to reinforce the inferior status of Blacks in America.

Yet most contemporary critiques of the child welfare system barely acknowledge the importance of race. Scholars who deal with Black children in the child welfare system tend to focus on social work practice—how children should be treated—rather than the politics of child protection—how political relationships affect which children become involved in the system. Their primary goal is to make services more sensitive to the needs and culture of Black families, not to question the fundamental conflict between the child welfare system and the integrity of the Black family and community. Child protection authorities are taking custody of Black children at alarming rates, and in doing so, they are dismantling social networks that are critical to Black community welfare.

Most authors frame the problem with child protection as a battle between bad government and innocent parents or between bad parents and innocent children. Advocates on the side of parents argue that overzealous efforts to combat child abuse are excessively intruding on family rights. They tell horrifying stories of government agents strip-searching children and dragging them away from their parents based on false, anonymous allegations. Their effort to find common ground among parents often hides the power of race and class in directing repressive government action. For example, one author warns that we

must “stop this assault on the family—before all our children become state wards.” I choose to refute the myth that there is a universal system of child protection that treats all parents equally badly. Although all families risk being hurt by these arbitrary abuses of power, Black families are being *systematically* demolished. Two critical factors remain unaddressed: the system’s distinct racial harm, and the role race plays in perpetuating a destructive understanding of child protection that affects all American families.

On the other side of the debate are those who tell horrifying stories of victims of parental abuse and a system that does too little to protect them. These advocates wildly exaggerate the harm inflicted by most parents monitored by child protective services as well as the good that state supervision can do. By focusing myopically on extreme cases of child abuse, these accounts deliberately ignore the damage caused by carelessly removing children from their homes. Not only do they overlook the child welfare system’s devastation of Black families, but they devalue the family ties that are so important to the children they claim to support. In this book, I refute the even more dangerous myth that the child welfare system will improve children’s well-being by separating more children from their parents.

This book answers three questions that correspond to its main parts. Why are so many Black children removed from their homes and placed under state supervision? How will the current politics of child welfare affect the system’s racial imbalance? And why should we be concerned about the racial disparity in the child welfare system? I conclude by proposing steps that we can take to transform the system toward respecting the integrity of Black families while addressing the deprivation in many homes.

Shattered Bonds is a plea to call the child welfare system what it is: a state-run program that disrupts, restructures, and polices Black families. I hope to capture the injustice of a system that separates thousands of Black children from their parents every year and relegates them to damaging state institutions. There is little evidence that the foster care system has improved the well-being of Black children and much evidence that it supports the disadvantaged position of Black people as a whole. A recent book by a Harvard law professor advocating easier termination of parental rights is titled *Nobody’s Children*—as if children in foster care have no parents who care about them. The truth is that many poor Black parents fight desperately against a wealthy and powerful sys-

tem to regain their children. They are often worn down by pointless and burdensome requirements, insidious financial incentives, and racial bias. I want to provide the missing voice of Black families torn apart by discriminatory and misguided policies.

Today, the Black nationalist charge of racial genocide from the 1970s sounds hopelessly extremist, yet many of the mothers I talked to were convinced that the child welfare system is waging a war to steal Black children. Although they are right that they are the victims of a racist system, this charge tends to inflame emotions and requires careful elaboration. My goal of developing a new case for protecting Black families against state intrusion is based not only on parents' and children's rights but also on the injury to the Black community as a whole. Racial inequities in the child welfare system, I will conclude, cause serious group-based harms by reinforcing disparaging stereotypes about Black family unfitness and need for white supervision, by destroying a sense of family autonomy and self-determination among many Black Americans, and by weakening Blacks' collective ability to overcome institutionalized discrimination. By examining the evidence of racism in the child welfare system, telling the stories of disrupted families, and presenting a theory of community harm, I highlight the political role of the child welfare system in America, a role often obscured by a focus on its rescue of individual children from neglectful parents.

Some people think that the best way to help the thousands of Black children in foster care is to terminate their parents' rights and place them in adoptive homes. These people do not see themselves as racists who are bent on destroying Black families. They may even endorse stronger social support programs for America's struggling families. But they do believe child protective services must intervene immediately to save Black children from their current crisis. "These children can't wait for social programs to eliminate poverty and racism," these advocates argue. "We must act now to move them from their destructive families and neighborhoods into stable homes." I hope this book demonstrates that this new cadre of child savers are wrong.

One hundred years from now, today's child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more

SHATTERED BONDS

privileged people. School children will marvel that so many scholars and politicians defended this devastation of Black families in the name of protecting Black children. 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.

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I asked Rivkin-Carothers what she hoped to accomplish by bringing the class action suit. “My clients want injunctive relief—they want DCFS to change the way it treats Black parents and children,” she replied. “We want Black children to be treated like white children. We want Black families to receive the same services, and we want them to be judged by the same standards.”

5. THE SYSTEM’S FUNDAMENTAL FLAW

SO FAR I HAVE DISCUSSED the systemic factors outside the child welfare system that make Black families more vulnerable to state intrusion, as well as evidence of racial bias on the part of actors in the system. The racial disparity is also caused by a fundamental flaw in the system’s very conception. The child welfare system is designed not as a way for government to assist parents to take care of their children but as a means to punish parents for their failures by threatening to take their children away. The child *welfare* system, then, is a misnomer. The mission of state agencies is not to promote children’s welfare. Rather, their purpose has become child *protection*: they try to protect children from the effects of society’s colossal failure to care enough about children’s welfare. The system is activated only after children have already experienced harm and puts all the blame on parents for their children’s problems. This protective function falls heaviest on African American parents because they are most likely to suffer from poverty and institutional discrimination and to be blamed for the effects on their children.

The Strong Arm of Child Protection

The system’s defective philosophy has poisoned the relationship between state agencies and poor minority communities. Child protective services have become an ever-present “Big Brother” in inner-city neighborhoods creating fear and mistrust among residents. Parents in these communities view caseworkers more as law enforcement agents than social service providers. They know that the job of caseworkers is not to assist families to take better care of their children. Their job is to investigate parents and to find evidence that can be used

against them to gain custody of their children. Florida's child protection agency panicked after nine child abuse deaths in the fall of 1997, and the number of child removals skyrocketed. "I may be going to see one family, but six or seven others run out, grab their children, and run in the house," a Tallahassee investigator reported. "Their perception is that I'm there to snatch their children."²²² The caseworker, notes Duncan Lindsey, has been "unmistakably cast in the role of inquisitor prying into and judging the affairs of the family, with predictably adverse effects on the family."²²³

Most people in poor minority neighborhoods have either had a terrifying encounter with child protective services or know someone who has. They have a legitimate fear that it might happen to them. In their community, child protection involvement isn't a rare and secret occurrence as it is in middle-class areas. In Bushwick, Brooklyn, 20 out of every 1,000 children have been removed from their homes and placed in protective custody. That rate is ten times as high as in the affluent Upper East Side of Manhattan and seven times the rate in middle-class Bayside, Queens. There were 1,413 investigations of child abuse and neglect in Bushwick in 1998, compared to only 109 on the Upper East Side.²²⁴ The level of child removal is even higher in Central Harlem, where 1 out of every 10 children is in foster care. In the Englewood neighborhood of Chicago, most of the families are supervised in some way by the Department of Children and Family Services. The child welfare system has a powerful, menacing presence in these communities.

And its presence has repercussions on community and family life. People sometimes use local child welfare agencies as a way of settling disputes. Several mothers I spoke with blamed their involvement in the system on a former boyfriend or relative who reported them to child protective services for some ulterior motive. Fear of involvement in the system makes others afraid to call the police or social service agencies for help with family disputes. Some mothers hold off taking their children to the doctor for accidental injuries for fear they will be reported to child protective services. "Say you take one of your kids to the hospital, the first thing they'll want to do is call Children and Family Services," one mother told me. "Even if they know it's not your fault or nothing that could be helped, they will still call. If a child falls and hurt themselves or someone comes in with a sick baby, they don't care what the circumstances was or anything. That's the first thing that comes out of their mouth—'Call Chil-

dren and Family Services.’ That’s why you find a lot of times people don’t take their kids to the hospital.”²²⁵

Others hold off reporting domestic violence. In some states it is considered neglect to permit a child to witness adults fight in the home. When a mother calls the police to report she has been beaten, she may be confessing to child neglect. “When I called 911, I was bleeding so badly I knew I needed medical attention,” Sharwline Nicholson told a *New York Times* reporter. “I didn’t know I’d end up down that road, that calling for help would escalate and I’d end up losing my kids.”²²⁶

In July 2001, federal judge Jack Weinstein heard testimony in a class action lawsuit brought by twenty battered women who allege that New York City child welfare officials violated their rights by taking custody of their children. April Rodriguez told the judge that ACS put her three children, ages seven, three, and one, in foster care when she called the police to report abuse by the father of two of the children. The agency refused to return them until Rodriguez moved into the city’s shelter system, forcing her to lose her job at a Manhattan video store. Although the children spent only a week in foster care, Rodriguez testified that “they weren’t the same children.” “My baby’s shirt was filthy and her diaper was disgusting,” she said. “My son, his face was bruised and bloody, and he had pus coming from his lip.”²²⁷

A Michigan court even terminated a battered woman’s parental rights based on a psychologist’s prediction that the woman was at risk of entering into a relationship with another abusive man.²²⁸ Some women decide to handle the situation themselves rather than risk intervention by child protective services.

In a recent *New York Times* article, “Child Welfare Turns Nightmare,” Somali Sengupta described the impact of this fear in poor New York City neighborhoods. Cynthia Marquez, a Bushwick mother, was suspected of child abuse when her ten-year-old son with behavioral problems hit his little brother and school officials reported the bruises. A child welfare investigator inspected her apartment and questioned the children. The charges were dropped, but the encounter with the child welfare agency left its mark on the family. The next time her son threw a temper tantrum Marquez thought twice about calling the police to help her control him. Marquez’s decision, Sengupta writes, reflects “a real everyday fear that a momentary crisis can become something worse. That a parental mistake can lead to an investigation. Or that in the nightmare case,

a difficult child can be taken away.”²²⁹ Parents feel they are “living out every parenting move under suspicion” and routinely protect themselves against the constant threat of investigation. They carry documents clearing them of abuse and neglect charges, such as a doctor’s note for school absences and food pantry receipts in case they run out of groceries.

Sengupta attributes this state of siege to the pressure on city officials to prevent another high-profile tragedy like the 1995 killing of Elisa Izquierdo by her mother. “That combustible combination of children at risk and an oversight agency under pressure not to slip up,” Sengupta explains, “can create an atmosphere in which a wide range of parents—some good, some bad, some in between and stressed out—alter their conduct, color their conversations, and have the frankest of strategic conversations with their children, all because they worry about their first or next encounter with the child protective agency.” As I have stressed, this adversarial relationship stems as much from systemic race and class bias as from alarm over the child abuse crisis. Children in wealthier parts of New York City also have temper tantrums, school absences, and bruises. But these signs of possible child maltreatment and delinquency appear less suspicious to reporters and caseworkers. Just as significant, parents in affluent and middle-class neighborhoods have voluntary, private resources to deal with their children’s problems. Mothers on the Upper East Side and Bayside don’t have to call the police or child welfare agency when they need help; they can consult with physicians, counselors, and therapists, often at the expense of their health insurance, with little fear that investigators will be alerted.

And mothers now have more to fear. Some places are cracking down on suspected child neglect in poor neighborhoods by treating it as a criminal matter. Although most child maltreatment is handled by civil child protection proceedings, it is sometimes prosecuted criminally. Many cases fall within the scope of general criminal statutes, such as those punishing assaults, homicides, sexual assaults, and incest. Many states have also passed special criminal child abuse and neglect statutes. In most states, child welfare agencies notify police about the most serious cases of abuse. But police are increasingly arresting parents even for minor instances of neglect that traditionally had been handled by child protective services.

In New York City, for example, misdemeanor arrests for endangering the welfare of a child have more than tripled in recent years. In 1998 there were

more than 1,000 child endangerment arrests, compared to only 300 in 1990.²³⁰ In the summer of 1997, Police Commissioner Howard Safir directed officers to “take action . . . when [they] see children in dangerous situations.”²³¹ This harsh response is part of Mayor Rudolph Giuliani’s assault on “quality-of-life” infractions such as panhandling and turnstile jumping, which are thought to lead to more serious crimes. The theory is that by arresting mothers on minor neglect charges, the city will prevent more serious cases of abuse. Mayor Giuliani also warned parents living in the city’s homeless shelters that city agents would put their children in foster care if they didn’t find a job. Sourette Alwysh, a thirty-four-year-old Haitian immigrant, was led away in handcuffs when police found her living with her five-year-old son in a fore-closed building without electricity or running water. Sidelina Zuniga, a thirty-nine-year-old Mexican immigrant, came home from grocery shopping to discover the police had taken her boys, ages ten and four, because she left them alone for an hour and a half. When she reported to the local precinct to claim them, she too was arrested.²³²

The arrest of Danish actress Annette Sorenson in Manhattan for child neglect became an international incident.²³³ Sorenson and her boyfriend left their baby in a stroller on the sidewalk outside a window in the restaurant where they were dining, a practice that is common in Denmark. Passersby who noticed the seemingly unattended child notified police. The child was placed in foster care and separated from the distraught parents for several days before intervention from the Danish government. The baby’s father charged that he was brutalized by the officers at the police station. While this story received attention for its clash of cultural approaches to child rearing, few commented that the baby’s father is African American and that the baby appears Black by American standards. The child’s race, then, may explain why the people who reported the episode and the police took such extreme measures to protect the child.

Although New York City’s policy is extreme, it is not unique. Carole Taylor was charged with misdemeanor child endangerment for allowing her six children to live in a messy apartment in Chicago’s Cabrini-Green housing projects without food or furniture except some soiled mattresses.²³⁴ Geraldine Jeffers, a thirty-eight-year-old Cincinnati mother, was convicted of child endangerment when she went to the hospital because of complications with her pregnancy,

leaving her fifteen-year-old daughter in charge of her four younger children.²³⁵ Neighbors called the police to report that the children were left alone overnight. The prosecutor noted that Jeffers's home was filthy and in disarray.

Even when charges are dropped or thrown out by a judge, the children have been scarred by their mother's arrest and their time in foster care. Laura Venegas was arrested when police found her two sons playing alone in front of their aunt's East Harlem apartment. Prosecutors agreed to drop child-endangerment charges, but Venegas had already spent a night in jail, and one of her sons got a black eye while in foster care. "Keep your eyes on your children," Venegas warns her friends. "You never know when the police might arrest you."²³⁶

It seems Orwellian to call what the child welfare system does "serving" families, when the vast majority of its clients are "served" against their will.²³⁷ The agency's "service plan" usually has little to do with *services* for the family. It is typically a list of requirements parents must fulfill in order to keep their children or get them back. Rarely are parents asked what services they need. The plans remind me of probation orders that list requirements and restrictions judges impose on criminals. Violation of a single provision lands the offender back in jail. In the child welfare system, parents who fail to comply risk never seeing their children again.

In 1997, outside specialists issued a report evaluating New York City's Administration for Children's Services. The report recommended that ACS improve its accountability by measuring "client satisfaction." "We saw customer satisfaction as an important issue," one task force member told *Child Welfare Watch*. "Because if you're working toward returning a child, you have to engage the parent. If the parent is having a problem with the system, that's an obstacle to getting the child home."²³⁸ In their study, the specialists found that parental input did not play a significant role in ACS's system for evaluating the agencies that provide foster care services.

Amy Sinden, a poverty lawyer in Philadelphia, once represented a Black woman whose three-year-old daughter was removed when she left her too long at the shelter where they were living.²³⁹ The client had recently moved from Virginia to Philadelphia to try to kick her crack habit. She had been clean until the day she left her daughter with another shelter resident to run errands. She visited one of her cousins hoping to borrow some money and ended up using crack with him. When she returned to the shelter after midnight, she discov-

ered that the shelter had called the child welfare agency and a social worker had taken her daughter into custody.

Three days later, Sinden met her client in court and was presented with the social worker's reunification plan. The social worker told the mother that to get her daughter back she had to send the child to live with her mother-in-law in Virginia while she completed six months of inpatient drug treatment in Philadelphia. When Sinden asked the mother whether she agreed with the plan, she stared at her blankly. "Pretend the worker didn't tell you what you have to do," Sinden told her. "How would you want to deal with this problem if it was entirely up to you?" Apparently this was the first time anyone proposed that the mother have some input in the decision.

She looks confused and startled, as if she's so used to thinking within the confines of what she has been told is permissible that the concept of thinking about what she wants is entirely foreign. Eventually, she expressed to me that she's terrified of leaving her daughter for six months—terrified that her daughter will feel abandoned, terrified that her mother-in-law won't treat her daughter well, terrified that her mother-in-law will try to get permanent custody, terrified that being separated from her daughter will make it harder to give up the habit. It is seeing her daughter's face every morning that gives her the resolve to keep fighting her addiction.²⁴⁰

Afraid of contradicting the social worker, the mother isn't sure what to do when her lawyer suggests a drug treatment program where she could live with her daughter.

The agency's plan soon takes on outlandish proportions. The family's fate becomes focused on a list of tasks a caseworker has typed or scribbled on a form. Compliance overshadows the child's needs or parent's ability to care for the child or even the truth of the original charges of maltreatment. The issue is no longer whether the child may be safely returned home, but whether the mother has attended every parenting class, made every urine drop, participated in every therapy session, shown up for every scheduled visitation, arrived at every appointment on time, and always maintained a contrite and cooperative disposition. Caseworkers use foster care as leverage to coerce compliance with

their demands instead of a refuge for children who are truly in danger. Many courts apply a rule that failure to complete the permanency plan is prima facie evidence that children should not be reunited with their parents. As incredible as it sounds, parents' ties to their children are routinely severed because the parent failed to fulfill some provision on a caseworker's list.

Sometimes permanency plans are so complicated or onerous that they seem designed to ensure failure. A grand jury investigating child protective services in San Diego heard testimony about plans that ordered parents to devote more than forty hours per week to various rehabilitation programs. Defense attorneys testified that they advised their clients to quit their jobs so they could keep up with reunification requirements. Parents typically rely on public transportation to get to all these appointments. They are often suffering from health problems or contending with some other crisis. "Obviously, there is no time to earn a living or otherwise live a life," the grand jury concluded. "A parent often becomes a slave to the reunification plan."

One mother from a poverty-stricken town near St. Louis described to me how her caseworker was pressuring her to pay an electricity bill. "I don't care what you got to do, if you don't have the receipt in my office soon, I will be out there to take your kids," he told her. "That's how he talks to me every time I call," the mother says. "He'll tell me to have something done and when I call back to let him know it's done, he'll say, 'I don't think you're really trying.' I just told him one day, 'I work five days a week, just like you do. What you want me to do—quit my job?'"

Vernon Bush is a plaintiff in the Chicago race discrimination lawsuit who became involved in the system when his four children were born drug exposed. He says that DCFS required him to perform the following tasks to be reunited with his children. Many of them require travel to the far Chicago suburbs where the children were placed, and he has no car.

1. Participate in substance abuse treatment
2. Attend Alcoholics Anonymous and Narcotics Anonymous meetings
3. Make random urine drops to test for unlawful drugs and alcohol
4. Participate in individual counseling
5. Participate in family counseling

6. Attend instructions on treating asthma
7. Learn sign language
8. Learn CPR
9. Attend speech therapy, sensory integration therapy, developmental play group therapy, occupational therapy, and physical therapy for the children
10. Attend educational classes
11. Attend all medical appointments scheduled by the foster parents
12. Attend all court dates and administrative reviews
13. Make scheduled visitations with all children, who are spread among four placements
14. Maintain employment to support his family
15. Contact each case manager once per week
16. Complete a psychological exam

Bush says caseworkers pressured him from the very beginning to relinquish his rights to two of his sons. He believes the agency required such a back-breaking plan so that he would become overwhelmed and give up.

“Voluntary” Placements: The Price of Help for Poor Children

Valerie wasn't reported to DCFS. She called child protective services for help with her two girls, ages three and five, and her baby boy. In the winter of 1998, Valerie and the children were living in a cold, dilapidated apartment infested with roaches. All of the children were sick. One girl was suffering from lead poisoning, and the baby, who was born two months premature, was recovering from a hernia operation. Her son's father, a recovering drug addict, had just relapsed and was back in a drug treatment program. Valerie turned to alcohol. “It was overwhelming,” Valerie told me. “And I had no one to help me.”

Valerie and the children ended up in her aunt's apartment. But the situation there was worse: the aunt's utilities were cut off, and they had no lights or hot water. Valerie and the children had to sleep on the floor. “I hit rock bottom. I had to call DCFS,” Valerie says. “I told them I just needed time to heal.

I figured in six months I would get my children back.” Valerie relinquished custody of the children, and they were placed in foster care.

I asked Valerie how she reached a point of such desperation. Valerie traced her problems to an incident that happened when she was seven years old. Until that summer, she led a happy childhood in a house full of relatives on Chicago's South Side. She had been playing outside her house with a group of friends when she went inside a house down the block to ask a teenage neighbor to join them. The older girl sexually assaulted her. Too traumatized to tell anyone, Valerie kept the secret until her life fell apart at age fifteen. Valerie was hospitalized for two weeks when she began experiencing severe depression, headaches, and seizures and was diagnosed with manic depression, now known as bipolar disorder. For the next four years, she went in and out of psychiatric institutions as doctors clumsily experimented with therapies for her mental illness.

“They kept me chained up every night,” Valerie remembers. “One night they strapped me down so tight, I woke up bleeding. They once gave me a drug that had me paralyzed for two days. Then they gave me medication that was so strong, I couldn't bathe myself or feed myself. I was like an infant. I was that way for months. I don't think jail could have been any worse.”

Finally the doctors discovered that lithium worked to relieve Valerie's symptoms. At nineteen, she was released from the hospital and received outpatient services. A year later, Valerie's bipolar disorder went into remission. “When I got my freedom back, I made up for lost time,” she told me. “I started going out and going shopping.” Her mother was transferred to an office in Denver, Colorado, and Valerie moved with her. She enrolled in a trade school and studied fashion design for two years. She fell in love with a kind, responsible man named Donald, who lived in her apartment building.* After dating for five years, they were engaged to be married. Donald joined the Navy, and the two spent three glorious months in San Diego together before Donald went out to sea. In 1991, Valerie was shaken by another crushing tragedy. The Navy notified her that Donald had been killed in the Persian Gulf War. Valerie moved back to Chicago. “I started drinking heavily, looking for a reason to live. The pain was so great.” She started seeing another man and found the motivation to stop drinking when she became pregnant with her first daughter in 1993.

*At Valerie's request, the names of individuals in her story are fictitious.

Her second daughter was born two years later. Valerie had already broken up with the father, and never even told him she was pregnant. The next year she met another boyfriend, a recovering drug addict, and was soon expecting her third child. But that relationship, too, was short-lived. Not long after the birth of her son, her boyfriend left to enter a drug treatment program, and Valerie placed the children in foster care.

“My first caseworker was good,” Valerie recalls. “She promised to help me and told me DCFS would return the children in six months like I wanted.” Valerie says that at her first administrative case review, the reviewer told her this was the official permanency goal. Valerie was given a service plan that provided for weekly visits with the children and required psychological counseling, parenting classes, substance abuse treatment, urine drops, and evaluation by a Parenting Assessment Team.

But at the end of six months, Valerie wasn't reunited with her children. Instead she got a new caseworker from a private agency that contracted with DCFS. “When I met her for the first time in court, she looked away and wouldn't shake my hand,” Valerie told me. “The second time I saw her was during a visit with my children. She said to me, ‘This is all your fault, you're not a good mother. I'm going to make sure you lose your kids. The foster parents are going to adopt them.’” Valerie and the caseworker were constantly at odds. “Whatever I did was wrong. She said I didn't know how to talk to children with special needs. She said I was holding them wrong. She even followed me to the bathroom.” Valerie says the caseworker accused her of dropping out of counseling after Valerie received a letter stating her appointments were discontinued until she was assigned a new counselor. Valerie also says the caseworker deliberately delayed getting her into services. Valerie wasn't able to attend a parenting class scheduled for May until the following September, thwarting her plans to take a college course. When Valerie successfully completed “Introduction to Parenting Skills,” the caseworker directed her to take another parenting class in December. Because of the delays, the Parenting Assessment Team's evaluation was postponed for another six months.

The setbacks and stress of the reunification process took its toll. In March 2000, Valerie began to experience symptoms of her bipolar disorder that had been in remission for twenty years. She began losing weight, crying incon-

solably, shopping hysterically. The judge ordered a psychiatric evaluation, and Valerie was placed on medication. Because of her mental distress, Valerie found it harder to make all the appointments the caseworker scheduled. At her administrative case review in August, Valerie learned that DCFS had changed the permanency goal from returning the children to terminating her parental rights and putting the children up for adoption.

One especially tragic consequence of the child protection approach is that parents must often confess to unfitness to get help for their children. In many poor communities, there are no public services to ensure children's welfare apart from the child protection agency. Social work professors Sheila Kamerman and Alfred Kahn note that child protection has "absorbed virtually all of the system's resources," leaving nothing for families who simply need help.²⁴¹ "It increasingly seems that only abused or severely neglected, delinquent, or runaway children can hope to receive public services in most jurisdictions." The only option for many parents desperately seeking counseling for a troubled teenager or decent shelter or respite from a family crisis is to present their problem as a case of child abuse or neglect. Child welfare agencies tell parents they must sign papers admitting they are neglectful. Community workers advocating for poor families are advised to report their clients to child protective authorities if they want to get services for them. One of my students took in a teenaged boy from a low-income Black family who had become trapped in a bitter fight between his estranged parents. The family needed counseling—the kind of mediation wealthier families pay for or have covered by their health insurance policies. When my student called various state agencies looking for help for the teen, she was told to call the child abuse hot line.

In the most difficult cases, parents voluntarily place their children in foster care. These agreements may entail a temporary stay away from home or the transfer of legal custody to the state. In New York City, the share of voluntary placements among all children in foster care has increased in recent years. The number of parents giving up their children rose 41 percent in 1997.²⁴² One in ten children admitted to the city's foster care system in 1999 was voluntarily placed.²⁴³ A growing number of these cases involve rebellious or emotionally disturbed adolescents whose parents can no longer handle them. Many trou-

bled children live in group homes for months while they wait for scarce residential treatment center beds.

When a parent turns a child over to foster care, it is rarely truly voluntary. In some cases, desperate parents reluctantly approach the child welfare agency only when they can find no other source of government support. The parents may be too ill or stressed to care for their children, or their children may need services they cannot afford. The AIDS epidemic has caused an explosion of poor minority mothers who need state assistance for both reasons. A few states have passed statutes that allow disabled parents to share custody of their children with a “standby guardian” who helps with child raising without usurping all parental authority. Unfortunately, most families coping with AIDS or other serious illness do not have this option. The West Virginia Supreme Court of Appeals reversed a judge’s decision to sever the bonds between a mother, Ada R., who was dying from AIDS and her HIV-positive son, Micah.²⁴⁴ Leaving Micah in foster care, the court lamented the mother’s “heartbreaking struggle to deal with her disease, while, at the same time, not turning her back on her child.” “By doing what she felt was best and voluntarily placing Micah with the Department,” the court said, “Ada R. has ended up not only fighting to remain alive, but also fighting to remain a parent.”

The shortage of mental health care for children is especially acute. Limits in private health care plans and lack of access to public services make it tough for even middle-class parents to get treatment for their children. Although Medicaid-eligible children are entitled to mental health care, this provision is not consistently enforced. In some states, residential treatment centers refuse to accept children on Medicaid unless they are wards of the state. Many state and local officials mistakenly believe that federal reimbursement for out-of-home care is available only if the state has legal custody of children. For many children, then, the only way to qualify for publicly funded mental health services is to enter the child welfare system

A report by the Bazelon Center for Mental Health Law in Washington, D.C., describes the dilemma faced by the parents of a girl with a serious emotional disturbance and developmental disabilities. The only treatment center in their area refused to accept Medicaid. The parents could not afford to pay its private fee of \$99.25 per day. The child welfare agency told the mother that she should file a “willful neglect and abandonment” petition in juvenile court so

the state could place her daughter in a mental health facility.²⁴⁵ According to the Bazelon Center, in half of the states almost one-quarter of families seeking mental health care for a child must choose between treatment and retaining legal custody of the child.²⁴⁶ Only eleven states prohibit the child welfare agency from requiring parents to relinquish custody to gain access to mental health services.²⁴⁷ One family advocate sums up the choices of parents seeking help for their children's mental health problems as "beat 'em up, lock 'em up, or give 'em up."²⁴⁸

Other parents agree to short-term placement or surrender custody as a way of avoiding abuse or neglect proceedings. Some parents decide that it's better to voluntarily place their child in foster care for a brief period than to risk child protective authorities taking the child for a long time. Giving up custody to the state has become the price of public support for poor and low-income children. The state then provides to foster parents the very services it denied to the parents. Respite care, for example, is often subsidized by the state for foster parents—but not for parents—of children with serious mental health problems.²⁴⁹

Voluntary placements are also a way for agencies to remove children from "unsuitable" homes without having to prove their parents abused or neglected them. Parents being investigated by child protective services are sometimes intimidated into agreeing to place their children in foster care. Caseworkers demand an immediate decision from terrified and unsophisticated parents while withholding information about the process and the consequences of placement.²⁵⁰ They threaten parents with permanently losing their children if they don't agree to a temporary separation. A survey conducted by Legal Services of New Jersey on voluntary placements suggests that this practice is common in that state. Parents reported that they were coerced to sign placement agreements by threats that the court would take their children if they did not cooperate. Many parents did not realize that they were waiving their rights to appointment of an attorney and prompt judicial review. "Unaware of any other options," the report concluded, "parents often feel they have no choice but to sign a placement agreement."²⁵¹

The *New York Daily News* recently reported that New York City's child welfare agency pressured teen mothers in its custody to give up their babies in an effort to relieve the shortage of foster homes.²⁵² Teen girls who became preg-

nant while in foster care spent months in maternity wards with their newborn babies because the city couldn't find enough homes that would take both mother and child. Social workers told fifteen-year-old Anisha Henry that if she didn't relinquish custody of her baby boy, they would take him away from her—with frightening consequences. “And if they take him away from me I wouldn't get no visitation,” Anisha said. “I was hurt; I was in tears. I told them I didn't go through nine months for no reason, just so they could take him away.”

Parents often buckle under the pressure to relinquish custody because of the power imbalance in legal contests with child protection authorities. Parents come into the child welfare system at a huge disadvantage. Most start out from a disenfranchised status—Black, female, poor, uneducated. Like criminal defendants, they are pitted against the tremendous might and resources of the government. They are unfamiliar with the way bureaucracies and the courts operate. They don't know their legal rights. And, worst of all, they know that if they don't cooperate, they risk losing their children. When they appear in court, they are confronted by a battalion of state-paid attorneys and advocates, all trying to prove that they are bad mothers. The mother, perhaps accompanied by a public defender, stands on one side of the courtroom. On the other side arrayed against her are a state's attorney, a guardian ad litem, and a caseworker. The state may have also called witnesses to testify against her. “When I got in the courtroom, I felt a wall,” Jornell told me. “The judge and the attorneys were on one side and I was on the other side. They were moving things along without me. All they wanted to do was get rid of the mother.” Philadelphia attorney Amy Sinden reported that her clients feel overwhelming pressure to acquiesce in the caseworkers' plans for them. “Even where coercion is not intentional on the part of the social worker, parents are often too quick to accede to the agency social worker's suggested resolution of their case, resulting in false agreements.”²⁵³

Parents who turn to child protective services for help often find themselves in an adversarial relationship. Once agencies have custody of children, they take control of child rearing and place conditions on parents' involvement with their children. Parents have no say over where their children are placed or important decisions about their children's health, education, and religious and cultural upbringing or even how often they can see them. The child welfare

agency may require parents to complete training courses and therapy sessions as a condition of reunification. And, most devastating, it may refuse to return children when parents are ready to take them back. Parents who “voluntarily” step into the maze of child protective services usually have a hard time getting their children out.

Avoiding Responsibility for Children's Welfare

The child welfare system's strong-arm tactics stem from its underlying philosophy. The child welfare system is built upon the presumption that children's basic needs for sustenance and development must and can be met solely by parents.²⁵⁴ The state intervenes to provide special institutionalized services—primarily placing children in foster care—only when parents fail to fulfill their child-rearing obligations. The child protection approach 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.

This approach to child welfare is defective in three related ways. First, it places all responsibility for taking care of children on their parents, without taking into account the economic, political, and social constraints that prevent many parents from doing so. Most single mothers, for example, face numerous barriers to providing for their children, including a segregated job market, inadequate wages, and a dearth of affordable child care.²⁵⁵ Thousands of poor families in this country lack the income to meet their children's basic needs of food, clothing, and shelter and live in a deprived environment that is dangerous for children. The child welfare system hides the systemic reasons for families' hardships by laying the blame on individual parents' failings. “The underlying philosophy of the present child welfare system is that *all* families *should* be able to function adequately without the assistance of society,” explain Billingsley and Giovannoni, “and that failure to perform the parental role without such assistance is indicative of individual pathology.”²⁵⁶

Recall Tatiana Cheeks, the mother who was charged with homicide for failing to nourish her baby. Punishing her for the death of her child covers up the social causes of the tragedy—inaccessible medical care, inadequate educa-

tion, and poor nutrition in inner-city neighborhoods. Some people reading news reports of her arrest may believe that making poor Black mothers criminally liable is a solution to poor infant health in these communities. Holding parents accountable for poverty-related harm to children replaces efforts to relieve children's poverty.

A second defect is that child protection is activated only when families are already in crisis. The role of government is limited to rescuing children who have been mistreated by deficient parents, rather than ensuring the health and welfare of all families. Duncan Lindsey calls this the "residual approach" to child welfare because state intervention is treated as a last resort to be invoked only after the family has exhausted all resources at its disposal. "The child welfare agency becomes the site of triage where casualties are sorted, and only the most seriously wounded receive attention," Lindsey writes. "But because the damage to children is so great by the time they enter the system, the number who survive and benefit is minimal."²⁵⁷ This is a fitting analogy to describe what happens to Black children in the child welfare system: Black families over-rely on hospital emergency rooms because of inadequate access to regular medical care.

Under this approach, caseworkers perceive families' problems as those amenable to social work intervention; they have at their disposal only limited tools to treat the immediate crisis. Caseworkers are discouraged from dealing with the systemic problems many must realize are the causes of child neglect. At one of her case reviews, Jornell wanted to talk about how her case related to the removal of other Black children in Chicago and the institutional barriers she faced in being reunited with David. A court-appointed advocate literally put her hands over her ears. "I don't want to hear about the system," she told Jornell. "I'm only here to help you get David back." Ann Hartman, a University of Michigan professor of social work, honestly confesses caseworkers' reluctance to confront systemic inequities: "The minute we turn around to attempt to address the system that is victimizing people, rather than making the victimization palatable, which is what our profession has done, we will have our heads in a noose."²⁵⁸ It is inevitable that agencies' solutions for family problems will be inadequate, if not damaging to families.

Finally, because the system perceives the resulting harm to children as parental rather than societal failures, state intervention to protect children is

punitive in nature. The state's solutions to children's deprivation involve intrusive meddling by social workers, behavioral requirements, and temporary or permanent removal of children from their homes. Child protection proceedings are more akin to criminal trials than most civil adjudications because they pit individuals against the state and issue moral condemnation of parents.²⁵⁹

The child welfare system, then, embodies a cruel paradox. At the same time that it brutally intrudes upon too many Black families, it also ignores the devastating impact of poverty and racism on even more children. For every child placed in foster care because she was malnourished or unsupervised, there are hundreds more who suffer the same deprivations. The National Incidence Study discovered that 75 percent of children known to be neglected in the community have not been investigated by child protective services.²⁶⁰ The state is guilty of both overintervention and underintervention when it comes to Black families. The system haphazardly picks out a fraction of families to bludgeon, while it leaves untouched the conditions that are really most damaging to children. *All* the children in the neighborhoods where child protective services operate are at risk for poor nutrition, inadequate health care, run-down housing, violence, and inferior education. The babies in Tatiana Cheeks's community die at a rate that is three times higher than that of babies in affluent parts of New York City. Should child protection authorities take all these children away from their parents? Instead the government sacrifices some unlucky families to perpetrate the hoax that it is protecting poor Black children from harm. The child welfare system reinforces the inferior status of poor Blacks in America both by destroying the families who come within its reach and by failing the families who don't.

This narrow concept of child welfare hurts all families in America, but it hurts Black families the most. The color of today's child welfare system results from the relationship between its flawed philosophy and the realities of institutional racism. The very design of the systems that deal with families—both the market approach to family well-being and the punitive approach of child protective services—operates in a racist society to dismantle families at the bottom of the social ladder. It fosters the widespread assumption that “the Black child's problems stem from his negatively valued family and disorganized community, and that his solutions lie in the institutions of the larger white society.”²⁶¹ Child welfare interventions become a way both to punish Black parents for their per-

ceived psycho-moral depravity and to place Black children in the state's superior care. As I explain in the last chapter of this book, ending racial discrimination in the child welfare system requires addressing both its racial bias and its structural flaws.

Experts have posited a number of reasons for the explosion in the foster care population since the 1960s—the discovery of “battered child syndrome,” the crusade to bring child abuse to national attention, the passage of mandatory child abuse reporting laws, federal funding incentives for states to spend more dollars on out-of-home care, and more recently, the crack and AIDS epidemics that have left thousands of children without parents. All of these developments have played a part in expanding the foster care rolls. But none can explain why policy makers have so tenaciously pursued the path of child removal, why there hasn't been an equally effective campaign against the travesty of family breakup, or why the nation hasn't embraced instead a program of family supports.

As significant as these forces was the darkening of the foster care population. As the foster care caseloads increased, so did the share of Black children. The financial and philosophical support for dismantling families instead of providing them services was tied to this racial transformation. Racism operates to prop up a defective system whose damage falls unequally on Black people. 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 foster care began to approach the present rate of Blacks, we would certainly see more moral outrage over the level of state interference in families. One anonymous observer put it bluntly, “If more white kids were going into the child welfare system, it would change. The fact that [more] white people don't go into the system says to me it is a bad place to be.”²⁶²

6. A RACIST INSTITUTION?

DESPITE ALL THIS EVIDENCE, it is still hard to find direct proof of racially biased decisions on the part of reporters, caseworkers, and judges. Racial motives are rarely articulated and may even be unconscious. Anyone interviewed

knows better than to say, “I thought that mother was unfit because she’s Black” or “I put the children in foster care because of their race.” The way race affects child welfare decision making is more complicated than that. Stereotypes about Black family dysfunction often work subconsciously. People in the system find that their options are limited by forces outside their control. They are likely to bristle at the charge of racial discrimination: “It’s not our fault that the most deprived children we see are Black and that the law requires us to intervene to protect them from harm.”

Some people will say that the racial disparity in the child welfare system does not constitute racial discrimination without a showing of racial motivation. The system is racist only if Black children are pulled out of their homes by bigoted caseworkers or as part of a deliberate government scheme to subjugate Black people. Any other explanation—such as higher rates of Black poverty—negates the significance of race. This is the position conservative pundit Lawrence Mead took in responding to a conference paper I presented on this topic. He argued that the racial imbalance in today’s child welfare system was different from official segregationist policies of the Jim Crow era. He wanted to see clear evidence of official racial animus, like the signs that read “FOR WHITES ONLY” at Southern drinking fountains. “There’s no smoking gun!” he protested. Agency officials also hide behind Black poverty as an excuse for the racial inequality in their services. The commissioner of New York City’s Administration for Children’s Services, Nicholas Scopetta, defended New York City’s outrageous statistics by saying, “I don’t really think it’s a question of racism, but of economic circumstances people find themselves in and drugs.”²⁶³

As an initial matter, race need not be the *only* reason a child is removed from the home for the decision to be racially biased. State agents may be primarily motivated by the desire to protect children, but race may be a factor in their deliberations about which course of action to take. Harvard Law School professor Randall Kennedy refutes a related argument that racial profiling is a defensible technique when police officers use other factors along with race to identify criminal suspects.²⁶⁴ The fact that race is only a marginal factor, Kennedy argues, “cannot logically negate the *existence* of racial discrimination.” He concludes, “Taking race into account at all means engaging in racial discrimination.”²⁶⁵

Without proof that child protective authorities are actually “taking race into account,” can we call the disparate treatment of Black children a pattern of racial discrimination? After reviewing studies on race and child welfare services, a group of researchers concluded that this characterization would be misleading “because evidence about the needs of the children and families prior to service receipt cannot be used to argue that these less favorable outcomes result from worse child welfare services for African American children than Caucasians rather than from worse initial circumstances of African American families.”²⁶⁶ In other words, the child welfare system can’t be blamed for discriminating against Black children because Black children are already worse off than whites when they enter the system.

The disparate initial circumstances of Black and white children doesn’t negate the existence of racial discrimination, either. Even if equally poor or equally wealthy families had precisely the same risk of intervention regardless of race, this would not discount the far greater risk to Black families. When some researchers conclude that race is not a significant predictor of involvement in the child welfare system, they mean that race by itself—without accounting for income, single parenting, neighborhood, and other relevant factors—cannot explain why certain families are disrupted by child protection agencies. Black children are no more likely to be removed from their parents *all else being equal*.

But all else is not equal. And all else is not equal because of a continuing legacy of racial discrimination. Racism allows us to predict with absolute certainty the color of families you will see if you walk into any urban juvenile court or child welfare agency.

The high level of Black childhood poverty reflects systemic biases against Black Americans. Being Black in America means having a huge risk of being poor and little chance of ever being wealthy. “The odds of black Americans experiencing affluence versus poverty are approximately one to twenty-five versus the one to one odds of all Americans,” notes Mark Rank.²⁶⁷ Numerous scholars, including most notably William Julius Wilson, have documented the profound impediments to Black economic equality.²⁶⁸ The effects of racist institutions established over centuries combined with persistent discrimination in employment, lending, housing, education, law enforcement and social services place Blacks of all classes at a disadvantage and have produced concen-

trations of extreme poverty and isolation in the inner cities. Because of past systemic discrimination, each generation of Blacks has had limited wealth, and all the advantages wealth bestows, to pass on to the next. Sociologist Dalton Conley explains: “While young African Americans may have the *opportunity* to obtain the same education, income, and wealth as whites, in actuality they are on a slippery slope, for the discrimination their parents faced in the housing and credit markets sets the stage for perpetual economic disadvantage.”²⁶⁹ Or as economics professor William Darity Jr. puts it, “there is a cumulative racial transmission process at work perpetuating economic disparity across generations.”²⁷⁰ Black males still suffer 12–15 percent losses in earnings as a result of continuing discrimination at all stages of employment.

State disruption of families is one symptom of this institutionalized discrimination. It reflects the persistent gulf between the material welfare of Black and white children in America. The racial disparity in the child welfare system—even if related directly to economic inequality—ultimately results from racial injustice.

Even if the racial disparity could be explained by higher Black poverty rates and not intentional discrimination, this would not negate the racist impact of the system or the racist reasons for its inequities. Racism often involves but does not require prejudice against Blacks. Racism is “a *structural* relationship based on the subordination of one racial group by another.”²⁷¹ In America, racism is a system of white privilege that is maintained by ideologies, institutions, and practices that place white people in a superior position and people of color in an inferior position economically, socially and politically. This definition of racism describes perfectly the differential treatment of white and Black children by the child welfare system.

My answer to critics who demand to see evidence of ill will against Black families, then, is that racial motivation is not necessary to show that the system discriminates. We should not ignore, though, the considerable evidence that race and not poverty alone affects decision making at every step of the child protection process. Racism in reporting illustrates how racial bias combines with broader inequities to push disparate numbers of Black children into the system. Earlier I cited studies that show racial differences in doctors’ interpretations of child abuse and neglect. But this kind of racial bias on the part of mandated reporters does not provide the whole picture. Many Black children

are in the system not because their parents were turned in by white outsiders but because of reports by members of their own community. Social isolation and economic deprivation have left many Black families without the resources necessary to raise healthy children. When parents, relatives, and neighbors become desperate, they often feel they have no recourse but to call on a system they view with suspicion.

Researchers who traced the reason for the overrepresentation of Black families in child protective services in a western New York county found no evidence of bias in reporting by mandated reporters.²⁷² In fact, almost half of all reports of child maltreatment came from nonmandated sources. African American families were almost twice as likely to be reported by other relatives as white families. Nationwide, almost half (47 percent) of abuse and neglect reports are submitted by nonprofessionals.²⁷³

Another study comparing the reporting behavior of nonmandated and mandated reporters found that the chances of community members reporting neglectful situations were significantly greater than the propensity of mandated reporters to do so.²⁷⁴ The inclination of community members to report child maltreatment was confirmed by research that surveyed the opinions of a diverse group of mothers as well as child welfare workers.²⁷⁵ The researchers asked the mothers and workers about the seriousness of harm to a six-year-old child subjected to various neglectful behaviors described in a set of vignettes. The mothers saw a more serious threat to the child in each dimension of neglect than did the caseworkers. African American and Hispanic mothers rated a number of dangers in the stories as more serious than the white mothers. A follow-up study of primarily white, middle-class child welfare workers and African American mothers also found that the mothers perceived all categories of neglect as more serious than the workers.²⁷⁶

Jeanne Giovannoni and William Meezan note that these studies “contradict assertions that mandated reporting requirements impose child rearing values on lay communities. Rather, these studies suggest that there may be a lack of responsiveness to community concerns, particularly around issues of neglect.”²⁷⁷ This does not mean that Black families want more of the kind of response that child welfare departments have made to child neglect in their communities. It does mean that Black communities may be even more con-

cerned about child maltreatment than government authorities but have only inadequate and even harmful ways to deal with it.

Refining the precise reason for the system's racial disparity—Black child poverty, caseworkers' cultural misconceptions and racist stereotypes, policy makers' insensitivity to Black families, or the structure of the system itself—might help to develop targeted programs for reducing the imbalance. But trying to isolate a single overriding source of the system's inferior treatment of Black children fails to capture the way institutional racism works. Black children are overrepresented in child protective services because of the interplay of societal, structural, and individual factors that feed into each other to determine which families fall under state scrutiny and supervision.²⁷⁸ To address the systemic discrimination against Black families, then, it is most helpful to attribute the disparity to a web of racial injustice that includes all of these causes.

Pointing out these injuries to Black families in the child welfare system is not to condemn all caseworkers, judges, or foster parents. Many caseworkers are dedicated to serving their clients without the resources they need. Many judges see the system's injustice but feel powerless to effect any meaningful change. Many foster parents are generously doing what they can to care for children already harmed by social deprivation. My condemnation is directed at the structural features of child welfare that result in racially disparate harms to families. As Leroy Pelton points out, "foster care is a *social system* and as such it has its own inherent characteristics quite apart from the qualities of the people—the staff and foster parents—who operate within that system."²⁷⁹

It would be a mistake to obscure the system's racial origins and impact by focusing solely on economic inequality. To begin with, poverty and race are so interrelated in America that it makes little sense to try to separate them in bringing attention to the racial injustice of the child welfare system. Downplaying the role of race also gravely mischaracterizes the problem. It has become fashionable to search for sources of Blacks' disadvantaged position apart from contemporary racism. Black people's poverty, family structure, welfare dependency, and lack of intelligence are all popular explanations for the persistent racial gap in power and well-being. Melvin Thomas, a sociologist at North Carolina State University, calls these theories "anything but race" perspectives. He

argues that “anything but race” perspectives are refuted by empirical studies that show the continuing impact of racial discrimination: “They ignore race when key racist practices such as segregated neighborhoods, culturally destructive educational practices or employer discrimination are forgotten in the rush to focus on something—anything other than race.”²⁸⁰

But “anything but race” theories are even more pernicious in the way they permit whites to ignore their social advantages based on race. “They defend the advantaged position of whites by claiming they have ‘superior’ characteristics such as: higher cognitive ability, stronger work ethic, better morals, stronger families, more human capital or skills, etc.,” writes Professor Thomas. “Because they see whites as somehow ‘better’ than blacks in some important way, their superordinate position in society is deserved. . . . If discrimination—the inequitable allocation of resources based on race—is left out of the analysis, there could be no other conclusion: black disadvantage is a result of deficiencies within blacks themselves.”

Social scientists, government bureaucrats, and policy pundits are all scrambling to explain the racial disparity in the child welfare system as “anything but race.” Black children are pouring into foster care in grossly disproportionate numbers, they argue, not because of their race but because of some problem with their families. Ignoring the role of race in child protective services allows people to believe that the system is fair and that they are actually helping poor Black children by placing them in state custody. Ignoring race also avoids the ugly reality that the system treats white families better not because they are somehow superior to Black families but because they benefit from racial privilege.

So far I have considered whether the child welfare system is guilty of racism because of the reasons families become involved in it. Some people might still believe that the system is a good—or at least racially neutral—way of dealing with the problems Black families experience as a consequence of racial discrimination. They may still see racism only on the outside of child protective services, with people on the inside left to handle the aftermath of discrimination as best they can. This is probably what it *feels* like to most of the reporters, caseworkers, administrators, and judges who make decisions everyday about Black families in the system. They see themselves more at the mercy of racism than as perpetrators of racism. It is important to ask, then, does the

system produce its own racial harms? What is the impact of targeting a minority group for family destruction? I take up these questions in Part Three of this book. There I argue that the child welfare system's racism lies not only in its disparate treatment of Black children but also in its injury to Black people as a group.

The opening passage of *Children of the Storm* still rings true today: "The racism that characterizes American society has had tragic effects upon Black children. It has given the Black child a history, a situation, and a set of problems that are qualitatively different from those of the white child. In a narrower context, American racism has placed Black children in an especially disadvantaged position in relation to American institutions, including the institution of child welfare."²⁸¹ In the three decades since the book's publication, the position of Black children in the child welfare system has not improved. In fact, child protective services have become even more segregated and more destructive. As the child welfare rolls have darkened, family-preserving services have dried up, and child removal has stepped up. Child welfare reflects the political choice to address dire child poverty in Black communities by punishing parents instead of confronting the structural reasons for racial and economic inequality. It is time to face the inescapable reality: America's child welfare system is a racist institution.

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PART TWO



The New Politics of Child Welfare

CLICK ONTO www.mnadopt.org/search.asp. Or www.state.il.us/dcf/adlink.htm. Or www.tdprs.state.tx.us/adoption/tare.html. You will find on these and other state web sites hundreds of photographs of children in foster care who are available for adoption. Public child welfare agencies call them the “waiting” children. Adoption web sites are states’ high-tech means of advertising foster children to potential adoptive parents. In most cases, the rights of their parents have been permanently terminated by the state. But some foster children broadcast on the Internet are not yet legally free for adoption. In some states, like Illinois, almost all the photos display Black faces. The U.S. Department of Health and Human Services plans to collect all the nation’s adoptable foster children into one megasite—“a gargantuan, searchable Virtual Orphanage that would likely scare the dickens even out of Dickens,” writes journalist Peggy Farber.¹ This is the web image of the Black family—children destined to be permanently separated from their irreparable parents, whose only salvation is to be adopted into new families.

Instead of working to eliminate racism in the child welfare system, federal and state governments have recently implemented policies that will increase the system’s racial disparity. The past five years have witnessed the passage of critical legislation that weakens family bonds. Three political trends in particular threaten to make the child welfare system even worse for Black families. First, both federal and state laws began to abandon family preservation as an important focus of child welfare practice. In its place, a new orientation emphasizes “freeing” children in foster care for adoption by speeding up termination of parental rights. Second, welfare reform measures aimed at pushing more mothers into the workforce make it harder for the most desperate recipients, who are disproportionately Black, to take care of their children. Child welfare policy is cracking down on neglectful parents precisely at a time when welfare policy eliminated guaranteed support for poor children. Finally, tougher criminal penalties are locking up growing numbers of Black parents and children. The children of many incarcerated parents end up in foster care, and under acceler-

ated termination time lines, long jail terms are increasingly seen as a reason to permanently sever parental rights. Juvenile detention and imprisonment are an alternative route for children to enter state custody. Combining the numbers of Black children in the foster care and criminal justice systems produces a disturbing level of state supervision of children. These major shifts in federal and state policy on child protection, welfare reform, and criminal justice are converging to proclaim a dangerous message: the solution to the problems of poor Black children is either to dissolve their family ties so that they can be adopted by more privileged parents or to lock them up in the nation's expanding prison system.

I. THE ASSAULT ON FAMILY PRESERVATION

The New Federal Adoption Law

It is often said that American child welfare policy operates like a pendulum. It swings from expressing the predominant objective of keeping troubled families together to making protection of children from parental harm its top priority. Family preservation and child safety are treated as two opposing ends of the spectrum of child welfare concerns. These shifts have not been based on any real changes in rates of child maltreatment. They are often responses to highly publicized incidents of abuse by parents or by the system and to the political currents surrounding child welfare debates. "Watching federal policy develop in the field of child abuse and neglect over the past two decades has been like watching the sunrise in Barrow, Alaska in late November!" proclaimed one expert. "Federal and state political action over the last several decades could be characterized as being symbolic rather than substantive, reactive and punitive rather than proactive and supportive (of either children or adults)."²

In reality, child welfare policy in the past century has never swung entirely to the side of family preservation or child protection. Federal and state policies have reflected to varying degrees both a family-centered and a child-saving philosophy. Programs designed to maintain poor children in their homes have existed alongside the practice of placing poor children in substitute care since the early 1900s. Although child welfare agencies abandoned an official policy of removing children on grounds of poverty alone, they never fully

embraced the policy of supporting poor families. Their professed concern for family preservation serves more as a justification for their continued reliance on child removals for parents who are deemed unreformable. For most Black children in the system, the reality has consistently been foster care placement.

In the 1970s Congress began to examine the toll that foster care was taking on children and their families. Leading scholars criticized the child welfare system for unnecessarily removing children from their homes and leaving them to languish in foster care.³ Hearings on Capitol Hill revealed that federal policy created financial incentives for state child welfare authorities to prefer placing children in foster care over keeping families intact.⁴ The federal government reimbursed states for the costs of out-of-home placements but not for services provided to families within the home. Stanford law professor Michael Wald noted in 1976 that, although state child welfare agencies received federal funds for each child in their custody, “the agency loses this money when the child is returned home, even though the agency must still provide services to the child.”⁵ Congress attempted to correct the overemphasis on foster care by passing legislation that tied federal funding to reforms in states’ approaches to child welfare. The Adoption Assistance and Child Welfare Act of 1980 encouraged states to replace costly and disruptive out-of-home placements with preventive and reunification programs. The law, which is still in effect today, requires that before placing children in foster care, state agencies must make “reasonable efforts” to enable them to remain safely at home. It also mandates that states make reasonable efforts to safely return children in foster care to their parents.

In the past several years, the pendulum of child welfare philosophy has swung decisively in the opposite direction. Congress has abandoned the focus on preventive and reunification programs it once expressed. Leading the way is the Adoption and Safe Families Act enacted by Congress in 1997 to amend the 1980 Child Welfare Act.⁶ President Clinton signed the law within a year of directing the federal government to take steps to double the number of foster children adopted annually to 54,000 by 2002.⁷ The new federal adoption law—known as “ASFA”—represents a dramatic change in the way the federal government deals with the overloaded foster care system. Its orientation has shifted from emphasizing the reunification of children in foster care with their biological families toward support for the adoption of these children into new families.

Both ASFA and the 1980 Child Welfare Act reflect the prevailing wisdom that children in foster care should be quickly placed in permanent homes because the instability of foster care damages children's psychological and social development. The goal of permanency stands as a pillar of current child welfare philosophy. Two books were particularly influential in convincing policy makers that permanent homes are essential to healthy child development.⁸ Mass and Engler's *Children in Need of Parents*, published in 1959, was the first book to document foster care drift and the psychological harms that stem from multiple placements. The 1973 classic, *Beyond the Best Interests of the Child*, asserted that continuity in children's relationships with a caregiver is essential to normal psychological development. Its authors, Joseph Goldstein, Anna Freud, and Albert Solnit, argued that children separated from their parents can form bonds of attachment with other adults who fulfill the role of parent. The longer children are away from their biological parents, the more likely they will bond with their new "psychological parents." According to "psychological parent" theory, moving children after these bonds have formed causes serious emotional damage. Critics have soundly denounced this perspective for discounting the connections children maintain with their parents even while in substitute care, as well as children's ability to develop relationships with more than one "psychological parent."⁹ Empirical studies show, for example, that children in foster care suffer psychological harm when they are cut off from their family and that they benefit from contact with their parents during placement. Policy makers and judges nevertheless hold fast to the preeminence that Goldstein, Freud, and Solnit accorded permanency.¹⁰

Concern for permanency places a limit on the federal mandate that state agencies make reasonable efforts to reunify children in foster care with their parents. Returning children home quickly satisfies their need for permanency, but what happens if parents are not ready to take back the child? How long can reunification efforts take before the damage of unstable custody arrangements occurs? At what point should agencies give up on parents for the sake of placing children in a permanent home? Judges are not willing to wait forever for parents to become fit enough to regain custody of their children. Most states have enacted statutes that make the length of time a child remains out of the legal custody of the parent a ground for terminating the parent's rights. In fact, the most common reason courts use for termination is a finding that the child

has been in foster care longer than the law allows.¹¹ Although the 1980 federal law encouraged reuniting children with their biological parents, it also provided for termination of parental rights as an avenue for permanency. The 1997 amendment intensifies the tension between permanency planning and family reunification by putting added pressure on states to expeditiously free children for adoption. In cases of conflict between reunification and permanency efforts, permanency must prevail.

Proponents of the policy change framed their critique of family preservation philosophy as a defense of children's rights. They argued that keeping families together often sacrifices children's interests for the sake of parental rights. Representative Deborah Pryce argued that ASFA "will elevate children's rights so that a child's health and safety will be of paramount concern under the law. . . . Let us do it for the children."¹² The *Washington Post* praised the law for putting "a new and welcome emphasis on the children,"¹³ and a Milwaukee columnist declared that ASFA was "to the abused and neglected children in our nation's foster care system what the Voting Rights Act was to black Americans in 1965."¹⁴

Advocates drummed up support for ASFA by pointing to cases where family preservation failed miserably. They recounted tragic stories of children who were killed after caseworkers returned them to blatantly dangerous parents. They passed around photographs of abused children to members of Congress. Perhaps the most effective rallying tool was *The Book of David: How Preserving Families Can Cost Children's Lives* by prominent family violence scholar Richard Gelles. *The Book of David* reported the events surrounding the suffocation of a little boy by his abusive mother after caseworkers sent him home from foster care. Gelles attributed this tragic lapse in judgment to the priority policy makers placed on families, rather than children. According to Gelles, caseworkers were interpreting the requirement to use "reasonable efforts" to preserve families to dictate reunification at all costs. Family preservation policies were a license to risk children's safety. Gelles argued that "the basic flaw of the child protection system is that it has two inherently contradictory goals: protecting children and preserving families." He advocated reinventing the child welfare system "so that it places children first."¹⁵

Numerous newspaper articles at the time also blamed cases of deadly child abuse on family reunification policies. In "The Little Boy Who Didn't

Have to Die,” *McCall’s* claimed that a boy who was returned home from foster care “appears to have been doomed by a decade-old national policy determined to patch up troubled parents and preserve families.”¹⁶ *New York Newsday* made the same point in an article explosively titled “Family Preservation—It Can Kill.”¹⁷ Members of Congress waved these stories about tragic child abuse cases as evidence that federal policy should abandon its emphasis on family unity. “Every one of us in this body can turn to and refer to headlines in their papers,” Representative Barbara Kennelly, one of the bill’s sponsors, stated during the House debate, “the terrible, heartbreaking case with little Emily in Michigan, other cases across the United States, headlines telling us the very worst can happen.”¹⁸ Senator John Chafee, the law’s coauthor, recalled the child abuse death of Sabrina Green. “Now, Mr. President,” he said, “we cannot bring Sabrina Green back to life, but we can take action to prevent such deaths in the future.”¹⁹ In short, ASFA supporters placed children’s right to be safe in opposition to parents’ right to custody of their children.

These statements follow a very common habit of contrasting parents’ rights and children’s rights. This way of framing the issue assumes that parents and children’s interests are in opposition to each other. And it assumes that only parents—and not children—have an interest in family integrity. ASFA is said to be “child centered” because it focuses on safety, whereas the prior law was “parent centered” because it focused on keeping families together. But many child welfare scholars and activists have refuted this opposition of children’s to families’ rights.²⁰ As Bruce Boyer, a clinical professor in the Children and Family Justice Center of Northwestern University Law School, put it, “in family preservation, to my mind, there’s a commonality of interests.”²¹ Typically, furthering a family’s interests will also benefit the children who belong to that family. Children also have an interest in maintaining a bond with their parents and other family members. The reason for limiting state intrusion in the home, therefore, is not only a concern for *parental* interests but also the recognition that children suffer when separated from their parents and community.

ASFA places limits on the reasonable efforts mandate that was blamed for caseworkers’ deadly mistakes. It generally narrows the requirement by directing state authorities to make the health and safety of children in foster care their “paramount concern.” It also exempts states from using reasonable efforts to return children who are abandoned, tortured, or repeatedly or severely

abused. Most people would agree that children have an interest in, if not a right to, government protection from this sort of violence. Yale law professor Akhil Amar has argued that the Thirteenth Amendment requires states to protect children from the domination of an abusive parent just as they protect citizens from enslavement.²²

But the new law's reform goes far beyond ensuring the safety of children who have been removed from violent homes. Victims of severe abuse covered by these provisions are a tiny minority of children in foster care and represented "easy cases" for termination even before the law was amended.²³ Most children in foster care, who were removed from their homes because of poverty-related neglect, will be affected more by Washington's major policy initiative—the emphasis on terminating parental rights to make children available for adoption. The federal adoption law and the rhetoric promoting it weaken the government's commitment to family preservation and establish a preference for adoption as the means of reducing the exploding foster care population. Congressional sponsors declared that ASFA "is putting children on a fast track from foster care to safe and loving and permanent homes."²⁴ Most of the children referred to in this statement are Black. And the homes the law supports are adoptive, not biological, ones.

Congress implemented its preference for adoption through a set of mandates and incentives to state child welfare departments. The new law establishes swifter timetables for terminating biological parents' rights to "free" children for adoption. Termination of parental rights is the most extreme measure judges can impose in abuse and neglect cases. It permanently severs the legal ties between parent and child, ending the parent's physical custody, "as well as the rights ever to visit, communicate with, or regain custody of the child."²⁵ The laws of every state permit juvenile or family court judges to terminate the rights of parents found to be unfit to care for their children. Judges frequently terminate the rights of parents whose children have been in foster care beyond a statutory deadline. These deadlines have little to do with child abuse; they instead concern the length of time a child has spent out of the parents' custody. Provisions like this affect parents whose children have been in foster care for too long but whose rights could not be terminated on other grounds.

Termination of biological parents' rights is a necessary prerequisite for children to be adopted by new parents. ASFA accelerates this process. The law

requires a permanency hearing to be held within a year of a child's entry into foster care. If the child is still in foster care three months later, the child welfare agency may have to start termination proceedings. The law mandates that states file a petition to terminate the rights of parents whose child has been in foster care for fifteen of the previous twenty-two months. (The law allows states to exempt cases where a relative is caring for the child, where a compelling reason exists that termination would not be in the best interests of the child, or where the agency did not make reasonable efforts for reunification.) By 1999, all fifty states had passed legislation that mirrored or was tougher than the federal law.²⁶ Some states imposed even shorter deadlines and expanded the grounds for severing biological ties. In Nevada, for example, a parent's failure to comply with the terms of the reunification plan within six months can trigger a hearing on termination of parental rights. The American Bar Association initiated the "Termination Barriers Project" to develop guidelines for state legislation promoting early termination of parental rights.²⁷

Some child welfare experts have criticized the imposition of accelerated time clocks on parents who are trying to regain custody of their children. In testimony on the proposed federal adoption law, the Children's Welfare League of America expressed concern that the bill's deadline for initiating termination proceedings might "disrupt good and timely progress toward reunification."²⁸ Jess McDonald, Director of the Illinois Department of Children and Family Services, charged that the time frame to initiate termination of parental rights proceedings "is an overly prescriptive mandate . . . [that] does not allow states the flexibility to decide on a case by case basis what is in the best interests of the child." These experts in the field recognized that it can be harmful to children to place a deadline on agencies' efforts to reunite them with their parents.

ASFA also offers financial incentives to states to get more children adopted. The federal government pays states a bonus for foster child adoptions during the fiscal year that exceed a baseline of the average annual number of children adopted in the state between 1995 and 1997. States receive \$4,000 for each child adopted above the baseline. The bonus goes up to \$6,000 for each adoption of a special needs child. There is also technical assistance to states to increase the number of adoptions. The law provides for the Secretary of Health and Human Services to help states in developing guidelines for expediting termination of parental rights, specialized units for moving children toward adop-

tion as a permanency goal, and models to encourage fast-tracking of infants into pre-adoptive placements. These federal enticements are spurring states, in turn, to put pressure on agencies to move more children into adoptive homes. Children's Services of Roxbury, a private social service agency in inner-city Boston, was given a quota.²⁹ The state told the agency to double the number of children it usually placed for adoption. The Illinois Department of Children and Family Services circulates a list of agencies ranked by the percentage of children they move into adoptive homes. "It's embarrassing to get a low ranking," says the director of a Chicago agency.³⁰

The incentives appear to be working. There were 46,000 adoptions of foster children in 1999, a 28 percent increase from the previous year. The number of adoptions doubled in Illinois, and they went up 75 percent in Texas and 57 percent in Florida. Forty-two states earned \$20 million in federal adoption bonuses.³¹ The federal incentives to move children out of foster care steer states in one direction. They encourage states to get more children adopted. But the new law doesn't provide comparable financial incentives or technical help to states to improve their family preservation programs.

Another key component of the move toward adoption is "concurrent permanency planning." This policy places foster children on two tracks at the same time—one track focuses on reuniting them with their parents; the other seeks to find them a permanent home with another family. Caseworkers must pursue both goals simultaneously. The point of this policy is to ensure that there will be a permanent home waiting for children in the event that reunification efforts fail. Concurrent permanency planning is supposed to keep children from being stranded in foster care. But this policy puts caseworkers in a schizophrenic position. It intensifies the conflict already inherent in child welfare practice between preserving families and seeking adoptive homes. Caseworkers' conflicting duties reflect a more fundamental "dual-role" structure of public child welfare agencies. Agencies combine helping impoverished families to overcome their problems with coercing them to conform to agency standards through the threat of removing their children.³²

Although federal law still requires that states make reasonable efforts to reunify children with their families, it now encourages states to make concurrent efforts to place these children with adoptive parents. A number of states have already instituted concurrent planning policies. Jornell's latest permanency

plan lists ten recommendations. The first recommendation reads, "We are not presently moving to change the goal Return Home as other information is needed to make this determination." The last one reads, "Concurrent planning to occur in the event that parent's rights are terminated."

Giving agencies the conflicting missions of reuniting foster children with their families while preparing them for adoption is likely to dilute agencies' efforts at family preservation. When children enter the child welfare system they become candidates for adoption. By offering bonuses for adoption, the new federal law weakens even more caseworkers' incentive to keep families together. "Can unbiased decisions be made with regard to the risk to a child in an atmosphere where adoptive placements are being encouraged and financially rewarded?" asks one social work professor.³³ The scales are weighted toward ending children's ties with their parents and moving them into adoptive homes.

As part of concurrent planning, children are increasingly placed for foster care in a potential adoptive home. The new terms for these arrangements are "fost-adopt" or "pre-adoptive" placements. There is new federal money available to assist states in developing programs that place children in pre-adoptive families without waiting for termination of parental rights. Turning foster homes into adoptive ones avoids uprooting the child if reunification fails and adoption occurs. Ideally, the child's birth parents will get to know the foster/adoptive parents during the concurrent planning process and can feel more comfortable about the adoption. But these benefits occur only in cases where adoption is inevitable or mutually agreed upon. Placing foster children in pre-adoptive homes while parents are still struggling to reunify the family preordains the outcome. Seeing foster parents as adoptive parents, moreover, gives them a vested interest in the breakdown of preservation efforts. Foster parents have a great deal of influence over the children in their care and their visitation schedules. They are instructed to report negative incidents between biological parents and children. When both caseworkers and foster parents team up to pursue adoption, it is easy to sabotage biological parents' efforts to maintain ties with their children.

Parents are already at a disadvantage in a match with foster parents. Foster parents usually have better incomes and less chaotic lives. Courts and agencies tend to overlook their deficiencies while highlighting the parents' flaws. If

reunification has been delayed, the foster parents have had time to develop a relationship with the children. As one family court judge observed, “One wonders if any natural parents of children in foster care could pass muster if the superior capabilities of the foster parents are the measure of ‘best interests.’”³⁴ Agencies that view foster children as candidates for adoption and foster parents as potential adopters are likely to lose sight of preserving biological families.

The new law’s supporters argue that these measures are critical for the more than 100,000 foster children who are awaiting adoption.³⁵ Of course, states should often facilitate adoption of children who have been abandoned by their parents or who cannot be returned safely to their families. But there is a big difference between removing barriers to the adoption of children who are already available to be adopted and viewing the legal relationship between children in foster care and their parents as a barrier to adoption. ASFA threatens to permanently separate children from families, families that might have been preserved with the right incentives, adequate state resources, or creative custody arrangements. Family preservation efforts often fail because they are inadequate: children are returned to troubled homes without focusing on the right problems and without providing the level or continuity of services required to solve them. Having never delivered on its promise to support poor families, Congress is now using the alleged failure of family preservation programs to justify permanently separating more Black children from their parents.

Disparaging Biological Bonds

One of the most disturbing aspects of the new focus on adoption is the message it sends about the families whose children have been placed in foster care. Throughout congressional testimony on the proposed legislation, adoption was portrayed as better for children than reunification with their biological families. Virtually every mention of biological families was negative, whereas adoptive homes were referred to as loving and stable. Foster parents were described as “loving caregivers” who are unfairly prevented by biological parents’ rights from developing stable relationships with the children they take in.³⁶ Congress assumed that permanence and safety came from adoption, not from reunifying children with their parents. “Terminating parental rights is the critical first step in moving children into permanent placements,” declared Senator Chafee.³⁷

The debate overlooked children's interest in living with their parents. To the contrary, the congressional record as well as the public discussion were saturated with stories about parents who were permitted to brutally torture and murder their children because of caseworkers' insistence on family reunification. All the blame for the problems with foster care were heaped on family preservation policies. Representative Dave Camp of Michigan accused the family preservation philosophy of "creat[ing] a system where nearly half a million children currently reside in foster care."³⁸ After describing the "sufferings of the abused, abandoned, and neglected; infants who have been burned at an open fire; children raped and assaulted," an article in the *Washington Post* claimed that "the Family Reunification and Preservation Act is the cause of these grotesque practices."³⁹

Even Ray Suarez, the host of National Public Radio's *Talk of the Nation* opened a show on the eve of ASFA's enactment in these terms. "Talk to anyone who's involved with children, families, and the law, and before long the horror stories start," Suarez told the audience. "Children removed from a home for their safety then returned only to be killed; children who bounce from home to home for years because a parent won't surrender legal rights to the child so he can't be adopted; families collapsing under the weight of dysfunction, drugs, poverty; where children are raped by mom's boyfriend or scalded, or starved, or beaten."⁴⁰

The message from all these quarters was clear: preserving families endangers children; placing children in adoptive homes protects them.

With this backdrop of vilifying foster children's families, adoption has leapt to unprecedented popularity. Adoption is now embraced across the political spectrum as the solution to the foster care crisis. As First Lady, Hillary Rodham Clinton made adoption a centerpiece of her children's rights platform. She was a vocal supporter of the federal adoption legislation. "For the thousands of American children who wait for a stable, loving home that will always be there, it is not a moment too soon," she stated on the day her husband signed it into law.⁴¹ Mrs. Clinton told reporters that adoption reform was a personal priority and that she was thinking about adopting a second child.⁴² The enthusiasm for adoption is by no means limited to Democrats. During his campaign, President George W. Bush declared that "foster care ought to be a bridge to adoption."⁴³ Surrounded by Black children in a Detroit center, he an-

nounced a plan to promote adoptions, including \$1 billion to expand the adoption tax credit from \$5,000 to \$7,500. He boasted that by expediting termination of parental rights, Texas had increased adoptions by 50 percent in one year. Bush established the Governor's Committee to Promote Adoption to put Texas at the forefront of adoption reform. Although the Bush proposal also included funds for preventive services, newspaper headlines focused on its goal of "getting more foster kids adopted."

Discussions in the media about what's best for children in foster care increasingly revolve around adoption. I recently listened to a program about social services on my local public radio station. At one point, the conversation among the guests turned to government and charitable programs designed to ensure permanence for children in foster care. The guests focused on how states would meet federal targets for adoption. No one mentioned fulfilling states' duty to try to return foster children to their families. They even used "adoption" interchangeably with "permanence." Like ASFA's supporters in Congress, these commentators were equating permanence for children with adoption, ignoring reunification with parents as an important option.

In *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*, Harvard law professor Elizabeth Bartholet calls on liberals to join the historically conservative campaign to increase adoptions. She advocates intensifying government inspection of homes, limiting family preservation programs, and escalating termination of parental rights. Bartholet sees "blood bias," the assumption that biological ties are central to the definition of family, as an impediment to moving more children into caring homes. Her mission, in a nutshell, is to break down biological and racial barriers to state intervention in poor Black families so that more children can be removed from "nonfunctioning" parents and their communities and adopted by more nurturing ones.

Unsurprisingly, Bartholet believes that new federal policy signals a positive move away from maintaining biological parents' ties to their children. Indeed, she says the federal adoption law does not go far enough to limit family preservation efforts and eliminate barriers to termination of parental rights. To Bartholet, ASFA's requirement that agencies show they provided timely reunification services is a "loophole" that threatens to swallow the new deadlines for termination. This prerequisite is understandable, she concedes, because "it seems unfair to take children away from parents who might be able to function

as adequate parents if only they received certain services from the state.”⁴⁴ So why shouldn’t states be required to try to reunite families before they permanently tear them apart? “The problem is that the state typically does *not* provide adequate and timely reunification services,” Bartholet answers. Bartholet views delaying termination in these cases as “punishing children for the sins of the state” because she doesn’t see that unnecessarily breaking up families hurts children.

Most telling, Bartholet even considers the exemption from speedy termination when it is in the best interests of the child to be a loophole.⁴⁵ But there are many times when it serves children best to retain their bonds with their parents, and it is a good thing that ASFA allows caseworkers and judges to take children’s interest in family relationships into account. The danger is not that caseworkers opposed to terminating parental rights will exploit this provision. The danger is that the law’s other incentives to free children for adoption will overwhelm consideration of their family bonds.

The popularity of adoption can be seen in other academic circles. Take, for instance, recent proposals to renew civil society. In the past decade, a group of prominent scholars has advocated reviving social ties outside of government, such as families and voluntary associations, to address a perceived decline in morality, political participation, and communal engagement. Robert Putnam’s celebrated book *Bowling Alone* is an example of the revivalists’ claim that Americans have lost the sense of community they once shared. Two documents published in 1998—*A Call to Civil Society: Why Democracy Needs Moral Truths*, by the Council on Civil Society, and *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It*, by the National Council on Civil Renewal—set forth an agenda for restoring moral decency and civic engagement. These appeals were endorsed by public academics across the political spectrum, including Jean Bethke Elshtain at the University of Chicago’s Divinity School, William Bennett, who served as secretary of education under President Ronald Reagan, and University of Maryland professor William Galston, a former Clinton policy advisor. Their proposals to revive civil society, then, constitute a significant bellwether of contemporary thought on family policy.

The revivalists’ proposals center on strengthening the family, which they see as the most important institution of civil society, by supporting marriage

and reducing divorce and single parenting. They advocate measures that will “enhance parental authority in the upbringing of children.”⁴⁶ But whose parental authority? The revivalists seem oblivious to the racial disparity in state supervision of children and the trends converging to further weaken Black family bonds.

The revivalists’ only recommendation related to the child welfare system is to strengthen and expand the institution of adoption, including transracial adoption.⁴⁷ Adoption is an important part of civil society, the scholars argue, because it ensures that more children will grow up with two married parents. They claim inaccurately that adoption has been “significantly weakened in recent years” and advocate “sweeping away impediments to adoption.” To the contrary, what has been weakened by recent state and federal legislation is government efforts to preserve ties between poor parents and their children. The civil society revivalists’ policy recommendations endorse the existing consensus to reject any national effort to address the systemic causes of children’s deprivation and to pursue instead the private remedies of marriage and adoption. By choosing to bolster adoption without mentioning programs that preserve the families of children in foster care, the revivalists favor the more privileged adoptive parents. Apparently, parents whose children have been removed by the state are less deserving of social support because they are less likely to be married.

It seems odd that scholars who stress family freedom and integrity would focus unilaterally on adoption when it comes to child welfare policy. They are right that the government should usually facilitate the adoption of children whose family ties have been irremediably fractured. But shouldn’t a civil society promote children’s welfare by supporting impoverished families? At the very least, scholars interested in protecting families from state domination should acknowledge that foster care constitutes a form of state supervision of poor children and that adoption often involves government disruption of their relationship with their parents. A civil society should be wary of state solutions to social problems that rely on terminating parents’ rights, rather than on reducing poverty or building stronger supports for families. The revivalists’ turn to adoption as the *only* strategy for improving the child welfare system is further illustration of how popular this approach has become.

The support for adoption as the solution to the foster care crisis presents a fascinating reversal of the typical comparison of adoptive and biological

bonds. Dominant American culture has always revered the genetic connection between parents and children and treated adoption as a second-best and unnatural alternative.⁴⁸ The fortunes spent on fertility treatment and high-tech means of conception such as in vitro fertilization are a powerful reflection of the value Americans place on genetic relatedness. 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.”⁴⁹ Representative Shaw of Florida predicted that the law “is going to bring about the joy of adoption and the bonding of a *real* family to so many kids.”⁵⁰ Senator Mike DeWine, on the other hand, referred to the homes of abused children as “households that look like families but are not.”⁵¹ Erasing the stigma of adoption is an important step in expanding our notions of family. But it seems that this preference for adoption over biology is reserved for the poor Black children who are the majority of “waiting” foster children.

Brooklyn law professor Marsha Garrison insightfully observes that the perceived conflict between children in foster care and their parents is a striking departure from “the general emphasis on relationship protection that has characterized advocacy on behalf of children.”⁵² The preference for permanence at the expense of family ties in the context of foster care stands in stark contrast to the treatment of this issue in the context of divorce. The belief that divorce inflicts emotional damage on children is regaining popularity. *The Unexpected Legacy of Divorce: A 25-Year Landmark Study*, by Judith Wallerstein, Julia Lewis, and Sandra Blakeslee, made the *New York Times* bestseller list and the talk show circuit. Based on a study that followed ninety-three children whose parents had divorced over the past quarter century, Wallerstein and her colleagues argue that family breakup causes long-term harm to children. She advises couples to stay together for the sake of the children. When parents do divorce, child advocates generally emphasize the importance of protecting the children’s relationships with their parents—even parents who lose custody.

Family law recognizes a strong emotional attachment between children of divorce and their noncustodial parents and views interference with this relationship as an awful injury to the child. Judges typically issue orders that permit visitation by the noncustodial parent and that often impose a great deal of

inconvenience, instability, and trauma on parents and children alike. If the mother gets custody, she has to arrange her schedule to give time to the non-custodial father to see the child. Some children bounce between two homes so that they can stay close to both parents. When custodial parents remarry, the stepmother or stepfather is rarely treated as a substitute for a biological parent. Children who acquire a stepmother usually still regard their biological mother as their “real” mother, and courts protect this biological relationship despite changes in the family’s composition. “In divorce, the child’s relationship with a noncustodial parent is almost invariably described as a positive factor in her development that should be encouraged and facilitated,” Professor Garrison notes. “In foster care, however, the noncustodial parent is typically seen as a threat to the child’s relationship with her foster parent or her opportunity to obtain adoptive parents.” Judges terminate relationships with divorced parents “only in extreme cases where the parent threatens the child’s health or safety.” But terminating the rights of parents with children in foster care “is urged whenever the child’s return home cannot be accomplished quickly.”⁵³

The deference to noncustodial relationships after divorce raises additional questions about the new emphasis on terminating parental rights. Why do so many children’s rights advocates appreciate the importance of preserving the parent-child bond in the case of divorce, but not in the case of foster care? For some, the reason may be economic. Preserving children’s ties to noncustodial middle-class fathers helps to guarantee that these children will not be added to the welfare rolls. In contrast, terminating the rights of poor parents so that their children can be adopted by wealthier ones yields a financial gain for the state. As Garrison notes, “If the child is adopted by parents who can afford to pay his keep, he costs the state nothing, and even subsidized adoption is cheaper than foster care.”⁵⁴

For others, the critical distinction may be the parental maltreatment that resulted in foster care placement. But divorced parents may also lose custody because they are unfit. In an earlier study on divorce’s impact on children, Judith Wallerstein found that 15 percent of middle-class divorced fathers suffered from severe psychiatric illness, 40 percent of father-child relationships were “profoundly troubled,” and 25 percent of surveyed children moderately or intensely feared their fathers.⁵⁵ Yet judges resolutely protect divorced fathers’ relationships with their children, even when the fathers are not suitable

caretakers. Courts understand, at least in the case of divorce, that parental unfitness does not necessarily negate children's bonds with their parents.

I believe that the main reason for preferring extinction of parental ties in foster care is society's depreciation of the relationship between poor parents and their children, especially those who are Black. Most Americans can grasp a white middle-class child's emotional attachment to her biological father even though she is being raised by a stepfather. No one doubts the family ties of a wealthy child who spends a year away from home at a distant boarding school. The public has a harder time, though, imagining a strong emotional bond between Black parents and their children. Jacquelynn Moffett, Executive Director of Homes for Black Children, discovered that the white participants in a workshop on Black adoption she conducted in Charleston, West Virginia, "really did not have a concept of Black families."⁵⁶ "They really did not believe that Black families exist," Moffett explains, "so they had no concept of Blacks being caring toward children." When parents of children in foster care are portrayed as deranged and violent monsters, it becomes even more difficult for the public to believe that their children would want to maintain a relationship with them.

The new federal policy further disparages biological parents by stacking the deck against them in contests with foster and pre-adoptive parents. For the first time, the federal law gives foster and pre-adoptive parents an opportunity to be heard in custody proceedings. Courts used to exclude these potential parents until they determined that the biological parents were unfit. Only then would it be fair to compare the biological parents with others in determining what's best for the child. 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."⁵⁷ He seemed to be saying that Congress chose foster and pre-adoptive parents over biological parents to represent the interests of children in foster care.

The Clinton administration opposed this provision out of concern that it gives foster parents standing that is "incongruent with their role as temporary caregivers of children" and "could result in the creation of unnecessary adversarial relationships between foster parents and biological parents and/or between foster parents and the State child welfare agency."⁵⁸ Allowing pre-

adoptive parents to intervene in unfitness hearings also intensifies the class and race conflicts often inherent in these adjudications. Deciding the best interests of children in this setting might conjure up the question, Would this child be better off in the comfortable home of this white, well-to-do couple or struggling on public assistance with that neglectful Black mother? Some pre-adoptive parents can afford to hire high-powered lawyers, whereas biological parents typically have inadequate representation. The law also places pre-adoptive parents in a better position than relatives who may want to permanently care for children but not adopt them. Relatives who aren't already providing care and aren't interested in adopting need not be notified at all.

Biased Against Whom?

How do the law's supporters justify its departure from the traditional protections of family integrity? The new priority placed on child safety and adoption is defended as a correction of bias in child welfare practice. Advocates of the policy charge that caseworkers and judges are biased against children's interests, in favor of parental rights. They claim that caseworkers coddle abusive parents and that judges bend over backward to avoid interfering in their authority over the children they mistreated. This favoritism, they argue, led caseworkers to interpret the reasonable efforts language to require returning foster children to violent homes. It also made judges unwilling to terminate parental rights. "Child welfare has grown into an enormous bureaucratic system that is biased toward preserving the family at any cost," stated Republican Representative Dan Burton of Indiana on behalf of ASFA.⁵⁹ "We will not continue the current system of always putting the needs and rights of biological parents first," Senator Chafee described as the purpose of the law.⁶⁰ The new child welfare philosophy reflects the judgment that, given this bias, the risk of wrongful reunification outweighs the risk of wrongful disruption of families.

To support her call for more coercive measures, Professor Bartholet paints a picture of extreme reluctance to intervene in child maltreatment. She tells the story of a fictitious drug-addicted mother named Linda who she says "is made up from bits and pieces of thousands on thousands of real people's stories."⁶¹ Although child protection authorities twice find that Linda's older child has been abused so severely that he is hospitalized, they decide against removing

him from the home and close the case. Linda subsequently gives birth to a premature drug-exposed baby with medical and developmental problems. Caseworkers still refuse to remove the children and fail to notice when Linda drops out of the drug treatment program they arrange for her. An overwhelmed Linda eventually slams the baby down in his crib to calm his incessant crying, causing internal injuries.

According to Bartholet, this unwillingness to remove children even in the face of repeated and grievous abuse is common: “Agencies are likely to investigate only on the basis of fairly serious allegations, and even then they are likely to do little more than investigate,” Bartholet writes. “Even if they find that severe maltreatment occurred they are unlikely to remove the child except as a last resort or in the most extreme cases.”⁶² This suggests to the reader that most children in foster care must be victims of horrible abuse who were placed in state custody only after their parents were given every chance to reform. One would never suspect from Bartholet’s account that families become involved with foster care because they are homeless, that children are taken from parents who left them unattended for a few hours, that thousands of newborns have been detained in hospitals based on a single positive drug test, or that half of Black children under supervision of child protective services are placed in foster care. Linda’s story does not comport with the experiences of real Black families I have described in Part One. Besides, coercive removal of children from their parents *should* be “a last resort,” used sparingly when efforts to keep the family together would be dangerous or have proven futile.

Contrary to this tale of reverence for family ties, there is tremendous pressure on judges, caseworkers, and administrators to remove children reported for maltreatment and to keep them in foster care. Risk-averse authorities are more afraid of making the wrong decision to return a child to an abusive home than of making the wrong decision to keep a child in state custody.⁶³ The former error may generate scathing headlines and public outcry, whereas the latter will probably go unnoticed. State officials rarely receive negative feedback as a result of mistaken decisions to intervene in poor Black families. This fear restrains caseworkers and agencies from being too bold or innovative in their family preservation efforts.

The pressure to remove children mounts after the death of a child by parents known to the system, and foster care caseloads skyrocket accordingly.

When Kayla McKean was beaten to death by her father despite repeated reports of abuse, the Florida legislature passed what was formerly known as the 1999 Kayla McKean Child Protection Act. (Kayla's grandfather demanded that Kayla's name be removed from the law.) The law has provisions for prosecuting caseworkers if they fail to remove a child who is later abused. Fearing criminal liability, caseworkers began to take children from parents based on the slightest indication of harm. It is no surprise that the foster care population has quadrupled in some Florida counties since the law went into effect.⁶⁴

There are also financial incentives to keep children in foster care. State child welfare departments frequently contract with private agencies to provide foster care services. These agencies, in turn, hire caseworkers who place children referred to them in foster homes and implement plans for reunification. The agencies are then reimbursed by the state for each day that children remain in foster care. They lose this payment when a child returns home. "States and private agencies now have financial incentives to keep children in foster care and financial incentives to place them for adoption," notes the National Coalition for Child Protection Reform, "but no financial incentives to keep them in their homes or return them there."⁶⁵

Moreover, public sympathies tend to side with foster parents who have selflessly cared for children mistreated by their own flesh and blood. It seems cruel to remove children from their new nurturing homes to return them to the very people who once hurt them. "Claims of birth parents tend to be discounted as rigid formalities—mere procedural rights of adults that should not be allowed to interfere with the obvious and unarguable interests of the children," maintain Northwestern law professors Bruce Boyer and Steven Lubet.⁶⁶ The public feels the pain of children when they are ripped from the arms of foster parents but not when they are taken from their families in the first place. Judges tend to think this way, too. Peggy Cooper Davis, a professor at New York University Law School, analyzed 193 judicial opinions issued over twenty years that employed the "psychological parent" theory espoused by Goldstein, Freud, and Solnit in their landmark book, *Beyond the Best Interests of the Child*. Professor Davis found many cases that denied the rights of biological families based on evidence of the need for continuity of care by foster parents. "There were very few cases in which those rights were bolstered by evidence concerning the need for continuity of relationships with biological families," asserts Davis.⁶⁷

A critical part of typical caseworker training is to erase any empathy toward parents to enable ruthless child removals. Being “objective” means, first, to see the parent and child as having opposing interests and, second, being blind to the parent’s point of view. “I tend to err on the side of the child,” says David Weinrich, a Los Angeles child welfare worker. “If I’m wrong, and I have been, then I’m wrong, but at least I took precautions.”⁶⁸ Caseworkers are instructed not to relate to parents or to be “sentimental” about taking their children away.⁶⁹ Weinrich found it difficult at first to remove children from their parents: “It was something I had to learn, and I needed supervision in the beginning . . . to do it without getting emotionally entangled. I did get better at it.”

A recent account by a former caseworker of her experience in New York City’s Administration for Children’s Services reveals how the bias against parents causes unnecessary pain and trauma to children.⁷⁰ Akka Gordon—a pseudonym—worked in emergency services for just over one year before she quit, disillusioned by the suffering she was expected to inflict on her poor Black and Latino clients by separating the children from their parents. Her description of how removal decisions are made sheds light on the pressures operating in today’s child welfare practice:

Caseworkers and their supervisors are accountable for each case; the days when cases piled up on desks without anyone contacting a family are long over. But accountability at ACS is a one-way street. A manager or supervisor has no one to answer to if a child who shouldn’t be in foster care is removed from home anyway. There is no penalty for the wrongful taking of a child. And the pressures to remove are intense. I was trained to do removals in cases that did not necessarily qualify as abuse or neglect because, as one of my supervisors reminded me, “prevention is better than a cure.” When I was resistant to doing a removal on a case, that same supervisor’s advice was, “It’s better to be safe than sorry.” And at moments of uncertainty, the mantra was “Cover your ass”—a phrase heard often around the office. It was backed up by a pervasive fear—among caseworkers, supervisors, managers, and attorneys—of seeing our photograph in the *Daily News* as the person who made an error that was literally fatal.

Gordon explains that any inclination to keep families together was routinely thwarted by case managers who had the final word. Caseworker actions

in support of family unity were met with swift recrimination. Caseworkers had to file electronic reports in which they had to choose whether a home was “safe” or “unsafe.” “But my manager accepted only one,” writes Gordon. “Any time I determined a child to be ‘safe,’ my manager rejected it and returned it to me. The first step to protect yourself, I quickly discovered, is to determine that a child is ‘unsafe’ from the outset of an investigation.” If an investigator could find no evidence to substantiate abuse allegations from a mandated reporter, such as a teacher or doctor, the manager simply refused to sign off on the case. One of Gordon’s coworkers who made the mistake of honestly telling a judge she thought the children were not in danger was demoted for “failing to protect the children of the City of New York.”

There are other kinds of incentives to remove children as well. Caseworkers in New York City can earn time-and-a-half for removing children at night, so it is simple to find someone in the office who will step in to take children without knowing the circumstances of the case. Placing children in foster care is also easier than working with an intact family. “Keeping a case obligates a worker to do regular home visits and follow-ups to make sure a family is getting preventive services,” Gordon explains. “It also means dealing with anything that may go wrong and continuing to be responsible for the children’s safety.”

New York City Mayor Rudolph Giuliani praised ACS’s success in reducing the number of child deaths in the city and presented the agency as a model for the rest of the country. But Gordon asks, “what kind of model is an agency whose success continues to depend on routinely causing unnecessary pain to children and the parents who want to take care of them?”

The bias against parents follows them into the courtroom. In hearings to adjudicate parents’ right to get their children back, parents are at a significant disadvantage. As we saw in Part One, parents must defend themselves against a veritable army of opponents seeking to keep them separated from their children. Parents, who are almost always indigent, often stand alone before the judge. At best, they are represented by a public defender or pro bono attorney assigned by the court. Only rarely can parents threatened with termination afford to hire a private attorney of their choice. The child welfare agency, represented by a state’s attorney, typically joins sides with the guardian ad litem who is supposed to speak on behalf of the child. Although guardians should not be

adversaries of the parents, they tend to take on this role. For example, Patrick Murphy, the Public Guardian of Cook County, has built a reputation for tending to oppose reunification of children in foster care with their parents. He once attacked family preservation programs on the op-ed page of the *New York Times*, writing that “in most cases, giving services and money to parents who have abused and neglected their children can do nothing but reward irresponsible and even criminal behavior.”⁷¹ Judges, in turn, tend to follow the recommendations of the guardian.

There is also usually an imbalance in the quality of representation. Whereas state’s attorneys and guardians ad litem make a career at litigating child abuse and neglect cases, public defenders often view family court as a training ground for criminal trials. Cathryn Stewart, an assistant clinical professor at Northwestern University Law School, told me that most parents receive inadequate legal representation. “Parents should be represented by a special group of lawyers who specialize in family law and who are committed to making abuse and neglect work their career,” she said. A University of Chicago study of the Public Defender’s Office, which represents 90 percent of parents in most Illinois counties, found that the office needed more staff and better training to properly advocate for its clients.⁷² Matthew Johnson, a professor of clinical psychiatry in Newark who serves as an expert in child welfare cares, echoes that pro bono attorneys who represent indigent parents in New Jersey are inexperienced in trying abuse and neglect cases and have little incentive to build any expertise in this area of law.⁷³

In New York City, on the other hand, lawyers appointed by the family court to represent parents are drawn from a panel of lawyers that make this work a major part of their practice.⁷⁴ But the state legislature set their hourly fees more than a decade ago at a meager \$40 for work in court and \$25 for work outside court. Frustrated when their appeals for a raise went unanswered, panel attorneys in most of the city refused to accept new cases starting in January 2001. Jody Adams, a Manhattan Family Court judge, called the impasse “a daily disaster in the lives of many of New York City’s children.” “Small children remain in foster care; adolescents remain in pretrial detention, their cases unreviewed past the statutory deadline, while their mothers weep in court,” Judge Adams wrote to the *New York Times*. “But only if they’re poor.”⁷⁵

The state can also afford to hire psychological experts to testify about parents' inadequacies. According to Dr. Johnson, their negative assessments of parental ability are "often scientifically questionable and at times irresponsible."⁷⁶ It is common for psychologists to offer "bonding evaluations" in which they measure how estranged children have become from their parents and how attached they have become to their substitute caregivers. Their predictions that children would be forever scarred if they were reunited with their parents are not supported by current scientific knowledge.⁷⁷ I observed a hearing in Cook County Juvenile Court where the judge couldn't find the bonding evaluation in the file, and everyone simply agreed without any evidence at all that the children had bonded with the foster mother.

Psychologists sometimes testify against parents without ever having examined them, basing their conclusions entirely on caseworker reports.⁷⁸ Others ignore tests that find nothing troubling in the parent's personality, while focusing on a single evaluation that uncovered a pathological tendency. The judge in Jornell's case, for example, rejected the positive reports prepared by an African American psychiatrist in Jornell's community. Instead, he relied on the evaluations submitted by DCFS that at one point speculated that Jornell might suffer from Munchausen's syndrome by proxy because she overmedicated her baby. Jornell's mistaken medical judgment was transformed into a rare psychosis that leads mothers to deliberately send their children to the hospital because they crave the attention from medical staff. This possible diagnosis sent her on a three-year saga of psychiatric evaluations and therapy sessions that produced a variety of revised assessments. The psychologists who prepare evaluations for court typically have a long-running contractual relationship with the child welfare agency that is petitioning to terminate the parent's rights and therefore have a vested interest in supporting the agency's determination. To add to the unfairness, public defenders or pro bono attorneys representing parents routinely find experts for trial from a list of the very same psychologists who have a financial relationship with the state agency.

Whereas courts scrutinize the psychological flaws of biological parents, they are less likely to require corresponding evaluations of the foster parents. Dr. Johnson challenged this oversight in a 1992 New Jersey case, *In re J.C.*, that overturned a trial judge's decision to terminate a Latina mother's rights three

years after she voluntarily placed her two daughters in foster care.⁷⁹ The judge ruled that the woman's daughters had bonded with their pre-adoptive families. The mother obtained a better lawyer for her appeal, who secured a new hearing and more extensive evaluations. The foster parents for the older daughter gave up custody because of her behavior problems, which they linked to the girl's desire to stay with her mother. The agency still refused to return the girl to her mother until the appellate court ordered it to focus on reunification.

The mother's new attorney retained Dr. Johnson to examine the mother, the younger daughter, and the proposed adoptive mother. The expert hired by the child welfare agency wrote explicitly in her report that she had not evaluated the pre-adoptive mother. Johnson's examination revealed serious deficits. Despite evidence in school records that the girl was frequently tardy and in danger of failing, the foster mother denied knowledge of her educational difficulties and did not know the names of the girl's teachers. The foster mother also harbored hostility toward the birth mother, which she expressed to the child. The girl reported that the foster mother chastised her for talking about her mother. Moreover, the foster mother was caring for more children than agency policy recommended. Johnson informed the court of "multiple risks associated with the child's continued placement at the proposed adoptive home," risks that the child welfare agency and the trial judge had originally overlooked.

Some states have compounded the hurdles parents must face in court by shifting the burden of proof to them instead of child welfare agencies. In implementing ASFA, states have begun to pass laws that make it easier for agencies to win petitions to terminate parental rights.⁸⁰ In Arkansas, for example, parents must prove that they made a "genuine, sustainable investment" in completing the reunification plan. Illinois law puts a time-limited burden on parents to challenge the state's reunification efforts. Parents must file a motion requesting the court to find that the state made no reasonable efforts toward reunification within sixty days of the state's deadline for making these efforts. In North Dakota, parents who fail "to make substantial, meaningful efforts to secure treatment" for an addiction are deemed to have abandoned their children.

The bias in the media and the courts against keeping families together has had a profound impact on the public's perception of the foster care problem. Led to believe that families involved in the system are dangerous, many

people automatically reject returning children home as a viable option. *Time* ran an investigative cover story in November 2000 on “The Crisis of Foster Care.”⁸¹ It began with a grisly account of the death of six-year-old Terrell Peterson in his Atlanta kinship foster home. Terrell, who weighed only twenty-nine pounds when he died, had been tortured, burned, and battered. During his stay in foster care, he was kept tied to a banister and fed only oatmeal and grits. The caseworker never checked to see whether he was being cared for properly. The article goes on to document case after case of children killed, maimed, or forgotten while under the care of state protection agencies. Two-year-old Gilbreania Wallace died from brain injuries inflicted by a foster mother with a questionable record. She was placed there by a private agency under contract with the California child welfare department that was plagued with corruption and mismanagement. Homer Bennett drifted among fourteen different Chicago foster homes during his fifteen years in state custody where he thought it was within the rules to be beaten with belts. “Nobody preserved his family unit,” the *Time* reporter notes.

One question that logically arises from foster care fatalities is whether the victims might have been safer remaining with their parents. You would expect that readers would contemplate as a solution to the crisis sending fewer children into this “foster hell,” as the author describes it. Yet not a single letter that *Time* published responding to the article raised this possibility. Instead readers accepted the foster care system while calling for its improvement. They proposed spending more money on “the resources, training, and support that foster care agencies need,” on “researching potential foster parents,” on “attracting some of our nation’s best social workers, administrators, and resource families to this difficult field,” and on adoption.⁸² Others objected to criticism of the foster care system, arguing that the abuses *Time* described “would be happening at an even more alarming rate if foster care did not exist.” What would happen if we devoted more resources to supporting families instead of foster care? No one asked that question.

Newspaper headlines about a child killed by her parents sends child welfare authorities into a panic, driving up the numbers of children needlessly taken from their homes. Headlines about a child killed by foster parents never leads to a dramatic *reduction* in children placed in foster care. The public believes that removing more children from their homes will diminish the chances

for deadly mistakes. But overloading the system with children who could remain safely with their parents means that caseworkers have less time and money to find and follow the minority of children who really are in danger. The escalating costs of foster care drain the system of funds that could be used to support families, only worsening the conditions that lead to serious abuse. Overzealous child protective authorities scare away families who might have sought help for their problems before they spiral into violent situations. This is why tragic cases of child abuse continue to appear even under the watch of the toughest child protection regimes. Children fall through the cracks not because child welfare agencies are devoting too much to family preservation. Children fall through the cracks because agencies are devoting too much to child removal.

A recent front-page story of child abuse illustrates how the child protection philosophy can backfire. In February 2001, *New York Times* reporter Nina Bernstein recounted the odyssey of two boys from Brooklyn whose mother, Linda Harley, slashed and battered their faces before taking them on a 3,000-mile train trip from California back to New York.⁸³ New York City's Administration for Children's Services returned the boys from foster care to the mother's custody in 1998 after she served time for stabbing the boys' father. The agency closed the case after monitoring the family for a year. But Ms. Harley, a former prostitute and drug addict, began to neglect the boys when she returned to abusing drugs and alcohol. By December 2000, she had asked her family to take legal custody of the boys because she could no longer handle them. Instead, she took the boys by bus to California and attacked them in a motel room with a knife, metal pipe, and high-heeled shoe.

People are quick to place the blame for cases like this on child welfare authorities too dedicated to keeping families together. But New York City's ACS is the very agency that was created in response to the Elisa Izquierdo murder to make sure that a similar tragedy didn't happen again. It is the very agency that increased the number of children placed in foster care by nearly 50 percent in two years. It is the very agency that already had custody of 40,000 of the city's minority children. Is the solution to take even more children from their parents? Bernstein's follow-up headline—"Family Loyalty and Distrust of System Helped Hide Abuse of 2 Boys"—suggests a different answer.⁸⁴ Bernstein explains that Ms. Harley's mother and sisters refused to report earlier evidence of

Harley's mistreatment of the boys because they didn't trust child protective services. "Rather than betray a wayward sister and daughter struggling to overcome years of drug addiction, violence, and prostitution," Bernstein reported, "they wanted to handle her problems and her sons' needs privately." Had ACS paid more attention to supporting families, Harley and her family might have been more comfortable turning to the agency for help. The agency might have taken more effective steps to assist Harley in the years after the children were returned to her. And, if truly supportive programs failed, caseworkers assigned to the family would have had more time to investigate signs that the children were in danger.

What about the argument that the prior law dangerously favored parents? The new orientation toward child safety and adoption, say its proponents, fixes the law's invitation to ignore children's well-being. But the reasonable efforts requirement was itself enacted in response to evidence that caseworkers offered families minimal assistance and even obstructed parents' attempts to reunite with their children. Even under the reasonable efforts requirement, state agencies continued to make anemic efforts to prevent out-of-home placements and to reunify families. The Department of Health and Human Services under the Reagan administration superficially monitored states' compliance.⁸⁵ A major hindrance was that there was no legislative guidance as to what reasonable efforts must minimally include. In *Suter v. Artist M*, the United States Supreme Court recognized this failure when foster children brought a federal lawsuit against the Illinois Department of Children and Family Services seeking to enforce the reasonable efforts provision.⁸⁶ The Court rejected their right to sue, finding that "how the State was to comply with this directive . . . was, within broad limits, left up to the State." The Court concluded, in other words, that the term was too ambiguous to be enforced by the federal courts.

Far from leading invariably to risky reunifications, the law's vagueness allows judges to terminate parental rights without any serious inquiry into the agency's activities. Although many agencies recognize the importance of documenting reunification services before petitioning for termination, many others successfully seek termination after doing practically nothing. A Minnesota child welfare official conceded to Congress that "our efforts are reasonable in relation to funding available, but not in relation to our knowledge of effective programming."⁸⁷ Judges often rubber stamp agencies' own determination that

they took sufficient steps to reunite the family. One study of the provision's implementation found that "many judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information."⁸⁸ A guardian in Illinois abuse and neglect proceedings testified before Congress that "judges are finding the reasonable efforts requirement satisfied simply because services are unavailable."⁸⁹ Some states have statutes permitting termination of parental rights based solely on the length of time children are in state custody without even considering the extent of agencies' efforts to reunite the family.⁹⁰ This means that child protection authorities can remove children from their parents, do nothing to facilitate their return—or even make it difficult for parents to contact them—and then petition for termination of parental rights on the grounds that the parents and children have been separated for too long.

Most of the time, the reasonable efforts mandate did not lead either to strenuous attempts to reunify families or to termination of parental rights. Instead, according to Children's Rights Director Marcia Lowery, the requirement "was really used as an excuse to do nothing."⁹¹ Lowery says caseworkers interpreted it to mean "you do not have to move toward adoption because you have to preserve the family, and then nobody makes you do anything to actually provide services." This state of inertia meant that children—especially Black children—entered foster care in record numbers and remained there longer.

The shift in policy, then, is unjustifiably weighted against keeping families together. The new federal law clarified the definition of reasonable efforts by making child safety a priority, but not by establishing specific guidelines governing the services that agencies should provide to families. This could easily be regarded by some agencies as a license to ignore the reasonable efforts requirement altogether by claiming that making them would jeopardize a child's "health and safety." When the U.S. General Accounting Office investigated how a Florida county was implementing ASFA, it found that "child welfare agency attorneys have begun to more proactively identify cases for which efforts to prevent removal from home or to return a child home may not be warranted."⁹² A Florida child abuse investigator told Richard Wexler, Director of the National Coalition for Child Protection Reform, that caseworkers easily get judges to approve removal without reasonable efforts: "We usually just put on the petition that the level of abuse was too severe or the risk was deemed too

high to offer services.”⁹³ It is now more likely than ever that the law’s vague terms will support unnecessary placements of children in foster care. Moreover, Congress poured money into adoption incentives but not into incentives to improve family preservation programs. It shines the spotlight on the paltry number of adoptions but not on the excessive removal of children from their parents.

2. WHY FAMILY PRESERVATION FAILS

THE FINAL ARGUMENT made for expediting termination of parental rights is that family preservation doesn’t work. Instead of spending more time and money on futile programs to salvage dysfunctional families, agencies should act quickly to put children in better homes. The problem with the argument that family preservation has failed is that it was never given a chance to succeed.

The term “family preservation” has two general meanings. Broadly speaking, family preservation is a philosophy about the goals of child welfare practice. “Family preservation as a philosophy,” writes Marianne Berry, a leading expert in the field, “emphasizes the importance of families to children and to society and the value of strengthening families as a first strategy in crisis.”⁹⁴ This approach holds that agencies should take steps to prevent the need to remove maltreated children from their homes and to reunite children in foster care with their families. Family preservation acknowledges the tremendous power government has to disrupt families and its corresponding obligation to provide support to minimize its destructive impact.

Family preservation also refers to a variety of specific social work practices designed to avert the need to place children in foster care.⁹⁵ Child welfare experts most frequently use the term to describe an intensive, home-based, crisis-oriented model that serves families at imminent risk of having children removed. (The Child Welfare League of America labeled this model “Intensive Family-Centered Crisis Services” to distinguish it from other types of family preservation programs.) Caseworkers make themselves available around the clock to two or three families for several weeks. They spend long hours in the family’s home on a daily basis, counseling parents, coordinating services, and monitoring children’s safety. They try to build on the family’s strengths while