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### Child Welfare and Civil Rights

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## CHILD WELFARE AND CIVIL RIGHTS<sup>†</sup>

Dorothy E. Roberts\*

*While child welfare receives considerable media and scholarly attention, it is seldom treated as a civil rights issue. The child welfare system, however, is plagued by an alarming racial disparity, with black children especially representing a disproportionate share of the foster care population. In her lecture, Dorothy Roberts ties the child welfare system's racial disparity to broader economic and racial inequities and argues that disparate state supervision and dissolution of black families inflict a racial harm. She concludes that viewing the disparity as a group-based civil rights violation calls for transforming the State's focus from punishing impoverished parents to providing increased, noncoercive support for vulnerable families.*

Child welfare is not usually viewed as a civil rights issue. If child welfare is discussed as a matter of rights at all, it is usually framed as a contest between children's rights and parents' rights.<sup>1</sup> Most books by legal scholars and activists about the child welfare system paint a battle between bad government and innocent parents,<sup>2</sup> or bad parents and innocent children.<sup>3</sup> 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. On the other side are those who tell horrifying stories of victims of parental abuse and a system that does too little to protect them. This way of framing the issue often assumes that parents' and children's interests oppose each other. It also often assumes that the child welfare system treats all parents and children equally.

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<sup>†</sup> This article was originally presented on October 2, 2001, as the first 2001–02 lecture of the David C. Baum Memorial Lecture in Civil Rights and Civil Liberties at the University of Illinois College of Law. It is based on Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

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1. See RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 152–54 (1997).

2. See, e.g., DANA MACK, *THE ASSAULT ON PARENTHOOD: HOW OUR CULTURE UNDERMINES THE FAMILY* (1997).

3. See, e.g., RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996).

Strangely, criticisms of the child welfare system are not placed among the burning violations of civil rights on the basis of race. I say “strangely” because anyone who is familiar with the child welfare system in the nation’s large cities knows that it is basically an apartheid institution. Spend a day at dependency or juvenile court in most major cities and you will see unmistakable evidence of the stark racial disparity in child welfare. Most of the families in these urban courts are black.<sup>4</sup> If you came with no preconceptions about the child welfare system’s purpose, you would have to conclude that it is an institution designed primarily to monitor, regulate, and punish poor black families. 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. The racial disparity of children in protective custody mirrors the disparity among adults in our nation’s prison system, a disparity which social critics are increasingly calling a civil rights violation.<sup>5</sup>

In this lecture, I want to explore why the gross racial disparity in the child welfare system exists and why it is an important civil rights concern. By focusing on child welfare and civil rights, I also hope to rethink the traditional methods and goals of civil rights jurisprudence.

The disproportionate number of black children in America’s child welfare system is staggering. Black children make up more than two-fifths of the foster care population, although they represent less than one-fifth of the nation’s children.<sup>6</sup> In Chicago, ninety-five percent of children in foster care are black.<sup>7</sup> The racial imbalance in New York City’s foster care population is truly mind-boggling: out of 42,000 children in the system at the end of 1997, only 1,300 were white.<sup>8</sup>

The worst part of the child welfare system’s treatment of black children is that it unnecessarily separates them from their parents. Child protective agencies are far more likely to place black children in foster care instead of offering their families less traumatic assistance. According to federal statistics, fifty-six percent of black children in the child welfare system have been placed in foster care, twice the percentage for white children.<sup>9</sup> A national study of child protective services by the U.S. Department of Health and Human Services reported that “[m]inority

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4. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7–9 (2002).

5. See, e.g., MARC MAUER, *RACE TO INCARCERATE: THE SENTENCING PROJECT* 124–26, 181–87 (1999).

6. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T HEALTH & HUMAN SERVS., *THE AFCARS REPORT: CURRENT ESTIMATES AS OF OCTOBER 2000*, available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/ar1000.htm> (last updated Mar. 5, 2001).

7. Natalie Pardo, *Losing Their Children*, 28 CHI. REP. 1, 7 (1999).

8. Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1718 n.11 (2000).

9. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T HEALTH & HUMAN SERVS., *CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM* (U.S. Gov’t Printing Office, 2000) [hereinafter *CHILD MALTREATMENT 1998*].

children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, *even when they have the same problems and characteristics as white children.*"<sup>10</sup>

White children who are abused or neglected are twice as likely as black children to receive services in their own homes, avoiding the emotional damage and physical risks of foster care placement.<sup>11</sup> Put another way, most white children who enter the system are permitted to stay with their families, while most black children are taken away from theirs. Foster care is the main "service" state agencies provide to black children brought to their attention.

Think for a moment what it means to rip children from their parents and their siblings to be placed in the care of strangers. Removing children from their homes is perhaps the most severe government intrusion into the lives of citizens. It is also one of the most terrifying experiences a child can have. Because parents involved with child protective services are so often portrayed as brutal monsters, the public usually ignores the trauma of taking their children. But many children in foster care, who typically have been removed because of neglect, have close and loving relationships with their parents, and it is indescribably painful to be separated from them.<sup>12</sup>

Of course, these harms of removal may be outweighed by the harm of leaving children with violent or very neglectful parents. But just as we should pay attention to the risks of child maltreatment, we should not minimize the very real pain caused by separating children from their families. The damage caused by disrupting these ties may be far greater than the harm agencies are trying to avoid.<sup>13</sup>

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 any other children.<sup>14</sup>

The new politics of child welfare threatens to intensify state supervision of black children. In the last several years, federal and state policy has shifted away from preserving families toward "freeing" children in foster care for adoption by terminating parental rights.<sup>15</sup> Welfare reform, by throwing many families deeper into poverty, heightens the risk that some children will be removed from the most vulnerable families and

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10. *Id.*, Executive Summary, Finding 4, at 3 (emphasis added).

11. *Id.*

12. See Seth Farber, *The Real Abuse*, NAT'L REV., Apr. 12, 1993, at 47.

13. See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 253 (E.D.N.Y. 2002).

14. See Edward V. Mech, *Public Social Service to Minority Children and Their Families*, in CHILDREN IN NEED OF ROOTS 133, 161 (R. O. Washington & Joan Boros-Van Hull eds., 1985); Mark E. Courtney & Vin-Ling Irene Wong, *Comparing the Timing of Exits from Substitute Care*, 18 CHILD. & YOUTH SERVS. REV. 307, 328 (1996); Loring P. Jones, *Social Class, Ethnicity, and Child Welfare*, 6 J. MULTICULTURAL SOC. WORK 123, 130 (1997); CHILD MALTREATMENT 1998, *supra* note 9.

15. See Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 119-25 (1999).

placed in foster care.<sup>16</sup> And the tougher treatment of juvenile offenders, imposed most harshly on African American youth, is increasing the numbers incarcerated in juvenile detention facilities and adult prisons.<sup>17</sup> These political trends are converging to settle the problems of poor black families by shattering the bonds between children and their parents. Under this approach, the innocent ones should be moved into more nurturing, adoptive homes. The guilty ones should be locked up in detention centers and prisons.

The color of America's child welfare system undeniably shows that race matters to state interventions in families. But in what sense does race matter? What are the reasons for the striking racial disparity in every aspect of child protective services, and why should we be concerned about it? Can we describe it as a civil rights violation?

One possibility is that black children disproportionately enter and stay in the child welfare system because their parents are more likely to abuse and neglect them. Perhaps there are sociocultural features of black families that predispose them to mistreat their children. In that case we would expect—we would even want—the State to intervene more often to protect black children from the greater harm that they face. We might say that the government violates black children's civil rights when it *fails* to intervene in harmful family situations.

Another possibility is that the racial disparity stems from differences in the way the system treats black families. Even then, this racial difference might result from factors such as higher rates of poverty or unwed motherhood that make black families more vulnerable to state intervention rather than from racial bias on the part of caseworkers and judges. Can we attribute the large numbers of black children in the child welfare system to racism? Can we say that black families are disproportionately split up *because of their race*? The answer to this question is critical in deciding what our response should be to the system's racial disparity.

Poverty is key to explaining why almost any child gets in the system.<sup>18</sup> It is the dominant explanation of researchers in the field for the

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16. See Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 386–89 (2002), reviewed by Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies; A Response to Ward Doran and Roberts*, 61 MD. L. REV. 437, 438–40 (2002).

17. Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1020–27 (2001).

18. See generally DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* (1994) (discussing the impact of poverty on child protective services); LEROY H. PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES* (1989) (discussing how poverty affected the foster care population) [hereinafter PELTON, *FOR REASONS OF POVERTY*]; LeRoy Pelton, *Child Welfare Policy and Practice: The Myth of Family Preservation*, 67 AM. J. ORTHOPSYCHIATRY 545, 546 (1997) (noting that “the children in foster care have come predominantly from impoverished families, and that child abuse and neglect are strongly related to poverty”).

inequitable representation of black children.<sup>19</sup> The high level of black involvement in child protective services parallels the high level of poverty among black families. Most children reported to the child welfare system are poor, and black children are more likely to live in poverty than children of other groups.<sup>20</sup>

Newspaper headlines about grievous child beatings lead many people to believe that most of the children in the system are victims of serious physical abuse. But most cases of child maltreatment stem from parental neglect.<sup>21</sup> Nationwide, there are twice as many neglected children as children who are physically abused.<sup>22</sup> When child protection agencies find that children have been neglected it usually relates to poverty.<sup>23</sup> Most neglect cases involve poor parents whose behavior was a consequence of economic desperation as much as lack of caring for their children. Poverty itself creates dangers for children: poor nutrition, serious health problems, hazardous housing, inadequate heat and utilities, and neighborhood crime.<sup>24</sup> Children are often removed from poor parents when parental carelessness increases the likelihood that these hazards will result in actual harm. Indigent parents do not have the resources to avoid the harmful effects of their negligence.

Parental conduct or home conditions that appear innocent when the parents are affluent are often considered to be neglectful when the parents are poor.<sup>25</sup> Several studies have found that poor children are more likely to be labeled "abused" than children from more affluent homes with similar injuries.<sup>26</sup> An investigation of suspected cases of child abuse referred by Boston hospitals, for example, discovered that "[f]amilies who were Medicaid-eligible and those with a previous report of suspected child maltreatment were more likely to have their children removed . . . . Severity of condition was not significantly associated with outcome."<sup>27</sup>

The child welfare system is designed to address mainly the problems of poor families. Because black children are disproportionately poor, we would expect a corresponding racial disparity in the child welfare caseload. The Illinois Department of Children and Family Services prepares a multicolored map that shows the distribution of abuse and ne-

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19. See Mark Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99, 101-07 (1998).

20. Mark R. Rank, *The Racial Injustice of Poverty*, 1 WASH. U. J.L. & POL'Y 95, 96-97 (1999).

21. CHILD MALTREATMENT 1998, *supra* note 9.

22. *Id.*

23. GOLDEN, *supra* note 1, at 56; PELTON, FOR REASONS OF POVERTY, *supra* note 18, at 38.

24. PELTON, FOR REASONS OF POVERTY, *supra* note 18, at 146.

25. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 579-89 (1997).

26. Robert L. Hampton, *Child Abuse in the African American Community*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 220, 222 (Joyce E. Everett et al. eds., 1991).

27. Mitchell H. Katz et al., *Returning Children Home: Clinical Decision Making in Cases of Child Abuse and Neglect*, 56 AM. J. ORTHOPSYCHIATRY 253, 257 (1986).

glect cases in Chicago. Neighborhoods with the highest concentration of cases form an L-shaped pattern colored in red. There is another map of Chicago with the same color coding that shows levels of poverty across the city. The poorest neighborhoods in the city form an identical red L-shaped pattern. A third map shows the distribution of ethnic groups in Chicago. The red-colored section marking the city's segregated black neighborhoods is virtually a perfect match.<sup>28</sup> In Chicago, there is a geographical overlap of child maltreatment cases, poverty, and black families.<sup>29</sup>

There is a persistent and striking gap in the economic status of blacks and whites that exists in unemployment, poverty, and income.<sup>30</sup> The strength of the economy has not erased the racial gap in child poverty nor improved the situation of black children at the very bottom.<sup>31</sup> Black children are still more than three times as likely as whites to live in extreme poverty.<sup>32</sup> Despite several years of decline, the U.S. child poverty rate is still exceptionally high by international standards. Extreme poverty is actually growing, and black children still lag far behind.

Race also influences child welfare decision making through strong and deeply embedded stereotypes about black family dysfunction. In *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*, I described a popular mythology that portrays black women as unfit to have children.<sup>33</sup> The purpose of that book was to expose the explosion of rhetoric and policies that degrade black women's reproductive decisions. The same set of stereotypes also supports the removal of black women's children. Some case workers and judges view black parents as less reformable than white parents, and less willing and able to respond to the treatment that child protection agencies prescribe.<sup>34</sup>

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 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 in taking care of their children, but as a means to punish parents for their failures by threatening to take their children away. The

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28. Mark Testa, Presentation at the Conference on the Impact of the Adoption & Safe Families Act on Minority Communities, Child Welfare League of America, Chicago, Ill. (Nov. 13, 2000).

29. *Id.*

30. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 15-34 (1994).

31. Don Terry, *U.S. Child Poverty Rate Fell as Economy Grew, But Is Above 1979 Level*, N.Y. TIMES, Aug. 11, 2000, at A10.

32. JOSEPH DDALAKER & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-210, POVERTY IN THE UNITED STATES: 1999, at v, x (2000).

33. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 3-21 (1997).

34. See Appell, *supra* note 25, at 585; Carol Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 545-46 (1983-84).

child *welfare* system, then, is a misnomer. The primary 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.<sup>35</sup> The system is activated only after children have already experienced harm and puts all the blame on parents for their children's problems.<sup>36</sup> This punitive 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.<sup>37</sup>

Under current civil rights jurisprudence, the racial disparity in the child welfare system may not constitute racial discrimination without a showing of racial motivation.<sup>38</sup> 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.<sup>39</sup> 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."<sup>40</sup>

Even if the racial disparity could be explained entirely 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. 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.

The reasons for the racial disparity can be attributed to racial inequality, but does the child welfare system itself violate the civil rights of

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35. See LINDSEY, *supra* note 18.

36. *Id.* at 4–5; ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 4–5 (1972).

37. See BILLINGSLEY & GIOVANNONI, *supra* note 36, at 214–15.

38. See *Jefferson v. Hackney*, 406 U.S. 535, 548–49 (1972), *reh'g denied*, 409 U.S. 898 (1972).

39. Lawrence Mead, Presentation at the American Society for Political & Legal Philosophy Annual Meeting, Atlanta, Ga. (Sept. 1, 1999).

40. Center for an Urban Future, *Race, Bias, and Power in Child Welfare*, CHILD WELFARE WATCH, Spring/Summer 1998, at 1, 5.



families on the basis of race? Understanding the nature of this harm is crucial to taking the correct steps to redress the racial disparity. The damage inflicted by foster care is being used to justify intensified destruction of black families. If black children are harmed in state custody, some reformers contend, then the solution is to sever their ties to their parents and move them into adoptive homes.<sup>41</sup> Others see the harm in excessive state intrusion in families, but do not see the significance of race.<sup>42</sup> Surely parents and children who are wrongfully separated from each other suffer a terrible injury, they acknowledge, but question why it is helpful to explain this injury in terms of race.<sup>43</sup>

American constitutional jurisprudence defines the harm caused by unwarranted state interference in families in terms of individual rights. Wrongfully removing children from the custody of their parents violates parents' due process right to liberty.<sup>44</sup> The earliest cases interpreting the Due Process Clause to protect citizens against government interference in their substantive liberty involved parental rights.<sup>45</sup> But these explanations of harm do not account for the particular injury inflicted by racially disparate state intervention. Without taking race into account, we do not capture the full scope of the harm caused by taking large numbers of black children from their families.

Both aspects of the child welfare system's racial disparity—the State's intrusion in families and its racial bias—are essential to explaining its injustice. First, the overrepresentation of black children in the child welfare system, especially foster care, represents massive state supervision and dissolution of families. Second, this interference with families helps to maintain the disadvantaged status of black people in the United States. The child welfare system not only inflicts general harms disproportionately on black families, it also inflicts a particular harm—a racial harm—on black people as a group.

Family disruption has historically served as a chief tool of group oppression.<sup>46</sup> The racial bias in state interventions in the family clarifies the reasons for safeguarding family autonomy. Parents' freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups. Weakening the parent-child bond and disintegrating families within a group is a means of subordinating the entire group. The individualized focus on preserving personal choice in the private sphere of family life fails to recognize the family's *political* role. Families are not only expressions of individual choices, they are social institutions serving political ends.

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41. See, e.g., ELIZABETH BARTHOLET, *NOBODY'S CHILDREN* 176–204 (1999).

42. See, e.g., Farber, *supra* note 12, at 47.

43. *Id.*

44. See *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982).

45. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 400 (1923).

46. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

The American regime of slavery reveals better than any other example the political function of repressing family autonomy. Slave law installed white masters as the head of an extended plantation family that included their slaves.<sup>47</sup> The plantation family ruled by white men was considered the best institution to transmit moral values to uncivilized Africans.<sup>48</sup> Courts reasoned that the slave owners' moral authority over the family was ordained by divine imperative. Slaves, on the other hand, had no legal authority over their children.

In *Neglected Stories: The Constitution and Family Values*, Peggy Cooper Davis powerfully uncovers the antislavery origins of rights to family autonomy.<sup>49</sup> Slave masters' control of their slaves hinged on restricting slaves' capacity to educate and socialize their children. In this way, whites attempted to prevent slaves from constructing their own system of morals and from acting according to their own chosen values. The legislators who drafted the Civil War Amendments understood the importance of protecting families because of slavery's destruction of families. Contemporary notions of family liberty, typically interpreted as individual rights, can trace their roots to the effort to eradicate racial oppression.

Family integrity is crucial to group welfare because of the role parents and other relatives play in transmitting survival skills, values, and self-esteem to the next generation. Placing large numbers of children in state custody interferes with the group's ability to form healthy connections among its members. Families are a principal form of "oppositional enclaves" that are essential to democracy, to use Harvard political theorist Jane Mansbridge's term.<sup>50</sup>

Excessive state interference in black family life damages black people's sense of personal and community identity. Family and community disintegration weakens blacks' collective ability to overcome institutionalized discrimination and work toward greater political and economic strength. The system's racial disparity also reinforces negative stereotypes about black people's incapacity to govern themselves and their need for state supervision.

The impact of family disruption and supervision is intensified when the child welfare system's destruction is concentrated in inner-city neighborhoods. In Chicago, for example, almost all child protection cases are clustered in two zip code areas, which are almost exclusively African American. Most of the families in the city's Englewood

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47. See WILMA KING, *STOLEN CHILDHOOD* 1–19 (1995).

48. Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 *LAW & INEQUALITY* 187, 194 (1987).

49. See DAVIS, *supra* note 46.

50. Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 46, 58 (Seyla Benhabib ed., 1996); see also SARA EVANS & HARRY C. BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA* (1986).

neighborhood are involved with state protective services.<sup>51</sup> One in ten children in Central Harlem have been taken from their parents and placed in foster care.<sup>52</sup> In 1997, 3,000 children in this single neighborhood were in the State's custody.<sup>53</sup> The spatial concentration of child welfare supervision creates an environment in which state custody of children is a realistic expectation, if not the norm.<sup>54</sup> Everyone in the neighborhood has either experienced state intrusion in their family or knows someone who has. Parents are either being monitored by case-workers or live with the fear that they may soon be investigated. Children have been traumatized by removal from their homes and placement in foster care or know that their parents are subject to the State's higher authority.

How can we measure the extent of community damage caused by the child welfare system? To my knowledge, no one has tried to do it. But we can look for guidance to the emerging literature on the collateral consequences of mass incarceration. Social scientists are just beginning to investigate the harm caused to black communities by locking up the large portions of young black men and women in the nation's prisons.<sup>55</sup> They have recently focused attention, for example, on the corrosive impact high black incarceration rates have on black communities' civic life.<sup>56</sup> Excessive state supervision of families inflicts a similar collateral damage on black communities.

You may be familiar with the National Association of Black Social Workers' (NABSW) position opposing transracial adoption.<sup>57</sup> Calling transracial adoption a form of "genocide," the NABSW declared that "Black children belong physically, psychologically and culturally in Black families in order that they receive a total sense of themselves and develop a sound projection of their future."<sup>58</sup> My assertion of group-based harm does not posit an essential black identity or way of raising children, nor does it warn of the total obliteration of blacks as a cultural group. I am arguing instead that disproportionate state intervention in black families reinforces the continued political subordination of blacks as a group. This claim does not seek to enforce a particular set of black cultural values. It seeks to liberate black families from state control so they

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51. Maisha Hamilton Bennett, Presentation at the Seminar on Current Controversies in Child Welfare Policy, Northwestern University School of Law, Chicago, Ill. (Sept. 7, 1999).

52. Center for an Urban Future, *supra* note 40, at 6.

53. *Id.*; see also Somini Sengupta, *Parents in Poor Neighborhoods Wary of Child Welfare Agency*, N.Y. TIMES, May 31, 2000, at A27.

54. See Sengupta, *supra* note 53.

55. See, e.g., MAUER, *supra* note 5; MARC MAUER, THE SENTENCING PROJECT, INTENDED AND UNINTENDED CONSEQUENCES: STATE RACIAL DISPARITIES IN IMPRISONMENT (1997).

56. See JAMIE FELLNER, THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998).

57. RITA J. SIMON & HOWARD ALSTEIN, TRANSRACIAL ADOPTION 50-54 app. *Position Paper Developed from Workshops Concerning Transracial Adoption* (1994).

58. *Id.*

may be free to form and pass on their own values. This, after all, is the role of families in a free society.

Many well-meaning 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 better adoptive homes.<sup>59</sup> They do not see themselves as racists who are bent on destroying black families. They may even endorse stronger programs to provide social supports for America's struggling families. But they 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.<sup>60</sup> "We must act now to move them from their destructive families and neighborhoods into stable homes."<sup>61</sup>

Harvard law professor, Elizabeth Bartholet makes a similar point in *Nobody's Children*.<sup>62</sup> She recognizes that the emphasis on child removal has a racially imbalanced effect, but sees family preservation as more damaging to black children.<sup>63</sup> "Keeping them in their families and their kinship and racial groups when they won't get decent care in those situations may alleviate guilt," Bartholet argues, "but it isn't going to do anything to promote racial and social justice. It isn't going to help groups who are at the bottom of the socioeconomic ladder to climb that ladder. It is simply going to victimize a new generation."<sup>64</sup>

This view of black children's civil rights recognizes that poor black families are victims of societal injustice, but uses their victimization as a reason to intervene in their families more than a reason to work toward social change. Its recognition of social injustice is dangerously limited, for it sees injustice as the root of child maltreatment, but not as the root of state intrusions into poor families. It appeals to whites only to pity black parents involved in the child welfare system but not to respect their autonomy, their claims of discrimination, or their bonds with their children. It sets up adoption as the only realistic way to persuade whites to care for black children and to guarantee their civil rights. This, it seems to me, is a particularly selfish way to approach child welfare that perpetuates rather than challenges America's racial hierarchy.

Surely black children deserve the same protection from injury as others. But acknowledging the problem of child maltreatment does not determine how the problem should be addressed. The racial disparity in the foster care population should cause us to reconsider the State's current response to child maltreatment. The State could address the group harms caused by both neglectful parents and the disruption of families by

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59. See Roberts, *supra* note 15, at 128–32 (discussing rhetoric in hearings on the Adoption & Safe Families Act that disparaged biological family ties).

60. See, e.g., BARTHOLET, *supra* note 41.

61. See e.g., *id.*

62. See *id.* at 238–40.

63. *Id.*

64. *Id.* at 6.

doing more to improve the material circumstances of families. The price of present policies that rely on child removal rather than family support falls unjustly on black families. Viewing the racial disparity in the child welfare system as a group-based civil rights violation suggests an unorthodox form of redress. Instead of vindicating individual claims in court, it calls for broader social action. I see the child welfare system's racial harm as a powerful argument in favor of radically transforming the system into one that generously and noncoercively supports families.