Children's Legal Rights Journal

Volume 42, Issue 1

Articles

Featured Practice Perspectives

Civitas ChildLaw Center Loyola University Chicago School of Law
in cooperation with the National Association of Counsel for Children

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Loyola University Chicago School of Law

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An Ounce of Prevention is Worth a Pound of Cure: Why Children's Lawyers Must Champion Preventive Legal Advocacy

Melissa D. Carter[1]

I. INTRODUCTION

The time for prevention in child welfare finally seems to have arrived. More than two decades ago, research documenting the effects of child abuse, neglect and family adversity on adult health and well-being furthered understanding about the ways in which adversity and toxic stress experienced in childhood relate to poor outcomes and highlight the need for prevention.[2] This research on Adverse Childhood Experiences (ACEs) compelled formal systems and institutions to reflect on how routine practices and procedures exacerbate or mitigate trauma and commit to being more trauma-informed.[3] The increased awareness and mounting evidence that a child's removal from home and the subsequent experience of foster care can cause acute and enduring trauma [4] have helped broaden thinking about the relationship between child protection and child well-being. In response, momentous changes have been made recently to federal policy to unlock new resources for the prevention of unnecessary separation of children from their families.[5] As these structural changes take root, more resources and interventions will be focused upstream of Child Protective Services, addressing the conditions that bring

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[2] Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 245-46 (1998), https://www.ajpmonline.org/action/showPdf?pii=S0749-3797%2898%2900017-8; *see also*, *Adverse Childhood Experiences (ACEs)* CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/aces/index.html (last updated Apr. 2, 2021).

[3] *See e.g.,* Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 FAM. L.Q. 123, 123-37 (2016).

[4] Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 526-27 (2019).

[5] The Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (codified as amended in scattered sections of 42 U.S.C.) authorizes federal reimbursement to states for the provision of certain evidence-based services to prevent the unnecessary placement of children in foster care. Before it became law in December 2019, the U.S. Department of Health and Human Services Administration on Children, Youth, and Families, Children's Bureau revised policy to allow state child welfare agencies to claim federal financial participation for administrastive costs of independent legal representation provided by attorneys representing children and their parents. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth Who Are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being* 12 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf.

families to the attention of the child welfare system in ways that can advance a child's right to family integrity.[6]

As child welfare system stakeholders coalesce around a prevention agenda, the role and responsibility of the legal and judicial community in achieving the outcomes of safety, permanency, and well-being for children must be redefined. One promising opportunity for system improvement that has captured the full attention of judges, lawyers, and agency administrators throughout the country is the national focus on high-quality legal representation. A subtle but significant policy change expands access to federal resources to support the provision of high-quality legal representation for all parties in dependency cases.[7] Implementation strategies will integrate research with practice, leveraging knowledgeable and well-trained lawyers as problem-solvers who can achieve improved individual client and system-level outcomes.[8]

It has been said that "an ounce of prevention is worth a pound of cure."[9] Thus far, research and evaluation has demonstrated the benefits of quality legal representation, primarily in the context of foster care proceedings and the permanency outcomes sought for children, youth, and families who have already been separated through state intervention.[10] The convergence of the aforementioned policy changes inspires reflection and imposes a new responsibility: system interventions must "move upstream" to address the social determinants of health that create vulnerabilities within families.[11] The emergence of models for preventive legal advocacy responds to this call for action.[12] Multidisciplinary legal teams work to resolve a family's unmet legal needs to prevent unnecessary reports to Child Protective Services.[13] Children's attorneys have a vested professional interest in preventive legal advocacy as an emerging strategy for protecting a child's right to family integrity and should be among the approach's most fervent supporters.

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[6] *See* Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 267, PAGE 523 (2021); *see also See* Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1037 (2014).

[7] CHILD.'S BUREAU, *supra* note 5, at 2.

[8] *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 1, 3 (2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1702.pdf.

[9] Benjamin Franklin, *On Protection of Towns from Fire*, PA. GAZETTE, Feb. 4, 1735, at 1.

[10] CHILD.'S BUREAU, *supra* note 8, at 2.

[11] David R. Williams et al., *Moving Upstream: How Interventions That Address the Social Determinants of Health Can Improve Health and Reduce Disparities*, 14 J. PUB. HEALTH MGMT. & PRAC. S8, S9 (2008).

[12] Preventive legal advocacy refers to a variety of models for the provision of civil legal aid. *See* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CIVIL LEGAL ADVOCACY TO PROMOTE CHILD AND FAMILY WELL-BEING, ADDRESS THE SOCIAL DETERMINANTS OF HEALTH, AND ENHANCE COMMUNITY RESILIENCE 1 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf; *see also* CASEY FAMILY PROGRAMS, HOW CAN PRE-PETITION LEGAL REPRESENTATION HELP STRENGTHEN FAMILIES AND KEEP THEM TOGETHER*?* 1 (2020), https://caseyfamilypro-wpengine.netdna-ssl.com/media/20.07-QFF-SF-Preventive-Legal-Support_fnl.pdf.

[13] Sankaran, *supra* note 6, at 1037.

II. THE RESEARCH CASE FOR INVESTING IN HIGH-QUALITY LEGAL REPRESENTATION

Interest in measuring the impact of legal representation provided to children and parents in dependency proceedings has been building for decades to inform strategies for advancing the right to counsel and securing adequate resources for a legal system that serves primarily indigent clients. Child welfare proceedings unfold within a complex and highly technical legal framework, and parents and children face challenges navigating the legal process and social services system. The vast majority of parents involved in child welfare cases contend with financial insecurity, and struggle with mental health and addiction issues.[14] Children, who have fundamental liberty interests at stake, are not provided with party rights in every state and representation models vary widely.[15] Procedural safeguards are needed to ensure parties fully participate in the legal process, yet low levels of engagement are pervasive and result in consistently poor outcomes.[16]

Over time, a body of research has developed, demonstrating the connection between high-quality legal representation and individual client and system-level outcomes.[17] Studies show that competent legal representation is associated with increased engagement of parties in court hearings, case planning, and services; more individually-tailored case plans and services; increases in family time; and increased party perception of fairness.[18] More remarkably, high-quality legal representation has been shown to expedite children's exits to permanency.[19] By reducing the amount of time children spend in state custody, such legal representation is also cost-effective for state and local government.[20]

A. Research Highlights

Researchers have studied individual attorney factors, such as specialized training, and systemic factors, including compensation, caseload, and administrative supports and

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[14] Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 42 (2019); Susan P. Kemp et al., *Engaging Parents in Child Welfare Services: Bridging Family Needs and Child Welfare Mandates*, 88 CHILD WELFARE 101, 104-05 (2009).
[15] Wendy Shea, *Legal Representation for Children: A Matter of Fairness*, 47 MITCHELL HAMLINE L. REV. 728, 731 (2021).
[16] Kemp et al., *supra* note 14, at 101.
[17] CHILD.'S BUREAU, *supra* note 8, at 7.
[18] THE JUSTICE IN GOVERNMENT PROJECT, KEY STUDIES AND DATA ABOUT HOW LEGAL AID HELPS KEEP FAMILIES TOGETHER AND OUT OF THE CHILD WELFARE SYSTEM 7 (2021), https://legalaidresourcesdotorg.files.wordpress.com/2021/04/foster-care.pdf; *see also* CHILD.'S BUREAU, *supra* note 8, at 2.
[19] CHILD.'S BUREAU, *supra* note 8, at 6.
[20] *Id.*

supervision to understand how these factors combine to foster or hinder the provision of quality legal representation. One of the earliest contributions to this research base was a study examining the impact of Palm Beach County's Foster Children's Project (FCP).[21] The FCP model, which adheres to an expressed interest model of child representation, was found to produce improved permanency outcomes, particularly with respect to increased rates of adoption.[22] On a larger scale, the federal government made a sizeable investment to develop and evaluate a model of child representation through the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep).[23] Findings from a randomized-control trial evaluating the QIC-ChildRep Best Practice Model were more nuanced, but nevertheless provided insight into attorney behaviors that facilitate party engagement and strong support for the early appointment of counsel to expedite permanency for children and youth.[24] Most recently, a study of the impact of interdisciplinary parental representation on child welfare outcomes showed that such a model, "significantly reduces the length of time children spend in foster care; increases rates of timely permanency, reunification, and guardianship; and does so without increasing repeat maltreatment."[25] The researchers in that study noted, "[t]hese results align with the stated goals not only of children, parents, and parent defenders, but of family courts, child welfare agencies, and other advocates."[26]

B. Moving from Research to Practice

With the value proposition of high-quality legal representation now clear, the federal government has consistently emphasized it as a priority for states, endorsing it as "critical to a well-functioning child welfare system."[27] The Children's Bureau of the U.S. Department of Health and Human Services issued specific guidance on the topic, encouraging state child welfare agencies and courts to ensure that all parties received high-quality legal representation during all stages of child welfare proceedings.[28] Acting further on its commitment, the Children's Bureau then expanded access to federal funding to resource quality legal representation by revising its guidance as to the activities for which states are allowed to claim federal reimbursement under Title IV-E of

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[21] Andrew Zinn & Clark Peters, *Expressed-Interest Legal Representation for Children in Substitute Care: Evaluation of the Impact of Representation on Children's Permanency Outcomes*, 53 FAM. CT. REV. 589, 589 (2015).
[22] *Id.* at 596.
[23] *National Quality Improvement Center on the Representation of Children in the Child Welfare System*, QIC CHILDREP, http://improvechildrep.org/Home.aspx (last visited Oct. 22, 2021).
[24] BRITANY ORLEBEKE ET AL., CHAPIN HALL, EVALUATION OF THE *QIC-CHILDREP* BEST PRACTICES MODEL TRAINING FOR ATTORNEYS REPRESENTING CHILDREN IN THE CHILD WELFARE SYSTEM,1, 71 (2016), https://www.chapinhall.org/wp-content/uploads/QIC-ChildRep_Chapin_Hall_Evaluation.pdf.
[25] Gerber et al., *supra* note 14, at 53.
[26] *Id.*
[27] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ENGAGING, EMPOWERING, AND UTILIZING FAMILY AND YOUTH VOICE IN ALL ASPECTS OF CHILD WELFARE TO DRIVE CASE PLANNING AND SYSTEM IMPROVEMENT 1, 1 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1903.pdf.
[28] CHILD.'S BUREAU, *supra* note 8, at 1.

the Social Security Act, the largest federal child welfare funding source.[29] A portion of the cost of independent legal representation for a child who is a candidate for title IV-E foster care or in foster care and his/her parent now can be recovered through the federal reimbursement scheme.[30] The policy was subsequently amended to include tribal representation and costs of paralegals, investigators, peer partners, social workers, support staff, and oversight for independent child and parent legal representation,[31] signaling clear support for multidisciplinary models of legal practice. The express objective of the Children's Bureau is "to promote and sustain high quality legal representation for all parents, children and youth, and child welfare agencies in all stages of child welfare proceedings."[32]

III. A CHILD'S RIGHT TO FAMILY INTEGRITY AS A MATTER OF CONSTITUTIONAL LAW

The U.S. Supreme Court first explicitly recognized the constitutional rights of children in In re Gault when the Court pronounced "…[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[33] However, lawyers who represent children know that children's legal rights are not coextensive with the legal rights of adults.[34] Though children are regarded generally as "rights-bearing individuals," in the balancing of interests between children, parents, and the state, children's rights are often disregarded or routinely subordinated.[35] Explanatory theories suggest that children's interests are less important than those that outweigh them, or that children's constitutional rights are more limited because children lack "full capacity for individual choice."[36] The U.S. Supreme Court has explicitly and affirmatively declined to engage in an analysis of the full scope of children's rights on more than one occasion.[37] Thus, as

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[29] *Title IV-E, Administrative Functions/Costs, Allowable Costs – Foster Care Maintenance Payments Program*, CHILD.'S BUREAU, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36 (last visited Oct. 30, 2021); *see* 45 C.F.R. § 1356.60(c) (2016).

[30] CHILD.'S BUREAU, *supra* note 29.

[31] *Id*.; *see* 45 C.F.R. § 1356.60(c)(2)(i-x) (2016).

[32] CHILD.'S BUREAU, *supra* note 8, at 1.

[33] *In re* Gault, 387 U.S. 1, 13 (1967).

[34] *See* Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (recognizing the state's authority to regulate children's behavior is broader than for adults); *see also* Bethel Schl. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) (recognizing that offensive speech made by children in public schools can be prohibited even though offensive speech may not be prohibited to adults).

[35] Shea, *supra* note 15, at 731-32; *see generally* Aoife Daly, *Assessing Children's Capacity: Reconceptualising Our Understanding Through the UN Convention on the Rights of the Child*, 28 INT'L J. CHILD.'S RTS. 471, 472 (2020) (arguing for a rights-based approach to assessing children's capacity).

[36] Daly, *supra* note 35, at 483.

[37] *See In re Gault*, 387 U.S. at 13 (clarifying that the Court's opinion does not "consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state"); *see also*

has been succinctly observed, "[t]o date, neither legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children's rights. Different courts and legislatures have been willing to give some new rights to children, while denying them others, without explaining the difference in outcome."[38]

A. The Parental Rights Paradigm

Reflecting this imbalance, familial rights have developed largely along a single analytical and conceptual dimension that, historically, has placed greater emphasis on the interests of parents than children.[39] Common law recognized certain parental duties stemming from the natural affection of parents for children.[40] This legal concept of natural affection has been afforded constitutional protection traditionally framed as a substantive due process right of a parent to the custody and care of his or her child and a corresponding privacy interest to exercise that right free from unwarranted government intrusion.[41] The U.S. Supreme Court first articulated the parental right in the 1923 case of Meyer v. Nebraska as an individual freedom included in the scope of liberty protected by the Fourteenth Amendment, stating, "[w]ithout doubt" that such liberty includes "the right of the individual … to establish a home and bring up children …"[42] Thus, the parental prerogative to direct the "upbringing … of children under their control"[43] became the basis for the legal doctrine of parental rights.

The Court has reaffirmed the parental rights doctrine time and again, most recently, in the case of Troxel v. Granville. In a plurality opinion, the Court held that the Constitution protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children" free from undue government interference, stating:

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[44]

Ginsberg v. New York, 390 U.S. 629, 636 (1968) (finding "no occasion . . . to consider the impact of the guarantees of freedom of expression upon the totality of the relationship of the minor and the State"); Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (declining to decide "whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship").

[38] Michael S. Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 258 (1979).

[39] Barbara Bennett Woodhouse, *Child Abuse, the Constitution, and the Legacy of* Pierce v. Society of Sisters, 78 U. DET. MERCY L. REV. 479, 482 (2001).

[40] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (1893); JAMES KENT, COMMENTARIES ON AMERICAN LAW 225 (1873).

[41] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[42] *See Meyer*, 262 U.S. at 399.

[43] *See Pierce*, 268 U.S. at 534-35.

[44] Troxel v. Granville, 530 U.S. 57, 65-66, 68 (2000).

The Troxel Court characterized the liberty interest at issue as being "perhaps the oldest of the fundamental liberty interests recognized by this Court" and reaffirmed the existence of a "constitutional dimension" to the parent-child relationship.[45]

However well-established, the parental right is not absolute, but rather, must be balanced against the state's *parens patriae* interest in promoting the well-being of children.[46] In the Court's own words, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[47] In the balancing of interests, parental rights "are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family."[48] Thus, the scope of the liberty interest in a familial relationship is, at one level, defined by the quality and enduring nature of that relationship.[49] Natural affection does not flow in a unilateral direction. Accordingly, "the child's own complementary interest in preserving relationships that serve her welfare and protection"[50] warrants the same legal recognition and protection as has been extended to the parent's liberty interest in preserving an established familial bond.

B. Children's Evolving Capacity

As child development research illuminates a more nuanced understanding of children's mental capacity for decision-making, children's legal capacity is no longer regarded as fixed.[51] With support, children's legal capacity has evolved and can be maximized, thereby allowing them greater autonomy to pursue their personal interests – that is, to maintain control over their own lives.[52] Arguably, one of the most fundamental personal interests is the one that an individual has in maintaining relationships with his or her family.[53] Recognition of the weight of this interest has shifted the law's conceptualization of family privacy from a narrow view of parental rights to a broader construction of a mutual and reciprocal right to family integrity.[54]

In his dissent in Troxel, Justice Stevens broadened the traditional framing of the rights protecting the parent's relationship to his or her child by elevating the interests of

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[45] *Id.* at 65.
[46] Prince v. Massachusetts, 321 U.S. 158, 167 (1944).
[47] *Id.*
[48] *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).
[49] *See* Lehr v. Robertson, 463 U.S. 248, 260 (1983); Caban v. Mohammed, 441 U.S. 380, 397 (1979).
[50] *See Troxel*, 530 U.S. at 88 (Stevens, J., dissenting).
[51] Daly, *supra* note 35, at 489; *see also* MODEL CODE OF PRO. RESP. r. 1.14(a) (AM. BAR ASS'N 1980) (directing lawyers to "maintain a normal client-lawyer relationship" as far as reasonably possible with a client with diminished capacity).
[52] Daly, *supra* note 35, at 473-74 (distinguishing legal capacity from mental capacity and rejecting a binary approach to capacity for one that recognizes children's rights as a function of evolving capacities).
[53] Kevin B. Frankel, *The Fourteenth Amendment Due Process Right to Family Integrity Applied to Custody Cases Involving Extended Family Members*, 40 COLUM. J.L. & SOC. PROBS. 301, 319-20 (2007).
[54] *Id.*

the children involved.[55] He asserted that while a child's liberty interests in the family relationship had not been clearly established as a matter of law:

> …it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation. At a minimum, our prior cases recognizing that children are, generally speaking, constitutionally protected actors require that this Court reject any suggestion that when it comes to parental rights, children are so much chattel.[56]

Justice Stevens's dissent recognizes that the liberty inherent in familial relationships does not flow in one direction from the parent to the child but, instead, is mutual and reciprocal between the two.[57] The argument holds that just as a parent possesses a natural and legal right to maintain a relationship with his or her child, the child also possesses a right to family integrity that warrants protection from undue state interference.

Similarly, the Federal District Court for the North District of Georgia acknowledged a child's right to family integrity in the state's child welfare reform lawsuit.[58] In its order denying the motions for summary judgment filed by defendants Fulton County and DeKalb County, the court elevated the child's liberty interest in family integrity to the status of a substantive right deserving of procedural protections, concluding:

> …children have fundamental liberty interests at stake in deprivation [dependency] and TPR [termination of parental rights] proceedings … includ[ing] a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parents.[59]

Against the now near-century of precedent examining the scope of family privacy rights, Justice Stevens's dissent in Troxel and the Kenny A. v. Perdue federal district court opinion stand out as potential inflection points in the evolution of children's rights. While the U.S. Supreme Court has not explicitly recognized a child's independent right to family integrity, such a right enjoys "strong theoretical and normative support."[60] It is consistent with parental privacy rights long protected in the tradition of American law,

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[55] *See Troxel*, 530 U.S. at 88–89 (Stevens, J., dissenting).
[56] *Id.*
[57] *Id.* at 89-90.
[58] Kenny A. *ex rel.* Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005).
[59] *Id.*
[60] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."); Trivedi, *supra* note 6, at 563.

particularly when asserted in response to the threat of family separation through state action.[61] Recognizing an independent right to family integrity "would let children's voices be heard, allow their needs to be met, give children more power, and honor the fact that children are affected by state intervention into families."[62]

IV. A CHILD'S RIGHT TO FAMILY INTEGRITY AS A MATTER OF STATUTORY LAW

Expectations about children's rights in the child welfare system originate with a number of complex and varied federal laws, the key provisions of which established child safety, permanency, and well-being as priorities central to the agency's responsibilities for placement and service provision and the court's oversight role.[63] These laws are enforced mainly through federal penalties imposed on states for findings of noncompliance or deficiency and lack meaningful enforcement as substantive rights for individual children.[64] The most significant federal child welfare laws have been roundly criticized for hindering the advancement of a child's right to family integrity, primarily by framing the interests of children as antagonistic to family preservation policies.[65]

The first comprehensive federal child welfare law, the Adoption Assistance and Child Welfare Act of 1980, prioritized the preservation of families.[66] It opened a new resource path to fund "child welfare services" offered to prevent child maltreatment and "the unnecessary separation of children from their families," and to restore families that had been separated.[67] More famously, the Act required as a condition of funding that state child welfare agencies make "reasonable efforts …prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home…"[68] A decade and a half later, the Adoption and Safe Families Act of 1997 (ASFA) "clarified" the reasonable efforts requirement, in part, by creating exceptions to its application when certain "aggravated circumstances" are present in a case and by extending the requirement to permanency planning efforts that are inconsistent with

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[61] Trivedi, *supra* note 6, at 564.
[62] *Id.*
[63] EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING (2021), https://fas.org/sgp/crs/misc/IF10590.pdf.
[64] *Id.*
[65] Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 117 (1999).
[66] Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Represetnation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 363-64 (2000).
[67] Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 425(a)(1)(C), 94 Stat. 500, 519 (1980) (amended 2006).
[68] § 471 (current version at 42 U.S.C. § 671(a)(15)(B)(i)); Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification,* MICH. STATE L. REV. 1029, 1041 (2013); *see also* Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 224 (2009).

reunification as a goal.[69] Critics convincingly argue that ASFA abandons family preservation policies by constructing and exploiting an artificial "opposition of children's to families' rights."[70]

Such "divergent understandings of the relationship between children's interests and preserving families"[71] are apparent in the weak and inconsistent enforcement of the reasonable efforts requirements. Self-report surveys reveal that judges consistently fail to enforce reasonable efforts requirements.[72] Judges either do not make the required findings or defer to the agency in the assessment of the efforts made to prevent family separation.[73] In this way, the reasonable efforts requirement has become a *pro forma* exercise, and the courts are not engaging in proper and meaningful oversight over state efforts to maintain the family.[74] "In abdicating their responsibility to carefully scrutinize removal petitions for reasonable efforts, courts have become complicit in the system's failure to prevent unnecessary removals, thereby compounding the trauma a child experiences."[75]

V. A CHILD'S RIGHT TO FAMILY INTEGRITY IN THE CHILD WELFARE SYSTEM

The child welfare system is neither designed nor resourced to protect a child's right to family integrity, even if that right enjoyed greater legal recognition. Inadequate staffing, high staff turnover, conflicting and incongruent policy priorities, insufficient resources, and unrealistic public and political expectations are among the many external forces distracting the system's focus from that central tenet.[76] The child welfare system did not become overwhelmed on its own; federal policies and supports to address the economic needs of families were separated from child protection policies, creating service silos that increase the vulnerability of families and children.[77] The result is a child welfare system that lacks both sensitivity and precision in responding to child maltreatment.

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[69] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. § 671(a)(15)(D)(i)).
[70] Roberts, *supra* note 65, at 116.
[71] *Id*. at 117.
[72] *See e.g.,* MUSKIE SCH. PUB. SERV. CUTLER INST. FOR CHILD & FAM. POL'Y & A.B.A CTR. ON CHILD. & L., MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 106 (2005), http://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf.
[73] *Id.*
[74] *See* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 227 (2016).
[75] *Id*. at 229.
[76] *See* Brenda D. Smith & Stella E.F. Donovan, *Child Welfare Practice in Organizational and Institutional Context*, 77 SOC. SERV. REV. 541, 546-53 (2003).
[77] Roberts, *supra* note 65, at 112.

System outcome and performance data consistently show that the majority of children who enter foster care are removed from their families for reasons of neglect.[78] For Federal Fiscal Year (FFY) 2019, the U.S. Department of Health and Human Services reports that 74.9% of victims were neglected.[79] For comparison, the next-highest category is physical abuse, at 17.5%.[80] Furthermore, "[t]hree-fifths (61.0%) of victims [were] neglected only" (i.e., were not substantiated for multiple maltreatment types).[81] Preliminary estimates for that same time period indicate that 63% of all removals to foster care involved neglect.[82] Researchers have observed a clear trend: "child abuse has become much less common; child neglect has not."[83]

The Federal Child Abuse Prevention and Treatment Act defines child abuse and neglect as, an "act or failure to act . . . which presents an imminent risk of serious harm."[84] State statutory definitions of child abuse and neglect vary considerably. Lacking precise definitional boundaries, state intervention often sweeps broadly, drawing many families deeper into the formal child welfare system unnecessarily and unjustly, particularly for reasons of chronic family adversity rooted in conditions of poverty.[85] Research has shown that family income status is a significant predictor of child welfare system involvement.[86] Families below the poverty line are three times more likely to be substantiated for child maltreatment, and children in poverty are more likely to enter foster care.[87] Put in starker terms, one out of three children living in neighborhoods with a poverty rate greater than 20% will experience a Child Protective Service (CPS) investigation.[88] Financial instability can create or exacerbate parental stress.[89]

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[78] *See* CHILD.'S BUREAU, U.S. DEP'T. OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at 6-15 (2019), HTTPS://WWW.ACF.HHS.GOV/SITES/DEFAULT/FILES/DOCUMENTS/CB/CM2019.PDF.
[79] *Id.* at xi.
[80] *Id.*
[81] *Id.*
[82] CHILD.'S BUREAU, U.S. DEP'T. OF HEALTH & HUM. SERVS., THE AFCARS REPORT 2 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.
[83] Natalie K. Worley & Gary B. Melton, *Mandated Reporting Laws and Child Maltreatment: The Evolution of a Flawed Policy Response*, *in* A 50 YEAR LEGACY TO THE FIELD OF CHILD ABUSE AND NEGLECT 103, 106 (Richard D. Krugman & Jill E. Korbin eds. 2013).
[84] CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459, 3482 (2010) (current version at 42 U.S.C. § 5101 note (Definitions) defining child abuse and neglect as "any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . or an act or failure to act which presents an imminent risk of serious harm").
[85] BRETT DRAKE & MELISSA JONSON-REID, *Child Maltreatment: Contemporary Issues in Research and Policy, Poverty and Child Maltreatment*, HANDBOOK OF CHILD MALTREATMENT (Jill E. Korbin & Richard D. Krugman eds. 2013).
[86] Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: the Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVS. REV. 5, 6 (2017).
[87] Kelley Fong, *Neighborhood Inequality in the Prevelance of Reported and Substantiated Child Maltreatment*, 90 CHILD ABUSE & NEGLECT 13, 17 (2019).
[88] *Id.*
[89] DRAKE & JONSON-REID, *supra* note 85, at 137.

Unemployment and lack of access to concrete resources such as food, adequate housing, and child care can increase the risk of child maltreatment.[90]

The broad sweep is powered by mandated reporters, the system's primary device for detecting the occurrence of child maltreatment in the community.[91] Professional report sources routinely constitute the majority of all reports of alleged or suspected child abuse or neglect made to CPS.[92] In FFY 2019, mandated reporters accounted for 68.6% of all CPS reports,[93] yet the majority of those reports (71%) find no victimization following an investigation (i.e., are unsubstantiated).[94] In this way, a structural incongruency exists between the system for detecting child maltreatment in the community and the tools available for responding to it.

That structural incongruency is a result of the flawed assumptions underlying the policy of mandatory reporting.[95] Though the majority of states had enacted mandatory reporting schemes prior to the 1962 "discovery" of battered child syndrome by pediatrician C. Henry Kempe, his body of work focused national attention on child maltreatment and led to the federal requirement for all states to adopt mandated reporting laws.[96] Dr. Kempe's conceptualization of the problem of child maltreatment was narrowly defined by physical harm inflicted on children by parents with significant mental health problems.[97] "[H]is focus was not on maltreatment that occurred because families lacked housing, lacked food security, or were unable to control their children's behavior."[98] As Worley and Melton observe,

> From this erroneous starting point, policymakers developed vague and inconsistent statutes designed to mandate a broad range of professionals to report suspected cases of child maltreatment. Rather than detecting a narrow band of cases for early intervention, this system of mandated reporting has resulted in a child protection system so overburdened by the requirement to investigate reports of suspected child maltreatment that it is unable to respond adequately to genuine needs. By largely absolving professionals and communities of the responsibility to keep children safe (in effect, to do

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[90] *Id.* at 141.
[91] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (current version at 42 U.S.C. § 601, 620, 5101-06).
[92] DANA WEINER ET AL., CHAPIN HALL, SYSTEM TRANSFORMATION TO SUPPORT CHILD & FAMILY WELL-BEING: THE CENTRAL ROLE OF ECONOMIC & CONCRETE SUPPORTS 3-4 (2021), https://www.chapinhall.org/wp-content/uploads/Economic-and-Concrete-Supports.pdf.
[93] CHILD.'S BUREAU, *supra* note 78, at 9.
[94] DANA WEINER ET AL., CHAPIN HALL, COVID-19 AND CHILD WELFARE: USING DATA TO UNDERSTAND TRENDS IN MALTREATMENT 4 (2021), https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf.
[95] Worley & Melton, *supra* note 83, at 107.
[96] *Id.* at 103.
[97] *Id.* at 104.
[98] WEINER ET AL., *supra* note 92, at 10.

> more than report), the evolution of our current system falls far short of fulfilling Kempe's intended objective.[99]

Adding nuance, Professor Fong points to the reliance of reporting professionals on the child protective service agency's "dual supportive and coercive capacities to rehabilitate families,[100] stating that, "Child maltreatment investigations thus emerge not so much from professionals sounding the alarm about children in imminent danger, but from constrained street-level bureaucrats hoping to rehabilitate families in need by shuttling them to a multifaceted surveilling agency."[101] When reporting professionals turn to CPS for support, they do so seeking assistance for the family, knowing that CPS can require a family to participate in services and monitor the family's compliance.[102] In this way, "CPS's dual therapeutic and regulative roles … align[ed] with reporting professionals' aspirations for families."[103] Restated, Fong's observation is that mandated reporters make referrals to CPS on the basis of concern for the family and an interest in ensuring the family gets services. Child Protective Services in turn, responds with an investigation and provision of services under ongoing oversight and threat of forced removal of a child from parental custody. The result is that the mandatory reporting system functions as a "system of surveillance rather than support."[104]

Rather than expand the mandatory reporting system and amplify its inefficiencies, system resources should be rededicated in ways that align with the prevention agenda. As observed by Chapin Hall researchers,

> …hotline reports consisting solely of neglect allegations (i.e., "neglect only") may be a phenomenon distinct from child endangerment. While lack of supervision, food, clothing, or shelter can surely jeopardize the safety of children, addressing these directly through concrete supports may be more efficient and effective than initiating a child welfare case that punishes families living in poverty.[105]

The child welfare system reimagined for the prevention era is one "that builds protective capacities, mitigates maltreatment risk factors, and addresses racial disparities[.]"[106] It is one that can reduce unnecessary intrusion on family privacy by replacing surveillance with a robust service array through which families can access

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[99] Worley & Melton, *supra* note 83, at 104.
[100] Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 620 (2020).
[101] *Id.* at 622.
[102] *Id.*
[103] *Id.* at 621-22.
[104] WEINER ET AL., *supra* note 92, at 3.
[105] DANA WEINER ET AL., CHAPIN HALL, ACHIEVING IMPROVED CHILD WELL-BEING THROUGH PREVENTION: A CALL FOR SYSTEM ADAPTATION 22 (2021), https://www.chapinhall.org/wp-content/uploads/AchievingImprovedChildandFamily-PP_Oct2020.pdf.
[106] WEINER ET AL., *supra* note 92, at 8.

supportive services directly.[107] And, in this way, it is one that changes the conditions holding the problems in place, by moving upstream.[108]

VI. PROTECTING A CHILD'S RIGHT TO FAMILY INTEGRITY THROUGH "UPSTREAM" PREVENTIVE LEGAL ADVOCACY

The upstream intervention alternative for legal and judicial actors in the child welfare system has a name: Preventive Legal Advocacy. The term Preventive Legal Advocacy (PLA) refers to a critical stage in a continuum of civil legal aid afforded to families who are at risk of being reported to CPS and/or losing custody of their children because of unresolved legal issues.[109] The model is still emerging but its core elements have been previously described:

> Child welfare agencies, courts, community-based organizations, and others refer families at risk of losing children to foster care because of unresolved legal issues. Once a case is accepted, the programs provide families with the assistance of an attorney, a social worker, and a parent advocate to help resolve legal issues … which affect the safety of the child in the home.[110]

This model is a data-driven and research-informed strategy with the potential to transform the child welfare system by shifting resource capacity in ways that support a more effective response to the needs of families and the conditions that drive the entry of children into foster care.

A. Civil Legal Advocacy Preserves Family Integrity

Administrative data, research, and experience compel recognition of the fact that most families involved with the child welfare system are economically insecure or living in poverty. As a population, low-income families also evidence a high need for civil legal advocacy. The Justice Gap Report, authored by the Legal Services Corporation (LSC), found that "71% of all low-income families experienced at least one civil legal problem in the last year."[111] Higher rates were documented for "households with survivors of domestic violence or sexual assault (97%), with parents/guardians of kids under 18 (80%), and with disabled persons (80%)."[112] Yet "86% of civil legal problems reported

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[107] *Id.*
[108] *See* JOHN KANIA ET AL., THE WATER OF SYSTEMS CHANGE 2-3 (2018), http://efc.issuelab.org/resources/30855/30855.pdf.
[109] *See How is Preventive Legal Advocacy Critical to the Continuum of Legal Advocacy?*, CASEY FAM. PROGRAMS, https://www.casey.org/preventive-legal-advocacy/ (last visited Nov. 3, 2021).
[110] Sankaran, *supra* note 6, at 1041.
[111] LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6-7 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.
[112] *Id.* at 7.

by low-income Americans received inadequate or no legal help."[113] As documented and discussed further by the LSC, the civil legal problems faced by most low-income individuals are those "most often related to basic needs" including access to health care, housing, and financial security.[114] Twenty-seven percent of low-income families reported a civil legal problem related to children or custody, including being investigated by CPS and having trouble with custody or visitation arrangements.[115] Families also reported legal problems related to being denied access to special education services, school discipline, and income maintenance.[116] At one level, these, as well as related unmet civil legal needs, are manifestations of individual and family adversity. But they unfold in a broader context, and their effects are compounded by the adverse community environments in which those individual experiences of adversity are rooted.[117]

Social determinants of health refer to "[t]he contexts in which people live, learn, work, and play."[118] Examples include quality of education, neighborhood safety, educational and job opportunities, and access to healthcare and transportation.[119] Deficits in these areas negatively affect a wide range of outcomes and can create or increase vulnerability within families.[120] For example, a child living in an unsafe neighborhood faces an increased risk of exposure to violence; a family's lack of access to healthcare means a child goes without necessary treatment for a chronic disease or injury; and an underemployed parent becomes homeless. When such adversity presents in clinical, educational, or social settings, mandated reporters alert child protection authorities to the perceived danger.[121] In this way, the "justice gap"[122] can lead to permanent family separation. Legal advocacy can offer an effective alternative early intervention strategy.

Civil legal advocacy has proven effective at addressing the social determinants of health that create vulnerability within families. For example, in the context of housing, Harvard University researchers found that clients "who were offered full legal representation were less likely to lose possession, less likely to have a judgment or writ of

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[113] *Id.* at 6.
[114] *Id.* at 21.
[115] *Id.* at 23.
[116] *Id.*
[117] Wendy R. Ellis & William H. Dietz, *A New Framework for Addressing Adverse Childhood and Community Experiences: The Building Community Resilience Model*, 17 ACAD. PEDIATRICS S86, S86-87 (2017).
[118] Paula A. Braveman et al., *Broadening the Focus: The Need to Address the Social Determinants of Health*, 40 AM. J. PREVENTIVE MED. S4, S5 (2011); see *also* COMM'N ON SOC. DETERMINANTS OF HEALTH, WORLD HEALTH ORG., CLOSING THE GAP IN A GENERATION: HEALTH EQUITY THROUGH ACTION ON THE SOCIAL DETERMINATS OF HEALTH 26 (2008), https://www.who.int/social_determinants/final_report/csdh_finalreport_2008.pdf.
[119] *See* Off. of Disease Prevention & Health Promotion, U.S. Dep't of Health & Hum. Servs., *Social Determinants of Health*, HEALTHY PEOPLE 2030, https://health.gov/healthypeople/objectives-and-data/social-determinants-health (last visited Dec. 5, 2021).
[120] Ellis & Dietz, *supra* note 117, at S87.
[121] Fong, *supra* note 100, at 13.
[122] *Id*. (defining "justice gap" as the difference between the civil legal needs of low-income Americans and the resources available to meet those needs).

execution entered against them, and required to pay less, on average," than those in the control group.[123] Studies also show more favorable outcomes for clients with legal representation in matters affecting economic prosperity such as successfully claiming unemployment, disability, and public benefits.[124] Legal representation in family law cases has been found to be positively associated with more favorable custody outcomes, greater protections against domestic violence, and increased alimony and support awards.[125] Resolving issues of housing, economic supports, health care, family conflict, and child custody through legal advocacy stabilizes the family and has been shown to reduce the need for further contact or involvement with the child welfare system.[126]

A. Pre-Petition Legal Representation

Researchers have observed that the "potential purchase of legal advocacy" may be a function of the "exigencies of each legal milestone."[127] The pre-petition stage of a case is a key transition point, presenting a strategic opportunity to prevent further progression of a potential child welfare case. In pre-petition programs, referrals for legal assistance are made by child welfare agencies, courts, community-based organizations, or by self-referral *after* a CPS report is made.[128] The purpose of the referral is to resolve an identified ancillary legal issue in order to divert the family from deeper involvement in the child welfare system.[129]

Federal law requires state child welfare agencies to make "reasonable efforts" to prevent removal,[130] but parents do not have a right to legal representation until after their child has already been removed.[131] Pre-petition legal representation programs seek to provide services that prevent the need for the agency to file a petition for custody.[132] In this way, making legal representation for parents available at the point of the CPS investigation for maltreatment provides an opportunity for the child welfare agency to make meaningful efforts to prevent removal.

One leading exemplar of a pre-petition legal representation program is the Detroit Center for Family Advocacy (CFA), which operated from 2009 to 2016 as a grant-funded

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[123] Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 901 (2016).

[124] *Id.* at 913-18.

[125] *Id.* at 922-26.

[126] CHILD.'S BUREAU, *supra* note 5, at 1.

[127] Zinn & Peters, *supra* note 21, at 598.

[128] Sankaran, *supra* note 6, at 1040.

[129] *Id.* at 1041.

[130] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (current version at 42 U.S.C. § 671(a)(15)(B)(i)).

[131] Sankaran & Church, *supra* note 74, at 230-33.

[132] Gianna Giordano & Jey Rajaraman, *Increasing Pre-Petition Legal Advocacy to Keep Families Together*, AM. BAR ASS'N (Dec. 15, 2020), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/.

project of the University of Michigan Law School's Child Advocacy Law Clinic.[133] Families were referred to CFA primarily by the Michigan Department of Human Services when the agency identified a legal issue affecting child safety.[134] Center for Family Advocay multidisciplinary legal teams, consisting of an attorney, a social worker, and a family advocate, provided legal counseling and out-of-court advocacy to prevent children from unnecessarily entering foster care.[135] Legal matters commonly addressed included housing, custody, public benefits, and domestic violence.[136] In addition, CFA social workers assessed families for additional, non-legal needs and provided resource assistance, counseling, and other services.[137] The CFA achieved its legal objectives in 98.2% of prevention cases, resolving collateral legal issues ultimately to prevent 110 children in fifty-five cases from entering foster care.[138] These results are demonstrable evidence of reasonable efforts to prevent removal and the ability of lawyers to protect a child's right to family integrity.

Legal Services of New Jersey (LSNJ) operates an established pre-petition legal representation program that has enjoyed comparable success. Since it began its pre-petition work in 2018, LSNJ has prevented removal in every one of the more than 200 referrals received.[139] Similar to the Center for Family Advocacy, LSNJ provides advice, social service support, and legal assistance through a multidisciplinary team approach to families who have come to the attention of the child protection agency.[140] All clients accepted by LSJN meet income guidelines, and most are contending with issues with housing or public benefits.[141]

Another well-publicized example is Iowa's Parent Representation Pilot Project (PRP), which began in 2013.[142] The PRP offers a multidisciplinary approach that makes holistic supports available to families, including social services (mental health or substance abuse counseling, housing supports, and domestic violence advocacy) and legal

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[133] DETROIT CTR. FOR FAM. ADVOC., UNIV. OF MICH. L. SCH., PROMOTING SAFE AND STABLE FAMILIES (2014), https://artscimedia.case.edu/wp-content/uploads/sites/35/2014/02/14194055/CFAReport.pdf; Vivek Sankaran, *What We Need to Protect American Families,* IMPRINT (Oct. 30, 2018), https://imprintnews.org/opinion/need-protect-american-families/32590.

[134] DETROIT CTR. FOR FAM. ADVOC, *supra* note 133.

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] VIVEK SANKARAN & ROBBIN POTT, UNIV. OF MICH. L. SCH., RESPONSE TO THE STATE OF MICHIGAN'S REQUEST FOR INFORMATION: SOCIAL IMPACT BONDS – PAY FOR SUCCESS BASED FINANCING 7 (2013), https://www.michigan.gov/documents/micontractconnect/The_Regents_of_the_University_of_Michigan_442319_7.pdf.

[139] Giordano & Rajaraman, *supra* note 132.

[140] *About Us,* LEGAL SERVS. OF N.J., https://www.lsnj.org/AboutUS.aspx (last visited Nov. 11, 2021); Giordano & Rajaraman, *supra* note 132.

[141] Giordano & Rajaraman, *supra* note 132.

[142] Amber Gilson & Michelle Jungers, *Preserving Families Through High-Quality Pre-Petition Representation*, AM. BAR ASS'N (Mar. 4, 2021), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2021/spring2021-preserving-families-through-high-quality-pre-petition-representation/.

representation to prevent formal dependency court proceedings.[143] Typical legal representation matters include child custody and guardianship, protective orders, criminal record expungements, and eviction.[144] The PRP reports receiving 450 referrals in the last three years, serving nearly 300 clients, and preventing 468 children from entering the juvenile court system.[145] Building on this success, the PRP is expanding to more local jurisdictions. A state law took effect on July 1, 2020, authorizing the state public defender to lead a four-year "pilot project to implement innovative models of legal representation in order to assist families involved in the child welfare system."[146] The law specifically allows and appropriates funding for the appointment of an attorney to represent a parent prior to the initiation of formal dependency court proceedings.[147]

Though few formal evaluations of pre-petition programs have been undertaken, available findings are encouraging. These programs do, in fact, prevent family separation. Unsurprisingly, more jurisdictions are considering creating pre-petition legal representation programs, and as they do, another innovation in the field has emerged.

B. Preventive Legal Advocacy

Moving the intervention further upstream, Preventive Legal Advocacy (PLA) programs make legal services available to address social determinants of health[148] *before* a CPS report is made. Preventative Legal Advocacy programs may address the same or similar legal issues as pre-petition legal representation programs – matters like housing, domestic violence, public benefits, employment, custody, special education and school discipline – they just provide advocacy at an earlier stage.

The classic example of PLA program is a medical-legal partnership (MLP).[149] MLPs conceive of lawyers as part of the health care team.[150] Lawyers are embedded in health care settings where their expertise can be leveraged to resolve problems for individual patients and to support professionals to overcome policy barriers, navigate complex regulatory and service systems, and transform institutional practice.[151] Other examples include school-based legal clinics and dedicated staff within existing civil legal

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[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] 2020 Iowa Acts 73.
[147] 2020 Iowa Acts 74.
[148] *See About Social Determinants of Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/socialdeterminants/about.html (last reviewed Mar. 10, 2021). The CDC defines the social determinants of health ("SDOH") as the environmental conditions in the places where people live, learn, work, and play that affect a wide range of health risks and outcomes. *Id.* Examples of SDOH include income insecurity, food insecurity, affordable and quality housing, quality education, and cohesion within a community. *Id.*
[149] *Home,* NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://medical-legalpartnership.org (last visited Nov. 12, 2021).
[150] *Id.*
[151] *The Need*, NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://medical-legalpartnership.org/need/ (last visited Nov. 12, 2021).

aid offices, or specially-designed programs through which legal assistance is available to address matters that are often referred to as "collateral legal issues," including housing, immigration, debt, employment, criminal records expungement, and access to public benefits, education, and healthcare.[152] Preventative Legal Advocacy programs are based on an understanding that individual, community, and societal factors create vulnerability within families and communities and increase the risk of child maltreatment.[153] Legal advocacy that addresses the social determinants of health promotes resilience at the individual and community level which, in turn, acts as a protective factor to prevent the harms of child abuse, neglect, and system intervention.

C. Key Elements

There is no single model for pre-petition legal representation nor for preventive legal advocacy programs, and imposing a standard model may limit the ability of such programs to help local communities respond to the unique needs of families. The key elements of the approach are familiar, however, and include:

- Collaboration with the child protection agency. In pre-petition legal representation programs, the legal services provider or legal advocacy organization is receiving referrals directly from CPS. In preventive legal advocacy programs, the legal representation is undertaken with an express goal of preventing CPS involvement with the family.
- Focus on legal issues that directly affect the ability of the parent or caregiver to provide for the child's safety, permanence, and well-being. The scope of representation varies and critical design questions must be answered about the capacity and expertise of the legal team and the costs and benefits of continuing representation of the parent or caregiver if or when the case comes within the formal jurisdiction of the juvenile court.
- A multidisciplinary team approach. The legal team includes lawyers with experience in child welfare matters, social workers with knowledge of available social services, and peer advocates with direct, personal experience in the child welfare system who can build trusting relationships and assist clients in navigating complex systems and processes.

Building a pre-petition legal representation or PLA program requires an assessment of need, identification and engagement of critical partners and system stakeholders, secure funding, and adequate staffing capacity. However, the key is to start with early adopters and scale-up as need requires and resources allow.

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[152] For example, see Atlanta Volunteer Lawyers Foundation Standing With Our Neighbors, https://avlf.org/standing-with-our-neighbors/

[153] *Risk and Protective Factors*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html (last reviewed Mar. 15, 2021).

VII. CONCLUSION

Recent changes in federal legislation and policy are reorienting the child welfare system toward prevention of unnecessary family separation. The momentum that has built around prevention outcomes simultaneously has renewed the attention to the power of lawyers as problem-solvers. High-quality legal representation has clear benefits, particularly with regard to timely disposition of cases. Lessons learned from studying the role of lawyers in achieving downstream impacts on permanency, which occur after the state has intervened in the privacy of a family and separated a child from his parents, are instructive for moving forward a prevention policy agenda. The prevention conversation has inspired strategies for deploying the power and resources of a lawyer earlier, in a pre-removal or pre-petition context to prevent unnecessary further contact with the child welfare system and to mitigate the risk of unnecessary removal of a child to foster care. Legal advocacy used to address the social determinants of health can have measureable impact on child welfare system outcomes and the children and families whose needs can be met more effectively with upstream interventions.

Preventive Legal Advocacy programs are an effective upstream intervention. Children's lawyers can and should be among the early adopters of this approach as a practice that stabilizes rather than separates families. Multidisciplinary teams mitigate risk that brings families to the attention of CPS by offering holistic advocacy to resolve legal issues and clear pathways to services. Positioned upstream, the legal team can effectively function as an expert resource for rights enforcement and a beacon to guide families as they navigate complex and overlapping bureaucratic systems. By preventing family separation, Preventive Legal Advocacy programs directly advance and protect a child's right to family integrity.

An Examination of Racism and Racial Discrimination Impacting Dual Status Youth

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Not everything that is faced can be changed; but
nothing can be changed until it is faced.
- James Baldwin[3]

INTRODUCTION

Racial disproportionality and disparity[4] have long been characteristic of both the child welfare and youth justice[5] systems. Discriminatory policies and practices present at

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[3] James Baldwin, *As Much Truth as One Can Bear*, N.Y. TIMES, Jan. 14, 1962, at 1.
[4] Disproportionality refers to "the overrepresentation or underrepresentation of a racial or ethnic group compared with its percentage in the total population." THE CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2 (2021), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf. Disparity describes "unequal outcomes of one racial or ethnic group when compared to another racial or ethnic group." *Id.*
[5] The juvenile justice system, hereinafter referred to as the youth justice system, is similar to the adult criminal justice system but different in many ways. One of the critical differences is terminology. Where the youth justice system uses terms such as delinquent act, factfinding, and disposition, the adult system uses the terms of crime, trial, and sentencing to describe the same function. LARRY J. SEIGEL & BRANDON C. WELSH, JUVENILE DELINQUENCY, THEORY, PRACTICE, AND LAW 21 (11th ed. 2012). The juvenile court reform movement wanted to "shield children from the stigma of a criminal conviction." *Id. See also* NAT'L RSCH. COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 157 (Joan McCord et al. eds., 2001) (explaining records of the first juvenile court "were to be confidential to minimize stigma"). The reader will note that the term "juvenile" shall be replaced by the terms "youth" or "children" wherever appropriate. In the context of youth justice, the term "juvenile" is nationwide most ordinarily associated with the term of juvenile delinquent. *See, e.g.*, United States v. Smith, 851 F.2d 706, 709 (4th. Cir. 1988) (proceeding against respondent as a juvenile delinquent while under the age of 21); *In re* J.W., 186 Cal. Rptr. 3d 756, 757 (Ct. App. 2015) (involving former juvenile delinquent petitioning to have his records sealed); C.C.B. v. Florida, 782 So. 2d 473, 475 (Fla. Dist. Ct. App. 2001) (striking community control condition that juvenile delinquent obey no contact orders); Bible v. Indiana, 254 N.E.2d 319, 320 (Ind. 1970) (explaining courts assume jurisdiction over juvenile delinquents for their protection); *In re* Detrece H., 575 N.E.2d 385, 387

the origin of these systems continue to plague children, families, and communities. The impact of racism[6] upon dual status youth—children who encounter both the child welfare and youth justice systems—is particularly concerning. Dual status youth tend to experience worse outcomes in a number of domains than youth involved in only one system. Dual status youth are also disproportionately Black[7]—significantly more so than in any single system.[8]

Efforts to reform the youth justice system in recent years have included initiatives to improve outcomes for dual status youth and to interrupt the trajectory of dual system involvement—primarily the movement of youth from the child welfare system into the youth justice system.[9] Other initiatives have sought to reduce or eliminate the racial disproportionality and disparities within both the child welfare and youth justice systems.[10] This article suggests that each of these reform efforts must inform one another,

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(N.Y. 1991) (explaining one purpose of juvenile delinquency proceedings is to decide whether a person is a juvenile delinquent); Dendy v. Wilson, 179 S.W.2d 269, 273 (Tex. 1944) (explaining statutes relating to juvenile delinquents); *In re* Welfare of Burtts, 530 P.2d. 709, 712-13 (Wash. Ct. App. 1975) (explaining juvenile court *per se* has resources adequate to care for a juvenile delinquent). The concept of stigma continuing to be associated with juvenile delinquency maintains its prevalence in courts of law. *See, e.g.*, Carrillo v. Texas, 480 S.W.2d 612, 617 (Tex. 1972) (reasoning there is stigma attached to being adjudged a juvenile delinquent); *In re* William A., 898 N.Y.S.2d 845, 846 (2010) (explaining the stigma attached to the juvenile delinquency proceedings remain); Rhode Island v. Day, 911 A.2d 1042, 1049 (R.I. 2006) (explaining the purpose of the jurisdictional division between juvenile delinquency adjudications in Family Court and criminal adjudications of adults in Superior Court is to guard children against the stigma attaching to criminal proceedings). Accordingly, for the purposes of this article we shall not continue to foster additional stigma upon youth and will avoid the terms juvenile, juvenile delinquent, and juvenile delinquency wherever possible.

[6] Racism as defined by Ibram X. Kendi is "a marriage of racist policies and racist ideas that produces and normalizes racial inequities." IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 18 (2019).

[7] We must note at the outset the concept of race as an artificial construct. It is well understood by scientists as having no basis in biology. *See* Megan Gannon, *Race is a Social Construct, Scientists Argue*, SCI. AM. (Feb. 5, 2016), https://www.scientificamerican.com/article/race-is-a-social-construct-scientists-argue. *See also* Steven A. Ramirez & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RSRV. L. REV. 299, 309 (2018) ("[A]ll racial disparities arise from social realities and legacies of oppression rather than any putative innate racial differences").

[8] *See infra* Part I.b.

[9] *See, e.g.* JANET K. WIIG & JOHN A. TUELL WITH JESSICA K. HELDMAN, ROBERT F. KENNEDY CHILD.'S ACTION CORPS, GUIDEBOOK FOR JUVENILE JUSTICE & CHILD WELFARE SYSTEM COORDINATION AND INTEGRATION, at ix-x (3rd ed. 2013), https://www.njjn.org/uploads/digital-library/MfC_Guidebook-for-JJ-CW-Crossover-Youth_March-2014.pdf (detailing the Dual Status Youth Reform framework developed and utilized by the Robert F. Kennedy National Resource Center for Juvenile Justice). *See also Crossover Youth Practice Model*, CTR. FOR JUV. JUST. REFORM, GEO., https://cjjr.georgetown.edu/our-work/crossover-youth-practice-model/ (last visited Aug. 21, 2021) (detailing the Crossover Youth Practice Model, developed at the Georgetown University Center for Juvenile Justice Reform).

[10] *See, e.g. Who We Are*, W. HAYWOOD BURNS INST., https://burnsinstitute.org/who-we-are/ (last visited Sept. 25, 2021); *Eliminating Racial and Ethnic Disparities*, CTR. FOR CHILD.'S L. & POL'Y, https://www.cclp.org/eliminating-racial-and-ethnic-disparities/ (last visited Sept. 25, 2021); CTR. FOR CHILD.'S L. & POL'Y, RACIAL AND ETHNIC DISPARITIES REDUCTION PRACTICE MANUAL 10-11 (2015), https://www.cclp.org/wp-content/uploads/2016/06/RED-Practice-Manual-Chapters-1-7.pdf.

and to make progress, both systems must acknowledge their shared history of racial discrimination and commit to transformative solutions.

Part I of this article explores the phenomenon of dual status youth by reviewing existing research that identifies risk factors for dual status, including system experiences that too often contribute to dual system involvement, particularly for Black youth. Part II provides context for how racial discrimination affects Black dual status youth by exploring how both the child welfare and youth justice systems have historically interacted with Black children and families, highlighting examples of systematic discrimination in both systems.[11] This section provides a brief synopsis of the evolution of child welfare and youth justice policy and the pervasive disenfranchisement of, disregard for, and dehumanization of Black youth and families within that policy context.

Part III reviews evidence demonstrating that the disparate experiences of Black children and families are not simply a vestige of a bygone era, but persist today through multiple points of decision-making within these systems. This review highlights the policies and practices that compound the risk of Black foster youths' initial and deepening involvement with the youth justice system. Part IV offers a starting place for the work of addressing disproportionality and disparities impacting Black dual status youth, challenging jurisdictions to commit to an anti-racist framework based on recognition, reorientation, and responsibility. This framework aims to create a foundation for crafting transformative solutions that positively impact children and families—particularly Black dual status youth.

I. THE PHENOMENON OF DUAL STATUS YOUTH

A. Pathways and Prevalence

An expanding body of research offers a preliminary understanding of the population of children who touch both the child welfare system and the youth justice system, generally known as dual status youth.[12] There are two primary pathways to

[11] Although this article focuses on the experience of Black youth within the child welfare and youth justice systems, the authors acknowledge the systemic disproportionality and disparity that affects youth and families of other non-white races and ethnicities as well.

[12] Dual status youth may sometimes be referred to by other terminology such as "crossover youth" or "dual jurisdiction youth." Although researchers draw various distinctions between categories of dual status youth based on when and how extensively they come into contact with the child welfare and the youth justice systems, in this article the reference to dual status youth encompasses the broadest definition—youth who come into contact with both systems to any degree and in any sequence. For a detailed discussion of terminology and categories of dual status youth, *see* DENISE C. HERZ & CARLY B. DIERKHISING, OJJDP DUAL SYSTEM YOUTH DESIGN STUDY: SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR PURSUING A NATIONAL ESTIMATE OF DUAL SYSTEM YOUTH 46-49 (2018) [hereinafter TECHNICAL REPORT], https://www.ojp.gov/pdffiles1/ojjdp/grants/252717.pdf; *See also* Denise C. Herz et al., *Dual System Youth and their Pathways: A Comparison of Incidence, Characteristics and System Experiences using Linked Administrative Data*, 48 J. YOUTH & ADOLESCENCE 2432 (2019) [hereinafter *Pathways*]. *See also* DENISE

becoming dual status. Some youth will come into contact with the child welfare system first, subsequently reaching the youth justice system through arrest (either while still involved with the child welfare system or after child welfare involvement has concluded); others will first encounter the youth justice system, at which point child protective issues are identified and contact is initiated with the child welfare system.[13] Research indicates that the most common pathway begins in the child welfare system.[14]

Contributing to the phenomenon of dual status youth is the well-established finding that childhood maltreatment is a risk factor associated with delinquency.[15] It is important to note that most children within the child welfare system will not become involved with the youth justice system.[16] However, studies in various jurisdictions consistently show that a significant number of youth formally entering the youth justice system have had previous child welfare system contact.[17] For example, a recent study using data from the Los Angeles County Probation Department confirmed that 64.1% of youth with an initial youth justice petition between 2014 and 2016 had previous involvement in the child welfare system.[18]

Retrospective studies suggest that the deeper a youth is involved in the youth justice system, the more likely they are to have had child welfare system contact. In a 2004 Arizona study, only 1% of youth diverted from the juvenile justice system had

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C. HERZ ET AL., THE INTERSECTION OF CHILD WELFARE & JUVENILE JUSTICE: KEY FINDINGS FROM THE LOS ANGELES DUAL SYSTEM YOUTH STUDY 2 (2021) [hereinafter INTERSECTION], https://www.datanetwork.org/wp-content/uploads/LADS-study.pdf.

[13] TECHNICAL REPORT, *supra* note 12, at 48.

[14] TECHNICAL REPORT, *supra* note 12, at 55. *See also Pathways*, *supra* note 12, at 2444-45. In addition to these two pathways, researchers identify several categories of dual status youth based on whether their involvement in the two systems is consecutive or concurrent. TECHNICAL REPORT, *supra* note 12, at 47-48.

[15] WIIG ET AL., *supra* note 9, at xiii. The seminal study conducted by Widom & Maxfield found that among the sample of 1,575 children "being abused or neglected as a child increased the likelihood of arrest as a juvenile by 59 percent . . . ." CATHY. S. WIDOM & MICHAEL G. MAXFIELD, U.S. DEP'T OF JUST., AN UPDATE ON THE "CYCLE OF VIOLENCE" 1 (2001), https://www.ojp.gov/pdffiles1/nij/184894.pdf. Similar findings emerged from other studies using both self-reports and arrest data to document delinquency and violent behavior. *Id.* at 3.

[16] Studies indicate that between 9-29% of child welfare system-involved youth will have contact with the youth justice system. J.J. Cutuli et al*., From Foster Care to Juvenile Justice: Exploring Characteristics of Youth in Three Cities*, 67 CHILD. & YOUTH SERVS. REV. 84, 84 (2016). One study found a 47% greater risk for delinquency among abused and neglected children. Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227, 243-44 (2005). There are currently no statistics on the prevalence of dual status youth nationwide.

[17] *See Pathways*, *supra* note 12, at 2433 (citing studies indicating that as many as 67%-83% of youth in juvenile justice samples had current or previous child welfare system involvement)*; See also* TECHNICAL REPORT, *supra* note 12, at 131 (indicating study findings that approximately half of youth petitioned to the juvenile delinquency court had also encountered the child welfare system). Rates of maltreatment and child welfare involvement are high among those in the criminal justice system as well. A recent article from the Kansas City Star reported that a survey of almost 6,000 inmates in 12 states revealed that 1 in 4 had been in foster care. Laura Bauer & Judy L. Thomas, *Throwaway Kids*, KAN. CITY STAR (Dec. 15, 2019), at 2, https://www.kansascity.com/news/special-reports/article238206754.html. More than half of these individuals also had previous involvement with the youth justice system. *Id.* at 3.

[18] INTERSECTION, *supra* note 12.

previous contact with the child welfare system, while 42% of those in probation placements through the youth justice system had touched the child welfare system.[19] A 2017 study found that 83% of youth exiting from probation group homes and correctional placements in Los Angeles had previous contact with the child welfare system for maltreatment, often in early childhood.[20]

B. Characteristics and Experiences of Dual Status Youth

Dual status youth tend to have complex needs. The prevalence of trauma and trauma symptoms in these youth is likely to be high in light of the known significant rates of trauma among youth in each individual system.[21] Dual status youth demonstrate higher rates of substance abuse and mental illness than youth in the youth justice system without child welfare system contact, and are more likely to have parents experiencing the same issues.[22] They are often experiencing educational challenges at the time they are arrested, including truancy, poor academic performance, and disciplinary issues.[23] They are often young—several studies show that dual status youth are arrested at a younger age compared to youth in the youth justice system without child welfare involvement.[24]

Dual status youth experience high rates of referrals to the child welfare system, as well as high rates of placement changes and out of home placements while in foster care.[25] This can result in the disruption or loss of protective factors that can mitigate risks

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[19] GREGORY J. HALEMBA ET AL., NAT'L CTR. FOR JUV. JUST., ARIZONA DUAL JURISDICTION STUDY FINAL REPORT, at vi (2004), http://www.ncjj.org/pdf/azdual_juri.pdf.

[20] JACQUELYN MCCROSKEY ET AL., CHILD.'S DATA NETWORK, CROSSOVER YOUTH: LOS ANGELES COUNTY PROBATION YOUTH WITH PREVIOUS REFERRALS TO CHILD PROTECTIVE SERVICES 3-4 (2017), https://www.datanetwork.org/wp-content/uploads/CrossoverYouth.pdf.

[21] THOMAS GRISSO & GINA VINCENT, TRAUMA IN DUAL STATUS YOUTH: PUTTING THINGS IN PERSPECTIVE 3 (2014), https://rfknrcjj.org/wp-content/uploads/2014/12/Trauma-in-Dual-Status-Youth-Putting-Things-In-Perspective-Grisso-Vincent-RFKNRCJJ.pdf.

[22] *Pathways*, *supra* note 12, at 2434; *See also* Anne Dannerbeck & Jiahui Yan, *Missouri's Crossover Youth: Examining the Relationship Between their Maltreatment History and their Risk of Violence*, OJJDP J. JUV. JUST., 78, 92 (2011). *See also* DOUGLAS YOUNG ET AL., TRAVERSING TWO SYSTEMS: AN ASSESSMENT OF CROSSOVER YOUTH IN MARYLAND, at i (2015), https://www.ojp.gov/pdffiles1/nij/grants/248679.pdf (indicating that the most significant difference between crossover youth and non-crossover delinquent youth was in the level of mental health needs).

[23] *Pathways*, *supra* note 12, at 2434. A study in Los Angeles County found that 37% of crossover youth had attendance issues, 41% were credit deficient, and 93% had reported behavior problems in school. *Id.* (citing Rebecca A. Hirsch et al., *Educational Risk, Recidivism, and Service Access Among Youth Involved in Both the Child Welfare and Juvenile Justice Systems*, 85 CHILD. & YOUTH SERVS. REV. 72, 73 (2018)). *See also* YOUNG ET AL., *supra* note 22, at i, 81-82 (noting the higher rate of school attendance and performance issues among crossover youth as compared to youth with only delinquency involvement).

[24] *Pathways*, *supra* note 12, at 2433. *See also* YOUNG ET AL., *supra* note 22, at 58.

[25] *Pathways*, *supra* note 12, at 2434. *See also* YOUNG ET AL., *supra* note 22, at 9 (noting the agreement among researchers that the number of placement changes experienced by a child increases risk of youth justice system involvement, particularly among youth who experience placement changes due to behavioral problems or running away from facilities). However, there may be a significant number of dual status youth who were referred to child protection but did not receive services from the agency or experience removal

associated with delinquency.[26] There is evidence that youth who experience placement in congregate care (*i.e.,* group homes) are at increased risk of involvement with the youth justice system.[27] Among other factors, such circumstances place foster children under a high degree of scrutiny, bringing their behavior to the attention of numerous adults and authorities (*e.g.*, social workers or group home staff) who may react differently than a parent would, such as calling law enforcement to respond to behavioral problems.[28] Researchers in a 2019 study posed the crucial question, "[b]e it not for their long involvement in the system and their multiple placements, including placement in a group home, would these youth find themselves taking the same actions that led them into the youth justice system?"[29]

Once a youth in foster care is referred to the youth justice system, they tend to experience differential treatment. They can be subject to decision-making that reflects what has been referred to as "child welfare bias."[30] A foundational study by the Vera Institute of Justice found that children identified as foster youth were less likely to receive diversion services and more likely to be detained at youth court intake.[31] Further research provides evidence that dual status youth are more likely to be ordered into out of home placement (rather than receive probation) as a result of their offense than their peers without child welfare involvement.[32]

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from home. For example, the recent Los Angeles study found that two-thirds of the children referred to child protection who later became involved with juvenile probation had never had a protective services case opened during their childhood. *See* MCCROSKEY ET AL., *supra* note 20, at 6. This raises questions, posed by the study authors for future exploration, regarding whether families are being connected to resources to address any family issues identified early. *Id.*

[26] Examples of protective factors include having positive relationships with adults outside the family and feelings of school connectedness. *See* OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., PROTECTIVE FACTORS AGAINST DELINQUENCY 8-9 (2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/protective_factors.pdf.

[27] Cutuli et al*., supra* note 16, at 91. *See also* Joseph P. Ryan et al., *Juvenile Delinquency in Child Welfare: Investigating Group Home Effects*, 30 CHILD. & YOUTH SERVS. REV. 1088, 1095 (2008).

[28] *See* Karen de Sá et al., *Dubious Arrests, Damaged Lives*, S.F. CHRON., (May 18, 2017), https://projects.sfchronicle.com/2017/fostering-failure/ (documenting the frequency of calls for service to law enforcement from foster care shelters in California).

[29] TECHNICAL REPORT, *supra* note 12, at 131.

[30] Joseph P. Ryan et al*., Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 CHILD. & YOUTH SERVS. REV. 1035, 1039 (2007). The study authors hypothesized that the demonstrated bias resulting in more severe sanctions may reflect negative assumptions regarding foster family willingness to engage with foster youth in the delinquency process as well as the perception that foster youth come from troubled families, making rehabilitation appear less likely. *Id.* at 1038-39.

[31] DYLAN CONGER & TIMOTHY ROSS, VERA INST. OF JUST., REDUCING THE FOSTER CARE BIAS IN JUVENILE DETENTION DECISIONS: THE IMPACT OF PROJECT CONFIRM 1, 9-10 (2001), https://www.vera.org/downloads/Publications/reducing-the-foster-care-bias-in-juvenile-detention-decisions-the-impact-of-project-confirm/legacy_downloads/Foster_care_bias.pdf. The argument is often made that the child welfare system has no placement for the youth as a result of their offending behavior, which places youth in jeopardy of extended stays in juvenile detention. *Id.*

[32] Christina C. Tam et al*., Juvenile Justice Sentencing: Do Gender and Child Welfare Involvement Matter?,* 64 CHILD & YOUTH SERVS. REV. 60, 64 (2016).

Studies confirm that Black youth are disproportionately represented in the population of dual status youth.[33] Disproportionality within child welfare and youth justice systems is already significant, with Black youth accounting for 34% of all delinquency cases and 23% of youth in foster care, while comprising only 14% of the general population.[34] Alarmingly, studies show overrepresentation of Black youth in dual status youth populations can be more than double that in single system populations.[35] Furthermore, although females are generally underrepresented in delinquency populations, they are represented at higher levels in the dual status youth population.[36] This is particularly true of Black females.[37] In an extensive study conducted in Los Angeles, 80% of Black females first petitioned to the delinquency court had experienced child welfare involvement.[38] Recent data also indicate high rates of LGBTQ+ youth in the youth justice system with child welfare involvement.[39] The population of Black LGBTQ+ girls and non-binary dual status youth warrants increased attention, given the particularly high rates of abuse and trauma they reportedly experience within the systems.[40]

Racial disproportionality within the dual status youth population raises special concern because of the poor outcomes generally experienced by dual status youth. Studies have consistently shown higher rates of recidivism among dual status youth compared to youth without child welfare involvement.[41] In fact, one study found that longer length of stay in the child welfare system correlated to higher rates of recidivism.[42] Furthermore, researchers uniformly conclude that "[d]ual system involvement is more likely to have a negative effect on youth adulthood outcomes than involvement in only the child welfare or juvenile justice systems."[43] Studies show that dual status youth are more likely to age out of the child welfare system without a permanent home or family (via reunification, adoption, or guardianship) and are more likely to experience homelessness, unemployment, and jail stays in early adulthood than their counterparts without dual system involvement.[44] Notably, dual status youth who have endured lengthy involvement with the child welfare system and a high number of placements experience the most negative outcomes among all dual status youth.[45]

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[33] Karen M. Kolivoski, *Applying Critical Race Theory (CRT) and Intersectionality to Address the Needs of African American Crossover Girls*, CHILD & ADOLESCENT SOC. WORK J. 1, 2 (2020).
[34] MADELINE STERN, GEORGETOWN UNIV. CTR. FOR JUV. JUST. REFORM, REDUCING SYSTEM CROSSOVER FOR BLACK LGBTQ+ GIRLS AND NONBINARY YOUTH 6 (March 2021).
[35] *Pathways*, *supra* note 12, at 2433.
[36] *Id.* at 2433-34; *See also* Kolivoski, *supra* note 33, at 2-3. In the Los Angeles County study, females were more likely than males to be dual status. INTERSECTION, *supra* note 12, at 7.
[37] STERN, *supra* note 34, at 3.
[38] INTERSECTION, *supra* note 12, at 2.
[39] *Pathways*, *supra* note 12, at 2434.
[40] *See* STERN, *supra* note 34, at 4.
[41] *Pathways*, *supra* note 12, at 2435.
[42] GREGORY HALEMBA & GENE SIEGEL, NAT'L CTR. FOR JUV. JUST., DOORWAYS TO DELINQUENCY: MULTI-SYSTEM INVOLVEMENT OF DELINQUENCY YOUTH IN KING COUNTY (SEATTLE, WA), at vi (2011).
[43] TECHNICAL REPORT, *supra* note 12, at 127.
[44] *Pathways*, *supra* note 12, at 2435.
[45] TECHNICAL REPORT, *supra* note 12, at 131.

A key takeaway from this exploration of dual status youth research is a recognition that some of the most marginalized youth—Black youth, females, and LGBTQ+ youth—are overrepresented in a population that experiences the most extensive system entrenchment and the most troubling outcomes. Regarding Black youth, not only do these systems extensively intervene with their families—some assert unnecessarily so[46]—but this intervention in some cases fails to prevent further and deeper system involvement, and may even introduce factors that contribute to it. This is a troubling finding regarding youth at the cross-section of these systems, where the child welfare system should ideally provide them protection and the youth justice system should ideally provide them with guidance. However, these systems have a long history of failing to reach their ideals, particularly with respect to Black youth.

II. THE ORIGINS OF THE SYSTEMS AND THE IMPACT OF RACIAL DISCRIMINATION

Within the systems that impact dual status youth are a complex of private and public entities empowered to intervene in the lives of children and families. This power has historically been wielded with harsh judgment over Black children, families, and communities with devastating effects. The examination of racial discrimination in the child welfare and youth justice systems necessarily begins with the recognition that pre-dating the development of formal systems of intervention, Black families experienced forcible separation resulting from slavery and other sanctioned practices that allowed children to be removed from parents indiscriminately.[47] As formal family and child-serving systems emerged, discriminatory practices were codified and institutionalized, establishing a foundation that continues to influence policy and practice today.

A. The "Child Saving" Era

The United States has a long history of private and public efforts to "save" children from family circumstances that are judged to be harmful or immoral. The first formal child protection agency, the New York Society for the Prevention of Cruelty to Children, was a private organization established in 1875.[48] This agency, and others that

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[46] A number of scholars, researchers, and advocates have argued that the child protection system functions as a "family policing" or "family regulation" system that relies on surveillance and punishment, harming children through unnecessary removals. *See* Alan Dettlaff et al., *What it Means to Abolish Child Welfare as We Know it*, IMPRINT (Oct. 14, 2020), https://imprintnews.org/race/what-means-abolish-child-welfare/48257. These voices have called for the abolishment of the child protection system as it exists, reframing the system to focus on supporting families and keeping them together. *Id.*

[47] MARGARET C. STEVENSON ET AL., THE LEGACY OF RACISM FOR CHILDREN: PSYCHOLOGY, LAW, AND PUBLIC POLICY 73 (2020).

[48] *Id*. *See also* THE NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 125TH ANNIVERSARY BOOKLET 7 (2000), https://nyspcc.org/wp-content/uploads/2021/01/booklet.pdf. The first anti-cruelty laws were enacted on behalf of animals. But the applicability to children was immediately recognized. *Id.* at 4.

followed, investigated reports of abusive or neglectful treatment and removed children from their homes when deemed necessary.[49] This generally occurred without oversight by public authorities.[50] Oftentimes there was little a parent could do to retain custody of children who were considered in need of "saving."[51]

There was no separate justice system for youth during this era, therefore children accused of breaking the law, if convicted, were imprisoned with adults.[52] Reformers of the 19th century endeavored to remove children who committed minor crimes from these adult prisons, instead focusing on the opportunity to engage in "moral retraining" of "potentially harmful deviants" through confinement at institutions specifically designed to educate and discipline children, known as houses of refuge or reformatories.[53] These institutions housed not only children accused of breaking the law, but also children considered at risk of destitution or criminality due to conditions of poverty and neglect.[54] The reformers made no distinction between "pauper, vagrant, and criminal children."[55] As a result, impoverished children held in reformatories soon outnumbered those who had committed crimes.[56] Although entities that intervened with families voiced a commitment to the welfare and best interests of children, their intervention also functioned as a strategy of social control, an attempt to steer society away from social and economic change that threatened the prevailing morality of the time.[57]

The experience of Black children was notably different during this "child saving" era. Many orphanages and reformatories simply refused to house Black children.[58] While conditions within these institutions were characterized by strictness, labor, and often severe discipline,[59] children of color who were routinely excluded from these facilities experienced harsher treatment.[60] Black youth continued to be sent to adult jails and

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[49] STEVENSON ET AL., *supra* note 47, at 73.
[50] *Id.*
[51] *Id.* at 74.
[52] Cecile P. Frey, *The House of Refuge for Colored Children*, 66 J. NEGRO HIST. 10 (1981).
[53] *Id.* at 11. The terms "houses of refuge" and "reformatories" are both used to refer to the institutions for children developed during this era. *See* Tamar R. Birckhead, *The Racialization of Juvenile Justice and The Role of the Defense Attorney*, 58 B.C. L. REV. 379, 396 n. 62, 397 (2017).
[54] Birckhead, *supra* note 53, at 397.
[55] Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1193 (1970). *See also* Birckhead, *supra* note 53, at 397 (noting that for the reformers, "living in a state of poverty and committing a criminal offense were virtually synonymous because both conditions were conceived of in strictly moral terms").
[56] Birckhead, *supra* note 53, at 397.
[57] Frey, *supra* note 52, at 10-11. (noting that the early Houses of Refuge in Philadelphia plainly stated that their purpose was to impart "the advantages of a moral and religious life")
[58] Birckhead, *supra* note 53, at 398.
[59] Daniel Macallair, *The San Francisco Industrial School and the Origins of Juvenile Justice in California: A Glance at the Great Reformation*, 7 U.C. DAVIS J. JUV. L. & POL'Y 1, 6 (2003). *See also* ROBERT C. FELLMETH & JESSICA K. HELDMAN, CHILD RIGHTS AND REMEDIES 449 (2019) (excerpt from Marvin Ventrell, *Nineteenth Century America: The Rise of the Parens Patriae System*, *in* NACC CHILD.'S L. MANUAL SERIES 12, 13 (Nat'l. Ass'n of Counsel for Child. ed., 1999).
[60] Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 AM. U. L. REV. 743, 764 (2020).

prisons.[61] They were arrested in large numbers and used to meet the need for cheap labor through the practice of "convict leasing."[62] This brought Black youth into circumstances that mirrored—or were reportedly worse than—slavery.[63]

Black children residing in the few reformatories open to them, such as the New York House of Refuge, were housed in segregated quarters devoid of the educational services and training available to white children.[64] The same was true in facilities established for Black youth only.[65] They were often held within these institutions indefinitely, where there was little to no investment in their development. Efforts to establish programming for the children were met with the sentiment that there was "no use trying to reform a Negro."[66]

B. The Development of the Juvenile Court

The standard recitation of juvenile court history casts reformers as envisioning a special tribunal providing troubled children with guidance and rehabilitation not afforded them through the criminal courts.[67] Under the doctrine of *parens patriae*, judges would have the power to separate children from their parents and take decision-making power over their lives under a variety of circumstances.[68] The proceedings would be informal and the intent was to serve the best interest of the child.[69] Although the juvenile court system dealt most often with delinquent or pre-delinquent behavior, it was characterized as a child welfare agency.[70] In recent years, the origin story of the juvenile court has evolved, with scholars emphasizing less altruistic motives for the venue's establishment.[71] The historical record today includes evidence that the juvenile court served "as a vehicle through which to exercise social control over Black and immigrant

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[61] JAMES BELL & LAURA JOHN RIDOLFI, W. HAYWOOD BURNS INST., ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL AND ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 4 (Shadi Rahimi ed., 2008). As a result, even in these early days of American history, jail and prison populations were majority Black, even in communities that were mostly white. *Id. See also* Birckhead, *supra* note 53, at 398.

[62] BELL & RIDOLFI, *supra* note 61. *See also* Feld & Moriearty, *supra* note 60, at 764.

[63] BELL & RIDOLFI, *supra* note 61, at 4.

[64] *Id.* at 3.

[65] Birkhead, *supra* note 53, at 398-99.

[66] BELL & RIDOLFI, *supra* note 61, at 3. Native American youth were subject to similar fates, with the establishment of Indian boarding schools that functioned as abusive work camps, intended to strip youth of their cultural traditions and force assimilation into white Euro-centric culture. *Id.* at 5.

[67] Kristin Henning, *The Challenge of Race and Crime in a Free Society: The Racial Divide in Fifty Years of Juvenile Justice Reform*, 86 GEO. WASH. L. REV. 1604, 1614-15 (2018).

[68] *See Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (establishing the court's power to intervene between children and parents under the doctrine of *parens patriae* explaining "[t]he right of parental control is a natural, but not unalienable one").

[69] Henning, *supra* note 67, at 1614.

[70] FELLMETH & HELDMAN, *supra* note 59, at 449.

[71] *See* Henning, *supra* note 67, at 1615.

youth."[72] It is argued that it was largely designed to facilitate the assimilation of immigrant youth and the removal of Black youth from a society that feared them.[73]

As a result, children of color were overrepresented in juvenile court delinquency matters from the outset.[74] As urban centers expanded in the early 20th century, police exercised broad discretion in the name of maintaining order. In this permissive law enforcement culture, personal views on children's attitudes and behaviors were influential in decisions to arrest or not arrest youth, leading to disproportionate rates in arrests of youth of color.[75] Critics of the juvenile court pointed to the similar discretion exercised by judges and social workers that perpetuated differential treatment of youth of color.[76] A review of juvenile courts across the country in the 1940s revealed that Black children were referred to the youth justice system more frequently and at a younger age than their white peers, more often resulting in adjudication and institutional commitment.[77]

Facilities for both dependent and delinquent youth remained segregated, with education and vocational training reserved only for white children.[78] On the child protection side, the few organizations that served Black children created separate orphanages that were far inferior to those operated for white children.[79] In Black orphanages, dependent and delinquent children were housed together and police officers, rather than judges, provided oversight.[80] Even Black youth separated from their parents ostensibly for their own protection were criminalized and discounted.[81]

C. 20th Century Child Welfare and Youth Justice Systems

During the 20th century, government bodies assumed greater responsibility for intervening with and serving children and families, establishing government-run systems of child welfare and youth justice.[82] State systems exercised the power to intervene in the interest of protecting children from abuse or neglect. However, Black children and families were often denied public services and Black children continued to come before the juvenile court as delinquents rather than dependents, sent to reformatories or adult prisons when needing care.[83]

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[72] Feld & Moriearty, *supra* note 60, at 763.
[73] *See* Henning, *supra* note 67, at 1616.
[74] BELL & RIDOLFI, *supra* note 61, at 6.
[75] *Id.* at 7.
[76] Feld & Moriearty, *supra* note 60, at 766.
[77] BELL & RIDOLFI, *supra* note 61, at 8. *See also* Birckhead, *supra* note 53, at 401-02.
[78] Feld & Moriearty, *supra* note 60, at 764. *See also* Birckhead, *supra* note 53, at 398-99.
[79] STEVENSON ET AL., *supra* note 47, at 74. *See also* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7 (Basic Books, 2002).
[80] STEVENSON ET AL., *supra* note 47, at 74.
[81] ROBERTS, *supra* note 79, at 7.
[82] *See id.*; *see also* STEVENSON ET AL., *supra* note 47, at 74.
[83] Jillian Jimenez, *The History of Child Protection in the African American Community: Implications for Current Child Welfare Policies*, 28 CHILD. & YOUTH SERVS. REV. 888, 897 (2006). *See also* ROBERTS, *supra* note 79, at 7.

By the middle of the 20th century, dependency courts and public child welfare agencies became accessible to Black children, who quickly made up a significant portion of the system's cases.[84] Black families, particularly Black mothers, experienced growing poverty while economic aid programs established in the early 20th century for poor mothers were made available to white women only, often based on discretionary and discriminatory eligibility standards.[85] As a result, Black children experienced a higher rate of removal and placement into foster care as compared to other children on grounds that met the nebulous definition of neglect.[86] This focus on intervention by state agencies and courts conflicted with, and disrupted the reliance on, historic systems of kin and community that had developed within the Black community to ensure child protection and family support.[87]

During the same period, concerns about juvenile court practice, particularly the discretionary and inconsistent treatment of youth and the court's apparent ineffectiveness in preventing recidivism, led to calls to reform the tribunal.[88] There was also clear evidence that Black youth were disproportionately represented in delinquency cases and received harsher treatment while subject to juvenile court jurisdiction.[89] In 1967, in the seminal case of *In re Gault*, the U.S. Supreme Court responded to criticisms of the juvenile court by establishing the right of youth accused of crimes to several constitutional protections already afforded adults.[90] To the extent that criticisms of the juvenile court included racial inequity, they went unaddressed by the Supreme Court with any specificity.[91] Furthermore, the Court's decision in *Gault* only addressed the requirements of due process as they related to adjudication—the phase at which guilt or innocence is determined.[92] At earlier phases such as court intake and detention, where

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[84] ROBERTS, *supra* note 79, at 7-8.

[85] *Id*. at 175-76. Examples of such restrictive standards included "suitable home" rules, which permitted disqualification of mothers from aid on the vague basis of "immorality." Risa E. Kaufman, *The Cultural Meaning of the "Welfare Queen": Using State Constitutions to Challenge Child Exclusion Provisions*, 23 N.Y.U. REV. L. & SOC. CHANGE 301, 307 (1997).

[86] Jimenez, *supra* note 83, at 900.

[87] *Id.* at 892. This system of community oversight provided support for families, discipline for children, and rebuke of poor parenting practices. *Id. "*From the latter decades of the 19th century up to the recent past, it has been common practice for African American families to assume responsibility for the children of relatives who needed a home due to parental death, separation, abandonment, or illness, without the assistance, interference, or sanction of the legal system." *Id*. at 895.

[88] Feld & Moriearty, *supra* note 60, at 765-66.

[89] *Id.* at 765.

[90] *In re* Gault, 387 U.S. 1, 41 (1967). The Justices concluded that due process required that juveniles receive notice of charges*, id.* at 33-34, and a hearing that afforded them the opportunity to confront and cross-examine witnesses*, id.* at 57. Youth also could invoke the privilege against self-incrimination and had a right to counsel. *Id.* at 41, 55.

[91] Feld & Moriearty, *supra* note 60, at 751, 771. There are scholars who point to evidence that the Warren Court's due process revolution was intended, in large part, to remedy the racial inequality of the criminal justice system. *Id.* at 770. However, when they took on juvenile justice, the Court selected the case of a white youth. *Id.* at 771. This can be viewed as a missed opportunity, if not a deliberate skirting of the racial issue.

[92] Feld & Moriearty, *supra* note 60, at 768.

probation officers often make largely discretionary decisions,[93] the *Gault* decision provided no additional procedural protections.[94]

Following *Gault*, the delinquency court, with its new procedural requirements, more closely resembled the adversarial environment of the adult criminal court.[95] It was within that context that the "tough on crime" rhetoric, policies, and practices of the 1990s ushered in a more punitive approach to youth justice.[96] Dire predictions of an impending wave of violence brought about by mythologized young "super predators"—portrayed as Black, inner-city youth[97]—drove policies that expanded criminal court jurisdiction over youth and imposed severe sentences.[98] Black boys bore the brunt of these policies.[99] Numerous states passed laws allowing or mandating that juvenile drug offenses—laws disproportionately applied to youth of color—be transferred to adult court.[100]

In addition to racialized criminal justice policies, poverty policy in the 1990s, particularly federal welfare reform, perpetuated other discriminatory mythologies, such as that of "welfare queens" gaming the system.[101] The stereotype of the "undeserving" Black mother—unemployed, unmarried, and reproductively irresponsible—fueled legislative changes resulting in the elimination of federal aid as an entitlement, thus decreasing financial supports to families and children under a block grant structure.[102] At the same time, payments to states for care and support of children removed from their homes continued as an entitlement.[103] Some argue that this provided a financial incentive for states to favor removal of children over providing in-home support to families struggling with poverty, many of whom were Black.[104]

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[93] *See infra* Section III.B.
[94] Feld & Moriearty, *supra* note 60, at 768.
[95] *Id.* at 772.
[96] GIUDI WEISS, NAT'L CAMPAIGN TO REFORM STATE JUV. JUST. SYS., THE FOURTH WAVE: JUVENILE JUSTICE REFORMS FOR THE TWENTY-FIRST CENTURY 11-12 (2013).
[97] Birckhead, *supra* note 53, at 410. The coverage of increased juvenile violent crime focused primarily on Black youth, who became the face of the mythical "superpredators." White youth were highlighted as the victims of such crime, despite the reality that Black youth were more likely to be victims themselves. *Id.* at 410-11.
[98] JOSH ROVNER, THE SENT'G PROJECT, HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURT 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/12/How-Tough-on-Crime-Became-Tough-on-Kids.pdf. *See also* Henning, *supra* note 67, at 1620.
[99] Birckhead, *supra* note 53, at 411-12.
[100] ROVNER, *supra* note 98. During this era, 40 states passed laws to make it easier to send children to adult court, with drug offense cases the most likely to be judicially waived into adult court. *Id.* As of 2016, 46 states still allowed for transfer on the basis of drug charges. *Id.*
[101] Kaufman, *supra* note 85, at 310.
[102] *See id.*
[103] ROBERTS, *supra* note 79, at 190.
[104] Karen U. Lindell et al., *The Family First Prevention Services Act: A New Era of Child Welfare Reform*, 135 PUB. HEALTH REPS. 282, 283 (2020). *See also* OFF. OF THE ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 2 (2005), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files//138206/ib.pdf. In response to this criticism,

This history of child welfare and youth justice, from "child saving" to the "tough on crime" era, illustrates the discriminatory perceptions, policies, and practices that have disadvantaged Black youth for generations. Despite progress made in recent years due in part to increased awareness and efforts to address the resulting disproportionality, the problem persists.[105] This has a significant impact on the likelihood of Black youth becoming dual status.

III. DISPROPORTIONALITY AND DISPARITY AND THE IMPACT ON THE DUAL STATUS TRAJECTORY

A substantial body of research, as well as ongoing data collection, confirms that Black youth today remain more likely to encounter these systems and become more deeply involved than their white counterparts. Why, and what it means about our systems and our society, are more hotly debated and contentious issues. Disproportionality is not proof positive of the existence of bias or discrimination.[106] But it is critical to note that at its foundation, the construct of the juvenile court and related systems relied on a view that one segment of society was entitled to control other segments of society they deemed troubled or deficient by standards of their own making.[107] This underpinning of both the child welfare as well as the youth justice system continues to facilitate state control over Black families and families of low socioeconomic status, as has been the case since the early days of reformatories.[108] In the past, these systems categorically excluded Black families and children. In their current form, they tend to envelop and entrench these families, often with negative results, particularly for dual status youth. The following sections detail the persistent and compounded racial disproportionality and disparities at multiple decision points in today's child welfare and youth justice systems.

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in 2018, Congress enacted the Family First Prevention Services Act, which allows federal funds to be used for prevention services provided to families, not just substitute care for children removed from their families. Lindell et al., *supra* note 104, at 282.

[105] Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?,* 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 254 (2020).

[106] Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 49 (2020) ("[W]hether disproportionate representation primarily reflects differential risk exposure—as compared with differential treatment—remains the subject of a large and contested body of research."). *Id.*

[107] *See supra* Section II.

[108] Birckhead, *supra* note 53, at 414.

A. Child Welfare

In every state, the child welfare system is authorized to receive reports of child abuse or neglect.[109] Studies indicate that Black children are more likely than white children to be the subject of these reports.[110] Researchers offer various explanations for this disparity. Some point to the greater likelihood of Black children living in poverty.[111] Although poverty should not be conflated with abuse or neglect, it is considered a risk factor for child welfare involvement.[112] Furthermore, poverty creates the potential for visibility or surveillance bias.[113] This results when higher rates of poverty among families of color increase contact with service providers who are likely to be among those required by law to report suspected abuse or neglect.[114] Others point to explicit and implicit bias among community members, particularly mandated reporters,[115] and system personnel.[116] For example, a 2001 study showed that substantiation of abuse and neglect reports—a determination by an investigating social worker that the alleged maltreatment likely occurred—happened at a higher rate for Black families, even when relevant conditions were controlled.[117]

If a substantiated abuse or neglect report reaches the dependency court, the judge determines placement of the child during investigation. If the allegations of abuse or neglect are found to be true, a determination is made whether services can be provided in-home or if the child should be placed outside the home.[118] Research indicates that Black

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[109] For example, in author Gaither's home state of Indiana, this type of action is referred to as a 310 report. *See* IND. DEP'T OF CHILD. SERVS., INDIANA CHILD WELFARE POLICY MANUAL, Chapter 3, § 4, at 1 (2021), https://www.in.gov/dcs/files/Child_Welfare_Policy_Manual.pdf. The Indiana Department of Child Services will investigate every report of child abuse and make recommendations. *Id*.

[110] Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 7 CHILD ABUSE & NEGLECT 33, 42 (2013).

[111] THE CHILD.'S BUREAU, *supra* note 4, at 5.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id*. at 14. Mandated reporters are individuals, generally professionals who come in frequent contact with children, who are mandated by law to report instances of confirmed or suspected abuse and neglect. *Id.*

[116] *See* Maguire-Jack et al., *supra* note 106, at 50. *See also* Dettlaff & Boyd, *supra* note 105, at 264 (detailing evidence of bias among medical professionals and educational professionals. For example, a 2018 study found that "non-White children with head injuries were nearly twice as likely to be reported for abusive head trauma than White children with similar injuries." *Id*.)

[117] STEVENSON ET AL., *supra* note 47, at 76. In addition, a 2008 study found social workers assigned a greater level of risk to Black parents than white parents despite the Black parents having lower scores on a risk assessment. *Id. See also* Maguire-Jack et al., *supra* note 106, at 56. *But see* Putnam-Hornstein et al., *supra* note 110 (indicating that low socioeconomic status Black children were less likely to be referred to child welfare, have allegations substantiated, or enter foster care than white children of similar socioeconomic status.)

[118] STEVENSON ET AL., *supra* note 47, at 77.

children are overrepresented in out of home placements.[119] Common out of home placements include living with relatives, in foster homes, or in some circumstances, within a residential facility. Studies show that Black children are more likely to be placed in residential facilities (*i.e.,* group homes) than white children[120]—the placement associated with increased risk of dual status involvement.[121] Federal and state law requires agencies to make reasonable efforts to reunify parents and children, but these efforts are time-limited and in some cases children are removed from their home permanently.[122] Research indicates that Black children reunify less often and wait longer for a substitute permanent home or family compared to white children.[123]

These decisions, affecting the most important aspects of the lives of children and families, are in the hands of social workers and judges who are directed by law and policy. For example, state dependency law provides definitions of abuse and neglect that guide child welfare agencies and courts.[124] Under these definitions, most cases that come

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[119] *See* John Fluke et al., *Research Synthesis on Child Welfare Disproportionality and Disparities*, *in* DISPARITIES & DISPROPORTIONALITY IN CHILD WELFARE 36-38 (2011). In addition, a 2008 study found that "Black children were 77 percent more likely than White children to be removed from their homes following a substantiated maltreatment investigation, even after controlling for factors such as poverty and related risks." Dettlaff & Boyd, *supra* note 105, at 256. More recently, researchers found that Black children had "significantly greater odds of substantiation and out of home placement when compared with non-Hispanic White children." Maguire-Jack et al., *supra* note 106, at 56.

[120] STEVENSON ET AL., *supra* note 47, at 77. *See also* NAT'L ACADS. OF SCIS., ENG'G, & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 109 (Richard J. Bonnie & Emily P. Backes eds., 2019), https://www.ncbi.nlm.nih.gov/books/NBK545481/pdf/Bookshelf_NBK545481.pdf.

[121] *See supra*, Part I.B.

[122] FELLMETH & HELDMAN, *supra* note 59, at 328.

[123] STEVENSON ET AL., *supra* note 47, at 77-78. *See also* Dettlaff & Boyd, *supra* note 105, at 254. A report from the Government Accountability Office (GAO) in 2007 reported that one factor contributing to longer stays in foster care for Black youth is the difficulty that Black potential foster and adoptive families face in meeting licensing requirements because of household members with prior criminal records. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 26-27 (2007), https://www.gao.gov/assets/gao-07-816.pdf. Decades of criminal justice policy leading to mass arrest and incarceration of Black individuals directly intersects with the overrepresentation of Black children in foster care and the disparate amount of time spent in the system. Other factors noted by the GAO include the lack of affordable housing and services available in largely Black communities, which can delay a parent's ability to comply with a case plan in order to be reunified with their child. *Id.* at 29-31. Furthermore, efforts to place children with kin—the preferred out-of-home placement for a child—can be complicated by the higher number of child protection referrals made of Black individuals. Put succinctly, "if a family of color is more likely to receive a report, more likely to have the report accepted when received, more likely to be substantiated when investigated, and more likely to have children removed when substantiated, then the kin options for children of color are severely limited." Rakesh Beniwal, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1023, 1042-43 (2017). Nevertheless, research has shown that African American children are more likely than white children to be placed with kin. Fluke et al., *supra* note 109, at 39. This has been offered as an explanation for the disproportionality in foster care placements, length of stay, and reunification outcomes—arguing that children living with relatives tend to stay in these placements longer than they would in non-family foster care, thus skewing the data. *Id.* at 41.

[124] *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT (2019), https://www.childwelfare.gov/pubPDFs/define.pdf.

into dependency court are cases of neglect.[125] The definition of neglect varies from state to state and some assert that statutory definitions are ambiguous in some jurisdictions, making the determination of neglect largely subjective and vulnerable to bias on the part of both social workers and judges.[126] The conflation of neglect and poverty is particularly concerning.[127] With the continued inequities in education, employment, and housing that contribute to higher levels of poverty among Black families, as well as the increased stressors associated with financial instability, there is significant risk that Black children are removed in circumstances that may otherwise be resolvable within communities or with additional resources.[128]

Unfortunately, there is little research closely examining factors that influence attitudes and decisions about dependency cases, making it difficult to determine the extent to which individual biases contribute to decision-making.[129] However, the history cited above illustrates a long-standing systemic tendency to intervene with families by removing children from impoverished circumstances. Instinctual decision-making by judges, the ultimate decision-makers in the child welfare system, has the potential to reflect such a tendency. Throughout dependency proceedings, various standards of evidence apply—a single case that moves from initial removal to termination of a parent's rights will involve determinations based on probable cause, preponderance of the evidence, and clear and convincing evidence.[130] Coupled with the complexity of the facts in many dependency cases and the generally fast pace of the calendar, judges must make difficult decisions quickly and efficiently, which can increase the risk that bias will influence decisions.[131] Research indicates that decision-makers in stressful circumstances who are required to make quick judgements are particularly susceptible to bias.[132]

Researchers in a recent study acknowledged the enduring stereotypes associating Black individuals with traits such as laziness and criminality and the risk that professionals will rely on such assumptions when making decisions.[133] Where such bias

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[125] In 2019, 74.9% of substantiated maltreatment victims across the U.S. experienced neglect. CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2019, at xi (2021), https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment. *See also* STEVENSON ET AL., *supra* note 47, at 79.

[126] STEVENSON ET AL., *supra* note 47, at 79.

[127] *Id. See also* Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty with Neglect*, IMPRINT, (Jan. 17, 2020), https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222 ("Poverty is a risk factor for neglect, but poverty does not equate to neglect."). Several states have addressed this concern by distinguishing conditions of poverty from the statutory definition of neglect to some extent. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 124. Twelve states and the District of Columbia have directly exempted poverty from the definition of neglect. *Id.* at 4.

[128] There is research indicating that maltreatment rates decline among all races when family income increases, even moderately. STEVENSON ET AL., *supra* note 47, at 80.

[129] *Id.*

[130] *Id.* at 79.

[131] *Id.*

[132] NAT'L CTR. FOR STATE CTS., STRATEGIES TO REDUCE THE INFLUENCE OF IMPLICIT BIAS 4 (2012), https://cdn.ymaws.com/www.napaba.org/resource/resmgr/2015_NAPABA_Con/CLE_/400s/404_NAPABA2015CLE.pdf.

[133] Maguire-Jack et al., *supra* note 106, at 56.

exists, it could lead to a failure to identify or recognize assets and supports that families may have to help prevent involvement in the child welfare system and the need for removal of the child. It can also result in very different experiences for families of color when trying to navigate the complexities of the child welfare system and dependency court. Research shows that parents' experience within the dependency system reflects a limited understanding of what is happening in their case. Black and Hispanic parents were shown to understand significantly less than white parents, controlling for education and income.[134] Some issues identified were based on language challenges, but researchers also hypothesized that there may be differences in how professionals communicate with parents of color.[135] Researchers also suggest that parents bring a historical distrust of the system into their interactions, choosing to ask fewer questions and engage less with professionals they believe harbor biases.[136]

Some scholars argue that disproportionality within the child welfare system is primarily a result of increased risk factors among Black parents, including high rates of poverty, substance abuse, and single parenting.[137] This, however, does not preclude acknowledgment and examination of the systemic racism that led to the circumstance of poverty as a result of discrimination in housing, employment, and the criminal justice system.[138] It also does not negate the impact of biases of those working within the system, contributing to a greater likelihood that families of color are investigated and that their children are removed from their home.[139] Ultimately, the causes are complex and varied. As Dorothy Roberts stated in her seminal work *Shattered Bonds*:

> 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

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[134] STEVENSON ET AL., *supra* note 47, at 81.
[135] *Id*. at 82. This suggestion is based on research indicating that implicit bias affects how much time attorneys spend with criminal defendants, with less time being spent with clients of color. *Id.* On the other hand, the single identified study considering the level of caseworker investment with families found no differences in time spent with Black versus white families. Maguire-Jack et al., *supra* note 106, at 50.
[136] Maguire-Jack et al., *supra* note 106, at 59. Furthermore, this distrust may result in parents opting to not cooperate with system professionals, which can negatively impact a social worker's assessment of the parent's willingness to address protective issues. *Id*.
[137] *See e.g.* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).
[138] *Id.* at 877.

> "Appropriate reform should also include the fundamental social changes that would address the poverty, unemployment, and related social ills characterizing the lives of so many poor and black people in our society. Recognition of the racially disparate breakup of black families can usefully focus attention on finally taking more effective action to solve some of the results of our societal legacy of slavery and of racial and economic injustice."

Id. at 878.
[139] *See* discussion *supra* section III.A.

> 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. 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.[140]

This racial injustice, resulting in the more frequent and extensive involvement of Black families with the child welfare system, places Black youth at greater risk of youth justice system involvement. As detailed *supra*, longer periods of time in the child welfare system, frequent placement changes, and placement in group facilities increase this risk. Once in contact with the youth justice system, child welfare-involved youth are subject to several additional decisions that can reflect disparate treatment of Black youth.

B. Youth Justice System

Youth arrest rates have significantly decreased overall in recent years, but youth of color continue to be arrested at disproportionate rates.[141] While this can be attributed to some degree to differences in the rate of offending, there is also evidence of unequal policing and harsher enforcement and punishment of Black youth.[142] Black youth are more likely, as shown by numerous studies, to be arrested than white youth for the same behavior and arrested more often than white youth for low-level, non-violent offenses.[143]

Following arrest, youth of color are less likely to be diverted from formal processing, and are more likely to be confined, both pre and post-adjudication.[144] Youth confinement rates overall have plummeted in recent years, with half the number of youths in confinement in 2017 as in 2007; however, youth of color continue to be confined at disparate rates.[145] Mirroring the early history of the youth justice system, research

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[140] ROBERTS, *supra* note 79, at 97.

[141] In 2018, 50% of all juvenile arrests were of Black youth, who make up only 16% of the general population of juveniles. OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., JUVENILE JUSTICE STATISTICS: JUVENILE ARRESTS, 2018, at 8 (2020), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf.

[142] JOSH ROVNER, THE SENT'G PROJECT, RACIAL DISPARITIES IN YOUTH INCARCERATION PERSIST 4 (2021), https://www.sentencingproject.org/publications/racial-disparities-in-youth-incarceration-persist/.

[143] *See* Barbara Robles-Ramamurthy & Clarence Watson, *Examining Racial Disparities in Juvenile Justice*, 47 J. AM. ACAD. PSYCHIATRY L. 48, 50 (2019). *See also* Feld & Moriearty, *supra* note 60, at 788.

[144] ROVNER, *supra* note 142, at 5. See also Robles-Ramamurthy, *supra* note 143, at 48.

[145] ROVNER, *supra* note 142, at 5-7. Recent data indicates that Black youth are about five times more likely than white youth to be incarcerated. *Id.* at 7. *See also United States of Disparities*, W. HAYWARD BURNS

indicates that Black youth have less access to services in the community, contributing to higher rates of secure confinement.[146] In addition, youth of color have been shown to receive harsher dispositions when charged with the same category of offense as their white peers.[147] Detention on the basis of a technical violation of probation conditions[148] is far more likely to impact Black youth rather than white youth.[149] Transfer to criminal court is less common overall than in years past, but Black youth still experience high rates of transfer, and make up a greater portion of those transferred for person offenses than white youth, despite comprising an equal percentage of those charged.[150] There is also evidence that children of color are denied due process protections, such as access to counsel, at disproportionate rates as well.[151]

As in the child welfare system, decisions in the youth justice system are guided by law and policy and are in the hands of state actors, including probation officers, prosecutors, and judges. As described above, the "tough on crime" era codified and expanded punitive policies toward children, focusing on punishing "behaviors, habits, and life conditions associated with Black youths living in poverty."[152] Although many of these policies have been dismantled, vestiges of the approach continue to influence

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INST.,
https://usdata.burnsinstitute.org/#comparison=2&placement=1&races=2,3,4,5,6&offenses=5,2,8,1,9,11,10&year=2017&view=map (last visited Sept. 25, 2021).

[146] *See* SAMANTHA HARVELL ET AL., URBAN INST., PROMOTING A NEW DIRECTION FOR YOUTH JUSTICE 9, 12 (2019),
https://www.urban.org/sites/default/files/publication/100013/innovative_strategies_for_investing_in_youth_justice_0.pdf. *See also* BELL & RIDOLFI, *supra* note 61, at 6.

[147] BELL & RIDOLFI, *supra* note 61, at 9. "In 2004, White youth represented 73 percent of total youth adjudicated delinquent for drug offenses. But they were provided far more opportunities for rehabilitation than Black youth. White youth represented 58 percent of youth sent to out-of-home placement and 75 percent of youth who received probation. In contrast, Black youth represented only 25 percent of total youth adjudicated delinquent for drug offenses. But they represented 40 percent of those sent to out-of-home placement, and a slim 22 percent whose case resulted in probation." *Id.* at 10.

[148] Technical violations are violations of court-approved probation conditions and are not themselves criminal offenses (*e.g.,* failure to report to probation appointment). NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, *Probation and Parole Violations*, *in* ENHANCED JUVENILE JUSTICE GUIDELINES 1 (2018), https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf.

[149] Feld & Moriearty, *supra* note 60, at 797. According to a report from The Appeal, in 2017, Black youth were almost four times more likely to be ordered to secure detention for technical violations as white youth. Dawn R. Wolfe, *Thousands of Children on Probation are Incarcerated Each Year for Nonviolent, Noncriminal Behaviors*, APPEAL (Sept. 4, 2020), https://theappeal.org/thousands-of-children-on-parole-are-incarcerated-each-year-for-nonviolent-noncriminal-behaviors/.

[150] JEREE MICHELE THOMAS & MEL WILSON, THE COLOR OF JUVENILE TRANSFER: POLICY & PRACTICE RECOMMENDATIONS 1 (2017), https://www.socialworkers.org/LinkClick.aspx?fileticket=30n7g-nwam8%3D&portalid=0.

[151] *See* Feld & Moriearty, *supra* note 60, at 752-53.

[152] Birckhead, *supra* note 53, at 411. An example noted by Professor Birckhead is an Illinois statute allowing drug violations in proximity to public housing to trigger mandatory transfer of youth as young as fifteen to adult court. *Id.*

practice within youth justice agencies and courts.[153] As a result, disparities persist. This is despite legislative efforts at the federal level to acknowledge and address disparities through the Juvenile Justice and Delinquency Prevention Act.[154] Ultimately, states' compliance with requirements under the Act have lacked enforcement and accountability, leaving the legislation largely ineffective.[155]

Research suggests that racial bias influences decisions made by many categories of professionals in the youth justice system.[156] The process through which a child experiences the system includes a series of decision points at which significant discretion is allowed—providing an opportunity for explicit and implicit biases to influence decision-making. For example, police officers make quick judgments regarding the need for intervention in behaviors they witness—some youth may be stopped, some may be redirected, and some may be arrested.[157] Once youth are referred to a probation department for intake, a number of additional decisions are made regarding eligibility and appropriateness for diversion *(i.e.,* providing alternatives to formal court involvement), and the need for detention.[158] In most cases prosecutors have the discretion whether to

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[153] Melissa Sickmund, *The Balanced Approach {Revisited}*, 70 JUV. & FAM. CT. J. 7, 34 (2019). In recent years, there has been a strong push toward probation reform based on a developmental approach to youth justice rather than the historically punitive one that particularly disadvantages Black youth. *See, e.g., Probation System Reform*, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., https://rfknrcjj.org/our-work/probation-system-review/ (last visited Sept. 15, 2021) (detailing the probation reform work of the Robert F. Kennedy National Resource Center for Juvenile Justice). *See also* ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION: A VISION FOR GETTING IT RIGHT 14 (2018), https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf. Judicial leadership for promoting such reform has been highlighted. *See* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, THE ROLE OF THE JUDGE IN TRANSFORMING JUVENILE PROBATION: A TOOLKIT FOR LEADERSHIP 12-13 (2021), https://www.ncjfcj.org/wp-content/uploads/2021/07/AECF_Juvenile_Probation_Toolkit.pdf.

[154] 34 U.S.C. § 11101(a)(10).

[155] The Act first required states to make "specific efforts to reduce the proportion of the youth detained or confined in secure detention facilities, secure correctional facilities, jails and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population." BELL & RIDOLFI, *supra* note 61, at 13. The provision had little impact as state funding was not tied to compliance. *Id.* Reauthorization in 1992 made efforts to reduce disproportionate minority confinement (DMC) a core requirement for funding, but without further guidance on what this entailed and lax enforcement, the provision has failed to effect change. *Id.* at 14. This remained true through the reauthorization in 2002, which broadened the provision to include disproportionate contact with the youth justice system, not just confinement. *Id.* But the legislation continued to lack meaningful enforcement. The 2018 reauthorization of the Act included additional strategies for combating disparities including simplified data collection requirements and the mandate for states to identify disparities at various contact points within the youth justice system, including arrest, diversion, pre-trial detention, disposition commitments, and adult transfer. *See Racial and Ethnic Disparities*, OFF. OF JUV. JUST. & DELINQ. PREVENTION (Oct. 7, 2019), https://ojjdp.ojp.gov/programs/racial-and-ethnic-disparities. States must also develop an action plan to reduce disparities and evaluate the impact of the plan. *Id.*

[156] Feld & Moriearty, *supra* note 60, at 790. *See also* Birckhead, *supra* note 53, at 412.

[157] Rod K. Brunson & Kashea Pegram, "*Kids Do Not So Much Make Trouble, They Are Trouble": Police-Youth Relations*, 28 FUTURE CHILDREN 83, 83 (2018).

[158] Michael J. Leiber & Katerhine M. Jemieson, *Race and Decision Making Within Juvenile Justice: The Importance of Context*, 11 J. QUANTITATIVE CRIMINOLOGY 363, 372-73 (1995).

file a formal petition on a youth or not, [159] and judges preside over adjudication and disposition decisions. It is argued that biases have influence at every step of this process.[160]

In a 1998 study, researchers found significant differences in how probation officers viewed the causes of youth offending in the cases of white youth and youth of color.[161] Offending by Black youth was attributed to negative attitude and personality defects whereas offending by white children was viewed as a product of external environmental factors such as drug abuse or negative peer influence.[162] These differing assessments influenced how probation officers determined risk to reoffend and dispositional recommendations.[163] More broadly, there is research demonstrating that white individuals in general tend to view Black boys as older and therefore more responsible for their actions than white boys, which can contribute to harsher treatment in the youth justice system.[164] Similarly, research reveals that Black girls are subject to gendered racial bias in which they are perceived as more adult-like, and ultimately less innocent, than white girls.[165] Scholars point out that court professionals today use terminology that is racially coded, reinforcing racial stereotypes within the court structure.[166]

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[159] However, in Indiana, where author Gaither presides over youth court, there is a rather unique system where judges must approve the filing of delinquency petitions. IND. CODE § 31-37-10-2(2) (2019) (stating the juvenile court shall approve the filing of the delinquency petition if there is probable cause to believe that the child is a delinquent child and that it is in the best interest of the child **or** the public that the petition be filed)(emphasis added). *See, e.g.*, J.R. v. Indiana, 820 N.E.2d 173, 175 (Ind. Ct. App. 2005) (explaining the juvenile court stated in the order that there was probable cause to believe that the juvenile had committed delinquent acts and authorized the State to file a delinquency petition).

[160] Birckhead, *supra* note 53, at 420. External sources of implicit bias, including mental health professionals and school personnel, also make determinations that can be influential in the handling of youth within the youth legal system. *Id*. at 423-24.

[161] NAT'L RSCH. COUNCIL & INST. OF MED., *supra* note 3, at 251 (citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOCIO. REV. 554, PAGE (1998)).

[162] *Id.*

[163] *Id.*at 252. *See also* MODELS FOR CHANGE, JUST. POL'Y INST., KNOWLEDGE BRIEF: ARE MINORITY YOUTHS TREATED DIFFERENTLY IN JUVENILE PROBATION? 1 (2011).

[164] Birckhead, *supra* note 53, at 428. In contrast, a study among three jurisdictions representing both urban and rural communities in different regions of the U.S. in 2011 found that there were "no clear patterns of systematic discrimination among juveniles on probation." MODELS FOR CHANGE, *supra* note 163, at 5.

[165] REBECCA EPSTEIN ET AL., GEORGETOWN L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS' CHILDHOOD 1 (2017), https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf. "Given established discrepancies in law enforcement and juvenile court practices that disproportionately affect Black girls, the perception of Black girls as less innocent and more adult-like may contribute to more punitive exercise of discretion by those in positions of authority, greater use of force, and harsher penalties." *Id.* Research indicates that Black girls have been less likely to have cases dismissed, they receive diversion less often, and are more likely to be placed out of home in secure facilities than white girls. *Id.* at 12.

[166] Birckhead, *supra* note 53, at 412. "Coded language" is defined as "substituting terms describing racial identity with seemingly race-neutral terms that disguise explicit and/or implicit racial animus." *Coded Language*, NAT'L EDUC. ASS'N, https://neaedjustice.org/social-justice-issues/racial-justice/coded-language/

C. The Compounded Risks for Black Youth

The impact of continued disproportionality and disparities on the likelihood of Black children becoming dual status and the troubling outcomes this status can produce is rarely emphasized. One study in 2011 examined the interplay between disproportionality within the child welfare and youth justice systems, examining the extent to which one influenced the other.[167] After reviewing eight years of arrest data in the state of Illinois, researchers determined that "child welfare involvement is an even higher risk for African-American youths than is juvenile justice involvement; thus, any additional risks for delinquency associated with the child welfare system will contribute to overrepresentation of these youths in the juvenile justice system."[168] In fact, researchers found that once in contact with the youth justice system, a youth's involvement with the child welfare system more than doubled the risk of a formal delinquency petition being filed.[169] The study concluded that the child welfare system is "a significant pathway" for Black children into the youth justice system and recommended it be a target for prevention.[170]

The graphic below unpacks the research on racial disproportionality and disparity in both systems and adds to the equation the disparate outcomes for foster youth. This illustrates the compounded risks for initial and continuing involvement in the youth justice system experienced by Black youth, as well as the increased likelihood that they will experience negative outcomes in adulthood.[171]

(last visited Aug. 20, 2021). Examples of racially coded language in juvenile court include descriptions of a youth as being from a "bad" neighborhood or prone to "running the streets." Birckhead, *supra* note 53, at 387. Such phrasing may not be racially-based on its face, but rather is encoded with stereotypes that can lead to biased decision-making. *Id*. at 412.

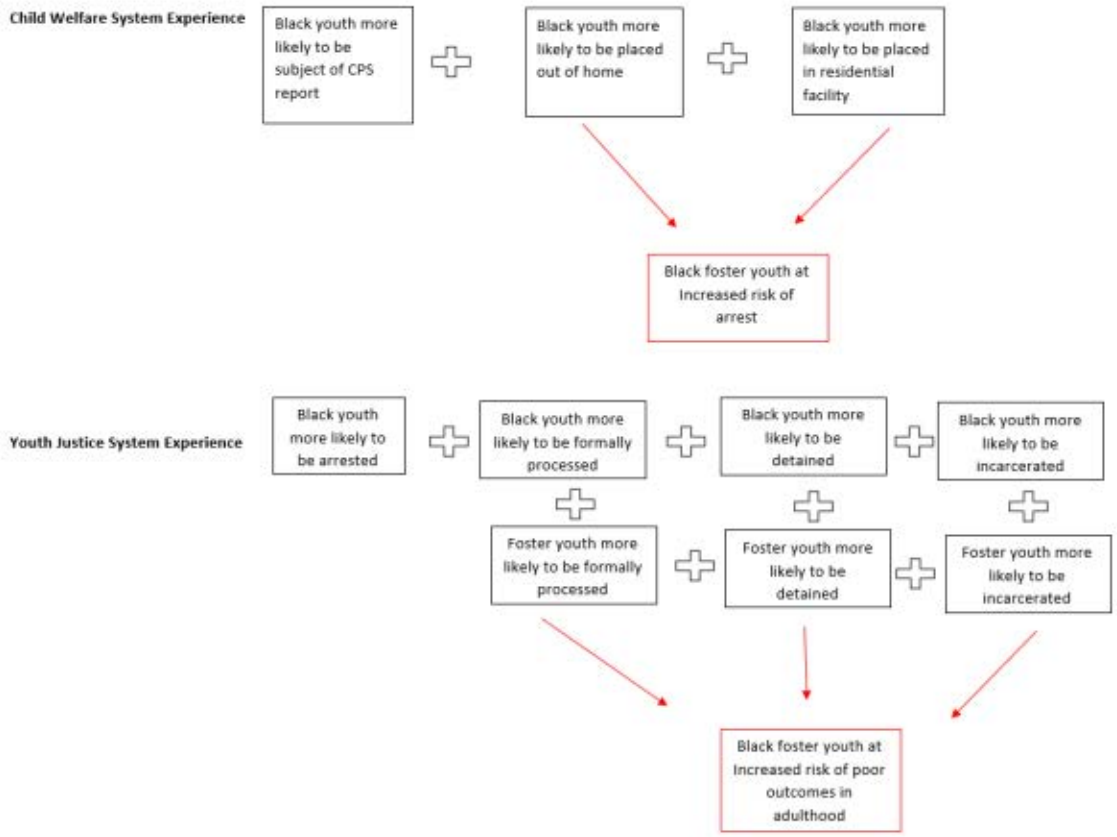
[167] MODELS FOR CHANGE, JUST. POL'Y INST., KNOWLEDGE BRIEF: IS THERE A LINK BETWEEN CHILD WELFARE AND DISPROPORTIONATE MINORITY CONTACT IN JUVENILE JUSTICE? 1 (2011), https://www.njjn.org/uploads/digital-library/Knowledge_Brief_Is_There_a_Link_between_Child_Welfare_and_Disproportionate_Minority_Contact_in_Juvenile_Justice_Models_for_Change_12.1.11.pdf.

[168] *Id.* at 2.

[169] *Id.* at 3.

[170] *Id.* at 4.

[171] *See supra* Section I.B.



Given the poor outcomes experienced by dual status youth, it is imperative that the child welfare and youth justice systems promote transformative solutions to not only reduce the risk of foster youth entering the youth justice system, but also to eliminate the systemic racism that compounds the risk of Black foster youth entering and more deeply penetrating the youth justice system.

IV. A TRANSFORMATIVE APPROACH

Efforts to reform how the child welfare and youth justice systems address the issue of dual status youth have primarily focused on how to identify and respond when youth first contact the second system—generally the youth justice system.[172] The goal is to interrupt the trajectory into—or deeper into—the system. This article poses an additional challenge, calling on the systems, including the juvenile court, to examine their functioning through the lens of historic and persistent racism and rooting the prevention of dual status in this understanding. This requires an acknowledgement of the damage done to Black communities and a commitment to restructuring to avoid damage in the future. Otherwise, we risk that future generations of Black youth will continue to struggle against structures and biases that drive a dual status trajectory.

[172] *See* sources cited *supra* note 9.

To embrace this challenge, this article proposes that each system adopt an anti-racist [173] approach to reform, which requires deliberate efforts to identify and transform the racist policies and practices—both internal and external to the systems—that contribute to inequality and disparate treatment at numerous decision points in each system.[174] This article proposes a framework for beginning these efforts on behalf of dual status youth: recognition, reorientation, and responsibility.[175] These strategies require using an anti-racist lens[176] to explore policy, practice, and organizational culture; shifting traditional power dynamics to empower and elevate the voices of historically subjugated families and communities; and holding system partners accountable for achieving transformation.

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[173] According to legal scholar Kimberlé Crenshaw, "[a]nti-racism is the active dismantling of systems, privileges, and everyday practices that reinforce and normalize the contemporary dimensions of white dominance." Minhae Shim Roth, *What Anti-Racism Really Means – and How to Be Anti-Racist* GOOD HOUSEKEEPING (July 6, 2020), https://www.goodhousekeeping.com/life/a32962206/what-is-anti-racism/. *See also* KENDI, *supra* note 4.

[174] In documenting the development of an anti-racist approach adopted by The Jewish Board of Family and Children's Services, Mary Pender Greene noted that, "[t]he core of anti-racist work is to seek to recognize institutional bias and to make structural changes that are supported by policies and procedures that are accountable with outcomes of equity." Mary Pender Greene, *Beyond Diversity and Multiculturalism: Towards the Development of Anti-Racist Institutions and Leaders*, J. NONPROFIT MGMT. 9, 10-11 (2007).

[175] This framework is informed by more than a decade of successful dual status youth reform initiatives led by the Robert F. Kennedy National Resource Center for Juvenile Justice. *See Dual Status Youth Reform*, ROBERT F. KENNEDY NAT'L RES. CTR. FOR JUV. JUST., https://rfknrcjj.org/our-work/dual-status-youth-reform/ (last visited Nov. 13, 2021). The Dual Status Youth Initiative Framework, developed with the assistance of author Heldman, emphasizes the following: 1) the need to identify the prevalence and characteristics of dual status youth as well as the decision-making processes that perpetuate the dual status youth trajectory (*i.e*. recognition); 2) the understanding that youth and families will rarely be successful if viewed as at the bottom of a hierarchy of power rather than engaged as experts and decision-makers in their own lives (*i.e.* reorientation); and 3) the obligation to ensure the work being done by systems on behalf of the youth and families is effective, meeting set objectives, and not causing additional harm (*i.e*. responsibility). *See* WIIG & TUELL., *supra* note 9.

[176] One description of using an "anti-racist lens" notes:

> When looking through an anti-racist lens, I am able to see how skin color, shade, texture of hair and shape of eyes influence the opportunities we have in life, the rights we enjoy, the access we have to resources and the representation and respect we receive. The anti-racist lens helps me to bring a historical and political perspective to solving problems and to understanding the roots of these problems. I can see how the ways in which we have organized our lives and our institutions, around race and other identities, have brought us to our present positions…. The anti-racist lens helps me to get at the ideas that support and justify practices which treat some people, based on their skin color, as superior and more deserving, while treating other people as inferior and less deserving. The most important feature of the anti-racist lens is that it leads me to see how situations can be transformed and how injustices can be reversed. It draws my attention to the ways in which power can be used and is used at the individual, community and institutional levels for change.

Enid Lee, *Looking Through an Anti-Racist Lens*, *in* BEYOND HEROES & HOLIDAYS 404, 404 (2007).

The first component of this framework is recognition. This article endeavored to provide a brief synopsis of the origin and evolution of the child welfare and youth justice systems through a lens focused on identifying how racial discrimination has shaped the systems even as they function today. This simply provides a starting point, establishing a shared understanding from which individual agencies and communities can proceed. In a recent article discussing how Critical Race Theory (CRT)[177] can be applied to the exploration of Black female dual status youth, the author argued that system professionals, "need to possess knowledge, including knowledge of race, racial history and treatment of children by the child welfare and youth justice systems and to acknowledge the unique experience of African American youth . . . ."[178] CRT argues that racism is so entrenched in American society that it can be difficult to identify, and therefore difficult to remedy.[179] Thus, "a race-conscious, critical lens needs to be applied" when addressing issues related to dual status youth.[180]

Rather than using an anti-racist lens, analysis of and efforts to combat disproportionality and disparities have suffered from continued focus on the contentious debate over whether disproportionate need or disproportionate offending is the cause of overrepresentation of Black children and families in these systems, or whether bias and discrimination within institutions are to blame.[181] This conversation will not move the needle on disparities. As noted by the National Research Council:

> We know that racial/ethnic disparities are not reducible to either differential offending or differential selection [*e.g.,* enforcement, prosecution]… DMC [Disproportionate Minority Contact] exists in the broader context of a "racialized society" in which many public policies, institutional practices, and cultural representations operate to produce and maintain racial inequities."[182]

In order to move past this debate, the child welfare and youth justice systems must concede that racial discrimination has produced both the societal conditions that give rise to disproportionate risks and needs as well as systems that were rooted in, and remain subject to, explicit and implicit biases. It is only when this is acknowledged at the highest levels of each system—including judges, child welfare directors, probation

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[177] Critical Race Theory (CRT) is described as "a theoretical framework that examines race, racism, and power structures…to guide critical analysis of issues to inform action strategies." Kolivoski, *supra* note 33, at 3.
[178] *Id.* at 8.
[179] *Id.* at 3.
[180] *Id.* at 5.
[181] Dettlaff & Boyd, *supra* note 105, at 266. *See also* NAT'L RSCH. COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 212 (Richard J. Bonnie et al. eds., 2013). "Despite a research and policy focus on this matter for more than two decades, remarkably little progress has been made on reducing the disparities themselves or in reaching scholarly consensus on the root source of these disparities." *Id.*
[182] NAT'L RSCH. COUNCIL, *supra* note 181, at 239.

chiefs, police chiefs, and leaders of service provider organizations—and when the issue of race is made primary that transformation can begin.[183]

Recognition also means identifying,[184] understanding, and accepting one's own biases.[185] This recognition must be accomplished by all community partners in the child welfare and youth justice systems.[186] Bias is something we all have. Use of stereotypes and other mental shortcuts is how we process information quickly.[187] The problem is when we incorporate beliefs in practice and extend individual characteristics to groups. We cannot eliminate bias, but we have a duty to understand and recognize when it creeps into the work of decision-makers.[188] This alone can have a positive impact. For example, one study highlighting the existence of racial bias among trial judges indicated that when they became aware of their biases and worked to monitor them, their biases ceased to influence their decisions.[189]

The second component is reorientation. In both the child welfare and youth justice system, relationships are designed to be hierarchical. Social workers, judges, and probation officers engage in decision-making regarding restricting the liberty and mandating behaviors of others, resulting in an extreme imbalance of power.[190] Although there will always be a degree of intervention necessary to protect children and communities, a reframing of the value and assets of communities and families as well as the primacy of their perspective and leadership in crafting solutions must become the

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[183] *See* ERIKA BERNABEI, GOV'T ALL. ON RACE & EQUITY, RACIAL EQUITY: GETTING TO RESULTS 6 (2017), https://www.racialequityalliance.org/wp-content/uploads/2017/09/GARE_GettingtoEquity_July2017_PUBLISH.pdf. "When we fail to name and center race, though we may be well-intentioned, we will reinforce racial inequities." *Id.* at 6. *See also* Kolivoski, *supra* note 33, at 6-7.

[184] The Implicit Association Test was created by Harvard University to help identify implicit bias. To take the test, go to https://implicit.harvard.edu/implicit/takeatest.html (last visited Nov. 13, 2021).

[185] Resources providing strategies for addressing bias within the child welfare system can be found at https://www.childwelfare.gov/topics/systemwide/cultural/disproportionality/reducing/bias/ (last visited Oct. 20, 2021).

[186] *See, e.g.*, Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, CHILD L. PRAC. TODAY (Dec. 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/.

[187] *See* Annie Murphy Paul, *Where Bias Begins: The Truth about Stereotypes*, PSYCH. TODAY (May 1, 1998), https://www.psychologytoday.com/us/articles/199805/where-bias-begins-the-truth-about-stereotypes.

[188] For example, the Model Code of Judicial Conduct Rule 2.3 states: "[a] judge shall perform the duties of judicial office, including administrative duties, ***without bias*** or prejudice." MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2020) (emphasis added), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

[189] CTR. FOR CHILD.'S L. & POL'Y, *supra* note 10, at 23-24.

[190] See JOAN PENNELL ET AL, CTR. FOR JUV. JUST. REFORM, GEO., SAFETY, FAIRNESS, STABILITY: REPOSITIONING JUVENILE JUSTICE AND CHILD WELFARE TO ENGAGE FAMILIES AND COMMUNITIES, 15-16 (2011), https://www.njjn.org/uploads/digital-library/SafetyFairnessStability.FamilyEngagementPaper.CJJR.May2011.pdf.

norm.[191] The harms and poor outcomes associated with foster care and youth justice system involvement, and particularly dual system involvement, necessitate a radical reorientation that avoids prescriptive solutions proposed solely by those in a position of privilege, and instead seeks to empower those with lived experience in constructing strategies to address individual as well as systemic concerns.[192]

One model that can be used to guide the process of reorientation is the Privilege and Subjugated Task (PAST) Model, described as "a power/privilege-sensitive framework designed to defuse contentious conversations and to facilitate constructive engagement across the divides of race and other dimensions of diversity."[193] The PAST Model provides guidance on how to communicate with families and communities in a manner that furthers productive conversations about race, with the goal of transforming systems.[194] To achieve this, conversations must focus not on the intentions of the privileged, but on the consequences experienced by the subjugated.[195] Those in the position of privilege must resist issuing prescriptions, as doing so sends a devaluing message, implying that "those in the privileged position know the needs of those in the subjugated position better than they do themselves."[196]

An additional component of reorientation must be to support solutions that invest in and originate within the communities themselves. One example is the establishment of resource centers based in communities. These programs are designed as a primary prevention strategy, helping to support families in communities that traditionally have lacked government investment in adequate support and services.[197] Ideally before a

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[191] *See* Vivek Sankaran, *Changing the Child Welfare System Starts with Reframing Our View of Families*, IMPRINT (July 1, 2021), https://imprintnews.org/opinion/changing-the-child-welfare-system-starts-with-reframing-our-view-of-families/56633.

[192] *See* Lexi Grüber, *Child Welfare Policymakers Need to Learn User Centered Design*, IMPRINT (May 27, 2020), https://imprintnews.org/opinion/child-welfare-policymakers-need-to-learn-user-centered-design/43938. *See also* Brian Samuels, *Family and Child Well-Being: An Urgent Call to Action*, 21 CHILDREN'S BUREAU EXPRESS (2020) https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218&sectionid=2&articleid=5602 ("New partnerships with communities, parents, kin, and youth with lived experience will be necessary to rebalance the power dynamic and build a system that reflects the priorities and meets the needs of its constituents."). *See also* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERVS., 2021/2022 PREVENTION RESOURCE GUIDE 41 (2021) (providing guidance on embracing community input and lived experience), https://www.childwelfare.gov/pubPDFs/guide_2021.pdf.

[193] Kenneth V. Hardy, *Antiracist Approaches for Shaping Theoretical and Practice Paradigms*, *in* ANTI-RACIST STRATEGIES FOR THE HEALTH AND HUMAN SERVICES 125, 126 (Mary Pender Greene & Alan Siskin eds., 2016).

[194] *Id.* at 125.

[195] *Id.* at 128.

[196] *Id*. at 132.

[197] CASEY FAM. PROGRAMS, DO PLACE-BASED PROGRAMS, SUCH AS FAMILY RESOURCE CENTERS, REDUCE RISK OF CHILD MALTREATMENT AND ENTRY INTO FOSTER CARE? 2 (2019), https://caseyfamilypro-wpengine.netdna-ssl.com/media/SComm_Family-Resource-Centers.pdf. In line with this recommendation is the work of the Los Angeles County Dual Status Workgroup, established in 2018 by the County Board of Supervisors. INTERSECTION, *supra* note 12, at 13. The workgroup identified supporting resource centers as an Action Area and key strategy for preventing dual system involvement of child welfare-involved youth.

family experiences a crisis, these centers can provide a variety of resources to help stabilize situations and promote protective factors. Such centers generally utilize a strength-based approach that is culturally and linguistically reflective of the community in which they exist.[198] In contrast to the history of ignoring or excluding low-income communities and communities of color, this reorientation invests in these communities. Furthermore, this approach builds bridges between families experiencing challenges and their communities, empowering both, rather than continuing to support a power dynamic that relies on subordination. Preliminary research suggests that these programs produce positive outcomes and provide a significant return on investment.[199]

Finally, systems must be held responsible for change. Leaders at the local, state, and federal levels all have roles to play in creating system accountability. The National Committee on Assessing Juvenile Justice Reform of the National Research Council suggests that local leaders must be responsible for identifying the scope of the issue in their community while state leaders must prioritize reform to eliminate disparities and provide oversight of and funding for local efforts to reform policy and practice.[200] In addition, the federal government must strengthen requirements designed to address disparities and hold states accountable for compliance.[201]

Among the characteristics of promising reform strategies is increased transparency regarding the scope of disparities and the effectiveness of efforts to reduce them.[202] As a preliminary matter, this requires the collection of local and state data highlighting disparities in the experience of Black youth and families in both the child welfare and youth justice systems.[203] Additionally, there must be consistent reporting and review of data indicating whether reform efforts have been effective in reducing these disparities. The importance of data collection, analysis, and reporting cannot be overstated, yet local jurisdictions typically struggle to ensure routine consideration of data points that can effectively illustrate problems and provide evidence of what may or may not be working to address those problems.[204] Oftentimes, system leaders and

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Id. at 13-14. Furthermore, the Workgroup identified several action items centered on reorienting the power structure between families and systems, including prioritizing "the voices of children, youth, and families at all stages of child welfare decision-making;" keeping "children and youth with their families whenever possible;" and "when out-of-home care is necessary, ensur[ing] that decisions are informed by children, youth, parents and family members . . . ." *Id.* at 14.

[198] CASEY FAM. PROGRAMS, *supra* note 197, at 3.

[199] *Id.* at 4.

[200] NAT'L RSCH. COUNCIL, *supra* note 181, at 240.

[201] *Id.* at 300.

[202] *Id.* at 237-38.

[203] One example of a data-driven reform effort is the Juvenile Detention Alternative Initiative (JDAI). *See JDAI Core Strategies*, ANNIE E. CASEY FOUND., https://www.aecf.org/work/juvenile-justice/jdai/jdai-core-strategies (last visited Sept. 25, 2021). JDAI guides jurisdictions in "improving racial and ethnic equity by examining data to identify policies and practices that may disadvantage youth of color at various stages of the process, and pursuing strategies to ensure a more level playing field for youth regardless of race or ethnicity". *Id.*

[204] NAT'L RSCH. COUNCIL, *supra* note 181, at 299.

personnel simply lack the understanding of how to interpret and use data effectively.[205] Other times either the will or the resources necessary to institute and maintain data collection and analysis practices are lacking. A commitment to centering reform efforts around the elimination of disparities is necessary to overcoming resistance or remedying underinvestment.

Although some states and local agencies have engaged in analysis of race and ethnicity data to identify the existence and scope of disproportionality and disparity,[206] there must also be responsibility for eliminating those conditions. Jurisdictions are urged to set goals and measure progress toward those goals.[207] This can be aided by the creation of structures or bodies to oversee and guide these efforts, and to hold leaders accountable for results.[208] The results for which leaders are accountable must reflect the values of child well-being; connection to family, community, and culture; and the elimination of racial disparities at every stage within the child welfare and youth justice systems.[209] Government funding should reflect these priorities and some measure of funding should be made contingent on systems achieving positive outcomes in these domains.

Most importantly, this article proposes that the duty of systems and leaders extends beyond the data collection, analysis, reporting, and oversight of reform efforts—all of which have been key aspects of reform efforts for many years, while disparities persist. What is suggested by the research and the potential consequences for Black dual status youth explored above is the urgent need for communities to reckon with the racism that exists within their structures and engage in anti-racist work to disrupt them. Government leaders must require, and communities must demand, that the systems of law

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[205] CTR. FOR CHILD.'S L. & POL'Y, *supra* note 10, at 26-27. Extensive guidance on the strategic use of data in reducing disparities is provided in the Center's Racial and Ethnic Disparities Reduction Practice Manual. *Id.*

[206] ORONDE MILLER & AMELIA ESENSTAD, STRATEGIES TO REDUCE RACIALLY DISPARATE OUTCOMES IN CHILD WELFARE 1, 8-9 (2015), https://cssp.org/wp-content/uploads/2018/08/Strategies-to-Reduce-Racially-Disparate-Outcomes-in-Child-Welfare-March-2015.pdf.

[207] BERNABEI, *supra* note 183, at 5.

[208] For example, Senate Bill 758 passed in Texas in 2007 established Disproportionality Specialist positions throughout the state as well as a Disproportionality Manager under the Assistant Commissioner for Child Protective Services. *See* MILLER & ESENSTAD, *supra* note 206, at 8. Among the duties of the Disproportionality Specialists is coordinating regional committees and supporting extensive training on racial equity. *Id.* A Minnesota effort included the convening of a Statewide Advisory Committee that for years routinely reviewed local jurisdiction data trends and policy and practice reforms and identified challenges requiring support from state officials. *Id.* at 9. Creation of the Advisory Committee was mandated by the state legislature. *Id.*

[209] For example, the Dually-Involved Youth Initiative in Santa Clara County early in its work identified a set of guiding values for its efforts to better serve dual status youth, including the statement that "[o]ur work is guided through the lens of reducing racial disparities within the juvenile justice and child welfare systems." *See* JOHN A. TUELL ET AL., ROBERT F. KENNEDY, CHILD'S ACTION CORPS, DUAL STATUS YOUTH – TECHNICAL ASSISTANCE WORKBOOK 60 (2013), https://rfknrcjj.org/images/PDFs/Dual-Status-Youth-TA-Workbook-Cover.pdf.

enforcement, child welfare, and youth justice adopt and incorporate anti-racist policies and practices and that system leaders be accountable for implementing them.[210]

CONCLUSION

Dual status youth provide the most comprehensive view into the issue of disproportionality and disparities that have plagued child-serving systems since their inception. Rather than viewing each system in isolation, the plight of dual status youth forces us to recognize the shared history of exclusion, dehumanization, and mistreatment of Black youth by our government systems. To be sure, other systems are similarly culpable, including the school system in no small part. Nevertheless, the examination of racial discrimination and the part it has played in our child welfare and youth justice systems is a powerful starting point for the discussion and actions necessary to disrupt the persistent problem of racial inequities for youth. To approach system reform with an understanding of the deleterious effects of this trajectory disproportionately experienced by Black dual status youth provides a pathway beyond reformation into true transformation.

[210] *See* MILLER & ESENSTAD, *supra* note 206, at 16. *See also* Jessica Pryce, *What Will It Take for the Child Welfare System to Become Anti-Racist?*, IMPRINT (June 25, 2020), https://imprintnews.org/child-welfare-2/what-will-take-for-child-welfare-system-become-anti-racist/44702.

Legislative Update:

The Strengthening Protections for Social Security Beneficiaries Act Fails to Improve Foster Youth's Awareness of their Federal Benefits.

Abigail Mitchell[*]

I. INTRODUCTION

In 2018, Congress passed the Strengthening Protections for Social Security Beneficiaries Act (Strengthening Protections Act) which attempted to remedy child welfare agencies' lack of representative payee reporting when they claimed foster youth's federal benefits. However, a 2021 Government Accountability Office (GAO) report found that most states have failed to implement data exchanges with the Social Security Administration (SSA) in compliance with the law.

In April of 2021, the Marshall Project reported that child welfare agencies were receiving federal benefits on behalf of foster youth without their knowledge. Rather than providing additional services for those children based on an individualized assessment of heightened needs, in some cases, states were outsourcing applications to a private contractor and funneling the federal benefits into the state general fund. Because foster children are generally not required to pay for their care, specific information about how states are spending garnished federal benefits is imperative to avoid violating beneficiary foster youth's due process rights. Yet, states have consistently failed to provide a detailed accounting of how Social Security Supplement Income (SSI) or survivor benefits (OASDI) are being spent and collecting data through the Strengthening Protections Act has proven difficult.

For young adults in the foster care system, receiving SSI or OASDI benefits can be life changing. Moving forward, states must implement the required data exchanges with SSA so that advocates and foster youth can better hold child welfare agencies accountable for how their federal benefits are being spent.

II. FEDERAL BENEFITS AVAILABLE TO CHILDREN IN FOSTER CARE

A child is eligible for SSI if they are disabled and meet the income and resource limits imposed by law. Benefits must be used to support the beneficiary's current maintenance, including the costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items. Because the funding is based on current maintenance, the SSA requires rigorous accounting of expenditures, and few funds can be conserved for later use.

OASDI benefits are intended for unmarried minors whose parents or guardians were eligible for certain benefits and have passed away. These funds can be saved without

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penalty for future use. Since OASDI funds do not need to be put toward current maintenance, less reporting is required.

Given that foster children are not able or expected to pay for their state care, a representative payee is appointed to spend federal benefits on the child's behalf and report to the SSA regarding how the funds are spent.

Because young adults emerging from foster care generally have less support from their parents than the general population, providing federal benefits to foster youth can help allow foster youth to participate in higher education or obtain financial security.

OASDI and SSI benefits provide integral help for young adults emerging from the foster care system. SSI maintenance payments could be utilized to provide heightened services for high needs children at an individual level while a child is under state supervision or utilized to aid family reunification efforts. Instead, states fail to engage in rigorous accounting and may divert federal benefits to the general state fund. Child development studies have found that the average age of financial self-sufficiency for American youth now extends into the mid-twenties. Foster youth are expected to be fully self-sufficient much earlier without any financial contributions from parents. OASDI benefits could be conserved for foster youth's education or large expenses to help them obtain self-sufficiency. Instead, many foster youths' futures are undermined when state representative payees fail to conserve funds on their behalf.

III. STRENGTHENING PROTECTIONS FOR SOCIAL SECURITY BENEFICIARIES ACT

Prior to 2018, foster children were liable for accidental SSA overpayments even when the state was receiving the benefits on their behalf. Former foster youth's credit could be marred by overpayments. To correct this, Congress passed the Strengthening Protections Act. The law clarified that states were liable to repay minor beneficiaries' overpayments and states could not use conserved minor's funds to repay the SSA.

Section 103(a) of the Act directed SSA to enter into agreements with states to share and match SSA and child welfare data. The goal was to remedy the lack of available information on how many children had federal benefits that were being funneled to states by identifying representative minor beneficiaries who are in foster care. States are required to report this data monthly to ensure that if a child's foster status shifted, an appropriate payee could be located. The law also required that the GAO report to congressional committees on issues related to foster care beneficiaries based on this data.

Section 103(a) promised transparency and foreshadowed potential future legislative moves should the data compiled by this data-exchange schema prove to show a larger issue affecting huge swathes of children. Unfortunately, over the past three years, states have failed to comply with the law.

IV. IMPLEMENTATION CHALLENGES HAVE OBSCURED ESSENTIAL DATA COLLECTION

According to a GAO report released in June of 2021, over the last three years the SSA designed a data system, developed a model exchange agreement, produced a starter

kit for states on what information had to be reported, and held webinars explaining the data exchanges. Despite this, the GAO found that as of April 2021, only fourteen states are actively exchanging data with SSA (Alabama, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maine, Nebraska, Nevada, Ohio, South Dakota, Vermont, and Virginia). Of the fourteen states reporting data, most self-reported that they used almost all federal funds on current maintenance with less than 15% being conserved on the child's behalf. Only thirty-one states have entered into data exchange agreements at all (Alabama, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maine, Nebraska, Nevada, Ohio, South Dakota, Vermont, Virginia, Arizona, California, Massachusetts, Montana, Tennessee, Texas, Utah, Alaska, Florida, Hawaii, Kansas, Louisiana, Maryland, Missouri, Oregon, Rhode Island, West Virginia).

The Strengthening Protections Act signaled a shift away from the view that all child welfare agencies were always acting in the best interest of children when they garnished their federal benefits. The act promised a measure of transparency, if only between bureaucratic structures. However, since there has been no meaningful implementation, the number of children in foster care whose benefits are being handled by the state remains elusive.

V. PRIVATIZATION OF REPRESENTATIVE PAYEE APPLICATIONS

The lack of data on the number of youths in foster care that have state representative payees is even more unsettling considering the uptick in private contracting of SSI and OASDI applications. Turning to for-profit companies to mine through a child's private health records, caseworker notes, and school records began during the Reagan Era. Many states utilize a private contractor to apply for federal benefits on behalf of foster youth for the first time. Many contractors boast about their ability to identify disabled children, (particularly those suffering from post-traumatic stress disorder, which is a known symptom of foster care placement) and successfully apply for federal benefits that will be paid to the state on the child's behalf. One such company, Maximus, advertised their SSI advocacy project, stating that the cost of their services can "pay for themselves." In essence, funds intended for disabled children will be utilized by states to repay private contractors for their labor. Because most states do not require that children be notified when federal benefits are being paid to states on their behalf, the child, their representation, their parents, and other family court stakeholders remain unaware of the existence of the federal benefits.

VI. MOVING BEYOND THE LAW: UNIVERSAL NOTICE REQUIREMENT

The Strengthening Protections Act was a promising beginning to better understand whether states are handling foster youth's federal benefits appropriately. Yet, advocates have asserted that the Act fails to go far enough, especially regarding the lack of due process afforded to foster youth. Advocates argue that providing children with due process includes providing all stakeholders in a family court proceeding with notice of receipt of federal benefits and potential exploration of how the resource is spent.

In 2003, the Supreme Court held in *Wash. Dept. of Soc. And Health Servs. v. Keffeler* that Washington state could constitutionally use SSI to reimburse itself, but the Court tasked the agency, as a representative payee, to ensure that the use of funds best serves the child's best interest. In other words, the Court rejected the argument that the large-scale practice was unconstitutional. The Court failed to address the petitioners' argument that the practice violated foster youth's procedural due process rights.

In a class action suit in Alaska in 2019, more than 250 current and former foster children demanded that the state pay back their SSI funds. The court mandated notice when the state sought to garnish their federal benefits because children had a significant privacy interest in their benefits that should not be erroneously deprived and the burden of providing notice was low.

In 2018, Maryland opted to build transparency into their family code. The law required that a foster child's legal counsel be notified when states apply for federal benefits on their behalf. The law also required some funds be conserved for emerging adults. The Texas state legislature is currently considering a bill that would require that every foster child's lawyer be notified about their benefits. It would also offer protected trust accounts to hold a portion of the funds until the children reached adulthood and provide for continued screening of foster children for SSI eligibility so that state agencies continue to help children apply for benefits despite the fact they may no longer have a financial incentive to apply.

As evidenced above, for states that aggressively advocate or litigate this issue, greater transparency generally follows. However, States have not universally adopted notice requirements. Some states say that they provide information about federal benefits in children's case file, allowing the child's lawyer to access the information. But almost all states declined to comment on their specific notification practices. Many admitted that they do not provide an explanation to children, their family, or advocates about their federal benefits. While SSA attempts to provide notice to a child's guardian or their parents if a representative payee changes, critics have noted that in most cases, a foster child's guardian is the child welfare agency and new applications do not warrant notice to parents or foster youth's legal representatives.

Most family court stakeholders remain completely unaware of potential SSI or OASDI funding. Many children and families are unaware that federal benefits have been applied for on their behalf let alone *how* that money is being spent. A broad notice requirement would allow family court stakeholders to gauge how federal benefits are being used on behalf of an individual heightened needs child and curb potential misappropriation of the funds.

VII. CONCLUSION

The Strengthening Protections Act was enacted to better protect children from bureaucratic ineptitude. Instead, Section 103(a) has been largely ignored by state child welfare agencies. Enforcement of data collection between states and the SSA would be a positive first step towards greater transparency to prevent unfair usage of funds. Still, greater protections should be enacted. Foster youth with elevated needs remain

vulnerable and invaluable benefits that could have helped emerging foster children prepare for self-sufficiency are being squandered. Family court stakeholders should be broadly provided with notice when the state applies to be a child's SSI or OASDI representative payee and state agencies should be held accountable for how those funds are spent. Foster children need to be able to have a say in their care. An equitable foster system would execute large-scale data transparency to illuminate when state welfare agencies are erroneously depriving children of their funds and demand actual notice when foster children's federal benefits are garnished by the state.

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Around the World:

Indigenous Children in Canada's Foster Care System: Bill C-92 and the Importance of Cultural Identity

Elizabeth Newland[1]

I. INTRODUCTION

The history of colonialism has negatively impacted Indigenous people in Canada since the 1800s and the child welfare system has exasperated this impact. The current state of the Canadian child welfare system exists as a system akin to traditional residential schools due to the disproportionate representation of Indigenous children. The racial make-up of the foster care system continues to diminish Indigenous culture and history by stripping children from their communities. The Canadian child welfare system has a history of erasing Indigenous culture that legislation must address to preserve the connection between Indigenous children in the foster care system and their unique culture.

This article addresses the historical colonization of Indigenous people in Canada and how this is continued through the Canadian child welfare system. It will examine the history of colonialism of Indigenous children in Canada, specifically through the creation of residential schools, the increase of Indigenous children in foster care through the Sixties Scoop, and the current state of the Canadian child welfare system. The article then will explain the importance of protecting and enhancing Indigenous culture, especially in foster care. Finally, while recognizing that Canada has worked to rectify the actions of the past, this article will explain why the current foster care legislation, Bill C-92, falls short of the cultural protection of Indigenous children in the foster care system.

II. HISTORY OF COLONIALISM OF INDIGENOUS CHILDREN IN CANADA

A. Creation of Residential Schools

The Indian Act of 1876, enacted by the Parliament of Canada, gave the Canadian government the power to control Indigenous people's identities, political structure, systems of governance, and right to educate their children. First Nations people, also called Indigenous or Aboriginal, are the first people to inhabit the land that was colonized by what is now the country of Canada. The Act put stringent restrictions on Indigenous rights with the intent to produce good, moral Canadians. It did this by outlawing Aboriginal government systems, restricting their ability to practice religious ceremonies, and forcing their children away from the tribes. This bill also required First Nations children to attend either industrial or residential schools.

Government and church-run residential schools became an official part of Indigenous colonialism in the late 1800s. The Canadian government and Christian churches created

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these schools to educate, convert, and assimilate Indigenous children into Canadian society. The school's goal was to turn the children into upstanding, industrious workers and productive members of Canadian society. These schools physically abused students through severe beatings, isolation, and food depravation, did not have adequate funding or resources, and did not offer a quality education. The government forced roughly 150,000 kids to attend these schools. Because the schools did not keep accurate records, the number of attendees and those that ultimately died at the hands of the school's abuse may not be completely accurate. Most of these schools began to close in the 1970s; however, the last federally funded school officially closed in the 1990s.

B. Sixties Scoop

The Sixties Scoop refers to the intentionally increased placement of Indigenous children in the foster care system from the 1960s-1980s as part of the aftermath of the residential school program. For example, in 1954 only 1% of children in care were indigenous in British Columbia, but by 1964 indigenous children made up 34% of all children in care. Increased removals occurred due to lack of culturally relevant training by child protective services. Social workers would remove Indigenous children from their homes because the homes did not conform with their Eurocentric ideals of a proper living environment. This included only having traditional and natural foods and wider societal problems like poverty and unemployment. The increase of children in foster care led to an increase in adoptions of Indigenous children by non-Indigenous families. One in three Aboriginal children were separated from their families through adoption or fostering by 1970. Scholarly statistics and reports about the disproportionality of Indigenous children removal during this period led to provincial policy changes that were theoretically supposed to address and end this practice. However, the reality and legacy of the sixties scoop did not end with new research. The Sixties Scoop paved the way for the current state of Indigenous overrepresentation in the Canadian foster care system.

C. Current Day Welfare System

Indigenous children are currently overrepresented in the Canadian foster care system. Indigenous children are placed in the state's care at thirteen times the rate of non-Indigenous children, even though they only make up less than 10% of the population of children in Canada. This equates to Indigenous children making up 50% of the entire foster child population. Most of these children are placed with non-Aboriginal families outside of their community group. The foster care system does not consider racial or cultural identities in foster placements; therefore, the government places most Indigenous children outside their community. After removal, caseworkers are supposed to attempt to place children with other family members outside their homes. However, when that is not possible, the government places these children with other willing foster families, most of whom are not Aboriginal. For example, in the province of Ontario, 40% of the children in foster care are Indigenous, while only 4% of the foster parents share this racial and cultural background.

D. Mass Graves

The continuous uncovering of mass graves associated with residential schools shows that the dark history of cultural erasure of Indigenous culture is far deeper than what meets the eye. These uncoverings started in 2015, with the most recent uncovering this year in Kamloops, British Columbia. The remains of 215 children were uncovered and continue a tragic pattern of mass, unmarked children's graves. The impact of this colonial system continues to show the loss of an entire generation of Indigenous children and its continued ramifications on the child welfare system.

III. THE IMPORTANCE OF EMPHASIZING CULTURE WITHIN THE FOSTER CARE SYSTEM

The uncovering of the Kamloops mass grave is yet another indication of the immense loss of culture due to a generation of abuse and premature death. Although residential schools alleged their purpose was to raise children to be upstanding members of Canadian society, it is now evident that the residential school's actual purpose was to eradicate the way of life of Indigenous children. This cultural erasure continues through the placement of children in foster care and the lack of consideration of their background and Aboriginal identity.

A strong cultural identity is important for all children. Being in foster care away from one's home greatly lowers a child's cultural sense of self. A strong cultural identity leads to greater self-esteem, higher education levels, better psychological adjustments, improved coping abilities, decreased levels of loneliness and depression, and an overall better social wellbeing. Emphasis on supporting and nurturing a child's sense of self-identity can strengthen their emotional growth.

The removal of Indigenous children from families and communities amplifies a generation of culture lost due to premature deaths and trauma at the hands of residential schools. These children are put into foster care with little to no recognition of their cultural practices, traditional food, holidays, clothing, and language. Indigenous children in foster care further the cultural erasure the residential schools began.

Indigenous children who grow up with non-Indigenous parents grapple with conflicting feelings of losing their birth culture, gaining an adopted culture, and ultimately must become "reacquainted with the most marginalized and oppressed group within Canadian society." Being in foster care can be a traumatizing and difficult transition for all children. Moreover, the stripping of Indigenous identity adds another layer of confusion and harm to children. Taking a child from a strong background and placing them with adults who do not know cultural customs or traditions can cause the child to experience increased mental and emotional pain.

Even before legislative and structural changes, there are steps that government agencies can take to foster culture within the foster care system. This might come in the form of increased emphasis on kinship care, which places children with other relatives, as well as community placement. Additionally, the government should emphasize better

family support services as a preventative method and culturally relevant practices when removal is necessary. Further, allowing for increased visits and community connections while children are in foster care is another way to keep Indigenous culture alive and growing. Culture and identity should be a central consideration of Indigenous child removal.

IV. CANADIAN LEGISLATION TO IMPROVE CULTURAL CONNECTEDNESS IN FOSTER CARE: BILL C-92

The Canadian government has taken substantial steps to begin the healing process stemming from the creation of residential schools through formal government apologies, the creation of the Truth and Reconciliation Committee, and monetary reconciliation settlements. Yet, there is a lack of legislative backing to ensure the protection of Indigenous culture within the foster care system.

The United States (U.S.) falls behind Canada in many ways regarding recognizing and reconciling its imperialistic relationship with Native Americans. However, the U.S. Congress passed the Indian Child Welfare Act (ICWA) of 1978 to combat the overrepresentation of Native American children in foster care and strengthen tribal communities. ICWA is one of the gold standards of Indigenous family services law. The strength of the American ICWA comes from the recognition of tribes as nations equipped with their own court system that retains jurisdiction over these cases. This extra layer of protection helps ensure that children are cared for by the tribal community and stay connected with their tribe's culture. It also allows tribal leaders to protect and strengthen the next generation of Indigenous people.

In early 2019, the Canadian government enacted a similar bill, Bill C-92, to combat the Indigenous inequalities in the foster care system. Scholars and officials have described Bill C-92 as the Canadian equivalent to ICWA. The government, Indigenous groups, provincial, and territorial partners drafted this bill to keep Indigenous children and youth connected to their families, communities, and culture. Bill C-92 addresses the first five points of Canada's Truth and Reconciliation Commission's Call to Action. The government formed this committee to provide a direct avenue for survivors of residential schools to share their experiences and hold the government accountable for their atrocities. Overall, this act attempts to protect the best interest of children by supporting Indigenous group jurisdiction over child and family services, addressing concerns laid out by the Canadian Truth and Reconciliation Commission, and increasing funding for these services.

While Bill C-92 takes initial steps towards stronger cultural protection for Indigenous children, aspects of the bill fall short of this goal. One criticism of the bill is the lack of tribal courts in Canada. The U.S.' ICWA is enforced and monitored by the 400 individual tribal court system. This system allows for increased accountability and self-governance in child welfare matters of Indigenous children. Tribal courts are necessary to ensure that Indigenous groups have the means and ability to have jurisdiction over children in foster care. Bill C-92 acknowledges Indigenous people's right to self-governance and jurisdiction over child and family services. Despite this acknowledgment, there is still a

disconnect between Indigenous governmental groups and provincial government standards.

A child living with an Indigenous family on a reserve or specified area falls under three distinct and conflicting jurisdictions: the federal government, the provincial government, and the Indigenous group. These three different governments often conflict when caring for the child. The conflicting jurisdictions are so problematic that Indigenous groups advocated for Jordan's Principle. The Canadian government enacted Jordan's Principle after an incident in which a First Nations foster child was unnecessarily left in a hospital for two years and ultimately died as a result. The government left the child in the hospital because of a jurisdictional dispute between the Province of Manitoba and the federal government regarding his at-home care. This payment dispute resulted because of his status as a First Nations foster child.

Bill C-92 provides only limited jurisdictional rights to Indigenous groups in child welfare matters. It limits their jurisdiction by stating that Indigenous laws can only be used if they are in the child's best interest. However, this stipulation still allows for almost unrestricted oversight and interference by non-tribal courts. So, while Indigenous groups are technically self-governing, other government bodies are often involved in much of the decision-making. While the bill allows for the gradual recognition of Indigenous jurisdiction, it does not adequately address the jurisdictional dilemmas faced by children in foster care.

V. CONCLUSION

While Bill C-92 needs improvement, it should be recognized as an incredibly powerful and important step towards reconciliation and rectification of a historically rooted problem. Bill C-92 specifically addresses point four of the Call to Action: "We call upon the federal government to enact Aboriginal child-welfare legislation that establishes national standards for Aboriginal child apprehension and custody cases." This bill is the first step to a more comprehensive policy that nurtures and emphasizes the importance of Indigenous culture and sovereignty. While this bill will not single-handedly or immediately change the structure of the Canadian child welfare system, it does promote growth and cultural healing.

Bill C-92 is the start of a nationwide attempt to make the child welfare scene more culturally competent and responsive to the Indigenous population by focusing on a community-centered approach to child and family safety. No amount of legislation or culturally relevant decision-making will undo the past injustices to all Indigenous folks. Despite this, there is hope and potential for a stronger community, cultural identity, and sense of belonging in the Indigenous community because of Bill C-92.

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Education Connection:

Schools Still Struggle with Compensatory Education Despite Coming Back to the Classroom

Alexa Valenzisi[1]

I. INTRODUCTION

Compensatory education is a common remedy among school districts to make sure children with disabilities are provided with their constitutional right to an appropriate education. Compensatory education provides students with disabilities additional programs or services so that child can receive their constitutional right to an appropriate education. These services can range from extended school years to providing a student with behavioral therapy. As schools wrestle with the myriad of challenges coming back to the classroom after the COVID-19 pandemic forced students to participate in online learning, compensatory services render themselves necessary in ways schools have not previously encountered. Autistic students, particularly, have faced social, emotional, and educational regressions, and schools must provide compensatory services as these students return to school to meet the goals laid out in their individualized education programs (IEPs). Though the COVID-19 pandemic has changed how schools provide compensatory education services, there are still compensatory education challenges schools face as autistic students re-enter the classroom.

II. EDUCATION LAW BACKGROUND

Section 504 of the Rehabilitation Act of 1973 protects the rights of individuals with disabilities within programs that receive federal funding. In this regulation, the government requires schools to provide students with disabilities a free appropriate public education (FAPE). A FAPE differs from student to student. Although each student comes with their own unique disability, state and federal legislation have tried to create a baseline for schools to follow to make sure each student does receive a FAPE in the least restrictive environment (LRE). Sometimes, however, students do not receive a FAPE for various reasons. These reasons can range from an inefficient and ineffective IEP to a global pandemic.

When students do not receive a FAPE, compensatory education - which is defined as an additional program or service to help students achieve a FAPE - is an equitable remedy that schools can employ either at their own discretion, or after a hearing officer mandates the school to provide it to a student. Courts have repeatedly upheld the constitutionality of compensatory education as a remedy for a lack of a FAPE.

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As a result of the COVID-19 pandemic, the U.S. Department of Education provided schools with general guidelines that laid out ways to rectify the lost in-person education time through compensatory education services. It is important to note that compensatory education is not a substitution, but rather a supplement, to provide students with a FAPE.

III. AUTISM SPECTRUM DISORDER AND CHALLENGES WITH THE COVID-19 PANDEMIC

A. Defining Autism Spectrum Disorder

According to the American Psychiatric Association (APA), autism spectrum disorder, also known as "autism" or "ASD", is defined as "a complex developmental condition involving persistent challenges with social communication, restricted interests, and repetitive behavior." Common IEPs for students with autism address social and behavioral skills, as well as educational concerns. One of the most beneficial elements of school for autistic students is interacting with typically developing students and learning certain social behaviors and etiquettes.

B. Concerns During Remote Learning

During remote learning due to COVID-19, parents were concerned about their autistic children's social, emotional, and academic development. One of the major issues for students with autism surrounding COVID-19 was the lack of social opportunities to better their socialization skills. When schools were completely virtual, there was no option for any students with disabilities to practice any socialization skills with their peers. Schools were entitled to provide special education services through a set plan for students with IEPs during online learning. These plans focused heavily on equal access to technology and other support tools. Even with plans in place, not every child with a disability who needed a FAPE received one through online learning.

Children with autism require compensatory services that address both social and emotional needs during remote learning. Some common concerns regarding compensatory education included, but were not limited to, lack of internet access, no opportunity for their child to socialize with typically developing students, or a lack of services that the student's IEP deemed necessary to achieve a FAPE. Before the pandemic, schools often received compensatory education requests, but the online learning environment raised new concerns that led parents to believe their child was not receiving a FAPE. Schools had to figure out new solutions to these new concerns quickly as online learning became the "new normal."

It is important to note that during COVID-19, students were entitled to services "as appropriate." This delineation between an "appropriate" education and "the best" education for students with disabilities has always been a point of contention between parents and school districts – as the law only demands an appropriate education – but courts did not veer from this distinction during COVID-19. Still, there were clear cases

where the IEP goals were not met, and therefore, the child was entitled to compensatory services.

C. The Process to Determine Who Receives Compensatory Education Services

The best way for a parent to ensure their autistic child receives compensatory education, specifically because of an online learning environment, is to show, through data, that the child regressed in their skills. Again, because each student is different, each regression would look different, and schools analyze them on a case-by-case basis. The most common method to demonstrate a child's need for a compensatory education service would be to look at the child's IEP and see what goals the IEP team laid out for them. Then, the parent would need to track their child's progress throughout the virtual learning period through charts, videos, or diaries. Once the data was complied, the parent would have to show the school that at the beginning of COVID-19, their child exceeded in a certain number of skills at a certain level. The parent would then have to show that there was a regression in those skills, specifically that the child was not achieving as many goals at the rate they were before school went online. It is the parent's burden to prove to the hearing officer that their child is entitled to compensatory education services because the school did not provide their child with a FAPE. If a parent were to successfully proves this, the child is eligible to receive compensatory education services.

The school, likewise, predominately evaluates the child's level of academic performance when determining who is entitled to compensatory education. If the performance level was below what it was before school closures and online learning began, the IEP team will need to provide more services to the child to make up for the lost time and educational benefits the child missed out on. A child can be eligible for compensatory education for other reasons as well, such as a delayed IEP implementation, or if the hybrid or online services do not meet the child's needs.

Schools will award compensatory education in either a quantitative or qualitative manner. The quantitative approach provides the student an hour-for-hour replacement of learning for the educational time lost. The qualitative approach, which courts tend to administer more often, focuses less on the time lost, and rather addresses the educational experience and benefits the child did not receive. The Department of Education lays out foundation for schools to adhere to compensatory education regulations. One of the most common methods is through an extended school year (ESY). ESY provides additional schooling outside normal school hours, usually during the summer. But because of COVID-19, the ESY was online, so schools had to think outside the box to provide students with a FAPE, specifically addressing social and behavioral skills. Schools attempted this in multiple ways, such as paying for behavioral therapy services and tutoring during online learning.

D. Concerns During In-Person and Hybrid Learning

As schools begin to go back to in-person learning, compensatory education still needs to be addressed, especially as it relates to autistic students. These students will still

struggle with socialization and certain behavioral changes as the new interface of in-person classrooms and learning environments come back. The adjustment to going back to in-person class is difficult for all students, and students with autism are absolutely no exception to this rule. Not only have students with autism lost certain levels of academic performance, but they may not understand the social implications of coming back to in-person classes. For example, students with autism may not be able to pick up on social cues in the classroom because of the mask mandates that require their teachers and peers to wear masks. Without the entire face to see facial expressions, students with autism are still losing valuable social skills that the classroom previously provided them. Moreover, students with autism may not be able to understand the need for social distancing and might require more sensory stimulation than what a socially distanced class can provide them with.

Compensatory education should not be neglected simply because students are back in the classroom. The need for compensatory education does not go away when students, specifically those with autism, are in person. Schools also need to acknowledge that students with autism still face a barrier when learning how to socialize, and parents should persist in their claims that their child is entitled to compensatory education services.

IV. RECOMMENDATIONS TO IMPROVE COMPENSATORY EDUCATION

Across the country, special education teams need to reinvent how they implement compensatory education services. There is no question that schools are run thin with resources and financial means to provide each student compensatory education. But despite being in unprecedented times, schools still must provide students with disabilities a FAPE. Schools are provided with financial resources, such as grants, to give students proper compensatory education services. However, schools will need to be more savvy than usual when conducting remedies to adhere to compensatory education regulations, as COVID-19 caused remedial measures for the lack of in-person learning in a way school districts had never experienced before. The Individuals with Disabilities Education Act (IDEA) has laid out certain ways for schools to ensure appropriate compensatory education services are provided to students, but these regulations are purposely vague, as each child requires their own unique IEP and goals. IDEA articulates that the IEP teams should focus on the delivery, timing, and frequency of the compensatory services.

As stated previously, courts typically lean more towards qualitative approaches to provide students with compensatory education. This qualitative approach - which focuses less on the educational time lost, but rather the experience and skills lost - should continue to be the trend, especially after COVID-19. Schools are overwhelmed with the number of students who are entitled to compensatory education and the amount of time lost in the classroom to the point where a quantitative approach would be nearly impossible to achieve. The qualitative approach allows school districts to use different methods to provide students with compensatory education. Notably, compensatory education services can be provided not only by the school, but also by private providers

any time before or after school, weekends, or during school breaks. This allows for the school to broaden their options for how to remediate the lack of a FAPE. For example, schools have previously employed this by paying for behavioral therapists or tutors to come and supplement lost educational time.

Schools need to look at other ways to outsource compensatory education services to take some of the burden off the teachers and staff within the district. While providing an extended school year is still an effective way to provide autistic students with compensatory education, the school might lack the resources to do so for every child that requires it. Instead, schools may want to send their students to camps, museums, or other places that will teach them skills they regressed in during online learning. For example, if a child with autism is experiencing a regression in behavioral skills, sending them to an aquarium, or field trips like an aquarium trip with their peers on the weekend would be a great opportunity for them to socialize with students outside the classroom. Moreover, the aquarium could have some interactive activities, which would allow the student to practice their social skills, and stimulate their sensory needs, as there can be a "pet the animal" exhibit that a child with autism would benefit from.

The qualitative approach, especially when the world opens up again, allows schools to maximize the time and way in which they can provide students with unique ways to receive compensatory education. The qualitative approach to compensatory education, considering how much time and the way in which students regressed, is the most probable and beneficial method to provide students with compensatory education.

V. CONCLUSION

Compensatory education has been a controversial issue in the special education sphere long before March 13, 2020. However, COVID-19 has expedited not only the concern, but also the need, for compensatory education across the entire country. The need for compensatory education, specifically for students with autism, was clear during virtual learning. Although students are returning to in-person learning, there are still obstacles that schools need to address and rectify.

School districts must be diligent when providing compensatory education to students and should not neglect the need for it even as students return to the classroom. Additionally, schools should focus on a qualitative approach to compensatory education and may need to go beyond ESY and other ordinary remedies to provide students a FAPE.

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Statistically Speaking:

The Future is Frightening: High Levels of Climate Anxiety in Young People Linked to Government Inaction

Helen Wu[1]

I. INTRODUCTION

The climate crisis is one of the defining human and children's rights challenge of this generation and is already having a devastating impact on the physical and psychological well-being of young people globally. According to new research, young people all over the world are experiencing increasing anxiety over the fate of the planet – specifically climate change and how governments are handling the looming crisis. The ones who bear the burden of climate change are experiencing significant and alarming levels of distress.

This article contends that inadequate governmental response is endangering the well-being of young people and the realities of the climate crisis need to be swiftly confronted before conditions worsen. First, this article will address the United Nations Children's Fund (UNICEF) report illustrating the extreme threat that climate change poses to the world's children. It will then discuss the research finding a direct link between the emotional weight of climate change and government inaction. It will further discuss the global movements that young people have led and engaged in in hopes of raising awareness and pushing for government action, including school strikes and litigation. The article will conclude by calling for action to protect not only the physical but also the mental health of young people.

II. THE EXTREME RISKS YOUNG PEOPLE FACE FROM CLIMATE IMPACTS

A 2021 report from UNICEF found that nearly every child on earth is exposed to at least one climate and environmental hazard, shock, or stress such as heatwaves, cyclones, air pollution, flooding, and water scarcity. Approximately 1 billion children – nearly half the world's 2.2 billion children – live in countries that are at an "extremely high-risk" from the impacts of climate change. Astoundingly, 850 million children – approximately one-third of all children – are exposed to four or more stresses. These children face a deadly combination of exposure to multiple climate and environmental shocks with a high vulnerability due to inadequate essential services, such as water and sanitation, healthcare, and education.

The report emphasized that children are uniquely vulnerable to climate hazards as children are less able to survive extreme weather events and are more susceptible to toxic chemicals, temperature changes and diseases. Without the urgent action required to reduce greenhouse gas emissions, children will continue to suffer the most. It called for

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increased investment in climate adaptation and in key services for children, providing children with climate education and greens skills, the inclusion of young people in all climate negotiations and decisions, and ensuring the recovery from the COVID-19 pandemic is green, low-carbon and inclusive.

The results of the report strongly suggest that young people face disproportionate and cascading forms of climate harm. They are and will continue to be adversely affected by the health effects of climate change.

III. THE RESEARCH ON CLIMATE ANXIETY

A new study published in September 2021 in the scientific journal The Lancet[2] found that the majority of young people ages sixteen to twenty-five[3] suffer from high levels of climate anxiety. The landmark study aimed to better understand the feelings, thoughts, and functional impacts associated with climate change among young people. The global study surveyed 10,000 young adults across ten countries (Australia, Brazil, Finland, France, India, Nigeria, the Philippines, Portugal, the United Kingdom, and the United States) and found "widespread psychological distress" among them.

Participants reported a wide range of negative emotions. Six in ten young people feel "very" or "extremely" worried about the climate crisis. More than half of respondents said they had felt afraid, sad, anxious, angry, powerless, helpless, and/or guilty. Nearly half of all young people surveyed said their feelings about climate change negatively affect their daily life and functioning. Three-quarters agreed with the statement "the future is frightening." These emotions are even leading more than one-third of young people to be hesitant about the idea of having children of their own, citing the unstable climate and the added carbon footprint of having kids as reasons.

Most notably, the research discovered for the first time that the climate anxiety these young people were experiencing was significantly related to perceived government inaction: 64% of those surveyed said governments are not doing enough to avoid a climate catastrophe; 61% said governments are not protecting them, the planet, or future generations; 58% said governments are betraying them. On every dimension of trust in authority figures and confidence that those in power were taking the climate crisis seriously, a majority of those surveyed expressed serious doubts that those with the power to address the climate emergency were willing, or able, to do so. The failure of governments to adequately address climate change and the impact on younger generations potentially constitutes moral injury – significant psychological distress caused by witnessing a traumatic event that runs against the viewer's morals, that they are powerless to stop. Not only can moral injury further increase mental health risks, the authors say, but it could also open the door to lawsuits based on psychological harm. The

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[2] The article has been released on a pre-publication basis while it is under the peer review process.

[3] As longitudinal neuroimaging studies demonstrate that the adolescent brain continues to mature well into the 20s, it is important to open up this discussion of the mental health impact of climate change to those we would otherwise consider to be young adults.

study concludes that governments must respond to protect the mental health of young people by engaging in ethical, collective, policy-based action against climate change.

To remedy climate change's negative mental health impacts, the authors propose increased psychosocial resources, coping skills, and agency. This would include having one's feelings and views heard, validated, respected, and acted upon, particularly by those in positions of power, accompanied by collective pro-environmental actions.

IV. OVERVIEW OF YOUNG PEOPLE AT THE FOREFRONT OF THE CLIMATE FIGHT

Young people have been at the forefront of the climate fight for some years. Eighteen-year-old environmental activist Greta Thunberg became a household name in 2018 when she began skipping school to protest outside the Swedish parliament to pressure the government to meet carbon emissions targets. After the Swedish election, Thunberg returned to school but continued to skip classes on Fridays to strike, and these days were called "Fridays for Future." Thanks to social media, her small campaign had a global effect, inspiring thousands of young people across the world to organize their own strikes. By December 2018, more than 20,000 students had joined her in at least 270 cities. The passion and activism of the global movements of Fridays For Future climate strikes have helped to catapult young people's concerns into the political arena.

Youth are not only striking and turning out in the streets, but they are also turning up in court – suing their governments to prioritize their claim to a future. Young people in the Netherlands sued their government in 2013 for inaction on climate change and the court ordered the government to curb carbon emissions by at least 25% by 2020. This was the most pivotal climate lawsuit in the past decade because it was the first tort case taken against a government challenging climate change aspects based on a human rights foundation, and the first such successful climate justice case. The case effectively argued that the government was putting citizens in "unacceptable danger" by setting an insufficient emissions reduction goal of 14-17% and sparked a wave of human rights lawsuits around the world.

Another ground-breaking success emerged in Colombia, where twenty-five young people won their lawsuit against the government in 2018 for failing to protect the Amazon rainforest. The plaintiffs successfully argued that the government's failure to curb deforestation threatened their rights and those of future generations, who will be the ones to suffer the worst climate change effects. The court agreed and ordered the government to come up with a plan to reduce deforestation. What made this case unique was that it recognized the Amazon rainforest as an entity with its own rights. The case had a similar impact as the Netherlands case in that it became a model for similarly fashioned lawsuits in other countries.

In the United States, where judges are traditionally immune from influence from international cases, twenty-one youths aged nine to twenty brought a federal lawsuit in 2015 accusing the government of failing to adequately combat climate change. The plaintiffs in *Juliana v. United States* sought to hold the U.S. accountable for its role in the climate crisis, charging it to work rapidly to reverse and mitigate the crisis by creating policies that phase out carbon dioxide emissions, among other things. In January 2020, a

Ninth Circuit panel dismissed the case on the grounds that that the plaintiffs lacked standing to sue. In February 2021, the *en banc* Ninth Circuit issued an order without written dissents denying the appeal, but lawyers representing the plaintiffs filed a motion in March to amend their complaint. The case is now pending in U.S. District Court, awaiting a ruling on that motion.

V. CONCLUSION

The research sends a very clear – and very worrying – message about young people's valid climate fears. For young people, climate change is the one of the greatest threats to their futures. The generation that is the least responsible for this unfolding crisis bears the brunt of climate-related consequences while possessing the fewest resources to react. Climate change is about not only the health of the planet, but also the health of those who will soon inherit it.

There is now firm evidence that climate anxiety isn't simply caused by ecological catastrophe spurred by human activity – it is just as much related to government inaction. Greater levels of response and commitment by governments can not only help limit the effects of global warming, but they can also have the potential to improve the mental wellbeing of young people around the world. Young people deserve a livable planet and governments, businesses, and other relevant actors must treat climate change like the crisis it is and act with urgency.

It is undeniably past time for decisive and consequential action on the climate crisis. Inaction on the climate crisis is having a severe and damaging impact on young people. Public discourse should move from derogatory terms such as "climate hysteria" to encouraging the expressions of feelings that young people have described. Society must also reject the popular narrative of blaming climate change on individual behaviors and call on governments and powerful entities to act to combat climate change. Young people are alerting to their fears for the future and the world must listen to them and take action.

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Established in 1993, Loyola's Civitas ChildLaw Center is an award-winning program for preparing law students, lawyers, and child-serving professionals to be effective and ethical advocates for children and families. Through teaching, research and service, its nationally-recognized faculty work across a broad spectrum of legal practice, including child welfare, juvenile justice, education, family law, health care, immigration, and international children's rights. The Center offers a comprehensive set of curricular and extracurricular opportunities designed to equip students with the legal knowledge and practical skills they need to work on behalf of children and families in their professional lives.

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Loyola offers graduates of an accredited law school an opportunity to specialize in child and family law through graduate study leading to a Master of Laws (LLM) Degree. Intended for graduates of US and foreign law schools, this degree is tailored to meet the individual background and interests of students and emphasizes interdisciplinary learning, advanced skills training, scholarly research on legal issues affecting children, and international perspectives on children's rights. International students may also receive an LLM in International Law with a concentration in child and family law.

Advanced Degree for Child-Serving Professionals

The only program of its kind in the nation, the Online Master of Jurisprudence (MJ) Degree in Children's Law and Policy is specially designed to give professionals in social work, education, health care, psychology, law enforcement and other disciplines a better understanding of the law and an ability to function more effectively in the legal system on behalf of children and families and to become leaders in their chosen fields. The online format is intended to provide a flexible adult learning environment for busy professionals.

For more information on Loyola's "Degrees of Difference"
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