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**Intersectionality amongst Disproportionate and
Forgotten Numbers within the Child Welfare System**

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Senior Thesis Spring 2021

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Vassar College

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Introduction

From America's conception, racism has been woven into its political institutions and most facets of its social life. The removal of children reflects America's hidden political history concerning Native American populations and Black families. Taking children has been a weapon of the wealthy white populous from the era of slavery to the nineteenth century practice of placing Native American children in boarding schools to contemporary public policies developed during the crack pandemic surrounding the frenzy of Fetal Alcohol Syndrome. These were policies that were fueled by the imagined "horrors" of mischaracterizations about Black and Native infants who were neglected by their mothers. These racialized visions and practices resulted in children of color being taken away from their families at a disproportionate rate compared to their white counterparts based on the assumption that they lacked the appropriate family values. These perceptions were based on racial stereotypes and rooted in social inequities that have disproportionately affected families of color for generations. The children were considered to be an especially vulnerable group that needed the protection and support of the state. Why then are serious discussions about the shortcomings of this system largely absent from the mainstream discourse in this arena? Why have these concerns been neglected? I argue that they have been overlooked because confronting the racism embedded in the foster care system makes Americans feel uncomfortable.

Families of color, primarily poor Black families, are treated differently than white families. They experience prejudice within the child welfare system. They are marginalized because their lives do not fit the white suburban norm: families with one

father, one mother, and 2.5 children. As a result, their voices have been stripped away, their children taken, and their lives uprooted by harsh and sometimes quick inspections that declare their homes unfit. I contend that the current system is unconstitutional. It values and protects one race and cultural background over another. In so doing, it fails to embrace the multidimensionality of families of color. It does not ask why certain communities are overrepresented in the system, or why the stereotype of the Black “welfare queen” is at the center of the mainstream discourse when it comes to stories about foster care.

To dismantle the racialized status quo of this system one must look at its origins as well as the current social and political policies that maintain it. Under its auspices, children are too easily removed by the state from their parents. To resolve these concerns, the courts and case workers must work together to establish proper visitation and treatment programs where and when necessary. Moreover, the rhetoric of the child welfare system and the definition of what is deemed neglect must be re-conceptualized so that we can reach an understanding and appreciation of the implications of distinctive racial and ethnic experiences across the United States.

The Social and Political Origins of Taking Black and Native Children

Early movements toward the foundation of child welfare agencies began in the 1700s. “In the mid-1700s orphans and children whose parents could not care for them

were often simply indentured to work for other families”¹ The children were majority white at the time. “By the early 1800s, private religious and charitable organizations [had] established the first orphanages.”² By 1850, however, there were serious concerns about the social and health effects of growing up in orphanages. Private agencies began the practice of placing orphans with foster families.³ This adaptation seemed like a positive move in the right direction. But, the families who took in children were rarely screened, and the agencies did not monitor their placements. For the most part, anyone willing to take in a child essentially could do just that. It was not until the early 1900s that the first state laws created to prevent child abuse and neglect were passed.

In response, a grass-roots movement was started in 1903 by two early social reformers, Lillian Wald, of New York's Henry Street Settlement House, and Florence Kelly, of the National Consumer's League. Their activism was noted, and it eventually secured the support of President Theodore Roosevelt.⁴ Nine years after launching the initiative for the Children’s Bureau, it was formally embraced when President William Howard Taft signed into law a bill creating a new federal government organization.⁵ Twenty years later, the Social Securities Act of 1935 authorized the first federal grants for child welfare services. These first federal grants were small, but they “served as an

¹ O’Neill Murray, Kasia, and Sarah Sarah Gesiriech. “A Brief Legislative History of the Child Welfare System.” masslegalservices.org, 2004, pp.1

² Ibid., 1

³ Ibid.

⁴ Ibid.

⁵ Ibid.

impetus for states to establish child welfare agencies and to develop local programs to deliver child welfare services.”⁶ In this era during the 1950s, children were denied benefits allotted to them under the rubric of the “suitable home” or “man-in-the-house” policies of the Social Securities Act. Aid payments were denied to children of unwed mothers or mothers who were deemed sexually promiscuous, since such behavior was characterized as immoral.

Overtime, the size of the grants increased and welfare services were expanded to include a broader range of activities. The original Social Securities Act created the Aid to Dependent Children (ADC) program as a way for states to provide financial assistance to children. The program was renamed Aid to Families with Dependent Children (AFDC) in 1962; and then, it was replaced by the Temporary Assistance to Needy Families or TANF, a block grant program, in 1996.⁷

The 1961 amendments to the Social Security Act created the Foster Care component of ADC and established the Flemming rule. This rule “declared that states could not simply ignore the needs of children living in households deemed to be unsuitable.”⁸ The ruling— which was also known as the “Louisiana Incident”— required states to either “provide appropriate services to make the home suitable, or move the child to a suitable placement while continuing to provide financial support on behalf of

⁶ Ibid.

⁷ Ibid., 2

⁸ Ibid., 2

the child.”⁹ Under ADC-Foster Care, “states received federal matching funds for foster care payments on behalf of children who were removed from unsuitable homes.”¹⁰ These provisions increased the number of children in out-of-home placement and created the groundwork for the modern-day foster care system.

During the 1970s, the number of children in foster care increased significantly. The Adoption Assistance and Child Welfare Act of 1980 was a response to this reality, and it is central to our contemporary conception of the ideas and values associated with the familial reunification process. This statute reflected the lawmakers’ concern that too many children were unnecessarily being removed from their homes or not being adequately reunified with their biological parents when possible.¹¹ The modern child welfare system is founded on this landmark legislation, “which for the first time established a major federal role in the administration and oversight of child welfare services.”¹² Welfare was a program administered by state governments (with usually about half the money coming from the federal government).¹³ With state-controlled welfare came state foster care.¹⁴ Because of the states’ commitments to the Adoption

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid., 3

¹² Ibid.

¹³ Ibid.

¹⁴ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp.18

Assistance and Child Welfare Act of 1980, both the number of children in foster care and their average length of stay decreased for a short period in the 80s.

Despite promising improvements by the mid-1980s, however, the number of children in foster care once again began to rise at an alarming rate. “Between 1986 and 1995, the number of children in foster care increased from 280,000 to nearly 500,000[—] a 76 percent increase.”¹⁵ Why did this occur? It has been credited to economic reasons, the crack cocaine epidemic, the frenzy surrounding Fetal Alcohol Syndrome, and the high incarceration rates of women of color.

In this setting, the Adoption and Safe Families Act of 1997 (ASFA) deployed significant revisions within the child welfare system that had been established in the 80s. The goals of ASFA were to address three general concerns: that children remained in foster care too long, that there was bias toward family punishment at the expense of a child’s safety and well-being, and that inadequate attention and resources were devoted to adoption as a form of permanent placement.¹⁶ The provisions of ASFA included the establishment of performance standards, a state accountability system, an expansion of the waiver program that assured that the child’s well-being was of paramount importance, and it encouraged states to expedite permanency decisions for children in foster care.¹⁷ The provisions made it clear that there were serious problems within the system. Simply put, the child’s well-being was not prioritized and that problem needed to be addressed.

¹⁵ O’Neill Murray, Kasia, and Sarah Sarah Gesiriech. “A Brief Legislative History of the Child Welfare System.” masslegalservices.org, 2004, pp.4

¹⁶ *Ibid.*, 5

¹⁷ *Ibid.*

Thus, from 1930s until today, legislative initiatives have constantly been advanced to enhance the child welfare system and, in so doing, support families in need. But, legislative initiatives alone cannot counteract the effects that social iniquities have on children in need. Moreover, an alarming number of children remain in the system because many aspects of the laws in place are routinely not followed. The guidelines appear to reflect constructive change, but they have never been adequately enforced. There is, for example, no punishment for wrongfully removing a child from the care of their parents or for failing to find a child a proper home in a timely manner. To make a long story short, the system is deeply flawed. It has been weaponized to punish families and caretakers rather than to save children.

Cultural Genocide and Weaponized Fear

The social origins of the modern child welfare system begin with the genocide of Indigenous peoples. When European settlers arrived in the Americas in the early seventeenth century, it has been estimated that there were over 10 million Native Americans living on the land. After European settlement, the estimation of the population diminished to under 300,000. Over this time, Native Americans were subjected to war and disease. A physical and cultural genocide took place with the intention of destroying and civilizing a 'barbaric' community. Five hundred years later, there are around four and a half million Native Americans living in the U.S. This is roughly 1.3 percent of the U.S

population. But, Native American children represent 1.9 percent of the foster care population.¹⁸

To understand the current welfare system, we must look to the past. Initially, separating children from their parents was intended to “terrorize enslaved people in the first three hundred years of U.S. history.”¹⁹ It was a dehumanizing practice created to instill the fear of separation onto slaves, abolitionists, and Indigenous populations. Families were considered sacred under common law and this form of separation was a weaponized tool.²⁰ The separation of mother and child was manipulative and cruel. It was a way to keep rebellious slaves and Native Americans in check.

The end of the Civil War and the creation of the Thirteenth Amendment did not subvert child taking. Reconstruction created “regimes of apprenticeship for Black children [which] often meant [creating another way] to separate them from their families.”²¹ These labor systems in no way created constructive and positive change in the lives of African Americans in the South after slavery. Amendments to the Constitution to protect their rights were undermined by Supreme Court opinions and racial terrorism. The KKK embodies this terror. Civil rights cases like *Cherokee Nation v. Georgia* and *United States v. Cruikshank* are examples of Supreme Court cases that undermined the

¹⁸ Margaret D. Jacobs. "Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s." *American Indian Quarterly* 37, 2013.

¹⁹ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp. 19

²⁰ *Ibid.*, 19

²¹ *Ibid.*, 28

Thirteenth and Fourteenth Amendments as well as Article III of the Constitution.

Loopholes were created and fundamental rights were severely circumscribed. In theory, newly freed families could finally live together and rear their children as they saw fit.

However, to ensure that there was food on the table, many children were forced to work in apprenticeships that separated them from their families.

By the 1930s, welfare aid would be withheld from Black mothers to keep them in the workforce.²² Post World War II welfare programs put Black families at risk, especially poor Black families and even more so when these families were headed by single mothers. The poverty rates of Black families soared when soldiers returned from the war because the fruits of the Federal Housing Act and the GI Bill were not fairly distributed. When white men returned home from war, they could buy homes in new gentrified suburbs. This was not so for men of color. Black men were fired from their jobs to create places for their white counterparts. Widowed, divorced, and separated women “found themselves in increasingly precarious circumstances” and “turned to Aid to Dependent Children—welfare—to feed their kids.”²³

At the time, Black families did not realize that they were putting their families at risk. These policies would open the door for the government and “local officials [to scandalize] their sexual morality and their parenting and... find that they were keeping... ‘unstable home[s]’ in which to raise their children.”²⁴ A woman viewed as morally

²² Ibid., 31

²³ Ibid., 30

²⁴ Ibid., 30

unethical due to her sexual and relationship choices could be deemed unfit. Black families would lose their children because their lifestyles failed to approximate the conditions of their white counterparts. Children could be removed from the homes of their mothers by insensitive case workers who failed to comprehend that a fatherless family could succeed in raising and caring for its children.

In this context in 1954, the landmark case of *Brown v. Board of Education* desegregated American public schools. But, this decision coexisted with a Congressional appropriation bill that cut “children off welfare if their mothers failed to keep a suitable home.”²⁵ A notion that was not clearly defined and that disparaged unmarried women, common law marriages, and homes where there were absent fathers. This “moral” standard threatened and shamed Black mothers, and homes considered unsuitable elevated the number of children in out-of-home care facilities. Many children found their welfare benefits completely cut off. So many Black children were displaced that some described the 1960s as “the browning of child welfare in America.”²⁶

As time passed and laws changed to benefit people of color, the welfare system remained to punish, threaten, and shame Black Americans with the looming threat that their children could be taken away at any time. Between 1954 and 1960, Mississippi alone “cut 8,392 children off welfare, almost all of them Black, because they or a sibling were illegitimate.”²⁷ While Federal legislation seemed more progressive, state legislatures

²⁵ Ibid., 33

²⁶ Ibid., 43

²⁷ Ibid., 34

took politics into their own hands. In 1964, a Mississippi bill “made bearing an illegitimate child a felony, punishable by sterilization or three years in the state penitentiary.”²⁸ As the nation debated the terms of racial justice for people of color, struggling families hoping for change were confronted by serious barriers to welfare eligibility and arbitrary efforts to disrupt their families.

Similarly, as America took over Native lands, the federal government began stripping them of their children. Military-run Indian boarding schools in the 1870s were a way for white America to separate children from their families under the guise of a process of cultural assimilation. The schools were designed to disrupt “the passing down of Indigenous languages and the organization of tribal nations.”²⁹ The system of separation was physically violent and emotionally debilitating for the children. Their hair was cut, they were forced to learn English, taught to cook and eat what whites ate, undergo military drills, and forced to attend Christian church services.³⁰ If they spoke their native tongues, they were punished and whipped. If the children were returned to their tribes they were sometimes left traumatized. Many were placed in white families once their ‘schooling’ was complete, never to see their parents or communities again. The children who were returned to their families sometimes no longer knew how to function in their former communities. Their customs and language were no longer a part of their sense of self.

²⁸ Ibid., 36

²⁹ Ibid., 48

³⁰ Ibid., 51

These sorts of boarding schools officially closed in the 1960s. But the traumatic experiences they imparted were passed down through stories from parents to their children.³¹ Generational memories of abuse were a warning to young members of Native communities.

Legalized Trauma within Welfare Programs on Native Populations

Welfare programs have taken children away from their families because they did not approximate Eurocentric ideals. “Welfare workers disparaged the poverty of reservations and shamed unmarried mothers and others who cared for children because they thought heterosexual nuclear families” represented the only proper family formations.³² Indigenous kinship systems were not given the respect or legitimacy they deserved. In the mid-twentieth century, some states such as Nevada, Arizona, and North Dakota “did not allow unmarried Native women to receive welfare benefits.”³³ Their children were sometimes automatically forced into the foster care system. Many were placed up for adoption. Under these circumstances, children were compelled to experience the disconcerting effects of being taken away from their families and communities with the hope that they might be adopted by a white family. Thus, welfare workers quickly became agents of fear for Native populations.

³¹ Ibid., 59

³² Ibid., 62

³³ Ibid., 65

The 1970s were also a time when state welfare organizations forced sterilization on to Native American women. In April 1974, Betty Jack from the Lac du Flambeau Reservation in Wisconsin testified before the Senate Commission on Indian Affairs about multiple such cases in her community.³⁴ One Native American woman had been told by her welfare case worker that if she did not consent to sterilization, “she would lose her four children.”³⁵ She conceded and was taken to a neighboring state for the operation. Another woman, an expecting mother, who was already on welfare on the Lac du Flambeau Reservation was displaced to Keshena Women’s Prison (on the Menominee Reservation). During her time at the prison she was sterilized, and the welfare worker assigned to her case “forced her to relinquish her baby for adoption.”³⁶

Norma Jean Serena, a Native American mother of five from Pittsburg, “charged that welfare officials compelled her to be sterilized without her knowledge and consent after the birth of [her] baby who [was] placed in an adoption” proceeding.³⁷ Welfare officials placed two of her children in foster care because “they were ill and needed medical treatment.”³⁸ Norma was under the impression that they would be returned to her. But, this never happened. Unfortunately, her experience is not rare. Many women were forced to accept sterilization to keep their children. In this respect, the child welfare

³⁴ *Ibid.*, 65

³⁵ *Ibid.*, 65

³⁶ *Ibid.*, 65

³⁷ *Ibid.*, 66

³⁸ *Ibid.*, 66

system was practicing a form of cultural genocide to limit the growth of a Native American communities.

Native American communities, then, were constrained by rigid cultural, economic, and social standards. The criteria in place were not sculpted to the contours of their lived experiences. They were Eurocentric standards that failed to consider the child's physical or emotional well-being. Thus, Native American children were "removed from the custody of their parents or [Native] foster families for placement in non-Indian homes without sufficient cause and without due process."³⁹ The state did not respect the legal rights of these Americans. In essence, their rights to life, liberty, and freedom were undermined rather than protected.

Native American children were disappearing from various tribes all over America. So, the "Devils Lake (now Spirit Lake) Sioux Tribe of North Dakota requested that the Association of American Indian Affairs (AAIA) conduct an investigation into" child welfare practices.⁴⁰ The AAIA is a non-profit agency that serves the Native American community. It was formed in 1922 to protect the sovereign culture of Indigenous communities. It intervenes when the government attempts to force assimilation, termination, and allotment policies on Indigenous communities. And, in 1968, the AAIA discovered that 275 out of 1,100 Devils Lake Sioux Indians under the age of twenty-one living on the Fort Totten reservation had been separated from their families.⁴¹

³⁹ Ibid., 66

⁴⁰ Margaret D. Jacobs. "Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s." *American Indian Quarterly* 37, 2013, pp. 137

⁴¹ Ibid.

After identifying this gross injustice, AAIA gathered evidence from similar social services and private placement agencies across the United States. It discovered that in the majority of states with “large American Indian populations, 25 to 35 percent of Indian children had been separated from their families and placed in foster or adoptive homes or in institutions at a per capita rate far higher than that of non-Indians.”⁴² 85 percent of these children were placed outside of their families and communities, even when willing and fit relatives were available to care for them.⁴³ While most states lost close to a third of their children to some kind of out-of-home care, North Dakota suffered a much larger loss. And, although Native Americans constituted less than 2 percent of the state’s population, their children made up fifty percent of the state’s foster population.⁴⁴ After the investigation, the Devils Lake Tribal Council “passed a resolution prohibiting county officials from removing children from the reservation under any circumstances.”⁴⁵

As more investigations were conducted, common themes of fear, intimidation, and humiliation surfaced. Tribes across the country, however, had not known that this scenario was being acted out across America. Welfare workers denigrated the poverty of reservations. The government associated unmarried mothers to families that “lacked the resources and skills to properly care for their own children.”⁴⁶ Welfare officials used

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp. 63

⁴⁵ Ibid.

⁴⁶ Margaret D. Jacobs. "Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s." *American Indian Quarterly* 37, 2013, pp. 137

ethnocentric and middle-class standards that are not applicable to Native American kinship communities as a justification for taking away Native children under the false pretense that these decisions were in the best interest of the child. Officials did not consider group rearing by family members such as cousins, aunts, uncles, and grandparents as adequate for a child. Yet, many of the communities in question reared their children in a collective manner. Responsibilities were not solely placed on the parents. Some members of the community were assigned food preparation while others were asked to baby-sit. Adults in these communities play disparate roles in helping to raise the children. But, the idea of conjoined child care is not common in white, middle-class America.

At the end of the day, the investigations by the AAIA unveiled serious abuses. Consequently, the movement led by the Devil's Lake Sioux people became the catalyst for legislative change. It connected tribal nations across America and lobbied Congress for the federal protection of Native children. From 1974-1977, state officials produced numerous volumes of testimonies from Native American women and girls at Congressional hearings.⁴⁷ These testimonies helped thousands of Indian families realize that these scenarios were not a series of isolated encounters, but coordinated events. A common theme was that these families consisted of unwed mothers: divorced, separated, or never married.⁴⁸ The women who took part in the hearings stressed that they had clearly indicated that their idea of kinship care looked different than what welfare

⁴⁷ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp.71

⁴⁸ Ibid.

officials thought they should be. But, social workers were fixated on heterosexual nuclear families and caretakers that they thought were the appropriate age. Native women argued that their “communities [should] have sovereignty over their children not only as a matter of simple justice, but also because Anglos failed to understand Indigenous meanings of kin.”⁴⁹

After years of loss and shame, Congress finally responded. In 1978, it enacted the Indian Child Welfare Act (ICWA), Public Law 95-608, which proclaimed that except in the rarest circumstances, Native American children must be placed with their relatives or tribes. Moreover, it directed the states to do everything they can to keep Native families together. Under ICWA, “all child welfare court proceedings involving Native American children must be heard in tribal courts if possible, [especially if removal is a potential factor of the case,] and tribes have the right to intervene in state court proceedings.”⁵⁰ The act created guidelines for family reunification and a placement proposal for keeping children with kin and community. “The preference was elaborated as follows: to keep Indian children with their own extended family first, other tribal members second, and other Native people third.”⁵¹ These guidelines, then, formally made welfare officials accountable for past wrongdoing with the hope that a better standard would follow.

⁴⁹ Ibid., 71-72

⁵⁰ O’Neill Murray, Kasia, and Sarah Sarah Gesiriech. “A Brief Legislative History of the Child Welfare System.” masslegalservices.org, 2004, pp. 3

⁵¹ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp.72

Unfortunately, an innovative set of legislative measures alone would not automatically solve the problems of Native children affected by the welfare system. Children are only protected under ICWA, if they are eligible for tribal enrollment. Additionally, compliance with its provisions were an “ongoing problem with some states trying harder than others to identify” whether a child qualified for tribal enrollment.⁵² Maine is a state, for example, that prides itself on its commitment to doing right by Native children. The governor, with the help of five tribal chiefs, “authorized a Truth and Reconciliation Commission (TRC) to untangle the state’s long history of child taking from the Wabanaki people.”⁵³ Yet, in 2015, one of the reports by the TRC still found that less than half the children in the system had their Native heritage verified.⁵⁴ Without certification, these children could be taken from their families and placed outside of their communities. To be sure, the 1978 Act was quite promising. But, “it [was] unclear whether it actually reduced the number of children taken from their homes” because not all social service programs are run the same.⁵⁵ Ten years after the passing of ICWA, “one federal study found that... the rate of Native children in out-of-home care remained one third.”⁵⁶ By the numbers, nothing had changed. Even the passing of progressive legislation was not enough to limit the number of Native American children being taken from their homes and placed in foreign environments at the hands of welfare officials.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid., 72-73

⁵⁵ Ibid., 73

⁵⁶ Ibid.

Today, thirty states fail to abide by this act because there is a fiscal incentive to do so. Legislation, then, can only go so far without proper compliance and enforcement from public service agencies.

Over the last seventy-five years, child taking has been molded into a form of structural violence masked as a way of saving vulnerable children from neglectful and abusive parents. The system does protect some children from harm. But, at times, its abuses disproportionately fall upon Black and Native mothers. The government has tended to view Native populations and ‘rebellious’ Black organizations as a threat to the American way. Removing children was a way to chastise these communities for participating in the Black freedom movement and the Red Power calls for tribal sovereignty. As men and women were advocating for their civil liberties, the welfare system was a reminder of who was really in control.

The War on Drugs: Targeting the Black Minority

In the years prior to ICWA’s official legislative initiatives, Black parents were targeted by the government during Nixon’s war on drugs instead of drug dealers. “State and Federal prosecutors aggressively targeted those who used drugs and alcohol during pregnancy— particularly Black and Latinx people who were using crack and Native people who were drinking— sending them to jail to protect fetuses.”⁵⁷ Sentencing laws for alcohol and drug crimes remained strict as we moved into the Reagan administration.

⁵⁷ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp.103

The imprisonment of pregnant women was heavily supported by both sides of the political spectrum which allowed for the mass incarceration of women of color. This is not to say that white woman did not lose their children to the foster care system, if alcohol or drugs were found in their or their child's system at birth. But, it was women of color who were tested for substance abuse at a higher rate in hospitals. When white mothers are tested and "have babies who are cocaine-exposed, the hospital sends the baby home with the mother and a visiting nurse."⁵⁸ White mothers receive a slap on the wrist and assistance from the government when their child is born exposed. But, under the same circumstances, Black mothers are rebuked and lose their children to the Department of Community and Family Services (DCFS).

In the eighties, "Black infant mortality rose from 18.5 to 18.6 per thousand- while for white babies, it declined from 8.4 to 8.1."⁵⁹ This was the first time mortality rates had risen for any demographic in over fifty years.⁶⁰ Chicago during this era found that "11 percent of pregnant woman in hospitals tested positive for illicit drugs or alcohol," and cocaine use was associated with stillbirth, low birth rates, and prematurity.⁶¹ Women of color — especially Black women— in this situation were subjected to greater scrutiny. than their white counterparts.

⁵⁸ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. RHYW, 2010, pp.

⁵⁹ *Ibid.*, 109

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

Crack cocaine was the less expensive drug of choice for impoverished communities while powder cocaine was the habit of the wealthy elite, middle class, and upper middle class. The possession of crack entailed longer sentences than its powder counterpart. America's war on drugs, then, was essentially a war on poor people of color.⁶² It wasn't about what was being consumed. It was about who was consuming it, and what they looked like. "Black and white people used (and still use) drugs at about the same rate, but African Americans were much more likely than whites to be imprisoned for drug use,... a sentencing disparity of 100:1."⁶³ The data suggests that Black Americans were not simply imprisoned because of their drug use. They were imprisoned because of the color of their skin. Black Americans were profiled. They were searched and punished at a much higher rate which led to the dramatic sentencing incongruity. The sixties and seventies were a time of hyper-policing that led to a dramatic increase in the prison population. And, yes, the majority of these new inmates were Black. Black men and women were no longer slaves or legally segregated. But, they were redistributed into the prison system and confined to life behind bars in disproportionate numbers to their white counterparts.

Accordingly, the war on drugs led to an increase of Black children in the child welfare system. With their parents and relatives in prison, Black children were placed in foster care due to what the courts deemed parental neglect. "Rates of incarceration tripled for women in the 1980s...[and,] 80 percent of Black women who were incarcerated at

⁶² Ibid., 107

⁶³ Ibid., 108

that time were living with their children.”⁶⁴ When no other relatives were present to obtain custody, those children would be forced to spend time in foster care.

To further political agendas, the figure of the ‘crack baby’ was introduced to society. The image depicted a small malnourished child on the brink of illness and death. “The infant dragged by drugs was... the war on drugs’s perfect innocent victim in need of protection.”⁶⁵ Politicians and human rights groups manipulated mainstream media to persuade Americans “that these babies needed help and that their mothers were choosing to abuse them before they were even born.”⁶⁶ Liberals, Democrats, and Republicans banded together to imprison thousands of ‘reckless’ mothers to save thousands of children, with the crack mother usually portrayed as a Black mother on television and in the newspapers. Law enforcement’s solution to remove these children from their homes was easier than offering treatment and support programs to addicted mothers.

Hospitals that routinely served Black patients began regularly screening for cocaine in the delivery room, and “mothers who tested positive lost their newborns on the spot... and went to jail, still bleeding from labor.”⁶⁷ These children were not saved. They were simply stripped away from their parents. The ones who did not have relatives to support them were placed in the foster system. They struggled to find placement in safe environments that valued their racial and cultural distinctiveness. Ultimately, many of

⁶⁴ Ibid., 109

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid., 114

these children would find themselves embedded in the juvenile justice system (a child is twice as likely to enter the juvenile justice system if they have spent time in foster care). Moreover, when they aged out of foster care, they were disproportionately escorted into the prison system.⁶⁸ Law enforcement was not acting in the best interest of these children. Instead, it put them in a position to be subject to greater harm and left many traumatized and feeling abandoned.

The Frenzy Associated with Fetal Alcohol Syndrome

During this era, fears surrounding fetal alcohol syndrome (FAS) circulated in the media and child services. In this setting, Native Americans living on reservations and in urban cities became targets of further marginalization. “The frenzy was launched by an autobiographical polemic, a book titled *The Broken Cord*.”⁶⁹ The memoir written by Native scholar Michael Dorris was a narrative about his adopted son who suffered from disabilities caused by FAS. It was published in 1989 which has been considered the height of the crisis concerning crack babies; the book tells the painful story about Dorris's crashing hopes for his young son.⁷⁰ Ultimately, its ABC-TV adaptation helped to construct a state of emergency surrounding fetal alcohol syndrome in the United States. Just like with the vulnerable and pitiful depiction of the crack baby, Americans across the

⁶⁸ Ibid., 109

⁶⁹ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020. 116

⁷⁰ Ibid., 117

country would become enthralled by the somber image of a vulnerable newborn that was seriously harmed by its mother.

Because of images and stories like these, white America found a need to speak up on behalf of these voiceless children. Parents around the country demanded a call to action and demanded that the government step in. The government responded with more policing and a greater number of arrests. “The moral panic around FAS contributed to the widespread criminalization of Native women[;]” even though, educated whites consume alcohol at a higher rate.⁷¹ Screening for alcohol could be done while the fetus was still in-utero, and as a result, pregnant Native women were put in jail to protect their babies. Due to the Major Crimes Act of 1985, some of these women were tried as felons, immediately losing their children to foster care. The Act actually broadened federal jurisdiction allowing the government to have prosecutory power over violent crimes on reservations.⁷² FAS, after all, was considered a horrible malady to inflict on to vulnerable children. The fear of developmental consequences justified the prosecution of thousands of Native women.

During this era between 1986 and 1995, the number of children in foster care increased from 280,000 to nearly 500,000, a 76 percent increase. “Researchers pointed to the multiple effects of the economic slowdown, the crack cocaine epidemic, AIDS, and higher incarceration rates among women offenders.”⁷³ Under these circumstances,

⁷¹ Ibid., 118

⁷² Ibid., 119

⁷³ O’Neill Murray, Kasia, and Sarah Sarah Gesiriech. “A Brief Legislative History of the Child Welfare System.” masslegalservices.org, 2004, pp.4

however, taking children from their mothers for the wellbeing of the child was a misguided belief. It often left the children with feelings of neglect while their parents continued the cycle of substance abuse to numb their shame. “Jailing and imprisoning people does not ensure healthy outcomes for pregnancies; it causes people to lose jobs and miscarry, stresses important relationships, and exposes people to the collateral consequences after a conviction”— from making it difficult to rent an apartment to being excluded from jobs and possible careers.⁷⁴ Children who are taken away from their parents are left feeling terrorized and neglected. The psychological trauma that they experience, however, is often worse than the abuse and neglect their mothers were accused of.

The idea of removing children of color from their families during the era of slavery and the operation of Indian boarding schools was motivated by the desire to instill fear in these insurgent communities. It has in turn laid the groundwork we have today for criminalizing poor families of color and placing their children into a racialized foster care system. It punishes racial communities and condemns cultures that differ from those of white Americans. Indigenous and Black populations are asymmetrical situated to their white counterparts. They endure serious stereotypes, experience gross mischaracterizations, and as a result, are unfairly punished.

⁷⁴ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp.121

Stories and Anecdotes

Stories and Anecdotes from Black Mothers

Various books, articles, and journals share personal anecdotes from families torn apart because of the child welfare system. These families are marginalized because of their race and or mistakes that have been made in the past. Legal scholar and the author of *Shattered Bonds: the Color of Child Welfare*, Dorothy Roberts, interviewed and collected the stories of these women. The first woman described in Roberts's book is named Jornell. Jornell's life is "an ongoing battle to hold on to [her] child."⁷⁵ Her involvement in the child welfare system started in 1998 when her second son, David, was born. Jornell had struggled with diabetes and addiction but vowed to stop drinking and smoking when she discovered she was pregnant. She joined a longterm program called the Healthy Family Intervention Team. The program was designed to assist and support women in her situation in rebuilding their families. But, Jornell calls it the "worst entanglement anyone could become involved in."⁷⁶

Once government agencies saw her as a Black woman with a drug problem, she had little or no chance to raise her son. Instead, she became a target of maltreatment with little protection under the law as a mother. Her race was a tax on a happy life with her children. Hospital social workers were aware of her status when her son was born. "She wasn't allowed to bring David home" because her newborn was put on social hold for four days until her house could be investigated and approved as an appropriate living

⁷⁵ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. RHYW, 2010, pp. 2

⁷⁶ *Ibid.*, 3

environment.⁷⁷ Her home had been suitable for her older son for many years. But, once the child welfare system was in the picture, its hospital workers and caseworkers were very much reluctant to believe that a former addict could find the strength to end her fixation.

Jornell was then wronged a second time within a month of her son's birth. David suffered from reoccurring digestive problems, so a concerned Jornell brought him to the hospital. But, the staff suspected she had overmedicated her son and reached out to the Department of Children and Family Services (DCFS). DCFS, of course, does not take such speculations lightly. It becomes involved in abuse cases quickly. Thus, a caseworker took custody of Jornell's baby and charged her with being "an overly concerned mother."⁷⁸ David was then placed in a foster home with four other children. In response a few months later, Jornell filed an appeal. Nothing changed however, even though she was interviewed by a team of social workers who maintained that she "thinks clearly and decisively, . . . would not harm her child, and is capable for caring for her child."⁷⁹ The team overturned the caseworker's initial finding of potential abuse. But, unfortunately, DCFS "did not return David. Instead, it filed a new report alleging that the baby would be at risk of harm if released to his mother because of her history of substance abuse and possible mental illness."⁸⁰

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid., 4

⁸⁰ Ibid., 5

However, Jornell had not been evaluated properly. She had done the work required and received favorable recommendations from the appropriate officials, but DCFS officials could not look past her race. She seemed unfit to the agency. A Black woman with a history of substance abuse and mental illness in the agency's eyes was incapable of recovery. Assumptions about her race cost her the early part of her son's life. Years of Jornell's unwavering compliance to DCFS guidelines came and went. She subjected herself to dozens of drug tests, psychiatric appointments, and parenting classes, but it was never enough. All of her trials and tribulations were just obstacles that kept her away from her child, now a toddler. Even when the evidence indicates that a parent is fit to raise his or her child in this context, once DCFS is involved, the chances of reunification are slim. Why? It is because under these circumstances the case workers have no incentives to bring the child back to his or her parents.

Another mother that Roberts interviewed goes by the pseudonym of Devon. Devon lives in a seven-room apartment with her four nieces and nephews that she calls her kids because she is the only parent they have ever known. The children suffer from developmental problems, and to ensure their safety and well-being, Devon took special classes and received a "license for relative foster care for medically complex children. When their [biological] mother's rights were terminated... Devon made plans to adopt them."⁸¹ Unfortunately, more problems followed when a new caseworker was assigned to Devon and her family who told her that the "apartment wasn't large enough for the

⁸¹ Ibid., 11

children.”⁸² The caseworker seemed overly critical from the beginning. “Devon reported the caseworker’s unprofessional conduct to DCFS.”⁸³ But, shortly after that, the children were removed from her custody without notice. Devon then tried every lawful means possible to have them returned. Her persistent efforts, however, were deemed too hostile and confrontational. Her desire to get her children back was miscast as an overly aggressive posture.

She faced unwarranted barriers because of her race. Her rights as a potential adoptive mother were taken away due to stereotypes passed down over generations. Only after a stressful and lengthy battle with the legal system was Devon able to secure the return of her children. She had to fight through the hostility and mischaracterizations to demonstrate that her home was a safe place. A turning point in her case was the discovery that the children had actually been abused while in the system. Racialized stereotypes about Devon had overpowered her rights as a citizen and prospective mother. Her children had to be physically harmed before they could be returned because her caseworkers were unable to entertain the idea that her four children already lived in a loving environment. They were blinded by their assumptions about what such a home looked like.

⁸² Ibid., 12

⁸³ Ibid.

Stories and Anecdotes from Native Mothers

Similar to Black communities, Native communities like that of the Great Sioux Nation are no stranger to unlawful child taking. Professor, writer, and activist Laura Briggs is an expert on U.S. and international child welfare policy. In her book *Taking Children: a History of American Terror*, Briggs examines multiple anecdotes from Native American families from the Dakotas. These stories are examples of the wrongdoing that many Indigenous Americans face when it comes to child taking. Their children are unlawfully taken, and the process of getting them back (for the ones that do) is a lengthy and traumatic one. There are no just reasons for these removals. Like Black children, Native children are removed from their parents because their lives are differentially situated from those of their white counterparts.

In her book, Briggs shares the story of Cheryl Spider DeCoteau of the Sisseton-Wahpeton Sioux. The injustices that Cheryl faced were centered on the fact that she would sometimes leave her four-year-old son, John, with his great-grandmother. His great-grandmother, Melinda Spider, was sixty-nine at the time. The officer assigned to this case claimed that she was too old to care for a four-year-old child, and the boy was taken into the system.⁸⁴ Shortly after, an officer from the welfare department came back to take John's siblings without legal authority.⁸⁵ The officer made the same claim about Cheryl's parenting abilities and Melinda's age even though the children this time were much older.

⁸⁴ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp. 69

⁸⁵ Ibid.

Cheryl told her story to a United States Senate subcommittee in 1974. She testified that one of her children had been removed while staying with a babysitter. In her testimonial, she explained that this was not the only time in her life that she had to fight the system. When pregnant with her other son, she disclosed that “a male social worker kept coming over to the house... every week... and they kept telling me and asking if I would give up [my son Bobby] for adoption and said that it would be best.”⁸⁶ He “kept coming and coming and finally when I did have him, the social worker came to the hospital.”⁸⁷ She repeatedly said no. After weeks of harassment, the social worker told her that she had to come to his office to sign papers. She explained to the committee that when she arrived at the office that she felt sick and “didn’t know what I was signing.”⁸⁸ She had signed a Termination of Parental Rights Agreement (TPR). Biological parents cannot sign these agreements when under a state of duress, and there must be a witness present to validate this process. Cheryl told the committee that “as soon as she signed the papers, the social worker refused to return Bobby” who was four months old at the time.⁸⁹ Throughout the 1970s, Congress heard similar testimonies from hundreds of Native American parents and grandparents. A common theme was the intense pressure to sign the termination agreements.

⁸⁶ Margaret D. Jacobs. "Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s." *American Indian Quarterly* 37, 2013, pp. 146

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

Another story that Briggs examines is about Delphine Shaving Bear of the Standing Rock Sioux. In 1973, she mistakenly asked the South Dakota Department of Public Welfare to take temporary custody of her one-year-old son Christopher.⁹⁰ Delphine thought she was doing the right thing at the time. She needed the state to watch her child for a week so she could hitchhike hundreds of miles to recover custody of her two other children.⁹¹ She had met all of the proper requirements that the welfare agency asked of her to gain full recovery of her older children. But, the system in place made it nearly impossible for reunification to come to fruition with regard to her younger child. When she returned with her older children, the welfare department refused to give Christopher back because the foster parents he had been with for that week wanted to adopt him. Here, the welfare department tried to convince Shaving Bear that she had relinquished her rights. She insisted she had not done so. She “pointed to a statement on the form she had signed that said, “I understand that this does not give the Division of Child Welfare the right to place my child for adoption.”⁹² Nonetheless, even though she had the proper documentation and had gone through the proper channels, it took her a year and a half to get Christopher back.

Similarly, on January 1, 1972, Benita Rowland, a three-year-old Oglala Lakota child from the Pine Ridge reservation in South Dakota was taken and ‘adopted’ by two

⁹⁰ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp. 69

⁹¹ Ibid.

⁹² Ibid.

white women from Wisconsin.⁹³ Benita's 'adoption,' however, did not follow proper legal regulations. There was no termination of rights and no speculation of harm involved. Frederick van Hecke, the attorney hired to fight for the Rowland family, stated in court that "there was not only no adoption, there was no pretense of adoption, no color of law. The couple had absolutely no legal right to take that little girl."⁹⁴ They simply felt they had a religious obligation to rear the child. They wrote a letter that read "we have not taken Benita from you; you gave her physical birth, which we could not give, [but] we can give her opportunities which you could not give so she belongs to both of us. But far more she belongs to the Lord."⁹⁵ The women believed they were entitled to save Benita from her life on a reservation because she was living without a Christian influence.

Many white couples have this same savior complex when it comes to Native American children. AAIA rightly got involved in The Rowland case to help bring Benita home. During the investigation, it discovered that these women also had another child, Vina Bear Eagle, an infant from Wounded Knee, wrongly living with them.⁹⁶ It took almost ten months for both Benita and Vina to be returned to their families. These unlawful takings were eventually reversed. But, there is nonetheless a cost to this form of abduction.

⁹³ Ibid.

⁹⁴ Ibid., 69-70

⁹⁵ Ibid., 70

⁹⁶ Ibid.

Lastly, Briggs discusses another story which took place in North Dakota on Christmas Day 1975. On December twenty-fifth, a young Charlene Summers gave birth to Marcia Marie Summers. A few months later, a white couple from Indiana approached Summers and offered to care for Marcia Marie so she could attend school.⁹⁷ So, Summers agreed to what she thought was a temporary arrangement. The document that Summers signed gave “the Indiana couple power of attorney over Marcia Marie in parent-child related actions.”⁹⁸ Within days, the couple left with the infant, taking her to Indiana. When Summers realized that the couple intended to permanently adopt her daughter, she requested that the Standing Rock Tribal Court intervene in the dispute.⁹⁹ The couple ignored the tribal court’s order to return the child however. So, Summers and the tribal authorities made their case in front of AAIA. The attorney assigned to the case “filed a writ of habeas corpus on Summers’s behalf in the Washington County, Indiana, Circuit Court,” and the judge ordered the couple to return Marcia Marie to Charlene.¹⁰⁰ He declared that the tribal court had jurisdiction on the matter and that its initial order was binding.

Stories like these continued to circulate in Native communities in the 1970s.

During this period, caseworkers removed dozens of children from their homes because welfare officials claimed that “households marked by poverty, inadequate housing, lack

⁹⁷ Margaret D. Jacobs. "Remembering the “Forgotten Child”: The American Indian Child Welfare Crisis of the 1960s and 1970s." *American Indian Quarterly* 37, 2013, pp. 136

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

of indoor plumbing, and overcrowding were not fit places for children.”¹⁰¹ In this context, Native American guardians were wrongfully mischaracterized. They were singled out because of their race. Thousands of Native American parents, and grandparents endured the unlawful removal of their children. They were denied due process and access to attorneys which is guaranteed under the Sixth and Fourteenth Amendments. They were manipulated, and treated as though their way of life and the circumstances within which they lived were untenable.

The Effects Forced upon the Children

The children in foster care are the ones who truly suffer. In 1980, New York held a series of hearings on the Child Welfare Act of 1980, a law that was intended to protect children and encourage the states to get them out of foster care through adoption or returning them to their homes. The Act promoted counseling for families to help them to stay together. Moreover, it required periodic monitoring by state officials to determine if the conditions in the home had improved enough for the children to return.¹⁰² In this context, a twelve-year-old boy named Boyd testified on his five year experience within the foster care system. Boyd, his sister, and two brothers were first placed in foster homes after an emergency put his mother in the hospital.¹⁰³ She had been hospitalized as a result

¹⁰¹ Briggs, Laura. *Taking Children: a History of American Terror*. Oakland, CA: University of California Press, 2020, pp. 69

¹⁰² “Former Foster Child Tells Panel of Five Lost Years.” *The New York Times* , 17 Apr. 1988, pp. 53

¹⁰³ Ibid.

of a severe beating by his father when he was six-years-old.¹⁰⁴ At the hearing, Boyd said that it was “hard for [him] to tell the [committee] how bad foster care truly is” because of the trauma he had endured and the sheer number of homes he was placed in over the five year period.¹⁰⁵ Boyd explained that one of his foster mothers hit him and threw hot water on him. Another mother only spoke to him in a language that he did not understand.¹⁰⁶

It took five years and a class-action suit brought by the Children's Rights Project of the American Civil Liberties Union to reunite Boyd with his mother; even though, attorneys had proven that there was no threat of abuse from her. At the hearing, Boyd spoke out about the problems within New York's tangled foster-care system. He explained, for example, that when his mother visited him when he was in foster care, each time after she left, “it felt like the whole world was leaving me.”¹⁰⁷ Boyd concluded his testimony by saying, “they took almost five years away from my life, and I'm only twelve.”¹⁰⁸ His story of loss and pain is not uncommon amongst children in this system. It took years for him to be reconnected with his mother when, in fact, she was the victim of an assault. Yet, the system treated her as though she had been an abuser.

¹⁰⁴ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. New York, New York: RHYW, 2010, pp. 159

¹⁰⁵ *Ibid.*

¹⁰⁶ “Former Foster Child Tells Panel of Five Lost Years.” *The New York Times* , 17 Apr. 1988, pp. 53

¹⁰⁷ *Ibid.*

¹⁰⁸ “Former Foster Child Tells Panel of Five Lost Years.” *The New York Times* , 17 Apr. 1988, pp. 53

Many studies detail the experiences of children within the foster care system. The majority of these children, especially the older ones, want to keep some form of a connection with their parents. A study that interviewed “ninety-five children ages eleven to fourteen who had been in the foster care system . . . [found that] more than half . . . said they missed their parents most of the time.”¹⁰⁹ Another project interviewed one hundred and eleven foster children between the ages of nine and eighteen who were considered legal orphans. Half of them said they did not want to be adopted, and that they considered the adoption process destructive insofar as their relationship to their parents was concerned.¹¹⁰ The termination of parental rights does not sever children’s emotional ties to their biological parents. Instead, it often leaves the children emotionally traumatized, depressed, anxious, and angry.

Disproportionate Numbers and Discoveries within the Black Minority

Black women like Jornell and Devon fear for the fate of their children every additional day that their child spends in foster care. Yet, the “disproportionate number of Black children in America’s child welfare system is staggering” and has been increasing since the 1940s.¹¹¹ Black children make up 15 percent of the children in the United States, but they account for 32 percent of the children currently in foster care. Native American children are also overrepresented. The percentage of Native children in foster

¹⁰⁹ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. New York, New York: RHYW, 2010, pp. 159

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 6

care is almost two times the rate at which they are represented in the general population.¹¹²

The overrepresentation of Black children is overwhelming. But, “Latino and Asian American children are underrepresented in the national foster care system.”¹¹³ The statistics only become worse when analyzed in urban areas. In big cities, “the foster care system is almost exclusively Black.”¹¹⁴ Moreover, Black children are left in foster homes longer than other children. They are unfairly targeted and mistreated at every stage of the foster care process. Often, they face years in foster care for unwarranted reasons.

The situation worsens when the Black population is small, without significant economic resources, and disproportionately female. “There is a higher probability for minority children to be placed in foster care when living in a geographic area where they are relatively less represented.”¹¹⁵ Moreover, the standard for a good home and a good life is based on the resources available to white, suburban modern families. As a result, “Black families are overrepresented in child maltreatment reports, case openings, and the foster care system.”¹¹⁶ Agencies fail to recognize cultural differences in child-rearing; thus, this failure creates damaging suspicions about lower-class Black families. These suspicions are fueled by stereotypes that lead to the separation of children from their

¹¹² Harris, Marian S. "Child Welfare System Change." In *Racial Disproportionality in Child Welfare*, 91-98. NEW YORK: Columbia University Press, 2014, pp. 95

¹¹³ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. RHYW, 2010, pp. 6

¹¹⁴ *Ibid.*

¹¹⁵ Roberts, Dorothy E. *Shattered Bonds: the Color of Child Welfare*. RHYW, 2010, pp. 9

¹¹⁶ *Ibid.*, 6

parents, and as a result, Black modes of child-rearing are viewed as inadequate rather than as alternative.

Consequently, the problems with the child welfare system have ongoing effects. Not only do “Black children have the greatest odds of being removed from their homes. [They also have] the smallest chance of being either returned to their parents or adopted.”¹¹⁷ The margin is 50 percent less in comparison to all other racial groups. Hearings for Black families are often postponed. Additionally, the longer children stay in the system—the less likely they are to get out of it, and their fate worsens under state supervision. Unfortunately, this daunting reality is just another facet of institutional racism and its continuing effects.

Black children that have the same problems and characteristics as white children but “are more likely to be in foster care than receive in-home services.”¹¹⁸ Institutional racism is the driving force behind this form of decision-making. White families receive a warning in situations where Black families are reprimanded and punished. In this sense, “removing children from their homes is perhaps the most severe government intrusion into the lives of citizens.”¹¹⁹ It shatters the bonds of the familial unit, and in so doing, it takes away the families’ inalienable right to privacy and the pursuit of happiness.

Taking a child from his or her parents does not just dismantle bonds and hinder the pursuit of happiness. It is one of the most terrifying experiences a child can have.

¹¹⁷ Ibid., 13

¹¹⁸ Ibid., 17

¹¹⁹ Ibid.

Why is it that white children who are abused or neglected are twice as likely as Black children to receive services from their own homes?¹²⁰ The same crimes are not given the same punishments. Why are white children spared from this trauma at a vastly different rate than Black and Native children? Structurally, “government authorities appear to believe that [the] maltreatment of Black children results from pathologies intrinsic to their homes and that helping them requires dislocating them from their families.”¹²¹ The discriminatory institution that is the welfare system sees one race as comparatively more deserving than others. Thus, public policies involving in-home care need to be re-evaluated to properly analyze the system’s racially divided treatment of children. We need to focus on what is best for the child and not the color of the family’s skin.

Poor judgements made by welfare officials, in this domain, lead to trauma for young children. They can grow up under the illusion that their parents neglected them. Older children continue to live with hate for the government that took away the parent that they loved. Both the children and the parents can be left with deep emotional scars. Agencies fail to weigh these consequences appropriately. There is, of course, no set of concrete guidelines that can determine without question whether a child should be taken from their parents or left with their families. Welfare agencies are quick to separate children from their parents because they do not want to run the risk of leaving a child in a harmful situation when they could have been removed. But, the problem here is that the welfare system does not have the appropriate practices in place to help foster healthy

¹²⁰ Ibid.

¹²¹ Ibid.

living situations in disparate circumstances. To achieve this goal, it must transcend the stereotypes and mischaracterizations rooted in colorblind approaches.

Poverty does not Equal Neglect

While discussing the question of why the Black minority is so disproportionately affected compared to any other demographic, one must notice why families that live under the poverty line are constantly discriminated against in the welfare system. The child welfare system interrogates families in lower income brackets to try to impede maltreatment and unfit residents. Welfare officials assume these families are more abusive because of the media's representation of the welfare queen whose husband has been in prison for decades and the incorrect parallel that poverty equates with neglect. One reason why most of the families in the system are Black is due to America's social history. Black children are more likely to live in poverty than other children because the Black population was subjugated to a life filled with hardship for centuries.¹²²

They were subjected, for instance, to the Jim Crow laws of apartheid that were put in place to separate the Black community from white life. Policies like those have left a legacy of racial subordination in the United States. Even after slavery ended and Jim Crow laws were erased from the political vernacular patterns of racial subordination have persisted. This, in turn, has laid the groundwork for the continuation of the marginalization of people of color. Racism evolved into a caste system in America that

¹²² Ibid., 26

remains in place. As a result, the simple God-given rights that the Constitution guarantees remain an illusive goal.

The abolition of slavery brought on an era of apartheid. The right to vote was circumscribed by literacy tests, and poll taxes. After World War II, the GI Bill was created to help veterans buy homes and further their economic status. But, those same housing policies also created loopholes for the American government to restrict and limit the rights of Black Americans. Suburban sprawl would create two housing markets: one white and privileged and the other Black and under-resourced. With every positive initiative toward racial justice came the backlash to the inclusion of Blacks in the pursuit of the American dream.

The Civil Rights Act of 1964, for instance, was intended to prohibit discrimination on the basis of race, color, religion, sex or national origin, but an educational system managed by whites left Black citizens with a slim chance of social mobility. The economic marginality that leaves many Black families subjected to over policing and colorblind polices infringes on their constitutional rights are a result.

Black parents who raise their children under these circumstances are often labeled neglectful. What is perceived as neglect in these settings, however, is “often the result of [the] parents’ financial inability to provide for their children.”¹²³ Cases of neglect are drawn when parents are “unable to afford adequate food, clothing, shelter, or medical care for their children.”¹²⁴ But, the definition of neglect is not clearly defined.

¹²³ Ibid., 33

¹²⁴ Ibid.

Thus, poverty and neglect can become synonymous in the foster care system because of the legal connotations of neglect. Here, neglect is “classified as child maltreatment defined by poverty rather than maltreatment caused by poverty.”¹²⁵ In this sense, child protective services are involved in innumerable cases concerning poor families simply due to the manner in which neglect and child maltreatment are defined. Middle-class and wealthy families are rarely, if ever, confronted with this problem because neglect and mistreatment in the home seem unimaginable when families have the adequate monetary resources. In such cases, social services has no reason to investigate or intervene in the lives of the parents because it is assumed that the more money a family has, the higher quality of life they must be experiencing. But, in this setting, “Black families are three times as likely as whites to be poor.”¹²⁶

The underlying problem here is that there is no clear distinction between poverty and neglect. Cases of neglect, of course, should not be taken lightly. It is a very serious offense and in the worst cases can lead to death. But, unfortunately, in many instances, cases of neglect are not truly cases of neglect. Rather, they are cases that relate to economic disadvantage; and in this context, loving and caring parents can lose the right to their children simply because they are poor. In such cases, there is no evidence of maltreatment, just evidence of small incomes. Thus, Black families in poverty are sometimes deprived of their right to raise their children because of their paychecks, and not their parenting ability.

¹²⁵ Ibid.

¹²⁶ Ibid., 45

Group-based Harm and Constitutional Analysis

Injury is thrust upon all children in foster care. If the public does not consider race, however, “the full scope of harm caused by taking large numbers of Black children from their families” is not captured.¹²⁷ To recognize group-based harm, one must think collectively instead of looking at individual cases. The child welfare system’s conception of racial harm condemns minorities especially the Black population. This process is rooted in the weaponized terror tactics employed by the American government during slavery to minimize rebellions and keep abolitionist movements in check. Even after the landmark case of *Brown v. Board of Education*, Black people are still denied constitutional protections since their rights are restricted as a function of systemic forms of racial bias. Simply put, when high rates of Black poverty conjoin with racial stereotypes institutional forms of prejudice against Black people that can be seamlessly constructed.

Moreover, members of the Black community who are not involved in the child welfare system are affected by those who are directly associated with it. Negative stereotypes touch the entire Black community, and the unfavorable consequences of disrupting large numbers of Black families and placing them under state supervision affects the community as a whole. This group-based harm leads to misconceptions in the justice system that further propel the stereotypes and stigmas already at play. Stereotypes directly affect how Black parents are seen by welfare officials. And, once the parents are deemed unfit, their children enter the child welfare system. In this system, Black children

¹²⁷ Ibid., 228-229

receive lower-quality services than their white counterparts; many of the services they do receive are geared towards middle class white children.¹²⁸ This approach has serious shortcomings since it fails to acknowledge meaningful cultural, economic and racial differences. In turn, it harms the development of Black youth.

I contend that this approach is rooted in institutional practices that should be considered unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment guarantees equal protection for all citizens under the law. Yet, rights, privileges, and protections given to white families are not being afforded to Black families in this arena. Understanding the disparate experiences of ethnic and racial groups in the United States is thus imperative in this setting. To promote equal protection under these circumstances, people who are differentially situated should not be assessed in the same way. Black children, then, should not be placed in situations where they grow up separated from their parents for unwarranted reasons. Instead, their rights and needs should be vigorously protected.

American society is centered around racial stratification “that determines... status in society.”¹²⁹ These classifications were engrained into society because of the genocidal experiences of Native Americans, slavery, apartheid, and segregation in the public and private spheres. “Whites established a racial caste system that required a clear racial demarcation between” themselves and people of color.¹³⁰ This hierarchy has been tested

¹²⁸ Ibid., 20

¹²⁹ Ibid., 230

¹³⁰ Ibid.

and discredited, but its implications can still be felt. It continues “to accord automatic benefits and privileges to people who are born white and automatic disadvantages to others.”¹³¹

Demeaning racial stereotypes personify these disadvantages today in a society that claims it is progressing. “Black Americans[, for example,] have been subjected to discrimination on the basis of their race in the political, economic, and social realms.”¹³² The eradication of overt barriers to equal opportunity have not equalized the conditions of Black people in America in comparison to their white counterparts due to myriad forms of institutional discrimination. Consequently, the Black community has “developed a race consciousness rooted in a sense of a shared destiny.”¹³³ A destiny riddled with discriminatory obstacles. They are underrepresented in all areas of life that reap benefits and overrepresented in the those that cause trauma and hardship.

Concluding Remarks

The problems developed within the child welfare system trickle down from systemic barriers due to injustices that surrounded slavery and Indian boarding schools. Constitutional laws in U.S. history institutionalized the cultural genocide of Indigenous communities, endorsed slavery, and promoted colorblind policies that separated Americans along racial lines. In this sense, the foster care system operates as an apartheid

¹³¹ Ibid.

¹³² Ibid., 231

¹³³ Ibid.

institution. White families receive the benefit of the doubt when Black families receive harsh charges with detrimental effects. The child welfare system revolves around racial separation as “just about all children in foster care are minorities.”¹³⁴ Black families have become the “normal” face in family court hearings without concern from those working in the field. Stereotypes about unfit mothers and abusive fathers tear families apart. They are not being fairly judged on the basis of their actions however, they are being punished because of their race.

Children are left with the trauma of being stripped away from their parents and communities. The system in place, then, does not function to serve the best interests of the child. Government officials take children of color away from their parents because neglect and poverty have become synonymous in the foster care system. In turn, the Black and Native communities are harmed since they are subjected to a life of stigma and stereotypes. Through critical race theory, it is evident that there are intersectional effects that negatively impact Black and Native American families in America. There is a link between race, gender, and class and the child welfare system; and it must be interrogated and accounted for in this setting.

Children are often abandoned in the eyes of the law when they are left alone in a home while their parents are at work. “Poor parents often cannot afford to pay others to care for their children” because they are at work.¹³⁵ The jobs that they have do not pay enough to allow the family to pay for childcare. These families turn to their communities

¹³⁴ Ibid., 232

¹³⁵ Ibid., 36

and relatives to watch their children when they are at work. However, this may be mistaken for neglect because courts often fail to recognize this reality. This is where the state fails. Yet, it has an “obligation to make a reasonable effort... to avoid placing a child in foster care.”¹³⁶ This obligation is routinely overlooked, however, when fear of neglect takes over. But, the level of federal funding could be reassessed to eliminate this problem. If the parents, for example, received a stipend for each child, they could maintain their jobs and attend to their children’s needs when their shifts were over. Support in this way could remove the pain of stripping away a child from his/her parents.

Welfare services need to acknowledge the range of communities that they serve. Services for Black and Native children falter because they are based on a white standard. The system needs to develop additional guidelines to account for the needs of children of color. To promote equal protection under the law, which is the legal right of all Americans, the policies and officials who endorse them need to acknowledge that Black and Native people are asymmetrically situated in relationship to their white counterparts. This would involve teaching caseworkers to be culturally sensitive. Often, case workers “come to work in the child welfare system with an entirely different worldview than that of the children and families of color involved in the ester.”¹³⁷ Before caseworkers enter ethnic communities, they need to be “committed to diversity and cultural competence... that embraces the role of culture” in family lives and respects these cultural

¹³⁶ Ibid., 37

¹³⁷ Harris, Marian S. "Child Welfare System Change." In *Racial Disproportionality in Child Welfare*, 91-98. NEW YORK: Columbia University Press, 2014. 96

differences.¹³⁸ This means understanding and appreciating other forms of kinship care to prevent unnecessary verdicts of neglect and unfit homes. Moreover, caseworkers need to work with the court system to insure that parents have a realistic opportunity to fulfill their requirements to obtain and maintain custody of their children.

Case workers need to work with the parents and the court system. Routinely, a parent is mandated to attend Drug/Alcohol treatment programs to regain custody of their children. At the same time, parents are told if they want to show a judge that they are committed to keeping their children, they must have supervised visitation with their children when they are in out-of-home facilities. More often than not, the timing of these visits and treatment programs coincide with each other. A parent who misses visitation for a substance abuse program meeting is marked neglectful even when said meeting is court ordered. Maintaining parental rights is even harder if the parent is behind bars. “Incarcerated women, . . . must participate in case planning, remain involved in their children’s lives, and demonstrate their commitment and ability to reform, typically by enrolling in corrective programs as set forth in the case plan.”¹³⁹ The conditions of incarceration paired with the policies of the child welfare system make it nearly impossible to meet these requirements. Caseworkers need to work with the court system to insure that parents have a realistic opportunity to fulfill their requirements to obtain and maintain custody of their children.

¹³⁸ Ibid., 97

¹³⁹ Roberts, Dorothy E. “Marginalized Mothers and Intersecting Systems of Surveillance: Prisons and Foster Care.” In *Reassembling Motherhood: Procreation and Care in a Globalized World*. New York: Columbia University Press, 2017, pp. 195

This problem, however, is not solely with case workers and the agencies themselves. There is a silence in the political mainstream when it comes to the child welfare system. “Silence allows children to be separated from their parents.”¹⁴⁰ It allows racial injustices to be swept under the rug. When we fail to pay attention to these forced separations, the families are left with harsh consequences.

Finally, the economic policies of the foster care system needs to be adjusted to better serve the children. I believe it would be more economically feasible to redistribute the funding a child would receive while in state custody to his or her family for food, school supplies, and treatment facilities for parents if necessary, and child care. Additionally, more caseworkers need to be hired for home inspections. If the personnel involved could spend more than a few minutes evaluating a family, less pressure would be on the parents and caseworkers could give accurate inspections. The parents in these situations are scared when a social worker comes into their home berating them with questions and remarks. If the inspections were longer and over a few days or week, more families would be able to prove they are capable of raising their children in a nurturing setting. This would result in less Black children in the system. Critics of my proposal may say that the money is not there to make this applicable. However, if this was done, fewer children would fall into the system. With fewer children under government funding, the money could be redistributed to hiring more caseworkers for home evaluations.

¹⁴⁰ Ibid., 172

I contend that policy reform within the system is imperative as the rights of families of color are not being recognized. The current system unjustly values and protects one race and cultural background over another. In so doing, families of color are denied access to certain substitutive privileges that white families have. These families do not deserve statutory initiatives under the Equal Protection Clause of the Fourteenth Amendment that have been limited as a function of the legacy of white supremacy and ongoing forms of societal discrimination. Again, to promote equal protection under the law, due process, the right of privacy and the pursuit of happiness people who are differentially situated should not be assessed in the same way. Policy makers must acknowledge differences between white families and families of color. Additionally, reformers needs to recognize that there are also differences amongst the various communities of color affected by the child welfare system. Thus, the constitutional rights of Black and Native Americans must be at the forefront of reform to accomplish real systemic change for families of color who have been disproportionately affected by the child welfare system for hundreds of years.

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