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Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]

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PROTECTING CHILDREN OR PUNISHING MOTHERS: GENDER, RACE, AND CLASS IN THE CHILD PROTECTION SYSTEM [AN ESSAY]

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INTRODUCTION

Towering over the three-story office buildings, storefronts, and run-down houses and apartment buildings on Chicago's near southwest side stands a tall, gleaming white building. Outside of that building, a line consisting predominately of African American women and children winds out the door and extends half way down the block.[1] These women are not waiting for a sale, to purchase concert tickets, or to apply for a job. They are waiting to enter the city's juvenile court where matters involving child abuse and neglect are heard. They are the mothers, grandmothers, aunts, cousins, and foster mothers of children who allegedly have been abused or neglected or are in some way dependant.

This scene—or what it connotes—is not an anomaly in the world of child protection. On the contrary, it is at once vividly descriptive and symbolic of a system of family law in this country that is growing yet continues to exist in a marginalized state. Nationwide, juvenile courts and child protection agencies target hundreds of thousands of mothers who are disproportionately poor and of color, even though child abuse and neglect is not confined to any social class or race.[2] The protective systems, themselves challenged by high employee turnover, poor allocation of resources and difficult mandates, specifically identify and treat these mothers based largely on race, class, and gender.[3] In the meantime, although such treatment is in the name of child protection, children too often experience other harms as a result of and while in protective care.

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1. Although not as visible as their race and gender, poverty is also dominant among these women.

2. Marie Ashe, *"Bad Mothers," "Good Lawyers," and "Legal Ethics"*, 81 GEO. L.J. 2533, 2556 (1993). *But see* U.S. Dep't of Health & Human Servs., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3) 10-12 (1996) [hereinafter NIS-3 Executive Summary] (suggesting a correlation between poverty and child maltreatment).

3. Bias in child protection proceedings is deep, complicated, and obscure. Without doubt, the bias faced by women in these proceedings is directly and inextricably related to larger social policies which harm women; the larger context is, however, beyond the scope of this essay. Such societal pressures resonate in the world of child protection which nevertheless attempts to "conceal[] these conditions behind the cloak of legal objectivity." Bernadine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 ROUNDTABLE 1, 5 (1995).

Nearly half of a million children are in foster care in this country,[4] an ironic state of affairs in view of the high political currency of "family values."[5] Indeed, removing children from their families runs counter to what the dominant culture knows about its own families, which despite their failings are viable and worthy of respect. A possible explanation is that "other families are not viewed as "real families," so the larger society tolerates their fissure. Otherwise, there surely would be an outcry about these half-million children separated from their parents.[6]

This "othering" of poor families, particularly when they are of color, makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all.[7] Just as these families are not families, these mothers are not really mothers.[8] They deviate from the normative notions of mother and womanhood and are defined as bad.[9] The result is an often punitive, rather than empowering, system focused more on mothers than on their children.[10] This punitive maternal focus serves both to decontextualize

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4. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICAN'S CHILDREN YEARBOOK 1994 89 (1994) (stating that by the end of 1992, 438,427 children were in foster care).

5. *See, e.g.*, Clif LeBlanc, *License Tags Sing Beasley's Theme*, THE STATE (Columbia), Feb. 22, 1997, at A1 (reporting that South Carolina's new license plates are anticipated to contain the slogan "Putting Families First," which also happened to be the state governor's campaign slogan).

6. This tolerance would appear to be part and parcel of this country's psyche. *See* Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 146 (1995) ("Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care.").

7. *See, e.g.*, Bob Secter, *Children's Guardian Draws Criticism*, CHI.-SUN TIMES, Mar. 20, 1995, at 1 (quoting a public official's statement regarding a seriously disturbed mother and her son: "There is no family to preserve"); Elizabeth Bartholet, *Blood Parents vs. Real Parents*, N.Y. TIMES, July 13, 1993, at A19 (stating "[t]he law should stop defining parenting in terms of procreation and recognize that true family ties have little to do with blood"). Child protection doctrine affirms this attitude by construing child abuse and neglect as an individual problem that can be fixed by individual therapeutic intervention. Barbara Nelson, *Making an Issue of Child Abuse*, *in* FAMILY MATTERS 232-45 (Martha Minow ed., 1993).

8. Dorothy Roberts has noted that African American women—by virtue of their race and regardless of class—cannot meet the ideal of motherhood because that ideal is white; as a result, their prosecution for being bad mothers is more acceptable. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 15 (1993).

9. Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 61 (1995); *see* Dohrn, *supra* note 3, at 6 (stating "[f]rom the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for 'deviant' mothering practices, and police the undeserving poor"); *see also* Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 365-66 (1996) (noting that mothers are blamed when there are problems).

10. Leroy H. Pelton, *Enabling Public Child Welfare Agencies to Promote Family Preservation*,

women from the larger familial, institutional, and societal factors that mothers experience[11] and to expand the scope of state intervention beyond child protection into every realm of mothers' lives in the name of making them good mothers.

This essay addresses the policies, practices, and perspectives that help to fuel the growing industry that has arisen from the state's[12] "protective" involvement with poor families and families of color and the state's punitive treatment of the mothers of these families. This essay, further, challenges the *sine qua non* behind the punitive treatment of these mothers and the state's protective scheme: that it is good for children. Because the state's reasons for both initial and continuing intervention are ill-defined and maternally-focused, state intervention often fails to meet children's basic needs for love, stability, continuity, and timely determination of legal status.[13]

Part one of this essay describes the legal and bureaucratic framework of coercive state intervention and how the state directs its actions based largely on the gender, race, and class of parents. Part two focuses on concrete examples of gender bias in child protection proceedings. The illustrations unfold first by presenting objective indicators of how women are singled out for their behavior or status and then by presenting a more subjective picture of how women and their families experience intervention. Part three points out shared failings of the various child protection systems. Finally, part four addresses some of the bureaucratic and legal factors that help perpetuate biased and punitive systems and explores some suggestions for improvement.

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38 SOC. WORK 491, 491 (1993); Martin Guggenheim, *The Political and Legal Implications of The Psychological Parenting Theory*, 12 N.Y.U. REV. L. & SOC. CHANGE 549 (1983-84). Not all juvenile or family courts are punitive. On the contrary, a good juvenile court exists to protect children, not to assign blame. For descriptions of three such courts, see MARK HARDIN, ET AL., A SECOND COURT THAT WORKS: JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORMS (1995); MARK HARDIN, JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORM: ONE COURT THAT WORKS (1992); Andrew Gottesman, *2 Cities Can Teach Chicago Juvenile Court Lessons*, CHI. TRIB., Dec. 22, 1993, at 1.

11. Bernadine Dohrn characterized this phenomenon as one of "legal isolation from social context, institutional neglect, and complex relationships of power [that] therefore relies exclusively on individual maternal accountability and blame. Fathers, step-fathers, and 'boyfriends,' as well as larger social institutions, are absent during the legal and moral adjudication of mothers." Dohrn, *supra* note 3, at 2-3.

12. As used in this essay, "state" refers to either or both governmental child protection agencies and the courts that adjudicate and oversee abuse and neglect cases.

13. *See* Roger J.R. Levesque, *The Failure of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, MD. J. CONTEMP. LEGAL ISSUES 1, 1-2 (1995); *see also* Louise Kiernan & Sue Ellen Christian, *Juvenile Court Plays the Waiting Game*, CHI. TRIB., Feb. 7, 1997, § 2, at 1 (citing a study finding that 90% of children who came into foster care in 1993 and 1994 had not been returned home by mid-1996).

PART ONE: THE CHILD PROTECTION SYSTEM

Historically there have been and there continue to be two systems of family law, one public and the other private. The private system adjudicates custody among relatively wealthy parents in divorce or domestic relations courts; the public system adjudicates custody among the state and predominately poor mothers in child protection courts.[14] The law of the public forum is also known as poor persons' family law.[15] It originated from state placement of poor children in asylums, indentured service, or with other families, and during this century, it has evolved into the modern foster care system.[16] In contrast, private family law is based on the doctrines of inheritance and property.[17] Currently, it primarily encompasses custody disputes among family members, usually parents, as a result of divorce, inheritance, and adoption.[18]

A key difference between the private and public systems, at least historically, is that the former is more deferential to parental rights and family autonomy, whereas the latter is more tolerant of, indeed at times has mandated, state usurpation of custody.[19] Although constitutional doctrine has evolved in the latter half of the twentieth century to ensure protection of the rights of poor parents,[20] the government still coercively intervenes more readily into the custodial relations of poor families.[21]

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14. *See e.g.*, MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 189-90 (1994) ("the law has maintained a two-tiered system in dealing with poor children and relatively rich children in custody matters"); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1039-41 (1979) (stating that poor laws governed poor families and patriarchal rules governed other families); *see also* Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 255 (1992) (noting how child protection proceedings are heard in separate court calls in this country).

15. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 433 (1983).

16. MASON, *supra* note 14 at 189-90; *see also* Tim Hasci, *From Indenture to Family Foster Care: A Brief History of Child Placing*, 74 CHILD WELFARE 162 (1995) (describing the evolution of indentured service, asylums and other protection of poor children to the foster care system); Garrison, *supra* note 15, at 432 (stating that "[t]he foster care system's lack of concern for natural parents reflects centuries of a dual family law—one for the rich and one for the poor").

17. Garrison, *supra* note 15, at 434.

18. Around 20% of adoptions nationwide are of foster children. Unif. Adoption Act prefatory note, 9 U.L.A. 2 (1994). Disregarding this rather significant statistic, adoption law tends to focus mostly on the private adoption of anonymous infants through consent of their parents. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1000 (1995).

19. Garrison, *supra* note 15, at 432-37.

20. M.L.B. v. S.L.J., 117 S. Ct. 555 (1996); Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977).

21. Garrison, *supra* note 15, at 432-37; Annette R. Appell & Bruce A. Boyer, *Parental Rights*

A. The Mechanics of State Intervention

Normally, state protective involvement with families begins with a call to a child abuse hotline.[22] Neighbors, educators, health care professionals, social workers, and family members are the most frequent callers.[23] Upon receiving a report of child abuse or neglect, the receiving agency will investigate any substantial allegations.[24] If the agency determines that a child has been harmed or is at risk of harm, it can either provide services to the family to ameliorate the problems or petition the case into court to seek court supervision of the family or removal of the child from the home. Actually, federal law requires child protection agencies to attempt to protect the child within the home rather than pursue removal.[25]

If the child protection agency seeks custody of a child, it must bring the case to court, unless the parents have agreed to placement. In a contested case, the court will probably appoint counsel for the parents. Appointed counselors, however, are likely to have few resources, little training, and high caseloads.[26] The court will also appoint the child an advocate who may or may not be a lawyer and may or may not be trained in pediatric law, child development, or the myriad of other disciplines that prepare professionals to make good decisions on behalf of children.[27]

Once the state removes a child, federal law requires the state to make "reasonable efforts" to return the child home and to monitor the child while in foster care.[28] Toward this end, an agency must draft a case plan for each

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vs. the Best Interests of the Child: A False Dichotomy in the Context of Adoption, 2 DUKE J. GENDER L. & POL'Y, 63, 79 (1995).

22. Federal law mandates that states receiving federal child protection funds maintain child abuse hotlines. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (1994).

23. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1994: REPORTS FROM THE STATES TO THE NAT'L CTR. ON CHILD ABUSE AND NEGLECT 3-3 (1996). Most states mandate that educators, medical and mental health professionals, police and, in some states, lawyers, report or risk fines or loss of licensure. Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 213-14 (1992). Other citizens are permitted to call in most states. *Id.* at 216.

24. 42 U.S.C. § 5106a(b)(2)(A)(iii).

25. 42 U.S.C. § 671(a)(15)(A) (1994).

26. It is typical for parent defenders to carry caseloads of 500 in urban jurisdictions. David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, LOY. U. CHI. L.J. 183, 204, n.142 (1995). Demonstrating the typical failings, the system of appointment in South Carolina calls attorneys at random from among the general bar without regard to their practice background, experience or resources. Indeed, South Carolina does not even pay its appointees for their time or expenses.

27. *See Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1309 (1996); Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 U. MICH. J.L. REFORM 341, 351 (1987).

28. 42 U.S.C. § 671(a)(15). Unfortunately, the United States Supreme Court compromised

child.[29] These plans primarily consist of tasks for a mother to complete in order to have her child returned. Although good social work practice mandates that the assigned caseworker and the mother draft these plans collaboratively,[30] it is more common for caseworkers to make the plans on their own, and in some instances, caseworkers use pretyped, generic forms that obligate the mother to submit to drug tests, go to counseling, submit to psychological evaluations, attend parenting classes, and visit the child.[31] These plans may also require the agency and foster parents to complete certain tasks, such as to arrange for services for the child or parent and to provide reasonable visitation. Finally, federal law requires the court or agency to review these plans every six months.[32]

In the meantime, the courts oversee or decide such things as whether the child should be in the home or in foster care, the parameters of parent-child visiting, and whether the child protection agency is performing its duties, including its duty to make reasonable efforts toward family reunification.[33] If there is a significant barrier to reunification, such as the mother's poor progress or prognosis for abiding with her plan, the court may terminate parental rights so the child can be adopted by someone else.[34]

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enforcement of this requirement when it ruled that "reasonable efforts" was too vague a term for courts to enforce. Suter v. Artist M., 503 U.S. 347 (1992). The Supreme Court's decision is particularly surprising given the doctrinal pervasiveness of "reasonable" in local and federal law.

29. 42 U.S.C. § 675(1)(B) (Supp. 1996). Case plans should include:

> A plan for assuring that the child receives proper care and that services are provided to the parents, child and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care . . . .

Id.

30. *See* Linda Katz, *Effective Permanency Planning for Children in Foster Care*, 35 SOC. WORK 220, 221 (1990).

31. This is the experience of the author, as well as others familiar with the child welfare system. *See, e.g.*, Herring, *supra* note 26, at 200-01.

32. 42 U.S.C. § 675(5)(B).

33. *See, e.g.*, S.C. CODE ANN. § 20-7-762 (Law. Co-op. Supp. 1996).

34. *See, e.g.*, S.C. CODE ANN. § 20-7-490 (Law. Co-op. Supp. 1996); 705 ILL. COMP. STAT. 405/2-29(2) (West 1993). Unfortunately, termination of parental rights does not necessarily lead to adoption placements. Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 413 (1996). As a result, states may be creating legal orphans by terminating parental rights when there is no one to adopt the child. *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995) (referencing a study that found many children whose parents' parental rights are terminated are not being adopted).

B. The Families Involved in the Child Protection System

The mothers and children "served" by the public, protective system are overwhelmingly poor and disproportionately of color.[35] Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies.[36] For example, the state must have probable cause to enter the homes of most Americans, yet women receiving aid to families with dependant children (AFDC) are not entitled to such privacy.[37] In addition to receiving direct public benefits (like AFDC and Medicaid), poor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care;[38] rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation.

Of course, the vast majority of the parents involved in the child protective system are mothers.[39] Men are rarely brought into court, held accountable, or viewed as resources for their children.[40] When fathers are involved in the proceedings, they are usually subject to lower expectations[41] and are

35. Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 ROUNDTABLE 139, 150 (1995). This race disproportionality is particularly shocking in view of findings that there is no correlation between race and rates of child maltreatment. NIS-3 Executive Summary, *supra* note 2, at 7-8. African American children make up 39 to 42.4% of the children in foster care—grossly disproportionate to their 15% representation in the general population. Annie Woodley Brown & Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 74-75 (1997). Latino children are only slightly over represented in foster care where they make up 11.8% of foster children, versus 10% in the general population. *Id.* Native American Children make up at least 1.9% of the foster care population. *Id.* at 75.

36. *See* Brown, *supra* note 35, at 71.

37. Wyman v. James, 400 U.S. 309 (1971) (holding that women receiving AFDC must permit state social workers to enter their homes even though the visits shared some characteristics of a Fourth Amendment search and seizure for which a warrant would normally be required).

38. Doctors have noted that these women are also more likely than their middle-class counterparts to be reported to government authorities because doctors serving paying clients are less likely to make child abuse reports, unless referrals diminish. *See* Ira J. Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (postulating that private obstetricians and hospitals may be less likely to diagnose prenatal drug use "for fear of adverse patient reactions and the loss of future referrals").

39. Ashe, *supra* note 2, at 2542.

40. *See id.*; Dohrn, *supra* note 3, at 5.

41. Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 ROUNDTABLE 13, 15 (1995) (noting the double standard for judgments of parenting depending on whether the parent be

significantly less likely to be criminally charged with neglect or passive abuse of their children. Women, on the other hand, are more frequently charged under such laws, even when they had nothing to do with the abuse.[42]

Thus, because poor families are more public and interact so frequently with governmental agencies, their problems are more visible to the child protection authorities. But this is not the entire story. In contrast to the largely poor and disproportionately African American families who constitute the main recipients of child protection services, the judges, caseworkers, and attorneys are mostly middle-class and white.[43] Many agencies and the individuals that monitor these families see them as pathological, incompetent, and less worthy of preservation.[44] Neither the families nor their heads—the mothers—fit dominant cultural paradigms, such as white, married, middle-class, and suburban.

The mothers have evaded the white middle-class mother norms—or myths—in a number of ways. First and foremost they are poor. Food, jobs, and decent housing are elusive. Five sisters may live together with their fifteen children in a roach infested slum:[45] their only other housing option being a roach infested apartment in a public housing high-rise where their children will be in daily danger of being shot or "shaken down." Because they live where they do, the state charges these mothers with neglect for subjecting their children to an injurious environment.[46]

These mothers do not have access to affordable childcare. They depend on informal kinship and community networks for babysitting. If a mother leaves her child with a neighbor or an aunt, rather than with a nanny or in a licensed day-care center, she is considered to have neglected her child.[47] In

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mother or father).

42. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 95-96 (1993).

43. By definition they (particularly the better paid lawyers and judges) are middle-class, even if they were raised in poverty. *See* Louise Kiernan, *Children on Trial*, CHI. TRIB. MAG. Jan. 19, 1997 at 11 (stating that [j]uvenile court "is a place where mostly white, middle-class lawyers and judges make decisions about the lives of families and children who are mostly black, Hispanic and poor"); KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK 1-2 (1996) (describing race disparity and one instance of court personnel surprise that an African American woman in juvenile court was there as an attorney, not a mother).

44. *See* Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 312-13 (1996) (noting the tendency of social workers to "rescue" children from their parents); Garrison, *supra* note 15, at 424.

45. *See* Ray Long, *DCFS Poverty Cases Rising Dramatically*, CHI. SUN TIMES, July 21, 1994) at 12 (describing such cases).

46. *See, e.g.*, COLO. REV. STAT. §§ 19-3-301 to -401 (Supp. 1996); 705 ILL. COMP. STAT. 405/2-3(1)(b) (West 1993) (stating that a neglected child includes a one "whose environment is injurious to his or her welfare"). In Illinois, in one year alone, the state removed nearly 1,000 children from their homes based on this allegation. *See* Long, *supra* note 45.

47. Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, THE BLACKLETTER J., Spring 1987, at 9, 12-13.

fact, extended family and kin networks so prevalent in non-white communities[48] do not fit the white middle class norm in which the mother is primary care-giver, supported by her husband and paid childcare.[49] Because the rich tradition of extended family or kin care is not normative, the child protection system does not recognize it as family and views the mothers who rely on that tradition as having abrogated their maternal roles and duties.[50]

Poor mothers are more likely to live in high risk areas under high stress related to the blight and violence which surrounds them and under the strain of living on government benefits that are below subsistence level. Some days, having the money or energy to do one more thing, such as to take three buses to go shopping or to visit a child, is just too much. When judged by someone who has a car or car-fare and who does not have to spend much time worrying about obtaining food, clean clothing, toiletries, or dodging bullets and crack dealers, these mothers appear not to care enough about mothering.[51]

These women are challenged for being self-determinative and are punished for having sex and producing children with men to whom they are not married.[52] They are punished for disobedience, *i.e.*, for refusing to comply with state or judicial directives no matter how irrelevant they may be to women's lives. They are punished for independent thought and any other deviation from gender norms. For example, a mother may be chastised for

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48. *See, e.g.*, Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539 (1983-84) (discussing kinship systems in African American communities); Rebecca Hegar & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Kinship Care*, 74 CHILD WELFARE 200 (1995) (providing survey of kin care in families of color).

49. Contrast this image with the description of parenthood in a black, working-class neighborhood: "[C]hildren are 'almost never alone and very rarely in the company of only one other person.' A crying baby is 'fed, tended, held, and fondled by anyone nearby.' Each child seems to be the concern of each adult." Davis, *supra* note 9, at 360 (quoting SHIRLEY BRICE HEATH, WAYS WITH WORDS: LANGUAGE, LIFE, AND WORK IN COMMUNITIES AND CLASSROOMS 116-17 (1983)). Then imagine how chaotic this world could look to someone used to exclusive, isolated, maternal parenting.

50. The child protection system has increased its reliance on extended families as resources for foster children in the past decade, but has been slow to recognize these expansive family networks as families. Julia Danzy & Sondra M. Jackson, *Family Preservation and Support Services: A Missed Opportunity for Kinship Care*, 76 CHILD WELFARE 31 (1997); *see also*, Madeline L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 25 CONN. L. REV. 1453 (1994) (describing unintended detrimental results of this reliance).

51. Material conditions shape perceptions of motherhood. *See* Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing about Motherhood*, *in* REPRESENTATIONS OF MOTHERHOOD 56 (Donna Bassin, et al., eds., 1994) (exploring how a white middle class feminist focus on motherhood fails to address the material and historic conditions of other women who do not share the privileges of financial security and family autonomy).

52. *See* Roberts, *supra* note 8, at 15 (noting how black women are punished for having babies).

being angry,[53] wearing pants,[54] or if there is a father present, for being the family's breadwinner.[55]

Given this structure of child protection based at least in part on larger institutional biases regarding motherhood, it is not surprising that women are judged harshly and lose custody of their children. The system focuses on maternal behavior, not on the larger conditions in which the family exists or the fact that many of these mothers have few real choices. As a result, mothers shoulder the blame for being homeless, beaten, young, or addicted to drugs. The response then is to fix them: to provide therapy and teach them how to live good, middle-class-like lives. This response too rarely includes meaningful assessments of a mother's strengths and material needs.

PART TWO: CONCRETE EXAMPLES OF BIAS

Women experience the public protective system's myopia in particularized ways. As the following two subsections show, the state clearly, and at times explicitly, targets women based on their gender, race and class; and unless these women conform to dominant gendered expectations, the state will not release their children.

A. Objective Indicators of Systemic Bias: Violence and Drugs

The system's treatment of domestic violence and substance abuse illustrates how it focuses on punishing and controlling women rather than on protecting children. In both instances, the child protection system blames women for putting their children at risk. In neither instance does the system hold men accountable for their actions that harm children or put them at risk. Unfortunately, while blaming the mothers, the child protection system all but ignores the children.

Women victimized by domestic violence face a tremendous bias. If a woman admits to being abused by her partner, she puts herself in danger of losing her children to the state based on her failure or perceived failure to protect them.[56] Thus, instead of the child protective apparatus stepping in to protect the children by removing their abusers, it blames the mothers and removes the children. Moreover, these actions are to the exclusion of

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53. Dohrn, *supra* note 3, at 9.

54. *Id.*

55. *See, e.g.*, *In re* P.F. & E.F., 638 N.E.2d 716, 719, 721 (Ill. App. Ct. 1994). The court noted that the mother provides financial support for the family and criticized the father for failing to "show any concern over his failure to earn a regular income." *Id.* at 719.

56. Dohrn, *supra* note 3, at 7-8; *see, e.g.*, *In re* A.D.R., 542 N.E.2d 487 (ILL. APP. CT. 1989) (upholding a finding that children whose father abused their mother were neglected by virtue of living in an environment injurious to their welfare).

providing assistance to the mother, a step that might better solve the problem. The state uses laws passed to protect women and children from their abusers to separate nonabusive mothers from their children, rather than abusers from mothers and children.[57] The child protection system thus blames mothers for being abused. It assumes that the mother has created the risky environment for the child by being involved with an abuser. In effect, she is blamed for the behavior of the violent man. Because she is at fault, the children should not remain in her care.

Prenatal drug use is another area that illustrates how child protection targets women. In many states, it is *prima facie* neglect for a woman to give birth to a child with a controlled substance in its system.[58] There is a universal gender bias on the face of this rule of law and a more particularized race and class bias in its enforcement. With regard to the universal gender bias, only maternal pre-birth conduct is defined as neglectful. Other non-sex-specific conduct aimed at or undertaken in spite of a fetus is not grounds for neglect. Thus, a man can beat up his pregnant wife, work around asbestos, or smoke, but such conduct is not characterized as neglectful or abusive in the context of child protection.[59] Indeed, were lawmakers truly concerned about the health of babies, prenatal health care would be accessible, there would be sufficient drug treatment for pregnant women and mothers, and nutrition programs for women, infants, and children would be fully funded.[60]

With regard to race and class bias, studies have shown that although African American and white women of all income levels use drugs and alcohol at similar rates (with higher rates for white women),[61] African American women are drug tested during delivery more often than white women,[62] and when both are tested, black women are reported to child welfare authorities for prenatal drug use at a significantly higher rate than their white sisters.[63] Studies have also shown that whether a mother or her child receives a diagnosis of substance exposure is directly related to their class and the color

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57. *See* Dohrn, *supra* note 3, at 7-8.

58. *E.g.*, 705 ILL. COMP. STAT. 405/2-3(1)(c) (West 1993); *see also,* Roberts, *supra* note 42, at n.20 (listing state statutes).

59. Katha Pollitt, *'Fetal Rights' A New Assault on Feminism*, THE NATION, Mar. 26, 1990, at 409, 416.

60. *Id.* at 410-11 (stating "[t]he focus on maternal behavior allows the government to appear to be concerned about babies without having to spend any money, change any priorities, or challenge any vested interests"); *see also* Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and The Right of Privacy*, 104 HARV. L. REV. 1419, 1436 (1991).

61. *See* Chasnof, *supra* note 38, at 1204; Daniel R. Neuspiel, *Racism and Perinatal Addiction, in* ETHNICITY & DISEASE 1 (1995).

62. Roberts, *supra* note 60, at 1433.

63. Chasnoff, *supra* note 38, at 1204 (indicating that a black woman [i]s 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy").

of their skin.[64] In sum, poor, minority women are much more likely to be diagnosed with prenatal drug and alcohol use than white women with private insurance.

B. Three Case Studies

It is evident then that the child protection system brings children into foster care largely based on the race, class, and sex of their primary parents. What happens after these families enter the system is equally parent-focused and replicates the themes described above: women who behave in ways that resemble white, middle-class, feminine, motherly paradigms get to keep their children. Those who do not and who do not exhibit sufficient contrition or obedience for their failure to conform are not entitled to their children. In the meantime, their children are subjected to the harms of separation from their families (and often their neighborhoods, communities, culture, and race)[65] and the "jurogenic"[66] harms of the child protection system.[67]

This viewpoint is largely absent from appellate court decisions which constitute the main forum for narratives of women and their families involved in the foster care system.[68] Their stories barely surface in the appellate decisions because they are derivative and distilled through the eyes and perceptions of caseworkers, judges, and lawyers. As a result, the mothers' experiences have little or no imprint on the doctrine that passes as based on true accounts.

An example of this lost experience of mothers is *In re P.F. & E.F.*,[69] a review of a trial court's decision not to return home two children whom the state removed due to inadequate housing. The opinion suggests that Sandy, the

64. Ira Chasnoff, Presentation at the National Association for Perinatal Addiction Research and Education 1993 National Forum on Drugs, Alcohol, Pregnancy and Parenting (December 11-14, 1993) (notes on file with author)

65. *See* Penny Ruff Johnson, et al., *Family Foster Care Placement: The Child's Perspective*, 74 CHILD WELFARE 959, 966 (1995) (placing a child in foster care greatly changes a child's life, often making them unable to maintain neighborly contacts or to remain in the same schools).

66. "Jurogenic" was coined from "iatrogenic" which refers to inadvertently induced byproducts of medical treatment or diagnostic procedures. Jurogenic refers to the problems judicial processes create while trying to solve other problems.

67. Children's negative experiences in foster care would constitute such harm. For example, one child "described one foster family that was so hostile that he had to break out of a locked room to steal food." Sheryl Brissett-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, 76 CHILD WELFARE 45, 46 (1997).

68. Women rarely relate their own stories publicly or through the legal process. Their voices are particularly weak when heard in legal proceedings, given their often inadequate representation there. *See supra* note 9, (noting heavy case loads of attorneys representing parents).

69. 638 N.E.2d 716 (Ill. App. Ct. 1994).

mother, was stupid, uncaring, and mentally incompetent.[70] The opinion selectively recites testimony from the maternal grandmother who was vying with the mother for custody of the children and other witnesses who were opposed to the mother receiving custody,[71] but it recites few of Sandy's strengths. The appellate court notes that the children came into care because they were living with their parents in inadequate housing, without hot water or cooking facilities.[72] What the opinion does not reveal is that the children came into care when the family home was all but destroyed in a flood that damaged the family's entire community.[73] Although the opinion notes that the children stayed with their grandparents for the better part of each week,[74] it does not indicate that Sandy left the children there precisely because her living conditions were inadequate. The court focuses on extensive testimony that Sandy, her husband, and the children were usually dirty and unkempt,[75] but does not note the obvious fact that the family's hygiene problems were primarily a result of living without water and, at times, electricity. The opinion recites testimony suggesting that Sandy had no clue about childcare or development, because she argued with her mother about how much creme to put on her baby's diaper rash and was "too strict" with the children.[76] In fact, Sandy, an intelligent, loving, and religious woman, had principled ideas about child rearing.

The appellate court, suggesting that Sandy was somehow out of touch with reality or simply insolent, recites testimony that Sandy did not know why the state took the children.[77] The court seems to miss the irony of Sandy's statement. If the housing conditions were the cause of removal, a mother might expect that protective efforts would focus on housing, not a psychological make-over. Yet, the opinion is filled with evidence that the state subjected Sandy to psychological and psychiatric assessments, required her to attend therapy, and monitored her employment situation. Is it surprising then that Sandy would be confused as to why her children were removed when the articulated reason was the condition of her home and the state's involvement had otherwise reached into every aspect of her life? The opinion also noted that Sandy was "seriously depressed and overwhelmed."[78] But is it not natural for a mother to be seriously depressed at the loss of her children and

70. *Id.* at 728.
71. *Id.* at 719, 720-21.
72. *Id.* at 718-19.
73. The author knows the family through her representation of them in related matters.
74. *In re P.F.*, 638 N.E.2d at 719.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

overwhelmed by managing a chaotic life made more so by layers of bureaucratic mandates?

Although the children came into care because of the housing problems, the opinion reveals that the children were not returned home because the parents were not good enough.[79] Sandy and her husband, the children's father, had difficulty putting their lives together after the loss of their home and then their children. Later, the state removed two of their subsequently born children. Sandy and her husband placed a third child for adoption at birth. In fact, after the state intervened, the parents ultimately separated and relinquished all of their children for adoption. The five siblings are growing up in four separate homes. The state managed to convince both parents that they were inadequate to raise their own children—that others could do it better. Sandy still talks about her children proudly and lovingly; she is in regular contact with all but one of them.[80]

The differences between the appellate court's view and Sandy's own experience illustrate that there is a dissonance between the state's perception of these families and their own perceptions. The following narratives are presented to give the mothers' perspectives on the child protection system.[81] They also serve as a counterpoint to the ideological underpinnings of child protection: improving children's lives by protecting them from their mothers.[82]

1. Janice

The state child protective agency became involved with Janice's family because Janice was not home one afternoon when her three daughters, then six, seven, and twelve years old, returned from school. The family was living in Janice's father's apartment where they had been living since Janice and her long-time partner separated several months earlier.

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79. *Id.* at 728. In fact, the court found the children were better off in their grandmother's "stable" home. *Id.* The grandmother subsequently placed the children with another family.

80. The adoptive parents of that daughter moved without giving Sandy their forwarding address. Accordingly, Sandy lost contact.

81. Of course, the narratives too are derivative because it is not the mothers themselves telling their stories, but the author who represented them in juvenile court proceedings in Chicago. The author, self-characterized as a strong advocate who is genuinely fond of these women, is nevertheless removed from them by class, by virtue of the type of relationship (professional rather than personal), and in two of the cases by race. Although the author has been in their homes, she has never been in their shoes. The names of all of the women and those of their family members have been changed

82. These are primarily maternal narratives. The author cannot tell these children's stories (except insofar as one of the mothers was also a child), but she is mindful that those stories must also be told.

Janice, an intermittent but long-term drug and alcohol abuser, had been particularly overwhelmed and depressed since her and her partner's separation. She admitted to her child protection caseworker that she was struggling with drugs and alcohol. Her father worked during the day but was home at night and in the mornings. Janice's father would feed the girls breakfast and get them off to school on mornings when Janice was out or incapacitated. There also was a very large extended family of blood, adoptive, and in-law relations who were interested and willing to be involved with the girls. The children were of above average intelligence and did very well in school and their many extracurricular activities, participation in which was encouraged by their mother. The girls adored Janice, and she was a very loving, protective, and involved mother.

With her caseworker's help, Janice entered and actively participated in treatment for depression and substance abuse. But when the family appeared in court, two months after initial state intervention, the court removed the girls from Janice and placed them in foster care. Following the court's ruling, the children went first to a shelter and then to a foster home, where the foster mother verbally abused them. They returned to the shelter and then proceeded to another foster home where the oldest of the girls was raped and forced to take care of her sisters and the foster mother's children as well. After removing them from that home, the state separated them. The younger two went to another foster home. The oldest went to a group home where she was violently raped and subsequently threatened by the rapist's friends until she finally ran away. While she was on the run, she stayed in contact with Janice, and Janice, in turn, tried to locate a safe place for her daughter to live. Eventually, Janice found elderly relatives with whom she convinced the agency to place her oldest daughter.

Janice is warm, charismatic, and dynamic, but she is forever taking shortcuts. She does not think that the rules apply to her. She complied with her case plan: attended psychotherapy, submitted to random drug screens, participated in drug counseling, and underwent psychological evaluations. She occasionally fell off the wagon, however, and was not a good candidate for therapy; she attended faithfully but was not involved in the therapeutic process. Janice's caseworker,[83] the children's attorney, and the court required Janice to provide six consecutive months of clean drug drops and to make progress in therapy before they would return the girls home. Due to the agency's limitations, Janice could never even submit to six consecutive months of random drug screenings. She did not make much progress in therapy, and in any event, she tested positive for drugs several times over the first four years her children were in foster care.

Janice never got her girls home. The state does not even allow her to have unsupervised visits with them. Janice is unlikely to change appreciably. She will probably continue to use drugs and alcohol and bend the rules to suit herself. Although she and her daughters love each other dearly, the state has grown impatient with Janice and is preparing to terminate her parental rights.

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83. Caseworker consistency was a problem for Janice and her family. They had four or five consecutive caseworkers during a three year period. Each one had a different assessment of Janice, and each required three to six months to acquaint themselves with Janice.

2. Sarah

Sarah, an abused wife, had two children with her husband Edwin. Although they met and married in Chicago, Sarah's hometown, they eventually moved to Puerto Rico to live near Edwin's family.[84] While in Puerto Rico, Edwin's violence escalated, and Sarah began to fear that Edwin would direct his violence toward the children. She fled to a friend in Arizona. While there, her then two-year-old daughter indicated that Edwin's brother Jose, a resident of Chicago, had touched her private parts. Sarah immediately contacted the child protection authorities. They investigated the charges but could not make conclusive findings. They suggested that Jose might simply have been tickling his niece and made no further recommendations or referrals.

Eventually, Edwin convinced Sarah to return with the children. After a honeymoon period, the abuse returned, and again it escalated. Sarah fled. This time, she and the children went to Chicago where she stayed from place to place while trying to scrape together bus fare back to Arizona. With nowhere to live, she and the children moved in with Jose. At some point, she even had an affair with him. When her daughter, then four-years-old, told her that Jose had hurt her private parts, Sarah became furious. She immediately confronted Jose who became angry and set fire to the apartment while Sarah and the children were inside. Sarah reported Jose to the police for arson and sex abuse. The police arrested Jose and contacted the child protection agency. This time, the authorities were able to diagnose the sex abuse of Sarah's daughter. They found no abuse of her brother.

Initially, the child protection investigator planned to allow the children to remain with Sarah. The investigator, however, changed her mind after discovering that Sarah had slept with Jose and that two years earlier she had suspected Jose of sexually abusing her daughter. The investigator disapproved of a wife sleeping with her husband's brother and felt that, because they had a sexual relationship at some point, Sarah must have somehow sanctioned or collaborated in the abuse. The investigator convinced the court to remove both children from Sarah, even though the boy had not been abused.

The child protection agency placed the children in foster care. In response, the children became angry and confused, and they missed their mother.[85] As a result, they were somewhat challenging as foster children. Despite Sarah's constant pressure, it took the agency nearly six months to enroll the children in counseling.[86] The first foster family asked for the children's removal within one week of their

84. Her family, of Eastern European heritage, disowned her when she married Edwin, who was Puerto Rican.

85. They were also angry at her. Due to their developmental ages, they felt abandoned by her. They could not fully appreciate why they were no longer living with their mother.

86. One of the weaknesses of the child protection system is its failure to treat the children once it removes them from a dangerous situation. *See* Anthony M. Graziano & Joseph R. Mills, *Treatment for Abused Children: When is a Partial Solution Acceptable?*, 16 CHILD ABUSE & NEGLECT 217 (1992) (noting that psychological counseling is underutilized for maltreated children).

placement. The situation was not much better in the second foster home. Sarah had concerns about how the foster parents were treating the children, but she did not push the matter because she did not want her children to experience the trauma of another move. Eventually, however, the foster mother admitted that she wanted to kill Sarah's daughter. Shortly thereafter, the state removed the children. The next foster home, their third within six months, was much better.[87]

In the meantime, Sarah was very taxing on her caseworkers. Extremely concerned about her children, she called the caseworkers daily to discuss the children, their needs, and their progress. Sarah diligently worked at completing the four pages of tasks set forth in the case plans her caseworkers had drafted. The early plans did not require assistance to Sarah for housing or obtaining a job, although later plans did. When a domestic violence counselor submitted a report stating that Sarah should have unsupervised visits[88] with the children and that the family should be reunited, the agency fired the counselor and sent Sarah to a more traditional therapist.

The court reunited the family in stages. Sarah first had to prove herself in short unsupervised visits. Then she made longer visits, until she finally had overnight and then weekend visitation with her children. Two successfully completed case plans later and fourteen months after the court removed her children, it returned them pursuant to a court order listing twenty tasks and obligations for Sarah to fulfill. Nine months later, the court closed the case.

3. DeeDee

DeeDee's mother Debra is an alcoholic.[89] DeeDee had been living with her great-grandmother Doris since DeeDee was about eight years old. When DeeDee was about eleven, Doris moved into publicly-funded senior citizen housing that was more affordable and much safer than her previous apartment. Unfortunately, housing regulations prohibited residents from sharing their apartments with non-senior citizens. Doris brought DeeDee with her, but when the housing authorities discovered the arrangement, Doris was forced to choose between her home and her granddaughter. Having no other family to shelter her, DeeDee entered the child protection system.

The state took custody of DeeDee and placed her in a group home because there were no foster homes available to take her at the time.[90] A smart girl and a good student, DeeDee was independent and did not like to follow the rules of the group home. She often stayed over at Doris' apartment without the group home's

87. These foster parents, more experienced and better trained than the previous ones, understood their role to be one of care-givers for the children until they could be returned to their mother.

88. The agency permitted Sarah to see her children one time per week for one hour, under supervision. Each visit required Sarah to travel two hours each way.

89. DeeDee is a composite of several teen wards the author represented while serving in her capacity as guardian ad litem and attorney.

90. There is a serious shortage of foster homes. Brown, *supra* note 35, at 70.

permission, and other times she stayed with friends or relatives with whom the agency had not authorized her to stay.

At age fourteen while under the state's care and guidance, DeeDee got pregnant. At fifteen, she delivered a healthy, full-term baby boy. The agency's first instinct was to remove the new born due to DeeDee's youth, but it could not convince the court that there was cause for removal. It was, however, able to obtain court supervision of the baby. The court, therefore, oversaw DeeDee's life as a ward and as a mother. The agency sent her to live at a state shelter for pregnant and parenting teen wards.

DeeDee hated having her baby at the shelter because it was infested with roaches. She kept him with her in her bed at night to protect him, but the staff insisted that she let him sleep in his crib. So, DeeDee left the group home. She stayed with Doris as much as possible, but it was hard to conceal the presence of an infant from the housing authorities. When she was not with Doris, she stayed with friends or other relatives and sometimes her stepfather. She also stayed with her son's father's family (the father's name is Jason).

Although young and inexperienced, DeeDee provided for her son's needs, attended to his medical care, and gave him love and attention. Doris and Jason's mother helped DeeDee with her parenting skills, and Jason, a recent high school graduate now attending a trade school, helped as much as he could financially. Without childcare or a stable address, DeeDee had to drop out of high-school.

The caseworker's primary goal for DeeDee and her son was to get them back to the shelter. The caseworker also established a case plan that required DeeDee to attend parenting classes, get a psychological evaluation, obtain a high school graduate equivalency degree, and go to counseling. In addition, because DeeDee mentioned that she had tried smoking marijuana a couple of times with other wards at the group home, the caseworker required DeeDee to submit to drug testing and a substance abuse evaluation.

The court eventually ordered the baby into foster care because DeeDee refused to stay at the shelter and did not comply with the tasks in the case plan. The agency refused to place him with his paternal grandmother because of her support of DeeDee. Instead, it placed him with suburban foster parents who refused to allow DeeDee or Jason to come to their home. The agency scheduled parent-child visits during regular business hours which also coincided with the agency's hours. Jason was rarely able to attend because he could have lost his job if he missed too much work. DeeDee attended most weeks but was discouraged by visiting her infant son for only one hour per week in agency offices. Every week she watched as her son slipped away from her and became more the son of the couple who was raising him. She became pregnant again several months after he was taken from her.

PART THREE: SHARED THEMES

Each of these three women had problems: one with drugs, one with violence, and the other with dependency. These problems placed their children at risk and resulted in actual abuse to one child. The state intervened because of these risks. But the state's intervention was arguably unnecessary in all of

the cases and certainly not helpful in any of them. Further, state intervention caused significant detriment to the children. The following themes emerge from these women's stories.

A. Failure To Utilize Existing Support Systems

Janice, Sarah, and DeeDee had support systems in place to help them and their children. Although Janice's use of drugs and alcohol compromised her parenting,[91] it did not place the children in danger because her father was also in the home. Both Janice and DeeDee had kin systems in the community willing and able to help. Sarah's support system was the least accessible because it was across the country, but she could have relied on the domestic violence programs until relocating to Arizona became possible. All of the mothers loved and nurtured their children. In turn, the children were attached to their mothers and thrived in their care. Yet, instead of bolstering these relationships by assisting the mothers to strengthen ties to existing support systems, the state removed the children from their mothers and these support systems.

B. Ill-defined Scope of Involvement

The state removed each of the children ostensibly because their mothers placed them at risk. The state's involvement, however, did not directly address the risk. Janice's children were left home alone. A more direct response to this problem would have been to help Janice develop a care plan for her daughters to accommodate her absences. Instead, the state chose to address underlying issues in Janice's life that could lead to irresponsible parenting: her drug use and non-compliant personality. Having identified these maladies, the state backed itself and the family into a corner, for until Janice was cured, it could not return her children to her. A cure, however, was unlikely.

Sarah's daughter was sexually abused. The abuser was in jail. The state, nevertheless, removed both the abused and non-abused child from Sarah's care because she made bad choices. The state did not comprehend the vulnerable and desperate position in which Sarah found herself: a single mother fleeing from an abusive husband, with no other friends or family to take her in. Instead of addressing the protective issue—the family's need for a safe place to live and the daughter's need for sex abuse counseling—the state chose to fix the parts of Sarah's personality that impacted on her decision-making ability. It is not clear whether Sarah was fixed, but the state was able to extricate itself because she complied with the tasks in her case plan.

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91. *See* Beyer, *supra* note 44, at 328 (describing how substance abuse can seriously impair parenting functions).

The protective issues in DeeDee's case are less clear. The state appears to have removed her son due to DeeDee's youth and failure to follow her case plan. The scope of the state's involvement was defined by DeeDee's age and non-compliance. A supportive environment and responsive plan would have encouraged DeeDee's compliance, but only time would solve the age problem. In the meantime, however, her son would become attached to another family. The state would be in a bind because by the time DeeDee grew up, it would traumatize her son to remove him from his foster family. The state will probably not face that dilemma because DeeDee will likely remain non-compliant, giving the state grounds to terminate her parental rights and place her son for adoption by his foster parents.

C. Failure To Provide Meaningful Services

Janice needed help with the depression and disorientation that was brought on by her separation from her partner and impacted on her drug and alcohol abuse. The state worsened the problem when it removed her children, depriving Janice of a major support device and a reason for sobriety.[92] She became extremely depressed without her girls and had a hard time responding to treatment. Moreover, once the state removed the children, Janice lost her financial and medical coverage and could no longer afford her therapy, depression medication, or carfare to attend her after-care drug program.[93]

Sarah needed bus fare to Arizona. Alternatively, she needed a place for her and her children to live and recover from the trauma they had endured. The state did not give that to the family. Instead, it took her children, ordered her go to therapy, and made her comply with numerous tasks listed in her case plan.

DeeDee needed a place to live. She had family and friends who were willing to shelter her and help her care for her baby, but as a state ward, DeeDee was relegated to foster care or a group home. Ideally and if the state really wanted to help her and her son, it would have used the money it spent on her group home to pay rent on an apartment for her and her grandmother.[94]

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92. *See* Beyer, *supra* note 44, at 330 (noting that keeping children at home is strong motivation for maternal success in substance abuse treatment).

93. As a mother with dependant children, Janice received government support—including medical insurance. As a woman without children, she was no longer entitled to those benefits.

94. DeeDee's story particularly illustrates the intersection of rigid government bureaucracies that wind up working at cross-purposes. The housing authority rules prohibited a grandmother from providing a home for her dependant grandchild; that prohibition in turn caused DeeDee's son to become a child in need of protection. Neither agency recognized or accommodated DeeDee's extended and perfectly adequate family system.

Instead of exhibiting sophistication, flexibility, and attentiveness regarding the mothers' needs, the state provided services according to administrative convenience. Thus, it limited parent-child visitation to one hour per week during times and at places convenient to the agencies rather than the parents. It required the parents to participate in available programs, rather than identifying, developing or locating more responsive services. In addition to failing to utilize existing supports, the state continued to require DeeDee and Janice to comply with services that the two mothers had clearly rejected and did not find helpful. DeeDee's case is particularly illustrative of this problem. DeeDee's caseworker did not help her to repair any parenting deficiencies, find another place to live, or obtain things for the baby. On the contrary, the shelter provided all of those services; so, the caseworker required DeeDee to go back to the shelter, even though DeeDee clearly did not want to be there.

D. Elevation of Form over Substance

The state removed DeeDee's son because she failed to follow her case plan. The state returned Sarah's children because she followed directions and complied with all of her assigned tasks.[95] DeeDee's and Janice's children remain in care because the two mothers did not complete their case plan tasks. Ironically, of the three families, Sarah's children were harmed the most while in their mother's care: her daughter was sexually abused at least once, perhaps twice; both children were victims of arson; and both had no doubt witnessed—and perhaps were victimized by—violence in their home. Yet, they returned home because Sarah complied with all of the tasks on her case plan. In contrast, the state never proved that Janice's and DeeDee's children were harmed while with their mothers. Their mothers simply had lifestyles of which the state did not approve.

E. Failure to provide for the children

The state was not particularly attentive to the children's needs either. In the first place, it hurt the children by removing them from their primary care givers.[96] Sarah's children especially suffered from the initial removal. They had been traumatized by family violence, several moves, a fire, and sexual abuse, and then they were removed from their mother—the one safe, stable, and nurturing aspect of their lives.

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95. Sarah exhibited the same good parenting skills and deep concern for her children both before and after state involvement, yet it was her compliance with her case plans that the court and agency monitored and rewarded.

96. *See* ALBERT J. SOLNIT, ET AL., WHEN HOME IS NO HAVEN 13-16 (1992) (reviewing the effects on the children of separation from their primary care-givers); *see also* Brissett-Chapman, *supra* note 67, at 50.

While in foster care, none of the six children fared particularly well. Janice's children suffered the most. In four years, they had at least four different homes, and they were ultimately separated from each other. Janice's oldest daughter was abused in three of her placements and raped twice. As minors, none of Janice's children will ever return home. In fact, the two youngest daughters may be adopted. Failing adoption, all three will be foster children until they reach eighteen and the state terminates its involvement.[97]

Sarah's children too suffered numerous placements—three within about six months. Although the state apparently removed the children because of the serious trauma they had suffered, the agency failed to address their trauma for months. Indeed, the state added to the trauma by removing them from Sarah and then by limiting their contact with her to one hour per week.

DeeDee and her son found themselves placed outside the family and kin network that was once woven around DeeDee. The state separated the boy from his community entirely and placed him in a suburb apart from mother, father, grandparents, aunts, uncles, and others who loved and supported him and his mother. The boy will lose contact completely when the state terminates parental rights so that foster parents can adopt him. At least he may grow up with one family in a safe environment,[98] but he may never know the wealth that he left behind.

F. A Caveat

These themes are common and pervasive in the child protection system, but not all caseworkers, courts, or agencies are so limited. Indeed, many innovative and community-based programs are being developed or are already thriving throughout the country. Even the court that presided over these cases has begun to initiate changes to improve treatment and oversight of mothers and children. Although caseloads remain very high,[99] the court has recently seen an increase in the quality and number of judges committed to change.[100]

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97. Teenaged wards are trained for "independent living" so that by the time they are finished with high school and reach majority, they can, with the help of foster care and the state, find their own apartments and divorce themselves from protective services. 42 U.S.C. § 675(1) (1994).

98. Like any other family, it is also possible that his adoptive parents will divorce, that they will abuse or neglect him, that they will become ill or lose their jobs and even their home. *See* Appell & Boyer, *supra* note 21, at 78 (noting the unpredictability of future outcomes involving child custody decisions).

99. Judges are responsible for about 3,500 cases each, and attorneys are responsible for at least 300. Louise Kierman, *Murdered Son Might Be Catalyst for Hope*, CHI. TRIB., July 26, 1996, § 1 at 1.

100. *See id.* (describing improvements resulting from new leadership, which includes a new presiding judge, and a restructuring of the juvenile court).

Further, the foregoing themes should not imply that the state's child protection system is entirely without value. On the contrary, child abuse and neglect is a serious problem that leads to nearly two thousand child deaths each year.[101] There are significant numbers of mothers who are unable or unwilling to care for their children. Many children surely benefit from state intervention and even find good, stable, loving homes away from their families. The child protection system, however, cannot guarantee that its charges will find such homes. Given its limitations, the state should be careful to focus on child protective issues rather than maternal make-overs.

PART FOUR: CAUSES AND SUGGESTIONS

The systemic problems in the child protection industry are inextricably related to race, class, gender, and the countless other social institutions that both weaken and devalue women and their families. A pertinent question then is how, apart from a societal restructuring of support for children,[102] can the child protection system better serve children. The following are thoughts on why the system has become so focused on mothers and how it could focus more productively on children while respecting the mother-child relationship.

A. Child Protection Bureaucracies

It is no secret that local child protection agencies are not meeting their mandates.[103] More than a decade after the federal government enacted funding legislation designed to protect against the over reliance and abuses of foster care, the states are still failing to provide the meaningful supports that would allow families to remain intact or reunify after foster care.[104] In fact, nearly half of the states are under court supervision for failing to provide basic services to children in need of protection.[105]

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101. Robert Pear, *Many States Fail to Meet Mandates on Child Welfare*, N.Y. TIMES (NATIONAL), Mar. 17, 1996, at 1. *But see* Nelson, *supra* note 7, at 238-40 (suggesting that there is no need for the child protection industry, at least as currently structured).

102. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY 230-33 (1995) (arguing for a redefinition of family as the mother-child dyad and provision of public, rather than private, support to mothers for dependant care).

103. Levesque, *supra* note 13, at 1-2.

104. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTERS, FOSTER CARE (Aug. 1989); Beyer, *supra* note 44, at 312-13 (pointing out that despite enactment of the Adoption Assistance & Child Welfare Act "anti-family policies and practices died slowly . . . [s]ixteen years [later] . . . children continue to be subjected unnecessarily to the trauma of lengthy separation from their families").

105. Pear, *supra* note 98, at 1 (noting "outrageous deficiencies" in a "Dickensian" child protection system); *see also* Susan L. Brooks, Note, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130,

In the meantime, the numbers of children in foster care keep growing,[106] and the caseworkers cannot keep up.[107] In the wake of these rising caseloads, children are taken from their mothers without meaningful attempts to assist the family.[108] The heavy demand in fact hinders the provision of services to protect and support families.[109] Instead of offering meaningful assistance, caseworkers too often take a cookie cutter approach to the families and their problems.[110] The problems become interchangeable, the serious ones indistinguishable from the minor ones;[111] and needs are generalized and defined according to what services are currently available.[112]

To compound these challenges, caseworker turnover is high, and caseworkers themselves are largely under educated and under trained.[113] Thus, they are frequently unable to assess risk, evaluate the needs or dynamics of families, and access services.[114] These problems compromise the child protection system's mission and consequently harm children by giving rise to the following maladies:

> (1) [a] lack of services to prevent initial placement; (2) a decline in the number of children discharged from out-of-home care; (3) increased

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1132 (1991) (noting a large percentage of foster children going from one placement to another and that some are further subjected to abuse and neglect).

106. For example, between 1990 and 1992, the number of children in foster care rose 8.3%. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK 1994 89 (1994).

107. Levesque, *supra* note 13, at 10-11. The Child Welfare League reported that caseworkers were often responsible for 50 to 70 cases, although standards recommend they carry no more than 15 cases each. Pear, *supra* note 98, at 1. In addition, child abuse and neglect reports doubled between 1980 and 1991. Brissett-Chapman, *supra* note 67, at 51. Although half of these reports are unsubstantiated, they still require child protection investigatory resources.

108. *See* Beyer, *supra* note 44, at 313 (concluding that "[m]any neglected or abused children removed from loving but overwhelmed parents could be safely protected in their own homes if agencies provided sufficient services").

109. *See, e.g.*, Brissett-Chapman, *supra* note 67, at 50.

110. *See id.* "Even for child welfare workers who believe in family preservation, implementing the philosophy in their day-to-day practice has been difficult. Inadequate services, inflexible agency policies and disjointed funding streams are obstacles to family preservation." Beyer, *supra* note 44, at 313.

111. The story of the Mann Family, told in a 1991 PBS documentary, presents a tragic example of this problem. After years of abuse and ineffective state intervention, Adam Mann's parents finally killed Adam. Adam's siblings, most of whom had also been abused, went into foster care when their parents were jailed. Four years later, they remained in foster care, their chances of being adopted dwindling as the months passed. Celia W. Dugger, *Escaping Abuse but Not Neglect: Children Languish in Foster Care*, N.Y. TIMES, July 27, 1994, at A1.

112. Beyer, *supra* note 44, at 324.

113. Brown & Bailey-Etta, *supra* note 35, at 68-69.

114. *See* Brissett-Chapman, *supra* note 67, at 60 ("As financial resources continue to dwindle in contrast to demands and needs, we are standing witness to the deprofessionalization of the governmental response.").

reentry into out-of-home care following periods of family reunification that fail due to lack of supportive services; and (4) a decline in the number of family foster homes available for child placement.[115]

In addition, because the lawyers who represent the children are often untrained and without resources,[116] the court system suffers similar weaknesses in assessment and evaluation.[117] Crowded dockets additionally create barriers to meaningful review. Both problems essentially disable the courts' oversight functions.[118] These limitations in turn undermine gatekeeping: too many families needlessly come into the system,[119] and too few exit in a timely fashion, if at all.[120] This ineffective gatekeeping creates a vicious circle—by keeping caseloads high, the system forecloses its ability to provide meaningful assessment and review of whether families should be in or out.

Improved training of caseworkers, lawyers, and judges could help ameliorate many of these problems. A more sophisticated approach to risk assessment, family dynamics, child development, and cultural diversity would likely improve both the identification of at-risk families and service provision to these families.[121] Moreover, a reorientation of the agency role from deficit-driven to strength-based assessment and service provision would most probably improve outcomes.[122] This approach would involve families and

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115. Brown & Bailey-Etta, *supra* note 35, at 68.

116. Judges hearing child protection matters in Chicago carry up to 3000 cases. Laura Duncan, *States Attorney's Office Adds 20 Lawyers for Surging Abuse and Neglect Caseload*, CHI. DAILY L. BULL., Feb. 24, 1994, at 1. Likewise, children's lawyers in Chicago represent an average of 350 children each. Bob Secter, *Children's Guardian Draws Criticism*, CHI.-SUN TIMES, Mar. 20, 1995, § 1, at 14.

117. *See* HOWZE, *supra* note 43 (discussing need for new methodology and cultural competency in child protection proceedings).

118. The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 501 (codified as amended in scattered sections of 42 U.S.C.), mandates court review of key decisions.

119. In addition, many families who need assistance may never make it in.

120. Brown & Bailey-Etta, *supra* note 35, at 69-70.

121. *See, e.g.*, Brissett-Chapman, *supra* note 67, at 48 (noting widespread call for child protection professionals "to acknowledge cultural differences and the larger community context"); Kathleen Wells & Elizabeth Tracy, *Reorienting Intensive Family Preservation Services in Relation to Public Child Welfare Practice*, 75 CHILD WELFARE 667 (1996) (arguing for interdisciplinary, community-based, developmentally targeted assessment and service provision to families); *see also* Beyer, *supra* note 44, at 318-19 (describing how understanding of cultural issues surrounding a deaf family improved service provision and outcome for the at-risk child).

122. Beyer, *supra* note 44, at 314-15. Assessment and service provision to families at risk for child abuse and neglect is complex and inextricably attached to other governmental policies and programs. *Id.* at 68. Moreover, there are serious questions about how child protective agencies themselves are structured. *See, e.g.*, Pelton, *supra* note 10, at 491 (arguing for "transformation of current public child welfare agencies into family preservation agencies by divesting them of their investigative, child removal, and foster care roles").

their kin systems in the development of case plans to insure that they are meaningful and helpful to the families.[123] Furthermore, such an approach mandates that when families do not follow through on case plans, different plans should be developed,[124] not that the mothers should be deemed failures like DeeDee and Janice.

These improvements could reduce the number of unnecessary family disruptions and decrease the time children spend in foster care by providing for quicker reunification or termination of parental rights.[125] The sophisticated approach would also lead to a decrease in caseloads, and with a decrease in caseloads, child protection agencies and courts could be more attentive to the families and better discern their risks and needs.

B. Legal Grounds for State Involvement

Another way of approaching the problem is through the scope of permissible state involvement. There are two sides to state involvement: (1) when the state can intervene in child-rearing; and (2) when the state can extricate itself after intervening. Any standard for intervention should dictate what areas the state may address and the standard for extrication should dictate what outcomes the state can seek in those areas. Both standards are intimately related to the scope of involvement. If the standards for intervention and extrication are clear but inconsistent, they may compromise the clarity of the scope of involvement. In addition, if the standards for intervention or extrication are themselves unclear, then the state's role will also be unclear.

Currently, the standards for intervention tend to be parent-focused; for extrication, they tend to be child-focused. Both focuses are problematic because neither is sufficiently grounded. By looking at the parent or child in isolation, these standards provide inadequate safeguards against biased, punitive, and ill-defined intervention. Standards based on the parent-child dyad may provide the balance and grounding the child- or parent-focused standards lack. The following is an exploration of these standards and how they impact on the quality and scope of involvement.

1. The Parent-Focused Inquiry

According to constitutional and family law, the state cannot, for the most part, coercively intervene into the family unless the parents' conduct places the

123. *Id.* at 315-16.

124. *Id.* at 317.

125. *See* Linda Katz, *Concurrent Planning: Fifteen Years Later*, ADOPTALK, Spring 1996, at 12 (working toward family reunification can lay the groundwork for termination of parental rights if reunification is unsuccessful).

child's health, safety, or welfare at significant risk of harm.[126] The state may not intervene simply because it believes that there is a better way to raise children.[127] Instead, the state must have an interest in child protection. Standards for state extrication are less clear.

a. Intervention

The state may initiate child protection proceedings only when the parents have fallen below some minimum parenting standard such that the children are, or are at risk of, being harmed. This standard for intervention is parent-focused. It assesses whether the parent is failing the child. The state is not permitted to look solely at the child's well-being or suffering and step in for the parents. Hence, if a child is harmed in an accident while in someone else's care or sexually abused by a neighbor or teacher, the state has no cause to be involved unless the parent intentionally or recklessly put the child in that position.

Accordingly, state child protection statutes permit state intervention when the child has been harmed or is at risk due to some parental failing.[128] In their exact language, these statutes permit protective intervention when a child has been "abused" or "neglected," and sometimes when the child is "at risk" of abuse or neglect.[129] These grounds are imprecise and difficult to apply.[130] Neglect and risk of harm are particularly nebulous and subjective concepts.[131] The lack of clarity leaves the state without sufficient guidance

126. Stanley v. Illinois, 405 U.S. 645, 658 (1972) (requiring the state to conduct individualized inquiry into parental fitness before removing child from father's custody); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (ruling that a state cannot require Amish families to send children to high school); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that a state cannot compel attendance at public schools);Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a state cannot prohibit teaching of foreign language).

127. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-63 (1977) [hereinafter, *Smith v. Organization of Foster Families*].

128. *See* NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT STATE STATUTE SERIES NUMBER 1, REPORTING LAWS: DEFINITIONS OF CHILD ABUSE AND NEGLECT (1996) (compiling state definitions).

129. *E.g.*, 705 ILL. COMP. STAT. 405/2-3(2)(ii) (West 1993) (defining "abused minor" to include one subjected to a substantial risk of physical injury); 5/2-3(1)(b) (defining "neglected minor" to include one whose "environment is injurious to his or her welfare" with a clear implication towards parental responsibility); 405/2-18(2)(f) (dictating that proof a parent's repeatedly using drugs is evidence of abuse or neglect).

130. Elizabeth Hutchison, *Child Maltreatment: Can it be Defined? in* CHILD WELFARE RESEARCH REVIEW 6 (Richard Barth, et al., eds., 1994); Marion Huxtable, *Child Protection: With Liberty and Justice for All*, 39 SOC. WORK 60 (1994).

131. Pelton, *supra* note 10, at 491. Indeed, definitions of child abuse and neglect vary not only among each of the states and federal law, but also among professional disciplines. Brissett-Chapman, *supra* note 67, at 53.

as to the reason for and scope of its involvement and results in needless disruption of families.

One alternative is to allow the state to intervene only when the child has been or is about to be physically harmed.[132] This option would clarify and narrow the grounds for intervention as most cases stem from claims of neglect. But permitting state intervention only in instances where children have been or are about to be physically harmed is also problematic. Neglect can be more insidious than abuse and can be very dangerous, even life threatening, for children. Although the line between neglect and poverty or child-rearing values is uncomfortably blurry, state intervention based on neglect may be essential to protect children. As such, the state should better clarify what constitutes neglect and require a direct nexus between parental conduct and the child's safety.

Whether intervention is based on abuse or neglect, as long as application or conceptualization of the need for intervention revolves around parental failings, the state's involvement will tend to be punitive rather than protective. For if the parent is at fault, then the purpose of intervention will be to fix the parent. Any mother who does not conform to dominant social norms is at risk of losing her children, no matter how tenuous the connection between the mother's behavior or status and her child's actual or imminent harm. From this perspective, the state's conduct in the preceding case studies makes sense. The state intervened because of the mothers' behavior or status: Janice was a drug abuser, Sarah an abused wife and adulterer, and DeeDee a rebellious teenager.

b. Extrication

The state can terminate its involvement either by returning a child home or by consummating the child's adoption.[133] For the latter method, the state must prove that the parent is unfit. This is clearly a parent-focused inquiry.[134] In contrast, standards for returning a child home are more variable and not subject to well developed constitutional guidance.[135]

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132. Another alternative is to raise the state's burden of proof to intervene. *See, e.g.*, J. Bohl, *"These Privileges Long Recognized." Termination of Parental Rights Law, The Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 327 (1994).

133. The state can also extricate itself by ceding guardianship to a private party. Nevertheless, the state's involvement is merely dormant because the parent or guardian may invoke the court at any time to protect the parent-child relationship (through proceedings to dismiss the guardian and reinstate the parent or enforce reasonable visitation, for example).

134. Santosky v. Kramer, 455 U.S. 745 (1982); *see also* Johnson, *supra* note 34, at 411-12 (discussing the parent-based inquiry as well as several departures that look to children's interests).

135. For example, in Illinois, courts may return children home only if it is in their best interests. 705 ILL. COMP STAT. 405/2-23(1)(a) (West Supp. 1996). In South Carolina, the court may return the child when it "would not cause an unreasonable risk of harm" to the child. S.C. CODE ANN. § 20-7-766(c) (Law. Co-op. Supp. 1996).

A parent-focused inquiry might look to whether the parent corrected the conditions that led to state removal. If the state simply asked whether the parent had corrected the conditions that led to intervention, then presumably the decision to extricate would be quite definite. Indeed, because the child protection apparatus does in fact intervene when a parent has failed, it understandably seeks to cure the parent's failings prior to extrication.[136] Nevertheless, if the conditions that lead to intervention are broadly or deeply defined to include all aspects of the mother's life, such as poverty or personality characteristics, then grounds for extrication through family reunification, though more definite, would rarely occur. On the other hand, the state could easily prove grounds for termination of parental rights due to parental failure to correct these conditions.

Additionally, this parental focus appears to contribute to the punitive nature of the child protection system. The problem again stems from the state's addressing the root causes of the mother's failings rather than practice of protecting the children. And again, with this parent-focused perspective in hand, the state's treatment of the mothers in the narratives makes sense: In Sarah's case, the state sought to insure that she will not become involved with any more abusive men. In Janice's case, the goal was to identify and correct whatever problems in her early family life caused her to turn to drugs. Finally, in DeeDee's case the state aimed to train her to be more compliant. These interventions ignore the living conditions that the three mothers faced. Thus, the state overlooked the violence, poverty, and the lack of housing, jobs, and childcare facing these women and focused on their psyches instead. Such overreaching is doomed to failure and further decreases the state's chances of meeting children's needs. As the narratives indicated, the children's needs came second to rehabilitating the mothers.

A parental focus also fails to account for the needs of children whose parents may be fit but for whom a return home would not be in the interests. For example, as a result of long stays in foster care, children may form significant attachments to their foster parents. Others might simply be extremely fearful of their parents. Many states, therefore, permit a child to stay in foster care if it would be best for the child.[137] With long-term foster care placements that raise questions about a child's best interests, merely correcting the material conditions that brought the child into care would not guarantee successful family reunification. Thus, the state must weigh the birth parents against the foster parents, or more precisely, the unknown risks of

136. *See* Graziano & Mills, *supra* note 87, at 217 ("Social and psychological interventions in child physical abuse and neglect focus primarily on parents.").

137. *See* Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 444-45 (1996) (describing reasons children may remain in foster care); Johnson, *supra* note 34, at 403-4 (noting that custody determinations weigh attachments children form to foster parents).

returning the child home with the known, but more containable, risks of foster care. This best interests of the child standard, as discussed in the next section, has its own shortcomings.

2. The Child-Focused Inquiry

Focusing solely on the child would appear to be the logical goal of child protection proceedings. The converse of the parent-focused standard, which marginalizes children, is the child-focused standard, which itself pushes parents to the margins. Just as the marginalization of children compromises the utility of the parent-focused standards, the marginalization of parents is problematic because it decontextualizes the child.

A purely child-focused inquiry arguably would look to the child's interests,[138] an inquiry that, for the purposes of this essay, would be tantamount to a best interests of the child standard.[139] Such a best interests standard encourages individualized consideration of a child's unique circumstances,[140] but decision-making on behalf of children in isolation is extremely difficult because of their undeveloped capacity to provide explicit information or direction.[141] Moreover, there are no clear rules for what factors to include or how to weigh them when determining the best interests of the child. As a result, a purely child-focused inquiry does not offer sufficient guidance for either state intervention or extrication.

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138. A full exploration of child-focused standards is beyond the scope of this essay, but simply put, child-focused inquiries could address either harm to the child (actual or imminent) or the interests of the child. The two standards are easily conflated. An interests standard would assess whether the child's interests are being or can be served. An actual or imminent harm standard would address whether the child is being harmed or is at risk of being harmed. If harm were construed as physical harm, it would be underinclusive because it would not target children whose other essential needs were not being met. *See supra* text accompanying notes 93-95. If harm were defined more broadly, it would be less distinguishable from an interests standard because the latter weighs harms and benefits to the child's interests and chooses the best (or least harmful) alternative. In any event, both standards exhibit similar features and infirmities arising out of their focus on the child.

139. Once viewing a child's interests, it is only natural, although not inevitable, to try to promote the best outcome.

140. Although vulnerable to abuse, the best interest of the child has potential for being a richly child-centered, textured, and thoughtful approach to decision-making involving children. *E.g.*, Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505 (1996).

141. This is particularly true of preverbal children. *See* Annette R. Appell, *Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children* 64 FORDHAM L. REV. 1955 (1996) (arguing that barriers to obtaining information from a child's parent or significant others limits decision-making on behalf of child); *see also* Peters, *supra* note 138 (providing a deeply contextual approach to determining a child's best interest).

a. Intervention

Using a best interest of the child standard for state intervention is problematic for at least two reasons. First, it is arguably unconstitutional.[142] Second, because of its pure child-focus and indeterminacy, it does not identify in which children's lives the state should intervene. For example, it does not dictate which of the following children the state should protect:

- a child who has been sexually abused but her mother does not believe in sending her to therapy;
- children who witness violence in the home;
- children raised by single mothers;
- all children living in certain neighborhoods;
- children who attend below average schools;
- children raised in certain religions;
- children who watch television or those who do not.

Unanchored by parental conduct, the child-focused inquiry applies to any child whose interests are or may be compromised.

This lack of guidance is compounded by the standard's subjectivity and indeterminacy. There is no agreement among social scientists or child protection professionals as to what constitutes the best interests of children or any particular child.[143] The United States is a diverse society with absolutely no consensus on child rearing practices, lifestyle, morality, or religion.[144] Even if there was consensus on what set of criteria should determine a child's best interests, there is no agreement on how to balance those factors.[145] In addition, the best interests standard disproportionately impacts poor families and families of color.[146] As it is, society more easily accepts intervention into those families than middle class families of the dominant culture.[147]

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142. *See, e.g.*, Reno v. Flores, 113 S. Ct. 1439, 1448 (1993) (emphasizing that "[e]ven if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*"); DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993) (Stevens, Circuit Justice) (denying an application for the stay of an order to return a child to her birth parents and noting that no law "authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they a may be better able to provide for her future and her education").

143. Appell & Boyer, *supra* note 21, at 77-78.

144. *Id.* at 79.

145. *Id.* at 80-81.

146. *Id.* at 79-80.

147. *See* Guggenheim, *supra* note 10; Stack, *supra* note 48, at 547; *see also* Santosky v. Kramer, 455 U.S. 745, 763 (1982) (holding that termination of parental rights "proceedings are often vulnerable to judgments based on cultural or class bias"); Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1977) (noting that middle-class social workers treat the poverty of the natural parents as detrimental to the best interests of the child).

Utilizing the best interests of the child as an intervention standard could lead to a large-scale usurpation of the parental role by the state and would magnify existing class, race and gender biases. What is more, social science does not provide tools to determine whether such intervention would be appropriate or helpful. Nor is it evident that the state has the resources or will to provide homes for children that are better than those their parents would provide.

b. Extrication

Best interests is also a problematic standard for state extrication, even though it is frequently the standard used for return home[148] and sometimes the standard for termination of parental rights.[149] Just as the standard's indeterminacy and subjectivity militate against its use in the intervention context, these same characteristics limit the standard's utility as an extrication tool. For example, the standard provides little guidance about how to weigh the changing needs of a child over time. What is best for the child now may not be best when the child is a teenager or an adult.[150] Moreover, social science does not provide reliable tools to accurately predict long-term outcomes of decisions made on behalf of children.[151]

Another problem with the best interests standard is that, like the parent-focused standard, it guides reunification service providers toward making ideal parents. It thus widens the scope of involvement to include creating or searching for the best parents. Unlike the parent-focus which addresses the goodness of mothers, the child-focus weighs mothers against other parental figures, such as foster or adoptive parents. Particularly when race, gender, and class bias are largely determinative of which parents the state is evaluating in the first place, the state will be hard-pressed to return children home. Too many natural parents will never be good enough. And if the state does not return children, then it must maintain them in foster care or place them for adoption. In addition, because there are more children in need of adoptive homes than there are families wanting to adopt, the state will continue to be responsible for a growing number of foster children.[152] The best interests for

148. Guggenheim, *supra* note 10, at 551; *e.g.*, *In re P.F.*, 638 N.E.2d at 716, 724; *In re* Ashley K., 571 N.E.2d 905, 923 (Ill. App. Ct. 1991); *In re* J.B.S., 863 P.2d 1344, 1348-50 (Wash. 1993).

149. *See* Johnson, *supra* note 34, at 411-12 (noting termination of parental rights based on best interests of the child).

150. Appell & Boyer, *supra* note 21, at 80-81.

151. *Id.* at 78-79. Longitudinal studies have shown that predictions made about the long-term development of children were wrong two-thirds of the time. *Id.* at 78.

152. *See, e.g.*, Guggenheim, *supra* note 34 (noting growing numbers of children in need of adoptive homes who are not being adopted).

the child standard then actually compromises the state's ability to extricate itself.

Utilizing this standard for Janice and DeeDee, the state effectively insures that their children will not return home. Janice cannot be the best placement for her children until she is better, more stable. DeeDee, a young, single, poor mother will never compare favorably to the middle-class, two parent, suburban foster family. These children will stay in foster care until the state can develop evidence to terminate parental rights or, as is likely in the case of Janice's girls, until they reach adulthood. Sarah, who is white and the most middle class of the three mothers, was able to prove herself worthy. In any event, the foster parents did not seek to keep her children from her.

3. The Parent-Child Focused Inquiry

If focusing on the parent or the child individually is problematic, perhaps the answer is not to look solely at either. Focusing on one or the other loses sight of the parent-child relationship, a relationship which the constitution protects.[153] Such an analysis arises out of and maintains focus on the parent-child dyad and provides much needed grounding for state involvement.[154] The standard first defers to the parent-child identity of interests and from that basis, assesses whether the parent is able to provide minimal care for the child and make decisions on behalf of the child.[155] This approach would recognize that state intervention should be based on protecting and strengthening the parent-child relationship, rather than intervening despite the relationship.

The parent-child approach begins with legally recognized parent-child relationships and views parenting within that context broadly. Parents direct the care, custody, and upbringing of their children. They need not provide these functions directly but instead may delegate them.[156] Thus, some parents hire nannies; others send their children to live with relatives; others use day

153. Santosky v. Kramer, 455 U.S. 745, 759-60 (1982) (holding that until the parents are proven unfit, the parent and child share an interest in their relationship); *see also* Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972) (both cases holding that family integrity protection arises out of parent-child relationship).

154. This approach also constitutes good social work practice which looks to "multiple, interactive causes pertaining to the child, the child's care-giver, and the environment" when assessing child maltreatment. Wells & Tracy, *supra* note 119, at 673.

155. *See* Beyer, *supra* note 44, at 318-23 (discussing minimally adequate care standard).

156. This unification of legal parental relationships and parental functions guards against the indeterminacy of defining the parent-child relationship solely in functional terms. *See* Martha L. Minow, *Redefining Families: Who's In and Who's Out?* 62 U. COL. L. REV. 269, 276-77 (1991) (proposing that the functional approach "will expose real people to enormously varied rules that create their own kind of unpredictability" and jeopardize "the security of anyone's family"); *see also* Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) (distinguishing between protection of birth families and foster families even though the two function similarly).

care or boarding school; some home school; some use public schools; and many delegate most, if not all parental functions to the other parent.[157] Though parents may delegate parental functions, that delegation does not dissolve the parent-child relationship.[158] On the contrary, delegation of parental functions is the very exercise of the parental relationship. The parent-child focus recognizes and respects the diversity of parent-child relationships and examines whether the parent is exercising her role such that the parental functions are fulfilled and the child is protected. It does not assess the parent's status or second-guess her choices apart from their bearing on accomplishment of parent functions.

A strength of the relational focus is that each end of the dyad anchors the other. Whereas the parent-focus looks to parental status or conduct without sufficient regard to whether that status or conduct significantly interferes with meeting the child's needs, the relational approach examines whether the parent-child relationship is significantly compromised such that the child's needs are not being met. Contrary to the child-focus, which looks solely to the child's interests without sufficient regard to the child's preexisting and persistent family ties, the relational focus views the child as part and parcel of the family, not as an unattached and idealized entity.

a. Intervention

Although the standard for intervention might remain abuse and neglect,[159] the question would be whether the parent's functioning is deficient, not whether the parent is. Rather than assessing who the parents are, whether they have failed, or whether the children are living in optimal conditions, a relational investigation would assess whether the parents are willing and able to meet the children's basic needs directly or through the assistance of others.

Looked at through this lens, the state might not have intervened in Janice's, Sarah's or DeeDee's families. Instead of looking at whether Janice used drugs, the state would have determined whether Janice was ensuring that the girls' needs were being met. Similarly, although the state would have assessed whether Sarah could protect her children from the abusive men in their lives and whether Sarah was in fact complicit in the sex abuse, the state would not have removed the children simply because Sarah had sex with the man who abused her daughter or because she had been involved with violent

157. Private family law respects this particular delegation when it considers both the functioning and non-functioning parents as custodial options for the child.

158. They may, however, completely abdicate the parental relationship by delegating both parental role and functions. Parents do this when they voluntarily relinquish their children for adoption. Joan H. Hollinger, *Introduction to Adoption Law & Practice*, *in* ADOPTION LAW & PRACTICE, 1-9 to 1-10 (Joan H. Hollinger, ed., 1992).

159. The definitions of these grounds could use some fine tuning. *See* Hutchison, *supra* note 128; Huxtable, *supra* note 128.

men. The state certainly would not have had grounds to interfere with Sarah and her son's relationship. In DeeDee's case, the state would have looked at whether her son was receiving appropriate care and not whether she was complying with her case plan or living in the shelter.

b. Extrication

Similarly, the standard for closure of a case would be whether the parent is able to resume the parental role, not whether the parent has dealt with issues surrounding her own childhood or whether she has stopped using drugs.[160] Although these issues may be relevant to parenting, the question should be whether their mother's drug use prohibits her from parenting her children. If she only uses drugs away from the home when the children are otherwise cared for by a capable care-giver, then she is not abdicating her parental role but rather delegating some functions.

Were the state looking through the parent-child lens in Janice's case, it would not have required her to go to therapy or even be drug free. Instead it would have looked to whether her children were safe in her care or whether she could insure their safety elsewhere: whether they were old enough to care for themselves if necessary; whether Janice could avoid using drugs when responsible for her children's care; whether she could assure that they had sufficient food, clothing, shelter, love, and schooling. The state would have returned Sarah's children as soon as she had a place for them to live. Its involvement would have revolved around helping her find a safe and supportive place for the family and assisting her to know how to address her daughter's needs arising from her sexual abuse. The state would have helped DeeDee find a more stable place to live, hopefully with one of the several supportive mentoring adults in her life.

Focusing on the parent-child relationship in the context of parental roles and supports would lead to more definite, child focused and less punitive intervention. On the other hand, it might not be sufficiently child-focused when determining whether to end intervention. After all, the child protection system moves slowly and children develop and adapt quickly. It would be harsh to remove a child from a safe, stable environment just because the mother is able to resume her parental role. But given the weaknesses of the best interest standard and children's deep and persistent attachments to their

160. South Carolina appears to be moving in this direction. Upon removal of a child, state law requires a plan that first identifies what necessitated removal and then what the parent must do to correct those conditions. S.C. CODE ANN. § 20-7-764(B)(1) (Law. Co-op. Supp. 1996). This law should militate against preparation of "generic," "cookie cutter" case plans. Mary Williams, *Evaluating a Placement Plan,in* 2 CHILDREN'S LAW REPORT No. 2 (Mar. 1997). Nevertheless, the statute widens the scope of involvement by mandating review and remedy of "[o]ther conditions in the home that warrant state intervention, but would not alone have been sufficient to warrant removal." S.C. CODE ANN. § 20-7-764(B)(2) (Law. Co-op. Supp. 1996).

families of origin,[161] erring on the side of determinacy and clarity might still be the better approach.[162]

CONCLUSION

A close review of the child protection system reveals that by and large it is not working. There may be disagreement about why that is, whether it is the parents' fault or the system's, but there is no question that changes are needed. Although many of the problems relate directly and inextricably to larger social and institutional biases, accessible tools exist for improving child protection systems. First, adequate training of the caseworkers, lawyers, and judges who decide whether children are at risk and how to ameliorate those risks is crucial. Second, review of the standards for intervention and extrication may reveal that the current reliance on parental fault and the best interests of the child subjects families and the state to indefinite goals and purposes and place children in limbo.

Child protection appears to be a system out of focus. Although its mandate is to protect children, its treatment of mothers like Sandy, Janice, Sarah, and DeeDee suggests that it is more concerned with controlling women. Too many families find their way into the system because of their mother's conduct, race, or class rather than because of a clear protective need. Systemic recognition of this phenomenon is essential if it is to refocus itself away from punishing mothers and toward protecting children.

161. Appell, *supra* note 18, at 1011, 1014-15.

162. For discussion of the vying interests between family and foster parent attachments, see Symposium, *Helping Families in Crisis: The Intersection of Law and Psychology*, 22 N.Y.U. REV. L. & SOC. CHANG. 295 (1996); Symposium, *The Impact of Psychological Parenting on Child Welfare Decision-Making*, 12 N.Y.U. REV. L. & SOC. CHANGE, 485 (1983-84).