

Winter 2017

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Recommended Citation

Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. Rev. (2016).

Available at: <https://academicworks.cuny.edu/clr/vol20/iss1/14>

CUNY Law Review Footnote Forum

March 3, 2017

Recommended citation:

Erin Cloud, Rebecca Oyama, & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), <http://www.cunylawreview.org/family-defense-black-lives-matter/> [<https://perma.cc/BE2M-79EX>].

FAMILY DEFENSE IN THE AGE OF BLACK LIVES MATTER

*Erin Cloud, Rebecca Oyama & Lauren Teichner*¹

One hundred years from now, today's child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people. School children will marvel that so many scholars and politicians defended this devastation of Black families in the name of protecting Black children. The color of child welfare system is the reason Americans have tolerated its destructiveness.

— Dorothy Roberts, *Shattered Bonds* (2012)

“Black people love their children with a kind of obsession. You are all we have, and you come to us endangered.”

— Ta-Nehisi Coates, *Between the World and Me* (2015)

INTRODUCTION²

All families have a constitutional right to be together, free from the unwarranted interference of third parties, particularly the state. This is an intrinsic human right that encompasses the right of parents to the “custody,

¹ Special thanks to Emma Ketteringham, Esq., Chris Gottlieb, Esq., and Cathren Cohen, J.D., for their assistance and diligence in the editing process.

² The views reflected in this article are from the vantage point of practitioners. We have not conducted our own independent research, but have used the research of many of the foremost scholars in child welfare, criminal justice, and racial justice movements to build upon our own experiences within the child welfare system and Family Court. Additionally, the examples used in this article focus more on the experience of Black mothers in the child welfare system, although there is much to be written about Black fathers as well.

care and nurture of [their] child[ren]”³ and the parallel right of children to be raised by and live with their parents.⁴ This fundamental right recognizes the inherent value in family ties, which provide a connection to culture and identity, and serve as a protective social bond. Of course, the government must be permitted to pursue measures to ensure the protection – and even the adoption – of children for whom it is ultimately deemed too unsafe to return home. But any such interference into the family structure, particularly the drastic step of taking children from their families, should be the exception to the rule and not the norm of child protective practices.

The reality, however, is that these sacred rights that preserve identity, family, and ultimately community in the face of state interference are systematically violated in Black families. The bonds of Black children to their families are routinely and needlessly demolished in the name of child protection, even when the majority of allegations leading to the removal of Black children from their homes do not involve child abuse, but instead arise from neglect conditions related to poverty or from discriminatory child welfare practices.⁵

Yet, child welfare practitioners and members of the public continue to ignore the existence of racism and its effects in the child welfare system. Arguably, this ignorance comes either from “focusing myopically on extreme cases of child abuse, . . . [and thereby] deliberately ignor[ing] the damage caused by carelessly removing children from their homes[,]”⁶ or believing that the over-representation of Black parents in poverty is the reason for the racial disparities in the system.⁷ Others maintain that the reason there are more Black children in foster care is because Black parents have “worse” parenting skills than white parents, and more frequently mistreat their kids.⁸ However, these race-blind assessments are

³ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000).

⁴ *See Stanley*, 405 U.S. at 651-52.

⁵ DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* vii, 48 (2002); *see generally* U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL STUDY OF PROTECTIVE, PREVENTIVE, AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES: FINAL REPORT (1994) [hereinafter NATIONAL STUDY].

⁶ ROBERTS, *supra* note 5, at viii.

⁷ Thomas D. Morton, *The Increasing Colorization of America’s Child Welfare System: The Overrepresentation of African-American Children*, POL’Y & PRAC. PUB. HUM. SERV., Dec. 1999, 23, 24; Daniel Heimpel, *The Future of Foster Care: Are We Too Cheap to Keep Children Safe?*, HUFFINGTON POST: THE BLOG (Feb. 11, 2011, 12:34 PM), http://www.huffingtonpost.com/daniel-heimpel/future-of-foster-care_b_821682.html [<https://perma.cc/T8ML-9GBU>].

⁸ *See Heimpel, supra* note 7; *see also* Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 584-85 (2015) [hereinafter Bartholet 2015]; Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in*

demonstrably untrue⁹ and defy common sense. In a world where Black men are more likely to be stopped by the police, more likely to be surveilled in a store regardless of their behavior, and least likely to be able to hail a taxi at night, “[w]hy, then, does anyone believe that the bias that still is part of every facet of American life somehow disappears at the child welfare agency door?”¹⁰ Maybe the answer to this question is that we are all complicit in the creation of a Black underclass through support for our country’s child protective practices. Maybe the answer is that privilege keeps those who are not oppressed by the child welfare system from recognizing the implicit fear of Blackness that pervades the system. Maybe our national (and historical) desire to “save” at-risk children promotes a sense of righteousness that allows racism despite the lectures, literature and statistics on the disproportionate effect on Black Families. Whatever the reason, the impact is the same: Black families are oppressed by the majority’s judgment,¹¹ and the voices of Black mothers, fathers and children proclaiming this oppression are aggressively stifled.¹²

Family Defense practitioners must make a concerted effort to fight against the caste system created by the child welfare system, and to eradicate these common race-blind myths. We must proclaim that racism, oppression, and violence are the more dominant themes in child welfare than salvation and social work. We must challenge the current rhetoric that argues for Black Families to comply, cooperate, and engage with a system that in its current form attacks and destroys Black Families under the guise of kindness and protection.

Critical to this success is joining forces with national political movements already structured to expose and combat institutional racism,

Child Welfare Reform, 24 WM. & MARY BILL RTS. J. 725, 728-29 (2016) [hereinafter Bartholet 2016].

⁹ Richard Wexler, *Response to Daniel Heimpel Column in the Huffington Post, February 11, 2011*, NAT’L COALITION FOR CHILD PROTECTION REFORM, <http://www.nccpr.org/reports/huffporesponse.pdf> [https://perma.cc/D5EM-2RK9] (last visited July 11, 2016); RICHARD WEXLER, NAT’L COAL. FOR CHILD PROT. REFORM, ISSUE PAPER 7: CHILD WELFARE & RACE 1 (2015), <http://www.nccpr.org/reports/7Race.pdf> [https://perma.cc/RU9C-H4FA] (“[P]erhaps most telling is what happens when caseworkers are given hypothetical situations and asked to evaluate the risk to the child. The scenarios are identical – except for the race of the family. Consistently, if the family is Black, the workers say the child is at greater risk.”); ROBERTS, *supra* note 5, at 48; Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS.ORG: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> [https://perma.cc/K3HR-C5K6] (last visited July 5, 2016) [hereinafter Roberts, *Race and Class*]; see generally NATIONAL STUDY, *supra* note 5.

¹⁰ Wexler, *supra* note 9.

¹¹ See ROBERTS, *supra* note 5, at vii.

¹² See *id.*

such as the Black Lives Matter (“BLM”) movement.¹³ Although the BLM movement encompasses a wide narrative that includes affirming Black families, Black women, and Black villages, in popular culture it has become synonymous with reform of police violence and the criminal justice system only.¹⁴ We assert that exclusively linking BLM with criminal justice reform

¹³ The Black Lives Matter movement grew out of the recent publicized deaths of Black men at the hands of police officers. These deaths brought national attention to the reality that by simply being Black in a country that has developed an insidious fear of “Blackness,” one will likely be subject to violence, harassment, and intrusion in the name of “intervention.” Through the use of “intervention” as a euphemism for what is in actuality targeted violence against Black people, institutional racism is thereby protected and government actors who murder, assault, and harass Black people are often not held accountable. As a challenge to the system’s blatant disregard of the Black body, and in response to the 2013 acquittal of George Zimmerman, a police officer charged with second-degree murder in the shooting death of 17-year-old Black child Trayvon Martin, Patrisse Cullors tweeted “#BlackLivesMatter” (“BLM”). Patrisse Marie Cullors-Brignac, *We Didn’t Start a Movement. We Started a Network.*, MEDIUM (Feb. 22, 2016), <https://medium.com/@patrissemariacullorsbrignac/we-didn-t-start-a-movement-we-started-a-network-90f9b5717668#.13fe4im41> [<https://perma.cc/8XB4-QYAU>]; see also Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [<https://perma.cc/BQ9Z-2WSN>]. The slogan began to gain popularity in response to incidences of racism, such as the shooting of Michael Brown. Using the slogan, Cullors and Alicia Garza organized hundreds of people around the events that transpired following Brown’s shooting in Ferguson, Missouri. This succinct affirmation of Black life immediately caught mass traction through social media, and has since evolved into a requiem to all Black lives lost to governmental violence, as well as into a rallying cry mobilizing Americans against institutional racism. In time, the BLM hashtag developed into the BLM movement, defining itself as “an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise.” *Guiding Principles*, BLACK LIVES MATTER, <http://blacklivesmatter.com/guiding-principles/> (last visited July 1, 2016). The deaths of Trayvon Martin, Freddie Gray, Eric Garner, Michael Brown, Alton Sterling, and Philando Castile are recent examples that perpetuate the movement. See Nishat Kurwa, ‘Black Lives Matter’ Slogan Becomes a Bigger Movement, NPR: YOUTH RADIO (Dec. 4, 2014, 5:06 AM), <http://www.npr.org/2014/12/04/368408247/black-lives-matter-slogan-becomes-a-bigger-movement> [<https://perma.cc/JAY6-LDYG>]. Opal Tometi is another co-founder of the Black Lives Matter movement. See Lilly Workneh, #BlackLivesMatter Co-Founders on Baltimore Uprisings: ‘We Stand in Solidarity,’ HUFFINGTON POST (Apr. 29, 2015, 10:30 AM), http://www.huffingtonpost.com/2015/04/29/black-lives-matter-baltimore_n_7170352.html [<https://perma.cc/Y3NA-CKM3>]; see also Zach Newman, Note, “Hands up, Don’t Shoot”: Policing, Fatal Force, and Equal Protection in the Age of Colorblindness, 43 HASTINGS CONST. L.Q. 117, 132-33 (2015).

¹⁴ At the time this article went to print, some public figures and news organizations had likened BLM to a call for violence against the police. However, this connection is unsupported, as founders of BLM and many supporters of the BLM movement promote nonviolent protest and have publicly denounced acts of violence against members of law enforcement. See Megan Twohey, *Rudolph Giuliani Lashes Out at Black Lives Matter*, N.Y. TIMES (July 10, 2016), <http://www.nytimes.com/2016/07/11/us/politics/rudy-giuliani->

minimizes the impact this movement could have on similar systems of oppression of Black people, such as the child welfare system.

We further contend that Family Defense work, politically, belongs next to the fight against police brutality and criminal justice reform. The perceived threat of the Black body to the sanctity of mainstream America is just as palpable in the child welfare system as it is in the criminal justice system.¹⁵ In the criminal justice system, the fear of Blackness justifies police officers' use of state-sanctioned tools, such as "Stop and Frisk," mass incarceration,¹⁶ and deadly force¹⁷ to remove Black men from mainstream

black-lives-matter.html [https://perma.cc/Z3PN-MW3C] ("Mr. Giuliani, a longtime promoter of aggressive policing, struck a different chord, saying the Black Lives Matter movement had targeted police officers."); Shaun King, *Black Lives Matter Opposes Police Brutality, Not Police*, N.Y. DAILY NEWS (July 19, 2016, 12:27 PM), <http://www.nydailynews.com/news/national/king-black-lives-matter-opposes-police-brutality-not-police-article-1.2717122> [https://perma.cc/7P6E-DA59]; Hilary Hanson, *#BlackLivesMatter Condemns NYPD Cop Killings: 'Not Our Vision Of Justice,'* HUFFINGTON POST (Dec. 21, 2014, 10:51 AM), http://www.huffingtonpost.com/2014/12/21/nypd-cop-killings-blacklivesmatter_n_6362400.html [https://perma.cc/7HJP-LX8H] ("[Color of Change] condemn[s] any and all forms of violence, including violence perpetrated by and against police officers[.]").

¹⁵ Of course, the point is not to say that police violence is the equivalent of violence inflicted by child protective workers, and even less to encourage a competition of claims of victimization. Being illegally frisked is different from being illegally drug tested; being shot is different from having your baby torn from your arms. The point is that these harms are deeply connected in the web of racism that exists in the United States in 2017. One of the key insights of BLM and of writers like Coates is that race-based violence does harm beyond even the significant accumulated injuries of particular incidents. Another of their insights is that in contemporary American society, race-based violence is often allowed and defended under the guise of high-sounding principles (community safety, individual accountability, etc.) that fail to acknowledge the significance of the racialized context in which they developed. We seek to bring those insights to the realm of child welfare in order to reveal the race-based harms the child protection system inflicts and create much needed alliances between activists at the forefronts of criminal justice reform and child welfare reform. To emphasize one is not at the expense of the other. On the contrary, the injustices of these systems are intertwined and the solutions must be as well.

¹⁶ See generally Antonio Moore, *The Black Male Incarceration Problem is Real and It's Catastrophic*, HUFFINGTON POST: THE BLOG (Feb. 17, 2015, 12:05 PM), http://www.huffingtonpost.com/antonio-moore/black-mass-incarceration-statistics_b_6682564.html [https://perma.cc/Y5EK-7C4J]; Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246> [https://perma.cc/85EV-665T] ("One in four black men born since the late 1970s has spent time in prison."); Jeff Guo, *America Has Locked Up So Many Black People It Has Warped Our Sense of Reality*, WASH. POST: WONKBLOG (Feb. 26, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality> [https://perma.cc/JDH5-88VW]; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS*

America. In the child welfare context, the fear of Blackness justifies child protective workers' use of so-called "intervention" tools to displace Black children from their homes in order to fill – at least in New York City¹⁸ – one of the most segregated institutions in our country: the foster care system.¹⁹

In order to make this case, after this introduction, Section II argues that child welfare interventions, which are largely argued to be "social work" interventions, are better understood to be racially-driven practices that frequently inflict irreversible violence and damage on Black children and

INCARCERATION IN THE AGE OF COLORBLINDNESS 180 (2012) ("More African American adults are under correctional control today—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began. . . . The absence of black fathers from families across America is not simply a function of laziness, immaturity, or too much time watching Sports Center. Thousands of black men have disappeared into prisons and jails, locked away for drug crimes that are largely ignored when committed by whites.") (footnote omitted); *see also* Jennifer Schuessler, *Drug Policy as Race Policy: Best Seller Galvanizes the Debate*, N.Y. TIMES (Mar. 6, 2012), <http://www.nytimes.com/2012/03/07/books/michelle-alexanders-new-jim-crow-raises-drug-law-debates.html> [<https://perma.cc/PYU9-6DCZ>].

¹⁷ *See, e.g.*, Jon Swaine et al., *Young Black Men Killed by US Police at Highest Rate in Year of 1,134 Deaths*, GUARDIAN (Dec. 31, 2015, 3:00 PM), <http://www.theguardian.com/us-news/2015/dec/31/the-counted-police-killings-2015-young-black-men> [<https://perma.cc/3JE2-FTJW>]; Nicholas Quah & Laura E. Davis, *Here's A Timeline of Unarmed Black People Killed By Police Over Past Year*, BUZZFEED NEWS (May 1, 2015, 4:46 PM), <https://www.buzzfeed.com/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over> [<https://perma.cc/XWC5-7W6C>]; Wesley Lowery, *Study Finds Police Fatally Shoot Unarmed Black Men at Disproportionate Rates*, WASH. POST (Apr. 7, 2016), http://www.washingtonpost.com/national/study-finds-police-fatally-shoot-unarmed-black-men-at-disproportionate-rates/2016/04/06/e494563e-fa74-11e5-80e4-c381214de1a3_story.html [<https://perma.cc/93AY-AQ8H>]; *see generally* TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

¹⁸ *See* GREGORY OWENS, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., OCFS INITIATIVE TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE, PRESENTATION FOR COURT APPOINTED SPECIAL ADVOCATES (2011), <https://www.nycourts.gov/ip/casa/training/ocfs-disproportionality.pdf> [<https://perma.cc/P5RX-3KVY>]; *see also* JOSHUA PADILLA & ALICIA SUMMERS, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (2011), http://www.ncjfcj.org/sites/default/files/Disproportionality%20TAB1_0.pdf [<https://perma.cc/HF9S-UDV9>]; Andrew White et al., *Child Removals: Dislocating the Black Family*, CHILD WELFARE WATCH, Spring/Summer 1998, at 4, 4-6, https://nycfuture.org/images_pdfs/pdfs/Race%20Bias%20&%20Power%20in%20Child%20Welfare%20CWW%2098.pdf [<https://perma.cc/QD5C-KDYS>].

¹⁹ ROBERTS, *supra* note 5, at vi ("The number of Black children in state custody—those in foster care as well as those in juvenile detention, prisons, and other state institutions—is a startling injustice that calls for radical reform. . . . The fact that the system supposedly designed to protect children remains one of the most segregated institutions in the country should arouse our suspicion.").

Black families. Section III contends that Black parents are being systematically attacked and legally “killed” through implementation of the 1997 Adoption and Safe Families Act (“ASFA”), which currently ensures that parents of children in foster care, who are disproportionately Black,²⁰ are swiftly deemed legally dead to their children through fast-tracked termination of parental rights proceedings.²¹ Finally, Section IV proposes targeted political interventions that can be incorporated into the BLM tenets in order to expose and reform the oppressive racism of our current child welfare system.

I. THE CHILD WELFARE SYSTEM, LIKE THE CRIMINAL JUSTICE SYSTEM,
ACTS AS A MECHANISM OF STATE-SANCTIONED SOCIAL CONTROL OVER
BLACK LIVES BY ATTACKING THE BLACK CHILD, WOMAN, AND FAMILY
IN THE NAME OF INTERVENTION.

This Section takes a critical look at three common child protective “interventions” – child removals, drug testing, and court-ordered supervision. Questioning the common assumption that these interventions are useful social work tools, this section will argue that they are disproportionately used against Black families and that (A) removals of Black children without imminent safety concerns are an attack on Black children’s bodies, (B) drug testing pregnant women, absent their consent, is an invasive investigative tool that assaults Black women’s bodies, and (C) legally requiring Black families to relinquish autonomy to succumb to court-ordered social services infantilizes Black families and relegates them to a permanent underclass.

A. *The Attack on the Black Child’s Body: Removals Without an Imminent
Safety Concern or Judicial Review*

²⁰ The authors are aware that the state’s child protective tools are disproportionately applied to many communities of color and income classes. However here we focus on Black families to show the connection between the issues facing Black American communities today and the rise of BLM. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 8 (2007) (“Although racial disproportionality is most severe and pervasive for African American children, Native American children also experience higher rates of representation in foster care than children of other races or ethnicities.”).

²¹ *See* Gerald P. Mallon & Ruth G. McRoy, *Children, Youth, and Family Serving Systems*, in STRATEGIES FOR DECONSTRUCTING RACISM IN THE HEALTH AND HUMAN SERVICES 143, 146-62 (Alma J. Carten et al. eds., 2016) (describing the racial disproportionality in the child welfare system and addressing the system’s failure to support parents of color).

Yolanda's²² story: Yolanda came to New York from New Jersey fleeing an abusive boyfriend after he beat her to the point of miscarrying her third child. She had had contact with the child welfare system in New Jersey (in other words a "history") because of the domestic violence and because she smoked marijuana. Child protective services in New York accused her of moving without the permission of New Jersey child protective services and as a result took her two children and put them in foster care. Two years later, at age twenty, Yolanda had stopped smoking marijuana and was in a new, healthy relationship when she gave birth to a beautiful baby boy. She breastfed and loved this boy. She and the father (a man without any criminal or child protective history) were at the hospital when she gave birth. She was honest with the hospital, providing her child protective information, including the fact that she had older children in foster care. The hospital did not believe it was unsafe for the baby to be discharged to her, so she and the father left the hospital with their baby. Six days later, they were home with the baby when two child protective workers came to their home at 11:00 pm. Yolanda let them in, answered their questions, and showed them around. The workers saw the baby and assessed the home and decided the baby should stay there with Yolanda. The family went to bed. At 3:00 am, the very same workers, now accompanied by three police officers, stormed her home with flashlights looking for the newborn. They grabbed Yolanda's baby, despite having agreed four hours prior that there were no safety concerns, and placed him in a government holding center for children. The workers did not seek a court order before taking the child as required by law, or even go to court for legal authorization afterward. Instead, Yolanda came to court to demand that her son, who was now in government custody, be returned to her care. When she arrived in court, Yolanda's breasts were engorged because she was unable to breastfeed, and her body was still bleeding from childbirth. The Family Court judge refused to even hear her request that day, saying she'd have to come back to court the following week. When Yolanda realized the child would not be returned to her right away, she asked that he be released to his father. The judge refused to give the baby to his father despite the fact that there were no allegations against him and he had no child protective or criminal history. Yolanda's son remained in government custody.

This interaction between the child protective system and Yolanda is not social work. It is harassment and violence against her family and newborn son. Yolanda's story, if told in a criminal context, would constitute an unlawful seizure of the child from his home. In a child protective context, however, her son – despite being only six days old, despite having multiple government actors place their hands on his body, and despite being physically taken from his home in the middle of the night by government

²² To protect the privacy of the clients mentioned in this article, all names and identifying information have been changed.

officials accompanied by police – was being “protected” by the state.

In New York²³ and most states,²⁴ child protective workers are legislatively empowered to remove a child from his or her home if the worker perceives that there is imminent danger to the child’s life or health. This authority is necessary to protect the most vulnerable children from harm. The problem is that, in practice, Black children are more likely than other children to be removed when there is no imminent safety concern, and are less likely to be offered voluntary in-home services so that they can remain at home.²⁵ Consequently, far too many children are taken unnecessarily from their homes, as was Yolanda’s baby.

Due process should place a check on the state’s removal authority – for example, New York’s statute requires the worker to go to court before seizing a child whenever possible and to seek judicial review of an emergency decision to seize a child “no later than the next court day after the child was removed.”²⁶ This offers a judge the opportunity to review the alleged safety concern, and provides the parent an opportunity to find out why the worker believes the child is in imminent risk of harm and to defend against those charges. The court has an obligation at that review to determine whether the trauma of removing the child from his or her home outweighs any potential safety concerns, if in-home services could mitigate any immediate threat to the child’s safety, and, if not, whether any other family members could care for the child. In Yolanda’s case, however, this judicial review process did not occur. The judge failed to conduct the hearing that would have given Yolanda the chance to defend herself. Instead, the judge voiced sympathy for the child protective worker’s busy schedule as a rationale for not conducting the required judicial review. And the child remained in government custody, away from his parents and extended family. No one could call that meaningful due process.

Yolanda’s experience is not an isolated incident.²⁷ It is precisely what Ta-Nehisi Coates describes in his book *Between the World and Me* as the

²³ See N.Y. FAM. CT. ACT §§ 1022, 1024, 1026-1028 (McKinney 2016); see also *Nicholson v. Scopetta*, 3 N.Y.3d 357 (2004).

²⁴ Nearly every state has a similar statute. See, e.g., MICH. CT. R. 3.963(B) (2015); TEX. FAM. CODE ANN. § 262.104 (West 2015).

²⁵ Children of color are less likely to receive family preservation services and are more likely to be removed from their families than white children in similar situations. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 20, at 22.

²⁶ N.Y. FAM. CT. ACT § 1026(c) (McKinney 2005).

²⁷ See *Nicholson*, 3 N.Y.3d at 366 n.2 (“The District Court cited the testimony of a child protective manager that it was common practice in domestic violence cases for ACS to wait a few days before going to court after removing a child because ‘after a few days of the children being in foster care, the mother will usually agree to ACS’s conditions for their return without the matter ever going to court[.]’” (quoting *Nicholson v. Williams*, 203 F. Supp. 2d 153, 170 (E.D.N.Y. 2002))).

type of visceral racism that physically attacks Black people and defends itself through the majority value system that is enshrined in the law.²⁸ Yet few people read the words of Coates and connect his criticism of police violence and institutional racism with Yolanda's and her son's experiences in the child protective system.

It is widely understood that Black people are taught to be twice as good as their white counterparts when encountering the police²⁹ in order to protect against the touch of "sensitive fingers [on] every portion of [the] body[]"³⁰ during police stops, the barreling of a bullet during a police assault, or the feel of the government's hand while being ushered into police custody. What is not commonly understood is that Black parents must *also* be twice as good to ensure that the extensions of their own bodies – their children – are not subject to governmental attacks, such as removals, which grab their children from the sanctity of their homes and force them into custody. Harm to the Black body is even more difficult to see when done in the name of protecting children,

For example, Yolanda's history of smoking marijuana placed her child at risk of governmental seizure, whereas white parents can write articles in the New York Times about how marijuana improves their parenting, without having to worry that their child will be removed.³¹ This double standard reflects the system's preferential treatment of white parents over Black—only the former have the right to make their own decisions while raising their children as they see fit.³²

²⁸ COATES, *supra* note 17, at 10 ("But all our phrasing—race relations, racial chasm, racial justice, racial profiling, white privilege, even white supremacy—serves to obscure that racism is a visceral experience, that it dislodges brains, blocks airways, rips muscle, extracts organs, cracks bones, breaks teeth. You must never look away from this. You must always remember that the sociology, the history, the economics, the graphs, the charts, the regressions all land, with great violence, upon the body.").

²⁹ See ALEXANDER, *supra* note 16, at 95-136; see, e.g., W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (1903); JAMES BALDWIN, *THE FIRE NEXT TIME* (1963); COATES, *supra* note 17.

³⁰ *Utah v. Strieff*, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 17 n.13 (1968)).

³¹ Mark Wolfe, Opinion, *Pot for Parents*, N.Y. TIMES (Sept. 7, 2012), <http://www.nytimes.com/2012/09/08/opinion/how-pot-helps-parenting.html> [https://perma.cc/2YTQ-9RP6]; Emma S. Ketteringham & Mary Anne Mendenhall, *Some Pro-Pot Parents Blog, Others Lose Their Children*, HUFFINGTON POST: THE BLOG (Oct. 15, 2012, 11:23 AM), http://www.huffingtonpost.com/emma-s-ketteringham/some-propot-parents-blog-_b_1962580.html [https://perma.cc/J4DR-ACNL].

³² White parents can also debate the merits of "free-range parenting." Clemens Wergin, Opinion, *The Case for Free-Range Parenting*, N.Y. TIMES (Mar. 20, 2015), <http://www.nytimes.com/2015/03/20/opinion/the-case-for-free-range-parenting.html> [https://perma.cc/C4HP-8QZB]. Meanwhile caseworkers and police officers routinely arrest Black parents and remove Black children when they are a hallway away from each

A system that treats Black children this way should not be allowed to remain shrouded in a cape of supposed nobility and social good. Family Defense Practitioners must redefine the narrative surrounding taking children from their families and draw connections to BLM's conversations about governmental violence, intrusion, and racial bias. If we fail to do so, the truth about children like Yolanda's son, their trauma and state-inflicted assault, will continue to go unheard, and the tragedy imposed on these families will continue unchecked.³³

B. The Attack on the Black Pregnant Body: State Legitimization of Prenatal and At-Birth Drug Testing Without Consent

Nancy's story: Child Protective Services began supervising Nancy after her shelter reported that her boyfriend perpetrated acts of domestic violence against her. Although there were no child protective allegations against Nancy, only her boyfriend, because she was the caregiver for the children, ACS supervised her home and subjected her to government intrusion. Soon after this incident, Nancy found out she was pregnant by her then ex-boyfriend. She was excited to have this baby, attended motherhood support groups, bought a crib and baby supplies, and attended all prenatal appointments. Nevertheless, when her baby was born, she found herself charged with child neglect because during her pregnancy, child protective services – without her consent – requested her prenatal records which revealed that she had one positive toxicology for marijuana during her pregnancy, and a positive toxicology for marijuana and opiates at birth.³⁴ The hospital – also without her consent – turned the records over. As a result, Children's Services charged Nancy with child neglect despite the fact that Nancy's son was born healthy.

other in public shelters. Conor Friedersdorf, *Working Mom Arrested for Letting Her 9-Year-Old Play Alone at Park*, ATLANTIC (July 15, 2014), <http://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436/> [https://perma.cc/YC96-HH7M]; see also Emma S. Ketteringham, *Lighting a Candle is Not Abuse*, HUFFINGTON POST: THE BLOG (Nov. 27, 2013, 10:02 AM), http://www.huffingtonpost.com/emma-s-ketteringham/lighting-a-candle-is-not_b_4349689.html [https://perma.cc/9CFK-GTR3].

³³ See generally ROBERTS, *supra* note 5, at 55. The removal of children from impoverished Black homes happens so often that it inflicts “collateral damage” on entire communities. *Id.* at 243 The loss of so many children demoralizes their families. Roberts writes that the removal of these children “disrupt[s] the family and community networks that prepare children to participate in future political life.” *Id.* And this needless removal of children reinforces the very stereotypes about Black families that are used to excuse such removals in the first place.

³⁴ The opiate toxicology was reportedly related to pain medication Nancy received during her labor from the hospital. This was not initially included in the records.

Nancy's doctor examined her body, her private areas, and took blood and urine out of her body, in order to report findings and observations to a government official. Her doctor did all of this without consulting with Nancy or obtaining her consent, as required under federal privacy laws.³⁵ This attack on Nancy's body, on her privacy, and on her fetus is an intimate invasion into Nancy's relationship with her unborn child, her medical doctors, and even her own body. By releasing all of Nancy's private records to child protective services, the doctor subjected Nancy's uterus to government surveillance and directly attached her womb to the foster-care-to-prison-pipeline.³⁶

Nancy's experience is not unlike those of many Black women across the nation. The drug testing of Black pregnant women and the child neglect charges that often follow are a constant reminder that the War on Drugs and its deleterious effects on the Black community are not limited to the criminal justice system.³⁷ At least two studies show that "black women and their newborns are far more likely to be tested for drug use — and to be reported for it — than white women, despite similar rates of drug use among the populations."³⁸ This is because the system of detecting and

³⁵ See generally Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996).

³⁶ Cynthia L. Cooper, *More Moms Losing Kids in Family Court Drug Wars*, WOMEN'S ENEWS (Jan. 20, 2014), <http://womensenews.org/2014/01/more-moms-losing-kids-in-family-court-drug-wars/> [<https://perma.cc/XU5U-G2MB>].

³⁷ *Id.*; Oren Yaniv, *Maternity Wards Test New Moms for Drugs*, N.Y. DAILY NEWS (Dec. 29, 2012, 5:25 AM), <http://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292> [<https://perma.cc/J8A7-HPU6>].

³⁸ Irin Carmon, *What's Wrong with Drug Testing Pregnant Women*, SALON (Dec. 28, 2012, 11:43 AM), http://www.salon.com/2012/12/28/whats_wrong_with_drug_testing_pregnant_women/ [<https://perma.cc/P9VD-NC2X>]; see also Paul Armentano, *Why Are We Testing Newborns for Pot?*, SALON (Nov. 29, 2012, 9:33 AM), http://www.salon.com/2012/11/29/why_are_we_testing_newborns_for_pot/ [<https://perma.cc/UWF8-ZAMX>] ("'[B]lack women and their newborns were 1.5 times more likely to be tested for illicit drugs as non-black women,' after controlling for obstetrical conditions and socio-demographic factors, such as single marital status or a lack of health insurance." (quoting Hillary Veda Kunins et al., *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J. WOMEN'S HEALTH 245, 245 (2007))); 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 N. ENG. J. MED. 1202, 1204 (1990) ("Thus, a black woman was 9.6 times more likely than a white woman to be reported for substance abuse during pregnancy."); *African-American Mothers More Likely To Be Tested For Drugs, Study Says*, NORML (Apr. 12, 2007), <http://norml.org/news/2007/04/12/african-american-mothers-more-likely-to-be-tested-for-drugs-study-says> [<https://perma.cc/E339-PYWY>].

reporting drug use during pregnancy is riddled with racial bias,³⁹ and the best indicators of whether a woman will be drug tested are race and class, not medicine.⁴⁰

This reach into the Black Woman's pregnant body, through non-consensual prenatal testing, is a physical assault against her and should be considered a seizure under the Fourth Amendment⁴¹ and subject to the exclusionary rule. It should also be legally and politically compared to racially-biased "stop and frisk"⁴² policing practices, as both "produce[] [a] double consciousness . . . that your body is subject to invasion . . . [and] impl[y] that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."⁴³

Courts have repeatedly refused, however, to apply the Fourth Amendment and the exclusionary rule to child protective proceedings. Yet there has been a striking absence of criticism of this failure. Despite the

³⁹ Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 85-86 (1999).

⁴⁰ *Id.*; Laura Newman, *As Substance Abuse Rises, Hospitals Drug Test Mothers, Newborns*, AM. ASS'N CLINICAL CHEMISTRY: CLINICAL LABORATORY NEWS (Mar. 1, 2016), <https://www.aacc.org/publications/cln/articles/2016/march/as-substance-abuse-rises-hospitals-drug-test-mothers-newborns> [<https://perma.cc/MXE5-895D>].

⁴¹ Marisa Carroll, *Roe v. Wade at Forty: Beyond Pro-Choice*, GUERNICA (Feb. 1, 2013), <https://www.guernicamag.com/interviews/roe-v-wade-at-forty-beyond-pro-choice/> [<https://perma.cc/PJ75-V8U7>] ("We've seen [prenatal drug testing] in terms of violation of pregnant women's Fourth Amendment rights. A hospital was secretly searching almost exclusively African-American women for evidence of drug use and then doctors and nurses were turning that information over to the police—claiming it was furthering the state interest in separate rights for embryos and fetuses—and coordinating the women's arrests out of their hospital beds, taking them away in chains and shackles while they were still pregnant. Or, almost immediately after giving birth, they were put into jails that had no healthcare. Eventually, the United States Supreme Court ruled that pregnant women don't lose their right to Fourth Amendment protections because they're pregnant, but we still see these cases happening.").

⁴² Cooper, *supra* note 36.

⁴³ *Utah v. Strieff*, 136 S. Ct. 2056, 2070-71 (2016) (Sotomayor, J., dissenting). In *Utah v. Strieff*, the Supreme Court had to determine whether the unlawful police stop which recovered illegal drugs, should be legitimized based on a subsequent finding that the defendant had an open warrant for a traffic infraction. The Court expanded the police search and seizure power in this case, but Justice Sotomayor's dissent highlighted the dangers of such an expansion. Although *Strieff* is a criminal justice case, the very same principles of governmental invasions occur in the Child Protective System. Controlling opinions in both the criminal and civil contexts continue to legitimize the unlawful conduct of governmental actors. *See, e.g.*, *Gates v. Texas Dep't of Prot. and Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008). BLM should be as concerned with overturning the child welfare case law as with overturning *Strieff*. *See, e.g.*, *Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Ill. 1988) ("Holding a mother liable for the unintentional infliction of prenatal injuries subjects to State scrutiny all the decisions a woman must make in attempting to carry a pregnancy to term, and infringes on her right to privacy and bodily autonomy.").

similarities between biased profiling in the criminal context and biased profiling of Black pregnant women in the child welfare context, there is little to no political discourse connecting these experiences.

It is incumbent on Practitioners to connect the similar racist underpinnings of these two systems. Black men in the criminal context, like Black women in the child welfare system, have to succumb to the physical hands of the government on their bodies. Yet many people, including many progressives, excuse the system's subjugation of the Black Female body in the child welfare context, arguing that to protect a child, even where one legally does not yet exist,⁴⁴ one *must* invade the woman's body. In this way, the assault on Black pregnant women becomes cloaked in sanctimonious righteousness, redefined as child advocacy, and therefore avoids public criticism. As a result, caseworkers and hospitals can continue to defend their practices, judges can allow it, and the consequences continue unchecked and devastating for Black women. In the least punitive child protective cases, illegal prenatal drug testing that yields positive drug results triggers child protective services involvement,⁴⁵ which subjects women to government intervention and oversight. In the most extreme cases, positive drug test results are used to justify taking the child from his/her mother or even incarcerating the mother.⁴⁶ This all occurs with even less Fourth Amendment protection than Black men have in the criminal context, and in the name of social welfare.

This unfettered testing is not social work. In fact, it violates the recommendations of the American College of Obstetricians and Gynecologists.⁴⁷ More profoundly, it dehumanizes the Black pregnant body

⁴⁴ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Byrn v. N.Y.C. Health and Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972) (holding that when there is no legislative declaration that a fetus is a person, neither the federal or state constitution “confer[s] or require[s] legal personality for the unborn”); *In re Klein*, 145 A.D.2d 145, 147 (2d Dep’t 1989) (holding that a non-viable fetus is not a legally recognized “person” requiring appointment of a guardian for the purposes of proceedings to determine medical treatment of a comatose pregnant woman).

⁴⁵ Cooper, *supra* note 36.

⁴⁶ Nina Martin & Amy Yurkanin, *How Some Alabama Hospitals Quietly Drug Test New Mothers — Without Their Consent*, PROPUBLICA (Sept. 30, 2015, 11:00 AM), <https://www.propublica.org/article/how-some-alabama-hospitals-drug-test-new-mothers-without-their-consent> [<https://perma.cc/85B2-TXSJ>]; Carroll, *supra* note 41.

⁴⁷ Carroll, *supra* note 41. The American College of Obstetricians and Gynecologists (“ACOG”) advocates all prenatal drug testing “should be performed only with the patient’s consent Pregnant women must be informed of the potential ramifications of a positive test result, including any mandatory reporting requirements[.]” AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 524: OPIOID ABUSE, DEPENDENCE, AND ADDICTION IN PREGNANCY 3 (2012), <https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co524.pdf?dmc=1&ts=20161030T1250388560> [<https://perma.cc/JK8J-UFGB>].

and strips away the personhood supposedly guaranteed to *all* women by *Roe v. Wade* and its progeny.⁴⁸

This practice of illegal prenatal drug testing is not the first time Black women have been stripped of their personhood in order to acquiesce to state or public demands.⁴⁹ This is a tradition “African-American women experienced under slavery,” then again under other racially oppressive laws such as “Jim Crow.”⁵⁰ This is why Lynn Paltrow, lawyer and founder of National Advocates for Pregnant Women, argues that the systematic criminalization of pregnancy, especially for Black women, is the “New Jane Crow”—a legitimized system of stripping the rights of Black pregnant women; this form of social control leads to more prosecutions, more child removals, and a subclass of the Black pregnant body.⁵¹ This is powerful rhetoric and that power should be used by practitioners to connect our testimony and the experiences of clients like Nancy to larger political and racial justice movements. This will help our allies see that what occurs in the child welfare system is as ugly as what occurs in the criminal justice system. It will help the public understand that while Black men are being shuffled into cages through mass incarceration, Black mothers are being prodded and surveilled by caseworkers, and Black babies are being shuffled into the cage of foster care.

C. The Attack on Black Families: Increased Surveillance and Supervision of the Black Family Unit

Nancy’s story continued: After Nancy was charged with child neglect, her case was set for trial. At Nancy’s initial arraignment, the judge had to determine whether there were any safety concerns with keeping Nancy’s son in her care pending the trial. The judge found there were no imminent safety concerns, and released Nancy’s son to her care on the condition that Nancy submit to court-ordered supervision. This meant the court mandated that she comply with a drug treatment program, complete a parenting class, exclude the father from the baby’s life unless he was being supervised by a child protective caseworker, and allow caseworkers to enter her home at any time and investigate any adults who would have contact with her child. The court also gave children’s services the authority to require Nancy to do any other services as they saw fit.

This is because failing to provide informed consent to mothers undermines the relationship between the pregnant woman and her doctor, and ultimately creates disincentives for women to obtain life-saving prenatal care that is beneficial for both her and the child.

⁴⁸ See, e.g., *Roe*, 410 U.S. at 162 (noting that Texas may not “override” the rights of pregnant women); see also Carroll, *supra* note 41.

⁴⁹ See Carroll, *supra* note 41.

⁵⁰ *Id.*

⁵¹ See *id.*

Nancy's case eventually was scheduled for trial 17 months later. When the trial date came, the government withdrew the entire petition against her. Nancy was never found guilty of any charges and her entire case was dismissed.

While taking children from their parents is the most obvious physical governmental interference in Black families, it is not the only way the government assaults the Black Family. Often, the system uses court-ordered supervision that requires Black Families to comply with social services determined by caseworkers and then ordered by mostly white⁵² judges, all of whom barely know the family. Such involuntary state intervention into the Black family infantilizes the Black parent. In Nancy's case, which is representative of so many others, her autonomy was assailed. She was forced to barter her own freedom – the right to live her life as she saw fit – in exchange for her child's freedom from foster care.

Many people believe that imposing social services on Black Families is a good thing that helps the unfortunate Black parent manage their children.⁵³ This belief must be interrogated. Not only were the allegations against Nancy never proven, but most of the services she was required to do were not even related to the allegations against her and were therefore not the product of social work efforts responding to true child neglect. Instead, these services are representative of the child welfare system's implicit bias that Black people are incapable of governing themselves,⁵⁴ and are a mechanism for the Court and child protective workers to impose these misguided values on the Black family. For instance, the parenting class requirement implied that Nancy was deficient in her parenting skills, despite *any* evidence of failed parenting. In fact, all available evidence of Nancy's parenting was positive: she had successfully raised two other children, was in a motherhood support group, and her son's pediatrician reported he was meeting all his developmental milestones.

Similarly, forcing Nancy to exclude her child's father from their lives was a reflection of the system's disdain for Black fathers and for relationships between two Black adults. It had nothing to do with prenatal marijuana usage. Requiring Nancy to open her home at the system's every whim was indicative of the caseworker's and court's skepticism of Nancy's entire family life, implying that she required vigilant oversight and

⁵² Andrew White et al., *Introduction: The Race Factor in Child Welfare*, CHILD WELFARE WATCH, Spring/Summer 1998, at 2, 2, https://nycfuture.org/images_pdfs/pdfs/Race%20Bias%20&%20Power%20in%20Child%20Welfare%20CWW%2098.pdf [https://perma.cc/QD5C-KDYS].

⁵³ See, e.g., Bartholet 2015, *supra* note 8; Bartholet 2016, *supra* note 8; Heimpel, *supra* note 7.

⁵⁴ Roberts, *Race and Class*, *supra* note 9.

investigation in order to keep up with the system's standards of child rearing.

While state supervision of a Black family is not a physical attack in the way we traditionally understand violence, we contend it is a form of government oppression so great that it subjugates the Black mother and father to governmental masters – including the courts, child protective workers, and the foster care system on the whole – who ultimately wield the authority of raising Black children in place of the parents. This cripples the Black parent, and reinforces the caste system that undermines Black mothers and fathers. This is not dissimilar to the caste system formed by the over-policing and mass incarceration that subordinates Black men. Like the criminal justice system, which is no longer primarily concerned with the “prevention and punishment of crime, but rather with the management and control of the dispossessed,”⁵⁵ the child welfare system is now structurally designed to police families in order to “monitor, regulate, and punish poor families of color”⁵⁶ instead of assisting families in actual need. Drawing this analogy between the two systems will help our political allies in the BLM movement recognize the oppressive assaults child welfare practices inflict on families. Such comparisons will hopefully also give voice to the experiences of Black families who currently live under the thumb of child welfare regimes.

II. FAST-TRACKED TERMINATION OF PARENTAL RIGHTS IS THE CIVIL DEATH PENALTY FOR BLACK FAMILIES TARGETED BY THE CHILD WELFARE SYSTEM

The racially-motivated child protective “interventions” discussed above – and their effects on Black families – do not exist in a legal vacuum. They have historically been cultivated within a larger federal and state legal framework that discriminates against Black families. The most powerful piece of legislation regarding the foster care system in the past twenty years is the Adoption and Safe Families Act (“ASFA”),⁵⁷ a federal statute that has had devastating consequences for Black families.

President Clinton signed ASFA into law on November 19, 1997. ASFA made significant changes to the nation's foster care system, most importantly by emphasizing adoption over family reunification for children in foster care.⁵⁸ The law encouraged caseworkers to begin planning for

⁵⁵ ALEXANDER, *supra* note 16, at 188.

⁵⁶ Roberts, *Race and Class*, *supra* note 9.

⁵⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

⁵⁸ It is important to note that ASFA was passed on the heels of another act – the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”)

adoption the moment a child is placed into foster care and told states they did not have to make social work efforts to reunify every family as had previously been required. For the first time, states were required to seek to terminate the rights of a substantial number of parents of children in foster care. The law even provided financial bonuses to states that increased the number of children who were adopted out of foster care rather than returning to their families.⁵⁹ “Congressional sponsors declared that ASFA ‘is putting children on a fast track from foster care to safe and loving and permanent homes.’ Most of the children referred to in this statement are Black. And the homes the law supports are adoptive, not biological, ones.”⁶⁰ In 1997, the year ASFA was passed, about 42% of children in foster care were Black, almost three times the percentage of Black children in the U.S. population.⁶¹

In short, ASFA puts children in foster care on a fast track to adoption. Given how easily and disproportionately Black children enter foster care, ASFA ensures that they are more often permanently severed from their families. Under ASFA, familial bonds between Black parents and their children are devalued and Black parents caught up in the system are swiftly deemed legally dead to their children, thereby “killing” the Black family. ASFA has been relabeled by one author the “federally mandated destruction of black families.”⁶² In other words, termination of parental rights is the civil death penalty for Black families targeted by the child welfare system.⁶³

– which was also signed into law by President Clinton, and was equally devastating to Black families, particularly in light of the changes brought by ASFA the following year. See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. PRWORA was essentially a welfare reform effort that took away economic support from poor families by “reduc[ing] cash assistance to families, eliminat[ing] payments to some families altogether, and requir[ing] mothers, often without adequate child care, to work and participate in job training, counseling, and other programs. . . . With that base kicked out from under families, the child welfare system is bound to catch some of the falling children.” ROBERTS, *supra* note 5, at 173-74.

⁵⁹ Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 11 (2009), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF> [<https://perma.cc/9MXG-7T3U>]; ROBERTS, *supra* note 5, at 110-12.

⁶⁰ ROBERTS, *supra* note 5, at 109; Roberts, *Race and Class*, *supra* note 9.

⁶¹ ROBERTS, *supra* note 5, at 8.

⁶² Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL’Y 303, 303 (2006).

⁶³ See *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) (internal citations omitted) (“The termination of parental rights has been characterized as tantamount to a ‘civil death penalty.’ . . . ‘It is a drastic intrusion into the sacred parent-child relationship.’”). *Accord In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002); *In re Parental Rights as to K.D.L.*, 58

Since its passage, ASFA has succeeded in reaching its own destructive goals: in the few years after ASFA took effect, the adoptions of children in foster care increased from 28,000 in 1996 to 50,000 in 2000.⁶⁴ In 1999, “[f]orty-two states earned \$20 million in federal adoption bonuses.”⁶⁵ And in subsequent years, from 2005 to 2014, the number of adoptions of children in foster care continued to hover around the 50,000 mark.⁶⁶

While the benefits of all these adoptions should be questioned, the drastic increase in terminations of parental rights is particularly troubling when it comes to Black children because terminations do not lead to the same outcomes for them as for white children. The purpose of terminating parental rights is supposed to be that it legally “frees” the child to be adopted by someone else, typically the foster parent.⁶⁷ But Black children in foster care are significantly less likely than their white counterparts to be adopted once they are “freed.”⁶⁸ These children have lost their parents (and often their siblings as well) without achieving the “permanency” at which ASFA was purportedly aimed. For instance, in 2010, of the foster children whose parents’ rights had been terminated, approximately 53,500 children were adopted, but a staggering 109,000 children had not yet been.⁶⁹ Only 24% of the children adopted that year were Black, while 43% of the children adopted that year were white.⁷⁰ Many of these children – orphaned by law – likely aged out of foster care without any parents or any other permanent arrangement. Dorothy Roberts writes:

P.3d 181, 186 (Nev. 2002); *In re P.C.*, 62 S.W.3d 600, 603 (Mo. Ct. App. 2001).

⁶⁴ White, *supra* note 62, at 322 (citing Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 144 (2001)).

⁶⁵ ROBERTS, *supra* note 5, at 111.

⁶⁶ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2005-FY 2014 (2015), http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2014.pdf [<https://perma.cc/WL7H-UVGR>].

⁶⁷ See, e.g., N.Y. SOC. SERV. LAW § 384-b (McKinney 2016).

⁶⁸ White, *supra* note 62, at 323 (citing Ruth G. McRoy, *Overrepresentation of Children and Youth of Color in Foster Care*, in CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 623, 628 (Gerald P. Mallon & Peg McCartt Hess eds., 2005)); see also ROBERT B. HILL, CTR. FOR THE STUDY OF SOC. POLICY, DISPROPORTIONALITY OF MINORITIES IN CHILD WELFARE: SYNTHESIS OF RESEARCH FINDINGS 7 (2002), <http://www.cssp.org/reform/child-welfare/other-resources/Disproportionality-of-Minorities-in-Child-Welfare-Synthesis-of-Research-Findings.pdf> [<https://perma.cc/ESZ4-PD3A>] (citing studies revealing that white children are more likely than black children to be adopted).

⁶⁹ CHILDREN’S BUREAU, *supra* note 66, at 1.

⁷⁰ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2010 ESTIMATES AS OF JUNE 2011(18) 4 (2011), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf> [<https://perma.cc/78JF-SNUJ>].

the children most likely to be affected by the expedited termination process are the very ones least likely to be adopted—Black children. Black parents' rights are already terminated sooner than those of white parents, yet Black children are less likely than white children to be adopted. This is why most of the children waiting to be adopted are Black.⁷¹

Thus, after Black parents' rights have been terminated, Black children often "continue to drift between foster care placements[]" while "any hope of reunification with their biological parents is lost."⁷² In this context, "permanency" for these children means that they become wards of the state and lose any semblance of family or family identity that they once had.

Even children who are ultimately adopted may later experience a "broken adoption," meaning that the adoption falls through and the child winds up back in foster care: for example, the New York City Administration for Children's Services has said that it believes that approximately one out of every 20 children adopted from foster care in New York City since the passage of ASFA eventually returns to care. Children's advocates believe the number of such broken adoptions might be even higher. Studies have shown that between 9 and 15 percent of adoptions from foster care eventually disrupt, and that number may even rise to 24 percent when adopted children become young adults.⁷³

The covert yet targeted dismantling of the Black family unit by ASFA for the sake of "permanency" not only devalues the relationships between Black parents and their children, but ultimately interferes with the larger Black community's dissemination of important personal, political, and cultural identities to future generations.⁷⁴

In order to draw attention to the injustices perpetrated against Black families by ASFA and other similar legislative mechanisms, Family Defense practitioners should highlight the stories of parents whose rights have been unnecessarily terminated at a fast-tracked pace. They should empower the voices of those parents and the voices of their children. Practitioners must also draw attention to the disproportionately high number of Black children languishing in foster care, without hope of any continuing connection to their families and communities. BLM and other racial justice organizers must soon realize that the disproportionate termination of parental rights to Black children serves to "kill" the Black family and Black communities (Black "villages," in BLM parlance) as we know them.

⁷¹ ROBERTS, *supra* note 5, at 159.

⁷² White, *supra* note 62, at 323.

⁷³ See *id.*; see generally Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012).

⁷⁴ White, *supra* note 62, at 324-25.

III. TARGETED SUGGESTIONS FOR CHANGE

Supporters of the Black Lives Movement already loudly condemn the specific struggles that Black Americans face at the hands of police brutality, and specifically affirm the values of Black families,⁷⁵ Black women,⁷⁶ and Black villages⁷⁷ as foundational tenets of its movement, to recognize the Black voice and the Black experience. This suggests there is strong potential for a new wave of Family Defense allies in this movement.⁷⁸ This last section offers targeted suggestions for methods advocates can use to push organizers and supporters of movements like Black Lives Matter to adopt positions against discriminatory child welfare practices, as would fall naturally within their already established tenets.⁷⁹

The BLM's "Campaign Zero" platform lists ten specific policy solutions for which BLM advocates should campaign in their jurisdictions, but strikingly does not yet address any child welfare policy reforms.⁸⁰ The child

⁷⁵ See *Guiding Principles*, BLACK LIVES MATTER, <http://blacklivesmatter.com/guiding-principles> (last visited July 1, 2016) (hover over "Black Families") ("We are committed to making our spaces family-friendly and enable parents to fully participate with their children. We are committed to dismantling the patriarchal practice that requires mothers to work 'double shifts' that require them to mother in private even as they participate in justice work.").

⁷⁶ See *id.* (hover over "Black Women") ("We are committed to building a Black women affirming space free from sexism, misogyny, and male-centeredness.").

⁷⁷ See *id.* (hover over "Black Villages") ("We are committed to disrupting the Western-prescribed nuclear family structure requirement by supporting each other as extended families and 'villages' that collectively care for one another, and especially 'our' children to the degree that mothers, parents and children are comfortable.").

⁷⁸ For example, the Say Her Name campaign sought to bring light to Black women's experiences of police violence and explain their importance in the Black Lives conversation. See Homa Khaleeli, *#SayHerName: Why Kimberlé Crenshaw Is Fighting for Forgotten Women*, GUARDIAN (May 30, 2016, 10:02 AM), <https://www.theguardian.com/lifeandstyle/2016/may/30/sayhername-why-kimberle-crenshaw-is-fighting-for-forgotten-women> [<https://perma.cc/2AS5-5NAR>]. Using these clear parallels, Family Defense Practitioners can weave Child Protective activism into the fabric of a larger BLM political agenda.

⁷⁹ For example, BLM's "About" webpage highlights among its issues "[h]ow women bearing the burden of a relentless assault on our children and our families is state violence." See *About the Black Lives Matter Movement*, BLACK LIVES MATTER, <http://blacklivesmatter.com/about> (last visited July 1, 2016).

⁸⁰ *Vision*, CAMPAIGN ZERO, <http://www.joincampaignzero.org/#vision> [<https://perma.cc/GP3B-CJDV>] (last visited July 12, 2016). An early, unfounded, criticism of the BLM movement was that it lacked specific legislative changes. See *11 Major Misconceptions About the Black Lives Matter Movement*, BLACK LIVES MATTER, <http://blacklivesmatter.com/11-major-misconceptions-about-the-black-lives-matter-movement> (last visited July 6, 2016) (explaining that a common misconception about the BLM movement is that "the Black Lives Matter movement has no agenda — other than

welfare realm is fertile ground for specific legislative and policy reforms, such as enhanced protections for parents and caretakers who are under investigation and monitoring by the state. Lobbying efforts could include various measures to ensure due process while balancing the need to keep children safe from harm. Pushing for improvements such as these suggested here could both increase public outcry at the damage Black families suffer in the child protective system and begin to curtail the state overreach described in Sections I, II, and III:

- Campaigning for a child protective *Gideon* right: the right to effective legal counsel for all parents.⁸¹ Disturbingly, there are still states that do not guarantee parents the right to a lawyer when the government accuses them of abuse or neglect and seeks to take their children from them,⁸² nor in cases where the permanent termination of their parental rights⁸³ is at stake. Black parents, whose children are disproportionately placed in foster care, simply cannot protect

yelling and protesting and disrupting the lives of white people”); *see also Ferguson Spurs 40 New State Measures; Activists Want More*, CHI. TRIBUNE (Aug. 2, 2015, 11:53 AM), <http://www.chicagotribune.com/news/nationworld/ct-ferguson-state-measures-20150802-story.html> [<https://perma.cc/8W6Y-KD7C>] (“Twenty-four states have passed at least 40 new measures addressing such things as officer-worn cameras, training about racial bias, independent investigations when police use force and new limits on the flow of surplus military equipment to local law enforcement agencies, according to an analysis by The Associated Press.”).

⁸¹ *See Gideon v. Wainwright*, 372 U.S. 335 (1963). The Supreme Court’s 1981 decision in *Lassiter v. Department of Social Services* determined that due process did not always require appointment of a state-funded attorney for parents but that, in termination of parental rights cases, whether an indigent parent is entitled to appointed counsel must be decided on a case-by-case basis. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 30-33 (1981).

⁸² According to recent nationwide data, in abuse and neglect cases, forty states have established a categorical parent right to counsel, seven have a discretionary appointment of counsel, and three provide a qualified right or appointment of counsel. *See Status Map*, NAT’L COALITION FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/VBV7-PVSL>] (last visited July 12, 2016) (click “Right to Counsel Status” bubble; then choose “Abuse/Neglect/Dependency – Accused Parents” from drop-down menu).

⁸³ In termination of parental rights cases, forty-five states have established a categorical parent right to counsel and five (Minnesota, Nevada, Vermont, Wyoming, and Mississippi) have a discretionary appointment of counsel. In many of these states, the appointment of counsel does not usually happen at the time the agency becomes involved with the family nor even at the filing of the case. *See id.*; *see also* AM. BAR ASS’N, INDICATORS OF SUCCESS FOR PARENT REPRESENTATION (2015), http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf [<https://perma.cc/GM3D-NG5X>].

their Constitutional rights without the sound advice of counsel and an effective voice in the courtroom.⁸⁴

- Demanding that states and localities fund parent representation organizations: parent defense organizations that have a full time staff of attorneys, social workers, parent advocates, and investigators have been shown to achieve better outcomes and swifter reunifications for families.⁸⁵ Such organizations are critical to ensuring appointed counsel is effective counsel.
- Instituting a child protective *Miranda* right: federal recognition of a *Miranda*-esque warning and protection for parents.⁸⁶ In the area of criminal law, state and federal bodies have recognized the crucial role of due process protections such as *Miranda* rights when individuals are in police custody. Obtaining the same rights for parents in child protective proceedings is an important long-term goal. More immediately, local BLM chapters could conduct public education campaigns informing parents of their right not to make self-incriminating statements to child welfare officials and to refuse entry to their homes and access to their children.
- Providing parents access to legal counsel during the investigative phase of a child protective case, starting from the initial contact by child welfare officials: this would allow parents to understand their rights at all stages of government intervention, including the critical juncture when a determination may be made by officials to remove a child prior to court involvement.⁸⁷ For example, the common

⁸⁴ See generally Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why it Matters*, 11 MICH. CHILD WELFARE L.J. 11 (2007).

⁸⁵ See AM. BAR ASS'N, *supra* note 83, at 1; TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 207 (2016); Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 141 (2012); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 238-40, 260 (E.D.N.Y. 2002) (noting that the best way to provide competent representation for indigent parents charged with abuse or neglect may be through an institutional provider). Victoria Rivkin, *Experts Say Lack of Respect, Low Pay Cause Exodus in System for Assigning Counsel*, 223 N.Y. L.J. 5 (2000) ("Most practitioners agreed that creation of a resource center would help . . . all lawyers representing the poor. They suggested that the center should be fully staffed with investigators and social workers, and also have translators, a full library, DNA expertise, legal training and appellate-support services.).

⁸⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966). This case established national standards to ensure that, at a minimum, suspects in the custody of police or other interrogating authorities knowingly, voluntarily, and intelligently waive their Fifth Amendment right before their statements can be used against them. *Id.* at 444.

⁸⁷ See, e.g., *Detroit Center for Family Advocacy*, U. OF MICH. DETROIT, <http://detroit.umich.edu/centers-initiatives/highlights/promoting-safe-and-stable-families->

practice in most states is that questioning of children by child protective officials does not require parental notice in advance. However, adding a provision that allows such questioning only in exigent circumstances might strike a better balance.

- Lobbying for greater protection in the court process for parents with child protective cases: for example, introducing a beyond a reasonable doubt standard, as in criminal cases, instead of the lower “preponderance of the evidence” standard used by many court systems.⁸⁸
- Following the lead of the few states that allow for juries in child protective and termination of parental rights trials.⁸⁹
- Instituting a right to speedy trial for parents and children in child protective cases, comparable to the Sixth Amendment speedy trial right guaranteed in criminal proceedings.
- Pushing for passage of Reinstatement of Parental Rights statutes in states that don’t yet have them.⁹⁰
- Promoting the benefits of open adoptions: these allow children to interact and continue relationships with their birth parents following a legal adoption.⁹¹

detroit-center-for-family-advocacy/ [https://perma.cc/3L5S-QEK6] (last visited Oct. 30, 2016) (which utilizes a parent-friendly preventative approach where parents are introduced to legal counsel during the investigation phase, allowing less drastic options than child removal to be proposed); *Healthy Mothers Healthy Babies*, BRONX DEFENDERS, <http://www.bronxdefenders.org/programs/healthy-mothers-healthy-babies> [https://perma.cc/Z8EE-7MDR] (last visited Sept. 1, 2016) (a program designed to keep infants safely at home with their parents by working with pregnant women who are at risk of losing their newborns to foster care).

⁸⁸ In *Santosky v. Kramer*, the U.S. Supreme Court held that “[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.” 455 U.S. 745, 747-48 (1982). A parental rights termination proceeding interferes with that fundamental liberty interest and, thus, a “fair preponderance of the evidence” standard of evidence in a termination of parental rights would violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 752-54.

⁸⁹ See, e.g., TEX. FAM. CODE ANN. § 105.002 (West 2015); WIS. STAT. § 48.424 (2014); WYO. STAT. ANN. § 14-3-423 (2014); *In re A.E. v. State*, 743 P.2d 1041 (Okla. 1987) (finding a constitutional right in the Oklahoma Constitution to a jury trial in termination of parental rights proceedings).

⁹⁰ As of April 2016, thirteen states had passed some form of parental right reinstatement statute (Alaska, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maine, North Carolina, Nevada, New York, Oklahoma, Washington). See, e.g., CAL. WELF. & INST. CODE § 366.26 (West 2016); DEL. CODE ANN. tit. 13, § 1103 (2009); NEV. REV. STAT. §§ 128.160-.170 (2007).

⁹¹ DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS

- Eliminating unreliable practices / uncertainty: instituting policies to ensure higher quality interviews of children by child protective caseworkers, such as videotaping interviews, and requiring the use of evidence-based child interviewing techniques. Black children questioned by unfamiliar authorities without their parents are in a unique position where they may be more susceptible to pressure.
- Exposing the public to the raw violent imagery of removing a child from his or her parent. Words can sanitize the act of a removal. However, video recordings, reenactments, and testimonials could effectively raise awareness and outrage against the trauma of unnecessary removals. By way of analogy, the introduction of video recording of police interactions with the public, while not a panacea, has raised public awareness and encouraged greater transparency in law enforcement.
- Organizing and partnering with local parent-led advocacy groups engaged in grassroots organizing around child welfare reform.⁹²
- Pushing local court systems to collect and report data in order to thoughtfully and realistically shape responses to racial disproportionality⁹³ and ensure accountability.

CONCLUSION

Family Defense practitioners need strong allies in larger political movements. We practice in rigid, conventional arenas – courtrooms, law offices, local government administrative offices, and the like – where judges, case workers, and agency heads are seemingly insensitive to the racial and socio-economic patterns that apply to the Black families in

http://www.adoptioninstitute.org/old/publications/2012_03_OpennessInAdoption.pdf [<https://perma.cc/CJ52-P7PK>] (“The benefits of openness for all parties involved have been well established in research, particularly as they relate to adopted children[.]”); Harold D. Grotevant et al., *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 ADOPTION Q. 79, 88 (2008).

⁹² See, e.g., CHILD WELFARE ORGANIZING PROJECT, <http://www.cwop.org> [<https://perma.cc/HL8S-QA2J>] (last visited July 6, 2016).

⁹³ See Howard A. Davidson, *Racial Disparities in the Child Welfare System: Reversing Trends*, 28 ABA CHILD L. PRAC. 94, 95 (2009), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/racial_disparities_1.authcheckdam.pdf [<https://perma.cc/CVJ6-NYB4>] (“The ABA calls upon courts to track, report, analyze, and report on corrective actions to respond to information gathered on racial disparities.”). This article argues that Courts that compile their own racial disparity data for all key decision points can then set benchmarks, monitor progress, and ensure racially fair treatment and outcomes. *Id.* (“This should occur at local and statewide levels.”)

question Family Defense practitioners are bound by ethical⁹⁴ duties that require us to silence our own political voices in deference to the goals of our client. The top priority of parent clients is, of course, almost always to get their children back as quickly as possible. When pursuing that goal, advocates often cannot press tough questions about race and class because that risks alienating the decision-maker.⁹⁵ Thus it is imperative that Family Defense practitioners step out of the courtroom and loudly inform our political allies about the destruction of Black bodies, families, and children in the false name of child protection that is happening every day, unacknowledged.

The Black Lives Matter movement offers Family Defense practitioners a powerful and far-reaching platform to publicize the alarmingly destructive and racially-biased forces underlying child protective practices as they currently exist. As advocates, we must take advantage of this platform to make it known that child protection is not about the prevention or eradication of child abuse; it is instead a vehicle for the state to monitor, intervene in, and ultimately destroy the Black family. By using the Black Lives Matter framework to mobilize awareness and persuasion, Family Defense practitioners may find receptive listeners who are willing to organize for political change and are well-versed in effective approaches to public speaking, media, art and story-telling, and community organizing.

⁹⁴ Notably, the standard ABA guide for Parents Attorneys states: “Although you must zealously represent the parent, experience shows that confrontational and obstructionist tactics often tend to be counterproductive to the parent’s interests. Since the agency and the court wield enormous and continuing power over the life of the child, and, therefore, the parent, it benefits your client when you are selective in deciding which issues to contest. You should seek a productive working relationship with the agency whenever possible, especially at the early stages of the juvenile court process. Such a relationship may help: expedite the resolution of the case, minimize needlessly the contentious relationships between the parents and agency caseworkers, and facilitate negotiated settlements that ensure the protection of the child without unnecessarily infringing on the family’s integrity. With the tightened timeframes under [the Adoption and Safe Families Act of 1997], in most cases, you should advise your client to cooperate and accept services immediately.” DIANE BOYD RAUBER & LISA A. GRANIK, AM. BAR ASS’N, REPRESENTING PARENTS IN CHILD WELFARE CASES: A BASIC INTRODUCTION FOR ATTORNEYS 4-5 (2000), http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/representparents.authcheckdam.pdf [https://perma.cc/CV9P-E6UA].

⁹⁵ Often for the particular attorney, caseworker, or judge, it is easier to focus on the specific details of a family situation and justify reasons for government intervention and compromised family autonomy. The alternative involves a much more searching inquiry: How did the family come to the attention of government actors? What protections from state involvement might a different family have had against this intrusion? Why is this parent’s account of an injury or family history cloaked in suspicion compared to a more affluent or educated parent’s?

Through these avenues, we can highlight our clients' experiences to Black Lives Matter supporters, analogize those experiences to the discriminatory policing experiences that are at the forefront of the national conversation on racial justice, and demand political change. We need to build alliances to build justice. Our clients deserve no less.

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