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THE VANISHING OF THE AFRICAN-AMERICAN FAMILY: “REASONABLE EFFORTS” and ITS CONNECTION TO THE DISPROPORTIONALITY OF THE CHILD WELFARE SYSTEM.

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INTRODUCTION

There can be no keener revelation of a society's soul than the way in which it treats its children.¹

In the United States, approximately three million cases of child abuse and neglect involving more than six million children are reported annually to child protective service agencies.² The United States has one of the worst records among industrialized nations – losing on average between four to seven children every day to child abuse and neglect.^{3 4} Our children are in need of protection. But what or who are they in need of protection from? This article suggests that until children are protected from the “master narrative”⁵ of child welfare that plays out in hundreds of courtrooms across this nation on a daily basis through the inconsistent application of “reasonable efforts”, our children stand desperately in need of protection from the very child protective service agencies that are charged with protecting them.

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¹ Nelson Mandela.

² Childhelp, <http://www.childhelp-usa.com/pages/statistics> (last visited April 10, 2014)

³ U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2013). *Child Maltreatment 2012*. Available at <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment>, or <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf> (last visited April 10, 2014)

⁴ United States Government Accountability Office, 2011. Child maltreatment: strengthening national data on child fatalities could aid in prevention (GAO-11-599). Available at <http://www.gao.gov/new.items/d11599.pdf> (last visited April 10, 2014).

⁵ See Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 Me. L. Rev. 1, 2 (2010). See also Jean-Francois Lyotard, *The Postmodern Condition: A Report on Knowledge* 18-37 (1979) (Manchester University Press, 1984).

Child welfare is characterized by a single, “master narrative,” or overarching description of conditions and phenomena that explains, or purports to explain, the field.⁶ In short, one of the “master narratives” of child welfare depicts foster care as a haven for “child-victims”⁷ savagely brutalized by “deviant,⁸ monstrous⁹ parents. The societally shared perspective created by this child welfare “master narrative” is that the majority of children who are subjects of child welfare law suits are victims of heinous physical and/or sexual abuse at the hands of, or at minimum, under the failed protection of biological parents. The second “master narrative” of child welfare law is that indigent parents are not deserving of the right to raise their children and these indigent children are thus, in need of being saved from poverty. However, while the media focuses attention on sensational cases of severe physical child abuse¹⁰, and legislation treats abuse and neglect identically, thereby providing support and confirmation of these flawed “master narratives”, data shows that seventy-one percent of children who were victims of maltreatment suffered neglect; with only sixteen percent suffering physical abuse.¹¹ Furthermore, the import of the abundance of neglect cases becomes clear when we accept that most removals involve allegations of neglect,¹² and these removals are from indigent parents, and the majority

⁶ Fraidin, *supra*, at 2.

⁷ *Id.* referencing Joel Best, *Threatened Children: Rhetoric and Concern About Child-Victims* 4-6 (University of Chicago Press, 1993).

⁸ *Id.* referencing Nina Bernstein, *Press Coverage and Public Perception: In Child Welfare Reporting, Even Good Daily Coverage Can be Damaging*, *Neiman Reports*, Winter 2000; Barbara J. Nelson, *Making an Issue of Child Abuse: Political Agenda Setting For Social Problems* 73 (University Of Chicago Press, 1984).

⁹ *Id.* referencing Axel Auburn & Joseph Grady, *How the News Frames Child Maltreatment: Unintended Consequences* 3 (Prevent Child Abuse America, 2003).

¹⁰ The case of Eric Forbes, 12 years old child from Georgia who died after being allegedly beat to death by his father. Records show that the Division of Family and Children Services, (the child protective services agency in Georgia) investigated several reports from Cobb County school officials that Forbes was being abused in 2012. Police said the boy had multiple bruises, bite marks, lacerations and other marks that are consistent with a history of abuse when they discovered his body. Investigators communicated that corporal punishment was a "regular part of the disciplinary process" for the boy.

¹¹ Child Abuse Prevention and Treatment Act, Reauthorizes 2010, Pub. L. No. 111-320, 124 Stat. 3459 (2010).

¹² Uma A. Segal and Sanford Schwartz, *Factors Affecting Placement Decisions of Children Following Short-Term Emergency Care*, 9 *Child Abuse & Neglect* 543, 547 (1985).

of these removals involve African-American children. The vast majority of parents who come into contact with the child welfare system are not reported for abuse; the report is for neglect;¹³ and neglect charges are typically related to poverty with issues such as homelessness, single parenting, addiction, mental illness, and domestic violence, frequently associated.¹⁴ Although there is a strong association between poverty and child maltreatment, poverty does not cause maltreatment.¹⁵

When investigating allegations of abuse and neglect, current federal legislation requires state actors to exercise “reasonable efforts” before removing children from their parents. However, the specific definition and expectations of “reasonable efforts” are left by the Federal Government to be defined by the State’s. With this latitude given to each state to define what is and what is not a reasonable effort, coupled with the internal biases created and supported by the “master narrative”, what defines reasonable efforts to one tribunal may be very different to another tribunal. The result has lead our nation to a child welfare system that is thwart with racial and ethnic disproportionality¹⁶; thereby resulting in generations of children who find themselves in need of protection from child protective service agencies.

From this shared but limited and flawed perspective created by the “master narrative” and supported by classism, racism and other internal biases, along with media focus and legislative action and/or inaction, trier of facts in child welfare cases apply the “reasonable efforts”

¹³ *Report of the Race, Class, Ethnicity, and Fender Working Group*, November 2001, 70 Fordham L. Rev. 411, 412 (2001) [hereinafter *Report of the Race*].

¹⁴ *Id.*

¹⁵ Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 Berkley J. Afr-Am. L. & Pol’y 109, 115 (2008).

¹⁶ For the purposes of this article disproportionality is defined as the overrepresentation of children of color in the child welfare system, compared to their numbers in the population.

requirements initially intended to keep children in their homes¹⁷ in ways that ignore reality and cause more harm to children and their families than protective good.

The first part of this article presents an overview of the problem of racial disproportionality in the child welfare system and its connection to the vanishing of the African American family within the United States. Part I of the article compares the status of the current plight of the African-American family to that of the Indian family prior to the enactment of the Indian Child Welfare Act in 1978. Part I also introduces comparative state statistics offering support to the premise that African American children are over-represented in the child welfare system; and this over representation leads to the diminishing existence of the African-American family unit. Part I engages the reader in a discussion of why we as a society should be concerned with the overrepresentation of African-American children in the child welfare system and the dissolution of the African-American family; and concludes with an examination of the effect that state agency removals has on children; the families of those children; and the communities from which these children are removed.

Section II of this article introduces two systemic causes of the over-representation of African-American children in the child welfare system: 1) poverty; and 2) classism. Part II discusses the reality faced by many parents; once a parent enters the child welfare system often times because of a lack of resources, they are deemed a “bad” parent.¹⁸ As a “bad” parent, they alone are culpable for child maltreatment, and it is presumed that their children would be better off with a new, usually more affluent adoptive family.¹⁹ The fact that a parent needs state support to raise their children causes her parenting to be subjected to excessive judgment and her

¹⁷ Adoption Assistance and Child Welfare Act. Pub.L. 96–272, 94 Stat. 500 (1980).

¹⁸ Cynthia Godsoe, *Parsing Parenthood*, 17 Lewis & Clark L. Rev. 113, 121 (2013).

¹⁹ *Id.*

constitutional right to up bring her children is ignored and the value of their relationship with their children is necessarily devalued.²⁰

Section III of this article concludes with the belief that both states and the federal government want to protect all children. However, in order to protect all children, more federal legislation is required. Specifically, this article proposes the enactment of the Federal American Child Welfare Act, calling for a federal definition of “reasonable efforts” with suggested guidelines for courts to use to ensure fair and equitable application of the doctrine.

This article acknowledges that simply defining the term “reasonable efforts” consistently for all states, will not completely resolve the subjective application of the child welfare laws, nor will it instantaneously reverse the disproportionality of child welfare removals, but it will decrease the increasing numbers of impoverished children, in general and impoverished African-American children specifically that enter into the foster care system, especially when any deficits in the care of the majority of these children can be addressed with the children in their natural homes.

²⁰ Linda Gordon, *Pitied But not Entitled: Single Mothers and the History of Welfare 1890-1935* (New York: The Free Press, 1994).

I. The Problem:

A. Racial and Ethnic Disproportionality-the Vanishing of African American Families.

African- American children are disproportionality overrepresented in the child welfare and foster care system.²¹ While this disproportionately has a direct impact on the health and welfare of African-American children, it also necessarily has a grave impact on the existence and state of African-American families.²² Similar to the state of Indian children and Indian families prior to the passage of the Indian Child Welfare Act where the rate of outplacements for Native American children far outpaced the number of Native American children in the general population;²³ currently, African-American children comprise less than one-fifth of the nation's children, yet they represent nearly half of the national foster care population.²⁴

The current overrepresentation of African American children in the child welfare system is an example of how state interference, when left unchallenged has led to the dissolution of the African American family.²⁵ The overrepresentation of African American children in the child

²¹ Ruth McRoy, PhD., *Expedited Permanency: Implications for African-American Children and Families*, 12 Va. J. Soc. Pol'y & L. 475, 476 (2005).

²² "Overrepresentation" refers to a situation in which a particular racial/ethnic group of children are represented in foster care at a higher percentage than they are represented in the general population. Ruth McRoy, *The Color of Child Welfare*, in *The Color of Social Policy* 37 (King E. Davis & Tricia B. Bent-Goodley eds., 2004).

²³ *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 Brandeis J. Fam. L. 201, 202 (Spring 1997-1998).

²⁴ The ASFA states that "reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently" with reasonable efforts to preserve and reunify families. 42 U.S.C.S. §671 (15)(F). Concurrent planning has recently been criticized by some child welfare workers that describe the "difficulty of being fully committed to two outcomes that seem to be in direct opposition to one another/" Susan Chibnall, et al., U.S. Department Health & Human Serv., Admin. Children & Fam., *Children of Color in the Child Welfare System: Perspectives from the Children Welfare Community* 4-1 (Dec. 2003), available at http://www.acf.hhs.gov/sites/default/files/opre/child_of_color.pdf [hereinafter *Children of Color*] (last visited April 10, 2014).

²⁵ Dorothy E. Roberts, *David C. Baum Memorial Lectures: Child Welfare and Civil Rights*, 2003 U. Ill. L. Rev. 171, 178 (2003).

welfare system, especially foster care, represents massive state supervision and dissolution of families.²⁶

This state sponsored dissolution of the African-American family is reminiscent of the “cultural genocide” spoken of by Congress when it said that ‘an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.’²⁷ In addition, this state interference of African American families via the child protection system helps to maintain the disadvantaged status of African-American people in the United States.²⁸ As such, the child welfare system not only inflicts general harms disproportionately on African-American children and families, it also inflicts a particular harm—a racial harm—on African-American people as a group.²⁹

The child welfare system is plagued by alarming racial disparity, with African American children especially representing a disproportionate share of the foster care population.³⁰ In addition to being overrepresented in the child welfare system, minority children are more likely to be removed from their families than white children.³¹ While the history of child welfare services prior to the passage of the Social Security Act in 1935 was essentially a history of services for white children;³² a recent national study of children protective services conducted

²⁶ *Id.* at 172

²⁷ *Id.* referencing 25 U.S.C. § 1901(4) (1978).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 171

³¹ Nell Clement, *Do “Reasonable Efforts” Require Cultural Competence? The Importance of Culturally Competent Reunification Services In the California Child Welfare System*, 5 Hastings Race & Poverty L. J. 397, 413 (2008).

³² Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs* at 23 (G. Mallon and P. Hess, eds. New York: Columbia University

by the United States Department of Health and Human Services reported that “minority children, and in particular African-American children, are more likely to be in foster care placement than to receive in home services, even when they have the same problems and characteristics as white children.”³³

On September 30, 2011 there were 400,540 children under the age of 18 in foster care in America.³⁴ Twenty-seven percent of the 400,540 children under the age of 18 in foster care were African American³⁵; however, African American children only made up 14% of the entire child population for this same time period.³⁶

In Texas, as of 2011 there were a total of 6,663,942 children in the State. In the foster care system in Texas, African American children made up 26.2 %, of the children in the care of the Texas Department of Family and Protective Services, but they are only 12.1%, of the general child population of Texas.³⁷ In Texas, as of 2013 there were a total of 7,159,172 children in the State.³⁸ In the foster care system in Texas, African-American children made up 23.1% of the

Press, 2005), referencing Robert. H. Bremner, *Children and youth in America: A documentary History*, vols. 1-3 (Cambridge: Harvard University Press, 1970-1974).

³³ Susan L. Brooks & Dorothy E. Roberts, *Family Court Reform: Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. 453, 454 (Octo.2002), (citing U.S. Dept. Health & Human Ser., Children’s Bureau, National Study of Protective, Preventative, and Reunification Services Delivered to Children and their families (1997)).

³⁴ Child Welfare Information Gateway. Foster Care Statistics 2011 available at <https://www.childwelfare.gov/pubs/factsheets/foster.pdf> (last visited April 10, 2014).

³⁵ *Id.*

³⁶ Dr. William O’Hare and the Annie E. Casey Foundation, the Changing Child Population of the United States: Analysis of Data from the 2010 Census (November 2011). Available at <http://www.aecf.org/~media/Pubs/Initiatives/KIDS%20COUNT/T/TheChangingChildPopulationoftheUnitedStates/AECFChangingChildPopulationv8web.pdf> (last visited April 10, 2014).

³⁷ Child Protective Services Overview – Texas Department of Family and Protective Services. Available at https://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2011/DataBook11.pdf (last visited April 10, 2014).

³⁸ Child Protective Services Overview- Texas Department of Family and Protective Services. Available at http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2013/DataBook13.pdf (last visited April 10, 2014)

children in the care of the Texas Department of Family and Protective Services, but they are only 11.6 percent of the general population of Texas.³⁹

In Florida in 2010 there were a total of 4,057,773 children in the state. In the Florida foster care system African American children make up 33% percent of the children in the care of the Department of Children and Families, but they are only 16% percent of the general population of Florida.⁴⁰

In California, as of 2013 there were a total of 55,218 children in foster care⁴¹. African American children makeup 25% of the children in the foster care in California, but are only 6% percent of the general population⁴². Similar disparate rates across the nation have led critics to charge that the child welfare system in action is racial and cultural genocide at worst and at best is the personification of cultural bias and ignorance.⁴³

The numbers of removed African-American children are almost as high as those figures reported for Native American Children in the 1970's, ⁴⁴ prior to the enactment of ICWA. As a response to this 'cultural genocide,' of the Indian culture, Congress passed the Indian Child

³⁹ Id. Noting that "As recommended by the Health and Human Services Commission (HHSC) to ensure consistency across all HHSC agencies, in 2012, the Department of Family and Protective Services (DFPS) adopted the HHSC methodology on how to categorize race and ethnicity. As a result, data broken down by race/ethnicity in 2012 and after is not directly comparable to race/ethnicity data in 2011 and before.

⁴⁰ State of Florida Department of Children and Families, Press Release (Feb. 17, 2012), available at http://www.dcf.state.fl.us/newsroom/pressreleases/20120217_MoreThan100People.shtml (last visited March 17, 2014).

⁴¹ Kathryn Baron, Despite drop in number of foster youth, significant educational obstacles remain, Edsource Jul. 10, 2013. Available at <http://edsource.org/today/2013/despite-overall-drop-in-number-of-foster-youth-significant-educational-obstacles-remain/34557#.UpfDrcRDvuw> (last visited March 17, 2014).

⁴² Available at http://www.finalcall.com/artman/publish/national_news_2/article_8761.shtml (last visited April 10, 2014).

⁴³ Elizabeth Bartholet, Family Bonds: Adoption and the Politics of Parenting 86-117 (Houghton Mifflin, 1993).

⁴⁴ Dixon, *supra*, at 113; referencing Cynthia G. Hawkins-Leon, the Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis. 36 Brandeis J. Fam. L. 201-02 (1997).

Welfare Act of 1978.⁴⁵ The stated purpose for the ICWA was to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.⁴⁶ The goals of stability and preservation of Indian families and Indian culture was to be achieved ‘ by making sure that Indian child welfare determinations were not based on a ‘white, middle-class standard.’⁴⁷

Is the epidemic caused to the African-American community by the disproportionality of its children in the child welfare system equivalent to that of “cultural genocide”? Yes.

B. Why Should We be Concerned with the Disproportionality of African-American children in the Child Welfare System? Because the United States Supreme Says that Biological Parents Have a Fundamental Right to Raise Their Children.

The United States Supreme Court has recognized the importance of parental interest in their child and has granted this interest a “distinguishable legal pedigree,”⁴⁸ labeling this interest a fundamental right.⁴⁹ The bundle of parental rights encompasses “the custody and

⁴⁵ The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis, 36 Brandeis J. Fam. L. 201 (Spring 1997-1998), referencing 25 U.S.C. § 1901(4) (1978)

⁴⁶ *Id.* referencing 25 U.S.C. § 1901(4) (1978); referencing 25 U.S. C. § 1902 (1978).

⁴⁷ *Id.* referencing 25 U.S.C. § 1901(4) (1978); referencing *Mississippi Board of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

⁴⁸ Eric G. Anderson, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. Rev. 935, 942 (1998).

⁴⁹ In *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923), the United States Supreme Court recognized as a constitutionally protected liberty interest, a parent’s right to bring up their children that. The Court went on to hold that the rights to conceive and to raise one’s children have been deemed ‘essential’. Justice Letton, using the language of *State v. Ferguson*, a New York Supreme Court case, stated “parents have a “fundamental ‘God-given and constitutional right to have some voice in the bringing up and education of his children.” The Court determined that the term “liberty” referred to in the Fourteenth Amendment included a parent’s right to raise his or her child. Justice McReynolds penned: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations.” *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), holding that the liberty of parents to direct the upbringing and education of the children under their control was fundamental.

companionship of the child, opportunities to influence the child's values and moral development through religious training, and important education and health care decisions."⁵⁰ Since 1923, the United States Supreme Court has said that family privacy and parental rights are guaranteed by the Fourteenth Amendment and subject to substantive⁵¹ and procedural protections of due process;⁵² ... the family is our society's most fundamental...institution";⁵³ the family's inviolable place in society 'stems from the emotional attachments that derive from the intimacy of daily association with our children'^{54 55}, and from the role it plays in 'prompting a way of life' through the instruction our children.'⁵⁶

More recently in 1977, *Smith v. Organization of Foster Families for Equality and Reform*,⁵⁷ the United States Supreme Court reiterated the constitutional protection of parental rights under the Fourteenth Amendment to conceive and raise one's children and found said

⁵⁰ Eric G. Anderson, *Children, Parents and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. Rev. 935, 942 (1998).

⁵¹ In *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) the United States Supreme Court found that a child was not a "mere creature of the State" but that there was a constitutional dimension to the right of parents to be free from state intrusion into their upbringing for their children. Current standards for the temporary removal of children from their parents must therefore account for the substantive and procedural due process rights of parents' rights to custody and control of their children. The Prince court went on to hold that 'it is cardinal with us that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'

⁵² Clement, *supra*, at 401.

⁵³ Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 Ohio St. L.J. 575, 589 (2011), referencing *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

⁵⁴ In *Stanley v. Illinois*, 405 U.S. 645 (1972) the United States Supreme Court opined that the family unit has the substantive right to maintain its integrity, explaining that it is necessary to 'protect the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition,' and that "it was through the family that we inculcate and pass down many of our most cherished values, moral and cultural."

⁵⁵ King, *supra*, at 589, referencing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

⁵⁶ *Id.* referencing *Smith v. Org. of Foster Families for Equal & Reform*, 431 U.S. 816, 844 (1977), quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972).

⁵⁷ *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 861-62 (1977).

right to be essential.⁵⁸ In 1981 in *Santosky v. Kramer*⁵⁹ the United States Supreme Court held that the fundamental liberty interest⁶⁰ of natural parents in the care custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.⁶¹ Additionally, in *Troxel v. Granville*,⁶² 2000, the Court affirmed the fundamental right of parents in the “care, custody and control” of their children, announcing that when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.⁶³

The United States Supreme Court has explained that it is necessary to ‘protect the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition,’⁶⁴ and that “it was through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”⁶⁵ Understanding that the United States Supreme Court has ruled that the family unit has the substantive right to maintain its integrity,⁶⁶ why is such principle not applied to impoverished African-American families?

⁵⁸ *Id.* The Court held that the biological parent’s essential right does not apply to foster parents, and thus, a foster parent’s rights to her foster child are not subject to substantive and procedural protection of due process.

⁵⁹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

⁶⁰ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Parents possess an interest in the care, custody and management of their children⁶⁰, and children possess a reciprocal interest in being raised by their parents.

⁶¹ *Id.* A parental rights termination proceeding interferes with that fundamental liberty interest; and as such demands that constitutional protections afforded to parents are safeguarded.

⁶² *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (holding that the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children, which cannot be limited by statutes that are too broad).

⁶³ *Santosky v. Kramer*, 455 U.S. 745, 752-54 (1982).

⁶⁴ King, *supra*, referencing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977).

⁶⁵ *Id.* at 503-504.

⁶⁶ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

When we look at the values that we as a nation profess, there does not appear to be a more protected and cherished social institution than the family; the family is our society's most fundamental...institution."⁶⁷ The family's inviolable place in society 'stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'prompting a way of life' through the instruction of children.'⁶⁸

The worst part of the child welfare system's treatment of African-American children is that it unnecessarily separates them from their parents;⁶⁹ from their families; from their communities. Child protective service agencies are far more likely to place black children in foster care instead of offering their families less traumatic alternatives, such as in home assistance.⁷⁰ White children who are abused or neglected are twice as likely as black children to receive services in their own homes, avoiding the emotional damage and physical risks of foster care placement.⁷¹ According to federal statistics, fifty-six percent of black children in the child welfare system have been placed in foster care, twice the percentage for white children.⁷²

Removing African-American children from their homes is perhaps the most severe government intrusion into the lives of individual citizens.⁷³

The Effects of Removals on Children.

⁶⁷ *Id.*, referencing *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

⁶⁸ *Id.*, referencing *Smith v. Org. of Foster Families for Equal & Reform*, 431 U.S. 816, 844 (1977) quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972).

⁶⁹ *Roberts, supra*, at 172.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* quoting Admin. For Children & Families, U.S. Department of Health and Human Services, The AFCARS Report: Current Estimates as of October 2000, available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/ar1000.htm> (last updated Marc 5, 2001), or <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf> (last visited April 10, 2014).

⁷³ *Roberts, supra*, at 173.

Children are strongly bonded to their parent, even “bad” parents. Intervention that disrupts the parent-child relationship can be extremely damaging to the child;⁷⁴ even when necessary to protect the child from harm, removal is traumatic to the child.⁷⁵ As Professor Brooks notes, “A considerable body of theoretical and empirical literature indicates that children benefit from maintaining important family attachments in their lives, even if those attachments are faulty or if the family members have significant defects.”⁷⁶ In fact, in some instances disruption of the parent-child relationship through removal may inflict worse psychological harm than the removal was intended to prevent.⁷⁷ While intervention is needed in some situations, we can protect children best by defining in advance those harms justifying intervention and the steps that may be taken to alleviate the harm, rather than by allowing courts such broad discretion to decide matters of removal.⁷⁸ We must demand the examination of the outdated and short-sighted standards, used by nearly every state currently to justify initially removing children.⁷⁹

In addition to psychological issues that may arise in children removed from their families, upon removal from their cultural communities, children are likely to suffer identity issues relating to their heritage and cultural belonging. Recognition of one’s cultural membership affects their “very sense of self and personal identity.”⁸⁰ Social science scholars have recognized

⁷⁴ Michael S. Ward, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stanford L. Rev. 623, 639-640 (April 1976).

⁷⁵ *Id.*

⁷⁶ Susan L. Brooks, *The Case For Adoption Alternatives*, 39 Fam. & Conciliation Cts. Rev. 43, 45 (2001).

⁷⁷ Martin Guggenheim, *The Effects of Recent Trends to Accelerate Termination of Parental Rights of Children in Foster Care: An Empirical Analysis in Two States*, 29 Fam. L.Q. 121, 140 (1995) (discussing how termination of parental rights often leaves children worse off because they become “unnatural orphans”).

⁷⁸ Ward, *supra*, at 639-640.

⁷⁹ Theo Liebman, *What’s Missing From Foster Care Reform? The Need For Comprehensive, Realistic, and Compassionate Removal Standards*, 28 Hamline J. Pub. L. & Pol’y 141, 144 (Fall 2006).

⁸⁰ Phillip Lynch, *Keeping Them Home: the Best Interests of Indigenous Children and Communities in Canada and Australia*, 23 Sydney L. Rev. 501, 510 (Dec. 2001) (quoting Will Kymlicka, *Liberalism, Community, and Culture* 165 (Oxford University Press 1989) (citations omitted)).

that “cutting people off from their cultures and histories has a devastating impact upon the self, dividing peoples from ‘the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world.’”⁸¹ A recent study of ninety inner-city children between the ages of eight and fourteen who had been removed from their birth families revealed that they referred to their experiences as been ‘taken;’ they thought police had targeted them rather than having been rescued from unfit parents.⁸² Removal of children from their cultural communities may likely “cut off an important source of personal development and of intellectual, imaginative and social enrichment.”⁸³

Removal of a child from their cultural community through removal from their parent’s care can also have ruinous effects on the community as well as the child.⁸⁴ The organization and institution of the cultural community depends heavily on its role in the lives and the development of its youngest members.⁸⁵ Child welfare measures that remove children from their cultural communities act as a direct attack on the “tenets, teaching, authority, and even viability” of these communities.⁸⁶ Thus, removal of a community’s children inhibits the ability of the community to pass its cultural beliefs, practices, and identity to the next generation of individuals.⁸⁷ Removal of the next generation of individuals in a cultural community threatens the future

⁸¹ *Id.* (quoting Will Kymlicka, *Liberalism, Community, and Culture* 165 (Oxford University Press 1989) (citations omitted).

⁸² McRoy, *supra*, at 487, referencing Rosalind D. Folman, *I Was “Token”: How Children Experience Removal from Their Parents Preliminary to Placement into Foster Care*, 2 Adoption Q. 7, 22 (1998).

⁸³ Shauna Van Praagh, *Faith Belonging and the Protection of “Our” Children*, 17 Windsor Y.B. Access Just. 154, 179-85 (1999).

⁸⁴ Clement, *supra*, at 421.

⁸⁵ Van Praagh, *supra*, at 179-85.

⁸⁶ *Id.* at 186.

⁸⁷ Clement, *supra*, at 421.

existence of that community.⁸⁸ The cultural community's loss of its children "is akin to the loss of freedom and even of life."⁸⁹

History has shown that removal of children from cultural communities often reflects more than a state interest in protecting the best interests and welfare of the child.⁹⁰ As Van Praagh states, society's attitude toward "any given community may well be expressed through its approach to the children in that community."⁹¹ Poverty, cultural difference, and subjective and potentially biased decision-making by those in positions of power often propel African-American families into the child welfare system and affect their ability to utilize and maneuver through the system.⁹²

The American regime of slavery reveals better than any other example the political function of repressing family autonomy.⁹³ Family integrity is crucial to group welfare because of the role parents and other relatives play in transmitting survival skills, values, and self-esteem to the next generation.⁹⁴ Placing large numbers of children in state custody interferes with the group's ability to form healthy connections among its members.⁹⁵ Families are a principal form of 'oppositional enclaves' that are essential to democracy.⁹⁶

⁸⁸ *Id.*

⁸⁹ Van Praagh, *supra*, at 179-85.

⁹⁰ Clement, *supra*, at 421.

⁹¹ Jon Reyhner and Jeanne Eder, *American Indian Education: A History* 71 (University of Oklahoma Press 2004) (citing the 1878 Annual Report of the Commissioner of Indian Affairs).

⁹² Clement, *supra*, at 422.

⁹³ Roberts, *supra*, at 179.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* referencing Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in *Democracy and Difference: Contesting the Boundaries of the Political* 46, 58 (Seyla Benhabib ed., 1996); see also Sara Evans & Harry C. Boyte, *Free Spaces: The Sources of Democratic Change in America* (Harper & Row, 1986).

Excessive state interference in black family life damages black people's sense of personal and community identity.⁹⁷ Family and community disintegration weakens black's collective ability to overcome institutionalized discrimination and work toward greater political and economic strength.⁹⁸ The system's racial disparity also reinforces negative stereotypes about black people's incapacity to govern themselves and their need for state supervision.⁹⁹

Disproportionate state intervention in black families reinforces the continued political subordination of African-Americans as a group.¹⁰⁰ This claim does not seek to enforce a particular set of African-American cultural values.¹⁰¹ It seeks to liberate African-American families from state control so they may be free to form and pass on their own values. This after all, is the role of families in a free society.¹⁰²

The child welfare system in the nation's largest cities is basically an apartheid system.¹⁰³ If you watched a child welfare court, having no preconceptions about the purpose of this system, you would have to conclude that it is an institution designed primarily to monitor, regulate, and punish poor black families.¹⁰⁴

Family disruption has historically served as a chief tool of group oppression.¹⁰⁵ Parents' freedom to raise their children is important not only to individuals but also to the welfare or even survival of ethnic, cultural, and religious groups.¹⁰⁶ Weakening the parent-child bond and

⁹⁷ Roberts, *supra*, at 179.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 180.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 172.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 178, quoting Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values*, (1997).

¹⁰⁶ *Id.*

disintegrating families within a group is a means of subordinating the entire group.¹⁰⁷ Without taking race into account, we do not capture the full scope of the harm caused by taking large numbers of black children from their families.¹⁰⁸

Acknowledging that removals may have been exercised based on a long standing legal position that was developed without the benefit of research and data that identified the inherent risks of removals, now knowing the unintended consequences and harm caused to children when they are removed from their homes, we must ensure at a minimum that all “reasonable efforts”, under the circumstances, are made to prevent the removal of the child when possible; and the only way to make this assurance is to have a federal definition of “reasonable efforts”.

Noting the potential for extreme damage that removal can have on the child, the family, and the community at large strengthens the argument that “reasonable efforts” requires a federally consistent, bright-line definition, along with guidelines to help support and guide judicial tribunals as they ask the questions to remove or not to remove, literally hundreds of times a day.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

II. Cause of Minority Disproportionality in the Child Welfare System.

A. Poverty

The link between poverty and child welfare in the United States can be traced back to English law,¹⁰⁹ which allowed the government to separate poor children from their families because they were poor.^{110 111} For poor families, the *parens patriae* doctrine led to the passage of the Poor Laws¹¹²; which authorized a highly intrusive level of state intervention into poor families¹¹³. Among the state's powers was the ability to remove children¹¹⁴ from poor families¹¹⁵ and place them in other homes for apprenticeships, without the consent of the parents or the child, and for no reason other than the family's economic status.¹¹⁶

More recent studies show that poverty is inextricably linked to the child welfare system and that poverty is one of the most important predictors of negative child outcomes.¹¹⁷

¹⁰⁹ 43 Eliz. 1, c.2 (1601). Cited in Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Abuse and Neglect Cases*, 63 Geo.L.J 887, 895 (1975).

¹¹⁰ Patricia A. Schene, *Past Present and Future Roles of Child Protective Services*, 8 Future Child: Protecting Child From Abuse & Neglect 23, 25 (Spring 1998).

¹¹¹ The legal authority of the state to interfere with parent's rights to care, custody and control of their children originally stems from the state's *parens patriae* role. Liebman, *supra*, at 149.

¹¹² Liebman, *supra*, at 149, referencing 43 Eliz. 1, c.2, § 1 (1601).

¹¹³ In the New World, because such high value was placed on work and self-sufficiency, "society" was concerned that without intervention, children of paupers would acquire the 'bad habits' of their parents and the children would become paupers as well.

¹¹⁴ Clement, *supra*, at 400-01. The families that failed to reflect desired American values were often the focus of child welfare inquiries.

¹¹⁵ As such, children of paupers were presumed to require attention from public authorities, which authorized state intervention. Parents who could not provide adequately for their children were deprived by the State of their right to maintain custody of their children and in turn, were socially condemned,¹¹⁵ by members of the upper class. Parents who were unable to provide care for their children on a level that was accepted by upper "society" were thought to have abrogated their parental rights, and the children were subsequently removed and placed most time in apprenticeships for the benefit of other families.

¹¹⁶ *Id.*

¹¹⁷ Amy Wilkinson-Hagen, *the Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 Geo.J. Poverty L. & Pol'y. 137, 142 (2004).

Circumstances of poor families often lead to involvement of state child welfare agencies.¹¹⁸ Poor families are “less likely to have adequate back-up arrangements or private support systems in times of emergency...are more likely to have trouble acquiring safe housing (or any housing); they are less likely to have adequate nutrition, medical care, child care and education, and...are more likely to suffer emotional harms from the stress of their situations.”¹¹⁹ Additionally, poor families; utilization of public programs increases their contact with public officials, heightening the possibility that these families will be subject to scrutiny in their child-rearing practices.¹²⁰

Empirical data repeatedly shows that children born into poor families suffer a lifetime of negative consequences and children of color are more than twice as likely to be impoverished as their white counterparts.¹²¹ In addition, race is a significant factor that determines what happens to children and families of color who encounter child protection services.¹²² The foster care program has thus been referred to as a “de facto poverty program,” with critics alleging that the government has taken over child rearing responsibilities from poor families.¹²³ Given that the population of African-Americans is expected to “collectively outpace” the number of Caucasian children in the United States by 2024, the population of African-American children living in

¹¹⁸ Clement, *supra*, at 413.

¹¹⁹ Amy Wilkinson-Hagen, *the Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 Geo.J. Poverty L. & Pol'y. 137, 139 (2004).

¹²⁰ Clement, *supra*, at 413.

¹²¹ Trina Shants et al., *Diverging Pathways: How Wealth Shapes Opportunities for Children* (2011). Available at <http://www.aecf.org/~media/Pubs/Topics/Economic%20Security/Family%20Economic%20Supports/DivergingPathwaysHowWealthShapesOpportunityforChildren/DivergingPathwaysReportInsightCenter.pdf> (last visited April 10, 2014).

¹²² Dixon, *supra*, at 115, referencing The Center for Community Partnerships in Child Welfare of the Center for the Study of Social Policy, *Places to Watch- Promising Practices to Address Racial Disproportionality in Child Welfare*, 7 (Dec. 2006), available at <http://www.casey.org/Resources/Publications/pdf/PlacesToWatch.pdf> (last visited April 10, 2014).

¹²³ Mark E. Courtney, *Foster Care and the Costs of Welfare Reform*, 53 Public Welfare 3, Summer 1995, in the *Foster Care Crisis* 129, 129 (Patrick A. Curtis, Grady Dale, Jr. & Joshua C. Kendall eds., 1999).

poverty will continue to grow,¹²⁴ as will the expected number of African-American children who are removed by state protective service agencies.

Once a parent enters the child welfare system often times because of a lack of resources, they are deemed a “bad” parent.¹²⁵ As a “bad” parent, they alone are culpable for child maltreatment, and it is presumed that their children would be better off with a new, usually more affluent adoptive family.¹²⁶ The fact that a parent needs state support to raise their children causes her parenting to be subjected to excessive judgment and her constitutional right to up bring her children is ignored and the value of their relationship with their children is necessarily devalued.¹²⁷ Those who implement the current laws on the termination of parental rights often presupposes that impoverished parents are inferior to other caregivers.¹²⁸ This flawed public policy story governs at every point of state intervention, from investigations to removals. This story governs hundreds of thousands of families at any one time.¹²⁹

Already, African-American families have been disproportionately impacted by both 1961 and 1996 welfare legislation because they comprise a disproportionate amount of the impoverished families in the United States.¹³⁰ Five years after the implementation of Temporary Assistance to Needy Families, (TANF), African-Americans had the largest

¹²⁴ Marybeth J. Mattingly et al., One Million Additional Children in Poverty Since 2009: 2010 Data Renewal Nearly One in four southern Children Now Live in Poverty 1 (Summer 2011). Available at <http://www.carseyinstitute.unh.edu/publications/IB-Bean-Same-Day-Poverty.pdf> (last visited April 10, 2014).

¹²⁵ Godsoe, *supra*, at 121.

¹²⁶ *Id.*

¹²⁷ Linda Gordon, *Pitied But not Entitled: Single Mothers and the History of Welfare 1890-1935*, New York: The Free Press, 1994.

¹²⁸ See *Smith v. Org. of Foster for Equality & Reform*, 431 U.S. 816, 836 n. 40 (1997).

¹²⁹ Godsoe, *supra*, at 122.

¹³⁰ McRoy, *supra*, at 478.

proportion of families and children on TANF rolls.¹³¹ The disproportionate number of African American children in the child welfare system is staggering.¹³²

Although there is a strong association between poverty and child maltreatment, poverty does not cause maltreatment.¹³³

B. Classism: Welfare Worker and Judicial Decision- Making

Classism¹³⁴ and racism¹³⁵ are not identical; however, they are intimately comingled and cannot be fully disentangled.¹³⁶ A classist¹³⁷ society will inevitably be a racist society because classist practices contribute to racial distinctions.¹³⁸ Conversely, a racist society produces classism.¹³⁹

In a society where all people have an incentive to protect themselves from falling to the bottom of the class hierarchy, where the impoverished and racial minority languish, it is the affluent and non-racial minority that benefit legally, economically, politically, socially and psychologically when the impoverished and racial minority are forced to remain at their societally imposed caste level.

¹³¹ *Id.*

¹³² Roberts, *supra*, at 172.

¹³³ Dixon, *supra*, at 115.

¹³⁴ *Classism* is defined as unfair treatment of people because of their social or economic class. Merriam Webster, available at <http://www.merriam-webster.com/dictionary/classism> (last visited April 10, 2014).

¹³⁵ Racism is the socially organized set of attitudes, ideas, and practices that deny African Americans and other people of color the dignity, opportunities, freedoms, and rewards that this nation offers white Americans. Joe R. Feagin & Hernan L. Vera, *White Racism: The Basics* 7 (New York: Routledge, 1995).

¹³⁶ Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States*, 8 Conn. Pub. Int. L.J. 207, 208-09 (2009).

¹³⁷ Classism is the systemic oppression of subordinated class groups to advantage and strengthen the dominant class groups. It is the system assignment of characteristics of worth and ability based on social class. Available at <http://www.classism.org/about-class/what-is-classism> (last visited April 10, 2014).

¹³⁸ Kleven, *supra*.

¹³⁹ *Id.*

Class and societal economics are interrelated. At the bottom of the class hierarchy, from an economic perspective, lays a substantial segment of the population, among whom African Americans and Hispanics are disproportionately represented.¹⁴⁰ In 2010, 15.1 percent of all persons living in the United States lived in poverty; this is the highest poverty rate for the United States since 1993.¹⁴¹ ¹⁴² According to the United States Census Bureau's data for the same year, the family poverty rate and the number of families in poverty were 11.7 percent, roughly 9.2 million people. Approximately 27.4 % African-American and 26.6 % Hispanic¹⁴³. Thus, children from some ethnic minority families, specifically African-Americans and Hispanics, are three times more likely to be poor; hence more likely to be the subjects of child protective service inquiries, simply because they are poor; which results in a disparate impact on impoverished families that are racial and ethnic minorities.

Poverty is the key to explaining why almost any child gets into the child welfare system;¹⁴⁴ and racism is the key to explaining why African-American children have been disproportionately represented in the child welfare system for decades, the solution is not merely more money. Henry Louise Gates, Jr. sets forth the 'Poverty Perplex' of the black poor,¹⁴⁵ asserting that the root cause of poverty is neither a lack of money nor a failure of analysis of the

¹⁴⁰ *Id.*

¹⁴¹ The National Poverty Center, *Poverty in the United States Frequently Asked Questions*, The University of Michigan Gerald R. Ford School of Public Policy 2010, Last accessed Jan. 14, 2014 at <http://www.npc.umich.edu/poverty/>.

¹⁴² Poverty defined in 2013 is an annual income of less than \$22,050. United States Department of Health and Human Services, <http://aspe.hhs.gov/poverty/10poverty.shtml> (last visited April 10, 2014).

¹⁴³ U.S. Department of Commerce, Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2010 http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html (last visited April 10, 2014).

¹⁴⁴ Roberts, *supra*, at 174, quoting see generally Duncan Lindsey, *The Welfare of Children* (1994) (discussing the impact of poverty on child protective services); LeRoy H. Pelton, *For Reasons of Poverty: A Critical Analysis of Public Child Welfare System in the United States* (1989) (discussing how poverty affected the foster care population).

¹⁴⁵ Dixon, *supra*, at 134.

poverty issue, but a failure of national will.¹⁴⁶ As to the national will, Gates argues that there are essentially two reasons that our country will not make a commitment to federal expenditures so that all poor families with children will be raised above the poverty line.¹⁴⁷ First, there is an enduring ideology of the ‘undeserving poor,’¹⁴⁸ feeding into the historic roots of classism. Second, poverty in the U.S. is mostly associated with blacks.¹⁴⁹

Parenthood is a socio-legal construct created based on cultural norms.¹⁵⁰ Even though it can be said that the national will is expressed in current federal laws that are written so as to provide for equal access to the law and allow for integration of the races, there is still an ongoing struggle to battle stereotypes, assumptions, and ignorance¹⁵¹ that impoverished families face in general and that African Americans face in particular. Child welfare cases are judged using assumptions; parents are presumed to be “bad”, “undeserving”, “monsters” who brutalize their children.¹⁵²

Subjectivity by state actors in decisions of child welfare matters often allows for individual biases and personal values to serve as a standard for measuring parental compliance and fitness.¹⁵³ Law professor Amy Sinden notes that disparity in culture, class, and education between state actors in child welfare proceedings and the families they are enlisted to work with and help.¹⁵⁴ The majority of state actors represent the dominant culture;¹⁵⁵ therefore it stands to reason that many of the professionals in the system are by and large well-educated, middle class,

¹⁴⁶ Henry Louis Gates, Jr. & Cornel West, *The Future of the Race* 28 (Alfred A. Knopf, Inc. 1996).

¹⁴⁷ Dixon, *supra*, at 136.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* referencing Henry Louis Gates, Jr. & Cornell West, *The Futures of the Race* 28 (Alfred A. Knopf, Inc. 1996).

¹⁵⁰ Godsoe, *supra*, at 118.

¹⁵¹ *Id.*

¹⁵² Fraidin, *supra*, at 2-3.

¹⁵³ Clement, *supra*, at 416-17.

¹⁵⁴ Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 *Yale J.L. & Feminism* 339, 352 (1999).

¹⁵⁵ Clement, *supra*, at 416-17.

and predominately white.¹⁵⁶ Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all are extremely poor with little formal education.¹⁵⁷ Social workers are responsible for making highly subjective decisions about intervention, removal, and services in child welfare cases.¹⁵⁸ Similarly, in child welfare proceedings, the presiding judge must make decisions about the ability and fitness of a parent.¹⁵⁹ This power to make highly subjective decisions in child welfare cases and the possibility that personal biases and values of state actors will influence these decisions is especially threatening to minority families because the majority of state actors represent the dominate culture.¹⁶⁰ Law professor Amy Sindon notes the disparity in culture, class and education between state actors in child welfare proceedings and the families they are enlisted to work with and help.¹⁶¹ The professionals in the system are by and large well educated, middle class, and predominately white. Meanwhile, many of the accused parents and their children are members of racial minority groups and virtually all indigent with little formal education.¹⁶² “[W]hen you have [workers] who are disconnected from the cultural dynamic of a community that is poor and minority and send them into the community with the force of law to remove children...[t]hey’ll determine the environment to be unsafe. Often times in the child welfare system, the “white

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 416, citing statistics showing the numbers and ethnicities of children in the California child welfare system in and out of home placements reflects an overrepresentation of children of color.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Amy Sindon, *supra*, 352.

¹⁶² *Id.*

middle-class family” is the “norm to which all families are compared.”¹⁶³ The system does not have controls to limit the subjectivity of the worker ¹⁶⁴, or of the presiding judge.

It is this subjectivity in the hands of child welfare agencies and presiding courts, when it comes to decisions regarding removal of children that serves as an additional explanation for disparate overrepresentation of African-American children in the child welfare system.¹⁶⁵

If judicial officers have no objective guidelines to follow when determining if the efforts of the child protective services agency are in fact “reasonable” or not; and reasonable minds can often disagree,¹⁶⁶ similarly situated people are treated unequally by different judges.¹⁶⁷ One judge may remove a child from a home situation that another judge finds perfectly adequate.¹⁶⁸ Of special concern is the fact that neglect laws appear to be applied more stringently in cases involving poor parents.¹⁶⁹ Coupled with the undeniable trends stated in the 2010 Census that children from ethnic minority families, specifically African-Americans and Hispanics, are three times more likely to be poor, it is reasonable to infer that disproportionality of the child welfare system will continue to increase making impoverished, African- American families the targeted

¹⁶³ Susan L. Brooks & Dorothy E. Roberts, *Family Court Reform: Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. at 454 (Octo.2002) (citing U.S. Dept Health & Human Ser., Children’s Bureau National Study of Protective, Preventive and Reunification Services Delivered to Children and their families (1997)).

¹⁶⁴ Susan Chibnall, et. al., U.S. Dept. Health & Human Serv., Admin. Children & Fam., Children of Color in the Child Welfare System” Perspectives from the Children Welfare Community 4-1 (Dec. 2003), available at <https://www.childwelfare.gov/pubs/otherpubs/children/children.pdf> (last visited April 10, 2014).

¹⁶⁵ Clement, *supra*, at 416.

¹⁶⁶ Texas Family Code Section 262.1015 allows the Texas Department of Protective and Regulatory Services, after investigation and determination that a child abuse has occurred, to file a Petition for the removal of an alleged perpetrator of the abuse rather than remove the child. One court may find that removal of the alleged perpetrator is reasonable, while another court, under the same facts and circumstances may find that removal of the alleged perpetrator is not reasonable, even if the home would then be safe for the child, and order the child removed instead.

¹⁶⁷ Ward, *supra*, at 639-640.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* referencing Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System, 48 S.C.L. Rev. 557, 580-81 (1997) (stating that the primary problem with the child protective system is that the public system, rather than the private system, hears custody cases involving poor parents and that the government intervenes more often in the parent-child relationship of poor families based on ill-defined reasons).

subjects of even more child protective service investigations and making the children of the these families the targeted subjects of even more child protective services removals, simply because they are impoverished and African- American.¹⁷⁰

The United States Supreme Court case of *Wyman v. James*¹⁷¹ illustrates the lingering assumptions present in the minds of many mid twentieth century people about how people who receive state assistance, as a class of people are presumed to be bad parents, unworthy of the presumption that they will act in the best interest of their children.¹⁷² *Wyman* held that the Fourth Amendment's prohibition of unreasonable searches and seizures was not violated by the termination of a welfare recipient's benefits because she refused to permit her caseworker to make a home visit, even though she was willing to meet with the caseworker outside her home. The majority said a welfare recipient could refuse entry with no risk of criminal penalty, just a termination of welfare benefits, and that there were important reasons for such home visits, including detection of child abuse.¹⁷³ Justice Thurgood Marshall dissented stating:

Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy.¹⁷⁴

¹⁷⁰ U.S. Department of Commerce, Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2010. Available at http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html (last visited April 10, 2014).

¹⁷¹ *Wyman v. James*, 400 U.S. 309, 344-47 (1971).

¹⁷² *Id.* at 326

¹⁷³ *Dixon, supra*, at 116.

¹⁷⁴ *Wyman v. James*, 400 U.S. 309, 322 (1971)

The bias against poor mothers has increased as the emphasis in child welfare proceedings has shifted from preservation of the birth family to swifter termination of parental rights and adoption.¹⁷⁵ At one time, federal and state policies were designed to limit state intervention and reunify mothers and children; but the political policies shifted to instead respond to the child welfare system's failure by limiting rather than expanding the obligation to provide services to needy families.

The shift from policies favoring reunification to policies encouraging quicker termination of parental (maternal) rights and adoption culminated with the enactment of the Adoption and Safe Families Act of 1997 (AFSA).¹⁷⁶ Poor women, particularly African American women, have a history of losing their children in juvenile court child protection proceedings.¹⁷⁷

From their inception, child welfare programs focused on poor children. The children of single mothers (particularly women of color) are particularly at risk of removal. Living in a single-parent household increases the risk that a child will live in poverty. Many commenters have suggested, that intervention results, at least in part from the child welfare system's adherence to the traditional idealized definition of the 'good mother' rather than from thorough investigations and documentation of child abuse and neglect.¹⁷⁸

For example, Bernardine Dohrn has explained:

From 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 practice, and police the undeserving poor. Women were locked at the private sphere of the family; their sole responsibility was to produce health offspring and provide for the well-being of men. Poor women, single women, and women who worked outside the home failed, by definition, to meet this responsibility. The legal

¹⁷⁵ Mary O'Flynn, *the Adoption and Safe Families Act of 1997: Changing Child Welfare Without Addressing Parental Substance Abuse*, 16 J. Contemp. Health L. & Pol'y 243, 247 (1999).

¹⁷⁶ Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 Wm & Mary Bill Rts. J. 969, Referencing Pub. L. No. 105-89, 111 Stat.2155.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* referencing Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Jane C. Murphy Family, and Criminal Law, 83 Cornell L. Rev. 689, 708-09 (1998).

and social welfare apparatus developed to regulate and punish these ‘bad’ mothers by ‘saving’ their children.¹⁷⁹

Another example of how subjectivity and internal biases yield different results can be seen with issues of addiction and alcohol abuse. These issues are spread across the socioeconomic spectrum of our society.¹⁸⁰ A poor woman with addiction problems comes to the attention of State Child Protection Services after delivering a baby at a public hospital who tests positive for drugs is more likely to have her child removed from her care than¹⁸¹ then a wealthy or middle class alcoholic or drug-addicted parent. In addition, the wealth or middle class alcoholic or drug-addicted parent is less likely to be drug tested in a hospital and more likely to have treatment options that prevent removal of their children.¹⁸² While studies show that addiction can be treated without removing children from their mothers, poor women with minimal support are likely to be faced with removal of their children and then told to find treatment to get them back.¹⁸³ Domestic violence, also present across the racial and socioeconomic spectrum, has different outcomes for poor women of color.¹⁸⁴ Impoverished women involved in relationships where they are victims of domestic violence are more likely to be trapped by their poverty and more likely to lose custody of their children through findings of neglect for “failing to protect their children from domestic violence.”¹⁸⁵ From this, it can be reasonably inferred that the system is removing children because they are poor not because they are abused.

¹⁷⁹ *Id.* referencing Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,”. Jane C. Murphy Family, and Criminal Law, 83 Cornell L. Rev. 689, 709 (1998).

¹⁸⁰ *Report of the Race, supra*, at 412.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 413

III. The Solution: The American Child Welfare Act

Why another Federal Statute now? Until 1973, policies regarding child welfare were exclusively a matter of state concern.¹⁸⁶ States had the freedom and responsibility to enact child welfare statutes¹⁸⁷, such as reporting laws for medical and educational professionals, and laws establishing parental rehabilitation programs.¹⁸⁸ However, after the introduction of the Battered Child Syndrome article, authored by Dr. Henry Kempe,¹⁸⁹ Congress passed the Child Abuse Prevention and Treatment Act, (CAPTA¹⁹⁰). With these humble beginnings there is now a complex relationship between the states and the federal government. Cash-starved states desperate to receive funding for child protective services systems have abdicated their authority to develop their own child welfare policies and instead have yielded to increasingly specific mandates made by the federal government.¹⁹¹

¹⁸⁶ Clement, *supra*, at 403.

¹⁸⁷ Innovation Held Hostage: Has Federal Intervention Stifled Efforts To Reform the Child Welfare System? Vivek S. Sankaran. 41 U. Mich.J.L. Reform 281. The traditional view was that the responsibility to confront family law issues rested with state governments, and as such the federal government assumed a very limited role in child welfare issues.

¹⁸⁸ Clement, *supra*, at 403.

¹⁸⁹ C. Henry Kempe, M.D., et. Al., *the Battered-Child Syndrome*, 9 Child Abuse & Neglect at 143-154 (1985).

¹⁹⁰ The Child Abuse Prevention and Treatment Act (Public Law 93-247) (United States Code Title 42, Section 67) provides federal funding to States in support of prevention, assessment, investigation, prosecution, and treatment activities related to child abuse and neglect. Additionally, CAPTA identifies the Federal role in supporting research, evaluation, technical assistance, and data collection activities; establishes the Office on Child Abuse and Neglect; and mandates the National Clearinghouse on Child Abuse and Neglect Information. CAPTA also sets forth a minimum definition of child abuse and neglect. The key Federal legislation addressing child abuse and neglect is the Child Abuse Prevention and Treatment Act (CAPTA), originally enacted in 1974 (Public Law 93-247). This Act was amended several times and was most recently amended and reauthorized on June 25, 2003, by the Keeping Children and Families Safe Act of 2003 (P.L. 108-36).

¹⁹¹ Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts To Reform the Child Welfare System?*, 41 U. Mich.J.L. Reform 281, 290 (Fall 2007).

A. Why aren't two federal laws that require "reasonable efforts" enough? Because the two federal laws that speak to "reasonable efforts", do not define "reasonable efforts".

In cases where there have been allegations of abuse and or neglect of a child, the federal Adoption Assistance and Child Welfare Act, (AACWA)¹⁹² enacted in 1980 requires that "reasonable efforts" be made to prevent the removal of a child from their parents.¹⁹³ The Adoption Safe Families Act, (AFSA)¹⁹⁴ of 1997, Public Law 105-89 (ASFA), modified "reasonable efforts" by stating that the 'paramount consideration' for child welfare programs must be the 'health and safety of the child'.¹⁹⁵

Since its introduction via the AACWA¹⁹⁶ the term, "reasonable efforts" has been a core concept in American child welfare practice; however, neither the AACWA nor the AFSA provide a "bright line" definition of what is and what is not a "reasonable effort" by a state agency seeking to remove a child from alleged abuse and/or neglect. Without a "bright line"

¹⁹² The Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat 500 (1980). "Reasonable efforts" requirements were introduced into child welfare proceedings by the Federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272 (AACWA). Since the enactment of AACWA, the term "reasonable efforts" has been a core concept in American child welfare and practice. "Reasonable efforts" speak to the actions initiated and or taken by the child protection agency to prevent the removal of the child. The AACWA Section.470. USC 671 (a)(15) provides that: "... in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home..."

¹⁹³ Clement, *supra*, at 403-04. Congress supported compliance with the ASFA's promotion of adoption over family preservation through financial incentives that pays states \$4,000- \$6,000.00 for each adoption consummated over an established minimum base number. The payments for adoptions are not contingent upon whether or not reasonable efforts were or were not made in the underlying cause.

¹⁹⁴ The Federal Adoption and Safe Families Act of 1997, Pub. L. 105-89 (ASFA); reaffirmed in 2003, 42 USC Section 670 (2003), amended AACWA by maintaining but clarifying the concept of "reasonable efforts" by stating that the 'paramount consideration' for child welfare programs must be the 'health and safety of the child', thereby relegating to second place the presumption that family preservation was in the child's best interest.

¹⁹⁵ The Adoption and Safe Families Act. 42 USC § 670 (2003).

¹⁹⁶ Hillary Baldwin, *Legislative Reform: Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. Legis. 239, 244-45 (2002) (quoting S. Rep. No. 96-336 (1997) reprinted in 1980U.S.C.C.A.N. 1448, 1459). AACWA was designed to change the focus of child welfare policies, looking to "deemphasize the use of foster care and encourage greater efforts to place children in permanent homes.

definition of “reasonable efforts”, how each state defines and applies “reasonable efforts” is based on subjective criteria; and it is this subjective application that leads to racial and ethnic disproportionality.

With a federally mandated application of “reasonable efforts” but no federal definition, fundamental liberty interests of impoverished families in general and specifically impoverished, African-American families are in jeopardy; thus leaving these children unprotected.

The United States Supreme Court in *Santosky v. Kramer*¹⁹⁷ acknowledged, albeit on a basic level that, “...even when a natural home is imperfect, permanent removal from that home will not necessarily improve the child’s welfare...nor does termination of parental rights necessarily ensure adoption.”¹⁹⁸ However, even with this general recognition of the potentially harmful effects of removing children from their parents, even temporarily, rarely is a consideration of this harm taken into account during the removal proceedings. When termination is the issue, courts readily balance the interests of the state to provide permanence for a child with the additional state’s interest of avoiding erroneous destruction of families.¹⁹⁹ However, in removal cases, no parallel state interest is balanced with the trauma to a child who is unnecessarily removed.²⁰⁰

Ultimately, poverty, cultural differences, and subjective decision-making that can embody biases, lead to the disproportionate removal of African-American children.

B. The American Child Welfare Act.

¹⁹⁷ *Santosky*, 455 U.S. at 766

¹⁹⁸ *Id.*

¹⁹⁹ Liebman, *supra*, at 158, referencing *Lassiter*, 452 U.S. at 27; *Santosky*, 455 U.S. 745 at 766.

²⁰⁰ Liebman, *supra*, at 160.

Due to variability across states as they applied “reasonable efforts”, effective child welfare programs existed in only some communities and some state programs completely failed in their protection of children and families in crisis.²⁰¹ As the status of our child welfare system exists today, the absence of a bright line federal definition of “reasonable efforts” coupled with the absence of uniform guidelines for judges to follow when applying “reasonable efforts” has resulted in ineffective child welfare programs; unwarranted removals of children from their families; overrepresentation of African-American children; and the inadvertent dissolution of the African American family. With the tremendous role currently played by the federal government in the arena of child welfare, the federal legislation proposed by this article will serve to reconcile previous federal legislation and add protection for all children that is currently lacking.

The American Child Welfare Act (ACWA) as proposed in this article follows the model provided in the Indian Child Welfare Act. The American Child Welfare Act is federal legislation that addresses the issue of disproportionality of impoverished children in general and specifically, impoverished African-American children in the child welfare system, by prescribing a bright line definition of “reasonable efforts” accompanied by guidelines to help navigate a Court’s decision on whether or not to remove a child.

The Indian Child Welfare Act of 1978, (ICWA)²⁰² is an example of how federal law can be used to resolve racial, ethnic and sociological inequities. ICWA was specifically enacted to address disproportionality for Native Americans within the child welfare system. In order to restore the Indian family, ICWA provides a due process procedure by which American Indian tribes have exclusive authority to make the decisions concerning abused or neglected Native

²⁰¹ Hillary Baldwin, *Legislative Reform: Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. Legis. 239, 244-45 (2002).

²⁰² Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1978).

American children.²⁰³ There is a higher burden of proof for Native American children to be removed from their parents requiring clear and convincing evidence and testimony from an expert witness for a court to make any findings of abuse or neglect.²⁰⁴ If a Native American child is removed from his parents, efforts must be made to place the child with relatives or a foster family from the child’s specific American Indian tribe.²⁰⁵

The American Child Welfare Act (ACWA) is comprised of three sections. This article focuses only on the first section of the proposed Act; a federal definition of “reasonable efforts” with judicial guidelines intended to yield a more consistent application of reasonable efforts. The other two sections of the ACWA will be addressed in subsequent articles.

i. The American Child Welfare Act: Federal definition of “reasonable efforts”.

The long-standing problem of racial inequities in the child welfare system are said to be “of such urgency that no lasting improvements are possible in child welfare services unless these inequities are reduced and eventually eliminated.”²⁰⁶ The Pew Commission on Children in Foster Care recognized the problem 2004, and the United States Government Accountability Office (GAO) reported on this issue in July, 2007.²⁰⁷ The GAO was asked to analyze: (1) the major factors influencing the proportion of African-American children in foster care, (2) the extent that states and localities have implemented promising strategies, and (3) ways in which federal

²⁰³ 25 U.S.C. § 1911

²⁰⁴ 25 U.S.C. § 1912, 1921

²⁰⁵ 25 U.S.C. § 1915

²⁰⁶ The Center for Community Partnerships in Child Welfare of the Center for the Study of Social Policy, Places to Watch- Promising Practices to Address Racial Disproportionality in Child Welfare, 7 (Dec. 2006), available at <http://www.casey.org/Resources/Publications/pdf/PlacesToWatch.pdf> (last visited April 10, 2014).

²⁰⁷ The Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanence and Well Being for Children in Foster Care* (2004); U.S. Government Accountability Office -07-816, *African American Children in Foster Care Report to the Chairman, Committee on Ways and Means, House of Representatives*, (2007), available at <http://www.gao.gov/new.items/d07816.pdf> (last visited April 10, 2014).

policies may have influenced African-American representation in foster care.²⁰⁸ The Casey Alliance for Racial Equity which consist of the five Casey sister organizations has developed and implemented a multi-year, national campaign to reduce the disproportionate number of youth of color in foster care and improve their outcomes.²⁰⁹ While the Pew Commission, the GAO, Casey’s sister organizations and many others have recognized and tried un-triumphantly to tackle the problem of the vanishing African-American family as the result of racial disproportionality in the child-welfare system, this article submits that there can be no reduction, elimination and/or resolution of African-American overrepresentation in the child welfare system unless and until there is a recognized federal definition of “reasonable efforts”, with accompanying guidelines for tribunals to apply.

When defining reasonable efforts, the American Child Welfare Act begins by analyzing the statutory language of AFSA, “assuming that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, —, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009). Accepting that court’s must enforce plain and unambiguous statutory language according to its terms; *Carcieri v. Salazar*, 555 U.S. 379, —, 129 S.Ct. 1058, 1063–1064, 172 L.Ed.2d 791 (2009); *Jimenez v. Quarterman*, 555 U.S. 113, —, 129 S.Ct. 681, 684–685, 172 L.Ed.2d 475 (2009); and understanding that “...where language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final impression of the meaning intended”²¹⁰

²⁰⁸ GAO 07-816, *supra* note 12, at 1.

²⁰⁹ Dixon, *supra*, at 116.

²¹⁰ *United States v. Missouri Pacific R.R.*, 269, 278, (1929).

To understand the plain language of “reasonable efforts” as used in the AACWA and ASFA, one might first define the term “reasonable”, which means “Agreeable to reason or sound judgment; logical...Not exceeding the limit prescribed by reason; not excessive...²¹¹ “Effort” means “1) Exertion of physical or mental power...2) an earnest or strenuous attempt...3) Something done by exertion or hard work.²¹² Thus “reasonable efforts to prevent the removal of a child” would rationally mean a sound, logical, strenuous, or earnest attempt to keep the child at home with his or her parents. ²¹³ Hence, “reasonable efforts”, should be defined as all acts and actions taken by the child protective services agency that reflect a good faith effort on the agency’s part; are within sound judgment; and that are done to actively prevent the removal of the child.

ii. The American Child Welfare Act: Employing Minimum Guidelines for Removals.

While the media focuses attention on sensational cases of severe physical child abuse²¹⁴, and legislation treats abuse and neglect identically, data shows that seventy-one percent of children who were victims of mal treatment suffered neglect; with only sixteen percent suffering physical abuse.²¹⁵ The import of the abundance of neglect cases becomes clear when we accept

²¹¹ Evelyn K. Calogero, *Reasonable Efforts to Reunite Families in Child Abuse and Neglect Proceedings: They Aren’t Just for Funding Anymore in Re Rood*, 763 N.W.ED 587 (Mich.2009), 12 T.M. Cooley J. Prac. & Clinical L. 25, 43 (2009).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The case of Eric Forbes, 12 years old child from Georgia who died after being allegedly beat to death by his father. Records show that the Division of Family and Children Services, (the child protective services agency in Georgia) investigated several reports from Cobb County school officials that Forbes was being abused in 2012. Police said the boy had multiple bruises, bite marks, lacerations and other marks that are consistent with a history of abuse when they discovered his body. Investigators communicated that corporal punishment was a "regular part of the disciplinary process" for the boy.

²¹⁵ Child Abuse Prevention and Treatment Act, Reauthorizes 2010, Pub. L. No. 111-320, 124 Stat. 3459 (2010).

that most removals involve allegations of neglect,²¹⁶ and these removals are from indigent, African-American parents. The vast majority of parents who come into contact with the child welfare system are not referred for abuse; the referral is for neglect;²¹⁷ and neglect charges are typically related to poverty with issues such as homelessness, single parenting, addiction, mental illness, and domestic violence, frequently associated.²¹⁸

It is important to note here that this article is not a proponent of children remaining in environments that are reasonably seen to be a specific threat to their safety and/or welfare. This article is suggesting however, that removal as a first option is not necessarily in the best interest of the child²¹⁹.

Historically²²⁰ and currently, when addressing removals, there are two presumptions at work that are worthy of rebutting: 1) the presumption that the removal is for a short period of

²¹⁶ Uma A. Segal and Sanford Schwartz, *Factors Affecting Placement Decisions of Children Following Short-Term Emergency Care*, 9 Child Abuse & Neglect 543, 547-48 (1985).

²¹⁷ *Report of the Race*, supra, at 412.

²¹⁸ *Id.*

²¹⁹ Brenda G. McGowan, Historical Evolution of Child Welfare Services, Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs at 13 (G. Mallon and P. Hess, ed. 2005), quoting Thurston, H.W., *The dependent child*. New York: Columbia University Press (1930), Historically, children that had been removed by the state as a measure to “protect” them, often times found themselves in deplorable, unsafe and unhealthy situations. For instance, the 1821 Report of the Massachusetts Committee on Pauper Laws concluded that ‘outdoor relief was the worst method of caring for removed children.’²¹⁹ In addition, the Yates Report of 1824, concluded: 1) Removal of human beings like felons for no other fault than poverty seems inconsistent with the spirit of a system professing to be founded on principles of pure benevolence and humanity; and 2) the poor, when farmed out, or sold, are frequently treated with barbarity and neglect by their keepers.

²²⁰ Jane Waldfogel, *The Future of Child Protection* 12 (1988) (pointing out that in the United States, poverty is strongly related to the likelihood of reports of child neglect). Such a strong link between poverty and reported child neglect suggests that the standard of proof articulated by Santosky fails to serve as sufficient protection against the erroneous termination of parental rights. (Once removed, also referred to as “put out”, from their biological families, children of paupers and dependent adults were treated alike and were generally handled in one of four ways:

1. Outdoor relief, a public assistance program for poor families and children consisting of a meager dole paid by the local community to maintain families in their own homes;
2. Farming-out, a system whereby individuals or groups of paupers were auctioned off to citizens who agreed to maintain the paupers in their homes for a contracted fee;
3. Almshouses or poorhouses, institutions established and administered by public authorities in large urban areas for the care of destitute children and adults; and

time²²¹; and 2) the presumption that the removal for a short period of time will have little to no effect on the child.^{222 223} There is ostensibly, no acknowledgement that the very action of removal and placement (not to mention the inevitable psychological and emotional harm associated with a prolonged foster care placement) of a child is, in and of itself, extremely harmful²²⁴ to that child.²²⁵ Often the child who is removed from her parents not only loses her parents, extended family members, and friends, but also their siblings.²²⁶ To suddenly uproot a child and separate her from everything she has ever known or loved is severely and profoundly traumatizing.²²⁷ To the child, it is much like suffering the death of multiple loved-ones, simultaneously.²²⁸ The damaging effects are irreparable; the child never truly recovers from them.²²⁹ This is even so where the placement of a child is in a loving and nurturing home; and this is so even where the home from where she has been removed is a bad one.²³⁰

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4. Indenture, a plan for apprenticing children to households where they would be cared for and tough at trade, in return for which they owed loyalty, obedience, and labor until the costs of their rearing had been worked off.)

²²¹ If a child is removed, the removal could last for days, weeks or months; hence “short” and “temporary” are relative terms.

²²² Liebman, *supra*, at 161.

²²³ Removal is based on the premise that children are “protected” and their “welfare” is promoted by governmental removal from their own families and placement with strangers. Tracy Green, *Parent Representation in Child Welfare: A Child Advocate’s Journey*, 13 Michigan Child Welfare L.J. 16, 16-17 (Fall 2009).

²²⁴ Robert H. Bremner, *Children and Youth in America: A Documentary History*, vols. 1-3 (Cambridge: Harvard University Press, 1970-1974). “The great discovery of the early twentieth century was that the best place for normal children was in their own homes. Home life is the highest and finest product of civilization...Children should not be deprived of it except for urgent and compelling reasons. Children of parents of working character, suffering from temporary misfortune, and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinners should as a rule be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children. The most important and valuable philanthropic work is not curative, but the preventative...”

²²⁵ Tracy Green, *Parent Representation in Child Welfare: A Child Advocate’s Journey*, 13 Mich. Child Welfare L.J. 16, 16-17 (Fall 2009).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

The current state of the child welfare system leads to the inexorable conclusion that the families of children who enter the child welfare system are not typically strengthened, and in contrast, the bonds of children with their families are frequently broken.²³¹

When considering removal, this article suggests that the judicial officer should be mandated to adhere to certain minimum guidelines when applying the “reasonable efforts” analysis; with the goal being a consistent, nationwide, jurisdiction to jurisdiction application of “reasonable efforts”. For the purpose of this article, four guidelines will be discussed.

The first guideline when considering the removal of children would require judicial officers to hold evidence-based removal hearings. The second guideline requires the court to receive into evidence, along with accompanying testimony the actual needs assessment of the family and of the child subject to removal, conducted by the child services agency. The third guideline requires the judicial officer to hear on the record, through testimony subject to cross-examination, all efforts made by the State agency to place the child with relatives or fictive kin²³² of the child; and if these placements cannot be made, there must be further evidentiary support as to why such placements are not appropriate. The fourth guideline requires the court to apply the clear and convincing standard to all removal hearings.

1. Application of Reasonable Efforts: Evidenced-based hearings- Guideline 1.

Children should be raised in a safe environment, which sometimes warrants the removal of the child from the parent. However, it must be acknowledged that often times it is in a child’s

²³¹ Peggy Cooper Davis, *Neglected Stories: the Constitution and Family Values* 112 (New York: Hill & Wang, 1997).

²³² Fictive kin is defined for the purposes of this article as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal ('by marriage') ties, in contrast to true kinship ties.

best interest not to disrupt the strong parent-child emotional bond by unnecessarily removing the child from the home, especially in many unfortunate cases where poverty has been mistaken for child neglect.²³³

In the absence of an emergency or aggravated circumstance as allowed by ASFA, the inquiry of “reasonable efforts”, using the definition as provided above, would require the judicial officer to make findings of fact based on evidence given in open court; subject to cross examination, supported by written conclusions of law. For example, removal could not be based on a positive drug test at birth alone, spoken of in a submitted affidavit²³⁴, executed by a caseworker, or collateral witness that is not present in court to give sworn testimony, subject to cross examination.

In general, the concept of the African-American family is similar to that of the Native American family; neither being “Western” nuclear families consisting of two parents and their children. Both African-American children and Indian children may have many relatives who are counted as close, responsible members of the family, who may not be “blood relatives”. The concept of the extended family maintains its vitality and strength in both the African-American

²³³ Candra Bullock, *Low-Income Parents Victimized By Child Protective Services*, 11 Am. U. J. Gender Soc. Pol'y & L. 1023, 1025 (2003), referencing Naomi R. Chan, *Children's Interest in a Familial Context: Poverty, Foster Care, and Adoption*, 60 Ohio St. L.J. 1189, 1191 (1999) (arguing that child welfare reforms should focus on children's rights to group in a safe environment, but that this focus must be placed in the context of children's interests in maintaining relationships with their parents because disrupting the parent-child bond has a severe impact on children).

²³⁴ Generally, once a child welfare agency concludes their investigation of alleged abuse and or neglect; and once the child welfare agency, with advice of counsel makes the decision to seek removal of a child, the agency representative executes an affidavit and tenders said to their legal representative, (County Attorney; Regional Attorney; District Attorney, or whatever legal entity charged with the responsibility of representing the state child welfare agency). The worker who executed the affidavit and/or their supervisor appears with their legal representative before a Judge, ex parte and requests removal of the child. The parents are not present; legal counsel for parents are not present; children are not present; legal counsel for children are not present; guardian ad litem are not present, etc. The only perspective that the judge hears at this critical juncture, deciding whether to or not to remove a child, is that of a potentially subjectively biased case worker, whose position is supported only on an affidavit that is often times replete with unsubstantiated hearsay, which subject to an exception is not admissible in any court of law in the United States.

and Indian community. By custom and tradition, if not necessity, extended members of African-American and Indian families (be they aunts, uncles, cousins, or grandparents-both fictive and real) have responsibilities and duties relating to familial childrearing²³⁵ and living in general.²³⁶ Precisely for these reasons, removals should not be based on a ‘white, middle-class nuclear family standard,’²³⁷ implicit with biases, which in many cases, forecloses placement with a relative or fictive kin²³⁸.

The removal hearing should mandate adequate evidentiary foundations that while the showing of the specific harm would not require the testimony of a “qualified expert witness”, the under oath examination of the investigative worker seeking the removal, specifically inquiring as to what specific harms are alleged suffered by the child and what specific actions the child protection services agency has taken to prevent the removal²³⁹ of the child, would be required.

Needlessly removing children from the custody of their parents violates parents’ due process rights to liberty.²⁴⁰ The removal hearing, for procedural due process²⁴¹ reasons, must

²³⁵ See generally Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 Temp. L. Rev. 1649, 1650-67(1995).

²³⁶ *Id* at 1653 n.35. Examples of shared living arrangements among African American extended families are the general pooling of financial resources, shared responsibility of caring for the elderly, joint living arrangements, and arranged employment opportunities.

²³⁷ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37 (1989).

²³⁸ For the purposes of this article, fictive kin is defined as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal ('by marriage') ties, in contrast to true kinship ties.

²³⁹ Brenda G. McGowan, *Historical Evolution of Child Welfare Services, Child Welfare for the Twenty-First Century: A Handbook of Practices, Policies, and Programs* 23 (G. Mallon and P. Hess, ed. 2005), referencing Thurston, H.W., *The dependent child*. New York: Columbia University Press, 1930. In 1923 the New York Children’s Aid Society further conveyed the consensus of the time: “There is a well-established conviction on the part of social workers that no child should be taken from his natural parents until everything is done to build up the home into what an American home should be. Even after the child has been removed, every effort should be continued to rehabilitate the home and when success crown’s one’s efforts, the child should be returned. In other words, every social agency should be a ‘home builder’ and not a ‘home breaker.’”

²⁴⁰ *Roberts, supra*, at 178, quoting *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

²⁴¹ To satisfy procedural due process, three distinct factors are considered: the private interest that is affected by the state action; the risk that the procedures used will lead to an erroneous deprivation of that private interest;

give sufficient notice to the responding parents; and this notice of the removal proceedings should include in plain language that there is a possibility that the rights of the parent may be terminated. For substantive due process²⁴² reasons, the evidentiary hearing must provide responding parents with a reasonable opportunity to have their interest represented. This substantive due process opportunity requires that the responding parent has an opportunity to present evidence that they are able and willing to provide the child with a safe and stable home environment.²⁴³ Any evidence entered at the removal hearing must adhere to published rules of evidence. The premise behind requiring the additional evidence at the evidentiary removal hearing is to change the focus of the child welfare system away from punishment of “bad parents” to prevention.

2. Application of Reasonable Efforts: Needs Assessment- Guideline 2.

The second guideline directs the court to require, prior to the removal hearing, a completed needs assessment of the family and of the child subject to removal. The needs assessment would be a mandate for states to receive federal assistance²⁴⁴. The needs assessment should be completed by either a child protective services licensed social worker²⁴⁵ who is specifically trained in the field of family needs assessments and child trauma; or a service provider who is comparably trained in gathering, administrating and assessing family needs

and, the state’s interest in support the use of the challenged procedure, including any interest in minimizing financial and administrative burdens.

²⁴² Using a traditional three-part analysis to determine whether a substantive due process right is at stake; the first step a court takes is to determine if the interest of the parent is so fundamental in nature that it is protected by the Fourteenth Amendment; the second step is for the court to determine if the State has infringed upon this fundamental right; and the third step is for the court to determine if the State has any State interest that justifies the intrusion.

²⁴³ Dixon, *supra*, at 116.

²⁴⁴ Monetary incentives are used as a way to encourage states to implement AACWA and AFSA.

²⁴⁵ Currently, there is no federal minimum requirement when it comes to caseworker standards; hence, all case workers that work with families are not required to be licensed social workers.

assessment tools and child trauma indexes. The needs assessment would be offered into evidence at the “removal hearing” and the author of the assessment shall be present at the hearing and subject to cross examination.

Currently, when removing children from allegedly neglectful homes, there is no analysis of the emotional effect the removal will have on the child, or what practical effect removal will have on the issues such as a child maintain ties with her school, community, family, and friends.

²⁴⁶ Across the board, removal standards whether if based on a reasonable person standard or a preponderance of the evidence standard, fail to acknowledge or incorporate into the analysis the poor outcomes for many foster children.²⁴⁷ They fail to acknowledge that removal from a parent carries proven risk of mental, emotional, and physical harm, including the development of separation anxiety, depression and other mental health problems.²⁴⁸ Currently, the decision to remove a child is made in a vacuum utterly devoid of these very real facts. Children in foster care are abused and neglected at a greater rate than other children, and have an increased risk of delinquency and other behavioral problems.²⁴⁹

The Family Needs Assessment and the Child’s Needs Assessment are important tools to ensure that children in need of protection are truly protected. If the Family Needs Assessments, (FNA), shows that the condition that resulted in the referral is either the result of poverty and/or can be alleviated by concrete financial services; home maker services; in home parenting classes; nutritional services; visiting nursing services; mandatory day care services, or something short of removal, than the child protective services agency’s request for removal should be denied and

²⁴⁶ Liebman, *supra*, at 148.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* referencing generally Jong G. Orme & Cheryl Buehler, *Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review*, 50 Family Relations 3 (2001); Betty Fish & Bette Chapman, *Mental Health Risks to Infants and Toddlers in Foster Care*, 32 Clinical Soc. Work J. 121 (2004).

instead the court should enter an order directing the agency to convene a meeting that qualifies as a “family group decision making”²⁵⁰ meeting to develop a safety plan of service to ensure the safety of the child and the stability of the family unit.²⁵¹ In addition, if services are identified through this family group decision²⁵² making process that can support the family while keeping the child safe within the family home, the court should order the child protective services agency to identify; refer; and pay for any services that the family needs to alleviate the poverty induced condition that is the root of the concern of abuse or neglect.

If the Child Needs Assessment, (CNA), shows that the removal is more harmful on the child than remaining in their current home, the request for removal should be denied, and again, the child protective services agency should be ordered to convene a meeting that qualifies as a “family group decision making”.²⁵³

3. Application of Reasonable Efforts: Specific Efforts Made to Prevent the Child’s Removal- Guideline 3.

²⁵⁰ Family Group Decision Making, brings together a child’s wider family group, who—in partnership with child welfare professional—lead decision-making about how to best care for and protect their children. Family group decision making has been proven to safely reduce the number of children in foster care, decrease the recurrence of child abuse and neglect and keep children connected to their roots and culture, which provides stability and helps them reach their full potential. Available at <http://www.americanhumane.org/children/programs/family-group-decision-making/> (last visited April 10, 2014).

²⁵¹ Family group decision making recognizes the power imbalances between child welfare workers and their clients, and seeks to alleviate these imbalances by deliberately promoting the voice of the family group in the development of a plan to resolve child welfare concerns.

²⁵² Cheryl Waites, et al., Increasing the Cultural Responsiveness of Family Group Counseling, 49 Social Work 291, 293 (2004).

²⁵³ The Family Group Counseling Service Model is one such model that requires service providers to directly recognize and address the unique culture of the families with whom they work. This model reflects a partnership between the service provider and the child’s “family,” defined to include the child’s immediate family, relatives, and cultural community.

The third guideline must inquire as to the specific efforts made by the State agency to place the child with relatives or fictive kin²⁵⁴ of the child; and if these placements cannot be made, there must be further evidentiary support as to why such placements are not appropriate.

Ultimately, it would be in the court's discretion to appoint a relative as temporary joint custodian until it could be determined if the child could be left permanently in the mother's care.

4. Application of Reasonable Efforts: Clear and Convincing Standard- Guideline 4.

The legal burden of proof needed for the state to secure the removal of a child in a child welfare case is initially fairly easy to satisfy. Throughout the fifty states, there is no consistent burden of proof standard for removal of a child from a parent's care; it varies from preponderance of the evident to clear and convincing evidence.²⁵⁵ Though this legal burden sets up a standard by which attorneys must present evidence, it does not take into account any implicit biases or underlying assumption made on the basis of race, ethnicity or socio-economic status of the family accused or the agency representative and/or the presiding judicial officer.²⁵⁶

The court was designed to be the objective eyes of the state with regard to removal of children.²⁵⁷ Children are not removed from their parents without a judicial order; children are not placed in foster care without a judicial order; children's placements are changed from one foster home to another foster home without either a court order, or a court's knowledge of the

²⁵⁴ Fictive kin is defined for the purposes of this article as a term used by anthropologists and ethnographers to describe forms of kinship or social ties that are based on neither consanguinal (blood ties) nor affinal ('by marriage') ties, in contrast to true kinship ties.

²⁵⁵ Richard Barth, *Child Welfare and Race: Models of Disproportionality*, in *Race Matters in child Welfare: The Overrepresentation of African-American Children in the System*, 25, 25-46 (Dennette Derezotes et al. eds., 2005).

²⁵⁶ Dixon, *supra*, at 116.

²⁵⁷ *Id.*

change; children's rights to their parents are not dissolved without a court's order; and a parents rights to their children are not terminated without a court's order. It makes sense for the presiding judicial officer hearing the case to share the lion share of the responsibility of assessing whether the parents were dealt with by the state agency in a fair and equitable manner.²⁵⁸

While for an indigent parent, an initial removal hearing may only be temporary, this temporary separation could last for weeks or even months. While temporary, the removal hearing is the precursor to the very real possibility that eventually that same parent may be subjected to the unjust termination of their parental rights.²⁵⁹

Under ICWA, the standard for removal is clear and convincing. This standard was selected after the 1978 House Report on the Indian Child Welfare Act noted that the vast majority of the removals of Indian children were based on vague grounds such as "neglect," "social deprivation," or unsupported allegations of "emotional damage" from living with their natural or biological parents.²⁶⁰

In addition, for termination of parental rights proceedings in non-ICWA child welfare cases, the Supreme Court in *Santosky* established that standard of proof must be that of clear and convincing evidence.²⁶¹ The clear and convincing standard emphasizes the Court's strong belief and adherence to the fundamental right of a parent to raise his or her child.²⁶² The Court further

²⁵⁸ *Id.*

²⁵⁹ Jane Waldfogel, *The Future of Child Protection 8-9* (Harvard University Press 2001) dreaming (pointing out that in the United States, poverty is strongly related to the likelihood of reports of child neglect). Such a strong link between poverty and reported child neglect suggests that the standard of proof articulated by *Santosky* fails to serve as sufficient protection against the erroneous termination of parental rights.

²⁶⁰ Hearing on S. 1214 Before the Senate Select Comm. On Indian Affairs, 95th cong. 539 (1977).

²⁶¹ *Santosky v. Karmer*, 455 U.S. at 747.

²⁶² *Santosky v. Karmer*, 455 U.S. at 651.

articulated that the standard of proof of clear and convincing reflects the degree of importance which society places on the interest at stake.²⁶³ Further, the Court stated that a clear and convincing evidence standard reflects interests that are both ‘particularly important’ and ‘more substantial than mere loss of money,’ whereas a preponderance of the evidence standard suggests society’s ‘minimal concern with the outcome.’²⁶⁴

Currently, the AACWA and ASFA are silent as to the standard of proof at the stage of removal. However, similar to the Indian Child Welfare Act (ICWA), the burden of proof for removal of all children should be clear and convincing, that continued custody of the child by the parent or Indian custodian is likely to result in “serious emotional or physical damage to the child. Professor Theo Liebman argues that initial removal standards should be so as to protect the child from greater risks of harm from the removal.²⁶⁵ Professor Cassandra Bullock also argues for a clear and convincing standard at the initial removal hearing in order to protect indigent parents’ rights to raise their children.²⁶⁶

Applying the legal analysis utilized by the United States Supreme Court in *Santosky*, the clear and convincing standard emphasizes the Court’s strong belief and adherence to the fundamental right of a parent to raise his or her child;²⁶⁷ again, further articulating that the standard of proof of clear and convincing reflects the degree of importance which society places on the fundamental liberty interest at stake.

²⁶³ Candra Bullock, *Low-Income Parents Victimized By Child Protective Services*, 11 Am. U. J. Gender Soc. Pol’y & L. 1023, 1034 (2003), referencing *Santosky*, 455 U.S. at 745, 755 (1982) stating that the standard of proof represents societal judgment regarding the manner in which the ‘risk of error should be distributed between the parties’).

²⁶⁴ *Id.*

²⁶⁵ Liebman, *supra*, at 148.

²⁶⁶ Dixon, *supra*, at 115, referencing Candra Bullock, *Low-Income Parents Victimized By Child Protective Services*, 11 Am. U. J. Gender Soc. Pol’y & L. 1023 (2003).

²⁶⁷ *Santosky v. Karmar*, 455 U.S. at 651.

The theory behind changing the removal requirements is that if it becomes more difficult for the state agency to remove an African American child, there will be more thorough investigations and subsequently more thorough investigations and subsequently more thorough risk assessments and ultimately more systemic protection of African-American children through the decrease in unnecessary removals of African-American children.

Conclusion

“CHILDREN DO NOT CONSTITUTE ANYONE’S PROPERTY; THEY ARE NEITHER THE PROPERTY OF THEIR PARENTS NOR EVEN SOCIETY. THEY BELONG TO THEIR OWN FUTURE FREEDOM.”²⁶⁸

Child welfare cases seeking the removal of African-American children from their biological parents continue to raise difficult issues related to children’s physical well-being; their psychological well-being; their cultural identity; and the survivability of the African-American family. The introduction of the American Child Welfare Act is intended to make the very difficult task of deciding to remove or not to remove a child consistent across the nation; removing the impact of implicit biases and reinforcing the ideals of procedural and substantive due process.

As stated in the introduction, this article acknowledges that simply defining the term “reasonable efforts” consistently for all states, will not completely resolve the subjective application of the child welfare laws, nor will it instantaneously reverse the disproportionality of child welfare removals, but it will decrease the increasing numbers of impoverished children, in

²⁶⁸ Mikhail Bakunin

general and impoverished African-American children specifically that enter into the foster care system. This author submits that this is progress.

