Historical Context

To understand how child welfare laws, policies, and practices have perpetuated and normalized anti-Black racism and Black family separation in America, it is important to look at the context in which those laws developed. This paper is not designed to lay blame or assign bad intention to legal and child welfare professionals by examining such history. Instead, the goal is to challenge ourselves to question how the child welfare system within which we work today is inevitably a reflection of the laws and practices that came before. Without understanding and owning the legal structures that led us here, we cannot chart a just future course.

This paper examines two categories of legal history: (1) laws that have facilitated Black family separation through oversurveillance; and (2) child welfare-specific laws designed to support children apart from their families. Both categories of laws have disproportionately harmed Black children and parents. Both categories have also been instrumental in shaping our current child welfare legal system by influencing the structures underlying that system, the biases we bring to decision making, and concepts of procedural justice (or lack thereof) in how the system is perceived and experienced.

I. Laws that Have Facilitated Separation of Black Children and Parents through Oversurveillance

Within the category of laws that have disproportionately resulted in Black family separation, three main topics emerge – economic interests, criminalization, and poverty.

A. Economic Interests - devaluing Black family bonds to serve financial goals

"*But the child was torn from the arms of its mother amid the most heart-rending shrieks from the mother and child on the one hand, and the bitter oaths and cruel lashes from the tyrants on the other*."[1]

Slavery in America provides the foundational context of separating Black children from Black parents.[2] For the more than 260 years while slavery was permitted by law in this country, the dehumanizing act of taking children from their families was intentional and served several economic interests for slave holders. First, Black offspring became a

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[1] 'Barbaric': America's cruel history of separating children from their parents, https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/ (quote taken from a 1849 narrative, Henry Bibb, a former slave in an exhibit at the Smithsonian's Museum of African American History and Culture, which documents the tragic U.S. history of enslaved children being separated from their enslaved parents).

[2] Michael A. Robinson,, Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015, University of Georgia School of Social Work, Athens, GA, USA; As Frederick Douglass noted in his autobiography "[i]t is a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age." *Narrative of the Life of Frederick Douglass.*

valuable resource for slaveholders who could multiply their holdings, maximize labor, and earn cash through sales of Black children as property.

The emphasis on enslaved women's fertility took on an especially prominent role beginning in the early 19th Century after Britain and the United States banned the transatlantic slave trade, which meant African captives were no longer brought to the continental United States and slave owner holdings depended entirely on children being born on the plantation.[3] In this way, separation of Black children from their parents was not incidental to slavery. It was a fundamental tenant of the economic interests for slaveholders who sought to force women to reproduce in order to increase the value of their holdings and the return of selling offspring to other plantation owners for further economic gain. Thomas Jefferson acknowledged precisely this economic interest in 1820 when he explained to another plantation owner that

"*I consider a woman who brings a child every two years as more profitable than the best man on the farm*."[4]

Second, slaveholders sought value from Black mothers who they required to serve as wet nurses to their white children, often taking mothers away from their own children altogether.[5] This component of family separation is especially jarring since mothers who were enslaved were regularly found suitable to care for other people's children while being accused of providing poor care for their own children. Indeed, due in large part to the physical extremes of slavery and the inherent deprivation experienced by children who lacked regular access to their mothers, an estimated 50% of infants born to enslaved women were stillborn or died within the first year of life.[6] White medical professionals blamed the mothers themselves for these deaths using gendered and racist language.[7]

Finally, the threat of family separation was used as a tool to keep enslaved mothers, fathers, and children compliant – no threat was more horrifying than the fear of being sold away from one's family. As archival recordings from formerly enslaved people make clear, parents and "[c]hildren, even from a young age, were well aware that their sale could occur at any moment."[8] Some proponents of slavery justified these separations by

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[3] Black Maternal and Infant Health: Historical Legacies of Slavery - PMC (nih.gov).
[4] Jacqueline Simmons Hedberg, Plantations, Slavery & Freedom on Maryland's Eastern Shore, 2019.
[5] The Tragic Plight of Enslaved Wet Nurses, https://medium.com/lessons-from-history/the-tragic-plight-of-enslaved-wet-nurses-b1c80b73f290; Another mother's love: exploitation, wet-nursing, and present-day Black breastfeeding, https://www.elvie.com/en-us/blog/another-mothers-love-exploitation-wet-nursing-and-present-day-black-breastfeeding; (In many cases, once a Black mother had been turned into a resource to serve as a wet nurse they would not see their own child or family again. If their own baby did remain in their care, inadequate nourishment contributed to high mortality and susceptibility to diseases in the early childhood of Black children).
[6] Steckel R. A dreadful childhood: the excess mortality of American slaves. *Soc Sci Hist.* 1986;10(4):427–466.
[7] Turner S. *Contested Bodies: Pregnancy, Childrearing, and Slavery in Jamaica.* Philadelphia, PA: University of Pennsylvania Press; 2017
[8] Slavery and America's Legacy of Family Separation | AAIHS; 'Barbaric': America's cruel history of separating children from their parents https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-

going so far as to suggest that Black parents and children did not experience personal emotions and family attachment in the same way as a white family member would. The majority of slaveholders, however, recognized the cruelty involved and used it as a tool to further obedience because the threat was so powerful and destructive.[9] In fact, the known cruelty of taking children from their parents became a key focus of abolitionists like Harriet Beecher Stowe who highlighted family separation through slavery to shame the system out of existence. By the 1850s, international outrage at the immorality of separating Black children and parents through slavery was fierce enough that Southern states began enacting laws to prohibit slave holders from separating infants and mothers.[10] These laws represented both a concession regarding the trauma caused by family separation and a strategic effort to preserve the larger economic system of slavery by siphoning off its cruelest parts.

B. Criminalization of poverty – family separation as a casualty of surveillance:

After the Civil War, Black leaders and their allies fought to secure a constitutional right to family integrity in recognition of the widespread destruction Black families had experienced and witnessed during slavery.[11] No such provision emerged. Despite emancipation family separation between Black children and parents continued with frequency through laws implemented to maintain control over Black people's lives and labor.[12] Southern state legislatures passed a series of laws known as Black Codes, which severely restricted the freedom of Black people living in the South, which was still where the majority of Black Americans resided at the time.[13] Two types of laws had a particularly negative impact on child and parent relationships – vagrancy laws and apprenticeships.

Vagrancy laws targeted formerly enslaved people and incentivized wide-scale surveillance by criminalizing unemployment and providing public authority to arrest anyone found "being idle."[14] Other similar laws limited access to labor, wages and voting by formerly enslaved Black people who were subject to local arrest. Once imprisoned, arrestees were required to perform hard labor through chain gangs, or in direct service to former slave masters on a plantation.[15] These laws often targeted young Black men and

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separating-children-from-their-parents/; https://face2faceafrica.com/article/the-disturbing-history-of-enslaved-mothers-forced-to-breastfeed-white-babies-in-the-1600s

[9] Thomas R.R. Cobb, a proponent of slavery was quoted in 1858 as proclaiming that the Black family "suffers little by separation". Reprinted in the New York Times, *Trump Wasn't First to Separate Families, but Policy Was Still Evil*, Kristof N., June 20, 2018.

[10] Briggs, L. Taking Children*: A History of American Terror*, 2020, at page 25.

[11] Brief for Law Professors as *Amici Curiae* in Support of Plaintiffs' Opposition to the Motion to Dismiss, *D.J.C.V. v. U.S.*, Civil Action No. 1:20-CV-05747-PAE (S.D.N.Y. Dec. 22, 2020).

[12] The History of Slave Patrols, Black Codes, and Vagrancy Laws, https://www.facinghistory.org/educator-resources/current-events/policing-legacy-racial-injustice/history-slave-patrols-black-codes-vagrancy-laws

[13] While Black Codes were negated by the Civil Rights Act and the 14th Amendment during Reconstruction, similar laws were enacted targeting Black Americans as the Reconstruction period ended.

[14] The History of Slave Patrols, Black Codes, and Vagrancy Laws, https://www.facinghistory.org/educator-resources/current-events/policing-legacy-racial-injustice/history-slave-patrols-black-codes-vagrancy-laws

[15] How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing (americanbar.org)

women, including youth and parents. Incarceration for breaking these local ordinances thus became a common way to separate Black family members from each other well after slavery.

Apprenticeships facilitated another form of Black family separation after the Civil War. In an apprenticeship, Black children were "hired out" to former slave masters through an agreement, often certified by a court, in which the child's unpaid labor was exchanged for a promise of "training."[16] In some cases, children were considered orphans when apprenticed. In other situations, Black children were required to enter labor agreements when their parents had been arrested or were found to be destitute.[17] Courts and landowners rationalized the agreements with rhetoric that it served the "child's best interests" to be apprenticed because their families could not support them.[18] As a result, Black adolescent children were once again separated from parents and kin in the interest of labor but this time under the guise of rescuing children from poverty.

Though vagrancy laws, forced apprenticeships, and slavery no longer provide legal contexts for separating Black children from their parents and other kin, aspects of these systems continue to influence legal practices today, especially in community policing and criminal justice contexts, but also in child welfare where poverty and parental arrest continue to serve as two of the most prominent drivers behind children's removal into foster care.[19]

II. Laws that have facilitated family separation through deliberate underinvestment in Black parents and children

America has a long history of discriminating against Black parents by excluding them in the distribution of public benefits. This too provides a foundational context for the child welfare system where foster care has been used at times as a compromise to provide for children without providing support for parents.

A. Social Security Act Funding

During the Depression when state mothers' pensions were provided to help women care for children in their own homes after losing a male breadwinner to death, abandonment, or poor health, restrictions limited these supports to only white children of widows, not Black children of Black mothers.[20] Likewise, in 1935 when the federal government

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[16] Michael Schuman, "History of child labor in the United States—part 1: little children working," *Monthly Labor Review,* U.S. Bureau of Labor Statistics, January 2017, https://doi.org/10.21916/mlr.2017.1.

[17] At the same time, state laws severely limited Black property ownership as well as participation in certain businesses and skilled trades. https://www.history.com/topics/black-history/black-codes.

[18] https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html. Taking Children.

[19] AFCARS data

[20] TANF Policies Reflect Racist Legacy of Cash Assistance | Center on Budget and Policy Priorities (cbpp.org)

established Aid to Dependent Children (ADC), Congress permitted state and local officials to set eligibility criteria and many states took steps to exclude Black families.[21]

Historians have documented two clear motivations for these exclusions. First, there was an effort "not to interfere with local labor conditions" that could be disrupted if Black mothers had an opportunity to care for their own children rather than serving as domestic laborers in other people's homes or as farm workers on land that needed tending.[22] This motivation carries echoes of prior decision-making around family separations during slavery that served others' economic interests. Second, there was widespread prejudice about who was "worthy" of public benefits. These reservations disproportionately affected Black families.[23]

In the 1950s, at the same time when schools in the South began integrating as required by law, many states imposed new restrictions on state-controlled welfare as a tool to push back by excluding "unsuitable homes." Under these exclusions, parents – frequently Black unwed mothers – were deemed unfit to receive public support. As one state legislator openly acknowledged, these laws sought in large part to encourage Black families to move out of the South and limit school enrollment.[24] The impact was extraordinary. Between 1954-1960, Mississippi cut more than 8,000 children from welfare, almost all of them Black, for being "illegitimate." In Arkansas, a 1957 "suitability" rule led to 8,000 children being removed from welfare eligibility within three years. And in Louisiana, when Ruby Bridges was braving the process of school integration, the state launched a new "suitable home" rule that cut 23,000 "illegitimate" children from welfare, 95% of whom were non-white.[25] Georgia, Virginia, Texas, and Michigan had similar laws in place.[26] Building on these suitability laws, Florida and Tennessee also established new relinquishment provisions through which caseworkers were encouraged to ask mothers seeking welfare to voluntarily release their children to a relative if they were found unsuitable. When mothers refused to comply, they were referred to juvenile court for "child neglect."[27] Rather than risk having their children taken, many families withdrew their applications for welfare support altogether.

B. The Flemming Rule – the foundation for federal child welfare law

After many years of ignoring the problem, the federal government ultimately sought to challenge these suitability laws through an administrative ruling issued three days before the end of President Eisenhower's term on January 17, 1961. In that ruling, Arthur

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[21] For example, Congress explicitly excluded "farm workers and domestic workers" from coverage, two major areas of employment for Black women at the time. (PDF) "Ending Welfare as We Know It" in 1960: Louisiana's Suitable Home Law (researchgate.net)

[22] Briggs page. 31.

[23] U.S. Department of Labor statistics, cited in *Aid to Dependent Children 9-10, Bell.*

[24] Briggs, Laura. Taking Children: A History of American Terror. p. 36, quoting a Mississippi state legislator who declared "when the cutting starts, [Negroes will] head for Chicago.") See also https://ushistoryscene.com/article/racializedborders/;

[25] Briggs at 39.

[26] Briggs at 38-39.

[27] Briggs at 38.

Flemming, the Secretary of Health, Education and Welfare, prohibited states from excluding children from ADC eligibility based on parental "suitability."[28] Although well-intentioned, Secretary Flemming included two exceptions that produced tragic results.[29] First, states were permitted to deny eligibility if they had sought to address the causes of unsuitability. Second, states could deny support for parents if they found "some other way" to provide for the child.[30]

In the same year the Flemming Rule issued, Congress made federal funds available to support children in foster care through the Social Security Act. Taken together, the provision of federal funds for foster care placement and the "some other way" exception to the Flemming Rule meant that states seeking to avoid supporting parents with public benefits could use foster care as an alternative means of providing for children and could seek federal support in doing so. Up until that time, foster care had been largely used as a temporary support for families and had excluded many non-white children. In a dramatic shift, however, after 1961 states seeking to deny ADC accessibility began removing children from "unfit families" – predominantly Black families – in increasing numbers and placing them in foster care. The results were disastrous for Black children and their families. Tens of thousands of Black parents lost their children, the racial identity of children in the system transformed, and the total number of children in foster care nationally increased by 67% in a year, from 163,000 in 1961 to 272,000 by 1962.[31]

Child advocates and national organizations, such as the Child Welfare League of America, understood that removing people's children into foster care had never been the intention of the Flemming Rule. In response they pushed for a safeguard requiring a judge to determine that if a family was considered unsuitable for benefits, the conditions in the home were actually harmful due to a parent's "immoral or negligent" behavior.[32] The idea was that judicial oversight should "ensure that rogue caseworkers would not remove children from their homes simply to punish poor mothers for applying for [ADC benefits] in the first place."[33] Unfortunately, instead of serving as an additional gatekeeper, judicial oversight often resulted in an even higher level of public authority signing off on the removal.[34] Parents and children lacked access to counsel to challenge such decisions, and after court review it became even harder for Black parents and children to reunify.

Adding to the complexity of the situation, in addition to Florida and Tennessee, other states also began establishing laws that encouraged mothers seeking welfare to

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[28] The Federal Role in the Federal System: The Dynamics of Growth ..., Volumes 1-4, United States. Advisory Commission on Intergovernmental Relations page 48.
[29] https://ushistoryscene.com/article/racializedborders/
[30] Rymph, Catherine. Raising Government Children: A History of Foster Care and the American Welfare State, at 168.
[31] (Lawrence Webb; referred to as the "Browning of child welfare in America"); https://www.johnstonsarchive.net/policy/adoptionstats.html
[32] Rymph, Catherine. Raising Government Children: A History of Foster Care and the American Welfare State, at 168.
[33] Rymph at 169.
[34] See generally, AFDC Eligibility Requirements Unrelated to Need: The Impact of King V. Smith, 1970 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9425&context=penn_law_review

voluntarily relinquish custody when found to be unsuitable or risk facing a judicial determination that children should be removed, both of which complied with the Flemming Rule.[35] As one child welfare historian explained, "[t]he court commitment provision had been intended as a protection for families. And yet professionals would discover that in practice the provision means foster care would now be used punitively against particular AFDC mothers who local agencies believed fell short of local standards of propriety 'without regard to the interests of the child.'"[36]

Today the language providing federal support for children in foster care in the Social Security Act, remains eerily reminiscent of the Flemming Rule. Eligibility for foster care maintenance payments continues to be linked to AFDC eligibility criteria and federal funds are available to support only children who have been voluntarily placed in foster care or for whom a judge has found it is "contrary to welfare" to remain at home and reasonable efforts have been made to support the family.[37]

C. The Child Abuse Prevention and Treatment Act of 1974

In 1968, the Supreme Court ruled in *King v. Smith* that a parent's welfare application could not be used as a reason to take children from their families.[38] Six years later, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) of 1974 – as "a campaign against the national problem of child abuse." The first federal child welfare law after Social Security Act funding had been made available to support children in foster care separately from their parents, CAPTA tragically revived themes focused on efforts to save children from poor families by removing them instead of providing support for parents directly and also emphasizing connections between parental criminalization and family separation. Although the intent of CAPTA was not as directly discriminatory as the ADC exclusions, it is difficult to see the results and conclude that this legislation, passed just thirteen years after the unsuitability rules were enacted, was entirely distinct from what came before.

For example, CAPTA required states to include "neglect" with "abuse" in their child protection reporting laws and defined those categories broadly as "any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation…or [a]n act or failure to act which presents an imminent risk of serious harm."[39] Similar to suitability provisions that emerged during the Civil Rights era, these expansive definitions opened the door to highly subjective assessments about parental fitness. In some states definitions of neglect include failures to provide adequate clothing, housing, or food without also addressing a parent's ability to afford such things, or guidance on what "adequate" means. Subjective determinations of adequate, for example believing opposite sex children need to have their own bedroom, have allowed poverty rather than neglect to influence determinations on parental fitness.

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[35] Briggs at 39.
[36] Rymph at 170-71.
[37] 42 U.S.C. 672.
[38] *King v. Smith*, 392 U.S. 309 (1968)
[39] CAPTA, P.L. 93-247

CAPTA also triggered an expansion of the network of professionals mandated to report abuse and neglect.[40] As a result, even though welfare retaliation referrals had been outlawed, the number of families referred for child welfare investigation through other means, including through schools, pediatricians, and law enforcement, increased dramatically. Within only a few years of CAPTA's enactment, the number of children removed from their families jumped again – between 1972 and 1977 the country saw a 60% increase from 319,800 to 502,000 children in foster care.

CAPTA's results have not been evenly distributed. Studies show that Black children are more likely to be reported for suspected maltreatment than white children, particularly by mandated reporters in the education and medical fields.[41] Out of every child in the United States, one in three youth between birth and 18 will have a CPS investigation brought on their behalf. For Black youth, that ratio increases to one in two.[42] Once a report is made, Black families are almost twice as likely to be investigated for alleged maltreatment as white families, and often for less severe reasons.[43] This suggests a false assumption among reporters that Black children are at a higher risk of abuse at home than white children.[44] For reports related to neglect, this may also suggest an ongoing correlation

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[40] After CAPTA was enacted, reports of child maltreatment increased from 60,000 in 1974 to one million in 1980 and two million in 1990. Recent estimates indicate that this figure has since doubled to roughly 4.4 million annual reports. JOHN E. B. MYERS, A SHORT HISTORY OF CHILD PROTECTION IN AMERICA, at 456 https://us.sagepub.com/sites/default/files/upm-binaries/35363_Chapter1.pdf; *Child Maltreatment 2019*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (2021), at 7, https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf; Douglas J. Bersharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect,* 23 Vill. L. Rev. 458, 460, 467-469 (1978), https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2180&context=vlr.

[41] Alan J. Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 THE ANNALS OF THE AM. ACAD. 253, 254 (2020) (citing Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 CHILD ABUSE & NEGLECT 33 (2013)); Kathryn Suzanne Krase, *Child Maltreatment Reporting by Educational Personnel: Implications for Racial Disproportionality in the Child Welfare System*, 37 CHILD. & SCHOOLS 89 (2015), https://doi.org/10.1093/cs/cdv005; Benard P. Dreyer, *Racial/Ethnic Bias in Pediatric Care and the Criminalization of Poverty and Race/Ethnicity-Seek and Ye Shall Find*, 174 JAMA PEDIATRICS 751 (2020), https://doi.org/10.1001/jamapediatrics.2020.1033; *Violence Against Women in the Medical Setting: An Examination of the U.S. Foster System*, MOVEMENT FOR FAM. POWER & NAT'L ADVOCS. FOR PREGNANT WOMEN (May 31, 2019), https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf.

[42] Fong, Kelley. "Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life." *American Sociological Review* 85(4), 2020, 610–638. <doi: 10.1177/0003122420938460>

[43] Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 278 (2017); John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVS. REV., 359 (2003); Sarah A. Font et al., *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD. & YOUTH SERVS. REV., 2188 (2012).

[44] Hlavinka, Elizabeth. "Racial Disparity Seen in Child Abuse Reporting." *Medpage Today*, October 5, 2020. <https://www.medpagetoday.com/meetingcoverage/aap/88958?xid=nl_mpt_DHE_2020-10-06&eun=g731842d0r&utm_source=Sailthru&utm_medium=email&utm_campaign=Daily%20Headlines%20Top%20Cat%20HeC%202020-10-06&utm_term=NL_Daily_DHE_dual-gmail-definition>

with disproportionate poverty rates that are addressed regularly through family separation rather than direct support to the family.

Following an investigation, Black children are also more likely to experience a substantiated report and have their constitutionally protected family bonds severed through removal than white children.[45] While not necessarily intended, the subjective and vague nature of mandatory reporting laws, opens the door for discrimination and for reporting to be influenced by bias. When the legal standard in states for reporting is highly abstract, typically requiring "reasonable suspicion" or "reasonable belief" or risk of harm to make a report, there is a risk that decisions to report will encompass personal biases.[46] Subjective interpretations of "reasonableness" may lead to significant variation among reporters about when a report is warranted; without an objective standard, reports will encompass individual biases that will not be addressed by legal review. Reporters may be acting on internalized stereotypes of what appropriate parenting looks like, or other biases, such as holding parents of color to a higher standard than white parents. For example, CAPTA's emphasis on drug testing and coordination between medical providers and child welfare authorities has also led to a substantial increase in separations between mothers and infants at birth.[47] Black women are more likely than white women to be screened for drug use during pregnancy and to face legal consequences for prenatal drug use, including incarceration and the loss of custody of their child.[48] These systemic racial discrepancies in how drug use is addressed increases substantiation rates and puts Black families at a higher risk of becoming involved with CPS and law enforcement, while white caregivers struggling with drug use are more likely to receive treatment referrals and sympathetic forms of assistance. Thoughtfully examining potential bias in the report is necessary by both the reporters themselves and the child welfare agency receiving the report.

Under CAPTA, as child welfare statues were broadened to require reporting of child neglect, courts saw a corresponding increase in allegations of "failure to protect" against mothers who are victims of domestic violence, resulting in children being removed from their care. Data shows that there is a disproportionate prevalence of domestic violence reports in the Black community. When exposure to domestic violence is defined as a form

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[45] Christopher Wildeman et al., *The Prevalence of Confirmed Maltreatment Among US Children, 2004 to 2011*, 168 JAMA PEDIATRICS 706, 706 (2014), https://doi.org/10.1001/jamapediatrics.2014.410 (finding that in 2011, 12.5% of U.S. children experienced a substantiated report of child abuse or neglect, however, 20.9% of Black children, compared to 10.7% of white children, experienced substantiated reports); Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System That Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 502 (2020), https://doi.org/10.1080/15548732.2020.1814542 (citing Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. OF ORTHOPSYCHIATRY 48 (2020), https://doi.org/10.1037/ort0000388, and Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: A Population-Based Examination of Risk Factors for Involvement with Child Protective* Services, 37 CHILD ABUSE & NEGLECT 33 (2013), https://www.doi.org/10.1016/j.chiabu.2012.08.005).

[46] Liu, 2019.

[47] Kaufman, Foster Children at Risk.

[48] Kathi L H Harp and Amanda M Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, October 23, 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7372952/

of maltreatment by law, mothers are inappropriately blamed for the actions of their abusive partners and may face revictimization if their children are removed from them.[49]

CAPTA also led to increased foster care entry following criminal incarceration of parents. Specifically, CAPTA called for active communication between child welfare caseworkers and local law enforcement authorities conducting criminal investigations. This call for collaboration coincided with the national launch of the "war on drugs" in the late 1970s and early 1980s, when rates of incarceration for Black men and women increased disproportionately despite evidence of no difference in the use or distribution of drugs when compared with white people in America.[50] Rates of female incarceration in particular tripled during the 1980s, and 80% of all Black women who were incarcerated during that time had children living with them at the time of their arrest.[51] Although some children were able to live with their fathers or other kin, many were referred to child welfare and entered foster care when their mothers were arrested. Law enforcement referrals to child welfare remain a leading cause of foster care entry today.[52]

A leading cause for incarceration related to mandatory minimum sentences where systemic racism was profoundly evident. For example, the 100-to-1 crack versus powder cocaine sentencing disparity established by Congress in 1986 is a significant example of systemic racism. [53] Coupled with societal images of which racial groups use which form of the drug and beliefs about violence involved with crack cocaine, sentencing disparities related to crack cocaine versus powder cocaine had an unquestionable racial impact.[54]

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[49] See generally, Debra Whitcomb, Children and Domestic Violence: The Prosecutor's Response, 2004, https://www.ojp.gov/pdffiles1/nij/199721.pdf; Prosecutors, Kids, and Domestic Violence Cases by Debra Whitcomb, https://www.ojp.gov/pdffiles1/jr000248b.pdf. How the Child Welfare System Polices Black Mothers
by Dorothy Roberts, https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/

[50] During the first 15 years of the war on drugs the prison population in the United States tripled from 200,000 to 600,000 (Sentencing project). The effects were not distributed equally across racial lines. Although white people have been statistically found to be more likely than Black people to sell drugs, and equally likely to consume them, Black people are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for drug possession. (Rothwell).

[51] Shattered Bonds (note to add detail on nature of specific offenses leading to increase in female incarceration)

[52] Weiner, D., Heaton, L., Stiehl, M., Chor, B., Kim, K., Heisler, K., Foltz, R., & Farrell, A. (2020). *Chapin Hall issue brief: COVID-19 and child welfare: Using data to understand trends in maltreatment and response*. Chicago, IL: Chapin Hall at the University of Chicago (including data indicating that law enforcement personnel account for close to 19% of all CPS referrals for investigation nationally).

[53]Under the sentencing laws, someone caught distributing 5 grams of crack cocaine was subject to a mandatory minimum five-year federal prison sentence, while the distribution of 500 grams for powder cocaine – 100 times the amount of crack cocaine – carried the same sentence. Because of the relatively low cost, crack cocaine is more accessible for poor Americans, many of whom are Black. Powder cocaine is more expensive and tends to be used by affluent white Americans. Keith M. Kilty &Alfred Joseph, Institutional Racism and Sentencing Disparities for Cocaine Possession, Pages 1-17 | Published online: 20 Oct 2008; Sentencing disparities related to crack cocaine versus powder cocaine had an unquestionable racial impact https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law: see also See U.S. Sentencing Commission, Report to The Congress: Cocaine And Federal Sentencing policy102-103 (2002)

[54] https://www.aclu.org/other/cracks-system-20-years-unjust-federal-crack-cocaine-law

These mandatory minimum sentences contributed to disproportionately high incarceration rates, separating fathers from families, separating mothers with sentences for minor possession crimes from their children, perpetuating fears about "crack-babies," creating massive disfranchisement of those with felony convictions, and prohibiting previously incarcerated people from receiving some social services for the betterment of their families.[55]

D. The Adoption Assistance and Child Welfare Act

In 1980, Congress passed the Adoption Assistance and Child Welfare Act (AACWA) in an effort to slow entries into foster care that had escalated substantially in the preceding years. Specifically, the AACWA included new provisions calling for "reasonable efforts" to keep children with their families and out of foster care. The numbers of children in foster care did begin to decline during this period, but not by the same margins of increase the country had seen previously. By 1990, for example, the total number of children in foster care hovered around 400,000. In part, the problem lay not in the intention of the law but the lack of tools for implementation. Like the Flemming Rule, which had included language calling for supports to address unsuitability without providing any tools to do so, reasonable efforts provisions in AACWA were largely rhetorical because they lacked additional resources to implement such "efforts" on the ground.

E. Multiethnic Placement Act

Throughout the early history of federally funded foster care, social workers often prioritized children's placements in the communities where they had roots. This could include family roots, cultural roots, and ethnic or racial identities. In 1994, Congress changed this landscape in the Multi-Ethnic Placement Act (MEPA), which allows foster and adoptive parents to retain rights to express a preference for children based on race while prohibiting racial preferences on behalf of the child or birth parents in finding a foster care placement for their child. Proponents of the law advocated for it as a "color blind" approach to child placements that would prioritize timeliness of a child's placement over cultural and racial heritage considerations. In juxtaposing those two interests as an either/or, without reconciling both as important, MEPA also diminished Black families' rights to family integrity.

Specifically, the law prohibits states from making placement decisions on the basis of race, color, or national origin, and mandates the "diligent recruitment" of racially and ethnically diverse pools of prospective foster and adoptive families. Despite its expressed intent to address racial disproportionality in adoption outcomes, MEPA has failed to reduce the overrepresentation of Black children in foster care who are awaiting adoption and languishing in care. For example, in 2019, Black and white children represented 18% and 50% of all adoptions, respectively.[56] Data also indicates that 13% of children adopted

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[55] ACLU data

[56] Radel et al. *The Multiethnic Placement Act 25 Years Later: Trends in Adoption and Transracial Adoption*, MATHEMATICA (Dec. 21, 2020), at 14-15, https://www.mathematica.org/publications/the-multiethnic-placement-act-25-years-later-trends-in-adoption-and-transracial-adoption.

within two years of entering foster care in 2017 were Black, while 54% were white.[57] Moreover, the documented failure of MEPA to ensure an adequate pool of potential foster and adoptive parents willing and able to foster or adopt the children, coupled with the lack of culturally appropriate training and guidance for foster and adoptive parents has created a system that often falls short in recognizing the unique identity that Black children have or respecting their need for community and culture that is connected to their identity.[58] This contradicts well-established best practice standards for adoption.[59]

F. Adoption and Safe Families Act

In the 1990s, the legacy of using foster care as a compromise to provide for children while denying support to their parents took center stage again with welfare reform, an effort driven largely by race-based efforts to cut assistance to Black families in both urban and rural jurisdictions.[60] Negotiations around cutting welfare raised a confounding question, however, about what would happen to children when their parents either lost support or had to work during time frames when children were normally home. As with the suitability debate thirty years prior, the answer was to use foster care, or the threat of foster care, as a compromise way of supporting children while cutting off parents. Speaker of the House Newt Gingrich acknowledged this link openly when he described the legislative goals of welfare reform as including an effort to "take the children of welfare mothers and put them in orphanages."[61] His projections were accurate. By 1999, just a few years after welfare reform, the number of children in foster care in the United States reached an all-time high at 567,000 – an increase of more than 570% since 1950.

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[57] *Id.*

[58] Lorelei B. Mitchell et al., *Child Welfare Reform in the United States: Findings from a Local Agency Survey*, 84 CHILD WELFARE 5, 15 (2005) (finding that only 8% of the 97 agencies included in the 1999-2000 Local Agency Survey created new recruitment efforts following the passage of MEPA); Ruth McRoy et al., *Making MEPA-IEP Work: Tools for Professionals*, 86 CHILD WELFARE 49, 56 (2007) (noting that since the enactment of the 1996 IEP, OCR has exclusively directed its enforcement efforts to the "no delay or deny" provision); *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, EVAN B. DONALDSON ADOPTION INST. (2008), at 35-36, 40, https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/62864.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D62864%27%29&m=1(reporting the same); *Child and Family Services Reviews Aggregate Report, Round 3: Fiscal Years 2015-2018*, ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (June 5, 2020), at 46, https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr_aggregate_report_2020.pdf (reporting that only seventeen states received a 'strength' rating for diligently recruiting diverse foster and adoptive families).

[59] *Moore v. City of East Cleveland*, 431 U.S. 494, 503-504 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *A Stronger Foundation for America's Families: Transition 2021*, CHILD WELFARE LEAGUE OF AM. (Dec. 2020), at 61, https://www.cwla.org/wp-content/uploads/2021/01/Transition-2021-Final.pdf ("All children deserve to be raised in a family that respects their cultural heritage.").

[60] TANF Policies Reflect Racist Legacy of Cash Assistance | Center on Budget and Policy Priorities (cbpp.org)

[61] Briggs at 122.

Child welfare professionals who believed many children were already lingering in foster care for too long raised concerns about the impact of welfare reform early on. Rather than invest greater supports in keeping families together or providing more investment in reunification services for children already in care, Congress responded by accelerating the timeline for terminating parental rights through the Adoption and Safe Families Act of 1997 ("ASFA"). Specifically, the law requires a child welfare agency to file a petition to terminate parental rights after a child has been in foster care for 15 of the most recent 22 months.[62] The theory was that while welfare reform might cause more children to enter foster care, their needs for permanent homes would be addressed by terminating parental rights and freeing them for adoption more quickly.[63] At the time there were real concerns about the length of time children spent in foster care before reaching permanency and expediting the timelines to adoption appeared to be a valuable solution. Rather than provide incentives to facilitate children's exit from foster care through safe family reunifications, however, ASFA solely funded incentives for states to place more children in adoptive homes.

Since ASFA was enacted, the number of parental terminations has exceeded the number of adoptions annually, resulting in a new legal concept known as the "legal orphan" who lacks legal birth parents and adoptive parents.[64] As one child welfare scholar wrote 20 years after ASFA's enactment "[w]e now know that well-intentioned zeal to protect children can create a population without permanent homes."[65] Following ASFA, the number of children who experience a termination of parental rights, many of whom are not adopted, has exploded nationally with current estimates from researchers at the National Institutes of Health finding that 1 of every 100 children is likely to experience a TPR by age 18, a number the researchers deemed "far more common than often thought."[66] The rate of TPR is closer to 2 of every 100 Black children.

Many people with lived experience in foster care note that even in situations where they could not remain with their birth parents, a termination of parental rights carries greater consequences than the law recognizes. A TPR, not only ends the relationship with birth parents, but often results in cutting connections to other family members, grandparents, cousins, aunts, uncles, even siblings. The premise that not all families should be kept

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[62] Several exceptions apply if a relative is caring for the child, there is a compelling reason TPR is not in the child's best interests, or the state has not provided reasonable efforts in support of reunification. The second exception is particularly significant because many states have interpreted the timelines to imply that terminating parental rights is presumed to be in a child's best interests at 15 months.

[63] Richard Gelles article.

[64] *ASFA, "Aging Out" and the Growth in Legal Orphans*, NAT'L COALITION FOR CHILD PROTECTION REFORM (Sept. 9, 2020), at 2, https://drive.google.com/file/d/1X3X9a4H6LFfKWRnSDolDxuZb6Dm4yUdA/view; *See also Information Memorandum Log No: ACYF-CB-IM-20-09*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 5, 2021), at 9, http://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf (reporting that "[c]hildren who enter care and have their parents' parental rights terminated more frequently fail to discharge and stay in care longer than children whose parent's parental rights are not terminated . . . .").

[65] Marvin Ventrell, NACC Redbook, The History of Child Welfare. 2017 edition of NACC's Redbook -— a regularly updated legal guide for child welfare attorneys – that was penned by Marvin

[66] Christopher Wildeman, Frank Edwars, Sara Wakefield, The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016; Child Maltreat. 2020 Feb; 25(1): 32–42.

together, and the racially disparate outcomes of the law itself reflect an undermining of the constitutionally protected right to family integrity for Black families that continues to reverberate throughout all the communities where TPR has grown so common.