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## Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare

Kurt Mundorff



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## CHILDREN AS CHATTEL: INVOKING THE THIRTEENTH AMENDMENT TO REFORM CHILD WELFARE

*Kurt Mundorff\**

During my fourteen months as a Child Protective Specialist for the New York City Administration for Children's Services I generally investigated two or three cases a week. I also accompanied co-workers on their home visits. Through my job, I became involved in the lives of dozens of families and hundreds of children. The Community District for which my unit was responsible was on the far eastern edge of Queens and contained African American and white neighborhoods. I rarely went to the white neighborhoods, but I became very familiar with the African American neighborhoods. I knew their streets. I knew their school officials. I knew their homes. I was surprised that almost none of the parents that I investigated had abused or neglected their children. I was involved with over a hundred cases, but only dealt with one case of real child neglect and one case of classic child abuse.

During my time with the agency I saw several children taken from homes where they faced some level of very real danger. I also saw the agency steamroll many dozens of innocent families. They became involved in a system that was capricious, abusive, and which seemed to do more harm than good. The only help we offered the children was to place them in foster care; there seemed to be no intention of helping parents. Very quickly, it became clear to me that the "help" of foster care was no help at all. While I met some warm, caring foster parents, the vast majority of foster parents I met were obviously in it for the money. They were baby boarders.

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Foster parents are not the only people who profit from the child protective process. I began to see myself as part of a vast industry of professionals who earn their income by providing services to families and their children. We provided a vast array of services, which I quickly came to realize were ineffective and at times even harmful to the people we were supposed to be helping. Parents also did not see services as helping. Services were a series of hoops they had to jump through to get my agency out of their lives. At each hoop was another professional accepting money from the state. The more hoops, the more money.

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Charles was a sweet, if somewhat defensive, twelve-year-old African American child.<sup>1</sup> Given the circumstances of his life, he had every reason to withhold his trust. He was born to a drug-addicted mother and ended up living with his grandmother. She cared for him as long as she was physically capable and then turned him over to the New York City Administration for Children's Services (ACS) when he was three years old. ACS transferred him from foster home to foster home before he was taken in by the Dawson family. They were an African American couple. She was in her late fifties and looking forward to retirement, while he was in his early sixties and had just retired. They took in Charles and two infants, who were both diagnosed as special needs children due to medical problems. Looking for income to augment their retirement, they intended to adopt all three. Between the three children, this would mean at least \$2,000 per month for the couple.

Soon, the Dawsons began to question whether they were a good match for Charles. Early on, they contacted the worker at the adoption agency, to tell her that they could not handle Charles and that they did not want to adopt him. The adoption agency worker told them that if they did not adopt Charles they could not keep the two infants. She said that because the three were placed together, they were now considered siblings and must be adopted together. This was a lie. The adoption worker, knowing that Charles was difficult to place, and that the couple wanted the other two children, simply pressured them into taking Charles.

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<sup>1</sup> All the names are fictional, but the events are accurate. Except as otherwise identified, the stories all reflect my personal experiences. I have avoided sensationalized media accounts of children abused in the system. Such stories are a potent rhetorical tool, but have an adverse impact on dialogue. They focus attention and resources on anomalies causing agencies to reconstitute themselves to address exceptional circumstances. In doing so they ignore more routine concerns.

The Dawsons came to fear for their safety. They found a pocketknife under Charles's pillow and described how Charles constructed home-made knives that he hid around his room. They said he was a liar, saying he made them take him to an emergency room, for stomach pains, while they were on vacation in South Carolina. They resented having to pay the emergency room bill when it turned out that there was nothing wrong with him. They submitted the bill to Charles's New York State Medicare, but were told that he was not covered for out-of-state emergency treatment. This too was a lie.

Charles's therapist called the State Central Register for Child Abuse and Neglect to report Mr. Dawson when he left Charles in her office during a family counseling appointment. The report came in as a case of abandonment. The police took custody of Charles and he was turned over to after-hours workers from the Emergency Children's Services division of ACS, who in turn took him to a local hospital. In addition to the child protective case, Mr. Dawson also faced criminal charges for the abandonment.

In my initial interview with the therapist, she reported the long history of difficulties between Charles and the Dawsons. Describing the couple as out of touch with childhood today, she admitted that Charles was having problems, but said she did not think he was a danger to anyone. The therapist reported that he had made the knives because he was being bullied at school, but he did not take the knives to school and had no plans to use them. She described the couple as rigid and punitive and said they blamed Charles for many of their problems.

Mr. Dawson was alarmed by the child protective proceedings against him as well as the criminal charges. He said that he did not want to leave Charles in the therapist's office and had done so only at her urging. He said he would not, under any circumstances, allow Charles into his home, but that he hoped this would not affect his other two adopted children. Reporting a long history of problems with Charles, he described how resistant the adoption agency had been to helping the family. Not required to have any involvement once the adoption became complete, the adoption agency refused to consider taking Charles back into foster care or to provide the family with therapy.

There had been an earlier child protective investigation concerning Charles and the Dawsons. That case was called in by a neighbor, Mrs. McMahon, who was concerned about the Dawsons' treatment of Charles. The investigation report had revealed that, following Charles's

emergency room visit, the Dawsons put him on a diet of franks and beans, until he paid them back the expense of the visit. He would eat this meal sitting in the kitchen while the rest of the family enjoyed a normal dinner in the dining room. They also withheld birthday gifts, Christmas gifts and clothing to compensate for this expense. The investigation also revealed that, because Charles came home from school earlier than they did, the Dawsons made him sit either in back of the house or in the garage each afternoon until they returned home. During this time, he had developed a relationship with the McMahons.

The McMahons had a son in the same class as Charles, and Charles would often come to their home during the time he was supposed to be waiting in the back yard. In their home, he was well-fed, loved and had a great time playing with their son, but he had to be sure to return to the yard before the Dawsons returned because they became angry if he was not waiting for them. On more than one occasion, they called the police on the McMahons for having Charles in their home. They resented the McMahons' interference in their affairs. In reviewing this report, I found a letter to the Ombudsman of ACS, from Mrs. McMahon, describing Charles's treatment and offering to adopt him.

It was clear that the Dawsons were not going to take Charles back. So, I contacted the McMahons, and they reiterated their desire to adopt him. It seemed like an easy solution, but there were several obstacles. First, I told the McMahons that they would need to go through an adoption agency in order to receive Charles's adoption subsidy money. This would be difficult because they would have to go through a lengthy clearance process during which Charles would be in yet another placement. But they said they were not interested in the subsidy, only in Charles. Second, the Dawsons were Charles's legal parents and it was unlikely that they would consent to the adoption. In a conference with the Dawsons, however, their only condition was that Charles was not to walk directly in front of their home; he would need to cross the street if he wanted to go down the block. The McMahons contacted an attorney, went to family court and filed for custody. The Dawsons did not oppose, and custody was transferred.

When I called the therapist to inform her of Charles's new situation, she asked that I tell the McMahons that they needed to keep Charles in therapy with her. I replied that I could not tell them to do anything, but would suggest that they continue some sort of therapy. The next day the McMahons called me reporting that the hospital

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would not release Charles without my approval. This was another lie. It turned out that the hospital feared they would not get paid for Charles's stay if they released him to the McMahons because they were not covered by Medicare. I told the hospital social worker that there was nothing I could do about the situation and told him that if they did not release Charles, I would urge the McMahons to file a civil suit against them. He was released that afternoon. Two weeks later, I received another call from Mrs. McMahon. She was contacted by the therapist who told her that I was requiring that Charles remain in therapy with her. According to Mrs. McMahon, the therapist was threatening to call in a child neglect report against her if she did not continue the therapy. Mrs. McMahon said she wanted to keep Charles in some sort of therapy, but this therapist could only meet Charles during work hours and she could not regularly miss work. I told her that I was recommending therapy but could not require it and had never told the therapist it was required. I called the therapist and told her to stop extorting the McMahons. As with every other case, when the file was closed, I heard nothing further of Charles or the McMahons.

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Charles's story is both shocking and common. Like so many of the children entering the foster care system, Charles was a child whose life was determined by the subsidies that attached to him. First, the adoption was intended to subsidize the Dawson's retirement. Second, the adoption agency received a subsidy for placing him in the home, even though he was not wanted. Later, the hospital held him hostage, refusing to release him, fearful of not being paid. Finally, his therapist, making her living off providing services to poor children in foster care, attempted to extort fees from the McMahons.

A funding stream of federal, state, and local dollars attaches to every child entering the child welfare system, who support a vast bureaucracy of professionals providing counseling, evaluation, investigation, medical, and placement services. All of these professionals take a cut of the subsidies at each step of the process. Finally, the child is placed with an adoptive or foster care parent. While there are many parents who do this for the most altruistic reasons, they seem to be the exception. The subsidies for this care are a strong motivator, and many of these families may take the child to subsidize a retirement, an addi-

tion to the home, or just to have a little extra money.<sup>2</sup> Certainly, some proportion of the children who come into contact with the child welfare system are in genuine need of help and cannot remain in their homes. But, regardless of her need, when a child enters the system, decisions about her life are reduced to a series of monetary equations. Through this process the child is commodified, traded back and forth between agencies and parents, all providing services in exchange for a piece of the subsidy pie.

Although improvements have been made in some localities, an increasing number of children are removed from their homes, and forced into situations that are physically dangerous and emotionally harmful.<sup>3</sup> The thirteenth amendment may be an appropriate tool for reform. In fact, Federal District Court Judge Jack B. Weinstein suggested in *Nicholson v. Williams* that, "The exact language of the Thirteenth Amendment could be construed to cover children forcibly and unnecessarily removed without due process and then consigned to the control of foster caretakers."<sup>4</sup> This note explores Judge Weinstein's suggestion.

Common sense would seem to indicate that children removed from their homes, often without good reason, and held in state custody while generating income for the adults around them, should be protected by this "grand yet simple amendment,"<sup>5</sup> which prohibits slavery and indentured servitude within the jurisdiction of the United States.<sup>6</sup> The first section of this paper will discuss the history of the thirteenth amendment, arguing that under current standards it is properly invoked to reform child protection. The second section will explore the degree of commodification suffered by children in the child welfare system, and the harm they experience in the system's custody. The third section will explore the impact of current policies on parents, families and communities, comparing their treatment to that of slaves under the slave regime. The fourth section will discuss the nexus of race and child protection, showing that the burden of current child protective practices falls disproportionately on the shoulders of African Americans.

At issue is the friction between the rights of families and the power of the State. The well-established principle of *parens patriae* gives the state power to interfere with the rights of natural parents when circum-

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<sup>2</sup> Section 2 will discuss this issue at length.

<sup>3</sup> This point will be proven in section 2 of this article.

<sup>4</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 248 (E.D.N.Y. 2002).

<sup>5</sup> *Slaughter House Cases*, 83 U.S. (16 Wall) 36, 69 (1873).

<sup>6</sup> U.S. CONST. amend. XIII.

stances compel it to do so.<sup>7</sup> However, the Supreme Court has established a liberty interest under the Constitution for a family to raise their children free of unnecessary state interference.<sup>8</sup> This balance is probably effective to protect America's middle class and affluent families. But, as this paper will demonstrate, these protections are insufficient to protect family integrity for America's poor and disenfranchised communities. Invocation of the thirteenth amendment would require a level of scrutiny of state actions that is far stricter than standards currently utilized, resulting in a stronger presumption against interference in the lives of children and their families.

A Judge McClellan in Lansing had authority over me and all my bothers and sisters, we were "state children," court wards; he had the full say-so over us. A white man in charge of a black man's children! Nothing but legal, modern slavery—however kindly intentioned.

Malcolm X<sup>9</sup>

## SECTION I

### THE THIRTEENTH AMENDMENT

- § 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
- § 2. Congress shall have power to enforce this article by appropriate legislation.<sup>10</sup>

<sup>7</sup> See Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 403-415 (2000).

<sup>8</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that state infringement of the fundamental right of parents to make child-rearing decisions violates the due process clause); *Santosky v. Kramer*, 455 U.S. 745 (1982) (establishing "clear and convincing evidence" as the standard of proof required to terminate a parent's rights); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (finding that a mother had no right, by being a parent or through protection of religious freedom, to have her child illegally sell Jehovah's Witness materials on street corners); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925) (declaring unconstitutional a statute prohibiting parents from sending their children to any schools but public schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (declaring unconstitutional a state statute that prohibited teaching a child a foreign language before the age of eight); see generally Linda L. Lane, *Comment: The Parental Rights Movement*, 69 U. COLO. L. REV. 825 (1998) (documenting the development of parental rights through the Supreme Court).

<sup>9</sup> NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE* 374-375 (2001) citing ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* (1965).

<sup>10</sup> U.S. CONST. amend. XIII.



The thirteenth amendment's plain meaning, legislative history, and jurisprudence all require that current child welfare practices in the United States be reformed. The ratifiers of this amendment would be horrified to learn that today states take children from their parents, with little or no adjudication, subject them to conditions under which they generate income for their keepers, while stripping them of the rights enjoyed by other citizens. They would be further horrified to learn that African Americans, the very group whose freedom they had attempted to guarantee, are being subjected to this treatment in vastly disproportionate numbers.

The amendment is "self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances."<sup>11</sup> If the state of circumstances created by the child welfare system is found to constitute conditions of either slavery or involuntary servitude, they are precluded by the amendment under its own power. This section argues, first, that children in foster care are protected under the limited definition of involuntary servitude enunciated by the Supreme Court in *United States v. Kozminski*;<sup>12</sup> second, that the more appropriate definition of slavery, as opposed to involuntary servitude, should be employed to offer these children more secure protection; and third, that a realistic definition of slavery would necessarily protect communities adversely impacted by child welfare practices.

There is little case law defining slavery.<sup>13</sup> Involuntary servitude, on the other hand, has been well-defined over the years. After expanding the definition of involuntary servitude for a brief period to cover labor-

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<sup>11</sup> *United States v. Kozminski*, 487 U.S. 931, 942 (1988), *citing* *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (quotations omitted).

<sup>12</sup> *Id.*

<sup>13</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896) (stating that slavery "implies . . . a state of bondage and the absence of a legal right to the disposal of [one's] own person."). See also *Hodges v. United States*, 203 U.S. 1, 17 (1906) ("The word 'slavery,' as used in the thirteenth amendment . . . means a condition of enforced, compulsory service of one to another: 'slavery' being defined in Webster as a 'state of entire subjugation of one person to the will of another.'"). See also *Slaughterhouse Cases*, 83 U.S. 36, 49 (1872) ("The thirteenth amendment prohibits 'slavery and involuntary servitude.' The expressions are ancient ones, and were familiar even before the time when they appeared in the great Ordinance of 1787, for the government of our vast Northwestern Territory . . ."); *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (explaining that slavery is defined and regulated by municipal law and varies with jurisdiction. "In other words, the *status* of slavery embraces every condition, from that in which the slave is known simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor."); *United States v. Ingalls*, 73 F. Supp. 76, 78 (D.C. Cal. 1947) ("A 'slave' . . . is a person who is wholly subject to the will of another, one who has no freedom of action and whose services are wholly under control of another, and who is in a state of enforced compulsory service to another.").

ers, patients in mental hospitals, and juveniles in youth centers,<sup>14</sup> the Supreme Court reversed that trend in *Kozminski*.<sup>15</sup> In an opinion written by Justice O'Connor, the court defined involuntary servitude, for the purposes of a criminal prosecution under 18 U.S.C. § 241 or § 1584 as:

[a] condition of servitude in which the victim is forced to work for the defendant by the use of force or threat of physical restraint or physical injury, or by the use or threat of . . . coercion through law or the legal process. This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion. Our holding does not imply that evidence of other means of coercion, or of poor working conditions, or of the victim's special vulnerabilities is irrelevant in a prosecution under these statutes. As we have indicated, the vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve.<sup>16</sup>

By this decision, the court reaffirmed its previous decisions declaring that the amendment went beyond its primary purpose of abolishing the institution of African slavery, extending "to cover those forms of compulsory labor *akin to African slavery* which in practical operation would tend to produce like undesirable results."<sup>17</sup> The court determined that the special "vulnerabilities of the victim are relevant in determining whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve."<sup>18</sup> In exploring the "vulnerabilities" concept, the court discussed at length earlier decisions on the anti-padrone statutes,<sup>19</sup> which addressed the plight of immigrant children brought to the United States and held for profit. The statutes were intended to prohibit the practice of bringing small Italian boys to

<sup>14</sup> See *United States v. Lewis, a.k.a. My Lord and Prophet*, 644 F. Supp. 1391, 1400 (1986) (citation omitted) (documenting the broadening scope of the thirteenth amendment).

<sup>15</sup> 487 U.S. 931.

<sup>16</sup> *Id.* at 952.

<sup>17</sup> *Id.* at 942 (emphasis added), citing *Butler v. Perry*, 240 U.S. 328, 332-333 (1916).

<sup>18</sup> *Kozminski*, 487 U.S. at 952.

<sup>19</sup> *Id.* at 947. Citing the Act of June 23, 1874, ch. 464 18 Stat. 251 "[w]hoever shall knowingly and willfully bring in the United States . . . any person inveighed or forcibly kidnapped in any other country, with intent to hold such person . . . in confinement or to any involuntary service, and whoever shall knowingly and willfully sell, or cause to be sold, into any condition of involuntary servitude, any other person for any term whatever, and every person so sold and bought, shall be deemed guilty of a felony."

the United States and compelling them to work on the streets in a coerced apprentice relationship.<sup>20</sup> In describing the boys' conditions the court found that they were held "without family, and without other sources of support" and that "these children had no actual means of escaping the padrones' service; they had no choice but to work for their masters or risk physical harm."<sup>21</sup> The Supreme Court found that such conditions were "akin to African slavery," and that they therefore triggered thirteenth amendment protections.<sup>22</sup> In finding a constitutional violation, the court specified that the vulnerabilities of the victim should be considered, especially the victim's age.<sup>23</sup> These factors are used to measure the plausibility of the victim's claim of coercion through physical or legal means, or the threat thereof.

All of the cases addressing indentured servitude have mentioned coerced labor.<sup>24</sup> Some will argue that the child welfare system is not creating involuntary servitude because children in it are not made to work. This point is debatable. If coerced labor is defined as actions an individual is forced to take, which enrich another individual, then these children easily qualify as coerced laborers.<sup>25</sup> Therefore, even retaining an implied work requirement under the prohibition against involuntary servitude, children in the child welfare system would be protected under the thirteenth amendment.

However, the prohibition against slavery is the more appropriate standard by which to judge the child welfare system, and it involves no requirement of labor.<sup>26</sup> As with slavery, the child welfare system affects not just individuals, but entire communities.<sup>27</sup> Involuntary servitude involves merely the perception of coercion. But the child welfare sys-

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<sup>20</sup> *Kozminski*, 487 U.S. at 947-948.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 942.

<sup>23</sup> *Id.* at 948.

<sup>24</sup> *Id.* at 943 ("[W]e find that in every case in which this Court has found a conditions of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction.").

<sup>25</sup> It does however seem clear that the Supreme Court was operating under an erroneous view of involuntary servitude when it stressed labor. Involuntary servitude, like slavery, was a status whereby one was reduced to chattel. But, as opposed to slavery, those in involuntary servitude retained more substantial rights and would eventually be freed. See generally Bradley J. Nicholson, *Reflections on Capitalism, Property, and the Law of Slavery*, 27 OKLA. CITY U.L. REV. 151, 175 (2002).

<sup>26</sup> Akhil Reed Amar & Daniel Widawsky, Commentary: *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1377 (1992) ("In the case of minors, however, we should focus less on 'involuntary servitude' and more on 'slavery,' which in this context is usefully understood as domination and degradation not plausibly for the benefit of the child.").

<sup>27</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 239 (2002).

tem, mirroring slavery, has established an actual regime of legal coercion and commodification.<sup>28</sup> For these reasons, the child welfare system is best analogized to slavery.

Slavery was a status, not merely an activity. Therefore, there can be no work requirement in the definition of slavery. If a slave was not made to work, she was not unshackled of her status and allowed to be free.<sup>29</sup> The injured, infants, and the elderly were slaves, whether or not they contributed any labor.<sup>30</sup> As with the child welfare system, slavery was a legal status, out of which one could not legally escape. Thus, an individual's ability to work was never determinative of his or her slave status, and should not be determinative in present day thirteenth amendment cases.

Since there is no relevant case law definition for slavery, a standard at least as broad as that recently outlined in *Kozminski* for involuntary servitude should be applied to define slavery.<sup>31</sup> The standard set in *Kozminski* was a criminal one where the standard proposed here is a civil one. Since the jurisprudential principles that concerned the Court in *Kozminski* do not apply, a court would have a great deal more latitude and could establish a much broader standard. But even under the rather restricted *Kozminski* standard, the amendment would prohibit any set of circumstances that was akin to African slavery.<sup>32</sup> The special vulnerabilities of the victim would also be evaluated in determining the plausibility of coercion.<sup>33</sup>

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<sup>28</sup> See *The Antelope*, 23 U.S. 66, 103 (1825) ("The very definition of slavery in the civil law, which has been copied by writers on public law, shows, that it was an institution established by positive law, against the law of nature.").

<sup>29</sup> See Paul Finkelman, *Crime of Color*, 67 TUL. L. REV. 2064, 2074-2082 (1993) (Virginia enacted the first slave statute in 1662, decreeing that one's status as a slave was determined by the status of one's mother. If the mother was a slave, so too was the child. The act read: "Whereas some doubts have arrisen [sic] whether children got by Englishman upon a negro woman should be slave or free, *Be there fore enacted and declared by this present grand assembly*, that all children borne in this country shalbe [sic] held bond or free only according to the condition of the mother," (emphasis in original)).

<sup>30</sup> Amar & Widawsky, *supra* note 26 at 1369-70 (describing slavery as "a system of dominance and degradation in which the master may treat the slave as a possession rather than a person. Some slaves were so physically abused that they were unable to work. Clearly the Thirteenth Amendment did not exclude these people from its protection simply because they served a sadistic master . . . rather than merely a greedy master.").

<sup>31</sup> *Kozminski*, 487 U.S. at 952.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

In this situation, the vulnerabilities of the affected communities must also be considered.<sup>34</sup> The child welfare system disproportionately targets African Americans, Native Americans and other disenfranchised racial groups. It also targets the poorest members of our society. There are no more vulnerable communities than those just listed. The proposed definition recognizes that a “necessary incident”<sup>35</sup> of slavery was the selective subjugation of our most vulnerable communities, and that to protect against the resurgence of slavery we must protect them. It offers protections not just to children in care but also to their parents, whose homes are searched and children are taken, and to poor and African and Native American communities, who are experiencing a large-scale forced relocation of their children. It should be noted that the thirteenth amendment does not state that no individual shall be subjected to conditions of slavery.<sup>36</sup> Instead, it states, “[n]either slavery nor involuntary servitude . . . shall exist,”<sup>37</sup> implying, in this simple prohibition, protection to racial or social groups who might feel the oppressive weight of slavery.<sup>38</sup>

By its simple declaration that slavery shall not exist, the thirteenth amendment proscribes any compelling state interest exception which would allow slavery or indentured servitude under exigent circumstances.<sup>39</sup> Defenders of the child welfare system may still insist that the state is compelled to intervene in homes where abuse or neglect are occurring. The fact that the current system may actually be causing more harm than good is evidence that the state can have no legitimate interest in pursuing this policy. After all, there can be no compelling state interest in randomly pulling children from their homes and subjecting them to a system known to be harmful.<sup>40</sup>

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<sup>34</sup> ROBERTS, *supra* note 27 at 250 (explaining that the Supreme Court noted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 33 (1989), that Congress had endorsed the concept of group harm in addressing the removal of Indian children from their homes by child welfare workers. Congress found “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.” (emphasis omitted)).

<sup>35</sup> *Civil Rights Cases*, 109 U.S. 3, 22 (1883).

<sup>36</sup> U.S. CONST. amend. XIII.

<sup>37</sup> *Id.*

<sup>38</sup> Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1019 (2002) (in propounding and ratifying the thirteenth amendment, Republicans held the conviction that “the rights they were guaranteeing were, in a fundamental sense, collective”).

<sup>39</sup> Andrew Koppelman, *Legal Theory: Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 *NW. U.L. REV.* 480, 515-516 (1990).

<sup>40</sup> See generally DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* ch. 6 (1994).

By the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be free forever.<sup>41</sup>

The amendment's ratifiers intended its scope to be broad. Those on both sides of the thirteenth amendment's ratification debate envisioned it as more than a mere prohibition on southern slavery,<sup>42</sup> recognizing that it prohibited all future circumstances that would create conditions of "substantive slavery."<sup>43</sup> Both those supporting and those opposing the amendment saw it as a broad attack against the traditional relationship between the states and the national government, and perhaps even the end of federalism.<sup>44</sup> The amendment's first section's prohibitions, coupled with the broad grant of power in the second section appeared to them as a broad expansion in federal powers. The opposition saw this power as granting Congress the ability to interfere in the actions of states and private individuals, to do away with conditions of slavery and to make all individuals equal before the law.<sup>45</sup> Several senators, attempting to invoke fear, argued that not only would it make blacks the legal equals of whites but would render women equal to men, wives the equals of their husbands.<sup>46</sup>

The amendment's supporters also saw it as a broad restructuring of power between the federal government and the states. Abolitionists viewed slavery as an affront to the Constitution and the natural rights of man. With this amendment, they intended not only to destroy the institution of slavery, but also to explicitly secure equal rights for all individuals under the law.<sup>47</sup> Supporters meant to reach beyond the formal institution of southern slavery, to individuals in the north and elsewhere who were being held in conditions of "substantive slavery."<sup>48</sup> The Supreme Court subsequently interpreted the amendment as doing no less

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<sup>41</sup> Griffin v. Breckenridge, 403 U.S. 88, 105 (1971).

<sup>42</sup> G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment: Chapter 1: Great Expectations: The Issuance of the Emancipation Proclamation, Adoption of the Thirteenth Amendment, and Passage of the Civil Rights Act of 1866*, 12 Hous. L. Rev. 2, 10 (1974) (explaining that the Emancipation Proclamation had effectively ended southern slavery and that the framers intended the amendment to reach into the future to prohibit conditions of substantive slavery).

<sup>43</sup> *Id.* at 11.

<sup>44</sup> Azmy, *supra* note 38 at 1022.

<sup>45</sup> Buchanan, *supra* note 42 at 8.

<sup>46</sup> *Id.* at 8-9.

<sup>47</sup> *Id.* at 9-10.

<sup>48</sup> *Id.* at 11.

than “establishing and decreeing universal civil and political freedom throughout the United States.”<sup>49</sup>

#### THE THIRTEENTH AMENDMENT APPLIED TO CHILD WELFARE

The thirteenth amendment has been raised infrequently in child welfare situations and has not been applied coherently. In *Hutchinson v. Spink*, the Seventh Circuit rejected a thirteenth amendment argument in a case involving the death of a foster child.<sup>50</sup> In *Spink*, Andrew Michael Baker, then twelve-years-old, was removed by child welfare officials from his mother because she could not handle his hyperactivity. During the removal, Andrew’s mother asked that the child be placed in the hospital. Instead, he was placed on a farm, with a foster family that was known to use foster boys as farm workers. While working on a piece of farm machinery, Andrew fell into the grain bin and was suffocated. He inhaled twenty pounds of grain into his lungs. The Court incomprehensibly rejected the thirteenth amendment claim saying it “fails because there is no allegation that Andrew was coerced into performing labor through the threat of physical or legal sanctions.”<sup>51</sup> However, the Court did not discuss the commodifying effect of the subsidy the foster family received.

In *Zazsheen v. Ragaglia*, a thirteenth amendment claim was similarly rejected for lack of a showing that the plaintiffs were subjected to compulsory labor.<sup>52</sup> In this case, claims were brought against child welfare officials for not intervening in a home where they knew abuse to be occurring.<sup>53</sup> The *Ragaglia* court cited the Supreme Court’s dicta in *Robertson v. Baldwin*<sup>54</sup> stating that the thirteenth amendment was not intended to “disturb the right of parents and guardians to the custody of their minor children or wards.”<sup>55</sup> In both these cases, one involving a child abused in foster care, the other involving a child abused in the home, the court rejected thirteenth amendment claims.<sup>56</sup>

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<sup>49</sup> *Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>50</sup> 126 F. 3d 895 (1997).

<sup>51</sup> *Id.* at 901.

<sup>52</sup> 154 F. Supp. 2d 290 (D. Conn. 2001) citing *Kozminski*, 487 U.S. at 942.

<sup>53</sup> See generally *Ragaglia*, 154 F. Supp. 2d at 290.

<sup>54</sup> 165 U.S. 275 (1897).

<sup>55</sup> *Id.* at 282.

<sup>56</sup> See Koppelman, *supra* note 39 at 525-526, “Robertson, although it has never expressly been overruled, stands as a decision whose rationale has evaporated from under it.”

However, at least two federal judges have realized the applicability of the thirteenth amendment to child welfare situations. In *Doe v. Johnson*, another district court judge chided the plaintiffs for not bringing a claim under the thirteenth amendment.<sup>57</sup> In her three years with foster parents, Doe was repeatedly bound, beaten, forced to watch the mutilation and dismemberment of various animals, denied proper nourishment, and sexually abused. When she entered foster care with the Swaziek family, she was thirty-five inches tall and weighed thirty pounds. When she was removed from their home three years later, she had grown only an inch and still weighed thirty pounds. She was visited repeatedly by caseworkers during this time, but they failed to notice her stunted growth. The judge said that the plaintiffs should have alleged a claim under the thirteenth amendment, as opposed to the fourteenth. The Court denied Doe's fourteenth amendment claim because Childserv, the social service agency that had placed and monitored her, was not determined to be a state actor, but suggested that the plaintiff could have made out a claim under the lower pleading requirements of the thirteenth amendment.<sup>58</sup>

In *Nicholson v. Williams*, Judge Jack Weinstein drew analogies between the treatment of slaves and the treatment of a class of mothers who had their children removed because these mothers were victims of domestic violence.<sup>59</sup> According to Judge Weinstein, the conditions under which the children were taken were sufficiently similar to conditions of slavery to raise a possible thirteenth amendment claim.<sup>60</sup> All of these cases point out compelling similarities between slavery and the current functioning of the child welfare system, and indicate a need for a coherent standard, based on the thirteenth amendment, to protect children and families. The remainder of this article will use the "akin to African slavery standard", to argue that the child welfare system mimics enough of the necessary incidents of slavery to make invocation of the thirteenth amendment appropriate.

Defenders of the child welfare system could note that the thirteenth amendment provides an exception for people who have committed crimes for which they have been convicted.<sup>61</sup> Clearly the children in the child welfare system have committed no crime. But some may point

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<sup>57</sup> 1993 U.S. Dist. LEXIS 3284 at \*8 (N.D. Ill. 1993).

<sup>58</sup> *See id.*

<sup>59</sup> 203 F. Supp. 2d 153, 248 (E.D.N.Y. 2002).

<sup>60</sup> *Id.*

<sup>61</sup> U.S. CONST. amend. XIII.



to family court procedures as satisfying the adjudication requirement as to their parents. In doing so, they ignore the fact that only rarely have parents committed a criminal act regarding their children's care. While some may have committed an act of criminal child abuse,<sup>62</sup> or child neglect,<sup>63</sup> the vast majority are accused of much milder forms of maltreatment that do not rise to the level of criminality.<sup>64</sup> Whether the parents have committed criminal acts against their children or not, it is clear that they do not receive the protections of a criminal adjudication in family court. Lawyers for these parents are scarce<sup>65</sup> and the standard of proof required of the state is far lower than in a criminal trial,<sup>66</sup> as is the standard for admissibility of evidence.<sup>67</sup> In addition, many parents have their children removed prior to any adjudication at all. Using an "imminent danger standard," caseworkers are allowed to remove the child from the parents and seek court approval later.<sup>68</sup> Therefore, the

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<sup>62</sup> New York criminal statutes concerning crimes against children: N.Y. PENAL LAW § 120 (McKinney 2003) (assault and reckless endangerment); N.Y. PENAL LAW § 125 (McKinney 2003) (homicide, manslaughter, murder); N.Y. PENAL LAW § 130 (McKinney 2003) (sex offenses); N.Y. PENAL LAW, § 255.25 (McKinney 2003) (incest); N.Y. PENAL LAW § 263 (McKinney 2003) (using a child in a sexual performance and promoting sexual performance by a child).

<sup>63</sup> N.Y. PENAL LAW § 263 (McKinney 2003) (abandonment and endangering the welfare of a child).

<sup>64</sup> See LINDSEY, *supra* note 40 at 120 (in one New York study, only 1% of child abuse allegations involve battered children). See also Martin Guggenheim, Commentary: *The Foster Care Dilemma and What to Do About It: Is the problem that too many children are not being adopted out of foster care or that too many children are entering foster care?* 2 U. PA. J. CONST. L. 141 at n. 19 (1999) (showing that children who have been severely maltreated by their parents constitute only 10% of the children coming into the system).

<sup>65</sup> The first time this author attended a hearing following an emergency removal of a child he heard the judge tell the parents that they would not be provided a lawyer as there were none available. See also Nicholson, 203 F. Supp. 2d at 221-230 (attorneys for poor parents are over-burdened and are not providing adequate representation).

<sup>66</sup> N.Y. JUDICIARY LAW §1046 (McKinney 2003). Cited in NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, CHILD PROTECTIVE MANUAL appendix E (1995) (For the Family Court to make a determination that child abuse or neglect occurred a "Fair Preponderance of the Evidence is required. To terminate parental rights, the state has to present "Clear and Convincing Evidence." The standard required in criminal court is "Beyond a Reasonable Doubt.").

<sup>67</sup> See N.Y. JUDICIARY LAW §1046 (a)(iv) (McKinney 2003).

<sup>68</sup> THE CITY OF NEW YORK ADMINISTRATION FOR CHILDREN'S SERVICES: JAMES SATTERWHITE TRAINING ACADEMY: LEGAL HANDOUTS: IMMINENT DANGER 14 (June 1998) (Conditions evidencing imminent danger to the child's life and health would include, but would not be limited to, the following: The child has suffered serious physical or emotional injury, for example, sexual abuse, and the parent or caretaker refuses or is unable to protect the child. The child is in a dangerous environment and there is a substantial likelihood that the child will be harmed and the parent or caretaker refuses or is unable to protect the child. The child does not receive the minimum degree of supervision for his age and the parent refuses or is unable to care for the child. Parent or caretaker states that s/he will seriously harm or kill the child or the child(ren) indicates that s/he will harm or kill himself or herself. The determination of imminent danger must be made on a case-by case basis, taking into

vast majority of parents have committed no criminal act and even those committing crimes against their children are rarely charged criminally, and so cannot be excluded from the thirteenth amendment's protections.<sup>69</sup>

## SECTION II

### CHILDREN AND THE SYSTEM

"You take her back! She's not worth the check anymore!" An adoptive mother said this to me during an investigation. Her eleven-year-old daughter had gone to the local police precinct after being back-handed by the adoptive father. According to all parties, the father back-handed the eleven-year-old girl after she returned home late from school. As I interviewed the mother, her contempt for the child was palpable. She felt that her husband had been justified in striking the child and was angry with the child for betraying the family. The couple, Asian Indian immigrants, had adopted the child, African American, at the age of four, after their own children were out of the home. The couple was angry with the girl because she had lingered too long in the school yard after school had been dismissed. They explained that they had raised two biological children in the same neighborhood with no difficulties and were at a loss as to their problems with this girl. The subtext seemed to be that they did not want their daughter hanging out with other African American children. Woefully unequipped to deal with the stresses of raising an African American girl in a troubled, overwhelmingly African American neighborhood, the adoptive parents decided that she was no longer worth the stress, or the subsidy check, and returned her. In an age of intensive interference into African American neighborhoods, and of systematic transfers of children from poor families to slightly less poor families, occurrences like this one have become the rule rather than the exception.

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consideration: the child's age, type of environment, condition of the child, behavior and condition of the parent or caretaker, history of the family if known, ability and willingness of the parent or caretaker to accept services, and the availability of services to alleviate the imminent danger of harm.).

<sup>69</sup> But see LINDSEY, *supra* note 40 at 169 (True acts of child abuse are actually assaults and should be treated as such. He points out the differential treatment of wife abuse and child abuse. Where, in many jurisdictions, the police are required to file a report and take a suspect in custody in a situation involving wife abuse, child abuse reports are investigated primarily by social workers whose aim is often to "treat" the abusing parent.).

PRIMUM NON NOCERE  
(FIRST, DO NO HARM)<sup>70</sup>

"I don't know what to say. We just picked the kid up from one crack house and dropped her off at another crack house." This is what Latoya, one of my co-workers, told me after completing her first emergency removal. Latoya, raised in the projects of the ghettoized Jamaica section of Queens, was generally not quick to judge or easy to shock, but this event had shaken her up. Six weeks of agency training about the need for intervention into the lives of families was unraveling. Clearly, Latoya thought she had in no way helped this child.

What I don't understand is, if you take a child out of an environment you consider unfit, why put her with someone else who does the same thing?

Savasia<sup>71</sup>

The impulse to "do something about child abuse" is understandable.<sup>72</sup> Tales of children brutalized and murdered in their own homes permeate the media, but those arguing for aggressive interference ignore one fundamental question: "Are children worse off in the care of abusing and neglecting parents or in the care of the state?"<sup>73</sup> Put differently, which is worse: the harm that results from maltreatment at the hands of a parent or the harm that results from the maltreatment of a state agency?

Richard Gelles and Ira Schwartz, take aim at programs designed to prevent the placement of children into the foster care system in their

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<sup>70</sup> HIPPOCRATES, *EPIDEMICS*, BK. 1 §11, "Declare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things—to help, or at least to do no harm," available at [www.geocities.com/everwild7/noharm.html](http://www.geocities.com/everwild7/noharm.html) (last visited Feb. 14, 2003).

<sup>71</sup> Deborah Gregory, *Savasia's Story*, *ESSENCE* at 62 (Dec. 1995) (recounting Savasia's childhood in foster care. She endured nineteen different placements, several of which were abusive.).

<sup>72</sup> See generally Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for Intervention, 8 *HARV. J. OF L. & PUB. POL.* 539 (1985) (explaining that despite the initial success at reducing the rate of child abuse, current practices offer little in the way of protection to the child and are actually quite harmful to the child).

<sup>73</sup> GARY B. MELTON, ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 441 (2d ed., 1997) ("Although there are no clear answers to this question yet, the fact that it is seriously posed indicates both the depth of controversy about policies concerning child maltreatment and the widespread skepticism about the ability of social service and mental health professionals to evaluate possible maltreatment validly and to treat parents and children successfully.").

article, *Children and the Child Welfare System*.<sup>74</sup> They defend foster care saying:

What little research exists on out-of-home-placement has found that *children who reside in foster care fare neither better nor worse than children who remain in homes in which mistreatment occurred*. This undermines the belief that foster care placements are more dangerous and detrimental to children than remaining with their biological parents who have abused or neglected them.<sup>75</sup>

Thus, foster care's defenders justify a program of massive government intervention, costing nearly \$12 billion per year, while defending it as, at best, ineffective.<sup>76</sup> Moreover, evidence suggests that child welfare professionals seldom face a Hobson's choice, abuse by the parents or abuse by the system, but instead are removing children from adequate homes and placing them in a system that will harm them.<sup>77</sup>

Research has demonstrated foster care to be quite harmful. The Children's Defense Fund reports that twenty thousand children age out of foster care each year with no formal connections to families, having been neither adopted nor returned to their parents.<sup>78</sup> They quote a national study as showing that "within two to four years of leaving foster care, only 54% of foster kids had completed high school, fewer than half were employed, 25% had been homeless, 30% had no access to needed healthcare, and 60% of the young women had given birth."<sup>79</sup> High

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<sup>74</sup> 2 U. PA. J. CONST. L. 95, 107 (1999).

<sup>75</sup> *Id.* at 107 (emphasis added).

<sup>76</sup> ROBERTS, *supra* note 27 at 142 (citing calculations by Mark Courtney estimating the amount spent by federal state and local governments directly for child welfare, to be \$11.2 billion in 1995).

<sup>77</sup> See Federal District Judge Richard Posner's commentary, criticizing a Gelles type "defense" of child welfare, in K.H., through *Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990). "If the fire department rescues you from a fire that would have killed you, this does not give the department license to kill you, on the ground that you will be no worse off than if there were no fire department. The state, having saved one man from a lynch mob, cannot then lynch him, on the ground that he will be no worse off than if he had not been saved. The Illinois Department of Children and Family Services could not have subjected K.H. to sexual abuse and then defended on the ground that by doing this it did not make her any worse off than she would have been had she been left with her parents."

<sup>78</sup> Children's Defense Fund, *Abuse and Neglect Basics* (2001), available at [www.cdfactioncouncil.org/child%20Abuse.htm](http://www.cdfactioncouncil.org/child%20Abuse.htm) (last visited Feb. 23, 2003).

<sup>79</sup> *Id.* But see, Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1777-1796 (1987) (arguing that the underlying tenets of the "minimum intervention" movement are deeply flawed and the benefits of intervention tend to outweigh the costs of non-intervention).

proportions of the homeless are also graduates of the foster care system.<sup>80</sup>

A child is more than twice as likely to die of abuse in foster care than in the general population.<sup>81</sup> The rate of sexual abuse in foster homes has been shown to be two to four times higher than in the general population, while physical abuse is three times higher.<sup>82</sup> In group homes, the rate of physical abuse is ten times higher than in the general population, while the rate of sexual abuse is twenty-eight times higher.<sup>83</sup> The high rate of abuse in group homes is due to the frequency of abuse between children.<sup>84</sup> The *Los Angeles Times*, relying on a 1997 grand jury report, reported that “many of the nearly 5,000 foster children housed in Los Angeles County group homes are physically abused and drugged excessively while being forced to live without proper food, clothing, education and counseling.”<sup>85</sup> Reports of long-term residents in New York City’s group homes subjecting newcomers to rape, robbery, and assault are common.<sup>86</sup> Also common are reports that girls in New York City’s group homes are being pimped out by local gang members.<sup>87</sup>

Besides being endangered while in the state’s custody, many, if not most, of the children in foster care were unnecessarily removed from their homes.<sup>88</sup> These children faced no harm in their homes,<sup>89</sup> except that of the deep levels of poverty to which we increasingly subject our

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<sup>80</sup> RICHARD WEXLER, *WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE*, 175 (1995) (In Minneapolis between 14 and 26 percent of homeless adults were foster care graduates. In New York, between 25 and 50 percent of the young men in the city’s homeless shelters were foster care graduates). See also BERNSTEIN, *supra* note 9 at 368 (until the 1980s New York City offered no support for those aging out of the foster care system at age 18, causing city shelters to be overrun by foster care graduates).

<sup>81</sup> Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 *NEW ENG. L. REV.* 129 at 137 (2001) [hereinafter Wexler, *Take the Child and Run*].

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> As cited in ROBERTS, *supra* note 27 at 204.

<sup>86</sup> *Id.*, see also BERNSTEIN, *supra* note 9 at 10 (describing the process whereby newcomers are systematically subjected to a regime of homosexual rapes, known as “the racket”).

<sup>87</sup> This situation was relayed to me by several co-workers at ACS and appears to be common knowledge within the agency. See also Nina Bernstein, *City Evaluates Providers at Group Homes*, *NEW YORK TIMES*, Sept. 1, 2001 (discussing a nineteen-year-old girl interviewed in a group home who “[l]ike many of the teenagers who end up in group care, including a four-month stint last year at the city’s Hegeman Transitional Center in Brooklyn, which has a long history of poor supervision, violence, drug use and prostitution”).

<sup>88</sup> Guggenheim, *supra* note 64 at 141 (only 10% of the children in foster care were removed for serious abuse).

children.<sup>90</sup> Obviously, the child facing death or injury at home may benefit by being placed in foster care, even a system as harmful as ours. But the child removed from an adequate home and placed in our foster care system is only harmed. This situation requires a “balancing of harms.”<sup>91</sup> The harm of remaining in the home must be balanced against the harm of removal and placement in foster care. Unfortunately in the United States an increasing number of families live in conditions of poverty.<sup>92</sup> Because of their poverty, children in these families face an increased danger of either being actually maltreated or neglected or of being misidentified as such by the child protective system.<sup>93</sup> To mitigate the risk of remaining in the home, concrete support should be supplied to the child’s family. There is debate as to the efficacy of current intensive home preservation programs.<sup>94</sup> There is conclusive evidence, however, that providing tangible support to a family can reduce the risk to the child.<sup>95</sup>

Many of the more than a quarter million children who enter foster care each year are needlessly removed from their parents.<sup>96</sup> A 1981 study of children in foster care found that about half of these children had never been maltreated by their parents.<sup>97</sup> By some estimates, fewer than ten percent of substantiated ACS cases involved any kind of physical or severe emotional abuse. Ninety percent of these cases were comprised of families accused of failing to provide properly for their children.<sup>98</sup> The Child Welfare Institute, in reviewing foster care decision in three Illinois cities, determined that “in one third of the cases

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<sup>89</sup> LINDSEY, *supra* note 40 at 127-157 (Whether a child is removed from the home is essentially a random event. The author’s study revealed that high percentages of children who were in foster care did not require it, while children who were in real danger were left in their homes).

<sup>90</sup> See also THE ANNIE E. CASEY FOUNDATION, CITY KIDS COUNT: DATA ON THE WELL-BEING OF CHILDREN IN LARGE CITIES, at [www.aecf.org/kidscount/city/newo\\_la.htm#povaff](http://www.aecf.org/kidscount/city/newo_la.htm#povaff) (explaining that the poverty rate for children in their 50 city survey had increased from 18% in 1969 to 27% in 1989) (last visited Mar. 19, 2003).

<sup>91</sup> ROBERTS, *supra* note 27 at 18.

<sup>92</sup> See generally ARLOC SHERMAN, CHILDREN’S DEFENSE FUND, WASTING AMERICA’S FUTURE: REPORT ON THE COSTS OF CHILD POVERTY, introduction by Marian Wright Edelman XV (1994).

<sup>93</sup> See LINDSEY, *supra* note 40 at 94-102.

<sup>94</sup> See generally Gelles, *supra* note 74 (demonstrating that home preservation programs are ineffective). But see Wexler, *Take the Child and Run*, *supra* note 80 at 129 (demonstrating those same programs to be effective).

<sup>95</sup> ROBERTS, *supra* note 27 at 137 (citing several studies).

<sup>96</sup> Children’s Rights, Facts About Child Welfare available at [www.childrensrights.org/about/facts.htm](http://www.childrensrights.org/about/facts.htm) (last visited March 23, 2001).

<sup>97</sup> Cited in Besharov, *supra* note 72 at 558.

<sup>98</sup> Guggenheim, *supra* note 64 at 141.

there was absolutely no reason for the children not to be at home with their parents.”<sup>99</sup>

“You want to be able to leave that home and know that the child will be safe, that you won’t end up in front of the fatality review board, or on the cover of the Post.”<sup>100</sup>

“When in doubt, take ‘em out.”<sup>101</sup>

“Any ambiguity regarding the safety of the child will be resolved in favor of removing the child from harm’s way.”<sup>102</sup>

This defensive social work practice, combined with racism and classism, results in over-intervention into families by child welfare officials. In the ACS offices it was called “*New York Post* syndrome” or “*Daily News* syndrome.”<sup>103</sup> The caseworker’s focus is not on the child’s welfare, it is on not ending up in front of the fatality review board and not getting his name in the papers. As a result, there is little focus on helping children or their families.<sup>104</sup> Removing children becomes the safe answer. When children die in the homes of their parents, it is the agency’s fault and it makes headlines. When they die in foster care, it is another caseworker’s fault, and ACS generally avoids the blame.

Much of the child protective system’s harmfulness stems from incoherent standards for intervention. Since statutes and guidelines are vague, caseworkers and supervisors are given discretion to make a “gut” call.<sup>105</sup> In making a gut call, it is nearly impossible for the caseworker to

<sup>99</sup> Cited in ROBERTS, *supra* note 27 at 59.

<sup>100</sup> This was stated repeatedly, by the trainer, during this author’s Child Protective Specialist Training at the NYC ACS Satterwhite Academy.

<sup>101</sup> The doctor running this author’s Medical Issues training at the NYC ACS Satterwhite Academy repeated this phrase frequently throughout the training.

<sup>102</sup> ACS mission statement contained in the 1996 reform plan. Cited in BERNSTEIN, *supra* note 9 at 437.

<sup>103</sup> See also Akka Gordon, *Taking Liberties*, CITY LIMITS 18, 20 (Dec. 2000) (“[A]t moments of uncertainty, the mantra was ‘Cover your ass’—a phrase heard often around the office. It was backed up by pervasive fear—among caseworkers, supervisors, managers and attorneys—of seeing our photograph in the *Daily News* as the person who made an error that was literally fatal.”).

<sup>104</sup> *Id.*

<sup>105</sup> NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT, PUBLICATIONS: DEFINING CHILD MALTREATMENT available at [www.calib.com/nccanch/pubs/usermanual/basic/section2.cfm](http://www.calib.com/nccanch/pubs/usermanual/basic/section2.cfm) (“Within any given State and community, there are different types of definitions of child maltreatment. Some definitions are found in laws, some are found in procedures, and some are found in the informal practices of those agencies assigned to implement laws concerning child abuse and neglect”). See also Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAVIOR 8 (1993) (explaining the ramifications of broad and narrow definitions of child maltreatment); Susan J. Rose & William Meezan, *Defining Child Neglect: Evolution, Influences and Issues*, SOC. SERV.

divorce himself from his cultural and class prejudices. This leads to differential treatment of the poor and non-whites. With no coherent guidelines, child welfare officials can justify nearly any interference, no matter how capricious. But when a child under their supervision is harmed, they also have nothing to defend themselves with against accusations about their judgment. With no protection from a decision not to remove a child, child welfare officials err on the side of removal, placing their interests over the children's.

This lack of coherent standards results in massive inconsistencies within agencies and within the system as a whole. Standards differ between supervisors, managers, and boroughs.<sup>106</sup> Some supervisors stress the need to investigate quickly and get out of the family's life. Others require the caseworker to visit every child at school, and to contact the child's doctors. These were the supervisors who required their caseworkers to "visualize the child for bruises." This meant that whether the report was that the child was not attending school, was not dressed for the weather, or had been told by her mother that her father did not love her, the child was asked to pull up her sleeves and pant legs and expose her back to check for bruising.<sup>107</sup> They collected all of this data regardless of relevance to the allegations. Some supervisors were cautious about removals, conducting them only after a careful investigation. Some ordered them on only the slightest allegations and conducted the investigation subsequently, if at all. Each investigative unit developed its own culture, its own definitions, and its own standards for investigation. These inconsistencies are reflected in local<sup>108</sup> and na-

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R. 279 (June 1993) ("a reliable operational definition of this concept has yet to be developed or generally accepted in practice").

<sup>106</sup> During the author's continued training phase, after caseworkers had been placed in a field office, performance standards became the source of much bemusement. When a trainer asked what the class would do in this or that scenario, the inevitable answer was "depends on who your supervisor is."

<sup>107</sup> This was not done for children who were old enough to communicate effectively.

<sup>108</sup> Not surprisingly, substantiation rates vary widely within agencies and between states and counties. NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, STATUS REPORT I: JUNE 1998: OUTCOME & PERFORMANCE INDICATORS (June 1998). ACS is broken down into boroughs, field offices within those boroughs and community districts. In Queens, the substantiation rate for abuse reports vary from 18.2% in Community District Nine (Ozone Park/Woodhaven) to 28.7% in Community District Fourteen (Rockaway/Broad Channel). Substantiation rates vary widely across boroughs as well. In 1997 Manhattan caseworkers substantiated 50.5% of the reports they investigated, while caseworkers in Queens substantiated only 25.5% and Staten Island caseworkers substantiated 31.8%. Interestingly, the Office of Confidential Investigations, which investigates allegations of abuse against foster parents, and other child care providers, only substantiated 14.7% of the reports it investigated.



tional<sup>109</sup> child protection data. One study compared the data of twenty-eight states and found tremendous variation between the rates of substantiation and the type of maltreatment found.<sup>110</sup> Interestingly, this study found that substantiation rates were not correlated with state variations in the percentages of children living in poverty, residing in metropolitan areas, or the percentage of children of color in the child population.<sup>111</sup> This study also found the correlation between the number of cases substantiated due to neglect and the rate of child poverty in the state to be insignificant.<sup>112</sup> Similarly, this report found that the poverty rate and the number of children entering foster care were not linked.<sup>113</sup>

The amount of child protective activity has also increased dramatically over time and has had no impact on actual child safety. The number of cases reported each year now exceeds three million, triple what it was in 1980.<sup>114</sup> Despite the massive increase in reporting and investigative activities, there has been no decrease in child fatalities.<sup>115</sup> In fact, in comparing states with differing reporting levels, Duncan Lindsey found no correlation between the level of reporting and child fatalities.<sup>116</sup>

The data above reveals much about the arbitrariness of our child protective and foster care systems. There is no consistent standard for intervention between jurisdictions or within jurisdictions over time. Whether a child is removed depends not so much on the type or degree of maltreatment,<sup>117</sup> but on the particular caseworker, supervisor, or manager assigned to the case, and on the amount of media attention

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<sup>109</sup> For instance, one South Carolina county substantiated 89% of maltreatment reports while another substantiated only 14%. *As cited in* ROBERTS, *supra* note 27 at 54.

<sup>110</sup> U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD WELFARE OUTCOMES 1999: ANNUAL REPORT: CHAPTER 3: KEY FINDINGS AND IMPLICATIONS, *available at* [www.acf.hhs.gov/programs/cb/publications/cwo99](http://www.acf.hhs.gov/programs/cb/publications/cwo99) (last visited Mar. 19, 2003). Although nationally the median incidence of psychological maltreatment was only 3.2%, it accounted for 37.9% of substantiated cases in Utah and 29.8% of substantiated reports in Connecticut. Physical abuse ranged from 3.6% in North Carolina to 28.5% in New Mexico with a median of 21.7%. Overall the amount of maltreatment per 1,000 children varied from 1.7% in Pennsylvania to 18.3% in Florida, with a median of 9.7%.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* For instance, while Minnesota has one of the lowest rates of children living in poverty it had one of the highest rates of children entering foster care. Alternatively, Texas, which has one of the highest rates of child poverty had one of the lowest rates of foster care entry. *Id.*

<sup>114</sup> MELTON, *supra* note 73 at 442.

<sup>115</sup> LINDSEY, *supra* note 40 at 102.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 154 (neither the degree of injury to the child nor the level of abuse suffered by the child were predictive of removal).

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child fatalities have received. The decision to remove a child from her home is primarily a political one. Inconsistent standards leave large holes through which individual caseworkers and agencies push their prejudices on parenting, class and race. These inconsistencies tell us that many of the children who suffer removals from their homes are condemned to needless harm. Since harming children should not be a legitimate state interest, this intervention cannot be justified.

I wonder if it be a sin, to think slavery a curse to any land. Men and women are punished when their masters and mistresses are brutes, not when they do wrong.<sup>118</sup>

Current discussions about foster care are reminiscent of those about slavery in the antebellum South. Defenders of foster care may admit its harm, but argue that because these children are uniformly poor, and because they were removed from possibly neglectful, or even abusive homes, the disadvantages resulting from their participation in the foster care system are not so bad. In defending the barbarous slave system, many southerners took a similar approach. As Eugene D. Genovese points out, "Slaveholders generally believed that their slaves lived better than the great mass of peasants and industrial workers of the world. Virtually every southerner who raised his voice at all on the subject insisted on the point."<sup>119</sup> Slaveholders pointed to the abysmal conditions of the white working poor, the length of the workday, their diet and their living conditions as evidence that their slaves did not unduly suffer.<sup>120</sup> Defenders of both these conditions, slavery and foster care, use this comparison to obscure the fact that they are subjecting individuals to a system that strips them of rights and converts them into commodities.

## COMMODIFICATION

It was a week before Christmas and wet snow fell on us as we stood in front of the ACS office waiting for the van service to show up. We were taking a four-year-old and his infant twin brothers for foster care placement in the Bronx. When the van pulled up we learned that it had one child seat, and it fit none of the children. We entered the van and

<sup>118</sup> Mary Boykin Chestnut as quoted in EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 67 (1974).

<sup>119</sup> *Id.* at 58.

<sup>120</sup> *Id.* at 59.

headed quickly, in the mounting snowstorm, down the Grand Central Parkway, over the Triborough Bridge and into the South Bronx. As the van sped through traffic, and as my partner and I both cradled infants in our arms, we were probably placing the children in as much harm as the mother ever had by not having an appropriate car seat.<sup>121</sup> The four-year-old kept crying, wailing that he just wanted his mother back. At one point, he looked me in the eyes and asked who he was going to spend Christmas with.

We arrived at our destination: a high-rise project tucked alongside the Brukner Expressway, and made our way to the foster mother's apartment. Although time and the Housing Authority's neglect had taken a toll, the place was neat, sparsely furnished and a bit dark. The walls had that dark patina of filth that comes from decades of greasy cooking, and the hard tile floor was fraying around the edges. This was not the type of foster home politicians want voters to picture. But, all in all, it was neither better nor worse than most other foster homes. The foster mother seemed competent, but was obviously in the baby boarding business and there were several children, whom she baby-sat, waiting to be picked up by their mothers. When the four-year-old walked in and looked around, he began crying even louder.

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From the moment the report<sup>122</sup> reaches the field office, the child on whose behalf the report was made becomes a potential source of income for the professionals and agencies which handle the case. Upon receiving the report, the caseworker decides when to conduct the home visit.<sup>123</sup> Financial matters are often decisive. ACS caseworkers are permitted nearly unlimited overtime, and often decide to investigate after normal working hours to increase their income. Taking children into

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<sup>121</sup> This problem remained constant throughout my time with the agency.

<sup>122</sup> All child protective investigations in the state of New York begin with an oral or written report to the State Central Register of Child Abuse and Maltreatment. N.Y. SOC. SERV. LAW § 422.2(a) (McKinney 2002). The Central Register transmits the report to the local (county or borough) office to conduct the investigation. See *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994) (providing a detailed discussion of the investigation process).

<sup>123</sup> NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, CASEWORK PRACTICE GUIDE: DIVISION OF CHILD PROTECTION: CHILD PROTECTIVE SERVICES 13 (2d ed., 2000) ("Within 48 hours (24 hours when immediate danger is suspected or the case involves high risk allegation), CPS staff must visit the home to initiate face-to-face interviews with all children, the subject(s), parents/caretakers and other household members. The home visit comprises of examining the home conditions and interviewing the children, alleged subjects, parent/caretakers and other household members.").

custody is even more lucrative. If a caseworker removes a child from home after hours, the caseworker must bring the child to the Emergency Children's Services (ECS) office in Manhattan. ECS processing and pre-placement services take many hours. The caseworker must remain with the child for the entire time and then bring the child to a foster placement, all while earning overtime pay. There are caseworkers, known around every office, who offer to help out with removals in order to boost their salaries.<sup>124</sup> Removals are also easier for caseworkers than constantly monitoring the families. Following a brief flurry of activity surrounding the removal of the child, the case is transferred to an adoption agency. Aside from occasional court appearances the caseworker has very little involvement in the case after.<sup>125</sup>

Whether or not the child is removed, the family becomes a funding source for a variety of professionals and agencies. It is difficult to "indicate" a report,<sup>126</sup> or find that there is some credible evidence to believe that maltreatment has occurred, without providing services to the family and the child. After a child has been removed, the parents are assigned services that they must complete if they want to be reunited with their children. In 2001, the federal government spent \$295 million on such services.<sup>127</sup> The caseworker picks from a menu of "cookie cutter" services which may or may not have any relevance to the family's problems. Services include drug testing, parenting classes, counseling, homemaking, or even the provision of a child's bed. Although these services have been shown to be ineffective, "[t]he issue is no longer whether the child may be safely returned to the home, but whether the mother has attended every parenting class, made every urine drop, [and] participated in every therapy session."<sup>128</sup> Thus, "[t]he agency's service plan usually

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<sup>124</sup> See also ROBERTS, *supra* note 27 at 125 ("Caseworkers in New York City can earn time-and-a-half for removing children at night, so it is simple to find someone in the office who will step in to take children without knowing the circumstances of the case.").

<sup>125</sup> See *id.*

<sup>126</sup> N.Y. SOC. SERV. LAW § 412.12 (McKinney 2002) (an "indicated" case is one in which there is "some credible evidence" of child abuse or maltreatment). N.Y. SOC. SERV. LAW § 412.11 (McKinney 2002) (an unfounded report is one in which there is no credible evidence of child abuse or maltreatment). N.Y. SOC. SERV. LAW § 424.6 (McKinney 2002), each local child protective services must investigate every report). N.Y. SOC. SERV. LAW § 424.7 (McKinney 2002) (each local child protective services must make a determination within 60 days as to whether the report is indicated or unfounded).

<sup>127</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES REPORT TO CONGRESS, GREEN BOOK OVERVIEW OF ENTITLEMENT PROGRAMS 656 (17th ed. 2000).

<sup>128</sup> ROBERTS, *supra* note 27 at 80. See also Gelles, *supra* note 74 at 105 ("Although there is a general belief that change can be achieved if there are sufficient soft and hard resources, as yet, there is

has little to do with *services* for the family. It is typically a list of requirements parents must fulfill in order to keep their children or get them back.”<sup>129</sup>

To meet the demand for services, a “child abuse industry”<sup>130</sup> has developed. Service providers surround the field offices, providing a one-stop shopping experience for caseworkers. An agency, conveniently located only blocks from the field office, will offer drug testing, domestic violence counseling, family counseling and, of course, parenting classes. Therapy is also extremely common. Child welfare may compel therapy either to prevent placement of the child, or to reunite the family. A vast network of therapists have become dependent on child welfare agencies for their livelihood. Therapists exercise tremendous discretion over the families they “counsel.” The mother is essentially held hostage by the therapist and the agency since she cannot quit therapy, or even change therapists, without being labeled non-cooperative.<sup>131</sup>

Child welfare agencies spend the majority of their preventive funds on therapy, group counseling and other “soft” services, when it has been shown that these services are uniformly ineffective.<sup>132</sup> Hard services such as money and other tangible supports, although proven effective, account for only a small portion of the services provided.<sup>133</sup> Funds for soft services tend to end up in the hands of professionals, who have political power, while hard service funds end up in the hands of the families, who are poor. As Richard Wexler put it, where protective services are provided “they are geared to the needs of the child savers, not the children.”<sup>134</sup> What has been constructed is a system in which poor

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no empirical evidence to support the effectiveness of child welfare services in general, nor in the newer, more innovative, intensive family preservation services.”).

<sup>129</sup> ROBERTS, *supra* note 27 at 79.

<sup>130</sup> LELA COSTIN, HOWARD J. KARGER AND DAVID STOESZ, *THE POLITICS OF CHILD ABUSE* 23 (1996) (“it is a sophisticated industry that includes, among others, psychotherapists, the legal profession; service providers, including those in for and nonprofit agencies; welfare bureaucrats; public welfare agencies and social workers; consumer groups who either favor or oppose intrusive child welfare legislation; and political advocates (on both the left and the right.”).

<sup>131</sup> ROBERTS, *supra* note 27 at 41-42. The author details the results of a Santa Clara grand jury investigation, which revealed that psychologists who testified against child welfare assessments were routinely blacklisted. A variety of ethical issues arise in this arrangement. Can the therapist, whose clients are referred from the child welfare agency, and who receives money from that agency, offer an unbiased opinion when asked to testify about the mother, or oppose an agency recommendation?.

<sup>132</sup> WEXLER, *supra* note 80 at 210 (arguing that poor people should be provided with food and bus fare before they are provided counseling).

<sup>133</sup> Mark E. Courtney et al., *Race and Child Welfare Service: Past Research and Future Directions*, LXXV *CHILD WELFARE* 99, 113.

<sup>134</sup> WEXLER, *supra* note 80 at 210.

families are made to endure a series of ineffective services that fatten the wallets of a variety of professionals who provide those services, while their children are held as collateral to compel their participation.

#### CHILDREN FOR SALE OR RENT

When a child is removed from her home and enters foster care, her value to the system increases drastically. In New York City, private agencies have a long tradition of vying for their fair share of the market in children.<sup>135</sup> In fact, when one facility was sold by one agency to a rival agency, the children were part of the deal.<sup>136</sup> The federal government spends more each year on training and administration of foster care than it does in actual payments to foster parents.<sup>137</sup> In spending nearly \$3.5 billion for training and the administration of foster care alone, the federal government has encouraged the development of an army of child welfare professionals, who depend on a steady supply of new children. Once a funding stream attaches to a child, and the agency can generate income merely by holding her, the agency has little incentive to relinquish her and does little to find her a permanent home, a constant source of friction in the foster care industry since its inception.<sup>138</sup>

Although some foster parents are altruistic, many are motivated by the child's attached subsidy.<sup>139</sup> A healthy twelve-year-old foster child in the New York City metropolitan area brings the foster parent \$626 in monthly payments.<sup>140</sup> This sum can be potent motivation for a family struggling to get by in America's largest city. And, unlike TANF

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<sup>135</sup> BERNSTEIN, *supra* note 9 at 51 ("[T]he city accorded the three "established" religions a virtual property right to the children, regardless of what was best for them or what their own parents wanted.").

<sup>136</sup> BERNSTEIN, *supra* note 9 at 366.

<sup>137</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES REPORT TO CONGRESS, *supra* note 127 at 648 (the federal government spent \$1,963,000,000 on payments to foster parents and \$2,048,000,000 on administration and training in 1999).

<sup>138</sup> See generally BERNSTEIN, *supra* note 9 (documenting in detail, children languishing in private foster care agencies, while those same agencies fought any attempts to reform their behavior).

<sup>139</sup> County of San Diego, GRAND JURY REPORT, *available at* [www.co.san-diego.ca.us/cnty/cntydepts/safety/grand/reports/report7.html](http://www.co.san-diego.ca.us/cnty/cntydepts/safety/grand/reports/report7.html) (last visited Jan. 12, 2003) (reporting of foster parents that "too many are in the business of making money by renting their homes to the dependency system").

<sup>140</sup> NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, ADOPTION SUBSIDY: FACT SHEETS: DEFINITIONS: STATE PROFILES: NEW YORK STATE SUBSIDY PROFILE (2001), *available at* [www.nysccc.org](http://www.nysccc.org) (last visited Jan. 23, 2003). A child age 0-5 is worth \$460, and a child 6-11 is worth \$541. In addition there is an annual clothing replacement allowance of \$806 for a 16-year-old child.

funds,<sup>141</sup> the foster parent receives an additional payment for each additional child she takes in.<sup>142</sup> Taking in two, or even three, foster children can be a windfall for a struggling family.

Unfortunately, this commodification process can lead to harsh treatment at the hands of foster parents. Foster children, at risk and in need of warm and supportive care, are often singled out by foster parents for disparate treatment. A San Diego Grand Jury found that often foster children were given cheaper food than the other children; access only to limited areas of the house; and very cheap clothing or poor-condition hand-me-down clothing; and sometimes were forbidden to watch television with the rest of the family or even to open the refrigerator.<sup>143</sup>

If a child is not healthy, the monthly stipend is even higher. For taking in a child with special needs in the New York City metropolitan area, a foster family will receive \$1,007 per month. If the child has “exceptional” needs, the foster family receives \$1,525.<sup>144</sup> This subsidy payment differential creates a strong incentive to over-diagnose foster children. As the San Diego report put it, “[c]aseworkers, investigators and attorneys believe that some foster parents routinely complain of behavioral problems, insist that those behavioral problems require mental health therapy and then seek additional funds for regular transportation to the therapist and special care needs.”<sup>145</sup> Foster parents also routinely convince pediatricians to unnecessarily prescribe behavior-altering medications in order to make the children docile and easier to control.<sup>146</sup>

In order to minimize the length of stay in foster care, politicians advocate adoption as a solution. In 1997, Congress passed the Adoption and Safe Families Act, which contained an “adoption incentive” aimed at motivating the states to adopt children out of foster care.<sup>147</sup> Under the program, states that increase the number of children who are

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<sup>141</sup> Temporary Assistance for Needy Families (TANF) was created by the Welfare Reform Law of 1996, replacing Aid to Families with Dependent Children (AFDC) and Job Opportunities and Basic Skills Training (JOBS). See generally at [www.acf.hhs.gov/programs/ofa](http://www.acf.hhs.gov/programs/ofa) (last visited Feb. 25, 2003). See also ROBERTS, *supra* note 27 at 173.

<sup>142</sup> ROBERTS, *supra* note 27 at 191 (although TANF funds are subject to a number of restrictions, and increase only moderately with each additional child in the household, foster care subsidies are not scaled down when there are additional children in the home).

<sup>143</sup> SAN DIEGO GRAND JURY REPORT, *supra* note 139.

<sup>144</sup> ADOPTION SUBSIDY: FACT SHEETS, *supra* note 140.

<sup>145</sup> SAN DIEGO GRAND JURY REPORT, *supra* note 139.

<sup>146</sup> *Id.*

<sup>147</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

adopted out of foster care, as compared to the previous year, receive a financial incentive of \$4,000 with an additional \$2,000 for each child who is determined to have special needs.<sup>148</sup> Some states have gone even further in incentivizing adoption. Michigan, for instance, rewards private agencies for placing children quickly by paying them an “enhanced rate” of \$5,600 for placing a child in a home within eight months, a significant increase over the standard rate of \$3,500.<sup>149</sup> If an agency places a child who is not in their care, but is included in the State’s photolisting book of hard to place children, the agency receives a “premium” payment of \$8,600.<sup>150</sup>

On its face, this program seems desirable. After all, the government should promptly separate a child from parents who seriously abuse her and, having done so, should make the time spent in foster care as short as possible. But, as Martin Guggenheim points out, “[t]he little evidence available suggests that no more than ten percent of the children in foster care are there because of serious abuse.”<sup>151</sup> By incentivizing adoption, the ninety percent who might be better off with their parents are lumped with the ten percent who should not return home and all are put on the fast track to adoption.<sup>152</sup> Efforts to reunite children with their families are curtailed, their relations with their parents are unnecessarily severed while they endure the harms of foster care, and they are either adopted out or are placed in a legal limbo, having no parents at all.<sup>153</sup> This “market approach to family well-being” subjugates the best interests of the child to a state-run bonus program.<sup>154</sup> While propo-

<sup>148</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES REPORT TO CONGRESS, *supra* note 126.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Guggenheim, *supra* note 64 at 111.

<sup>152</sup> See ROBERTS, *supra* note 27 at 111. Adoption incentives seem to be working. The author documents a 28% rise in the number of adoptions from 1998 to 1999. She shows that in that same year, the number of adoptions doubled in Illinois, went up by 75% in Texas and 57% in Florida. Also, that year forty-two states took home \$20 million in federal adoption bonuses. See also Wexler, *Take the Child and Run*, *supra* note 81 at 129-130 (due to ASFA, states have de-emphasized efforts to prevent removal or to reunite children with families).

<sup>153</sup> ROBERTS, *supra* note 27 at 158 (ASFA incentives aimed at aggressively terminating parental rights have led to the creation of “legal orphans,” children who have been severed from their parents, but not adopted by any other family).

<sup>154</sup> ROBERTS, *supra* note 27 at 91. But see Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (arguing that a free market approach to adoption would be beneficial). See Tamar Frankel & Frances H. Miller, Forum: *Adoption and Market Theory: The Inapplicability of Market Theory to Adoptions*, 67 B. U. L. REV. 99 (criticizing a free market approach to adoption). Interestingly, inasmuch as being sold would seem to be a necessary incident of slavery, the debate surrounding Judge Posner’s proposal was strangely devoid of a thirteenth amendment analysis.



nents laud adoption as the solution to a failed system, there are signs of trouble with this solution. Dorothy Roberts quotes officials in several states as saying that there is a fifteen to twenty-five percent rate of failed adoptions<sup>155</sup> and Leroy Pelton cites studies that have found a forty-seven percent rate of failed adoptions for children adopted over age six.<sup>156</sup>

Child welfare agencies have begun aggressive campaigns to market children to potential adoptive parents. State and private agencies market their children to potential parents through websites, photolisting books, and even television commercials in the modern equivalent of an open-air slave auction.<sup>157</sup> Potential parents review the photos and biographies of each child prior to contacting the agency to adopt.<sup>158</sup> As with foster care, when a child is adopted, the parents are entitled to adoption assistance maintenance payments. For instance, adoptive parents of a twelve-year-old child in the New York City metropolitan area can expect a basic adoption subsidy of \$626 monthly.<sup>159</sup> But if the child is categorized as having special or exceptional needs he is worth \$973 or \$1,473 respectively, and the adoptive parents become entitled to extensive healthcare coverage, day care services, and even respite care.<sup>160</sup> Of course, as with foster care, incentivizing disability in this manner has led to over-diagnosis of many children.

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<sup>155</sup> ROBERTS, *supra* note 27 at 160.

<sup>156</sup> Leroy Pelton, *Symposium: The Implications of Welfare Reform for Children: Other Remarks on the Effects on Welfare Reform on Children: Welfare Discriminations and Child Welfare*, 60 OHIO ST. L.J. 1479, 1490 (1999); citing J. Boyne et al, *Log-Linear Models of Factors Which Affect the Adoption of "Hard-to-Place" Children*, in PROCEEDINGS OF THE SOCIAL STATISTICS SECTION, (Social Statistics Section, American Statistical Ass'n ed, 1982). Note that this study is twenty years old and recent moves to incentivize adoptions for potential parents, coupled with a drive to recruit more parents has probably led to an even greater incidence of failed adoptions.

<sup>157</sup> See ROBERTS, *supra* note 27 at 103 (listing several state adoption websites). See also BERNSTEIN, *supra* note 9 at 365. The author recounts the experiences of Lamont, a foster child and the son of a foster child. At age fifteen, after seeing himself on a public service television show about children available for adoption, Lamont confronted adoption agency staff saying, "I'm not going to let you exploit me and market me like a piece of meat."

<sup>158</sup> See New York State Office of Children & Family Services, *The Adoption Album: Internet Photolisting Search*, available at [www.ocfs.state.ny.us/adopt/internet/InternetPhotoinq.asp](http://www.ocfs.state.ny.us/adopt/internet/InternetPhotoinq.asp) (last visited Mar. 3, 2003). (Allows prospective parents to sort children by age, race, sex, level of physical disability, diagnosed psychiatric needs, emotional and behavioral needs, and developmental delays.) See also Internet Adoption Photo Listing by Precious in HIS Sight, available at [www.precious.org](http://www.precious.org) (last visited Mar. 3, 2003) (advertising that they have "over 500 children currently available for international and domestic adoption"); The Children's Bureau, *AdoptUSKids*, available at [www.adoptuskids.org](http://www.adoptuskids.org) (last visited March 3, 2003). This allows prospective parents to sort children by race disability age and gender. A search on this site for all children under six yielded 144 children. Most were African Americans and many had disabilities. *Id.*

<sup>159</sup> ADOPTION SUBSIDY: FACT SHEETS, *supra* note 140.

<sup>160</sup> *Id.*

The process of commodifying children probably has a differential impact on adoptive families of varying degrees of wealth, resulting in disproportionately worse treatment for hard to place children. If an adoptive family is affluent, or even middle class, the roughly \$7,200 annually a child brings in is likely to be seen as a token or break-even proposition. The payment probably factors very little, and maybe not at all, into the calculation of adopting. Due to wealth distribution in the United States, affluent and middle class adoptive families are much more likely to be white and much more likely to adopt a white child.<sup>161</sup> The adoption system probably operates as intended for white children. The child fills a need in the family, joining a warm and nurturing environment. On the other hand, African American children are relegated to a system in which they are likely to be sold to a family looking to generate additional revenue, if they are adopted at all.<sup>162</sup> Through this process, the disproportionate impact of commodification falls primarily, if not exclusively, on minority children.

Adoption incentives are not per se bad. They can operate as a potent counterweight to the inertia that encourages states and private agencies to keep children in foster care,<sup>163</sup> undoubtedly opening homes to hard to place children. But, in constructing a system such as this, we cannot ignore its potential harms. Decisions are not made according to the child's best interests, but are a reaction to the incentive structure that surrounds the child. Because this commodification of children is "akin to African slavery,"<sup>164</sup> thirteenth amendment claims are an appropriate mechanism to more vigorously scrutinize the child welfare subsidy structure.

#### RIGHTS OF THE CHILD IN CARE

The rights of children in the care of the child protective system are limited, confused and contradictory. Children in state custody have an extremely qualified right to the protection of the state.<sup>165</sup> In *Suter v.*

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<sup>161</sup> ROBERTS, *supra* note 27 at 167.

<sup>162</sup> Courtney et al., *supra* note 133 at 117 (explaining that African American children remain in foster care far longer and are much less likely to be adopted than white children).

<sup>163</sup> See Gelles, *supra* note 74.

<sup>164</sup> *Kozminski*, 487 U.S. at 948.

<sup>165</sup> For more detailed analysis see Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199 (1988). See also Lawrence G. Albrecht, Essay: *Human Rights Paradigms for Remediating Governmental Child Abuse*, 40 WASHBURN L.J. 447 (2001); Arlene E. Fried, *The Foster Child's Avenues of Redress: Questions Left Unanswered*, 26 COLUM. J. L. & SOC. PROB. 465 (1993); Brendan P. Kearse, *Abused Again: Compet-*

*Artist M.*,<sup>166</sup> the Supreme Court held that the phrase “reasonable efforts” was too vague to afford foster children a remedy under the Adoption Assistance and Child Welfare Act.<sup>167</sup> Accordingly, the court found children had no mechanism to enforce provisions requiring that state child welfare agencies make reasonable efforts to keep their families intact, or to work to reunify the family following a removal.<sup>168</sup> Most federal circuits have held that states have an affirmative duty to protect children in their care, but are divided as to what degree of apathy warrants civil rights liability.<sup>169</sup> The controversy reduces to a question of whether the child is best analogized to a convicted prisoner or a committed mental patient.<sup>170</sup> The deliberate indifference standard arises under the eighth amendment’s prohibitions against cruel and unusual punishment.<sup>171</sup> In some circuits, like the convicted prisoner, a foster child, to maintain a cause of action, must demonstrate that child welfare agency personnel deliberately failed to learn of dangerous conditions in her foster placement.<sup>172</sup> Other circuits have held the state to the higher standard of professional judgment, which was first applied to mental patients committed to state care.<sup>173</sup> Under this standard, the judgments of professionals are accorded great deference and liability can only be imposed “when the decision by the professional is such a substantial departure from accepted judgment practice, standards,” that it could not have been based on a professional level of judgment.<sup>174</sup>

Even these limited protections can be denied through a variety of judicial doctrines. Courts have held that a child placed voluntarily by a parent is owed no duty of protection by the state because the voluntary nature of her confinement does not trigger due process protections.<sup>175</sup> The Fourth Circuit held that children in foster care are in the care of their foster parents, not the care of the state, foreclosing the possibility

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*ing Constitutional Standards for the State’s Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385 (1996).

<sup>166</sup> 503 U.S. 347 (1992).

<sup>167</sup> Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended at 42 U.S.C. §§ 620-628, 670-679a (1988)).

<sup>168</sup> *Suter*, 503 U.S. at 347.

<sup>169</sup> Albrecht, *supra* note 165 at 455.

<sup>170</sup> *Id.*

<sup>171</sup> *Estelle v. Gamble*, 429 U.S. 97 (1976).

<sup>172</sup> Albrecht, *supra* note 165 at 456, *citing* Taylor v. Ledbetter, 818 F.2d. 791 (11th Cir. 1987).

<sup>173</sup> Kears, *supra* note 165 at 408, *citing* Youngberg v. Romeo, 457 U.S. 307 (1982).

<sup>174</sup> *Youngberg*, 457 U.S. at 323.

<sup>175</sup> Fried, *supra* note 165 at 487, *citing* Milburn v. Anne Arundel County Dep’t of Social Services, 871 F.2d 474 (4th Cir. 1989).

of a suit against the deep pockets of the state and only leaving the child with the generally shallow pockets of the foster parent.<sup>176</sup> While some courts have held that foster parents are not state actors, which limits the child's constitutional rights, other courts have extended sovereign immunity,<sup>177</sup> or parental immunity.<sup>178</sup> State liability for foster parents actions may also be denied by finding no agency, *respondeat superior*, or vicarious liability.<sup>179</sup> The problem arises from attempting to shoehorn the rights of foster children into existing legal doctrines. The eighth amendment, fourteenth amendment, and tort liability doctrines simply do not fit the needs of the child in care. But, in acknowledging the many similarities between the child in care and the circumstances of those held under conditions of slavery and involuntary servitude, we should apply the thirteenth amendment to provide children with the protection they require to become healthy adults and productive citizens.

Similar to the rights of slaves, the rights of children in foster care are not only limited and ill-defined, they are impractical to exercise. Michael Mushlin ascribes the comparative lack of rights enjoyed by foster children to the "dearth of lawyers pursuing the issue," raising very real issues of access to lawyers and judicial remedies.<sup>180</sup> The child is isolated, under the near complete dominion of the foster parent. Even if she is profoundly dissatisfied with her situation, she is unlikely to see a way out.<sup>181</sup> Her situation is analogous to that in *Kozminski*, in which two mentally retarded farm workers were held under coercion.<sup>182</sup> Although the farm laborers certainly enjoyed substantial rights, far more than a child in foster care, they did not perceive these rights and were unable to exercise them. Justice O'Connor stated that in a circumstance like this, the "vulnerabilities of the victim are relevant in determining whether the physical or legal coercion, or threats thereof could plausibly have compelled the victim to serve."<sup>183</sup> Given the special vulnerabilities of the foster child, access to judicial redress, even the limited amount discussed above, is improbable. Her complaints will not be heard and

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<sup>176</sup> Fried, *supra* note 165 at 482; Mushlin, *supra* note 165 at 247.

<sup>177</sup> Mushlin, *supra* note 165 at 246.

<sup>178</sup> *Id.* at 247.

<sup>179</sup> DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE (2000).

<sup>180</sup> Mushlin, *supra* note 165 at 233.

<sup>181</sup> See generally Gordon, *supra* note 103.

<sup>182</sup> *Kozminski*, 487 U.S. at 934.

<sup>183</sup> *Id.* at 951.

her situation will likely be addressed only after she is dead, or injured enough to peak outside interest.

The conditions under which many older foster children are held are not so subtle, and easily qualify as involuntary servitude or slavery under the “physical or legal coercion” standard of *Kozminski*.<sup>184</sup> If children in foster care attempt to leave, they will eventually be picked up by the police, processed, and returned to the system.<sup>185</sup> If they continue to try to escape, or engage in other disruptive activities, they are subjected to increasingly restrictive environments, often culminating in arrest and detention in the juvenile justice system.<sup>186</sup> Thus, like runaway slaves in the nineteenth century, foster children risk criminal justice system involvement when they attempt to escape the foster agency’s custody.<sup>187</sup> Unlikely to contact an attorney or file a *pro se* complaint, most adolescent foster children are likely to vent their dissatisfaction in an age-appropriate manner, by acting out. One New York City study found that thirty-six percent of teens in foster homes and fifty-five percent of teens in group homes were arrested in their homes, compared to only four percent of non-foster kids.<sup>188</sup> A significant number of teens simply vote with their feet and go AWOL.<sup>189</sup>

Judge Ruffin overstated, when he declared about slavery, the “power of the master must be absolute to render the submission of the slave absolute.”<sup>190</sup> Slaves held a variety of rights, which varied between time and location in the antebellum South.<sup>191</sup> For instance, a slave had the right to use lethal force to defend himself against a life-threatening attack by a white man.<sup>192</sup> And, during the nineteenth century, a master

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<sup>184</sup> *Id.* (“[C]ompulsion of services by the use or threatened use of physical or legal coercion is a necessary incident of a condition of involuntary servitude.”).

<sup>185</sup> Gordon, *supra* note 103 at 31 (telling the story of Carla, unnecessarily removed from her home and then placed in increasingly harsh environments.).

<sup>186</sup> Dylan Conger, et al., Vera Institute of Justice, *Reducing the Foster Care Bias in Juvenile Detention Decision: The Impact of Project Confirm*, 9 (2001) available at [www.vera.org](http://www.vera.org) (last visited Jan. 3, 2003).

<sup>187</sup> *Id.* (Although foster children are only 2% of the city’s population they comprise 15% of those in the juvenile detention system. Also, that involvement in the juvenile detention system is a toxic influence in the life of an adolescent.).

<sup>188</sup> ROBERTS, *supra* note 27 at 204 (citing a study by the Vera Institute of Justice).

<sup>189</sup> Timothy Ross et al., Vera Institute of Justice, *The Experiences of Early Adolescents in Foster Care in New York City: Analysis of the 1994 Cohort*, 23 (2001) available at [www.vera.org](http://www.vera.org) (last visited Jan. 3, 2003) (18% of the 1994 cohort who left foster care did so because they had gone AWOL).

<sup>190</sup> GENOVESE, *supra* note 118 at 35.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

who murdered a slave could theoretically face murder charges.<sup>193</sup> Historians have discovered that, contrary to the post-emancipation South, slaves were often afforded substantial justice when accused of rape. Appellate courts in every state in the South threw out rape charges against slaves, even for purely technical matters.<sup>194</sup> But, the efficacy of any protections afforded the slaves was undercut by prohibiting blacks from testifying against whites. While the laws were on the books, and were periodically utilized to sanction the most egregious slave abusers, they were generally unenforceable for lack of qualified witnesses. Thus, these theoretical rights were often enjoyed only in theory, practicalities prohibiting their full imposition. The rights retained by children in foster care mirrors this situation.

### SECTION III

#### FAMILIES AND THE SYSTEM

Having concluded that my uncle was the center of all knowledge in the universe, I asked him this one night: "You know, I have another thing on my mind. Why are all these Black women named Iona? What's to this? There's a lady down the block and her first name is Iona." And he said, "Well, that's one of them code names." I said "Code names? What do you mean code names?" . . . He said, "Aunt Lizzy used to tell us the story about these women named Iona." He explained that during the period of chattel slavery, as the family law at that time was based upon the deconstruction of the African American family, children would be torn, literally, from the tit of a mother and sold to another state or another town, another region. And the slave overseers and the slave masters would essentially place the children in the hands of another adult, usually another slave, to preserve this commodity, this human property. But the mothers, in defiance of these slave laws that attempted to deconstruct the families, would place a name on the children saying, "I own her."<sup>195</sup>

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<sup>193</sup> *Id.* at 37 ("[I]n 1821, South Carolina became the last of the slave states to declare itself clearly in protection of slave life. During the nineteenth century, despite state-by-state variations, slaveholders theoretically faced murder charges for wantonly killing a slave or for causing his death by excessive punishment.").

<sup>194</sup> *Id.* at 34.

<sup>195</sup> Roger L. Green, Symposium: *Legal and Community Services Advocates Working Together to Preserve Families*, *Columbia University School of Law*, December 1-2, 1994, 3 J.L. & POL'Y 487, 489 (1995).

*Parens Patriae* is, at least in the child welfare arena, the modern day equivalent of the paternalistic obligations of slaveholders. In both instances, a doctrine of beneficence is employed to assert control over and systematically dismantle families, in the name of saving them from themselves. A more highly ranked social group disrupts poor families for economic and political gain and the dominant group laments the need for this invasion into the private sphere. Current levels of surveillance over and interference with the lives of America's poor families have replicated conditions "akin to African slavery"<sup>196</sup> under the thirteenth amendment.

As Judge Weinstein states, "The exact language of the Thirteenth Amendment could be construed to cover children forcibly and unnecessarily removed without due process and then consigned to the control of foster caretakers. They are continually forcibly removed from their abused mothers without a court adjudication and placed in either state or privately run institutions for long periods of time."<sup>197</sup>

Slaveholders justified their dominance through the doctrine of paternalism, viewing themselves as caretakers of "their black family."<sup>198</sup> John Wise, a Virginian, said, "[t]here is not a graveyard in Old Virginia but has some tombstone marking the resting place of somebody who accepted slavery as he or she found it, who bore it as a duty and a burden, and who wore himself or herself out in the conscientious effort to perform that duty well."<sup>199</sup> This "duty and burden" required that slaveholders see to the needs of their slaves to the end of their days.<sup>200</sup> This arrangement implied more than a quid pro quo, labor for sustenance. It implied that Africans were infantile, incompetent, and reliant on the master's caretaking<sup>201</sup>

This doctrine of paternalism, or "duty and burden," allowed pernicious interference into the family life of slaves. Employing legal doc-

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<sup>196</sup> *Kozminski*, 487 U.S. at 934.

<sup>197</sup> *Nicholson*, 203 F. Supp. 2d at 248.

<sup>198</sup> GENOVESE, *supra* note 118 at 70-75. See also Mark Tushnet, Review Essay: *Constructing Paternalist Hegemony*: 27 LAW & SOC. INQUIRY 169 (2002) (reviewing the dispute between those who see master-slave relations under slavery as based on paternalism and those who see it based in ideas of property).

<sup>199</sup> *Cited in* GENOVESE, *supra* note 118 at 75.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 85. Ideologues of the time "vigorously insisted that blacks could never survive in the cutthroat world of the capitalist marketplace; that they would drop to the bottom of the social scale as unwanted and improvident unskilled workers and would starve to death. Slavery represented white protection against this horror; it gave the masters an interest in the preservation of the blacks and created a bond of human sympathy that led to an interest in their happiness as well."

trine, slaveholders would not recognize marriages between slaves. They rationalized that because slaves had no ability to contract, they had no capacity to enter into the contract of marriage.<sup>202</sup> Thus, slaves had no recourse when the master sold their spouses to a distant plantation.<sup>203</sup> Similarly, slaveholders interfered in the relations of slave parents and their children.<sup>204</sup> A slave woman was valued for her breeding capacity; that capacity often figured into her price.<sup>205</sup> The birth of a child was treated primarily as a commercial event, and her children could be separated from her after they reached the age of ten.<sup>206</sup> The slave quarters were owned by the master and were subject to search at any moment. This denied the slave family any privacy.<sup>207</sup> Through this, slaveholders taught the children that the parents had little control and that “it was the master who really held the whip and the reins.”<sup>208</sup>

In accordance with the doctrine of paternalism, slaveholders blamed this interference on the slaves themselves. Blacks were considered too immature to provide proper parenting. Slave owners, while denying self-autonomy to the slaves, denigrated their lifestyles and had an undying fascination with the supposed promiscuity of slave women.<sup>209</sup> Although the slave system discouraged strong bonds between parents and their children, slave mothers were often accused of being neglectful<sup>210</sup> while slave fathers were accused of being brutal.<sup>211</sup> As Margaret Burnham states, “Indeed, slaves were cursed as both immoral and incompetent parents.”<sup>212</sup>

The total denigration of the slave family’s rights caused abolitionist attacks for what was one of the most horrific aspects of slavery, the

<sup>202</sup> Margaret A. Burnham, *An Impossible Marriage: Slave Law and Family Law*, 5 LAW & INEQ. 198, 209 (1987).

<sup>203</sup> Cheryl Harris, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Private Law and United States Slave Regimes: Article Finding Sojourner’s Truth: Race Gender and the Institution of Slavery*, 18 CARDOZO L. REV. 309, 332 (1996) (explaining of the legal non-recognition of marriages, “[i]t first ensured that there were no competing claims by Black men to Black women based on the marriage contract, thereby reducing legal impediments to their commercial alienation and reproduction”).

<sup>204</sup> GENOVESE, *supra* note 118 at 451-458.

<sup>205</sup> Burnham, *supra* note 202 at 198 (1987). See also Harris, *supra* note 206 at 338.

<sup>206</sup> GENOVESE, *supra* note 118 at 457 (explaining that although the actual incidence of separation was rather low, the fear of it hung over every family).

<sup>207</sup> Burnham, *supra* note 202 at 201.

<sup>208</sup> *Id.*

<sup>209</sup> See GENOVESE, *supra* note 118 at 460-75.

<sup>210</sup> Burnham, *supra* note 202 at 204

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*



tearing apart of families. Despite the mounting opposition, slaveholders maintained the power to disrupt families at will. This power served a number of purposes including conferral of “a terrifying authority upon the master class.” Because the family is a source of various forms of capital, primarily social and symbolic, the ruling class effectively foreclosed the possibility of opposition by systematically disabling slave families and communities. Pierre Bourdieu stated it as an anthropological law that the rich and powerful have large families because “they have a specific interest in maintaining extended family relations and, through these relations, a particular form of concentration of capital.” By trading and selling family members, slaveholders inhibited the slaves’ accumulation of the capital of family relations, consequently limiting the slave class’s potential political power.

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We sat in the van, around the corner from the house, in a working class section of Queens, waiting for the police to arrive. It was about eight at night, dark, and raining. I had taken the older sister, a seventeen-year-old Hispanic girl, into custody that afternoon after she had told her school counselor that her father was beating her. As she grew older and had begun asserting herself, things between them had gotten progressively worse, to the point where they were getting in brawls. Her sexuality was the issue; he wanted to control it and she wanted to experience it. I was sent to remove her ten-year-old brother and did not feel good about it. He had not been abused, and probably never would be. According to his school and doctor, he was well-adjusted, well cared for, and had a great relationship with his father. When I asked my manager why we were doing this, he replied, “You know I can’t take one kid out and just leave the other one there. What if something happens to that boy, what would be said?”

With six cops behind me, I went up to the door and knocked. When the father opened the door and saw me, he tried to shut the door and went for the boy. The cops pushed the door open. The father stood in the kitchen with the boy behind him, tears streaming down his cheeks. He was waving his arms, screaming, “You want my boy, you gonna have to fucking shoot me! I love this boy and you are not going to take him, not while I’m alive.” The mother entered the room, screaming at me, “Don’t do it, please don’t take him.” There were some kitchen knives on the counter. The father was standing near them, and the police were obviously concerned. By this time, several more patrol

cars had arrived, lighting up the neighborhood and alerting the neighbors to the trauma inside.

The police calmed the father and convinced him that he would not win this situation. Despite her hysterics, the mother helped me pack some clothes and toys for the boy and we left, the boy crying and refusing to talk to me. I couldn't blame him. I placed him and his sister in a foster home with a mother who was the quintessential baby boarder. With her own children out of the house, she took children in to make some extra money. The house was clean. The rooms were nice. The children would be well fed and respected, but they would not be loved. This was by far the best foster home I had seen. I told the kids that they were lucky, at least for this, and said goodbye. Later, I learned that while in the foster home, the boy had been taking the bus to his old school. His school was halfway across Queens, and the trip required two transfers. This ten-year-old boy was spending three hours a day commuting by himself. He was in more danger on the bus than he was in the home from which he had been removed.

"*Parens patriae*, literally, 'parent of the country' is the government's power and responsibility, beyond its police power over all citizens, to protect, care for and control citizens who cannot take care of themselves, traditionally, infants, idiots, and lunatics . . . and who have no other protector."<sup>213</sup> As the doctrine of paternalism ("duty and burden") was used by the slaveholding master class to justify systematic degradation of individuals and families, so too is the doctrine of *parens patriae* ("power and responsibility") used to justify a systematic degradation of and intrusion into our poorest families. Each year in the United States, three million reports of possible child maltreatment are received.<sup>214</sup> As a result, millions of homes are searched. Millions of children and their parents answer a barrage of intimate questions. Millions of reports are compiled and databases across the country are fattened. Only about a third of these reports are indicated.<sup>215</sup> Hundreds of thousands of families are placed under surveillance, the parents forced to comply with

<sup>213</sup> Natalie Loder Clark, *supra* note 7 at 381 (citation omitted).

<sup>214</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES, PROGRESS REPORT TO THE CONGRESS – OVERVIEW: FACTSHEETS/PUBLICATIONS: II. AN OVERVIEW OF THE CHILD WELFARE SYSTEM TODAY, available at [www.acf.hhs.gov/programs/cb/publications/congress/overview.htm](http://www.acf.hhs.gov/programs/cb/publications/congress/overview.htm) (explaining that between 1976 and 1992 maltreatment reports increased by 331%) (last visited Feb. 02, 2003).

<sup>215</sup> National Clearinghouse on Child Abuse and Neglect, Highlights from Child Maltreatment 1999, available at [www.calib.com/nccanch/pubs/factsheets/canstats.cfm](http://www.calib.com/nccanch/pubs/factsheets/canstats.cfm) (last visited Oct. 6, 2001). "Of the estimated 2,974,000 referrals received, approximately three-fifths (60.4%) were transferred for investigation or assessment and two-fifths (39.6%) were screened out. Slightly fewer than one-third of

burdensome and worthless services.<sup>216</sup> Hundreds of thousands of parents have their children stripped from their homes and placed in state custody.<sup>217</sup> And, nearly all families affected are poor.<sup>218</sup>

A child maltreatment investigation is an invasive and demeaning experience for the affected families.<sup>219</sup> Usually the caseworker arrives unannounced, near dinnertime. If the parent refuses to allow the caseworker to enter the home, he tells the parent that he will return with a warrant and the police. He tells her that it will be a lot easier if she cooperates. Once inside, the caseworker begins to ask questions and requests to see the children. He then asks her for a private space where he can interview the children alone. If the parent objects, the caseworker will interview the child at school the next day, in the presence of a school principal or some other school employee.<sup>220</sup> He asks the children to describe how they are disciplined, the fights their parents have, how they are doing in school, how they get along with siblings, and a battery of other questions. Some degree of strip-searching is common. The caseworker will generally ask the child to pull up her sleeves, her pant legs and the back of her shirt, so he can look for bruises. If the allegations actually concern physical abuse, the strip search will be more intrusive. While in the home, the caseworker will ask the parent to show him the house, exposing the cupboards, the refrigerator and every room in the home. Parents are given the same barrage of questions as their children. They are also asked about their intimate relationships, the criminal histories of people visiting the home, their financial status, their medical providers, whether their children are vaccinated, etc. When the caseworker leaves the home his investigation has just begun.

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investigations (29.2%) resulted in a disposition of either substantiated or indicated child maltreatment. More than half (54.7%) resulted in a finding that child maltreatment was not substantiated."

<sup>216</sup> Children's Rights, Facts on Child Welfare: Child Abuse and Neglect, *available at* [www.childrensrights.org/about/facts.htm](http://www.childrensrights.org/about/facts.htm), (in 2000, 879,000 children were found to have suffered from maltreatment) (last visited Mar. 13, 2003), *citing* U.S. Dept. of Health and Human Services, *AFCARS Report*, *available at* [www.acf.dhhs.gov/programs/cb/publications/afcars/report7.htm](http://www.acf.dhhs.gov/programs/cb/publications/afcars/report7.htm) (2002).

<sup>217</sup> *Id.* (in 1998, 286,000 children entered foster care).

<sup>218</sup> See Ruth Lawrence Karski, *Key Decisions in Child Protective Services: Report Investigation and Court Referral*, 8 CHILD. AND YOUTH SERVICES. R. 643 (1999) (explaining that whether a family is receiving AFDC affects every aspect of decision making by child welfare officials regarding their case). See generally LEROY PELTON, *FOR REASONS OF POVERTY* (1989) (demonstrating that the poor and the very poor constitute the vast majority of those involved in the child welfare system). See also ROBERTS, *supra* note 27 at 27-29; WEXLER, *supra* note 80 at 69.

<sup>219</sup> See LINDSEY, *supra* note 40 at 97-98 (1994). See also WEXLER, *supra* note 80 at 105.

<sup>220</sup> But see ADMINISTRATION FOR CHILDREN'S SERVICES, CASEWORK PRACTICE GUIDE, *supra* note 123 at 15. "Interview the children while at school whenever possible." Since school administrators rarely allow caseworkers to interview children alone, this policy destroys the family's confidentiality.

In the office the next morning, he will sit down at his desk to send letters to the school and begin to call medical providers, family, friends and others involved in the child's life. He will make at least one, if not several, more visits to the home before the investigation is complete.<sup>221</sup>

"Foster children tend to come largely out of the ghettos and poverty areas of our country in what seems to be almost a random process. There is no research in the literature to indicate that entrance into foster care can be predicted."<sup>222</sup> The seemingly random pattern of report and investigation creates a massive downward pressure on America's poorest communities. In parts of Harlem, one in ten children is currently in some form of foster care.<sup>223</sup> Nationally, four percent of African American children are in foster care. Of the 1.8 million children in New York City, about one quarter or, 450,000, will come into contact with the child welfare system at some point.<sup>224</sup> Approximately one third, or 540,000, of New York City's children are poor.<sup>225</sup> In 1997, New York City conducted investigations into the lives of 106,052 children.<sup>226</sup> Because the vast majority of children caught in the child protective services net are poor,<sup>227</sup> these numbers mean that a tremendous surveillance effort is aimed at New York City's poorest families. If a child spends any significant portion of her childhood in poverty it is quite likely that her family will be investigated at some point.

Child welfare officials camouflage their actions behind a rhetoric of diagnosis and treatment. Like the slaves, today's underclass are regarded as bad parents, unwilling or unable to provide for their children. And, like the slaves, this is seen as a result of their own inherent defects.

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<sup>221</sup> NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, DIVISION OF CHILD PROTECTION CHILD PROTECTIVE SPECIALIST CORE TRAINING CURRICULUM, EVIDENCE FOR ADMINISTRATION FOR CHILDREN'S SERVICES CASEWORKERS, *citing* N.Y. JUDICIARY LAW § 1046(a)(ii) (McKinney 2003) "Proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent of other person legally responsible."

<sup>222</sup> D. FANSHEL & E. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 506 (1978), *cited in* LINDSEY, *supra* note 40 at 142.

<sup>223</sup> *People United for Children v. The City of New York*, 108 F. Supp. 2d 275, 297 (S.D.N.Y. 2000).

<sup>224</sup> NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, GET INVOLVED: PREVENT CHILD ABUSE AND NEGLECT: STATISTICS, *available at* [www.ci.nyc.us/html/acs/html/getinvolved/abuseprevent\\_stats.html](http://www.ci.nyc.us/html/acs/html/getinvolved/abuseprevent_stats.html) (last visited Apr. 4, 2001).

<sup>225</sup> THE ANNIE E. CASEY FOUNDATION, *supra* note 90.

<sup>226</sup> NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, STATUS REPORT 1: JUNE 1998: *supra* note 108.

<sup>227</sup> ROBERTS, *supra* note 27 at 29.

Slaves were purportedly of an inferior race, while today's underclass is pathologized and given psychological pseudo diagnoses to justify intervention. Parents may be described as cold, rejecting and hostile or over-meshed and clinging. The first question a caseworker is asked to answer on New York's Initial Risk Assessment and Service Plan, is whether the parent was maltreated as a child.<sup>228</sup> The caseworker is then asked to rate the severity of the abuse in a consideration of whether or not to remove the child. The caseworker then assesses "family identity and interaction," "ability to cope with stress", the "child's response to caretaker," and other similarly nebulous indicators.<sup>229</sup> Fuzzy standards like these have led to a system with such a low level of reliability that it has been referred to by researchers as "roughly equivalent to the lottery."<sup>230</sup>

But researchers have found unifying factors in the decision to remove a child. Studies have revealed that race and income stability, or lack thereof, are the strongest predictors of a child's placement in foster care.<sup>231</sup> In fact, instability of parental income is a stronger predictor of placement than actual maltreatment suffered by the child.<sup>232</sup> Much like slaveholders, today's child welfare officials are disabling the lowest ranked sectors of our society while blaming the need for intervention on the victims of that intervention and ascribing that need to the latent characteristics of those affected.

Through the process of child maltreatment investigation, poor children are socialized to accept state intrusion into the private sphere. In 1979, Joseph Goldstein, Anna Freud, and Albert J. Solnit published an influential work, *Before the Best Interests of the Child*, asserting, among other things, that even interventions short of removal, pose great risks for a child. They state, "When family integrity is broken or weakened by state intrusion, [the child's] . . . needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimen-

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<sup>228</sup> NEW YORK STATE, UCR INITIAL RISK ASSESSMENT AND SERVICE PLAN 4 (1992).

<sup>229</sup> See NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, JAMES SATTERWHITE TRAINING ACADEMY, NEGLECT HANDOUT 4 (May 1999) (lists the "characteristics of neglecting parents" as "1) Low ego strength, manifested primarily by poor reality awareness, rigid, concrete thinking and poor judgment. 2) Preoccupied with own frustrations, worries and bodily functions to the total exclusion of the needs of the children in their care. 3) Inconsistent in daily routines. 4) Depression and apathy. 5) Cannot trust others, feel persecuted and victimized by repeated attempts to provide services.").

<sup>230</sup> LINDSEY, *supra* note 40 at 138.

<sup>231</sup> See *id.* at 139-146.

<sup>232</sup> *Id.* at 153.

tal.”<sup>233</sup> After all, the child protective system might look quite different if the families of lawyers and judges, doctors and therapists were routinely subjected to intrusion. While the family integrity and parental authority of the rich and middle class are vigorously defended, the poor are forced to throw open the doors to their homes, and bedrooms, and submit the most intimate corners of their lives to state scrutiny. De facto, or by design, poor children are taught to accept this intrusion. Much like slave children, they are taught that somebody else, not their parents, holds the whip and the reins.

The thirteenth amendment should protect parents from a system that invades their homes and strips their children from them without justification. The systematic interference into families, the socialization of children to accept the arbitrary exercise of state authority, the destruction of our poorest families, and the political incapacitation of entire communities are essential characteristics of slavery and should be subject to thirteenth amendment protection.

#### SECTION IV

#### RACE AND CHILD WELFARE

Interference into a child's life by child welfare professionals is a disproportionately African American experience.<sup>234</sup> Meanwhile, there is no characteristic more essential to American slavery, than the systematic singling out of a group, based on race, for debilitating treatment.<sup>235</sup> This section will historically document how social elites have stigmatized the parenting styles and home environments of lower-ranking social groups. By systematically disrupting African American families, the state disrupts family bonds which in turn disrupts the potential political base of African American communities, providing more justification for application of the thirteenth amendment.

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<sup>233</sup> As cited in, Marsha Garrison, *supra* note 79 at 1763 (criticizes the psychoanalytic foundation of Goldstein, Freud & Solnit's work).

<sup>234</sup> Native Americans are discriminated against at a higher rate. 20% of Native American children are in out of home, and out of tribe care. See Lorie M. Graham, "The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 3 (1998). African Americans comprise 56% of the 600,000 children in out of home care nationally. See Zanita E. Fenton, *Foster Care: The Border of Family Identity Maintaining, (Re)creating, Destroying*, 36 NEW ENG. L. REV. 59, 61-62 (2001).

<sup>235</sup> See Bradley J. Nicholson, *supra* note 25. "The revolutionary aspect of slavery was not capitalism, exploitation, or property law, but governance of a different race for the benefit of the colonial elite and the racial attitudes that followed from that choice."

The American child rescue movement was founded, in the mid-eighteenth century, in an age of Slavic, Jewish, Italian, and Irish immigration. These groups, mostly Catholic, were outside the American Protestant ideal.<sup>236</sup> There was a belief that these “racially inferior” intruders would overwhelm “the superior heredity of the dominant class.”<sup>237</sup> Therefore, the original child welfare organizations placed the blame for their poverty on the immigrants themselves.<sup>238</sup> Labeling immigrants “the dangerous classes”, child welfare groups sought to save children from slothfulness, idleness, and sin by removing them from their families.<sup>239</sup> Orphanages, indenture, and foster homes were commonly employed to separate children from their parents.<sup>240</sup>

Charles Loring Brace and the New York Children’s Aid Society went even further, gathering immigrant children from their homes, placing them on trains, and shipping them to the Midwest where they worked on farms.<sup>241</sup> The trains were euphemistically referred to as “orphan trains.” According to Brace, this effort was intended to save orphaned and neglected children who were wandering the streets of New York in gangs.<sup>242</sup> But, many of the children were not orphaned and not neglected. They just happened to be born into families that were excruciatingly poor.

Despite intentions to give them a wholesome upbringing with hard work and clean air, many of the children were abused or merely exploited for their labor. While there are reports of children welcomed into warm and loving homes, there are also reports of children running away from abusive and exploitive homes.<sup>243</sup> Whatever the outcome, the approval process for families taking a child was casual at best and those sending the children west had no way of monitoring their development.<sup>244</sup> Having no recourse, the children served as unpaid farm help until they reached the age of majority and were set free to fend for themselves. The “orphan trains” ran from the 1850s until 1929 and as many as 200,000 white immigrant children may have made that jour-

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<sup>236</sup> See generally COSTIN, *supra* note 130 at 46-75 (1996).

<sup>237</sup> *Id.* at 49.

<sup>238</sup> *Id.* See also LINDSEY, *supra* note 40 at 13 (describing how, between 1853 and 1890, the Children’s Aid Society moved more than 92,000 children from New York City to the Midwest).

<sup>239</sup> BERNSTEIN *supra* note 9 at 197-199.

<sup>240</sup> See generally COSTIN, *supra* note 130 at 46-75; LINDSEY, *supra* note 40 at 13-17.

<sup>241</sup> COSTIN, *supra* note 130 at 46-57.

<sup>242</sup> *Id.* at 46-75; LINDSEY, *supra* note 40 at 13-17.

<sup>243</sup> LINDSEY, *supra* note 40 at 14.

<sup>244</sup> *Id.* at 17.

ney.<sup>245</sup> While the trains were regarded by New York's social elites as a success, they were criticized by many groups, especially Catholics, who felt they were being robbed of their children like slaves.<sup>246</sup>

Wielding the excuse of helping children of immigrant groups, the dominant class implemented programs that systematically dismantled immigrant families, thereby forestalling their attempts to accumulate political power. When the immigrant groups later achieved a critical mass, finally possessing the requisite political power, they were mainstreamed into the dominant group,<sup>247</sup> and not coincidentally, ceased to be the target of child welfare activities.

Native Americans were the first group targeted for systematic family interference, and remain the most impacted ethnic/racial group.<sup>248</sup> Interference in Native American families dates back to the colonial period, when Indian children were removed from their homes and educated in white boarding schools.<sup>249</sup> The strategy of removing Native American children from their homes to assimilate them remained strong until the mid-1970s. Many children were also adopted out to white families, often through established organizations like the Child Welfare League's Indian Adoption Project. Indian babies were also simply sold to white couples on the black market.<sup>250</sup> In 1978, Congress passed the Indian Child Welfare Act, seeking to reverse the policies that led to the massive removal of Indian children from their homes. As a result, the number of Indian children in out-of-home care outside the tribal community has dropped from one-third to one-fifth.<sup>251</sup> Thus, as Native Americans have become politically empowered, the autonomy granted to their families has increased.

Initially, African American children were excluded from child welfare practices.<sup>252</sup> Many African American children in the South were subjected to apprenticeship laws, whereby the parent, often coerced, sold the labor of their child to a white master.<sup>253</sup> In the period following the Civil War, the child's labor was often sold to the master who had

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<sup>245</sup> BERNSTEIN, *supra* note 9 at 197.

<sup>246</sup> *Id.* at 198.

<sup>247</sup> See generally NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1996).

<sup>248</sup> See generally Graham, *supra* note 237 at 15-30.

<sup>249</sup> *Id.* at 15.

<sup>250</sup> *Id.* at 29.

<sup>251</sup> *Id.* at 2.

<sup>252</sup> FENTON, *supra* note 237 at 61.

<sup>253</sup> Margaret A. Burnham, *Bondage, Freedom & the Constitution: The New Slavery Scholarship and its Impact on Law and Legal Historiography: Private Law and United States Slave Regimes: Article: Prop-*



formerly owned her outright. The parent received a nominal amount, and the child was said to receive basic care and instruction in a skill. This “skill” consisted of menial labor in the house or in the fields, and often the care the child received was inhumane.<sup>254</sup>

Largely ignored by the “baby savers” until the mid-1950s, during the rediscovery of child abuse and neglect, African American children once again began to be removed from their homes and placed in a system that viciously discriminated against them. The 1970s saw an overall “browning” of the child welfare system.<sup>255</sup> By 1973, fifty-two percent of the children in New York City’s foster care system were African American.<sup>256</sup> Upon removal from their homes, New York City’s African American children were placed in a system run by private religious organizations. As these agencies gave priority in services, first, to members of their own religion, second, to other white children, and last, to African American children,<sup>257</sup> African American kids were disproportionately placed in “less desirable placements,”<sup>258</sup> and their chances of being adopted were exceedingly slim.<sup>259</sup> The private, or “voluntary agencies,” adhered to these practices despite the fact that they received ninety percent of their funding from the city.<sup>260</sup> Newspaper accounts from the time painted a picture of large religious organizations, their portfolios rich with donations, milking the city for money to provide care and services to children while simultaneously denying these children proper care due to lack of funds.<sup>261</sup> Of course, this burden was felt most sharply by African American children.

The manner in which voluntary agencies treated a child depended entirely on her skin color.<sup>262</sup> A white child was more likely to receive a specialized therapeutic placement, while a black child would be told that the facility was full, would be put on interminable waiting lists, or would be rejected outright.<sup>263</sup> Also, African American families who lost

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erty, *Parenthood, and Peonage: Reflections on the Return to the Status Quo Antebellum*, 18 *CARDOZO L. REV.* 433, 435 (1996).

<sup>254</sup> *Id.*

<sup>255</sup> Sheryl Brissett-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, Vol. LXXVI, #1 *CHILD WELFARE* 45, 49 (1997).

<sup>256</sup> BERNSTEIN, *supra* note 9 at 45.

<sup>257</sup> See generally BERNSTEIN, *supra* note 9.

<sup>258</sup> ROBERTS, *supra* note 27 at 19.

<sup>259</sup> See generally, Mark E. Courtney et al. *supra* note 133.

<sup>260</sup> BERNSTEIN, *supra* note 9 at 185.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 149.

<sup>263</sup> *Id.*

a child to the child protective system were less likely to receive services to allow the child to return home.<sup>264</sup> African American children were less likely to be adopted, resulting in a series of increasingly harmful placements.<sup>265</sup> Race played such an important role in the allocation of services that one adoption agency, when confronted with a child in their nursery whose race they could not easily determine, turned to the resident anthropologist at the Museum of Natural History, to assign a race to the child.<sup>266</sup> Although the more obvious forms of discrimination were eliminated in response to a series of lawsuits, African American families continue to be targeted more frequently for intervention by child welfare services. Nationally, African Americans comprise fifty-six percent of the 600,000 children in foster care today.<sup>267</sup> In California and New York, in 1990, four percent of African American children were in the foster care and adoption systems.<sup>268</sup> Judge Ward, in *People United for Children, Inc v. The City of New York*, quoted the following statistics:

[A]s of June 1, 1997, there were 41,987 children in foster care in New York City, of which, an estimated three percent were white and less than twenty-four percent were Latino, while seventy-three percent were African American; African American children are more than twice as likely as white children to be removed from their parents or guardians following a confirmed report of abuse and neglect; one out of every twenty-two African American children City-wide are in foster care, compared to one out of every 385 white children.<sup>269</sup>

Although both groups are subject to a disproportionately high intervention rate by child protective agencies, African Americans are targeted at a rate much higher than Latinos.<sup>270</sup> Again, skin shade plays a role in the fate of a child. Light-skinned African Americans were less

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<sup>264</sup> See Courtney, *supra* note 133 at 107-112. African Americans continue to receive fewer services designed to prevent a child from being removed. *Id.*

<sup>265</sup> BERNSTEIN, *supra* note 9 at 110-11.

<sup>266</sup> *Id.* at 149.

<sup>267</sup> Fenton, *supra* note 237 at 62. Whites comprise 28%, Hispanics 9%, American Indian/Alaskan Native 1%, Pacific Islander 1% and Unknown/Unable to determine 5%.

<sup>268</sup> Courtney, *supra* note 133 at 100.

<sup>269</sup> 108 F. Supp. 2d 275, 296-97 (S.D.N.Y. 2000).

<sup>270</sup> Andrew White, John Courtney & Adam Fifield, *The Race Factor In Child Welfare*, report compiled for Child Welfare Watch (1998), available at [www.nycfuture.org](http://www.nycfuture.org) (One study found that while one in ten children in the predominantly African American neighborhood of Central Harlem was in foster care, one in nineteen children from the predominantly Latino Hunts Point neighborhood in the Bronx was in care. This was the case despite the fact that on nearly every measure Hunts Point was in greater poverty, and had more of the characteristics commonly associated with child maltreatment).

likely than other African Americans to experience foster care placement, while darker-skinned Latinos were more likely than their lighter-skinned counterparts, to be placed in the system.<sup>271</sup>

Researchers have long recognized that African American families are subject to discriminatory practices during the investigative process that follows a report of maltreatment.<sup>272</sup> “In New York City, African-American children are more than twice as likely as white children to be taken away from their parents following a confirmed report of abuse or neglect.”<sup>273</sup> Once in the foster care system, African American families and children are offered fewer services and fare far worse than their lighter-skinned counterparts. Upon an indicated finding of child abuse or neglect, African American families were less likely to receive services intended to prevent the child from being removed from the home<sup>274</sup> and they were less likely to have plans in place for the family to visit the child.<sup>275</sup> African American children stay in foster care longer, are reunited with their families less frequently, and are adopted less frequently than their white counterparts.<sup>276</sup> Some adoption officials have asserted that these resources are allocated not only according to race but according to the relative lightness of the child’s skin color. Luis Medina, executive director of a major New York foster care agency, stated flatly, “the darker the skin, the greater the length of placement.”<sup>277</sup>

There may be more subtle factors at play here than simple racism.<sup>278</sup> First, many claim that the statistical imbalances result from the overwhelming association of poverty with child abuse.<sup>279</sup> Although poverty has been proven to be the most potent factor in the creation of actual child maltreatment and although African Americans live in pov-

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.* See also ROBERTS, *supra* note 27 at 13-14.

<sup>273</sup> *Id.* See also Wendy G. Lane, et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse* (African American children are more than twice as likely than their white counterparts to have a skeletal survey performed, even after controlling for a variety of factors including the likelihood of abuse and the appropriateness of performing the survey. Again, after controlling for a variety of factors they found that African American, over twelve months of age, were three times more likely to be reported for possible abuse to CPS.).

<sup>274</sup> Courtney, *supra* note 133 at 109.

<sup>275</sup> *Id.* at 108.

<sup>276</sup> *Id.* at 118.

<sup>277</sup> See White *supra* note 273.

<sup>278</sup> See Naomi Cahn, *Book Review Essay: Race Poverty, History, and Child Abuse: Connections*, 36 *LAW & SOC’Y REV.* 461, 474 (2002) (discussing competing theories to explain the racial discrepancy in child welfare).

<sup>279</sup> White, *supra* note 273.

erty at a far higher rate than whites, the disparity remains out of proportion to all relative poverty rates.<sup>280</sup> Also, as the discrepancy between foster care rates in African American and Latino neighborhoods demonstrates, poverty alone cannot explain the disparity.<sup>281</sup>

Second, cultural differences between poor African American clients and their middle class caseworkers are often cited as a partial cause for this disparity.<sup>282</sup> African American families have a distinct parenting style that many caseworkers misidentify as harmful to the child. African American families value obedience and ambition in their children more than white families.<sup>283</sup> African Americans are often more punitive and condemning in their communications with their children and are more likely to use physical punishment.<sup>284</sup> They are socializing their children for a world riddled with violence and infected by racism, especially in poorer neighborhoods.<sup>285</sup> Studies have determined that African American children, raised by parents using a parenting style that was, by white standards, punitive and condemning, had better outcomes than those raised by more permissive parents.<sup>286</sup> Notably, this parenting style would likely be harmful if exercised by white parents toward a white child.<sup>287</sup> Also, African American family structures, in many instances, differ from the white idealized family. Nationally, seventeen percent of families with children have a single female head of household, while for African American families in New York City, the rate is more than fifty percent.<sup>288</sup> In turn, this leads to a higher percentage of African American families living in poverty. But, what many social workers fail to recognize is that African Americans generally have a wide network of social supports. They rely more heavily on the extended family to help with childcare.<sup>289</sup> Caseworkers may identify neglect where there is none. They may presume that the African American family is broken and that

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<sup>280</sup> See ROBERTS, *supra* note 27 at 47.

<sup>281</sup> White, *supra* note 273.

<sup>282</sup> *Id.* See also ROBERTS, *supra* note 27 at 52 citing a National Child Welfare Leadership Center study (caseworkers are unintentionally biased toward African American families).

<sup>283</sup> White, *supra* note 273.

<sup>284</sup> *Id.*

<sup>285</sup> E. MAVIS HETHERINGTON & ROSS D. PARKE, *CHILD PSYCHOLOGY: A CONTEMPORARY VIEW POINT* 481-486 (5th ed. 1999).

<sup>286</sup> *Id.*

<sup>287</sup> HETHERINGTON, *supra* note 288 at 56.

<sup>288</sup> White, *supra* note 273.

<sup>289</sup> *Id.*

the child would be better off in a foster home, thereby leading to differential treatment of African Americans in the child protective system.

Much of the cause of disparate treatment is also structural, resulting from the stubborn refusal of social elites to share leadership of the child welfare apparatus. Thirty years ago, in their seminal work, *Children of the Storm*, Giovanni and Billingsley asserted that the situation for African American children in the child welfare system would not improve until the faces of those running the system reflected the faces of those enrolled in it.<sup>290</sup> But, today, when over seventy percent of the children in New York City's foster care program are African American, foster care agencies established by people of color serve only twelve percent of them.<sup>291</sup> Although an increasing number of African Americans populate the ranks of caseworkers, supervisors, and managers, there is a "glass ceiling" preventing them from taking positions of leadership.<sup>292</sup>

The political philosopher, Charles W. Mills, effectively describes the causes of racial stereotyping.<sup>293</sup> Mills theorizes that a contract exists between people of European descent, whereby peoples around the globe are stratified according to their race. The lighter a group's skin is, the closer to "civilization" they are. Alternatively, darker-skinned peoples are thought to live in a "state of nature." This explains why poor urban centers, populated with peoples whose skin is of varying shades of brown, are referred to as "urban jungles," a description never applied to rural areas, often afflicted with destitute poverty, underground methamphetamine laboratories, domestic violence and guns. Mills's theory also explains why darker skinned children and their families are treated worse at every turn of the child protective process. Caseworkers, administrators, and legislators all filter their assessment of the family through their biases, assuming the supremacy of white culture, and turning a blind eye to the strengths of the African American family. Meanwhile, foster care, especially in the group setting, is a place that is "jungle like," where might makes right and where violence reigns. Racism permeates every step of the process as African American children are treated in a manner that would be patently unacceptable for white children.

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<sup>290</sup> A BILLINGSLEY, & J.M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972).

<sup>291</sup> White, *supra* note 273.

<sup>292</sup> *Id.*

<sup>293</sup> See CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

Whether by design or oversight, whether due to overt racism or more ingrained presumptions, the child protective system adversely affects not only individual children, but the entire African American community. In *Shattered Bonds*, Dorothy Roberts propounds a theory of group-based rights:

The system's racial disparity also *inflicts* a group-based harm. The damage caused by the child welfare system is visited upon a disproportionate share of Black people. Those parents and children directly injured by child welfare authorities should have legal claims based on the violation of their family and civil rights—although current legal doctrines make it difficult for many to establish such a cause of action. But the harmful impact of a racist child welfare system is also felt by Blacks who are not directly involved in it. The negative consequences of disrupting large numbers of Black families and placing them under state supervision affects Black people's status and welfare as a group.<sup>294</sup>

The devaluation of African American families' autonomy has a negative impact on the African American community as whole. Meanwhile, cuts in welfare impoverish families, creating conditions ripe for actual child abuse and reports of abuse, which in turn lead to interference and removal. Foster care leads to later criminality, which leads to incarceration. Incarceration results in an increase in the number of single parent households which causes more children to live in poverty, which results in more investigations and interference. Through this process the African American community is debilitated in a manner akin to african slavery.

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I told the old man who peered out through the cracked door that I had police and a warrant this time and that he had no choice but to let me in. A report had come in that a child was living in unsanitary conditions. I had been trying for three weeks to gain entry into the home. My letters were not responded to, and when I visited or called the home, I was told that the mother and child no longer lived there, or that they had gone upstate and had left no forwarding address.

The old man opened the door, unleashing an overwhelming stench, and revealing a chaotic living room. To enter the house, I had to

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<sup>294</sup> See ROBERTS, *supra* note 27 at 229.

step over a decaying plastic cat box. The sides were blown out, litter was scattered and stale feces protruded. The cops, eyeing the house, told me they felt it was safe for me to go in alone, but offered to wait outside, in case I needed any backup.

Stepping into the room, I entered one of the corridors carved through the refuse that filled the house. The corridor was about shoulder width, the sides comprised of stratified layers of trash. Mostly this was comprised of magazines, newspapers, and a tremendous number of the plastic containers that Barbie dolls come in. Little, smiling blonde Barbie faces peered out incongruously through the layers of filth. I walked through the living room and into the kitchen. The kitchen was similarly cluttered, the counters piled high with dirty dishes, fast food containers, frozen food containers, and other garbage. Chained to the kitchen table was a medium size brown dog, dog shit surrounding him in a radius as wide as his chain was long. The kitchen table was strangely free of clutter, but was teeming with cockroaches, about one per square-inch of table. They were crawling up and down the table legs and covering the floor and walls.

I walked back out to the living room and when I looked at my cell phone I saw that I had no reception. I asked to borrow the family's phone and when I picked it up not less than a dozen cockroaches scurried out from under the phone. I told my supervisor that I was doing a removal.

The mother was about nineteen. She was attractive and well-kept, except for gnarled teeth. She carried her daughter, two-and-a-half years old, also blonde, and quite beautiful. The daughter seemed curious about what was going on, but displayed no emotion.

The police thought it would be better to hold the interview at the station and transported the mother and daughter. I met them at the station and conducted the interview there. I asked the mother why she was living there and she exploded. She told me, through her tears and anger, that she had nowhere else to go. When she turned eighteen she had left her foster care placement and had returned with her infant daughter to live with her mother, stepfather, and grandmother. She had been removed about seven years earlier and two of her siblings were still in foster care. She said she was working part-time and hoped to have enough money to move out of the place soon. I asked her why she had not applied for welfare or housing and she replied, "I've seen enough shit from this system. I don't want any part of it."

I told her that I had to take her daughter. She stood up, slammed her hand on the table and stormed out, leaving her daughter sucking her thumb and holding one of the table legs. A second later, the mother came back in, walked over to the child, knelt down and hugged her. She said, "Mommy loves you. Mommy is going to get you back." Then she stood up, turned around and stormed out the door again. The child did not react; she just stood there sucking her thumb. Leaning over to pick her up, I noticed she had the same stench as the house. Holding her, I felt that she had no muscle tone, as though she'd been kept in a cage. I introduced myself to the girl and told her what was going on. When she did not respond I tried to engage her by tickling her nose and tummy. She did not react, and continued to stare blankly at me. Seven hours later I was placing her in a foster home out on Long Island and she still had not said a word, or displayed any emotion.

The foster home was beautiful, a suburban tract home with a large, manicured lawn. Inside, it was clean and very well furnished. This was by far the nicest foster home I had encountered. The foster mother told me that her husband had died the previous year and that she was looking to fill a hole in her life. She said she did not know if she was ready to adopt but felt that she needed someone to focus on. Her own children were grown and had children of their own, who she was close to, but she wanted more. Her sister lived across the street and had offered to help out as much as possible. In fact, the whole block was excited to have a new child in the neighborhood. After months of placing children in marginal environments, it was a relief to place this little girl in a home I could feel good about.

This story illustrates all that can go right when child protective services becomes involved in the life of a child. We were able to correctly identify a child in need. We removed her from a home which was harming her and which would continue to harm her. And after her removal, she was placed in a warm, loving foster home, with a foster mother whose only motivation was to provide love to the child. The day after I placed the child, the foster mother went out and bought her a new wardrobe and toys and began to have other small children over to the home for the girl to play with.

This story illustrates much of what is wrong with the current system. This birth mother was herself a foster child. Not only did her experience with the system leave her lacking even the most basic life skills, it left her so embittered with the system that she was unwilling to



accept any help. Despite the conditions in which I found this child, I have no doubt that her mother loved her and was doing the best she thought she could. If we could have found her housing and supervision, while she learned to parent, mother and child could have remained together. In fact, at the removal hearing, the judge recommended just that. But the ACS attorneys snickered at his recommendation because there is no program that provides those services. The current system is set up to punish this mother, not to help her.

Of the dozens of removals I did in my time with ACS, this was the only white child I had removed. After months of placing black and brown children in some of New York's poorest neighborhoods, with families clearly motivated by the subsidy money, this was the only time that I placed a child in such a nice home. This could be coincidental. More likely it reflects the functioning of a racist system. White foster parents, who on average are more affluent, typically select white foster children. Whatever the cause, the result is a dual foster care system. White children receive love and quality care, while black and brown children are warehoused for their subsidy money.

#### CONCLUSION

This paper has attempted to demonstrate that the current child welfare system replicates the essential features of slavery and indentured servitude. African American children populate the system in numbers far disproportionate to the general population. Further, skin color appears to play a vital role, as Hispanics from comparably worse neighborhoods are less likely to become ensnared in the system. Once in the system, African American children are treated worse in the evaluation and treatment process. They receive fewer services and remain in foster care far longer than their lightly colored counterparts.

Like slavery, disenfranchised groups are targeted by an elite class offering beneficence, while systematically dismantling their families. The elite have identified those affected as having a fundamental flaw demanding intervention. Based on this rationale, families are disabled, and children are socialized to accept the arbitrary interference of power.

Upon entering the custody of the state, children are reduced to a state similar to that of chattel. They have few legal rights, and the few rights they have are impractical to exercise. The funding stream attached to these children supports a vast industry of child welfare professionals, all of whom take a bit of the subsidy pie. Decisions about

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children are not made according to their individual interests, but are dictated by an elaborate scheme of incentives calculated to achieve a politically palatable outcome. Even the system's defenders generally admit that it is just as harmful to children as the environments from which they were removed.

It is just this type of circumstance that the ratifiers of the thirteenth amendment hoped to prevent with its passage. Originally this amendment was intended as a broad grant of power to Congress and the courts, to reach into the states in order to prevent such large scale exploitation of our most powerless citizens. Subsequent interpretations have limited and expanded the amendment's reach. Under the most recent standard, a condition needs to be "akin to African slavery" to trigger thirteenth amendment protections. Surely, the conditions outlined in this paper replicate conditions "akin to African slavery." Unless the amendment has slipped into meaninglessness, it must be invoked to protect these children and their families.

