Social Justice and Family Court Reform

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Creating a unified family court, or any type of family court reform, may have only a minimal impact if it simply changes the structure of how judges do business rather than addresses the structure of the child welfare system itself. The authors argue that family court reform must place social justice at its center. First, they discuss profound flaws in the child welfare system that make poor and minority families especially vulnerable to coercive state intervention. Second, they describe two approaches to child welfare cases—family systems theory and therapeutic justice—that can help to guide reform efforts directed at addressing these structural flaws. Finally, they suggest ways in which family law scholarship can assist in creating a social justice agenda for family court reform.

SYSTEMIC FLAWS

What aspect of family courts is in most dire need of reform? The fundamental problem with family courts is that they treat family problems according to a family’s race and class status. White middle-class and affluent families almost always come to family court voluntarily to handle private matters, even though they may be seeking a coercive resolution to a dispute. Poor and minority families, on the other hand, are disproportionately compelled to appear before family court judges against their will. The state coercively intervenes in their lives and orders them to submit to the court’s jurisdiction because parents are charged with child maltreatment or children are charged with delinquency.

The child welfare system is marked by striking class and race disparities. Children raised in poverty are many times more likely than other children to be reported to child protective services and to be placed in substitute care. Poverty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there. America’s child welfare system is rooted in the philosophy of “child saving”—the idea that children should be rescued from the ills of poverty by taking them away from their parents. Thus, the public child welfare system often equates poverty with neglect. Most child maltreatment addressed by child protective services involves neglect related to poverty.

Black children make up nearly half of the national foster care population, although they represent fewer than one fifth of the nation’s children. Latino and Native American children are also in the system in disproportionate numbers. The system’s racial imbalance is most apparent in big cities, where there are sizeable minority and foster care populations. In Chicago, for example, 95% of children in foster care are Black. Of 42,000 children in New York City’s foster care system at the end of 1997, only 1,300 were White. Black children in New York were 10 times as likely as White children to be in state protective custody. State disruption of families of color reflects the persistent gulf between the material welfare of White and non-White children in America. Race also influences child welfare decision-making, and the authors argue that this is a crucial factor in addressing the systemic flaws of the child welfare system.
making through strong and deeply embedded stereotypes about minority families and the use of White, middle-class nuclear families as the norm to which all families are compared. There is evidence of racial bias at every stage of child welfare decision making, from reporting child maltreatment to placement of children by caseworkers and judges.

State agencies are far more likely to place Black children who come to their attention in foster care instead offering the families less traumatic assistance. According to federal statistics, Black children in the child welfare system are placed in foster care at twice the rate of White children. A national study of child protective services by the U.S. Department of Health and Human Services reported that “minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children.”

Most White children who enter the system are permitted to stay with their families, avoiding the emotional damage and physical risks of foster care placement, whereas most Black children are taken away from their families. And once removed from their homes, Black children remain in foster care longer, are moved more often, receive fewer services, and are less likely to be returned home or adopted than any other children.

Family courts often exacerbate these class and race disparities by prescribing solutions that do not fit the family’s problems. For example, judges often use mental health interventions to address poverty-related issues, such as inadequate housing, and they resort to expedited adoption as the medicine for curing all of the system’s ills.

Judges routinely rely on therapists’ evaluations of families in making child welfare decisions. Therapists, in turn, tend to describe family problems that are related to poverty as mental health deficiencies, which become the justification for keeping children in foster care while the family undergoes therapy. Consider, for example, a mother who is charged with neglect because a caseworker finds her child sleeping on a mattress on the floor in an apartment infested with roaches and vermin. Rather than addressing the family’s needs by providing a bed and extermination services, a judge is likely to order the mother to undergo psychological evaluation to determine what mental deficit prompted her to provide such an injurious environment for her child.

Recent changes in state and federal policy that emphasize moving children more expeditiously into adoptive homes also misdiagnose the reason why the foster care system is overburdened. Federal child welfare policy has recently shifted its emphasis from preserving families toward expediting termination of parental rights to “free” children in foster care for adoption. The Adoption and Safe Families Act (ASFA), passed in 1997, diminishes the existing requirement that states make “reasonable efforts” to avoid foster care, largely through a list of enumerated exceptions. Instead, it imposes a swifter and rigid time frame for state agencies to initiate petitions to terminate parental rights and offers financial incentives for states to increase the number of adoptions of children in foster care. Moreover, ASFA allows states to implement “concurrent planning,” in which agencies pursue both family reunification and adoption from the outset of the proceedings. Given that most states already provide inadequate family preservation services, it is likely that concurrent planning will often serve as a fast track to adoption.

Although adoption is the best option for some children in foster care, the priority placed on adoption to cure the ills of foster care is misguided. The strategy of increasing adoptions by expediting termination of parental rights may backfire because many of the “legal orphans” produced by these terminations will not be adopted. ASFA may result in a net increase in the number of children in long-term foster care. Moreover, the adoption strategy fails to address the child welfare system’s fundamental flaw—the biased state intervention in
poor and minority families and removal of children from their homes. Finally, the heavy emphasis on adoption overlooks other permanency alternatives, such as subsidized guardianship, which is often better at maintaining family relations that are important to children. There is currently too much state disruption and supervision of poor minority families. Any innovations in the family court system, then, should be aimed at minimizing coercive intervention in families and at family preservation. Court reform aimed at expediting processes and increasing efficiency, without attention to social justice, will only intensify the race and class disparities we have criticized. Making a biased system more efficient increases the scope of its injustice. This does not mean that the government should not intervene at all in these families. These families need services and resources. But the goal should be to support the majority of families on a voluntary, noncoercive, and nonpunitive basis.

**PROMISING APPROACHES TO REFORM**

For court reform to be meaningful, it must be informed not only by awareness of the socioeconomic and racial dimensions of child welfare but also by a holistic, ecological approach to children and families. Two such approaches are family systems theory and therapeutic jurisprudence. Family systems theory is a well-developed way of understanding how families function that has achieved wide acceptance in the mental health fields of social work, psychology, and psychiatry, despite its relative lack of familiarity among judges and courts. Contrary to the legal system's emphasis on individual rights and remedies, the family systems approach views the family as a living system, whose members are its interacting parts.

A family systems approach requires courts to take into consideration the whole family, broadly defined, in making decisions about a child. It also requires a court to respect the child's attachments to family members and other intimate relationships, attempt to maintain family ties wherever possible, and focus on family strengths rather than deficits.

A family court model that exemplifies this approach is what the former chief judge of the Jefferson County Family Court, Richard FitzGerald, has called the "Clinic Court." His vision is that the family court should be a core that can deliver needed services to the family under a single roof. The services offered through the court must be as comprehensive as possible. Ideally, they should include education, health and mental health services, as well as more concrete services, such as assistance with housing and public benefits. In addition, the court should make available to families alternative mechanisms to resolve conflicts, such as mediation and family group conferencing.

The key to the effectiveness of this model is offering services in a preventive and noncoercive fashion. Thus, families may take advantage of the court's resources to avoid the need to file a petition, initiate adversarial litigation, or relinquish custody of the children to the state. A major defect of the child welfare system is that it is usually activated only when families are already in crisis. Social work professor Duncan Lindsey criticized the "residual approach" to child welfare that makes state intervention a last resort to be invoked only after the family has exhausted all resources at its disposal. "But because the damage to children is so great by the time they enter the system, the number who survive and benefit is minimal," he wrote. Instead, families need to be able to access the full range of services as early as possible when a vulnerable child or family presents itself.

Another theory that captures this approach to family court reform is "therapeutic jurisprudence." Therapeutic jurisprudence has been defined as the study of law as a therapeutic agent. It is an effort to focus on how the law can and should enhance the well-being of those...
who are affected by it.\textsuperscript{38} Beginning as a scholarly inquiry, it has expanded into an exploration by practitioners, advocates, and judges. Professor Barbara Babb has suggested how therapeutic jurisprudence would guide reform by describing how a family court is structured to meet therapeutic goals.\textsuperscript{39}

**DIRECTIONS FOR SCHOLARSHIP**

Family law scholars can draw on theoretical and empirical research by social scientists and can collaborate with clinicians to translate ideas about reform into practice. For our scholarship to have an impact, however, it must go beyond the traditional framework of making legal arguments and drawing on case law. As our discussion of family systems theory shows, family law scholars can look to theories of human development and interpersonal dynamics to develop legal approaches to children and families. We need to reach into other disciplines and adopt some of their better practices, such as using empirical data to study problems and test the effectiveness of proposed reforms. For example, social science research can help to explain the reasons for race and class disparity in the child welfare system to provide a stronger foundation for tackling these inequities. It also can help to describe the harm that the disparity causes to children, families, and communities.\textsuperscript{40}

This description of harm is particularly important because there are very vocal and powerful people who publicize the harm to children of remaining in neglectful and violent homes.\textsuperscript{41} We hear far less about the harms to children, families, and communities caused by excessive state disruption and supervision of families. One model for this research is the recent investigation of collateral damage inflicted by high rates of incarceration among young Black men and women.\textsuperscript{42} We need similar research on the impact of the child welfare system in poor Black communities, such as Central Harlem, where 1 of 10 children has been placed in foster care.\textsuperscript{43}

Another useful collaboration for family law scholarship is between clinicians and theoretical scholars. Indeed, this article and some of the authors’ prior work are examples of this kind of interaction. Because scholars can focus their attention on examining the systemic causes of and solutions for societal inequities, they can give clinicians a framework for understanding the particular inequities they encounter in their practice. Because clinicians work “in the trenches,” they bring problems to the attention of their colleagues, as well as bring their colleagues’ scholarship to the attention of legislators and policymakers. Clinicians also can translate scholars’ substantive understandings about the direction the law should take into concrete law reform efforts. The therapeutic jurisprudence movement, too, represents an effort to bridge the gap between scholarship and advocacy. By examining how a particular law or program—or in this case, court structure—might enhance or detract from the well-being of those affected by it, family law scholars have used their knowledge to affect change in the “real world.”\textsuperscript{44}

A project initiated by the legal clinic at Vanderbilt University Law School, in partnership with state agencies and community leaders, illustrates the vision we have laid out for the voluntary provision of family supports. The Relative Caregiver Program has developed out of the recognition that abused and neglected children or children whose parents are unable to provide for them are best served and cared for by other suitable family members instead of being placed in foster care with unrelated caregivers. It also recognizes that relatives often have difficulty taking care of children because of their financial limitations.
In June 2000, the Tennessee General Assembly passed legislation that allocated $4 million to support a 2-year pilot program funded through the temporary assistance to needy families block grant. Under the program, the Department of Children’s Services contracted with community-based agencies at three sites to serve children and their relative caregivers in 16 counties.

The families participate in strategic planning with their own communities to identify existing resources available to children and their relative caregivers, and they identify the needs of these families within their own communities. The services include individual and family counseling, legal services, financial aid, recreation, homemaker services, support group participation, and case management, as well as concrete needs, such as beds, mattresses, and clothing. Importantly, families need not relinquish custody of the children to the state to receive services. The families must come to the court and petition for private custody (described as guardianship in other states). They can do this by agreement, and they also can simply share custody with the parent, rather than take custody away from a parent, to qualify for the program. The program has been very successful, judging from the numbers of families that have joined the program: More than 1,500 children have been served under this program in less than a year, with only 16 of 95 counties being served.

CONCLUSION

The Relative Caregiver Program is still a pilot project and may not represent structural reform of the Tennessee child welfare system. Nevertheless, it can serve as a model for more broad-based change. This reform simply cannot make a biased system more efficient. Rather, it must make social justice its central focus. Family court reform should aim to eliminate the child welfare system’s inequalities and minimize its punitive and coercive functions. It should develop ways to address most families’ needs on an egalitarian and voluntary basis. Family law scholars can assist in this process best by collaborating with social science researchers, who can provide an empirical foundation for reform, and clinical colleagues, who can help to translate theory into practice.

NOTES

1. See Judith Areen, Intervention between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEORGETOWN L.J. 887, 899 (1975) (describing a dual legal system based on wealth that originated in the Elizabethan Poor Law). As Areen observed about the history of our dual system of family law,

For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action. (Id.)

3. Id.
5. Id.; Leroy Pelton, Child Welfare Policy and Practice: The Myth of Family Preservation, 67 AM. J. ORTHOPSYCHIATRY 545, 546 (1997) (noting that the correlation between income and risk of involvement with child protective services leaves “no doubt that the children in foster care have come predominantly from impoverished families”); Duncan Lindsey, Adequacy of Income and the Foster Care Placement Decision: Using an Odds Ratio


9. Id.


13. Id.


15. Id. at 59-67.

16. Id. at 47-55.


18. Id., Executive Summary, Finding 4, at 3 (emphasis added).


22. Id. at 149-165. See also Susan L. Brooks, The Case for Adoption Alternatives, 39 FAM. CT. REV. 43 (2001) (criticizing the Adoption & Safe Families Act’s emphasis on traditional adoption and advocating the use of subsidized guardianship and cooperative adoption as alternatives).

23. Id. at 45.

24. Id.

25. Id.

26. Roberts, supra note 2, at 157-159.

27. Id. at 163-165.


33. See Pelton, supra note 5.


35. Id.


40. See generally Roberts, supra note 2, at 228-267 (describing a theory of group-based harm caused by the racial disparity in the child welfare system).

42. See, e.g., MARC MAUER, RACETO INCARCERATE (1999).


45. As of this writing the Tennessee General Assembly has extended the program for at least 2 more years.

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