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# Colorblind Must Not Mean Blind to the Realities Facing Black Children

Zanita E. Fenton

*University of Miami School of Law*, [zfenton@law.miami.edu](mailto:zfenton@law.miami.edu)

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# COLORBLIND MUST NOT MEAN BLIND TO THE REALITIES FACING BLACK CHILDREN

ZANITA E. FENTON\*

**Abstract:** This discussion identifies the statistical realities resulting from institutionalized racism and foregrounding the challenges to ensuring the welfare of Black children. It then identifies specific instances where policy and law makers should reconsider rules and objectives, while keeping in mind the ultimate effects imposed on children and their family systems of support.

## INTRODUCTION

Did you hear about the tragic removal of four-year old Evan Scott from the only home he had ever known?<sup>1</sup> Or do you remember the cases of Baby Jessica<sup>2</sup> or Baby Richard?<sup>3</sup> In each of these instances, a child was removed from his or her adoptive home after a period of years, and the child knew that adoptive family as the only family she

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\* Professor of Law, University of Miami School of Law. A.B., Princeton University; J.D., Harvard Law School. I would like to thank the *Boston College Third World Law Journal* for holding this symposium and for having the wisdom to honor the career and many achievements of Professor Ruth-Arlene Howe.

<sup>1</sup> Evan's father had filed for putative consent when Evan was approximately five months old. Evan's original adoption was first over-turned at that time. Through a series of legal motions and events, the Starks (Evan's adoptive family) were not required to return Evan until he was four. See Ron Word, *Adoptive Mom Gives Up Custody of Florida Boy*, ASSOC. PRESS, Oct. 8, 2004, at A11.

<sup>2</sup> *DeBoer v. Schmidt* (*In re Baby Girl Clausen*), 502 N.W.2d 649 (Mich. 1993). In *DeBoer v. Schmidt*, the biological mother gave birth to a baby girl, Jessica, in the state of Iowa. *Id.* at 652. She gave Jessica over for adoption to a couple in Michigan. *Id.* In the adoption process, she named a man who was not the father as the biological father. *Id.* Shortly thereafter, she changed her mind. *Id.* When the true biological father of Jessica was informed, he sought custody of the child. *Id.* Iowa ruled that he had not relinquished his parental rights and that the child should be returned. *Id.* Through multiple court proceedings, it took almost three years for baby Jessica to be transferred back to her biological parents. *Id.* at 652-53.

<sup>3</sup> "Baby Richard" was adopted four days after his birth. The biological mother told the adoptive parents that the child was abandoned by the father and told the biological father that the boy had died. When the biological father learned that the child was alive two months after his birth, he immediately began proceedings to gain custody. After multiple court proceedings and four years, Richard was transferred to his biological parents. The transfer was very emotional and highly publicized. See Don Terry, *Storm Rages in Chicago over Revoked Adoption*, N.Y. TIMES, July 15, 1994, at A1.

or he had ever had. These cases were well publicized, making the national news. The common factor in all of these stories is not just that they were well publicized, but also that the children and their families were all white and the prospective adoptive parents were both white and financially well established. These are heart breaking events, possibly causing irreparable emotional damage to the child, but are they emotionally different from the daily stories where children are ripped from their parents and taken to foster care, or from their foster parents, and sometimes from successive sets of foster parents?<sup>4</sup> By and large, children placed in foster care are children of impoverished families. In addition, foster placements are disproportionately comprised of Black children.<sup>5</sup>

Society tends to have expectations that the law and social institutions will be colorblind in its dealings. Society is not colorblind, however, when it automatically gives its sympathies to the torn families like those of Evan Scott, and it is not colorblind when it is willfully and blissfully ignorant of the plight of children removed from their homes to become wards of the state, which is far too often, the plight of Black children.<sup>6</sup>

It is true that foster care is not explicitly "raced." There are children of all races and ethnicities in foster care, and families of all races and ethnicities are affected by the removal of children from their homes.<sup>7</sup> Nonetheless, Black children are far more likely to be affected

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<sup>4</sup> "Foster care drift" refers to situations where children languish in a foster care placement, or successive foster placements, for extended periods of time, sometimes years. This situation may occur where the system fails either: (1) to resolve the problems that led to placement and succeed in family reunification, or, (2) to recognize that reunification is unlikely and, alternatively, arrange for termination of parental rights and a subsequent permanent placement, such as adoption.

<sup>5</sup> The level of disproportionality is best understood by juxtaposing population statistics, identified in the text accompanying note 10, with the statistics concerning foster care, identified in the text accompanying note 23.

<sup>6</sup> The paradigm here is a straight-forward binary: Black and white. A paradigm based on a binary of poverty and wealth would also be instructive. Though the correlation is not strict, the correspondence of race and poverty in America today, and in history, is sufficient to support the points concerning race. *See infra* text accompanying notes 10–12. In addition, this paradigm is used to correlate with the social extremes, statistically speaking. *See infra* text accompanying notes 19–25.

<sup>7</sup> *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002). *See also* Steven Hobbs & Shenavia Baity, *Tending to the Spirit: A Proposal for Healing the Hearts of Black Children in Poverty*, 26 B.C. THIRD WORLD L.J. 107, 107-08 (2006).

by the foster care system.<sup>8</sup> The disproportionality of the effects alone must be considered as a form of institutionalized racism.<sup>9</sup>

### I. STATISTICS: THE REALITIES OF INSTITUTIONALIZED RACISM

African-American or Black people constitute approximately twelve percent of the total population of the United States, yet are disproportionately represented within populations of poverty.<sup>10</sup> Rates of poverty in 2001 were approximately 23.1% for Blacks, 24.9% for Hispanics, and 7.9% for whites. With these numbers, it is apparent that Blacks and Hispanics are approximately three times as likely to be poor as whites are.<sup>11</sup> In addition, “[y]oung (under 30 years of age), Black, or never-married custodial parents also tended to have higher rates of poverty (about 36 percent) than other members of their respective demographic groups.”<sup>12</sup> This fact is especially relevant given the prevalent living arrangements for poor Black children.<sup>13</sup>

In addition, Blacks are disproportionately represented within prison populations.

<sup>8</sup> See *infra* text accompanying notes 22–25.

<sup>9</sup> Institutional racism may be overt (e.g., specifically excluding people-of-color from services) or inherent (e.g., adopting policies that, while not specifically directed at excluding people-of-color, nevertheless result in their exclusion).

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people.

SIR WILLIAM MACPHERSON OF CLUNY ET AL., *THE STEPHEN LAWRENCE INQUIRY* (1999), <http://archive.official-documents.co.uk/document/cm42/4262/sli-06.htm>.

<sup>10</sup> In 2000, Blacks or African-American persons were 12.3% of the population; Whites were 75.1%; Latinos were 12.5%. U.S. CENSUS BUREAU, *STATE & COUNTY QUICK FACTS* (2000), <http://quickfacts.census.gov/qfd/states/00000.html>.

<sup>11</sup> TIMOTHY S. GRALL, *URBAN INSTITUTE, FAST FACTS ON WELFARE POLICY: POVERTY GAP BETWEEN WHITES, BLACKS, HISPANICS NARROWS BETWEEN 1996 AND 2001*, at 1 (2004), available at <http://www.urban.org/UploadedPDF/900703.pdf>.

<sup>12</sup> U.S. CENSUS BUREAU, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001*, at 3 (2003), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

<sup>13</sup> Forty-nine point three percent of poor Black children live only with their single mother with no involvement of the father; forty-five percent live in arrangements where there is significant visiting by the biological father. RONALD B. MINCY & HELEN OLIVER, *THE URBAN INSTITUTE, AGE, RACE, & CHILDREN'S LIVING ARRANGEMENTS: IMPLICATIONS FOR TANF REAUTHORIZATION 5* (2003), available at [http://www.urban.org/UploadedPDF/310670\\_B-53.pdf](http://www.urban.org/UploadedPDF/310670_B-53.pdf); see also LAURA WHERRY & KENNETH FEINGOLD, *THE URBAN INSTITUTE, MARRIAGE PROMOTION AND THE LIVING ARRANGEMENTS OF BLACK, HISPANIC, AND WHITE CHILDREN 2* (2004), available at [http://www.urban.org/UploadedPDF/311064\\_B-61.pdf](http://www.urban.org/UploadedPDF/311064_B-61.pdf).

Two-thirds of the people in prison are now racial and ethnic minorities, and for black males in their twenties, one in every eight is in prison or jail on any given day. Moreover, black males born today have a one in three chance of going to prison during their lifetime, compared to a one in seventeen chance for white males. These trends have been exacerbated by the impact of the "war on drugs," with three-fourths of all drug offenders being persons of color, far out of proportion to their share of drug users in society.<sup>14</sup>

These high rates of incarceration have a definite impact on the human resources available within the Black community, and most significantly on the lives of Black children. When a parent is incarcerated, the establishment and continuation of strong parent-child bonds are disrupted, affecting healthy child development.<sup>15</sup> Perhaps most relevant to the lives of many Black children, "African American women have experienced the greatest increase in their rate of criminal justice control of all demographic groups in recent years, increasing by 78% from 1989 to 1994."<sup>16</sup>

Further, as with the misguided "war on drugs," prison policies emphasize punishment over rehabilitation, which leads to long sentences<sup>17</sup> and resulting missed opportunities for the benefit of families. As stated by the Urban Institute, "[p]rison presents opportunities to improve prisoners' abilities to serve as productive members of their families

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<sup>14</sup> THE SENTENCING PROJECT, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1* (2001), available at <http://www.sentencingproject.org/pdfs/9070smy.pdf>.

<sup>15</sup> JEREMY TRAVIS ET AL., URBAN INSTITUTE, *FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1* (2003), available at [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf) ("With incarceration rates in America at record high levels, the criminal justice system now touches the lives of millions of children each year. The imprisonment of nearly three-quarters of a million parents disrupts parent-child relationships, alters the networks of familial support . . .").

<sup>16</sup> THE SENTENCING PROJECT, *supra* note 14, at 1.

<sup>17</sup> U.S. DEP'T. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *CRIMINAL SENTENCING STATISTICS*, <http://www.ojp.usdoj.gov/bjs/sent.htm#publications>. For just drug offenses alone, the average maximum sentence was thirty-two months in 2002, whereas the average maximum sentence for all offenses, including violent offenses was thirty-six months. This average has remained essentially the same since 1996 as has the overall number of felons convicted of drug offenses. *See id.*; JODI M. BROWN ET AL., THE URBAN INSTITUTE, *FELONY SENTENCES IN STATE COURTS*, 1996, at 3 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc96.pdf>. In addition, and perhaps most significant, the percentage of those convicted for drug offenses who are Black has remained constant at fifty-three percent, which indicates, again, the disproportional nature of enforcement and effect. *See id.* at 5.

once they are released. For example, prison-based programs can enhance parenting skills, treat addictions, increase literacy, raise educational levels, and generally prepare inmates for life outside prison."<sup>18</sup>

Moreover, Blacks are disproportionately represented among welfare recipients. "Indeed, a majority of children receiving [Temporary Aid for Needy Families (TANF)] today are African-American or Hispanic."<sup>19</sup> The professed concerns of policy makers of the late 1970s and early 1980s for preserving Black families have been abandoned.<sup>20</sup> "Welfare reform, by throwing many families deeper into poverty, heightens the risk that some children will be removed from struggling families and placed in foster care."<sup>21</sup> Furthermore, removal rates are staggering.<sup>22</sup>

Black children are disproportionately represented within foster care. "Of the estimated 542,000 children in foster care as of September 30, 2001: 38 percent were Black/Non-Hispanic; 37 percent were White/Non-Hispanic; 17 percent were Hispanic; and 8 percent were other races/ethnic origins."<sup>23</sup> Thus, foster care, nationally, is racially imbalanced; it is far more likely that Black children will be placed in foster care than children of any other race.<sup>24</sup> A comprehensive federal study of child maltreatment found that, "even when families have the same characteristics and lack of problems, African-American children, and Hispanic children to a lesser extent, are more likely than white children to be placed in foster care."<sup>25</sup>

<sup>18</sup> TRAVIS, *supra* note 15, at 2.

<sup>19</sup> David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2588 (1995).

<sup>20</sup> See ROBERTS, *supra* note 7, at vi (discussing Andrew Billingsley & Jeane M. Giovannoni, *Children of the Storm: Black Children and American Child Welfare* (1972) and the lack of progress in the last three decades).

<sup>21</sup> *Id.* The comparison of the state costs for foster care versus those for welfare and programs designed to keep families together is not altogether a fair one, but given the ubiquitous stereotypes of poverty and welfare dependency in tandem with the media valorization of adoption, it is important to be aware of this relative comparison.

<sup>22</sup> *Id.* at 7–10. "Child protection authorities are taking custody of Black children at alarming rates, and in doing so, they are dismantling social networks that are critical to Black community welfare." *Id.* at vii.

<sup>23</sup> NAT'L ADOPTION INFO. CLEARINGHOUSE, FOSTER CARE NATIONAL STATISTICS 5 (2003), available at <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.pdf>; see also U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, THE AFCARS REPORT 2 (2005), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report10.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.pdf).

<sup>24</sup> ROBERTS, *supra* note 7, at 7–10.

<sup>25</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN'S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES (1997), <http://www.acf.hhs.gov/programs/cb/pubs/97natstudy/raceethn.htm>.

Black children have the greatest odds of being removed from their homes and the smallest chance of being either reunited with their parents or adopted. They spend the most time in foster care and receive the least helpful services. The inferior treatment of Black children seems to be orchestrated at the policy level.<sup>26</sup>

An honest assessment of these combined statistical effects leads us to understand that Black children in foster care or at risk of removal from their homes are the most disadvantaged. These realities concern the entire Black community and, ultimately, how the needs of its children are addressed. Meaningful and effective services for the needs of the majority of children in foster care can only be realized when these disproportionate effects visited upon the Black community are directly addressed.

## II. A FEW WORDS ABOUT ADOPTION

Whenever there are discussions concerning the welfare of Black children, especially if adoption is mentioned, transracial adoption becomes prominent in the conversation. While transracial adoption needs to be discussed insofar as it is an important option in ensuring that children without homes are cared for, the vast number of minority children are not effected by this single issue.<sup>27</sup> This one, statistically small issue, however, has deflected attention from the needs of the majority of Black children raised by Black families, in Black communi-

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<sup>26</sup> ROBERTS, *supra* note 7, at 13–14.

<sup>27</sup> Black children's odds of being adopted are three times less than those of white children. Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 67 n.30, 68 (2006) (referencing the trend of Canadian and Europeans adopting Black children from the United States); see also Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39, 50–62 (1993); Professor Ruth-Arlene Howe has critically examined how transracial adoption has been touted as the best hope for creating a "colorblind" society. See generally Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995) [hereinafter Howe, *Transracial Adoption*].

ties.<sup>28</sup> How can transracial adoption promote “colorblindness,”<sup>29</sup> if this is the case?<sup>30</sup>

To have the full picture of adoption in its racialized state, it is important to also consider the politics of abortion<sup>31</sup> and the financial issues surrounding the reproductive technologies.<sup>32</sup> Access to both abortion and adoption is key in understanding the unease in the juxtaposition of these matters. There is no mistaking the connection be-

<sup>28</sup> See generally Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993–1994) [hereinafter Perry, *Adoption Controversy*].

<sup>29</sup> “Colorblindness” has been used by some to establish social equality. Unfortunately, it has more often served as a means of reaffirming the status quo in which equality is not the norm. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528 (1980) (arguing that accommodations of Black interests are only successfully accomplished when they also serve majoritarian interests).

<sup>30</sup> Ruth-Arlene W. Howe, *Adoption and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 685 (1999) (“This prevents acknowledgment of unresolved issues of race and color which are inextricably intertwined with issues of power, status, and the allocation of resources and account for continuing inequities that make a mockery of America’s claims of being a democratic land of equal opportunity for all.”); see also Howe, *Transracial Adoption*, *supra* note 27, at 138 (“Proponents of transracial adoption who claim that same-race placement preferences are victimizing the increasing numbers of Black children in foster care are employing a diversionary “smokescreen” strategy. This smokescreen obfuscates important systemic problems and creates additional barriers to meeting the needs of Black children, Black families, and the Black community.”).

<sup>31</sup> See Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 138 (1998) (discussing feminist authors’ general analytic inattention to adoption because it is perceived as the political alternative to abortion).

Why have feminists been so silent on the question of adoption? Professor Carol Sanger has speculated that many in the women’s movement have adopted a dichotomy of adoption as the alternative to abortion, so that favoring adoption becomes equated with opposing abortion. Professor Elizabeth Bartholet describes the response of feminists to adoption as one of “a combination of hostility and silence.” She also argues that hostility to adoption is the result of a reaction by feminists “against the anti-abortion apparent embrace of adoption as the preferred alternative to abortion.” Making the argument that a feminist orientation is consistent with support for adoption, she argues that “it makes perfect feminist sense to extend our understanding of reproductive rights to include . . . adoption rights—the birth mother’s right to surrender her child for others to raise, the infertile woman’s right to adopt children in need of nurturing, and the child’s right to a home.”

*Id.* (citations omitted).

<sup>32</sup> See Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–1983*, 17 FAM. L.Q. 173, 195 (1983) (“Is there any future for the human institution of adoption as it has been practiced over the years? Once the acceptable social solution for the curse of infertility, will adoption now become obsolete because of scientific breakthroughs such as in vitro fertilization, or will it remain only for the maltreated, bereaved, and abandoned children of the lower classes?”).



tween adoption and abortion. The Hyde Amendment,<sup>33</sup> in effect since 1977, has returned wealth-based social realities to pre-*Roe v. Wade*, where, usually white, middle-class and wealthy women, were able to procure safe abortions (sometimes even legally); while women without means, often women of color, resorted to back-alley, life-threatening abortions. Pro-life positions are promoted to young white women in order to minimize the dearth of healthy white infants available for adoption.<sup>34</sup> Add to this dynamic an understanding of how likely foster care drift will be for Black children,<sup>35</sup> and you have a better understanding of what “choice” means for many Black mothers.

Furthermore, for women having difficulty reproducing, those with money who are more often white, have the option of reproductive technologies.<sup>36</sup> On the other side of the coin (pun intended), for women in poverty, the reproductive technologies may provide an opportunity to make money, but are not generally a means of family planning.<sup>37</sup> Adoption and reproductive technologies are analytically related, especially where race is concerned. For example, compare adoption with surrogacy. Adoption may be perceived as surrogacy for free.<sup>38</sup> Nonetheless, the fees (both legal and not-so-legal) associated with both surrogacy and adoption increase with the whiteness and health of the child.<sup>39</sup> This broader picture significantly contributes to

<sup>33</sup> 42 U.S.C. § 1397(ee)(c)(1) (2000). The Hyde Amendment, as it is known, is a rider to the annual Public Health and Welfare appropriations bill that prevents Medicaid and other programs under these departments from funding abortions unless necessary to save the life of the mother or if the pregnancy is the result of rape or incest. *See id.*

<sup>34</sup> *See* Fenton, *supra* note 26, at 51.

<sup>35</sup> “Foster care drift” refers to lengthy waits for permanent placements or the date of “aging-out” of the system. Children included in the category of “special needs” often spend the longest time waiting for a placement. Special needs children include those with emotional, physical, or mental disabilities, those beyond age five, those in large sibling groups, and those exposed to drugs or otherwise abused or neglected. Minority racial status alone implicates the special needs status of a child.

<sup>36</sup> The costs of reproductive technologies are astronomical. In vitro fertilization costs upwards of \$9000 per attempt. *See* Shared Journey: Your Path to Fertility, Typical Infertility Fees, <http://www.sharedjourney.com/articles/fees.html> (last visited Jan. 19, 2006). Procuring the services of a sperm donor, an egg donor and/or a surrogate increase the overall costs considerably; *see also* Anita L. Allen, *The Black Surrogate Mother*, 8 HARV. BLACKLETTER L.J. 17, 24 (1991) (discussing the California Superior Court case of *Johnson v. Calvert* in which Judge Parslow compares gestational surrogacy to both foster care and to “wet nurse[]” services). These comparisons make evident both the wealth and the racial component in the overall procreative dynamic.

<sup>37</sup> *See supra* text accompanying note 5.

<sup>38</sup> *See* Perry, *Adoption Controversy*, *supra* note 28, at 138–39.

<sup>39</sup> *See* ROBERTS, *supra* note 7, at 166.

the racial statistical imbalance of children in foster care<sup>40</sup> and those waiting to be adopted.<sup>41</sup> With this picture in mind along and a complete understanding of the statistics, poverty is the obvious place to begin to find the reasons why so many Black children end up in foster care.<sup>42</sup>

### III. DEALING WITH INSTITUTIONAL RACISM

The interaction of state agencies and administrative bodies, especially those of the justice system (including police, prosecutors, and judges) with communities of color is a major factor that contributes to a dynamic that is central to understanding the pervasiveness of institutional racism.<sup>43</sup> People of color have a general distrust of the justice system that is well founded in history. This foundation includes both legal and extra-legal persecution of Black males, an entire era of extrajudicial lynching,<sup>44</sup> the more recent documentation of racial profiling,<sup>45</sup> and police brutality against people of color.<sup>46</sup> The dispro-

<sup>40</sup> See *supra* text accompanying note 5.

<sup>41</sup> See *supra* text accompanying note 6.

<sup>42</sup> See Hobbs & Baity, *supra* note 7, at 109-114.

<sup>43</sup> See, e.g., Beth Richie, *Battered Black Women: A Challenge for the Black Community*, BLACK SCHOLAR, Mar./Apr. 1985, at 43 ("How can blacks in the domestic violence movement reconcile the reality of police brutality and blatant racism in the criminal justice system with the need for police and court intervention on behalf of battered women?").

<sup>44</sup> See IDA B. WELLS, ON LYNCHINGS: SOUTHERN HORRORS, A RED RECORD, MOB RULE IN NEW ORLEANS 58-70 (Arno Press 1969).

<sup>45</sup> See, e.g., René Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 80 (2001); Frank Rudy Cooper, *The Unbalanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 870 (2002); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 551-52 (2001); Kathryn R. Russell, "Driving While Black": *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 725 (1999); DJ Siltan, Article, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 54 (2002) (citing HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 2000: EVENTS OF 1999, at 393 (2000)).

<sup>46</sup> See, e.g., David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 19-27 (1999). See generally Gregory Howard Williams, *Controlling the Use of Non-deadly Force: Policy and Practice*, 10 HARV. BLACKLETTER L.J. 79 (1993) (discussing the use of non-deadly force in communities of color and citing several incidents). See also Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1740 (1993) (noting the animal imagery used to describe the victim in the criminal trial where the four white police officers were acquitted). The beating of Rodney King has become an infamous reference for the treatment of Black men by the justice system. It is nonetheless not unique or only a reference to past practices. A recent example of police brutality against Black men is in the torture case of a Haitian man by Brooklyn Police, where the officers sodomized the man with the wooden handle of a toilet plunger, puncturing his intestines and bladder from shoving it into his rectum and

portionate numbers of Black children in foster care easily leads one to believe there are biases operating in this system as well.<sup>47</sup> Thus, there is a real reticence in inviting state involvement of any kind into the private and family lives of people within the Black community.

There is also a strong belief within many Black communities in poverty that Social Services organizations are “out to get them.” For example, consider one state’s recent response to the effects of domestic violence<sup>48</sup> on children.<sup>49</sup> New York State’s Department of Children and Family Services took the policy stance that children exposed to domestic violence were neglected by their custodial parent (usually the mother and the one being abused) who “permitted” them to watch.<sup>50</sup> Since Black mothers are among those with the highest rates

then breaking his teeth from ramming it into his mouth. See John Kifner, *Thousands Call on City Hall to Confront Police Brutality*, N.Y. TIMES, Aug. 30, 1997, at A3; David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B2; David Kocieniewski, *Relatives, Not Officers, Were First To Complain*, N.Y. TIMES, Aug. 14, 1997, at B3.

<sup>47</sup> See *supra* text accompanying note 5.

<sup>48</sup> Though domestic violence is a broad concept covering many types of violence, this article here refers to domestic violence as that which is perpetrated by a controlling member of an adult relationship. Typical expectations and statistical realities are of abuse of the wife by the husband in a heterosexual, marital relationship.

<sup>49</sup> See, e.g., *Nicholson v. Scopetta*, 820 N.E.2d 840, 848–49 (N.Y. 2004). This case came to the author’s attention through a colleague, Janet Findlater, who was instrumental in changing this policy as a consultant to the review committee, established by the preliminary injunction. In *Re Sharwline Nicholson*, 181 F.Supp.2d 182 (E.D.N.Y. 2002). See OFFICIAL NEW YORK CITY WEBSITE, ADMINISTRATION FOR CHILDREN’S SERVICES, DOMESTIC VIOLENCE: A STRATEGIC PLAN, [http://www.nyc.gov/html/acs/html/about/domestic\\_violence.shtml](http://www.nyc.gov/html/acs/html/about/domestic_violence.shtml) (suggesting that the most effective way to ensure children’s safety is to support and help non-abusive parents protect themselves and their children). See generally Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565 (2004) (arguing the inappropriateness of charging battered mothers with child abuse or neglect for child’s witnessing abuse of mothers).

<sup>50</sup> There is reason to believe that this policy position was not unique to New York. See Dunlap, *supra* note 49, at 589–90 (discussing Minnesota’s legislative shift, and stating that “state made exposure to domestic violence a reportable incident for child abuse. The new reporting requirements paralyzed a system ill-equipped to handle the flood of new cases. Less than a year later, the law was repealed.”); Janet Findlater & Susan Kelly, *Reframing Child Safety in Michigan: Building Collaboration Among Domestic Violence, Family Preservation, and Child Protection Services*, 4 CHILD MALTREATMENT 167, 167 (1999) (“[T]hrough policy development; training; and resource sharing; Michigan’s child protection; family preservation; and domestic violence programs are working together to enhance the safety for children, recognizing that safety for children is often best achieved by enhancing the safety and self-sufficiency of their mothers.”); Nancy K. D. Lemon, *The Legal System’s Response to Children Exposed to Domestic Violence*, 9 DOMESTIC VIOLENCE & CHILD. 67, 71 (1999) (“Battered mothers frequently have their parental rights terminated for failure to protect their children from exposure to domestic violence, even when neither the mother nor the batterer has physically abused the children.”); Pamela Whitney & Lonna Davis, *Child Abuse*

of poverty<sup>51</sup> and are disproportionately represented among welfare recipients,<sup>52</sup> both factors increase the likelihood of interaction with state agencies, it follows that Black mothers and their children would be affected by this ill-considered rule. Indeed, mothers who are not in poverty and do not have regular interactions with state social services agencies are far less likely to have their children removed.

In addition to trepidation concerning the possible consequences of state interaction, women of color often lack confidence in the system's ability to serve their needs. There is both a real and perceived lack of interest by the police in the complaints of Black women, especially regarding domestic violence.<sup>53</sup> Generally, there has been a pat-

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*and Domestic Violence in Massachusetts: Can Practice Be Integrated in a Public Child Welfare Setting?*, 4 CHILD MALTREATMENT 158, 158 (1999) ("In 1990, DSS moved to address the overlapping problem of domestic violence and child abuse by making basic domestic violence training mandatory for all new workers and by hiring a battered women's advocate into the department's Family Life Center, a statewide, multidisciplinary assessment and intensive family-based services model. New funding was provided to the shelter community for services for battered women and their children."). See generally Symposium, *Children and the Courts: Is Our System Truly Just?*, 82 DENV. U. L. REV. 629 (2005).

<sup>51</sup> See *supra* text accompanying note 12.

<sup>52</sup> See *supra* text accompanying note 19.

<sup>53</sup> See Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1, 53 (1998). "Even though activism has begun to change the way the police are trained and the protocols by which they are governed, the police are not exempt from the attitudes about race and gender that pervade society." *Id.* at 53 n.218. "Two of the most common beliefs and the ones most likely to affect your interaction with the police as an abused black woman are 1) domestic violence is a private 'family matter' in which the police shouldn't interfere and 2) violence is a 'natural' part of black culture." EVELYN C. WHITE, CHAIN CHAIN CHANGE: FOR BLACK WOMEN DEALING WITH PHYSICAL AND EMOTIONAL ABUSE 36 (1985).

"After one acknowledges the limitations of statistical correlations, however, there remains the patterns plus anecdotal evidence which adds plausibility, if not probability, to the fear that legal systems continue to regard the victimization of black women with less concern than the victimization of white women." RANDALL KENNEDY, RACE, CRIME, AND THE LAW 73-74 (1997) (discussing the 1988 commissioned study, reported in *Race Tilts the Scales of Justice. Study: Dallas Punishes Attacks on Whites More Harshly*, DALLAS TIMES HERALD, Aug. 19, 1990, (no longer in print) and the work of GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT (1989)).

"Evidence concerning police behavior also documents the fact that the claims of Black rape victims are taken less seriously than those of whites." Jennifer Wiggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 122 (1983) (citing a study on the treatment of rape victims); see also SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 212-14 (1975); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 51-86 (1981). "In sum, Black women who are raped are racially discriminated against because their rapists, whether Black or white, are less likely to be charged with rape, and when charged and convicted, are less likely to receive significant jail time than the rapists of white women." Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identify Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1277 (1991). In other words, just as society

tern of not treating the complaints of domestic related violence by any woman very seriously, as it is usually dismissed as a private affair.<sup>54</sup> This dynamic is compounded with the stereotypes of social pathology within Black families and within the Black community.<sup>55</sup>

These stereotypes are particularized in the stereotype of the "welfare queen."<sup>56</sup> Indeed, within social policy rhetoric "the eagerness of conservatives to cut off young unmarried mothers and to pursue young unmarried fathers is almost certainly shaped in part by the fact that when most white Americans imagine an unmarried mother on welfare, the woman they picture is black."<sup>57</sup> Correspondingly, irresponsible fathers must also be Black. Further, these images surely underpin campaigns to establish and enforce child support awards.

Undoubtedly, child support is an important component to the well being of children, especially those in poverty. Legislation has

values the lives of Black men less than others, society does not value Black women victims very much. See Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1391 (1988); Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842, 847-48 (1980) (after accounting for the effects of other variables, rapists (Black or white) of Black women were penalized less harshly than rapists of white women).

<sup>54</sup> See Barbara Hart, *Battered Women and the Criminal Justice System*, 36 AM. BEHAVIORAL SCIENTIST 624, 626-27 (1993). Hart points out that:

[u]nlike other victims of violent crime, battered women are often viewed by the police, the prosecutor, judges, jurors, and probation/parole staff as responsible for the crimes against them—responsible either because battered women are believed to 'provoke' the perpetrator into violence or because they are believed to have the power to avoid the criminal assault through accommodating the perpetrator's demands.

*Id.* at 626; Deborah L. Rhode, *Simpson Sound Bites: What Is and Isn't News About Domestic Violence*, in *POSTMORTEM: THE O.J. SIMPSON CASE* 83, 88 (Jeffrey Abramson ed., 1996).

<sup>55</sup> See, e.g., CARL GINSBURG, *RACE AND MEDIA: THE ENDURING LIFE OF THE MOYNIHAN REPORT* (1989) (discussing media endorsement of the images created by the *Moynihan Report*); WILLIAM RYAN, *MAMMY OBSERVED: FIXING THE NEGRO FAMILY IN BLAMING THE VICTIM* 63 (1976); Waheema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 323, 337-38 (Toni Morrison ed., 1992) (discussing how the *Moynihan Report* contributed to the perpetuation of stereotypes like the "welfare queen" and the "culture of poverty"); see also Adele Logan Alexander, *"She's No Lady, She's a Nigger": Abuses, Stereotypes, and Realities from the Middle Passage to Capitol (and Anita) Hill*, in *RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS* 3, 10-12 (Anita Faye Hill & Emma Coleman Jordan eds., 1995) (discussing the expectations of female slaves and their status at the convenience of the master, and stating that "America's first single black mothers hardly acquired or maintained that role by choice, or through a lack sexual morality.").

<sup>56</sup> Lubiano, *supra* note 55, at 337-38.

<sup>57</sup> David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2588 (1995).

“imposed increasingly exacting requirements on the states to collect child support from fathers in order to offset the costs of the [welfare] system and to help mothers who are not welfare recipients to secure support for themselves and their children.”<sup>58</sup> Nonetheless, some of the policy positions can be counter-productive to that goal. Generally applicable rules may seem fair and balanced, but exceptions should be made for rational reasons. For example, forced contact for the purpose of establishing paternity and pursuing child support may not be in the child’s best interest, which may mean taking seriously the concerns of mothers.

We should care about mothers who wish to avoid manipulative or abusive relationships with men who had never before shown an interest in caring for their children. We should also care about mothers who decide that their children will not benefit from a relationship with the particular man who got them pregnant and then moved on. It is, after all, these women who have to raise the children, largely on their own.”<sup>59</sup>

Society should also remember that it “is only unmarried mothers on welfare who are forced into enduring financial relationships with the father that may carry unfortunate consequences for them and their child.”<sup>60</sup> Non-poor women have very limited or no interaction with the system, and may choose whether or not to even establish the paternity of their child, much less accept child support.

Furthermore, enforcement of child support is especially onerous for fathers in poverty. “About 70 percent of [overall child support] debt is owed by men who earn \$10,000 a year or less, or have no recorded wage earnings at all, according to the Federal Office of Child Support Enforcement. Less than 4 percent is owed by men with incomes of more than \$40,000.”<sup>61</sup> Thus, child support enforcement efforts primarily impact fathers in poverty. Since Black people are disproportionately represented in poverty, it can be extrapolated that Black men are also disproportionately subject to child support enforcement efforts.

Given these statistics, the legal institutions should question whether current enforcement mechanisms make any sense, and

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<sup>58</sup> *Id.* at 2583.

<sup>59</sup> *Id.* at 2602.

<sup>60</sup> *Id.* at 2603.

<sup>61</sup> Leslie Kaufman, *Tough Child Support Laws Put Poor Fathers in a Bind*, N.Y. TIMES, Feb. 19, 2005, at B1.

whether they serve to perpetuate poverty with the relevant consequences to children. For example, penalties for child support arrears include driver's license revocation.<sup>62</sup> This seemingly simple penalty may make the difference in someone's ability to continue work or obtain employment. Specifically, this may prevent participation in one of the driving professions or one's ability to access work.<sup>63</sup> Incarceration is another penalty that obviously hampers the ability to work.<sup>64</sup> "Recent research by the Urban Institute, a think tank in Washington, found that aggressive collection of debts played a crucial role in pushing low-income black men ages 25 to 34 out of lawful employment, the opposite effect policy makers might have desired."<sup>65</sup> If the effects of the penalties for non-payment of child support hamper the payers' ability to maintain employment or support themselves, then the goal of increasing compliance will never be achieved. In fact, it may increase the numbers or intensity of those in poverty, both children and adults.

There is also strong statistical data that suggests that fathers who are employed are more likely to have *relationships* with their children, which is at least as important as cash payments. "Male employment increases the family formation plans and . . . employed fathers are more likely than unemployed fathers to visit and provide financial support for their children."<sup>66</sup> Thus, job assistance to fathers in poverty would have a significant impact on the welfare of their children.<sup>67</sup>

In addition, cash assistance programs designed to promote the welfare of children in poverty may actually reduce the incentives of fathers who are able to pay to do so through the state. "[N]early all the support paid on behalf of poor children receiving cash assistance goes to the government rather than to the children."<sup>68</sup> In other words, payments of child support do not tangibly contribute to the increased

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<sup>62</sup> *Id.*

<sup>63</sup> Public transportation, such as buses or commuter rail, does not exist or is unreliable in many locations, both urban and rural.

<sup>64</sup> See *supra* text accompanying note 14. In addition to the inability to earn wages, incarceration may also impact the variables correlated with the emotional development of children. See *infra* text accompanying notes 66, 67.

<sup>65</sup> Kaufman, *supra* note 61, at B1.

<sup>66</sup> MINCY & OLIVER, *supra* note 13, at 6; see also ELAINE SORENSON & CHAVA ZIBMAN, THE URBAN INSTITUTE, POOR DADS WHO DON'T PAY CHILD SUPPORT: DEADBEATS OR DISADVANTAGED 5 (2001), available at [http://www.urban.org/UploadedPDF/anf\\_b30.pdf](http://www.urban.org/UploadedPDF/anf_b30.pdf) (arguing that poor fathers should receive employment enhancing services under TANF).

<sup>67</sup> See MINCY & OLIVER, *supra* note 13, at 6. Job assistance to mothers in poverty is routinely offered by states administering TANF. SORENSON & ZIBMAN, *supra* note 66, at 5.

<sup>68</sup> URBAN INSTITUTE, CHILD SUPPORT INCREASES FOR LOW-INCOME FAMILIES 1 (2004), available at <http://www.urban.org/UploadedPDF/900675.pdf>.

welfare of the child. If anything, fathers who care for and wish to support their children have greater incentive to make cash payments and provide other forms of support "under the table," notwithstanding any penalties for non-payment through the state.<sup>69</sup> State agencies would provide better incentives for payment and more likely increase the resources available for the care of children by ensuring that larger portions of child support payments go directly to the child, independent of payments made by the State.

Full payment of child support will not end child poverty. Society must ask whether the penalties for non-payment of support and the normal operation of cash assistance programs have become additional barriers to family preservation for families in poverty. Given the disproportionate representation of Blacks in the ranks of the impoverished, society can only view these effects as one more systematic institutionalization of racism and/or classism.

#### CONCLUSION

The causes of poverty are myriad and complex. The reasons for the disproportionate effects within Black communities are also complicated. Therefore, the manner in which we address poverty, along with the institutional and other forms of racism that lead to the composition of communities in poverty, must be inventive. In order to remove more children from poverty, and not exclusively from their homes, solutions need to address the needs of the entire community from whence the child comes. Simplistic solutions that too swiftly remove children from their homes are like a band-aid and are only temporary. Sometimes this choice leads to greater problems<sup>70</sup> than the ones it was designed to address.

All of the participants in this symposium suggest new directions we should consider for the benefit of Black children. I have also attempted to paint a more complete picture of the odds against Black children, in a manner that suggests direction for holistic solutions. Clearly, the entire Black community must be part of any plan. It *does*

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<sup>69</sup> Every State has penalties designed to punish non-payment of child support. In addition, the Child Support Recovery Act of 1992 (CSRA), makes willful failure to pay past due support obligations, with respect to a child residing in another state, a federal offense. 18 U.S.C. § 228(a)(1) (2000).

<sup>70</sup> The problems that children face do not automatically disappear because the child's location physically changes. The child may still endure emotional hardships, issues, poverty, and abuse. Removal does not solve problems unless those problems are addressed as well.



take a village, but it must be a village with both the resources and the means to care for its children.