

RACIAL (IN)JUSTICE IN THE U.S. CHILD WELFARE SYSTEM

Response to the Combined Tenth to Twelfth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination

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I. INTRODUCTION

Although the United States (U.S.) child welfare system claims to protect children’s safety and well-being, decades of research, data, and lived experiences reveal that the system instead has a long history of harming children and families of color, particularly Black families, because of unjust and racist policies and practices.¹ The United States’ failure to adequately review, address, or remedy racial discrimination within the child welfare system violates Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The U.S. child welfare system refers to a set of laws and government agencies mandated to protect and support victims of child abuse and neglect, together called “child maltreatment.”² Under this system, government agencies at the state and local level enforce federal and state laws relating to child welfare.³ These agencies receive reports with claims of child maltreatment, investigate those claims, determine if they believe abuse or neglect occurred, and, often, remove children from their homes and place them into the physical and/or legal custody of the state.⁴ At every stage of this process, Black children and families face racial discrimination and unequal outcomes.

The child welfare system has had a devastating and disparate impact on Black families. Entry into this system, which licenses and mandates the surveillance, regulation, control, and separation of families through federal and state law, causes profound trauma to Black children and their families that has life-long impacts. While discriminatory and disproportionate harms caused by the child welfare system have also deeply impacted other communities of color, including Indigenous communities, this report focuses on the experiences of Black communities, which to date have not been reviewed by the Committee on the Elimination of Racial Discrimination (CERD).

CERD’s Periodic Review of the U.S. comes at an important moment, when the Government has begun to acknowledge the historical and contemporary harms caused by racist child welfare policies,⁵ but has not yet taken meaningful action to address or remedy these harms. The Committee should take this opportunity to hold the United States accountable to its commitments under ICERD. Institutional racism in the child welfare system, and the resulting harm to Black children and families, needs urgent action on the part of the United States.

¹ We recognize that racially disproportionate outcomes are experienced by many communities of color in the U.S., but we focus here on the experiences of Black children and families because we are best positioned to speak meaningfully on their experiences, given the scope of our work, because of the unique experiences of Black communities in the U.S., and because Black children and families have previously been left out of the Committee’s review. We use the term Black to include Black or African American people, defined as “a person having origins in any of the Black racial groups of Africa.” *Child Maltreatment 2019*, CHILD.’S BUREAU, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP’T OF HEALTH & HUM. SERVS. (2021), at 115, <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf>.

II. THE CHILD WELFARE SYSTEM DISPROPORTIONATELY HARMS BLACK CHILDREN

A. Disproportionate Representation of Black Children

Black children are overrepresented in the child welfare system. Despite making up only 14% of the general child population, Black children represent 24% of the child welfare population.⁶ In fact, nearly 10% of Black children “will experience foster care placement by their eighteenth birthday,” compared to 5% of white children.⁷ Moreover, over 50% of Black children are investigated by child welfare services, compared to 28% of white children.⁸ The U.S. Administration for Children and Families, the federal agency responsible for overseeing national child welfare policy, itself acknowledged in 2021 that Black children and other racial minorities are disproportionately represented in the child welfare system.⁹ The cause, it found, was bad policies and “structural racism.”¹⁰

Black families encounter racial discrimination at each stage of the child welfare system. As a result, they are not only “more likely to become involved in child protective services” than white families, but also “experience worse outcomes once they become involved.”¹¹ Nearly 20% of Black children will have a substantiated child maltreatment case before they turn eighteen, compared to 10% of white children.¹² Black children whose cases are substantiated are 15% more likely than white children to be separated from their families and placed in out-of-home foster care.¹³ Once they are placed in the system, Black children receive inferior services,¹⁴ are moved more often,¹⁵ and are four times less likely to be reunified with their families than white children.¹⁶ Black youth experience worse outcomes once they leave foster care as well—23% of Black youth who age out of foster care experience homelessness and 29% experience incarceration, far higher rates than for non-Black youth.¹⁷

B. Grounds for Child Welfare Involvement: Laws that Penalize Poverty

U.S. federal law that penalizes families experiencing poverty plays a major role in perpetuating racial discrimination within the child welfare system. The Child Abuse Prevention and Treatment Act of 1974 (CAPTA), for example, requires that individual States include the poorly-defined concept of “neglect” as legal grounds for child welfare involvement.²¹ According to a January 2021 memo by the U.S. Administration for Children and Families, “neglect” removals—including removals for “inadequate housing” or “failure to provide adequate nutrition”—are often the result of families living in conditions of poverty.²² Research also shows that “inadequacy of income, more than any other factor, constitutes the reason that children are removed.”²³ President Biden himself acknowledged, in April 2021, that “too many children are removed from loving homes because poverty is often conflated with neglect,” and that “the enduring effects of systemic racism and economic barriers mean that families of color are disproportionately affected.”²⁴

In July 2019, public school officials in Pennsylvania threatened to report families whose children had outstanding breakfast and/or lunch debts.¹⁸ In their letter to about 40 families, they wrote, “your child has been sent to school every day without money and without a breakfast and/or lunch.”¹⁹ This is a failure to provide your child with proper nutrition and you can be sent to . . . Court [on child welfare charges] for neglecting your child’s right to food.”²⁰

In 2020, in the midst of the COVID-19 pandemic, school staff in New York City threatened to report a Black mother for educational neglect because her two children, who were sharing a single laptop to attend school, missed class whenever their schedules overlapped.²⁵

Laws that penalize poverty disproportionately harm Black families because they are overrepresented in the under-resourced communities that the child welfare system targets.²⁶ Black children are over three times more likely to live in poverty than white children.²⁷ According to government data, around 70% of all children, including 63% of Black children, removed from their families in 2020 were removed because of “neglect.”²⁸ This means that a significant percentage of the Black children forcibly removed from their homes in 2020 experienced family separation for reasons related to poverty, not because of abuse. The racial disparities in the enforcement of laws that penalize poverty are so extreme that some lawyers and advocates have begun referring to the child welfare system as the new “Jane Crow”—a reference to laws enforcing racial segregation in the U.S. South during the first half of the 20th century.²⁹

C. Laws that Expand Discriminatory Surveillance & Policing of Black Families

Not only does U.S. federal law encourage states to separate Black families for poverty-based “neglect,” it also requires states to expand surveillance and reporting mechanisms that target Black families. Interventions by the child welfare system are typically triggered by an initial report, often anonymous, of suspected abuse or neglect.³⁰ The Child Abuse Prevention and Treatment Act (CAPTA), which conditions federal funding on states instituting mandatory reporting laws for child maltreatment, contributes to disproportionality at this initial stage as well.³¹ In response to CAPTA, states expanded the network of professionals legally required to report suspected child maltreatment—from physicians and teachers to police officers and social service providers.³² This resulted in a dramatic increase in reporting, from 60,000 reports when the law was enacted in 1974 to two million by 1990.³³

Research has shown that mandated reporters in both the education and medical fields are more likely to report Black families than white families.³⁶ For instance, in the medical field, professionals are twice as likely to screen Black infants for maternal drug use than white infants.³⁷ Black pregnant mothers are four times more likely to be subjected to a toxicology test, absent reports of substance abuse, than white pregnant mothers.³⁸ And a Black pregnant mother’s refusal of medical care is more likely to result in reports to child welfare services.³⁹

Syesha Mercado visited the hospital in February 2021 hoping to get help for her 13-month-old son, who was losing weight as he transitioned from breast milk to other fluids. Instead, Syesha was confronted by child welfare agents and armed police officers who removed her son and took him into child welfare custody. Troublingly, the physician who treated Syesha had previously been investigated on claims that she was too quick to conclude parents were abusing their children.³⁴ Syesha’s daughter, who was not yet two weeks old, was also later removed by police officers. Syesha regained custody of her daughter after one week, but her son remained in child welfare custody for seven months before finally returning home.³⁵

Tiffany Banks, a Black mother in Chicago and a teacher herself, was reported to child welfare services in 2018 when her son attended school with “a bad haircut that he had given himself.”⁴⁰ Caseworkers claimed that “sending him to school like that could constitute emotional abuse.”⁴¹ Tiffany had previously clashed with school administrators over decisions about her younger son’s education, and suspected the school reported her out of retaliation.

In education as well, discriminatory reporting occurs among reporting professionals.⁴² Research indicates that the disproportionate reports of Black children by educational personnel often conflate poverty with neglect.⁴³ In New York City’s school system, for example, “needless” reports of suspected child maltreatment submitted by teachers have been so common that the city’s child welfare agency has labeled it a “problem” and established a “two-tiered system” to “have a different response to lower-risk calls” from educators.⁴⁴ Educators themselves have observed that under current mandated reporting laws, “parenting practices are scrutinized through a deeply classed, heterogendered, and racialized lens”—one that invites bias in decision-making and results in highly disparate outcomes for Black families.⁴⁵

D. Investigations: Discrimination in Screenings & Maltreatment Findings

Once a report of child abuse or neglect has been filed, child welfare agencies, and their case workers, have discretion to determine whether a case should be investigated or closed—providing yet another window for racist outcomes. At this stage, studies that account for geographic variations in racial and ethnic disparities have found that Black families are between two and five times more likely than white families to have their cases investigated instead of closed.⁴⁷ Disturbingly, 53% of Black children will be subjected to a child welfare investigation before they turn eighteen, compared to 28% of white children.⁴⁸

At the end of an investigation, case workers determine whether to substantiate child maltreatment allegations. Researchers evaluating the rates of substantiated maltreatment among U.S. children found that, by the age of eighteen, roughly 1 in 5 Black children will be the subject of a substantiated child maltreatment report, compared to 1 in 10 white children.⁴⁹ In addition, state-level studies have found that during investigations, “Black families were over six times more likely” to face findings of abuse than white families.⁵⁰ And the “risk scores” used to make removal determinations have been consistently lower in cases of removals involving Black children than in cases involving white children, indicating that Black families are systematically torn apart at a lower threshold of risk.⁵¹

In August 2013, Angeline Montauban, a Black mother in New York, was forcibly separated from her two-year-old son. Angeline had called a domestic violence hotline, seeking support for her own difficulties with her partner. Instead of receiving that support, a child welfare caseworker arrived at her home claiming the agency received a report that her son had been mistreated. Although this claim was false, Angeline’s son was soon separated from his mother and placed in foster care. The child welfare agency never found any physical abuse.

For five years, Angeline tried everything she could to reunify with her son, fighting a complicated bureaucratic legal system. The court even ruled that Angeline’s parental rights should be terminated, but after fighting back, Angeline was able to have that decision reversed. On August 16, 2018, Angeline’s son, who was by then seven years old, finally returned home.⁴⁶

E. Outcomes: Discrimination in Service Determinations, Removal Decisions & Barriers to Reunification

When the state child welfare agency concludes an investigation and a court makes a finding of abuse or neglect, children can either receive in-home services or be removed from their homes and placed into the care of the government. Black children are 15% more likely than white children to be placed into government care instead of receiving in-home services.⁵² One study found that “white children who are abused or neglected are twice as likely as black children to receive services in their own homes, avoiding the emotional damage and physical risks of foster care placement.”⁵³ Individual caseworkers, as well as individual judges, have sweeping discretion to determine which children to remove, allowing personal bias to drive critical removal decisions.⁵⁴

Once removed from their families, Black children “receive inferior services,” “are shuffled to more placements and stay in foster care longer,” and are less likely to be either returned home or adopted than white children.⁵⁵ One study found white children were four times more likely to be reunified with their families than Black children.⁵⁶

Here again, federal law plays a significant role in these disparate outcomes. Under the Adoption Assistance and Child Welfare Act of 1980 (AACWA) state agencies are required to make “reasonable efforts” to prevent family separation and safely return children home once they enter the child welfare system.⁵⁷ Recognizing the deficiencies of the “reasonable efforts” standard, advocates have been calling for a much higher standard, such as “active efforts,” to ensure that caseworkers make meaningful family preservation and reunification efforts.⁵⁸ Instituting a heightened standard, in policy and in practice, would hold child welfare agencies accountable for providing effective assistance and services to families before taking the traumatic, life-altering step of removing a child or terminating their parents’ legal rights.

Goldie Tibbs was separated from her son by a child welfare agency in June 2019 because she could not secure stable housing.

After 15 months, Goldie’s parental rights were terminated because she still did not have permanent housing, despite her continuous efforts to improve her living situation and numerous requests for housing assistance and government support so she could reunify with her son.⁵⁹

Federal law has also sped up the process to terminate parental rights after a child enters the child welfare system. In 1997, the Adoption and Safe Families Act (ASFA) set a national standard that parental rights can be terminated after a child has been in out-of-home care for 15 of the most recent 22 months.⁶⁰ For many parents, particularly those engaged in drug or other rehabilitative programs, this standard has been impossible to meet.⁶¹ Since the law came into effect, the number of children who experience termination of parental rights has increased dramatically. On average, 1 out of every 100 children living in the U.S. will have their parents’ legal rights terminated before they turn eighteen.⁶² Even more troublingly, more children have their legal relationship to their parents terminated each year than are adopted out of the child welfare system.⁶³ This has created a whole category of children called “legal orphans”—children who have no legal relationship to either their birth parents or an adoptive parent.⁶⁴

ASFA’s termination standard has disproportionately harmed Black families. Black children are 2.4 times more likely than white children to have their parents’ rights legally terminated.⁶⁵

Further, the number of Black children whose relationship to their birth parents is terminated is double that of the general population (averaging a shocking 1 out of every 41 children).⁶⁶ As a result, the majority of children who become “legal orphans” are Black.⁶⁷

Disparate outcomes in the child welfare system intersect with racism and disparate outcomes in other government systems, such as the U.S. criminal justice system. The U.S. incarcerates Black individuals at 4.8 times the rate of white individuals.⁶⁸ Racial disparities in incarceration impact outcomes for families in the child welfare system because formerly incarcerated individuals face systemic barriers in the fight for family reunification. They experience heightened scrutiny and obstacles to securing housing, employment, and a steady income—all of which are necessary for reunification with their children.⁶⁹

F. Long-Term Trauma Resulting from Removal & Child Welfare Involvement

The disproportionate removal of Black children comes at a heavy cost to both children and parents. Children experience deep trauma and life-long harm from the removal itself and the resulting separation from their parents, families, and communities. In addition, placement in the child welfare system comes with additional risks and harms. Black parents also experience trauma and harm from family separation.⁷⁰

For most children, entry into the child welfare system is unexpected, shocking, and traumatic. Without warning, children are taken from their home by strangers, sometimes in the middle of the night and taken to a new, unfamiliar place. If a family foster home is not immediately available, as they often are not, the child is placed into a group facility. It is not uncommon for the child to be first taken to a government office and spend hours, or even days, at the office before a placement is found for them.⁷¹

Separating children from their families breaks a critical source of attachment and support. The American Association of Pediatrics has found that family separation “can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.”⁷² Toxic stress can affect a child’s mental and physical health as well as their cognitive functioning—it can even alter their gene expression. Heart disease, immune dysregulation, cancer, depression, anxiety, and post-traumatic stress disorder (PTSD) are just some of the long-term adverse effects of toxic stress on children.⁷³ Importantly, for Black children, the trauma of separation includes not only the disruption of critical family and community attachments, but also the potential harm to their sense of individual and cultural identity.⁷⁴

In many cases, the trauma of forced separation outweighs the risk of harm due to neglect.⁷⁵ As Professor Dorothy E. Roberts recently wrote:

From a political perspective, removing children from their homes is one of the most severe exercises of government power. From a child’s perspective, it is terrifying. The very act of being pried away from parents is by itself damaging—a significant turning point... that many children will relive over and over again in their minds.”⁷⁶

Children are not the only ones traumatized by family separation. Parents also experience severe trauma from forced separation, as well as from a threat of removal. This trauma can result in grief, loss, and an increased risk of health disorders such as mental health or substance abuse disorders.⁸⁰ The deep stress of navigating a racist system causes its own additional stress and harm. Research has shown that encounters with racist institutions and events are linked to a variety of psychological and physical health concerns.⁸¹

Not only do children entering the child welfare system suffer deep trauma and harm from the removal itself, but many children suffer harm within the child welfare system. In fact, there is substantial evidence that children in foster care are more likely to be abused *while in care*, than are children in the general population.⁸² In addition, children in the child welfare system are at far higher risk of suffering from mental health disorders. Researchers have found that 43% of children in foster care report diagnoses of depression and 29% report suffering from PTSD.⁸³ Alarming, studies also indicate that the rate of PTSD among children in foster care is almost twice as high as the rate in U.S. war veterans.⁸⁴ There is also significant evidence that children in foster care are overprescribed psychotropic medication.⁸⁵

One evening in 2010, Maisha Joefield's daughter, five-year-old Deja, left their apartment after Maisha had put her to sleep. Deja wanted to walk across the street to visit her grandmother. After a passerby "encountered Deja on the sidewalk at midnight" and called child welfare services, Maisha was arrested, and Deja was sent to foster care, despite reports that Maisha was a "very attentive" mother with "significant family support."⁷⁷ Although Deja was returned to her mother's care after four days, "the effects of the brief removal were lasting" and "changed" her daughter.⁷⁸ Deja emotionally struggled at school and at home following the separation. And Maisha was also "placed on a state registry of child abusers," which meant she could no longer work in the daycare center that formerly employed her.⁷⁹

The long-term effect of children's involvement with the child welfare system is severe. Study after study has demonstrated poor long-term outcomes for foster children, including greater involvement with the criminal justice system, less educational achievement, higher teenage pregnancy rates, higher rates of drug and alcohol abuse, more psychological problems as adults, and less long-term financial success.⁸⁶ Black children transitioning out of the child welfare system experience even worse outcomes than their white peers. An estimated 23% of Black youth who age out of foster care experience homelessness and 29% experience incarceration, far higher rates than for non-Black youth.⁸⁷

Despite these well-documented harms, the harm that a child will face from removal and placement into the child welfare system is rarely considered by the U.S. legal system or child welfare agencies. In fact, as of the filing of this report, only six jurisdictions in the U.S. require courts to consider the harm of family separation, in determining whether to remove a child.⁸⁸

III. RACIAL HISTORY OF THE CHILD WELFARE SYSTEM

The overrepresentation of Black children and families in the child welfare system must be understood in light of the history of the U.S. child welfare system. Contemporary racism in the child welfare system exists against this historical backdrop and harmful historic policies, many of which continue to govern the system today.

The racist history of child welfare in the U.S. includes the removal and separation of Indigenous children, thousands of whom suffered physical, sexual, and emotional abuse, forced disappearance, or death while placed at government funded Boarding Schools.⁸⁹ Although this report focuses specifically on the experiences of Black children and communities, the history of Indigenous children is a fundamental part of the U.S. child welfare system's history, including its emphasis on "rescuing" children from non-white or non-middle-class families. The disproportionate rates at which Indigenous children are separated from their families and communities by the child welfare system is an ongoing, urgent problem.⁹⁰

With regard to the experiences of Black families in the child welfare system, segregation excluded Black children from early child welfare services until the mid-twentieth century.⁹¹ In the early 1800s, separate Black orphanages and "colored orphan asylums" existed, but were overcrowded and deeply inferior to the orphanages established to rescue white immigrant children during the same period.⁹² Early versions of organized child welfare systems, despite their racial segregation, help explain issues that continue to affect the system today. Beginning in the 1850s, early children's rights activists—the architects of the modern child welfare system—insisted upon a policy of family separation. They felt it was in the best interest of children that they be removed from families who suffered poverty, even though many of these children were not actually orphans.⁹³ Thousands of poor or immigrant children were sent to western parts of the country to work as indentured servants as part of the "Orphan Train Movement," a predecessor to the foster care system.⁹⁴ As child protection efforts expanded in the 1870s, the Societies for Prevention of Cruelty to Children (SPCCs) continued to intervene in the lives of families based on conditions of poverty.⁹⁵ SPCCs adopted "expansive definitions of [child abuse] that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households."⁹⁶

By the 1940s, child welfare agencies steadily began to include Black children as services shifted from the private to public sector.⁹⁷ However, the system had experienced "little meaningful change" because "adequate services remained unavailable to the black child."⁹⁸ By 1972, scholars found that "the system of child welfare services in this country is failing Black children."⁹⁹ Nonetheless, rather than address these harms, federal and state governments rolled out and implemented a series of federal legislation, including the Child Abuse Prevention and Treatment Act, the Adoption Assistance and Child Welfare Act, and the Adoption and Safe Families Act, that instead expanded the ways families of color are subject to policing, government surveillance, separation, termination of parental rights, and trauma.¹⁰⁰

Historically, racial discrimination in other areas of law have also deeply impacted the child welfare system. For example, the war on drugs, launched in the 1980s and running through the mid-2000s, led to a spike in Black women incarcerated for drug offenses—an increase of 828%.¹⁰¹ Between 1986 and 1996, as the prison population rose, the number of children in foster care also increased.¹⁰² By 2007, there were 1.7 million children with an incarcerated parent in the United States; over 70% of those children were children of color.¹⁰³ Black children were eight times more likely than white children to have a parent in prison.¹⁰⁴ To this day, the unjust policing of communities of color continues to result in the disproportionate separation of Black families.

Parallels Between America's Prison and Child Welfare Systems

Advocate Joyce McMillan has described the alarming connections between the structure of the prison system, and the child welfare, or “family policing system,” as she calls it.¹⁰⁵ She argues that, “any system built to protect children should in no way mimic a system purposefully built to punish adults.” Joyce identifies the following parallels for both prison inmates and many children involved in the child welfare system:

- They are both strip-searched;
- They are both separated from everyone and everything that they are familiar with, know, and love;
- They both have set visit times and set visit days;
- They both have oversight during the visit;
- They both eat what they are served;
- They both change homes and cells regularly;
- They both use garbage bags or pillow cases to change locations;
- They both have a history of developing mental illness from the alienation of loved ones;
- They are both “paroled” back to either their family or community and they both have oversight during that parole period; and,
- They can both be re-separated for any tiny infraction.

IV. LEGAL BACKGROUND

A. The International Convention on the Elimination of All Forms of Racial Discrimination

ICERD prohibits a State Party's maintenance and furtherance of discriminatory policies. Article 2 of ICERD obligates State Parties to “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.”¹⁰⁶ This commitment includes a State's duty to “ensure that all public authorities and public institutions” on both a “national and local” level “engage in no act or practice of racial discrimination;”¹⁰⁷ and to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”¹⁰⁸

The United States' continued allowance of and failure to halt racial discrimination within the child welfare system violates Article 2's mandate. Specifically, that mandate requires the U.S. Government to affirmatively review and address policies that contain a racially discriminatory “purpose or effect,”¹⁰⁹ or that produce “an unjustifiable disparate impact.”¹¹⁰ The disparate rates at which families of color are surveilled, reported, harassed, investigated, and torn apart—and the disparate harms felt by Black children and families experiencing these outcomes—constitute such “unjustifiable disparate impact.”¹¹¹

Importantly, Article 6 of the Convention requires State Parties to institute accessible remedies for victims of private or state-sponsored racial discrimination. In particular, Article 6 requires State Parties to “assure to everyone within their jurisdiction effective protection and

remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination.”¹¹² This obligation includes a requirement for states to cease to continue a wrongful act, as well as the possibility of other remedies for harm suffered as a result of the violation.¹¹³

B. U.S. Federal Law

Multiple U.S. laws and policies are in direct contravention to the requirements of the Convention. Two laws in particular must be immediately reviewed, amended, or repealed: the 1974 Child Abuse Prevention and Treatment Act (CAPTA) and the 1997 Adoption and Safe Families Act (ASFA).

CAPTA authorized federal grant money to be provided to state governments for expenses related to child abuse and neglect. However, in order to receive this funding, states must comply with certain requirements. These include establishing mandatory reporting laws, as well as including the category of “neglect” as one of the mandatory categories for reporting. As discussed above, the result of these requirements has been a dramatic increase in the number of families, in particular Black families, reported to child welfare services, and a corresponding increase in the number of Black children entering the child welfare system. Notably, over half of Black children in the system were separated from their families because of “neglect.” This notoriously vague and amorphous term is often conflated with poverty. As such, reporting for “neglect” has had a disparate and harmful effect on Black children and families, who are overwhelmingly separated due to unmet needs for housing, food, medical care, or other manifestations of poverty.

As recommended by numerous experts, scholars, activists, and state bar associations, the government must review the impact of CAPTA on Black families and take appropriate action, including amending or repealing portions of the Act that have had an unjustifiable disparate impact on Black families.¹¹⁴ The upEND Movement, created by child welfare scholars and social workers, explains that CAPTA “has contributed to the proliferation of surveillance and policing of Black communities,” and that repairing these harms “requires repealing mandatory reporting laws.”¹¹⁵ Likewise Angela Olivia Burton, an attorney and parent advocate, and Angeline Montauban, an educator and social justice activist, have explained that “CAPTA’s foundational requirements of mandated reporting and cross-systems collaboration” create a “‘stop-and-frisk’ type referral system” that has caused hundreds of thousands of Black families to enter the child welfare system.¹¹⁶

ASFA has also resulted in devastating outcomes for Black children and families. In particular, ASFA provisions that allow for the legal termination of parental rights if a child has been in foster care for 15 of the last 22 months have disproportionately impacted Black children (who are 2.4 times more likely to experience termination of parental rights than white children).¹¹⁷ As discussed above, this mandatory and unrealistic timeline has created thousands of “legal orphans,” the majority of whom are Black.¹¹⁸ Research indicates that 1 out every 41 Black children in the U.S. will have their legal relationship to their parents terminated, compared with 1 out of every 100 children in the U.S.¹¹⁹ While the Administration for Children and Families recently recognized that ASFA “may disproportionately affect families of diverse racial and ethnic backgrounds,” the government has not taken adequate action to remedy the law’s observed harms.¹²⁰

The Government should follow the recommendation of experts and legal scholars and immediately repeal ASFA.¹²¹ The advocacy group Repeal ASFA, a collective of impacted mothers, community organizations, and advocates, has explained that “ASFA is a symptom of centuries of family separation policies that have relied on the degradation of Black, Brown, and poor bodies to legitimize their existence.”¹²² NYU Law Professor Martin Guggenheim has similarly called for the repeal of ASFA, denouncing the “morally indefensible” practice of permanently severing a parent’s legal relationship to their child.¹²³ Urgent action is needed from the Government in order to disrupt ASFA’s ongoing harm to Black families.

C. Position of the Committee on the Elimination of Racial Discrimination

The Committee has never directly addressed racial discrimination against Black communities within the U.S. child welfare system. However, the requirements of ICERD clearly prohibits such discrimination and disparate impact. Moreover, the Committee has previously expressed concern over policies that have unjustly separated Indigenous and migrant families. The Committee has also expressed concern over discrimination and disparate impact in systems deeply tied to unjust outcomes in the child welfare system, including racial injustice in policing, the criminal justice system, and socio-economic need. These prior findings further demonstrate that the U.S. child welfare system violates the requirements of the Convention.

1. The Committee’s Proactive Condemnation of U.S. Policies that Separate Families

This Committee has previously called for immediate remedial action in response to discriminatory policies that have caused the separation of children from their parents and communities. For instance, in its Concluding Observations following the United States’ 2014 Review, the Committee expressed its concern at the “ongoing removal of indigenous children from their families and communities through the United States child welfare system” and called for effective enforcement of the “Indian Child Welfare Act of 1978 to halt the removal of indigenous children from their families and communities.”¹²⁴

The Committee also proactively criticized and called for immediate remedial action in response to the U.S. Government’s “zero tolerance policy” which separated migrant families crossing the Southern border. On August 30, 2018, the Chair of the Committee wrote to the U.S. Representative to the United Nations to express grave concern” over the U.S. Government’s “zero tolerance policy” and the resultant “separation of more than 2,500 migrant children from their parents/families.”¹²⁵ The Chair expressed profound regret at the inability of the U.S. to prevent family separation and to reunify families after.¹²⁶ Other policies that cause family separation and threaten family integrity, including towards Black families, must be addressed with similar urgency.

2. The Committee’s Recognition of Bias in Law Enforcement

The Committee has also recognized that biased law enforcement officers can contribute to a system’s overall discriminatory character, an observation with direct relevance to the child welfare context. Almost three decades ago, the Committee acknowledged the role that individual law enforcement personnel can have on whether or not a system overall produces discrimination.¹²⁷ Specifically, the Committee noted that fulfilling States’ obligations “very much depends upon national law enforcement officials who exercise police powers.”¹²⁸ Importantly, the U.S. child welfare and

criminal justice systems share remarkable procedural similarities. Officials within both systems exercise vast discretion in determining when to apply state intervention and are only required to show a low burden of proof when initiating investigations.¹²⁹ As is the case in criminal justice, in “family policing” by the child welfare system, due process and appropriate policies must be enacted to protect families and inform them of their rights.¹³⁰

3. The Committee’s Recognition of Structural Discrimination Underlying the Child Welfare System

In addition, the Committee has already recognized that several of the underlying causes for child welfare interventions—such as criminal convictions or poverty—themselves are the products of racial discrimination. In its 2014 Concluding Observations, the Committee voiced its concern that “members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately arrested, incarcerated and subjected to harsher sentences, including life imprisonment without parole and the death penalty.”¹³¹ Notably, the Committee expressed particular concern about “the negative impact of parental incarceration on children from racial and ethnic minorities.”¹³² In the same set of Concluding Observations, the Committee called upon the U.S. to “take concrete and effective steps to eliminate racial disparities at all stages of the criminal justice system” and to ensure “the impact of incarceration on children and/or other dependents is taken into account when sentencing an individual convicted of a non-violent offence and promoting the use of alternatives to imprisonment.”¹³³ The Committee has also remarked on “the high degree of racial segregation and concentrated poverty” in certain communities, including “poor housing conditions.”¹³⁴ Discrimination and disparate impact within the U.S. criminal justice system, and disproportionate poverty rates among Black communities have contributed to unjust and unequal outcomes within the child welfare system.

4. The Committee’s Recognition of the “Particular Vulnerability” of Black Children

Finally, the Committee has recognized “the particular vulnerability” of Black people.¹³⁵ The Committee has explained that discriminatory policies “may lead to the transmission of poverty from generation to generation” among this group.¹³⁶

D. Other International Authority

Other international agreements further support the rights and concerns discussed here, by establishing a fundamental human right to family integrity. ICERD should be read in conjunction with these treaties. For instance, the UN Convention on the Rights of the Child (UNCRC), which the U.S. has signed but not ratified, contains broad protections for children and family integrity. Article 8 of the UNCRC obligates states “to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”¹³⁷ Article 9 of the UNCRC obligates states to ensure “that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”¹³⁸ Although “abuse or neglect” may warrant such judicial determinations, the UNCRC places strict conditions prior to abrogating family integrity.

E. U.S. Government Response

Despite the U.S. federal government's recent acknowledgement of "structural racism" within child welfare,¹³⁹ the government has not addressed racism towards Black communities within the child welfare system in any submissions to the Committee. However, in its 2021 Submission, the U.S. made several acknowledgments that are relevant to the issue:

1. U.S. Acknowledgment of Harms to Indigenous Families

First, the 2021 Submission discussed the policies the U.S. Government is pursuing to remedy the impact of racial discrimination in the child welfare system on Indigenous families. Responding to the Committee's 2014 Concluding Observations, the U.S. indicated that in June and December 2016 the government issued a rule, 25 C.F.R. 23, and separate Guidelines, "to promote consistent and strong enforcement of ICWA [the Indian Child Welfare Act]."¹⁴⁰ This includes rules, among others, that articulate, "'the efforts state courts and agencies must make to provide appropriate family services designed to keep families together'" and "establishes procedures governing emergency removal of children from their homes."¹⁴¹ Importantly, the December 2016 Guidelines require child welfare officials to seek to place children with extended family when possible and to use "active efforts" to maintain family integrity and reunification.¹⁴²

2. U.S. Acknowledgment of Harms Caused by Separation of Migrant Families

Second, the U.S. Submission also acknowledges U.S. Government efforts to address the devastating consequences of the Government's "zero tolerance" migration policy that separated migrant families at the border. In particular, the Submission cites President Biden's February 2021 Executive Order 14011 "Establishment of Interagency Task Force on the Reunification of Families," which "condemns" the Administration's policy and practice of separating families as a "human tragedy."¹⁴³ The U.S. should also acknowledge and remedy the analogous separation of Black families.

3. U.S. Recognition of Structural Racism in Other Policy Areas

Third and finally, the U.S. Submission acknowledges the disparate impact that families and children of color disproportionately face in several other policy areas—including the homelessness crises, the Covid-19 pandemic, housing, and educational inequity. Given how poverty and lack of access to public services is a driving cause of child neglect and frequently used as justification for child removal, the U.S. should acknowledge and remedy the effects that racial discrimination in healthcare, housing, education, employment, and criminal justice have on the outcomes for Black children and families subject to the child welfare system.

V. LEGAL CONCLUSIONS

The United States' failure to adequately address and remedy the racial harms caused by the child welfare system violate Article 2 of the Convention.¹⁴⁴ Specifically, the U.S. continues to uphold federal and state laws and practices that cause racial discrimination and racially disparate outcomes for Black children and families.

The Convention issues a clear mandate for the U.S. Government to review laws and policies to determine whether they cause racially disparate impact, to affirmatively address concerns, and to make legislative amendments or repeal such laws where necessary.¹⁴⁵ After years of activism on the part of impacted Black families and communities, the U.S. Government has recently begun to acknowledge the existence of disparate impact and racist child welfare policies. The Government has not yet taken steps to review or remedy these harms.¹⁴⁶ In particular, the U.S. Government has not undertaken a comprehensive review of federal laws, such as the Child Abuse Prevention and Treatment Act (CAPTA), the Adoption Assistance and Child Welfare Act (AACWA), and the Adoption and Safe Families Act (ASFA), that cause significant harm to Black children and families, and has taken no steps to amend or repeal these harmful laws.

Although intervention is appropriate where a child is in imminent danger of serious harm, in the majority of child welfare cases in the U.S. there has been no intentional harmful act by the parent. Instead, the majority of cases are the result of poverty and a family's struggle to meet their very basic needs. Child welfare regulations that penalize poverty disproportionately harm Black families and must be reviewed and amended. In addition, the prevalence of poverty-based removals highlights the critical need for increased community-based services to support and thereby preserve families, instead of penalizing and separating them.

The U.S. child welfare system has its historical roots in racism and discrimination. It is only by deliberate focus on, and unmasking of, this racism, a review of its causes, and a recognition of the urgent need to act by the U.S. Government that these harms will finally be addressed, and Black children and families will begin to receive a remedy.

VI. RECOMMENDED QUESTIONS FOR THE COMMITTEE TO ASK U.S. DELEGATES

We request the Committee ask the following questions of the U.S. during its periodic review:

1. What concrete steps is the United States taking to recognize, review, and remedy racial disparities and ongoing discrimination against Black families in the child welfare system?
2. What concrete steps will the United States take to review federal laws, including CAPTA, AACWA, and ASFA, that perpetuate racism in the child welfare system and harm Black children and families? Is the Administration committed to drafting, recommending, and sponsoring legislation that rescinds harmful laws and policy and enhances protections for Black children?

3. How will the United States work to prevent the poverty-based removals of Black children? What action will it take to address the underlying factors that lead families to child welfare involvement for poverty reasons?
4. What concrete steps will the United States take to ensure that key factors, including the right to family integrity and the known trauma of family separation, are considered by child welfare agents and judicial decision makers in determinations regarding child removal?

VII. SUGGESTED POLICY RECOMMENDATIONS

The Committee should recommend the U.S. improve its compliance with the Convention by taking the following steps:

1. Take all appropriate measures to eliminate racial discrimination in the child welfare system, including reviewing federal laws and policies, and amending or repealing any laws or regulations that perpetuate racial discrimination.
2. Hold a series of Congressional Hearings with comprehensive public testimony to evaluate the harm of the Child Abuse Prevention and Treatment Act (CAPTA) on Black families, and subsequently take appropriate action, including by amending or repealing portions of the Act that continue to disproportionately harm Black families.
3. Develop critical community-based services to support and preserve families, and de-link those supportive services from the child welfare system and the coercive threat of child removal.
4. Repeal the Adoption and Safe Families Act (ASFA) and its forced timeline for the termination of parental rights, which has resulted in thousands of “legal orphans” and broken families.
5. Ensure that federal and state systems and policies recognize the fundamental right to family integrity and center the known trauma of family separation at every decision point in the child welfare system, including at initial decisions on child removal.

² *How the Child Welfare System Works*, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS. (Oct. 2020), at 2, <https://www.childwelfare.gov/pubpdfs/cpswork.pdf>.

³ *Id.*

⁴ *Id.* at 3-7.

⁵ *Child Welfare Practice to Address Racial Disproportionality and Disparity*, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMILIES, DEP'T OF HEALTH & HUM. SERVS. (Apr. 2021) [hereinafter *Child Welfare Practice to Address Racial Disproportionality and Disparity*], at 7, https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf; *Equity in Action: Prioritizing and Advancing Racial Equity and Support for Underserved Communities*, ADMIN. FOR CHILD. & FAMILIES, U.S. DEP'T OF HEALTH & HUM. SERVS. (Feb. 2, 2022) [hereinafter *Equity in Action*], <https://www.acf.hhs.gov/sites/default/files/documents/ACF-Equity-Action-Plan-February-2022.pdf>; *A Proclamation on National Foster Care Month*, THE WHITE HOUSE (Apr. 30, 2021) [hereinafter *Proclamation on National Foster Care Month*], <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/30/a-proclamation-on-national-foster-care-month-2021/>.

⁶ Adoption & Foster Care Analysis Reporting System ("AFCARS") 2020 Data Set (analysis by Children's Rights' Advocacy & Policy Department). Black children are not only disproportionately represented in the child welfare system at a national level, but also in 41 out of 52 U.S. jurisdictions. AFCARS 2019 Data Set (analysis by Children's Rights' Advocacy & Policy Department); *Child Population by Race in the United States*, ANNIE E. CASEY FOUND., <https://datacenter.kidscount.org/data/tables/103-child-population-by-race> (last visited July 12, 2022). The disproportionate involvement of Black children in the child welfare system has been evident for decades. In 2000, for example, Black children comprised only 15% of the general child population, but represented 36.6% of children in foster care. Robert B. Hill, *Synthesis of Research on Disproportionality in Child Welfare: An Update*, CASEY-CSSP ALL. FOR RACIAL EQUITY IN THE CHILD WELFARE SYS. (Oct. 2006), at 15, <https://www.issuelab.org/resources/11355/11355.pdf>.

⁷ Elisa Minoff & Alexandra Citrin, *Systemically Neglected: How Racism Structures Public Systems to Produce Child Neglect*, CTR. FOR THE STUDY OF SOC. POL'Y (Mar. 2022), at 5, <https://cssp.org/resource/systemically-neglected/> (citing Christopher Wildeman et al., *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011-2016*, 110 AM. J. PUB. HEALTH 704, 707 (2020)).

⁸ Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH. 274, 277 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227926/>. These disparities persist, with some variation, across local jurisdictions. Frank Edwards et al., *Contact with Child Protective Services is Pervasive but Unequally Distributed by Race and Ethnicity in Large US Counties*, 118 PROCEEDINGS NAT'L ACAD. SCI. 1 (2021).

⁹ *Child Welfare Practice to Address Racial Disproportionality and Disparity*, *supra* note 5 at 2-3.

¹⁰ *Id.* at 7.

¹¹ Minoff & Citrin, *supra* note 7.

¹² Youngmin Yi et al., *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011-2016*, 110 AM. J. PUB. HEALTH 704, 707 (2020), <https://pubmed.ncbi.nlm.nih.gov/32191517/>.

¹³ Kathryn Maguire-Jack et al., *Child Protective Services Decision-Making: The Role of Children's Race and County Factors*, 90 AM. J. ORTHOPSYCHIATRY 48, 55 (2020), <https://pubmed.ncbi.nlm.nih.gov/31081655/>.

¹⁴ DOROTHY E. ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 39 (2022) [hereinafter ROBERTS, *TORN APART*]; *Shifting the Perceptions and Treatment of Black, Native, and Latinx Youth Involved in Systems of Care*, LINKING SYS. OF CARE FOR CHILD. & YOUTH PROJECT, CTR. FOR THE STUDY OF SOC. POL'Y, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES (2022) [hereinafter *Shifting Perceptions and Treatment*], at 10, <https://cssp.org/wp-content/uploads/2022/01/Shifting-the-Perception-of-Black-Latinx-Native-Youth-in-Systems-of-Care.pdf>.

¹⁵ *Id.* In FFY 2019, 61.3% of Black children in care experienced two or fewer placements, compared to 67.8% of white children. AFCARS 2019 Data Set (analysis by Children's Rights' Advocacy & Policy Department).

¹⁶ Hill, *supra* note 6 at 24.

¹⁷ National Youth in Transition Database Outcomes 2020 Cohort Wave 1 (analysis by Children's Rights' Advocacy & Policy Department).

¹⁸ This report includes a handful of examples of recent stories highlighting the experiences of Black families and communities. These stories represent the experiences of thousands of Black families and children across the country, who each have experienced the harms of racism in the child welfare system in unique and individualized ways.

¹⁹ Bobby Allyn, *Don't Have Lunch Money? A Pennsylvania School District Threatens Foster Care*, NPR (July 22, 2019), <https://www.npr.org/2019/07/22/744005587/dont-have-your-lunch-money-one-pennsylvania-school-district-threatening-foster-c>.

²⁰ *Id.*

²¹ CAPTA, Pub. L. No. 93-247, 88 Stat. 4 (1974). Prior to CAPTA, there was no federal law requiring states to report or separate families for "neglect." Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 459-61 (1978), <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2180&context=vlr>.

²² *Civil Legal Advocacy to Promote Child and Family Well-Being, Address the Social Determinants of Health, and Enhance Community Resilience*, CHILD.'S BUREAU, ADMIN. FOR CHILD. & FAMILIES, DEP'T OF HEALTH & HUM. SERVS. (Jan. 12, 2021), at 4-5, <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2102.pdf>.

²³ DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 175 (2d ed. 2004).

²⁴ *Proclamation on National Foster Care Month*, *supra* note 5. See also Shereen A. White et al., *Fighting Institutional Racism at the Front End of Child Welfare Systems: A Call to Action to End the Unjust, Unnecessary, and Disproportionate Removal of Black Children from Their Families*, CHILDREN'S RIGHTS (May 15, 2021), at 4, <https://bit.ly/3hGX2jj>.

²⁵ Noah Goldberg & Michael Elsen-Rooney, *NYC Families Unable to Have Kids Log Into Online Classes Fear Being Reported to Child Services for Truancy*, NY DAILY NEWS (Oct. 25 2020), <https://www.nydailynews.com/new-york/ny-homeless-mother-nyc-truancy-school-doe-shelter-wifi-remote-learning-20201026-jl55pntulfjbfwt3etgyxfsm-story.html>.

²⁶ Alan J. Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, THE ANNALS. AM. ACAD. POL. & SOC. SCI. 253, 260 (2020), <https://doi.org/10.1177/0002716220980329> ("Enduring consequences of racism, including residential segregation, discrimination in labor markets, unequal access to quality education, and implicit and explicit biases perpetuate the disproportionate concentration of Black families among the poor."); ROBERTS, *TORN APART*, *supra* note 14 at 288.

²⁷ In 2019, 26.4% of Black children were living in poverty compared to 8% of white children. *Income and Poverty in the United States: 2019*, U.S. CENSUS BUREAU (Sept. 2020), <https://www.census.gov/data/tables/2020/demo/income-poverty/p60-270.html>. See also *Prior to COVID-19, Child Poverty Rates Had Reached Record Lows in U.S.*, PEW RSCH. CTR. (Nov. 30, 2020), <https://www.pewresearch.org/fact-tank/2020/11/30/prior-to-covid-19-child-poverty-rates-had-reached-record-lows-in-u-s>.

²⁸ AFCARS 2020 Data Set (analysis by Children's Rights' Advocacy & Policy Department).

²⁹ Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (Jul. 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>. See also Elisa Minoff, *Entangled Roots*, CTR. FOR THE STUDY OF SOC. POL'Y (Oct. 2018), at 19, <https://cssp.org/resource/entangled-roots; Testimony of the New York Civil Liberties Union to the New York State Assembly Committee on Children and Families Regarding Family Involvement in the Child Welfare System>, N.Y. C.L. UNION (Oct. 21, 2021), at 2, https://www.nyclu.org/sites/default/files/field_documents/211021-testimony-familyregulation_0.pdf.

³⁰ Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51 (2014).

- ³¹ Specifically, the law required states to “provide for the reporting of known and suspected instances of child abuse and neglect” in order to receive federal funding. CAPTA, Pub. L. No. 93-247, 88 Stat. 4 (1974).
- ³² Before Congress enacted CAPTA in 1974, states primarily required medical professionals to report suspected child maltreatment. By 1978, 14 states had introduced reporting requirements for nurses, 24 had introduced reporting requirements for social workers, 25 had introduced reporting requirements for educational personnel, and 31 had introduced reporting requirements for law enforcement personnel. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLEGE 37, 40-42 (2014), <https://digitalcommons.law.villanova.edu/vlr/vol59/iss6/5/>.
- ³³ John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 456 (2008); White et al., *supra* note 24 at 8. In recent years, the child welfare system has received roughly four million reports of suspected child maltreatment annually. *Child Maltreatment 2020*, CHILD.’S BUREAU, ADMIN. FOR CHILD. & FAMILIES, DEP’T OF HEALTH & HUM. SERVS. (2022), at 8, <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2020.pdf>; *Child Maltreatment 2019*, *supra* note 1 at 8.
- ³⁴ Daphne Chen, *Bad Medicine: Critics Say Powerful Pediatrician Too Quick to Diagnose Child Abuse, Traumatizing Families*, USA TODAY NETWORK, <https://stories.usatodaynetwork.com/torn-apart/sally-smith/> (last visited July 13, 2022).
- ³⁵ Jay Handelman, *Sysha Mercado Regains Custody of Her Son After Seven-Month Battle*, SARASOTA HERALD-TRIB. (Oct. 6, 2021), <https://eu.heraldtribune.com/story/news/2021/10/06/sysha-mercado-regains-custody-her-son/6018529001/>.
- ³⁶ Kathryn Suzanne Kruse, *Child Maltreatment Reporting by Educational Personnel: Implications for Racial Disproportionality in the Child Welfare System*, 37 CHILD. & SCHOOLS 89 (2015); Benard P. Dreyer, *Racial/Ethnic Bias in Pediatric Care and the Criminalization of Poverty and Race/Ethnicity-Seek and Ye Shall Find*, 174 JAMA Pediatrics 751 (2020); *Violence Against Women in the Medical Setting: An Examination of The U.S. Foster System*, MOVEMENT FOR FAM. POWER & NAT’L ADVOC. FOR PREGNANT WOMEN (May 31, 2019) [hereinafter *Violence Against Women*], at 7-8, https://ccrjustice.org/sites/default/files/attach/2019/06/MFP_NAPW_UN_VAW_Submission-20190531-Final.pdf.
- ³⁷ Dreyer, *supra* note 36 at 751.
- ³⁸ Nicola C. Perlman et al., *Racial Differences in Indications for Obstetrical Toxicology Testing and Relationship of Indications to Test Results*, 4 AM. J. OBSTETRICS & GYNECOLOGY 100453, <https://pubmed.ncbi.nlm.nih.gov/34352428/>.
- ³⁹ *Violence Against Women*, *supra* note 36 at 8.
- ⁴⁰ Keyna Franklin, *When Schools Use Child Welfare as a Weapon – What a Reporter Learned Investigating Malicious Reports*, RISE MAG. (Oct. 16, 2019), <https://www.risemagazine.org/2019/10/when-schools-use-child-welfare-as-a-weapon/>.
- ⁴¹ *Id.*
- ⁴² Kruse, *supra* note 36; Caroline Preston & Rebecca Klein, *When Schools Use Child Protective Services as a Weapon Against Parents*, HUFFPOST (Nov. 17, 2018) https://www.huffpost.com/entry/child-protective-services-schools_n_5bee8aee4b0860184a7f61c. See also White et al., *supra* note 24 at 13, 16.
- ⁴³ Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKLEY J. AFR.-AM. L. & POL’Y 109, 118 (2008), https://scholar.smu.edu/law_faculty/29/.
- ⁴⁴ Franklin, *supra* note 40.
- ⁴⁵ Erica Meiners & Charity Tolliver, *Refusing to be Complicit in Our Prison Nation: Teachers Rethinking Mandated Reporting*, 106 RADICAL TEACHER 106, 110 (2016), <https://radicalteacher.library.pitt.edu/ojs/radicalteacher/article/view/286>.
- ⁴⁶ Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 650-662 (2021), <https://doi.org/10.52214/cjrl.v11i3.8747>; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>.
- ⁴⁷ Nancy Rolock et al., *Measurement Issues in Identifying and Describing Racial Disproportionality and Disparity*, in RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM 25, 40 (Alan J. Dettlaff ed., 2021).
- ⁴⁸ Kim et al., *supra* note 8; Edwards et al., *supra* note 8.
- ⁴⁹ Yi et al., *supra* note 12.
- ⁵⁰ Dixon, *supra* note 43 at 119. See also Hill, *supra* note 6 at 20-21 (“In an urban county in Ohio, [researchers] found that black children in the child welfare system were three times more likely to be the subject of substantiated reports by their tenth birthday than white children”).
- ⁵¹ Stephanie L. Rivaux, et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 157-162. (2008), <https://pubmed.ncbi.nlm.nih.gov/18972936/>.
- ⁵² Maguire-Jack et al., *supra* note 13 at 55.
- ⁵³ Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 UNIV. ILL. L. REV. 171, 173 (2003) [hereinafter *Child Welfare and Civil Rights*].
- ⁵⁴ Jaime Perrone, *Failing to Realize Nicholson’s Vision: How New York’s Child Welfare System Continues to Punish Battered Mothers*, 20 J.L. & POL’Y 641, 660-61 (2012), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1083&context=ijlp>; Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-and-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 130-133 (2019), <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1470&context=clr>.
- ⁵⁵ ROBERTS, *TORN APART*, *supra* note 14 at 39. See also *Shifting Perceptions and Treatment*, *supra* note 14. In FFY 2019, 61.3% of Black children in care experienced 2 or fewer placements, compared to 67.8% of white children. 21.9% of Black children who exited care during the same period exited to adoption, compared to 27.5% of white children. AFCARS 2019 Data Set (analysis by Children’s Rights’ Advocacy & Policy Department).
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- ⁵⁷ Jennifer A. Reich, *Child Protection: A Historical Perspective*, in FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 27, 42-43 (2005).
- ⁵⁸ See Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can’t Be Repealed, Here’s How to At Least Make it Better*, THE IMPRINT (Feb. 9, 2021), <https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490>; *An Adoption and Safe Families Act Overhaul to Center Family Connections*, UNITED FAM. ADVOC., <https://www.unitedfamilyadvocates.org/adoption-and-safe-families-act> (last visited July 7, 2022). See also Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System That Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 508-513 (2020); MINN. AFR. AM. FAM. PRES. ACT, H.F. 342, 91st Leg. Sess. (Minn. 2019).
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⁶³ ASFA: The Racist Child Welfare Law from the 1990s That Almost No One Talks About, NAT'L COAL. FOR CHILD PROT. REFORM (Nov. 8, 2020), <https://www.nccprb.org/2020/11/asfa-racist-child-welfare-law-from.html>.

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⁶⁵ Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*, 25 CHILD MALTREATMENT 32, 33 (2020), <https://doi.org/10.1177/1077559519848499>.

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⁶⁸ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 2021), at 6, <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

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⁷⁷ Clifford & Silver-Greenberg, *supra* note 29. See also Minoff, *supra* note 29.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See Sankaran et al., *supra* note 70; ROBERTS, TORN APART, *supra* note 14 at 50-51.

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⁸² J. William Spencer & Dean D. Knudsen, *Out-of-Home Maltreatment: An Analysis of Risk in Various Settings for Children*, 14 CHILD. & YOUTH SERVS. REV. 485 (1992); 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, 205-207 (1988). See, e.g., Memorandum Opinion and Verdict of the Court, M.D. v. Abbott, No. 11-CV-84, at *56 (S.D. Tex. Dec. 17, 2015) (“The Court does not base any system-wide findings solely on the Named Plaintiffs’ experiences in foster care. Their experiences, however, paint a similar picture: children often enter foster care at the Basic service level, are assigned a carousel of overburdened caseworkers, suffer abuse and neglect that is rarely confirmed or treated, are shuttled between placements—often inappropriate for their needs—throughout the State, are migrated through schools at a rate that makes academic achievement impossible, are medicated with psychotropic drugs, and then age out of foster care at the Intense service level, damaged, institutionalized, and unable to succeed as adults.”).

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⁸⁷ National Youth in Transition Database Outcomes 2020 Cohort Wave 1 (analysis by Children’s Rights’ Advocacy & Policy Department).

⁸⁸ Washington, D.C., New York, Iowa, and Alaska require courts to assess the harm of removal in deciding whether to separate a child from their family. New Mexico and South Carolina include the harm of removal in their reasonable efforts criteria. Hawaii, Minnesota, Nebraska, and Connecticut have issued policies or agency guidance that emphasize family preservation.

⁸⁹ See *Response to the United States 2013 Periodic Report: Joint Submission of Two Alternative Reports Regarding the Violations of Indigenous Children’s Right to Culture and Continuing Legacy of the Boarding School Policies*, NAT’L NATIVE AM. BOARDING SCH. HEALING COAL., INT’L INDIAN TREATY COUNCIL, NAT’L INDIAN CHILD WELFARE ASS’N (June 4, 2014) [hereinafter *Joint Submission of Two Alternative Reports*], https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17602_E.pdf; Bryan Newland, *Federal Indian Boarding School Initiative Investigative Report*, BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF INTERIOR (May 2022), at 51-63, https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf. See also Margaret D. Jacobs, *The Great White Mother: Maternalism and American Indian Child Removal in the American West, 1880-1940*, in *ONE STEP OVER THE LINE: TOWARD A HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS* 191, 202 (Elizabeth Jameson & Sheila McManus eds., 2008),

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⁹¹ ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 80 (1972) (describing a 1930 report by the White House Conference on Child Health and Protection of Dependent and Neglected Children, which wrote "the dependent and neglected children of Negro, Puerto Rican, Mexican, and Indian families present special problems" before acknowledging that the plight of these children were "almost wholly ignored" by child welfare agencies and "many communities"); ROBERTS, TORN APART, *supra* note 14 at 112.

⁹² Ruth McRoy, *The Color of Child Welfare*, in THE COLOR OF SOCIAL POLICY 37, 38 (King E. Davis & Tricia B. Bent-Goodley eds., 2004); ROBERTS, TORN APART, *supra* note 14 at 112-13.

⁹³ Minoff, *supra* note 29 at 17.

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⁹⁷ DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7-8 (2002).

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⁹⁹ BILLINGSLEY & GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 3 (1972).

¹⁰⁰ White et al., *supra* note 24 at 8-10.

¹⁰¹ Dorothy E. Roberts, *Marginalized Mothers and Intersecting Systems of Surveillance: Prisons and Foster Care*, in REASSEMBLING MOTHERHOOD: PROCREATION AND CARE IN A GLOBALIZED WORLD 185, 187-88 (Yasmin Ergas et al. eds., 2017) [hereinafter *Marginalized Mothers*]. See also White et al., *supra* note 24 at 11. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

¹⁰² Sangoi, *supra* note 64 at 15-16. See generally MICHELLE ALEXANDER, *supra* note 101.

¹⁰³ *Marginalized Mothers*, *supra* note 101 at 188-89.

¹⁰⁴ *Id.*

¹⁰⁵ Telephone Interview by Shereen A. White with Joyce McMillan, Executive Director, JMacForFamilies (July 1, 2022).

¹⁰⁶ International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Sep. 28, 1966, 660 U.N.T.S. 195 [hereinafter ICERD]. Racial discrimination, in this context, refers to distinctions, exclusions, restrictions, or preference based on "race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *Id.* at art. 1.

¹⁰⁷ ICERD art. 2.

¹⁰⁸ ICERD art. 2.

¹⁰⁹ ICERD art. 1.

¹¹⁰ U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XIV on Article 1, Paragraph 1, of the Convention, ¶ 2, (1993). The Committee has stated that "in seeking to determine whether an action has an effect contrary to the Convention," the Committee "will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national or ethnic origin." *Id.*

¹¹¹ *Id.*

¹¹² ICERD art. 6.

¹¹³ ICERD art. 6. See also, for a discussion of state responsibilities under international law, the Draft Articles on responsibility of States for internationally wrongful acts, adopted by the General Assembly in 2001. U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001).

¹¹⁴ Burton & Montauban, *supra* note 46 at 644, 676-77; *Report and Recommendations of the Committee on Families and the Law: Racial Justice and Child Welfare*, N.Y. STATE BAR ASS'N (April 2, 2022) [hereinafter *N.Y. State Bar Association Report and Recommendations*], at 26-27, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf>; Victoria Copeland & Maya Pendleton, *Surveillance of Black Families in the Family Policing System*, UPEND MOVEMENT (June 2022), https://upendmovement.org/wp-content/uploads/2022/06/upEND-Surveillance-06_2022.pdf; G. Inguanta et al., *Time Doesn't Heal All Wounds: A Call to End Mandated Reporting Laws*, 19 COLUM. SOC. WORK REV. 117 (2021), <https://journals.library.columbia.edu/index.php/cswr/article/view/7403>; Richard Wexler, *CAPTA Law Codifies Everything Wrong with How We 'Fight' Child Abuse*, YOUTH TODAY (Aug. 31, 2018), <https://youthtoday.org/2018/08/capta-law-codifies-everything-wrong-with-how-we-fight-child-abuse/>.

¹¹⁵ Copeland & Pendleton, *supra* note 114 at 7, 10.

¹¹⁶ Burton & Montauban, *supra* note 46 at 644, 676-77.

¹¹⁷ Wildeman et al., *supra* note 65.

¹¹⁸ Guggenheim, *supra* note 62.

¹¹⁹ *Id.*

¹²⁰ *Child Welfare Practice to Address Racial Disproportionality and Disparity*, *supra* note 5.

¹²¹ Guggenheim, *supra* note 62 at 57; Vivek S. Sankaran, *Ending the Unnecessary Pain Inflicted by Federal Child Welfare Policy*, 1 FAM. INTEGRITY & J. Q. 26 (2021), <https://publications.pubknow.com/view/752322160/26/>; Karen Baynes-Dunning, *Stop Blaming the "Uncooperative Mother": The Adoption and Safe Families Act of 1997 Caught in the Aftershock of America's Reckoning*, 1 FAM. INTEGRITY & J. Q. 14 (2021), <https://publications.pubknow.com/view/752322160/14/>; Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861 (2021), <https://doi.org/10.52214/cjrl.v11i3.8753>; N.Y. State Bar Association *Report and Recommendations*, *supra* note 114 at 27. See generally Resources, REPEAL ASFA, <https://www.repealasfa.org/resources> (last visited July 5, 2022).

¹²² Albert et al., *supra* note 121 at 878; *Who Are We?* REPEAL ASFA, <https://www.repealasfa.org/who-we-are> (last visited July 7, 2022).

¹²³ Guggenheim, *supra* note 62 at 57.

¹²⁴ U.N. Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America, ¶ 24, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014) [hereinafter CERD Concluding

Observations on U.S. Combined Tenth to Twelfth Periodic Reports].

¹²⁵ Nouredine Amir, Letter from the Chair of the U.N. Committee on the Elimination of Racial Discrimination to the United States of America, U.N. Doc. CERD/96th/EWUAP/MJA/USA/2018 (Aug. 30, 2018).

¹²⁶ *Id.*

¹²⁷ U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XIII on the Training of Law Enforcement Officials in the Protection of Human Rights, ¶ 2, (1993).

¹²⁸ *Id.*

¹²⁹ Burrell, *supra* note 54 at 130-136.

¹³⁰ *Family Court Justice: Miranda Rights for Families*, PARENT LEGISLATIVE ACTION NETWORK (PLAN) COALITION, THE BRONX DEFS., NYU WAGNER (Oct. 2021), https://wagner.nyu.edu/files/nyc2025/Bronx%20Defenders_NYU%20Policy%20Project%20-%20Family%20Miranda%20-%20DRAFT.pdf; *Defenders, Advocates and Impacted Parents Urge Passage of Legislation Requiring ACS and Other Family Regulation Agencies to Inform Parents of Their Miranda Rights*, THE BRONX DEFS. (Oct. 22, 2021), <https://www.bronxdefenders.org/defenders-advocates-and-impacted-parents-urge-passage-of-legislation-requiring-ac-s-and-other-family-regulation-agencies-to-inform-parents-of-their-miranda-rights/>.

¹³¹ CERD Concluding Observations on U.S. Combined Tenth to Twelfth Periodic Reports, *supra* note 124 at ¶ 20.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 34 Adopted by the Committee, Racial Discrimination Against People of African Descent, ¶ 6, 25, U.N. Doc. CERD/C/GC/34 (Oct. 3, 2011).

¹³⁶ *Id.*

¹³⁷ Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]

¹³⁸ CRC art. 9.

¹³⁹ *Child Welfare Practice to Address Racial Disproportionality and Disparity*, *supra* note 5. See also *Equity in Action*, *supra* note 5; *Proclamation on National Foster Care Month*, *supra* note 5.

¹⁴⁰ United States of America, Combined Tenth to Twelfth Periodic Reports Submitted by the United States of America Under Article 9 of the Convention, Due in 2017, ¶ 132, U.N. Doc. CERD/C/USA/10-12 (June 2, 2021) [hereinafter U.S. Combined Tenth to Twelfth Periodic Reports]. Notably, the protections of ICWA are currently in question, given a pending case at the Supreme Court, *Haaland v. Brackeen* (No. 21-376).

¹⁴¹ U.S. Combined Tenth to Twelfth Periodic Reports, *supra* note 140 at ¶ 132.

¹⁴² *Guidelines for Implementing the Indian Child Welfare Act*, BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR (Dec. 2016), at 39-44, <https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>.

¹⁴³ U.S. Combined Tenth to Twelfth Periodic Reports, *supra* note 140 at ¶ 85; *Executive Order 14011, Establishment of Interagency Task Force on the Reunification of Families*, FED. REG. (Feb. 2, 2021), <https://www.federalregister.gov/documents/2021/02/05/2021-02562/establishment-of-interagency-task-force-on-the-reunification-of-families>.

¹⁴⁴ *supra* note 106 and accompanying text.

¹⁴⁵ ICERD art. 2.

¹⁴⁶ *Child Welfare Practice to Address Racial Disproportionality and Disparity*, *supra* note 5; *Proclamation on National Foster Care Month*, *supra* note 5.