

# THE RACIAL DISPROPORTIONALITY MOVEMENT IN CHILD WELFARE: FALSE FACTS AND DANGEROUS DIRECTIONS

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*A powerful coalition has made “Racial Disproportionality” the central issue in child welfare today. It notes that black children represent a larger percentage of the foster care population than they do of the general population. It claims this is caused by racial discrimination and calls for reducing the number of black children removed to foster care. But the central question is whether black children are disproportionately victimized by maltreatment. If so, black children should be removed at rates proportionate to their maltreatment rates, which will necessarily be disproportionate to their population percentage. Racial equity for black children means providing them with protection against maltreatment equivalent to what white children get. The evidence indicates that black children are in fact disproportionately victimized by maltreatment. This is to be expected because black families are disproportionately characterized by risk factors associated with maltreatment, including severe poverty, serious substance abuse, and single parenting. These are reasons for concern and reform. But the problems—and consequently the solutions—are entirely different from those identified by the Movement. Society should act to prevent the disproportionate maltreatment of black children, and provide greater support to families at risk of falling into the dysfunction that results in maltreatment. This should result in a reduction in the number of black children in foster care, without putting them at undue risk.*

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## INTRODUCTION

“Racial Disproportionality” is the new war cry of a powerful group of players in the child welfare policy arena. Led by the Casey-CSSP Alliance, they characterize as overrepresentation the fact that black children are represented in the foster care system at a higher rate than white children as compared to their general population percentages. They claim that this overrepresentation is caused by systemic biases in child welfare system decision-making. They call for solutions which would reduce the rate at which black children are removed from their parents for maltreatment and increase the rate at which those removed to foster care are reunified with their parents. Their goal is to achieve what they term racial equity—the removal of black and white children to foster care at rates equal to their general population percentages. *See Part I infra.*

The players include powerful foundations, non-profit organizations, and academics. Many of them have fought for years for policies that put a high priority on keeping children in their birth families and in their racial communities of origin. Accordingly, they have opposed federal laws passed in the 1990s designed to put new emphasis on moving children out of their birth families as necessary to keep them safe, and on removing racial barriers to adoptive placement, the Adoption and Safe Families Act (ASFA)<sup>1</sup> and the Multiethnic Placement Act (MEPA).<sup>2</sup> They have also promoted policies designed to keep black children in their birth families and their kinship and racial groups, such as Community Partnership or Alternative Track systems, Family Group Decision-Making, and subsidized kinship guardianship.<sup>3</sup> In banding together now to fight what they call Racial Disproportionality, they have found not only a new cause but also a new vehicle with which to refight the ASFA and MEPA battles that they lost, and to promote the alternative policies they have for years been advocating. *See Part I infra.*

The Racial Disproportionality “Movement”<sup>4</sup> is having a dramatic impact on the child welfare field. Influential leaders recognize Racial Disproportionality as the hot issue of the day. Many states have been persuaded that they have a Racial Disproportionality problem and have begun to take action designed to reduce the number of black children in foster care, and more are sure to follow given the pressure from the Movement’s campaign. The federal government has been urged to take an active role by requiring states to reduce Racial Disproportionality as a condition for receiving federal funds for their child welfare

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1. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

2. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, Pt. E, Subpt.1, 108 Stat. 4056 (1994), *amended by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (current version at 42 U.S.C. § 1996(b) (2000)).

3. *See generally* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 113–59 (1999) [hereinafter *NOBODY’S CHILDREN*] (discussing opposition to ASFA and MEPA, and the alternative policies promoted to keep children in their birth and racial communities).

4. I use the term “Movement” to describe the activities of those pressing the Racial Disproportionality claim because this is clearly a self-conscious, deliberate campaign to bring about major social and legal change.

systems. The groundwork for such action has been laid with a 2007 General Accounting Office report and a 2008 Congressional hearing, both condemning disproportionality and calling for action. *See* Part. I.D *infra*.

The Movement's reliance on statistics as evidence of discrimination calls upon a valuable tradition in our nation's discrimination law. Demonstration of disparate racial impact has been an important tool in proving intentional discrimination in many areas of law. Disparate impact theory, which enables courts to find discrimination even in the absence of discriminatory intent, has been helpful in the employment area to strike down racially exclusionary practices that could not be justified as job-related.<sup>5</sup>

But, in considering whether statistical impact warrants a conclusion of discrimination, it is important to determine whether non-discriminatory factors explain and justify the impact. For example, disparate impact theory provides an employer charged with using a selection system that has an adverse impact on black job applicants an opportunity to show that its system selects employees based on essential job-related criteria that, if taken into account, explain away any apparent racial impact.

It is particularly important to be careful with the use of statistics in assessing whether the child welfare system is guilty of discrimination in removing children because of alleged harmful maltreatment by their parents. Black parents are disproportionately characterized by risk factors for maltreatment, such as extreme poverty, serious substance abuse, and single parenting; therefore, there is good reason to believe that black parents actually commit maltreatment at higher rates than whites. If black children are in fact subject to serious maltreatment by their parents at higher rates than white children, it is in their interest to be removed at higher rates than white children. If the child welfare system is wrongfully found discriminatory, and, as a result, stops removing black children at serious risk for ongoing maltreatment, the children will suffer immediate and dangerous consequences. *See* Part II *infra*.

Professor Randall Kennedy made a similar point in his book *Race, Crime, and the Law*.<sup>6</sup> He warned against simplistic claims that the criminal justice system victimizes blacks accused of crime, noting that the victims of crime are disproportionately black, and that they deserve protection against discrimination in the form of under-enforcement of the law:

[B]lacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants, although it is allegations of the latter that now typically receive the most attention . . . .<sup>7</sup>

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5. Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 947–59 (1982).

6. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

7. *Id.* at x; *see also id.* at 69 (“[G]overnments have failed . . . to protect blacks from “ordinary” criminality, much of it perpetrated by blacks.”).

Richard Thompson Ford makes a related point in a recent opinion piece in the *Boston Globe*.<sup>8</sup> He notes that many civil rights activists today condemn the criminal justice system as discriminatory based on racial disparities in the prison population.<sup>9</sup> Ford argues that this is misguided, since these disparities “are largely the result of the lack of opportunities for lawful employment and the resulting prevalence of crime in many inner-city neighborhoods.”<sup>10</sup> He points out that “[p]rohibiting discrimination and condemning racism is much less costly and less controversial than confronting the fundamental inequities of our economy.”<sup>11</sup> He argues for focusing instead on “solutions to poverty, joblessness, failing schools, and crime.”<sup>12</sup>

Racial Disproportionality theory is popular today in a variety of other areas; it is relied on to raise challenges to policymaking in juvenile justice<sup>13</sup> and health care, for example. But legitimate questions have been raised in these areas also as to whether it makes sense to simply equate racial disparities with discrimination, and then to make the policy priority reduction of those racial disparities. For example, in the health area the Institute of Medicine issued a 2003 report criticizing racial disparities in services and outcomes, faulting racial bias.<sup>14</sup> A recent critique of that report argues that it fails to demonstrate a causal link between racial bias and racial disparities, and that its suggested policy reforms distract from more constructive solutions that would provide better service to minority communities, such as the expansion of community health clinics and grassroots outreach efforts.<sup>15</sup>

This Article should not be misunderstood as an attack on the black family as inherently problematic, although there is a real risk that it will be mischaracterized that way, or otherwise disparaged as racist. Racial Disproportionality Movement advocates regularly assert that everyone in the child

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8. Richard T. Ford, *The End of Civil Rights*, BOSTON GLOBE, May 17, 2009, available at [www.boston.com/bostonglobe/ideas/articles/2009/05/17/the\\_end\\_of\\_civil\\_rights/?page=4](http://www.boston.com/bostonglobe/ideas/articles/2009/05/17/the_end_of_civil_rights/?page=4).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. See Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(22) (2006) (requiring states to develop plans that will “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system”).

14. INST. OF MED. OF THE NAT’L ACADEMIES, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley et al. eds., 2003). See also José J. Escarce, *How Does Race Matter, Anyway?*, 40 HEALTH SERVS. RES. 1 (2005).

15. Sally Satel & Jonathan Klick, *The Institute of Medicine Report: Too Quick to Diagnose Bias*, 48 PERSP. BIOLOGY & MED. S15, S23 (2005 Supp.) (“Understanding health disparities as an economic problem tied to issues of access to quality care and health literacy, rather than a civil rights problem borne of overt or unconscious bias on the part of physicians, is a more efficient and rational way to address the problem of differential health outcomes.”).

welfare system needs anti-racism training so that they will recognize the truth that the system is functioning in a racially discriminatory way;<sup>16</sup> if you do not agree with them then you are by definition racist in your thinking and in need of anti-racism training.<sup>17</sup> Those who have opposed Movement players' positions on a range of related child welfare policies have often been accused of taking a racist position.<sup>18</sup> In an earlier time, Daniel P. Moynihan was accused of attacking the black family when he noted problems in the black community "that amplified the effects of other social problems" and helped perpetuate "black poverty over time and across the generations."<sup>19</sup> Recent commentary has tended to vindicate Moynihan, pointing out that he clearly targeted historic and ongoing discrimination as responsible for the plight of the black family, and he argued for significant social reforms which, had they been implemented, would have done much to empower the black community.<sup>20</sup>

The Obama era provides reason to hope that we can talk more openly today about challenging issues involving race, without triggering unproductive claims of racism.<sup>21</sup>

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16. See discussion *infra* at notes 49–52.

17. See *infra* note 51.

18. Compare Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000) (reviewing and condemning NOBODY'S CHILDREN, *supra* note 3), with Elizabeth Bartholet, Reply, *Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999 (2000).

19. Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2009, at 6.

20. *Id.* ("The [Moynihan] report argued that . . . black poverty was more intractable than white poverty owing to the legacy of slavery and the persistence of discrimination and segregation throughout the country. . . . The purpose of the report was to make an impassioned moral case for a massive federal intervention to break the cycle of black poverty and put African Americans on the road to socioeconomic achievement and integration into American society."). See also *id.* at 20 ("[T]he categorical dismissal of the [Moynihan] report . . . [is] a real setback for social policy analysis, which for decades strenuously avoided facing up to the escalating maladies of ghetto life . . ."); Richard T. Ford, *Why the Poor Stay Poor*, N.Y. TIMES, Mar. 6, 2009, at BR8 (book review of WILLIAM J. WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009)) ("Wilson criticizes the liberals and black power activists who attacked as racist Daniel Patrick Moynihan's prescient report . . . . According to Wilson, the vitriolic condemnation of the Moynihan Report effectively closed off a serious academic focus on the culture of poverty for decades, robbing policy makers of a complete and nuanced account of the causes of ghetto poverty."); cf. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (discussing the proliferation of unwed childbearing, female-headed families, joblessness, drugs, and violence in the black community).

21. See, e.g., *Newshour with Jim Lehrer* (PBS television broadcast May 13, 2009) (interview of Eric Holder by Gwen Ifill, responding to a question about his prior statement that Americans are cowards about race, saying that now "there is a dialogue [on race] that's going on. I think the presence of the President, the presence of the First Lady . . . have . . . engendered a conversation that perhaps might not otherwise have occurred."), available at [http://www.pbs.org/newshour/bb/law/jan-june09/torture2\\_05-13.html/](http://www.pbs.org/newshour/bb/law/jan-june09/torture2_05-13.html/); Shailagh Murray & Dan Balz, *Obama Urges U.S.: 'Move Beyond Our Old Racial*

Obviously, black parents are neither *inherently* more likely to abuse and neglect their children than whites, nor *inherently* more likely to be associated with poverty, single parenting, substance abuse, and other risk factors associated with child maltreatment. They are victims of historic and ongoing racial and economic injustice that has put them in a seriously disadvantaged position in our society.

The raw racial statistics that the Movement relies on in the child welfare area do represent a very real problem, both for black children and for the larger black community. Children removed from their parents for maltreatment, and placed in foster care for significant periods of time, generally do not fare well in later life. Appallingly high numbers end up in homeless shelters, unemployed, on drugs, and in prisons. They often end up continuing the cycle of child maltreatment into the next generation.<sup>22</sup> See Part II.D.3 *infra*. This represents an ongoing problem for the black community, as does the fact that that community is disproportionately plagued by the risk factors that are so linked to child maltreatment.

But the question is *what kind of problem* these statistics represent, because that will determine what corrective action is appropriate. Black children are removed and placed in foster care because the social workers and judges involved in the child protective system conclude that the parents have been guilty of serious child maltreatment and are not capable of avoiding such maltreatment if the children remain in their care. There are many reasons to think that the social workers and judges are getting it right in terms of needed child protection by removing black children at higher rates than white children compared to their population percentages. See Part II, *infra*.

If actual child maltreatment rates for black children are in fact disproportionately high, then the racial problems we should focus on are the disproportionate maltreatment of black children, and the disproportionate victimization of the black community by severe poverty, unemployment, substance abuse, and other risk factors that are associated with maltreatment.

Appropriate reform should be directed toward reducing black maltreatment rates by, for example, expanding programs to support fragile families at risk of maltreatment, and programs to address the substance abuse so strongly associated with maltreatment. See Part III.A *infra*. There is little mention, however, of such prevention programs in the Racial Disproportionality Movement literature. Instead the focus is almost entirely on preventing the removal of black children from their parents, and on addressing the discrimination alleged to occur at various points in the child welfare decision-making process. See Part III.B *infra*.

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*Wounds,* WASH. POST, Mar. 19, 2008, at A1 (reporting on Obama's campaign speech where he spoke "directly to the grievances and resentments on both sides of the racial divide and to urge all Americans to 'move beyond our old racial wounds'"); Julie Bosman, *Obama Calls for More Responsibility from Black Fathers*, N.Y. TIMES, June 16, 2008, at A15 (reporting on Obama's speech noting that "more than half of all black children live in single-parent households").

22. NOBODY'S CHILDREN, *supra* note 3, at 95–97.

Appropriate reform should also include the fundamental social changes that would address the poverty, unemployment, and related social ills characterizing the lives of so many poor and black people in our society. Recognition of the racially disparate breakup of black families can usefully focus attention on finally taking more effective action to solve some of the results of our societal legacy of slavery and of racial and economic injustice.

Some Movement leaders may see what they are doing as part of a strategy to pursue these larger social reform goals. They may think it is useful to identify the disproportionate breakup of black families as a form of racism. They may think that by promoting preservation of black families they will force a stingy society to commit more resources for supportive family services.

But if this is the strategy, it is wrong, both because it puts black children at unfair risk, and because it seems far too limited in its goals for the black community. Leaving black children with their parents to suffer ongoing maltreatment hurts those children, and sends them on to adult lives characterized by poverty, substance abuse, unemployment, and a high likelihood that they will in turn victimize the next generation through maltreatment of their children. The increased family support services that might result from an expansion of family preservation programs will be limited, and will do little to protect children from ongoing maltreatment, or to make any dent on the problems suffered by the black community. Focus on the claimed racism of child welfare workers puts attention on a non-problem, while ignoring the real problems of the black community—the societal legacy of racial injustice and the miserable socio-economic conditions that characterize too many black lives.

The Racial Disproportionality Movement makes the claim that black children are no more likely than white children to be victimized by abuse and neglect, a claim that is central to its position that black children are overrepresented in the foster care system, rather than appropriately represented given the level of maltreatment. The theory is that discrimination in the *official* child protective services system of reporting, investigating, and substantiating maltreatment cases, and in making decisions to remove children to foster care, results in black child representation in foster care in numbers disproportionate to *actual* maltreatment. The Movement relies overwhelmingly on one source to support its central claim that *actual* black and white maltreatment rates are identical, the National Incidence Studies (NIS). The NIS did indeed state that actual, as opposed to official, maltreatment rates were the same for blacks and whites.<sup>23</sup> Excellent research analyses conducted subsequently, however, have persuasively debunked this NIS assertion. And taken as a whole, the empirical literature demonstrates the overwhelming likelihood that actual black maltreatment

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23. The three NIS studies are congressionally mandated efforts to analyze the actual incidence of child maltreatment as distinguished from officially reported child maltreatment. The NIS-3, published in 1996, concluded that there were “*no significant race differences*” in actual maltreatment incidence. ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP’T OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT 8-7 (1996). The NIS-1 and NIS-2 came to similar conclusions. *Id.*



rates are in fact significantly higher than white, because blacks suffer at significantly higher rates from risk factors that are known predictors of child maltreatment. *See Part II infra.*

This is not to say that actual black maltreatment rates are an exact match for the official statistics on child maltreatment, or that there is no bias in the child protective services system. Black children might be removed at somewhat higher rates than their actual maltreatment rates, or at somewhat lower rates. It is a complicated picture to unravel. But the better studies, which control for a range of the relevant non-racial explanations for child welfare decision-making, generally indicate that race plays either a minimal role or no role at all. Those leading the Racial Disproportionality Movement appear to be deliberately using suspect data to persuade policymakers to move in a particular policy direction.

The debate has so far been extraordinarily limited, with one side's views repeated over and over, and the handful of countervailing voices muted. Movement actors have bombarded the media and policymakers on the state and federal level with their claims, rarely admitting that serious questions have been raised about the validity of those claims. The Movement includes foundations and organizations that have had a powerful impact on policy in the child welfare area for many years. *See Part I.E infra.* They have systematically reached out to other important child welfare players, and have had great success getting them on board; the Child Welfare League of America, the American Bar Association, and other important establishment organizations are now helping to propagate the Movement's message. The Casey foundations involved are the ones that at present provide almost all the private funds available in the child welfare area for both advocacy and research. There is no powerful group that is countering the Movement's advocacy efforts, or promoting more disinterested research than that which the Movement supports. The literature in the area reflects this, consisting primarily of articles and reports that repeat the standard Movement line. A relatively lonely few in the child welfare research world have dared to challenge the Movement's claims, and even they tend to speak in restrained tones.

Also, to the degree there *is* a debate, it has taken place almost entirely within the walls of the social welfare world. Law review literature, which might expose the issues to a broader audience and range of potential policymakers, contains practically no articles on the topic, and those few that do exist take the Movement's position.<sup>24</sup>

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24. *See* Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109 (2008) (proposing new federal legislation making it more difficult to remove black children to foster care by raising the proof standard CPS agencies must meet in cases involving black children); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court—The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007); Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881 (2007); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23 (2005); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 180

This Article seeks to clarify the facts, analyzing both the nature of the Racial Disproportionality Movement and the relevant empirical literature. *See* Parts I and II *infra*. It suggests appropriate directions for law and policy given the facts. *See* Part III *infra*. The issues go to the heart of our child welfare system. The Racial Disproportionality Movement has made significant progress toward its goals of dramatically changing how the child welfare system operates. It is past time for all those who care about children's welfare to take notice.

## I. THE RACIAL DISPROPORTIONALITY MOVEMENT

### A. Key Players

The Casey-CSSP Alliance for Racial Equity, which heads the Movement,<sup>25</sup> consists of five Casey foundations together with the Center for the Study of Social Policy (CSSP). The Casey organizations are the Annie E. Casey Foundation, Casey Family Services, Casey Family Programs, The Jim Casey Youth Opportunities Initiative and the Marguerite Casey Foundation, which together command enormous resources.<sup>26</sup> The Alliance was formed in 2004 “to develop and implement a national, multiyear campaign to address racial disparities and reduce the disproportionate representation of children from certain racial or ethnic communities in the nation’s child welfare system.”<sup>27</sup> It devotes substantial resources to finance a wide range of efforts to push the Movement’s agenda. It offers states funding and technical assistance to address Racial Disproportionality in their child welfare systems. It also funds a range of other Racial Disproportionality studies and conferences. The Casey foundations and the CSSP have long been active in the child welfare policy area. Together they have promoted policies with a strong family preservation bent, such as the Community Partnership or Alternative Track programs.<sup>28</sup>

The Alliance is joined by The Race Matters Consortium,<sup>29</sup> which describes itself as “a national, multisystem initiative whose mission is to research and develop policy responses to the phenomenon of racial and ethnic

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(2003); Richard Wright & Wadie Thomas, Jr., *Disproportionate Representation: Communities of Color in the Domestic Violence, Juvenile Justice, and Child Welfare Systems*, JUV. & FAM. CT. J., Fall 2003, at 87.

25. KEESHA DUNBAR & RICHARD P. BARTH, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, RACIAL DISPROPORTIONALITY, RACE DISPARITY, AND OTHER RACE-RELATED FINDINGS IN PUBLISHED WORKS DERIVED FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (Casey Family Programs 2007).

26. In its latest annual financial report, the Annie E. Casey Foundation reported assets of over \$3.3 billion. *See* ANNIE E. CASEY FOUNDATION, FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED DECEMBER 31, 2007 AND 2006, AND INDEPENDENT AUDITORS’ REPORT, [http://www.caseyfoundation.org/AboutUs/~media/PDFFiles/AECF\\_2007\\_Financial\\_Statements.pdf](http://www.caseyfoundation.org/AboutUs/~media/PDFFiles/AECF_2007_Financial_Statements.pdf). The Stuart Foundation has also provided support for Movement activities.

27. DUNBAR & BARTH, *supra* note 25, at title page.

28. *See* NOBODY’S CHILDREN, *supra* note 3, at 141–54; *see also infra* Part I.E.

29. *See* Race Matters Consortium, <http://www.racemattersconsortium.org/> (last visited Oct. 8, 2009).

disproportionality in the child welfare system.”<sup>30</sup> The Consortium formed in 1999 to focus on the Racial Disproportionality problem and helped get the Movement off the ground. Dorothy Roberts, Robert Hill, Ernestine Jones, and Dennette Derezotes are key figures. The Consortium receives ongoing financial support from Casey Family Programs and from the Illinois Department of Children and Family Services.<sup>31</sup>

Westat, a major child welfare research firm, has also played an important role. Westat is responsible for the National Incidence Studies, whose claim that black and white maltreatment rates are the same has been central to the Movement’s theory. In 1999, Westat formed an internal Race Matters Study Group. Then, together with the University of Illinois Children and Family Research Center (Illinois Research Center), Westat organized a Race Matters forum in Washington, D.C., in January, 2001.<sup>32</sup> The Race Matters Consortium collected the papers generated by that forum in a 2005 book titled *Race Matters in Child Welfare: The Overrepresentation of African American Children in the System*.<sup>33</sup> The Casey Family Programs foundation cosponsored a second such forum with the Illinois Research Center and Westat in March, 2002, with the goal of “developing a national agenda for addressing disproportionality in the child welfare system.”<sup>34</sup>

The influential Child Welfare League of America published a special issue in 2008 titled “Overrepresentation of Minority Youth in Care.”<sup>35</sup> This collection of articles and editorials is a powerful endorsement of the Movement’s position. The articles in the first half analyze Racial Disproportionality, with the dominant view identifying racial bias in the child welfare system as the problem.<sup>36</sup> The editorial introducing this section calls the notion that poverty causes racial disparities “mostly myth,” identifying instead race and cultural bias as the problem.<sup>37</sup> The articles in the second half discuss “Methods to Reduce Racial Disproportionality,” recommending the kinds of programs that the Casey-CSSP Alliance has been systematically promoting: a range of initiatives designed to keep black children in their birth families and their racial communities, to increase anti-racism and cultural-competence training, and to put more pressure on states to reduce racial disparities.<sup>38</sup>

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30. RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM vi (Dennette M. Derezotes et al. eds., Child Welfare League of America 2005) [hereinafter RACE MATTERS].

31. *Id.*

32. *Id.* at v–vi.

33. *Id.* at vi.

34. *Id.*

35. *Overrepresentation of Minority Youth in Care*, CHILD WELFARE, Mar.–Apr. 2008, at 1.

36. *See id.* (table of contents).

37. Terry L. Cross, *Disproportionality in Child Welfare*, CHILD WELFARE, Mar.–Apr. 2008, at 11, 12.

38. *See Overrepresentation of Minority Youth in Care*, *supra* note 35. *See, e.g.*, Robert B. Hill, *Gaps in Research and Policies*, CHILD WELFARE, Mar.–Apr. 2008, at 359;

The Alliance lists the Black Administrators in Child Welfare as a partner in their work.<sup>39</sup> The National Association of Black Social Workers has adopted a supportive statement,<sup>40</sup> as has the North American Council on Adoptable Children.<sup>41</sup>

### *B. Core Initiatives*

The Casey-CSSP Alliance has issued and funded many reports and papers,<sup>42</sup> and sponsored various conferences and colloquia,<sup>43</sup> beyond those

Ruth G. McRoy, *Acknowledging Disproportionate Outcomes and Changing Service Delivery*, CHILD WELFARE, Mar.–Apr. 2008, at 205.

39. GEORGETOWN UNIV. CTR. FOR JUVENILE JUSTICE REFORM & CHAPIN HALL CTR. FOR CHILDREN AT UNIV. OF CHI., RACIAL AND ETHNIC DISPARITY AND DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM 24 (2009) [hereinafter CHAPIN HALL, COMPENDIUM].

40. Nat'l Ass'n of Black Soc. Workers, *Preserving Families of African Ancestry* (Jan. 10, 2003), <http://www.nabsw.org/mserver/PreservingFamilies.aspx> [hereinafter *Preserving Families of African American Ancestry*] (states that discrimination is the reason for Racial Disproportionality and calls for keeping black children with their parents).

41. N. Am. Council on Adoptable Children (NACAC), *Race and Ethnicity in Child Welfare*, <http://www.nacac.org/policy/race.html> (last visited Oct. 9, 2009).

42. CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYS., POLICY RESPONSE TO THE GAO AUDIT ON DISPROPORTIONALITY FOR AFRICAN AMERICAN CHILDREN IN FOSTER CARE (2007), [http://www.cssp.org/uploadFiles/Casey-CSSP%20Alliance%20Policy%20Recommendations%20\\_5\\_%2012%2014%2007.pdf](http://www.cssp.org/uploadFiles/Casey-CSSP%20Alliance%20Policy%20Recommendations%20_5_%2012%2014%2007.pdf); CTR. FOR THE STUDY OF SOC. POLICY, THE RACE + CHILD WELFARE PROJECT: FACT SHEET 1—BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN AMERICANS IN THE FOSTER CARE SYSTEM (2004), <http://www.cssp.org/uploadFiles/factSheet1.pdf>; CTR. FOR THE STUDY OF SOC. POLICY, THE RACE + CHILD WELFARE PROJECT: FACT SHEET 2—STATE-BY-STATE STATISTICAL PROFILE OF RACIAL OVERREPRESENTATION IN FOSTER CARE (2004), <http://www.cssp.org/uploadFiles/statORFactSheet2.pdf>; CASEY FAMILY PROGRAMS, BREAKTHROUGH SERIES COLLABORATIVE: REDUCING DISPROPORTIONALITY AND DISPARATE OUTCOMES FOR CHILDREN AND FAMILIES OF COLOR IN THE CHILD WELFARE SYSTEM—FRAMEWORK FOR CHANGE (2005), [http://calswec.berkeley.edu/calSWEC/2005\\_FELeader\\_BSCDisproporFramework.pdf](http://calswec.berkeley.edu/calSWEC/2005_FELeader_BSCDisproporFramework.pdf); CASEY FAMILY PROGRAMS, DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM: THE DISPROPORTIONATE REPRESENTATION OF CHILDREN OF COLOR IN FOSTER CARE, <http://www.ncsl.org/Portals/1/documents/cyf/fostercarecolor.pdf> (last visited Oct. 9, 2009); CASEY-CSSP ALLIANCE FOR RACIAL EQUITY, PLACES TO WATCH: PROMISING PRACTICES TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE SERVICES (2006), [http://www.cssp.org/uploadFiles/Promising\\_Practices\\_to\\_Address\\_Racial\\_Disproportionality.pdf](http://www.cssp.org/uploadFiles/Promising_Practices_to_Address_Racial_Disproportionality.pdf) (overview of efforts to reduce Racial Disproportionality taken by ten jurisdictions; acknowledging Casey Foundation support for production of report); DENNETTE DEREZOTES & MARY ANN HARTNETT, CHILD WELFARE SYSTEM INVOLVEMENT OF AFRICAN AMERICANS: JONES COUNTY, ILLINOIS (2005), <http://www.racemattersconsortium.org/docs/whopaper6.pdf> (a report developed by the Race Matters Consortium as an example of the Racial Disproportionality analysis that child welfare system administrators should conduct); ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, AN ANALYSIS OF RACIAL AND ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS (2007), <http://www.casey.org/Resources/Publications/pdf/AnalysisOfDisproportionality.pdf> [hereinafter HILL ANALYSIS]; ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE,

mentioned above. As noted *supra* in Part I.A, the Alliance has systematically reached out to states to encourage them to focus on their alleged Racial Disproportionality problem. It has provided funding and technical assistance to states to analyze their child welfare systems in terms defined by the Movement, leading to the production of a series of reports in different states which replicate the Movement's standard analysis of Racial Disproportionality issues, and standard recommendations for reform.<sup>44</sup> For example, in June 2005, Casey Family Programs "invited 13 public child welfare jurisdictions to participate in the Breakthrough Series Collaborative (BSC) on Reducing Disproportionality and Disparate Outcomes for Children and Families of Color in the Child Welfare System."<sup>45</sup> The BSC is described as "incorporating an analysis of structural racism and potential system bias," and "as a tool for engaging public child welfare agencies in a rapid, action-oriented process for identifying innovative strategies and practices to reduce racial disproportionality . . . ."<sup>46</sup> The Alliance has also developed a "Racial Equity Scorecard" as part of its campaign, for use in its work with state agencies to reduce racial disparities at various points in the child welfare decision-making process.<sup>47</sup> The Alliance's "Action Card" calls on child welfare agencies to "[h]old child welfare leadership accountable for racial equity as an outcome standard . . . beginning with substantiations of abuse/neglect and continuing through exit strategies," "track racial disparity data at all key decision points in order to set benchmarks, monitor progress and ensure racially equitable

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SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (2006), <http://www.cssp.org/uploadFiles/Synthesis%20of%20Research%20on%20Disproportionality-Robert%20Hill.pdf> [hereinafter HILL SYNTHESIS]; RACE MATTERS CONSORTIUM, DEVELOPING A FRAMEWORK FOR ANALYSIS OF THE KEY ISSUES INFLUENCING DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM: FEDERAL POLICIES AND THEIR IMPACT ON RACIAL/ETHNIC/DISPROPORTIONALITY (2002), <http://www.racemattersconsortium.org/docs/whopaper1.pdf> [hereinafter RACE MATTERS FRAMEWORK]; KRISTIN J. WARD, CASEY FAMILY PROGRAMS, OUTCOMES AND LESSONS LEARNED: CASEY'S BREAKTHROUGH SERIES COLLABORATIVE ON REDUCING DISPROPORTIONALITY AND DISPARITIES FOR CHILDREN AND FAMILIES OF COLOR IN THE CHILD WELFARE SYSTEM (2008), [http://www.casey.org/Resources/Publications/pdf/BreakthroughSeries\\_ReducingDisproportionality\\_ES.pdf](http://www.casey.org/Resources/Publications/pdf/BreakthroughSeries_ReducingDisproportionality_ES.pdf).

43. See, e.g., FORDHAM UNIV. INTERDISCIPLINARY CTR. FOR FAMILY & CHILD ADVOCACY, RACIAL GEOGRAPHY OF THE CHILD WELFARE SYSTEM: COMMUNITY IMPACT AND RESPONSE (2006), [http://law2.fordham.edu/documents/int-2AnnualReport05\\_06.pdf](http://law2.fordham.edu/documents/int-2AnnualReport05_06.pdf); RACE MATTERS FRAMEWORK, *supra* note 42 (prepared for National Heritage Coalition Summit on Dec. 11–12, 2002); Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61 (2003) [hereinafter New York Bar Symposium]; Rutgers Sch. of Soc. Work, Inst. for Families, Disparities and Disproportionality in Child Welfare: Best Practices and Emerging Opportunities (Apr. 29, 2009).

44. See Part I.D *infra*.

45. Oronde A. Miller & Kristin J. Ward, *Emerging Strategies for Reducing Racial Disproportionality and Disparate Outcomes in Child Welfare: The Results of a National Breakthrough Series Collaborative*, CHILD WELFARE, Mar.–Apr. 2008, at 211, 211.

46. *Id.*

47. Dennette Derezotes et al., *Evaluating Multisystemic Efforts to Impact Disproportionality Through Key Decision Points*, CHILD WELFARE, Mar.–Apr. 2008, at 248.

treatment and outcomes,” and “[e]nsure that services and staff are culturally competent.”<sup>48</sup>

At the core of these state action initiatives is the notion that racism is the problem to be recognized and overcome at every level. Thus, when Washington State formed an Advisory Committee to study the problem of Racial Disproportionality in response to its new legislative mandate, the committee decided that its first step should be to engage in an Undoing Racism Workshop conducted by The People’s Institute for Survival and Beyond. The committee’s later report explains what it saw as the importance of this initial focus:

This workshop offered a lens to consider intended or unintended institutional racism, systematic racism and other societal factors that create barriers for the families and children our child welfare system serves. The workshop allowed the advisory members to examine the conditions that consistently contribute to racial inequality and provided them an opportunity to hear how various institutional systems affect people of color. The workshop further confirmed that racial disproportionality is multi-dimensional and commands consistent monitoring of our intention to be culturally sensitive and responsive to all of the people we serve.<sup>49</sup>

Similarly, the very recent Michigan Race Equity Review, conducted by a team led by CSSP, co-leader of the Movement along with the Casey foundations, made acknowledgement of discrimination the starting point of its study, rather than designing a study to assess whether such discrimination exists. Thus, its report indicated that, in assessing Michigan’s alleged Racial Disproportionality problem, it made *assumptions* that child maltreatment is evenly distributed across racial groups and, thus, should not predict outcomes to the degree it does.<sup>50</sup> When it found that caseworkers, lawyers, and judges often questioned the assumption that racial bias was responsible for the high rates of black children in foster care, the Review concluded that this was simply a reflection of their inability to understand “how racism is embedded in institutional structures.”<sup>51</sup> The Review recommended that leaders in Michigan’s child welfare system must be “trained and retrained on the dynamics of race and child welfare using an anti racism approach . . . as part of creating an environment which is amenable to addressing institutional racism.”<sup>52</sup>

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48. CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, AN EMBEDDED INEQUITIES LENS FOR CHILD WELFARE PRACTICE, [http://www.cssp.org/uploadFiles/AEC\\_ACard\\_1.pdf](http://www.cssp.org/uploadFiles/AEC_ACard_1.pdf) (last visited Oct. 28, 2009).

49. WASH. ST. RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE 13 (2008), *available at* <http://www1.dshs.wa.gov/pdf/ca/RaceDisproReport.pdf>.

50. CTR. FOR THE STUDY OF SOC. POLICY, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN’S CHILD WELFARE SYSTEM 5 (2009), <http://www.cssp.org/uploadFiles/michigan%20report%201%2014%2009%20FINAL.pdf> [hereinafter CSSP, MICHIGAN REPORT].

51. *Id.* at 40.

52. *Id.* at 41. *See also* Joyce James et al., *Addressing Disproportionality Through Undoing Racism, Leadership Development, and Community Engagement*, CHILD WELFARE,

Anti-racism training makes sense in many contexts. But if the goal really is to find out whether black child removal rates reflect racial bias or actual maltreatment, then the Movement's use of anti-racism training is problematic, as it seems designed to tell those who are supposed to be studying the system what they should find, and to tell them that if they fail to find that racial bias is the explanation for the black removal rates, then they are demonstrating their own racial bias, or at a minimum their inability to recognize racial bias when they see it.

Similarly, the Movement's anti-racism training is designed to tell those in supervisory and in-line staff positions that they must stop removing children in numbers disproportionate to their population numbers if they want to avoid acting as racists and if they want to avoid being held accountable for racism. Movement strategies urge creating accountability measures that will judge child protective services supervisors and staff in terms of whether they reduce the removal of black children so as to achieve "racial equity"—defined as the equalization of black and white rates of removal and of foster care representation, by comparison to population percentages. Thus, the Movement calls for making child protective services (CPS) workers "accountable for measurable outcomes,"<sup>53</sup> and stresses "developing a cultural change that embraces the principles of anti-racism in everyday practices."<sup>54</sup> The Michigan Race Equity Review noted above recommends that the central CPS office:

[D]evelop routine data reports that look at critical decision points . . . by race/cultural groups [and] . . . provide an annual report to the public of progress on remedying racial disproportionality. . . Supervisors and workers must be regularly held accountable. . . Personnel appraisal process should include assessments of . . . their cultural competency, and outcomes for the parents and children.

....

[CPS must build] an internal quality assurance review that annually . . . examines racial differences in outcomes.<sup>55</sup>

The message to CPS from top management down to the social workers making the front-line decisions is clear: if you find maltreatment and act to remove children based on maltreatment in ways that result in removing black children at higher rates than white, you are racist and will be held accountable.

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Mar.–Apr. 2008, at 282, 286, 293 (2008) (reporting that in the Texas Racial Disproportionality campaign, "Undoing Racism" training has been central to the strategy, with workshops provided to those on the top leadership levels on down through the ranks).

53. James et al., *supra* note 52, at 293.

54. *Id.* at 294.

55. CSSP, MICHIGAN REPORT, *supra* note 50, at 41–42.

Media stories give some indication of how Movement initiatives may translate on the ground and of potential dangers for children. The *Contra Costa Times* reported in 2006 on efforts funded by the Casey-CSSP Alliance to reduce alleged overrepresentation of black children in foster care in this California county, by setting specific reduction goals:

Lately, county welfare officials have pushed [to reduce Racial Disproportionality] with programs designed to keep more black children in their homes and out of foster care. But some county social workers say moves to correct the imbalance come with a price—pressure to apply a lower standard of safety in those homes.

The policy may not be in writing, they say, but it is clear: Barring heavy violence or sexual abuse, removing a black child is frowned upon.

....

The county initiatives, which include social worker training on “white guilt” and what some describe as a “bend-over-backward” approach for black families, have some social workers wondering whether the county is sacrificing safety to make its “numbers” look better.

“We were told not to remove any black children under the age of 3 unless we had supervisor’s approval, and we never got it,” said one veteran child welfare worker.

“We used to remove children who had black and blue marks and were beaten. Now, not if they’re ethnic,” said another. “We used to remove children because they were at risk. Then they told us not to remove children, particularly black children, unless they were unsafe in that moment . . . .”<sup>56</sup>

### C. Classic Movement Analysis and Recommendations

It is obvious from reading the Movement’s many dozens of reports and papers, with their largely duplicative claims,<sup>57</sup> that it is systematically propagating a simplistic message.

The Movement’s standard analysis of Racial Disproportionality focuses on the difference between the percentage of black children in the child welfare system and in the general population, contrasting this to the picture for white children. The literature often uses the term *disproportionality* to describe the extent to which children are overrepresented or underrepresented in the system relative to

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56. John Simerman, *Racial Split a Breach in Foster Care: Effort to Reduce Disparity, Leave More Black Children in Their Homes Raises Questions About Safety Standards*, *CONTRA COSTA TIMES*, Dec. 20, 2006, at F4.

57. Core Movement literature includes Casey-CSSP Alliance reports and papers, *supra* note 42, state and local jurisdiction reports on Racial Disproportionality, *infra* note 74, and the federal GAO Report, *infra* note 65. See also articles and books cited at notes 24, 30, 35, 49, 65, 95.



their population percentages, and the term *disparity* to describe the difference between the rate at which blacks as compared to whites are represented in the system.<sup>58</sup> Movement literature also discusses the apparent impact of various decision-making points in the child welfare system. It contends that blacks are first more likely than whites to be reported to the CPS for child maltreatment, and then that CPS is more likely to investigate, substantiate, and remove to foster care in black cases, and is less likely to move black children out of foster care either to be reunified with their parents or adopted. The claim is that biased decision-making is occurring throughout the system. Movement literature notes that the racial disparity is cumulative, increasing as children are affected at different decision points.<sup>59</sup> Some recent Movement analyses emphasize “life table” statistics, noting the likelihood that black children will be identified as victims of maltreatment or removed to foster care by a certain age. One study states that:

[B]y the time they are seven years old, almost 2 in 5 black children have been referred to the child welfare system and almost 1 in 10 has been removed from his or her parents’ care . . . [whereas] less than 1 in 5 white or Hispanic children has been referred and about 1 in 30 has been removed.<sup>60</sup>

Another argues that life table statistics are especially useful in triggering attention from media and from policymakers.<sup>61</sup>

The emphasis is on disparities between blacks as compared to whites, with some discussion of similar disparities regarding Native Americans. *There is little discussion of the fact that Asians are underrepresented in the child welfare system by comparison to their general population percentages, or that Hispanics are represented at roughly the same rates as whites.* Nor do Movement advocates argue that we should be increasing the number of Asian children removed in order to achieve racial equity.

Sometimes the raw disparity statistics are the only basis for concluding that the child welfare system is operating in a discriminatory way. Other times the Movement literature baldly asserts that black and white maltreatment rates are the same as a way of bolstering its claims of discrimination, and in these instances it regularly relies on the NIS studies, and typically relies *only* on the NIS studies. When Movement advocates cite the NIS studies, they generally describe them as comprehensive federal studies that demonstrate that black and white maltreatment rates are identical. On the occasions that additional studies are cited, the overwhelming favorites are a small handful of older studies involving medical

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58. See, e.g., HILL SYNTHESIS, *supra* note 42, at 8; Terry V. Shaw et al., *Measuring Racial Disparity in Child Welfare*, CHILD WELFARE, Mar.–Apr. 2008, at 23, 31 (arguing for the benefits of the “disparity index” in calculating racial differences in treatment, and defining it as showing “the likelihood of one group experiencing an event, compared to the likelihood of another group experiencing that same event”).

59. HILL ANALYSIS, *supra* note 42, at 9.

60. Joseph Magruder & Terry V. Shaw, *Children Ever in Care: An Examination of Cumulative Disproportionality*, CHILD WELFARE, Mar.–Apr. 2008, at 169, 187.

61. David Crampton & Claudia J. Coulton, *The Benefits of Life Table Analysis for Describing Disproportionality*, CHILD WELFARE, Mar.–Apr. 2008, at 189.

reporting of maltreatment, which failed to control for important risk factors, but which the literature claims demonstrate biased decision-making.<sup>62</sup> Much of the Movement literature, including most of the state reports purporting to find discrimination in various state child welfare systems,<sup>63</sup> simply cites other Movement documents, including articles by favorite Movement authors like Robert Hill, which themselves generally rely solely on either the raw disparity statistics, or additionally on the NIS studies.

Typically, there is no reference to any limitations in the supporting research cited, or to the powerful studies debunking the NIS claim that black and white maltreatment rates are the same.

The standard recommendations for reform in the Movement literature focus entirely on the child welfare system and its key decision-making points—investigation, substantiation, removal for placement in foster care, and exit from foster care through reunification or adoption.

The recommendations can be divided between those that logically flow directly from the Movement's analysis of the Racial Disproportionality problem, and those that do not. The first category focuses on reducing the number of black children in foster care. Recommendations include methods for reducing removal rates, and increasing reunification rates. Casey Family Programs has the stated goal of reducing foster care by 50% by 2020,<sup>64</sup> and reducing black representation in foster care is part of the program. Since bias is claimed to be the problem, it is no surprise that recommendations include the recruitment and hiring of more minority-race social workers and an increase in the already extensive anti-racism and cultural-competence training for workers. The Adoption and Safe Families Act (ASFA) comes in for criticism for its emphasis on the importance of removing children from their homes if they cannot be safely kept there.<sup>65</sup>

Community partnership or Alternative Track systems are promoted, since these emphasize diverting many children from the coercive CPS track, which can lead to removal to foster care. Family Group Decision-Making is promoted, since this is thought more likely to keep children in their birth families or at least in their

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62. For discussion of the NIS and of these additional medical reporting studies, see *infra* Part II.C.

63. See *infra* note 74.

64. WARD, *supra* note 42, at 3; CHAPIN HALL, COMPENDIUM, *supra* note 39, at 24.

65. For Movement critiques of ASFA see, e.g., GOV'T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 32–34, 65 (2007), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-07-816> [hereinafter GAO REPORT]; RUTH MCROY, COLOR OF CHILD WELFARE POLICY: RACIAL DISPARITIES IN CHILD WELFARE SERVICES 8–9 (2002), <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/mcroys-transcript.pdf>; RACE MATTERS FRAMEWORK, *supra* note 42, at 18; U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, ADMIN. FOR CHILDREN & FAMILIES, CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY iii–iv (2003), available at <http://www.childwelfare.gov/pubs/otherpubs/children/children.pdf> [hereinafter DHHS STUDY]; Preserving Families of African American Ancestry, *supra* note 40.

kinship group, and also to more likely result in reunification with parents of any children temporarily removed. Subsidized guardianship is promoted, since it is thought that many black kinship foster care parents might become guardians if guardianship provided stipends comparable to those given foster parents, and, thus, provide black children in foster care another permanency option which will keep them in their kinship group.

The second category of recommendations is not obviously logically related to the goal of reducing the number of black children in foster care and may be somewhat inconsistent with that goal. This category includes the recommendations for changes in the Multiethnic Placement Act (MEPA).<sup>66</sup> MEPA removed racial barriers to placement that had stood in the way of black children finding adoptive homes with white families. It was designed in significant part to address the fact that black children were represented in foster care in very high numbers, and they were being delayed in placement and sometimes denied placement altogether by policies that required they be placed with same-race adoptive parents. There is some evidence that MEPA has helped reduce the number of black children in foster care: transracial adoptive placements have increased since MEPA,<sup>67</sup> as have adoptive placements generally of black children from foster care.<sup>68</sup> Thus, the Movement criticism of MEPA demonstrates more generalized hostility to MEPA by Movement advocates and their commitment to keeping black children in the black community whether or not they can be kept at home with their birth parents. ASFA is also criticized for creating new screening criteria for foster and adoptive parents, including criminal record checks that make it harder for black prospective parents to qualify. Again, this illustrates the Movement's commitment to keeping black children in their racial communities through same-race foster and adoptive placement, even if they cannot be kept with their birth parents.

Similarly, the Movement's criticism of ASFA for its allegedly overly rigid timelines has no clear relationship to the goal of reducing the number of black children in foster care. ASFA provides that children held for more than a certain amount of time in foster care be moved *either* back to their birth parents *or*

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66. For Movement critiques of MEPA see, for example, GAO REPORT, *supra* note 65, at 58; CLEGG & ASSOCS. & WANDA HACKETT ENTERS., RACIAL DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM IN KING COUNTY, WASHINGTON 47 (2004), <http://www.catalystforkids.org/KingCountyReportonRacialDisproportionality.pdf> [hereinafter KING COUNTY REPORT]; MCROY, *supra* note 65, at 11; RACE MATTERS FRAMEWORK, *supra* note 42, at 9–10, 11; DHHS STUDY, *supra* note 65, at iii–iv; Preserving Families of African American Ancestry, *supra* note 40 (recommends repealing the IEPA 1996 amendments to MEPA which strengthened the Act to prohibit any use of race by child welfare agencies in the child placement process).

67. EVAN B. DONALDSON INST., FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 33 (2008) [hereinafter DONALDSON REPORT], available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf>.

68. FRED H. WULCZYN ET AL., CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., FOSTER CARE DYNAMICS 1983–1998: A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE 60 (2000), available at [http://www.chapinhall.org/sites/default/files/old\\_reports/75.pdf](http://www.chapinhall.org/sites/default/files/old_reports/75.pdf).

on to adoption. It provides pressure to move black as well as white children out of foster care into permanency, something that Racial Disproportionality Movement advocates say they want. Also, more children exit foster care to reunification than to adoption, so ASFA timelines should further the Movement goal of keeping more black children with their parents. But Movement critics are presumably concerned with the fact that ASFA will lead to at least some increase in adoption of black children out of foster care, moving these children away from their birth parents and, in some cases, away from their racial communities.

#### *D. Impact on the Child Welfare Field*

The Racial Disproportionality Movement has already had a very significant impact on the child welfare field.<sup>69</sup> So far this impact can be measured primarily in terms of the number of reports and articles published, and the number of influential people and organizations who have bought into the Movement's standard analysis and recommendations. But more significant action changing child welfare system policies will likely be next unless something stops the train.

National and local media have given Racial Disproportionality issues increasing attention, often replicating core Movement claims.<sup>70</sup> This reflects systematic efforts by the Movement to reach out to the media for favorable coverage so as to influence policymakers.<sup>71</sup>

The National Conference of State Legislators and the National Governor's Association have issued statements supporting the Racial Disproportionality Movement's analysis.<sup>72</sup> The former is an organization designed to provide policy information to inform state legislative decision-making. Its statement, *Racial Equity in Child Welfare: The Role of State Legislators*, claims that, while black children appear in foster care at more than twice their population percentage, "federal studies indicate that child abuse and neglect is actually lower for black families than it is for whites."<sup>73</sup>

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69. A recent summary of developments appears in CHAPIN HALL, COMPENDIUM, *supra* note 39, at 21–24.

70. *Racial Bias to Blame for Foster Care Disparity*, ASSOCIATED PRESS, Nov. 13, 2007, available at <http://www.msnbc.msn.com/id/21775847>; Natalie Jordan, *Racial Disparity in Foster Care Addressed*, BOWLING GREEN DAILY NEWS, Apr. 5, 2007, available at <http://www.bgdailynews.com/articles/2007/04/05/news/news3.txt>; Brooke Kempner, *No Place to Call Home: Children of Color in Foster Care*, COLORSNW MAG., Jan. 2006.

71. Crampton & Coulton, *supra* note 61, at 189 (discussing usefulness of life table analysis statistics for media and policymakers).

72. Nat'l Conference of State Legislatures, *Racial Equity in Child Welfare: The Role of State Legislators*, <http://www.ncsl.org/programs/cyf/racialequity.htm> (last visited Oct. 9, 2009); Nat'l Governors Ass'n, *Addressing Disproportionality in the Child Welfare System: What State Policymakers Should Know*, <http://www.nga.org/portal/site/nga/menuitem.9123e83a1f6786440ddcbeeb501010a0/?vgnextoid=bbe4edc8acf54110VgnVCM1000001a01010aRCRD> (last visited Oct. 9, 2009).

73. Nat'l Conference of State Legislatures, *supra* note 72 (citing the NIS).

A number of state and local jurisdictions have issued reports that apply the standard Movement analysis in looking at their own child welfare systems.<sup>74</sup> This is of course no surprise given that the Casey-CSSP Alliance encourages and guides these activities by providing funding and expertise. As noted above, the CSSP itself conducted the Michigan study and wrote the Michigan Equity Report.<sup>75</sup> The Race Matters Consortium developed a report on a fictitiously named Illinois county to provide a model for state and local authorities in how to analyze their Racial Disproportionality problems.<sup>76</sup>

Several states including Michigan, Texas, Florida, Iowa, Minnesota, and Washington have recently passed legislation requiring Racial Disproportionality analysis as well as action designed to reduce disproportionality; others have introduced similar legislation.<sup>77</sup>

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74. KING COUNTY REPORT, *supra* note 66 (acknowledging Casey Foundation support); KATHY LEMON ET AL., BAY AREA SOC. SERVS. CONSORTIUM, UNDERSTANDING AND ADDRESSING DISPROPORTIONALITY IN THE FRONT END OF THE CHILD WELFARE SYSTEM (2005), *available at* [http://cssr.berkeley.edu/bassc/public/DISPRO\\_PDF.pdf](http://cssr.berkeley.edu/bassc/public/DISPRO_PDF.pdf); INTER-CITY FAMILY RES. NETWORK, INC., THE DISPROPORTIONALITY PROJECT: RAISING OUR CHILDREN TOGETHER: A REPORT ON RECOMMENDATIONS FOR REDUCING THE DISPROPORTIONALITY OF AFRICAN AMERICAN CHILDREN IN SAN FRANCISCO'S CHILD WELFARE SYSTEM (2004), <http://www.f2f.ca.gov/res/DisprReport.pdf> (report recognizes funding and support from the Stuart and Casey foundations); MICH. DEP'T OF HUMAN SERVS., EQUITY: MOVING TOWARD BETTER OUTCOMES FOR ALL OF MICHIGAN'S CHILDREN (2006), [http://www.michigan.gov/documents/DHS-Child-Equity-Report\\_153952\\_7.pdf](http://www.michigan.gov/documents/DHS-Child-Equity-Report_153952_7.pdf) (noting Casey Foundation funding); TEX. HEALTH & HUMAN SERVS. COMM'N & DEP'T OF FAMILY & PROTECTIVE SERVS., DISPROPORTIONALITY IN CHILD PROTECTIVE SERVICES: STATEWIDE REFORM EFFORT BEGINS WITH EXAMINATION OF THE PROBLEM (2006), [http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02\\_Disproportionality.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02_Disproportionality.pdf) (noting collaboration with Casey Foundation); TEX. HEALTH & HUMAN SERVS. COMM'N & DEP'T OF FAMILY & PROTECTIVE SERVS., DISPROPORTIONALITY IN CHILD PROTECTIVE SERVICES—POLICY EVALUATION AND REMEDIATION PLAN (2006), [http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01\\_Disproportionality.pdf](http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01_Disproportionality.pdf); WASH. ST. RACIAL DISPROPORTIONALITY ADVISORY COMM., *supra* note 49; CSSP, MICHIGAN REPORT, *supra* note 50; NANCY ROLOCK, CHILDREN & FAMILY RESEARCH CTR., UNIV. ILL. AT URBANA-CHAMPAIGN, DISPROPORTIONALITY IN ILLINOIS CHILD WELFARE (2008), *available at* <http://www.cfr.illinois.edu/pubs/pdf.files/Disproportionality.pdf>. While most of these reports buy into the standard Movement analysis, occasionally there is a serious attempt to control for non-race factors with a likely impact on CPS system decision-making, with related findings that race plays no role or a greatly reduced role. MINN. DEP'T OF HUMAN SERVS., AFRICAN AMERICAN COMPARATIVE CASE REVIEW STUDY REPORT (2005), *available at* <http://edocs.dhs.state.mn.us/lfsrerver/Legacy/DHS-4575-ENG>; Erik P. Johnson et al., *Investigating Racial Disparity in Minnesota's Child Welfare System*, CHILD WELFARE, July–Aug. 2007, at 5.

75. CSSP, MICHIGAN REPORT, *supra* note 50 and accompanying text. *See generally supra* Part I.B.

76. *See* DEREZOTES & HARTNETT, *supra* note 42.

77. *See, e.g.*, S.B. 271, 93d Leg., 2005th Sess. (Mich. 2005) (legislation creating development of Racial Disproportionality Advisory Committee for the State of Michigan); TEX. FAM. CODE ANN. § 264.2041 (Vernon 2005); One Church, One Child of Florida Corporation Act, FLA. STAT. § 409.1755 (2009); 2001 Minn. Laws. 1st Special Sess. SF 4, Ch. 9, Art. 11, § 15; 2003 Iowa Acts SF 453, Ch. 178 & SF 354 Ch. 153, *available at* <http://www.legis.state.ia.us/>; WA. ST. ANN. § 74.13.096 (West 2008); Final Bill Report, S.B.

The Joint Center for Political and Economic Studies, which describes itself as a leading think tank on public policy issues of concern to people of color, issued a major report focusing on Racial Disproportionality in 2006.<sup>78</sup> The important Pew Commission on Foster Care called for a reduction in Racial Disproportionality in its report on the nation's foster care system.<sup>79</sup> The National Association of Public Child Welfare Administrators issued a report in 2006 calling Racial Disproportionality a "widely accepted problem," adopting the Movement's standard analysis and calling for the reduction of disproportionality through the Movement's standard panoply of strategies.<sup>80</sup> The American Public Human Services Administration and the National Association for Public Child Welfare Administrators have joined together to analyze Racial Disproportionality and identify targets of reform action.<sup>81</sup> The influential American Bar Association (ABA) adopted a policy on Racial Disproportionality in August 2008, which urges federal, state, and local governments to reduce the "disproportionate representation of racial and ethnic minority children in the child welfare system," and recommends anti-racism training for child welfare system personnel and increased minority recruitment and retention.<sup>82</sup>

Racial Disproportionality is recognized as the hottest issue on the current child welfare scene. Fred Wulczyn,<sup>83</sup> a deeply knowledgeable, long-time student of the nation's child welfare system,<sup>84</sup> writes in a recent report that Racial Disproportionality "is now gaining real traction as a critical policy and practice issue within the child welfare system."<sup>85</sup> He notes various federal and state agency

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5882, 61st Leg. (Wa. 2009), available at <http://www.leg.wa.gov/pub/billinfo/2009-10/Pdf/Bills/Senate/Bills/5882.pdf>.

78. ERNESTINE F. JONES, JOINT CTR. FOR POLITICAL & ECON. STUDIES HEALTH POLICY INST., PUBLIC POLICIES AND PRACTICES IN CHILD WELFARE SYSTEMS THAT AFFECT LIFE OPTIONS FOR CHILDREN OF COLOR (2006).

79. PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 50 (2004) ("The Commission urges policymakers and practice organizations to intensify their efforts to eliminate these disparities.").

80. NAT'L ASS'N OF PUB. CHILD WELFARE ADM'RS, DISPROPORTIONATE REPRESENTATION IN THE CHILD WELFARE SYSTEM: EMERGING PROMISING PRACTICES SURVEY 6 (2006), <http://www.napcwa.org/Home/docs/Disproportionate-Representation.pdf>.

81. CHAPIN HALL, COMPENDIUM, *supra* note 39, at 23.

82. AM. BAR ASS'N, COMM'N ON YOUTH AT RISK, ABA POLICY ON ADDRESSING RACIAL DISPARITIES IN THE CHILD WELFARE SYSTEM (2008), <http://www.abanet.org/youthatrisk/youthpolicies/home.shtml>.

83. Fred Wulczyn is Senior Research Associate at the Chapin Hall Center for Children and Director of the Center for State Foster Care and Adoption Data.

84. Mr. Wulczyn designed the Chapin Hall's Multi-State Foster Care Data Archive and constructed the longitudinal database on children's services in Illinois, now in use for over 25 years. In 2006, he received the prestigious National Association of Public Child Welfare Administrators' (NAPCWA) Peter Forsyth Award for leadership in public child welfare. Chapin Hall, Experts, Fred Wulczyn, <http://www.about.chapinhall.org/experts/fred-wulczyn> (last visited Oct. 9, 2009).

85. FRED WULCZYN & BRIDGETTE LERY, CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., RACIAL DISPARITY IN FOSTER CARE ADMISSIONS 23 (2007) (acknowledging funding support from Casey Family Programs).

actions attesting to the Movement's significance, and states that "[w]ithin the private sector, the Race Matters Consortium and the Casey[-CSSP] Alliance . . . have helped move the issue to the forefront of policy discussions."<sup>86</sup> In March 2008, the Center for Juvenile Justice Reform at the Georgetown Public Policy Institute and the well-known Chapin Hall Center for Children at the University of Chicago sponsored a major symposium titled "The Overrepresentation of Children of Color in America's Juvenile Justice and Child Welfare Systems." The goal was to focus on ways in which federal, state, and local government might help address the "overrepresentation" problem.<sup>87</sup>

The Movement has recently broadened its focus from the child protective services agencies to include the juvenile or family court system. It is child welfare agencies that *initiate* most important decisions regarding removal to foster care, reunification with parents, termination of parental rights, and adoption, and it is the courts that *finalize* such decisions. Recently, the Movement has used articles,<sup>88</sup> reports,<sup>89</sup> and conferences,<sup>90</sup> to encourage family court judges to take action to reduce the representation of black children in foster care. The National Council of Juvenile and Family Court Judges, an organization of more than 1900 judges and other juvenile and family law professionals,<sup>91</sup> recently formed an initiative to address Racial Disproportionality, called Courts Catalyzing Change.<sup>92</sup> The

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86. *Id.* See also Magruder & Shaw, *supra* note 60, at 170 (observing that the Racial Disproportionality issue "is finally coming to the forefront of child welfare research").

87. CHAPIN HALL, COMPENDIUM, *supra* note 39, at 7.

88. See, e.g., Hill, *supra* note 24, at 531 n.10 ("Across the country the impact of racial disproportionality in juvenile and family courts is beginning to spur the interests of researchers and practitioners."); Brooks & Roberts, *supra* note 24 (arguing for "therapeutic justice" approach given the Racial Disproportionality problem, urging family courts to forego their coercive intervention in favor of supportive services approach to alleged maltreatment); New York Bar Symposium, *supra* note 43, at 61, 64–66, 68–70 (discussing content of symposium held by the Association of the Bar of the City of New York); Wright & Thomas, *supra* note 24 (courts must address racism and racial disproportionality).

89. See, e.g., CSSP, MICHIGAN REPORT, *supra* note 50, at 44.

90. Shawn Marsh et al., Courts Catalyzing Change: Key Measures of Racial/Ethnic Disproportionality and Disparity for Children and Families in the Dependency Court System, Presentation at the 11th National Child Welfare Data and Technology Conference (July 21, 2008); The Disproportionate Number of Minority Youth in the Family and Criminal Court Systems, Conference of the Franklin H. Williams Judicial Comm'n on Minorities & the New York State Family Court Judges Ass'n (Sept. 18, 2006); New York Bar Symposium, *supra* note 43; ABA 2009 Nat'l Conference on Children and the Law, Representing Your Client and Advocating for Change in Challenging Times (May 15–16, 2009), <http://www.abanet.org/child/ConfAgenda.pdf> (including a workshop by judges Katherine Delgado and Nan Waller presenting "tools for judges to use . . . to ensure that disproportionality and disparities are identified and rectified at the very earliest stages").

91. Nat'l Council of Juvenile & Family Court Judges, About the National Council of Juvenile and Family Court Judges, <http://www.ncjfcj.org/content/view/full/15/75/> (last visited Oct. 10, 2009).

92. See Sophia I. Gatowski, Candice L. Maze & Nancy B. Miller, *Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care—Transforming*

initiative, funded by one of the Casey foundations and the U.S. Department of Justice, accepts as true that children of color “are disproportionately represented in the child welfare system and frequently experience disparate outcomes,”<sup>93</sup> and plans to “recommend strategies for court and systems change to reduce racial disproportionality and disparate treatment.”<sup>94</sup>

The Racial Disproportionality Movement has put increasing emphasis on the importance of having the federal government take action. If successful, this initiative would likely have a dramatic impact, since the federal government funds roughly half of state child welfare budgets and is in a position to effectively coerce states into changing their policies by threatening to withhold federal funds. The Movement wants the federal government to require that state and local jurisdictions make analysis of Racial Disproportionality a priority and wants continued federal funding to be conditioned on those jurisdictions taking action to reduce the number of black children in foster care.

For example, a recent CSSP report recommends that the federal government become heavily involved in addressing Racial Disproportionality. The report recommends that Racial Disproportionality analysis be made part of the federal government’s annual review of states’ success in achieving appropriate child welfare goals and that states’ federal funding for their child welfare systems be conditioned on demonstrated success in reducing the rates of alleged disproportionality.<sup>95</sup> Also, the report recommends that the federal government fund demonstration grants. Robert Hill, a key Movement figure, has similarly called for federal involvement, making clear the importance of this strategy.<sup>96</sup> Hill notes that to date most of the financial and technical support for the Movement has been provided by the Casey-CSSP Alliance and argues that to advance Movement goals the federal government must now provide funds and technical support.<sup>97</sup> The ABA Policy noted above “urges Congress to change laws . . . to broaden federal review of the disproportionate representation of racial and ethnic minority children in the child welfare system and require and fund states to track, report, analyze, and take and report on corrective action.”<sup>98</sup>

Various federal entities have been responsive to this call for action. U.S. House Representative Charles Rangel, Chairman of the House Committee on Ways and Means, called on the federal General Accounting Office (GAO) to assess the Racial Disproportionality issue, and the GAO issued a report in July

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*Examination into Action*, JUV. & FAM. JUST. TODAY, Summer 2008, at 16, available at <http://www.ncjfcj.org/images/stories/dept/ppcd/CCC/ccctodayarticlefinal.pdf>.

93. Nat’l Council of Juvenile & Family Court Judges, Courts Catalyzing Change, <http://www.ncjfcj.org/content/blogcategory/447/580/> (last visited Oct. 10, 2009).

94. *Id.*

95. CASEY-CSSP ALLIANCE PUB. POLICY WORKING GROUP, RACIAL AND ETHNIC DISPARITIES IN THE CHILD WELFARE SYSTEM: CASEY-CSSP ALLIANCE PUBLIC POLICY WORKING GROUP RECOMMENDATIONS FOR FEDERAL POLICY (2007), <http://www.cssp.org/uploadFiles/revisedCongressionalRecommendations2-16-05.pdf> [hereinafter CASEY-CCSP FEDERAL POLICY RECOMMENDATIONS]. See also McRoy, *supra* note 38.

96. Hill, *Gaps in Research*, *supra* note 38, at 366.

97. *Id.*

98. See AM. BAR ASS’N, *supra* note 82.



2007 that replicates the Movement's standard analysis and standard set of recommendations. Thus, the report accepts the Movement's claim that black and white maltreatment rates are the same, and asserts that racial bias or cultural misunderstanding is a key factor contributing to the Racial Disproportionality problem.<sup>99</sup> It describes favorably some of the extensive Casey-CSSP Alliance and related state reports addressing Racial Disproportionality,<sup>100</sup> and calls on Congress and the U.S. Department of Health and Human Services to take action encouraging states to track racial data and to reduce Racial Disproportionality.<sup>101</sup>

The Administration on Children and Families (ACF) of the U.S. Department of Health and Human Services has identified Racial Disproportionality as an important problem deserving significant attention. It hosted a Research Roundtable on Racial Disproportionality in the Child Welfare System in Washington, D.C., in September 2002, having previously commissioned a set of academic papers on the Racial Disproportionality issue.<sup>102</sup> A sizeable coalition of organizations including the Child Welfare League of America is urging Congress to hold a national conference on child welfare, and a bill to that effect has been introduced in Congress. One of its goals is to address the "overrepresentation" of certain minority-race populations in the child welfare system.<sup>103</sup>

Recently, the U.S. House Subcommittee on Income Security and Family Support held a hearing on Racial Disproportionality.<sup>104</sup> The Advisory announcing the hearing relied on the NIS and the GAO Report for the claim that blacks were disproportionately represented in foster care compared to actual maltreatment rates and called for the development of strategies to overcome the problem.<sup>105</sup>

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99. GAO REPORT, *supra* note 65, at 1, 3, 7 (relying on NIS).

100. *Id.* at 32–50.

101. *Id.* at 65–66.

102. These were published in a special issue of the Child and Youth Services Review. Mark Courtney & Ada Skyles, *Racial Disproportionality in the Child Welfare System*, 25 CHILD. & YOUTH SERVICES REV. (SPECIAL ISSUE) 355 (2003) (papers jointly commissioned by ACF, the American Institutes for Research and Chapin Hall Center for Children). See also U.S. Dept. of Health & Human Servs., Admin. on Children, Youth & Families, Disproportionality, <http://www.childwelfare.gov/systemwide/cultural/disporp/> (last visited Oct. 28, 2009).

103. White House Conference on Children and Youth in 2010 Act, H.R. 618, 111th Cong. § 3(c)(7) (2009) ("The purposes of the Conference are . . . to . . . reduce the overrepresentation of certain populations including but not limited to Native American, African-American, and Hispanic populations in the child welfare system"); Child Welfare League of America, CWLA Calls on President Barack Obama to Convene a White House Conference on Child Welfare in 2010, <http://www.cwla.org/advocacy/whitehouseconf10.htm> (last visited Oct. 8, 2009).

104. *Hearing on Racial Disproportionality in Foster Care Before the H. Subcomm. on Income Security & Family Support*, 110th Cong. (2008), available at <http://waysandmeans.house.gov/hearings.asp?formmode=wlprint&hearing=643>.

105. Press Release, House Subcomm. on Income Sec. and Family Support, McDermott Announces Hearing on Racial Disproportionality in Foster Care (July 24, 2008), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=7261>.

*E. Success of Prior Related Movements*

In terms of leadership, strategy, and ideology, the Racial Disproportionality Movement looks much like two recent movements that have had a very significant impact on child welfare policy. One promotes Intensive Family Preservation Services (IFPS), and the other promotes Community Partnership or Alternative Track systems. All three of these movements have been led by foundations that provided a massive amount of funding to push forward their agenda. All three have developed sophisticated strategies for accomplishing change and have consciously reached out to a wide range of different camps, including federal and state child welfare policy agencies, the media, non-profits, and academia. All three have promoted self-serving research and used that research effectively to push for their preferred policy changes. All three have been driven by a powerful family preservation ideology.<sup>106</sup> All three are problematic from the viewpoint of children's best interests.

The earlier two movements have been very successful in getting their preferred programs adopted. The IFPS movement swept the country in the 1980s, with many jurisdictions adopting the proposed model of family preservation, although its popularity has now waned. The basic idea was to prevent children described as "at risk of placement" from being removed from their parents and placed in foster care. Child abuse and neglect was conceived of as occurring because of a crisis in the family, which could be resolved by intensive but short-term supportive services. Typically, the services were designed to last for only a six-month period. The movement claimed that these programs were successful based on research which evaluated success in terms of the programs' ability to reduce placement rates, without regard to whether the children kept at home did better or worse in terms of child maltreatment. Eventually independent researchers demonstrated that the IFPS movement's claims for success were flawed, both because the research success criteria wrongfully omitted measures of child well-being like maltreatment and because there was no evidence that the programs succeeded even in their limited goal of reducing removal rates.<sup>107</sup> And eventually most policymakers became disillusioned with the idea that any such short-term program could be successful in addressing child maltreatment, given the evidence that maltreatment generally arises out of long-term, deeply entrenched patterns of family dysfunction, against a background often including unemployment, substance abuse, and mental illness. A recent study of IFPS in connection with attempts to reduce the number of black children removed to foster care, notes the importance of including in any future research measures of child maltreatment, noting the risk that if IFPS does reduce black placement it may be leaving black children at risk at higher rates than white children.<sup>108</sup>

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106. See NOBODY'S CHILDREN, *supra* note 3, at 113–59 (describing IFPS and Community Partnership movements).

107. *Id.* at 118–21.

108. Raymond S. Kirk & Diana P. Griffith, *Impact of Intensive Family Preservation Services on Disproportionality of Out-of-Home Placement of Children of Color in One State's Child Welfare System*, CHILD WELFARE, Sept.–Oct. 2008, at 87, 103.

The Community Partnership or Alternative Track movement arose in the context of reaction against the IFPS movement. It was led in the beginning by the Edna McConnell Clark Foundation, which had also led the IFPS movement. The Casey foundations have also played an important role. The basic idea is to divert a very large percentage of the cases typically dealt with by CPS with its coercive powers to remove children to foster care, to a non-coercive, community-based system of services, which parents are offered but are free to refuse. The movement relies on claims that most of the CPS system's caseload consists of "neglect" cases, and that these are virtually all minor, "mere poverty" cases, which can be safely diverted to a non-coercive system. The goal again, as with IFPS, is to keep more children identified as at risk for maltreatment with their parents, and the idea again is that, with more supportive services for those parents, the children can be kept safe. This movement is enjoying current success in getting its preferred programs adopted in increasing numbers of jurisdictions across the nation. As with IFPS, claims that the programs are actually succeeding in any other sense are based primarily on the idea that increased numbers of cases are being diverted from the CPS system, keeping increased numbers of children identified as at risk for maltreatment at home. There is no evidence that the programs are succeeding in generating significant new community-based supportive services or that children are better off and not worse off by virtue of being diverted from the CPS system.<sup>109</sup> There are many reasons to worry that they may be worse off.<sup>110</sup> There is significant evidence that our child protective system is guilty of underintervention rather than overintervention, leaving too many children at home who are at serious risk for maltreatment. There is no good evidence that a large percentage of cases in which CPS now removes children are minor cases, or that most cases categorized as neglect are minor cases. Most, in fact, are cases in which children are at as serious of a risk for harm as those cases categorized as abuse.

There is, of course, nothing wrong with private foundations playing a role in the child welfare area. The area is starved for resources, and it is good that private foundations are interested in trying to help solve problems by contributing their resources to supplement unduly limited government funding. There is also nothing wrong with private foundations setting out to systematically change policy in the child welfare area. Private entities have regularly made important contributions to social policy reform. One example is the influence of the NAACP Legal Defense Fund over the years in promoting the civil rights revolution. But, when one group of related foundations overwhelmingly dominate the funding picture, there is a danger that policy will be changed before important issues are adequately explored by lawmakers. This danger is exacerbated when those

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109. See, e.g., Deborah Daro, Community Partnerships to Protect Children: Challenges and Opportunities, Presentation at the American Bar Association's 12th National Conference on Children and the Law (in partnership with the Harvard Law School Child Advocacy Program) (Apr. 14, 2007) (noting that Chapin Hall assessment of community partnerships in four locations found "[n]o consistent reductions in child abuse reports, subsequent maltreatment or placements"); DEBORAH DARO ET AL., CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., COMMUNITY PARTNERSHIPS FOR PROTECTING CHILDREN: PHASE II OUTCOME EVALUATION (2005).

110. See NOBODY'S CHILDREN, *supra* note 3, at 150–54. See also *infra* Part II.D.2.

foundations simultaneously dominate not only policy advocacy, but also empirical research, which should itself function as something of a guide to the wisdom of various policy directions.

The Racial Disproportionality Movement has had great success to date in getting its message out in various important policy arenas. It is seen as the hot issue of the day in the child welfare world. Now it is beginning to move into the action stage. Policymakers should take a careful look at the facts underlying the Movement's claims before moving further down the implementation road.

## II. UNDERSTANDING THE RACIAL DISPROPORTIONALITY ISSUE

### A. *The Statistics: Black Children Represent a Higher Percentage of the Foster Care Population than the General Population*

Black children are reported for abuse and neglect, removed from their parents, and placed in foster care at higher rates than white children as compared to their respective percentages in the general population. Black children also spend longer in foster care than white children, are reunited with their parents at lower rates, and move on to adoption at slower rates. While they exit foster care by adoption at relatively high rates, the adoption exit takes longer than the reunification exit. As a result, black children appear in foster care at higher rates than white children as compared to their population percentages.<sup>111</sup> So, for example, Wulczyn reports that, although black children make up only 15% of the children living in the United States, they make up roughly 37% of those in foster care.<sup>112</sup>

Recent years show some reduction in these racial differences. Black entries to foster care are going down while white entries are going up.<sup>113</sup> The racial disparity in length of time spent in foster care is also being reduced because black adoption rates are going up and the time to adoption is being reduced.<sup>114</sup> This appears to be in part because of the influence of ASFA and MEPA.<sup>115</sup>

But despite these recent trends, the basic statistical picture remains the same: black children are represented in foster care at higher rates than white children compared to their population percentages. These raw statistics signal an important social problem that calls for action. But, the kind of action needed depends on the kind of problem lying behind the statistical picture.

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111. See, e.g., WULCZYN ET AL., *supra* note 68, at 17, 28, 43, 60.

112. WULCZYN & LERY, *supra* note 85, at 1.

113. FRED WULCZYN ET AL., FOSTER CARE DYNAMICS 2000–2005: A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE 19–20 (2007) [hereinafter FOSTER CARE DYNAMICS 2000–2005]; FRED WULCZYN ET AL., CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., ENTRY AND EXIT DISPARITIES IN THE TENNESSEE FOSTER CARE SYSTEM 1–2, 11, 32 (2006) [hereinafter TENNESSEE REPORT].

114. See WULCZYN ET AL., *supra* note 68, at 60; see also Fred Wulczyn, *Closing the Gap: Are Changing Exit Patterns Reducing the Time African American Children Spend in Foster Care Relative to Caucasian Children?*, 25 CHILD. & YOUTH SERVICES REV. 431, 451, 456–59 (2003) [hereinafter *Closing the Gap*].

115. See *Closing the Gap*, *supra* note 114, at 459 (referencing ASFA). See also *supra* notes 67–68 and accompanying text.

Black children are being reported and removed at the rates that the child protective services systems we have in place to deal with child maltreatment have concluded are appropriate, given their findings as to the rates at which these children are being seriously victimized and the risks to these children posed by living at home. The fact that they spend longer in foster care than white children has largely to do with the fact that black children are placed disproportionately in kinship foster care, which generally lasts longer than non-kin foster care for reasons discussed below. The very groups pushing the Racial Disproportionality Movement have long promoted placing black children in kinship foster care as a way of keeping them in the family and also in the racial community. Accordingly, the key issue in assessing the Movement's claims of discrimination is whether black children are being *reported and removed* appropriately, or unfairly.

If black children are being reported and removed at rates comparable to their *actual* maltreatment victimization rates, then the child welfare decision-making system is functioning appropriately. If, as urged by the Movement, we reduce black reporting and removal rates to achieve equal rates with whites, we would put black children at undue risk. This is true at least if the system generally intervenes in coercive ways, such as removal, only where serious abuse and neglect cases put children at high risk for ongoing maltreatment. In my view this is clearly the case.<sup>116</sup>

If black children are being reported and removed at high rates because of bias in the system for reporting, investigating, substantiating, and making removal and reunification decisions, then the Movement is right that efforts to correct that bias are appropriate. Even if that were true, it would still not be clear that the solution would be to reduce the number of black children reported and removed, as called for by the Movement. The problem might lie in disproportionate *underintervention* in white cases, and the solution in removing white children in greater numbers.

### ***B. Reasons for the Large Representation of Black Children in Foster Care***

#### ***1. Actual Black Child Maltreatment Rates are Higher***

The obvious explanation for the large representation of black children in foster care is that black maltreatment rates are higher. CPS is designed to receive reports of maltreatment, investigate those reports, decide whether they are substantiated, and then decide on a course of action. In some cases, the decision is to remove children temporarily to foster care and then reunite them promptly with their parents. In the most serious cases, however, the decision is to keep them in foster care for prolonged periods or to place them in adoption. The people making the decisions at every stage of the system are in a position to have the fullest picture of the facts of each case. If they are doing their job, black children are showing up in the system at higher rates than white children because they are at higher risk of serious abuse and neglect in their families, and accordingly are most

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116. See *infra* Part II.D.2. By contrast, Movement advocates argue that our system overintervenes generally.

likely to need removal from home, and least likely to be safe if reunified with their parents.

While the system is far from perfect, there are many reasons to think that it is correctly reflecting the reality in finding higher black child maltreatment rates. First and foremost is that blacks are disproportionately associated with a set of characteristics that have been repeatedly found to be accurate predictors for child maltreatment.<sup>117</sup> These characteristics include poverty, unemployment, single-parent status, substance abuse, and living in a significantly disadvantaged neighborhood. There is no doubt that these characteristics are disproportionately associated with black families because of the generally disadvantaged socioeconomic status of blacks as compared to whites.<sup>118</sup> For example, studies have long shown that black parents are disproportionately involved with serious substance abuse, that parental substance abuse is a factor in a very high percentage of all cases in which children are removed to foster care, and that children removed in these cases spend disproportionate amounts of time in foster care.<sup>119</sup>

Interestingly, the NIS-3 study relied on so heavily by the Racial Disproportionality Movement produced one of the most stunning demonstrations

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117. See, e.g., Bridget Freisthler et al., *Understanding the Ecology of Child Maltreatment: A Review of the Literature and Directions for Future Research*, 11 CHILD MALTREATMENT 263 (2006) (recent review of non-racial risk factors for child maltreatment); Ellen E. Pinderhughes, *Parenting in Context: Impact of Neighborhood Poverty, Residential Stability, Public Services, Social Networks, and Danger on Parental Behaviors*, 63 J. MARRIAGE & FAM. 941, 941–42 (2001) (citing series of studies demonstrating influence of neighborhood and family structure on quality of parenting); Amie M. Schuck, *Explaining Black-White Disparity in Maltreatment: Poverty, Female-Headed Families, and Urbanization*, 67 J. MARRIAGE & FAM. 543, 544 (2005) (poverty and single parenting long recognized as risk factors for maltreatment, citing Garbarino, Pelton, Gelles and others); see also DUNBAR & BARTH, *supra* note 25, at 3 (noting high rates of domestic violence (involving adult partners) and arrest rates among black parents as explanatory factors for high black child removal rates). The early classic demonstrating the connection between socioeconomic disadvantage and child maltreatment, including the most violent maltreatment, is Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608 (1978) (arguing that claim that child maltreatment problems are broadly distributed throughout society not supported by evidence and that its perpetuation diverts attention from nature of the problems and their solution). See also NOBODY'S CHILDREN, *supra* note 3, at 233–34 (reporting the strong connection between socioeconomic status and child maltreatment).

118. See, e.g., Pinderhughes, *supra* note 117, at 943; Jon M. Hussey, *The Effects of Race, Socioeconomic Status, and Household Structure on Injury Mortality in Children and Young Adults*, 1 MATERNAL & CHILD HEALTH J. 217, 217–19, 223 (1997) (reviewing and adding to studies demonstrating relationship of socioeconomic status to injury mortality including homicide risk in children, and finding that “much of the excess homicide risk faced by young African-Americans is due to underlying racial differentials in socioeconomic status, household structure, and residential location”).

119. Jeffrey J. Vanderploeg, *The Impact of Parental Alcohol or Drug Removals on Foster Care Placement Experiences: A Matched Comparison Group Study*, 12 CHILD MALTREATMENT 125, 125–26, 132–33, 135 (2007); NOBODY'S CHILDREN, *supra* note 3, at 207–32.

of the significance of socioeconomic status in predicting child maltreatment. The Foreword summarizes:

Children of single parents had a 77-percent greater risk of being harmed by physical abuse, an 87-percent greater risk of being harmed by physical neglect, and an 80-percent greater risk of suffering serious injury or harm from abuse or neglect than children living with both parents.

Children in the largest families were physically neglected at nearly three times the rate of those who came from single-child families.

Children from families with annual incomes below \$15,000 as compared to children from families with annual incomes above \$30,000 per year were over 22 times more likely to experience some form of maltreatment that fit the Harm Standard [the NIS more serious maltreatment category] and over 25 times more likely to suffer some form of maltreatment as defined by the Endangerment Standard [the NIS less serious maltreatment category].

Children from the lowest income families were 18 times more likely to be sexually abused, almost 56 times more likely to be educationally neglected, and over 22 times more likely to be seriously injured from maltreatment as defined under the Harm Standard than children from the higher income families.<sup>120</sup>

NIS-3 further found that poverty predicted for *the most serious* forms of maltreatment. Children in families with incomes below \$15,000 per year were sixty times more likely to die from maltreatment.<sup>121</sup> NIS-3 noted that low income was associated with other factors likely to contribute to maltreatment, including substance abuse and emotional disorders.<sup>122</sup>

Other research has also attempted to assess *actual* maltreatment incidence rates among the poor as compared to those better off, free from any bias that might be reflected in *official* CPS rates. It has confirmed that actual maltreatment is much higher in poor families. Richard Gelles, a long-time student of family violence, assessed violence toward children based on parent self-reports to trained interviewers and found that the rates of violence were significantly higher among families with an annual income below the poverty line: the rate of “severe violence” is 62% higher and the rate of “very severe violence” 250% higher.<sup>123</sup> He concluded:

[A]busive violence is more likely to occur in poor homes. Specific social and demographic characteristics increase the likelihood that poverty will lead to abuse. Poor young parents who are raising young children have an elevated risk of using the most abusive

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120. SEDLAK & BROADHURST, *supra* note 23, at xviii.

121. *Id.* at 5-51.

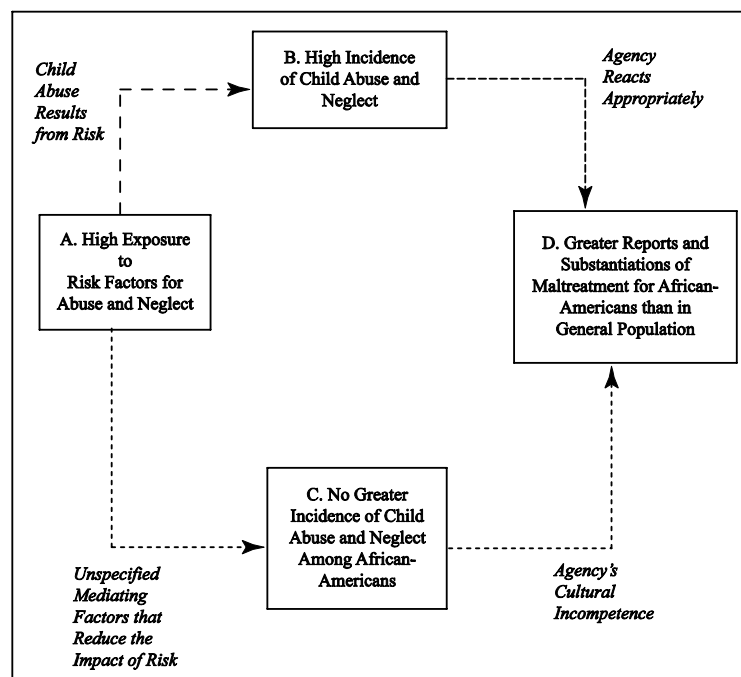
122. *Id.* at 5-54.

123. Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAV. SCI. 258, 263 (1992).

forms of violence toward their children, as do poor single mothers.<sup>124</sup>

Given the powerful connection repeatedly demonstrated between poverty and related risk factors and maltreatment, and the fact that black families are disproportionately exposed to such risk factors, black parents would have to possess extraordinary compensatory features to enable them to overcome all these predictive factors to achieve child maltreatment rates comparable to those of white parents. The following chart taken from a study by Richard Barth and colleagues illustrates:

**Stated and Unstated Assumptions of Disproportionality of Population**<sup>125</sup>



This chart shows two alternative ways of understanding the fact that black families have a high exposure to risk factors for maltreatment and that black children end up in foster care at high rates. The first, at the top, is that the risk factors lead to increased maltreatment rates and, accordingly, through appropriate

124. *Id.* at 271; see also Murray A. Straus & Christine Smith, *Family Patterns and Child Abuse*, in *PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES* 245, 249, 260 (Murray A. Straus & Richard J. Gelles eds., 1990) (self-reports confirm a connection between low socioeconomic status and high maltreatment incidence) [hereinafter *PHYSICAL VIOLENCE IN FAMILIES*].

125. Richard P. Barth et al., *Children of Color in the Child Welfare System: Toward Explaining Their Disproportionate Involvement in Comparison to Their Numbers in the General Population* 19 (Dec. 31, 2000) (unpublished manuscript, on file with author) [hereinafter Barth et al., *Children of Color in the Child Welfare System*].



CPS action, to high removal rates. The second, at the bottom, is that black families have “unspecified mediating factors” that counteract the risk factors, leading to maltreatment rates that are the same as white rates, and biased CPS agency decision-making then removes black children at higher than white rates even though they are not at higher risk for maltreatment.

The Movement has never explained the so-called “mediating factors” that could help black parents overcome the socioeconomic disadvantages that are understood to systematically predict, for other groups, the likelihood of child maltreatment.<sup>126</sup>

A 1996 report by a distinguished child welfare research team powerfully sums up the research on race and child welfare, and the interconnection between race, socioeconomic status, and child maltreatment.<sup>127</sup> It finds that Racial

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126. At best, vague claims are occasionally made. *See, e.g.*, HILL SYNTHESIS, *supra* note 42, at 14 (“Strong extended family networks in black families and communities may serve as a protective factor in reducing the extent of child abuse and neglect.”).

127. Mark E. Courtney, Richard P. Barth, Jill D. Berrick, Devon Brooks, Barbara Needell & Linda Park, *Race and Child Welfare Services: Past Research and Future Directions*, 75 CHILD WELFARE 99 (1996). Professor Mark Courtney is the Ballmer Chair for Child Well-Being at University of Washington, School of Social Work, and Director of Partners for Our Children. He has authored five books and edited volumes, approximately fifty peer-reviewed publications and dozens of additional studies, reports, and projects. He has received multiple generous grants to conduct research in child welfare and is currently a member of the Editorial Board of the *Children and Youth Services Review* and the *Journal of Public Child Welfare*. *See* West Coast Poverty Center, Mark Courtney, [http://wcpc.washington.edu/about/docs/Courtney\\_CV.pdf](http://wcpc.washington.edu/about/docs/Courtney_CV.pdf) (last visited Oct. 9, 2009).

Richard P. Barth is a highly respected leader in the child welfare research world, and Dean of the School of Social Work at the University of Maryland. He also served as the Frank A. Daniels Distinguished Professor in the School of Social Work at the University of North Carolina, Chapel Hill, from 1998 to 2006. He is author or coauthor of 10 books on child welfare services and has authored more than 170 book chapters and articles. He received the Presidential Award for Excellence in Research from the National Association of Social Workers, and won the Frank Breul Prize for Excellence in Child Welfare Scholarship from the University of Chicago. Univ. Md., Sch. Soc. Work, Dr. Richard P. Barth, Dean of the School of Social Work and Professor, [http://www.ssw.umaryland.edu/faculty\\_and\\_research/bios/barth/RPB\\_Bio.doc/](http://www.ssw.umaryland.edu/faculty_and_research/bios/barth/RPB_Bio.doc/) (last visited Oct. 9, 2009).

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Disproportionality claims generally fail to take into account the documented correlation between race and socioeconomic status, and concludes:

Perhaps the most important finding of this review is that many of the observed differences in child welfare outcomes by race or ethnicity reflect differences in the economic and social well-being of children and families. Few of the studies we reviewed attempted to account for such variation, and many of those that did showed a reduced or nonexistent effect of race or ethnicity when social class was factored into the equation. . . .

Several of the studies . . . indicate that the relationship between race and child welfare cannot be separated from the relationship between economic deprivation and child welfare. . . .

[I]t is one thing to say that collectively our social institutions have failed children of color and their families and that one result is an inequitable representation of children of color in the child welfare services system. It is quite another to state that any inequity of outcomes within the system is prima facie evidence of a failure of the system itself. In fact, in the absence of efforts to improve the lot of impoverished families of color, it might be justifiable cause for concern if the children of such families were *not* overrepresented in child welfare services caseloads.<sup>128</sup>

Fred Wulczyn and Kristin Hislop found similarly in a study done for the U.S. Department of Health and Human Services, that poverty, and in particular urban poverty, is connected to Racial Disproportionality, with “the fundamental question to be answered . . . whether need in its many forms accounts *fully*” for such disproportionality.<sup>129</sup>

A recent study designed to assess whether race was a predictor for child maltreatment *reporting* when poverty was taken into account, found that it was not.<sup>130</sup> The report sums up:

It would be unwise to take the 2:1 relative disproportionality of reports of Blacks vs. Whites at face value and make changes in the reporting system to address this seeming disparity or bias. . . . *[T]here is no evidence of a general racial bias in child maltreatment reports.* Our findings in this area are not new, and are best seen as confirming prior work . . . .<sup>131</sup>

There is, of course, always reason to suspect that conscious or unconscious bias might infect any decision-making system. There have been many

128. Courtney et al., *supra* note 127, at 126, 128, 130.

129. FRED H. WULCZYN & KRISTIN BRUNNER HISLOP, CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., FOSTER CARE DYNAMICS IN URBAN AND NON-URBAN COUNTIES 32 (2002) (emphasis added). *See also* TENNESSEE REPORT, *supra* note 113, at 16 (suggesting placement rates associated with underlying social conditions).

130. Brett Drake, Sang Moo Lee & Melissa Jonson-Reid, *Race and Child Maltreatment Reporting: Are Blacks Overrepresented?*, 31 CHILD. & YOUTH SERVICES REV. 309 (2009).

131. *Id.* at 314.

studies in fields other than child welfare demonstrating the prevalence of such bias.<sup>132</sup> The highly subjective decisions typical of child welfare decision-making provide a ready vehicle for the expression of both conscious and unconscious bias. However there is reason to think that such bias may be less of a problem in the child welfare area than in areas where it has triggered significant attention like employment.

First, the child welfare workforce has a more substantial representation of black and other minority-race workers than many other workforces and one that is higher than their population percentages. The first national survey addressing this issue reports that child welfare workers are now 32% black, 11% Hispanic, and 46% white, with 12% identifying themselves as other, and that child welfare workers tend to be assigned to work with racially matched children.<sup>133</sup>

Second, a few studies that have specifically tried to examine the issue of bias in social worker decision-making have come up with findings that confound the assumption of bias.<sup>134</sup> These studies have found that black social workers are sometimes more likely than white workers to find child maltreatment or to remove children.<sup>135</sup> Black and white social workers are no more likely to conclude that maltreatment has occurred or to make removal decisions when they are working with other-race parents than when they are working with same-race parents.<sup>136</sup> One important study of race and the child welfare system concludes: “Despite the

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132. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 n.31 (2006) (describing the legal literature on implicit bias as “enormous” and reviewing recent work emphasizing the use of the implicit association test).

133. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING: EXECUTIVE SUMMARY 8 (2003) (on file with author). An article based on this national survey, which was weighted to make the results of the NSCAW study representative of child welfare workers nationally, reports that social workers are 33% nonwhite (defined as African American, Hispanic, Asian, or other) and 67% white (defined as white non-Hispanic) overall, and 39% of those hired recently are nonwhite as compared to 61% white. Richard P. Barth et al., *Child Welfare Worker Characteristics and Job Satisfaction: A National Study*, 53 SOCIAL WORK 199, 204, 206 (2008).

134. See Brian M. Gryzlak et al., *The Role of Race in Child Protective Services Screening Decisions*, in RACE MATTERS, *supra* note 30, at 93; Ruth A. Gammon, Racial and Socioeconomic Bias in Social Workers’ Decisions Regarding Family Reunification 1, 61, 85 (Oct. 2008) (unpublished Ph.D. dissertation, California School of Professional Psychology at Alameda) (on file with author) (finding no racial bias in study using hypothetical vignettes).

135. Gryzlak et al., *supra* note 134, at 91–94.

136. See Nancy Rolock & Mark F. Testa, *Indicated Child Abuse and Neglect Reports: Is the Investigation Process Racially Biased?*, in RACE MATTERS, *supra* note 30, at 125, 130; Lawrence M. Berger et al., *Assessing Parenting Behaviors Across Racial Groups: Implications for the Child Welfare System*, 79 SOC. SERVICE REV. 653 (2005) (black social workers more tolerant of maltreatment than white with both black and white parents), available at [http://socwork.wisc.edu/lmberger/race\\_parenting\\_SSR\\_final.pdf](http://socwork.wisc.edu/lmberger/race_parenting_SSR_final.pdf); see also CHAPIN HALL, COMPENDIUM, *supra* note 39, at 20 (caseworker race does not appear to explain or moderate the longer stays and reduced likelihood of reunification for African American children (citing Joseph P. Ryan et al., *Investigating the Effects of Caseworker Characteristics in Child Welfare*, 28 CHILD. & YOUTH SERVICES REV. 993 (2006))).

degree of consensus regarding the importance of developing culturally competent child welfare services that make use of the expertise and experience of people of color, virtually no empirical evidence supports this consensus.”<sup>137</sup>

Third, there are powerful pressures that may create bias in the opposite direction. Social workers have long been given anti-racism and cultural competency training, socializing them to worry about overintervention in black families. For example, the GAO Report found that almost all states (forty-five) systematically engaged in cultural competency training, a strong majority of states (thirty-six) had programs to recruit and retain culturally competent staff, and a number of states required that child welfare workers take an intensive program in “Undoing Racism.”<sup>138</sup> Even Dorothy Roberts, a key Movement player, admits that “[a] common response to racial disparities in the child welfare system has been the implementation of ‘culturally competent’ social work practice.”<sup>139</sup> Social workers are also educated and trained in a child welfare system that still tends to believe powerfully in race matching, despite passage of the Multiethnic Placement Act (MEPA). They know that if they remove black children, it will be hard to find same-race foster and adoptive parents for them, and this produces pressure to keep black children with their birth parents.

Some have argued that black people, because they are disproportionately poor, are more likely to be reported because they have greater exposure to the social workers, police, and other officials who are “mandated reporters,” required by law to report suspected child maltreatment. This claim is often referred to as the visibility bias. However, studies examining this claim, including the NIS-3, have repeatedly failed to find any support for the visibility bias theory.<sup>140</sup>

Racial Disproportionality theorists have argued that the risk-assessment tools used by child welfare decisionmakers may be biased. However, studies of whether such tools do indeed operate in a biased way have found no evidence that they do.<sup>141</sup>

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137. Courtney et al., *supra* note 127, at 131.

138. GAO REPORT, *supra* note 65, at 36. See also Satel & Klick, *supra* note 15, at S15–S17, S22 (describing the “veritable ‘cultural competence training’ industry” in context of critique of the Racial Disproportionality approach in the medical area, and calling recommendations for more such training as “divisive distraction from more constructive solutions” to the problems of racial disparities in health services and outcomes).

139. Roberts, *Community Dimension of State Child Protection*, *supra* note 24, at 35 (stating same while expressing concern that this may not lead them to the family preservation decisions she prefers).

140. SEDLAK & BROADHURST, *supra* note 23, at 5-51 to 5-52, 8-11 (concluding that its findings regarding higher rates of child maltreatment among those characterized by poverty and other risk factors cannot be explained by visibility factor); Drake et al., *supra* note 130, at 310, 315 (finding no support for visibility bias either with respect to the poor generally or to blacks, and finding further that prior empirical literature provided no support); Pelton, *supra* note 117, at 610–11 (concluding that public scrutiny argument cannot explain away real relationship between socioeconomic status and child maltreatment).

141. Will Johnson, *Effects of a Research-Based Risk Assessment on Racial/Ethnic Disproportionality in Service Provision Decisions*, in RACE MATTERS, *supra* note 30, at

In any event, there is a good deal of evidence indicating that *actual* maltreatment rates for black children are in fact significantly higher than for white children, confirming the non-discriminatory character of CPS decision-making. First, black children *die* from apparent child maltreatment at much higher rates than whites by comparison to their general population percentages. Again, it is always possible that some of these findings are biased, but most think that findings of maltreatment *deaths* are at less risk for reflecting bias than other maltreatment findings. This is so because most deaths will be carefully investigated, and the decision whether to classify the death as maltreatment is likely to involve less subjective judgment of the kind that can mask conscious or unconscious bias than in the case of less serious harm.<sup>142</sup>

Official reports collected through the National Child Abuse and Neglect Data System (NCANDS) and published by the U.S. Department of Health and Human Services show that 29.4% of child fatality victims are black, significantly higher than their population percentage, while only 43% are white, significantly lower than their population percentage.<sup>143</sup>

The CDC's comprehensive study of fatal injuries among children, thought to reflect maltreatment rates, shows consistently and significantly higher rates for black, American Indian, and Alaskan Native children, with the death rate for blacks 2.5 times that for whites in infancy, and homicide rates highest for black children overall.<sup>144</sup> Homicide rates for black infants are 3.6 times higher than for white infants.<sup>145</sup>

An important recent study in California compares actual child death rates by race while simultaneously analyzing the degree to which the death rates track the official child maltreatment substantiation rates for each racial group.<sup>146</sup> The study indicates that racial disparities observed in maltreatment rates are the manifestations of real differences in risk. It shows, like the other studies, that black death rates are significantly higher: black infants die of injuries at 2.5 times the

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160–61; Christopher Baird, *The Effect of Risk Assessments and Their Relationship to Maltreatment Recurrence Across Races*, in RACE MATTERS, *supra* note 30, at 135. Movement advocates are nonetheless committed to changing risk-assessment tools so as to remove any racial impact, which would involve eliminating the use of factors generally understood to predict for risk, simply because they would result in high risk assessments for black families. See CSSP, MICHIGAN REPORT, *supra* note 50, at 25–26, 43 (finding the following risk factors to be suspect: e.g., use of prior CPS investigation, single parenting, multiple children, parenting skills, self-esteem, motivation).

142. See Sheila D. Ards et al., *Letter to the Editor*, 23 CHILD ABUSE & NEGLECT 1211, 1212 (1999) [hereinafter Ards 1999 Letter]; Pelton, *supra* note 117, at 608.

143. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006, at 66 (2006) [hereinafter CHILD MALTREATMENT REPORT].

144. Stephanie J. Bernard et al., *Fatal Injuries Among Children by Race and Ethnicity—United States, 1999–2002*, in SURVEILLANCE SUMMARIES: CDC MORBIDITY & MORTALITY WEEKLY REPORT, May 18, 2007, at 1, 10–11.

145. Kay M. Tomashek et al., *Trends in Postneonatal Mortality Attributable to Injury, United States, 1988–1998*, 111 PEDIATRICS 1219, 1221 (2003).

146. Emily Putnam-Hornstein, *Racial Disproportionality in the Child Welfare System: Disproportionate Need or Systematic Bias?*, Paper Presented at the John Burton Foundation Child Welfare Policy Briefing Series (Nov. 20, 2008).

rate of white infants. *Even more significant, this study shows that injury death rates within each racial group closely track maltreatment substantiation rates.*

In addition, black children are at greater risk of death and other severe violence when reunited with their birth parents than white children. A careful research analysis of the degree to which foster care functions as a protection against harm children might suffer in their birth homes indicates that it does so function for black children significantly more than it does for whites, particularly with respect to “preventable (and especially violent) ends,” such as death.<sup>147</sup>

Finally, studies relying on black and white parent self-reports indicate that black parents engage in severe violence toward their children and other problematic parental conduct at significantly higher rates than white parents.<sup>148</sup> One study published recently by the Conduct Problems Prevention Research Group found, based on self-reports, disproportionately problematic parental behaviors among blacks in terms of warmth, appropriate discipline, and harsh interactions. The study concluded that the differences were explained by differences in neighborhoods and family structure, causing “stressful neighborhood and family conditions.”<sup>149</sup>

## 2. Black Children Placed in Foster Care are Placed Disproportionately in Kinship Care

Disproportionate placement of black children in kinship foster care rather than non-kin foster care provides the major additional explanation for why black children are represented in such large numbers in foster care. This is because foster

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147. Richard P. Barth & Debra L. Blackwell, *Death Rates Among California's Foster Care and Former Foster Care Populations*, 20 CHILD. & YOUTH SERVICES REV. 577, 601, 593, 600 (1998) (study of death rates concluding that foster care is protective for African-American children in a way that it is not for Caucasian and Hispanic children).

148. PATRICIA L. KOHL, CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, UNSUCCESSFUL IN-HOME CHILD WELFARE SERVICE PLANS FOLLOWING A MALTREATMENT INVESTIGATION: RACIAL AND ETHNIC DIFFERENCES 1–3 (2007), <http://www.casey.org/Resources/Publications/pdf/UnsuccessfulInHomePlans.pdf> (study for the Casey-CSSP Alliance, concluding based on self-reports that following a maltreatment investigation, black parents were more likely than white to engage in severe violence toward their children). *See also* Berger et al., *supra* note 136, at 667–70 (finding based on self-reports as well as observer reports higher black rates of inappropriate parenting behaviors). Other studies showing that black parents' self-description of severe violence is higher than that of white parents, based on community-based samples include: Kirby Deater-Deckard et al., *Physical Discipline Among African American and European American Mothers: Links to Children's Externalizing Behaviors*, 32 DEVELOPMENTAL PSYCHOL. 1065 (1996); Murray A. Straus et al., *Identification of Child Maltreatment with the Parent-Child Conflict Tactics Scales: Development & Psychometric Data for a National Sample of American Parents*, 22 CHILD ABUSE & NEGLECT 249 (1998).

149. Pinderhughes, *supra* note 117, at 952; *see also* Noel A. Cazenave & Murray A. Straus, *Race, Class, Network Embeddedness, and Family Violence*, in PHYSICAL VIOLENCE IN FAMILIES, *supra* note 124 at 321, 322–23, 338 (self-reports confirm high black maltreatment rates, noting that they are result of socioeconomic factors to which black families are subject, and that these high rates are somewhat moderated by embeddedness in primary social networks).

children in kinship care generally stay longer than foster children in non-kin care. Many knowledgeable students of the foster care system have concluded that this provides a major part of the explanation for black children's high representation in foster care and for their long stays in foster care.<sup>150</sup> Black kinship care placement rates also explain why black children in foster care tend to receive fewer services than white children, another grievance cited by the Movement—kinship foster care families generally receive fewer services than non-kin foster care families.<sup>151</sup>

There are many reasons why kinship care tends to involve longer stays than non-kin care. First, the Adoption and Safe Families Act (ASFA), which puts pressure on the system to move children out of care if they have been held for fifteen out of the prior twenty-two months, has an exception to this 15/22 provision for all children held in kinship care and puts no limits on the length of time they can be held. Second, social work practice tends to strongly favor kinship placement, and so many social workers prefer keeping children in kinship foster care even for long periods to severing parental ties and placing the child for adoption by non-kin. Third, kinship families are generally thought to be reluctant to adopt, even if the child's parents are not likely ever to be capable of parenting the child; kin may prefer long-term foster arrangements which do not involve terminating parental rights, or social workers may think they prefer these arrangements or for other reasons not press the issue. Finally, foster care stipends are more generous than welfare stipends that the parent might receive if the child is returned home. Once the whole family adjusts to the foster care stipend, they may decide to stay with the formal foster care arrangement, especially as this may not in any event prevent informal arrangements involving the child's return home.<sup>152</sup>

The disproportionate placement of black children in kinship care could be thought of as discriminatory, but the Racial Disproportionality Movement generally supports kinship placements as a way of keeping black children in the extended family network and in the black community.<sup>153</sup>

In sum, there is good reason to conclude that Racial Disproportionality is mostly if not entirely explained by higher rates of *actual* black child maltreatment, and by broadly agreed-to preferences for black kinship placement.

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150. See, e.g., FOSTER CARE DYNAMICS 2000–2005, *supra* note 113, at 57; Barth et al., Children of Color in the Child Welfare System, *supra* note 125, at vii, x, 107; WULCZYN & HISLOP, *supra* note 129, at 32; see also Marian S. Harris & Ada Sykes, *Kinship Care for African American Children: Disproportionate and Disadvantageous*, 29 J. FAM. ISSUES 1013, 1013, 1019, 1021–22 (2008); TENNESSEE REPORT, *supra* note 113, at 4, 35–36.

151. See, e.g., Courtney et al., *supra* note 127, at 112.

152. Jill Duer Berrick, *From Private to Public: Paying Grandparents as Caregivers*, in RAISING CHILDREN: EMERGING NEEDS, MODERN RISKS, AND SOCIAL RESPONSES 27–43 (Jill Duer Berrick & Neil Gilbert eds., 2008) (discussing perverse incentives created by kinship foster care and subsidized guardianship stipends).

153. For discussion of whether some reduction in the power of kinship placement preferences is warranted, not simply to reduce racial disparities but in order to better serve children's interests, see *infra* Part III.C.

### *C. Debunking the Movement's Claims*

The Racial Disproportionality Movement claims that bias in child welfare system decision-making is responsible for the high rates at which black children appear in the system.

Often this claim is based simply on the bare statistical fact that the child protective system makes intervention decisions at a higher rate for black as compared to white children, as compared to population percentages, without addressing the issue of whether this is justified by higher black maltreatment rates. Statistics are simply cited showing the difference between black and white rates of representation in foster care, and at various stages of the system such as removal, substantiation, reunification, and adoption, as well as racial differences in length of stay in foster care. The assumption is made that any such differential rate must reflect discrimination, and the remedies proposed make it clear that the form of discrimination assumed has largely to do with system decision-making. Thus, popular reform proposals include training social workers in anti-racism and cultural competence, and recruiting more minority social workers.

When Movement literature does address the issue of maltreatment rates, it claims that actual black and white maltreatment rates are the same. Here, the Movement relies overwhelmingly on the NIS studies, sometimes on a few favorite medical reporting studies, and also occasionally on some more recent and more sophisticated studies which attempt to control for non-racial factors that might explain removal rates. The following sections address these categories of studies in turn.

#### *1. The National Incidence Studies*

Many Movement reports cite only the NIS, stating baldly that the NIS studies prove that black and white child maltreatment rates are the same, and, therefore, the high rate at which black children are represented in the system must result from system discrimination. Various Movement reports citing the NIS are then, themselves, cited in other Movement reports, so that in the end any such report may include lots of citations for the claim that maltreatment rates are the same without any reference to additional social science backing the claim.<sup>154</sup> However, the NIS studies provide little support for the Movement's claims of system discrimination.

The NIS studies, including the most recent NIS-3, do state that actual black and white maltreatment rates are the same. The NIS was designed to inquire into the nature and rate of actual maltreatment, as opposed to officially reported and substantiated maltreatment, and while race was not its primary focus, it included race in its discussion. The NIS-3 summed up in its Foreword: "There

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154. Thus Robert Hill's work is often relied on for the claim that there is no race difference in actual as opposed to reported maltreatment rates. But Hill, a key research figure in the Racial Disproportionality Movement, relies largely on the NIS, stating that it "provides the most reliable estimates of the incidence of child abuse and neglect." HILL SYNTHESIS, *supra* note 42, at 10.



were no significant race differences in the incidence of maltreatment or maltreatment-related injuries uncovered in either the NIS-2 or the NIS-3.”<sup>155</sup>

The NIS methodology involved surveying various mandated reporters to assess the number of cases of apparent child maltreatment they found, broken into the Harm and the Endangerment categories, the first more serious than the second, while at the same time reviewing a set of cases that were actually reported to the child welfare system.

One of the major conclusions of the NIS studies was that child maltreatment, including very serious child maltreatment, was massively underreported. Thus, the NIS-3 Report states that CPS investigated only 28% of the children in the more serious “Harm” category—children who had already experienced harm from abuse and neglect; it states that CPS investigated only 26% of the seriously injured and 26% of the moderately injured children.<sup>156</sup> NIS-3 found this low rate of investigation was “cause for serious concern,”<sup>157</sup> and argued for increased CPS intervention generally, and in particular for increased attention to neglect cases, and to families characterized by poverty, single parents, and illegal drug use.<sup>158</sup>

Thus, even if the NIS was correct in concluding that black and white maltreatment rates are the same, its findings with regard to underreporting indicate that maltreatment of both blacks and whites is significantly underreported. Thus, its findings fail to support the Movement’s recommendations to reduce the rates of reporting, substantiation, and removal of black children who are suspected victims.

But there is no reason to believe that the NIS *was* right in concluding that black and white actual maltreatment rates are the same.

First, the NIS-3 Report appears internally inconsistent. The Report makes an overwhelming case that poverty and other factors generally known to be predictors of child maltreatment are in fact such predictors, a case confirmed by many others.<sup>159</sup> Black families are disproportionately likely to be characterized by these risk factors. Yet, the NIS-3 makes no attempt to explain how black and white maltreatment rates could nonetheless be the same.<sup>160</sup>

Second, the NIS statement that maltreatment rates are the same has been persuasively rebutted by respected social scientists. Sheila Ards has published, with colleagues, powerful critiques of the NIS methodology, noting among other problems that the NIS used a biased sample of community observers for its

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155. SEDLAK & BROADHURST, *supra* note 23, at xviii; *see also id.* at 4-28 to 4-29, 8-7.

156. *Id.* at xviii–xix.

157. *Id.* at 7-42.

158. *Id.* at 8-18 to 8-19.

159. *See supra* Part II.B.1.

160. A subsequent study by NIS report author Andrea J. Sedlak and Dana Schultz claims that when risk factors are controlled for, black maltreatment rates are lower than white rates, relying on the same suspect methodology as the problematic NIS studies. Andrea J. Sedlak & Dana Schultz, *Race Differences in Risk of Maltreatment in the General Population*, in RACE MATTERS, *supra* note 30, at 57–59.

conclusions regarding the extent of actual maltreatment, a sample that excluded roughly half of those who make maltreatment reports to CPS, namely victimized children, parents, neighbors, and anonymous parties.<sup>161</sup> Ards and her colleagues concluded that given the NIS sample bias, and given their own studies indicating absence of racial bias in official reporting and official substantiation systems, there was no basis for accepting the NIS conclusions that black and white maltreatment rates were the same.<sup>162</sup> They also argued that the NIS conclusion conflicted with powerful evidence that actual maltreatment rates were in fact different for racial groups, namely the evidence that black infants and toddlers are murdered at much higher rates than whites:

More than 40% of all infant and toddler (under age 5) homicides are black, almost all of which are perpetrated by parents and caretakers . . . . Yet only about 15% of children under 5 are Black. . . . It is difficult to imagine how or whether differences in investigation or differences in opening of cases will somehow narrow or eliminate this enormous gap in the most visible and horrible manifestation of child abuse.<sup>163</sup>

Ards and her colleagues concluded:

The policy implications of this debate are profound. If we are to believe the NIS data, we should focus our resources on combating racial bias in reporting, substantiation, and case openings. . . . However if . . . racial bias is not the cause of the overrepresentation of black children among abused children, then we should look elsewhere to confront the disparities that we observe. We are concerned that too little attention has been paid to the structural factors that may contribute to underlying racial differences in abuse. . . . While such a structural phenomenon does

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161. Sheila Ards is Associate Vice President for Community Partnerships and Development at the University of Minnesota. Prior to that, she was Vice President for Community Development at Benedict College and the first director of the Center of Excellence for Community Development at Benedict. Dr. Ards' research focuses on child abuse and neglect, family policy, welfare policy and redistricting. She has served as principal investigator on grants from the National Center for Child Abuse and Neglect, the Urban League, and the NAACP Legal Defense Fund, and was a research scholar at the Urban Institute. See Univ. of Minn., UMNews, *Ards Named VP for Community Partnerships and Development*, Jun. 7, 2004, [http://www1.umn.edu/news/news-releases/2004/UR\\_RELEASE\\_MIG\\_1697.html](http://www1.umn.edu/news/news-releases/2004/UR_RELEASE_MIG_1697.html).

162. Ards 1999 Letter, *supra* note 142, at 1211–12 (summing up prior work); Shelia Ards & Adele Harrell, *Reporting of Child Maltreatment: A Secondary Analysis of the National Incidence Surveys*, 17 CHILD ABUSE & NEGLECT 337, 337 (1993); Shelia D. Ards et al., *Letter to the Editor: Sample Selection Bias and Racial Differences in Child Abuse Reporting: Once Again*, 25 CHILD ABUSE & NEGLECT 7, 12 (2001) [hereinafter Ards 2001 Letter] (summing up prior work and debate and concluding that “we restate, therefore, that conclusions about racial differences in child abuse and neglect reached using NIS should be approached with caution and should fully acknowledge the limitations posed by the selective exclusion of certain types of reporters”); Shelia D. Ards et al., *The Effects of Sample Selection Bias on Racial Differences in Child Abuse Reporting*, 22 CHILD ABUSE & NEGLECT 103 (1998).

163. Ards 1999 Letter, *supra* note 142, at 1212.

not predict that blacks are naturally or genetically more violent than whites, it may predict greater violence in the black family, violence that needs to be confronted whatever the source. Neglecting to explore the structural roots of racial disparities in abuse and violence in black families serves no purpose and contributes to the further deterioration in the conditions these families face.<sup>164</sup>

In 2000 Richard Barth, a highly respected leader in child welfare research, submitted with colleagues to the U.S. Department of Health and Human Services, Administration on Children, Youth and Families, a comprehensive study analyzing the Racial Disproportionality claims generally, and the NIS statements regarding equal maltreatment rates in particular. Titled *Children of Color in the Child Welfare System: Toward Explaining Their Disproportionate Involvement in Comparison to Their Numbers in the General Population*, the study constitutes a detailed and devastating critique of the NIS claims.<sup>165</sup> The study reviewed the documentation that blacks are at substantially greater risk of experiencing a variety of circumstances increasing the likelihood of child maltreatment.<sup>166</sup> It analyzed the NIS methodology and found it fatally flawed, stating that the NIS failed “adequately to capture the incidence of abuse and neglect in the African-American community because no data were collected from family members and very limited data were collected from urban centers.”<sup>167</sup> It concluded that policymakers should not rely on the NIS findings: “[W]e do not believe that the NIS findings can be used as a basis for judging whether child welfare services are delivered in an equitable way to people of different racial or ethnic backgrounds.”<sup>168</sup>

The Barth team’s study argues that simply reducing Racial Disproportionality would put black children at risk of harm and would be discriminatory, given the evidence that the child welfare system was responding to real dangers of maltreatment.<sup>169</sup> While not ruling out the possibility that there might be some racial-bias effect in the system, the study suggests that any such effect would be minor—that the racial differences in the system reflect at least roughly the actual differences between black and white maltreatment rates.<sup>170</sup> The study summarizes its findings as follows:

There is certainly no basis for determining that high rates of involvement in child welfare services are bad for African-American children, after all of their general environmental risks are

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164. *Id.* at 1212–14.

165. Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125. For a description of Richard Barth, see *supra* note 127.

166. Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125, at vi–vii (parental incarceration, substance abuse, death); *id.* at 5–6 (poverty, single-parent status, large family size, urbanicity); *id.* at 33–37 (substance abuse).

167. *Id.* at vii, 3–5.

168. *Id.* at vii.

169. *Id.* at ix, 106.

170. *Id.* at ix (“the disproportionalities in foster care placement are apparently most attributable to the differences between racial groups . . . in their risks of needing the assistance provided [in] substitute care”); *id.* at x (“there is no compelling finding that race alone contributes substantially to child welfare decision-making”); *id.* at 106 (same).

considered. Child welfare services appear to reduce mortality and later involvement with the juvenile justice system for African-American children, in particular. Receiving less child welfare service than is needed can contribute to higher risks of incarceration and early death. When community and family risk factors are high, then child welfare services have a critical role.<sup>171</sup>

A reduced version of this Barth co-authored 2000 report concludes: “[T]he research provides us with no compelling reason to assume that this disproportionality is not, generally, in the best interests of the children served.”<sup>172</sup>

The U.S. Department of Health and Human Services Children’s Bureau issued a report questioning the NIS claim, citing the Ards and the Barth team’s analyses.<sup>173</sup> Fred Wulczyn, a long-time well-respected leader in the child welfare research world, has written that the Barth 2000 analysis, concluding that differences in the likelihood of placement were attributable to non-race factors, “is probably the most comprehensive and purposeful attempt yet to separate the effect of race on placement from the other factors that contribute to the risk of placement.”<sup>174</sup>

Many of these critiques of the NIS have noted, in addition, its inconsistency with other evidence indicating the likelihood that black maltreatment rates are higher than white rates. These inconsistencies include the high black child maltreatment death rates, the high black self-reported rate of extreme violence toward children, and the high black child death and violent maltreatment rate after reunification with birth parents.<sup>175</sup>

The Racial Disproportionality Movement has provided no adequate response to the devastating critiques of the NIS claims for equal maltreatment rates discussed above. Instead, the Movement has generally ignored the existence of these critiques, and continued to churn out reports and articles that cite the NIS claims without even acknowledging the critiques.

## 2. *The Medical Reporting Studies*

When the Movement does mention additional studies, typically it will be only a favored few, each involving hospital staff reporting issues: the Jenny head

171. *Id.* at 113 (citation omitted).

172. Richard P. Barth, *Child Welfare and Race: Models of Disproportionality*, in RACE MATTERS, *supra* note 30, at 42; *see also id.* at 43 (while hard to define the relative contributions of personal and social conditions as compared to agency practice, “if we attribute all of the cause to agency practice, as has been done by others, we are at risk of overlooking real risks to African American children and diminishing their opportunities for safe and successful futures”) (citations omitted).

173. DHHS STUDY, *supra* note 65, at 5–6.

174. *Closing the Gap*, *supra* note 114, at 434. On Wulczyn, *see supra* notes 83–84.

175. *See* Ards 1999 Letter, *supra* note 142; Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125; Barth & Blackwell, *supra* note 147; *see also* discussion *supra* Part II.B.1.

injury study,<sup>176</sup> the Chasnoff study involving rates of actual, as compared to reported, maternal substance abuse,<sup>177</sup> and the Hampton and Newberger study involving racially disparate rates of reporting suspected child abuse.<sup>178</sup>

These medical reporting studies provide little support for the Movement's claims that medical personnel are more likely to report black children than white children even if they are at the same risk, and accordingly that black children and parents are being discriminated against. All are older studies characterized by limited efforts to control for non-racial factors that could easily explain the reporting results. None demonstrate or even claim to demonstrate that black and white maltreatment rates are the same. In addition, even if we accept the studies' claims as to apparent disparate treatment, the studies point to problematic *under-reporting* of white cases, putting white children at undue risk, rather than to any over-reporting of black cases.

Jenny's Abusive Head Trauma study<sup>179</sup> is described in Movement literature as showing that medical personnel dealing with infants with traumatic head injuries are more likely to find child maltreatment when the infants are black as opposed to white. First, even if this study showed disparate treatment of black as compared to white cases, the study itself considered the problem to be one of *under-reporting the white cases*. The study was designed to assess the problematic failure to properly diagnose Abusive Head Trauma in cases in which the study authors concluded that such maltreatment had in fact taken place. Given the extremely serious nature of the abuse at issue, which often resulted in death or permanent serious disability, any under-reporting of white as compared to black cases would constitute serious discrimination against white children, assuming that any racial bias is revealed by the study. Second, the study failed to persuasively demonstrate bias because there were various actual and possible non-racial differences between the cases which were properly diagnosed, and those in which the diagnosis was missed, that were not controlled for, differences that the authors recognize could have been very significant in the actual diagnosis decision.<sup>180</sup>

The Chasnoff study is described in Movement literature as showing that black and white pregnant women have the same substance-abuse rates, and yet black mothers and infants are more likely reported at birth. Here again, even if this study showed disparate treatment of black as compared to white cases, the discrimination issue should be understood as one of discrimination against white children in the form of under-reporting. Parental substance abuse is a major

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176. Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 J. AM. MED. ASS'N 621 (1999).

177. Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990).

178. Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56 (1985).

179. Jenny et al., *supra* note 176.

180. *Id.* at 625–26 (noting differences in child age, public or private hospital setting for diagnosis, and other differences that might not have appeared on the hospital records for analysis).

predictor for child maltreatment, and sending fragile drug-affected infants home from the hospital with parents who are caught up in substance abuse is a recipe for disaster.<sup>181</sup> But again, this study fails to support the claims regularly made by the Movement that it shows racial bias in reporting. While it did show similar rates of overall drug use at the time of the first prenatal visit, it showed very different rates of use of different types of drugs, with blacks more likely to use cocaine, and whites more likely to use marijuana. Although both drugs may be damaging to the fetus if used during pregnancy, cocaine use is more strongly associated with destructive addictive patterns, and parental use of cocaine is more strongly associated with child maltreatment. The study had no data on drug use during the subsequent pregnancy or at the time of birth, and there is reason to believe that parents using highly addictive drugs like cocaine might have been more likely to continue use through the pregnancy and afterwards, causing more harm to the fetus and putting any infant going home with the parent at risk of seriously impaired parenting. The authors themselves found that while bias “could” contribute to the reporting decisions made by medical staff, many non-racial factors, including greater familiarity of public hospital staff with substance-abuse problems, could explain the results. They concluded: “The present study cannot fully differentiate among the factors that could produce higher rates of reporting of black or poor women than of white or more affluent women.”<sup>182</sup>

The Hampton and Newberger study tried to compare the actual incidence of child abuse brought to the awareness of hospital personnel with the rate at which such cases were reported to CPS and to assess the degree to which race, among other factors, played a role in determining whether reports to CPS were made.<sup>183</sup> Again, even if one assumes that the study accurately identified race as an explanatory factor, the primary problem allegedly identified is the underreporting of white cases rather than the overreporting of black cases. The study dealt only with cases that “should have been reported,”<sup>184</sup> noting that large numbers were not reported, and it talked about the problem of “selectively ignoring the prevalence of child abuse in more affluent, majority homes.”<sup>185</sup> And again, the study fails to

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181. See *NOBODY’S CHILDREN*, *supra* note 3, at 207–32.

182. Chasnoff et al., *supra* note 177, at 1206 (1990). See also Courtney et al., *supra* note 127, at 105–06 (description of Chasnoff study cites authors’ many possible non-racial explanations for racial disparities reported and discussion of another study showing disproportionate numbers of black infants with positive urine test removed from mothers to which authors suggest nonracial explanations).

183. Hampton & Newberger, *supra* note 178.

184. *Id.* at 57.

185. *Id.* at 59. A recent study in this same tradition looks at long-bone and skull fractures in infants and toddlers resulting from physical abuse, and purports to find racial differences in the evaluation and reporting of such fractures, resulting in higher reporting of minority than white children. Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED. ASS’N 1603 (2002). However, this study makes it clear that the *actual* incidence rate of these severe injuries for black children was more than twice that for white children, showing simply that for those children actually abused there was still a disproportionate likelihood that the black children would be reported. The authors state that this arguably makes out a case of underreporting for white children, rather than overreporting for black. In addition, the authors concede that they did

support the bias claim. Although it controlled for some non-racial factors and indicated that race remained an explanatory factor, the study relied solely on hospital records and the limited information they contained about the many factors which might actually have influenced the decision to report some cases to CPS and not others. Indeed, the study specifically conceded that various factors not controlled for might influence decision-making, including whether reporting is associated with efforts to obtain services for families.<sup>186</sup>

These studies have, like the NIS studies, been subject to critical analysis by impressive research in the child welfare world, which puts them in a larger context of related-reporter-bias research. This research confirms that studies based on actual case records like these three hospital studies, that sometimes claim to show bias, are typically flawed by limitations in the information contained in the case records, since other information may well have influenced the decisionmakers.<sup>187</sup> This research also shows that studies on reporter bias based on hypothetical case scenarios generally fail to reveal bias.<sup>188</sup> A recent example of a hypothetical case study assessing whether teachers, who are responsible for a significant percentage of all child maltreatment reports, demonstrated any racial bias in their reporting, found no evidence of such bias. The study concluded: “Our results leave open the disturbing possibility that . . . [b]lack children appear more often in abuse reports because they are more likely to be abused.”<sup>189</sup>

Again, as with the NIS critiques, core Movement literature rarely mentions the research demonstrating the limitations of the medical reporting studies, or the other studies that fail to find bias in medical reporting. Instead,

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not control for some important non-racial factors such as parental drug use, which could have justified the hospital staff decisions to report in some cases but not in others.

186. Hampton & Newberger, *supra* note 178, at 58.

187. *See, e.g.*, Berger et al., *supra* note 136, at 658–59. This Article notes that research on potential bias by reporters, caseworkers, and judges breaks into two types—vignettes in which hypothetical cases are used and case reviews using actual cases, with the first showing little evidence of racial bias and the latter tending to support the racial-bias finding. It then questions the racial-bias conclusions of the latter, including the Hampton and Newberger study, stating:

[I]t is difficult to determine whether decisions that appear to be racially biased may have been influenced by other relevant information not included in the case record. For instance, a physician who treats a child for a fracture may have had an opportunity to question family members about the incident and observe their demeanors and interactions with each other. He or she may also have access to information about the child’s medical history that is not reflected in the records available to researchers. This information can result in what appears to be racial bias if it is correlated with race.

*Id.* at 659. *See also* Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125, at 8 (critiquing Chasnoff and Hampton & Newberger studies, noting that “these results have been overinterpreted because these studies were not able to control for the type or severity of substance abuse or the severity of the abuse of the child”).

188. *See, e.g.*, Berger et al., *supra* note 136.

189. Chizoma Egu & David Weiss, *The Role of Race and Severity of Abuse in Teachers’ Recognition or Reporting of Child Abuse*, 12 J. CHILD & FAM. STUDIES 465, 465–66, 472–73 (2003).

when Movement literature cites the hospital studies, they are generally used, along with the NIS, as proof of discrimination without any qualification.

### 3. *More Sophisticated Controlled Studies*

Supporters of the Movement occasionally cite a number of other studies, which have included an attempt to control for some of the factors likely to predict for maltreatment, and have still found that race shows up as an explanatory factor in child welfare decision-making. These studies generally demonstrate that controlling for some risk factors significantly reduces the apparent impact of race. The problem with the conclusions regarding a remaining racial factor that some of these studies draw is that they omit many additional factors that could justify differential treatment of cases, and so in the end there is no way to conclude that race has *any* independent explanatory power.

The more responsible studies concede this problem. One by Needell, Brookhart, and Lee about foster care placement in California is illustrative. It controlled for age, maltreatment type, and neighborhood poverty, and noted that by controlling for these factors the racial effect was reduced but not eliminated.<sup>190</sup> But the report noted:

As with all other research to date, this analysis leaves out as much important information as it includes. The models controlled for maltreatment type, but we do not at this time have a good indicator of severity of maltreatment. The models controlled for poverty at the zip code level, but the poverty status of individual children was not available. There is no shortage of possible missing variables, and all should be included in future research. Child problems and/or disabilities, parental substance abuse, and single-parent status may all be associated with placement into foster care [but were not controlled for] . . . .<sup>191</sup>

Amie Schuck's study controlled for poverty, female-headed families, and urbanization, noting that these were generally accepted as important factors contributing to maltreatment, and found that this analysis significantly reduced the apparent role of race, while not ruling out any such role.<sup>192</sup> Goerge and Lee's study found that controlling for increasing numbers of relevant variables such as poverty and mother's level of education reduced the apparent impact of race, and concluded that controlling for more such variables, such as kinship care placement

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190. Barbara Needell et al., *Black Children and Foster Care Placement in California*, 25 CHILD. & YOUTH SERVICES REV. 393 (2003).

191. *Id.* at 405.

192. Amie M. Schuck, *Explaining Black-White Disparity in Maltreatment: Poverty, Female-Headed Families, and Urbanization*, 67 J. MARRIAGE & FAM. 543, 551 (2005). Schuck finds only that "differences in parenting practices, cultural aspects of childrearing, and discrimination by child welfare workers *may also contribute* to the overrepresentation." *Id.*



and mother's substance abuse would reduce the apparent impact of race yet further.<sup>193</sup>

*As a general matter, the sophisticated modern studies of the Racial Disproportionality phenomenon, which have controlled for some of the most important known predictors of maltreatment, have found any apparent independent influence of race either greatly reduced or eliminated. The more risk factors that are controlled for, the less likely are the studies to find any evidence of racial bias.<sup>194</sup> Some of the most careful studies designed to try to assess whether race played an independent explanatory role—studies which include a good set of the kinds of case-specific factors thought relevant to deciding whether child maltreatment exists and whether it is serious enough to warrant significant coercive intervention—have been unable to find that race plays any significant role in decision-making.<sup>195</sup>*

Supporters of the Movement occasionally concede the complexity of the research picture, and the absence of definitive evidence of bias as an explanation for the racial disproportionality picture, but then put out reports that nonetheless

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193. Robert M. Goerge & Bong Joo Lee, *The Entry of Children from the Welfare System into Foster Care*, in RACE MATTERS, *supra* note 30, at 182–83. See also Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, CHILD WELFARE, Mar.–Apr. 2008, at 164–65 (concluding that controlling for poverty and other risk factors reduces, but does not eliminate, apparent impact of race but lack of available services in black communities could be responsible for differences in decision-making).

194. See, e.g., *supra* notes 190–93; Erik P. Johnson et al., *Racial Disparity in Minnesota's Child Protection System*, CHILD WELFARE, July–Aug. 2007, at 5 (finding that role of race as explanatory factor at various child welfare decision points is reduced by controlling for certain risk factors and acknowledging that important factors not controlled for include family size and marital status); Rolock & Testa, *supra* note 136.

195. DUNBAR & BARTH, *supra* note 25, at 4 (reviewing racial disproportionality, race disparity, and race-related findings in published works from the National Survey of Child and Adolescent Well-Being and concluding that “there is a lack of a consistent race or ethnicity effect”); Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125, and discussion at notes 160–67; Gardenia Harris et al., *Factors that Predict the Decision to Place a Child in Substitute Care*, in RACE MATTERS, *supra* note 30, at 171 (analyzing studies conducted by the Illinois Children and Family Research Center and finding that the variables found to be predictive of child placement are suitable for decision-making, including characteristics of the child, characteristics of the family, abuse and neglect history, and the investigative process); Judith Wildfire et al., *Predictors of Reunification*, in CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE 155–70 (2007) (parental compliance and various risk factors have more explanatory power than race and racial disparity in reunification rates for children aged seven months through ten years eliminated when controlling for relevant factors, although not entirely eliminated for infants and older children); Patricia L. Kohl et al., *Child Welfare as a Gateway to Domestic Violence Services*, 27 CHILD. & YOUTH SERVICES REV. 1203, 1213, 1215 (2005) (race not a significant predictor of social worker failure to identify domestic violence when investigating child maltreatment); see also Laurel K. Leslie et al., *Outpatient Mental Health Services for Children in Foster Care: A National Perspective*, 28 CHILD ABUSE & NEGLECT 697, 705 (2004) (race/ethnicity not significant predictor of outpatient mental health service use among foster care population).

make simplistic claims that Racial Disproportionality amounts to discrimination, and must be eliminated by keeping more black children with their parents. For example, Robert Hill makes a major concession in the concluding summary to his synthesis of Racial Disproportionality research for the Casey-CSSP Alliance:

[O]ne must not assume that when racial differences are evident, they invariably are the result of intentional (or unintentional) bias, prejudice, or racism. It is possible for racial differences to occur due to nonracial reasons. On the other hand, some racial differences may indeed result from race-related factors. *This summary of the literature is not able to provide answers in either direction.*<sup>196</sup>

Yet the thrust of this report and of Hill's other work is that the NIS is right in claiming that black maltreatment rates are the same as white, and therefore Racial Disproportionality is a problem that must be solved by changing the way child welfare decisions are made so that more black children are kept with their parents.

Rarely do any of the leading Movement figures attempt to take on the most persuasive evidence against their position—including that blacks as a group are disproportionately characterized by the factors that are universally agreed to be good predictors for child maltreatment and that studies attempting to control for a range of predictive factors regularly reduce or entirely eliminate race as an explanatory factor for child welfare decision-making.

#### ***D. The Bottom Line***

##### *1. There is No Persuasive Evidence that the Racial Picture Results from Discrimination by Child Welfare Decisionmakers*

There is substantial evidence that black maltreatment rates are significantly higher than white because black families are affected by poverty and other risk factors for maltreatment at significantly higher rates than whites. There is no persuasive evidence that child welfare decision-making is systematically biased in the sense that it is more likely to report, substantiate, and remove black children, as compared to similarly situated white children.

It is impossible to know *exactly* how closely official maltreatment records track actual maltreatment by race. Black children might be somewhat under-represented or somewhat overrepresented in the child welfare system compared to their actual maltreatment rates, and there is no way to know which is more likely the case based on existing empirical studies.

##### *2. Even if We Assume that CPS Intervenes Disproportionately in Cases of Black Child Maltreatment, this Would Constitute Discrimination Against White, Not Black, Children*

Even if we were to assume that black children were somewhat overrepresented compared to actual maltreatment rates, this should be understood as discrimination against white children rather than discrimination against black children. This is because overall the child welfare system is guilty of

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196. HILL SYNTHESIS, *supra* note 42, at 34 (emphasis added).

underintervention—of not doing enough to protect children against maltreatment. So if white children are not being removed to foster care at rates equivalent to black children given the incidence of actual maltreatment, it means that white children are being disproportionately denied protection.

I have written elsewhere extensively about why I believe the system is generally guilty of underintervention.<sup>197</sup> The NIS provides additional evidence of underintervention. Its goal was to inquire into the differences between actual and officially reported child maltreatment, and it concluded that the CPS system fails to reach a large proportion of all cases of serious maltreatment.<sup>198</sup>

Movement advocates often talk as if there was systematic *overintervention*, and such claims are the basis for their promotion of Community Partnership or Alternative Track systems. Thus, they regularly argue that a majority of the cases that now trigger CPS intervention and removal to foster care can safely be handled without any coercive intervention. They cite as proof of the alleged overintervention problem the fact that a majority of those in foster care have been removed based on neglect, and then characterize the entire neglect category as minor, “mere poverty” cases.<sup>199</sup>

This is a fallacious argument. Abuse and neglect cases do not constitute a simple hierarchy, with abuse at the top in terms of the level of risk to children, and neglect at the bottom. Most neglect cases are cases in which parents are heavily involved in substance abuse, or suffer from serious mental illness, or for other reasons are unable to provide the basics of nurturing parenting.<sup>200</sup> And of course many child maltreatment cases are categorized as neglect simply because it may be easier to prove than abuse. Social science demonstrates that children identified as victims of neglect suffer at least as severe long-term consequences as children identified as victims of abuse.<sup>201</sup> Out of all cases in which children die of maltreatment, more than 40% fall in the neglect category, far higher than the percentage in the physical abuse or any other category.<sup>202</sup>

### 3. *The Racial Picture is Nonetheless Disturbing*

The fact remains that the statistical picture is troubling. Black parents are losing their children to foster care at high rates, compared to their population percentage, and this is a terrible loss for parents to suffer. Black children are victimized by maltreatment at high rates, and end up in foster care at high rates.

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197. NOBODY’S CHILDREN, *supra* note 3, at 98–110 (Chapter 4, “Underintervention vs. Overintervention”).

198. See discussion *supra* notes 156–58 and accompanying text. See SEDLAK & BROADHURST, *supra* note 23, at xviii–xix, 7–42, 8–18 (discussing NIS finding that a large percentage of serious maltreatment cases are unreported).

199. See *supra* Part I.E for discussion of Community Partnership or Alternative Track systems. See also NOBODY’S CHILDREN, *supra* note 3, at 146–54.

200. NOBODY’S CHILDREN, *supra* note 3, at 65–81.

201. *Id.* at 150–51.

202. CHILD MALTREATMENT REPORT, *supra* note 143, at 67 (reporting that neglect cases constituted 41.1% of child fatalities).

We know that abuse and neglect take a toll on children, leading to long-term problems. Removal from parents is often traumatic, even in cases where children have actually been subjected to maltreatment, and even if removal is generally preferable for the child over remaining at home. Lengthy stays in foster care are generally harmful. Children subjected to maltreatment, to the disruption related to trying to protect them from further maltreatment, and to lengthy foster care, are not likely, as a group, to do well in later life.

We should be concerned that black children are so disproportionately subject to the trauma and the risk of long-term damage that the raw statistics reveal. Our society suffers from a terrible divide between rich and poor, with blacks falling disproportionately in the poor group. The disproportionate representation of black children in foster care both reflects and exacerbates this situation.<sup>203</sup> Moreover, the fact that black parents are disproportionately characterized by the risk factors associated with child maltreatment—factors that include extreme poverty, unemployment, substance abuse, and mental illness—represents a huge problem for the black community and the larger society. The raw statistics present a picture demanding some kind of action.

This does not, however, mean that the solution is that proposed by the Racial Disproportionality Movement—cutting back on the reporting, substantiation, and removal of black children for maltreatment. Leaving children victimized by abuse and neglect at home to be further victimized is not only unfair to those children, but also unlikely to, in any way, address larger social justice concerns. Blacks abused and neglected as children will grow into adults at high risk for unemployment, homelessness, substance abuse, and incarceration, and at high risk for maltreatment of the next generation, not into leaders who will help empower the black community or promote productive social change. Moreover, by focusing on child welfare discrimination as the central problem, the Movement actually diverts attention from the real and burning problems facing the black community, and from the real solutions for those problems, which lie in the challenging but essential realm of addressing poverty, unemployment, and the other social ills that plague those at the socioeconomic bottom of our society.

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203. Dorothy Roberts, a major Movement figure, makes a somewhat related point when she argues that even if Racial Disproportionality could be explained entirely by higher black poverty rates, there would still be a problem of racial injustice: “[D]isproportionate state intervention in Black families reinforces the continued political subordination of Blacks as a group.” DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 254 (2002).

### III. THE POLICY IMPLICATIONS

#### *A. Address Racial and Economic Injustice, and Expand Specific Programs Designed to Prevent Child Maltreatment*

The real Racial Disproportionality problem is that black children are disproportionately victimized by abuse and neglect. We should focus Racial Disproportionality reform efforts on reducing this maltreatment.

The best way to reduce maltreatment is to fundamentally reform our society so that those at the socioeconomic bottom have the kind of educational, economic, and other opportunities that would enable them to escape the conditions that breed child maltreatment. This is, of course, also the best way to address the real injustice suffered by black parents and the larger black community—the fact that their lives are characterized by extreme poverty and all that goes with it.

What is more imaginable in the near future is to develop and expand programs that provide support for poor families and for fragile families at risk of falling into the kind of dysfunction that produces child maltreatment, so as to reduce the incidence of maltreatment. We need family support systems that give poor, single parents a better chance to make it. We need more substance-abuse treatment services. We need to expand Intensive Early Home Visitation programs designed to reach new parents and link them with a range of supportive services, programs like David Olds' Nurse Partnership model that have a proven record of success in reducing child maltreatment.<sup>204</sup>

These kinds of support and maltreatment prevention programs provide the best opportunity to protect black children against maltreatment as well as the child welfare system involvement that maltreatment triggers. They provide a route to reduce the number of black children in the child welfare system that will serve those children's interests.

So, for example, we now have black infants entering foster care at especially high rates, apparently because many of them have been exposed during pregnancy to harmful drugs. Fred Wulczyn and his colleagues have noted this phenomenon and argued for home visitation and substance-abuse strategies to simultaneously address both the infant maltreatment and the racial disparity issues.<sup>205</sup>

The Racial Disproportionality Movement has been essentially silent on the importance of this kind of upfront support and prevention. This is not surprising given its claim that there is, in fact, no difference in maltreatment rates.

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204. See generally *NOBODY'S CHILDREN*, *supra* note 3, at 233–43 for fuller development of these ideas. See *id.* at 163–75 in particular for discussion of Intensive Early Home Visitation programs and the demonstrated success of the Nurse Partnership model that David Olds has developed and promoted.

205. *WULCZYN & LERY*, *supra* note 85, at 1–2, 24; *WULCZYN & HISLOP*, *supra* note 129, at 32 (arguing that high rates of black infant admissions to foster care “demonstrate a clear need to build service capacity in low-income neighborhoods that targets interventions to families expecting a newborn”); see also *TENNESSEE REPORT*, *supra* note 113, at 3, 35.

But this does mean that it is missing the main point in terms of the civil rights of black children. Black children need to be protected against maltreatment. And appropriate efforts to prevent maltreatment would likely reduce Racial Disproportionality in ways that would genuinely protect, rather than endanger, black children.

The Movement does call for an expansion of family support services in the context of family preservation and family reunification programs, but these are programs designed to operate only after child maltreatment has been identified. They do not serve the same purposes as the early prevention programs recommended above. Once maltreatment occurs, it risks causing damage that may be irreparable. Also, once parents have fallen into the deeply dysfunctional patterns characterizing maltreatment, the evidence indicates that family support programs do not work very well to prevent maltreatment from recurring.<sup>206</sup> Studies show that parents in these family preservation and reunification programs continue to maltreat their children at very high rates—official reports show recurrent maltreatment in more than one-third of all cases, and actual maltreatment has been found to significantly exceed this figure.<sup>207</sup> This is by way of significant contrast to the much-maligned foster care system, where the national annual average maltreatment rate is 0.5%.<sup>208</sup> Children die as a result of violence when reunified with their original families at a rate three times the rate of children in the general population, and one and one-half times the rate of children in foster care.<sup>209</sup>

### ***B. Reject Classic Racial Disproportionality Movement Recommendations***

As discussed previously, the Movement's policy recommendations break down into essentially two groups: one which grows logically out of their analysis of the Racial Disproportionality problem, and one which contains a somewhat random assortment of complaints about certain recent child welfare policy reform moves. All the recommendations relate to the Movement's goals of keeping black children in either their birth or their racial community.

We should reject both sets of recommendations. Those that grow logically out of the Movement's analysis are flawed for the same reasons the analysis is flawed. Overall, the goal is to reduce the number of black children

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206. See generally NOBODY'S CHILDREN, *supra* note 3, at 96–97, 109–10, 118–21; JILL DUER BERRICK, TAKE ME HOME: PROTECTING AMERICA'S VULNERABLE CHILDREN AND FAMILIES (2008) (questioning evidence base for traditional family preservation programs).

207. Patricia Kohl's study for the Casey Alliance shows that out of those cases in which child welfare system (CWS) investigations found maltreatment and the child remained at home with a CWS plan, the plan failed approximately 33.5% of the time during the next thirty-six months by virtue of a new maltreatment report or placement into out-of-home care. The study found, in addition, based on self-reports, severe violence in many cases that never showed up in official reports, demonstrating that official rates underestimate the rates of recurrent maltreatment. Self-reports of severe violence occurred disproportionately in black families. KOHL, *supra* note 148, at 1–3. See also NOBODY'S CHILDREN, *supra* note 3, at 97, 109 (one-third to one-half of those reunited subject to repeated maltreatment).

208. CHILD MALTREATMENT REPORT, *supra* note 143, at 31.

209. See Barth & Blackwell, *supra* note 147, at 591, 601.

reported, substantiated, and removed, and to increase the number reunified. As discussed above, it is not in the interest of black children to do these things given that child welfare decision-making generally reflects the rates of actual child maltreatment. Changing child welfare decision-making without changing the reality of child maltreatment is likely to harm, not help, black children. Children now are generally removed only for extremely severe maltreatment.<sup>210</sup> They are generally kept in foster care rather than being reunified with their parents only because of serious risks that they will be maltreated if reunified. As noted above, even under current policies one-third of all children reunified will be removed again because of repeated maltreatment, and more than that will have been maltreated again without being removed.<sup>211</sup> Children reunified quickly are more likely to reenter foster care than those reunified after a longer stay in foster care.<sup>212</sup> Black children are at particular risk of particularly violent and dangerous maltreatment if kept in their homes after a maltreatment investigation and if reunified from foster care.<sup>213</sup>

The list of Movement recommendations often starts with a call to study the Racial Disproportionality problem. This sounds good, but the calls for study are not motivated by any interest in a deep and unbiased analysis. Instead, Movement efforts are designed to get states to *recognize* that they have a Racial Disproportionality problem, that its nature has to do with discriminatory child welfare decision-making, and that the solutions are to change that decision-making in ways that will keep more black children at home. The state reports produced as a result of the Casey-CSSP Alliance's call for addressing Racial Disproportionality generally do little more than parrot classic Movement analysis and classic Movement reform proposals.

Serious, unbiased research might be helpful to policymakers. But research costs significant resources, resources that could also be devoted to new early support and prevention activities. And the child welfare system is starved for resources. Also, we already know enough from the good research available that we should be focusing our efforts on reducing the maltreatment of black children, rather than on reducing intervention by child protective services.

Core Movement recommendations also include an increase in anti-racial and cultural-competence training. This relates to the unfounded claim that the system now operates in a discriminatory way. Nonetheless, these recommendations might sound harmless. Who could be against training designed to accomplish such apparently worthy goals? But there are real problems with these recommendations. The obvious point of such training is to strengthen the

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210. See *supra* Part II.D.2.

211. See *supra* note 207.

212. FOSTER CARE DYNAMICS 2000–2005, *supra* note 113, at 58.

213. KOHL, *supra* note 148, at 32; Barth & Blackwell, *supra* note 147, at 601 (noting that “foster care is protective for African American children and is more protective against preventable (and especially violent) ends than exit from foster care” and the “threefold increase in rates of death due to violent ends for children who have left foster care as opposed to children in the general public”); Barth et al., *Children of Color in the Child Welfare System*, *supra* note 125, at 15.

signal sent to all social workers that they should be reluctant to find child maltreatment in a case involving a black child, they should be reluctant to remove a black child to foster care, and they should do all else that they can to reduce the number of black children in the system, recognizing that high levels of black representation result from their own racist decisions. Given that workers are today generally making appropriate, rather than biased, removal decisions, this signal risks encouraging social workers to keep children at home without adequate regard to the dangers of ongoing severe maltreatment.<sup>214</sup> Also, as discussed above, the evidence fails to support any notion that social workers generally operate on the basis of bias,<sup>215</sup> and there is already a huge amount of anti-racism and cultural-competence training directed at social workers.<sup>216</sup> In a child welfare system starved for resources, we should not be throwing yet more money at the cultural-competence industry to provide training which, at best, seems like unnecessary overload,<sup>217</sup> and which risks pushing social workers in a dangerous direction. Resources would again be better spent on early prevention programs, or on a range of documented needs such as providing reduced caseloads, more support services, better pay, better working conditions, and more training on implementation of evidence-based programs.

A related Movement recommendation is the recruitment of more black social workers. As discussed above, blacks are already disproportionately represented in child protective services compared to their population, nor is there any evidence that black social workers would be more likely than white to make the kinds of family preservation decisions that the Movement seeks.<sup>218</sup>

Additional recommendations often include Community Partnership or Alternative Track programs.<sup>219</sup> These programs are designed to serve the Movement's goals of keeping a much larger percentage of black children now identified as at risk for maltreatment out of the child welfare system. These programs rely on the false assumption that virtually the entire neglect category are minor cases, and, thus, can be safely diverted from the official CPS system to a system which relies on community organizations to provide family support services to parents who are free to accept or reject those services.<sup>220</sup> There is no evidence demonstrating that children are better off as a result of being diverted from the CPS system by these programs, and many reasons to think that they may in fact be worse off.<sup>221</sup>

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214. See Simerman, *supra* note 56 (illustrating this problem).

215. See *supra* Part II; see also *supra* Part II.B.1 (discussing the issue of possible social worker bias in particular).

216. See *supra* Part II.B.1.

217. See Jordan, *supra* note 70 (reporting that the proposed 2007 budget for Kentucky included half a million dollars to address Racial Disproportionality, including to train foster families in cultural sensitivity and how to do Black children's hair).

218. See *supra* notes 133–37 and accompanying text.

219. See *supra* Part I.E.

220. See *supra* Part II.D.2.

221. See *supra* Part I.E.



A related recommendation is to make greater use of Family Group Decision-Making.<sup>222</sup> This kind of program is again designed to serve the Movement's goals of keeping black children with their birth parents, and if that is not possible, then at least in the extended family network. The idea is to involve the extended family in CPS decision-making when child maltreatment is at issue and to see if the family can help develop a plan enabling the child to stay at home with its parents, or temporarily with a family member. Success is defined in terms of these criteria. Again, there is no evidence demonstrating that these programs work to protect children against maltreatment,<sup>223</sup> and there is reason for concern that they may not, precisely because the goal is defined largely in terms of keeping children in their birth families and kinship networks, without any particular regard to whether this will serve the children's interests.<sup>224</sup> Obviously it makes sense to look to extended family members to help understand the situation and develop placement possibilities. But to promote these programs primarily with a view to keeping children out of the child welfare system and reducing Racial Disproportionality puts children at risk.

Another recommendation is for increased recruitment of black prospective adoptive parents, in order to help move black children out of foster care into adoption. But if we really want to further this goal, we should increase recruitment of white as well as black prospective parents, so as to reach the overwhelming majority of prospective parents who are white, many of whom would be interested in adopting across racial lines if they were encouraged to do so rather than discouraged or ignored.<sup>225</sup>

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222. Elizabeth C. Weigensberg, Richard P. Barth & Shenyang Guo, *Family Group Decision Making: A Propensity Score Analysis to Evaluate Child and Family Services at Baseline and After 36 Months*, 31 CHILD. & YOUTH SERVICES REV. 383, 384 (2009) (supporting FGDM as method to address Racial Disproportionality).

223. The only study of FGDM using random assignment methodology and examining outcomes for children found no more positive outcomes for children receiving FGDM. Stephanie C. Berzin et al., *Does Family Group Decision Making Affect Child Welfare Outcomes? Findings from a Randomized Control Study*, CHILD WELFARE, July–Aug. 2008, at 35, at 35. See also Stephanie Cosner Berzin et al., *Using Sibling Data to Understand the Impact of Family Group Decision-Making in Child Welfare Outcomes*, 28 CHILD. & YOUTH SERVICES REV. 1449 (2006) (noting that there is a dearth of evidence from FGDM research on outcomes for children, and concluding that children who received FGDM had higher rates of substantiated maltreatment and other poor outcomes, but that results were not statistically significant); Weigensberg et al., *supra* note 222, at 383 (noting that study of FDGM using matched comparison group method found increase in access to services for parents and children over short term but not over long term with latter defined as after thirty-six months).

224. See NOBODY'S CHILDREN, *supra* note 3, at 141–46.

225. See Devon Brooks, Sigrid James & Richard P. Barth, *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575 (2002) (finding that whites were willing to adopt older, disabled black and brown children from foster care in very significant percentages); Jo Jones, U.S. Dep't of Health & Human Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, VITAL & HEALTH STATS., SERIES 23, Aug. 2008, at 1, 16 (finding that among white adoption seekers, 84% would accept a black child).

Movement documents are full of criticisms of the Multiethnic Placement Act (MEPA) and of the Adoption and Safe Families Act (ASFA), claiming that these Acts are somehow responsible for exacerbating the Racial Disproportionality problem, and, accordingly, should be revised or eliminated.

MEPA prohibited the use of race as a basis for disqualifying transracial adoptive parents or delaying adoptive placement, and was designed to help move more black children out of foster care, and move them more expeditiously, by reducing racial barriers to placement. It has only been in effect in its powerful 1996 form for a little more than a decade. The federal enforcement agency has only recently begun to take vigorous action to implement MEPA, with the first enforcement decision issued only in 2003 and affirmed on administrative appeal only in 2006.<sup>226</sup> Transracial placements of black children have been on the rise in the years since MEPA, although not yet as significantly as one might hope.<sup>227</sup> It is unimaginable that repealing MEPA to reintroduce race as a basis for disqualifying white adopters, as some Movement advocates propose, will in any way further the goal of reducing the number of black children in foster care, or the length of their stays. Moreover, MEPA serves black children's interests in finding good adoptive homes, and in finding them sooner rather than later. There is plenty of evidence that delay in or denial of adoptive placement hurts children, and no evidence that transracial placement causes them any harm.<sup>228</sup>

The Movement's criticism of ASFA focuses on the Act's allegedly rigid timelines, complaining that by limiting the length of time children can be held in foster care to fifteen out of the prior twenty-two months, ASFA unfairly limits many black parents' opportunities to prove their fitness as parents. Elimination of the 15/22 provision would be counterproductive to the Movement's goals of reducing the number of black children in foster care. This provision is designed to limit stays in foster care, and most of the children moved out of foster care will be reunified with their parents rather than adopted. Moreover, ASFA was passed in recognition of the fact that children have their own important time clock and cannot afford to wait for extensive periods to see whether their parents are going to be able to work through their problems. ASFA is, in my view, a good law because it shifts the balance in child welfare law and policy somewhat in the direction of valuing children's rights more, and parents' rights less, with the 15/22 foster care time limit being one important example of this shift.<sup>229</sup>

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226. Elizabeth Bartholet, Response to the Donaldson Institute Call for Amendment of the Multiethnic Placement Act (MEPA) to Reinstate Use of Race as a Placement Factor, Congressional Coalition on Adoption Institute Briefing (June 10, 2008) [hereinafter Bartholet, Donaldson Response], available at [http://www.law.harvard.edu/faculty/bartholet/STATEMENT\\_DONALDSON\\_INSTITUTE.pdf](http://www.law.harvard.edu/faculty/bartholet/STATEMENT_DONALDSON_INSTITUTE.pdf). For access to recent HHS enforcement decisions, visit <http://www.law.harvard.edu/faculty/bartholet/mepa.php>.

227. See DONALDSON REPORT, *supra* note 67.

228. See Bartholet, Donaldson Response, *supra* note 226; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1201–26 (1991); NOBODY'S CHILDREN, *supra* note 3, at 125–27.

229. See NOBODY'S CHILDREN, *supra* note 3, at 23–27, 188–89.

*C. Address the Complex Dilemma Posed by Racially Disparate Stays in Foster Care*

Black children's stays in foster care last longer than white children's primarily because of the high rates of black kinship foster care placement, and, additionally, because black children are reunified at somewhat lower rates than whites, and move on to adoption at somewhat slower rates.<sup>230</sup> This is a potential problem for black children. Foster care is supposed to be temporary, with children moved in a timely way, either back to their original homes or on to adoption. Lengthy stays in foster care are generally thought to be negative for children, as compared to permanency.

One obvious way to reduce racial disparity in this area is to reduce the rate of black kinship placement. But Movement advocates favor kinship placements and, so, do not advocate this solution.

However, some reduction in the rate of kinship placements may well be appropriate, not because it would reduce racial disparity, but because current preferences for placing with kin over non-kin are so powerful that they likely result in many placements which do not serve children's interests in a range of ways, including their interests in achieving permanency.<sup>231</sup> All things being equal it makes sense to place children with kin rather than strangers. But things are rarely equal, and powerful preferences for kin placement have been put in place which often require social workers to ignore other factors generally thought relevant to the child's best interest, including whether the kin at issue are likely to provide nurturing care on an ongoing basis. We should have policies that encourage social workers to make individualized, context-specific decisions as to when to place with kin, free from powerful kinship preferences that ignore the actual best interests of the child. Such policies would both serve children's best interests better than current policies and likely reduce racial disparity.<sup>232</sup>

Movement recommendations also focus on increasing the permanency of kinship placements by creating subsidies for guardianship comparable to foster parent subsidies as a way of encouraging kinship foster parents to become guardians.<sup>233</sup>

Expanding kinship guardianship through subsidies has both pros and cons. Guardianship means that officially the children are not in the state system's care and, therefore, that social workers have no oversight role to ensure their safety. This might be fine in some cases, but might put the children at risk in others, especially given the risks discussed above associated with today's powerful

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230. See *supra* Part II.B.2.

231. A recent study documents that kinship care provides inferior care compared to already marginal care in foster care generally in terms of such factors as cognitive stimulation, emotional responsiveness, punitiveness—all problematic in light of the needs of the typically high-risk children who enter foster care. See Richard P. Barth et al., *Characteristics of Out-of-Home Caregiving Environments Provided Under Child Welfare Services*, CHILD WELFARE, May–June 2008, at 5, 31–36.

232. See generally *NOBODY'S CHILDREN*, *supra* note 3, at 89–93.

233. For ABA endorsement of this recommendation, see AM. BAR ASS'N, *supra* note 82.

kinship preferences. The kinship foster parents who become guardians may or may not be as good for the child as those that would be provided by a more open process, considering a broad pool of adoptive parents. Guardianship is a form of permanency, but generally it is not considered as good a form of permanency as the kind of full legal parenthood involved in adoption, in part because it does not have the same legal protections for permanency as adoption. The subsidies involved in guardianship may create perverse incentives, encouraging families to keep children in guardianship, rather than moving them back to their parents or on to adoption, solely because of the financial rewards.<sup>234</sup>

Subsidized guardianship should be developed as a policy option in a way that would encourage social workers to decide on an individual case basis whether it served the child's best interests. For example, it might make sense in a case in which a child is happily bonded with loving, nurturing kinship foster parents, the foster parents pose no risk to the child, the foster parents do not want to adopt because they want to maintain the child's legal relationship with its parents, and maintaining this relationship seems appropriate given past history and the child's feelings about the parents. However, subsidized guardianship should not be embraced simply as a method of reducing the numbers of black children in foster care because this creates too great a risk that such guardianships will be created in situations where they will not serve children's best interests.<sup>235</sup>

There *are* some promising ways to reduce the number of black children in kinship foster care that are likely to serve their best interests. One is to do more to encourage kin foster parents to adopt. Social workers often simply assume that kin have no interest in adoption, or do not bother to inquire because there is not the same pressure to push for permanency when children are in kinship care. Mark Testa's work helps demonstrate that there is much greater potential for formal adoption by kin than has been assumed.<sup>236</sup> We should have policies which push social workers to inquire into the potential for kinship adoption, and make decisions based on children's best interests.

Another is to move more black children into non-kin adoptive homes. This means enforcing the current MEPA vigorously and working to broaden recruitment so that we enlarge the pool of adoptive parents. It also means vigorously enforcing ASFA and related state law reform moves. The current trend is already in the direction of reducing black child stays in foster care, and this is likely due in part at least to MEPA and ASFA.<sup>237</sup> ASFA has a range of different provisions, including but not limited to the 15/22 mandate, that should reduce stays in foster care. ASFA allows states to bypass any reunification services and to move

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234. Berrick, *supra* note 152, at 27–43 (discussing perverse incentives created by kinship foster care and subsidized guardianship stipends).

235. See generally NOBODY'S CHILDREN, *supra* note 3, at 154–59.

236. Mark F. Testa, *The Changing Significance of Race and Kinship for Achieving Permanence for Foster Children*, in RACE MATTERS, *supra* note 30, at 239 (Illinois adoptions out of foster care increased between 1995 and 1999 by a factor of almost 4.5, to a total of 7315 children, with kin accounting for a growing percentage of these adoptions, rising by 1999 to 58%).

237. See *supra* Part II.A.

promptly to terminate parental rights in cases of extreme parental misconduct, enabling the system to move children more expeditiously into adoption. It encourages states to pay more attention to children's safety and best interests generally in making removal decisions, and this should mean, along with the other provisions, that children are moved out of homes in which they suffer serious maltreatment more promptly, having suffered less damage. Such children will be easier to place than the older, often very damaged children that have traditionally populated the foster care system.

There are also many state system reform programs, which move in the same direction as ASFA. Concurrent planning is one, and it is given an approving nod by ASFA. It envisions placing children in foster care on a reunification track while simultaneously placing them on a pre-adoption track, so that if reunification turns out not to be appropriate the child can be immediately freed for adoption. Ideally the child would have been placed in the pre-adoptive or "fost-adopt" home when first removed, so that from the child's point of view there is no disruption if the adoption decision is ultimately made. These and similar programs are the kinds of programs we should pursue to speed black and white children who cannot be safely reunified toward adoptive homes, and, thus, reduce their stays in foster care.<sup>238</sup>

#### ***D. Address Discrete Examples of Problematic Racial Disparities***

One area for possible productive action reducing racial disparities in the child welfare system has to do with CPS intervention at birth for purposes of investigation and possible removal of children who have been affected by their mothers' substance abuse during pregnancy. There does seem to be a significant racial disparity in the likelihood that infants will be tested, and evidence of substance abuse reported to CPS. Public hospitals are much more likely to test, and so black infants are more likely to be tested and identified as at risk for maltreatment by substance-abusing parents, given that black parents are more likely, as a group, for economic reasons, to frequent public hospitals. Also infants are more likely to be tested for illegal drugs than for alcohol, and this likely has a disparate impact on blacks as compared to whites because of different drug and alcohol usage patterns in the different racial groups. However, alcohol use and abuse during pregnancy causes fetal damage that is probably at least as significant as illegal drug use during pregnancy. And parental alcohol abuse creates significant risks for child maltreatment.<sup>239</sup>

These policies and practices in combination mean that black children are much more likely to be identified as drug-affected at birth, their parents are more likely to be investigated for parental unfitness, and the children are more likely to be removed to foster care. White children whose parents are abusing illegal drugs or alcohol in ways that put them at high risk for maltreatment are not nearly as likely to be tested, have their cases investigated, or be removed. The racial victims,

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238. See *NOBODY'S CHILDREN*, *supra* note 3, at 176–92.

239. See generally *id.* at 207–32. However, alcohol use may present somewhat lessened risks since it does not involve the parents in the systematic violation of criminal laws and all that goes with that.

if they should be termed that, are the white children. And the appropriate action to correct this situation would be to increase testing for alcohol, and to mandate testing in all private, as well as all public, hospitals, so that all children receive greater protection against being sent home as fragile, needy, drug or alcohol-affected infants to parents unfit to provide appropriate care, even to normal infants.<sup>240</sup>

### CONCLUSION

We are now hurtling forward toward change in the direction set by the Racial Disproportionality Movement. To date there has not been much in the way of definitive action by states or the federal government that would systematically reduce the level of intervention by child protective services systems in black families to protect children against maltreatment. But there are many signals that if we do not change direction in short order, dramatic action will be next. Racial Disproportionality is the hot issue of the day. Many states have called at the highest levels for the kinds of changes in child welfare practice demanded by the Movement. The federal GAO and a U.S. Congressional Committee have endorsed Movement claims and recommendations. Should the federal government take the step that Movement advocates urge, conditioning federal funds on state efforts to reduce racial disparities in child welfare, this will likely force radical changes. Federal funding is essential to the functioning of all state child welfare systems, so any such federal condition constitutes an irresistible demand.

Race does matter, as the Movement advocates like to say. But facts matter also. And the facts related to the racial picture in child welfare should direct those who care about black children to do something more to protect them against abuse and neglect. The facts should inspire more support for upfront maltreatment prevention programs. The facts should inspire more attention to fundamental socioeconomic reform. The facts should make state and federal policymakers wary of any move to reduce the number of black children in foster care by simply keeping more black children at home, without having first fundamentally changed the nature of what goes on at home. We have to hope that policymakers are interested in the facts, capable of resisting the Movement's political pressure, and concerned enough about the genuine welfare of black children and the larger black community to pursue genuine reform.

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240. *See id.*