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Kinship Care and The Price of State Support for Poor Children

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This essay is part of a book project entitled *Shattered Bonds: The Color of Child Welfare* (forthcoming 2001). I am grateful to Carolyn Frazier and Heidi Hayes for excellent research assistance.

ABSTRACT

This paper focuses on kinship foster care as an example of relinquishing legal custody of children to gain access to public services they need. Kinship foster care replaces a traditional, private African American family arrangement with a similar structure that is regulated by state child welfare agencies. Part II describes this transformation of kinship care from a predominantly private family network to a widely used source of public foster care. Part III discusses the structure of state payments for kinship care giving and its correlation to the level of state supervision of care givers. In Part IV, I explore how kinship foster care often involves relinquishing custody of children in exchange for services and benefits that families need. I discuss the increasing number of “voluntary” placements of children in foster care, the impact of state supervision on families involved in kinship foster care, and the inferior services received by these families. In Part V, I show that incorporating kinship care in the child welfare system often harms families by disrupting ties among kin rather than preserving them. Finally, Part VI contends that the extreme government supervision of these families through the child welfare system stems from the failure of more general state support for care giving. The onerous price exacted from poor Black families for public assistance demonstrates the need for fundamental change in our philosophy of care.

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Kinship Care and The Price of State Support for Children
(For Symposium on Legal Approaches to Care, Chicago-Kent Law Review, Vol. 76)
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I. Introduction

One of the key issues raised by care giving is determining who should be responsible for its financial support. Law and public policy in the United States assume that care giving is primarily a private matter. Parents, for example, are supposed to bear the costs of caring for children. Martha Fineman,² Eva Feder Kittay,³ and other feminist scholars have shown that relying on private arrangements for inevitable dependencies has negative consequences for women.⁴ The nuclear family norm gives women the responsibility of care giving while denying them adequate government support and vilifying those who do not depend on husbands. Mothers who are unable to rely on a male breadwinner or their own income to raise their children must pay a high price for state support. The US welfare state provides stingy benefits to poor mothers

¹ Professor, Northwestern University School of Law; faculty fellow, Institute for Policy Research. This essay is part of a book project entitled *Shattered Bonds: The Color of Child Welfare* (forthcoming 2001). I am grateful to Carolyn Frazier and Heidi Hayes for excellent research assistance.

² See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

³ See EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999).

⁴ See, e.g., Nancy Fraser & Linda Gordon, *A Genealogy of "Dependency" Tracing a Keyword of the U.S. Welfare State* in JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTCOLONIALIST" CONDITION 122 (Nancy Fraser, ed., 1997) (explaining how relationships of dependency were removed from the market and attached to disfavored and excluded groups).

that are stigmatized and encumbered by

behavioral regulations.⁵ Mothers must waive privacy rights as a condition of receiving public aid.⁶ The law permits bureaucratic surveillance of clients to determine their eligibility based on both means- and morals-testing, to check their conformance to behavioral mandates, and to guarantee that they are spending benefits properly. The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)⁷ converted welfare from a federal entitlement to a means for states to influence poor mothers' work, marital, and childbearing decisions.⁸

Less explored by feminist legal scholars is the role of the public child welfare system in care giving by poor mothers. The child welfare system intervenes in families when parents are alleged to have abused or neglected their children.⁹ State child protective agencies may provide services to these families while keeping them intact or remove children from the home to be placed in foster care. Although fewer families are involved with child protective services than with the welfare system, the number of children in state custody is alarming. In 1999, there were 568,000 children in foster care.¹⁰ The vast majority of these children are poor.¹¹ Not only is

⁵ GWENDOLYN MINK, *WELFARE'S END* (1997); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992). For historical accounts of the welfare system's regulation of poor mothers, see MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (1988); LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942* (1995).

⁶ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 226-29 (1997).

⁷ Title III, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁸ Francis Fox Piven, *Welfare and Work* in *WHOSE WELFARE?* 83 (Gwendolyn Mink, ed., 1999); Dorothy Roberts, *Welfare's Ban on Poor Motherhood* in *WHOSE WELFARE*, *supra*, at 152.

⁹ See generally RICHARD P. BARTH ET AL, *FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES, PATHWAYS AND PLACEMENTS* (1994).

¹⁰ U.S. Dept. of Health & Human Services, Administration for Children & Families, www.acf.dhhs.gov/programs/cb, "The AFCARS Report: Current Estimates as of October 2000

child maltreatment highly correlated with poverty,¹² but child neglect is defined and interpreted in a way that subjects greater numbers of poor families to state surveillance and intervention.¹³ Black children are grossly over-represented in child welfare caseloads: nearly half of all children in foster care nationwide are Black, although Black children are only 17 per cent of the nation's youth. The child welfare system, then, is a significant means of public support of poor children, especially poor Black children.

The consequences for families of involvement in the child welfare system are even more devastating than the burdens attached to receiving welfare. Involvement in the child welfare

¹¹ LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 38-42 (1989); DUNCAN LINDSEY, THE WELFARE OF CHILDREN 139-55 (1994).

¹² A.J. Sedlak and D.D. Broadhurst, Third National Incidence Study of Child Abuse and Neglect, Final Report (Washington, D.C.: U.S. Department of Health and Human Services, 1996); Kristine E. Nelson, et al, *Chronic Child Neglect in Perspective*, 38 SOC. WORK 661 (1993).

¹³ PELTON, *supra* note ____; RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA' CHILD WELFARE SYSTEM (1997); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 SOUTH CAROLINA LAW REVIEW 577(1997).

system entails intensive supervision by child protection agencies, which often includes losing legal custody of children to the state. This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. I argue in this essay that transferring parental authority to the state is the price poor people must often pay for state support of their children. I focus on kinship foster care as an example of relinquishing legal custody of children to gain access to public services they need. Kinship foster care replaces a traditional, private African American family arrangement with a similar structure that is regulated by state child welfare agencies. Part II describes this transformation of kinship care from a predominantly private family network to a widely used source of public foster care. Part III discusses the structure of state payments for kinship care giving and its correlation to the level of state supervision of care givers.

In Part IV, I explore how kinship foster care often involves relinquishing custody of children in exchange for services and benefits that families need. I discuss the increasing number of “voluntary” placements of children in foster care, the impact of state supervision on families involved in kinship foster care, and the inferior services received by these families. In Part V, I show that incorporating kinship care in the child welfare system often harms families by disrupting ties among kin rather than preserving them. Finally, Part VI contends that the extreme government supervision of these families through the child welfare system stems from the failure of more general state support for care giving. The onerous price exacted from poor Black families for public assistance demonstrates the need for fundamental change in our philosophy of care.

II. The Transformation of Kinship Care

Mothers have often relied on relatives and neighbors to help with child raising. Black women in particular share a rich tradition of women-centered, communal childcare.¹⁴ These

cooperative networks have included members of the extended family (grandmothers, sisters, aunts, and cousins), as well as non-blood kin and neighbors.¹⁵ Their relationship with children ranges from daily assistance to long-term care or informal adoption. Carol Stack's classic research in the "Flats," for example, revealed that many children there moved back and forth between households of close female relatives.¹⁶ Three or more women related to a child formed a cooperative domestic network, taking turns assuming parental responsibility toward the child.

Kinship care historically had a double-edged relationship to the child welfare system. Child rearing by relatives was often a response to poverty and other hardships that made it difficult for parents to raise children by themselves.¹⁷ Indeed, for a century Black families had no recourse to the formal child welfare system. Blacks were virtually excluded from openly segregated child welfare services until the end of World War II.¹⁸ The orphanages established by progressive reformers in the late nineteenth century to rescue destitute immigrant children refused to accept Blacks. The few "colored orphan asylums" were woefully inferior and overcrowded. Black people relied primarily on extended family networks and community resources such as churches, women's clubs, and benevolent societies to take care of children whose parents were unable to meet their needs.

Kinship care continued in more recent decades as an informal safety net for struggling Black families. By temporarily moving children to the care of kin, parents could avoid either

¹⁵ ROBERT B. HILL, *INFORMAL ADOPTION AMONG BLACK FAMILIES* (1977); ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER* ____ (1992).

¹⁶ CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974).

¹⁷ ELMER P. MARTIN & JOANNE M. MARTIN, *THE BLACK EXTENDED FAMILY* 39-47 (1978).

¹⁸ ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORK: BLACK CHILDREN AND AMERICAN CHILD WELFARE* 34-38 (1972); David Rosner & Gerald Markowitz, *Race, Foster Care, and the Politics of Abandonment in New York City*, 87 *AM. J. PUBLIC HEALTH* 1844 (1997).

voluntarily relinquishing them to the state or running the risk of coercive state intervention.¹⁹ Kinship care, then, served as a family-preserving alternative to foster care. Skyrocketing female incarceration rates, cutbacks in social services, the AIDS epidemic, and maternal substance abuse led to a resurgence in care giving by relatives, especially grandmothers, in the late 1980s.²⁰ Between 1980 and 1990, the number of children living with grandparents increased by 44 percent.²¹ In 1994, nearly 4 million children lived in grandparent-headed households.²² More than one-third of these children lived in homes with no parent present.²³ Almost half of these children being raised by grandparents were Black.²⁴

Kinship care, on the other hand, also invited state intrusion. The Black community's cultural tradition of sharing parenting responsibilities among kin has been mistaken as parental neglect.²⁵ Because mothers who depend on kinship care do not fit the middle-class norm of a primary care giver supported by her husband and paid childcare, they seem to have abrogated their duty toward their children.²⁶ Ironically, Illinois, a state that now relies heavily on kinship foster care, considered children who lived with relatives other than their parents to be neglected less than a decade ago.²⁷

19 Maria Scannapieco & Sondra Jackson, *Kinship Care: The African American Response to Family Preservation*, 41 SOCIAL WORK 190, ____ (1996).

20 Id., at ____; Rob Geen, *In the Interest of Children: Rethinking Federal and State Policies Affecting Kinship Care*, POLICY & PRACTICE (March 2000), at 19, 21; Beth Witrogen McLeod, *The Second Time Around*, SAN FRANCISCO EXAMINER, Aug. 12, 1997, at C1.

21 McLeod, *supra* note ____, at C1.

22 U.S. BUREAU OF THE CENSUS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994 (1994).

23 Id.

24 Charlisse Nelson, *The New Nuclear Family: Grandparenting in the Nineties*, BLACK CHILD, July 31, 1997, at 9.

25 Carol Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (1983-84).

26 Appell, *supra* note ____, at 586.

27 Comments of Mark Testa, University of Illinois Children and Family Research Center, [Conference], Chicago, IL., November 14, 2000.

While state child welfare agencies used to consider private kinship care neglectful, they increasingly turn to relatives to place neglected and abused children. Private kinship care is arranged by families without child welfare agency involvement; kinship foster care is provided to children who are in the legal custody of the state.²⁸ Between 1986 and 1990, the proportion of foster children living with relatives grew from 18 percent to 31 percent in 25 states.²⁹ In Illinois, for example, relative placements increased 232 percent in a five-year period.³⁰ By 1997, there are at least as many relative care givers as traditional foster parents in California, Illinois, and New York.³¹ An exploding foster care population combined with a shortage of licensed non- relative foster homes made relatives an attractive placement option.³² The passage of federal law that encouraged family preservation and court decisions guaranteeing relatives the opportunity to serve as foster care providers also facilitated this development.³³ In the landmark decision *Miller v. Youakim*, for example, the United States Supreme Court held that otherwise eligible relatives could not be denied foster parent certification and the same financial support as non-kin providers.³⁴

Just as private kinship care has been especially prevalent among Black families, most children placed in kinship foster care are Black.³⁵ This is both because of the over-representation of Black children in the foster care population and because agencies are more

²⁸ MARIANNE TAKAS, AMERICAN BAR ASS'N CTR. FOR CHILDREN AND THE LAW, KINSHIP CARE AND FAMILY PRESERVATION: A GUIDE FOR STATES IN LEGAL AND POLICY DEVELOPMENT 3 (1993).

²⁹ Brown & Bailey-Etta, "An Out-of-Home Care System in Crisis," p. 76.

³⁰ James Gleeson, *Kinship Care as a Child Welfare Service: The Policy Debate in an Era of Welfare Reform*, 75 CHILD WELFARE 419, 429 (1996).

³¹ James P. Gleeson et al., *Understanding the Complexity of Practice in Kinship Foster Care*, 76 CHILD WELFARE 801, 802 (1997).

³² Geen, supra note ____, at 21; Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN 72, 74 (1998).

³³ Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1454 (1994); Geen, supra note ____, at 21-22; Gleeson, supra note ____, at 425.

³⁴ 440 U.S. 125 (1979).

³⁵ Scannapieco & Jackson, supra note ____, at ____.

likely to turn to relatives in the case of Black children than other children. A study of foster care in suburban Baltimore County, Maryland, for example, found that 49 percent of relative care givers were African American while only 25 percent of non-relative foster parents were.³⁶ Similarly, a California study reported that 43 percent of kin and 22 percent of non-kin foster parents were African American, while 34 percent of kin and 63 percent of non-kin foster parents were white.³⁷ Kinship care is the main type of out-of-home placement for Black children in New York City, Chicago, and Philadelphia.³⁸ In fact, almost all -- 94 percent -- of relative care givers in Chicago are Black.³⁹

Compared to non-kin foster care, kinship foster care has many advantages for children. It usually preserves family, community, and cultural ties. For most people, staying in the extended family is in and of itself a benefit for children. Children are more likely to maintain contact with their parents and to stay with siblings if they are living with relatives than if they are placed in non-relative foster care.⁴⁰ It is likely that children are already familiar with the kin care giver, so the placement avoids that trauma of moving in with strangers.⁴¹ Kinship foster care usually allows children to stay in their communities and to continue the cultural traditions their parents observe. Kinship foster care is more stable: children living with relatives are less likely to be

³⁶ Maria Scannapieco et al., *Kinship Care and Foster Care: A Comparison of Characteristics and Outcomes*, 78 FAMILIES IN SOCIETY 480 (1997).

³⁷ Berrick, supra note ___, at 78, Table 2.

³⁸ Scannapieco & Jackson, supra note ___, at ___; Sarah Karp, *DCFS Policy Spells Pressure for Black Families*, CHICAGO REPORTER (Oct. 1999), at 1, 10.

³⁹ Mark Testa et al., *Permanency Planning Options for Children in Formal Kinship Care*, 75 CHILD WELFARE 451 (1996).

⁴⁰ Mark Testa, *Kinship Foster Care in Illinois*, in 2 CHILD WELFARE RESEARCH REVIEW ___, ___ (Richard Barth, Jill D. Berrick, & Neil Gilbert, eds. 1997); Jill D. Berrick, et al, *A Comparison of Kinship Foster Homes and Foster Family Homes: Implications for Kinship Care as Family Preservation*, 16 CHILDREN & YOUTH SERVICES REV. 33 (1994); Marla Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 354 (1993).

⁴¹ James Gleeson & L. Craig, *Kinship Care in Child Welfare: An Analysis of States' Policies* 16 CHILDREN & YOUTH SERVICES REV. 731 (1994); Gayle Hafner, *Protections Extended to Foster Children in Kinship Care*, YOUTH L. NEWS, July-Aug., 1991, at 8, 9.

moved to multiple placements while in substitute care.⁴² There is also evidence that children are better cared for by relatives than by strangers: more children in kinship foster care reported that they felt loved and happy, and fewer are abused while in state custody.⁴³

III. The Financial Structure of Kinship Foster Care

Kinship foster care also provides financial support for relatives' care giving. Public assistance is especially significant because kinship care givers tend to have limited means and have substantially lower incomes than traditional foster parents.⁴⁴ A 1996 study of foster care in a southern county found that almost 60 percent of relative care givers earned less

⁴² Berrick, et al., supra note ____; Mark Courtney & Barbara Needell, *Outcomes of Kinship Care: Lessons from California*, in 2 CHILD WELFARE RESEARCH REVIEW 130 (Richard Barth, Jill D. Berrick, & Neil Gilbert, eds., 1997); Alfreda P. Inglehart, *Kinship Foster Care: Placement, Service, and Outcome Issues*, 16 CHILDREN & YOUTH SERVICES REV. 107 (1994).

⁴³ Susan J. Zuravin, *Child Maltreatment in Family Foster Care: Foster Home Correlates* in 2 CHILD WELFARE RESEARCH REVIEW 189 (Jill D. Berrick, Richard P. Barth, & Neil Gildber, eds., 1997); Berrick, supra note ____, at 80.

⁴⁴ Berrick, supra note ____, at 77, 78, Table 2.

than \$ 10,000 annually while only 10 percent of non-relative foster parents earned so

⁴⁵ The median annual income of kin care givers is only \$22,500 in Chicago⁴⁶ and \$13,000 in Toledo.⁴⁷

Although federal child welfare policy promotes kinship foster care, it gives states wide latitude in creating the system of financial support for kin care givers.⁴⁸ The level of state support for kinship care givers is directly correlated with the level of state intrusion into their lives. The higher the payment, the greater the intensity of state supervision. The two principal sources of public financial assistance for relatives are Temporary Assistance to Needy Families (TANF) and foster care benefits.⁴⁹ All states offer TANF benefits to relatives caring for children as they do other needy families.⁵⁰ Foster care stipends, however, are much larger than TANF benefits and they are multiplied by each child in the home instead of the marginal increase per child under TANF.⁵¹ A relative caring for several children might receive two to four times as much in foster care payments as she would in welfare benefits.⁵² In the early 1990s, Illinois paid foster parents an average of \$350 per child, while AFDC benefits were \$102 for one child and less for each additional child.⁵³ A California foster parent of siblings ages 8 and 16 received a foster care stipend of \$849 per month in 1996, compared to only \$479 in AFDC benefits.⁵⁴

⁴⁵ T. Gebel, *Kinship Care and Non-Relative Family Foster Care: A Comparison of Caregiver Attributes and Attitudes*, 75 CHILD WELFARE 5 (1996).

⁴⁶ Testa, et al., supra note ____.

⁴⁷ B. Davidson, *Service Needs of Relative Caregivers: A Qualitative Analysis*, 78 FAMILIES IN SOCIETY 502 (1997).

⁴⁸ Geen, supra note ____, at 21.

⁴⁹ Laurie Hanson & Irene Opsahl, *Kinship Caregiving: Law and Policy*, 30 CLEARINGHOUSE REVIEW 481, 483 (1996).

⁵⁰ Geen, supra note ____, at 21.

⁵¹ Hanson & Opsahl, supra note ____, at 483.

⁵² Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 915 (1995); Zwas, supra note ____, at 365; Note, *The Policy of Penalty in Kinship Care*, 112 HARVARD L. REV. 1047, 1052 (1999).

⁵³ Gleeson, et al, supra note ____, at 814.

⁵⁴ Berrick, supra note ____, at 75.

This difference in levels of support reflects the government's perverse willingness to give more financial aid to children in state custody than to children in the custody of their parents. Relatives can take advantage of the higher benefit level of foster care only by becoming involved in the child protection system. As Jill Duerr Berrick, director of the Berkeley Center for Social Services Research, observes, "[t]his disparity spawns concerns that the foster care payment system may act as an incentive for a troubled family to seek a formal agency-supervised placement with kin rather than sharing child-rearing informally with the same relatives."⁵⁵ In addition to a stipend, kin foster parents are entitled to Medicaid, clothing allowances, and other assistance to meet the children's needs. Moreover, child welfare agencies make available services that address the parents' problems, such as drug treatment, mental health counseling, and housing assistance, only to families under their supervision.

The amount of kinship foster care payments, in turn, depends on whether or not the kin care giver is licensed by the state child welfare agency. Most states require relatives to meet the same licensing requirements as non-relative foster parents to receive foster care payments.⁵⁶ The licensing process involves another layer of intrusion into relatives' lives. The agency inspects relatives' homes, including sleeping arrangements, the number of bedrooms, and square footage, and investigates relatives' backgrounds to check for compliance with strict licensing requirements.⁵⁷ If relatives are not licensed, they are paid less than licensed foster parents. In some states, unlicensed kin care givers receive only the TANF child-only benefit; in others, they receive a lower foster care payment.⁵⁸ The Illinois Department of Children and Family Services, for example, pays licensed foster parents about \$100 more per month than unlicensed relatives.

Finally, several states have implemented an intermediate arrangement called subsidized guardianship. Guardianship gives legal custody to relative caretakers, thus permitting children to stay with relatives on a long-term basis while avoiding the need to terminate parental rights to

⁵⁵ Berrick, *supra* note ____, at 75-76.

⁵⁶ Geen, *supra* note ____, at 23.

⁵⁷ Note, *The Policy of Penalty in Kinship Care*, *supra* note ____, at 1052.

⁵⁸ Geen, *supra* note ____, at 23; Berrick, *supra* note ____, at 76 & Table 1.

“free” children for adoption.⁵⁹ It addresses the situation of children in kinship foster care who have little chance of either being adopted by the relative or being reunited with their parents. Kin care givers often reject adoption as both unnecessary for and disruptive of family ties. Many have already made a lifetime commitment to the children in their care, while terminating parental rights to permit adoption would create an adversarial relationship with relatives.⁶⁰ Guardians are given a level of state support that reflects the extent of their authority over the children in their care: they typically receive stipends that are less than foster care stipends, but more than TANF benefits.⁶¹

Thus, families involved in kinship care must exchange a degree of autonomy and independence in child rearing that is in proportion to the amount of financial support they receive from the government. The price of the highest amount of aid -- foster care benefits -- is relinquishing custody of children to the state and submitting to foster care regulations and supervision by the child welfare system.

Welfare reform makes foster care even more attractive for relative caretakers, despite the burdens it entails. The federal welfare law’s policies designed to modify the behavior of poor parents exacts a harsh penalty on kin who are forced to rely on TANF benefits to support the children in their care.⁶² Under the PRWORA, relatives can be required to participate in work, community service, and training programs even if it is unlikely they will ever return to the job market because they are too old or too sick.⁶³ Those who are not working at the end of the two-year time limit could lose TANF cash assistance and related benefits. The federal law also imposes a 5-year lifetime cap on receiving TANF benefits.⁶⁴ Relatives thus run the risk of

⁵⁹ Gleeson, et al, supra note ____, at 814; Berrick, supra note ____, at 83.

⁶⁰ Berrick, supra note ____, at 82.

⁶¹ Note, *The Policy of Penalty in Kinship Care*, supra note ____, at 1063.

⁶² Note, *The Policy of Penalty in Kinship Care*, supra note ____, at 1060.

⁶³ Faith Mullen, *Welcome to Procrustes’ House: Welfare Reform and Grandparents Raising Grandchildren*, 30 CLEARINGHOUSE REVIEW 511, 516 (1996); Note, *The Policy of Penalty in Kinship Care*, supra note ____, at 1059.

⁶⁴ PRWORA, Pub. L. No. 104-193, 110 Stat. 2105, 2137.

depleting their lifetime TANF allotment to receive aid for children in their care.⁶⁵ The federal law permits states to offer exemptions from work requirements and time limits, but leaves their determination to state discretion.⁶⁶ “For example,” writes Faith Mullen, “absent a hardship waiver, a 64-year-old grandmother who assumed care of her three-year-old grandson because of his mother’s death will receive aid at most until the child reaches age eight. At that time, the grandmother will be in the impossible position of finding work, living on an inadequate income, or giving up custody of the child.”⁶⁷

IV. Relinquishing Custody of Children

Making kinship care part of the child welfare system has a dramatic impact on the relationships of family members and on their relationship to the state. Foster care assistance is only available to state wards. The family must therefore hand over legal custody of the children to the state child welfare agency. In addition, relatives must be approved by the child welfare agency to care for children in its custody. The kin network is transformed from a “natural family” to a “foster family.” In *Smith v. Organization of Foster Families for Equality and Reform*,⁶⁸ the United States Supreme Court upheld the limited rights of foster parents on the grounds that a foster family has “its source in state law and contractual arrangement.”⁶⁹ In the case of kinship care, the extended family exchanges its autonomy over child raising for financial support and services needed to raise its children.

A. “Voluntary” Placements

Relatives may become foster parents when the family seeks assistance from child welfare agencies or when agencies seek relatives to provide foster care for children removed from their parents. Increasingly, parents “voluntarily” place their children in foster care to gain access to financial assistance and services needed for care giving. The number of children in

⁶⁵ Note, *The Policy of Penalty in Kinship Care*, supra note ____, at 1059.

⁶⁶ Note, *The Policy of Penalty in Kinship Care*, supra note ____, at 1060.

⁶⁷ Mullen, supra note ____, at 517.

⁶⁸ 431 U.S. 816 (1977).

⁶⁹ Id. at 845.

private kinship care has decreased since 1994, while the number in kinship foster care has increased,⁷⁰ suggesting that many extended families are turning to the child welfare system for support. Voluntary placement agreements may entail a temporary stay away from home or the transfer of legal custody to the state. In New York City, the share of voluntary placements among all children in foster care has increased in recent years. The number of parents giving up their children rose 41 per cent in 1997.⁷¹ One in 10 children admitted to the city's foster care system in 1999 was voluntarily placed.⁷²

When a parent turns a child over to foster care it is rarely truly voluntary. In some cases, desperate parents reluctantly approach the child welfare agency only when they can find no other source of government support. The parents may be too ill or stressed out to care for their children or their children may need services they cannot afford. The AIDS epidemic has caused an explosion of poor minority mothers who need state assistance for both reasons. A few states have passed statutes that allow disabled parents to share custody of their children with a "standby guardian" who helps with child raising without usurping all parental authority. Unfortunately, most families coping with AIDS or other serious illness do not have this option. The West Virginia Supreme Court of Appeals reversed a judge's decision to sever the bonds between a mother, Ada R., who was dying from AIDS and her HIV-positive son, Micah.⁷³ Leaving Micah in foster care, the court lamented the mother's "heartbreaking struggle to deal with her disease, while, at the same time, not turning her back on her child."⁷⁴ "By doing what she felt was best and voluntarily placing Micah with the Department," the court said, "Ada R. has ended up not only fighting to remain alive, but also fighting to remain a parent."⁷⁵

70 Geen, *supra* note ____, at 21.

71 David L. Lewis, "Tidal Wave of Needy Teens," *New York Daily News*, July 19, 1998, p. 18.

72 Somini Sengupta, "Many Frustrated Parents Turn to Foster Care as Their Only Option," *New York Times*, Sept. 1, 2000, p. ____.

73 *In the Interest of Micah Alyn R.*, 202 W. Va. 400, 504 S.E.2d 635 (1998).

74 202 W. Va., at ____; 504 S.E.2d, at ____.

75 *Id.*

The shortage of mental health care for children is especially acute. Limits in private health care plans and lack of access to public services make it tough for even middle-class parents to get treatment for their children⁷⁶. Although Medicaid-eligible children are entitled to mental health care, this provision is not consistently enforced. In some states, residential treatment centers refuse to accept children on Medicaid unless they are wards of the state. Many state and local officials mistakenly believe that federal reimbursement for out-of-home care is available only if the state has legal custody of children. For many children, then, the only way to qualify for publicly funded mental health services is to enter the child welfare system

A report by the Bazelon Center for Mental Health Law in Washington, D.C., describes the dilemma faced by the parents of a girl with a serious emotional disturbance and developmental disabilities. The only treatment center in their area refused to accept Medicaid. The parents could not afford to pay its private fee of \$99.25 per day. The child welfare agency told the mother that she should file a “willful neglect and abandonment” petition in juvenile court so the state could place her daughter in a mental health facility.⁷⁷ According to the Bazelon Center, in half of the states almost one quarter of families seeking mental health care for a child must choose between treatment and retaining legal custody of the child.⁷⁸ Only 11 states prohibit the child welfare agency from requiring parents to relinquish custody to access mental health services.⁷⁹

Other parents agree to short-term placement or surrender custody as a way of avoiding abuse or neglect proceedings. Some parents believe it is better to voluntarily place their child in

⁷⁶ MARY GILIBERTI & RHODA SCHULZINGER, BAZELON CENTER FOR MENTAL HEALTH LAW, *RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN’S MENTAL HEALTH NEEDS* (2000).

⁷⁷ *Id.*, at 8.

⁷⁸ *Id.*, at 1.

⁷⁹ See KELLY BLANKENSHIP, MICHAEL PULLMAN & BARBARA J. FRIESEN, RESEARCH AND TRAINING CENTER ON FAMILY SUPPORT AND CHILDREN’S MENTAL HEALTH, *KEEPING FAMILIES TOGETHER: IMPLEMENTATION OF AN OREGON LAW ABOLISHING THE CUSTODY RELINQUISHMENT REQUIREMENT* (1999).

foster care for a brief period than to risk child protective authorities taking the child for a long time. Giving up custody to the state has become the price of public support for poor and low-income children. The state then provides to foster parents the very services it denied to the parents. Respite care, for example, is often subsidized by the state for foster parents -- but not parents -- of children with serious mental health problems.⁸⁰

Parents who turn to child protective services for help quickly find themselves in an adversarial relationship. Once child welfare agencies have custody of children they take control of child rearing and place conditions on parents' involvement with their children. Parents have no say over where their children are placed or important decisions about their children's health, education, and religious and cultural upbringing or even how often they can see them. The child welfare agency may require parents to complete training courses and therapy sessions as a condition of reunification. Most devastating, it may refuse to return children when parents are ready to take them back.

B. The Impact of State Supervision

As noted above, transferring custody to the state means losing control over important child rearing decisions. Kinship foster care also requires waiver of protections against state intrusion in family life. Thus, although the children are cared for by kin, it is the state that has authority over them. The parents and kin care givers must submit to surveillance by caseworkers and requirements that the agency prescribes. Kin foster parents must comply with agency rules specifying the type of home and care they provide, and they must allow periodic visits by caseworkers to check compliance. They must give the agency access to personal information and may have to undergo psychological evaluations. The child may be represented by a guardian ad litem, adding another outsider who has a say in family affairs.⁸¹ The family also runs the risk that the agency will move the children to another foster home if the relatives fail to comply with agency demands.

80 Giliberti & Schulzinger, supra note ____, at 14.

81 Hanson and Opsahl, supra note ____, at 498.

The transformation of kinship care from a private to a state-run arrangement suppresses the historical strengths of this family form. Social scientists have remarked at the success of Black kin networks in meeting the challenges of raising children under conditions of poverty and racial discrimination.⁸² Some have called for policymakers to “affirm a black family kinship system that was historically strong, intact, resilient and adaptive.”⁸³ Yet research shows that many caseworkers devalue the important role that kin traditionally have had in helping to raise children.⁸⁴ A study of caseworkers serving children in kinship care in Illinois, for example, revealed that caseworkers failed to involve kin care givers or the rest of the extended family in making long-term plans for the children.⁸⁵ According to the study’s authors, “[p]ermanency plans appear to be made primarily by child welfare caseworkers, their supervisors, and other service providers rather than by the person who will have to live with the consequences of these decisions.”⁸⁶ They attributed the lack of involvement by kin both to the bureaucratic nature of child welfare practice and to caseworkers’ lack of understanding of kin participation in child rearing as a cultural strength of African American families.⁸⁷ To a large extent, the suppression of kin involvement in decision making is an inherent feature of foster care as it requires relinquishing legal custody of children.

C. Inferior Services

82 See supra notes ___ - ___.

83 Scannapieco & Jackson, supra note ___, at ___, quoting S.M.L. LOGAN, ET AL, *SOCIAL WORK PRACTICE WITH BLACK FAMILIES* (1990). See also Ramona Denby & Nolan Rindfleisch, *African Americans’ Foster Parenting Experiences: Research Findings and Implications for Policy and Practice*, 18 *CHILDREN & YOUTH SERVICES REV.* 523, 545 (1996) (documenting the importance of building on African American foster parents’ strengths, including family orientation, religious obligation, community responsibility, and interconnection of family, religion, and community).

84 See Gleeson, et al, supra note ___, at 819; Denby & Rindfleisch, supra note ___, at 545.

85 Gleeson, et al, supra note ___, at 818-19.

86 Gleeson, et al, supra note ___, at 818.

87 Gleeson, et al, supra note ___, at 818-19.

The child welfare system also devalues relative care givers in its distribution of services. Agencies tend to devote fewer resources to reunification of children in kinship foster care with their parents.⁸⁸ Caseworkers have less contact with relatives and the children in their care and are less likely to offer them services.⁸⁹ In the Baltimore study, for example, twice as many foster care families received two or more services as families involved in kinship care.⁹⁰ A lawsuit filed in 1986 by the Legal Aid Society on behalf of children in kinship foster care in New York City charged that the child welfare agency delayed paying relatives their stipends and issuing children their Medicaid cards and failed to provide families with necessities such as beds, clothes, and school supplies.⁹¹

Of particular concern is the inferior health care received by children in kinship foster care. According to a 1995 federal report, children placed with relatives were less likely to receive health-related services than children in traditional foster care; they were 3 times as likely to get no routine health care at all.⁹² Only 13 percent of premature, low birth weight infants in kinship care followed in a study received appropriate health care.⁹³ Most of the children did not receive adequate well-baby visits or immunizations, and many used emergency rooms for primary care.

It seems that some agencies view placing children with relatives as a way of cutting costs. Perhaps they believe that children need fewer services if they are being cared for by a grandmother or an aunt. But many kinship care givers come from poor or low-income families

⁸⁸ Kurtz, *supra* note ____, at 1472, citing TASK FORCE ON PERMANENCY PLANNING FOR FOSTER CHILDREN, KINSHIP FOSTER CARE: THE DOUBLE EDGED DILEMMA (1990).

⁸⁹ Gabel, *supra* note ____; Berrick, et al., *supra* note ____; Gleeson, et al, *supra* note ____, at 803.

⁹⁰ Scannapieco, *supra* note ____.

⁹¹ Zwas, *supra* note ____, at 355-56.

⁹² Foster Care: Health Needs of Many Young Children Are Unknown and Unmet, Letter Report Number HEHS-95-114, Washington, D.C.: Government Accounting Office, March 26, 1995.

⁹³ S. Gennaro, *Vulnerable Infants: Kinship Care and Health*, 24 PEDIATRIC NURSING 119 (1998).

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like the grandchildren, nieces, and nephews placed in their homes. They are more likely to be single females and to have less income, more health problems, and more children to take care of than non-relative foster parents.⁹⁴ A study of foster parents in Ohio found that although African American foster parents reported more satisfaction with fostering than whites, they experienced more economic barriers to providing foster care.⁹⁵ They are therefore in *greater* need of state assistance. Because Black children are the most likely to be placed with relatives, these policies systematically provide inferior financial support and services for Black children in state custody.⁹⁶

V. Disrupting Family Ties

Kinship foster care not only gives insufficient support to families, but it often affirmatively harms them. One of the most perplexing discoveries from recent empirical research is that children placed with relatives remain in state custody longer.⁹⁷ According to University of Chicago social work professor James P. Gleeson, “[s]tudies in several states have demonstrated lower return home and lower adoption rates for children in kinship foster care than for those in nonrelative care.”⁹⁸ Although researchers have no definitive explanation, the increased time spent in foster care may result from the inadequacy of reunification and other services provided to families involved in kinship care. The incentives for families themselves to prefer children to remain longer with kin foster care givers probably also plays a role in delaying reunification. Parents whose children are living with relatives rather than strangers may be less anxious to regain custody because the entire family is comfortable with the living arrangement and needs the higher level of financial support foster care affords.⁹⁹ Total family income may

⁹⁴ Gleeson, supra note ____, at 442; Gleeson, et al, supra note ____, at 803; Berrick et al, supra note ____.

⁹⁵ Denby & Rindfleisch, supra note ____, at 544, 547.

⁹⁶ Gleeson, supra note ____, at 442.

⁹⁷ See, e.g., Berrick et al., supra note ____; Scannapieco et al., supra note ____; Courtney & Needell, supra note ____; Testa, *Kinship Foster Care in Illinois*, supra note ____.

⁹⁸ Gleeson, supra note ____, at 430.

⁹⁹ See supra note ____ & accompanying text.

drop precipitously if children leave grandmother's care to return home. In California, children in kinship homes receiving foster care benefits were half as likely to be reunited with their parents after 4 years as were children in kinship homes receiving lower welfare benefits.¹⁰⁰ This financial disparity appears to have the greatest impact on Black families: "African American children in kinship homes supported by the foster care subsidy remained in care approximately twice as long as all other children."¹⁰¹ All of these reasons suggest that kinship foster care imposes powerful incentives on poor Black families and caseworkers to keep children in state custody. Even with inadequate services and loss of family autonomy, kinship foster care offers the only avenue for needed public support for many children.

Kinship care, which historically kept Black families together, sometimes disrupts family relationships when incorporated in the public child welfare system. Madeleine Kurtz, a clinical professor at New York University School of Law, argues that because traditional foster care rules are based on the nuclear family model they "frustrate the extent to which children might be maintained by extended family."¹⁰² Kurtz examines two cases from the New York child welfare system to show that kinship foster care encourages the unnecessary severance of family ties. In one case, Marcus, the father of a girl living in kinship foster care with her great grandmother, did not realize his daughter was technically in foster care.¹⁰³ Marcus visited and maintained a relationship with his daughter for several years without arranging the contacts through the agency.¹⁰⁴ The agency sent letters to Marcus in care of his mother, but failed to make meaningful efforts to strengthen his relationship with his daughter. Marcus was taken by surprise when the agency petitioned to terminate his parental rights on grounds of abandonment. He thought that, because his daughter was living with family, he had satisfied his parental obligation to his daughter by keeping in touch with her. The court, however, treated the case as

100 Berrick, et al., supra note ____, at ____.

101 Berrick, supra note ____, at 82.

102 Kurtz, supra note ____, at 1457. For a similar argument that the foster care system was not designed to meet the needs of kinship care givers, see Mandelbaum, supra note ____.

103 Kurtz, supra note ____, at 1476.

104 Id. at 1476-78.

an ordinary non-kin foster care arrangement: it “held Marcus to the standard of behavior expected and required of a parent with a child in a traditional foster care setting, where a parent’s failure to actively pursue custody is a critical failure indicative of inability or disinterest.”¹⁰⁵ The court suspended judgment, imposing a number of conditions on the family as well as continued court supervision. If this family had been able to maintain a private kinship care arrangement, Marcus’s legal status as father would not have been jeopardized. Instead, by involving the state in their family life, “[t]he legal and permanent dissolution of this family was and continues to be a very real possibility.”¹⁰⁶

Marcus’s experience of exclusion is typical of Black fathers with children in kinship foster care.¹⁰⁷ A secondary analysis of the study of Illinois caseworkers discussed above focused on casework with African American fathers.¹⁰⁸ Few of the fathers participated in family assessments, case planning, or service delivery.¹⁰⁹ Most of the fathers had not participated in a single case planning activity and only 5 percent of the fathers were receiving any services to assist them in playing a greater role in their children’s lives.¹¹⁰ Caseworkers simply were not interested in what fathers could offer. In most cases, caseworkers had incomplete information that would be essential in assessing fathers’ care giving ability and they reported no communication with fathers or with their supervisors about the fathers during the previous 6 months.¹¹¹ “The extensive absence of and silence about fathers in these cases,” the study’s author concludes, “suggest systemic deterrence to paternal involvement.”¹¹²

105 Id., at 1482.

106 Id., at 1484.

107 See John M. O’Donnell, *Involvement of African American Fathers in Kinship Care Services*, 44 SOCIAL WORK 428 (1999).

108 O’Donnell, supra note ____.

109 O’Donnell, supra note ____, at ____.

110 O’Donnell, supra note ____, at ____.

111 O’Donnell, supra note ____, at ____.

112 O’Donnell, supra note ____, at ____.

It appears that the exclusion of fathers from kinship foster care results from “mutual avoidance between caseworkers and fathers.”¹¹³ On the one hand, Black fathers tend to view child welfare agencies as demeaning and coercive institutions that have targeted them for child support enforcement without appreciating the obstacles they face in providing financially for their children. Dealing with a caseworker only intensifies the emotional stress many poor and unemployed Black fathers experience about their inability to live up to the middle-class breadwinner ideal.¹¹⁴ On the other hand, caseworkers view Black fathers as a particularly hostile and perplexing clientele whom it is easiest to ignore.¹¹⁵ While placing kinship care in the child welfare system diminishes the autonomy of Black mothers, aunts, and grandmothers, it erases the already limited role of Black fathers.

The second case Kurtz discusses involves a woman, Nora, who became the kinship foster care giver for her infant granddaughter, Evelyn, who was born exposed to crack cocaine.¹¹⁶ When Evelyn was three-years-old, the agency obtained an order terminating Nora’s daughter’s parental rights and Evelyn became a ward of the state. Ending the mother’s legal status meant that Nora was only a foster parent -- an employee of the state hired to take care of Evelyn; she was no longer Evelyn’s legal grandmother.¹¹⁷ The family lost all of the protections against state disruption that kinship bonds ordinarily afford. So when the agency determined that Nora had a drinking problem and was not an appropriate adoptive parent for Evelyn, it had virtually complete discretion to move Evelyn to a more suitable family.¹¹⁸ As Kurtz puts it, because Nora had broken the agency’s rules, the agency was permitted to “fire a bad foster parent and find a

113 O’Donnell, supra note ____, at ____.

114 See generally Dorothy Roberts, *The Absent Black Father* in LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA 145 (Cynthia R. Daniels, ed. 1998) (discussing the role of Black fathers in the promotion of marital fatherhood as the solution to meeting children’s needs).

115 O’Donnell, supra note ____, at ____.

116 Kurtz, supra note ____, at 1499-1500.

117 Id. at 1502.

118 Id. at 1503.

better home for its foster child.”¹¹⁹ No longer a grandmother or a foster parent, Nora -- and the rest of Evelyn’s family -- lacked standing to challenge the agency’s plan for Evelyn. As in the case of Marcus, transforming a private kinship care arrangement into a formal one put the family at a disadvantage in its relationship to the state. If Nora had never become a foster parent, her alleged drinking problem could not so easily have justified the destruction of her bonds with her granddaughter.

Recent changes in federal child welfare policy may further threaten the integrity of families in kinship foster care. The Adoption and Safe Families Act¹²⁰ passed in 1997, encourages states to increase adoptions of children in foster care by mandating swifter timetables for terminating parental rights,¹²¹ providing technical assistance to states to facilitate adoptions,¹²² and awarding financial bonuses to states that succeed in placing more children in adoptive homes.¹²³ As suggested above, the traditional permanency goals of reunification or adoption often do not fit kinship care giving.¹²⁴ It is often in the best interests of children to remain on a long-term basis in stable kin homes while maintaining legal ties to their parents. Recognizing that typical permanency goals may not be applicable, ASFA exempts kinship foster care from its deadlines for petitioning for termination of parental rights.¹²⁵ But ASFA's incentives for adoption may nevertheless encourage agencies to prefer adoptive parents outside the family to relative guardians and foster care givers who do not wish to adopt. Caseworkers may be pressured to disband kin networks, terminating parental rights and moving children from loving relatives' homes, to boost the adoption numbers.

Harvard law professor Elizabeth Bartholet advocates precisely such a preference for adoption over kinship foster care in her recent book, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*.¹²⁶ Bartholet characterizes kinship foster care as a devious way of avoiding federal prohibitions against race-matching in placement decision making. "Private foundations and nonprofit child welfare groups have joined forces with public agencies to promote kinship care," she claims "in part to help ensure that children in need of

120 See 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.).

121 See 42 U.S.C. 675(5)(E) (Supp. III 1997).

122 See 42 U.S.C. 673b(i) (Supp. III 1997).

123 See 42 U.S.C. 673b(d)(1) (Supp. III 1997).

124 See supra notes ___ - ___ and accompanying text [discussion of subsidized guardianship].

125 See 42 U.S.C. 675(5)(E) (Supp. III 1997).

126 See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

homes remain within their racial group.”¹²⁷ Bartholet also doubts the qualifications of relative caretakers. She subscribes to the theory that abuse and neglect is both transmitted inter-generationally within families and the product of deprived and dangerous communities. Relatives of maltreated children are suspect both because they are related to the abusive parents and because they come from the same community that generated the abuse. “Often the blood kin are plagued by the same problems and victims of the same circumstances as the child’s parents,” Bartholet writes. “The extended kinship group has to be seen as a high risk group for parenting purposes.”¹²⁸ Bartholet advocates adoption by people in more privileged communities as a way to avoid foster care placement with incapable relatives.

The Flawed Philosophy of Child Welfare

The state justifies its intrusion into families that receive public support through the child welfare system on the grounds that it is necessary to protect children. Parents referred to child protective services have maltreated their children and must be rehabilitated to ensure it is safe to return their children to them. Foster parents must be carefully regulated to guarantee that they are using subsidies for the benefit of the state wards in their care. Professor Bartholet, for example, begrudges relatives the stipends they receive to care for foster children, especially if, in the case of subsidized guardianship, they are not “subject to the state supervision that goes with foster parenting.”¹²⁹ She questions relatives’ motives: “For extended family members at the poverty level, as many relatives of victims of maltreatment will be, these stipends may make it worthwhile to agree to foster whether or not they have any capacity or motivation to parent.”¹³⁰ The transformation of kinship care, however, shows that many families must relinquish custody of children to the state and submit to government supervision because of their poverty more than their maltreatment. The price the child welfare system exacts for its support stems from its underlying philosophy. The child welfare system is built upon the presumption that children’s

127 Id., at. 26.

128 Bartholet, supra note ____, at ____ & 91.

129 Bartholet, supra note ____, at. 28.

130 Bartholet, supra note ____, at 92.

basic needs for sustenance and development will and can be met solely by parents.¹³¹ The state intervenes to provide special institutionalized services -- primarily placing children in foster care — only when parents fail to fulfill their child-rearing obligations. The child protection approach is inextricably tied to our society's refusal to see a collective responsibility for children's welfare. It is a society willing to pay \$1 billion a year on maintaining poor children as state wards outside their homes, but only a fraction of that on child welfare services to intact families.

This approach to child welfare is defective in three related ways. First, it places all responsibility for taking care of children on their parents, without taking into account the economic, political, and social constraints that prevent many parents from doing so. Most single mothers, for example, face numerous barriers to providing for their children, including a segregated job market, inadequate wages, and a dearth of affordable child care.¹³² The child welfare system hides the systemic reasons for families' hardships by laying the blame on individual parents' failings. "The underlying philosophy of the present child welfare system is that *all* families *should* be able to function adequately without the assistance of society," explain Andrew Billingsley and Jeanne Giovannoni, "and that failure to perform the parental role without such assistance is indicative of individual pathology."¹³³

A second defect is that child protection is activated only when families are already in crisis. The role of government is limited to rescuing children who have been mistreated by deficient parents, rather than ensuring the health and welfare of all families. Duncan Lindsey calls this the "residual approach" to child welfare because state intervention is treated as a last resort to be invoked only after the family has exhausted all resources at its disposal. "The child welfare agency becomes the site of triage where casualties are sorted and only the most seriously

131 Billingsley & Giovannoni, *supra* note ____, at 4.

132 Fineman, *supra* note ____, at ____; Mink, *Welfare's End*, *supra* note ____, at ____.

133 Billingsley & Giovannoni, *supra* note ____, at viii.

wounded receive attention,” Lindsey writes. “But because the damage to children is so great by the time they enter the system, the number who survive and benefit is minimal.”¹³⁴

Under this approach, caseworkers perceive families’ problems as those amenable to social work intervention; they have at their disposal only limited tools to treat the immediate crisis. Caseworkers are discouraged from dealing with the systemic problems many must realize are the causes of child neglect. Ann Hartman, a University of Michigan professor of social work, honestly confesses caseworkers’ reluctance to confront systemic inequities: “The minute we turn around to attempt to address the system that is victimizing people, rather than making the victimization palatable, which is what our profession has done, we will have our heads in a noose.”¹³⁵ It is inevitable that agencies’ solutions for family problems will be inadequate, if not damaging to families.

Finally, because the system perceives the resulting harm to children as parental rather than societal failures, state intervention to protect children is punitive in nature. The state’s solutions to children’s deprivation involve intrusive meddling by social workers, behavioral requirements, and temporary or permanent removal of children from their homes. Child protection proceedings are more akin to criminal trials than most civil adjudications because they pit individuals against the state and issue moral condemnation of parents.¹³⁶

The child welfare system has become less service-oriented in recent decades, focusing more on placing children in foster care than on providing families with needed support. In the last 30 years, the number of children receiving child welfare services has dropped dramatically while the foster care population has skyrocketed. Between 1977 and 1994, there was a 60 percent

¹³⁴ Lindsey, *supra* note ____, at 4-5; see also Billingsley & Giovannoni, *supra* note ____, at 5.

¹³⁵ Carol B. Stack, *Social Policy and Practice* in EMPOWERING THE BLACK FAMILY 21, 26 (Sylvia Sims Gray, Ann Hartman, & Ellen S. Saalberg, eds., 1985).

¹³⁶ The United State Supreme Court recognized similarities between proceedings to terminate parental rights and criminal trials. See *Lassiter v Dep’t of Social Services*, 452 U.S. 18 (1981) (holding that parents have a due process right to counsel in complex proceedings to terminate parental rights); *Santosky v Kramer*, 455 U.S. 745 (1982) (holding that termination of parental rights must be justified by clear and convincing evidence).

decline in the number of children receiving services in their homes.¹³⁷ These seemingly contradictory observations reflect the transformation of the child welfare system from a social service system that tried (albeit inadequately) to help needy families to a child protection system that investigates allegations of abuse and neglect.¹³⁸ Black families, who dominate foster care caseloads, are the main casualties of this shift away from service provision toward coercive state intervention, which includes the requirement to relinquish custody of children as a condition of financial assistance.

Conclusion

Kinship foster care, promoted as a way of keeping Black families together, exacts a high price for state assistance that may include tearing families apart. The child welfare system provides foster care only to state wards and higher benefits to foster parents, so families involved in kinship foster care must relinquish custody of children and submit to government supervision to receive needed support. The transformation of kinship care from a private family arrangement to a type of public foster care illustrates a deeper flaw in the philosophy underlying the child welfare system -- the assumption that parents are solely responsible for the care of children and that their inability to provide for them warrants coercive state intervention. The onerous price the child welfare system demands for needed benefits and services provides further proof of the need for more generous state support of care giving.

¹³⁷ U.S. Department of Health and Human Services, Children's Bureau, National Study of Protective, Preventive and Reunification Services Delivered to Children and Their Families (1997).

¹³⁸ See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS (1984).