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# A Call to Action for Parents' Lawyers in the Family Regulation System: Bearing Witness as Praxis and Practice in the Face of Structural Injustice

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# A CALL TO ACTION FOR PARENTS' LAWYERS IN THE FAMILY REGULATION SYSTEM: BEARING WITNESS AS PRAXIS AND PRACTICE IN THE FACE OF STRUCTURAL INJUSTICE

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*In this Essay, a public defender specializing in parent defense argues that the family regulation system is fundamentally unfair to parents, and that this unfairness is perpetuated by closed courtrooms and a lack of public understanding. He calls on lawyers who represent parents in these proceedings to make the practice of public storytelling integral to their work, by reporting the injustices that happen in family regulation courts to a broader audience, and helping clients tell their own stories publicly when they want to. He argues that only when the workings of this system are broadly exposed can policy change and accountability occur.*

## INTRODUCTION

Attorneys who represent parents in the family regulation system—what has traditionally been called "child welfare" or "child protection"—quickly realize that just being a good a lawyer is not nearly enough. All of our eloquence and strategy and preparation are little match for a system that is deeply racist and classist,[1] and that operates largely outside of meaningful scrutiny. This Essay

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[1] For a deeper analysis of the racism that is baked into the system, Dorothy Roberts's SHATTERED BONDS: THE COLOR OF CHILD WELFARE is an excellent starting point. For an overview of the racist and classist history of the modern family regulation system, Mical Raz's ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY is essential reading.

proposes that parents' lawyers reconceive our role with an eye toward bringing about structural change, not just through the glacial movement of sporadic appellate victories or infrequent and often ill-informed legislative interventions, but through a thoughtful, concerted effort to expose the system and its abuses to the larger public.

## I. LAWYERS' OBLIGATION TO UNDERMINE THE FAMILY REGULATION SYSTEM

I write this Essay not to detail the cruel, frequently racist effects of the family regulation system. Scholars too numerous to mention have done and continue to do that work better than I can. I am not a scholar, but a practitioner. For over a decade, I have represented indigent parents when the state tries to interfere with their ability to raise their children and I train other lawyers to do the same. In that capacity, I write to urge a change in the contours of what we think of as zealous representation: it is simply not enough for parents' lawyers to work within the confines of this system and behind the doors of its closed courtrooms, deflecting its terrible impact one family at a time. We must treat speaking out publicly and strategically against the system as a fundamental part of our practice.

The family regulation system intrudes on the daily lives and liberties of marginalized populations in the United States on a scale similar to the criminal punishment system. One in three children in the U.S. will be the subject of a child protection investigation before turning eighteen.[2] Like the criminal punishment system, the family regulation system is uneven in its impacts: Black families are nearly twice as likely as white families to have allegations of abuse or neglect substantiated by a child welfare agency;[3] Black children are

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[2] *See* Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 253 (2020).

[3] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD MALTREATMENT 2021, 111 (2023), *available at* https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2021.pdf (finding that of the [Black] children screened-in-referrals, 19.5% received a substantiated

more than twice as likely to be removed from the home as white children;[4] native families are also disproportionately impacted.[5] Most of all, neglect findings are strongly correlated with poverty.[6] In short, the system is a pervasive intrusion on the lives of an economically and racially marginalized minority of people. Perhaps unsurprisingly, this system does not present a lot of good and just options for the parents and children it ensnares.

I have been representing parents in this system for over a decade. When I train new lawyers for this work, I try to take a moment to explain to them a fundamental truth about the practice area: none of this is set up for parents to win. It is not even set up to be fair. Child protection trials are meant to provide *just enough* due process to legitimize a system that efficiently ratifies the decisions of the child protection agency. These are not neutral proceedings of unknown outcome. As trials go, they are a scam. As a lawyer representing parents, you will be part of the scam.

I tell them this because I need lawyers to know that there is more to this work than being a skilled fixer who snatches the occasional victory from the maw of a cruel system. Certainly, we must be skilled fixers, zealous advocates, and tireless litigators. But if that is all we do, we will be nothing more than collaborators, enabling the system by lending it an undeserved veneer of due process. While our foremost obligation is to our clients, we cannot neglect our duty to undermine the system—even as we help our clients navigate it. The only way we can do that is to bear witness: just as teachers and healthcare workers have a legal duty to report suspected abuse to state agencies,[7] parents' lawyers must take on a moral and strategic duty to report the system's abuses to the public.

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finding and were determined to be maltreatment victims at a rate of 13.0 per 1000 [Black] children" compared to the rate of 7.1 per 1000 white children).

[4] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 3 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

[5] *Id.*

[6] Kathryn Maguire-Jack, et al., *Geographic Variation in Racial Disparities in Child Maltreatment: The Influence of County Poverty and Population Density*, 47 CHILD ABUSE & NEGLECT 1, 10–11 (2015).

[7] The Federal Child Abuse Prevention and Treatment Act requires states receiving the federal grant to adopt statutes or rules that require members of

## II. THE UNDERESTIMATED HARMS OF FAMILY DISRUPTION

The family regulation system is uniquely positioned to avoid reform, in part because the people it harms the most are seldom those empowered to make change, nor are they particularly relatable to those in power, and because the proceedings occur almost entirely outside of the public eye. The people who write child welfare laws and oversee their enforcement are not, by and large, the people subjected to them.[8] They are not defining neglect and abuse with an eye toward policing the conduct of their friends or neighbors, but with an abstract conception of the horrors that they imagine a very different sort of people inflict on their children far away—people whose way of life, even without abuse, does not strike them as especially appealing.[9]

That disconnect is the spring from which the disparate harms of family disruption flow. It is easy to understand that beating one's children is bad and should probably be prevented. It is much harder

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certain professions, such as doctors, teachers, sports coaches, and others, to report suspected child mistreatment to the state child welfare agency. 42 U.S.C. § 5106a(b)(2)(B)(i); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 1 (2019), https://www.childwelfare.gov/pubpdfs/manda.pdf.

[8] While Black children are more than twice as likely as white children to be removed from their families, *see* U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES CHILDREN'S BUREAU, *supra* note 3, at 3, there are 17 times as many white as Black lawyers. AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 2020, 34 (2020). State legislators remain far whiter, on average, than the populations they represent. Renuka Rayasam et al., *Why State Legislatures Are Still Very White – and Very Male*, POLITICO (Feb. 23, 2021, 2:13 PM), https://www.politico.com/interactives/2021/state-legislature-demographics/.

[9] *See generally* Gwendoline M. Alphonso, *Political-Economic Roots of Coercion – Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11. COLUM. J. RACE & L. 471, 475–76 (2021) ("[A]t the core of the American neoliberal policy regime, of which child welfare is a critical part, lies an enduring raced family policy logic that has long permeated how Black and white families are disparately viewed (and treated) in public policy. The neoliberal policy logic of family is made up of two racially stratified standards: a punitive Black *economic utility* family standard and a supportive white *domestic affection* family standard, whose policy roots and practices trace back to slavery in the antebellum South.").

for the kinds of people who tend to be lawmakers, agency attorneys, and judges to believe that there is much harm at all in taking a child away from the kind of parents whom they imagine beat their children.

I once argued back and forth with a patrician attorney for the child protection agency because he was pressing for a battery of evaluations, drug tests, and other invasions into my parent client's life that had nothing at all to do with the incident that had gotten the agency involved in the first place. "I see [Department of Children and Families'] contact with a family as more than a chance to correct an identified wrong," he explained. "I see it as a chance for general uplift." *General uplift*, as you can imagine, looks less benign to the families on the receiving end of it than to the state agency. The harms of neglect and abuse are relatively immediate and easy to see: a child is injured, malnourished, or frequently absent from school. The harms of family disruption are every bit as real: children who are removed from their biological families and raised in foster care have inordinately high rates of mental health challenges, incarceration, homelessness, and future involvement with the family regulation system as young parents.[10] However, these harms are harder to see, especially to people who live in fairly different worlds from the families being policed.

Additionally, the structural incentives within the system do not encourage a thoughtful balancing of these harms: major consequences, in the form of added oversight, executive resignation, and additional funding, usually come only after a child has died while in an agency's care or shortly after the agency has declined to take the child into care.[11] Every child who ages out of the foster

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[10] *See* Ramesh Kasarabada, *Fostering the Human Rights of Youth in Foster Care: Defining Reasonable Efforts to Improve Consequences of Aging Out,* 17 CUNY L. REV. 145, 151 (2013).

[11] Vivek Sankaram & Christopher Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L. REV. FORUM 123, 125 (2020); *see, e.g.*, Jen Balduf & Parker Perry, *Ohio Governor Signs Bill On Child Welfare Reforms*, DAYTON DAILY NEWS (Feb. 28, 2022), https://www.daytondailynews.com/crime/dewine-signs-bill-on-child-welfare-reforms-created-after-takoda-collins-death/665MZASE2NCTZEY56JJ27VUABI/; Associated Press, *Mom Convicted in Death That Led to Child Welfare Reforms*, U.S.NEWS (Oct. 18, 2022, 3:08 PM),

system and becomes homeless quickly finds their way into the criminal justice system or has a child of their own who ends up in the foster care system is a failure of the child welfare agency.[12] Those failures take years to come to light and the connection between a needless family disruption when a kid was seven and that same kid's conviction for armed robbery at twenty-two is hard to encapsulate on the evening news. A dead baby, on the other hand, is a failure that everyone can understand—one that demands a very particular sort of reform.[13]

Child protection agencies act much more zealously to prevent a remote risk of short-term catastrophic harm than a nearly certain risk of long-term psychological harm. Judges, for similar reasons, are happy to accept the agency's judgment. When broader reform efforts do arise, they tend to be spurred by salient, tragic cases that move the uninitiated and influential—lawmakers, commentators, the white middle class—to demand *more* family intervention.[14] From the perspective of the architects and implementers of family disruption, and the opinion of the broader public that only becomes aware of the system after a high-profile case makes the news, the harm of erroneously removing a child from a home that you would never want your own child in to begin with is not very compelling. Most people who are not touched by the child protection system believe—and instinctively want to keep believing—that the system is essentially just and that the families it disrupts *need* and *deserve* disruption.

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https://www.usnews.com/news/best-states/maine/articles/2022-10-18/mom-convicted-in-death-that-led-to-child-welfare-reforms.

[12] *See* Elisabeth Balistreri, *What Happens to Kids Who Age Out of Foster Care?*, HOUSE OF PROVIDENCE (Mar. 3, 2023), https://www.thehofp.org/articles/what-happens-to-kids-who-age-out-of-foster-care.

[13] *See generally*, Matthew I. Fraidin, *Stories Told and Untold, Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010).

[14] *See* Sankaram & Church, *supra* note 11, at 125.

## III. A LACK OF PUBLIC ACCESS AND UNDERSTANDING IN TRIALS

In the 1971 case of *McKeiver v. Pennsylvania*, the United States Supreme Court considered whether children accused of crimes and tried in juvenile court had a due process right to a jury trial. In that context, Justice Brennan said this about the importance of the broader public's role in trials:

> The availability of trial by jury allows an accused to protect himself against possible oppression by what is, in essence, an appeal to the community conscience, as embodied in the jury that hears his case. To some extent, however, a similar protection may be obtained when an accused may, in essence, appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation.[15]

In essence, Justice Brennan was recognizing that the presence of members of the public, either in the form of jurors or journalists, brings needed scrutiny to otherwise opaque judicial processes, lessening the likelihood of abuse. In family regulation actions, representatives of the larger community are seldom present. Trials involving the state's removal of children from their parents and the permanent termination of parents' rights are almost always bench trials, occurring with no one in attendance but the parties, their lawyers, and court personnel. Only four states allow parents to elect trial by jury in family regulation cases.[16] Nor is the press or an attentive audience reliably present. About half of the states treat cases involving allegations of abuse or neglect as presumptively

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[15] McKeiver v. Pennsylvania, 403 U.S. 528, 554–55 (1971) (Brennan, J., concurring in part).

[16] Parents may demand jury trials in dependency proceedings in Oklahoma, as a matter of constitutional right, s*ee* A.E. v. State, 743 P.2d 1041 (Okla. 1987), and by statute in Texas (TEX. FAM. CODE ANN. § 105.002), Wyoming (WYO. STAT. ANN. § 14-2-312), and Wisconsin (WIS. STAT. ANN. § 48.422(4)).

closed to the public.[17] In theory, public access should bring transparency and scrutiny and should improve the fairness of juvenile court proceedings.[18] However, even open courtrooms do not guarantee the actual dissemination of information. In an age of dwindling local news coverage,[19] the press is unlikely, if not unable, to devote significant attention to any but the most salacious cases. Barring a deep investigative dive on the family regulation system, journalists are no more likely than any other layperson to understand the nuances of the shortcomings of this area of the law, let alone make its workings accessible to a broad audience. A friend who is an investigative journalist once told me about sitting in on a trial during Connecticut's brief experiment with open juvenile court proceedings:[20] "I was in a termination of parental rights trial and I honestly had very little idea what was going on. As a reporter, I don't think I could have done it justice."

## IV. THE LAWYER'S DUTY TO ADVOCATE FOR SYSTEMIC CHANGE

The work of telling the stories of the family regulation system—of contextualizing its harms and making them compelling to those with the power to make change—*must* fall to parents' lawyers. We are in the room every time. We see the system operate enough times to distinguish the exception from the norm, to give detail *and* context to the abuses we see, and to connect the anecdotal with the structural. We cannot depend on the bench to lift the veil on its own proceedings, let alone the child welfare agencies and their lawyers.

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[17] Kelly Crecco, *Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 FIRST AMEND. L. REV. 490, 511–12 (2013).

[18] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (noting that public access to criminal trials enhances the quality and fairness of what occurs there).

[19] Julie Bosman, *How the Collapse of Local News is Causing a National Crisis*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/us/local-news-disappear-pen-america.html.

[20] For information on Connecticut's pilot open courts program, *see* JUVENILE ACCESS PILOT PROGRAM ADVISORY BOARD, REPORT TO THE CONNECTICUT GENERAL ASSEMBLY (2010), https://www.jud.ct.gov/committees/juv_access/Final_report_123010.pdf.

We are the institutional actors with the best perspective to indict the system and the least incentive to preserve it.

We must see this task not as an optional project, nor as an academic one, but as necessary systemic advocacy for the benefit of our clients. Where a fully informed client allows us to share particular details about their case in a public forum, we should do so with an eye not to self-promotion, but to public persuasion and reform, without compromising the client's goals in the representation. Where the client does not want any part of their story disclosed, we must find ways to speak authoritatively and accessibly about the general depredations of the family regulation system.

Most importantly, we must help our clients tell their own stories when they want to. In court, a good attorney is an interpreter for their client: translating their story, their struggles, and the injustices they've suffered into the language of evidence and legal argument, while thoroughly preparing the client to speak for themself in the way that will be most effective for the audience at hand, whether judge or jury. Parents' lawyers can and must do this for clients who wish to tell their stories outside of the family regulation court. Their voices can be the most compelling evidence of the system's failures and we must consider it part of our job to help them find the most effective way to be heard.

This work of bearing witness will require parents' attorneys to learn some of the public relations skills that legal advocacy organizations have long incorporated into their representation: developing relationships with journalists that create opportunities for parents' lawyers to weigh in on issues important to their clients; submitting opinion pieces to newspapers and other outlets when the family regulation system is in the news;[21] deploying social media thoughtfully to raise broader awareness of the issues that go on in the courts where they practice; and connecting with advocacy organizations that can help raise clients' stories and voices.[22]

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[21] *See, e.g.*, Conor Friedersdorf, *Another Challenge of Parenting While Poor: Wealthy Judges*, THE ATLANTIC (July 29, 2014), https://www.theatlantic.com/business/archive/2014/07/the-states-unwitting-attack-on-parenting-while-poor/375210/.

[22] *See, e.g.*, HUMAN RIGHTS WATCH & ACLU, "IF I WASN'T POOR, I WOULDN'T BE UNFIT" THE FAMILY SEPARATION CRISIS IN THE US CHILD WELFARE SYSTEM (2022), https://www.hrw.org/report/2022/11/17/if-i-wasnt-

The work of publicly bearing witness will not be easy. Parents' lawyers in family regulation cases are already, on the whole, overworked and underpaid. There will be backlash. When I advanced the seemingly uncontroversial notion that there is a dramatic socioeconomic divide between judges and the parents who appear before them in a national publication,[23] an appellate judge called my employer and tried to get me fired. In Tennessee, the state child welfare agency recently sought to bring criminal charges against parents and their attorney after they spoke to the press about the questionable removal of their five children.[24] Indeed, the confidentiality of family regulation courts may be the greatest enabler of harm to our clients and their families. It is a shield, not just for cruelty, but for shoddy practice, haphazard process, and the general disregard that characterizes the coercive actions societies take against their most vulnerable populations. Even when we don't speak up about the abuses we see in family regulation courts, those courts scarcely give our clients any semblance of justice: our silence has not, up to now, earned them fairness. We do our clients a further injustice if we don't use our positions to expose the system that mistreats them.

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poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare. This extensive report on the abuses of the family regulation system includes the stories of affected families, including one of my former clients.

[23] *See* Friedersdorf, *supra* note 21.

[24] Anita Wadhwani, *DCS Seeks Prosecution of Parents, Lawyers for Speaking About Kids' Removal After Traffic Stop*, TENNESSEE LOOKOUT (Mar. 17, 2023, 4:01 PM), https://tennesseelookout.com/2023/03/17/dcs-seeks-prosecution-of-black-parents-lawyers-for-speaking-about-kids-removal-after-traffic-stop/.