

**ADOPTED****AMERICAN BAR ASSOCIATION****COMMISSION ON YOUTH AT RISK  
SECTION OF LITIGATION****COALITION ON RACIAL AND ETHNIC JUSTICE  
CRIMINAL JUSTICE SECTION****JUDICIAL DIVISION****SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION****COMMISSION ON DISABILITY RIGHTS  
COMMISSION ON DOMESTIC & SEXUAL VIOLENCE  
COMMISSION ON LAW AND AGING****REPORT TO THE HOUSE OF DELEGATES****RESOLUTION**

- 1 RESOLVED, That the American Bar Association urges all federal state, local, territorial,  
2 and tribal Bar Associations to educate attorneys and other legal professionals about anti-  
3 Black systemic racism within the child welfare system, stemming from the history of  
4 slavery in the United States and perpetuated by over-surveillance of and under-  
5 investment in Black families in America, which is pervasive, ongoing, and a root cause of  
6 the disproportionate involvement of Black parents and children within the system; and  
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- 8 FURTHER RESOLVED, That the American Bar Association urges federal, state, local,  
9 territorial, and tribal governments and courts, as well as attorneys, judges, legislatures,  
10 governmental agencies, and policymakers to:
- 11
- 12 (1) Recognize implicit and explicit bias and acknowledge collective responsibility for  
13 challenging laws, policies, and practices that devalue Black families and normalize  
14 systemic racism and family separation;  
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- 16 (2) Ensure all legal decisions, policies, and practices regarding children's wellbeing  
17 respect the value of Black children and families' racial, cultural, and ethnic  
18 identities and the connections, needs, and strengths that arise from those  
19 identities; and  
20
- 21 (3) Consult, listen to, and be led by Black parents, children, and kin with lived  
22 experience in child welfare to learn how to support constructive steps to end the  
23 legacy of Black family separation under the law.



## REPORT

### I. Introduction

Examining and acknowledging America's history of anti-Black racism and how it has impacted families since times of slavery and into the modern-day child welfare field is necessary. This historical recognition does not suggest that every child removal from the home is wrong. And it is not designed to support a full repeal of all child welfare laws. With this call to reflect on and recognize the connection between our collective history of under-investment in Black families and over-surveilling Black communities, however, the ABA can contribute to an important national conversation about what child welfare means for Black children and parents to ensure any system designed to meet family needs is grounded in understanding those needs directly.

In June 2020, the murder of George Floyd by a police officer spurred national outrage and a renewed call to action to stand up to systemic racism committed under authority of law against Black Americans. The ABA called on the legal community to recognize the special responsibility lawyers have to address these injustices and work to end systemic racism.<sup>1</sup> This Resolution follows that call by focusing on the responsibilities legal professionals have to challenge anti-Black racism in the child welfare system, one of the most complex and wide-reaching legal systems in our country today.

Racial disparity occurs at every decision point along the child welfare continuum.<sup>2</sup>

- Black families are overrepresented in reports of suspected maltreatment and experience child protective services (CPS) investigations at higher rates.<sup>3</sup> These reports are so common that more than half of all Black children in America will experience a child welfare investigation by age 18.<sup>4</sup>
- Black children are at greater risk than white children of being separated from their families following an investigation, even when alleged maltreatment is the same.<sup>5</sup>

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<sup>1</sup> *ABA President Martinez decries violence against George Floyd, Black community. Pledges action*, (June 5, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/06/aba-president-martinez-decries-violence-against-george-floyd--bl/>.

<sup>2</sup> This inequitable treatment is compounded at the intersection of race and disability. See Loe et al., *Disproportionate Representation of Children of Color and Parents with Disabilities in the Child Welfare System: The Intersection of Race/Ethnicity, Immigration Status, and Disability*, 42(6) J DEVELOPMENT & BEHAVIORAL PEDIATRICS 512-514 (Aug. 2021), <https://pubmed.ncbi.nlm.nih.gov/34232145/>.

<sup>3</sup> See K.S. Kruse, Differences in racially disproportionate reporting of child maltreatment across report sources. 7 JOURNAL OF PUBLIC CHILD WELFARE 351–369 (2013) <https://doi.org/10.1080/15548732.2013.79876>; Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 274-280 (2017), <https://doi.org/10.2105/AJPH.2016.303545>.

<sup>4</sup> See Kim, et al., *supra* note 3, at 274-280.

<sup>5</sup> See Youngmin Yi et al., *Cumulative prevalence of confirmed maltreatment and foster care placements for US children by race/ethnicity, 2011-2016*. 110 AMERICAN JOURNAL OF PUBLIC HEALTH 704–709 (2020), <https://www.doi.org/10.2105/AJPH.2019.305554>.

- Once in CPS custody, Black children have longer placements in foster care, receive fewer services, and are less likely to reunify with families.<sup>6</sup>
- Finally, Black children are 2.4 times more likely than white children in foster care to experience parental loss through a court-ordered termination of parental rights.<sup>7</sup>

This Resolution seeks to ground these numbers in an understanding of how we arrived here. Specifically, this Resolution begins by calling on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country.<sup>8</sup> With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children through the child welfare system. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in child welfare in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

In addition to calling on other Bar Associations to provide this education, the ABA also has a responsibility to recognize its own role contributing to racism in the legal field. For example, the ABA's refusal to permit Black attorneys as members until 1943 is a part of our organizational decision-making and structure that was consistent with other exclusions toward Black Americans that existed and harmed families for decades.<sup>9</sup> Within the child welfare legal field in particular, the ABA has also traditionally supported and helped design pieces of legislation that have disproportionately affected and caused harm to Black children, parents, and families.<sup>10</sup> Recognizing the discriminatory effect of these laws requires that the legal profession stand up and do something to change them. Even if those results arose from well-intended laws, no profession should turn a blind eye once the consequences are clear. More importantly, the ABA can support and implement a vision for child welfare emerging from the most important leaders in this space – Black children, parents, and family members whose lives have been affected by child welfare.

## II. Prior ABA Policy

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<sup>6</sup> Children's Bureau Bulletin, *Child Welfare Practice to Address Racial Disproportionality and Disparity* (April 2021), [https://www.childwelfare.gov/pubpdfs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf).

<sup>7</sup> Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016*; 25(1) CHILD MALTREAT. 32–42 (Feb. 2020).

<sup>8</sup> See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System “replete with systemic racism” and calling for reform).

<sup>9</sup> American Bar Association, *ABA Timeline*, [https://www.americanbar.org/about\\_the\\_aba/timeline/](https://www.americanbar.org/about_the_aba/timeline/).

<sup>10</sup> See, e.g., Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2001), (Referencing the ABA's project Termination Barriers and active support for provisions in the Adoption and Safe Families Act that facilitated parental and child termination of family rights).

In 2008, the ABA passed Resolution 107, which urged Congress to review and collect data on the disproportionate representation of racial and ethnic minority children in the child welfare system.<sup>11</sup> Resolution 107 also called on judges, attorneys, and other legal professionals to help racial and ethnic minority families access services to prevent child removal into foster care and provide greater supports for kin caregivers. Finally, Resolution 107 encouraged legal professionals to seek bias training to improve cultural competence when working with racial and ethnic minority families. The ABA has passed several additional policies focused on bias training for all legal professionals, including judges, lawyers and law students in the ensuing years.<sup>12</sup>

Resolution 107 was an important starting point in recognizing and researching the issue of disproportionality for racial and ethnic minorities in the child welfare system. But it did not address the roots of that disproportionality, including longstanding systemic oppression perpetrated on Black families since before the nation's founding. Nor did it address the intersection of poverty and race that contribute to inequities Black families have often experienced when resources and public services are unevenly distributed.

This resolution goes beyond Resolution 107's examination of disproportionality in foster care to focus on understanding how the history of government surveillance of and deliberate underinvestment in Black families has led to and continues to impact decisions to separate Black children from their parents. Additionally, in contrast with Resolution 107, which focused broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. This does not imply that other areas of child welfare disproportionality and family separation are not also important areas of focus for the Association, including those that affect Native American children, LGBTQ children, and Latino and immigrant children and youth. The ABA has recent policies that focus on rights for each of those groups.<sup>13</sup> Like those resolutions, this resolution focuses on calling for change in the treatment of one particular group – Black families.

### **III. Education on the Roots of Anti-Black Systemic Racism in Child Welfare**

To understand how child welfare laws, policies, and practices have perpetuated and normalized anti-Black racism and Black family separation in America, it is important to look at the context in which those laws developed. This report examines two categories of legal history: (1) laws that have facilitated surveillance and separation of Black children and parents; and (2) laws that have facilitated underinvestment in Black families and incentivized caring for children apart from their parents. Both categories have shaped current child welfare laws and practices. The Commission on Youth at Risk will be

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<sup>11</sup> ABA RESOLUTION 08A107 (2008).

<sup>12</sup> ABA RESOLUTION 21A102 (2021); ABA RESOLUTION 20A117 (2020); ABA RESOLUTION 20A116G (2020); ABA RESOLUTION 91A10D (1991).

<sup>13</sup> See *generally*, ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy); ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy); ABA RESOLUTION 07A104B (2007), (LGBT Youth in Foster Care Policy); ABA RESOLUTION 18A119 (2018), (Rights of Immigrant Children); ABA RESOLUTION 19A115C (2019), (Constitutionality of the Indian Child Welfare Act Policy); ABA RESOLUTION 11A103D (2011), (Protection of Unaccompanied and Undocumented Immigrant Children).

producing a more complete historical White Paper on these categories as an additional resource. The history provided below is abbreviated for the Report structure.

### A. Laws that Facilitated Surveillance and Separation of Black Children and Parents

*“But the child was torn from the arms of its mother amid the most heart-rending shrieks from the mother and child on the one hand, and the bitter oaths and cruel lashes from the tyrants on the other.”*<sup>14</sup>

For the more than 200 years when slavery was permitted by law in this country, the dehumanizing and violent act of taking children from their families was intentional and served enslavers’ economic interests.<sup>15</sup> For example, the threat of family separation was used as a tool to keep enslaved mothers, fathers, and children compliant – no threat was more horrifying than the fear of being sold away from one’s family. As archival recordings from formerly enslaved people make clear, parents and “[c]hildren, even from a young age, were well aware that their sale could occur at any moment.”<sup>16</sup> Family separation was also often a form of business development because children born to enslaved mothers were automatically deemed to be property of the enslaver and as such could be sold. While some supporters of slavery sought to normalize these breaks in family bonds by suggesting that Black parents and children did not experience personal emotions and family attachment in the same way as a white family member would, the majority recognized the cruelty involved.<sup>17</sup> In fact, the known cruelty of taking children from their parents became a key focus of abolitionists who highlighted the pain of family separation to shame the system out of existence.

After the Civil War, Black leaders and their allies fought to secure a constitutional right to family integrity in recognition of the widespread destruction Black families had

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<sup>14</sup> DeNeen L. Brown, *‘Barbaric’: America’s cruel history of separating children from their parents*, WASH. POST, May 31, 2018, <https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/> (quote taken from a 1849 narrative, Henry Bibb, a former enslaved person in an exhibit at the Smithsonian’s Museum of African American History and Culture, which documents the history of enslaved children being separated from their enslaved parents).

<sup>15</sup> Michael A. Robinson, *Black Bodies on the Ground: Policing Disparities in the African American Community—An Analysis of Newsprint From January 1, 2015, Through December 31, 2015*, University of Georgia School of Social Work, (April 7, 2017) <https://doi.org/10.1177/0021934717702134>; As Frederick Douglass noted “[i]t is a common custom, in the part of Maryland from which I ran away, to part children from their mothers at a very early age.” *Narrative of the Life of Frederick Douglass*.

<sup>16</sup> See Vanessa M. Holden, *Slavery and America’s Legacy of Family Separation*, AAIHS (July 25, 2018) <https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/>; Brown, *supra* note 14; Elizabeth Ofosuah Johnson, *The disturbing history of enslaved mothers forced to breastfeed white babies in the 1600s*, FACE2FACE IN AFRICA (Aug. 20, 2018), <https://face2faceafrica.com/article/the-disturbing-history-of-enslaved-mothers-forced-to-breastfeed-white-babies-in-the-1600s>.

<sup>17</sup> Thomas R.R. Cobb, a proponent of slavery was quoted in 1858 as proclaiming that the Black family “suffers little by separation”. See Nicholas Kristof, *Trump Wasn’t First to Separate Families, but Policy Was Still Evil*, NEW YORK TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/opinion/trump-family-separation-executive-order.html>.

experienced during slavery.<sup>18</sup> Despite these efforts, family separations between Black children and parents continued with frequency under the color of new laws. For example, vagrancy laws criminalized unemployment, and often led to Black family separation when parents were imprisoned and forced to perform labor through chain gangs or in direct service to former enslavers on plantations. Another legal basis for separation arose from “apprenticeship” laws, through which Black children were “hired out” to former enslavers through an agreement, often certified by a court, where unpaid labor was exchanged for a promise of “training.”<sup>19</sup> In some cases, children were considered orphans when apprenticed. In others, children were required to enter labor agreements when their parents had been arrested or found to be destitute.<sup>20</sup> Courts and landowners rationalized the agreements with rhetoric that it served the “child’s best interests” to be apprenticed because their families could not support them financially.<sup>21</sup>

Though slavery, vagrancy laws, and forced apprenticeships no longer provide legal contexts for separating Black children from their parents and other kin, aspects of these laws influence practices today. For example, poverty and parental arrest continue to serve as two of the most prominent causes of child removal into foster care.<sup>22</sup>

### **B. Laws that Facilitated Underinvestment in Black Families and Incentivized Caring for Children Apart from Their Parents**

America has a long history of excluding Black parents from public support. For example, during the Depression, when mothers’ pensions were provided to help women care for children in their own homes after losing a male breadwinner to death, abandonment, or poor health, restrictions limited these supports to only white children of widows, and excluded children of Black mothers.<sup>23</sup> Likewise, in 1935 when the federal government established Aid to Dependent Children (ADC), Congress permitted state and local officials to set eligibility criteria and many states took steps to exclude Black parents.<sup>24</sup>

<sup>18</sup> Brief for Law Professors as *Amici Curiae* in Support of Plaintiffs’ Opposition to the Motion to Dismiss, *D.J.C.V. v. U.S.*, Civil Action No. 1:20-CV-05747-PAE (S.D.N.Y. Dec. 22, 2020).

<sup>19</sup> See *The History of Slave Patrols, Black Codes, and Vagrancy Laws*, available at <https://www.facinghistory.org/educator-resources/current-events/policing-legacy-racial-injustice/history-slave-patrols-black-codes-vagrancy-laws>.

<sup>20</sup> At the same time, state laws severely limited Black property ownership as well as participation in certain businesses and skilled trades. See *Black Codes*, (June 1, 2010), available at <https://www.history.com/topics/black-history/black-codes>.

<sup>21</sup> Constitutional Rights Foundation, *The Southern “Black Codes” of 1865-66*, <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html>.

<sup>22</sup> National data released by the U.S. Department of Health and Human Services for FY20 indicates parental incarceration and neglect comprised 70% of all foster care entries that year. See U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU, *The AFCARS Report: Preliminary FY 2020 Estimates as of October 04, 2021*, No.28 <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf>.

<sup>23</sup> Ife Floyd et al., *TANF Policies Reflect Racist Legacy of Cash Assistance: Reimagined Program Should Center Black Mothers*, CENTER ON BUDGET AND POLICY PRIORITIES (Aug. 4, 2021), <https://www.cbpp.org/research/family-income-support/tanf-policies-reflect-racist-legacy-of-cash-assistance>.

<sup>24</sup> See, e.g., Taryn Lindhorst & Leslie Leighninger, “Ending Welfare as We Know It” in 1960: Louisiana’s

### i. Unsuitability Provisions

In the second half of the 20<sup>th</sup> Century, underinvestment in Black families became especially intertwined with concepts of parental fitness and “unsuitability” that continue to have implications in the child welfare system today. Specifically, in the 1950s, as court-ordered public school desegregation processes began throughout the country, states passed new laws to exclude “unsuitable homes” from public aid eligibility based on parental fitness determinations. As one state legislator openly acknowledged, these exclusions were not based on actual fitness determinations, but were instead designed to push Black families out of the community to limit their children’s school enrollment.<sup>25</sup>

The impact was extraordinary. In the span of just a few years, tens of thousands of children were cut from public aid, almost all of them Black, for being “illegitimate” or because their parents were “unfit.”<sup>26</sup> Laws in Florida and Tennessee went a step further. These states not only denied public benefits, they also encouraged caseworkers to ask mothers “unfit” for receiving aid to voluntarily release their children to a relative or risk referral to juvenile court for “child neglect.”<sup>27</sup>

### ii. The Flemming Rule – A Faulty Foundation for Child Welfare Law

Following significant domestic and international pressure, the federal government challenged these state suitability laws in 1961, when Arthur Flemming, the Secretary of Health, Education and Welfare, issued an administrative ruling prohibiting states from excluding children from ADC eligibility based on parental “suitability.”<sup>28</sup>

*“A State plan . . . may not impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child lives are unsuitable, while the child continues to reside in the home. Assistance will therefore be continued during the time efforts are being made either to improve the home conditions or to make arrangements for the child elsewhere.”<sup>29</sup>*

As a result of the carveout language in the rule, however, although states could no longer deny aid to children based on parental unsuitability, they could continue to deny public

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*Suitable Home Law*, SOCIAL SERVICE REVIEW, (December 2003) (Congress explicitly excluded “farm workers and domestic workers” from coverage, two areas of employment for Black women at the time).

<sup>25</sup> See LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 36 (2021) (quoting a Mississippi state legislator who declared “when the cutting starts, [Negroes will] head for Chicago”). See also Kelly Condit-Shrestha, *Racialized Borders within the United States: A History of Foster Care, Adoption, and Child Removal in African American Communities*, US HISTORY SCENE, <https://ushistoryscene.com/article/racializedborders> (last visited April 26, 2022).

<sup>26</sup> BRIGGS, at 39.

<sup>27</sup> *Id.* at 38.

<sup>28</sup> State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare; *The Federal Role in the Federal System: The Dynamics of Growth ...*, Volumes 1-4, United States. Advisory Commission on Intergovernmental Relations page 48.

<sup>29</sup> In 1968, the Supreme Court reaffirmed the message of the Flemming Rule when it held that a parent’s welfare application could justify taking children from their families. *King v. Smith*, 392 U.S. 309 (1968).



support if the child resided elsewhere.<sup>30</sup> Using this exception, and building on examples from Tennessee and Florida, states began removing children from Black parents seeking public aid and placing them in foster care, another “arrangement,” at rapid rates. Congress unintentionally incentivized this approach when it adopted the Flemming Rule into law, and simultaneously made Social Security Act funds available to support children in foster care away from their families.<sup>31</sup> Before then, foster care had not received federal funding, had been largely used as a temporary support for families seeking voluntary help, and had excluded many non-white children. After 1961, the racial identity of children in foster care transformed. Tens of thousands of Black parents lost their children and Black children lost their parents, kin and communities. The total number of children in foster care nationally increased by 67% in a year, from 163,000 in 1961 to 272,000 by 1962.<sup>32</sup>

Organizations, such as the Child Welfare League of America pushed for judicial oversight as a safeguard to “ensure that rogue caseworkers would not remove children from their homes simply to punish poor mothers for applying for [ADC benefits] in the first place.”<sup>33</sup> In response, Congress amended the Social Security Act in 1962 to provide that states are permitted to remove a child from a home that is *judicially determined* to be so unsuitable as to “be contrary to the welfare of such child.”<sup>34</sup> Unfortunately, judicial oversight did not provide the sought check on the system and often led to higher levels of public authority approving child removals into foster care.<sup>35</sup> Parents and children lacked counsel to challenge such decisions, and after court review it became even harder for Black parents and children to reunify. Today, sixty-one years later, the federal child welfare architecture established in 1961 remains largely unchanged.

#### **IV. Recognize Bias and Acknowledge Collective Responsibility for Challenging Laws that Devalue Black Families**

Although many laws passed since 1961 do not have the same explicitly discriminatory underpinnings, they cannot be understood in isolation from the centuries of foundation upon which they were developed. Looking forward, legal professionals have a responsibility to untangle the child welfare field from this foundation rooted in racism by challenging laws, policies and practices that have the impact of devaluing Black parent

<sup>30</sup> See CATHERINE RYMPH, *RAISING GOVERNMENT CHILDREN: A HISTORY OF FOSTER CARE AND THE AMERICAN WELFARE STATE* 168 (2017).

<sup>31</sup> 42 U.S.C. § 604(b) (1961).

<sup>32</sup> See C. Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76(1) *CHILD WELFARE* (Jan-Feb 1997) 9-30 (referred to as the “Browning of child welfare in America”). See also W. Robert Johnston, *Historical statistics on adoption in the United States, plus statistics on child population and welfare* (Aug. 5, 2017) <https://www.johnstonsarchive.net/policy/adoptionstats.html>.

<sup>33</sup> RYMPH, *supra* note 29, at 168.

<sup>34</sup> 42 U.S.C. § 608(a)(1); see also 42 U.S.C. § 604(b); S.Rep. No. 1589, 87th Cong., 2d Sess., 14 (1962). Under the 1962 amendments, Congress also clarified that states can terminate AFDC assistance to a child living in an unsuitable home if they provide other adequate care and assistance for the child.

<sup>35</sup> See generally, Edward V. Sparer, *AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith*, 1219 U. PENN L. REV. (1970), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9425&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9425&context=penn_law_review).

and child bonds. Areas where historical impact should be addressed in future discussions about legislative change, include:

- Linking Foster Care Funding with Aid Eligibility;
- Definitions of Abuse and Neglect;
- Mandatory Reporting;
- Child Removals Based on Parental Incarceration;
- Prioritizing Cultural Identity;
- Terminations of Parental Rights

Each of these areas of law are complex and require careful consideration when proposing changes. Each area also requires an understanding of the historical underpinnings, outcomes produced, and calls for change from Black children, parents, and communities. With this Resolution, the ABA calls for all consideration of changes in these areas to be grounded in those core tenets.

i. Linking Foster Care Funding with Aid Eligibility

Federal maintenance payments, which cover partial costs of children’s placement in foster care, continue to be linked to AFDC eligibility criteria. Building on the Flemming Rule, maintenance payments support only children who have been “voluntarily” placed in foster care or for whom a judge has found it is “contrary to welfare” to remain at home and “efforts” have been made to support the family.<sup>36</sup> These problematic thresholds for removing a child from their family require re-examination in light of the original intentions surrounding their creation as an alternative to supporting families through public aid.

ii. Definitions of Abuse and Neglect

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) – as “a campaign against the national problem of child abuse.”<sup>37</sup> Although CAPTA was non-discriminatory on its face, its passage, just thirteen years after the unsuitability rules were prohibited and federal funding became available for child removals, reinforced discriminatory impact for Black families. For example, several CAPTA provisions revived themes of saving children from poor families based on expansive definitions of abuse and neglect that continued to invite subjective assessments about parental fitness much like the suitability laws.<sup>38</sup> In some states, definitions of neglect included basic concepts of poverty, such as a lack of adequate clothing, housing, or food. These laws did not address a parent’s ability to afford such things or provide guidance on what “adequate” means.

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<sup>36</sup> 42 U.S.C. § 672.

<sup>37</sup> See Kathy Barbell & Madelyn Freundlich, *Foster Care Today*, CASEY FAMILY PROGRAMS NATIONAL CENTER FOR RESOURCE FAMILY SUPPORT (2001), [http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster\\_care\\_today.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/policy-issues/foster_care_today.pdf).

<sup>38</sup> CAPTA, P.L. 93-247 defined those categories broadly as “any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation...or [a]n act or failure to act which presents an imminent risk of serious harm.”

### iii. Mandatory Reporting

As passed in 1974, CAPTA also triggered an expansion of the number of professionals mandated to report abuse and neglect.<sup>39</sup> Again the outcomes have not been even. Black children are more likely to be reported for suspected maltreatment than white children, particularly by mandated reporters in the education and medical fields.<sup>40</sup> The data demonstrate a false assumption among reporters that Black children are at a higher risk of abuse at home than white children.<sup>41</sup> For reports related to neglect, this may also suggest an ongoing correlation with poverty rates that are addressed through child removal rather than support to the family.<sup>42</sup> Black women are also more likely than white women to be screened for drug use during pregnancy and to face legal consequences for prenatal substance exposure, including incarceration and child removal.<sup>43</sup> Under CAPTA, courts also saw an increase in allegations of “failure to protect” against mothers who experienced domestic violence.<sup>44</sup>

### iv. Parental Incarceration

In a recurrent theme from the past, parental incarceration also led to increased foster care entry in the 1970s, 80s and 90s. CAPTA called for active communication between child welfare caseworkers and local law enforcement authorities conducting criminal investigations. This call for collaboration coincided with the national launch of the “war on drugs” in the late 1970s and early 1980s, when rates of incarceration for Black men and women increased disproportionately despite evidence of no difference in the use or distribution of drugs when compared with white people in America.<sup>45</sup> Rates of female

<sup>39</sup> After CAPTA, reports of child maltreatment increased from 60,000 in 1974 to one million in 1980 and 2 million in 1990. Recent estimates indicate that this figure has since doubled to roughly 4.4 million annual reports. JOHN E. B. MYERS, *A SHORT HISTORY OF CHILD PROTECTION IN AMERICA*, 456; *Child Maltreatment 2019*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (2021), at 7.

<sup>40</sup> Alan J. Detlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 *THE ANNALS OF THE AM. ACAD.* 253, 254 (2020) (citing Emily Putnam-Hornstein et al., *Racial and Ethnic Disparities: Population-Based Examination of Risk Factors for Involvement with Child Protective Services*, 37 *CHILD ABUSE & NEGLECT* 33 (2013)).

<sup>41</sup> Elizabeth Hlavinka, *Racial Disparity Seen in Child Abuse Reporting*, *MEDPAGE TODAY* (2020).

<sup>42</sup> See New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law, RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, at 11 (April 2, 2022), <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (CAPTA’s inclusion of neglect encapsulates poverty and has perpetuated surveillance and separation of Black families based on ability to provide basic needs).

<sup>43</sup> Kathi L H Harp and Amanda M Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 (2) *SOC POLIT.* 258–281 (Jun. 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7372952/>

<sup>44</sup> See generally, Debra Whitcomb, *Children and Domestic Violence: The Prosecutor’s Response*, (2004), <https://www.ojp.gov/pdffiles1/nij/199721.pdf>; Debra Whitcomb, *Prosecutors, Kids, and Domestic Violence Cases*, 248 *NATIONAL INSTITUTE OF JUSTICE JOURNAL* 2-9 (March 2002). See also Dorothy Roberts, *How the Child Welfare System Polices Black Mothers*, 15 *BARNARD CENTER FOR RESEARCH ON WOMEN* 3, (2019) <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/how-the-child-welfare-system-polices-black-mothers/>.

<sup>45</sup> See The Sentencing Project: *Criminal Justice Facts*, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited April 16, 2022) (During the first 15 years of the war on drugs the U.S. prison population

incarceration in particular tripled during the 1980s, and 80% of all Black women who were incarcerated during that time had children living with them at the time of their arrest.<sup>46</sup> Although some children were able to live with their fathers or other kin, many were referred to child welfare and entered foster care when their mothers were arrested. Law enforcement referrals to child welfare remain a leading cause of foster care entry today, accounting for nearly 20% of all referrals to child protection services.<sup>47</sup>

#### v. Racial Identity

Throughout the early history of federally funded foster care, social workers often prioritized children's placements in the communities where they had roots. This could include family roots, cultural roots, and ethnic or racial identities. In 1994, Congress changed this landscape in the Multi-Ethnic Placement Act (MEPA), which allows foster and adoptive parents to retain rights to express a preference for children based on race while prohibiting racial preferences on behalf of the child or birth parents in finding a foster care placement for their child. Proponents of the law advocated for it as a "color blind" approach to child placements that would prioritize timeliness of a child's placement over cultural and racial heritage considerations. In juxtaposing those two interests as an either/or, without reconciling both as important, MEPA diminished the importance of the Black child's identity and the families' rights to family integrity.<sup>48</sup>

Overrepresentation of Black children in foster care awaiting adoption remains and MEPA's focus on diminishing the importance of racial and cultural identity in placements has led to a gap in recognizing the unique identity that Black children have or respecting their need for community and culture that is connected to their identity.<sup>49</sup> This contradicts well-established best practice standards for adoption.<sup>50</sup>

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tripled from 200,000 to 600,000). See also Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility* (Sept. 30, 2014) <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility/> (Although white people have been statistically found to be more likely than Black people to sell drugs, and equally likely to consume them, Black people are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possession).

<sup>46</sup> Roberts, *supra* note 44.

<sup>47</sup> Dana Weiner et al., *Chapin Hall Issue Brief: COVID-19 and Child Welfare: Using Data to Understand Trends in Maltreatment*, CHAPIN HALL AT UNIVERSITY OF CHICAGO, <https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf>.

<sup>48</sup> Specifically, the law prohibits states from making placement decisions on the basis of race, color, or national origin, and mandates the "diligent recruitment" of racially and ethnically diverse pools of prospective foster and adoptive families.

<sup>49</sup> See Lorelei B. Mitchell et al., *Child Welfare Reform in the United States: Findings from a Local Agency Survey*, 84 CHILD WELFARE 5, 15 (2005) (only 8% of the 97 agencies included in the 1999-2000 Local Agency Survey created new recruitment efforts following the passage of MEPA); Evan B. Donaldson *Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care*, ADOPTION INST. (2008), at 35-36, 40; *Child and Family Services Reviews Aggregate Report, Round 3: Fiscal Years 2015-2018*, ADMIN. FOR CHILD. & FAMILIES, CHILD. BUREAU (June 5, 2020), at 46, (reporting that only seventeen states received a 'strength' rating for diligently recruiting diverse foster and adoptive families).

<sup>50</sup> *A Stronger Foundation for America's Families: Transition 2021*, CHILD WELFARE LEAGUE OF AM. (Dec. 2020), at 61, <https://www.cwla.org/wp-content/uploads/2021/01/Transition-2021-Final.pdf> ("All children deserve to be raised in a family that respects their cultural heritage.").

In 2022, the ABA adopted Resolution M22613, establishing a presumption of child presence in all dependency proceedings.<sup>51</sup> Hearing from court-involved children informs legal decisions and practices that respect and value a child's unique identity, including their racial, cultural, and ethnic, linguistic, disability, sexual orientation, and gender identities. Consistent with federal law, efforts should always be made to place children with kinship relatives as the first placement option. When that is not an option, priority placements with foster parents who provide a nurturing home where a child's identity can be affirmed are critical to supporting children's well-being.

vi. Terminations of Parental Rights

Welfare reform in the 1990s further cut assistance to Black families and contributed to increased use of foster care. By 1999, just a few years after welfare reform, the number of children in foster care in the United States reached an all-time high at 567,000 – an increase of more than 570% since 1950. Child welfare professionals who believed many children were already lingering in foster care for too long, instead of achieving permanency, raised concerns about the impact of welfare reform early on. Congress responded by accelerating the timeline for terminating parental rights through the Adoption and Safe Families Act of 1997 (“ASFA”). Rather than incentivize supports for families staying together or reunifying, Congress funded adoption incentives only.

Since 1997, the number of parental terminations has exceeded the number of adoptions annually, resulting in a new legal concept known as the “legal orphan” who lacks legal birth parents and adoptive parents.<sup>52</sup> A majority of these “legal orphans” are Black children. The number of children who experience a termination of parental rights, many of whom are not adopted, has exploded nationally. Researchers at the National Institutes of Health recently found 1 of every 100 children living in the U.S. is likely to experience a TPR by age 18.<sup>53</sup> The rate of TPR is closer to 2 of every 100 Black children.

Many people with lived experience in foster care note that even in situations where they could not remain with their birth parents, a termination of parental rights carries greater consequences than the law recognizes. A TPR not only ends the relationship with birth parents, but often results in cutting connections to other family members, grandparents, cousins, aunts, uncles, even siblings. The premise that not all families should be kept together, and the racially disparate outcomes of the law itself reflect an undermining of

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<sup>51</sup> ABA RESOLUTION 22M613 (2022), [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/aba-resolution-613.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-resolution-613.pdf) (Presumption of Youth Presence in Court).

<sup>52</sup> ASFA, “Aging Out” and the Growth in Legal Orphans, NAT’L COALITION FOR CHILD PROTECTION REFORM (Sept. 9, 2020), at 2, available at <https://drive.google.com/file/d/1X3X9a4H6LFFfKWRnSDoIDxuZb6Dm4yUdA/view>; See also *Information Memorandum Log No: ACYF-CB-IM-20-09*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES (Jan. 5, 2021), at 9, <http://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf> (“[c]hildren who enter care and have their parents’ parental rights terminated more frequently fail to discharge and stay in care longer than children whose parent’s parental rights are not terminated . . .”).

<sup>53</sup> See Wildeman, *supra* note 7.

the constitutionally protected right to family integrity for Black families that continues to reverberate throughout all the communities where TPR has grown so common.

## V. Valuing Race, Culture and Identity as Part of Child and Parent Rights to Family Integrity

Addressing anti-Black systemic racism in the child welfare system, just as slavery abolitionist and Black leaders called for 150 years ago, also involves renewing our nation's commitment to upholding the integrity of Black families. Today family integrity is a well-established fundamental liberty interest under the Fourteenth Amendment. It protects the interests of parents in directing the upbringing of their children and maintaining their families free from unwarranted government intrusion.<sup>54</sup> The Supreme Court has referred to parental rights to family integrity as “perhaps the oldest of the fundamental liberty interests recognized.”<sup>55</sup> As acknowledged in ABA Resolution 19A118, rights to family integrity also extends to children.<sup>56</sup>

The Supreme Court's framing of the right to family integrity underscores the contours of the basic rights guaranteed to all families under the Constitution. In *Meyer v. Nebraska*, the Court explained that the Fourteenth Amendment protects the right to “establish a home and bring up children,” upholding the right of parents to control the education of their children.<sup>57</sup> The Court later reaffirmed the “fundamental liberty interest of natural parents in the care, custody, and management of their child” in *Santosky v. Kramer*.<sup>58</sup> Specifically, the *Santosky* Court held that “[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>59</sup> Recent immigration cases in lower courts have expounded on family integrity as

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<sup>54</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children . . .”); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reaffirming the “Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”); *Troxel v. Granville*, 530 U.S. 57, 77 (2000) (“We have long recognized that a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment.”).

<sup>55</sup> *Troxel* 530 U.S. at 77. While the *Troxel* Court recognized family integrity as a fundamental liberty interest, it did not clearly articulate the level of scrutiny it applied in rendering its decision. Lower courts have applied varying levels of scrutiny. For example, the Ninth Circuit has applied both strict scrutiny and rational basis review in cases asserting a family integrity claim, and the Seventh Circuit has applied the Fourth Amendment’s “reasonableness test,” in recognition that some heightened level of scrutiny is warranted.

<sup>56</sup> ABA RESOLUTION 19A118 (2019).

<sup>57</sup> *Meyer*, 262 U.S. at 399. See also *Pierce v. Soc’y of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (holding that laws compelling children to attend public school unreasonably interfered with the liberty interests of parents in directing their children’s education).

<sup>58</sup> *Santosky*, 455 U.S. at 745.

<sup>59</sup> *Id.* at 753.

an independent liberty interest of children, holding that forced separations at the border “deprived the children of their family integrity.”<sup>60</sup>

Despite our highest Court recognizing this fundamental right, it remains illusory in the face of laws and policies that perpetuate systemic injustice towards Black families. Whether by design or from disparate outcomes, child welfare legislation has regularly failed to uphold the constitutional right to family integrity for Black families. Allowing the status quo to persist without such a challenge ignores the role of existing laws in the destruction and devaluation of the Black family within the child welfare system. System impacted people emphasize that the right to family integrity implicates more than the immediate nuclear family. Indeed, entire bloodlines have been impacted by this system. For example, termination of parental rights, cuts a child off from more than just their biological parents. Frequently, their connection to grandparents, aunts, uncles, cousins, and even siblings is also terminated. Too often generations of families are negatively impacted by this system. A former system-impacted youth shared that, now as a parent, she grieves her own daughter’s loss of great-grandparents, aunts, and uncles.

To address anti-Black systemic racism in child welfare, policymakers must evaluate where laws run afoul of the right to maintain one’s family and, where necessary, revise or repeal legislation with a discriminatory impact. This call has been accepted in one state already – in April 2022, the New York State Bar Association (NYSBA) passed a resolution with accompanying report recognizing systemic racism resulting from the history of slavery exists within the state’s child welfare system, impacting Black families disparately, and acknowledging the collective responsibility of “legislators, policymakers, judges and attorneys for creating, promulgating, maintaining, implementing and/or enforcing laws, policies, rulings and practices that have not adequately valued Black families and have often resulted in their unnecessary investigation and separation of families.”<sup>61</sup>

## **VI. Following the Lead of Black Parents, Children and Kin**

No one understands the impact of the child welfare system better than those who have lived experience within this system. Accordingly, to confront the legacy of anti-Black systemic racism in child welfare, we must ground our goals by following the lead of Black families—children, parents, and kin—directly impacted by this system.<sup>62</sup> We cannot expect to have meaningful changes surrounding the child welfare system without stepping aside and allowing those closest to the problem—and therefore closest to the solution—to lead in implementing change. Despite the disparate impact child welfare laws have had on Black families, Black families with lived expertise historically have not been invited to

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<sup>60</sup> *S.R. by and through J.S.G. v. Sessions*, 330 F. Supp. 3d 731 (D. Conn. 2018); See also *W.S.R. v. Sessions*, 318 F. Supp. 3d 1116 (N.D. Ill., 2018) (stating that the constitutional interest at issue was the “child’s right to remain in the custody of his parent”).

<sup>61</sup> New York State Bar, *supra* note 8.

<sup>62</sup> See ABA RESOLUTION 20A115 (calling for all legal system reform efforts that affect children and youth to be led by or conducted in partnership with individuals who had experienced those systems as children and youth). See also Zoe Livengood, *Strategies for Engaging Youth and Families with Lived Experiences*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2020), [https://www.ncjfcj.org/wp-content/uploads/2020/09/NCJFCJ\\_Strategies\\_for\\_Engaging\\_PWLE\\_Final.pdf](https://www.ncjfcj.org/wp-content/uploads/2020/09/NCJFCJ_Strategies_for_Engaging_PWLE_Final.pdf)

the table where decisions are being made. Black families with lived experience should be encouraged and supported in taking a leading role in drafting, creating, and implementing federal child welfare legislation. This change is necessary for Black families to truly experience their right to family integrity.<sup>63</sup>

Black leaders with lived experience as parents, children, and kin around the country have already established organizations to facilitate this leadership. Organizations such as Rise,<sup>64</sup> Movement for Family Power,<sup>65</sup> and Think of Us<sup>66</sup> are excellent examples. Each focus on the concept “nothing about us without us.” Individuals with lived experience have a wide range of perspectives and include not only parents and children, but also Black kin, foster parents, and adoptive parents. It is important to acknowledge there are conflicting perspectives on the continued viability of the child welfare system. Many people, both those with lived experience and those who work within the system, are asking, “Should we advocate for reforms or tear the child welfare system down?” Listening to the voices of those with lived experience will reaffirm that change is needed. Opinions vary as to what that change looks like, with some advocating for the elimination of all forms of foster care, and others seeking to make improvements to the system rather than dismantle it.<sup>67</sup>

Judges and attorneys who are obligated to represent, defend, and decide the outcome for a family, no matter how egalitarian their belief system, bring bias to the courtroom. Here too, legal professionals must follow the lead of Black leaders in the child welfare system, to achieve better outcomes for children. Resources on bias correction are available, but to truly address anti-Black systemic racism, listening to and following the lead of Black leaders, is essential. An analysis of discrimination and bias in the child welfare system requires acknowledging the correlation of poverty and child welfare that is frequently discussed by Black leaders. Diversity of the bench and the legal profession

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<sup>63</sup> This call for Black family leadership is not new. In 1972, two scholars released a book on racism in child welfare that concluded by calling explicitly for Black family leadership as the key to addressing disproportionality. See ANDREW BILLINGSLEY AND JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972).

<sup>64</sup> *About Rise*, <https://www.risemagazine.org/about/>, (last visited April 26, 2022).

<sup>65</sup> *Movement for Family Power*, <https://www.movementforfamilypower.org/> (last visited April 26, 2022).

<sup>66</sup> *Think of Us*, <https://www.thinkof-us.org/>

<sup>67</sup> *Compare Center for the Study of Social Policy, What Does it Mean to Abolish the Child Welfare System as We Know It?* (Jun. 29, 2020) available at <https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it/> (Upend the system) vs AJ Ortiz, *Abolishing the Child Welfare System Would Harm Victims of Child Abuse*, CHILD USA (Jun 21, 2021) available at <https://childusa.org/abolishing-the-child-welfare-system-would-harm-victims-of-child-abuse/>. See also, Alan Dettlaff et al., *What It Means to Abolish Child Welfare as We Know it*, IMPRINT NEWS (OCT. 14, 2020) <https://imprintnews.org/race/what-means-abolish-child-welfare/48257>; Michael Fitzgerald, *Rising Voices For ‘Family Power’ Seek to Abolish the Child Welfare System*, IMPRINT NEWS (JUL. 8, 2020), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141>; Molly Schwartz, *Do We Need to Abolish Child Protective Services? Inside one parent’s five-year battle with the “family destruction system,”* MOTHER JONES (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>; Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System*, THE NEWS REPUBLIC (Aug. 18, 2021), <https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system>.



is also an important tool in reducing anti-black systemic racism as it helps to incorporate a variety of approaches and experiences when interpreting and applying the law.<sup>68, 69</sup>

So much of the history of denying real needs stems from public narratives that distinguish Black families from the parenting ideal embodied in the white, middle-class model traditionally supported by state and federal law.<sup>70</sup> By following the lead of Black families with lived experience, judges, attorneys, policy makers, and other professionals in the child welfare system can learn to help change the narrative and view the strengths of the Black family, community, and support system for what they have always been.

## VII. Conclusion

Like other legal systems, child welfare has a long history of over-surveillance of and underinvestment in the lives of Black families. This Resolution urges the ABA and the legal profession to examine that history, acknowledge our role in shaping it, and begin to untangle it by following the lead of Black children, parents, and kin who have experienced child welfare and know both the potential for harm and the importance of investing in the strength of Black families as foundational to our country.

Respectfully submitted,

Ernestine Gray, Chair  
Commission on Youth at Risk - August 2022

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<sup>68</sup> *Addressing Bias in Delinquency and Child Welfare Systems*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, (2018) <https://www.ncjfcj.org/publications/addressing-bias-in-delinquency-and-child-welfare-systems>; *ENHANCING JUSTICE: REDUCING BIAS*, (Sarah E Redfield, ed., American Bar Association Judicial Division 2017); *JUDGES' JOURNAL: BLUEPRINT FOR DIVERSITY* (American Bar Association 2016); MARY-MARGARET ANDERSON, *UNDERSTANDING IMPLICIT BIAS: AN ATTAINABLE GOAL* (2015). [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2015/fall/understanding\\_implicit\\_bias\\_an\\_attainable\\_goal/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2015/fall/understanding_implicit_bias_an_attainable_goal/)

<sup>70</sup> Dorothy Roberts, *Race and Class in the Child Welfare System*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html>.

**GENERAL INFORMATION FORM**

Submitting Entity: COMMISSION ON YOUTH AT RISK  
 SECTION OF LITIGATION  
 COALITION ON RACIAL AND ETHNIC JUSTICE  
 CRIMINAL JUSTICE SECTION  
 JUDICIAL DIVISION  
 SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE  
 SOLO, SMALL FIRM AND GENERAL PRACTICE DIVISION  
 COMMISSION ON DISABILITY RIGHTS  
 COMMISSION ON DOMESTIC & SEXUAL VIOLENCE  
 COMMISSION ON LAW AND AGING

Submitted By: Ernestine Gray, Chair, Commission on Youth at Risk

1. Summary of the Resolution(s).

This resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.<sup>71</sup> With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future.

This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution seeks to improve our profession (Goal 2) by encouraging attorneys and judges to recognize ongoing anti-Black systemic racism in the child welfare

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<sup>71</sup> See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

system and ensure all legal decisions, policies, and practices, regarding child well-being are not informed by racist goals or assumptions. The resolution also seeks to eliminate bias (Goal 3) by urging courts, attorneys, judges, legislators, governmental agencies, and other policy makers to recognize Black children, parents, and kin as unique individuals with unique racial, cultural, and ethnic identities that have important strengths and needs that should be valued rather than devalued in the child welfare system.

3. Approval by Submitting Entity.

Commission on Youth at Risk – April 25, 2022  
 Commission on Disability Rights – May 3, 2022  
 Commission on Domestic & Sexual Violence – April 28, 2022  
 Commission on Law and Aging – May 3, 2022  
 Criminal Justice Section – May 2, 2022  
 Section of Civil Rights and Social Justice – May 4, 2022  
 Section of Litigation – May 7, 2022  
 Solo, Small Firm and General Practice Division – May 17, 2022

4. Has this or a similar resolution been submitted to the House or Board previously?

Yes. We submitted a prior version of this resolution on November 16, 2021. We withdrew the prior version from consideration at Midyear upon learning it would not be calendared. Since that date, we have made extensive changes based on feedback from the Drafting Team, Rules and Calendar, and other ABA entities. We have also cut the length of the accompanying Report as requested. Following those changes, we attach the revised Resolution and Report with a request that it be calendared at Annual.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

This Resolution builds on the existing policies and standards identified below. Existing policies examine the disproportionate representation of racial and ethnic minority children in the child welfare system, addressing bias to improve cultural competence, engaging youth in legal system reform, preserving a right to family integrity, and supporting immigrant and other minority groups. This policy focuses solely on Black families, thus goes beyond existing policies or expands upon them. This Resolution does not contradict or undermine any existing ABA policies.

See:

- ABA RESOLUTION 08A107 (2008) (Racial and Ethnic Disproportionality in Child Welfare);
- ABA RESOLUTION 03A101B (2003) (Disparate Treatment by Race and Ethnicity);
- ABA RESOLUTION 21M103A (2021) (Non-citizen Children Policy);

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- ABA RESOLUTION 18A119 (2018) (Rights of Immigrant Children and Standards for Custody, Placement and Care);
- ABA RESOLUTION 11A103D (2011) (Protection of Unaccompanied and Undocumented Immigrant Children);
- ABA RESOLUTION 19A115C (2019) (Constitutionality of the Indian Child Welfare Act);
- ABA RESOLUTION 22M613 (2022) (Presumption of Youth Presence in Court);
- ABA RESOLUTION 20A115 (2020) (Engagement in Youth Legal System Reform);
- ABA RESOLUTION 19A118 (2019) ( Family Integrity and Family Unity);
- ABA RESOLUTION 07A104B (2007) (LGBT Youth in Foster Care Policy);
- ABA RESOLUTION 15A112 (2015), (Conversion Therapy Policy);
- ABA RESOLUTION 21A102 (2021) (Bias Training for Legal Professionals);
- ABA RESOLUTION 20A117 (2020) (Guidelines on Remote Technology in Proceedings);
- ABA RESOLUTION 20A116G (2020) (Training on Implicit Bias);
- ABA RESOLUTION 91A10D (1991) (Examining Bias in Federal Judicial System).

6. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

7. Status of Legislation. (If applicable) N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted, this ABA Resolution with Report will be shared with federal, state, local, territorial, and tribal Bar Associations and courts, as well as attorneys, judges, legislators, governmental agencies, and policymakers with connection to or involved in the child welfare system to support and engage in eliminating anti-Black systemic racism that continues to impact Black families who come into contact with the system. We will encourage courts and judges to use this policy when helping to create relevant court rules, policies and procedures.

9. Cost to the Association. (Both direct and indirect costs)

Adoption of this proposed resolution would result in only minor indirect costs associated with Commission staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

10. Disclosure of Interest. (If applicable) None

11. Referrals. By copy of this form, the Report with Recommendation will be referred to the following entities:

- Center for Human Rights
- Coalition on Racial and Ethnic Justice

- Commission on Disability Rights
- Commission on Domestic and Sexual Violence
- Commission on Hispanic Legal Rights and Responsibilities
- Commission on Homelessness and Poverty
- Commission on Immigration
- Commission on Race and Ethnicity in the Profession
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Council for Diversity in the Educational Pipeline
- Criminal Justice Section
- Division for Legal Services
- Family Law Section
- Health Law Section
- Judicial Division
- Litigation Section
- Section of Civil Rights and Social Justice
- Section of Science and Technology
- Solo, Small Firm and General Practice Division
- Special Committee on Hispanic Legal Rights and Responsibilities
- Standing Committee on Legal Aid and Indigent Defense
- Standing Committee on Gun Violence
- Young Lawyers Division

12. Name and Contact Information (Prior to the Meeting. Please include name, telephone number and e-mail address). *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

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13. Name and Contact Information. (Who will present the Resolution with Report to the House?) Please include best contact information to use when on-site at the meeting.

# 606

*Be aware that this information will be available to anyone who views the House of Delegates agenda online.*

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## EXECUTIVE SUMMARY

### 1. Summary of the Resolution.

This Resolution calls on Bar Associations throughout the country to educate attorneys and other legal professionals on how the experience of separating Black children from their parents in the child welfare system is intimately linked to the history of slavery in our country as well as subsequent approaches to over-surveillance of and underinvestment in Black families.<sup>72</sup> With an understanding of this history, the Resolution also urges judges, attorneys, legislators, and other legal professionals to challenge present-day laws that have devalued Black families and resulted in the separation of Black parents from their children. Further, the Resolution urges the legal profession to recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience in taking constructive steps to end the legacy of family separation and design a public approach to family support that best meets children and parents' needs in the future. This policy is the natural evolution of the ABA's larger call for the legal profession to address issues of racism in our civil and criminal justice systems in America.

### 2. Summary of the issue that the resolution addresses.

As described above this Resolution builds on existing ABA law policies that examine disproportionality in the child welfare system, with a directed focus on recognizing how anti-Black systemic racism has resulted in the disparate treatment and involvement of Black parents, children, and kin in the system. More specifically, the Resolution calls for recognition that the history of governmental control, surveillance, under-investment, and interference in the lives of Black families since times of slavery, has led to and continues to impact decisions to separate Black children from their families as well as decisions about what happens once a child has been removed. Without that greater context it is impossible to avoid reinforcing the same structures. Instead of focusing broadly on "racial and ethnic minorities," this Resolution focuses solely on Black families. The history and impact of anti-Black racism in America is unique and must be honored as such. Additionally, the Resolution articulates specific guidance for Bar Associations, courts, attorneys, judges, legislators, governmental agencies, and policy makers to consult, listen to, and be led by Black parents, children, and kin with lived experience to end the legacy of Black family separation that has been embedded in the child welfare system.

### 3. Please explain how the proposed policy position will address the issue.

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<sup>72</sup> See e.g., New York State Bar Association House of Delegates, Report and Recommendations of Committee on Families and the Law RESOLUTION ADDRESSING SYSTEMIC RACISM IN THE CHILD WELFARE SYSTEM OF THE STATE OF NEW YORK, April 2, 2022, <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf> (the NYSBA passed a resolution with an accompanying report finding the Child Welfare System "replete with systemic racism" and calling for reform).

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This Resolution identifies actions needed to acknowledge and take constructive steps to correct for anti-Black systemic racism. By recognizing how specific laws and policies have devalued Black families and normalized systemic racism, we can begin to actively re-evaluate and assess laws that have been informed by racist goals or assumptions, undermining Black family integrity. We can also learn from Black people with lived experience to support constructive steps to end Black family separation, which implicates the constitutional rights of parents and children to family integrity.

4. Summary of any minority views or opposition internal and/or external to the ABA which have been identified.

None have been identified.