

**The Right to Family:
Bringing Human Rights to Bear on Racial and Socioeconomic
Discrimination in the U.S. Child Welfare System**

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ABSTRACT

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This paper discusses the ongoing patterns of racial and socioeconomic discrimination carried out by the U.S. child welfare system and analyzes their human rights implications as well as the potential strategic benefits of using human rights norms to frame and condemn those patterns. It finds that today's child welfare system reflects many of the same fundamental abuses identified two decades ago as causing disproportionate harm to poor people of color, including excessive surveillance and suspicion of them, racialized constructions of families of color as less bonded, treatment of poverty as parental inadequacy, and prioritization of punishing parents over protecting children. The researcher analyzes these trends through the lens of international human rights law and finds that, not only are provisions of several treaties being violated, but that those treaties offer important tactical tools in this arena. Namely, they embrace a broader definition of racial discrimination than that available in U.S. law, they shift the blame for poverty from the individual to the State, and they instill a strong presumption in favor of family unity, all of which could help to combat the different forms of discrimination that have pervaded the child welfare system in the United States.

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Chapter 1: Introduction

In October 2017, U.S. Immigration and Customs Enforcement officials began routinely separating families who were attempting to enter the United States from Mexico, tearing young children away from their parents and placing them in the custody of the state.¹ Public reaction was, justifiably, outraged. Lawyers flocked to the border to defend the immigrants in court proceedings, activists organized to demand an end to the family separations,² politicians from around the world spoke out condemning the policy as shameful,³ and the United Nations identified the tactic as a violation of families' and children's' internationally recognized human rights.⁴ On a global scale, individuals and institutions refused to stand by while this violent attack on family integrity was carried out by the U.S. government.

And yet, this sort of attack on family integrity had been happening already within the United States for years, through its child welfare system. This system was established in the early 20th century for a variety of purposes, including to prevent, investigate, treat, and punish cases of parental neglect and abuse of children.⁵ In this function, U.S. child protective agencies and family courts have taken children from their families in manners that disproportionately and systematically target poor families and families of color, and that suggest that the system's purported aim of achieving children's best interests sometimes conceals racist and prejudiced motives. The child welfare system—the totality of organizations involved in the process of child

¹ “Children 'as Young as One' Involved in US Separation of Migrant Families – UN Rights Office | UN News,” United Nations (United Nations, June 5, 2018), <https://news.un.org/en/story/2018/06/1011391>.

² Nicole Gallucci, “7 Activist Groups Supporting Families at the Border That Need Your Help Right Now,” Mashable (Mashable, June 18, 2018), https://mashable.com/article/child-separation-immigration-charities-donate/#0x8R_BIIoqF.

³ Alex Ward, “How the World Is Reacting to Trump's Family Separation Policy,” Vox (Vox, June 20, 2018), <https://www.vox.com/world/2018/6/20/17483738/trump-family-separation-border-trudeau-may-reaction>.

⁴ “Children 'as Young as One' Involved in US Separation of Migrant Families – UN Rights Office | UN News,” United Nations (2018).

⁵ Courtney, Mark E. 2013 "Child Welfare: History and Policy Framework." *Encyclopedia of Social Work*. 28 Apr. 2019. <http://oxfordre.com/socialwork/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-530>.

removals, including child protection services and family courts—has been critiqued as a modern iteration of centuries-old attempts by the State to surveil, police, and oppress people of color, and particularly poor people of color. A series of studies conducted between the late 1990s and early 2000s found that structural and historically embedded racism facilitates in this system a willingness to tear apart families of color, and that the child welfare system routinely demonizes the poor, constructing conditions of poverty as signs of parents' moral failure and punishing them by removing their children.

These findings raise serious questions about whether the U.S. child welfare system operates consistently with international human rights norms. Specifically, there are grounds on which to examine whether the U.S. is violating the right of families to live free from arbitrary State intervention,⁶ the right of children to be raised by their parents unless dire circumstances mean that their best interests require otherwise,⁷ the right to fair and equal treatment before organs of justice,⁸ and the State's duty to protect these rights without regard to race. And yet, to date, these questions have not been engaged by either domestic family rights advocates or the international human rights community. American advocates and scholars arguing for change in this system discuss its failings in terms of civil or constitutional rights, but not human rights.⁹ Internationally, while the United Nations has criticized the United States for its violation of

⁶ "International Covenant on Civil and Political Rights." Opened for signature December 16, 1966. United Nations, Treaty Series, vol. 999, p. 171.

⁷ "Convention on the Rights of the Child." Opened for signature November 20, 1989. United Nations, Treaty Series, vol. 1577, p. 3

⁸ "International Convention on the Elimination of All Forms of Racial Discrimination." Opened for signature December 21, 1965. United Nations, Treaty Series, vol. 660, p. 195.

⁹ Dorothy E. Roberts, "Child Welfare and Civil Rights," 2003 U. Ill. L. Rev. 171 (2003); Erin Cloud, Rebecca Oyama & Lauren Teichner, "Family Defense in the Age of Black Lives Matter," 20 CUNY L. Rev. (2016). Available at: <https://academicworks.cuny.edu/clr/vol20/iss1/14>

families' rights in separating migrant families at the border,¹⁰ there has been no similar condemnation of the U.S. family court system. Moreover, within human rights scholarship, analysis of the U.S. child welfare system is limited to discussions of the potential impacts of U.S. ratification of the Convention on the Rights of the Child,¹¹ or the U.S. child welfare system as reflecting the challenges in balancing families' rights to stay together and the state's duty to protect children from harm.¹² However, no available scholarship engages seriously with the possibility that the U.S. child welfare system's determination that certain children are endangered is colored by racist and classist prejudices, nor does any scholarship thus far examine whether the State is "protecting" children in a way that might violate human rights law.

The goal of my research has been to fill this gap by evaluating the U.S. child welfare system through the lens of human rights law to see how its operations square with international norms surrounding the protection of families. I sought to assess whether the system in place today continues to carry out decades-old discrimination on the basis of race and/or the basis of class in a way that is inconsistent with international law, and if so, how it does this. Beyond that, I also sought to understand what new perspectives or strategies the incorporation of human rights standards can bring to ongoing efforts to reform the child welfare and family court system, and what the limitations of human rights law are for these efforts. Through my research, I found that structural racism and deep-seated stigmas towards people of color, especially black people, cause the U.S. child welfare system to arbitrarily intervene into the lives of families in a racially

¹⁰ "Children 'as Young as One' Involved in US Separation of Migrant Families – UN Rights Office | UN News," United Nations (United Nations, June 5, 2018), <https://news.un.org/en/story/2018/06/1011391>.

¹¹ Martin Guggenheim, "Ratify the U.N. Convention on the Rights of the Child, but Don't Expect any Miracles," *Emory International Law Review* 20, no. 1 (Spring 2006): 43-68; Roger J. R. Levesque, "International Children's Rights: Can They Make a Difference in American Family Policy?," *American Psychologist* 51, no. 12 (December 1996): pp. 1251-1256, <https://doi.org/10.1037/0003-066x.51.12.1251>.

¹² Sonja Starr; Lea Brilmayer, "Family Separation as a Violation of International Law," *Berkeley Journal of International Law* 21, no. 2 (2003): 213-287

discriminatory way. I also found that prejudice towards the poor motivates the State to remove children on the flawed presumption that their parents are fundamentally inadequate instead of offering material resources to help families stay together. Finally, I found that these racist and classist biases prevent the child welfare system from consistently operating in the best interests of children and prioritizing family integrity. These practices, which mirror the same ones identified 20 years ago, imply violations of rights established by the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of Racial Discrimination (ICERD), and the Convention on the Rights of the Child (CRC). Holding the U.S. to these human rights instruments is important not just as a matter of principle, but as a matter of strategy: they offer new tools to help advocates address the persistent racial and socioeconomic discrimination in the child welfare system by embracing a broader definition of racial discrimination and by reframing poverty as a State failure instead of an individual one.

My hope is that these findings will offer new tools with which to bring the child welfare system to define and condemn the abuses of the U.S. child welfare system, and will bring this system to the attention of the international human rights community. Ideally, this will lay the groundwork for human rights defenders worldwide to hold the United States accountable for its obligation to separate families responsibly and without prejudice.

Chapter 2: Roots of the U.S. Child Welfare System

The legislative evolution of our child welfare system reflects a growing concern for what the State has deemed “child safety” over family integrity. In 1935, as part of President Roosevelt’s New Deal, Congress passed the Social Security Act, which included the Child Welfare Service Program, through which the federal government provided funding to states for preventive and protective services and foster care payments. Under Title IV-E of the Act, the government can spend an unlimited amount on out-of-home care for children (such as foster care or adoption), but Title IV-B of the Act limits expenditures for preventing child removals and reuniting families.¹³ Although 1980 saw the passage of the Adoption Assistance and Child Welfare Act, which required states to make “reasonable efforts” to avoid child removals or to achieve family reunification where removals were necessary, Congress later passed the Adoption and Safe Families Act of 1997 (ASFA), which shifted the priority back to “child safety” over family unity and established timelines for terminating parental rights and “freeing” children for adoption. ASFA also dictates that in cases of physical and sexual abuse, the State has no obligation to make reasonable efforts to keep families intact.¹⁴

It is important to consider, though, that the State’s efforts to achieve safety for children are carried out through a system that is built on historical racial and socioeconomic prejudice. Today’s child welfare system has its roots in a combination of criminal justice bodies, private social service organizations, and State welfare programs. Before the mid 19th century, matters

¹³ Courtney, Mark E. 2013 "Child Welfare: History and Policy Framework." *Encyclopedia of Social Work*. 28 Apr. 2019. <http://oxfordre.com/socialwork/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-530>.

¹⁴ John E.b. Myers, “A Short History of Child Protection in America,” *Family Law Quarterly* 42, no. 3, Golden Anniversary Issue (October 1, 2008): pp. 449-463, <http://www.jstor.org/stable/10.2307/25740668?refreqid=search-gateway:632f1dd9c6836598ffc317509df45e8f>.

pertaining to abuse of children in the United States were handled by the police and by the courts.¹⁵ In the 1850s, however, a man named Charles Brace founded the Children's Aid Society (CAS), originally with the goal of providing shelter and vocational training to urban, poor youth. Eventually, CAS launched a wide-scale effort called the "orphan trains"—even though the children it targeted were not always orphans—to ship these underprivileged children to the Midwest to be raised by Protestant families¹⁶ Subsequently, the New York Society for the Prevention of Child Cruelty (SCPCC) was created, which inspired the foundation of approximately 300 similar non-governmental child protection organizations in cities nationwide by 1922.¹⁷ These private organizations wielded astonishing power to intervene in and control the lives of the poor people they served, entering and searching their homes and removing their children with a police-like level of authority. And though the work of CAS on its face may have appeared to advance the interests of the poor, Brace's writing makes it evident that the organization was driven by a deep fear and resentment of them, especially the non-white poor. In CAS's second annual report, Brace warned that "The greatest danger that can threaten a country like ours is from the existence of an ignorant, debased, permanently poor class, in the great cities. It is still more threatening if this class be of foreign birth, and of different habits from those of our own people."¹⁸

Today's child welfare system is also rooted in a history of government-run family support services that have long excluded people of color. After the proliferation of non-governmental child protection organizations like CAS and SCPCC, in the early 20th century, with

¹⁵ Ibid.

¹⁶ Engel, Madeline, Frances DellaCava, and Norma Kolko Phillips. "Cultural Difference and Adoption Policy in the United States: The Quest for Social Justice for Children", *The International Journal of Children's Rights* 18, 2: 291-308, doi: <https://doi.org/10.1163/092755609X12488514988991>

¹⁷ Myers, "A Short History of Child Protection in America."

¹⁸ Bullard, Katharine S.. *Civilizing the Child : Discourses of Race, Nation, and Child Welfare in America*. Blue Ridge Summit: Lexington Books, 2013. Accessed April 28, 2019. ProQuest Ebook Central.

the advent of the juvenile court and the development of state-run social services, there were increasing calls to shift all child protection services from private societies back to the State.¹⁹ One of the earliest State agencies to handle child protection was the federal Children's Bureau, established in 1912, which investigated the condition of children throughout the country and promoted their health by offering information and support services to mothers. It has been argued that the Bureau's work reflected the State's commitment to social rights of citizenship, specifically to the rights of children and mothers to material assistance. That said, it has also been argued that the Bureau did not extend those rights of citizenship to everyone, instead focusing resources and attention predominantly on white families. It also contributed to a division of the population along racial lines through records and reports that categorized by race, and through a construction of the image of the "ideal" or "average" child as a white one, excluding children of other races from the picture. In the South, the Bureau complied with segregationist practices by training physicians to deliver the babies of white women, while training midwives to attend to black women's deliveries. The Bureau's training of these midwives consisted predominantly of teaching them to record the children's' births, and less so how to safely deliver babies, revealing its priority of surveillance over the health of black families.²⁰

As the nation's poor have become less white and social security benefits have been made available to more communities of color, the narrative surrounding social and economic rights in the United States has also changed. Over the last few decades, whatever commitment the State had to women's and children's socioeconomic rights began to deteriorate, and poor mothers, especially mothers of color, have been required to prove their deservingness in order to receive

¹⁹ Myers, "A Short History of Child Protection in America."

²⁰ Bullard, Katharine S.. *Civilizing the Child*.

aid.²¹ Under this system, the black woman has been constructed as the “welfare queen,” taking advantage of social security and depending completely on government handouts. This incendiary archetype carries with it the stigma of bad motherhood—the welfare queen is believed to be neglectful, lazy, degenerate, and a poor example to her children.²² The welfare queen has children only because she relies on the State to finance them, not for any of the socially legitimate reasons that motivate people of privilege to raise families.²³ This country’s historical treatment of people of color as unentitled to social or economic supports and as categorically inferior mothers, as well as its legacy of private child protection services that demonized and controlled the poor, set the stage for a child welfare system tinged by racial and socioeconomic bias.

²¹ Ibid.

²² Ibid.

²³ Khiara M.. Bridges, *The Poverty of Privacy Rights* (Stanford University Press, 2017).

Chapter 3: Systemic Trends of Discrimination

In fact, when we look at our modern child welfare and family court system, there is statistical evidence that it disproportionately affects poor people and people of color. In 2017, black children only accounted for about 14% of the population, but made up nearly 21% of the children identified as victims of abuse or neglect nationwide and 23% of children in foster care. The same disproportionality is reflected among adults; in 2017, 12% of the total adult U.S. population was black,²⁴ while nearly 21% of those found to be perpetrators of child neglect or abuse were black.²⁵ Scholars have written at length on how these numbers reflect not just disparate impact, but systematic bias against black people, including a conception of blackness as moral failure,²⁶ and an extension of the historic American effort to control and oppress black communities.²⁷ Furthermore, research has demonstrated that racism directly influences the outcomes of child welfare cases, including one experiment in which Child Protection Services caseworkers were shown identical photographs of a messy room that varied only in whether it contained a white baby, a black baby, or no baby at all. That study concluded that caseworkers shown the photo with the black baby were more likely to find that the situation constituted neglect and should be reported.²⁸

Some scholars argue that racism either does not account for, or only partially accounts for, the overrepresentation of people of color among those affected by the child welfare system,

²⁴ “Adult Population by Race in the United States (2008-2017),” n.d., <https://datacenter.kidscount.org/data/tables/6539-adult-population-by-race#detailed/1/any/false/871,870,573,869,36,868,867,133,38,35/68,69,67,12,70,66,71,2800/13517,13518>.

²⁵ Children's Bureau, Department of Health and Human Services. “Child Maltreatment 2017.” (January 28, 2019), <https://www.acf.hhs.gov/cb/resource/child-maltreatment-2017>.

²⁶ Annette R. Appell, “Protecting Children Or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay],” *South Carolina Law Review* 48, no. 3 (Spring1997): 577-614

²⁷ Roberts, Dorothy E. 2002. *Shattered bonds: the color of child welfare*. New York: Basic Books.

²⁸ Sheila D. Ards et al., “Racialized Perceptions and Child Neglect,” *Children and Youth Services Review* 34, no. 8 (August 2012): pp. 1480-1491, <https://doi.org/10.1016/j.chilyouth.2012.03.018>.

and that the more significant factor contributing to this phenomenon is poverty.²⁹ These scholars point to research from 2009 in Missouri indicating that, after controlling for poverty rates, there is little evidence of racial disparities in decisions to investigate child maltreatment reports,³⁰ as well as a 2012 nationwide study demonstrating that racial disparities in risk assessment and substantiation of neglect and abuse cases are attributable to differential circumstances, not to racism.³¹ The logic goes that because people of color are disproportionately poor, and because the poor are disproportionately involved in the child welfare system, we see high rates of minority families swept up by this system. Although there is still debate about the degree to which racism impacts outcomes in the child welfare system, this argument is valid to the extent that poverty is a very strong indicator for findings of neglect or abuse; a 2006 study found that half of the caregivers of children entering foster care had challenges paying for basic necessities,³² and the Department of Health and Human Service's reported in 2010 that children of families of low socioeconomic status (meaning a household income below \$15,000 a year, the parents' highest education level is less than high school, or any member of the household participates in a poverty program) are five times more likely to experience child maltreatment (defined as either neglect or abuse).³³ Researchers have also demonstrated that poverty increases

²⁹ Leroy Pelton, "The continuing role of material factors in child maltreatment and placement," *Child Abuse and Neglect*, 41 (March 2015): 30-39.

³⁰ Drake, B., Jolley, J. M., Lanier, P., Fluke, J., Barth, R. P., & Jonson-Reid, M. (2011). Racial bias in child protection? A comparison of competing explanations using national data. *Pediatrics*, 127, 471-478.

³¹ Font, S. A., Berger, L. M., & Slack, K. S. (2012). Examining racial disproportionality in child protective services case decisions. *Children and Youth Services Review*, 34, 2188-2200.

³² Barth, R. P., Wildfire, J., & Green, R. L. (2006). Placement into foster care and the interplay of urbanicity, child behavior problems, and poverty. *American Journal of Orthopsychiatry*, 76, 358-366.

³³ Department of Health and Human Services, Office of Planning, Research, and Evaluation, "Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress," § (2010), <https://www.acf.hhs.gov/opre/resource/fourth-national-incidence-study-of-child-abuse-and-neglect-nis-4-report-to>.

the likelihood of out-of-home placements³⁴ and decreases the likelihood of family reunification.³⁵

Several scholars have considered what might be causing the relationship between poverty and family court involvement, with some suggesting that the stress of life with severe financial limitations can lead to emotional or mental conditions that result in child abuse.³⁶ Even if this is true, studies showing that poor children are more likely to be labeled “abused” than wealthier children with similar injuries³⁷ suggest that bias towards poor people plays a role in the identification of abuse. Furthermore, abuse accounts for only a small portion of family court cases compared to neglect: according to HHS, in 2017, 75% of the victims of child maltreatment were neglected, compared to 18.3% who were physically abused and 8.6% who were sexually abused.³⁸ To understand why the poor are so heavily represented in the family court system, then, it is important to look at the relationship between poverty and findings of neglect. Notably, the HHS report cited above found that while children from low socioeconomic means were 3 times more likely to experience abuse, they were 7 times more likely to experience neglect.³⁹ This may seem intuitive, as poverty can lead to an absence of material resources and thereby endanger the wellbeing of children. However, as scholars like Leroy Pelton have pointed out, neglect is often defined within family law as not only produced by, but synonymous with,

³⁴ Barth, R. P., Courtney, M., Berrick, J. D., & Albert, V. (1994). From child abuse to permanency planning. New York: Aldine de Gruyter; Courtney, M. E., & Wong, Y. I. (1996). Comparing the timing of exits from substitute care. *Children and Youth Services Review*, 18, 307 – 334, as cited in Barth, R. P., Courtney, M., Berrick, J. D., & Albert, V. (1994). From child abuse to permanency planning. New York: Aldine de Gruyter; Courtney, M. E., & Wong, Y. I. (1996). Comparing the timing of exits from substitute care. *Children and Youth Services Review*, 18, 307 – 334.

³⁵ Ibid.

³⁶ Pelton, “The continuing role of material factors”

³⁷ Robert L. Hampton, Child Abuse in the African American Community, in *CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE* 220, 222 (Joyce E. Everett et al. eds., 1991), as cited in Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. Ill. L. Rev. 171 (2003)

³⁸ Department of Health and Human Services. “Child Maltreatment 2017.”

³⁹ Department of Health and Human Services, NIS-4

poverty.⁴⁰ As law professor Robert Mnookin once wrote, “Some ‘dirty homes’ may seriously endanger a child’s growth and well-being, but most merely offend middle-class sensibilities.”⁴¹

It is apparent that both racism and socioeconomic prejudice are active vectors of discrimination at work in the child welfare system. The child welfare system’s heritage of excluding and demonizing people of color, and of offering social services that criminalized and denied the rights of the poor, are somehow continuing to impact its practices today and are leading to the disproportionate destruction of poor families of color. The question then becomes not just whether an injustice is being carried out, but more specifically, how?

⁴⁰ Pelton, “The continuing role of material factors.”

⁴¹ Mnookin, R. H. (1973). Foster care – In whose best interest? *Harvard Educational Review*, 43, 599–638, as cited in Pelton, “The continuing role of material factors.”

Chapter 4: Preparing to Trace Bias

4.1: Research Questions and Methodology

Quantitative data, while illustrative of wide patterns, can only go so far. Although it may demonstrate a disproportionate representation of a particular group that suggests discriminatory effect, it does little to elucidate how that discrimination operates, which makes it difficult to identify the specific ways in which racial and class bias are manifested in the child welfare system to the detriment of poor families of colors. To understand this, it is important to engage closely with the experiences of parents and to draw on the expertise of lawyers who have worked in the family court system and scholars who have studied it.

Since the late 1990s, there have been three major scholarly works that have looked closely at the experiences of families within child welfare and family court system as a means of learning how race and class is treated by this system. One was published in 1997 by Annette Appell,⁴² a professor at Washington University Law School who has spent her career representing children and parents in family court proceedings and teaching Family Law.⁴³ The second was published in 2001 by Dorothy Roberts,⁴⁴ a professor at the University of Pennsylvania Law School and an acclaimed scholar of race, gender, and the law.⁴⁵ The third was published in 2016 based on research conducted between 2006-2007 by Tina Lee for her graduate dissertation.⁴⁶ Appell and Roberts both studied parents with cases before the Family court in Chicago; Appell relied on her own experience as an attorney and the stories of several women

⁴² Annette R. Appell, "Protecting Children Or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]," *South Carolina Law Review* 48, no. 3 (Spring 1997): 577-614

⁴³ "Annette Ruth Appell," National Coalition For Child Protection Reform, June 29, 2017, <https://nccpr.org/annette-ruth-appell-2/>.

⁴⁴ Roberts, Dorothy E. 2002. *Shattered bonds: the color of child welfare*. New York: Basic Books

⁴⁵ "Dorothy E. Roberts," Penn Law, accessed April 29, 2019, <https://www.law.upenn.edu/cf/faculty/roberts1/>.

⁴⁶ Lee, Tina. *Catching a Case: Inequality and Fear in New York City's Child Welfare System* (New Brunswick, NJ: Rutgers University Press, 2016).

she represented, and Roberts relied upon court decisions, empirical studies, and newspaper articles, as well as interviews with affected parents. Meanwhile, Lee's research was based in New York City and included observations of court, support groups, and parenting classes, and interviews with affected parents, lawyers, caseworkers, and judges. These three studies taken together provide a picture of the ways in which racial and socioeconomic prejudice shaped the operations of the U.S. child welfare system between the late 1990's and early 2000's.

Nearly 20 years later, it is necessary to take the pulse of the child welfare system to see if the problems identified by earlier researchers as contributing to the system's racial and socioeconomic inequality persist. This is a particularly important question because, since the last study of this nature was done, Congress passed the Families First Prevention Services Act with the goal of incentivizing states to take appropriate steps to avoid family separations.⁴⁷

Additionally, in New York City, organizations like the Bronx Defenders, the Child Welfare Organizing Project (CWOP), and others have been active in efforts to bring attention to the injustices in the family court system, push for legislative reforms, and advocate for affected parents. The purpose of my research, therefore, was to understand what sorts of racial and socioeconomic discrimination remain in the child welfare system despite the progress that has been, and to suggest ways in which human rights norms, principles, and framings might be able to respond to those forms of discrimination and support further calls for reform.

To answer these questions, I conducted interviews in early 2019 with three categories of stakeholders in the child welfare system: affected parents (parents with past or current cases before the family court), public family defense attorneys (lawyers who represent indigent parents in family court proceedings), and scholars on U.S. family law. I interviewed six affected parents,

⁴⁷ First Focus Campaign for Children, "Family First Prevention Act Bill Summary," *Family First Prevention Act Bill Summary*, n.d., <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Short-Summary-FFPSA.pdf>.

all of whom were affiliated with the Child Welfare Organizing Project, which offers support and advocacy training to parents dealing with the child welfare system, and also does lobbying and public education work towards reforming the system.⁴⁸ I interviewed two legal scholars: Dr. Jane Spinak and Dr. Martin Guggenheim, who teach at Columbia Law School and New York University Law School, respectively, and each of whom has approximately 40 years of experience in family law. I interviewed five family defense attorneys who work at the Bronx Defenders, a public defense agency that provides legal services to indigent residents of the Bronx and has participated regularly in discussions about the problems in the child welfare system.⁴⁹ These attorneys estimated that they had worked on between 120 and 1,000 family court cases in their careers. Tina Lee's research in 2006-7 was based in part on interviews with staff at the Bronx Defenders and parents from CWOP,⁵⁰ which makes the responses of participants from those organizations in this study particularly helpful for tracking change, or lack thereof, in the child welfare system.

All interview participants were based in New York City and primarily had contact with the New York family court system. However, the lawyers interviewed, especially the legal scholars, had familiarity with the national child welfare landscape, and their comments varied in subject between the local system and the national one. Furthermore, this paper is concerned with the human rights implications of child welfare practices, and human rights law assigns responsibility to central governments for the conduct of constituent authorities; in the United States, that would mean that the federal government is considered responsible for the conduct of

⁴⁸ "About Us," Child Welfare Organizing Project, accessed April 29, 2019, <http://www.cwop.org/>.

⁴⁹ "Our Work," The Bronx Defenders, accessed April 29, 2019, <https://www.bronxdefenders.org/our-work/>.

⁵⁰ Lee. *Catching a Case*.

individual state governments.⁵¹ For these reasons, this paper takes interview responses as reflective of the “U.S. child welfare system.” This is not to suggest that the patterns described by interviewees are identical in all parts of the country, only that they are often reflective of wider trends and that, more importantly, insofar as they represent even a segment of the national child welfare system, they are attributable to the United States for the purposes of human rights law.

4.2: Overview of a Family Court Case

It may serve the reader to be familiar with the basics of how a case proceeds through the child welfare and family court system in New York City. The New York Family court Act (NYFCA) defines abuse and neglect as “the act, or failure to act, by any parent or caretaker that results in the death, serious physical or emotional harm, sexual abuse, or exploitation of a child under the age of 18.”⁵² ACS, or the Administration for Children’s Services, is the organization responsible for investigating reports of abuse and neglect, monitoring parents, and removing children in New York City.⁵³ NYFCA dictates that shortly after an emergency child removal or before a non-emergency removal, ACS must appear before the Family court to demonstrate that the child is in imminent risk of harm.⁵⁴ The Court must then determine whether to remove the child from the custody of her parent(s) by weighing whether the imminent risk can be mitigated by reasonable efforts to avoid removal, balancing that risk against the harms associated with removal in order to determine the “best interests of the child.”⁵⁵ This “best interests” standard governs all stages of Family court proceedings for neglect and abuse cases, with the exception of

⁵¹ Peter J. Spiro, *The States and International Human Rights*, 66 *Fordham L. Rev.* 567 (1997).

⁵² “What Is Child Abuse/Neglect?,” NYC Administration for Children's Services, accessed April 29, 2019, <https://www1.nyc.gov/site/acs/child-welfare/what-is-child-abuse-neglect.page>.

⁵³ “About Us,” Child Welfare Organizing Project, accessed April 29, 2019, <http://www.cwop.org/>.

⁵⁴ New York Family Court Act §§1022 and 1024]

⁵⁵ *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003). New York State Unified Court System (n.d.).

fact-finding (the Court's determination of whether the parent did engage in the conduct of which she is accused).⁵⁶ The Court may also order a parent to comply with "services" in order to maintain or repossess custody of her child, which can include programs like parenting classes, anger management classes, and drug or alcohol rehabilitation.⁵⁷

⁵⁶ "Best Interest of the Child - Custody Proceedings," New York City Bar - Legal Referral Service, February 19, 2016, <https://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/best-interests-of-the-child/>.

⁵⁷ New York Family Court Act §§1015-a, 1022(a) and (c)

Chapter 5: Research Findings: Identifying Persistent Racist and Classist Practices

In this section, I summarize some of the main findings of Appell, Roberts, and Lee from the late 1990's and early 2000's with regard to the functions of racism and classism in the child welfare system in order to then identify, based on my research, whether and how today's system reflects those same functions. The goal of this is to understand what, if any, biases remain in the child welfare system that continue to cause the inequitable separation of poor families of color, despite the activism and legislative reform that has taken place in the last 15 years.

5.1: Bringing Poor People of Color into the Child Welfare System

Then:

Appell, Roberts, and Lee all noted that the families affected by the child welfare system were disproportionately poor, and disproportionately people of color. All three also attributed this in part to the fact that poor families were more heavily surveilled by the State as a function of their reliance on public programs, bringing behavior to the attention of the State that might otherwise go unnoticed. Additionally, they found that decisions to report these families to child protection agencies were often influenced by societal stigmas about people of color, and black mothers in particular, that created heightened suspicion towards them and undermined their credibility as parents.⁵⁸

Now:

My research demonstrated that the enhanced surveillance of and suspicion towards poor people of color still facilitates their disproportionate representation in the child welfare system.

⁵⁸ Appell, Annette R. "Protecting Children Or Punishing Mothers"; Roberts, Dorothy E.. *Shattered bonds*; Lee, Tina, *Catching a Case*.

Most of my interview participants, particularly the family defenders and legal scholars, spoke to the fact that those affected by this system are overwhelmingly poor people of color. Lawyers from the Bronx Defenders told me that this system operates “almost exclusively in poor communities and almost exclusively in communities of color” and that “almost all of our clients are people of color . . . all of our clients are poor people.” Eva Santiago, the director of CWOP, said that “if you’re white in the Village, it’s very less likely that ACS is going to be knocking on your door.” There was a widespread sentiment that this is not a coincidence, but that poor people of color are surveilled by the State and targeted by the child welfare system in a way that wealthy white families are not. Estelita Baez, an affected parent, said, “If you're a colored person and you live in a low-income area, you're already red tagged for ACS,” while a Bronx Defenders lawyer told me that “the State is targeting people and communities of color.” Parents felt that the State scrutinizes people of color much more heavily than it does white, wealthier people: Ms. Baez stated “Look, do you go on 12th avenue, with these other white people, no offense, where the white people are at? Do you worry about if their kid is on drugs? Do you worry about if their kid is stealing, raping, or killing? No, you're not worried about them.”

Dr. Guggenheim explained during his interview how racist stigmas can turn overzealous scrutiny into overzealous reporting. He told me that medical professionals are inclined to be more suspicious of parents of color and to afford them less respect, seeing them as “the parent of a public charge” instead of “a client, an important person.” This, he said, makes them more likely to report those parents to ACS when their children experience health issues. A lawyer from the Bronx Defenders echoed this idea, saying, “If the parents don't have an adequate explanation, then they’re assumed to be the perpetrator of the harm, whereas in other communities, communities that are not black and brown, communities that are not poor, it's working with the

parent to try and figure out what happened to their child.” Eric Carrasguillo, one of the affected parents who was interviewed, believes that his ACS case began because he was reported by his children’s school, and outlined a number of ways in which the school administrators were more critical of his children and other children of color than they were of white children. He spoke about how the principal singled out his children for discipline while ignoring the bad behavior of white, wealthier children, including a white student who was known to have marijuana in school. Mr. Carasguillo explained that he tried on multiple occasions to cooperate with school administrators to address his children’s situations, but was consistently met with disrespect, and was eventually charged with educational neglect. His experience reflects how the structure of the child welfare system still creates the opportunity for large numbers of poor people of color to be swept into the system by reporters influenced by racial bias.

5.2: Prejudice in Separations

Then:

Appell concluded that as a society, we tended to “other” poor families, especially those of color, constructing them as inherently dysfunctional and perhaps not even seeing them as families at all. According to Appell, this made it much easier for the child welfare system to condone breaking these families apart.⁵⁹ Roberts similarly concluded from her research that internalized stigmas towards black people, especially black mothers, negatively affected their outcomes in the child welfare system, and that agents of the child welfare system found it easier to break up black families than other families.⁶⁰ Lee, in the same vein, found that that societal archetypes of black people as irresponsible and immoral led caseworkers and judges to be

⁵⁹ Appell, Annette R. “Protecting Children Or Punishing Mothers.”

⁶⁰ Roberts, Dorothy E.. *Shattered bonds*

particularly skeptical and distrusting of parents of color and to therefore more critically evaluate the charges against them.⁶¹

Now:

No interviewee asserted that individual agents of the child welfare system, be they ACS caseworkers or judges, are operating with the intent to discriminate based on race. In fact, a lawyer from the Bronx Defenders acknowledged that the ACS caseworkers themselves are mostly people of color. However, it became clear throughout my interviews that the racist prejudice that these agents hold—their view of poor families of color as less than human—continues to have detrimental consequences for those families in ways similar to those noted 15-25 years ago.

Almost every interviewee said something to the effect that white people of privilege would never be subjected to the treatment borne by people of color within the child welfare system. Many of the lawyers spoke about how parents of color who they have represented faced neglect charges for drinking wine, smoking marijuana, or leaving their children unattended for a few minutes, all things that they believe white parents are able to do with impunity. Dr. Guggenheim argued that if white people believed they could lose their children for the reasons that poor people of color do – medical emergencies that preclude them from parenting, substance abuse, etc. – that they would never support these laws. They support them, said Dr. Guggenheim, because “they know, correctly, they will never be victims of these laws.” A lawyer from the Bronx Defenders similarly stated, “I think if privileged families were treated the way the system treats the family, that the system would be abolished, because there's no way that families of

⁶¹ Lee, Tina, *Catching a Case*.

privilege would tolerate what the families in this system are required to tolerate.” Not all of the interview subjects spoke in speculative terms; one Bronx Defenders lawyer who estimates that she has worked on about 1,000 family court cases in her career said that she has never seen a white family treated by ACS or the Court with the same level of monitoring or supervision as that she has witnessed be applied to families of color.

This systemic racism can and does translate to a cavalier attitude towards breaking apart families of color. As one Bronx Defenders lawyer told me, “Babies are ripped away from mothers so nonchalantly because of a drug test, and I don't think that that would happen if somebody were rich and white and powerful.” Another echoed the sentiment, saying “I think that the way people are treated in Family court would not happen if they were rich and white. They would be given the benefit of the doubt, and there would be more of an inclination to try to keep families together.” An additional Bronx Defenders lawyer recounted a case in which the attorney for ACS admitted that keeping the child in foster care was no better than returning her home, but pushed for the child to remain in State custody regardless. The lawyer told me that this choice not to prioritize family unity suggests to her “that the system is framed by racism, classism, sexism, because the idea that it's a no-brainer for wealthy, white families that it's important for families to be together, you know, it's a no-brainer in general right?”

The system's lack of respect for the integrity of families of color is reflected in its apathy towards the emotions that parents of color express when their children are removed. Ms. Fardoush, a Bengali woman, described how after giving birth to her son, ACS came to the hospital to take him: “When they took the baby away, when I cried and when I pleaded with them to not take the baby away, they didn't show any kind of concern or any kind of reaction or anything.” Ms. Fardoush related that her son was taken due to her mental illness—she struggles

with depression and schizophrenia—and not because of any harm she had actually inflicted. Without asserting that ACS was wrong to remove the child, the fact that ACS workers treated Ms. Fardoush this way despite her posing no immediate danger to the child reflects a lack of appreciation for the significant pain imposed by separating her family. This implies that some form of prejudice is leading them to view those familial bonds as weak or insignificant, and therefore to take her child away with relative ease.

Parents' emotions upon having their children removed, if not ignored, are often held against them in a heavily racialized way that can similarly facilitate the casual separation of families of color. One Bronx Defenders lawyer stated that “the vast majority of everyone that I represent. . . most of whom are people of color, they are not allowed to have the same emotional responses as people with class privilege and people with race privilege.” That lawyer went on to explain a particular case where the mother, whose son was taken from her in the hospital after he was born, was prone to crying in court. The judge's response was to express concern that the mother was not taking the case seriously. Elaborating further, the lawyer told me:

“It's that type of thing, right, it's when parents have what is often termed an explosive reaction to their children being removed, where it's like on what planet is it not a normal thing for a child or for a parent to be angry and upset and have explosive emotions when their children are being ripped from them? So it's stuff like that where . . . it leads me to believe that it's because these people, these parents are being viewed in a racialized manner, where their behaviors instead of being coded as a normal reaction to a really traumatizing experience it's being coded as uncooperative, non-compliant, recalcitrant, possibly mentally ill, erratic, angry.”

Another lawyer from the Bronx Defenders similarly reported that the efforts by the courts and by ACS lawyers to dehumanize the parents she represents are “pervasive.” Dr. Guggenheim said that his primary objection to the family court system is that it begins with the “explicit or implicit belief that these are inadequate people, that these are subhumans,” and that this belief is connected to historic racism in the United States. It is apparent that the capacity of racist bias to

encourage the disproportionate separation of families of color continues to be a problem in the child welfare system.

5.3: Treating Poverty as Parental Failure

Then:

Roberts found that what is termed by the State as “neglect” was often synonymous with poverty, and that this definition of neglect was widely applied to parents who simply didn’t have the means to provide their children with adequate care.⁶² Lee and Appell also recognized that many of the problems addressed by the Family court were functions of poverty,⁶³ but they, along with Roberts, found that the system rarely (if ever) offered parents material resources to alleviate their conditions of poverty. Instead of lending financial or logistical support to help these parents care for their children, the State invested resources into removing children and requiring parents to complete “service” regimens. All of the researchers found that these mandated services were often aimed at correcting parents’ supposed behavioral problems rather than addressing the concrete needs at the cores of their cases, that compliance with services was used as a gauge for parental competence, and that compliance was at times a stronger determinant of child placement than actual home conditions.⁶⁴ Lee and Roberts both argued that this practice reflected a treatment of poverty as an individual pathology instead of the result of broad societal inequities. They also argued that the practice revealed a systemic goal of punishing parents for their poverty instead of helping families stay together.⁶⁵

⁶² Roberts, Dorothy E.. *Shattered bonds*

⁶³ Appell, Annette R. “Protecting Children Or Punishing Mothers”; Lee, Tina, *Catching a Case*.

⁶⁴ Appell, Annette R. “Protecting Children Or Punishing Mothers”; Roberts, Dorothy E.. *Shattered bonds*; Lee, Tina, *Catching a Case*.

⁶⁵ Roberts, Dorothy E.. *Shattered bonds*; Lee, Tina, *Catching a Case*.

Now:

Most of the Bronx Defenders lawyers interviewed for this paper discussed how many of the parents they represent are charged with neglect not because they have harmed their children, but because of conditions of poverty outside of their control. One lawyer mentioned as examples that the charges of “home alone” or “educational neglect” often stem from a parent’s inability to afford a babysitter who can watch or transport the children, or that the charge of “inadequate provisions” can be produced by parents’ inability to afford adequate housing, clothes, or food. Ironically, as one Bronx Defenders lawyer recounted, some parents are accused of neglect for unclean or unsafe conditions in the city-run public housing or shelters where they live with their families, despite having complained to the city themselves about the very same issues. Two affected parents, Ms. Alfinez and Ms. Anonymous, expressed how elements of their cases arose from their inability to purchase new clothes, to keep air conditioning on, and to secure comfortable housing. Another parent, Ms. Fardoush, told me, based on her experience, “If you're poor then it's easy to take your child away . . . if you don't have the money to provide for the child, they can make an allegation.” Interviewees explained how, in many cases, what parents needed was material or financial support, such as childcare vouchers or housing assistance, but that the family court almost never provides that kind of aid to address the concrete needs of poor families. Instead, they said, it responds by removing children and by ordering “services,” which are programs or tests that parents are required (or strongly encouraged) to complete in order to retain or regain custody of their children.

Affected parents and lawyers described to me at length how these services are often unproductive and unrelated to the allegations against the parent and indicate that the family court system, with its embedded racist and classist prejudices, mistakes poverty for a failure to parent.

One Bronx Defenders lawyer told me that “the vast majority of my cases, it’s going to be these sort of familiar and relatively useless services that are going to be provided to the family.” Four of the six affected parents I interviewed had been subjected to repeated drug testing, with which they said they complied despite never having been drug users. Bronx Defenders lawyers explained that these parents’ experiences are not unique, and that ACS will frequently ask for drug testing in cases where there has been no allegation of drug use, which, in their opinion, results from discriminatory attitudes toward the poor as generally deficient parents. Another Bronx Defenders lawyer told me that she has had cases where her clients did use drugs, but rather than just substance abuse treatment, her clients were ordered to take parenting classes. She added “they were rich and white, would you assume they don't know how to parent? . . . I don’t think so.” Another lawyer mentioned that she had seen a case where the parent was unable to pay a utilities bill, and in response was required to take parenting classes. The Bronx Defenders lawyers also told me that in certain cases, the Court orders “homemaking services,” where someone is sent into the family’s home, not to do housework, but to teach the parent how to perform housework. Additionally, according to interviewed lawyers, the “homemaker” cannot interact with the children without the parent present, and so could not, for example, transport the children to school while the parent is working. Finally, some of the Bronx Defenders lawyers noted that the Court sometimes orders mental health evaluations even when there has been no complaint of a mental health problem. As one lawyer put it, this reflects the system’s belief that poor parents “must have a mental health issue if they're living in these conditions.”

Not only do these services fail to alleviate the challenges that produced these parents’ cases, but, as some affected parents and lawyers described, they can even worsen those problems. One affected parent, the director of CWOP, explained that many parents lose their

jobs and sources of income because of the huge amount of time they are required to devote to completing services. A lawyer from the Bronx Defenders similarly told me that she sometimes has to tell parents that they need to choose between working and completing the services mandated by ACS, “which . . . is so backwards, because what is at issue often for families is that they don't have the . . . financial resources necessary to do all the things that they wish they could do for their kids.” The fact that the family court system requires parents to perform activities that make them *less* able to care for their children suggests that these services are perhaps not intended to improve home conditions in order to make family reunification possible, but rather to test parents' ability to comply with orders. For example, one parent, Mr. Carasguillo, described how ACS had agreed to return his children to him, but at the last moment denied reunification not because they identified a risk to his children, but because they claimed that Mr. Carasguillo failed to complete a particular service. This type of behavior by ACS indicates that services are sometimes not intended to address specific material needs and thereby lay the groundwork for family reunification, but to monitor and correct parents' perceived behavioral inadequacies. This is consistent with the opinion stated by many interview participants, especially the lawyers and legal experts, that the child welfare system sees poverty as not as a concrete lack of resources, but as a symptom of parents' fundamental pathologies.

In fact, many of my interview participants expressed that the types of services with which the family court system responds to issues of poverty suggest that it conceives of poverty as a moral failure by parents, and that it takes this approach partly in order to avoid addressing the greater systemic inequities that underlie poverty. A number of affected parents said that they felt blamed by ACS and the court and judged to be poor parents for circumstances beyond their control. One parent noted, “poor people are being . . . discriminated against big time, because

they don't have the resources to always produce what people are asking.” Likewise, a Bronx Defenders lawyer told me that the system’s decision to invest substantial resources into family separation instead of into material supports that could keep families together “reflects our belief that people are poor because they've done something wrong or they deserve to be . . . We have to believe they're deviant.” Lawyers also explained how blaming individual parents for their children’s poverty evades any discussion of the structural forces that allow those children to live in conditions that are deemed socially and legally unacceptable, with one stating, “Really helping the family would necessitate talking about the real sort of incongruity of resources that poor people of color have to take care of their children . . . And that requires solutions that aren't parenting classes, solutions that are preventive services.” In the same vein, Dr. Guggenheim told me:

“Our child welfare system is based on an ideology that the worst things that can happen to children is the pathology in the family, but actually the worst things that can happen to American children are being raised in a city in which the children are subject to asbestos, to lead poisoning, to rodent infestation, children who are born with a almost certain risk of lifelong asthma, of a shortened life expectancy. None of those problems fall within child welfare. Child welfare is defined as pathology. Parental inadequacy.”

Both Dr. Guggenheim and Dr. Spinak argued that the child welfare system as it stands is more punitive than rehabilitative, and that what would best serve families would be a system that deals with the conditions of poverty causing children to live without adequate housing, food, education, and care as a public health crisis instead of as parental neglect.

5.4: Jeopardizing Children’s Best Interests

Then:

Both Appell and Roberts found in their research that the act of separating children from their families is often extremely traumatizing to those children.⁶⁶ Appell found that children removed from their parents were also moved repeatedly from one foster home to another, making them susceptible to terrible abuse. She also argued that State often fails to provide resources to ameliorate the trauma it imposed on children by removing them.⁶⁷ Roberts concluded that the child welfare system does not approach the harm of family separation with the weight that it deserves.⁶⁸

Now:

Many of my interviewees expressed that they have seen children experience serious trauma by being removed from their parents. One Bronx Defenders lawyer discussed stated:

“These cases cause such emotional trauma to my clients’ children, to my clients. It has a destructive effect on their relationships with their children. I mean I don’t think that we can underestimate the impact of having to be taken away from your family and stay in foster care among strangers, that not only affects a child’s bonding to the parents, it affects a child’s ability to feel safe in their relationship with their parents.”

Another Bronx Defenders lawyer told me that in 80-90% of the cases she has seen, the children have wanted to stay with their parents. Eva Santiago, an affected parent and the director of CWOP, echoed this sentiment, saying that the majority of children want to stay with their families and that “the trauma that the children go through being removed from their families is far worse than anything else.” The harm isn’t only psychological, though: two of the parents whom I interviewed, Mr. Carasguillo and Ms. Alfinez, told me that the people who were given custody of their children abused them physically, and Dr. Guggenheim and Estelita Baez, an

⁶⁶ Appell, Annette R. “Protecting Children Or Punishing Mothers.”; Roberts, Dorothy E.. *Shattered bonds*.

⁶⁷ Appell, Annette R. “Protecting Children Or Punishing Mothers.”

⁶⁸ Roberts, Dorothy E.. *Shattered bonds*.

affected parent, both talked about how children often experience sexual and physical abuse in foster care and in group homes.

A picture arose from these interviews of a child welfare system that is not sufficiently concerned with the welfare of children. Both of the parents who believe their children were being physically abused by foster parents say that they reported the abuse to ACS, but that ACS left the children in those homes. Ms. Alfinez told me that her son at one point ran away from his foster home, but ACS has made no effort to locate him. Ms. Alfinez and Mr. Carasguillo both also said that they believe their children's mental states have deteriorated since being removed, and blame ACS for this; Mr. Carasguillo said that his children's foster parent did not take them to any services, and Ms. Alfinez explained that now her sons are receiving none of the therapeutic and other support services that she had in place for them when they lived with her. My research suggests that this experience is not unusual. A Bronx Defenders lawyer told me that she has had cases where parents were accused of sexual abuse, and yet after the children were removed they received no therapeutic services. In general, lawyers expressed that ACS and the Court don't take appropriate steps to mitigate the harm inflicted on children that occurs as a direct result of removing them from their families. They said that ACS often places children in homes where the culture and even the language is foreign to them, and frequently removes children by barging into their homes in the middle of the night with a level of urgency that is both terrifying and traumatizing to them.

I heard many times in these interviews that the child welfare system is not prioritizing the wellbeing of children. Some interview participants conceded that the individual agents of the system are well-intentioned, and even that the system as a whole is built on a positive premise. However, lawyers also told me that "any honest reflection on what the system is actually

carrying out and accomplishing makes it obvious that what's being done is not best for children” and that the system is not “operating in a way that has the children's best interests are best outcomes at heart.” Another lawyer explained with respect to the system’s removal of children:

“It's almost impossible to think of the system as a good one, because it does not have enough safeguards in place to ensure that we're never doing that unnecessarily and there aren't even safe guards in place to ensure that when we must do it, we're mitigating the harm of doing that.”

The general consensus was that if the system were truly operating in the best interests of children, it would make a much more concerted effort to keep families intact. As one lawyer put it, “if you’re really concerned about the kids, then you should be making every effort possible to keep them with their parents.”

5.5: Conclusion

Many of the injustices of the U.S. child welfare system identified by Appell, Roberts, and Lee between 1995-2007 persist today. My research has shown that excessive public surveillance of poor communities of color coupled with pervasive biases that create heightened suspicion towards those communities continue to drag a disproportionate number of poor families of color into the family court system. Additionally, racist constructions of parents of color as less adequate and even less human, and a lack of respect for the unity of families of color, still cause agents of the system to separate those families with alarming ease. Beyond this, the system continues to treat poverty as the failure of individual parents, which means that, rather than offer material aid that would enable families to stay together, it removes children and mandates services to correct parents’ behaviors. Finally, all of these practices continue to jeopardize the best interests of children, and suggest that the system is still less focused on achieving genuine child welfare than it is on punishing poor parents of color.

Chapter 6: Child Welfare in Dialogue with Human Rights

Given that the same issues of racial and socioeconomic discrimination appear in the U.S. child welfare system today as the ones identified 20 years ago, it seems pertinent to consider whether any new tools exist for framing these issues and attempting to challenge them. This is an important entry point for human rights; to this point, the abuses of the child welfare system have not been evaluated as potential human rights violations, despite the evidence that the system is generally not rights-respecting. It is worthwhile, then, to examine how the United States' practices in this area square with international human rights norms and what strategies these norms might offer for working towards reform.

6.1: Human Rights and Racial Discrimination

The Bronx Defenders lawyers expressed that their ability to raise issues of discrimination or rights violations on behalf of their clients is extremely limited. One lawyer related that arguments about parents' civil and constitutional rights, such as due process and privacy, are received poorly by the Family court:

“I do know that in Bronx family court if you are to bring up sort of principles of civil rights, like God forbid due process or privacy rights, it's viewed as obstructionist . . . It often feels in family court like the law is something that applies in theory . . . that's viewed I believe as being more obstructionist than . . . talking about the 'real' issues and what we should be doing to push this case forward.”

She explained that her primary obligation is to be the most effective advocate for her client, and that “it is often not effective to tell a racist, classist system that it is a racist, classist, unfair system.” She said that as a result, she refrains from using this sort of discourse in court. Another lawyer explained that, unlike the criminal justice system, the family court system is one of “rights without remedies,” giving the example of how, in criminal court, evidence produced by

unconstitutional police practices is inadmissible, while in family court, a child removed in a way that violates parental rights will not therefore be returned to the parent.

Today's U.S. legal jurisprudence has also made it very difficult to bring civil rights action against the government. In the United States, the standard for proving discrimination based on race is "purposeful" discrimination, meaning that there must be evidence not just of disparate impact, but of intentional racist motivation.⁶⁹ The consequence of this standard is that the disproportionate representation of people of color in the U.S. child welfare system, although cited by most interviewees as a sign of the racist nature of this system, is not sufficient on its own to prove that it discriminates based on race. In fact, in 1972, in the case *Jackson v. Hackney*, the Supreme Court ruled that the racial disparity in the child welfare system is not sufficient to demonstrate discrimination on the basis of race, and that there must be proof of racist motivation rather than simply disparate impact.

The responses given by parents, lawyers, and legal scholars in my research signal that racist biases do influence judges' and caseworkers' decision-making, but do not support a finding that there is intentional discrimination at work. Instead, responses consistently reflected that this system is rife with opportunities for institutional racist assumptions and individuals' latent racial biases to influence how its agents make decisions. As family law expert Jane Spinak has discussed in her scholarship, because the Family court attempts to be both adjudicative and therapeutic, it affords judges huge latitude to project onto the families who enter their courtrooms their personal notions of the ideal family. Spinak notes that these judges, like all people, have cognitive biases that might influence their decisions when not checked by more

⁶⁹ Kairys, David, "A Brief History of Race and the Supreme Court" (2006). Penn IUR Publications. 17. http://repository.upenn.edu/penniur_papers/17.

stringent judicial guidelines.⁷⁰ And numerous interview participants explained how the perceptions of people of color as inept, morally deficient, and sub-human lead to heightened scrutinization, a disregard for their autonomy, and, ultimately, a willingness to tear their apart their families. Since the 1990's, this pattern has been repeatedly identified in the family court and child welfare system, and it is clear that racialized biases, whether or not they are consciously deployed, have created and continue to create significant harm to communities of color within this system. However, in the U.S. legal system at large, racist effect is not enough to bring a claim of civil rights violations.

This is why it may benefit advocates to turn to the human rights legal system. Under international human rights law, evidence of disparate racist effect *is* enough to establish that a State practice or policy discriminates based on race. The Convention on the Elimination of All Forms of Racial Discrimination, which has been signed and ratified by the United States, defines racial discrimination as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”⁷¹

Notably, this definition includes practices which have the “effect” of infringing upon the rights of citizens based on their race. The Committee has also stated that a State action will be determined to be contrary to the Convention if its effect has “an unjustifiable disparate impact” on a group distinguished by race.⁷² The Committee on the Elimination of Racial Discrimination has applied this definition to practices in the United States which have disproportionate impact

⁷⁰ Spinak Jane, “Judicial Leadership in Family Court: A Cautionary Tale,” *Columbia Law School, Public Law and Legal Theory Working Paper Group*, no. 14-451 (April 4, 2014).

⁷¹ "International Convention on the Elimination of All Forms of Racial Discrimination." Article 1. (1965).

⁷² UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XIV on Article 1, Paragraph 1, of the Convention*. Forty-second session (1993).

on communities of color. In its concluding observations on the combined seventh to ninth periodic report by the United States, the Committee called upon the U.S. to “take concrete and effective steps to eliminate racial disparities at all stages of the criminal justice system” and expressed concern that “members of racial and ethnic minorities, particularly African Americans, continue to be disproportionately arrested, incarcerated and subjected to harsher sentences, including life imprisonment without parole and the death penalty.”⁷³

Advocates for reform of the U.S. child welfare system may want to bring attention to how this system operates in violation of international human rights law prohibiting racial discrimination. For example, ICERD guarantees the right to “equal treatment before tribunals and all other organs administering justice,” which requires the United States to protect the right of parents of color to equal treatment before the Family court. The lawyers and parents interviewed emphasized repeatedly that white parents would never be treated by the Family court the way that parents of color are treated; they went as far as to say that the very existence of the child welfare system depends on the understanding of white, wealthy people that they are immune to its intervention in their lives. Moreover, there is evidence that the harm of the family court system has an “unjustifiable disparate impact” of the family court system based on their statistically disproportionate representation in the system. There is therefore a strong claim to be made that the child welfare system violates this provision of ICERD.

Additionally, the International Covenant on Civil and Political Rights, also signed and ratified by the United States, guarantees the right of every individual not to be subjected to “arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to

⁷³UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations observations on the combined seventh to ninth periodic reports of United States of America*, (April 29, 2016). CERD/C/GUY/CO/7-9.

unlawful attacks on his honour and reputation.”⁷⁴ The Human Rights Committee, which oversaw the drafting of this treaty, has commented that the term “arbitrary” was included in order to extend the prohibition to interference which is allowed under the domestic law but which is not in accordance with the “aims, provisions, or objectives” of the Covenant or which is unreasonable in the particular circumstances.⁷⁵ One provision of the Covenant is that this right, like all others it establishes, must be respected and ensured without distinction of any kind, including race.⁷⁶ The human rights Committee defined racial discrimination using identical language to that found in Article 1 of ICERD,⁷⁷ so that it also includes racial distinctions that have the effect of precluding people of color from full enjoyment of their rights. Advocates can therefore make a parallel argument to the one possible under ICERD: that although technically provided for by domestic law, the interventions of the child welfare system into family life disproportionately affect people of color because they are fueled by prejudices that construct parents of color as dangerous and families of color as less deserving of unity. These interventions are therefore a discriminatory practice in violation of ICCPR.

6.2: Human Rights and Socioeconomic Discrimination

Race is not the only vector of discrimination operating within the U.S. child welfare system. It became clear through my interviews that the same prejudice towards the poor that inspired the genesis of this system is still a major force at play. Participants in this study explained how the child welfare system defines poverty as neglect and responds to the material

⁷⁴ "International Covenant on Civil and Political Rights," Article 17. (1966)

⁷⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*. (April 8, 1988)

⁷⁶ "International Covenant on Civil and Political Rights," Article 2. (1966)

⁷⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*. (November 10, 1989).

needs of parents not by providing financial or logistical support but by sending them to parenting classes and using resources to place their children in other, often dangerous, living situations. These practices illustrate that running through the child welfare system is a disdain for the poor, a sense that poverty is a personal and moral failure, and a belief that poor parents need to be taught to be good parents. As a result, the rights of the poor are routinely violated.

Unfortunately, a claim of socioeconomic discrimination in the United States is likely to prove even less fruitful than a claim of racial discrimination. The majority of legal scholars agree that poor people are not a suspect class (one that has been subject to historical discrimination and whose treatment is therefore entitled to heightened legal scrutiny⁷⁸) under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution⁷⁹. The Supreme Court has clearly stated that “poverty, standing alone, is not a suspect classification.”⁸⁰ Because the courts have not recognized poverty as a protected class, it would seem impossible to challenge the child welfare system for its socioeconomic discrimination under current jurisprudence.

Human rights law similarly fails to clearly define poverty as a protected class. There is no treaty like ICERD with the goal of eliminating socioeconomic discrimination, and class and income level are not cited in the ICCPR or other instruments as categories based on which States may not make distinctions in their protection of rights. That said, human rights still offers advocates some useful tools for combatting poverty-based discrimination. In 2010, the UN General Assembly adopted its Guidelines for the Alternative Care of Children, which were “intended to enhance the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of

⁷⁸ “Suspect Classification,” Legal Information Institute (Cornell Law School, November 28, 2018), https://www.law.cornell.edu/wex/suspect_classification.

⁷⁹ Rose, Henry, “The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question,” 34 *Nova Law Review* 407. (2010).

⁸⁰ *Harris v. McRae*, 448 U.S. 297, 323 (1980), as cited in Rose, “The Poor as a Suspect Class.”

children who are deprived of parental care or who are at risk of being so.”⁸¹ The 15th Guideline specifically provides:

“Financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his/her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.”

This Guideline represents a fundamentally different conceptualization of poverty than the one embraced by the U.S. child welfare system. It suggests that, by representing poverty as neglect and by removing children in response, not only is the child welfare system not operating in the best interests of children, but it is actually failing them. Beyond that, it asks the State to recognize circumstances of poverty not as evidence of neglect but as a signal for its obligation to provide support. Advocates could use this Guideline to pressure the U.S. to reform the child welfare system so that parents are provided with the material supports they need instead of punished for their lack of means. This treaty establishes that it is the State’s responsibility to ensure basic standards of living for its citizens, and therefore the State’s failure if those standards are not met. This means that if a child is deprived of food, housing, education, or medical care because her parents cannot afford these resources, it is not the parent who has neglected the child, but rather it is the State. Were this mentality adopted, the United States could stop demonizing poor parents and start taking accountability for helping them in the way that advocates for families’ rights seek and that is encouraged by international law.

⁸¹ UN General Assembly, *Guidelines for the Alternative Care of Children : resolution / adopted by the General Assembly*, A/RES/64/142. (February 24, 2010).

6.3 Human Rights and The Best Interests of Children

Some of the lawyers with whom I spoke described how, within the family court system, the rights of parents and the rights of children are often treated as antagonistic to one another. Because of this, one lawyer explained, when parents' advocates make claims about parents' rights, judges will respond along the lines of "this is not about your client, this is about the best interests of the child." This "best interest" standard operates as a loosely defined guideline for judges, leaving them enormous latitude to determine what is best for the child without imposing a presumption that remaining with her parents is, generally, best. As family law expert Martin Guggenheim described it, the American definition of best interest is "*de novo*, it is free-floating," citing Hillary Clinton's characterization of "best interests" as an "empty vessel into which adult perceptions and prejudices are poured."⁸² One of the obstacles that parents face, then, is that the U.S. conceptualization of children's "best interests" does not prioritize keeping children with their families and allows judges' and ACS workers' discriminatory attitudes towards poor parents of color to inform their decisions about what is best for those parents' children. As traumatizing as removal can be for children, agents of the child welfare system are able to justify removals instead of offering parents material support because, as Dr. Guggenheim described it, they see poverty as a "pathology," a fundamental character flaw that makes these people incapable of properly parenting their children, no matter what resources they are provided.

One lawyer suggested that a successful strategy for reforming the child welfare system might need to be centered on children's rights instead of parents' rights. Human rights law offers a tool for identifying the ways in which this system violates children's rights while simultaneously recognizing that children's and parent's rights are most often not antagonistic,

⁸² Hillary Rodham, *Children Under the Law*, 43 Harv. Ed. Rev. 487, 513 (1973)

but complementary and interdependent. This tool is the Convention on the Rights of the Child (CRC). CRC provides:

“States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”⁸³

In its General Comments, the Committee on the Rights of Children emphasized how, in determining the best interests of the child in circumstances that might lead to family separation, considerable weight must be given to the protection of the family unit. The Committee noted that “preventing family separation and preserving family unity are important components of the child protection system” and that “given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure.”⁸⁴ This built-in presumption against separating families is something that seems not to operate at the level of policy, and certainly not at the level of practice, in the United States. The human rights concept of a unified family as something that is strongly within a child’s best interests presents an opportunity for advocates to reconcile any perceived disjunction between children’s’ and parents’ rights and to advance both sets of rights together.

In addition, the Committee on the Rights of Children has made it clear that socioeconomic and racial biases are not to influence States’ determinations of children’s best interests. CRC establishes that children, like adults, have a right to freedom from intervention in their family life which must be respected without any distinction based on race.⁸⁵ And in its General Comment, the Committee made reference to the Guideline for Alternative Care

⁸³ "Convention on the Rights of the Child," Article 9. (1989).

⁸⁴ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC /C/GC/14. (May 29, 2013).

⁸⁵ "Convention on the Rights of the Child," Article 2. (1989).

discussed above that prohibits conditions of poverty from being the sole reason for child removal, and advised that:

“Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family’s capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.”⁸⁶

The Committee insisted that parents are not to be condemned for their financial need, but that instead, much like ICESCR outlines, conditions of poverty that endanger the wellbeing of children are to be treated as the fault and responsibility of the State. This provides a practical solution to the perpetual problem of income inequality in the child welfare system by encouraging agents of the system to take every measure possible to alleviate conditions of poverty before resorting to separating families. But beyond that, it has potential to perform similar work to what ICESCR could do by shifting the way we fundamentally understand poverty, and eroding the discrimination that takes place as a result.

⁸⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 14* (2013).

Chapter 7: Conclusion

Human rights law has valuable tools to help family rights advocates identify the racial discrimination that is perpetuated by the U.S. child welfare system and challenge the system's demonization and punishment of poverty to the detriment of familial integrity. However, the unique relationship that the United States has with human rights – in which it condemns other countries for their violations while refusing to bind itself to widely accepted treaties – complicates how these tools can be effectively deployed.

Both the ICCPR and the ICERD were ratified by the United States with the reservation that the treaties were not self-executing, meaning that additional legislation would be required to implement the treaties into domestic law and create a private right of action under them. However, the U.S. Constitution dictates that ratified treaties will become the “supreme law of the land,” which gives the ICCPR and ICERD legal status equivalent to that of federal statutes, and imposes on the federal government an obligation to ensure states' compliance with the treaties.⁸⁷ In theory, then, complaints of racial discrimination in the child welfare system that violates these conventions could be raised not only to their international governing bodies, but to a U.S. court. Furthermore, there is a precedent, albeit a limited one, of the U.S. Supreme Court considering international laws and standards in its decisions; in the majority opinion in *Roper v. Simmons*, a case deciding the constitutionality of the juvenile death penalty, Justice Kennedy wrote that “the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions,” and noted that every country except two, the U.S. and Somalia, had ratified the article of the Convention on the Rights of the Child that

⁸⁷ Parker, Amelia. "Racial Disparities in U.S. Public Education and International Human Rights Standards: Holding the U.S. Accountable to CERD." Human Rights Brief 14, no.3 (2007): 27-32.

abolishes the juvenile death penalty.⁸⁸ Similarly, in both *Grotter v. Bollinger*, a case about affirmative action, and *Lawrence v. Texas*, a case about sodomy laws, the Court cited progressive international human rights trends in its decisions⁸⁹. These cases, among others, go to show that it is possible for international legal norms to bear on domestic jurisprudence, especially insofar as they set the United States apart as particularly disrespectful of rights.

That said, many of the lawyers and legal scholars whom I interviewed expressed reluctance towards the notion of using human rights arguments in a legal setting. They related their sense that the U.S. legal system has little respect for or interest in international human rights law, and that arguments grounded in those standards would fall on deaf ears. Dr. Guggenheim even said that the United States' emphasis on negative rights and rejection of positive rights, coupled with its exceptionalist identity, makes the country proud to differentiate itself from the rest of the world by refusing to submit to a human rights regime. A Bronx Defenders lawyer, in the same spirit, told me that she does not believe that human rights arguments will hold real legal weight in the United States until the framework gains greater recognition and acceptance the country. It seems, then, that the potential for human rights to help make change in the child welfare system is partly contingent upon work outside of courtrooms by social and political movements to a) adopt and normalize human rights in the United States and b) bring the attention of the international human rights community to this issue.

This work is already underway. For example, Human Rights published a report⁹⁰ and Amnesty International submitted a report to the Human Rights Committee⁹¹ on how the U.S.

⁸⁸ *Roper v. Simmons*, 543 U.S. 551 (2005), as cited in Robert E. Sinnott, "Universalism and Cultural Relativism in *Roper v. Simmons*," *Willamette Journal of International Law and Dispute Resolution* 14, no. 1 (2006): 132-154

⁸⁹ Sinnott, "Universalism and Cultural Relativism in *Roper v. Simmons*." (2006).

⁹⁰ Human Rights Watch, "Targeting Blacks: Drug Law Enforcement and Race," May 2008, https://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

carries out racially discriminatory practices, especially in its criminal justice system, that are inconsistent with the rights established by ICCPR and ICERD. This type of reporting could easily be expanded to include racial discrimination within the family justice system.

Furthermore, the UN has demonstrated an interest in addressing the racism within the U.S. criminal justice system; the Committee on the Elimination of Racial Discrimination recommended to the United States in 2014 that review and reform its law enforcement practices in order to reduce the disproportionate harm experienced by communities of color.⁹² It is reasonable to hope that, if the parallel racist practices within the family justice system were brought to the attention of the Committee, it might similarly urge the U.S. to reform those.

With respect to economic and social rights, Many of the lawyers and scholars interviewed suggested that what is required is not just reform of the child welfare system, but an overhaul of how we treat poverty in the United States and a move towards greater socioeconomic equality. If advocates for parents are committed to changing this paradigm, they should participate in calls for the U.S. to ratify the International Covenant on Economic, Social, and Cultural Rights, which, as argued above, has the potential not only to protect people's rights to live free from conditions of poverty, but to reorient the United States' view of poverty from an individual to a State failure. Organizations like the National Economic and Social Rights Initiative and the Center for Economic and Social Rights have already been advocating for the United States to respect the rights set out by the ICESCR. These organizations work from the community level to the international level to shift the U.S. attitude towards social and economic rights towards one

⁹¹ Amnesty International, "USA: Submission to the UN Human Rights Committee in Advance of the Adoption of List of Issues Prior to Reporting," 125th Session,, 4-29 March 2019. (2019).

⁹² CERD, *UN Committee on the Elimination of Racial Discrimination: Concluding Observations observations on the combined seventh to ninth periodic reports of United States of America.* (2016).

that recognizes State accountability for eliminating poverty,⁹³ and to demand accountability for violations of those rights by reporting to the U.N. Special Rapporteur on Poverty and human rights.⁹⁴ And there is reason to believe that agents of the international human rights regime are willing to deliver that accountability, if not through legal action then at least through public criticism: Phillip Alston, the U.N. Special Rapporteur on Extreme Poverty, recently issued a report on the United States. In it, he condemns the United States' criminalization of poverty and discusses the elements of the criminal justice system that not only punish but perpetuate poverty, saying that policies that lock up the poor and shame those who need assistance "seem primarily driven by contempt, and sometimes even hatred for the poor."⁹⁵ This critique of the criminal justice system is identical to those made of the family justice system by many advocates, and so it appears that an important step is to bring the conversation about the child welfare system and the conversation about protecting economic and social rights in the U.S. together so that the reframing of poverty-based neglect can begin.

With regard to enhancing children's rights within the child welfare system, efforts are complicated by the United States failure to ratify the Convention on the Rights of the Child. This means that the United States cannot be held accountable by international legal bodies for violations of the Convention. Advocates for parents' and families' rights, therefore, may want to invest energy in encouraging the U.S. to adopt the treaty. They would be joining a number of

⁹³ "Join NESRI in Supporting People's Movements for Human Rights," NESRI, accessed April 28, 2019, <https://www.nesri.org/initiatives>.

⁹⁴ Center for Economic and Social Rights, "Fiscal Impoverishment in the United States: Submission to the UN Special Rapporteur on Poverty and Human Rights," *Center for Economic and Social Rights*, October 2017, http://www.cesr.org/sites/default/files/CESR_Alston_Submission_0.pdf.

⁹⁵ UN Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights on his mission to the United States of America*, 4 May 2018, A/HRC/32/31/A/HRC/38/33/Add.1

activists who have already been calling for U.S. ratification of the CRC for years on the basis that it establishes important protections for children and has been ratified by every other UN member state.⁹⁶ In the meantime, however, the fact that the United States has not ratified the treaty does not preclude the global human rights community from exerting pressure on the United States to abide by internationally recognized standards for the treatment of children. In fact, it has already done so; after the United States began separating migrant children from their families at the U.S.-Mexico border, Human Rights Watch published a report condemning the practice as a violation of children's rights and noting the traumatic impact of family separation for children and parents.⁹⁷ Additionally, the United Nations issued a statement identifying the practice as a violation of children's rights under CRC. A spokesperson for OHCHR was quoted saying that the detention of children "is never in the best interests of the child and always constitutes a child rights violation."⁹⁸ Although the circumstances are not identical, the position taken by human rights Watch and by the UN with regard to the United States' separation of migrant families signals that the U.S. is expected to respect children's rights as outlined by international human rights law. Advocates for change within the U.S. child welfare system should partner with Human Rights Watch and other human rights watchdog organizations to call on the United Nations to similarly condemn the separation of families and violation of children's rights that have been carried out by that system for decades.

⁹⁶ Martha Middleton, "ABA Adds Its Voice to Calls for the US to Ratify the Convention on the Rights of the Child," *ABA Journal*, March 2016, http://www.abajournal.com/magazine/article/aba_adds_its_voice_to_calls_for_the_us_to_ratify_the_convention_on_the_righ.

⁹⁷ "US: Separated Families Report Trauma, Lies, Coercion," Human Rights Watch, October 23, 2018, <https://www.hrw.org/news/2018/07/26/us-separated-families-report-trauma-lies-coercion>.

⁹⁸ "Children 'as Young as One' Involved in US Separation of Migrant Families – UN Rights Office | UN News," United Nations (United Nations, June 5, 2018), <https://news.un.org/en/story/2018/06/1011391>.

The implementation of human rights certainly faces unique challenges in the United States. The country's refusal to ratify central treaties and historic resistance to the authority of an international human rights regime makes it difficult to hold it responsible for violating its citizens' rights. However, it is important that human rights not be disregarded as a tool for fighting for social justice in the U.S.. Although that fight might not take place in courtrooms, either domestic or international, those seeking to create accountability for the abuses of the child welfare system and to advance efforts for reform of the system can use human rights laws, norms, and framework to demand better from the U.S. government. Human rights can be wielded to expand the definition of racial discrimination, to shift blame for poverty from individuals to the State, and to instill a strong presumption in favor of family unity. In order for this to happen, though, advocates for family's rights need to communicate to the international human rights community about the injustices that they see, and agents of the international human rights community need to loudly condemn those injustices. Although this will not guarantee any immediate solutions to the historic, deeply rooted discrimination in the child welfare system, it can launch a crucial dialogue and help lay the groundwork for a future United States that protects the rights of all its families, regardless of their race or socioeconomic status.

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