

DRAFT

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

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*A powerful coalition of forces has made what they term “Racial Disproportionality” the central issue in child welfare today. They use this phrase to describe the fact that black children represent a larger percentage of the foster care population than they do of the general population. This coalition is led by the Casey-CSSP Alliance, which includes the foundations that provide virtually all the private funding available for research and advocacy in child welfare. The coalition includes organizations and individuals who with these foundations have played a major role in shaping policy over the past decades.*

*This Movement uses the term Racial Disproportionality to indicate that there is something wrong with the system that removes black children to foster care, and it identifies the problem as primarily one of racial discrimination by child welfare decision makers. It calls for addressing the problem by reducing the number of black children removed to foster care to achieve what it characterizes as “racial equity” – the removal of black children at the same rate as white children.*

*The Racial Disproportionality Movement has already had significant impact. Child welfare leaders proclaim that Racial Disproportionality is the major issue of the day. Many states have accepted the Casey-CSSP Alliance’s lead, and are instituting measures designed to reduce the number of black children removed to foster care. Important federal officials and agencies have endorsed the Alliance’s approach, as have leading private child welfare organizations.*

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*This article analyzes the Racial Disproportionality Movement, and the underlying issues. Child Protective Service agencies remove children to foster care, with court approval, based on reports of child maltreatment, and investigations that substantiate that maltreatment has occurred, and that it poses such serious threats to child safety as to justify removal. The goal is to protect children from repeated maltreatment, to provide services to the parents that enable the children to be safely returned home, and to move children on to adoption if the parents prove incapable of rehabilitation. Black children are identified by child protective services as victimized by serious maltreatment, and in need of the protection that removal, foster care and adoption represent, at higher rates than white children. A central question is whether black children are in fact disproportionately victimized by maltreatment, and in need of child protective services, as compared to their general population percentages. If they are, then they should be removed at rates proportionate to their maltreatment rates, which will necessarily be disproportionate to their population percentages. Racial equity for black children would mean providing them with protection against maltreatment equivalent to what white children get. If black children are in fact disproportionately victimized by maltreatment, the Movement's proposed reform solutions would put black children at risk for being victimized by maltreatment at higher rates than white children.*

*The evidence indicates that black children are indeed disproportionately victimized by maltreatment. This is to be expected given that black families are disproportionately characterized by the risk factors associated with maltreatment, including severe poverty, serious substance abuse, and single parenting. This is reason for concern and for reform action. And it does represent an important racial problem, even if not the problem identified by the Movement. Children may need the protection provided by removal to foster care, but children who suffer maltreatment and endure lengthy stays in foster care will be hurt by these experiences, and will as a group not do well later in life. Society should act to prevent the maltreatment, and should feel additional pressure to act because this maltreatment disproportionately affects black children. But the form of action should be quite different from that proposed by the Movement. We should expand programs designed to prevent maltreatment from occurring in the first place. We should provide greater support to families at risk of falling into the kind of dysfunction that results in maltreatment. This should in turn result in a reduction in the percentage of black children in foster care, without putting those children at undue risk.*

*To date there has been no adequate debate on the issues at the heart of the Racial Disproportionality Movement, because the Casey-CSSP Alliance and its allies have overwhelmingly dominated the discourse. This Article is designed to illuminate the issues surrounding the current racial picture of child maltreatment and foster care, so that policy makers can take action that will protect rather than endanger black children.*

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**INTRODUCTION**

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

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

I use the term “Movement” to describe the activities of those pressing the Racial Disproportionality claim, because this is clearly a self-conscious, deliberate campaign to bring about major social and legal change. And this Movement is having a dramatic impact on the child welfare field. Influential leaders recognize Racial Disproportionality as the hot issue of the day. Many states have been persuaded that they have a Racial Disproportionality problem and have begun to take action designed to reduce the number of black children in foster care, and more are sure to follow given the pressure from the Movement’s campaign. The federal government has been urged to take an active role requiring states to reduce Racial Disproportionality as a condition for receiving federal funding for their child welfare systems. The groundwork for such action has been laid with a 2007 General Accounting Office report and a 2008 Congressional hearing, both condemning disproportionality and calling for action. See Part. I.D *infra*.

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

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

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

<sup>3</sup> See generally ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 113-159 (1999) [hereinafter NOBODY’S CHILDREN] (discussing opposition to ASFA and MEPA, and the alternative policies promoted to keep children in their birth and racial communities).

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

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

The Racial Disproportionality Movement focuses on the issue of alleged discrimination against black parents, although Movement advocates sometimes talk as if they are concerned with discrimination against black children as well, making the claim that black children are hurt by being taken from their parents. But if black children are in fact subject to serious maltreatment by their parents at higher rates than white children, it is in their interest to be removed at higher rates than white children, and those removal rates, while disproportionate compared to general population rates, will be properly proportionate to their greater maltreatment rate. Not removing black children at rates proportionate to their actual maltreatment would constitute discrimination against those children.

Professor Randall Kennedy made a similar point in his book *Race, Crime, and the Law*.<sup>4</sup> He warned against simplistic claims that the criminal justice system victimizes blacks accused of crime, noting that the victims of crime are disproportionately black, and that they deserve protection against discrimination in the form of under-enforcement of the law:

An important theme of this book is that blacks have suffered more from being left unprotected or underprotected by law enforcement authorities than from being mistreated as suspects or defendants, although it is allegations of the latter that now typically receive the most attention. . . .<sup>5</sup>

Richard Thompson Ford makes a similar point in a recent opinion piece in the *Boston Globe*.<sup>6</sup> He notes that many civil rights activists today condemn the criminal justice system as racially

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<sup>4</sup> RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1997).

<sup>5</sup> *Id.* at x; *see also id.* at 19, 69 (“the principle injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. . .;” “governments have failed . . . to protect blacks from “ordinary” criminality, much of it perpetrated by blacks”).

<sup>6</sup> Richard T. Ford, *The End of Civil Rights*, *BOSTON GLOBE*, May 17, 2009, at \_\_.

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discriminatory based on such evidence as racial disparities in the prison population, and argues that this is misguided, since these disparities “are largely the result of the lack of opportunities for lawful employment and the resulting prevalence of crime in many inner-city neighborhoods.” He points out that “[p]rohibiting discrimination and condemning racism is much less costly and less controversial than confronting the fundamental inequities of our economy and our use of public resources.” He argues for an approach that would instead focus on the only real solutions to the real problems, “solutions to poverty, joblessness, failing schools, and crime. . . .”<sup>7</sup>

Racial Disproportionality theory is popular today in a variety of other areas, relied on to raise challenges to policy making in juvenile justice<sup>8</sup> and health care, for example. But legitimate questions have been raised in these areas also as whether it makes sense to simply equate racial disparities with discrimination, and then to make the policy priority reduction of those racial disparities. For example, in the health area the Institute of Medicine issued a 2003 report criticizing racial disparities in services and outcomes, and claiming that they resulted from racial bias.<sup>9</sup> A recent critique of that report argues that most of the studies relied on fail in fact to demonstrate a causal link between racial bias and racial disparities. It argues that the report’s suggested policy solutions are both inappropriate and counter-productive, distracting from more constructive solutions designed to actually provide a better service to minority communities, such as the expansion of community health clinics and grassroots outreach efforts.<sup>10</sup>

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<sup>7</sup> *Id.* at \_.

<sup>8</sup> Federal law requires that juvenile justice agencies track racial disproportionality statistics and take action to address problems revealed. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5633(a)(22) (2006) (requiring states to develop plans that will “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce . . . the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system”). Movement actors often cite this Act as supportive precedent. But it is worth asking whether black youth enter the juvenile justice system in significant numbers because in fact they have demonstrated a greater need for the kinds of services that system is supposed to provide, and/or have committed serious delinquent acts victimizing others, and whether the system is so bankrupt that we can assume it provides no useful services and no deterrent function, before simply assuming that diverting black youth from the system should be the priority policy solution.

<sup>9</sup> INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003). *See also* José J. Escarce, *How Does Race Matter, Anyway?*, 40 HEALTH SERV. RES. 1 (2005).

<sup>10</sup> Sally Satel & Jonathan Klick, *The Institute of Medicine Report: Too Quick to Diagnose Bias*, 48 PERSP. BIOLOGY & MED. S15, S23 (2005 Supp.) (“Understanding health disparities as an economic problem tied to issues of access to quality care and health literacy, rather than a civil rights problem borne of overt or unconscious bias on the part of physicians, is a more efficient and rational way to address the problem of differential health outcomes”). *See also id.* at S15, S22.

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The raw racial statistics that the Movement relies on in the child welfare area do represent a very real problem. Children removed from their parents for maltreatment reasons, and placed in foster care for significant periods of time, generally do not fare well in later life. They end up in appallingly high numbers in homeless shelters, unemployed, on drugs, and in prisons, and they often end up continuing the cycle of child maltreatment into the next generation.<sup>11</sup> See Part II.D.3 *infra*.

But the question is *what kind of problem* these statistics represent, because that will determine what corrective action is appropriate. Black children are removed and placed in foster care because the social workers and judges involved in the child protective system conclude that the parents have been guilty of serious child maltreatment, and are not capable of avoiding such maltreatment if the children remain in their care. There are many reasons to think that the social workers and judges are getting it right in removing black children at higher rates than white children compared to their population percentages. Among these reasons are the fact that black families suffer poverty and live in disadvantaged neighborhoods disproportionately, and therefore suffer disproportionately from all the related factors that are known predictors of child maltreatment. See Part II.A, B, and C, *infra*.

This should not be misunderstood as an attack on the black family as inherently problematic, although there is a real risk that it will be mischaracterized that way, or otherwise characterized as racist. Racial Disproportionality Movement advocates regularly assert that everyone in the child welfare system needs anti-racism training so that they will recognize the truth that the system is functioning in a racially discriminatory way.<sup>12</sup> If you do not agree with them then you are by definition racist in your thinking and in need of anti-racism training.<sup>13</sup> Those who have opposed Movement players' related positions on a range of related child welfare policies have regularly been accused of taking a racist position.<sup>14</sup> Daniel P. Moynihan was accused of attacking the black family when during the Lyndon Johnson Administration he noted problems in the black family "that amplified the effects of other social problems," and helped perpetuate "black poverty over time and across the generations."<sup>15</sup> Recent commentary has tended to vindicate Moynihan, pointing out that he clearly targeted historic and ongoing discrimination as responsible for the plight of the black family, and he was arguing for significant social reforms which, had they been implemented, would have done much to empower the black community.<sup>16</sup>

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<sup>11</sup> NOBODY'S CHILDREN, *supra* note 3, at 95-97.

<sup>12</sup> See discussion *infra* notes 43-46

<sup>13</sup> See *infra* note 45.

<sup>14</sup> See Martin Guggenheim, *Somebody's Children*, 113 HARV. L. REV. 1716 (2000) (reviewing ELIZABETH BARTHOLET, *NOBODY'S CHILDREN* (1999)) and Elizabeth Bartholet, Reply, *Whose Children? A Response to Professor Guggenheim*, 113 HARV. L. REV. 1999 (2000).

<sup>15</sup> Douglas S. Massey & Robert J. Sampson, *Moynihan Redux: Legacies and Lessons*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2009, at 6.

<sup>16</sup> *Id.* at 6 ("The [Moynihan] report argued that . . . black poverty was more intractable than white poverty owing to the legacy of slavery and the persistence of discrimination and segregation throughout the country. . . . The purpose of the report was to make an impassioned moral case for a massive federal intervention to break the cycle of black poverty and put African

The Obama era provides reason to hope that we can talk more openly today about challenging issues involving race, without triggering claims of racism.<sup>17</sup>

Obviously black parents are neither inherently more likely to abuse and neglect their children than whites, nor are they inherently more likely to be associated with poverty, single parenting, substance abuse, and other risk factors associated with child maltreatment. They are victims of historic and ongoing discrimination that has put them in a seriously disadvantaged position in our society. It is essential that our society addresses this enormous problem. But it does not seem helpful in addressing this problem to leave black children who are in fact being seriously abused and neglected at home to suffer ongoing maltreatment. This simply victimizes the next generation.

If the social workers are getting it right in removing black children at higher rates because they are at higher risk, then the Racial Disproportionality Movement's recommendations pose a serious danger to black children. The Movement talks about racial disproportionality as a civil rights problem, but reducing disproportionality by not removing children who are at serious risk

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Americans on the road to socioeconomic achievement and integration into American society.”). *See also id.* at 20 (“[T]he categorical dismissal of the [Moynihan] report . . . [is] a real setback for social policy analysis, which for decades strenuously avoided facing up to the escalating maladies of ghetto life. . . .”); Richard T. Ford, *Why the Poor Stay Poor*, N.Y. TIMES, Mar. 3, 2009, at BR8 (book review of WILLIAM J. WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* (2009)) (“Wilson criticizes the liberals and black power activists who attacked as racist Daniel Patrick Moynihan’s prescient report . . . . According to Wilson, the vitriolic condemnation of the Moynihan Report effectively closed off a serious academic focus on the culture of poverty for decades, robbing policy makers of a complete and nuanced account of the causes of ghetto poverty”). *Cf.* WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987) (talking about the proliferation of unwed childbearing, female-headed families, joblessness, drugs, and violence in the black community).

<sup>17</sup> *See e.g.,* *Amid New Questions on Interrogation Tactics, Holder Mulls Road Ahead* (PBS interview of Eric Holder by Gwen Ifill, broadcast May 13, 2009) (responding to a question about his prior statement that Americans are cowards about race, saying that now “there is a dialogue [on race] that’s going on. I think the presence of the president, the presence of the first lady . . . have . . . engendered a conversation that perhaps might not otherwise have occurred”), available at [http://www.pbs.org/newshour/bb/law/jan-june09/torture2\\_05-13.html/](http://www.pbs.org/newshour/bb/law/jan-june09/torture2_05-13.html/); Shailagh Murray & Dan Balz, *Obama Urges U.S.: ‘Move Beyond Our Old Racial Wounds’*, WASH. POST, Mar. 19, 2008, at A1 (reporting on Obama’s campaign speech where he spoke “directly to the grievances and resentments on both sides of the racial divide and to urge all Americans to ‘move beyond our old racial wounds’”); Julie Bosman, *Obama Calls for More Responsibility from Black Fathers*, N.Y. TIMES, Jun. 16, 2008, at A15 (reporting on Obama’s speech noting that “more than half of all black children live in single-parent households”).

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of harm from their parents, would violate those children's vital rights to protection, and would do nothing to help the larger black community in the long run.

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

The Racial Disproportionality Movement makes the claim that black children are no more likely than white children to be victimized by abuse and neglect, a claim that is central to its position that black children are over-represented in the foster care system, rather than appropriately represented given the level of maltreatment. The theory is that discrimination in the system of reporting, investigating, and substantiating maltreatment cases, and in making decisions to remove children to foster care, results in black child representation in foster care in numbers disproportionate to actual maltreatment. The Movement relies overwhelmingly on one source to support its central claim as to black and white maltreatment rates being identical, the National Incidence Studies (NIS), which did indeed state that *actual*, as opposed to *official*, maltreatment rates were the same for blacks and whites.<sup>18</sup> However excellent research analyses conducted subsequently have persuasively debunked this NIS assertion. And taken as a whole, the empirical literature on point demonstrates the overwhelming likelihood that actual black maltreatment rates are in fact significantly higher than white, because blacks suffer at significantly higher rates from risk factors that are known predictors of child maltreatment. See Part II *infra*.

This is not to say that black maltreatment rates are an exact match for the official statistics on child maltreatment, or that there is no bias in the child protective services system. Black children might be removed at somewhat higher rates than their actual maltreatment rates, or at somewhat lower rates. It is a complicated picture to unravel, and the field's best researchers confess how hard it is to account appropriately for all the factors likely to produce actual maltreatment, in trying to assess whether race did or did not operate as an independent causal factor. But the better studies, which control for a range of the relevant non-racial explanations for child welfare decision-making, generally indicate that race plays either a minimal role or no role at all, and the more factors that are included in the studies the less likely race is to show up at all as an explanatory factor. Those leading the Racial Disproportionality Movement appear to be

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<sup>18</sup> The three NIS studies are Congressionally mandated efforts to analyze the actual incidence of child maltreatment as distinguished from official reported child maltreatment. The NIS-3, published in 1996, concluded that there were "*no significant race differences*" in maltreatment incidence. ANDREA J. SEDLAK & DIANE D. BROADHURST, THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 8-7 (Dept. of Health & Human Servs. 1996) (emphasis in original). The NIS-1 and NIS-2 came to similar conclusions. *Id.*

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deliberately using suspect data to persuade policy makers to move in a particular policy direction.

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

Also, to the degree there is a debate it has taken place almost entirely within the walls of the social welfare world. Law review literature, which might bring others into the debate, and expose the issues to a broader audience and range of potential policy-makers, contains practically no articles on the topic, and those few that do exist take the Movement position.<sup>19</sup>

This Article seeks to clarify the facts, analyzing both the nature of the Racial Disproportionality Movement and the empirical literature relevant to its claims. See Part II *infra*. It suggests appropriate directions for law and policy given the facts. See Part III *infra*. The issues go to the heart of our child welfare system, and the role that it plays in protecting children against maltreatment. The Racial Disproportionality Movement has made significant progress toward its

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<sup>19</sup> See Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109 (2008) (proposing new federal legislation making it more difficult to remove black children to foster care by raising the proof standard CPS agencies must meet in cases involving black children); Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court – The Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007); Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881 (2007); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23 (2005); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 180 (2003); Richard Wright & Wadie Thomas, *Disproportionate Representation: Communities of Color in the Domestic Violence, Juvenile Justice, & Child Welfare Systems*, 54 JUV. & FAM. CT. J. 87 (2003).

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goals of dramatically changing how the child welfare system operates. It is past time for all those who care about children's welfare to take notice.

## I. THE RACIAL DISPROPORTIONALITY MOVEMENT

### A. Key Players

The Movement is led by a group calling itself the Casey-CSSP Alliance for Racial Equity.<sup>20</sup> Its members include five Casey organizations together with the Center for the Study of Social Policy (CSSP). The Casey organizations are the Annie E. Casey Foundation, Casey Family Services, Casey Family Programs, The Jim Casey Youth Opportunities Initiative and the Marguerite Casey Foundation, which together command enormous resources.<sup>21</sup> The Alliance was formed in 2004 "to develop and implement a national, multiyear campaign to address racial disparities and reduce the disproportionate representation of children from certain racial or ethnic communities in the nation's child welfare system."<sup>22</sup> It devotes substantial resources to finance a wide range of efforts to push the Movement agenda. It offers states funding and technical assistance to study and address Racial Disproportionality in their child welfare systems. It also funds a range of other Racial Disproportionality studies and conferences. Casey and the CSSP have long been active in the child welfare policy area. Both have promoted policies with a strong family preservation bent such as the Community Partnership or Alternative Track programs.<sup>23</sup>

The Alliance is joined by The Race Matters Consortium,<sup>24</sup> which describes itself as "a national, multisystem initiative whose mission is to research and develop policy responses to the phenomenon of racial and ethnic disproportionality in the child welfare system."<sup>25</sup> The Consortium formed in 1999 to focus on the Racial Disproportionality problem, and helped get the Movement off the ground. Dorothy Roberts, Robert Hill, Ernestine Jones, and Dennette

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<sup>20</sup> KEESHA DUNBAR & RICHARD BARTH, RACIAL DISPROPORTIONALITY, RACE DISPARITY, AND OTHER RACE-RELATED FINDINGS IN PUBLISHED WORKS DERIVED FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (Casey Family Programs 2007).

<sup>21</sup> In its latest annual financial report, The Annie E. Casey Foundation reported assets of over \$3.3 billion. *See* Annie E. Casey Foundation: Financial Statements As of and For the Years Ended December 31, 2007 and 2006, and Independent Auditors' Report, *available at* [http://www.caseyfoundation.org/AboutUs/~media/PDFFiles/AECF\\_2007\\_Financial\\_Statements.pdf](http://www.caseyfoundation.org/AboutUs/~media/PDFFiles/AECF_2007_Financial_Statements.pdf). The Stuart Foundation has also provided support for Movement activities.

<sup>22</sup> DUNBAR & BARTH, *supra* note 20, at title page.

<sup>23</sup> *See* NOBODY'S CHILDREN, *supra* note 3, at 141-154; *see also infra* Part I.E.

<sup>24</sup> *See* Race Matters Consortium Website, <http://www.racemattersconsortium.org/> (last visited ---, 2009).

<sup>25</sup> RACE MATTERS IN CHILD WELFARE: THE OVERREPRESENTATION OF AFRICAN AMERICAN CHILDREN IN THE SYSTEM vi (Dennette M. Derezotes et al. eds, Child Welfare League of America 2005) [hereinafter RACE MATTERS].

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Derezotes are key figures. The Consortium receives ongoing financial support from Casey and from the Illinois Department of Children and Family Services.<sup>26</sup>

Westat, a major child welfare research firm, has also played an important role. Westat is responsible for the National Incidence Studies, whose claim that black and white maltreatment rates are the same has been central to the Movement's theory. And in 1999 Westat formed an internal Race Matters Study Group, and then, together with the University of Illinois Children and Family Research Center (Illinois Research Center), organized a Race Matters forum in Washington, D.C., in January, 2001.<sup>27</sup> The Race Matters Consortium published the papers produced in connection with that forum as a 2005 book titled *Race Matters in Child Welfare: The Overrepresentation of African American Children in the System*.<sup>28</sup> The Casey Family Programs foundation cosponsored a second such forum with the Illinois Research Center and Westat in March, 2002, with the goal of "developing a national agenda for addressing disproportionality in the child welfare system."<sup>29</sup>

The influential Child Welfare League of America published a Special Issue in 2008 entitled "Overrepresentation of Minority Youth in Care."<sup>30</sup> This collection of articles and editorials represents in sum a powerful endorsement of the Movement position. The articles in the first half focus on analyzing Racial Disproportionality, with the dominant view emphasizing racial bias in the child welfare system as the problem.<sup>31</sup> The editorial introducing this section calls the notion that poverty causes racial disparities "mostly myth," identifying instead race and cultural bias as the problem.<sup>32</sup> The articles in the second half discuss "Methods to Reduce Racial Disproportionality," recommending the kinds of programs that the Casey Alliance has been systematically promoting, a range of initiatives designed to keep black children in their birth families and their racial communities, to increase anti-racism and cultural competence training, and to put more pressure on states to reduce racial disparities.<sup>33</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at v-vi.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at vi.

<sup>30</sup> *Overrepresentation of Minority Youth in Care*, 87 CHILD WELFARE (SPECIAL ISSUE) 1 (2008).

<sup>31</sup> *See id.* (table of contents).

<sup>32</sup> Terry L. Cross, *Disproportionality in Child Welfare*, 87 CHILD WELFARE (SPECIAL ISSUE) 11, 12 (2008).

<sup>33</sup> *See supra* note 30. *See, e.g.*, Robert B. Hill, *Gaps in Research and Policies*, 87 CHILD WELFARE (SPECIAL ISSUE) 359 (2008); Ruth G. McRoy, *Acknowledging Disproportionate Outcomes and Changing Service Delivery*, 87 CHILD WELFARE (SPECIAL ISSUE) 205 (2008).

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The Casey Alliance lists the Black Administrators in Child Welfare as a partner in their work.<sup>34</sup> The National Association of Black Social Workers has adopted a supportive statement,<sup>35</sup> as has the North American Council on Adoptable Children.<sup>36</sup>

*B. Core Initiatives*

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<sup>34</sup> GEO. UNIV. CTR. FOR JUV. JUST. REFORM & CHAPIN HALL CTR. FOR CHILD. AT UNIV. CHI., RACIAL AND ETHNIC DISPARITY AND DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE: A COMPENDIUM 24 (2009) [hereinafter CHAPIN HALL, COMPENDIUM].

<sup>35</sup> National Association of Black Social Workers, Preserving Families of African Ancestry (Jan. 10, 2003), <http://www.nabsw.org/mserver/PreservingFamilies.aspx> [hereinafter Preserving Families of African American Ancestry] (states that discrimination or “disparate treatment” is the reason for Racial Disproportionality, and calls for keeping black children with their parents).

<sup>36</sup> North American Council on Adoptable Children (NACAC), *Policy Statement on Race and Ethnicity and Adoption*, <http://www.nacac.org/policy/race.html>.

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The Casey-CSSP Alliance has issued and funded many reports and papers,<sup>37</sup> and sponsored

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<sup>37</sup> CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYS., POLICY RESPONSE TO THE GAO AUDIT ON DISPROPORTIONALITY FOR AFRICAN AMERICAN CHILDREN IN FOSTER CARE (2007), [http://www.cssp.org/uploadFiles/Casey-CSSP%20Alliance%20Policy%20Recommendations%20\\_5\\_%2012%2014%2007.pdf](http://www.cssp.org/uploadFiles/Casey-CSSP%20Alliance%20Policy%20Recommendations%20_5_%2012%2014%2007.pdf); CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYS., FACT SHEET #1: BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN AMERICANS IN THE FOSTER CARE SYSTEM (2004), <http://www.cssp.org/uploadFiles/factSheet1.pdf>; CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYS., FACT SHEET #2: STATE-BY-STATE PROFILE ON RACIAL OVERREPRESENTATION IN FOSTER CARE (2004), <http://www.cssp.org/uploadFiles/statORFactSheet2.pdf>; CASEY FAM. PROGRAMS, BREAKTHROUGH SERIES COLLABORATIVE: REDUCING DISPROPORTIONALITY AND DISPARATE OUTCOMES FOR CHILDREN AND FAMILIES OF COLOR IN THE CHILD WELFARE SYSTEM – FRAMEWORK FOR CHANGE (2005), *available at* [http://www.casey.org/NR/rdonlyres/8BEDB678-4EBF-4C66-97F3-0922F5F8B783/309/Focus\\_April06.pdf](http://www.casey.org/NR/rdonlyres/8BEDB678-4EBF-4C66-97F3-0922F5F8B783/309/Focus_April06.pdf); CASEY FAM. PROGRAMS, DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM: THE DISPROPORTIONATE REPRESENTATION OF CHILDREN OF COLOR IN FOSTER CARE, [http://www.casey.org/NR/rdonlyres/4F632D30-69AA-4BAD-A948-9F3F950A3C7E/565/Disproportionality\\_Fact\\_Sheet\\_31407.pdf](http://www.casey.org/NR/rdonlyres/4F632D30-69AA-4BAD-A948-9F3F950A3C7E/565/Disproportionality_Fact_Sheet_31407.pdf); CTR. FOR CMTY. P'SHIPS IN CHILD WELFARE OF THE CTR. FOR THE STUDY OF SOC. POL'Y, PLACES TO WATCH: PROMISING PRACTICES TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE (2006), *available at* <http://www.casey.org/NR/rdonlyres/F6481984-237B-43FA-A60F-E10F33810B94/535/PlacesToWatch1.pdf> (overview of efforts to reduce Racial Disproportionality taken by ten jurisdictions; acknowledging Casey Foundation support for production of report); DENNETTE DEREZOTES & MARY ANN HARTNETT, CHILD WELFARE SYSTEM INVOLVEMENT OF AFRICAN AMERICANS: JONES COUNTY, ILLINOIS (2005), <http://www.racemattersconsortium.org/docs/whopaper6.pdf> (a report developed by the Race Matters Consortium as an example of the Racial Disproportionality analysis that child welfare system administrators should conduct); ROBERT B. HILL, AN ANALYSIS OF RACIAL AND ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE AND COUNTY LEVELS (Casey-CCSP Alliance for Racial Equity in the Child Welfare System 2007), *available at* <http://www.cssp.org/uploadFiles/An%20Analysis%20Of%20Racial-Ethnic%20Disproportionality.pdf> [hereinafter HILL ANALYSIS]; ROBERT B. HILL, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (Casey-CCSP Alliance for Racial Equity in the Child Welfare Sys. 2006), *available at* <http://www.cssp.org/uploadFiles/Synthesis%20of%20Research%20on%20Disproportionality-Robert%20Hill.pdf> [hereinafter HILL SYNTHESIS]; RACE MATTERS CONSORTIUM, DEVELOPING A FRAMEWORK FOR ANALYSIS OF THE KEY ISSUES INFLUENCING DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM: FEDERAL POLICIES AND THEIR IMPACT ON RACIAL/ETHNIC/DISPROPORTIONALITY (2002), <http://www.racemattersconsortium.org/docs/whopaper1.pdf> [hereinafter RACE MATTERS FRAMEWORK]; KRISTIN J. WARD, CASEY FAM. PROGRAMS, OUTCOMES AND LESSONS LEARNED: CASEY'S BREAKTHROUGH SERIES COLLABORATIVE ON REDUCING DISPROPORTIONALITY AND DISPARITIES FOR CHILDREN AND FAMILIES OF COLOR IN THE CHILD WELFARE SYSTEM (2008).

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various conferences and colloquia,<sup>38</sup> beyond those mentioned above. As noted *supra* in Part I.A, the Alliance has systematically reached out to states to encourage them to focus on their alleged Racial Disproportionality problem. It has provided funding and technical assistance to states to analyze their child welfare systems in terms defined by the Movement, leading to the production of a series of reports in different states which replicate the Movement's standard analysis of Racial Disproportionality issues, and standard recommendations for reform. See Part I.D *infra*. For example, in June 2005 Casey Family Programs "invited 13 public child welfare jurisdictions to participate in the Breakthrough Series Collaborative (BSC) on Reducing Disproportionality and Disparate Outcomes for Children and Families of Color in the Child Welfare System."<sup>39</sup> The BSC is described as "incorporating an analysis of structural racism and potential system bias," and "as a tool for engaging public child welfare agencies in a rapid, action-oriented process for identifying innovative strategies and practices to reduce racial disproportionality . . . ."<sup>40</sup> The Alliance has also developed a "Racial Equity Scorecard" as part of its campaign, for use in its work with state agencies to reduce racial disparities at various points in the child welfare decision-making process.<sup>41</sup> The Alliance's "Action Card" calls on child welfare agencies to "[h]old child welfare leadership accountable for racial equity as an outcome standard . . . beginning with substantiations of abuse/neglect and continuing through exit strategies," "track racial disparity data at all key decision points in order to set benchmarks, monitor progress and ensure racially equitable treatment and outcomes," and "[e]nsure that services and staff are culturally competent . . . ."<sup>42</sup>

At the core of these state action initiatives is the notion that racism is the problem to be recognized and overcome at every level. Thus when Washington State formed an Advisory Committee to study the problem of Racial Disproportionality in response to its new legislative mandate, the Committee decided that its first step should be to engage in an Undoing Racism

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<sup>38</sup> See, e.g., FORDHAM UNIV. INTERDISC. CTR. FOR FAM. & CHILD ADVOC., THE RACIAL GEOGRAPHY OF THE CHILD WELFARE SYSTEM: COMMUNITY IMPACT AND RESPONSE (Dorothy Roberts, Leah Hill & Eric Pitchal eds., 2006), available at <http://law.fordham.edu/documents/int-2RacialGeography.pdf>; RACE MATTERS FRAMEWORK, *supra* note 37 (prepared for National Heritage Coalition Summit on Dec. 11-12, 2002); The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predictive Power of Race, Symposium of the Association of the Bar of the City of New York (Apr. 17, 2000) [hereinafter New York Bar Symposium]; Rutgers Sch. of Soc. Work, Inst. for Fam., Addressing Disparities and Disproportionality in Child Welfare: Best Practices and Emerging Opportunities (Apr. 29, 2009).

<sup>39</sup> Ordone A. Miller & Kristin J. Ward, *Emerging Strategies for Reducing Racial Disproportionality and Disparate Outcomes in Child Welfare: The Results of a National Breakthrough Series Collaborative*, 87 CHILD WELFARE 211, 213 (2008).

<sup>40</sup> *Id.* at 211.

<sup>41</sup> Dennette Derezotes et al., *Evaluating Multisystemic Efforts to Impact Disproportionality Through Key Decision Points*, 87 CHILD WELFARE 241, 248 (2008).

<sup>42</sup> CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, STRUCTURAL RACISM IN CHILD WELFARE ACTION CARD, available at [http://www.cssp.org/uploadFiles/AEC\\_ACard\\_1.pdf](http://www.cssp.org/uploadFiles/AEC_ACard_1.pdf).

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Workshop conducted by The People's Institute for Survival and Beyond. The Committee's later Report explains what it saw as the importance of making racial bias the lens for its work:

This workshop offered a lens to consider intended or unintended institutional racism, systematic racism and other societal factors that create barriers for the families and children our child welfare system serves. The workshop allowed the advisory members to examine the conditions that consistently contribute to racial inequality and provided them an opportunity to hear how various institutional systems affect people of color. The workshop further confirmed that racial disproportionality is multi-dimensional and commands consistent monitoring of our intention to be culturally sensitive and responsive to all of the people we serve.<sup>43</sup>

Similarly, the very recent Michigan "Race Equity Review, conducted by a team led by the Center for the Study of Social Policy (CSSP), co-leader of the Movement along with the Casey foundations, made acknowledgement of discrimination the starting point of its study, rather than designing a study to assess whether such discrimination exists. Thus its report indicated that in assessing Michigan's alleged Racial Disproportionality problem, it made *assumptions* that child maltreatment is evenly distributed across racial groups and thus should not predict outcomes to the degree it does.<sup>44</sup> When it found that caseworkers, lawyers, and judges often questioned the assumption that racial bias was responsible for the high rates of black children in foster care, the Review concluded that this was simply a reflection of their inability to understand "how racism is embedded in institutional structures."<sup>45</sup> The Review recommended that leaders in Michigan's child welfare system must be "trained and retrained on the dynamics of race and child welfare using an anti racism approach ... as part of creating an environment which is amenable to addressing institutional racism."<sup>46</sup>

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

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<sup>43</sup> WASH. ST. RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE 13 (2008), *available at* <http://www1.dshs.wa.gov/pdf/ca/RaceDisproReport.pdf>.

<sup>44</sup> CTR. FOR THE STUDY OF SOC. POL'Y, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN'S CHILD WELFARE SYSTEM 5 (2009) [hereinafter CSSP, MICHIGAN REPORT].

<sup>45</sup> *Id.* at 40.

<sup>46</sup> *Id.* at 41. See also Joyce James et al., *Addressing Disproportionality Through Undoing Racism, Leadership Development, and Community Engagement*, 87 CHILD WELFARE 279, 282, 286, 293 (2008) (reporting that in the Texas Racial Disproportionality campaign, "Undoing Racism" training has been central to the strategy, with workshops provided to those on the top leadership levels on down through the ranks).

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explanation for the black removal rates, then they are demonstrating their own racial bias, or at a minimum their inability to recognize racial bias when they see it.

Similarly, Movement anti-racism training is designed to tell those in supervisory and in line staff positions that they must avoid removing children in numbers disproportionate to their population numbers if they want to avoid racist action, and if they want to avoid being held accountable for such racist action.

Movement strategies urge creating accountability measures that will judge child protective services supervisors and staff in terms of whether they reduce the removal of black children so as to achieve “racial equity” – defined as the equalization of black and white rates of removal and of foster care representation, by comparison to population percentages. Thus the Movement calls for making child protective service (CPS) workers “accountable for measurable outcomes,”<sup>47</sup> and stresses “developing a cultural change that embraces the principles of anti-racism in everyday practices.”<sup>48</sup> The Michigan Race Equity Review noted above recommends that the central CPS office “develop routine data reports that look at critical decision points. . . by race/cultural groups,” and provide an annual report to the public “of progress on remedying racial disproportionality. . . .” “Supervisors and workers must be regularly held accountable. . . . Personnel appraisal process should include assessments of . . . their cultural competency, and outcomes for the parents and children.” CPS must build “an internal quality assurance review that annually . . . examines racial differences in outcomes.”<sup>49</sup>

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

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

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

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

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<sup>47</sup> James et al. *supra* note 46, at 293.

<sup>48</sup> *Id.* at 294.

<sup>49</sup> CSSP, MICHIGAN REPORT, *supra* note 44, at 41-42.

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

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

“We used to remove children who had black and blue marks and were beaten. Now, not if they’re ethnic,” said another. “We used to remove children because they were at risk. Then they told us not to remove children, particularly black children, unless they were unsafe in that moment . . . .”<sup>50</sup>

### C. Classic Movement Analysis and Recommendations

The Movement’s standard analysis of Racial Disproportionality focuses on the difference between the percentage of black children in the child welfare system and in the general population, contrasting this to the picture for white children. The literature<sup>51</sup> often uses the term *disproportionality* to describe the extent to which children are over- or underrepresented in the system relative to their population percentages, and the term *disparity* to describe the difference between the rate at which blacks as compared to whites are represented in the system.<sup>52</sup> Movement literature also discusses the apparent impact of various decision-making points in the child welfare system. It contends that blacks are first more likely than whites to be reported to the child protective services system (CPS) for child maltreatment, that CPS is more likely to investigate, substantiate, and remove to foster care in black cases, and is then less likely to move black children out of foster care either to be reunified with their parents or adopted. The claim is that biased decision-making is occurring throughout the system. Movement literature notes that the racial disparity is cumulative, increasing as children are affected at different decision points.<sup>53</sup> Some recent Movement analyses emphasize “life table” statistics, noting the likelihood that black children will be identified as victims of maltreatment or removed to foster care by a certain age. Thus one study states that “by the time they are seven years old, almost 2 in 5 black children have been referred to the child welfare system and almost 1 in 10 has been removed

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<sup>50</sup> John Simerman, *Racial Split a Breach in Foster Care: Effort to Reduce Disparity, Leave More Black Children in Their Homes Raises Questions About Safety Standards*, *CONTRA COSTA TIMES*, Dec. 20, 2006, at F4.

<sup>51</sup> For examples of major movement literature see *supra* notes 19, 25, 30, 37. See also note 69 *infra*.

<sup>52</sup> See, e.g., HILL SYNTHESIS, *supra* note 37, at 8; Terry V. Shaw et al., *Measuring Racial Disparity in Child Welfare*, 87 *CHILD WELFARE* 23, 31 (2008) (arguing for the benefits of the “disparity index” in calculating racial differences in treatment, and defining it as showing “the likelihood of one group experiencing an event, compared to the likelihood of another group experiencing that same event”).

<sup>53</sup> HILL ANALYSIS, *supra* note 37, at 9.

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from his or her parents' care . . . [whereas] less than 1 in 5 white or Hispanic children has been referred and about 1 in 30 has been removed."<sup>54</sup> Another argues that life table statistics are especially useful in triggering attention from media and from policy makers.<sup>55</sup>

The emphasis is on disparities between blacks as compared to whites, with some discussion of similar disparities regarding Native Americans. *There is little discussion of the fact that Asians are underrepresented in the child welfare system by comparison to their general population figures, or that Hispanics are represented at roughly the same rates as whites.* Some Movement literature contends that Hispanics are overrepresented in certain geographic areas, even if not more generally. But they cannot deny that as a general matter Hispanics are not overrepresented in foster care as compared to their share in the population, and have come up with no explanation as to why the racial discrimination they allege applies as a general matter only for black and not for Hispanic groups. Nor do Movement advocates argue that we should be increasing the number of Asian children removed in order to achieve racial equity.

Sometimes the raw disparity statistics are the only basis for concluding that the child welfare system is operating in a discriminatory way. Other times the literature baldly asserts that black and white maltreatment rates are the same as a way of bolstering its claims of discrimination, and in these instances it regularly relies on the NIS studies, and typically relies *only* on the NIS studies. The NIS studies, when cited, are generally described as comprehensive federal studies which demonstrate that black and white maltreatment rates are identical. Occasionally additional studies are cited, and the overwhelming favorites are a small handful of older studies involving medical reporting of maltreatment, which failed to control for important risk factors, but which the literature claims demonstrate biased decision-making.<sup>56</sup> Much of the Movement literature, including most of the state reports purporting to find discrimination in various state child welfare systems,<sup>57</sup> simply cites other Movement documents, including articles by favorite Movement authors like Robert Hill, which themselves generally rely solely on either the raw disparity statistics, or additionally on the NIS studies.

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

It is obvious from reading the Movement literature<sup>58</sup> that a simplistic Movement Message is being systematically propagated from a limited number of central command posts.

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<sup>54</sup> Joseph Magruder & Terry V. Shaw, *Children Ever in Care: An Examination of Cumulative Disproportionality*, 87 CHILD WELFARE 169, 187 (2008).

<sup>55</sup> David Crampton & Claudia J. Coulton, *The Benefits of Life Table Analysis for Describing Disproportionality*, 87 CHILD WELFARE 189 (2008).

<sup>56</sup> For discussion of the NIS and of these additional medical reporting studies, *see infra* Part II.C.

<sup>57</sup> *See* note 69 *infra*.

<sup>58</sup> Core Movement literature includes Casey-CSSP Alliance reports and papers, *supra* note 37, state and local jurisdiction reports on Racial Disproportionality, *infra* note 69, and the federal GAO Report, *infra* note 60.

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

The recommendations can be divided between those that logically flow directly from the Movement's analysis of the Racial Disproportionality problem, and those that do not. The first category focuses on reducing the number of black children in foster care. Recommendations include methods for reducing removal rates, and increasing reunification rates. Casey Family Programs has the stated goal of reducing foster care by 50% by 2020,<sup>59</sup> and reducing black representation in foster care is part of the program. Since bias is claimed to be the problem, it is no surprise that recommendations include the recruitment and hiring of more minority race social workers, and an increase in -- already extensive -- antiracism and cultural competence training for all workers. The Adoption and Safe Families Act (ASFA) comes in for criticism for its emphasis on the importance of removing children from their homes, if they cannot be safely kept there.<sup>60</sup>

Community partnership or Alternative Track systems are promoted, since these emphasize diverting many children from the coercive Child Protective Services track which can lead to removal to foster care. Family Group Decision-Making is promoted, since this is thought more likely to keep children in their birth families or at least in their kinship group, and also to more likely result in reunification with parents of any children removed temporarily. Subsidized guardianship is promoted, since it is thought that many black kinship foster care parents might become guardians if guardianship provided stipends comparable to those given foster parents, and thus provide black children in foster care another permanency option which will keep them in their kinship group.

The second category of recommendations is not obviously logically related to the goal of reducing the number of black children in foster care and may be somewhat inconsistent with that goal. This category includes the recommendations for changes in the Multiethnic Placement Act

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<sup>59</sup> WARD, *supra* note 37, at 4; CHAPIN HALL, COMPENDIUM, *supra* note 34, at 24.

<sup>60</sup> For Movement critiques of ASFA *see, e.g.*, GOVERNMENT ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE TO HELP STATES REDUCE THE PROPORTION IN CARE 31-33, 65 (2007), *available at* <http://www.gao.gov/cgi-bin/getrpt?GAO-07-816> [hereinafter GAO REPORT]; RUTH MCROY, COLOR OF CHILD WELFARE POLICY: RACIAL DISPARITIES IN CHILD WELFARE SERVICES 8-9 (2002), <http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/mcroys-transcript.pdf>; RACE MATTERS FRAMEWORK, *supra* note 37, at 18; U.S. DEP'T OF HEALTH & HUM. SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES AND CHILDREN'S BUREAU, CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY iii-iv (2003), *available at* <http://www.childwelfare.gov/pubs/otherpubs/children/children.pdf> [hereinafter DHHS STUDY]; Preserving Families of African American Ancestry, *supra* note 35.

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(MEPA).<sup>61</sup> MEPA removed racial barriers to placement that had stood in the way of black children finding adoptive homes with white families. It was designed in significant part to address the fact that black children were represented in foster care in very high numbers, and were being delayed in placement and sometimes denied placement altogether by policies that required they be placed with same-race adoptive parents. And there is some evidence that MEPA has helped reduce the number of black children in foster care: transracial adoptive placements have increased since MEPA,<sup>62</sup> as have adoptive placements generally of black children from foster care.<sup>63</sup> Thus the Movement criticism of MEPA demonstrates more generalized hostility to MEPA by Movement advocates, and their general commitment to keeping black children in the black community whether or not they can be kept at home with their birth parents. ASFA is also criticized for creating new screening criteria for foster and adoptive parents, including criminal record checks that make it harder for black prospective parents to qualify. Again this illustrates the Movement's commitment to keeping black children in their racial communities through same-race foster and adoptive placement, even if they cannot be kept with their birth parents.

Similarly, the Movement's criticism of ASFA for its allegedly overly rigid timelines has no clear relationship to the goal of reducing the number of black children in foster care. ASFA provides that children held for more than a certain amount of time in foster care be moved *either* back to their birth parents *or* on to adoption. Logically it should provide pressure to move black as well as white children out of foster care into permanency, something that Racial Disproportionality Movement advocates say they want. And as a general matter more children exit foster care to reunification than to adoption, so ASFA timelines should further the Movement goal of keeping more black children with their parents. But Movement critics are presumably concerned with the fact that ASFA will lead to at least some increase in adoption of black children out of foster care, moving these children away from their birth parents and, in some cases, away from their racial communities.

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<sup>61</sup> For Movement critiques of MEPA *see, e.g.*, GAO REPORT, *supra* note 60, at 63; CLEGG & ASSOCIATES & WANDA HACKETT ENTERPRISES, RACIAL DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM IN KING COUNTY, WASHINGTON 47 (2004), <http://www.chs-wa.org/KingCountyReportonRacialDisproportionality.pdf> [hereinafter KING COUNTY REPORT]; MCROY, *supra* note 60, at 11; RACE MATTERS FRAMEWORK, *supra* note 37, at 8-9, 11; DHHS STUDY, *supra* note 60, at iii-iv; Preserving Families of African American Ancestry, *supra* note 35 (recommends repealing the IEPA 1996 amendments to MEPA which strengthened the Act to prohibit any use of race by child welfare agencies in the child placement process).

<sup>62</sup> EVAN B. DONALDSON INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 33 (2008) [hereinafter DONALDSON REPORT], *available at* <http://www.adoptioninstitute.org/publications/MEPAPER20080527.pdf>.

<sup>63</sup> FRED H. WULCZYN ET AL., CHAPIN HALL CTR. FOR CHILDREN, UNIV. OF CHI., FOSTER CARE DYNAMICS 1983-1998: A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE 60 (2000), *available at* [http://www.chapinhall.org/content\\_director.aspx?arid=1322&afid=75&dt=1](http://www.chapinhall.org/content_director.aspx?arid=1322&afid=75&dt=1).

*D. Impact on the Child Welfare Field*

The Racial Disproportionality Movement has already had a very significant impact on the child welfare field.<sup>64</sup> So far this impact can be measured primarily in terms of the number of reports and articles published, and the number of people and organizations in a position to influence policy who have bought into the Movement's standard analysis and standard set of recommendations. But more significant action changing child welfare system policies will likely be next unless something stops the train.

National and local media have given Racial Disproportionality issues increasing attention, often replicating core Movement claims.<sup>65</sup> This reflects systematic efforts by the Movement to reach out to the media for favorable coverage so as to influence policy-makers.<sup>66</sup>

The National Conference of State Legislators and the National Governor's Association have issued statements supporting the Racial Disproportionality Movement's analysis of the problem.<sup>67</sup> The former is an organization designed to provide policy information to inform state legislative decision-making. Its statement, *Racial Equity in Child Welfare: The Role of State Legislators*, makes the claim that while black children appear in foster care at more than twice their population percentage, "federal studies indicate that child abuse and neglect is actually lower for black families than it is for whites."<sup>68</sup>

A number of state and local jurisdictions have issued reports that replicate the standard Movement analysis, and adopt standard Movement recommendations to change the child welfare systems in their states or localities.<sup>69</sup> This is of course no surprise given that the Casey-CSSP

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<sup>64</sup> A recent summary appears in CHAPIN HALL, COMPENDIUM, *supra* note 34, at 21-24.

<sup>65</sup> Steve Leblanc, *Racial Disparities in Foster Care*, ASSOC. PRESS, Nov. 14, 2007, available at <http://www.msnbc.msn.com/id/21775847/>; Natalie Jordan, *Racial Disparity in Foster Care Addressed*, BOWLING GREEN DAILY NEWS, Apr. 5, 2007, available at <http://www.bgdailynews.com/articles/2007/04/05/news/news3.txt>; Brooke Kempner, *No Place to Call Home: Children of Color in Foster Care*, COLORSNW MAG., Jan. 2006.

<sup>66</sup> Crampton & Coulton, *supra* note 55, at 189 (discussing usefulness of life table analysis statistics for media and policymakers).

<sup>67</sup> Nat'l Conf. St. Legs., *Racial Equity in Child Welfare: The Role of State Legislators*, <http://www.ncsl.org/programs/cyf/racialequity.htm> (last visited ---, 2009); Nat'l Governor's Assoc., *Addressing Disproportionality in the Child Welfare System: What State Policymakers Should Know*, <http://www.nga.org/portal/site/nga/menuitem.9123e83a1f6786440ddcbbeb501010a0/?vgnnextoid=bbe4edc8acf54110VgnVCM1000001a01010aRCRD> (last visited ---, 2009).

<sup>68</sup> Nat'l Conf. of St. Legs., *supra* note 67 (citing the NIS).

<sup>69</sup> KING COUNTY REPORT, *supra* note 61 (acknowledging Casey Foundation support); BAY AREA SOC. SERVS. CONSORTIUM, *UNDERSTANDING AND ADDRESSING RACIAL/ETHNIC DISPROPORTIONALITY IN THE FRONT END OF THE CHILD WELFARE SYSTEM* (2005), available at [http://cssr.berkeley.edu/bassc/public/DISPRO\\_PDF.pdf](http://cssr.berkeley.edu/bassc/public/DISPRO_PDF.pdf); INTER-CITY FAM. RESOURCE CTR., INC., *THE DISPROPORTIONALITY PROJECT: RAISING OUR CHILDREN TOGETHER, A REPORT ON*

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Alliance provides funding and expertise encouraging and guiding these activities. The Alliance even provides consultants to do the work, including writing the reports. As noted above, the CSSP itself conducted the Michigan study and wrote the Michigan Equity Report.<sup>70</sup> The Race Matters Consortium developed a report on a fictitiously named Illinois county to provide a model for state and local authorities in how to analyze their Racial Disproportionality problems.<sup>71</sup>

Several states including Michigan, Texas, Florida, Iowa, Minnesota and Washington have recently passed legislation requiring Racial Disproportionality analysis as well as action designed to reduce disproportionality, and others have introduced such legislation.<sup>72</sup>

The Joint Center for Political and Economic Studies, which describes itself as a leading think tank on public policy issues of concern to people of color, issued a major report focusing on

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RECOMMENDATIONS FOR REDUCING THE DISPROPORTIONALITY OF AFRICAN AMERICAN CHILDREN IN SAN FRANCISCO'S CHILD WELFARE SYSTEM (2004), *available at* <http://www.f2f.ca.gov/res/DisprReport.pdf> (report recognizes funding and support from the Stuart and Casey Foundations); MICH. DEP'T OF HUM. SERVS., EQUITY: MOVING TOWARD BETTER OUTCOMES FOR ALL OF MICHIGAN'S CHILDREN (2006), *available at* [http://www.michigan.gov/documents/DHS-Child-Equity-Report\\_153952\\_7.pdf](http://www.michigan.gov/documents/DHS-Child-Equity-Report_153952_7.pdf) (noting Casey Foundation funding); TEX. HEALTH & HUM. SERVS. COMM'N DEP'T OF FAM. & PROTECTIVE SERVS., DISPROPORTIONALITY IN CHILD PROTECTIVE SERVICES: STATEWIDE REFORM EFFORT BEGINS WITH EXAMINATION OF THE PROBLEM (2006), *available at* [http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02\\_Disproportionality.pdf](http://www.dfps.state.tx.us/documents/about/pdf/2006-01-02_Disproportionality.pdf) (noting collaboration with Casey Foundation); TEX. HEALTH & HUM. SERVS. COMM'N DEP'T OF FAM. & PROTECTIVE SERVS., DISPROPORTIONALITY IN CHILD PROTECTIVE SERVICES: POLICY EVALUATION AND REMEDIATION PLAN (2006), *available at* [http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01\\_Disproportionality.pdf](http://www.dfps.state.tx.us/Documents/about/pdf/2006-07-01_Disproportionality.pdf); WASH. ST. RACIAL DISPROPORTIONALITY ADVISORY COMM., *supra* note 43; CSSP, MICHIGAN REPORT, *supra* note 44; NANCY ROLOCK, CHILDREN & FAM. RESEARCH CTR., UNIV. ILL. AT URBANA – CHAMPAIGN, DISPROPORTIONALITY IN ILLINOIS CHILD WELFARE (2008). While most of these reports buy into the standard Movement analysis, occasionally there is a serious attempt to control for non-race factors with a likely impact on CPS system decision-making, with related findings that race plays no role or a greatly reduced role. MINN. DEP'T OF HUM. SERVS., AFRICAN AMERICAN COMPARATIVE CASE REVIEW STUDY REPORT (2005), *available at* <http://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-4575-ENG>; SONJA CLARK ET AL., INVESTIGATING RACIAL DISPARITY IN MINNESOTA'S CHILD WELFARE SYSTEM (2003).

<sup>70</sup> CSSP, MICHIGAN REPORT, *supra* note 44 and accompanying text. See generally Part I.B *supra*.

<sup>71</sup> See DEREZOTES & HARTNETT, *supra* note 37.

<sup>72</sup> See, e.g., S.B. 271, 93 Leg., 2005 Sess. (Mich. 2005) (legislation creating development of Racial Disproportionality Advisory Committee for the State of Michigan); TEX. FAM. CODE ANN. § 264.2041 (Vernon 2005); FLA. STAT. ANN § 409.912 (West 2008); 2001 Minn. Laws. 1st Special Sess. HF 4, Ch. 9, Art. 11, Sec. 15 (Minn. 2001); Iowa Acts SF 453, Ch. 178 & SF 354 Ch. 153 (2003), *available at* <http://www.legis.state.ia.us/>; WA. ST. ANN. § 74.13.096 (West 2008); Final Bill Report, S.B. 5882, 61st Leg. (Wa. 2009).

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Racial Disproportionality in 2006.<sup>73</sup> The important Pew Commission on Foster Care called for a reduction in Racial Disproportionality in its report on the nation's foster care system.<sup>74</sup> The National Association of Public Child Welfare Administrators issued a report in 2006 calling Racial Disproportionality a "widely accepted problem," buying into the Movement's standard analysis, and calling for the reduction of disproportionality through the Movement's standard panoply of strategies.<sup>75</sup> The American Public Human Services Administration and the National Association for Public Child Welfare Administrators have joined together to analyze Racial Disproportionality and identify targets of reform action.<sup>76</sup> The influential American Bar Association (ABA) adopted a policy on Racial Disproportionality in August 2008, urging federal, state and local governments to take action to reduce the "disproportionate representation of racial and ethnic minority children in the child welfare system," and recommending training for a wide range of child welfare system personnel in cultural competence and anti-racism, as well as the recruitment and retention of racial minority personnel.<sup>77</sup>

There is increasing recognition that Racial Disproportionality is the hottest issue on the current child welfare scene. Fred Wulczyn, Senior Research Associate at the Chapin Hall Center for Children and Director of the Center for State Foster Care and Adoption Data, a deeply knowledgeable, long-time student of the nation's child welfare system,<sup>78</sup> wrote in a 2007 report for Chapin Hall that Racial Disproportionality "is now gaining real traction as a

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<sup>73</sup> ERNESTINE E. JONES, JOINT CTR. FOR POL. & EC. STUDIES HEALTH POL'Y INST., PUBLIC POLICIES AND PRACTICES IN CHILD WELFARE SYSTEMS THAT AFFECT LIFE OPTIONS FOR CHILDREN OF COLOR (2006).

<sup>74</sup> PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 50 (2004) ("The Commission urges policymakers and practice organizations to intensify their efforts to eliminate these disparities.").

<sup>75</sup> NAT'L ASSOC. OF PUB. CHILD WELFARE ADM'RS, DISPROPORTIONATE REPRESENTATION IN THE CHILD WELFARE SYSTEM: EMERGING PROMISING PRACTICES SURVEY 6 (2006), *available at* <http://www.napcwa.org/Home/docs/Disproportionate-Representation.pdf>.

<sup>76</sup> CHAPIN HALL, COMPENDIUM, *supra* note 34, at 23.

<sup>77</sup> AM. BAR ASS'N, COMM'N ON YOUTH AT RISK, ABA POLICY ON ADDRESSING RACIAL DISPARITIES IN THE CHILD WELFARE SYSTEM (2008), *available at* <http://www.abanet.org/youthatrisk/youthpolicies/home.shtml/> (last visited ----, 2009).

<sup>78</sup> In addition, Fred Wulczyn designed the Chapin Hall's Multi-State Foster Care Data Archive and constructed the original integrated longitudinal database on children's services in Illinois, now in use for over 25 years. The database has enabled state administrators to analyze key child welfare outcomes, compare outcomes, and test the impact of policy innovations. In 2006, he received the prestigious National Association of Public Child Welfare Administrators' (NAPCWA) Peter Forsyth Award for leadership in public child welfare. Chapin Hall, Researchers, Fred Wulczyn, <http://www.about.chapinhall.org/research/researchdetail.lasso?empID=87/> (last visited ----, 2009).

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critical policy and practice issue within the child welfare system.”<sup>79</sup> The report notes various federal and state agency actions attesting to the Movement’s significance, and states that “within the private sector, the Race Matters Consortium and the Casey[-CSSP] Alliance . . . have helped move the issue to the forefront of policy discussions.”<sup>80</sup> In March 2008 the Center for Juvenile Justice Reform at the Georgetown Public Policy Institute and the Chapin Hall Center for Children at the University of Chicago sponsored a major symposium titled “The Overrepresentation of Children of Color in America’s Juvenile Justice and Child Welfare Systems.” The goal was to focus on ways in which federal, state, and local government might help both systems address the “overrepresentation” problem.<sup>81</sup>

The Movement has recently expanded its attention from the child welfare to the juvenile or family court system. It is child welfare agencies that *initiate* most important decisions regarding removal to foster care, reunification with parents, termination of parental rights, and adoption, and it is the courts that *finalize* such decisions. The Movement has been emphasizing recently, by way of articles,<sup>82</sup> reports,<sup>83</sup> and conferences,<sup>84</sup> the importance of educating family court judges about Racial Disproportionality, so that they will do more to keep black children identified as victims of maltreatment in their original homes and communities. The National Council of Juvenile and Family Court Judges, an organization of more than 1,900 judges and

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<sup>79</sup> FRED WULCZYN & BRIDGETTE LERY, CHAPIN HALL CENTER FOR CHILDREN, UNIVERSITY OF CHICAGO, RACIAL DISPARITY IN FOSTER CARE ADMISSIONS 23 (2007) (acknowledging funding support from Casey Foundation).

<sup>80</sup> *Id.* See also Magruder & Shaw, *supra* note 54, at 170 (observing that the Racial Disproportionality issue “is finally coming to the forefront of child welfare research”).

<sup>81</sup> CHAPIN HALL, COMPENDIUM, *supra* note 34, at 7.

<sup>82</sup> See, e.g., L.A. Hill, *supra* note 19, at 10 n.10 (“Across the country the impact of racial disproportionality in juvenile and family courts is beginning to spur the interests of researchers and practitioners”); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002) (arguing for “therapeutic justice” approach given the Racial Disproportionality problem, urging family courts to forego their coercive intervention in favor of supportive services approach to alleged maltreatment); Symposium, *The Rights of Parents With Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 64-66, 68-70 (2003) (discussing content of symposium held by the Association of the Bar of the City of New York); Wright & Thomas, *supra* note 19 (courts must address racism and racial disproportionality).

<sup>83</sup> See, e.g., CSSP, MICHIGAN REPORT, *supra* note 44, at 44.

<sup>84</sup> Shawn Marsh et al., Courts Catalyzing Change: Key Measures of Racial/Ethnic Disproportionality and Disparity for Children and Families in the Dependency Court System, Presentation at the 11th National Child Welfare Data and Technology Conference (July 21, 2008); Disproportionate Number of Minority Youth in the Family and Criminal Court Systems, Conference of the New York State Family Court Judges Association (Sept. 18, 2006); New York Bar Symposium, *supra* note 38; ABA 2009 National Conference on Children and the Law (May 15-16, 2009), available at <http://www.abanet.org/child/ConfAgenda.pdf/> (including a workshop by judges Katherine Delgado and Nan Waller presenting “tools for judges to use . . . to ensure that disproportionality and disparities are identified and rectified at the very earliest stages”).

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other juvenile and family law professionals,<sup>85</sup> recently formed Courts Catalyzing Change, an initiative to address Racial Disproportionality.<sup>86</sup> The initiative, funded by Casey and the U.S. Department of Justice, accepts as true that children of color “are disproportionately represented in the child welfare system and frequently experience disparate outcomes,”<sup>87</sup> and plans to “recommend strategies for court and systems change to reduce racial disproportionality and disparate treatment.”<sup>88</sup>

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

Thus the CSSP, Casey’s partner in the Alliance, put out a report recently recommending that the federal government become heavily involved in addressing Racial Disproportionality, including through funding demonstration grants. The Report recommends that Racial Disproportionality analysis be made part of the federal government’s annual analysis of states’ success in achieving appropriate child welfare goals, and that states’ federal funding for their child welfare systems be conditioned on demonstrated success in reducing the rates of alleged disproportionality.<sup>89</sup> Robert Hill, a key Movement figure, has similarly called for federal involvement in the editorial which concludes the 2008 CWLA Special Issue on Racial Disproportionality, and makes clear the importance of this strategy.<sup>90</sup> He notes that to date most of the financial and technical support for the Movement has been provided by the Casey-CSSP Alliance, and argues that to advance Movement goals the federal government must now provide funds and technical

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<sup>85</sup> Nat’l Council of Juv. & Fam. Ct. Judges, About the National Council of Juvenile and Family Court Judges, <http://www.ncjfcj.org/content/view/15/75/> (last visited ----, 2009).

<sup>86</sup> See Sophia I. Gatowski, Candice L. Maze & Nancy B. Miller, *Courts Catalyzing Change: Achieving Equity and Fairness in Foster Care – Transforming Examination into Action*, JUV. & FAM. JUST. TODAY, Summer 2008, at 16, available at <http://www.ncjfcj.org/images/stories/dept/ppcd/CCC/ccctodayarticlefinal.pdf/>.

<sup>87</sup> Nat’l Council of Juv. & Fam. Ct. Judges, Courts Catalyzing Change, <http://www.ncjfcj.org/content/blogcategory/447/580/> (last visited ----, 2009).

<sup>88</sup> *Id.*

<sup>89</sup> CASEY-CSSP ALLIANCE PUB. POL’Y WORKING GROUP, RACIAL AND ETHNIC DISPARITIES IN THE CHILD WELFARE SYSTEM: CASEY-CSSP ALLIANCE PUBLIC POLICY WORKING GROUP RECOMMENDATIONS FOR FEDERAL POLICY (2007) [hereinafter CASEY-CCSP FEDERAL POLICY RECOMMENDATIONS]. See also Ruth G. McRoy, *Acknowledging Disproportionate Outcomes and Changing Service Delivery*, 87 CHILD WELFARE 205 (2008).

<sup>90</sup> Robert B. Hill, *Gaps in Research and Public Policies*, 87 CHILD WELFARE 359, 366 (2008).

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support.<sup>91</sup> The ABA Policy noted above “urges Congress to change laws . . . to broaden federal review of the disproportionate representation of racial and ethnic minority children in the child welfare system and require and fund states to track, report, analyze, and take and report on corrective action.”<sup>92</sup>

And various federal entities have been responsive to this call for action. U.S. House Representative Charles Rangel, Chairman of the House Committee on Ways and Means, called on the federal General Accounting Office (GAO) to assess the Racial Disproportionality issue, and the GAO issued a report in July 2007 which replicates the Movement’s standard analysis and standard set of recommendations. Thus the Report buys into the Movement claim that black and white maltreatment rates are the same, and asserts that racial bias or cultural misunderstanding is a key factor contributing to the Racial Disproportionality problem.<sup>93</sup> It describes favorably some of the extensive Casey-CSSP Alliance and related state reports addressing Racial Disproportionality,<sup>94</sup> and calls on Congress and the U.S. Department of Health and Human Services to take action encouraging states to track racial data and to reduce Racial Disproportionality.<sup>95</sup>

The Administration on Children and Families (ACF) of the U.S. Department of Health and Human Services has identified Racial Disproportionality as an important problem deserving significant attention. It hosted a Research Roundtable on Racial Disproportionality in the Child Welfare System in Washington, D.C., in September 2002, having previously commissioned a set of academic papers on the Racial Disproportionality issue, which were published in a special issue of the *Child and Youth Services Review*, an important journal in the child welfare area.<sup>96</sup> A huge coalition of organizations including the Child Welfare League of America is urging Congress to hold a national conference on child welfare, and a bill to that effect has been introduced in Congress. One of its goals is to address the “overrepresentation” of certain minority race populations in the child welfare system.<sup>97</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *See* AM. BAR ASS’N, *supra* note 77.

<sup>93</sup> GAO REPORT, *supra* note 60, at 1, 4, 7 (relying on NIS).

<sup>94</sup> *Id.* at 32-50.

<sup>95</sup> *Id.* at 55, 65-66.

<sup>96</sup> *Racial Disproportionality in the Child Welfare System*, 25 CHILD. & YOUTH SERVS. REV. (SPECIAL ISSUE) 355 (2003) (papers jointly commissioned by ACF, the American Institutes for Research and Chapin Hall Center for Children). *See also* Children’s Bureau/Administration on Children, Youth and Families, Child Welfare Information Gateway, <http://www.childwelfare.gov/systemwide/cultural/disporp/> (last visited Nov. 4, 2008).

<sup>97</sup> White House Conference on Children and Youth in 2010 Act, H.R. 618, 111th Cong. § 3(c)(6) (2009) (“The purposes of the Conference are . . . to . . . reduce the overrepresentation of certain populations including but not limited to Native American, African-American, and Hispanic populations in the child welfare system”); Child Welfare League of America, CWLA Calls on President Barack Obama to Convene a White House Conference on Child Welfare in 2010, <http://www.cwla.org/advocacy/whitehouseconf10.htm/> (last visited ----, 2009).

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Recently the U.S. House Subcommittee on Income Security and Family Support held a hearing on Racial Disproportionality.<sup>98</sup> The Advisory announcing the hearing relied on the NIS and the GAO Report for the claim that blacks were disproportionately represented in foster care compared not just to population figures but to actual maltreatment rates, and called for the development of strategies to overcome the problem.

#### *E. Success of Prior Related Movements*

The Racial Disproportionality Movement looks in terms of leadership and strategy, as well as ideology, much like two recent movements which have had a very significant impact on child welfare policy, one promoting Intensive Family Preservation Services (IFPS), and one promoting Community Partnership or Alternative Track systems. All three of these movements have been led by foundations which have provided massive amounts of funding to push forward their agenda. All three have developed sophisticated strategies for accomplishing change, and have consciously reached out to a wide range of different camps, including federal and state child welfare policy agencies, the media, non-profits, and academia. All three have promoted self-serving research, and used that research effectively to push for their preferred policy changes. All three have been driven by a powerful family preservation ideology.<sup>99</sup> All three are problematic from the viewpoint of children's best interests.

The earlier two movements have been very successful in getting their preferred programs adopted. The IFPS movement swept the country in the 1980's, with many jurisdictions adopting the proposed model of family preservation, although its popularity has now waned. The basic idea was to prevent children described as "at risk of placement" from being removed from their parents and placed in foster care. Child abuse and neglect was conceived of as occurring because of a crisis in the family which could be resolved by intensive but short-term supportive services. Typically the services were designed to last for only a six-month period. The movement claimed that these programs were successful based on research which evaluated success in terms of the programs' ability to reduce placement rates, without regard to whether the children kept at home did better or worse in terms of child maltreatment. Eventually independent researchers demonstrated that the IFPS movement's claims for success were flawed, both because the research success criteria wrongfully omitted measures of child well-being like maltreatment, and because there was no evidence that the programs succeeded even in their limited goal of reducing removal rates.<sup>100</sup> And eventually most policy makers became disillusioned with the idea that any such short-term program could be successful in addressing child maltreatment, given the evidence that such maltreatment generally arises out of long-term, deeply entrenched patterns of family dysfunction, against a background often including unemployment, substance abuse, and mental illness. A recent study of IFPS in connection with

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<sup>98</sup> *Hearing on Racial Disproportionality in Foster Care Before the H. Subcomm. on Income Security & Support* (2008), available at <http://waysandmeans.house.gov/hearings.asp?formmode=wlprint&hearing=643>.

<sup>99</sup> See *NOBODY'S CHILDREN*, *supra* note 3, at 113-159 (describing IFPS and Community Partnership movements).

<sup>100</sup> *Id.* at 118-21.

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attempts to reduce the number of black children removed to foster care, notes the importance of including in any future research measures of child maltreatment, noting the risk that if IFPS does reduce black placement it may be leaving black children at risk at higher rates than white children.<sup>101</sup>

The Community Partnership or Alternative Track movement arose out of the ashes of IFPS. It was led in the beginning by the Edna McConnell Clark Foundation, which had also led the IFPS movement. Casey has also played an important role. The basic idea is to divert a very large percentage of the cases typically dealt with by the child protective services system (CPS) with its coercive powers to remove children to foster care, to a non-coercive community-based system of services which parents are offered but are free to refuse. The movement relies on claims that most of the CPS system's caseload consists of "neglect" cases, and that these are virtually all minor, "mere poverty" cases, which can be safely diverted to a non-coercive system. The goal again, as with IFPS, is to keep more children identified as at risk for maltreatment with their parents, and the idea again is that with more supportive services for those parents, the children can be kept safe. This movement is enjoying current success in getting its preferred programs adopted in increasing numbers of jurisdictions across the nation. As with IFPS, claims that the programs are actually succeeding in any other sense are based primarily on the idea that increased numbers of cases are being diverted from the CPS system, keeping increased numbers of children identified as at risk for maltreatment at home. There is no evidence that the programs are succeeding in generating significant new community-based supportive services, or that children are better off and not worse off by virtue of being diverted from the CPS system.<sup>102</sup> There are many reasons to worry that they may be worse off. As discussed in Part II.D.2 below, there is every reason to believe that our child protective system is guilty of underintervention rather than overintervention, leaving too many children at home who are at serious risk for maltreatment. There is no reason to believe that a large percentage of cases in which CPS now removes children are minor cases, or that most cases categorized as neglect are minor cases. Most in fact are cases in which children are at as serious risk for harm as those cases categorized as abuse.

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<sup>101</sup> Raymond S. Kirk & Diana P. Griffith, *Impact of Intensive Family Preservation Services on Disproportionality of Out-of-Home Placement of Children of Color in One State's Child Welfare System*, 87 CHILD WELFARE 87, 103 (2008).

<sup>102</sup> See, e.g., Deborah Daro, *Community Partnerships to Protect Children: Challenges and Opportunities*, Presentation at the American Bar Association's 12th National Conference on Children and the Law (in partnership with the Harvard Law School Child Advocacy Program) (Apr. 14, 2007) (noting that Chapin Hall assessment of community partnerships in four locations found "[n]o consistent reductions in child abuse reports, subsequent maltreatment or placements at either the aggregate or ICA participant levels"); DEBORAH DARO ET AL., CHAPIN HALL CENTER FOR CHILDREN, UNIVERSITY OF CHICAGO, COMMUNITY PARTNERSHIPS FOR PROTECTING CHILDREN: PHASE II OUTCOME EVALUATION (2005).

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There is of course nothing wrong with private foundations playing a role in the child welfare area. The area is starved for resources, and it is good that private foundations are interested in trying to help solve problems by contributing their resources to supplement unduly limited government funding. And there is also nothing wrong with private foundations setting out to systematically change policy in the child welfare area. Private entities have regularly made important contributions in encouraging changes in social policy. Witness the influence of the NAACP Legal Defense Fund over the years in promoting the civil rights revolution, as just one example. But when one set of related foundations dominate the funding picture in a way that enables them to apply enormous pressure for change in their chosen direction, there is an obvious danger that policy will be changed without regard to important issues having been adequately explored and considered by those theoretically in charge of making policy decisions in our democratic system. This danger is exacerbated when that set of foundations simultaneously dominates not only the world of policy advocacy, but also the world of empirical research, research which should itself function as something of a check on the wisdom of various policy directions.

The Racial Disproportionality Movement has had great success to date in getting its message out in various important policy arenas. It is seen as the hot issue of the day in the child welfare world. It is beginning to move into the action stage, with many states having adopted action agendas. Policy makers should take a careful look now at the facts central to the Movement's claims, before moving further down the implementation road.

## II. UNDERSTANDING THE RACIAL DISPROPORTIONALITY ISSUE

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

Black children are reported for abuse and neglect, and removed from their parents to be placed in foster care, at higher rates than white children, as compared to their respective percentages in the general population. Black children also spend longer in foster care than white children, are reunited with their parents at lower rates, and move on to adoption at slower rates. While they exit foster care by adoption at relatively high rates, the adoption exit takes longer than the reunification exit. As a result of all this, black children appear in foster care at higher rates than white children as compared to their population percentages.<sup>103</sup> So, for example, Wulczyn reports that although black children make up only 15% of the children living in the U.S., they make up roughly 37% of those in foster care.<sup>104</sup>

Recent years show some reduction in these racial differences. Black entries to foster care are going down while white entries are going up.<sup>105</sup> The racial disparity in length of time spent in

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<sup>103</sup> See, e.g., WULCZYN ET AL., *supra* note 63, at 17, 28, 43, 60.

<sup>104</sup> WULCZYN & LERY, *supra* note 79, at 1.

<sup>105</sup> FRED WULCZYN ET AL., FOSTER CARE DYNAMICS 2000-2005: A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE 19-20 (2007) [hereinafter FOSTER CARE DYNAMICS 2000-2005]; FRED WULCZYN ET AL., CHAPIN HALL CENTER FOR CHILDREN, UNIVERSITY OF

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foster care is also being reduced, because black adoption rates are going up and the time to adoption is being reduced.<sup>106</sup> This appears to be in part because of the influence of ASFA and MEPA.<sup>107</sup>

But despite these recent trends, the basic statistical picture remains true: black children are represented in foster care at higher rates than white children compared to their population percentages. These raw statistics do signal an important social problem calling for reform action, as discussed in II.D.3 below. But the kind of action called for depends on the kind of problem that lies behind the statistical picture.

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

If black children are being reported and removed at rates comparable to their *actual* maltreatment victimization rates, then the child welfare decision-making system is functioning appropriately. If we were to reduce black reporting and removal rates so as to achieve equal rates with whites, as urged by the Movement, we would put black children at undue risk. This is true at least if we think that overall the system is intervening in coercive ways such as removal only in serious abuse and neglect cases that put children at serious risk for ongoing maltreatment. In my view this is clearly the case.<sup>108</sup>

If black children are being reported and removed at high rates because of bias in the system for reporting, investigating, substantiating, and making removal and reunification decisions, then of course the Movement is right that efforts to correct that bias are called for. However it would still not be clear that the solution is to reduce the number of black children reported and

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CHICAGO, ENTRY AND EXIT DISPARITIES IN THE TENNESSEE FOSTER CARE SYSTEM 1-2, 11, 32 (2006) [hereinafter TENNESSEE REPORT].

<sup>106</sup> See WULCZYN ET AL., *supra* note 63, at 60. On these exit data, see also Fred Wulczyn, *Closing the Gap: Are Changing Exit Patterns Reducing the Time African American Children Spend in Foster Care Relative to Caucasian Children?*, 25 CHILD. & YOUTH SERVS. REV. 431, 451, 456-57, 458-59 (2003) [hereinafter *Closing the Gap*].

<sup>107</sup> See *Closing the Gap*, *supra* note 106, at 459 (referencing ASFA). See also *supra* notes 62-63 and accompanying text.

<sup>108</sup> See *infra* Part II.D.2. By contrast, Movement advocates argue that our system over-intervenes generally.

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removed, as called for by the Movement. The problem might lie in disproportionate *under-intervention* in white cases, and the solution in removing white children in greater numbers. See Part II.D.2 *infra*.

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

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

The obvious explanation for the large representation of black children in foster care is that black maltreatment rates are higher, and this appears to be the right explanation. The child protective services system is designed to receive reports of maltreatment, investigate those reports, decide whether they are substantiated, and then decide in the more serious cases to remove children temporarily to foster care, and in the most serious cases to keep them in foster care for prolonged periods or to place them in adoption, rather than reunifying them with their parents. The people making the decisions at every stage of the system are in a position to have the fullest picture of the facts of each case. If they are doing their job, black children are showing up in the system at higher rates than white children because they are at higher risk of serious abuse and neglect in their families, and accordingly are most likely to need removal from home, and least likely to be safe if reunified with their parents.

While of course it is possible that the system is not operating appropriately, and is reflecting systematic bias as alleged by the Movement, there are many reasons to think that the system is correctly reflecting the reality in finding higher black child maltreatment rates. First and foremost is that blacks are disproportionately associated with a set of characteristics that have been repeatedly found by many different child welfare experts to be accurate predictors for child maltreatment. These characteristics include poverty, unemployment, single parent status, substance abuse, and living in a significantly disadvantaged neighborhood. Child welfare research has regularly reaffirmed the significance of these predictors,<sup>109</sup> and there is no doubt

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<sup>109</sup> See, e.g., Bridget Freisthler et al., *Understanding the Ecology of Child Maltreatment: A Review of the Literature and Directions for Future Research*, 11 CHILD MALTREATMENT 236 (2006) (recent review of non-racial risk factors for child maltreatment); Ellen E. Pinderhughes, *Parenting in Context: Impact of Neighborhood Poverty, Residential Stability, Public Services, Social Networks, and Danger on Parental Behaviors*, 63 J. MARRIAGE & FAM. 941, 941-42 (2008) (citing series of studies demonstrating influence of neighborhood and family structure on quality of parenting); Amie M. Schuck, *Explaining Black-White Disparity in Maltreatment: Poverty, Female-Headed Families, and Urbanization*, 67 J. MARRIAGE & FAM. 543, 544 (2005) (poverty and single parenting long recognized as risk factors for maltreatment, citing Garbarino, Pelton, Gelles and others); see also DUNBAR & BARTH, *supra* note 20, at 3 (noting high rates of domestic violence (involving adult partners) and arrest rates among black parents as explanatory factors for black high child removal rates). The early classic demonstrating the connection between socioeconomic disadvantage and child maltreatment, including the most violent maltreatment, is Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608 (1978) (arguing that claim that child maltreatment problems are broadly distributed throughout society not supported by evidence, and that its perpetuation diverts

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that they are disproportionately associated with black families, because of the generally disadvantaged socioeconomic status of blacks as compared to whites.<sup>110</sup> So, for example, studies have long shown that black parents are disproportionately involved with substance abuse, that parental substance abuse is a factor in a very high percentage of all cases in which children are removed to foster care, and that children removed in these cases spend disproportionate amounts of time in foster care.<sup>111</sup>

Interestingly the NIS-3 study, on which the Racial Disproportionality Movement places so much weight, produced one of the most stunning demonstrations of the significance of socioeconomic status in predicting child maltreatment. The Foreword summarizes:

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

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

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

Children from the lowest income families were 18 times more likely to be sexually abused, almost 56 times more likely to be educationally neglected, and over 22 times more likely to be seriously injured from maltreatment as defined under the Harm Standard than children from the higher income families.<sup>112</sup>

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attention from nature of the problems and their solution). *See also* NOBODY'S CHILDREN, *supra* note 3, at 233-34 (reporting that there is a strong connection between socio-economic status and child maltreatment).

<sup>110</sup> *See, e.g.,* Pinderhughes, *supra* note 109, at 943; Jon M. Hussey, *The Effects of Race, Socioeconomic Status, and Household Structure on Injury Mortality in Children and Young Adults*, 1 *MATERNAL & CHILD HEALTH J.* 217, 217-19, 223 (reviewing and adding to studies demonstrating relationship of socioeconomic status to injury mortality including homicide risk in children; finding that “much of the excess homicide risk faced by young African-Americans is due to underlying racial differentials in socioeconomic status, household structure, and residential location”).

<sup>111</sup> Jeffrey J. Vanderploeg, *The Impact of Parental Alcohol or Drug Removals on Foster Care Placement Experiences: A Matched Comparison Group Study*, 12 *CHILD MALTREATMENT* 125, 125-26, 132-33, 135 (2007); NOBODY'S CHILDREN, *supra* note 3, at 207-32.

<sup>112</sup> SEDLAK & BROADHURST, *supra* note 18, at xviii.

NIS-3 further found that poverty predicted for *the most serious* forms of maltreatment. Children in families with incomes below \$15,000 per year were sixty times more likely to die from maltreatment.<sup>113</sup> NIS-3 noted that low income was associated with other factors likely to contribute to maltreatment, including substance abuse and emotional disorders.<sup>114</sup>

Other research has also attempted to assess *actual* maltreatment incidence rates among the poor as compared to those better off, free from any bias that might be reflected in *official* CPS rates. It has confirmed that actual maltreatment is much higher in poor families. Richard Gelles, a long-time student of family violence, assessed violence toward children based on parent self-reports to trained interviewers and found that the rates of violence were significantly higher among families with an annual income below the poverty line: the rate of “severe violence” is 62% higher and the rate of “very severe violence” 250% higher.<sup>115</sup> He concluded:

[A]busive violence is more likely to occur in poor homes. Specific social and demographic characteristics increase the likelihood that poverty will lead to abuse. Poor young parents who are raising young children have an elevated risk of using the most abusive forms of violence toward their children, as do poor single mothers.<sup>116</sup>

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

### **Stated and Unstated Assumptions of Disproportionality of Population<sup>117</sup>**

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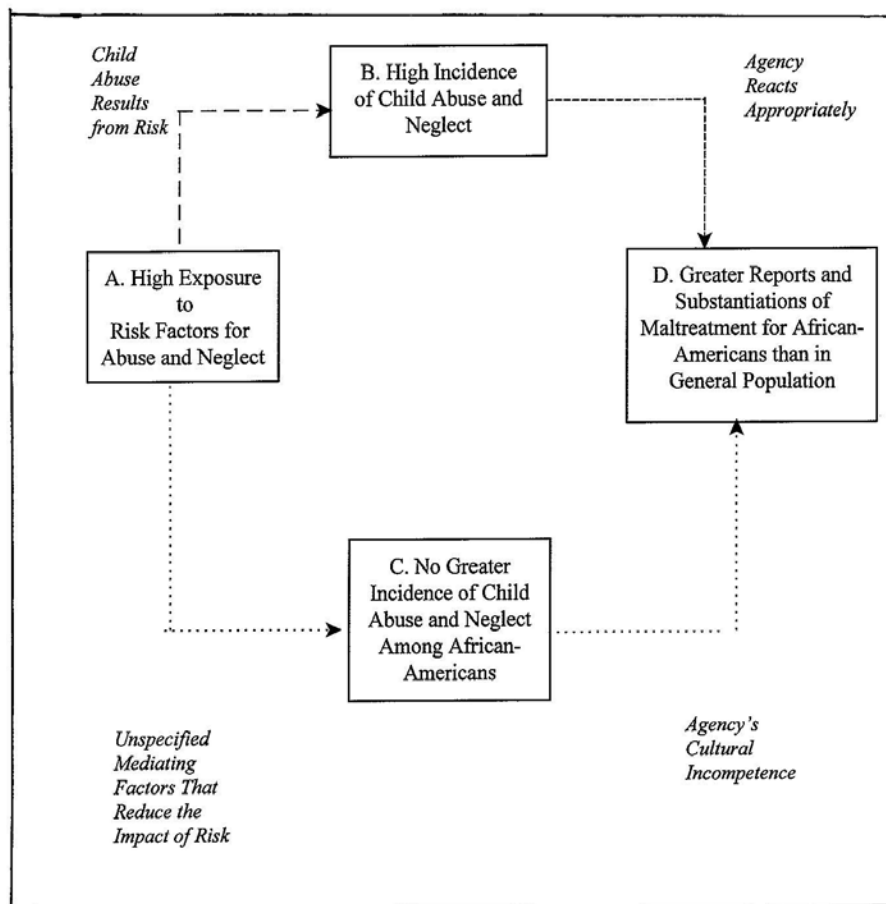
<sup>113</sup> *Id.* at 5-51.

<sup>114</sup> *Id.* at 5-54.

<sup>115</sup> Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAV. SCI. 258, 263 (1992).

<sup>116</sup> *Id.* at 271. See also Murray A. Straus & Christine Smith, *Family Patterns and Child Abuse*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 245, 249, 260 (Murray A. Straus & Richard J. Gelles eds. 1990) (self-reports confirm a connection between low socioeconomic status and high maltreatment incidence) [hereinafter PHYSICAL VIOLENCE IN FAMILIES].

<sup>117</sup> Richard P. Barth, Julie M. Miller, Rebecca L. Green & Joy N., *Children of Color in the Child Welfare System: Toward Explaining Their Disproportionate Involvement in Comparison to Their Numbers in The General Population* 19 (University of North Carolina, Chapel Hill, School of Social Work, 2001) [hereinafter Barth et al., *Children of Color in the Child Welfare System*] and sources cited therein.



This chart shows two alternative ways of understanding the fact that black families have a high exposure to risk factors for maltreatment, and that black children end up in foster care at high rates. The first, at the top, is that the risk factors lead to increased maltreatment rates and accordingly, through appropriate CPS action, to high removal rates. The second, at the bottom, is that (1) black families have “unspecified mediating factors” that counteract the risk factors, leading to maltreatment rates that are the same as white rates even though white families are less affected by the risk factors, (2) biased CPS agency decision-making then removes black children at higher than white rates even though they are not at higher risk for maltreatment.

The Movement has never provided any explanation for why black parents could pull off being able to overcome in this way socioeconomic disadvantages that are understood to systematically predict, for other groups, the likelihood of child maltreatment.<sup>118</sup>

A 1996 report by a distinguished child welfare research team powerfully sums up the research on race and child welfare, and the interconnection between race, socioeconomic status, and child

<sup>118</sup> At best, vague claims are occasionally made. See, e.g., HILL SYNTHESIS, *supra* note 37, at 14 (“strong extended family networks in black families and communities may serve as a protective factor in reducing the extent of child abuse and neglect”).

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maltreatment.<sup>119</sup> It finds that Racial Disproportionality claims generally fail to take into account the documented correlation between race and socioeconomic status, and concludes:

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

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

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<sup>119</sup> Mark E. Courtney, Richard P. Barth, Jill D. Berrick, Devon Brooks, Barbara Needell & Linda Park, *Race and Child Welfare Services: Past Research and Future Directions*, 75 *CHILD WELFARE* 99 (1996). Professor Mark Courtney is the Ballmer Chair for Child Well-Being at University of Washington, School of Social Work, and Executive Director of Partners for Our Children. He has authored 5 books and edited volumes, approximately 50 peer-reviewed publications and dozens additional studies, reports, and projects. He has received multiple generous grants to conduct research in child welfare and is currently a member of the Editorial Board of the *Children and Youth Services Review* and the *Journal of Public Child Welfare*. See West Coast Poverty Center, Mark Courtney, [http://wcpc.washington.edu/about/docs/Courtney\\_CV.pdf/](http://wcpc.washington.edu/about/docs/Courtney_CV.pdf/) (last visited ----, 2009).

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

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[I]t is one thing to say that collectively our social institutions have failed children of color and their families and that one result is an inequitable representation of children of color in the child welfare services system. It is quite another to state that any inequity of outcomes within the system is *prima facie* evidence of a failure of the system itself. In fact, in the absence of efforts to improve the lot of impoverished families of color, it might be justifiable cause for concern if the children of such families were *not* overrepresented in child welfare services caseloads.<sup>120</sup>

Fred Wulczyn and Kristin Hislop found similarly in a study done for the U.S. Department of Health and Human Services, that poverty, and in particular urban poverty, is connected to Racial Disproportionality, with “the fundamental question to be answered . . . whether need in its many forms accounts *fully*” for such disproportionality.<sup>121</sup>

A recent study designed to assess whether race was a predictor for child maltreatment reporting when poverty was taken into account, found that it was not.<sup>122</sup> The report sums up: “It would be unwise to take the 2:1 relative disproportionality of reports of Blacks vs. Whites at face value and make changes in the reporting system to address this seeming disparity or bias. . . . [T]here is no evidence of a general racial bias in child maltreatment reports. Our findings in this area are not new, and are best seen as confirming prior work. . . .”<sup>123</sup>

There is of course always reason to suspect that conscious or unconscious bias might infect any decision-making system. There have been many studies in fields other than child welfare demonstrating the prevalence of such bias.<sup>124</sup> The highly subjective decisions typical of child welfare decision-making provide a ready vehicle for the expression of both conscious and unconscious bias. However there is reason to think that such bias may be less of a problem in the child welfare area than in areas where it has triggered significant attention like employment.

First, the child welfare workforce has a more substantial representation of black and other minority race workers than many other workforces and one that is higher than their population percentages. The first national survey addressing this issue reports that child welfare workers are

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<sup>120</sup> Courtney et al., *supra* note 119, at 126, 128, 130 (emphasis in the original).

<sup>121</sup> FRED H. WULCZYN & KRISTIN BRUNNER HISLOP, CHAPIN HALL CENTER FOR CHILDREN, UNIVERSITY OF CHICAGO, FOSTER CARE DYNAMICS IN URBAN AND NON-URBAN COUNTIES 32 (2003) (emphasis added). *See also* TENNESSEE REPORT, *supra* note 105, at 16 (suggesting placement rates associated with underlying social conditions).

<sup>122</sup> Brett Drake, Sang Moo Lee & Melissa Jonson-Reid, *Race and Child Maltreatment Reporting: Are Blacks Overrepresented?*, 31 CHILD. & YOUTH SERVS. REV. 309 (2009).

<sup>123</sup> *Id.* at 314.

<sup>124</sup> *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 n.31 (2006) (describing the legal literature on implicit bias as “enormous” and reviewing recent work emphasizing the use of the implicit association test).

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now 32% black, 11% Hispanic, and 46% white, with 12% identifying themselves as other, and that child welfare workers tend to be assigned to work with racially matched children.<sup>125</sup>

Second, a few studies which have tried to examine the issue of bias in social worker decision making specifically, have come up with findings that confound the assumption of bias.<sup>126</sup> Black social workers have sometimes been found more likely than white workers to find child maltreatment or to remove children.<sup>127</sup> Black and white social workers have been found no more likely to find maltreatment or to make removal decisions when they are working with other-race parents than when they are working with same-race parents.<sup>128</sup> One important study of race and the child welfare system concludes:

Despite the degree of consensus regarding the importance of developing culturally competent child welfare services that make use of the expertise and experience of people of color, virtually no empirical evidence supports this consensus.<sup>129</sup>

Third, there are powerful pressures which may create bias in the opposite direction. Social workers have long been given antiracism and cultural competency training, socializing them to worry about overintervention in black families. For example, the GAO Report found that almost all states (45) systematically engaged in cultural competency training, a strong majority of states (36) had programs to recruit and retain culturally competent staff, and some states required that

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<sup>125</sup> U.S. DEP'T OF HEALTH & HUM. SERVS. & ADMIN. ON CHILDREN, YOUTH & FAMILIES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING: EXECUTIVE SUMMARY 8 (2003). An article based on this national survey, which was weighted to make the results of the NSCAW study representative of child welfare workers nationally, reports that social workers are 33% nonwhite (defined as African American, Hispanic, Asian, or other) and 67% white (defined as white non-Hispanic) overall, and 39% of those hired recently nonwhite as compared to 61% white. Richard P. Barth et al., *Child Welfare Worker Characteristics and Job Satisfaction: A National Study*, 53 SOCIAL WORK 199, 204, 206 (2008).

<sup>126</sup> See Brian M. Gryzlak et al., *The Role of Race in Child Protective Services Screening Decisions*, in RACE MATTERS, *supra* note 25, at 93; Ruth A. Gammon, Racial and Socioeconomic Bias in Social Workers' Decisions Regarding Family Reunification 1, 61, 85 (Oct. 2008) (unpublished Ph.D. dissertation, California School of Professional Psychology at Alameda) (on file with author) (finding no racial bias in study using hypothetical vignettes).

<sup>127</sup> Gryzlak et al., *supra* note 126, at 91-92.

<sup>128</sup> See Nancy Rolock & Mark F. Testa, *Indicated Child Abuse and Neglect Reports: Is the Investigation Process Racially Biased?*, in RACE MATTERS, *supra* note 25, at 125, 130; Lawrence M. Berger et al., *Assessing Parenting Behaviors Across Racial Groups: Implications for the Child Welfare System* (Univ. of Wisc. School of Social Work 2005), available at [http://socwork.wisc.edu/lmberger/race\\_parenting\\_SSR\\_final.pdf](http://socwork.wisc.edu/lmberger/race_parenting_SSR_final.pdf) (black social workers more tolerant of maltreatment than white with both black and white parents). See also CHAPIN HALL, COMPENDIUM, *supra* note 34, at 20 (caseworker race does not appear to explain or moderate the longer stays and reduced likelihood of reunification for African American children, citing Ryan et al., 2006).

<sup>129</sup> Courtney et al., *supra* note 119, at 21.

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child welfare workers take an intensive program in “Undoing Racism.”<sup>130</sup> Even Movement leader Dorothy Roberts admits that “a common response to racial disparities in the child welfare system has been the implementation of ‘culturally competent’ social work practice . . . .”<sup>131</sup> Social workers are also educated and trained in a child welfare system that still tends to believe powerfully in race matching, despite passage of the Multiethnic Placement Act (MEPA). They know that if they remove black children, it will be hard to find same-race foster and adoptive parents for them, and this produces pressure to keep black children with their birth parents. Some have argued that poor people and black people because they are disproportionately poor, are more likely to be reported because they have greater exposure to mandated reporters, something often referred to as the visibility bias. However many studies have examined this claim, including the NIS-3, and they have repeatedly failed to find any support for the visibility bias theory.<sup>132</sup>

Racial Disproportionality theorists have argued that the risk assessment tools used by child welfare decision-makers may be biased. However studies of whether such tools indeed do operate in a biased way have found no evidence that they do.<sup>133</sup>

In any event, there is a good deal of evidence indicating that *actual* maltreatment rates for black children are in fact significantly higher than for white children, confirming the validity and non-

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<sup>130</sup> GAO REPORT, *supra* note 60, at 36. *See also* Satel & Klick, *supra* note 10, at S22 (describing the “veritable ‘cultural competence training’ industry” in context of critique of the racial disproportionality approach in the medical area and calling recommendations for more such training as “divisive distraction from more constructive solutions” to the problems of racial disparities in health services and outcomes); *id.* at S15-S17.

<sup>131</sup> Roberts, *Community Dimension of State Child Protection*, *supra* note 19, at 35 (stating same while complaining that this may not lead them to the family preservation decisions she prefers).

<sup>132</sup> SEDLAK & BROADHURST, *supra* note 18, at 5-51 to 5-52, 8-11 (concluding that its findings re higher rates of child maltreatment among those characterized by poverty and other risk factors cannot be explained by visibility factor; Drake et al., *supra* note 122, at 310, 315 (~~recent study~~ finding no support for visibility bias either with respect to the poor generally or to blacks, and finding further that prior empirical literature provided no support); Pelton, *supra* note 109, at 610-11 (concluding that public scrutiny argument cannot explain away real relationship between socioeconomic status and child maltreatment).

<sup>133</sup> Will Johnson, *Effects of a Research-Based Risk Assessment on Racial/Ethnic Disproportionality in Service Provision Decisions*, in RACE MATTERS, *supra* note 25, at 147; Christopher Baird, *The Effect of Risk Assessments and Their Relationship to Maltreatment Recurrence Across Races*, in RACE MATTERS, *supra* note 25, at 131. Movement advocates are nonetheless committed to changing risk assessment tools so as to remove any racial impact, which would involve eliminating the use of factors generally understood to predict for risk, simply because they would result in high risk assessments for black families. *See* CSSP, MICHIGAN REPORT, *supra* note 44, at 25-26, 43 (finding the following risk factors to be suspect: e.g., use of prior CPS investigation, single parenting, multiple children, parenting skills, self-esteem, motivation).

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discriminatory character of CPS decision-making. First, black children *die* from apparent child maltreatment at much higher rates than whites by comparison to their general population percentages. Again it's always possible that some of these findings are biased, but most think that findings of maltreatment *deaths* are at less risk for reflecting bias than other maltreatment findings. This is so because most deaths will be carefully investigated, and the decision as to whether to classify the death as maltreatment is likely to involve less subjective judgment of the kind that can mask conscious or unconscious bias than in the case of less serious harm.<sup>134</sup>

Official reports collected through the National Child Abuse and Neglect Data System (NCANDS) and published by the U.S. Department of Health and Human Services show that 29.4% of child fatality victims are black, significantly higher than their population percentage, while only 43% are white, significantly lower than their population percentage.<sup>135</sup>

The CDC's comprehensive study of fatal injuries among children thought to reflect maltreatment rates, shows consistently and significantly higher rates for black along with American Indian and Alaskan Native children, with the death rate for blacks 2.5 times that for whites in infancy, and homicide rates highest for black children overall.<sup>136</sup> Homicide rates for black infants are 3.6 times higher than for white infants.<sup>137</sup>

An important recent study in California compares actual child death rates by race while simultaneously analyzing the degree to which the death rates track the official child maltreatment substantiation rates for each racial group.<sup>138</sup> The study indicates that racial disparities observed in maltreatment rates are the manifestations of real differences in risk. It shows, like the other studies, that black death rates are significantly higher: black infants die of injuries at 2.5 times the rate of white infants. *Even more significant, this study shows that injury death rates within each racial group closely track maltreatment substantiation rates.*

In addition, black children are at greater risk of death and other severe violence when reunited with their birth parents than white children. A careful research analysis of the degree to which foster care functions as a protection against harm children might suffer in their birth homes

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<sup>134</sup> See Shelia D. Ards et al., *Letter to the Editor*, 23 CHILD ABUSE & NEGLECT 1211, 1212 (1999) [hereinafter Ards 1999 Letter]; Pelton, *supra* note 109, at 608.

<sup>135</sup> U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT REPORT 66 (2006) [hereinafter CHILD MALTREATMENT REPORT].

<sup>136</sup> Stephanie J. Bernard, *Fatal Injuries Among Children by Race and Ethnicity – U.S. 1999-2002*, in 56 SURVEILLANCE SUMMARIES 1, 8 (CDC Morbidity & Mortality Weekly Rep. 2007).

<sup>137</sup> Kay M. Tomashek, *Trends in Postneonatal Mortality Attributable to Injury, United States, 1988-1998*, 111 PEDIATRICS 1219, 1121 (Supp. 2005).

<sup>138</sup> Emily Putnam-Hornstein, *Racial Disproportionality in the Child Welfare System: Disproportionate Need or Systematic Bias?*, Paper Presented at the John Burton Foundation's Child Welfare Policy Briefing Series (Nov. 20, 2008).

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indicates that it does so function for black children significantly more than it does for whites, particularly with respect to “preventable (and especially violent) ends” such as death.<sup>139</sup>

Finally, studies which rely on black and white parent self-reports indicate that black parents engage in severe violence toward their children and other problematic parental conduct at significantly higher rates than white parents.<sup>140</sup> One such study published recently by the Conduct Problems Prevention Research Group found, based on self-reports, disproportionately problematic parental behaviors among blacks in terms of warmth, appropriate discipline and harsh interactions. The study concluded that the differences were explained by differences in neighborhoods and family structure, causing “stressful neighborhood and family conditions.”<sup>141</sup>

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

Disproportionate placement of black children in kinship foster care rather than non-kin foster care provides the major additional explanation for why black children are represented in such large numbers in foster care. This is because foster children in kinship care generally stay longer than foster children in non-kin care. Many knowledgeable students of the foster care system have concluded that this provides a major part of the explanation for black children’s high

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<sup>139</sup> Barth and Blackwell’s study of death rates among foster children concludes that foster care is protective for African American children in a way that it is not for Caucasian and Hispanic children. Richard P. Barth & Debra L. Blackwell, *Death Rates Among California’s Foster Care and Former Foster Care Populations*, 20 CHILD. & YOUTH SERVS. REV. 577, 601, 593, 600 (1998) (reporting that the death rate of African American children in foster care, defined as deaths per 100,000 children, was 35.5, as compared with rates of 57.8 among children formerly in foster care and 47.9 among the general population).

<sup>140</sup> Kohl found this in a study done for the Casey Alliance, concluding based on self-reports that following a maltreatment investigation, black parents were more likely than white to engage in severe violence toward their children. PATRICIA L. KOHL, CASEY-CCSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, UNSUCCESSFUL IN-HOME CHILD WELFARE SERVICE PLANS FOLLOWING A MALTREATMENT INVESTIGATION: RACIAL AND ETHNIC DIFFERENCES, 1-3 (2007). See also Berger et al., *supra* note 128, at 18-19 (finding based on self-reports as well as observer reports higher rates of inappropriate parenting behaviors). See also other studies showing that black parents’ self-description of severe violence is higher than that of white parents, based on community-based samples: see, e.g., Kirby Deater-Deckard et al., *Physical Discipline Among African American and European American Mothers: Links to Children’s Externalizing Behaviors*, 32 DEV. PSYCH. 1065 (1996); Murray A. Straus et al., *Identification of Child Maltreatment with the Parent-Child Conflict Tactics Scales: Development & Psychometric Data for a National Sample of American Parents*, 22 CHILD ABUSE & NEGLECT 249 (1998).

<sup>141</sup> Pinderhughes, *supra* note 109, at 952. See also Noel A. Cazenave & Murray A. Strauss, *Race, Class, Network Embeddedness, and Family Violence*, in PHYSICAL VIOLENCE IN FAMILIES, *supra* note 116, at 321, 322-23, 338 (self-reports confirm high black maltreatment rates, noting that they are result of socioeconomic factors to which black families are subject, and that these high rates are somewhat moderated by embeddedness in primary social networks).

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representation in foster care and for their long stays in foster care.<sup>142</sup> Black kinship care placement rates also explain why black children in foster care tend to receive fewer services than white children, another grievance cited by the Movement – kinship foster care families generally receive fewer services than non-kin foster care families.<sup>143</sup>

There are many reasons why kinship care tends to involve longer stays than non-kin care. First, the Adoption and Safe Families Act (ASFA), which puts pressure on the system to move children out of care if they have been held for 15 out of the prior 22 months, has an exception to this 15/22 provision for all children held in kinship care, and puts no limits on the length of time they can be held. Second, social work practice tends to strongly favor kinship placement, and so many social workers are likely to think well of keeping children in kinship foster care for long periods by comparison to severing parental ties and placing the child for adoption by non-kin. Third, kinship families are generally thought to be reluctant to adopt, even if the child's parents are not likely ever to be capable of parenting the child; they may prefer long-term foster arrangements which do not involve terminating parental rights, or social workers may think they prefer these arrangements or for other reasons do not press the issue. Finally, foster care stipends are more generous than welfare stipends that the parent might receive if the child is returned home. Once the whole family adjusts to the foster care stipend, they may decide to stay with the formal foster care arrangement, especially as this may not in any event prevent informal arrangements involving the child's return home.<sup>144</sup>

The disproportionate placement of black children in kinship care could be thought of as discriminatory, but the Racial Disproportionality Movement generally supports kinship placements as a way of keeping black children in the extended family network and in the black community. For discussion of whether some reduction in the power of kinship placement preferences is warranted, not simply to reduce racial disparities but in order to better serve children's interests, see Part III.C *infra*.

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

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<sup>142</sup> See, e.g., FOSTER CARE DYNAMICS 2000-2005, *supra* note 105, at 57 (concluding that higher rates of kinship care are a partial explanation); Barth et al., *Children of Color in the Child Welfare System*, *supra* note 117, at vii, x, 107; WULCZYN & HISLOP, *supra* note 121, at 32; see also Marian S. Harris & Ada Sykes, *Kinship Care for African American Children: Disproportionate and Disadvantageous*, 29 J. FAM. ISSUES 1013, 1013, 1019, 1021-22 (2008); TENNESSEE REPORT, *supra* note 105, at 4, 35-36.

<sup>143</sup> See, e.g., Courtney et al., *supra* note 119, at 9.

<sup>144</sup> Jill Duer Berrick, *From Private to Public: Paying Grandparents as Caregivers* 27-43, in RAISING CHILDREN: EMERGING NEEDS, MODERN RISKS, AND SOCIAL RESPONSES (Jill Duer Berrick & Neil Gilbert Eds. 2008) (discussing perverse incentives created by kinship foster care and subsidized guardianship stipends).

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

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

Often this claim is based simply on the bare statistical picture, without any attempt to address the issue of whether black rates of *actual* child maltreatment are higher than white rates, or the degree to which black children's disproportionate placement in kinship care explains the overall picture. Statistics are simply cited showing that black children appear in foster care at rates higher than white children. Sometimes additional statistics are cited showing the difference between black and white rates at various stages of the system such as removal, substantiation, reunification, and adoption, as well as racial differences in length of stay in foster care. The assumption is made that this must reflect discrimination, and the remedies proposed make it clear that the form of discrimination assumed has largely to do with system decision-making. Thus popular reform proposals include training social workers in antiracism and cultural competence, and recruiting more minority social workers.

When Movement literature does address the issue of maltreatment rates, it claims that actual black and white maltreatment rates are the same, and thus discrimination by child welfare system decision makers is responsible for the high levels of black representation in foster care. Here the Movement relies overwhelmingly on the NIS studies, occasionally on a few favorite medical reporting studies, and also occasionally on some more recent and more sophisticated studies which attempt to control for non-racial factors that might explain removal rates. I deal with each of these categories of studies in turn below.

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

Many Movement reports cite only the NIS, stating baldly that the NIS studies prove that black and white child maltreatment rates are the same, and therefore the high rate at which black children are represented in the system must result from system discrimination. Various Movement reports citing the NIS are then themselves cited in other Movement reports, so that in the end any such report may include lots of citations for the claim that maltreatment rates are the same, without any additional actual social science studies purporting to document the claim relied on.<sup>145</sup> Looked at in any depth, the NIS studies provide little support for the Movement's claims of system discrimination.

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<sup>145</sup> Thus Robert Hill's work is often relied on for the claim that there is no race difference in actual as opposed to reported maltreatment rates. But Hill, a key research figure in the Racial Disproportionality Movement, relies largely on the NIS, stating that it "provides the most reliable estimates of the incidence of child abuse and neglect." HILL SYNTHESIS, *supra* note 37, at 10.

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The NIS studies, including the most recent NIS-3, do state that actual black and white maltreatment rates are the same. The NIS was designed to inquire into the nature and rate of actual maltreatment, as opposed to officially reported and substantiated maltreatment, and while race was not its primary focus, it included race in its discussion. The NIS-3 summed up in its Foreword: “There were no significant race differences in the incidence of maltreatment or maltreatment-related injuries uncovered in either the NIS-2 or the NIS-3.”<sup>146</sup>

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

One of the NIS studies’ major conclusions was that child maltreatment, including very serious child maltreatment, was massively under-reported. Thus the NIS-3 Report states that CPS investigated only 28% of the children in the more serious “Harm” category – children who had already experienced harm from abuse and neglect; and it states that CPS investigated only 26% of the seriously injured and 26% of the moderately injured children.<sup>147</sup> NIS-3 found this low rate of investigation “cause for serious concern,”<sup>148</sup> and argued for increased CPS attention not only generally but particularly in connection with neglect cases, and families characterized by poverty, single parents, and illegal drug use.<sup>149</sup>

*Thus, even if the NIS was right in concluding that black and white maltreatment rates are the same, its findings as to underreporting indicate that both black and white maltreatment are significantly underreported, and thus fail to support Movement recommendations to reduce the rates of reporting, substantiation and removal of black children who are suspected victims.*

But there is no reason to believe that the NIS *was* right in concluding that black and white actual maltreatment rates are the same. First, the NIS-3 Report appears internally inconsistent. As noted above in Part II.B.1, the Report makes an overwhelming case that poverty and other factors generally known to be predictors of child maltreatment are in fact such predictors, a case confirmed by many others. Black families are disproportionately likely to be characterized by these risk factors, as discussed in Part II.B.1. Yet the NIS-3 makes no attempt to explain how it could be that black and white maltreatment rates are nonetheless the same.<sup>150</sup>

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<sup>146</sup> SEDLAK & BROADHURST, *supra* note 18, at xviii. *See also id.* at 4-28 to 4-29, 8-7.

<sup>147</sup> *Id.* at xviii-xix.

<sup>148</sup> *Id.* at 7-42.

<sup>149</sup> *Id.* at 8-18 to 8-19.

<sup>150</sup> A subsequent study by NIS report authors Andrea J. Sedlak and Dana Schultz claims that when risk factors are controlled for, black maltreatment rates are lower than white rates, relying on the same suspect methodology as the problematic NIS studies. Andrea J. Sedlak & Dana Schultz, *Race Differences in Risk of Maltreatment in the General Population*, in RACE MATTERS, *supra* note 25, at 57-58.

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Second, the NIS statement that maltreatment rates are the same has been persuasively rebutted by respected social scientists. Sheila Ards has published, with colleagues, powerful critiques of the NIS methodology, noting among other problems that the NIS used a biased sample of community observers for its conclusions regarding the extent of actual maltreatment, a sample which excluded roughly half of those who make maltreatment reports to CPS, namely victimized children, parents, neighbors, and anonymous parties.<sup>151</sup> Ards and her colleagues concluded that given the NIS sample bias, and given their own studies indicating absence of racial bias in official reporting and official substantiation systems, there was no basis for accepting the NIS conclusions that black and white maltreatment rates were the same.<sup>152</sup> They also argued that the NIS conclusion conflicted with powerful evidence that actual maltreatment rates were in fact different for racial groups, namely the evidence that black infants and toddlers are murdered at much higher rates than whites:

More than 40% of all infant and toddler (under age 5) homicides are black, almost all of which are perpetrated by parents and caretakers . . . . Yet only about 15% of children under 5 are Black . . . . It is difficult to imagine how or whether differences in investigation or differences in opening of cases will somehow narrow or eliminate this enormous gap in the most visible and horrible manifestation of child abuse.<sup>153</sup>

Ards and her colleagues concluded:

The policy implications of this debate are profound. If we are to believe the NIS data, we should focus our resources on combating racial bias in reporting, substantiation, and case

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<sup>151</sup> Sheila Ards is Associate Vice President for Community Partnerships and Development at the University of Minnesota. Prior to that, she was Vice President for Community Development at Benedict College and the first director of the Center of Excellence for Community Development at Benedict. Dr. Ards' research focuses on child abuse and neglect, family policy, welfare policy and redistricting. She has served as principal investigator on grants from the National Center for Child Abuse and Neglect, the Urban League, and the NAACP Legal Defense Fund, and was a research scholar at the Urban Institute. See Univ. of Minn., UMNews, *Ards Named VP for Community Partnerships and Development*, Jun. 7, 2004, [http://www1.umn.edu/news/news-releases/2004/UR\\_RELEASE\\_MIG\\_1697.html/](http://www1.umn.edu/news/news-releases/2004/UR_RELEASE_MIG_1697.html/); <http://www.ncat.edu/~neconasc/president2004.html/> (last visited ----, 2009).

<sup>152</sup> Ards 1999 Letter, *supra* note 134, at 1211-12 (summing up prior work); Shelia Ards & Adele Harrell, *Reporting of Child Maltreatment: A Secondary Analysis of the National Incidence Surveys*, 17 CHILD ABUSE & NEGLECT 337, 337 (1993); Shelia D. Ards et al., *Letter to the Editor: Sample Selection Bias and Racial Differences in Child Abuse Reporting: Once Again*, 25 CHILD ABUSE & NEGLECT 7, 12 (2001) [hereinafter Ards 2001 Letter] (summing up prior work and debate, and concluding "we restate, therefore, that conclusions about racial differences in child abuse and neglect reached using NIS should be approached with caution and should fully acknowledge the limitations posed by the selective exclusion of certain types of reporters"); Shelia D. Ards et al., *The Effects of Sample Selection Bias on Racial Differences in Child Abuse Reporting*, 22 CHILD ABUSE & NEGLECT 103 (1998).

<sup>153</sup> Ards 1999 Letter, *supra* note 134, at 1212.

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openings . . . . However if . . . racial bias is not the cause of the overrepresentation of black children among abused children, then we should look elsewhere to confront the disparities that we observe. We are concerned that too little attention has been paid to the structural factors that may contribute to underlying racial differences in abuse . . . . While such a structural phenomenon does not predict that blacks are naturally or genetically more violent than whites, it may predict greater violence in the black family, violence that needs to be confronted whatever the source. Neglecting to explore the structural roots of racial disparities in abuse and violence in black families serves no purpose and contributes to the further deterioration in the conditions these families face.<sup>154</sup>

In 2000 Richard Barth, a highly respected leader in the child welfare research world, and Dean of the School of Social Work at the University of Maryland, submitted a comprehensive study to the U.S. Department of Health and Human Services, Administration on Children, Youth and Families, analyzing the Racial Disproportionality claims generally, and the NIS statements regarding equal maltreatment rates in particular. Entitled *Children of Color in the Child Welfare System: Toward Explaining Their Disproportionate Involvement in Comparison to Their Numbers in the General Population*, the study constitutes a detailed and devastating critique of the NIS claims.<sup>155</sup> The study reviewed the documentation that blacks are at substantially greater risk of experiencing a variety of circumstances increasing the likelihood of child maltreatment.<sup>156</sup> It analyzed the NIS methodology and concluded, relying in part on Ards' work and also on additional analysis, that the NIS methodology was fatally flawed, and thus the NIS failed "adequately to capture the incidence of abuse and neglect in the African-American community because no data were collected from family members and very limited data were collected from urban centers."<sup>157</sup> It concluded that the NIS findings should not be relied on by policy makers:

[W]e do not believe that the NIS findings can be used as a basis for judging whether child welfare services are delivered in an equitable way to people of different racial or ethnic backgrounds.<sup>158</sup>

The Barth study argues that simply reducing Racial Disproportionality would put black children at risk of harm and would be discriminatory, given the evidence that the child welfare system was responding to real dangers of maltreatment.<sup>159</sup> While not ruling out the possibility that there might be some racial bias effect in the system, the study suggests that any such effect would be

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<sup>154</sup> Ards 1999 Letter, *supra* note 134, at 1212-13.

<sup>155</sup> Barth et al., *Children of Color in the Child Welfare System*, *supra* note 117. For a description of Richard Barth, see *supra* note 119.

<sup>156</sup> *Id.* at vi-vii (parental incarceration, substance abuse, death); *id.* at 5-6 (poverty, single parent status, large family size, urbanicity); *id.* at 33-37 (substance abuse).

<sup>157</sup> *Id.* at vii, 3-5.

<sup>158</sup> *Id.* at vii.

<sup>159</sup> *Id.* at ix, 106.

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minor – that the racial differences in the system reflect at least roughly the actual differences between black and white maltreatment rates.<sup>160</sup> The study ends in a Summary stating:

There is certainly no basis for determining that high rates of involvement in child welfare services are bad for African-American children, after all of their general environmental risks are considered. Child welfare services appear to reduce mortality and later involvement with the juvenile justice system for African-American children, in particular. (citation omitted) Receiving less child welfare service than is needed can contribute to higher risks of incarceration and early death. When community and family risk factors are high, then child welfare services have a critical role.<sup>161</sup>

A reduced version of the co-authored 2000 report concludes: “the research provides us with no compelling reason to assume that this disproportionality is not, generally, in the best interests of the children served.”<sup>162</sup>

The U.S. Department of Health and Human Services Children’s Bureau issued a report questioning the NIS claim, citing the Ards and the Barth, Miller, Green & Baumgartner analyses.<sup>163</sup> Fred Wulczyn, a long-time well-respected leader in the child welfare research world, has written that the Barth team’s 2000 analysis, concluding that differences in the likelihood of placement were attributable to non-race factors, “is probably the most comprehensive and purposeful attempt yet to separate the effect of race on placement from the other factors that contribute to the risk of placement.”<sup>164</sup>

Many of these critiques of the NIS have noted in addition the inconsistency of the NIS claims with other evidence indicating the likelihood that black maltreatment rates are higher than white rates, including the high black child maltreatment death rates, the high black self-reported extreme violence toward children rate, and the high black child death and violent maltreatment rate after reunification with birth parents.<sup>165</sup>

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<sup>160</sup> *Id.* at ix (“the disproportionalities in foster care placement are apparently most attributable to the differences between racial groups . . . in their risks of needing the assistance provided [in] substitute care”); *id.* at x (“there is no compelling finding that race alone contributes substantially to child welfare decision-making”); *id.* at 106 (same).

<sup>161</sup> *Id.* at 114.

<sup>162</sup> Richard P. Barth, *Child Welfare and Race: Models of Disproportionality*, in RACE MATTERS, *supra* note 25, at 42. *See also id.* at 43 (while hard to define the relative contributions of personal and social conditions as compared to agency practice, “if we attribute all of the cause to agency practice, as has been done by others, we are at risk of overlooking real risks to African American children and diminishing their opportunities for safe and successful futures”) (citations omitted).

<sup>163</sup> DHHS STUDY, *supra* note 60, at 5-6.

<sup>164</sup> *Closing the Gap*, *supra* note 106, at 434. On Wulczyn, see *supra* note 78.

<sup>165</sup> *See* Ards 1999 Letter, *supra* note 134; Barth et al., *Children of Color in the Child Welfare System*, *supra* note 117; Barth & Blackwell, *supra* note 139; *see also* discussion, *supra*, in Part II.B.1.

An additional problem with relying on the NIS claim that black and white maltreatment rates are the same lies in the fact that it ignores the level of serious risk to children involved in the different kinds of maltreatment the NIS found in different racial groups. Thus the NIS found that black infants were disproportionately likely to be at risk for physical abuse and neglect, whereas white children were disproportionately at risk for educational neglect.<sup>166</sup> NIS then lumped these findings together in concluding that the maltreatment rates were the same for both races. But, infant maltreatment tends to constitute a serious risk to safety and to normal future development, justifying significant child welfare system intervention, whereas educational neglect typically poses no safety risk, and typically involves older children whose development has largely been formed. The NIS-3 itself recognized the legitimacy of child welfare systems distinguishing between these different forms of maltreatment.<sup>167</sup>

The persuasive critiques of the NIS claims for equal maltreatment rates discussed above have been published for many years now, and there has been no persuasive response from the Racial Disproportionality Movement. Instead the Movement has tended simply to ignore the existence of these critiques, continuing to churn out reports and articles which cite the NIS claims without any reference to the studies debunking those NIS claims.

## 2. *The Medical Reporting Studies*

When the Movement does mention additional studies, typically it will be only a favored few about hospital staff reporting issues: the Jenny head injury study,<sup>168</sup> the Chasnoff study involving rates of actual as compared to reported maternal substance abuse,<sup>169</sup> and the Hampton and Newberger study involving racially disparate rates of reporting of suspected child abuse.<sup>170</sup>

These medical reporting studies also provide little support for the Movement's discrimination claims that medical personnel are more likely to report black children than white children even if they are at the same risk, and accordingly that black children and parents are being discriminated against. All are older studies characterized by limited efforts to control for non-racial factors which could easily explain the reporting results. None demonstrate or even claim to demonstrate the Movement claim that black and white maltreatment rates are the same.

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<sup>166</sup> SEDLAK & BROADHURST, *supra* note 18, at 6-18 to 6-19, 8-14.

<sup>167</sup> *See id.*

<sup>168</sup> Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 J. AM. MED. ASS'N 621 (1999).

<sup>169</sup> Ira J. Chasnoff, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990).

<sup>170</sup> Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56 (1985).

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Jenny's Abusive Head Trauma study<sup>171</sup> is described in Movement literature as showing that medical personnel dealing with infants with traumatic head injuries are more likely to find child maltreatment when the infants are black as opposed to white. First, even if this study showed disparate treatment of black as compared to white cases, the study itself considered the problem to be one of *under-reporting* the white cases. The study was designed to assess the problematic *failure* to properly diagnose Abusive Head Trauma in cases in which the study authors concluded that such maltreatment had in fact taken place. Given the extremely serious nature of the abuse at issue, often resulting in death or permanent serious disability, we should understand any such under-reporting as serious discrimination against white children, assuming that indeed any racial bias is revealed by the study. Second, the study failed to persuasively demonstrate bias because there were various actual and possible differences between the cases which were properly diagnosed, and those in which the diagnosis was missed, that were not controlled for, differences that the authors recognize could have been very significant in the actual diagnosis decision.<sup>172</sup>

The Chasnoff study is described in Movement literature as showing that black and white pregnant women have the same substance abuse rates, and yet black mothers and infants are more likely reported at birth. Here again, even if this study showed disparate treatment of black as compared to white cases, the discrimination issue should be understood as one of discrimination against white children in the form of under-reporting. Parental substance abuse is a major predictor for child maltreatment, and sending fragile drug-affected infants home from the hospital with parents who are caught up in substance abuse is a prediction for disaster.<sup>173</sup> However again this study fails to support the claims regularly made by the Movement that it shows racial bias in reporting. While it did find similar rates of overall drug use at the time of first prenatal visit, it found very different rates of use of different types of drugs, with blacks more likely to use cocaine, and whites more likely to use marijuana. Although both drugs may be damaging to the fetus if used during pregnancy, cocaine use is more strongly associated with destructive addictive patterns, and parental use of cocaine is strongly associated with child maltreatment, while parental use of marijuana is not. The study had no data on use during the subsequent pregnancy or at the time of birth, and there is reason to think that parents using highly addictive drugs like cocaine might have been more likely to continue use through the pregnancy and afterwards, causing more harm to the fetus and putting any infant going home with the parent at risk of seriously impaired parenting. The authors themselves found that while bias "could" contribute to the reporting decisions made by medical staff, many non-racial factors, including greater familiarity of public hospital staff with substance abuse problems, could explain the results. They concluded: "The present study cannot fully differentiate among the factors that could produce higher rates of reporting of black or poor women than of white or more affluent women."<sup>174</sup>

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<sup>171</sup> Jenny et al., *supra* note 168.

<sup>172</sup> *Id.* at 625-26 (differences in child age, public or private hospital setting for diagnosis, and other differences that might not have appeared on the hospital records for analysis).

<sup>173</sup> See NOBODY'S CHILDREN, *supra* note 3, at 207-32.

<sup>174</sup> Chasnoff, *supra* note 169, at 1206 (1990). See also Courtney et al., *supra* note 119, at 6 (description of Chasnoff study cites authors' many non-racial possible explanations for racial disparities reported, and discussion of another study showing disproportionate numbers of black

The Hampton and Newberger study tried to compare the actual incidence of child abuse brought to the awareness of hospital personnel with the rate at which such cases were reported to CPS, and to assess the degree to which race among other factors played a role in determining whether reports to CPS were made.<sup>175</sup> Again, even if one assumes that the study accurately identified race as an explanatory factor, arguably the primary problem allegedly identified is the underreporting of white cases rather than the overreporting of black cases. The study dealt only with cases that “should have been reported,”<sup>176</sup> noting that large numbers were not reported, and it talked about the problem of “selectively ignoring the prevalence of child abuse in more affluent, majority homes . . . .”<sup>177</sup> And again, the study fails to support the bias claim. Although it controlled for some non-racial factors and indicated that race remained an explanatory factor, the study relied solely on hospital records and the limited information they contained about the many factors which might actually have influenced the decision to report some cases to CPS and not others. Indeed the study specifically conceded that various factors not controlled for might influence decision making, including whether reporting is associated with efforts to obtain services for families.<sup>178</sup>

These studies have, like the NIS studies, been subject to critical analysis by impressive research in the child welfare world which put them in a larger context of related reporter bias research. These critiques tend to show that research on reporter bias based on hypothetical case scenarios fail to reveal bias, while the research based on actual case records like the three hospital studies discussed above, that sometimes do claim to show bias, are typically flawed by the limitations in the information reflected in the case records, since other information may well have influenced the decision-makers.<sup>179</sup> A recent example of a hypothetical case study assessing whether

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infants with positive urine test removed from mothers, in which authors suggest nonracial explanations).

<sup>175</sup> Hampton & Newberger, *supra* note 170.

<sup>176</sup> *Id.* at 57.

<sup>177</sup> *Id.* at 59. A recent study in this same tradition looks at long-bone and skull fractures in infants and toddlers resulting from physical abuse, and purports to find racial differences in the evaluation and reporting of such fractures, resulting in higher reporting of minority than white children. Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED. ASS’N 1603 (2002). However this study makes it clear that the *actual* incidence rate of these severe injuries for black children was more than twice that for white children, arguing simply that for those children actually abused there was still a disproportionate likelihood that the black children would be reported. As the authors confess, this arguably makes out a case of under-reporting for white children, rather than over-reporting for black. In addition the authors concede that they did not control for some important non-racial factors such as parental drug use, which could have justified the hospital staff decisions to report in some cases but not in others.

<sup>178</sup> Hampton & Newberger, *supra* note 170, at 58.

<sup>179</sup> See, e.g., Berger et al., *supra* note 128, at 9-10. This article notes that research on potential bias by reporters, caseworkers and judges breaks into two types – vignettes in which hypothetical cases are used, and case reviews using actual cases, with the first showing little

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teachers, who constitute the largest category making official reports of child maltreatment, demonstrated any racial bias in their reporting, found no evidence of such bias, concluding: “Our results leave open the disturbing possibility that . . . [b]lack children appear more often in abuse reports because they are more likely to be abused.”<sup>180</sup>

Again, as with the NIS critiques, core Movement literature rarely mentions the research demonstrating the limitations of the medical reporting studies, or the other studies that fail to find bias in medical reporting. Instead when Movement literature cites the hospital studies, they are generally used, along with the NIS, as proof of discrimination, without any qualification.

### *3. More Sophisticated Studies Controlling for Certain Non-Racial Factors*

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

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

As with all other research to date, this analysis leaves out as much important information as it includes. The models controlled for maltreatment type, but we do not at this time have a good indicator of severity of maltreatment. The models controlled for poverty at the zip code level, but the poverty status of individual children was not available. There

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evidence of racial bias, and the latter tending to support the racial bias finding. It then questions the racial bias conclusions of the latter, including the Hampton and Newberger study, stating: “[I]t is difficult to determine whether decisions that appear to be racially biased may have been influenced by other relevant information not included in the case record. For instance, a physician who treats a child for a fracture may have had an opportunity to question family members about the incident and observe their demeanors and interactions with each other. He or she may also have access to information about the child’s medical history that is not reflected in the records available to researchers. This information can result in what appears to be racial bias if it is correlated with race.” *See also* Barth et al., *Children of Color in the Child Welfare System*, *supra* note 117, at 8 (critiquing Chasnoff and Hampton & Newberger studies, noting “these results have been overinterpreted because these studies were not able to control for the type or severity of substance abuse or the severity of the abuse of the child”).

<sup>180</sup> Chizoma Egu & David Weiss, *The Role of Race and Severity of Abuse in Teachers’ Recognition or Reporting of Child Abuse*, J. CHILD & FAM. STUDIES 465, 465-66, 472-73.

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is no shortage of possible missing variables, and all should be included in future research. Child problems and/or disabilities, parental substance abuse, and single-parent status may all be associated with placement into foster care . . . .<sup>181</sup>

Amie Schuck's study controlled for poverty, female-headed families and urbanization, noting that these were generally accepted as important factors contributing to maltreatment, and found that this analysis reduced significantly the apparent role of race, while not ruling out any such role.<sup>182</sup> Goerge and Lee's study found that controlling for increasing numbers of relevant variables such as poverty and mother's level of education reduced the apparent impact of race, and concluded that controlling for more such variables, such as kinship care placement and mother's substance abuse would reduce the apparent impact of race yet further.<sup>183</sup>

*As a general matter, the sophisticated modern studies of the Racial Disproportionality phenomenon which have controlled for some of the most important known predictors of maltreatment have found any apparent independent influence of race either greatly reduced or eliminated. The more risk factors that are controlled for, the less likely are the studies to find any evidence of racial bias.<sup>184</sup> Some of the most careful studies designed to try to assess whether race played an independent explanatory role, studies which include a good set of the kinds of case-specific factors thought relevant to deciding whether child maltreatment exists, and whether it is serious enough to warrant significant coercive intervention such as removal to foster care, have been unable to find that race plays any significant role in decision-making.<sup>185</sup>*

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<sup>181</sup> Barbara Needell et al., *Black Children and Foster Care Placement in California*, 25 CHILD. & YOUTH SERVS. REV. 393, 405 (2003). See also the special issue of *Children and Youth Services Review*, discussed *supra* note 96.

<sup>182</sup> Amie M. Shuck, *Explaining Black-White Disparity in Maltreatment: Poverty, Female-Headed Families, and Urbanization*, 67 J. MARRIAGE & FAM. 543, 551 (2005). Shuck finds only that "differences in parenting practices, cultural aspects of childrearing, and discrimination by child welfare workers may also contribute to the overrepresentation." *Id.*

<sup>183</sup> Robert M. Goerge & Bong Joo Lee, *The Entry of Children from the Welfare System into Foster Care* 183, in RACE MATTERS, *supra* note 25. See also Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 164-65 (2007) (concluding that controlling for poverty and other risk factors reduces but does not eliminate apparent impact of race, but lack of available services in black communities could be responsible for differences in decision making).

<sup>184</sup> See, e.g., *supra* notes 181-183; Erik P. Johnson et al., *Racial Disparity in Minnesota's Child Protection System*, 87 CHILD WELFARE 5 (2007) (finding role of race as explanatory factor at various child welfare decision points reduced by controlling for certain risk factors, and acknowledging that important factors not controlled for including family size and marital status); Rolock & Testa, *supra* note 128.

<sup>185</sup> DUNBAR & BARTH, *supra* note 20, at 4 (reviewing racial disproportionality, race disparity, and race related findings in published works from the National Survey of Child and Adolescent Well-Being and concluding that "there is a lack of a consistent race or ethnicity effect"); Gardenia Harris et al., *Factors that Predict the Decision to Place a Child in Substitute*

Supporters of the Movement occasionally concede the complexity of the research picture, and the absence of definitive evidence of bias – conscious or unconscious – as an explanation for the racial disproportionality picture, but then put out reports which nonetheless make simplistic claims that Racial Disproportionality amounts to discrimination, and must be eliminated by keeping more black children with their parents. So for example Robert Hill makes a major concession in the concluding summary to his major synthesis of Racial Disproportionality research for the Casey Alliance:

[O]ne must not assume that when racial differences are evident, they invariably are the result of intentional (or unintentional) bias, prejudice, or racism. It is possible for racial differences to occur due to nonracial reasons. On the other hand, some racial differences may indeed result from race-related factors. *This summary of the literature is not able to provide answers in either direction.*<sup>186</sup>

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

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

#### *D. The Bottom Line*

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*Care* 171, in RACE MATTERS, *supra* note 25 (analyzing studies conducted by the Illinois Children and Family Research Center and finding that the variables found to be predictive of child placement are characteristics of the child, characteristics of the family, abuse and neglect history, and the investigative process, factors that appeared suitable for use in decisionmaking); Judith Wildfire et al., *Reunification of Children from Foster Care at 18-months: Findings from the National Survey of Child and Adolescent Well-Being* 155-170, in CHILD PROTECTION: USING RESEARCH TO IMPROVE POLICY AND PRACTICE (2007) (parental compliance and various risk factors have more explanatory power than race, and racial disparity in reunification rates for children aged seven months through ten years eliminated when controlling for relevant factors, although not entirely eliminated for infants and older children); Patricia L. Kohl et al., *Child Welfare as a Gateway to Domestic Violence Services*, 27 CHILD. & YOUTH SERVS. REV. 1203, 1213, 1215 (2005) (race not a significant predictor of social worker failure to identify domestic violence when investigating child maltreatment); Laurel K. Leslie et al., *Outpatient Mental Health Services for Children in Foster Care: A National Perspective*, 28 CHILD ABUSE & NEGLECT 697, 705 (2004) (race/ethnicity not significant predictor of outpatient mental health service use among foster care population).

<sup>186</sup> HILL SYNTHESIS, *supra* note 37, at 34 (emphasis added).

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

As discussed in II.B.1 above, there is substantial evidence that black maltreatment rates are significantly higher than white, because black families are affected by poverty and other risk factors for maltreatment at significantly higher rates than whites. As discussed in II.B.2, there is no persuasive evidence that child welfare decision-making is systematically biased in the sense that it is more likely to report, substantiate, and remove black children, as compared to similarly situated white children.

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

*2. Even if We Assume that CPS Intervenes Disproportionately in Cases of Black Child Maltreatment, this Would Constitute Discrimination Against White not Black Children, Given the General Underintervention Problem*

Even if we were to assume that black children were somewhat overrepresented compared to actual maltreatment rates, this should be understood as discrimination against white children rather than discrimination against black children. This is because overall the child welfare system is guilty of *underintervention* – of not doing enough to protect children against maltreatment. So if white children are not being removed to foster care at rates equivalent to black rates given the incidence of actual maltreatment, *it means that white children are being disproportionately denied protection.*

I have written elsewhere extensively about why I believe the system is generally guilty of underintervention.<sup>187</sup> The NIS provides additional evidence of underintervention. As discussed above in Part II.C.1, its goal was to inquire into the differences between actual and officially reported child maltreatment, and it concluded that the CPS system fails to reach a large proportion of all cases of serious maltreatment.<sup>188</sup>

Movement advocates often talk as there was systematic *overintervention*, and such claims are the basis for their promotion of Community Partnership or Alternative Track systems. Thus they regularly argue that a majority of the cases that now trigger CPS intervention and removal to foster care can safely be handled without any coercive intervention. They cite as proof of the alleged overintervention problem the fact that a majority of those in foster care have been

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<sup>187</sup> NOBODY’S CHILDREN, *supra* note 3, at 98-110 (Chapter 4, “Underintervention Vs. Overintervention”).

<sup>188</sup> See discussion in text at notes 147-149 *supra*; see SEDLAK & BROADHURST, *supra* note 18, at xviii-xix, 7-42, 8-18 (discussing NIS finding that a large percentage of serious maltreatment cases are unreported).

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removed based on neglect, and then characterize the entire neglect category as minor, “mere poverty” cases.<sup>189</sup>

This is a fallacious argument. Abuse and neglect cases do not constitute a simple hierarchy, with abuse at top in terms of the level of risk to children, and neglect at the bottom. Most neglect cases are cases in which parents are heavily involved in substance abuse, or suffer from mental illness, or for other reasons are seriously unable to provide the basics of nurturing parenting.<sup>190</sup> And of course many child maltreatment cases are categorized as neglect simply because it may be easier to prove than abuse. *Social science demonstrates that children identified as victims of neglect suffer at least as bad long-term consequences as children identified as victims of abuse.*<sup>191</sup> *Out of all cases in which children die of maltreatment, more than 40% fall in the neglect category, far higher than the percentage in the physical abuse or any other category.*<sup>192</sup>

### 3. The Racial Picture is Nonetheless Disturbing

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

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

We should be concerned that black children are so disproportionately subject to the trauma and the risk of long-term damage that the raw statistics reveal. Our society suffers from a terrible divide between rich and poor, with blacks falling disproportionately in the poor group. The disproportionate representation of black children in foster care both reflects and exacerbates this unfortunate situation. This represents a huge problem for the black community and the larger society.<sup>193</sup> The raw statistics present a picture demanding some kind of action.

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<sup>189</sup> See Part I.E *supra* for discussion of Community Partnership or Alternative Track systems. See also *NOBODY’S CHILDREN*, *supra* note 3, at 146-54.

<sup>190</sup> *NOBODY’S CHILDREN*, *supra* note 3, at 65-81.

<sup>191</sup> *Id.* at 150-51.

<sup>192</sup> *CHILD MALTREATMENT REPORT*, *supra* note 135, at 67 (reporting that neglect cases constituted 41.1% of child fatalities).

<sup>193</sup> Dorothy Roberts, a major Movement figure, argues that even if Racial Disproportionality could be explained entirely by higher black poverty rates, there would still be a problem of racial injustice: “disproportionate state intervention in Black families reinforces the continued political subordination of Blacks as a group.” See DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 254 (2002).

This does not however mean that the solution is that proposed by the Racial Disproportionality Movement – cutting back on the reporting, substantiation, and removal of black children for maltreatment. Leaving children victimized by abuse and neglect at home to be further victimized is not only unfair to those children, but also unlikely to in any way address larger social justice concerns. Blacks abused and neglected as children will grow into adults at high risk for unemployment, homelessness, substance abuse, and incarceration, and at high risk for maltreatment of the next generation, not into leaders who will help empower the black community.

### **III. THE POLICY IMPLICATIONS**

#### *A. Promote Family Support and Child Maltreatment Prevention*

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

The best way to reduce maltreatment is to fundamentally reform our society so that those at the socioeconomic bottom have the kind of educational, economic and other opportunities that would enable them to escape the conditions that breed child maltreatment.

The next best way, but the way that is more imaginable in the near future, is to develop and expand programs which provide support for poor families, and for fragile families at risk of falling into the kind of dysfunction that produces child maltreatment, so as to reduce the incidence of maltreatment. We need family support systems that give poor single parents a better chance to make it. We need more substance abuse treatment services. We need to expand intensive early home visitation programs designed to reach new parents and link them with a range of supportive services, programs like David Olds' Nurse Partnership model that have a proven record of success in reducing child maltreatment.<sup>194</sup>

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

So, for example, we now have black infants entering foster care at especially high rates, apparently because many of them have been born showing the signs of the drugs that their mothers used during pregnancy. Fred Wulczyn and colleagues have noted this, and the relationship to socioeconomic status, and argued for home visitation and substance abuse

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<sup>194</sup> See generally NOBODY'S CHILDREN, *supra* note 3, at 233-43 for fuller development of all these ideas, and see pages 163-75 in particular for discussion of Intensive Early Home Visitation programs, and the demonstrated success of the Nurse Partnership model that David Olds has developed and promoted.

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strategies to address simultaneously both the infant maltreatment and the racial disparity issues.<sup>195</sup>

The Racial Disproportionality Movement has been essentially silent on the importance of this kind of upfront support and prevention. This is not surprising given its claim that there is in fact no difference in maltreatment rates. But this does mean that they are missing the main point in terms of the civil rights of black children. Black children need to be protected against maltreatment. And appropriate efforts to prevent maltreatment would very likely result in reducing Racial Disproportionality in ways that would genuinely protect rather than endanger black children.

The Movement does call for an expansion of family support services in the context of family preservation and family reunification programs, but these are programs designed to operate only after child maltreatment has been identified. They don't serve the same purposes as the early prevention programs recommended above. Once maltreatment occurs it risks causing damage that may be irreparable. Also, once parents have fallen into the deeply dysfunctional patterns characterizing maltreatment, the evidence indicates that family support programs don't work very well to prevent maltreatment from recurring.<sup>196</sup> Studies show that parents in these family preservation and reunification programs continue to maltreat their children at very high rates – official reports show recurrent maltreatment in more than one-third of all cases, and actual maltreatment has been found to significantly exceed this figure.<sup>197</sup> This is by way of significant contrast to the much-maligned foster care system, where the national annual average maltreatment rate is one-half of one percent.<sup>198</sup> Children die as a result of violence when reunified with their original families at a rate three times the rate of children in the general population, and one and a half times the rate of children in foster care.<sup>199</sup>

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<sup>195</sup> WULCZYN & LERY, *supra* note 79, at 1-2, 24; WULCZYN & HISLOP, *supra* note 121, at 32 (arguing that high rates of black infant admissions to foster care “demonstrate clear need to build service capacity in low-income neighborhoods that targets interventions to families expecting a newborn.”); *see also* TENNESSEE REPORT, *supra* note 105, at 3, 35.

<sup>196</sup> *See generally* NOBODY'S CHILDREN, *supra* note 3, at 96-97, 109-110, 118-121; JILL DUER BERRICK, TAKE ME HOME: PROTECTING AMERICA'S VULNERABLE CHILDREN AND FAMILIES (2008) (questioning evidence base for traditional family preservation programs).

<sup>197</sup> Patricia Kohl's study for the Casey Alliance shows that out of those cases in which child welfare system (CWS) investigations found maltreatment and the child remained at home with a CWS plan, the plan failed approximately 33.5% of the time during the next thirty-six months by virtue of a new maltreatment report or placement into out-of-home care, and found in addition based on self-reports severe violence in many cases that never showed up in official reports, demonstrating that official rates underestimate the rates of recurrent maltreatment. Self-reports of severe violence occurred disproportionately in black families. KOHL, *supra* note 140, at 1-3. *See also* NOBODY'S CHILDREN, *supra* note 3, at 97, 109 (one-third to one-half of those reunited subject to repeated maltreatment).

<sup>198</sup> CHILD MALTREATMENT REPORT, *supra* note 135, at 31.

<sup>199</sup> *See* Barth & Blackwell, *supra* note 139, at 577, 601.

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*B. Reject Classic Racial Disproportionality Movement Recommendations*

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

We should reject both sets of recommendations. Those that grow logically out of the Movement's analysis are flawed for the same reasons the analysis is flawed. Overall the goal is to reduce the number of black children reported, substantiated and removed, and to increase the number reunified. As discussed above, it is not in the interest of black children to do these things given that child welfare decision-making generally reflects the rates of actual child maltreatment. Changing child welfare decision-making without changing the reality of child maltreatment is likely to harm not help black children. Children now are generally removed only for extremely serious maltreatment. See Part II.D.2 *supra*. They are generally kept in foster care rather than being reunified with their parents only because of serious risks that they will be maltreated if reunified. As noted above, even under current policies one-third of all children reunified will be removed again because of repeated maltreatment, and more than that will have been maltreated again without being removed.<sup>200</sup> Children reunified quickly are more likely to reenter foster care than those reunified after a longer stay in foster care.<sup>201</sup> Black children are at particular risk of particularly violent and dangerous maltreatment if kept in their homes after a maltreatment investigation and if reunified from foster care.<sup>202</sup>

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

Serious, unbiased research might be helpful to policy-makers. But research costs significant resources, resources that could also be devoted to new early support and prevention activities, and the child welfare system is starved for resources. Also we already know enough from the

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<sup>200</sup> See *supra* note 197.

<sup>201</sup> FOSTER CARE DYNAMICS 2000-2005, *supra* note 105, at 58.

<sup>202</sup> KOHL, *supra* note 140, at 32; Barth & Blackwell, *supra* note 139, at 601 ("foster care is protective for African American children and is more protective against preventable (and especially violent) ends than exit from foster care;" "threefold increase in rates of death due to violent ends for children who have left foster care as opposed to children in the general public"); Barth et al., *Children of Color in the Child Welfare System*, *supra* note 117, at 15.

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good research available to know that we should be focusing our efforts on reducing the maltreatment of black children, rather than on reducing intervention by child protective services.

Core Movement recommendations also include an increase in antiracial and cultural competence training. This relates to the unfounded claim that the system now operates in a discriminatory way. Nonetheless these recommendations might sound harmless. Who could be against training designed to accomplish such obviously worthy goals? But there are real problems with these recommendations. The obvious point of such training is to strengthen the signal sent to all social workers that they should be reluctant to find child maltreatment in a case involving a black child, they should be reluctant to remove a black child to foster care, and they should do all else that they can to reduce the number of black children in the system, recognizing that high levels of black representation result from their own racist decisions. Given that workers are today generally making appropriate rather than biased decisions, this signal risks encouraging social workers to keep children at home without adequate regard to the dangers of ongoing severe maltreatment.<sup>203</sup> Also as discussed above, the evidence fails to support any notion that social workers generally operate on the basis of bias,<sup>204</sup> and there is already a huge amount of antiracism and cultural competence training directed at social workers.<sup>205</sup> In a child welfare system starved for resources, we should not be throwing yet more money at the cultural competence industry to provide training which at best seems unnecessary overload,<sup>206</sup> and which risks pushing social workers in a dangerous direction. Resources would again be better spent on early prevention programs, or on a range of documented needs such as providing reduced caseloads, more support services, better pay, better working conditions, and more training on implementation of evidence-based programs.

A related Movement recommendation is the recruitment of more black social workers. As discussed above, black social workers are already disproportionately represented in child protective services, compared to their population, nor is there any evidence that black social workers would be more likely than white to make the kinds of family preservation decisions that the Movement seeks.<sup>207</sup>

Additional recommendations often include Community Partnership or Alternative Track programs, discussed above in Part I.E. These programs rely on the false assumption that virtually the entire neglect category, which constitutes the majority of child welfare cases, can be safely diverted from the official child protective services system (CPS), to a system which relies on community organizations to provide family support services to parents who are free to accept or reject those services. See II.D.2 above. This is designed to serve the Movement's goals of

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<sup>203</sup> See Simerman, *supra* note 50 (illustrating this problem).

<sup>204</sup> See generally *supra* Part II. See also Part II.B.1. (discussing the issue of possible social worker bias in particular).

<sup>205</sup> See Part II.B.1.

<sup>206</sup> See Jordan, *supra* note 65 (reporting that the proposed 2007 budget for Kentucky included half million dollars to address Racial Disproportionality, including to train foster families in cultural sensitivity and how to do Black children's hair).

<sup>207</sup> See *supra* notes 125-127 and accompanying text.

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keeping a much larger percentage of black children now identified as at risk for maltreatment out of the child welfare system. Many of those supporting the Racial Disproportionality Movement, such as Casey, have also played roles in the Community Partnership movement. As discussed above in IE, there is no evidence demonstrating that children are better off rather than worse off as a result of being diverted from the CPS system by these programs, and many reasons to think that they may in fact be worse off.

A related recommendation is to make greater use of Family Group Decision-Making.<sup>208</sup> This kind of program is again designed to serve the Movement's goals of keeping black children with their birth parents, and if that is not possible then at least in the extended family network. The idea is to involve the extended family in CPS decision-making when child maltreatment is at issue, and to see if the family can help develop a plan enabling the child to stay at home with its parents, or temporarily with a family member. Success is defined in terms of these criteria. Again there is no evidence demonstrating that these programs work to protect children against maltreatment,<sup>209</sup> and reason for concern that they may not, precisely because the goal is defined largely in terms of keeping children in their birth families and kinship networks, without any particular regard to whether this will serve the children's interests.<sup>210</sup> Obviously it makes sense to look to extended family members to help understand the situation and develop placement possibilities. But to promote these programs primarily with a view to keeping children out of the child welfare system and reducing Racial Disproportionality, puts children at risk.

Another recommendation is for increased recruitment of black prospective adoptive parents, in order to help move black children out of foster care into adoption. But if we really want to further this goal, we should increase recruitment of white as well as black prospective parents, so as to reach the overwhelming majority of prospective parents who are white, many of whom

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<sup>208</sup> Elizabeth C. Weigensberg, Richard P. Barth & Shenyang Guo, *Family Group Decision Making: A Propensity Score Analysis to Evaluate Child and Family Services at Baseline and After 36 Months*, 31 CHILD. & YOUTH SERVS. REV. 383, 384 (2009) (supporting FGDM as method to address Racial Disproportionality).

<sup>209</sup> The only study of FGDM using random assignment methodology and examining outcomes for children found no more positive outcomes for children receiving FGDM. Stephanie C. Berzin et al., *Does Family Decision Making Affect Child Welfare Outcomes? Findings from a Randomized Control Study*, 87 CHILD WELFARE 35 (2007). See also Stephanie C. Berzin, *Using Sibling Data to Understand the Impact of Family Group Decision-Making in Child Welfare Outcomes*, 28 CHILD. & YOUTH SERVS. REV. 1449 (2006) (noting that there is a dearth of evidence from FGDM research on outcomes for children, and concluding that children who received FGDM had higher rates of substantiated maltreatment and other poor outcomes, but that results were not statistically significant); Weigensberg et al., *supra* note 208, at 383 (study of FGDM using matched comparison group method finds increase in access to services for parents and children over short term but not over long term with latter defined as after 36 months).

<sup>210</sup> See NOBODY'S CHILDREN, *supra* note 3, at 141-46.

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would be interested in adopting across racial lines if they were encouraged to do so rather than discouraged or ignored.<sup>211</sup>

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

MEPA prohibited the use of race as a basis for disqualifying transracial adoptive parents, or delaying adoptive placement, and was designed to help move more black children out of foster care, and move them more expeditiously, by reducing racial barriers to placement. It has only been in effect in its powerful 1996 form for a little more than a decade. The federal enforcement agency has only recently begun to take vigorous action to enforce MEPA, with the first enforcement decision issued only in 2003, and affirmed on administrative appeal only in 2006.<sup>212</sup> Transracial placements of black children have been on the rise in the years since MEPA, although not yet as significantly as one might hope.<sup>213</sup> It is unimaginable that repealing MEPA to re-introduce race as a basis for disqualifying white adopters, as some MEPA opponents propose, will in any way further the goal of reducing the number of black children in foster care, or the length of their stays. Moreover, MEPA serves black children's interests in finding good adoptive homes, and in finding them sooner rather than later. There is lots of evidence that delay in or denial of adoptive placement hurts children, and no evidence that transracial placement causes them any harm.<sup>214</sup>

The Movement's criticism of ASFA focuses on the Act's allegedly rigid timelines, complaining that by limiting the length of time children can be held in foster care to 15 out of the prior 22 months, ASFA unfairly limits many black parents' opportunities to prove their fitness as parents.

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<sup>211</sup> See Devon Brooks, Sigrid James & Richard P. Barth, *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575 (2002) (finding that whites were willing to adopt older, disabled black and brown children from foster care in very significant percentages); U.S. Dep't of Health & Hum. Servs., *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, 23 VITAL & HEALTH STATS. 1, 16 (2008) (finding that among white adoption seekers, 84% would accept a black child).

<sup>212</sup> Elizabeth Bartholet, Response to the Donaldson Institute Call for Amendment of the Multiethnic Placement Act (MEPA) to Reinstate Use of Race as a Placement Factor, Congressional Coalition on Adoption Institute Briefing (June 10, 2008) [hereinafter Bartholet, Donaldson Response], available at [http://www.law.harvard.edu/faculty/bartholet/STATEMENT\\_DONALDSON\\_INSTITUTE.pdf](http://www.law.harvard.edu/faculty/bartholet/STATEMENT_DONALDSON_INSTITUTE.pdf). For access to recent HHS enforcement decisions, visit <http://www.law.harvard.edu/faculty/bartholet/mepa.php>.

<sup>213</sup> See DONALDSON REPORT, *supra* note 62.

<sup>214</sup> See Bartholet, Donaldson Response, *supra* note 212; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1201-26 (1991); NOBODY'S CHILDREN, *supra* note 3, at 125-27.

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Elimination of the 15/22 provision would be counterproductive to the Movement's goals of reducing the number of black children in foster care. This provision is designed to limit stays in foster care, and most of the children moved out of foster will be reunified with their parents rather than adopted. Moreover, ASFA was passed in recognition of the fact that children have their own important time clock, and cannot afford to wait for extensive periods to see whether their parents are going to be able to work through their problems. ASFA is in my view a good law, because it shifts the balance in child welfare law and policy somewhat in the direction of valuing children's rights more, and parents' rights less, with the 15/22 foster care time limit being one important example of this shift.<sup>215</sup>

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

As discussed above in IIB2, black children's stays in foster care last longer than white children's primarily because of the high rates of black kinship foster care placement, and additionally because black children are reunified at somewhat lower rates than whites, and move on to adoption at somewhat slower rates. This is a potential problem for black children. Foster care is supposed to be temporary, with children moved in a timely way either back to their original homes or on to adoption. Lengthy stays in foster care are generally thought not to be a good thing for children, as compared to permanency.

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

However some reduction in the rate of kinship placements may well be appropriate, not simply because it would reduce racial disparity, but because current preferences for placing with kin over non-kin are so powerful that they likely result in many placements which don't serve children's interests in a range of ways, including their interests in achieving permanency.<sup>216</sup> All things being equal it makes sense to place children with kin rather than strangers. But things are rarely equal, and powerful preferences for kin placement have been put in place which often require social workers to ignore other factors generally thought relevant to the child's best interest, including whether the kin at issue are likely to provide nurturing care on an ongoing basis. We should have policies that encourage social workers to make individualized, context-specific decisions as to when to place with kin, free from powerful kinship preferences that ignore the actual best interests of the child. Such policies would both serve children's best interests better than current policies, and likely reduce racial disparity.<sup>217</sup>

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<sup>215</sup> See NOBODY'S CHILDREN, *supra* note 3, at 23-27, 188-89.

<sup>216</sup> A recent study documents that kinship care provides inferior care as compared to already marginal care in foster care generally in terms of such characteristics as cognitive stimulation, emotional responsiveness, punitiveness, all problematic in light of the needs of the typically high-risk children who enter foster care. See Richard P. Barth et al. *Characteristics of Out-of-Home Caregiving Environments Provided Under Child Welfare Services*, 87 CHILD WELFARE 5, 31-37 (2008).

<sup>217</sup> See generally NOBODY'S CHILDREN, *supra* note 3, at 89-93.

Movement recommendations also focus on increasing the permanency of kinship placements by creating subsidies for guardianship comparable to foster parent subsidies as a way of encouraging kinship foster parents to become guardians.<sup>218</sup>

Expanding kinship guardianship through subsidies has both pros and cons. Guardianship means that officially the children are not in the state system's care and therefore that social workers have no oversight role to ensure their safety. This might be fine in some cases, but might put the children at risk in others, especially given the risks discussed above associated with today's powerful kinship preferences. The kinship foster parents who become guardians may or may not be as good parents for the child as those that would be provided by a more open process, considering a broad pool of adoptive parents. Guardianship is a form of permanency, but generally it is not considered as good a form of permanency as the kind of full legal parenthood involved in adoption, in part because it does not have the same legal protections for permanency as adoption. The subsidies involved in guardianship may create perverse incentives, encouraging families to keep children in guardianship, rather than moving them back to their parents or on to adoption, solely because of the financial rewards.<sup>219</sup>

Subsidized guardianship should be developed as a policy option in a way that would encourage social workers to decide on an individual case basis whether it served the child's best interests. For example, it might make sense in a case in which a child is happily bonded with loving, nurturing kinship foster parents, the foster parents pose no risk to the child, the foster parents don't want to adopt because they want to maintain the child's legal relationship with its parents, and maintaining this relationship seems appropriate given past history and the child's feelings about the parents. However, subsidized guardianship should not be embraced simply as a method of reducing the numbers of black children in foster care, because this creates too great a risk that such guardianships will be created in situations where they will not serve children's best interests.<sup>220</sup>

There *are* some promising ways to reduce the numbers of black children in kinship foster care that are likely to serve children's best interests. One is to do more to encourage kin foster parents to adopt. Social workers often simply assume that kin have no interest in adoption, or don't bother to inquire because there is not the same pressure to push for permanency when children are in kinship care. Mark Testa's work helps demonstrate that there is much greater potential for formal adoption by kin than has been assumed.<sup>221</sup> We should have policies which

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<sup>218</sup> For ABA endorsement of this recommendation see AM. BAR ASS'N, *supra* note 77.

<sup>219</sup> Berrick, *supra* note 144, at 27-43 (discussing perverse incentives created by kinship foster care and subsidized guardianship stipends).

<sup>220</sup> See generally NOBODY'S CHILDREN, *supra* note 3, at 154-59.

<sup>221</sup> Mark F. Testa, *The Changing Significance of Race and Kinship for Achieving Permanence for Foster Children*, in RACE MATTERS, *supra* note 25, at 239 (Illinois adoptions out of foster care increased between 1995 and 1999 by a factor of almost 4.5, to a total of 7315 children, with kin accounting for a growing percentage of these adoptions, rising by 1999 to 58%).

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push social workers to inquire into the potential for kinship adoption, and make decisions based on children's best interests.

Another is to move more black children into non-kin adoptive homes. This means enforcing the current MEPA vigorously, and working to broaden recruitment so that we enlarge the pool of adoptive parents. It also means vigorously enforcing ASFA and related state law reform moves. As noted above in IIA, the current trend is already in the direction of reducing black child stays in foster care, and this is likely due in part at least to MEPA and ASFA. ASFA has a range of different provisions including but not limited to the 15/22 mandate which should reduce stays in foster care. ASFA allows states to bypass any reunification services, and to move promptly to terminate parental rights, in cases of extreme parental misconduct, enabling the system to move children more expeditiously into adoption. It encourages states to pay more attention to children's safety and best interests generally in making removal decisions, and this should mean, along with the other provisions, that children are moved out of homes in which they suffer serious maltreatment more promptly, having suffered less damage. Such children will be easier to place than the older, often very damaged children that have traditionally populated the foster care system.

There are also many state system reform programs which tend in the same direction as ASFA. Concurrent planning is one, and it is given an approving nod by ASFA. It envisions placing children in foster care on a reunification track while simultaneously placing them on a pre-adoption track, so that if reunification turns out not to be appropriate the child can be immediately freed for adoption. Ideally the child would have been placed in the pre-adoptive or "fost-adopt" home when first removed, so that from the child's point of view there is no disruption if the adoption decision is ultimately made. These and similar programs are the kinds of programs we should pursue to speed black and white children who cannot be safely reunified toward adoptive homes, and thus reduce their stays in foster care.<sup>222</sup>

#### *D. Address With Appropriate Action Discrete Examples of Problematic Racial Disparities*

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

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<sup>222</sup> See NOBODY'S CHILDREN, *supra* note 3, at 176-92.

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drug use during pregnancy. And parental alcohol abuse creates significant risks for child maltreatment.<sup>223</sup>

These policies and practices in combination mean that black children are much more likely to be identified as drug-affected at birth, their parents are more likely to be investigated for parental unfitness, and the children are more likely to be removed to foster care. White children whose parents are abusing illegal drugs or alcohol in ways that put them at high risk for maltreatment are not nearly as likely to be tested, have their cases investigated, or be removed. However the racial victims if they should be termed that are the white children. And the appropriate action to correct this situation would be to increase testing for alcohol, and to mandate testing in all private as well as all public hospitals, so that all children receive greater protection against being sent home as fragile, needy, drug or alcohol-affected infants to parents unfit to provide appropriate care even to normal infants.<sup>224</sup>

## CONCLUSION

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

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

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<sup>223</sup> See generally *id.* at 207-32. Alcohol use may present somewhat lessened risks since it does not involve the parents in the systematic violation of criminal laws and all that goes with that.

<sup>224</sup> See *id.* See also *supra* notes 175-178 and accompanying text.