

How judges can use their discretion to combat Anti-Black racism in the United States family policing system

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Abstract

Child protection court judges have broad authority and practically unchecked discretion to shape the everyday experiences and long-term outcomes for children and families that come before them. For Black families, this broad power to dictate intimate details of family life - including the power to legally terminate a child's parental and familial connections - is exercised within the historical and social context of chattel slavery and anti-Black racism. Judges wield their power to regulate the everyday lives and inter-generational outcomes of Black families charged with child maltreatment within a legal and practice framework characterized by indeterminacy and subjectivity that implicates the parent-child relationship and the constitutionally recognized rights of family privacy, autonomy, and integrity. Drawing on the authors' experiences and perspectives as Black women with personal lived expertise and professional practice with the so-called child protection or child welfare system, and referencing the limited literature that examines parents' experiences in child protection courts, this Article explores how judges' exercise of discretion perpetuates anti-Black racism in the family policing system and suggests ways child protection judges can consciously exercise their discretion to mitigate harm and maximize due process,

Just so many different dynamics that play into race...Cause when you walk in...and you see maybe two families that are White and the rest are all like you, you're like crap, I'm fucked. What else can you say about it? You're sitting there like I'm so fucked, because look at me and look at this room. The whole floor is people that are like me...You're like, this is not gonna go well. (Stephens et al., 2021, p. 10).

accountability, and justice for Black children and families. The authors urge child protection judges to heed the expertise and wisdom of Black parents about their family's needs and desires, to hold child protection agencies and workers accountable to their legal obligations and duties, and to tightly constrain their own tendencies to silence, punish, and regulate Black parents.

KEYWORDS

anti-Black racism, child protection, child welfare, civil rights, civil rights, constitutional rights, family court, international human rights, judicial discretion

Key Points for the Family Court Community

- Child protection court judges can promote due process, accountability, and justice for Black children and families through conscious and deliberative exercise of discretion in decision-making.
- In exercising discretion in child protection cases, judges should work to mitigate the harms to Black children and families from the operation of bias and discrimination inherent in the legal and practice framework characterized by indeterminacy and subjectivity.
- Child protection judges should ensure that Black children and parents have the opportunity to be heard and that their input about their families' needs and desires are listened to and acted upon.

INTRODUCTION

It has been long argued, and is now widely recognized by national and international entities, that the well-documented overrepresentation and disparate treatment of Black families in the United States child welfare system is a direct result of the history of chattel slavery and institutionalized oppression of discrimination against Black people in the United States (Roberts, 2002; Hill, 2006; Roberts, 2014; Sangoi, 2020; White et al. 2021; Biden, 2021; Burton & Montauban, 2021; Children's Bureau, 2021; American Bar Association, 2022; New York State Bar Association, 2022; Committee on the Elimination of Racial Discrimination, United Nations, 2022; Working Group of Experts on People of African Descent, United Nations (2022)). Given the overwhelming evidence that the foster system is inherently racist, oppressive, punitive, and unhelpful, we join with many advocates in calling for an end to family policing and for abolishing the current "child protective services" ("CPS") system of reporting, investigation, prosecution, and "treatment" of families as the primary policy response to structurally created racialized poverty and disadvantage (Burton & McMillan, 2022).

As the ultimate decision-makers in prosecutions of families accused of child maltreatment, child protection court judges exercise sweeping power and control over the daily lives of Black children and families that come before them, compounding the accumulated negative impacts of the brutal history of chattel slavery and its ongoing effects. Federal law forming the basis for far-reaching state intervention into constitutionally protected family privacy, parental autonomy, and family integrity on the grounds of “safety, permanency, and well-being” of children gives judges broad decision-making authority over Black families that come before them (Adoption Assistance and Child Welfare Act, Pub. Law 96–27, 1980; Adoption and Safe Families Act, Pub. L. No. 105–89, 1997). However, in recognition of the stark reality that the system fails children and families on all those grounds, (Kelly, 2022), in this Article we use the terms “family policing”, “family regulation”, “foster system”, and “foster industry” to more accurately reflect the inherently carceral nature of the CPS approach that funnels children and families into a revenue and profit generating industry through a system explicitly defined by surveillance, investigation, prosecution, and regulation (“treatment”) of parents accused of child maltreatment, as codified in the foundational federal child welfare law, the Child Abuse Prevention and Treatment Act (1974) (Burton & Montauban, 2021). Indeed, decades of data on outcomes for children as well as the lived experience accounts of families impacted by the system belie the ingeniously crafted public image of a benevolent state intervention that “keeps children safe” and promotes their well-being. (Burton & Montauban, 2021).

The carceral logics of the family policing system are perhaps most starkly demonstrated by the fact that the consequences of government intervention on the grounds of child protection mirror those of criminal procedures and punishments: Parents are reported, investigated, accused, and labeled as wrongdoers; children are detained in state custody (“foster care”), separated from their parents, families, and communities under the control and management of others, most often with strangers, sometimes under prison-like conditions in “congregate care” facilities (Children’s Rights and Community Impact Advisors, 2023); and, similar to criminal legal system probation or “community supervision”, families are regulated and monitored through court ordered agency supervision and oversight for extended periods of time.

Black parents accused of child maltreatment are uniquely situated to illuminate the destabilizing effect of judges’ decisions on their families. As such, this Article weaves historical, social, and legal analysis with lived experience insights from co-author Joyce McMillan and other system-impacted parents, as well as observations from family defense advocates, including lawyers, social workers, and parent advocates, to highlight how judges’ decisions perpetuate anti-Black racism in child protection court proceedings and contribute to the documented racial disproportionality and disparities evident in the foster system generally.

First, we summarize the historical and current societal context of judicial decision-making about Black families, highlighting the gross indeterminacy of the substantive legal framework in which these decisions are made. Next, we illuminate the ways in which Black parents experience child protection court as oppressive, disrespectful, and punitive, referencing judges’ failure to ensure parents’ right to be heard about decisions affecting their children and families, inappropriate and harmful oversight of parent’s mental health care, and court ordered supervision as examples of how unchecked discretionary decision-making impacts Black families’ privacy, autonomy, and integrity rights. Finally, we reflect on ways that judges can mitigate the effects of substantive indeterminacy in the law and use their discretion to promote due process, fairness, and justice for Black families within the current milieu by balancing their legal obligation to protect children from parental harm with their legal obligations to respect and uphold Black families’ rights to privacy, integrity, and autonomy.

JUDICIAL DISCRETION IN CONTEXT: OVERVIEW OF THE FAMILY POLICING SYSTEM

Child protection court judges exercise virtually unconstrained discretionary decision-making about Black families in “one of the most complex and wide-reaching legal systems in our country today” (American Bar Association, 2022).

Structurally and financially, the system is geared primarily toward separating children from their parents, maintaining them temporarily under state control in the custody of contracted caregivers (“foster care”), and in far too many cases, permanently severing the parent–child relationship through legal termination of parental rights and adoption (Burton & Montauban, 2021; Kelly, 2022). In this section, we consider how the structural and funding environment surrounding child protection judges’ exercise of discretion factors into the disproportionate representation and disparate treatment of Black families in the foster system. In this context, *disproportionality* refers to the proportion of racially diverse children within the system compared to their representation in the general population, and *disparity* refers to unequal treatment of Black families in relation to white families (Hill, 2006).

Structural and financial context: Federal law and funding

Structurally, federal law codifies a nationwide family policing system of reporting, investigation, prosecution, and “treatment” of alleged abuse and neglect of children by their parents in the Child Abuse Prevention and Treatment Act of 1974 (CAPTA).¹ CAPTA created “child protective services” (“CPS”), a system in which doctors, teachers, armed police, providers of essential social service support (such as domestic violence, childcare, public housing, emergency and temporary shelter, mental health, substance abuse, and other services), and other professionals (“mandated reporters”) are required, under threat of criminal sanctions,² to report incidents of suspected parental child maltreatment to state operated CPS agencies. At the front-end of this system, CPS workers receive reports, investigate families, initiate family prosecutions in child protection court, and often force parents to transfer of a child’s physical care and custody to someone else without ever initiating a court proceeding in a wide-scale, largely unregulated practice known as “hidden” or “shadow” foster care” (Gupta-Kagan, 2020). In this Article we refer to CPS as the “family police” to emphasize those core policing functions.

After families are funneled into the family policing system, the federal Adoption and Safe Families Act of 1980 – which family defender and legal scholar Professor Martin Guggenheim calls “the most family destructive law since slavery was abolished” – provides financial incentives to states to rush toward terminating children’s family relationships legally (“termination of parental rights”) after a mere 15 months in the foster system, without any requirement to prove the parent harmed the child or that maintaining the child’s family relationship would harm the child (Guggenheim, 2021). Other federal laws like the Adoption Assistance and Child Welfare Act of 1980 and the Multiethnic Placement Act of 1994, as amended by the Interethnic Provisions of 1996 (MEPA), are also foundational to the operations of the family policing system in which judges make critical, life altering decisions (White et al., 2021; New York State Bar Association, 2022).

Despite the fundamental freedoms and civil, constitutional, and human rights at stake, key legal standards and statutory language implicating these rights and freedoms such as “reasonable efforts,” “contrary to the welfare of the child,” and “best interest of the child” are left undefined, creating an open invitation for the operation of bias and discrimination. Moreover, the lack of definitional clarity about the system’s stated goals of child “safety, permanency, and well-being” allows for “highly subjective interpretations at all stages of a child welfare case, from reporting through investigation, adjudication, and disposition, as well as each case-planning decision and judicial determination made thereafter” (Kelly, 2022, p. 11). Moreover, the “child protection” approach has been shown to be an ineffective and indeed harmful approach to ensuring children’s wellbeing, and as such, calls are growing to substantially transform and even abolish the current system (Burton & Montauban, 2021; Detlaff, et al., 2021; Kelly, John, 2021; Roberts, 2002, 2022).

¹42 U.S.C. §§5101–5116i. Originally enacted in P.L. 93–247, CAPTA has been amended numerous times, most recently on January 7, 2019, by the Victims of Child Abuse Reauthorization Act of 2018 (P.L.115–424).

²Child Welfare Information Gateway. (2019). Penalties for failure to report and false reporting of child abuse and neglect. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau. <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/report/>.

Financially, the foster system is a multi-billion-dollar industry that depends on the constant supply of children and families. According to a federally funded report by Child Trends, in 2018, state and local child welfare agencies spent \$33.0 billion using a combination of federal, state, local, and other funds (Rosinsky et al., 2021, p. 1). States reported collectively spending \$18.2 billion in state and local funds, with the remaining \$12.8 billion coming from the federal government. Child welfare agencies used nearly 65% of all federal and state/local expenditures on family separation: 45% on out-of-home placement and 19% on adoption and guardianship (Rosinsky et al., 2021, p. 3). According to the Congressional Research Service, in 2021, almost 80% of the federal government's funding to states for child welfare specific programs was spent on family separation (\$5.796 for foster care and \$4.073 billion for adoption), with the remaining 20% designated for "child and family services" (\$1.252 billion); "services to older and former foster youth programs" (\$586 million); and "competitive grants, research, technical assistance, and incentives" (\$253 million) (Stolzfus, 2021).

The "child welfare services and activities" funded by these billions of tax dollars encompass a range of government interventions, categorized as "child and family services"³; "child protective services"⁴; "out-of-home placement costs"⁵; "adoption and guardianship costs"⁶; and "services and assistance for older youth in, or previously in, foster care"⁷ (Rosinsky et al., 2021, pp. 48–49). Altogether, these activities operationalize a system of family policing and regulation by mandated reporters, public and private child welfare agencies and workers, public and private social services providers and workers, law enforcement, state and local judges, prosecutors, and law enforcement personnel. Tracking with the funding allocations discussed above, four of these five child welfare services and activities encompass investigation, taking children from their parents, payments for their maintenance while in state custody, and adoption payments. Although these activities purport to protect children from parental harm and promote their welfare, the overwhelming evidence demonstrates that the impacts of these unjust and oppressive tactics make children and families less safe and are detrimental to Black children and families' overall health and well-being (Burton & Montauban, 2021; Roberts, 2022).

How judges contribute to overrepresentation and disparate treatment of Black children in the court process

Before a court proceeding is initiated, CPS receives reports of potential child maltreatment and investigates to determine whether a child should be separated from their families or to implement less draconian state intervention, such as offering "voluntary services" (Stolzfus, 2021). CPS investigates Black children at a shocking rate - over half (53%) of all Black children in America will be investigated by age 18 (Kim et al., 2017). While appalling, this intense level of policing is a reasonably foreseeable - and arguably intentional - result of the long history of legally sanctioned disregard of Black families' privacy, integrity, and autonomy in chattel slavery and the ongoing commodification and private profiteering off Black children by government and private individuals and institutions in the United States (Children's Rights, 2021; Roberts, 2022; Working Group of Experts on People of African Descent, 2022, para. 61).

³Defined as "family support or family preservation services provided to children who are not in foster care; caseworker supports or services provided after a child abuse/neglect investigation or assessment is closed; any post-reunification services or supports; and all associated administrative costs, including IV-E candidate administrative expenditures supporting prevention.

⁴Covers "intake/screening; family assessment; investigation; services provided during the investigation/assessment; and all associated administrative costs."

⁵Includes foster care maintenance payments (including for youth 18 and older); case planning and review activities for all children in foster care; services provided to children in foster care or their parents (e.g., to enable reunification); foster parent training; and all associated administrative costs, including IV-E candidate administrative expenditures related to preparing for out-of-home placement, SACWIS/CCWIS costs, and training expenditures.

⁶Covers ongoing and non-recurring assistance payments; other post-adoption or post-guardianship services or supports; and all associated administrative costs, including training expenditures.

⁷Covers services or supports intended to help youth make a successful transition from foster care to adulthood; services for youth who have aged out of foster care or who left foster care (for any reason) at age 16 or older; and all associated administrative costs.

CPS agencies prosecute Black families for child maltreatment at higher rates than other racialized groups. Black families are overrepresented in judicially sanctioned child removals and termination of children's family rights in these quasi-criminal family prosecutions in civil "child protection" courts (also known as "dependency" or "family" courts) (Children's Bureau, 2021; Roberts, 2022). Child protection judges' decisions to grant CPS agencies' requests to separate families and terminate children's family rights implicate the fundamental liberty interest in the parent-child relationship and tread on Black families' constitutional, civil, and human rights (American Bar Association, 2022; Working Group of Experts on People of African Descent, 2022; Fitzgerald, 2022). Moreover, akin to "community supervision" (probation) in the criminal legal system, even when children are not taken, child protection judges issue orders that regulate intimate details of the lives of Black families through "court ordered supervision". For example, New York judges are authorized to place a family under the jurisdiction of the local child protection agency, direct parents "to comply with specific terms and conditions," and dictate "the actions that the child protective agency or other supervising entity must take to exercise the supervision." Judges can issue supervision orders at any time during a child protection proceeding, maintaining jurisdiction over the family for up to 1 year, with the power to extend the period for an additional year for "good cause" (New York State Office of Children and Family Services, 2022).

Child protection judges contribute in other ways to the unnecessary and prolonged separation of children from their parents and families, irremediably weakening the Black family structure while endangering children's health and well-being. Relative to children of other races, judges more often detain Black children in state protective custody ("foster care"); detain them longer; and are more likely to house Black children in an institution or facility rather than with a family (Children's Bureau, 2021). While in state custody, Black children are less likely to receive proper care (Children's Bureau, 2021). They are at heightened risk of being sex trafficked (Post, 2015; Ryan, 2013) and being given dangerous psychotropic drugs without proper oversight (Burton, 2010; Fernandes-Alcantara et al., 2017). Relative to children in the general population, all children impacted by the family regulation system are more vulnerable to debilitating adverse life experiences, including "poor school performance, homelessness, arrest, chemical dependency, and mental and physical illness" (Yaroni et al., 2014, p. 1).

In New York, in 2019, Black youth comprised 15% of the general child population, but represented 41% of the foster population and 57% of the population of youth placed in congregate settings (Children's Rights and Community Impact Advisors, 2023). Regarding the detention of Black children in congregate facilities, the New York State Bar Association elaborates on the disparate impact of these judicial orders on Black children:

Moreover, judges are more likely to order Black children placed into congregate care rather than into a relative's home for the sole reason that the system deems that home too small, as families of color and various cultures live in a wide variety of arrangements, as compared with the more typical white, suburban, American household. Black children are 35% more likely than white youths to be placed in group homes or residential treatment facilities. Black youth spend an average of 29 months in institutions, compared with white youth who spend an average of 18 months. Black youth over age 10 who are institutionalized are significantly less likely to be reunited with family than their white counterparts. Lengthy, traumatic, and unstable congregate care placements are costly, ineffective, and rob children of the opportunity to be raised within a family. Often, children are subjected to numerous moves from one institution to another (New York State Bar Association, 2022, p. 17).

Based on reports by impacted youth, Children's Rights and Community Impact Advisors describe the devastating effects of the congregate facility experience as follows:

[Y]outh in congregate placements often lack basic necessities, including food, clothing, and medical care. They frequently experience physical and emotional insecurity, describing congregate placements as "prison-like," isolating, traumatizing, and unsanitary. This has immediate and longer-term impacts on young people's health and development while they are in the foster system and long after they leave. These experiences and the inherently carceral nature of congregate settings deprive young people of the mental, physical, and developmental milestones that are the foundation of healthy, stable futures. Moreover, they underscore the need for child welfare leaders, policymakers, and advocates to listen to youth accounts when examining and undertaking efforts to address ongoing

harms in congregate settings, including therapeutic, treatment, and hospital-based settings (Children's Rights and Community Impact Advisors, 2023, p. 7).

For many Black children, the permanent destruction of their legal and social ties to their families is the end result of their involvement with the system. Judges are less likely to release Black children to their families than children of other races and more likely to terminate Black children's familial rights (Children's Bureau, 2021). When judges refuse to reunite a family, children whose familial rights are terminated ("freed" for adoption) but who are not adopted are discarded by the system at 18 (or in some cases 21) (euphemistically called "aging out"). Government-raised children suffer worse life outcomes than other children in education and employment and are more likely to experience housing instability, reliance on public assistance receipt, and criminal legal system involvement, for example (Courtney et al., 2011; Gypen et al., 2017; Rymph, 2017).

This litany of horrific outcomes only scratches the surface of the devastating effects of judges' decisions on the spiritual, mental, emotional, behavioral, and physical well-being of Black children, families, and the Black community. Given its destructive nature, a growing number of activists are calling for the reorientation of government assistance toward family support, with some pushing for the abolition of family policing altogether (Roberts, 2002, 2022; Burton & Montauban, 2021), while others push to narrow the scope and reach of the system drastically (Kelly, D., 2022).

Acknowledging Anti-Black racism in the child protection legal system

In recent times, numerous influential leaders and organizations have acknowledged the existence of anti-Black racism in family policing. In his 2021 National Foster Care Month Proclamation, pointing to the historical and ongoing unequal and unfair treatment of Black families by the system, President Joseph Biden acknowledged that "[t]oo many children are removed from loving homes because poverty is often conflated with neglect, and the enduring effects of systemic racism and economic barriers mean that families of color are disproportionately affected by this as well" (Biden, 2021).

An April 2022 report and resolution adopted by the New York State Bar Association ("NYSBA") recognized systemic racism in New York's child welfare system "resulting from the history of slavery...[and] impacting Black families disparately" and cited the "[c]ollective responsibility of legislators, policymakers, judges and attorneys for creating, promulgating, maintaining, implementing and/or enforcing laws, policies, rulings and practices that have not adequately valued Black families and have often resulted in their unnecessary investigation and separation of families" (New York State Bar Association Resolution and Report, 2022). In August 2022, the New York Advisory Committee to the United States Commission on Civil Rights announced its intention to launch an investigation into "the extent to which racial disproportionalities and disparities exist in the New York child welfare system and its impact on Black children and families" (Fitzgerald, 2022).

Echoing the NYSBA report and resolution, in August 2022, the American Bar Association ("ABA") issued a resolution acknowledging the link between slavery and anti-Black racism in the family regulation system, noting that racism is "pervasive, ongoing, and a root cause of the disproportionate involvement of Black parents and children within the system" (American Bar Association Resolution, 2022). The accompanying report outlines the history of laws that have facilitated surveillance and separation of Black families and under-investment in Black families, and calls on legal professionals to "examine that history, acknowledge our role in shaping it, and begin to untangle it by following the lead of Black children, parents, and kin who have experienced" family regulation and who "know both the potential for harm and the importance of investing in the strength of Black families as foundational to our country" (American Bar Association Report, 2022). The ABA urges judges and other legal professionals to recognize bias and challenge laws, policies, and practices that devalue Black families and normalize Black family separation, and to "recognize the inherent strength of Black families, to value Black cultural and ethnic identity tied to race, and to follow the lead of Black parents, children, and kin with lived experience" (American Bar Association Report, 2022).

The international community has also joined the growing and ever more insistent calls to end state-sanctioned violence against Black families by the United States family policing system. As a party to the International Convention on the Elimination of All Forms of Racial Discrimination, the United States is subject to periodic compliance reviews by the United Nations Committee on the Elimination of Racial Discrimination (“CERD”). In August 2022, for the very first time, the CERD included anti-Black racism in its review of the US. The CERD’s Concluding Observations, reached after presentations by and consultations with US community and non-governmental organizations as well as high ranking US government officials, the CERD voiced concern over “the disproportionate number of children belonging to racial and ethnic minorities who are removed from their families and placed in foster care, in particular children of African descent and indigenous children,” their “disproportionately high levels of surveillance and investigation,” noting that racial and ethnic parents are “less likely to be reunified with their children” (Committee on the Elimination of Racial Discrimination, 1022, para. 43). The CERD urged the US “to take all appropriate measures to eliminate racial discrimination in the child welfare system, including by amending or repealing laws, policies and practices, such as the Child Abuse Prevention and Treatment Act, the Adoption and Safe Families Act and the Adoption Assistance and Child Welfare Act, that have a disparate impact on families belonging to racial and ethnic minorities,” and took the position of advocates that the US should “hold hearings, including congressional hearings, of families who are affected by the child welfare system” (Committee on the Elimination of Racial Discrimination, 2022, para. 44).

In its August 2022 report on “Children of African Descent,” the United Nations Working Group of Experts on People of African Descent (“WGEPAD”) concluded that racial discrimination continues to harm children of African descent “in all areas of life, including administration of justice, law enforcement, education, health, family-regulation systems, and development, as well as redress for legacies of enslavement, colonialism, and racial segregation.” The WGEPAD stated that:

Foundational ideologies of racism toward people of African descent, white supremacy and devalued family bonds have structured legal and social systems around the world. In this regard, a critical aspect of the experience of people of African descent in the global diaspora is supervision and the disruption of family relationships by the white political elite. Families of African descent have been torn apart by legalized separation ever since the global trade in enslaved people and the international agreement that people of African descent, including children, were legally property to be trafficked and sold. This historical dehumanization of people of African descent included sale at auction blocks, systematic rape, forced breeding, inhumane work expectations during and after pregnancy, and criminalization of pregnancy and childbearing. (Working Group of Experts on People of African Descent, 2022, para. 61).

Observing that “persistent racial disparities in family interventions, including removal of children and termination of parental rights, often involve racialized decision-making and outcomes,” the WGEPAD emphasized that “targeted regulation of families of African descent across the diaspora spring from a common historical root in the trade and trafficking in enslaved Africans, colonialism and the social construct of race that normalizes ongoing racial atrocities” (Working Group of Experts on People of African Descent, 2022, para. 62). Measures of redress recommended by the WGEPAD include: replacing family policing with care and strength-based interventions that support parents, kinship resources and communities and recognize States’ obligation to support the reunification of families and that recognize children’s right to family life with their parents by preserving the family or “making sincere efforts to reunify families separated through legal action or in the name of child protection,” and providing families with “clear, articulated measures for the return of removed children.” The WGEPAD recommendations include ensuring that parents facing CPS investigations, child removals, or termination of parental rights have access to “culturally competent, free counsel from the earliest contact with the State” and that “policies for immediate review of removal decisions, including hearings” be made publicly available in all languages. Relevant to the present discussion, the recommendations include regular data collection and analysis, racial equity audits, and impact assessments “*that publicly examine the use of discretion and the role of systemic racism in the routine operation of systems affecting children, including in the juvenile legal system and the family-regulation system*” (Working Group of Experts on People of African Descent, 2022, paras. 85–87; emphasis added).

With this selective overview of the historical and current context of anti-Black racism in the family policing system, in Part II we explore how child protection judges' use of discretion within a legal framework in which indeterminacy and subjectivity is pervasive operates to oppress and silence Black parents in court proceedings. We highlight two critical areas affecting family privacy, autonomy, and integrity— mandated mental health evaluations and court ordered supervision. We then explore how judges disempower parents by privileging CPS agents' voices while silencing parents, undermining their agency and ability to exercise their right to be heard and to participate in decision-making about their lives and the lives of their children. We conclude with concrete suggestions for ways judges can use their discretion to support Black family integrity and autonomy while fulfilling their legal obligations to protect children's health, safety, and well-being.

PART II. ANTI-BLACK RACISM IN CHILD PROTECTION COURT JUDICIAL DECISION-MAKING

Judicial discretion is the power to harm or to help, and parents are keenly aware of judges' power over their lives and that of their children and families. Once a family is brought into court on charges of child maltreatment, "judges exercise broad authority to oversee and regulate intimate aspects of a family's life, and can order detailed investigations and reports by CPS, issue orders of protection and warrants, and take any other steps they decide is necessary to protect the child's interests" (New York State Bar Association, 2022). This invasive and far-reaching judicial oversight of families, which often lasts for years, is exercised within a complex legal framework of federal and state child welfare laws characterized by definitional imprecision and ambiguous legal standards that threaten family integrity and autonomy. In his article, *Confronting Indeterminacy and Bias in Child Protection Law*, Professor Josh Gupta-Kagan identifies substantive legal indeterminacy as a foundational source of grave harm to children and their families (Gupta-Kagan, 2022). Imprecise statutory language and undefined legal standards invite excessive subjectivity and government overreach, setting the stage for implicit bias and anti-Black racism to flourish in child protection court prosecutions. Commenting on Gupta-Kagan's comprehensive and incisive analysis, David Kelly, former Special Assistant to the Associate Commissioner of the United States Children's Bureau argues that:

Subjectivity, fueled in part by indeterminacy, is pervasive in the child protection legal system. Statutory language such as "reasonable efforts," "contrary to the welfare of the child" and "best interest of the child" are hallmarks of child protection law and practice. These are among the most nebulous standards in law, yet their application has grave consequences. Indeed, the right of a parent to raise their child – a fundamental liberty interest – hangs in the balance of each such application. Furthermore, the vagueness of current standards is an invitation for implicit bias and discrimination based on race, class, religion, country of origin, sexual orientation, and gender identity." (Kelly, 2022 at p. 10).

Co-author Joyce McMillan (Joyce) elaborates on how this open-ended, subjective decision-making environment is particularly problematic for Black families:

Parents too often experience judicial discretion as a one-sided tool that ratifies harm already inflicted on a family, in ways that deprive Black parents of their autonomy, integrity, and dignity, maintain intense surveillance and control over Black children and their families; and make our children unsafe, disrupt their stability, and destroy their physical, mental, emotional, and spiritual well-being. What does it mean when judges are so willing to use their discretion to so-called "protect" children from their families but are not willing to use that same discretion to keep them home and out of actual harms' way from systemic racism that impedes on the child's right to be raised by their parent and to have functional relationships with siblings and extended family members, and the family's right to remain intact?

With broad authority to regulate families and oversee the actions of government agencies that investigate and prosecute them, judges operationalize core features of the family regulation system – policing, separation, oversight, and destruction of Black families through termination of children's familial rights. Family defender and legal scholar Vivek Sankaran observes that "[j]ustice for children in the child welfare system hinges on their race, their income,

what county they live in, and what caseworker or judge they draw” (Sankaran, 2020). And, Sankaran explains, racism is hiding in the discretion:

Discretion is the rule. And when such wide discretion exists, we know that both implicit and explicit bias can significantly affect the decisions that are made. In similar circumstances, Black children are thought to be at greater risk of abuse than white children. And behavior that’s accepted as normal in affluent, white neighborhoods – smoking a joint, co-sleeping with your child, or leaving a 10-year-old home alone – can be grounds for taking a child in a Black neighborhood. Embedded in the system and manifest in decisions, these ambiguities create cover for violence against the very children it claims to protect (Sankaran, 2020).

In New York, for example, the stated purposes of the statute governing child protection court proceedings are to “establish procedures to help protect children from injury or mistreatment; “help safeguard their physical, mental, and emotional well-being”; and “provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met” (New York Family Court Act sec. 1011). To effectuate these purposes, child protection court judges are given “a wide range of powers for dealing with the complexities of family life,” and “a wide discretion and grave responsibilities” (New York Family Court Act sec. 141).

However, the reality is that for Black families in New York’s child protection courts, these purposes are largely unrealized. A 2020 evaluation of the New York State court system’s response to issues of institutional racism, led by former Secretary of Homeland Security Jeh Johnson found that “the #1 complaint...from multiple interviewees from all perspectives was about an under-resourced, over-burdened court system, the dehumanizing effect it has on litigants and the disparate impact all this has on people of color” (Johnson, 2020, p. 54). Johnson noted the longstanding existence of the harsh effects of court system involvement on Black families in New York, in “ghetto courts” used primarily by people of color, including the New York City Family, Criminal, Civil and Housing courts, citing a 1991 report that stated “there are two justice systems at work in the courts of New York State, one for Whites, and a very different one for minorities and the poor” (id. p. 27). Reflecting on Johnson’s conclusion that there is “a second-class system of justice for people of color in New York State,” in 2022 the New York State Bar Association warned that “[t]he devastating impacts of Family Court on Black families cannot be overstated or overlooked any longer. These findings by Secretary Johnson illuminate the extreme lack of respect experienced by Black children, parents, and families and the urgent need for the New York State Family Court system to undertake a more searching and critical examination of its policies, practices, and procedures through a racial justice lens” (New York State Bar Association, 2022, p. 22).

Given the disproportionate outcomes for Black families nationwide, the New York experience is likely generalizable across the country. In every jurisdiction, child protection court judges significantly shape the experiences and outcomes of the families they oversee, with far-ranging effects on the parent–child bond, family privacy, integrity, autonomy, and virtually every aspect of daily family life. The judge decides whether a Black child gets to stay with their parents, with whom they can associate, how much time they are allowed to spend with their family members and under what conditions, and whether they get to remain a part of their family at all. In the face of this all-encompassing power, Joyce observes that “there’s often no recourse to hold judges accountable, so they act like the law is not relevant to their responsibilities in the courtroom where they are assigned to make decisions within the boundaries of the law. They therefore can and do make decisions based on their own opinions, their implicit and explicit biases.”

In the next two sections, we present, in their own words, parent analysis and insights about how anti-Black racism plays into two significant decisions made by child protection judges – court mandated mental health evaluations and court ordered supervision (“family probation”).

“Mental hazing”: The trap of mental health evaluations

Labeling parents mentally or psychologically unfit is a key structural feature of the family regulation system (Burton & Montauban, 2021), and results in what J.J., a parent embroiled in the system, refers to as “mental hazing.”

As described elsewhere, the basic premise of CAPTA is pathologizing and criminalization of Black and poor families, bolstered by the medicalization of “poverty-framed-as-neglect” as a disease susceptible to “treatment” by prosecution, court and agency oversight, and “preventive services” (Burton & Montauban, 2021). Angeline Montauban, a parent who retrieved her son from the New York City foster system after a five-year long struggle, writes:

The foster care industrial complex thrives on the medical diagnosis and subsequent treatment of the parent. Treatment of the “disease” of child abuse and neglect is a key focus of CAPTA. To place children in foster care, the agency must show proof of a problem with the parent. As a result, poverty and given circumstances are treated as an illness and parents are subjected to cheap, low-quality, and faulty evaluations done by for-profit contractors. The system benefits from this arrangement, especially the mental health professionals- psychologists, psychiatrists, licensed social workers, and other mental health workers. However, these evaluations do not have any real value in determining a child's and family's needs. The main purpose of forensic psychological evaluation is to provide a diagnosis for clinical purposes. Currently, in New York City, forensic psychological evaluations are used by ACS [the family policing agency] mainly for character assassination to demonize and criminalize a parent and to provide justifications for removals and termination of parental rights (Burton & Montauban, 2021).

The dangers of misuse of mental health evaluations in child protection matters, particularly for Black families, have been examined from various angles (Sapien, 2017; Hurley, 2009). Although a recent statement by the American Psychological Association acknowledges the history and detrimental impact of racism in the field of psychology (American Psychological Association, 2021), the organization has not specifically acknowledged the family policing system's inappropriate use of psychological evaluations.

Montauban understands mental health evaluations in family prosecutions as an invasion of privacy, a tool of surveillance, and an unjustified basis for family separations. For her, weaponization of mental health evaluations is “a particularly pernicious form of state violence against Black families. [used] as a mechanism to deem parents unfit and to justify removals, foster care placement, and termination of parental rights.” Critiquing the foundational “medical model” of the family regulation system, she explains that “[t]o ‘treat’ child abuse, one needs to determine the cause or ‘etiology’” of behavior (symptoms) classified as abusive or neglectful.” Despite the lack of evidence supporting this framing of “child abuse and neglect” as a mental health diagnosis, judges “rely heavily on mental health evaluations as a tool not only to keep children in foster care, but also to prolong families’ contact with the system...[and] as grounds to terminate parental rights, best known as the civil death penalty” (Burton & Montauban, 2021, p. 658).

Furthermore, the use of these evaluations punishes both children and parents. Counseling judges to use restraint in ordering mental health evaluations, Joyce echoes Montauban's account:

Judges routinely issue orders for mental health evaluations of parents on the unqualified, uncredentialed reports of CPS agents' purported observations and “concerns” about parental behaviors, often couched as symptoms or diagnosis of some psychological disorder or syndrome. They then refuse to release children from state custody if their parents do not or cannot adhere to a recommended course of treatment, or if they share information with others about how their mental health status is being weaponized against them.

Judges casually and routinely order parents to submit to these highly intrusive and discredited evaluations, most often in the absence of any prior history of a parent being diagnosed or treated for a mental disorder. And without ever considering that the parent's behavior could be situational, triggered by the assault against the family and their loss of control over their lives to relentless, disrespectful, and disruptive government intervention with no recourse. Our reactions to yet another assault on our agency and autonomy in the parent-child relationship can reflect deep trauma responses to ongoing violence of systemic racism at every turn.

The American Psychological Association's *Guidelines for Psychological Evaluations in Child Protection Matters* state that “[p]articular competencies and knowledge are necessary to perform psychological evaluations in child protection matters” and “opinions and recommendations of such evaluations must have a reliable basis in the knowledge and experience of psychology — a standard based in psychology's professional ethics and in

legal case law” (American Psychological Association, 2013). However, judges often rely without question on CPS unqualified characterizations of parents, which influences how they see and treat parents and interjects unjustified bias in their decision-making about the family. Joyce explains that CPS agents use words they themselves do not understand; saying things like parents need “extensive” mental health treatment, using adjectives that aren’t used within the mental health arena to intensify the false narrative of the “defective, mentally ill parent” and heighten the level of concerns for a child’s safety.

It’s not, “she needs therapy, but “she needs “intensive therapy” - what does that mean in mental health? Judges foster these false narratives and codify this improper practice by giving credence to these unjustified speculations. They use their authority to make orders requiring parents to undergo these invasive, racially biased, and destructive psychological evaluations and to follow any and all recommendations that result. This overreliance on unquestioned caseworker speculations about parents can be devastating to families: by accepting as valid the impressions of CPS workers who do not have the credentials to make these decisions, judges issue orders that are contrary to reality (false) and irrelevant to a family’s needs and desires.

The evaluation order immediately embroils the family in a sea of frustration and failure. Shrouded in conditions of secrecy and flush with unbridled discretion, instead of properly weighing all relevant information and holding all parties accountable, especially those who are hurling unsupported diagnoses, judges sentence the accused parent to undergo intrusive, unwarranted, and potentially dangerous mental health evaluation and treatment and sign waivers of their HIPPA rights to release all information about their treatment plan and progress to agency workers, the judge, and other court actors.

The problem with this is they should only be concerned that a parent is consistent in their treatment. They should only have information that the parent is consistently participating, and following the mental health providers’ recommended treatment plan, not what they are being treated for.

Court ordered supervision

Government surveillance and oversight of Black families is institutionalized in the family policing system. Judges routinely grant CPS agencies and their private contractors broad and unchecked authority to monitor and regulate Black families. In New York, for example, a judge may allow a child to remain at home under supervision by the CPS agency, with terms and conditions the parent must meet to avoid being brought back into court and having their child taken (New York City Administration for Children’s Services, 2022). On their own or at the agency’s request, judges routinely issue orders that regulate every aspect of a parent’s private family life, including whom they can associate with and how they spend their time daily. Parents are required to juggle a long list of cookie cutter mandates, including, for example, parenting class, anger management class, participation in drug treatment programs, random drug tests, and unannounced visits to the home by the family police with full access to the home for inspection, and participation in all court conferences and hearings (regardless of the substance or conflict with the parent’s schedule). The judge may require the CPS agency to make progress reports about the implementation of the order, including the parents’ engagement with mandated services.

Reflecting on her experience helping parents navigate child protective services and the New York City family court system, Joyce points out what she sees as judges’ insensitive and unreflective attitude in placing families under CPS control:

In my experience, judges use “court ordered supervision” to codify CPS surveillance, disruption, and control of Black families under the dangerous mindset that “it can’t hurt” to put “services” in place and monitor the family “just to be safe.” Cannot hurt who? And who is safe as a result? Certainly not the children and families whose every move is being closely watched, recorded, misinterpreted, reported, and weaponized against them individually and as a family unit. This “safer course” mentality is used as a cover for all manner of disrespectful, intrusive, and corrupt power plays by judges, CPS agents, and private foster care agency employees.

These “cookie cutter” service plans have little to do with what a family needs or desires; they also have nothing to do with the reasons CPS was weaponized against the family in the first place, and everything to do with “what’s on the menu.” Miriam Mack, a family defender in New York City, notes that these services are typically not concrete resources the family could benefit from; but are federally identified behavioral control mechanisms supposedly designed to “fix” the parent (Mack, 2021). The mandated activities are driven not by any real need of the family but are driven by federal and state decisions about the type of “services” government that fit within the system’s medical model of the “mentally defective” parent. Pointing to the frustration felt by parents under this intense and unhelpful surveillance, Joyce notes:

Help is not help if it does not help. Court mandated “services” lets government agents and private contractors dictate the intimate details of family life with no concern for the quality of the services or mechanisms of accountability to ensure the service is effective for the stated purposes of protecting children, supporting families, and avoiding inappropriate intervention and unnecessary harm. And this disrupts everyday life and relationships, employment, schooling, elder care, childcare, business development, and just everyday living.

Court ordered supervision increases surveillance. When the judge orders agency supervision, it’s a case where there’s no need to remove a child, so instead they choose to oversee the family. But they do not provide relevant supports to the family, never ask the families what they need. Even when judges see that none of the things offered by the agency applies to the family, they *still* mandate them to oversight and surveillance framed as “services.” If a family does not need drug treatment, and the service you provide is a referral to drug testing – what are we providing oversight of? What are we overseeing exactly? In one case, the judge asked the case manager what services she offered the family; she said a drug treatment program. Based on what? Instead of asking why she offered them a drug treatment program, the judge ordered the family to a drug screening. When the drug test came back negative, the judge ordered supervision for a year, including drug testing and treatment.

Judges force families to fit into what is being offered because they have them in their grips, instead of using their power to ensure that the services benefit the family, they use their power to maintain the funding stream for cookie cutter services. PROFIT. Keeping the bodies flowing into the system and keeping them there for as long as possible.

As these reflections show, parents experience judicial oversight under the rubric of “court ordered supervision” as a key site of surveillance, control, punishment, and state violence against Black families.

Joyce on due process: How judges use their discretion to silence parents and deny their right to be heard

Another way judges control parents and undermine our agency and ability to exercise our right to be heard is by silencing us. In my experience, I find judges treat parents differently from litigants in other legal matters: requiring parents to be present for non-substantive court appearances even though counsel is present; conversely, silencing parents when they are in court by only allowing their attorneys to speak for them. Parents are usually only allowed to speak when they are being interrogated in direct or cross examination. Language barriers and lack of translators and interpreters also undercut effective representation and judicial decision-making, and get in the way of parents’ ability to participate, understand, challenge, and follow court orders.

We have to come to court and sit around listening to hearsay and discussions about things that aren’t substantive. It’s a complete waste of time for parents who are trying to maintain jobs and other responsibilities in addition to the forced cookie cutter services mandated by the court. Parents have to sit through all of this, be tortured by lies and remain silent because the parent, as they are told, “will eventually have their day in court.” That’s when they can take the stand and defend themselves; but, in the meantime, and every time we show up in court, the agency workers can make accusations without being questioned or challenged to prove anything they are saying, which poisons the thoughts of those listening.

Narratives about Black families are created in child protection court the same way we sell products: by repeating the same story and different parts of the story about families, stories shaped by agency caseworkers and the lawyers, and by talking about things that are irrelevant to the safety of the child or how a parent relates to and parents their child. Sometimes parents sit through this for a year or two before going to trial. By then, the judge has already decided who the parent is and whether they deserve to be punished. Then the judge weaponizes the arsenal of the court against them, to forever destroy their families.

By the time a case goes to trial (if it ever does), the judge already knows what he or she is leaning toward. They're always looking at parents' body language instead of questioning and challenging the content of CPS testimony. You're looking at the parent to see their body language because that's all there is – you have already silenced their voice. In their decisions they say, “the parent was squirming in her seat.” Well, I'm squirming in my seat because I'm tired of being separated from my child, tired of hearing the lies of CPS, and frustrated because I do not know what's going on and when this is going to end – my attorney has not been available from the last court date until today!

That's what judges are making decisions on – how the parent “presents”, their “demeanor” and “attitude.” And they know they are – instead of dragging out this farce of due process, why do not we just take the case to trial within a reasonable amount of time, like the speedy trial rule in criminal court? CPS has already done its investigation and gathered and fabricated whatever evidence they have which will either prove the allegations or not.

Judges rubber stamp CPS caseworker and agency decisions and grant requests without pressing for information, evidence, follow-through, or compliance with legal obligations and responsibilities, while silencing parents, their advocates, and legal representatives. Meanwhile, caseworker case notes are taken as truth; they aren't questioned or cross examined for truth or accuracy, which corrupts fair and informed decision-making. These decisions are devastating to families; they cause immediate, ongoing, and generational harm and trauma. The judge takes what CPS says as the Bible, and it becomes part of the record.

Parents are silenced outside of the courtroom as well. Judges tell parents they cannot talk about what's going on in the court case with other people or on social media (“gag orders”), and they cannot share what their children are experiencing while separated that no one hears, listens to, addresses, or corrects. Silencing parents in this way creates dishonest, false narratives that allow business as usual without interruption or accountability, and leaves children defenseless and unsafe. The family police agents are more powerful than armed police because there are no clear boundaries on their behavior, no protection for children and parents' constitutional rights, and no effective or clear legal standards. All CPS has to say is “the child will be unsafe.”

PART III: RECOMMENDATIONS: USING JUDICIAL DISCRETION TO COMBAT ANTI-BLACK RACISM IN THE FAMILY POLICING SYSTEM: “ONCE YOU KNOW BETTER, YOU DO BETTER”

Racial disproportionality, disparate treatment, and anti-Black racism are features, not flaws, of the family regulation system. The system is not broken; it does what it is intended to do - to capture, rupture, and destroy children and families of African descent. The UN WGEPAD succinctly describes the connection between the current family regulation system and US chattel slavery:

Families of African descent have been torn apart by legalized separation ever since the global trade in enslaved people and the international agreement that people of African descent, including children, were legally property to be trafficked and sold...those inhumane practices have been upheld by racist images and narratives that...label them immoral and delegitimize their authority and investments in their own children and families (WGEPAD, 2022).

Although racial bias and discrimination cannot be completely eliminated within the framework of what is an inherently unjust system, child protection court judges can significantly contribute to justice for Black families by consciously contextualizing their exercise of discretion within the historical experience and ongoing harms of the

family policing system, and by making explicit efforts to deliver justice to Black children and their families by all available means.

So, what now? While we work toward ending the prosecutorial approach to assisting families struggling with child-rearing challenges, child protection court judges continue to dictate the everyday lived experiences and dismal outcomes of Black parents, children, and families in the system. Below, we sketch out a few ideas for child protection judges to consider when making decisions about Black children and families.

Listen to Black families

First and foremost, judges should recognize their own biases and take into account the wisdom of Black parents, children, and families as experts in their own lives. The American Bar Association emphasizes that judges who are obligated to “decide the outcome for a family, no matter how egalitarian their belief system, bring bias to the courtroom...[b]y following the lead of Black families with lived experience, judges, attorneys, policymakers and other professionals in the child welfare system can learn to help change the narrative and view the strengths of the Black family, community, and support system for what they have always been.” (ABA Report, 2022, p. 15). The US Supreme Court has emphasized the importance of parental leadership in decision-making about their children, even when under court jurisdiction:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.⁸

Disregarding or discrediting parental knowledge not only violates parents’ right to be heard as a matter of due process; it is disempowering and can also be harmful to a child’s development, care, and safety. Judges should allow parents to speak directly on all issues and decisions affecting their family. Children of appropriate age and maturity level should also be allowed to participate in court proceedings.⁹ For example, although implementation is rare, New York gives children the right to come to court appearances if they want to. However, children rarely attend court. Caseworkers and lawyers speak for them, which pits the child and parent against each other. It’s another way to stack the deck against family autonomy, unity, and preservation. Instead of supporting the wholeness and wellbeing of the family unit, the court is just there to prosecute the family and turn the family upside down, using tools that separate and divide. Keeping kids out of court and preventing them from the full understanding of or input into decisions about their lives and their families can lead to great frustration and anger, as explained by foster youth Shanice Holmes:

As a youth in foster care, I am used to major decisions about me being made in my absence. Countless times, I was not made aware of my court dates, where my future would be decided. But not being able to participate in court can have a far-reaching impact on foster youth like me. Last year, I tried reaching out to my attorney to find out my court date and to discuss some challenges I had with my case workers. However, he never answered, and attended my hearing without me. I later found out my court hearing took place 4 days after my 18th birthday. Because I did not show up, my lawyer and new caseworker discharged me from foster care, without my permission. I was angry and confused because I already signed a board extension, which allows youth to remain in care until age 21.

Foster youth like me feel like we do not have any control and often feel discouraged to use our voices when we are in dependency court. Sadly, many youths do not realize they have rights in court... Speaking up also gives the

⁸*Santosky v. Kramer*, 455 U.S. 753–754 (1982).

⁹For a discussion of the why children’s participation should be an expectation not an exception, see Hon. Ernestine Steward Gray (Ret.) and Brenda C. Robinson, *The Right for Children to Be Present, Be Heard, and Meaningfully Participate in Their Own Dependency Court Proceedings*, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/empowering-youth-at-risk/the-right-for-children/.

opportunity for the judge to get a better understanding about you as a person, not just as words on paper. These do not define who we are.... It is so important to have foster youth speak up in dependency court. For many of us, while we might be scared to speak in court, saying something when scared is better than not being heard at all (Holmes, 2017).

Mental Health Evaluations

Judges should not use mental health evaluations to make decisions about Black parents' ability to care for their children. Definitive standards about when mental health evaluations should be ordered, as well as qualifications for conducting them, and how they should and should not be used would go a long way toward limiting their inappropriate use. Moreover, a mental health diagnosis does not automatically mean that a person is unfit to parent or make decisions about their child.

Judicial reliance on caseworker speculation and stereotypical, pathologizing characterizations of parental behavior can lead to biased assessments, faulty decisions, eroded credibility, and family plans that are not individualized and tailored (Washington, 2023, p. 49). Caseworkers' interpretation of a parent's behavior, demeanor, and state of mind, using vague and subjective terms, become the basis for judicial decision-making and "a language of pathology" (Washington, 2023, p. 15). System actors characterize Black parents as "erratic", "aggressive", "hostile", "angry", "loud", and "confrontational" in charging documents, investigation notes, and court reports without providing a basis for these gendered and racialized descriptions (Washington, 2023, p. 15). In petitions, court reports, and testimony, caseworkers regularly interpret parents' speech, behavior, and appearance to argue for family separation or other forms of state intervention, giving them an unfair opportunity to influence judicial decision-making (Washington, 2023, p. 48).

With reference to the experiences of three Black mothers, Washington illustrates how the system's pathology logics focus attention and resources on "fixing" the parent rather than addressing conditions of poverty and racism that threaten child and family safety:

Tamara Jones was pathologized and sent to counseling and parenting classes when she, in a moment of panic, fought back against her abusive ex-partner. In Danielle Smiths' case, the family regulation system focused primarily on vague, unsubstantiated mental health concerns, instead of assisting the family in obtaining safe housing or advocating against the landlord on their behalf. Jackie Williams's son was removed from her care for a reflexive response to being grabbed by a security officer, while trying to navigate the chaotic and time-consuming shelter system with her toddler. Instead of ensuring her and her child's safety, which would have included appropriate housing, she was required to undergo mental health evaluations, and anger management and parenting class (Washington, 2023, pp. 46-47).

Court ordered psychological evaluations may also violate important privacy rights. Although sensitive mental health information is protected by the Health Insurance Portability and Accountability Act (HIPAA), judges are known to order parents to provide a waiver of their right to privacy and provide releases to CPS as a condition of family reunification. Judges sometimes order parents to permit mental health professionals to disclose information about their evaluations, treatment, progress, and even therapy notes, or risk separation from their child. Clinical labels necessary to get insurance reimbursement are used by CPS "to further build a case against a parent and establish or confirm suspicions of parental pathology," and prior preexisting mental health diagnosis produced by other system involvement - or even from a time when the parent themselves was a child in the foster system - may come back to haunt a parent once targeted by the system (Washington, 2023, p. 17).

For all these reasons and more, Joyce urges judges to stop using pseudo-scientific, discredited mental health evaluations:

Nothing should come into play about a parent's mental health other than whether the child is safe with the parent, and if they are not, what safety measures can be put into place. Having a mental health diagnosis in and of itself,

just like having cancer, does not put a child in danger. Judges should not be weighing prior mental health history, or accusations of prior mental health history against current reactions or responses taken out of context. They should consider that these reactions or responses by parents could be related to the current assault and actual separation or threat of separation from their children.

Fundamentally, just as a drug test is not a parenting test, a mental health diagnosis does not indicate whether a person can safely parent their child. Most methods used to determine parental fitness are grossly inaccurate and unreliable (Hurley, 2009). To the extent that evaluation of parental fitness may be helpful in supporting child safety and wellbeing, family integrity, and family preservation, judges should require that the method used is consistent with forensic training and focuses on assessing a parent's ability to satisfy minimal standards that meet their child's basic physical, developmental, and emotional needs in the context of risk and protective factors across child, parenting/family, and social/environment domains (Burton and Montauban, 2021).

Weigh the Harms of Removal

Isolation, disconnection, and placement with strangers increases children's vulnerability. Judges should weigh well-documented harms that befall children in state "protective" custody against the risk that a child will be unsafe in her parents' care. "While the accepted wisdom is that removal is the better option for a child in a potentially abusive or neglectful home, research demonstrates that this is not always true. In fact, the bond between children and their parents is extremely strong, and disrupting it can be even more damaging to a child—even when her parents are imperfect" (Trivedi, 2019, p. 527). In 2018, in response to mass family separations at US borders, the American Association of Pediatrics issued a petition signed by over 13,000 doctors warning that family separation "can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children." (Trivedi, 2019, p. 525).

Although only New York and the District of Columbia mandate that the harm of removal be considered by child protection judges, judges are generally free to exercise their discretion to take the harm of removal into account in deciding the question of parent-child separation. "Consideration of the harm of removal would allow the child welfare system to better serve children by contemplating all potential harms prior to removal and balancing them to determine what is really in a particular child's best interest—removal or remaining at home" (Trivedi, 2019, p. 526). An expansive and particularized understanding of the consequences of removal for a child enhances a judge's ability to make informed decisions that best support a particular child's safety, stability, and wellbeing.

The act of removal itself is inherently traumatic. One study found that children are "often upset not only because they are being removed, but also because of how they are removed. The caseworkers involved either do not provide them with adequate information, or provide them with incorrect information, leading to feelings of frustration and anxiety" (Trivedi, 2019, p. 532). One twelve-year-old child reported feeling "like you're being kidnapped and nobody wants to tell you anything" (Trivedi, 2019, p. 532). Emotional distress, aggression, depression, temper tantrums, bedwetting, speech defects, attention demanding behavior, shyness and sensitiveness, difficulties about food, stubbornness and negativism, selfishness, finger sucking, and excessive crying are all documented reactions to removal (Trivedi, 2019, pp. 528–531). Furthermore, children grieve the loss of their families, resulting in feelings of guilt, post-traumatic stress disorder, isolation, substance abuse, anxiety, low self-esteem, and despair," and "may mourn the loss of their parents as much as if they had died." They suffer additionally from the loss of siblings, other family members, and their communities, compounding feelings of loss and isolation. In addition to the loss of immediate family members, foster children also lament the loss of contact with other relatives, friends, pets, and possessions (Trivedi, 2019, pp. 532–533).

In addition to the harms of the removal itself, there is substantial evidence that children are more likely to be abused in foster care than in the general population (with their parents and other caregivers), although the system

operates on the opposite assumption. Pointing out that “[t]he foster care system does not know what happens behind closed doors in group homes or foster homes. Many children in foster care are not safe,” former foster youth Isabel Lucena Olvera describes her “nightmare” in state custody:

Then my foster care nightmare started. In 1 year of foster care, I lived in three group homes and three foster homes. I was only able to see my mother once a week for 30 min and was not permitted to call her. My sophomore year was spent in four high schools.

I went through a lot of depression and anxiety. In the group homes, the other girls were always jumping me, leaving me unconscious, and stealing the clothes, food, and money my mom would give me on my visits with her. When I was getting beat up, the staff did nothing to help me. The staff would also bring random guys into the homes and allow them to come into our rooms. In the foster homes, I had two foster mothers who did a lot of drugs and were abusive to me and other kids. The social worker I had was one of the most terrible, non-supportive, heartless people I ever met. She never showed empathy about anything I said. She would see me bruised and hurt and say, “That’s your fault” (Olvera, 2022).

Olvera’s experience punctuates Trivedi’s conclusion that “[o]verall, the weight of social scientific evidence suggests that children who are removed from their homes based on allegations of abuse or neglect often face more abuse and neglect in foster care. This is anathema to a system whose stated goal is child safety” (id., p. 544). However, “[d]espite the mountain of evidence that foster children fare worse than their similarly situated peers across the board, none of this information is considered in child welfare proceedings in most states when deciding whether to remove children from their homes” (id.)

Summarizing the unique harms of removal for Black children, Trivedi concludes that disproportionate and excessive removals of Black children disrupt and weaken individual families, and “continued targeted destruction of minority families leads to the devastation of the larger community, which, in turn, has long-term consequences for the children of those communities” (Trivedi, 2019). More and better quality information can help judges avoid exposing Black children to the predictable, harmful experiences and outcomes of family separation. Considering the harms of removal can help avoid the injustice and traumatic effects of family separation on Black children, families, and communities.

Accountability and Transparency

Judges can advance accountability by providing parents with important information about the judicial process. For example, parents often do not understand the judicial process (many lawyers do not either, it seems). Judges should state in open court that litigants have the right to appeal their decisions and explain the appeal process. Often, people can appeal, but they are not told they can. Attorneys should tell them, but the judge should be telling them also. Judges should also be required at the beginning and end of every court appearance, where any parent or child is present, to state in open court and provide in writing information about judicial and attorney grievance procedures. This would give parents at least some semblance of hope that there are avenues to recourse for unjust treatment.

Frame discretion as an anti-bias tool in judicial education

Judges’ training must be designed to shift the mindset about what quality decision-making means about Black children and Black families. As the ABA urges, judges must study the historical and ongoing treatment of Black children and families in society generally and in the family policing system, take active steps to recognize bias in their own decision-making, and actively challenge laws, policies, and practices that devalue Black families and normalize Black family separation.

At the case level, judges should strictly enforce the legal requirement that family policing agencies make “reasonable efforts” to avoid removing a child, and, if a child is removed, to make reasonable efforts to reunify the family as quickly as is safely possible. However, this critical decision point is all too often a perfunctory matter for many judges:

Currently... [m]any courts simply have forms with a checkbox for whether reasonable efforts were made. Scholars have noted that legislators were concerned that courts would be hesitant to deprive children of potential foster care funds, but summarily dismissed that concern due to their confidence in judges’ ability to appropriately weigh their responsibilities. Yet, in reality, judges rarely fail to make reasonable efforts findings. One survey showed that less than 4% of judges had ever made a finding of no reasonable efforts. Another showed that over 90% of surveyed judges rarely or never made a no-reasonable-efforts finding and over 40 percent had made reasonable efforts findings *even when they believed that the agency had not, in fact, made those efforts*. Thus, the legal check on agency abuse is failing, and judges are the only ones with the power to correct this flaw in the system (Trivedi, 2019, p. 577).

Practice Basic Humanity and Civility

Finally, in decision-making about Black families, judges can balance their legal obligations by implementing basic principles of humanity and civility. Professor Stephens and her colleagues suggest a variety of approaches judges can take that align with principles of therapeutic jurisprudence, which recognizes the emotional and psychological toll legal proceedings can take on litigants. These include “being thoughtful about what information they share about parents in court and why”; creating collaborative courtrooms where parents are empowered by asking what they think needs to happen for their children to safely return home; helping parents be prepared for what will happen in court; avoiding a punishing attitude toward parents and celebrating accomplishments; and offering parents trauma-informed services (Stephens et al., p. 15). Bench books and bench cards help educate judges about structural, explicit, and implicit bias, provide a tool to help recognize and prevent bias, and offer concrete strategies to counter their own tendencies toward stereotyping and bias (Stephens et al., 2021, p. 15).

CONCLUSION

Judges can help mitigate the oppression and destruction of Black families caused by structural, systemic, and individual anti-Black racism in the family policing system by using their wide discretion to promote due process, accountability, and justice for Black children and families. We urge judges to heed the wisdom of Black parents about their families’ needs and desires, hold child welfare agencies and agents accountable to their legal obligations and duties, and to tightly check their own tendencies to silence, punish, and regulate Black parents. We offer these reflections and insights as encouragement for judges to use their discretion with compassion and respect for the constitutional, civil, and human rights of Black children and their families, and to use all available measures within their power to advance Black family well-being, integrity, and autonomy. We sincerely hope our contribution will prompt child protection court judges to take active steps to combat anti-Black racism in the family policing system.

Black children matter. Black parents matter. Black families matter.

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How to cite this article: Burton, A. O., & McMillan, J. (2023). How judges can use their discretion to combat Anti-Black racism in the United States family policing system. *Family Court Review*, 1–22. <https://doi.org/10.1111/fcre.12706>