

## Why the American Child Welfare System is not Child Centered

Richard J. Gelles

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### Repository Citation

Richard J. Gelles, *Why the American Child Welfare System is not Child Centered*, 24 Wm. & Mary Bill Rts. J. 733 (2016), <https://scholarship.law.wm.edu/wmborj/vol24/iss3/9>

## WHY THE AMERICAN CHILD WELFARE SYSTEM IS NOT CHILD CENTERED

Richard J. Gelles, Ph.D.\*

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### INTRODUCTION

Danieal Kelly died on August 4, 2006.<sup>1</sup> When police and medical personnel arrived at Danieal's home, she was curled up like a ball on a urine-and-feces-stained bed.<sup>2</sup> Danieal, fourteen years old, weighed forty-two pounds.<sup>3</sup> Infected bedsores almost reached Danieal's bones.<sup>4</sup> The system that was supposed to protect Danieal Kelly failed her in every possible way.<sup>5</sup>

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<sup>1</sup> *Reports Details Philly Teen's Horrific Death*, NBC NEWS (Aug. 1, 2008, 6:20 PM), [http://www.nbcnews.com/id/25970609/nslus\\_news-crime\\_and\\_courts/t/reports-details-philly-teens-horrific-death/#.Vj4gK4QzPzI](http://www.nbcnews.com/id/25970609/nslus_news-crime_and_courts/t/reports-details-philly-teens-horrific-death/#.Vj4gK4QzPzI) [<http://perma.cc/VDB7-55BX>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Report of the Grand Jury at 211, *In re* County Investigating Grand Jury XXII, No. 3211-2007 (Pa. Ct. Com. Pl. July 2008).

<sup>5</sup> *Id.* at 1.

The first referral for maltreatment in the Kelly home came in 1997, alleging that Danieal's three-year-old brother was seen in bug-infested clothing and with rotting teeth.<sup>6</sup> The report was substantiated for neglect, and the Philadelphia Department of Human Services (DHS) assigned a contract agency to provide services to the Kelly family.<sup>7</sup> The services lasted for two years, and the case was closed in 1999.<sup>8</sup> Almost immediately a second report of suspected neglect came in, was investigated, but was ruled "unsubstantiated."<sup>9</sup> On October 8, 2002, the Department of Human Services received a new report that Andrea Kelly (Danieal's mother) was neglecting her children.<sup>10</sup> DHS files contain no record of whether anyone at DHS investigated the report.

In the summer of 2003, an anonymous caller made yet another report of suspected abuse.<sup>11</sup> The caller claimed that the Kelly children informed her that Daniel (Danieal's father) hit the children with extension cords and belts.<sup>12</sup> The reporter stated that she herself never saw marks on the kids.<sup>13</sup> As for Danieal, the reporter stated that she rarely saw her.<sup>14</sup> The report was assigned to a DHS intake child protective social worker for an investigation.<sup>15</sup>

Over the next ten months, DHS contracted with a local private agency to provide services to the Kelly family.<sup>16</sup> Included in the services was the expectation that Danieal, who had cerebral palsy, would be enrolled in school.<sup>17</sup> Although the contract with the private agency required that an agency caseworker visit the Kelly home and see Danieal on a monthly basis, the visits rarely occurred.<sup>18</sup> DHS was expected to visit the Kelly home two times each year—only about half of the required visits occurred.<sup>19</sup>

After Danieal's death, the Office of the Philadelphia District Attorney launched an investigation.<sup>20</sup> Eventually, the District Attorney presented the evidence to a Grand Jury.<sup>21</sup> By the time the judicial process was complete, sixteen individuals, including Andrea Kelly, Daniel Kelly, two DHS employees, and nine employees of the contract agency were convicted of, or pled guilty to, charges ranging from involuntary

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<sup>6</sup> *Id.* at 63–64.

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

<sup>8</sup> *Id.* at 64.

<sup>9</sup> *Id.* at 7, 64.

<sup>10</sup> *Id.* at 64–65, 79–80.

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 39.

<sup>17</sup> *Id.* at 41.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 142, 198.

<sup>20</sup> Jon Hurdle, *Girl's Parents and Agency Face Charges in Starvation*, N.Y. TIMES (Aug. 2, 2008), <http://www.nytimes.com/2008/08/02/us/02starve.html>.

<sup>21</sup> Report of the Grand Jury, *supra* note 4, at iii.

manslaughter to perjury.<sup>22</sup> For the City of Philadelphia, and perhaps for most of the United States, the case of Danieal Kelly is an example of the most egregious form of malfeasance in child protective services.

In all fairness, few cases come close to the shocking indifference to a child's welfare as the Kelly case. The death of Danieal Kelly is not typical of all deaths of children known to child protective services. It is equally fair to argue that child maltreatment fatalities do not provide a full window into the workings of child welfare systems.

On the other hand, the rather obvious question is how can a case like Danieal's occur in a city where the human services budget exceeds \$600 million?<sup>23</sup> Danieal did not "fall through the cracks" of the system—she toppled into a Grand-Canyon-style gap that exists throughout child welfare systems in the United States. The grisly details of Danieal's life and death offer a view into the failings of the system and an opportunity to consider how the gaps and failings of the system could be revised.

I was asked by the Assistant District Attorney in Philadelphia to review the documentation on the Kelly case and testify before the Grand Jury regarding the actions of the caseworkers and social workers assigned to the Kelly home. The Assistant District Attorney, Ed McCann, asked me how could social workers go in and out of the Kelly home and not recognize Danieal's desperate condition? Even though the caseworker was criminally negligent, workers did make visits to the Kelly home on occasion.<sup>24</sup> Even if they ignored the fact that Danieal was not in school and was always laying in the same bed, how could they ignore that she was starving to death?

My answer was that child welfare workers generally think it is the parent who is the client, not the child. In the Kelly case, it was Mrs. Kelly, and not Danieal, who was considered the primary client. In her testimony before the Grand Jury, a Department of Human Services supervisor stated:

To be honest, mother [Mrs. Kelly] was cooperating and we had services in. She had been cooperating to the extent that she was allowing people in, and we felt that the children were not at an imminent risk, so we're going to give services a chance to see if we could work on those issues.<sup>25</sup>

In some ways, this response is in accord with the mandate for child welfare agencies to make reasonable efforts to keep children in their own homes. On the other hand, the response is indicative of the prevailing culture in child welfare

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<sup>22</sup> Joseph Slobodzian, *Prison for Three in Danieal Kelly's Death*, INQUIRER (July 16, 2011), [http://articles.philly.com/2011-07-16/news/29780893\\_1\\_involuntary-manslaughter-prison-term-mickal-kamuvaka](http://articles.philly.com/2011-07-16/news/29780893_1_involuntary-manslaughter-prison-term-mickal-kamuvaka) [<http://perma.cc/79HT-G8QN>].

<sup>23</sup> CITY OF PHILA., FISCAL 2006 OPERATING BUDGET 14 (2005) (showing a proposed \$656 million in funding for the city's Department of Human Services for 2006).

<sup>24</sup> Report of the Grand Jury, *supra* note 4, at 142.

<sup>25</sup> *Id.* at 120.

agencies: that the client is actually the parent and not the child.<sup>26</sup> The supervisor's focus was on Mrs. Kelly.<sup>27</sup> Mrs. Kelly cooperated, let workers in, and did not object to the proffer of services.<sup>28</sup> On the other hand, as much as Mrs. Kelly cooperated, she failed to engage in a single act of caring for the needs of her child.<sup>29</sup>

When they actually made visits to the Kelly home, workers often spent most of their time with Mrs. Kelly, trying to motivate her to take steps to care for her children.<sup>30</sup> Some workers merely looked into Danieal's dark room before they left the home.<sup>31</sup> In one of the few case notes in the Kelly file, the DHS investigator stated that he talked to Mrs. Kelly and Danieal's maternal grandmother about Danieal's needs.<sup>32</sup> The note merely mentioned that the caseworker saw Danieal and said nothing else about the child.<sup>33</sup> According to Danieal's aunt, when the DHS investigator visited the home, "he just walked in the house, he didn't even look at Danieal, he just seen the other kids and then left. . . . The man don't do nothing but try to talk to women."<sup>34</sup>

The Kelly case might be uniquely horrific, but the focus on the caregivers instead of the child is typical.<sup>35</sup> In another state, child protective services received a report of suspected physical abuse from a hospital that treated a toddler for a severe burn on his foot.<sup>36</sup> Child protective services investigated and substantiated the injury as abuse.<sup>37</sup> The mother's live-in boyfriend was the only possible perpetrator.<sup>38</sup> The case was open for services and the child welfare agency created a "safety plan" for the household.<sup>39</sup> The core provision of the plan was that the boyfriend would have no contact with the toddler.<sup>40</sup> Over the next few months, the caseworker discovered a number of violations of the safety plan.<sup>41</sup> Eventually, the caseworker told the mother that the state would remove the child if the mother did not follow

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<sup>26</sup> See *infra* Part II.

<sup>27</sup> See generally Report of the Grand Jury, *supra* note 4, at 26–61 (describing interactions between case workers and Mrs. Kelly).

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

<sup>29</sup> See *id.* at 7.

<sup>30</sup> See *id.* at 42, 89–90.

<sup>31</sup> See *id.* at 49.

<sup>32</sup> *Id.* at 89.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 85.

<sup>35</sup> See *infra* Part II.

<sup>36</sup> Lisa Rossi, *Documents Show Burns, Bruises, Neglect Complaints in Year Before Columbia Toddler's Death*, PATCH (Aug. 11, 2011), <http://patch.com/maryland/columbia/documents-show-burns-bruises-neglect-complaints-in-ye5054ce9e34> [<http://perma.cc/928L-USEL>].

<sup>37</sup> *Id.*

<sup>38</sup> Deborah Weiner, *Investigation Into 3-Year-Old Boy's Death Unsolved*, WBAL-TV BALT. (Mar. 26, 2015, 1:36 PM), <http://www.wbaltv.com/news/investigation-into-3yearold-boys-death-unsolved/32011392> [<http://perma.cc/XRF6-LAQF>].

<sup>39</sup> *Id.*

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

<sup>41</sup> *Id.*

the safety plan.<sup>42</sup> The mother's reaction was to call the caseworker's supervisor and request a new caseworker.<sup>43</sup> This is an example of a caseworker viewing the child as the client. The supervisor, however, assigned a new caseworker who was unfamiliar with the case.<sup>44</sup> The supervisor's justification for the reassignment was that she, the supervisor, feared mom would not accept services if the child-focused caseworker remained on the case.<sup>45</sup> Six months after the initial caseworker was removed from the case, the toddler was dead.<sup>46</sup>

Children are not the clients in other non-fatal cases. For example, in a case I worked on in a southwestern state, three boys were placed in a group home as a result of parental neglect.<sup>47</sup> State and federal requirements stipulate that the boys be visited no less than once per month by a state or contract agency caseworker.<sup>48</sup> The files for the three boys indicated that the caseworker failed to meet the once-per-month standard.<sup>49</sup> The boys testified that they did not know the caseworker's name and had never met with the caseworker face-to-face out of the presence of the group-home supervisor—who was the perpetrator of the sexual abuse.<sup>50</sup> Most of the meetings consisted of the caseworker talking with the group home supervisor.<sup>51</sup>

In another case of sexual abuse that I worked on, the case records never mentioned the names and needs of two boys placed in foster care.<sup>52</sup> Although the caseworker made frequent visits to the foster home, all the case notes reflect conversations with the foster mother.<sup>53</sup> It was as if the two boys did not exist. All the while, the foster mother's son was molesting the boys.<sup>54</sup>

#### I. A STRUCTURAL AND CULTURAL ISSUE, NOT A LIBERAL CONSPIRACY

It is indeed tempting to blame a liberal agenda as the underlying cause of the child welfare system being more parent-centered than child-centered. Liberals promulgated many of the most significant federal child welfare laws. Senator Walter Mondale (D-MN) and Representative John Brademas (D-IN) sponsored the law that provides funding for states to establish mandatory child abuse reporting statutes and

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<sup>42</sup> *Id.*

<sup>43</sup> Based on various materials reviewed in preparation for testimony as an expert, which are on file with the author.

<sup>44</sup> *Id.*

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

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

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

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

procedures, the Child Abuse Prevention and Treatment Act of 1974.<sup>55</sup> Representative George Miller (D-CA) co-sponsored 1980 legislation establishing the open-ended entitlement for foster care—Title IV-E of the Social Security Act of 1935—the Adoption Assistance and Child Welfare Act of 1980.<sup>56</sup> Senator John Chafee (R-RI) and Senator Jay Rockefeller (D-WV) were primary supporters of the federal legislation that changed the primary goal of child welfare from preserving families to child safety and well-being.<sup>57</sup>

Beyond the political forces that sponsor legislation, there is the fact that the profession that implements the policy—social workers—is well recognized as a liberal, progressive profession. The progressive and liberal leanings of social work are embodied in the profession’s Code of Ethics.<sup>58</sup>

As true as these facts may be, placing the credit or the blame for the parent-focus of the child welfare system on liberals and their agenda is too glib and simplistic. There are a number of structural and cultural factors that generate the fact that parents are considered the prime client of the child welfare system.<sup>59</sup> There are also significant arguments *against* making the child the primary client, and these too are discussed in this Article.<sup>60</sup>

## II. WHY ARE PARENTS CONSIDERED THE CLIENT?

### A. *The Impact of the Research and Policy*

When physician C. Henry Kempe and his colleagues first wrote about the battered child syndrome, they applied a “psychopathological model” paradigm.<sup>61</sup> Parents who abused and neglected their children suffered from some form of mental illness.<sup>62</sup> The most appropriate intervention would be to remove the child from the home and

<sup>55</sup> *Bill Summary and Status of S. 1191*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:SN01191:@@L&summ2=m&> (summarizing bill and listing sponsors). For the text of the Act, see Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended in scattered sections of 42 U.S.C. (2012)).

<sup>56</sup> *Bill Summary and Status of H.R. 3434*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d096:H.R.3434:@@L>. For the text of the Act, see Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C. (2012)).

<sup>57</sup> See *Congressional Record for H.R. 867*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d105:HR00867:@@L&summ2=m&> (showing Senate amendments sponsored by Senators Chafee and Rockefeller). For the text of the Adoption and Safe Families Act of 1997, see Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C. (2012)).

<sup>58</sup> See *Code of Ethics*, NAT’L ASS’N OF SOC. WORKERS, <http://www.socialworkers.org/pubs/code/code.asp> [<http://perma.cc/VQ6G-FPV5>] (discussing social workers’ commitment to challenging social injustice as one of the ethical principles of the profession).

<sup>59</sup> See *infra* Part II.

<sup>60</sup> See *infra* Part IV.

<sup>61</sup> C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17, 18 (1962).

<sup>62</sup> See *id.*

provide the parents with psychological treatment.<sup>63</sup> If, and when, the parents achieved an acceptable level of mental health, the children could be safely returned home.<sup>64</sup>

Social scientists looked at Kempe's data and other publications on child maltreatment and came to a different conclusion. David Gil<sup>65</sup> and I<sup>66</sup> have opined and presented data showing that social factors were much more important correlates and causal agents leading to maltreatment than were psychological variables. We, along with other researchers, have pushed to change the paradigm for child abuse and neglect from a purely psychological paradigm to a social-psychological model.<sup>67</sup> Gil consistently honed in on poverty as one of the most important root causes of child maltreatment.<sup>68</sup> I added social stressors to his conceptualization.<sup>69</sup>

Independent of research efforts, others recoiled at the consequences of the psychological paradigm. Children were indeed removed from homes in which they were maltreated and placed into foster care.<sup>70</sup> If, and when, psychological services were provided to abusive parents, the results were minimal and children were not returned home.<sup>71</sup> And so the foster care population grew, children moved from placement to placement, and the concept of "foster care drift" came about.<sup>72</sup>

The number of children in foster care and "foster care drift," combined with the new social-psychological paradigm, led to the enactment of the Adoption Assistance and Child Welfare Act of 1980 (AACWA).<sup>73</sup> One key component of AACWA was the requirement that states develop permanency plans for children by the time the children were in out-of-home care for eighteen months.<sup>74</sup> The second provision was that states make "reasonable efforts" to maintain a family before they remove a child

<sup>63</sup> See *id.* at 23–24.

<sup>64</sup> See *id.*

<sup>65</sup> DAVID G. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD ABUSE IN THE UNITED STATES 140–41 (1970).

<sup>66</sup> Richard J. Gelles, *Child Abuse as Psychopathology: A Sociological Critique and Reformulation*, 43 AM. J. ORTHOPSYCHIATRY 611, 620 (1973) [hereinafter Gelles, *Child Abuse as Psychopathology*].

<sup>67</sup> See, e.g., Eli H. Newberger et al., *Pediatric Social Illness: Toward an Etiologic Classification*, 60 PEDIATRICS 178, 184–85 (1977); see also *supra* notes 65–66 and accompanying text.

<sup>68</sup> See GIL, *supra* note 65, at 144–45.

<sup>69</sup> See Gelles, *Child Abuse as Psychopathology*, *supra* note 66, at 620.

<sup>70</sup> See DAVID FANSHIEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 476–77 (1978).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 476–82; HENRY S. MAAS ET AL., CHILDREN IN NEED OF PARENTS 356–57, 379–80, 388–89 (1959).

<sup>73</sup> See Mitchell I. Ginsberg, *Foreword* to DAVID FANSHIEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION (1978) (noting key U.S. Senators' positive reception of research about foster care at the time); see also Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

<sup>74</sup> See § 475(5)(C), 94 Stat. at 511.



from the child's birth parent(s) and "reasonable efforts" to reunify a family before establishing a permanency plan of adoption.<sup>75</sup>

As a result of AACWA, parents became the primary clients as caseworkers, supervisors, and agency administrators worked to meet the standard of "reasonable efforts." Given the nature of the workforce and the lack of a definition of the threshold of "reasonable efforts," reasonable efforts morphed into "every possible effort" before too long. Few people were unhappy about the paradigm shift or the new law. Parents seemed to be the logical client given our understanding that social factors were key contributors to child maltreatment.<sup>76</sup>

### *B. The Child Welfare Workforce*

When the child welfare workforce receives attention, which usually occurs only after a public tragedy, the focus is on caseloads and training. But in looking deeper into the workforce and the culture the workforce generates, it is easier to understand why parents often become the client instead of the children.

The two key levels of the child welfare system are caseworkers and their supervisors. In general, child protective service caseworkers enter the workforce with Bachelor of Social Work (BSW) degrees or are liberal arts majors. Some counties, such as Los Angeles County, require all caseworkers to hold the Masters of Social Work (MSW),<sup>77</sup> but this is the exception rather than the rule.<sup>78</sup> Supervisors, especially in large counties and localities, usually hold the MSW degree or the equivalent.<sup>79</sup>

Social work programs require students to be versed in clinical skills, social policy, and research methods.<sup>80</sup> Social work is also a "value-based" profession. The values are expressed in the National Association of Social Workers' (NASW) Code of Ethics.<sup>81</sup> In terms of practice in the field of child protection, the key statement in the Code of Ethics comes under the value of "Social Justice":

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<sup>75</sup> See *id.* § 471(15), 94 Stat. at 503.

<sup>76</sup> See *supra* notes 65–69 and accompanying text.

<sup>77</sup> See, e.g., *Children's Social Worker Vacancy*, COUNTY OF L.A., <http://www.governmentjobs.com/careers/lacounty/jobs/1227799/childrens-social-worker-ii-north-county> [<http://perma.cc/6X7K-Q78M>].

<sup>78</sup> See *Manual of Policies and Procedures: Child Welfare Services, State of California* § 31-070, CAL. DEP'T SOC. SERVICES, <http://www.dss.cahwnet.gov/ord/PG309.htm> [<http://perma.cc/U7CH-GEXM>] (explaining that in California, all county caseworker supervisors and at least 50% of the professional staff must have a master's degree in social work).

<sup>79</sup> See, e.g., *id.*

<sup>80</sup> See, e.g., *Foundation Course Content*, U. MICH. SCH. SOC. WORK, <http://ssw.umich.edu/msw-student-guide/section/2.03.00/75/foundation-course-content> [<http://perma.cc/MF5D-UYYL>].

<sup>81</sup> See *Code of Ethics*, *supra* note 58.

## Value: Social Justice

Ethical Principle: Social workers challenge social injustice. Social workers pursue social change, particularly with and on behalf of vulnerable and oppressed individuals and groups of people. Social workers' social change efforts are focused primarily on issues of poverty, unemployment, discrimination, and other forms of social injustice. These activities seek to promote sensitivity to and knowledge about oppression and cultural and ethnic diversity. Social workers strive to ensure access to needed information, services, and resources; equality of opportunity; and meaningful participation in decision making for all people.<sup>82</sup>

The social justice value directly influences social workers to view the parents as the clients of the child welfare system. Given that the current paradigm of explaining and understanding child abuse and neglect is that poverty, stress, and oppression are key correlates of child maltreatment,<sup>83</sup> it is easy to understand that the paradigm and the values of the social work profession combine to produce a view that pursuing social justice, particularly with, and on behalf of, vulnerable and oppressed individuals and groups of people, means that caseworkers and supervisors see parents as their clients. Applying the Code of Ethics, the current explanatory paradigm, and the policy mandate of "reasonable efforts" to child welfare work, leads directly to the parent-as-client approach.

Not only does the Code of Ethics push the workforce in the direction of the parent-as-client, the Code also negates seeing other key players in the child welfare system as clients.<sup>84</sup> White, middle class parents who seek to adopt children from the foster care system are rarely considered the clients of social workers. Adoptive parents are not poor, not oppressed, and are not generally on the radar screen of the social work social justice value.

*C. The Scales of Justice: The Impact of Legal Precedents*

If Lady Justice were mounted over a family or juvenile court building, the scales she holds would not be even. In matters of child maltreatment, the scales of justice are heavily tilted toward parental rights.

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<sup>82</sup> *Id.* (emphasis omitted).

<sup>83</sup> See *supra* notes 65–69 and accompanying text.

<sup>84</sup> See generally *Code of Ethics*, *supra* note 58 (focusing the scope of "clients" on impoverished, oppressed, or otherwise vulnerable individuals without any reference to other individuals or entities involved in the child welfare system).

There were three major Supreme Court rulings in the 1970s and 1980s that established guiding precedents for the American child welfare system.<sup>85</sup> In issues of child protection and custody, the Supreme Court has been the arbiter of the relationship between parents, children, and the states.

Until the early 1970s, unmarried mothers were deemed the sole custodians of their children.<sup>86</sup> For children entering foster care, the legal proceedings were focused on the relationship between the child and the birth mother.<sup>87</sup> Unmarried fathers were only part of the proceeding in those instances in which their legal relationship to the child was established through cohabitation.<sup>88</sup> This issue was addressed in *Stanley v. Illinois*, when the Supreme Court ruled that unmarried fathers were entitled to a hearing to determine their fitness in child protection custody proceedings.<sup>89</sup> This right was based on the Due Process Clause of the Fourteenth Amendment.<sup>90</sup> This landmark decision not only gave unmarried fathers a right to be heard, but also gave children access to the resources of their non-custodial, unmarried parent.<sup>91</sup>

United States law and tradition grant parents broad discretion as to how they rear their children. In *Smith v. Organization of Foster Families for Equality and Reform*, the Supreme Court held that the Fourteenth Amendment gave parents a “constitutionally recognized liberty interest” in maintaining the custody of their children “that derives from blood relationship, state-law sanction, and basic human right.”<sup>92</sup> This interest is not absolute, however, because of the state’s power and authority to exercise *parens patriae* duties to protect citizens who cannot fend for themselves.<sup>93</sup> The state may attempt to limit or end parent-child contact and make children eligible for temporary or permanent placement or adoption when parents: (1) abuse, neglect, or abandon their children; (2) become incapacitated in their ability to be a parent; (3) refuse or are unable to remedy serious, identified problems in caring for their children; or (4) experience an extraordinarily severe breakdown

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<sup>85</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>86</sup> *See, e.g., Stanley*, 405 U.S. at 646 (holding an Illinois law unconstitutional because it mandated that children of deceased, unmarried mothers become wards of the state without giving the unmarried father an opportunity to petition the court for custody); *id.* at 653 n.5 (quoting from the State’s brief which argued that the child of unmarried parents “normally knows only one parent—the mother”).

<sup>87</sup> *See Smith*, 431 U.S. at 818–19 n.1, 821–22 n.5.

<sup>88</sup> *See Stanley*, 405 U.S. at 646–47; *see also* Jennifer E. Burns, *Should Marriage Matter?: Evaluating the Rights of Legal Absentee Fathers*, 68 *FORDHAM L. REV.* 2299, 2301–02 (2000) (noting that at common law, the father did not have a legal relationship with his child if he was not married to the mother).

<sup>89</sup> *Stanley*, 405 U.S. at 657–58.

<sup>90</sup> *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *Smith*, 431 U.S. at 846.

<sup>93</sup> *See Santosky v. Kramer*, 455 U.S. 745, 766 (1982).

in their relationship with their children (e.g., owing to a long prison sentence).<sup>94</sup> Cognizant that severing the parent-child relationship is an extremely drastic measure, the Supreme Court held in *Santosky v. Kramer* that a court may only terminate parental rights if the state can demonstrate with clear and convincing evidence that a parent has failed in one of the aforementioned four ways.<sup>95</sup> Most state statutes also contain provisions for parents to voluntarily relinquish their rights.<sup>96</sup> In addition, the state also has the authority to return a child to his or her parents.<sup>97</sup> Ideally, this occurs once a determination is made that it would be safe to return a child to his or her home and that the child's parents would be able to provide appropriate care.

Thus, the Supreme Court, in three decisions, established a high bar for government intervention in matters of caregiving. The bar is even higher with regards to legally terminating the rights of parents. The practical reality of the Supreme Court's decisions is seen in the reluctance of child welfare systems to remove children from their caregivers. Of the more than 6,400,000 children reported as suspected victims of child maltreatment annually, and the nearly 700,000 children deemed victims of child maltreatment after investigations, only 144,000 children are removed from their homes and placed in foster care.<sup>98</sup> That means that children referred as suspected victims of maltreatment have a 2.5% chance of being removed from their caregivers. Of the children substantiated as victims of child maltreatment, the chance of being removed is 14.7%. This is hardly a system that leans in the direction of protecting children through removal. Claims that child welfare workers are "child snatchers" are simply false.

Tilting the scales of justice toward parents is not a bad thing. Parents should have rights and should be free from unwarranted government intervention. But, combined with other factors, the tilted scales of justice do push child welfare workers toward the parent as client.

### III. BUT WE CAN SERVE BOTH PARENTS AND CHILDREN

Rather than dispute the argument that the child should be the client instead of the parents, many in the child welfare system argue that they can serve both equally.

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<sup>94</sup> Richard J. Gelles, *Protecting Children Is More Important Than Preserving Families*, in CURRENT CONTROVERSIES ON FAMILY VIOLENCE 329, 329–30 (Donileen R. Loseke et al. eds., 2005).

<sup>95</sup> See *Santosky*, 455 U.S. at 768–69.

<sup>96</sup> See, e.g., MINN. STAT. § 260C.301.1(a) (2013) (stating that the court may terminate rights of parents "with the written consent of a parent who for good cause desires to terminate parental rights").

<sup>97</sup> See, e.g., *Child Placement Services Manual*, N.C. DEP'T HEALTH & HUM. SERVICES, <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-10/man/index.htm#To> [<http://perma.cc/4H9K-6A4L>] (last updated Sept. 18, 2015).

<sup>98</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2013 (2013), <http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf> [<http://perma.cc/L5HL-ZVS4>].

For many in the child welfare system, the entire notion of answering the question of “who is the client” is a false dichotomy.<sup>99</sup> After all, aren’t both parents and children the clients of the system?

Many mission statements that open the policy and procedures manuals of child welfare agencies and appear on websites claim the agency’s goals are to ensure the safety and well-being of children, preserve families, and establish permanency of caregiving for vulnerable children.<sup>100</sup> As idealistic as these mission statements are, the goals cannot be accomplished, because they are contradictory.

#### *A. Ensuring Safety and Well-Being*

Ensuring safety is easy. Err on the side of caution. If there is probable cause that a child is being maltreated, remove the child from the home. Once removed, ensure the child is in a safe home and do not return the child to his or her birth parents until they convincingly demonstrate they are capable of safely caring for the child. There is a risk of maltreatment in out-of-home care, but that is significantly lower than the risk of leaving children in abusive homes or returning them before the parents are clearly able to care for the children.<sup>101</sup> Of course, such an aggressive approach undermines the mission of preserving families. Moreover, children in out-of-home care experience quite a number of moves, which undermines the goal of permanency.<sup>102</sup>

#### *B. Preserve Families*

Preservation of families was the primary goal of the child welfare system from 1980 to 1997.<sup>103</sup> Child welfare agencies endeavor to make every possible, reasonable effort to keep children in the home or expeditiously return children.<sup>104</sup> Intensive family preservation services were created to minimize the need to remove children from the home.<sup>105</sup> While families were preserved, there were a spate of public tragedies that demonstrated that some families could not be safely preserved and, sadly, some families were not worth preserving. Although the families were preserved and children had a degree of permanency, many were simply not safe.

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<sup>99</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 5–6 (2013), <http://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<http://perma.cc/8VVS-6SEY>] (discussing how parents and children both receive services from the child welfare system).

<sup>100</sup> See, e.g., *id.* at 1.

<sup>101</sup> See RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES 118–20 (1996).

<sup>102</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT No. 20 (2013), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> [<http://perma.cc/C8KR-8NCE>].

<sup>103</sup> See *Congressional Record for H.R. 867*, *supra* note 57.

<sup>104</sup> See HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 99, at 5–6.

<sup>105</sup> See *id.*

### C. Permanency

At two different ends of the continuum, permanency of caregiving can be achieved. First, never remove children from abusive and neglectful caregivers. Law professor Martin Guggenheim argues that children should not be removed from their homes without parental permission.<sup>106</sup> A reluctance to remove children will no doubt preserve the family and ensure permanence. On the other hand, many children will endure continued abuse and neglect as the price of permanence.

At the other end of the continuum is the fact that adoptions are more permanent than most other forms of caregiving. Few adoptions are disrupted after they are finalized.<sup>107</sup> Given the reality of maltreated children being removed and returned to their birth parents multiple times, and the fact that children in foster care move frequently, adoption is a means to achieving permanence for maltreated children.<sup>108</sup> Adoption also improves safety and well-being.<sup>109</sup> On the other hand, all of the goals are achieved at the expense of preserving the birth family.

The bottom line is that the three core goals of the American child welfare system are inherently contradictory. The claim that both parents and children can be the clients is simply false.

### D. Even Probability Theory Tells Us Parents and Children Cannot Both Be the Prime Client

In the child welfare field, a core task of caseworkers is to determine whether a child is at risk in the home.<sup>110</sup> Simply stated, this is a binary decision—the child is or is not at risk; the child should or should not remain in the home. When making the decision the caseworker can be correct, or make two kinds of errors. The first error, what statisticians call a “false positive,” is to deem the child at risk when the child is not. A classic example of a false positive is a child who looks like she has numerous bruises and black and blue marks that are actually caused by an organic condition rather than are inflicted. The second error is a “false negative.” The case of Danieal Kelly is a classic false negative. No one decided Danieal was at risk and she subsequently died from neglect.<sup>111</sup>

While in an ideal world, a caseworker would like to reduce both false positives and false negatives, probability theory tells us this is impossible: in short, probability theory tells us child welfare workers and systems need to decide which type of mistake they

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<sup>106</sup> See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 77, 248 (2005).

<sup>107</sup> See ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 156, 178–79 (1999).

<sup>108</sup> See *id.* at 177–78.

<sup>109</sup> See *id.* at 177.

<sup>110</sup> See HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 99, at 3.

<sup>111</sup> See Report of the Grand Jury, *supra* note 4, at 2.

are willing to make. If one seeks to avoid the unnecessary removal from the home, that decision means increasing false negatives and there will be more Danieal Kelly cases. A “family preservation first” and “parent as client” approach to child welfare is designed to minimize false positives and will lead to more false negatives. If one seeks to minimize cases like Danieal Kelly and reduce false negatives, there will be more false positives. In the name of ensuring safety and well-being, we will remove more children from their homes and terminate more parental rights.

Applying the basic law of probability theory to child welfare, it is simply impossible to reduce false positives and false negatives together. Choosing the parent as client can significantly disadvantage the safety of the child. Choosing the child as client reduces parental rights. Child welfare agencies must choose the errors they are willing to make and tolerate.

#### IV. ARGUMENTS AGAINST THE CHILD AS CLIENT

Beyond arguing that the child welfare system can meet the needs of both parents and children, balance safety, preservation, and well-being, and simultaneously reduce false positive and false negatives, there are principled arguments that imply that the child *should not* be the client. The most important argument arises out of data on the racial disproportionality found in the American child welfare system.<sup>112</sup>

##### *A. Racial Disproportionality*

University of Pennsylvania Law Professor Dorothy Roberts tells a compelling story about a foreign delegation visiting the child welfare agency in Chicago.<sup>113</sup> The guests observed the agency, the staff, the parents, and the children.<sup>114</sup> When the visit was complete, one of the members of the delegation asked if they were now going to visit the child welfare program for the white children.<sup>115</sup> In some cities, such as Chicago and Philadelphia, it would appear that the clients of the child welfare system are entirely African American. Writing in 2008, Roberts points out that in 2003, black children made up 18% of the state of Illinois’s population.<sup>116</sup> However, 68% of the children in foster care were black.<sup>117</sup>

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<sup>112</sup> See *infra* Part IV.A.

<sup>113</sup> Dorothy Roberts, Race and Child Welfare: Disproportionality, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options, Working Conference at Harvard Law School (Jan. 28–29, 2011).

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

<sup>115</sup> *Id.*

<sup>116</sup> Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 127 (2008).

<sup>117</sup> *Id.* at 127–28 (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2003: ANNUAL REPORT (2006), <http://archive.acf.hhs.gov/programs/cb/pubs/cwo03/cwo03.pdf> [<http://perma.cc/7YKD-Z8ZV>]).

Overall, the statistics on child welfare clearly indicate that African-American families and children are the disproportionate clients of the system.<sup>118</sup> Roberts, citing national data, states that “[d]espite representing only 15 percent of the nation’s children [a] black child is four times as likely as a white child to be placed in foster care.”<sup>119</sup> The conclusion Roberts and others draw from the data indicating the overrepresentation of African-American children in the child welfare system is that the system itself is racist.<sup>120</sup> Children of color are more likely to be referred as suspected victims of maltreatment, more likely to be substantiated after investigations, more likely to be removed from their homes and placed in foster care, and more likely to have their parents’ parental rights terminated.<sup>121</sup>

The statistics on race and involvement in the child welfare system are compelling. The concern over racial disproportionality has, in the words of Harvard Law Professor Elizabeth Bartholet, become a movement.<sup>122</sup> The “movement” is embodied in the Annie E. Casey, Casey Family Services, Casey Family Programs, Jim Casey Youth Opportunities Initiative, and the Marguerite Casey Foundation’s funded “Casey-CSSP<sup>123</sup> Alliance for Racial Equity.” Roberts and other leading figures such as Robert Hill, Ernestine Jones, and Dennette Derezotes are among the leaders in the effort to deal with the problem of racial disproportionality.

The statistics on racial disproportionality do not exactly speak for themselves. Indeed, there is likely a bias in child welfare services such that minority families, especially minority families living below the poverty line, are more likely to be reported and substantiated for child maltreatment.<sup>124</sup> Removal of children from homes may be easier when the children live in poverty-stricken homes and neighborhoods. But at the same time, poverty, unemployment, domestic violence, substance abuse, and other family stressors do disproportionately impact minority families.<sup>125</sup> In my own research, I have found low-income minority caregivers reporting high levels of violence toward their children.<sup>126</sup>

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<sup>118</sup> *Id.* at 127.

<sup>119</sup> Dorothy E. Roberts, *Child Welfare’s Paradox*, 49 WM. & MARY L. REV. 881, 882 (2007) [hereinafter Roberts, *Child Welfare’s Paradox*] (footnote omitted).

<sup>120</sup> *See id.* at 883.

<sup>121</sup> *See* DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 6 (2002).

<sup>122</sup> Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 871 (2009) (stating that a “powerful coalition has made ‘Racial Disproportionality’ the central issue in child welfare”).

<sup>123</sup> CSSP is the Washington, D.C. based Center for the Study of Social Policy.

<sup>124</sup> *See* Fred Wulczyn, *Epidemiological Perspectives on Maltreatment Prevention*, 19 FUTURE CHILD. 39, 53 (2009).

<sup>125</sup> *Id.*

<sup>126</sup> *See* RICHARD J. GELLES & MURRAY A. STRAUS, INTIMATE VIOLENCE 85 (1988); MURRAY A. STRAUS, RICHARD J. GELLES & SUZANNE K. STEINMETZ, BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 128–29, 134, 147–48 (1980).



Simply said, it is entirely possible that racial disproportionality arises out of both actual high rates of maltreatment among racial minorities and the selection bias that makes it easier to report, substantiate, and remove black children from their homes.

There are data that contradict the claim that bias is the main explanation for racial disproportionality. One important study that addresses the disproportionality debate is Emily Putnam-Hornstein's examination of a birth cohort of children and assessing the rates at which children became child maltreatment fatalities.<sup>127</sup> Putnam-Hornstein reports that African-American children were disproportionately likely to be victims of intentional and unintentional fatal injuries, while Asian and Latino children's fatality rates were lower than their percentage in the general population.<sup>128</sup> Assuming there is no bias or discrimination in determining child fatalities, the rates of child deaths in Putnam-Hornstein's study mirror official report data in terms of referrals for suspected child abuse.<sup>129</sup> Her study undercuts claims that disproportionality is the direct result of racism.

Irrespective of the data and the interpretations of the data, the very fact that there are compelling claims that the child welfare system's racial disproportionality is the result of racism, plays right into the hands of both those who wish parents to be the clients of the system and the core value system of the social work profession. If the child welfare system is thought to be racist, then the value of social justice implores caseworkers and supervisors to work on behalf of those who are vulnerable and oppressed. While children improperly removed from caregivers may be given lip service in the matter of racial disproportionality, the real victims of oppression and racism are the parents who are subjected to profiling and racism.

The racial disproportionality effort clearly would prefer to reduce "false positives."<sup>130</sup> The unintended result is that children of color will experience the injuries and harm caused by "false negatives." Addressing racism experienced by parents can inadvertently produce racism experienced by minority children in the form of increased maltreatment and lack of services to ensure safety and well-being.

### *B. Poverty*

Beyond the issue of racism, the issue of poverty is employed to argue that parents should be the clients of the child welfare system. The essence of the argument is that, if we would just commit ourselves to eliminating poverty, there would be no need to remove children from their homes.

Over the last forty years perhaps the most consistent finding in research on child maltreatment is that, with the exception of child sexual abuse, living below the

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<sup>127</sup> Emily Putnam-Hornstein, *Report of Maltreatment as a Risk Factor for Injury Death: A Prospective Birth Cohort Study*, 16 CHILD MALTREATMENT 163 (2011).

<sup>128</sup> *Id.* at 171.

<sup>129</sup> *Compare id.*, with Roberts, *Child Welfare's Paradox*, *supra* note 119, at 882.

<sup>130</sup> *See supra* Part III.D.

poverty line is highly related to the risk of child maltreatment.<sup>131</sup> For single parents, it is low income, not the stress of raising children alone, which explains the high rate of child maltreatment in single parent households.<sup>132</sup>

Will eliminating poverty resolve the conflict regarding who is the client of the child welfare system? Won't both children and parents benefit from a renewed effort to reduce poverty? The answer to both questions is "yes," but the process is still complex. First, a causal relationship does not mean that all poor parents maltreat their children and no parent above the poverty line abuses or neglects a child. Second, poverty is an important causal factor, but not the only causal factor.<sup>133</sup> Eliminating poverty would reduce, but not eliminate child maltreatment. Third, poverty or not, there are still some extremely bad parents in society and no increase in their income will prevent them from maltreating their children.

Any one of the four answers listed above means that we will continue to have abused and neglected children in our society for some time to come. Turning the debate about who is the client into some kind of "moral" issue—I am against poverty and those who want the child to be the client are not—serves no purpose.

### C. *Don't Worry, We Have the Solution*

A final tactic—like the argument about poverty—begs the question of who should be the client with the claim that "we have the solution." Here the tactic is not to worry about false positives and false negatives, but to claim that a new and innovative intervention will allow us to preserve families, ensure permanence, and keep children safe in their own homes.

The most widespread intervention for cases of substantiated child maltreatment programs are family preservation interventions or what is often referred to as intensive family preservation services (IFPS).<sup>134</sup> Family preservation programs are not new. They go back at least to the settlement house movement created at Hull House in Chicago by Jane Addams in 1910.<sup>135</sup> "Family preservation programs are designed

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<sup>131</sup> Gelles, *Child Abuse as Psychopathology*, *supra* note 66, at 616; Richard J. Gelles, *Poverty and Violence Toward Children*, 35 AM. BEHAV. SCIENTIST 258, 263 (1992); *see also* NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH 4 (Anne C. Petersen et al. eds., 2014).

<sup>132</sup> Richard J. Gelles, *Child Abuse and Violence in Single-Parent Families: Parent Absence and Economic Deprivation*, 59 AM. J. ORTHOPSYCHIATRY 492, 497 (1989).

<sup>133</sup> *See, e.g.*, Wulczyn, *supra* note 124, at 40–41 (emphasizing that more research is required to understand persistent patterns).

<sup>134</sup> *See* Frank Farrow, *The Shifting Policy Impact of Intensive Family Preservation Services* 1 (Univ. of Chic. Chapin Hall Ctr. for Children, Discussion Paper No. CS-68, 2001), [http://www.chapinhall.org/sites/default/files/old\\_reports/59.pdf](http://www.chapinhall.org/sites/default/files/old_reports/59.pdf) [<http://perma.cc/2EC4-7GJG>] (tracing the history of intensive family preservation services and the implementation of services in the overall child welfare system).

<sup>135</sup> Richard J. Gelles, *Family Preservation and Reunification: How Effective a Social Policy?*, in HANDBOOK OF YOUTH AND JUSTICE 367, 367 (Susan O. White ed., 2001).

to help children and families, including extended and adoptive families, that are at risk . . . or are in crisis.”<sup>136</sup> The current version of family preservation programs is “Homebuilders” developed in the late 1970s.<sup>137</sup> The goal of “Homebuilders” and all intensive family preservation services (IFPS) is to safely maintain children in their homes or to facilitate a safe and lasting reunification.<sup>138</sup> The essential features are intensive, short-term, crisis intervention.<sup>139</sup> Services are provided in the client’s home.<sup>140</sup> The length of session is variable—it is not confined to the “50 minute” clinical hour.<sup>141</sup> Services are available seven days a week, twenty-four hours a day, not just during business hours Monday through Friday.<sup>142</sup> Caseloads are small—two or three families per worker.<sup>143</sup> Services are both soft and hard.<sup>144</sup> But the most important difference between Homebuilders and traditional family reunification programs is the intensive, short-term nature of the program.<sup>145</sup> Although services can be provided daily, Homebuilders was designed to be “short-term.”<sup>146</sup> Finally, whereas traditional child welfare programs are based on a deficit model that assumes that abusive parents do not have the personal, social, or economic resources to cope with raising children, intensive family preservation programs are designed to identify and work with families around their strengths.<sup>147</sup> Thus, if a family has a strong network of relatives, the work focuses on using this network to help with family stressors or crises.

The initial evaluations of intensive family preservation programs were uniformly enthusiastic. The programs were claimed to have reduced the placement of children while at the same time assuring the safety of those children.<sup>148</sup> Foundation program officers and program administrators claimed that the families involved in intensive family preservation programs had low rates of placement and 100% safety records.<sup>149</sup> But the empirical case that abusive and neglectful families can be preserved using IFPS has yet to be made. Amid the claims and counter-claims on intensive family preservation and following the funding of the Family Preservation and Support Act of 1993, the Department of Health and Human Services funded a national evaluation

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<sup>136</sup> *Id.*

<sup>137</sup> JOAN BARTHEL, FOR CHILDREN’S SAKE: THE PROMISE OF FAMILY PRESERVATION 14 (1991).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 15.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 14.

<sup>146</sup> *Id.* at 14–15.

<sup>147</sup> *Id.* at 22.

<sup>148</sup> *Id.* at 15.

<sup>149</sup> Peter Forsythe, *Homebuilders and Family Preservation*, 14 CHILD. & YOUTH SERVICES REV. 37, 43 (1992); *see also* BARTHEL, *supra* note 137, at 15.

of family preservation and support services.<sup>150</sup> This evaluation, conducted by Westat, the University of Chicago Chapin Hall Center for Children, and James Bell Associates, examined a full range of family preservation and support programs at a number of sites across the country.<sup>151</sup> The study used a randomized clinical trial design with a variety of outcome measures, including placement, cost, and family functioning.<sup>152</sup> More important, the study evaluated IFPS that rigorously followed the “Homebuilders” model.<sup>153</sup> The multi-year project concluded that intensive family preservation programs do not reduce placement, do not reduce cost, do not improve family functioning and, most importantly, do not improve child safety.<sup>154</sup> It is not that such programs serve no useful purpose; it is that they offer no broadly effective solution to the vexing problems confronting those in the child welfare system.<sup>155</sup>

By the time sufficient research had been conducted to demonstrate that the claims for the effectiveness of intensive family services were not supported by evidence, a new intervention had been rolled out. Family Group Decision-Making employs a group conferencing model that brings together the immediate family, relatives, friends and other close supporters for the purpose of making decisions about how to stop maltreatment.<sup>156</sup> Family Group Decision-Making was initially developed in New Zealand and is now widely implemented in the United States and Canada.<sup>157</sup> Though again viewed as a promising approach, there is yet to be a body of research that supports Family Group Decision-Making as a means of preserving families and protecting children. The lack of evidence for the effectiveness of Family Group Decision-Making is not much of a deterrent for local child welfare agencies. In Philadelphia, in the aftermath of the Danieal Kelly case, the new Commissioner of the Department of Human Services implemented Family Group Decision-Making on a trial basis.<sup>158</sup>

The newest effort to help caregivers is a program entitled “Differential Response.”<sup>159</sup> “Differential Response” is designed as a means of eliminating the “one-size-fits-all” approach to child maltreatment investigations.<sup>160</sup> In addition, “Differential

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<sup>150</sup> WESTAT, INC. ET AL., EVALUATION OF FAMILY PRESERVATION AND REUNIFICATION PROGRAMS: FINAL REPORT 4 (2002).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 4–5.

<sup>153</sup> *Id.* at 3–4.

<sup>154</sup> *Id.* at 11–13.

<sup>155</sup> *Id.* at 16–17.

<sup>156</sup> Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131, 133 (2000).

<sup>157</sup> *Id.* at 137.

<sup>158</sup> CASEY FAMILY PROGRAMS, IMPROVING OUTCOMES FOR CHILDREN IN PHILADELPHIA: ONE FAMILY, ONE PLAN, ONE CASE MANAGER (2012), [http://dynamicsights.com/dhs/ioc/files/1330\\_SC%20IOC%20Philly%20Chronicle\\_sm.pdf](http://dynamicsights.com/dhs/ioc/files/1330_SC%20IOC%20Philly%20Chronicle_sm.pdf) [<http://perma.cc/Q2N4-CP7K>].

<sup>159</sup> See, e.g., Patricia Schene, *The Emergence of Differential Response*, 20 PROTECTING CHILD. 4, 4 (2005).

<sup>160</sup> Marie Connolly, *Differential Responses in Child Care and Protection: Innovative Approaches in Family-Centered Practice*, 20 PROTECTING CHILD. 8, 14 (2005).

Response” brings a more compassionate approach to the response to a report of child maltreatment.<sup>161</sup> As implied, “Differential Response” involves employing more than one method to respond to reports of suspected abuse and neglect.<sup>162</sup> “Dual Track,” “Multiple Track,” or “Alternative Response” approaches begin with the assumption that there are different kinds of reports of child maltreatment.<sup>163</sup> The goal is to divert a large percentage of the cases that traditionally are under child protective services jurisdiction to the new, voluntary “Alternative Response” or AR track.<sup>164</sup> “Differential Response” is a means of employing a less adversarial approach to suspected child maltreatment.<sup>165</sup> While some reports of suspected abuse—serious physical abuse and sexual abuse—are investigated in the traditional way, other reports, such as neglect, are approached from a service point of view.<sup>166</sup> Children are viewed as members of the community and families are offered services.<sup>167</sup>

The [AR] track is entirely voluntary for parents. At the outset, they can accept or reject the offer to participate in the AR program, with no consequence for rejecting it. They can also start down the AR track but can get off of it at any point they choose, again with no consequence.<sup>168</sup>

“Differential Response” is mainly a means of responding to the demands on resources of carrying out millions of investigations of suspected child maltreatment—most of which are ruled “unsubstantiated.” Second, “Differential Response” is a way of responding to community dissatisfaction with the traditional forms of investigations. Third, “Differential Response” is a response to concerns about differential reporting of minority families.

“Differential Response,” like intensive family preservation and family group decision-making, expanded quickly even in the absence of data supporting its effectiveness.<sup>169</sup> Local child protective service agencies may save resources by not fielding a full-scale investigation, but there still is a question about whether agencies can accurately determine which children are at dire risk of harm prior to an actual

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<sup>161</sup> See, e.g., Schene, *supra* note 159, at 4.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Ying-Ying T. Yuan, *Potential Policy Implications of Alternative Response*, 20 PROTECTING CHILD. 22, 23 (2005).

<sup>165</sup> See Schene, *supra* note 159, at 4.

<sup>166</sup> *Id.* at 5.

<sup>167</sup> Carole Johnson et al., *Child Welfare Reform in Minnesota*, 20 PROTECTING CHILD. 55, 55 (2005).

<sup>168</sup> Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 587–88 (2015).

<sup>169</sup> *Id.* at 575.

investigation. Law Professor Elizabeth Bartholet is even more critical of “Differential Response,” labeling it another fad designed to prioritize the preservation of families over the safety, well-being, and permanence of children.<sup>170</sup>

From IFPS to FGDM and finally DR, the accumulation of acronyms adds up to be a consistent multi-decade focus on the parent as the client of the child welfare system. All the interventions focus their efforts on parents and caregivers. The overt goals of the programs are the preservation of families and providing parents empowerment and resources to care for their children.

#### CONCLUSION

For people outside of the child welfare system, the assumption is that the obvious client of the system is the child. What should be a one-sentence article about who is the client of the child welfare system—the child is the client—turns into a significantly longer examination of the culture, structure, and forces that place parents and caregivers as the essential and main clients of the child welfare system.

That the child is not the client is not the result of a liberal conspiracy or a liberal value system dominating the child welfare system. Parents and caregivers have been the main clients of the system since at least the 1980s, if not longer. However, as long as parents and caregivers are the core clients of the system, we will continue to experience many cases like the tragic and preventable death of Danieal Kelly.

The simple thought that concludes this Article is that the child welfare system will never be able to ensure the safety and well-being of children unless and until it places the child as the client, makes decisions with the child’s safety and well-being as the most important goal, and makes decisions with a child’s sense of time. Children must not be held “hostage” in out-of-home care while waiting for services to be delivered to parents or waiting for parents to engage with the services. Children under three years of age, whose brains are in the most critical development period, must have permanency and safety plans implemented quicker and more effectively than older children. Postponed services and judicial hearings may have little to no developmental impact on parents but will always have developmental impacts on young children.

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<sup>170</sup> *Id.* at 642.

