HEALTHY MOTHERS, HEALTHY BABIES: A REPRODUCTIVE JUSTICE RESPONSE TO THE "WOMB-TO-FOSTER-CARE PIPELINE"

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Jennifer[1] was 20 years old and had a three-year-old son in foster care. Her son had been removed from her care after Jennifer had a violent fight with his father in a city homeless shelter and both parents were arrested. It had taken months, but Jennifer's criminal case had been dismissed, she had separated from her son's father, and she had begun to fulfill the onerous requirements the Administration for Children's Services ("ACS") had said were necessary before her son returned home. These included submitting to a mental health evaluation and individual therapy, completing anger management and parenting classes, and locating suitable housing. She saw her son just once a week for two hours in a small, joyless room at the same foster care agency where she had once visited her own mother. Now it was her every move that was judged by the watchful eyes of a caseworker.

Then she learned she was pregnant. Jennifer was terrified that the ACS caseworkers would discover she was expecting a baby. Having grown up in foster care herself and with one child already in state care, she was terrified to lose another. She considered an abortion. Fearing her pregnancy would be reported if it was discovered, she avoided prenatal care, missed several of her service appointments, and wore baggy clothing to the visits with her son. When her pregnancy was detected, her reproductive choice to have a child was met mostly with scorn and disdain by ACS caseworkers. Jennifer spent her pregnancy riddled with anxiety and dread about what would happen after she delivered her baby.

Her fears were not unfounded. When her daughter was born, the hospital placed her on a "social hold," not allowing Jennifer to take her home. ACS convened an automatic meeting pursuant to its policy Child Safety Alert 14,[2] where they told Jennifer that because she had not completed her service plan for her son and was at risk of entering another volatile relationship, her baby would be removed. As is common at meetings held after a baby is born to a woman with children in foster care, caseworkers referred to Jennifer, not by name, but as the "bio mom" and her baby as the "afterborn,"[3] to define her birth as being after Jennifer's child

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[1] The names and some of the salient facts of the examples in this article have been changed to protect the privacy of our clients and their stories.

[2] Memorandum from John B. Mattingly, Comm'r, N.Y.C. Admin. of Children's Servs., Safety Planning for Newborns or Newly Discovered Children Whose Siblings Are in Foster Care: Child Safety Alert #14 (Revision) (June 5, 2008) [hereinafter "Child Alert 14"], https://nycfuture.org/images_pdfs/pdfs/NewbornsPolicy.pdf [https://perma.cc/L2CZ-Z64X].

[3] THE CHILD WELFARE ORG. PROJECT ET AL., THE SURVIVAL GUIDE TO THE NYC

protection case had commenced. At no time during her pregnancy did anyone meet with Jennifer to plan for the birth of her expected child. No one supported Jennifer's parenting by asking her what she needed so that she could prepare to care for her arriving child. No one advised her of housing options for pregnant women or helped her find a GED program so she could get her degree. No one considered that Jennifer's relationship with the father of her son was over or spoke to Jennifer's therapist. No one considered the ways in which Jennifer's newborn would be at a disadvantage in state care, having lost the opportunity to nurse, bond, and be held by her mother. No one advocated or supported Jennifer in her negotiations with ACS. Instead, ACS summarily devalued Jennifer as a mother and took her newborn from the hospital, sending Jennifer to heal on her own.

The research is clear that removing children from their parents and all that is familiar has devastating consequences.[4] Yet the child protection system[5] rarely seriously considers the high likelihood of trauma and long-term emotional and psychological harm to newborns when they are removed from a parent and placed in foster care. This is true even where there is scant evidence that they are unfit to raise their children; the fact that they are already child-protection-system-involved (hereinafter also referred to as "system-involved") is considered reason enough to take the new baby away, even if a mother's situation has changed. It is no wonder pregnant women who have children in New York City's child protection system, like Jennifer, are terrified that their newborn will be removed and cast into the perilous foster care system.

The Bronx Defenders,[6] a community-based holistic public defense organization established in 1997, has long recognized that the prison, deportation, and foster care systems are punitive

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CHILD WELFARE SYSTEM: A WORKBOOK FOR PARENTS BY PARENTS 39 (2d ed. 2007), http://advocatesforpregnantwomen.org/survivalguide2007english.pdf [https://perma.cc/P98T-F2HX].

4 *See, e.g.*, Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70 (2008).

5 This article is about child protection as a system rather than about the specifics of protecting children. The use of "child protection system" rather than "child welfare system" reflects the belief that today's system, in its daily operations, fails to comprehend child abuse and neglect appropriately as a social problem rooted in poverty and thus fails to improve the well-being or welfare of children or their families.

6 *Our Mission and Story*, BRONX DEFENDERS, http://www.bronxdefenders.org/who-we-are/ [https://perma.cc/L52U-5U9W] (last visited Nov. 20, 2016).

mechanisms to monitor and regulate the residents of low income neighborhoods with few public or private resources. In communities like the South Bronx, where child protection system involvement is concentrated and high rates of child removals exist,[7] the degree of state supervision over parents facilitates the reproductive oppression of the entire community. Indeed, for babies born to women involved in the child protection system in the South Bronx, there exists a virtual "womb-to-foster-care" pipeline. Much like the "school-to-prison" pipeline, a term used to describe the ways in which marginalized and at-risk schoolchildren are pushed out of the public education system into the juvenile and criminal justice systems,[8] the womb-to-foster-care pipeline refers to the policies and practice of the current child protection system that push impoverished newborns, especially babies born to system-involved families, who are predominantly low-income and of color, out of the womb and into the foster care system. This pipeline reflects the systemic inequality within which the child protection system operates and the disregard for the critical bond between a newborn and her mother. The fear of having one's newborn taken often causes system-involved pregnant women, like Jennifer, to attempt to hide their pregnancies, thus thwarting their planning for the return of older children and seeking essential services, and ultimately making them even more vulnerable to family disruption and other adverse effects.

Armed with the understanding that parents in the South Bronx, the majority of whom are low income people and people of color, are disproportionately vulnerable to the dissolution of their families, and that high quality legal representation for parents could prevent the unnecessary and traumatic removal of children from their homes and families, we have, for more than a decade, provided family defense advocacy and fought for the rights of parents in this community to raise their children. This article discusses the *Healthy Mothers, Healthy Babies* ("HMHB") project,[9] a project developed by and contained within the Family Defense Practice at The Bronx Defenders, created in 2013 in response to a

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[7] Bree Akesson et al., *Parental Involvement with the Criminal Justice System and the Effects on Their Children: A Collaborative Model for Researching Vulnerable Families*, 27 SOC. WORK PUB. HEALTH 148, 152, 155 (2012).

[8] *School-To-Prison Pipeline*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/racial-justice/race-and-inequality-education/school-prison-pipeline [https://perma.cc/QD79-DG2Z] (last visited Nov. 20, 2016).

[9] *Healthy Mothers Healthy Babies*, BRONX DEFENDERS, http://www.bronxdefenders.org/programs/healthy-mothers-healthy-babies [https://perma.cc/C8FR-WFDC] (last visited Nov. 20, 2016).

specific policy of New York City's child-protection-system called Child Safety Alert 14 ("CSA 14"). CSA 14, detailed in Section III, is an ACS policy that determines the fate of children born to women with older children in foster care.[10] This policy, and the agency practices driven by CSA 14, provides for very little family preservation planning with a system-involved pregnant woman prior to birth and strongly favors the baby's automatic removal and separation from his or her mother. And just as when a mother's older child or children were removed, the child protection system will use assessments based in misconceptions and assumptions about poverty, race, disability, and history with the child protection system, rather than those based upon the risk actually posed by the mother to her newborn or how her living conditions could be improved with meaningful material support, to determine whether the newborn can stay in the care of her mother. Rooted in contemporary reproductive justice ideology, HMHB seeks to disrupt the womb-to-foster-care pipeline by responding specifically to the inequalities perpetuated by the child protection system, and to the coercive operation of CSA 14 that further entrenches our clients and their families in the system by virtually ensuring each newborn's placement in foster care.

I. The Reproductive Justice Movement's Call to Interrogate the Child Protection System

The law-focused reproductive rights movement has not traditionally concerned itself with the child protection system. Reproductive justice ("RJ") is a term coined by feminists of color who sought to place a discussion about reproductive rights within a broader conversation about social and racial justice.[11] The RJ movement is distinct from the dominant reproductive rights movement, which focuses specifically on improving women's access to reproductive health care and advocating for legal reproductive

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10 *See* Child Alert 14, *supra* note 2.

11 *See* Loretta Ross, *Understanding Reproductive Justice: Transforming the Pro-Choice Movement*, 36 Off Our Backs, no. 4, 2006, at 14, 14-19; *see also* Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 328-30 (2013) (discussing the reproductive justice movement and its relationship to law, academic scholarship, and social movements); *see generally* Asian Communities for Reproductive Justice, A New Vision for Advancing Our Movement For Reproductive Health, Reproductive Rights and Reproductive Justice (2005), http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf [https://perma.cc/6QZW-E7K6] (discussing the organization's role in the Reproductive Justice movement and discussing the movement's placement within a social justice framework).

rights.[12] Although increasing access to health care and legal rights are also important aspects of the RJ vision, the movement has demonstrated the limitations of the popular narrative of "choice," which has come to mean the choice to have an abortion.[13] RJ advocates have moved beyond the narrow focus on abortion[14] and advocated for the realization of the full range of reproductive decisions, placing equal importance on the right to have a child, the right not to have a child, and the right to parent the children one has with dignity.[15]

The RJ framework specifically requires us to "integrate analysis of race, class, and immigration status into analysis of reproductive politics, thereby better illuminating multiple power structures that prevent[ ] the realization of reproductive rights and the achievement of broader reproductive justice."[16] RJ thought leaders recognize that when the reproductive and parenting experiences of women of color are considered, a history of targeting, surveilling, discouraging, and regulating the reproductive decisions of such women in the United States is revealed. For example, read together, Dorothy Roberts's books *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty*[17] and *Shattered Bonds: The Color of Child Welfare*[18] offer an unflinching analysis of the historical regulation of black women's reproduction and its modern day vestiges. Starting with slavery and continuing through our country's shameful history of sterilization programs and birth control laws, Roberts demonstrates how efforts designed to curtail black reproduction and the mythology of black mothers' unfitness has cast black childbearing as a "dangerous activity."[19]

The RJ movement calls upon those committed to reproductive justice to "interrogate the lasting consequence of the racist (and classist and sexist) ideology that these programs have legitimated

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12 *See, e.g.*, *Our Mission*, Ctr. for Reproductive Rights, http://www.reproductiverights.org/about-us/mission [https://perma.cc/47XC-2BU2] (last visited Sept. 27, 2016).

13 Luna & Luker, *supra* note 11, at 328.

14 Numerous texts and books offer an able analysis of the history of reproductive politics and questioning of the mainstream reproductive movement's consistent reliance on the market logic of choice that is beyond the scope of this article. *See, e.g.*, Abortion Wars: A Half Century of Struggle, 1950-2000 (Rickie Solinger ed., 1998).

15 Ross, *supra* note 11, at 14; Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 6 (1997).

16 Luna & Luker, *supra* note 11, at 335.

17 Roberts, *supra* note 15.

18 Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2003).

19 *Id.*

and perpetuated long after laws were struck down or programs formally dismantled."[20] Accordingly, the RJ movement has effectively focused on issues that concern the rights of disenfranchised women to reproduce and raise one's children, such as the empowerment of teen mothers, the shackling of incarcerated women giving birth in jails and prisons, and the termination of parental rights of incarcerated women.[21] Although Roberts, in her study of the Chicago child protection system, as well as other leaders in the movement, have effectively argued that the child protection system punishes and devalues black motherhood,[22] less attention has been paid by the national RJ movement to reforming or resisting the daily operation of the system in this country. Heeding the call of the ideals that underlie the RJ movement that fully incorporate the rights of all women to give birth to and raise their children, HMHB was designed to concern itself with advocating on behalf of low-income mothers of color who are systematically disadvantaged by the operation of the child protection system in their lives.

II. The Child Protection System Reflects and Reinforces Reproductive Stratification in American Society

If an RJ framework calls attention to the need to support a broader range of nurturing activities than those covered by the traditional conception of choice, the term "stratified reproduction" gives us a way to talk about the underlying structural power imbalances that impede this support.[23] The concept of stratified reproduction posits that certain categories of people in a society are encouraged to reproduce and parent, but others are not.[24] In other words, an individual's position within other social hierarchies such as race or class results in the valuation of some people's repro-

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20 Luna & Luker, *supra* note 11, at 337 (summarizing Roberts, *supra* note 15).

21 *Id.* at 328-29.

22 *See, e.g.*, Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. Mich. J.L. Reform 683, 768 (2001).

23 *See* Shellee Colen, *"Like a Mother to Them": Stratified Reproduction and West Indian Childcare Workers and Employers in New York*, *in* Conceiving the New World Order: The Global Politics of Reproduction 78 (Faye D. Ginsburg & Rayna Rapp eds., 1995), http://n.ereserve.fiu.edu/010007385-1.pdf [https://perma.cc/7HXJ-YMWS]. Stratified reproduction is a term coined by Shellee Colen in her classic 1986 study of West Indian nannies and their (female) employers in New York City, which found inequalities of race, class, gender, culture, and legal status played out on a domestic and transnational field. *Id.* at 97-98.

24 Harriet M. Phinney et al., *Obstacles to the 'Cleanliness of Our Race': HIV, Reproductive Risk, Stratified Reproduction, and Population Quality in Hanoi, Vietnam*, 24 Critical Pub. Health 445, 446 (2014).

duction and the devaluation of others.[25] The RJ movement requires us to examine and seek to eradicate the way systems create and perpetuate reproductive stratification by devaluing the reproductive choices of some. We view the child protection system, as a whole, as a system that reflects and reinforces a system of reproductive stratification. The disruptive formula of CSA 14, which almost guarantees that newborns born to system-involved mothers will also have child-protection-system-involvement, is best understood when viewed through a reproductive justice lens and in the context of this system.

A. The Child Protection System is a Dystopia Reserved for Poor Families of Color

It is a widespread misconception that parents lose their children to foster care because they have abused or abandoned them. Many people outside and inside the system believe that the parents whose children have been taken and placed in foster care have done harm to their children and that foster care is necessary positive protection. In fact, the child protection system is unequally applied to poor families, mostly of color, for allegations related to child neglect, not abuse. More than 60% of the allegations made against parents in New York City in 2013 were for charges of neglect.[26] This pattern holds across the country, with over 78% of maltreated children in the U.S. experiencing neglect rather than some form of physical or mental abuse.[27]

Even more telling about the system is that allegations of neglect—such as failing to provide adequate food, shelter, or medical care to a child—often reflect conditions of abject poverty, rather than parental failure or ill will. Studies have shown that families who are "below the poverty line are twenty-two times more likely to be involved in the child protective system than families with incomes slightly above it."[28] This means that despite the myriad studies showing that children are better off staying with their parents,

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25 *See id.*

26 *New York City*: *Allegations of Abuse and Neglect*, CITIZENS' COMMITTEE FOR CHILD. N.Y.: KEEPING TRACK ONLINE, http://data.cccnewyork.org/profile/location/1/city#1/new-york-city/1/1193,1194/a/a [https://perma.cc/VW88-NZ67] (last visited Nov. 20, 2016) (listing "educational neglect," "lack of medical care," and "neglect" as accounting for 60.6% of all allegations).

27 DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICAN'S MOST VULNERABLE CITIZENS 14 (2016).

28 Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, *in* REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 1, 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

discussed *infra* Section IVC,[29] mothers and fathers are at risk of losing custody of their children merely because of the effects of their economic and social deprivation, including lack of access to health and prenatal care, inadequate or unstable housing, unemployment, mental health issues or cognitive disabilities, and substance abuse or dependence. Although the parents in the child protection system are overwhelmingly poor and have faced structural hardship throughout their lives, not all people who are poor neglect their children and not all people who harm their children are poor. The point is that poverty—*not* the kind or severity of child mistreatment—is the leading predictor of both placement into foster care and the amount of time that children spend separated from their parents.[30] Thus, rather than serve to protect all children equally from parents who abuse them, the child protection system, with its power of child removal and reliance on foster care, is the system designated to address the social disadvantages of poor families.

Multiple theories exist for why low-income families are disproportionately represented in the child protection system, with many possible risk factors acting together to make less privileged communities particularly vulnerable to system involvement. Some scholars argue that the correlation between poverty and child maltreatment exists because of the stress on parents caused by the relentless and exhausting circumstances of poverty and limited support.[31] Others argue that poor families are simply more susceptible to reports of

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29 *See, e.g.*, Joseph J. Doyle Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POLITICAL ECON. 746, 760-61 (2008) (comparing young adults who had been in foster care to a group of adults who had been similarly neglected but remained with their families and finding that, compared to the group who stayed with their birth families, those placed in foster care were more likely to be arrested).

30 *See* Leroy H. Pelton, *The Continuing Role of Material Factors in Child Maltreatment and Placement*, 41 CHILD ABUSE & NEGLECT 30, 35 (2014) ("Children in foster care have been and continue to be placed there from predominantly impoverished families."); *see also* ROBERTS, *supra* note 18, at 27, 29 (noting that "[p]overty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care and the amount of time spent there" and describing the "high and well-established correlation between poverty and cases of child abuse and neglect"); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, 192-93 (2005) ("[O]nly a very small percentage of children in foster care have suffered serious forms of maltreatment."); *cf.* Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE CHILD., Spring 1998, at 88, 100 ("The political debate over how poor children will be protected in the postreform era has often betrayed a poor understanding of the interdependence of the child welfare system with the welfare system.").

31 ROBERTS, *supra* note 18, at 31.

child neglect because of their daily interactions with government services.[32] Women living in low-income communities are more likely to use public services like schools, hospitals, and public benefits than women of relatively greater privilege, which increases their visibility and exposes them to increased government scrutiny and surveillance.[33] Still others argue that neglect and poverty are conflated, and conditions such as inadequate housing, lack of childcare, or an ability to get quality effective services for mental health and addiction problems are simply labeled child neglect by authorities and wrongfully treated as a failure of will rather than a product of poverty and social inequality.[34] Indeed, state laws, including New York's, also make the confusion of poverty with neglect almost inevitable by including conditions of poverty in the statutory definition of child neglect.[35]

Regardless of why the child protection system is reserved almost exclusively for families of low wealth, families living in the Bronx are particularly vulnerable to child protection involvement. The neighborhood of the South Bronx, where The Bronx Defenders is located, is in the heart of the poorest congressional district in the United States and home to some of the most disenfranchised people in New York City.[36] The Bronx has the highest rates of eviction, unemployment, public benefits enrollment, and child-protection-system-involvement in the state. Here, according to the 2014 American Community Survey, 43.3 percent of children under 18 and 27.5 percent of adults live below the poverty line.[37] Community District 1, encompassing much of the South Bronx where our

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32 Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. Rev. 577, 584 (1997).

33 *See* Roberts, *supra* note 18, at 173; Tina Lee, Catching a Case: Inequality and Fear In New York City's Child Welfare System 80-83 (2016).

34 *See generally* Julia Krane & Linda Davies, *Mothering and Child Protection Practice: Rethinking Risk Assessment*, 5 Child & Fam. Soc. Work 35 (2000); *see also generally* Karen J. Swift, Manufacturing "Bad Mothers": A Critical Perspective on Child Neglect (1995).

35 *See, e.g.*, N.Y. Fam. Ct. Act § 1012(f) (McKinney 2016).

36 Lee A. Daniels, *The Talk of the South Bronx; South Bronx Residents Try to Change the Odds*, N.Y. Times (Apr. 11, 1981), http://www.nytimes.com/1981/04/11/nyregion/the-talk-of-the-south-bronx-south-bronx-residents-try-to-change-the-odds.html [https://perma.cc/EMU2-Z98P]; Foster Kamer, *The Poorest Congressional District in America? Right Here, in New York City*, Village Voice (Sept. 30, 2010, 5:00 PM), http://www.villagevoice.com/news/the-poorest-congressional-district-in-america-right-here-in-new-york-city-6725868 [https://perma.cc/2YQX-5KNP].

37 N.Y.C. Dep't of City Planning, DP03: Selected Economic Characteristics, 2014 American Community Survey 1-Year Estimates New York City and Boroughs (2015), http://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/acs/econ_2014acs1yr_nyc.pdf [https://perma.cc/M243-Z8S2].

office is situated, has a median income of just $16,800 per year,[38] with 60 percent of residents receiving some form of public assistance.[39] Bronx County has the highest rates of both high school non-completion and unemployment in the state.[40] Families in the Bronx experience homelessness at higher rates than in any other borough: in 2010, more than one-third (37%) of all family shelter applications in New York City came from the Bronx, and nearly all applicants (92.8%) were either black (52.8%) or Hispanic (40%).[41]

Each year, thousands of children whose families are suffering from the confluence of these structural issues are taken from their parents and placed in foster care. In 2015, Bronx County had a total of 1,219 foster care placements, more than 30% of the total foster care placements for all of New York City.[42] Because of its critical absence of resources, mothers and fathers living in the South Bronx are particularly vulnerable to the interventions of the child protection system. While it's necessary to have a mechanism for investigating reports of maltreatment and protecting children who are, in fact, being abused, the overwhelming over-representation of poor families in the system reflects that this mission has been abandoned. Rather than protecting children who are truly in need of protection by the state, the current child protection system reflects the social hierarchy of reproduction that exists in American society.

Not only are the families that populate the child protection system almost exclusively low income, they are also disproportion-

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38 N.Y.C. Dep't of City Planning, Community District Needs: Fiscal Year 2013 for the Borough of The Bronx 27 (2012), http://www1.nyc.gov/assets/planning/download/pdf/about/publications/bxneeds_2013.pdf [https://perma.cc/HJN4-ALV6].

39 *Id.* at 8.

40 For the cohort of children entering high school in 2011, Bronx County had a 13.1% dropout rate, compared with 8.3% for Kings County, 7.7% for New York County, 7.9% for Queens County, and 7.5% for Richmond County. N.Y.C. Dep't of Educ., Cohorts of 2001 through 2011 (Classes of 2005 through 2015) Graduation Outcomes, http://schools.nyc.gov/NR/rdonlyres/EA0009CA-63C4-42AC-BFCA-9DE083DE779F/0/2015Graduation_Rates_Public_Borough.xlsx [https://perma.cc/NW5J-PVCW]; N.Y. State Dep't of Labor, Counties Ranked By Unemployment Rate (2016), https://labor.ny.gov/stats/ur_rank.xls [https://perma.cc/2PV9-RAH3].

41 Ralph da Costa Nunez et al., Inst. for Children, Poverty, & Homelessness, A Bronx Tale: The Doorway to Homelessness in New York City 1-2 (2012), http://www.icphusa.org/PDF/reports/ICPH_brief_ABronxTale.pdf [https://perma.cc/A6ET-E8RB].

42 N.Y.C. Admin. for Children's Servs., Child Welfare Indicators Annual Report 2015 (2016), https://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/CityCouncilAnnualReport.pdf [https://perma.cc/FV5C-HBXQ].

ately families of color. The racial disparity of children in foster care mirrors the far more publicized and criticized racial disparity in our nation's prison population.[43] For more than a decade, black children have made up the majority of children in the United States child protection system, despite making up a relatively small portion of the nation's population.[44] A national study of child protective services by the U.S. Department of Health and Human Services reported that "minority children, and in particular African American children, are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children[.]"[45]

While racial disproportionality exists in foster care nationally, statistics from New York City illuminate the extent to which foster care placements are concentrated in poor communities of color:

> In 2008, African American children accounted for 27 percent of the children under the age of eighteen in the city but comprised a staggering 57.1 percent of the foster care population. In contrast, 24 percent of the children under age eighteen in New York City were white, but white children comprised only 4 percent of the foster care population.[46]

Dorothy Roberts's description is on point: "[i]f you go into dependency court in . . . New York . . . without any preconceptions, you might conclude that the child welfare system is designed to monitor, regulate, and punish black mothers[,]"[47] causing her to rightfully conclude that "[t]he fact that the system supposedly designed to protect children remains one of the most segregated institutions in the country should arouse our suspicion."[48]

While the fact that black children are more likely to live in poor families than white children could account for, in part, the

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[43] *See, e.g.*, Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. Rev. 1474, 1477 (2012) (footnote omitted) ("About one-third of women in prison are black and most were the primary caretakers of their children. About one-third of children in foster care are black, and most have been removed from black mothers who are their primary caretakers.").

[44] *See, e.g.*, Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS.org: Frontline, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html [https://perma.cc/K3U3-VJZJ] (last visited Sept. 27, 2016) ("Black children make up more than two-fifths of the foster care population, though they represent less than one-fifth of the nation's children.").

[45] James Bell Assocs., Bridging the Gap Between Child Welfare and Communities 3 (2002), http://www.acf.hhs.gov/sites/default/files/opre/bridg_gap.pdf [https://perma.cc/EN7P-QLNS].

[46] Lee, *supra* note 33, at 5-6.

[47] Roberts, *supra* note 43, at 1483.

[48] Roberts, *supra* note 18, at vi.

disproportionate representation of black children in the child protection system, there is also evidence that racial bias plays a role in decision-making practices throughout the child protection system.[49] Social science and medical research reveals a disturbing prevalence of race and class disproportionality with respect to when and how alleged child abuse and neglect claims are reported to and handled by child protection authorities. For example, in 2006, the Casey-CSSP Alliance for Racial Equity in the Child Welfare System undertook a comprehensive review of existing research studies regarding race and class disproportionality in the child welfare system.[50] It found that "[m]ost of the studies reviewed identified race as one of the primary determinants of decisions of child protective services at the stages of reporting, investigation, substantiation, placement, and exit from care."[51] Among other things, it found (1) that most research studies suggest that race alone or race interacting with other factors is strongly related to the rate of child welfare investigations; (2) that African American women were more likely than white women to be reported for child abuse when their newborns had tested positive for drug use; (3) that child maltreatment is reported more often for low-income than middle- and upper-income families with similar presenting circumstances; and (4) that hospitals over report abuse and neglect among African Americans and under report maltreatment among whites.[52] Studies also indicate that African American women are more likely to experience intrusive child welfare interventions because their newborn children are more likely to be screened for drugs than children of other races,[53] despite the lack of any evi-

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[49] *Id.* at 47.

[50] ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE 1 (2006), http://www.cssp.org/reform/child-welfare/other-resources/synthesis-of-research-on-disproportionality-robert-hill.pdf [https://perma.cc/JDP4-SWAR].

[51] *Id.*

[52] *Id.* at 18-20; *see also* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (comparing results of universal testing with the number of cases reported to child welfare authorities, and concluding that pursuant to discretionary testing "a significantly higher proportion of black women than white women were reported," even though their rates of substance use during pregnancy were similar).

[53] *See* Marc A. Ellsworth et al., *Infant Race Affects Application of Clinical Guidelines When Screening for Drugs of Abuse in Newborns*, 125 PEDIATRICS 1379 (2010) (finding that providers seemed to have used race, in addition to recognized risk criteria, as a factor in deciding whether to screen an infant for maternal illicit drug use); *see also* Troy Anderson, *Hospital Staff More Likely to Screen Minority Mothers*, L.A. DAILY NEWS (June 30, 2008, 12:01 AM), http://www.dailynews.com/article/zz/20080630/NEWS/

dence-based research supporting race or any other factor as a basis for screening some women and not others.[54] African American women also experience disproportionate state interventions because they lack access to maternal health services, leading to greater rates of health problems among African American infants.[55] Racial disproportionality in reporting certainly is not limited to cases involving the use of illegal drugs.[56] One retrospective study showed that doctors failed to detect abusive head trauma twice as often in white children as in minority children,[57] showing that physicians more often referred black children for child abuse investigation than white children. Another study showed that black and Hispanic toddlers hospitalized for fractures between 1994 and 2000 were more than twice as likely to be evaluated for child abuse and more than twice as likely to be reported to authorities than white children.[58]

In addition to being more likely to become ensnared in the child protection system, families of color tend to fare much worse than white families once a case has been opened. Studies have shown that minority children are more likely than white children to be placed in foster care, even when they have the same characteristics as white children.[59] An initial placement in foster care

806309944 [https://perma.cc/MAA6-7ZNG] ("There is very strong evidence that hospital staff are more likely to suspect drug use on the part of black mothers and these mothers are more likely to have their children removed and put in foster care . . . ."); Brenda Warner Rotzoll, *Black Newborns Likelier to be Drug-Tested: Study*, CHI. SUN-TIMES, Mar. 16, 2001, at 18 ("Black babies are more likely than white babies to be tested for cocaine and to be taken away from their mothers if the drug is present, according to the March issue of the Chicago Reporter.").

54 *See* Marylou Behnke et al., *Multiple Risk Factors Do Not Identify Cocaine Use in Rural Obstetrical Patients*, 16 NEUROTOXICOLOGY & TERATOLOGY 479, 481-83 (1994) (finding that criteria established by a hospital for testing certain women were not effective in predicting which women were more likely to have used an illegal drug).

55 *See* AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA 19-20, 25-26 (2010), https://www.amnestyusa.org/sites/default/files/pdfs/deadlydelivery.pdf [https://perma.cc/96LB-RTDW]; ROBERTS, *supra* note 15, at 172.

56 *See* Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 117 (2008) (finding that there may be racial and economic differences in who reports, who gets reported, and the types of maltreatment that are reported, resulting from discrimination, including from the top sources of reports to CPS hotlines: educational staff, law enforcement officials, social service employees, and medical personnel).

57 Carole Jenny et al., *Analysis of Missed Cases of Abusive Head Trauma*, 282 JAMA 621, 623 (1999).

58 Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1606 tbl. 2 (2002).

59 *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 8 (2007) [hereinafter GAO-07-816]; ROBERTS, *supra*

greatly increases the risk that parents will have their custodial rights permanently terminated.[60] Once in foster care, black children suffer worse consequences—they remain in foster care longer, are moved from home to home more often, and receive less desirable placements than white children.[61] Black children who are removed from their homes stay in care for an average of nine months longer than white children do.[62] Increased lengths of stay in foster care are particularly significant because the chances a child will reunify with his or her parent begin to decrease rapidly after the first five months of placement.[63] Although the intention of the child protection system may not be to dissolve poor families and, in particular, poor families of color, the families most surveilled and most often destroyed by the system are almost always poor and disproportionately African American,[64] reflecting the disenfranchised status of their reproduction.

B. The Child Protection System Devalues the Childrearing of Poor, Mostly of Color, Parents by Treating Poverty and Its Social Disadvantage As A Personal Failing

Regardless of whether family poverty causes, reflects, or reveals child abuse or neglect, parents in the child protection system face numerous real barriers and material disadvantages in raising their children that the system cannot and does not address. Almost all of the parents in the system lack safe, adequate, and permanent housing, meaningful employment, quality child care and schools, safe neighborhoods and sufficient income and resources—all things relied upon by the more privileged to raise

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note 18, at 17 (discussing that African American children are less likely to receive family preservation services and are more likely to be removed from their families than white children in similar situations).

60 Guggenheim, *supra* note 28, at 17 ("When children are placed in foster care, children and parents face a very high risk of having their relationship permanently severed. Once children are removed from the custody of their parents, the functional—if not legal—burden of proof often shifts to the parents to show that the return of the children to their custody is both appropriate and consistent with the best interests of the children. When parents do not have custody of their children, it is difficult to show that under the current conditions in the home the parents can care adequately for them.").

61 ROBERTS, *supra* note 18, at 19.

62 GAO-07-816, *supra* note 59, at 26; *see also* Ruth G. McRoy, *Acknowledging Disproportionate Outcomes and Changing Service Delivery*, CHILD WELFARE, Mar./Apr. 2008, at 205, 205.

63 ROBERTS, *supra* note 18, at 19.

64 Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 602-04 (2011).

their children. As Tina Lee observes in her recently published, in-depth exploration of Bronx Family Court and child protection services,

> [t]he child welfare system is asked to deal with the profoundly detrimental effects of social inequalities with few resources and practically no ability to confront the roots of family problems: lack of income and meaningful jobs, lack of decent housing, the stress of living in poverty and parenting under difficult circumstances, and few services to deal with issues such as drug abuse and domestic violence.[65]

The system is not designed or equipped to "make the lives of families better."[66] Jennifer A. Reich, in her book *Fixing Families: Parents, Power, and the Child Welfare System*, similarly observes that, while well intentioned, those charged with child protection who confront the very real problems faced by system-involved families are able to "do little more than provide proverbial Band-Aids to gaping wounds."[67] For example, a study of "lack of supervision" cases in New York City by the Child Welfare League of America found that in 52 percent of the cases studied, the service needed most was child care, but the "service" offered most was foster care.[68] Other studies have found that families are kept apart solely because they lack decent housing, yet the system is unable to ensure that entire families are stably housed.[69]

Unable to address the roots of the problems that system-involved families experience, the system locates responsibility for child neglect with individual parents, rather than with the failure of multiple social service safety nets or racial and economic inequality.[70] As Lee observes, tying help for parents struggling with poverty, drug addiction, domestic violence, and mental illness so closely to investigation, surveillance, child removal, and the ultimate dissolution of the family undermines the system's ability to

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65 Lee, *supra* note 33, at 183.

66 *Id.* at 184.

67 Jennifer A. Reich, Fixing Families: Parents, Power, and the Child Welfare System 4 (2005).

68 *See* Mary Ann Jones, Parental Lack of Supervision: Nature and Consequence of a Major Child Neglect Problem 29, 40 (1987).

69 *See* Deborah S. Harburger & Ruth A. White, *Reunifying Families, Cutting Costs: Housing–Child Welfare Partnerships for Permanent Supportive Housing*, Child Welfare, Sept./Oct. 2004, at 493, 502-05.

70 The history of the transformation of the US child welfare system from one that focused on rescuing children from poverty to one focused on rescuing children from their parents is ably told by child welfare scholars. *See, e.g.*, Roberts, *supra* note 18; Lee, *supra* note 33; Barbara J. Nelson, Making an Issue of Child Abuse: Political Agenda Setting for Social Problems (1984).

provide meaningful support and assistance.[71] Instead, the system further perpetuates reproductive stratification by drawing lines between fit and unfit parents, while not providing the real support necessary to truly honor the reproductive decisions and child-rearing of the families in the system.[72] The toxic intervention of the child protection system is analogous to what we see in the criminal legal system, which deals punitively with problems that also have their roots in poverty and racism.[73] In the child protection system, however, parents are asked to meet unreachable standards of proper parenting and child-rearing while the children, rather than the parents, serve the time away from their families.

Over the last few decades, the challenges that low-income families experience in the child protection system have grown even more acute. As social services and substantive supports for poor families have become scarcer, the child protection system has grown to increasingly focus on family dissolution and adoption as the resolution of child neglect. In the same decade that the federal government reconfigured welfare and transformed Aid to Families with Dependent Children ("AFDC") into today's Temporary Aid to Needy Families ("TANF"),[74] a time-limited program replete with sanctions and work requirements and a life-time ban on welfare and food stamps eligibility for anyone convicted of a felony drug offense, Congress also transformed child protection by passing the Adoption and Safe Families Act ("ASFA").[75] ASFA defined categories of parents who should not be provided an opportunity to regain custody, shortened the window of time in which parents who are eligible for services can regain custody, and articulated a greater preference for adoption whenever possible.[76] This combined reform resulted in increased scrutiny of parenting by low-income people, added new hurdles for parents to overcome, and shortened the timelines by which parents must meet the expecta-

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71 *See* LEE, *supra* note 33, at 183.

72 *See id.* at 80.

73 Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment*, *in* DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY 322, 329-31 (Hazel Rose Markus & Paula M.L. Moya eds., 2010), http://scholar.harvard.edu/files/bobo/files/2010_racialized_mass_incarceration_doing_race.pdf [https://perma.cc/2AUZ-AKKF].

74 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601) (eliminating the AFDC program and creating TANF in its place).

75 *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C.§ 1305).

76 *Id.*

tions of the state in order to maintain their parental rights, all while shrinking their support and making it harder and harder for them to find what they need.[77]

In a culture in which poverty is attributed to individual deficits, parents are blamed, their disadvantage and stress pathologized, and their children removed when material assistance for the entire family might provide an effective remedy for the same issues.[78] In a system ill-equipped to address social inequalities, stereotypes of lazy and "deadbeat" parents who require re-socializing inform service plans and decision-making around removals and parental fitness.[79] The expectation that parents subordinate and show compliance comes with no alleviation from any material deprivation they might experience, even as the resources available for poor families shrink.[80] The intervention of the child protection system does not provide the material support, the parenting assistance, and the hope for a safer and better future that more-privileged parents take for granted. Rather than value and support the reproduction and child rearing of poor parents, it focuses on child removal, foster care, and the provision of services aimed at rehabilitation and the "normalization" of the parent.[81] The services offer little in the way of real help, but instead "attempt to instill proper attitudes and test to see which parents are committed and 'together' enough to regain custody."[82]

Embedded in these expectations are ideals of family life that reflect specific visions of an "optimal" parent, often inextricably re-

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77 The worsening circumstances for poor families in the United States over the past decade cannot be understated. Government data show that by 2012, circumstances for low-income families were worsening. More than 70 percent of cities reported increases in family homelessness, and almost two-thirds of cities were turning away homeless families with children from emergency shelters due to lack of resources. By 2013, family homelessness again increased, emergency food assistance requests increased, and the percentage of the total food assistance requests coming from families increased to almost 60 percent. Almost one out of four children under six years of age were living in families under the poverty threshold. *See* HATCHER, *supra* note 27, at 13.

78 Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 61-64 (2003).

79 *Id.*

80 *Id.*

81 There is nothing new about this approach. It dates back to the inception of the system in the mid-nineteenth century when Charles Loring Brace, a Protestant clergyman in New York City, removed children from urban immigrants he believed to be morally and genetically inferior in the hope that their children would be removed from their "evil influence." *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 130 (2001).

82 LEE, *supra* note 33, at 80.

lated to race, class, and gender. Complicating it further, unlike in the criminal legal system where crimes and infractions are defined by specific elements, the "child maltreatment" and "best interests of the child" concepts that are addressed in the child protection system have no fixed, universal meanings.[83] The child protection system is a complex bureaucracy of individual social workers, attorneys, therapists, children's advocates, and judges who are tasked with evaluating parental behavior and determining, based on no consistent standards, whether it is in a child's best interest to live with their parents or to live somewhere else. It seeks to draw lines between those who are fit to raise their children and those who are not, without the ability to improve children's lives by keeping their families intact. Where there are no fixed standards or definitions, absent a child's obvious physical injury, the system's players base their decisions and judgment in no small part on their own perceptions of adequate parenting and risk to a child.[84] This invites judgment, subjective interpretations of cultural standards and norms, and an exercise of almost unbridled discretion when players make the critical decisions that impact the families in the system, such as a caseworker's choice to bring a case or remove a child, a judge's finding of maltreatment, or a child's advocate's determination to support parent-child reunification.[85]

Even worse, the child protection system's flawed emphasis on locating failures within individual parents rather than in larger systemic inequalities means it fails to address what poses the greatest risk to the wellbeing of children: poverty. The health consequences of poverty during pregnancy and early childhood are often severe, and can set a newborn child on a life-long course of disparities in health outcomes. These adverse outcomes include greatly increased risks for preterm birth, intrauterine growth restriction, and neonatal or infant death.[86] Poverty has consistently been found to

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83 *See* Elizabeth D. Hutchison, *Child Maltreatment: Can It Be Defined?*, 64 SOC. SERV. REV. 60, 62 (1990) (discussing the vagueness in legal definitions of child maltreatment); Stephen Parker, *The Best Interests of the Child – Principles and Problems*, 8 INT'L J.L. & FAM. 26, 26-27 (1994) (discussing the indeterminacy of the best interests standard).

84 Daniel R. Victor & Keri L. Middleditch, *When Should Third Parties Get Custody or Visitation?*, FAM. ADVOC., Winter 2009, at 34, 34-35; *see* Graci v. Graci, 187 A.D.2d 970, 972 (4th Dep't 1992) (finding that the wife was entitled to primary physical custody of the parties' children where it was shown, inter alia, that she took the children to church while the husband did not).

85 A. Chand, *The Over-Representation of Black Children in the Child Protection System: Possible Causes, Consequences and Solutions*, 5 CHILD & FAM. SOC. WORK 67, 72-73 (2000).

86 Charles P. Larson, *Poverty During Pregnancy: Its Effects on Child Health Outcomes*, 12 PAEDIATRICS & CHILD HEALTH 673, 674 (2007).

be a powerful determinant of delayed cognitive development and poor school performance.[87] These effects are compounded for mothers of color and their children, who experience disparities due to race, in addition to those caused by lower socioeconomic status. "[A]lthough poverty is a significant contributor to racial/ethnic disparities in pregnancy outcome, higher socioeconomic status does not confer the same protection for African American women as for white women."[88]

It is clear that the child protection system is almost exclusively reserved for poor families of color and that its interventions are not only largely futile, but also an effective red herring for the true culprits that pose a risk to our society's children. Even more disturbing, however, is that involvement with the child protection system often exacerbates already-difficult situations, rendering marginally stable economic situations even more precarious.[89] The focus on personal transformation, without equal attention to material conditions almost always makes things worse for system-involved families. Many of the parents with whom we work become homeless, have their efforts to secure permanent housing or housing with family derailed, or lose their employment or public benefits simply by having their children removed or trying to comply with the services required by ACS and the Family Court. For women who become pregnant while involved in this system and plan to give birth, they are often in a worse place socially, economically, and emotionally than they were when they first came under its purview. As Tina Lee forcefully concludes, "[d]aily practices in child welfare are an outcome of stratified reproduction, but they also help to reproduce it."[90]

C. The Child Protection System's Reliance on Removals and Foster Care Hurts Children and Families and Weakens the Community

The reproductive justice movement requires social systems to be analyzed not just in terms of their harm to the individual, but also their harm to families and the community as a whole. Although it is tasked with improving the welfare of children, the child protection system's inability or unwillingness to address the

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87 *Id.* at 675.

88 Briggett C. Ford et al., *Racial Disparities in Birth Outcomes: Poverty, Discrimination, and the Life Course of African American Women*, AFR. AM. RES. PERSPECTIVES, Fall 2005, at 1, 2, http://www.rcgd.isr.umich.edu/prba/perspectives/fall2005/ford.pdf [https://perma.cc/BC66-YC7B].

89 *See* LEE, *supra* note 33, at 82.

90 *Id.* at 200.

real struggles of impoverished families and its overreliance on child removal and foster care as its primary intervention are misguided. While the state must remove a child who is at risk of serious harm, the child protection system's interventions hurt children and families and weaken entire communities in both short- and long-term ways. In so doing, these interventions further reinforce a system of reproductive stratification.

Although many people who foster a child are well-intentioned and provide a safe and loving environment, research shows that the state makes a poor parent: children in foster care have worse outcomes both while in care and after they leave the foster care system. Placement in foster care has been linked to an increase in behavioral psychological, developmental, and academic problems.[91] Children placed in foster care are more likely to experience psychopathology than children who are not in foster care,[92] with children in foster care being between 2.7 and 4.5 times more likely to be prescribed psychotropic medication than children not in foster care, according to one study.[93] Most problematically, studies in jurisdiction after jurisdiction have found that rates of safety are actually worse for children in foster care than for those in family preservation programs.[94] One study shows that children are actually twice as likely to die of abuse in foster care than in the general population.[95] New York State ranks the third worst for rates of substantiated or indicated reports of maltreatment of children in foster care.[96] However, statistics of such rates are likely underes-

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91 Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 57 (2006).

92 K. Chase Stovall & Mary Dozier, *Infants in Foster Care: An Attachment Theory Perspective*, 2 ADOPTION Q. 55, 55-56 (1998).

93 Children in foster care in Florida, Massachusetts, Michigan, Oregon, and Texas were prescribed psychotropic medications 2.7 to 4.5 times more often than children who were not in foster care. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS 7 (2011), http://www.gao.gov/assets/590/586570.pdf [https://perma.cc/HTQ8-QXLM].

94 NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING (2015), http://www.nccpr.org/reports/01SAFETY.pdf [https://perma.cc/ZA34-S646].

95 Wexler, *supra* note 81, at 137, 137 n.51.

96 Amended Class Action Complaint for Injunctive & Declaratory Relief at 78, Elisa W. v. City of N.Y., No. 15 Civ. 5273 (LTS) (HBP) (S.D.N.Y. Dec. 28, 2015), http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/amended_complaint_12.28.2015.pdf [https://perma.cc/4XNH-XRMY] ("Based on the most recent federal data available, New York State ranks 46th out of 48 states and territories for instances of substantiated or indicated maltreatment of children while in foster care. Put simply, children in New York are more likely to be harmed while under the state's protection than children in virtually every other state.").

timations, as "[a]buse or neglect by foster parents often is not even reported, because . . . agencies tolerate behavior from foster parents which would be unacceptable by birth parents."[97]

System-involved children tend to exit foster care with more problems than they had when entering. Children leaving foster care have significantly more behavioral problems when compared with their own pre-placement measures of adaptation.[98] Former foster children experience additional negative life outcomes, including having higher teen birth rates and lower career earnings[99] and being disproportionately likely to experience homelessness compared to the general population.[100]

Children who are on the margin of placement tend to have better outcomes when they remain home as opposed to in out-of-home care. In one study, a researcher looked at case records for more than 15,000 children, pulling out only the in-between cases where a real problem existed in the home, but the decision to remove could go either way.[101] Despite the fact that the children left at home did not get extraordinary help, only typical assistance, on measure after measure the children left in their own homes fared better than comparably maltreated children placed in foster care.[102] When children on this border are removed from home, they experience adverse outcomes compared to children left in their homes.[103] Children who are removed have higher levels of internalizing problems compared to similarly situated children reared by "maltreating" caregivers.[104] Children who have spent time in foster care are also three times more likely to be involved with the juvenile justice system than comparably maltreated children left in their homes.[105] All of this evidence demonstrates that keeping children together with their parents, even within homes that are not perfect, is usually preferable to placement in foster care.

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97 Complaint for Declaratory and Injunctive Relief ¶ 245, Marisol v. Giuliani, 929 F. Supp. 660 (S.D.N.Y 1996) (No. 95-Civ.-10533).

98 Lawrence et al., *supra* note 91, at 72.

99 Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007).

100 *See generally* Patrick J. Fowler et al., *Pathways to and From Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453 (2009).

101 *See* Doyle, *supra* note 29.

102 *Id.* at 766-67.

103 *See* Doyle, *supra* note 99, at 1607.

104 Lawrence et al., *supra* note 91, at 66.

105 Doyle, *supra* note 99, at 1599.

Some of the adverse consequences of removal can be decreased by placing children who have been removed from their homes with relatives rather than in foster care with strangers. Children fostered by relatives—known as "kinship care"—have fewer behavioral problems,[106] better development, and better mental health functioning than children in non-kinship foster care.[107] Additionally, children cared for by relatives in foster care experience fewer disruptions and a better quality of life while in care: they have fewer placement moves,[108] are more likely to remain in their own school,[109] and are more likely to report liking their placement and wanting it to become permanent.[110] However, most foster children do not receive these benefits; ACS reports that, as of August 2016, only about one third of children in foster care in New York City were placed in kinship care.[111] An approach that does not recognize how critical one's family and home life are to healthy human development, even when troubled or full of challenges, harms rather than improves the welfare of children and families.

While foster care is likely to be a traumatic experience for children at any age, a child-protective regimen that presumptively places newborns in care is particularly ill-advised. Babies are most vulnerable to the effects of being separated from their families, whose caregivers serve as an extension of their own regulatory systems.[112] Infants have an innate predisposition to form an attachment to their caregivers and this relationship is vital to promoting infant mental health.[113] When babies are placed in foster care,

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106 David Rubin et al., *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162 Archives Pediatrics & Adolescent Med. 550, 552-53 (2008).

107 Marc Winokur et al., The Campbell Collaboration, Kinship Care for the Safety, Permanency, and Well-being of Children Removed from the Home for Maltreatment: A Systematic Review 7 (Geraldine Macdonald et al. eds., 2014).

108 Mark F. Testa, *Kinship Care and Permanency*, 28 J. Soc. Serv. Res. 25, 25-26 (2001); *see* Nancy Rolock et al., Children & Family Research Ctr., Multiple Move Study: Understanding Reasons for Foster Care Instability 5 (2009), http://www.centerforchildwelfare.org/kb/oohpublications/MultipleMoveReport2009.pdf [https://perma.cc/J2Y9-ZF7J].

109 Pew Charitable Trs., Time for Reform: Support Relatives in Providing Foster Care and Permanent Families for Children 5 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/supportingrelativespdf.pdf [https://perma.cc/5F5B-QD42].

110 Winokur et al., *supra* note 107, at 217.

111 N.Y.C. Admin. for Children's Servs., Flash 16 (2016), http://www1.nyc.gov/assets/acs/pdf/data-analysis/2016/FlashIndicators.pdf [https://perma.cc/2SBF-6EQJ].

112 *See generally* Beatrice Beebe et al., *A Systems View of Mother-Infant Face-to-Face Communication*, 52 Dev. Psychol. 556 (2016).

113 *See generally* John Bowlby, A Secure Base: Parent-Child Attachment and

there is a major disruption in the primary attachment relationship. Failure to form an attachment with a primary caregiver because of a disruption in the caregiver-infant relationship results in affective, behavioral, and social difficulties for the infant,[114] such as failure to contain and manage emotion, persistent difficulty with regulating behavior, distortions in the capacity to develop healthy relationships, heightened vulnerability to stress, and increased risk of psychopathology.[115] Babies with disrupted attachments are at a greatly increased risk of developing lifelong disorganized attachments, which are associated with often-disastrous long-term outcomes, including internalizing disorders, externalizing disorders, and dissociation.[116] Disruption of primary attachment is also linked to developing impaired stress response systems, abnormal levels of cortisol[117] and even a higher risk of mortality.[118]

Far too often in New York City's child protection system, newborns are removed from homes and placed in foster care with multiple caretakers and no services in place to promote a close attachment between a newborn and any caregiver. Connections to evidence-based, attachment-oriented services, or even an immediate and frequent visitation plan that allows for consistent time between mother and child, are often not pursued with any sense of urgency.

The reproductive justice praxis requires us to examine the impact on an individual of a right being abrogated as well as the potential harm to entire communities.[119] The decision to remove children from the home not only discounts the centrality of the parental role, but also damages both the family and neighborhood

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HEALTHY HUMAN DEVELOPMENT (1988); John Bowlby, *Attachment and Loss: Retrospect and Prospect*, 52 AM. J. ORTHOPSYCHIATRY 664, 668-69 (1982).

114 Stovall & Dozier, *supra* note 92, at 56.

115 *See generally* ROBERT KAREN, BECOMING ATTACHED: FIRST RELATIONSHIPS AND HOW THEY SHAPE OUR CAPACITY TO LOVE (1998).

116 Barbara J. Burns et al., *Mental Health Need and Access to Mental Health Services by Youths Involved with Child Welfare: A National Survey*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 960, 961 (2004); *see also* Laurel K. Leslie et al., *Outpatient Mental Health Services for Children in Foster Care: A National Perspective*, 28 CHILD ABUSE & NEGLECT 697, 710 (2004) ("[C]hildren in foster care have high rates of need but . . . multiple non-clinical factors—age, group care setting, race/ethnicity, and maltreatment history—serve to either facilitate or hinder access to mental health services.").

117 Philip A. Fisher et al., *Effects of Therapeutic Interventions for Foster Children on Behavioral Problems, Caregiver Attachment, and Stress Regulatory Neural Systems*, 1094 ANNALS N.Y. ACAD. SCI. 215, 222 (2006).

118 *See* Hee-Soon Juon et al., *Childhood Adversity and Later Mortality in an Urban African American Cohort*, 93 AM. J. PUB. HEALTH 2044, 2044-46 (2003).

119 Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 71, 76-80 (2011).

community. Relationships between parents and children placed in foster care are often permanently damaged by child-protection-involvement: studies show that children placed in foster care often lose respect for their parents, who no longer have custody of them, and that foster care placement inhibits parents' ability to discipline or effectively parent their child going forward.[120]

In neighborhoods like the South Bronx, where child-protection-involvement is sweeping, the social cohesion of the community is devastated by the system's wide-scale involvement, which "interferes with community members' ability to form healthy connections and to participate fully in the democratic process."[121] Mistrust between neighbors is one common result of high levels of child removal, with state supervision "encourag[ing] neighbors to gossip about families in the system, to handle grudges by threatening to report one another to the department, and to otherwise turn to destructive means for resolving neighborhood conflicts[.]"[122] In addition, a high rate of child protection involvement harms the community's strength in other areas. "Collective efficacy," defined by Dorothy Roberts as the community's "shared belief in their ability take joint action on behalf of their children's welfare[,]" is associated with "fewer incidents of violence, personal victimization, and homicide."[123] In New York City, African American and Hispanic populations are overrepresented in "high loss" communities, characterized as those who lose a higher than average number of community members to systems, including foster care.[124]

The child protection system unequally applies to poor families of color, fails to address the true material disadvantage and poverty of those families, and its primary interventions of child removal and foster care further weaken families and entire communities. Its punitive focus on judging, blaming and punishing individual parents, rather than helping entire families and communities does further harm. When the reproductive experiences of women in the system are considered, it is revealed as a power structure that prevents the achievement of broader reproductive justice and one that should be of great concern to the RJ movement. An approach that

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120 Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, CHILD WELFARE, Mar./Apr. 2008, at 125, 133-34.

121 Mimi Abramovitz & Jochen Albrecht, *The Community Loss Index: A New Social Indicator*, 87 SOC. SERV. REV. 677, 689 (2013).

122 *Id.* at 688.

123 Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 27 (2005).

124 Abramovitz & Albrecht, *supra* note 121, at 711.

truly values child well-being must address the underlying, intersecting forces of racism and poverty that affect mothers in low-income communities rather than focusing exclusively on issues or deficiencies located within individual parents. The RJ framework calls on us to recognize these disparities not by taking children away from their homes and families, but by defending the right of system-involved parents to raise their children and by addressing the inequalities that exist in poor communities. In the context of this system and while it continues to exist, women who become pregnant and plan to give birth require skilled advocates, who understand their work as part of a movement for social and reproductive justice, and are both willing to challenge the system's dominant narrative and prepared to zealously defend women's rights to raise their children.

III. Child Safety Alert 14: The Creation of a Womb-to-Foster-Care Pipeline that Devalues the Reproductive Decisions of Women Who Have Children in Foster Care and Perpetuates Reproductive Stratification

When The Bronx Defenders became the institutional provider of legal defense for parents in Bronx Family Court child protective proceedings in 2007, our attorneys, social workers, and parent advocates[125] noticed a recurring phenomenon: clients who had previously been or were currently involved with the child protection system and planning to reunify with their children would disappear when they became pregnant. Many women did not seek prenatal health care or medical treatment during their pregnancy; they stopped attending their court appearances and services like mental health or substance abuse treatment programs that were required for the return of their older children; and they often abruptly, without explanation, stopped visiting their older children in foster care. The fear of child apprehension by the child protection system not only impeded their prospects of regaining custody of their children, it drove them away from the health services best for their pregnancy and expected child, compromising their maternal and fetal health.[126]

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[125] Parent Advocates are non-attorney advocates, some of whom have had a child protection case, who attend meetings and conferences with parents with ACS and provide support to parents through the process of a child protection case. *Parent Advocate*, Bronx Defenders, http://www.bronxdefenders.org/who-we-are/how-we-work/parent-advocate/ [https://perma.cc/4H42-3LCK] (last visited Nov. 25, 2016).

[126] This is consistent with research of Sarah Roberts who found that fear of being reported to the child protection system drives drug-using pregnant women away from

If they remained involved with the system, like Jennifer, they expressed ambivalence, fear, and anxiety about what would happen after they delivered their baby. Oftentimes when a system-involved woman learned she was pregnant, a first stop was to see her lawyer, rather than a doctor, for counsel on a profoundly personal decision: whether she should continue her pregnancy or have an abortion. Rarely did she have anyone at the foster care agency offering to assist her in preventing the removal of her baby when born or preparing for birth. None of the forms of "assistance" offered by ACS acknowledged the social inequality or material disadvantage the mother continued to experience despite her continued involvement with the system. We knew that we had to address this recurring phenomenon and the system's response to our pregnant clients to better serve them.

The system's power to dismantle families exists alongside—and in direct contradiction to—its stated task and legal obligation to preserve them.[127] When New York State decides it must interfere to protect the safety of a child, the preservation or reunification of families is required to be the paramount goal whenever possible. Not only does federal law require it,[128] New York law expressly provides that "the state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home[.]"[129]

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prenatal care and drug treatment. *See, e.g.*, Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL & CHILD HEALTH J. 333 (2010); Sarah C.M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMEN'S HEALTH ISSUES 193 (2010). Women's fear of engaging in services has an adverse impact on maternal fetal health. That is why the American College of Obstetricians and Gynecologists opposes laws that require universal testing and reporting of women to child protection authorities who give birth despite having used an illegal drug. COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 473, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011), https://www.acog.org/-/media/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/co473.pdf?dmc=1&ts=20161113T1552564675 [https://perma.cc/4JXU-WNDJ] (opinion reaffirmed in 2014).

127 REICH, *supra* note 67, at 4-5.

128 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115, 2116 (codified at 42 U.S.C. § 671(a)(15)(B)) ("[E]xcept as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families . . . .").

129 N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2016); *see also id.* § 384-b(1)(a)(ii) ("[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered . . . .").

To fulfill its legal obligation as to children born to parents already involved in the system, ACS has adopted CSA 14 to govern planning for and decisions regarding the removal of babies born to system-involved families.[130] Under CSA 14, upon learning that a mother with a child in foster care is pregnant, the case worker from the foster care agency that is assigned to oversee the siblings' placement is asked to do a "safety assessment" to determine if it would be safe for the newborn to reside in the home.[131] The policy directs the assigned foster care agency case worker to hold a case conference or meeting with the family and the family's service providers to consider the reasons the older children remain in care, discuss the upcoming birth, and review the family and agency's safety plan for the baby.[132] This conference is commonly called the "pre-birth conference." In practice, agencies routinely fail to hold pre-birth planning conferences with pregnant women unless a client or her legal team advocates for or requests the court to order its convening.

When they do happen, the discussion and recommendation from the pre-birth conference is, in reality, largely irrelevant to whether the baby will be taken after delivery. Representatives from ACS, who ultimately determine whether to remove the newborn, are not required to be present at the pre-birth conference.[133] Nor is information from the pre-birth conference shared with ACS in a timely or meaningful way.[134] The services discussed at the pre-birth conference are those traditionally offered by the child protection system, like parenting and anger management classes, aimed at addressing personal failings and the underlying crisis that caused the siblings to be placed in care. The system fails to focus on or even attempt to address the underlying disadvantage and stress that might have caused the crisis, the right of the system-involved mother to parent her child, or any particular material barriers to the infant going home after birth. Even if the foster care agency recommends to ACS that the baby remain home, because ACS has

130 *See* Child Alert 14, *supra* note 2.

131 *Id.* at 1, 3.

132 *Id.* at 1.

133 After years spent attempting to reform this aspect of CSA 14, ACS continues to refuse to require its case workers to attend pre-birth conferences. *Id.*

134 Information from the pre-birth conference is entered by the agency case worker into Connections, the ACS casework database, as a progress note. ACS can refer to the case notes for the discussion and recommendations at the conference or speak to the agency case worker directly. There is no formal pre-birth planning conference with ACS, the primary decision maker. A parent is at the mercy of what the case worker decides to include and what level of detail is provided.

less familiarity with the family and is largely focused on the original allegations regarding the older children and strict compliance with the original service plan, that recommendation is often ignored when the baby is born. Rather than being valued, a woman's decision to have a baby when older children are in foster care is often met with contempt and disrespect by the system. When a woman shares with her agency case worker that she is pregnant, the threat of child apprehension begins to loom large. Without regard for the emotional impact of their words, case workers frequently warn expectant mothers of the likelihood that their infants will be removed at birth by virtue of their older children's placement in care. One of our parent advocates recalls a caseworker commencing a pre-birth planning conference by stating, "[w]e're here because once you give birth, we're going to remove your child. That's what happens when you have kids in care." The pre-birth planning conferences, far from fulfilling the law's mandate to preserve a family whenever necessary,[135] leave parents feeling hopeless and anxious about what will happen when their child is born.

Even regardless of whether the foster care agency believes a newborn to be at risk of harm, CSA 14 requires that the foster care agency automatically make a report of a neglected child to the State Central Registry ("SCR") once the child is born.[136] Even when there is no reasonable cause to suspect abuse or neglect of the newborn child, CSA 14 instructs the SCR to accept the information about the birth of a child with a sibling in care as "additional information" for the first case.[137] The call to the SCR empowers ACS to commence a second full investigation and assessment of the safety of the new child.[138] After the report is received, a child safety conference is scheduled to determine whether the newborn shall be removed.[139] The purpose of the child safety conference, a conference that is held in every case prior to ACS filing a petition in Family Court, is to determine whether the child must be removed to foster care or remain with the parent under supervision.[140] The policy contemplates that, at the child safety conference, the ACS case worker and the foster care agency case worker will share and discuss information with each other, including the family's current service needs and their ability to care for

135 N.Y. Soc. Serv. Law § 397(2)(a) (McKinney 1997).
136 Child Alert 14, *supra* note 2, at 1.
137 *Id.*
138 *Id.*
139 *Id.* at 2.
140 *Id.*

the child, coupled with the family's history and the progress the family has made towards addressing those safety concerns.[141]

The disrespect and insensitive treatment that system-involved pregnant women are often subjected to at CSA 14 child safety conferences is indicative of the system's disregard for the families it serves and its lack of urgency in preserving them. For example, the players in the system, including the caseworkers, often use child-protection jargon that masks the enormity of the decisions they are making and the emotional investment parents have in their children. In the conferences and in court, in line with the long tradition of referring to a mother as "bio mom," the family's new baby is routinely referred to as an "afterborn," rather than by his or her given name. CSA 14 child safety conferences are often held in the hospital at a mother's bedside, just a short time after she has given birth. Sometimes, new mothers are asked to leave their newborns at the hospital to attend a conference at an ACS office, sometimes far away, without any indication of whether they will be able to return to the hospital to bring their babies home. Women are also required to come to court just days after giving birth, even before they have fully recovered, and are asked to wait for hours while ACS prepares its paperwork.

Often there is inexplicable delay after the child is born before ACS conducts its investigation and convenes the CSA 14 child safety conference, even when the approximate timing of a baby's birth is known. This leads to unnecessary disruptions in parental-child bonding even before ACS has made a decision as to whether the newborn can remain safely in her parent's care. Our client Donna had moved into a residential mother-child substance abuse program when she gave birth to her daughter. Her intention was to have her baby reside with her in the program when she was born. Donna's daughter's birth was a planned delivery by cesarean surgery and the foster care agency was informed of it months in advance. No one from ACS came to visit Donna at the hospital to determine its position as to whether the baby could reside with Donna in mother-child inpatient treatment. When she was discharged from the hospital four days later, she had still not heard from ACS and was told that her baby was on a "social hold"[142] at

141 *Id.* at 1.

142 The practice of placing a baby on social hold in a hospital is illegal. Under the family court act, a physician has the power to remove a child who is at imminent risk of serious harm. The law, however, requires the physician to seek a court order within 24 hours of removing the child. N.Y. FAM. CT. ACT § 1026(c) (McKinney 2005). A hospital cannot hold a baby who is otherwise ready for discharge without a parent's

the hospital until ACS could investigate. Two days later, ACS conducted the child safety conference and recommended that the baby be released to Donna under court-ordered supervision. The days without her newborn permanently disrupted Donna's ability to nurse and deprived her and her newborn of days of mother-infant bonding critical to forming a securely attached relationship.

Delays in investigation and conducting the child safety conference then lead to further delay in the judicial review of ACS's decision to place a child in foster care. The law requires that ACS go to court within 24 hours of removing a child from his parent without her permission.[143] ACS's policy requires case workers to hold a child safety conference prior to filing a case in court. Before that conference is convened, ACS conducts a safety assessment and investigation. The investigation may include speaking with foster care agency case planners, reviewing records, and speaking with doctors and service providers. ACS investigative workers then coordinate with other parties to plan a child safety conference, to discuss the agency's potential safety concerns. Once the conference is scheduled, mothers who have very recently given birth often wait hours at an ACS office or in the hospital for these conferences to begin; there is often little sense of urgency to identify and discuss the information relevant to a child safety determination. The delays in gathering information and convening child safety conferences mean that the initial court appearance is often unnecessarily delayed. Babies routinely remain in the hospital on a "social hold" after they have been medically cleared for discharge, until ACS coordinates and conducts a child safety conference. Delays in gathering information and holding these conferences frequently means that ACS misses the 24-hour deadline to file in court, resulting in the routine violation of a parent's rights and babies spending more time separated from their parents without court review.

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consent without a court order. Routinely, however, hospitals refuse to allow mothers to take their newborns out of the hospital based on the fact that ACS is investigating or might investigate.

143 *Id.* ("If the child protective agency for any reason does not return the child under this section after an emergency removal pursuant to section one thousand twenty-four of this part on the same day that the child is removed, or if the child protective agency concludes it appropriate after an emergency removal pursuant to section one thousand twenty-four of this part, it shall cause a petition to be filed under this part no later than the next court day after the child was removed. The court may order an extension, only upon good cause shown, of up to three court days from the date of such child's removal. A hearing shall be held no later than the next court day after the petition is filed and findings shall be made as required pursuant to section one thousand twenty-seven of this part.").

Because there are older children in foster care, the chances that ACS will remove the new baby are increased exponentially. Child Safety Alert 14 encourages investigating child protective workers to err on the side of removing newborns, explicitly warning them:

> If the decision is to seek court ordered supervision (or in exceptional circumstances not to take court action on behalf of the new child), there needs to be clear documentation from the conference that explains why the older children have not yet been reunified, while it would be safe for a new child, especially when that child is a more dependent and fragile newborn, to remain safely in the home.[144]

As per the policy, child safety conferences for newborns always highlight prior ACS involvement as a primary safety concern.[145] No matter how much progress a parent has made in addressing the allegations that originally brought her to the attention of child protection authorities, or how much time has passed and the myriad of ways her circumstances have changed, CSA 14 often operates as a self-fulfilling prophecy. For example, at the time of her newborn's birth, our client Ana's older children were in kinship care in New Jersey while she resided in New York City. When she learned she was pregnant, Ana immediately entered a mother-child residential treatment program to address her cocaine addiction, which had spiraled out of control after her older children were removed from her care and placed out of state. Ana's program counselor and advocate were at her bedside while ACS called her into the child safety conference by phone. Ana tearfully explained the circumstances that led to her cocaine addiction, the ways in which she was benefitting from treatment, and the reasons she should be given an opportunity to care for her newborn baby in residential treatment. Despite five months of success in inpatient mother-child treatment without a relapse, ACS refused to agree that Ana's baby could remain with her while she continued on her road to recovery, citing her "history." ACS placed the baby on a "social hold" and Ana had to leave the hospital without her newborn daughter. In court, after her attorney from The Bronx Defenders requested a hearing, the Judge ordered that the baby be released to Ana's care in the mother-child treatment program, noting that a mother's his-

144 Child Alert 14, *supra* note 2, at 2.

145 *Id.*; Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS L. REP. 107, 130 (2002).

tory alone is not enough to prove that a baby would be in imminent risk of harm in her care.

Rather than conduct an individualized, strengths-based analysis of the circumstances under which the new baby came in to the world, CSA 14 virtually guarantees that ACS will file a petition alleging that the newborn is a neglected child and recommend foster care placement with little analysis of the current circumstances. Child protective workers place incredible weight on a mother's history in the system without sufficient regard for the progress a parent has made to address the issues that led to the older children's removal. Its emphasis on "history" rather than current circumstances perpetuates the view that the parents in the system are fundamentally flawed and the sum of their problems, rather than individuals asked to overcome extreme disadvantage with little assistance.

The focus of the CSA 14 conference also perpetuates the misguided focus of the child protection system on compliance with personal corrective service plans, rather than the material issues that truly pose a risk to the family and child's welfare. One Bronx Defenders client, Lauryn, gave birth to a baby girl after she had completed her service plan, which included drug treatment, counseling, and a parenting class, but before her three-year-old son had returned home. Her son was trapped in foster care because Lauryn would lose her priority status on a waitlist for an apartment in New York City Public Housing if he came home. It did not matter that the reason she lacked housing was no fault of her own, but rather a failure of coordination and cooperation between city agencies. Rather than provide Lauryn with help addressing the bureaucratic snarl that resulted in her homelessness, ACS offered foster care for her newborn. Although ACS's decision was ultimately reversed by the Family Court and Lauryn's daughter was released to her care, ACS missed an opportunity to address the actual material disadvantage causing harm to the family. Lauryn's housing issue was not addressed, Lauryn lost faith and trust in the agency purportedly interested in her child's welfare, and Lauryn's newborn was needlessly separated from her for days after birth.

In line with the system's expectation of contrition and deference by parents to the system, decisions by ACS regarding the removal of newborns are often based on a mother's compliance with original service plans required to address the neglect of her older children, rather than actual risk to the newborn. As Dorothy Roberts observed about Chicago's system, often

> [t]he issue is no longer whether the child may be safely returned home, but whether the mother has attended every parenting class, made every urine drop, participated in every therapy session, shown up for every scheduled visitation, arrived at every appointment on time, and always maintained a contrite and cooperative disposition.[146]

One client, Emily, gave birth to a baby boy. The original allegations that resulted in her older children being placed in foster care were marijuana use and a fight with her brother that had resulted in an assault charge. When her son was born, Emily enjoyed liberal unsupervised visitation with her older children, was actively engaged in a substance abuse program, and had enrolled in a home-based parenting program for parents with newborns. The ACS caseworker who attended the child safety conference cited no safety concern and recommended that the baby be released to Emily. Her supervisor's supervisor, the deputy at ACS, who has ultimate decision-making power but who did not attend the conference or ever meet or work with the family, summarily reversed the decision and recommended instead that the infant enter foster care because Emily had not yet completed her substance abuse program for marijuana use. Given the widespread use of marijuana by parents of privilege and the dearth of social or scientific research that shows a parent's marijuana use (or prior use in Emily's case) causes risk of harm to the life or health of her child, this decision showed a blind adherence to compliance even while forsaking the needs of an infant.[147]

ACS has even gone so far as to remove children in cases where complete compliance with services is impossible for medical reasons. In one such case, our client Tina had unsupervised visits with her older children when her new baby was born. She had numerous complications during her pregnancy, including a hospitalization for her gallbladder and a surgery. ACS removed her son at birth because Tina missed several psychotherapy appointments after her surgery and, upon the advice of her doctor, was not taking psychotropic medication during her pregnancy. Although she was not exhibiting any signs or symptoms of her mental illness and planned to resume treatment after birth, ACS focused on Tina's noncompliance with services rather than actual risk posed to her

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146 ROBERTS, *supra* note 18, at 80.

147 *See, e.g*, Mosi Secret, *No Cause for Marijuana Case, but Enough for Child Neglect*, N.Y. TIMES (Aug. 17, 2011), http://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html?scp=1&sq=marijuana%20case%20child%20neglect&st=cse [https://perma.cc/6VXZ-X66R].

child. Tina's son was not returned until ACS's decision was reversed by the Bronx Family Court after her Bronx Defenders attorney requested and won a several-day-long hearing for his return.

The gross inequality that accompanies the functioning of the child welfare system is further reinforced when ACS, under CSA 14, systematically removes newborns from system-involved families without attempting to meaningfully plan and prevent such a removal. Both in policy and in practice, CSA 14 plays a role in reinforcing the disadvantage of families already involved in the child protection system and recreating the very inequalities inherent in the system. The system's approach to pregnant women with children in foster care perpetuates the view that system-involved parents are fundamentally flawed individuals in need of constant state supervision, ignoring their individual strengths and the positive things happening in their families' lives in favor of focusing exclusively on the worst thing that has happened: the removal and placement of their older children in foster care. The child protection system, having failed to address the deprivation and material conditions that the crisis involving the older children revealed, over-relies on foster care as the preferred intervention for the newborn. In such a system, the reproductive decision to give birth despite having older children in foster care is not adequately supported, is treated with little value, and further entrenches reproductive stratification.

IV. Healthy Mothers, Healthy Babies: Family Defense with a Reproductive Justice Vision

The fundamentally flawed approach of the child protection system and CSA 14's failure to meaningfully support pregnant system-involved women and its presumption in favor of removal means that a woman's decision to continue a pregnancy when she has older children in foster care comes with great risk that her baby will be removed at birth. The Bronx Defenders set out to develop a response to this coercive function of the system that would support and respect our clients' reproductive decisions and increase the likelihood that mothers would keep their newborns home at birth. With the help of an independent grant, HMHB was born. At the core of HMHB is the recognition that raising one's children is fundamental to one's humanity. By firmly advocating for the right to parent one's children with dignity and provide support during pregnancy and advocacy the moment the child is born, HMHB seeks to curb the womb-to-foster care pipeline by providing

targeted client-centered, holistic advocacy to system-involved pregnant women in the South Bronx from the moment they say that they are pregnant.

A. HMHB Employs an Integrated Holistic Response

Grounded in an RJ framework, HMHB seeks to honor the full range of reproductive decisions made by our clients. If our client determines she would like to continue her pregnancy and bear her child, HMHB provides a combination of high-quality legal representation and social work advocacy before the baby is born to maximize the likelihood that our client's newborn will not be removed and placed in foster care after delivery. HMHB connects expectant mothers with a dedicated social worker or parent advocate (depending on the client's particular needs) who works collaboratively with the client's attorney as part of a legal team. Driven by a client-centered, strengths-based approach, the legal team works with expectant mothers to help them identify what supports, if any, they need to prepare for their newborns and ensure that their babies can remain safely at home.

The location of HMHB in a public defender office is critical to its mission to provide expecting women with what they need. Our lawyers, social workers, and parent advocates have a duty of loyalty to no one but their client, the expectant parent.[148] Unlike ACS caseworkers who have the dueling and conflicting obligations of investigating and surveilling the expectant mother while also offering services deemed necessary to keep her family intact, HMHB is loyal only to the expectant mother herself.[149] Unlike the ACS caseworker, HMHB does not, by definition, approach our client with the ability to destroy her family. Nor does HMHB tie its assistance to the parent's prosecution. HMHB also is not interested in our client's subordination to dominant ideals of parenting in order to achieve reunification. Rather, HMHB aims to empower our clients to fulfill their goals in regard to their children, while also assisting them in addressing the challenges and barriers that exist in their lives. All interactions between HMHB advocates and our pregnant clients are governed by the duty of confidentiality. This means that clients can honestly confide with their advocates and openly

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148 Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 699-701 (2007) (discussing the duties of nonlawyers, such as social workers and mental health professionals, to report when working with lawyers).

149 *See About ACS*, N.Y.C. ADMIN. FOR CHILDREN'S SERVS., http://www1.nyc.gov/site/acs/about/about.page [https://perma.cc/VJ9R-NSDS] (last visited Nov. 25, 2016).

discuss their greatest challenges, worries, anxieties, and problems. They can openly share their needs for themselves, their pregnancy, and their children, without fear that the content of these conversations will appear in reports to a court and be used against them in favor of removing their child. Because of the duties of loyalty and confidence owed to our clients, the HMHB team is uniquely situated to identify the true needs of the family and effectively provide the supports necessary to achieve social stability.

Legal teams at The Bronx Defenders collaborate through our innovative holistic model[150] to advocate with ACS and the court for what our clients want for their families and what they feel they need in order to address issues in the home. The social worker can advise the attorney of what services the family needs and what material needs the family has, while the attorney can advise the social worker of how the legal goals identified by the client, such as the return of her older children or her infant remaining home, can be achieved. Together, the attorney and the advocate work with each woman to secure the assistance she feels she needs to prepare for her baby's birth. For example, a client might reveal to her HMHB team that she has relapsed and is using drugs again, but fears telling anyone because she will be drug tested and that her baby will be taken at birth. Rather than struggling alone and testing positive for an illegal drug at birth, the client's lawyer and advocate can assist her in finding an opening at a mother-child treatment program that would allow her to reduce the harms of drug use during pregnancy and allow her newborn to remain with her at birth. Likewise, a client might share with her HMHB team that she would like to stop her mental health medication because of potential harm to her pregnancy, but she fears speaking to her physician alone. The HMHB team can assist the client in identifying the information she needs to make an informed decision and developing the questions she has for her physician and will accompany her to a visit with her physician. Likewise, if a client needs an order of protection against a violent partner or is interested in a support group for domestic violence survivors, HMHB can assist the client in connecting to those services without using the threat of child apprehension to force her to go. HMHB's location in a public defender office, by definition and by design, provides system-involved pregnant women with a legal safe haven during one of the most anxious and stressful times in their lives.

150 *See Holistic Defense*, BRONX DEFENDERS, http://www.bronxdefenders.org/holistic-defense/ [https://perma.cc/W2XH-NBWS] (last visited Nov. 25, 2016).

HMHB also recognizes that poverty, not individual failing, is the single most important predictor of losing one's children to foster care. Rather than exacerbate the class and race disparities that exist in today's child protection system by prescribing generic solutions like parenting and anger management classes that do not fit the family's problems, HMHB seeks to directly address poverty-related issues such as housing, child care, public assistance, and unemployment. HMHB advocates connect system-involved pregnant women with civil advocates in the office to assist with litigating fair hearings for benefits wrongfully turned off as well as acquiring Medicaid, public assistance, and vouchers for childcare. HMHB also connects our clients with attorneys who practice in housing court to defend against evictions, force landlords to fix dangerous housing conditions, and advocate for access to safe, affordable, permanent housing. Civil advocates also assist clients in identifying and obtaining benefits such as social security and supportive housing during pregnancy so that ACS will not remove a baby for the weeks or months it takes to secure these benefits after a baby is born. Although unable to dismantle the fundamental racial and economic inequality experienced by our clients, HHMB's location in a holistic office with civil legal advocates is able to address many of the material disadvantages mistaken by the system for the inability to care for a child or child neglect. Thus, HMHB improves the material circumstances of our clients by securing housing and income, greatly increasing the chance that the newborn will not be removed.

By providing system-involved pregnant women with legal teams that include social workers and parent advocates as well as civil attorneys and legal advocates who can assist with accessing housing and benefits, HMHB does what the child protection system should do: ask a parent what they need to address or overcome in order to take good care of their child and then work hard to provide that assistance. Indeed, the parent advocates and social workers who work as part of HMHB are a good match to any team of caseworkers at a foster care agency. Their approach to the client, commitment to families, understanding of the social and economic issues faced by parents in the South Bronx, and around-the-clock work ethic are a formidable force. Moreover, because HMHB often does what agency caseworkers claim is impossible, they pose a challenge to the million-dollar-budget city and private agencies that could be so much more effective if they focused less on prosecution and more on prevention. If ACS does not agree at the child

safety conference that the baby goes home even with all of the supports in place, HMHB often succeeds in laying the groundwork for the client to prevail in court. Although unable to completely alleviate the fundamental unfairness of the child protection system, the existence of HMHB counters its coercive function and increases the chance that a system-involved parent's newborn will not follow her siblings to foster care.

B. HMHB Advocates Seek to Counter the Dominant Child Protection Narrative by Employing A Client-Centered, Strengths-Based Approach

In the context of child welfare, the accepted narrative is one of terrible parents who make irresponsible reproductive choices. It is filled with harsh, inaccurate beliefs about parents of children in foster care that are rooted in racial, gender, and class-based stereotypes. As Marty Guggenheim observes, "[t]he poor families exposed to judicial and agency scrutiny in the child welfare system are reviewed through a lens that looks at the worst thing that has happened."[151] By contrast, in families of privilege "the bad things are invariably framed against the wonderful things that happen in families every day."[152] Because of the dominant child welfare narrative of selfish, ignorant, and bad parents, more often than not, the news of our clients' pregnancies is met by caseworkers with disdain and viewed as irresponsible choices.[153] HMHB advocates assist clients in overcoming "the stereotypes, assumptions and false expectations that smother them, and . . . pervade child welfare decision-making processes."[154]

As discussed previously, most of our clients have not committed an inhumane act against a child. The vast majority of our cli-

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151 Guggenheim, *supra* note 28, at 18.

152 *Id.*

153 The assumption that becoming pregnant is always a choice is easily challenged. According to the Guttmacher Institute, 45% of pregnancies were "unintended" (defined as pregnancies that were either mistimed or unwanted) in 2011. Low-income women, as well as young women and minority women, are more likely to experience unintended pregnancy than higher income and white women. "The rate of unintended pregnancy among poor women (those with incomes at or below the federal poverty level) was 112 per 1,000 women aged 15-44 in 2011, more than five times the rate among women at the highest income level (20 per 1,000)." GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES 1 (2016), https://www.guttmacher.org/sites/default/files/pdfs/pubs/FB-Unintended-Pregnancy-US.pdf [https://perma.cc/PPH7-ZCZ8].

154 Matthew Fraidin, *Changing the Narrative in Child Welfare Cases*, *in* REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS, *supra* note 28, at 19.

ents are charged with neglect, rather than abuse. Some are charged with a single act of neglect and some for neglect that has developed over time. Many are there because of allegations that they failed to protect their children from harm inflicted by someone else, but have never hurt their children themselves. Others are in the system because they suffer from addiction to illegal drugs or have symptoms of mental illness, pathologies also suffered by privileged people who are fortunately able to address their problems with private resources. Our clients are invariably low-income and many have faced significant social issues in their lifetime such as violence, poverty, homelessness, hunger, incarceration, and foster care. Many of them have had their children removed from their homes for unjustifiable reasons and their cases demonstrate ACS errors in removing children from loving, caring homes. Many of them have done the thing, or some variation of the thing, of which they were accused. Save for a tiny few, they are also parents who love their children, who care for their children, and who cherish their identity as parents. Just like all humans and all other parents, they have aspirations, complex emotions, poor luck, better luck, lapses in judgment, moments of embarrassment and shame, and sometimes self-destructive impulses. They often have overcome incredible odds and personal challenges and would inspire anyone who stopped long enough to listen to the story of what they have overcome. And in child protection proceedings, "they face the loss of one of the few precious things in their lives."[155]

Advocates at HMHB resist the dominant child welfare narrative about parents in the system and do not view system-involved parents as simply a sum of problems, of which a new baby is one more. In their interactions with ACS or in court, they are devoted to revealing our clients' humanity, resilience, and strength. They seek to support and empower our clients to lend their voice to the proceedings about them and their children. They challenge the system's view of them and its actions. They seek to frame the issues our clients face and the things they have done in the context of their lives and what is available to them, and in light of everything else they have done. Most importantly, HMHB advocates, whether in conferences with ACS or the foster care agencies or in a court hearing, are skilled at assisting the system players in locating fault in the systemic inequality and disadvantage experienced by our clients, rather than in the individual parent. In so doing, we give

[155] Guggenheim, *supra* note 28, at 17.

voice to our clients and challenge the popular uninformed misconceptions of the parents in the system.

C. *HMHB is Informed by Social Science Research that Emphasizes the Importance of Early Attachment and Bonding and Strives to Provide Education and Information to Other Players in the System*

The HMHB model is driven by the body of research that demonstrates that children fare better when they are able to remain at home with their families, in their communities.[156] The HMHB team recognizes that the removal of a child from all he or she knows and loves should be a last resort and only after less harmful alternatives are explored. Prior to placing a baby outside of his or her home, intensive clinical services within and outside the home environment should be availed to the family to prevent the trauma of unnecessary removal. Transforming the system's over-reliance on child removal and foster care to address the problems of poor families requires educating its players regarding the harm and trauma of foster care to a child. The system is more likely to support alternatives to removal and not act impulsively out of an urge to punish a parent of whom they disapprove if it understands the critical importance of parent-child attachments and the harm of foster care. HMHB participates in and provides multiple trainings on the social science and research regarding attachment and the harms associated with foster care. HMHB advocates use this information to strengthen their clients' cases against the removal of their newborns by presenting it at conferences, in court, and at trainings attended by all players in the system.

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156 The fact that infants are better off when allowed to remain with their parents remains true even for drug-exposed infants who are often removed as a matter of course. In one study of babies born to mothers who used cocaine during pregnancy, one group of the newborns was placed in foster care while the other group was allowed to remain with their mothers. After six months, the researchers studied the babies for developmental milestones and consistently found that the babies placed with their mothers did better. Kathleen Wobie *et al.*, *Abstract: To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, 43 *Pediatric Res.* 234 (1998), http://www.nature.com/pr/journal/v43/n4s/full/pr19981518a.html [https://perma.cc/Y2UQ-P566]. Another study found that "rooming-in"—the practice of caring for the mother and her newborn together in the same room after birth—directly benefited drug-exposed infants, decreasing the rate at which such infants were admitted NICU as well as how long they remained there once admitted. Ronald R. Abrahams et al., *An Evaluation of Rooming-in Among Substance-Exposed Newborns in British Columbia*, 32 J. Obstetrics & Gynecology Can. 866, 866 (2010). In addition, rooming-in increased the likelihood of maternal custody of the infant once discharged from treatment.

D. HMHB Connects Clients to Empowering Resources and Supports to Assist in Making Helpful Decisions for One's Family.

HMHB recognizes that one way to preserve families is to prevent child maltreatment and avert the need for foster care placement before it arises. Although significant eradication of child neglect and maltreatment requires redressing racial and social inequality and poverty with generous social support, HMHB seeks to provide some necessary, non-coercive support to system-involved pregnant women to avoid foster care placement for their newborn. Pregnant women in resource-deficient neighborhoods like the South Bronx often have limited options for support and guidance throughout their pregnancy. Many of our clients grew up in foster care themselves and may not have support on which they can rely as they prepare for their baby's arrival. The womb-to-foster-care pipeline inherent to vulnerable communities creates a justifiable sense of fear and mistrust in the very institutions tasked with providing guidance during this time. Thus, these same women are often hesitant or completely avoidant of reaching out to agencies, all of which are child-protection-affiliated or mandated reporters to the child protection system, for support.

Rather than coerce mothers into services and treatment with the threat of child apprehension, HMHB lawyers, social workers, and clients participate in collaborative strategic planning to identify community resources available to parents with newborns and young children. HMHB aims to connect pregnant clients to the prenatal care and community-based services that they identify themselves as ones they desire. For example, we provide access to infant and early childhood mental health providers in the community to ensure our clients' access to quality, evidence-based, family-strengthening services before the child is born. The community-based service referrals are driven by our clients' goals and individually tailored to the needs they identify. Services include child care, play groups, respite care, mother-child dyadic therapy, individual counseling, homemaker services, domestic violence counseling, and substance abuse treatment, including family-based care. HMHB prioritizes connecting clients to attachment-based services that benefit all parents and children, rather than services that are focused more on "teaching" a person believed to be deficient how to parent. Parent-child-attachment-based interventions have been demonstrated to promote secure attachment.[157] Reducing the

[157] Barry Wright & Elizabeth Edginton, *Evidence-Based Parenting Interventions to Promote Secure Attachment: Findings From a Systematic Review and Meta-Analysis*, GLOBAL PEDI-

harm of substance abuse, mental illness, and domestic violence prior to birth or removal can also promote attachment and allow parents to be more psychologically available to engage in reflective functioning and understanding.

Clients are counseled that these services are "voluntary" and that neither ACS nor the court has required them, but that participation in self-identified services during pregnancy before the baby is born will optimize the chance that the baby will not be removed. It is important to acknowledge that the "voluntariness" of the client's decision to participate is qualified due to the coercive nature of the system. We have found, however, that our clients who feel that they need services willingly participate in services prior to birth and before ACS has required them and are much more likely to report getting something out of the services and succeed in completing them. HMHB also provides material support to overcome the all too common barriers to engaging in services such as clothing, transportation assistance, and advocates who can accompany our clients to the intake and appointments.

E. HMHB Provides Isolated Pregnant Women With Children in the System with a Supportive Community

Our clients often express feelings of shame and embarrassment about their involvement in the child protection system. HMHB helps empower pregnant women with older children in foster care and provide space for community, connection, and positivity. HMHB facilitates a weekly support group for pregnant and postpartum system-involved women. The participants drive the agenda and suggest topics for discussion including nutrition, reducing the harm of drug use, domestic violence, job searching and resume building, and tips for negotiating with aggressive caseworkers. We partner with organizations like Ancient Song Doula Services[158] and Planned Parenthood[159] to conduct workshops focused on reproductive planning, nutrition, and postpartum health. Many of the participants have remained connected outside of the group and provide continued support to one another after their babies are born.

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atric Health, June 22, 2016, at 1, 2-3, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4995667/pdf/10.1177_2333794X16661888.pdf [https://perma.cc/D8N3-9C7A].

158 Ancient Song Doula Services, http://www.ancientsongdoulaservices.com/ [https://perma.cc/B8V2-MGUB] (last visited Nov. 25, 2016).

159 Planned Parenthood, https://www.plannedparenthood.org/planned-parenthood-new-york-city/who-we-are [https://perma.cc/6ZZU-VTKA] (last visited Nov. 25, 2016).

F. HMHB Seeks To Provide Child-Protection-System-Involved Pregnant Women with Birth Dignity and Doula Support

When a woman makes the difficult choice to terminate her pregnancy, the HMHB team honors that choice and connects her with community-based supports if she is interested in receiving them. For women who choose to continue their pregnancies, the HMHB team honors that choice as well. HMHB partners with Ancient Song Doula Services,[160] which seeks to empower women, especially low-income women of color, to make healthful, informed decisions about their lives. For parents who decide to carry their pregnancies to term, the HMHB team views the child's birth as a reason for motivation, rather than a moment of judgment and anxiety. Too often, our clients experience a total lack of control over their birth experience. Doulas assigned to clients assist in developing personal birth plans and informing the hospital of the plan. Doulas also support clients in engaging in self-care during pregnancy and postpartum periods, provide education on a range of birthing options, offer breastfeeding support, and serve to ensure the emotional health of our clients during the difficult experiences they face. When our clients give birth, HMHB ensures that they have a team of advocates available to assist them in creating a supportive environment in the hospital and advising them through the anticipated child protective investigation.

G. HMHB is Able to Address Emergency Material Needs of Parents in Crisis

The state's mistrust of poor mothers is undeniably clear; the child protection system is unwilling to provide actual material support to parents, instead providing all available resources to children and foster parents even when supporting parents might allow for the best outcomes for many vulnerable children. Given this context, HMHB intentionally provides direct material assistance to parents when it would aid them in keeping their child in their custody. HMHB participates in The Bronx Defenders Client Emergency Fund,[161] a fund created, managed, and run by dedicated individuals on staff and used for clients in need. Direct assistance, even in small amounts, can be the difference between a child being removed or remaining at home. Through the Client Emergency

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160 Ancient Song Doula Services, *supra* note 158.

161 *Client Emergency Fund*, Bronx Defenders, http://www.bronxdefenders.org/programs/client-emergency-fund/ [https://perma.cc/SN3R-CQGY] (last visited Nov. 25, 2016).

Fund, HMHB has provided clients in need with groceries, strollers, diapers, cribs, school uniforms, cleaning supplies, breast pumps, minutes on a phone to stay in touch with case workers, transportation costs, beds so that children can visit, and the fees for licensing exams. Although HMHB's Client Emergency Fund cannot, in any long-lasting way, improve the economic status of our clients, the provision of direct support expresses trust in the responsibility of its recipients and can go a long way in preventing the kind of emergency that can result in further child-protection-involvement. In this way, HMHB resists the notion that the hardships faced by families in the child protection system are due to maternal, rather than material, deprivations.

H. HMHB Has Succeeded In Keeping Children Out of Foster Care and Home with Their Parents

Since its inception, HMHB has worked with more than 224 pregnant women and 54 parents of children ages zero to three, with the goal of providing an oppressed and targeted community of women with choices regarding their families. With the support and advocacy provided by HMHB, 86 percent of the newborns were able to remain with their immediate family (66 percent with the mother and 20 percent with the father or other relative), and only 14 percent were placed in non-kinship foster care. In contrast, in the last fiscal year, of the 328 babies born to mothers with children in foster care city-wide, 65 percent of those newborns entered foster care.[162]

HMHB advocates provide linkages to supportive services aimed at assisting our clients in achieving their goals; in the last fiscal year alone, our team provided 123 referrals to quality, community-based providers. More broadly, we advocate for our clients' rights to bear and raise their own children without undue government interference. By aligning our mission with the reproductive justice movement, we seek to connect our work defending parents to a broader conversation about child welfare and reproductive freedom.

V. A Call to Action

Family defense and advocacy on behalf of pregnant women in the child protection system are fairly understood as worthy work

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[162] Memorandum from N.Y. State Admin. for Children's Servs. Office of Research & Analysis, Safety Alert 14 Outcomes 10 (Sept. 16, 2015) (on file with author).

that is part of the movement for reproductive justice. The system is unequally applied to poor families of color. Rather than targeting systemic reasons for family hardship to prevent maltreatment, it blames individual parents after a crisis has already occurred. It is too punitive, relying on child removal, foster care, and family dissolution, rather than providing the material resources that would actually assist struggling families and better the welfare and well-being of society's children. By separating children from their parents, placing them in foster care, and legally dissolving their families, the system does further harm to the individuals, families, and communities it seeks to serve. Unwilling to honor poor families and unable to adequately address their real problems, the system seeks to draw lines between those "deserving" parents who should retain custody of their children and those who should not. These lines are based not in fair analysis of risk to the child or a parent's ability to care for their child, but in assumptions about race, class, and gender and on ability to comply with and meet the expectations of the system. If a baby is born to a woman who is already system-involved, these same forces are at play, almost guaranteeing the placement of the newborn in foster care as well.

In addition to providing the high-quality legal defense owed to all clients who are accused by the state of wrongdoing, family defense advocates also play an important role in challenging the presumptions and misconceptions about system-involved parents and the policies and practices that target and devalue their reproductive decisions. Implementing HMHB, a reproductive-justice-informed, advocacy-based program in a holistic public defender office, with its hallmark duties of loyalty and confidentiality, is such an attempt. At its core, it seeks to secure the right to parent for women in the city who are most vulnerable to losing their children. In so doing, HMHB demonstrates respect for their reproductive decisions and challenges the central presumption of the child protection system, steeped in racist and classist values, that the majority of parents caught up in that system cannot raise their children. Programs like HMHB are necessary because of the very fundamental inequalities of the system that the RJ movement calls on us to eradicate. With its holistic advocacy and reproductive justice approach, HMHB has been successful at curbing the womb-to-foster-care pipeline for many system-involved women in the South Bronx by ensuring that they raise their newborns from birth.

While a strong family defense model and innovations that focus on challenging specific coercive functions of the system (like

CSA 14) are critical, improving legal resources for system-involved parents is not the fundamental change necessary to improve the welfare of families in the South Bronx. Despite its success on behalf of individual parents, HMHB's location within a legal system means it is limited in its impact.[163] The very real power of the child protection system over families, and the consequences for parents if they fail to meet the system's demands, are real and devastating and borne alone by the client and her family. To the degree that one can turn to the court to challenge an injustice or unfair decision by ACS, decades of research finds that the more powerful parties continue to win over the less powerful.[164] This means that the rights and goals of our clients are continually contested and negotiated and more direct challenges to ACS authority and decisions are often conceded in order to meet the client's goal of retaining or regaining custody of her child. A client may justifiably choose not to challenge ACS's view of her family, even if it is blatantly incorrect or steeped in racist and classist ideology, and bend to its demands, so that ACS's intervention in her life will end more quickly. Because so much is at stake for our clients, HMHB is limited in its ability to challenge the system's structural inequality and address the systemic reasons for our families' hardship. System-involved pregnant women and their newborns fare better within the existing system with HMHB, but the system's structural inequality remains.

The RJ movement seeks comprehensive, long-term solutions to social justice issues with the goal of achieving complete physical, mental, spiritual, political, and economic well-being of women and girls.[165] While a system to protect children who are seriously abused and unsafe in their homes is necessary, addressing the problems of poor families through a punitive child protection regime perpetuates stratified reproduction in this country.[166] An RJ vision requires the restructuring of public welfare so that all families have real economic and social support and the need for such support is not tied to a system of child removals and foster care. It must pose a challenge to the fundamental flaws in the child protection system, which include, but are not limited to, its unequal application to poor families and families of color and its conflation of poor parents with poor parenting. We must work to transform this unpopular and dreaded system into one known for its fairness, its

163 *See* Luna & Luker, *supra* note 11, at 329.

164 *Id.*

165 Ross, *supra* note 11, at 14; Asian Communities for Reproductive Justice, *supra* note 11, at 2.

166 Lee, *supra* note 33, at 4.

respect and support for the families it serves and their decisions regarding whether and when to bear children, and its willingness to truly help and work tirelessly to keep families together.