"BAD" MOTHERS AND SPANISH-SPEAKING CAREGIVERS

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Children are an essential but often overlooked bounty in the regulation of race, culture, and rights. The role of children in perpetuating and enriching culture, moral value, and political power is surprisingly under-theorized in the critical literature. Indeed, there is very little discussion about child welfare in civil rights and critical race studies. This absence is surprising given that children are both primary receivers and transmitters of race, ethnicity, culture, language, and values; and that the constitutional civil rights to family autonomy – the parental rights so often denigrated – recognize the importance of children in the creation and perpetuation of moral values and, ultimately, to a diverse and critical polity.

In light of the important social and political roles of children, the power of mothers to be recognized as mothers is crucial not only for hedonic and creative purposes but for the very perpetuation of culture. Nevertheless, we have in this country a long and continuing history of constructing the ideal of "mother" according to skin color, religion, culture, national origin, language, ethnicity, class, and marital status. Families headed by mothers who do not meet these norms become visible because of their difference and because they use certain public services. Their visibility and differences make these families vulnerable to coercive state intervention and regulation through the child welfare system by exposing otherwise private intimate relationships.[1] This intervention is in practice – and in theory – state-oriented, normative, and often punitive.[2]

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[1] *See* Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001) [hereinafter Appell, *Virtual Mothers*]; Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577 (1997).

[2] This intervention has also been historically and presently intertwined with other structures that are punitive in nature, though often benevolent in guise and potential, such as aid to dependent families and its current incarnation Temporary Aid to Needy Families; adoption; and juvenile justice. Each of these interrelated systems arises out of and reinforces privatization of social problems and basic human need that provides assistance to morally worthy recipients and metes out punishment to those who are not. Mothers were morally worthy when they were White, widowed women, then single, chaste women with children, and currently, mothers who can work for pay or mothers who can work their case plans. *See* LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 (1994); Appell, *Virtual Mothers*, *supra* note 1, at 765-79.

Women who are compliant, English-speaking, not ethnically diverse, White, and middle class are most successful in the child welfare system; those who diverge from these norms are most likely to lose their motherhood. When mothers lose their children, they lose their chance to pass on their language, culture, and values, and their children lose their chance to receive these social goods. This loss can compromise individual, cultural, and even political identity.

While the child welfare system most extremely and notably targets poor African American and Native American families, there has been little study of the experiences of Latino families in that system. This Article illustrates an intersection of Latino families with the child welfare system and highlights the importance and vulnerability of language in this system. The next section briefly rehearses the history and role of the child welfare system in the battle for racial, cultural, and political supremacy in this country. Then the Article discusses how this struggle relates to Latino families, illuminating the struggle through a brief case study of Maria, a Spanish-speaking grandmother of a child involved in the child welfare system in Las Vegas, Nevada, where approximately a quarter of the population is Latino. The Article concludes with some lessons about the child welfare system the case study illustrates.

CHILD WELFARE SYSTEMS OVERVIEW AND BRIEF HISTORY

The "child welfare system" generally refers to the laws and social movements designed to protect vulnerable children from abuse and neglect and to socialize them to become productive adults. The child welfare system is at its best, strongest, and most vital when it provides meaningful protection of children from abuse and neglect. Its purpose is to intervene when children are, or are at risk of being, abused or neglected. Neglect, not abuse, is by far the most commonly identified risk to children.[3] The child welfare system permits state agents to intervene in family life by regulating neglectful or abusive parents and, if warranted, placing children in foster, kin, or adoptive homes. The child welfare system is at its worst when it confuses poverty and norm-diversion with abuse and neglect and when it fails to offer children and families culturally appropriate assistance that is also respectful of their own self-determination. At its worst, the system undermines or even threatens the well-being and integrity of children and families and the political, moral, and social power of mothers who do not embody dominant norms.

The child welfare system can be broadly and positively construed to include provision for basic medical care, nutrition for pregnant and parenting women and children, and limited cash benefits. However, the dominant and most heavily funded portion of the child welfare system relates to perceived family dysfunction that often results in foster care and adoption, each of which

[3] An estimated 872,000 children were determined to be victims of child abuse or neglect for 2004, over 60% of whom were neglected by their parents or other caregivers. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SUMMARY of Child Maltreatment 2004 xiv (2004), http://www.acf.hhs.gov/programs/cb/pubs/cm04/ cm04.pdf. Although neglect is often confused with poverty, more than one-third of the estimated 1490 child abuse or neglect related deaths were attributed to neglect. *See id.* at xvii.

provides much more generous benefits to children in state or state-sponsored care than to children in their families.[4] This system, broadly or narrowly construed, does not address the larger systemic material and social conditions that undermine families' and children's health, welfare, and opportunity. In this way, the system both responds to and reinforces the dominant conservative narrative undergirding a socioeconomic and political structure that individualizes and privatizes need and distribution of resources while promoting personal accountability and solutions. Briefly told from a critical perspective, the story of child welfare in this country – and perhaps children's dependency rights more broadly – is the attempt to acculturate children and families into White, Anglo-Saxon, Protestant norms.[5]

The conventional story places the beginning of the child welfare movement with the child savers and Progressives of the nineteenth and early twentieth centuries who were primarily concerned with poor, immigrant children. In truth, the story begins earlier and includes several parallel and intersecting tracks: one for Native American children, one for enslaved children,[6] one for those children we now consider to be White (European), one for free Black children, and perhaps one for Mexican-American children. The tracks for free Black and Mexican-American children both appear to have been similar to, but often segregated from, the systems for White children. I highlight the Native American system and the White system because the former so clearly exemplifies the connection between children and political identity and the latter is the one that most directly led to the structure of the current dominant state-driven child welfare system, which, ironically, now serves a disproportionally large percentage of children from families of color.

Child Welfare and Native Americans

Beginning in colonial times, missionaries undertook to "educate" Indian children into Anglo, Christian ways.[7] By the early 1800s, the federal government became more formally involved with this mission and established the Civilization Fund, which provided grants to "private agencies, primarily

[4] Appell, *Virtual Mothers, supra* note 1, at 774.

[5] *See* Annette R. Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141 (2004) [hereinafter Appell, *Uneasy Tensions*]; *see also* Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 456-65 (2004) (book review) (discussing the conservative narrative and approach to child welfare, inter-racial adoption, and welfare reform) [hereinafter Appell, *Disposable Mothers*].

[6] Although still deeply relevant and influential, I do not recount in this paper the complex, cruel, and deadly history of children in slavery or the multiple lines of positive and negative authority that law, parents, owners, and other slaves had regarding enslaved children. For research regarding African and African American children in and after slavery, see, e.g., HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925 (1976); WILMA KING, STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA (1995); STEVEN MINTZ, HUCK'S RAFT: A HISTORY OF AMERICAN CHILDHOOD (2004); MARIE JENKINS SCHWARTZ, BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH (2000). For one of many more current treatments of African American children, families and communities in the child welfare system, see DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

[7] Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356-60 (1986).

churches, to establish programs to 'civilize the Indian.'"[8] By the end of the nineteenth century, the federal government's official Indian child policy was to separate Native American children from their tribes. Pursuant to this policy, the government and private agencies established boarding schools away from tribal communities to acculturate Native American children to Anglo-American language, religion, and other cultural norms.[9] Federal practice also included placing Native American children on farms in the East and Midwest, a practice that continued into the mid-twentieth century.[10] As recently as 1959, the Bureau of Indian Affairs and Child Welfare League of America, the standard-bearer for child welfare practice then and now, jointly created the "Indian Adoption Project," designed to remove Indian children from their Indian homes and place them for adoption with non-Indian families.[11] During the 1960s and 1970s, state social workers removed 25% to 35% of Indian children from their homes to foster and adoptive homes and more institutional settings.[12]

This extensive history of coercive public and private (though publicly sanctioned) removal of large numbers of Indian children from their families and tribes presented a serious threat to the continued cultural and political existence of many Native American tribes. Because the removed children lost their tribal language and were not acculturated into tribal life and practices, there was a dearth of children on the reservations or otherwise connected to their tribes and culture to carry on the tribal traditions. This crisis led to the adoption of the federal Indian Child Welfare Act ("ICWA") in 1978. ICWA was designed to stem the tide of removal of Indian children from their families and tribes by: (1) mandating higher procedural protections and culturally appropriate assessments and (2) allowing tribes to intervene in child welfare proceedings and exercise jurisdiction over child welfare cases – to retain and reclaim their children whenever possible.[13] ICWA thus recognized the historical and contemporary culturally inappropriate interventions into Indian families and the political, cultural, and personal harms this appropriation of children causes for the children, parents, and tribes.

Child Welfare and European Immigrants

The more often told story of child welfare – the one relating mostly to White children – also begins in colonial times but ramps up in the decades preceding the Progressive Era around the turn of the nineteenth century and into the twentieth century, corresponding roughly to the influx of immigrants from places like Germany, Ireland, and Poland. During the colonial period,

[8] Democrat Supplemental Views on H.R. 3828, Indian Child Welfare Act Amendments of 1996, H.R. REP. No. 104-808, at 15 (1996).

[9] *Id.*; MINTZ, *supra* note 6, at 171-72; Lacey, *supra* note 7, at 356-60, 363-64.

[10] H.R. REP. No. 104-808, at 15-16; Lacey, *supra* note 7, at 359-61.

[11] H.R. REP. No. 104-808, at 16. At least 50,000 Indian children were adopted by non-Indians in the 20th century. MINTZ, *supra* note 6, at 172, n.45.

[12] *Problems that American Indian Families Face in Raising Their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs of the Sen. Comm. on Interior and Insular Affairs*, 93rd Cong. 2d Sess. 15 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs, Inc.); H.R. REP. No. 104-808, at 16.

[13] 25 U.S.C. §§ 1901-1963 (2000).

children were generally valuable economic producers who worked for their families or others. Children without parents were apprenticed or bound out to masters.[14] Courts could remove children from parents and masters who failed to support them or to protect their interests, safety, or morals.[15] The primary aim of this early regulation of children was to assure children were properly socialized and to keep them from becoming public charges as children or adults. Men elected to enforce community norms policed families and apprentice masters to ensure that children were behaving well and receiving proper civic and religious training.[16] Contemporary norms of childhood as a time for development and play did not apply widely, but fathers and masters could be punished for treating children too harshly, and children could use parental neglect or abuse as a defense in actions against the child.[17]

By the early 1800s, the economy was changing, cities were growing, a middle class was arising, and more contemporary notions of childhood were beginning to take hold. Still, poor and neglected children were placed in almshouses in terrible conditions alongside poor and disabled adults and in Dickensian orphanages, houses of refuge, and eventually reformatories.[18] These placed children included literal orphans, non-marital children, and children living and working in the streets.[19] In response to these conditions, charitable civic and religious organizations known as the child savers began to provide programs to protect these children and prepare them for adulthood. While still relying on reformatories and orphanages to shelter, contain, and socialize children, starting in the 1850s these private child savers also bound children out to work for families. The child savers often sent children to locations hundreds of miles away from their homes to places where children were more economically valuable than in the cities. Eventually, hundreds of thousands of children went out West on orphan trains bound for adoption and work.[20]

The "saved" children were primarily from immigrant, Catholic working class and poor families headed by single mothers,[21] but also included free African American children who were also indentured or housed in segregated orphanages.[22] These well-meaning child welfare proponents thought children should be clean and modest, attend school, and not play outside unattended.[23] Even then, the Protestant child savers imposed "standards of proper parenting [that] were not only antagonistic to the practices of many of these immigrants

[14] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 2-3 (1994). These children included literal orphans and also the large number of children who came to the colonies as indentured servants. *See also* MINTZ, *supra* note 6, at 32-41.

[15] JOSEPH M. HAWES, THE CHILDREN'S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION 1-7 (1991); MASON, *supra* note 14, at 1-47.

[16] MASON, *supra* note 14, at 8-9, 88.

[17] HAWES, *supra* note 15, at 4-7; MASON, *supra* note 14, at 6-13.

[18] LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 8 (1999); MINTZ, *supra* note 6, at 157-62.

[19] GORDON, *supra* note 18, at 8.

[20] MINTZ, *supra* note 6, at 164-67; GORDON, *supra* note 18, at 8.

[21] GORDON, *supra* note 18, at 8-13.

[22] ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 27-30 (1972).

[23] GORDON, *supra* note 18, at 11.

but also often inimical to the economic necessities of their lives."[24] The aim of these efforts was to protect the children, teach White, middle-class, Protestant values and work ethic,[25] and to protect the public from these children.[26] At the time in the East, the concept of race placed Irish and Polish immigrants in non-White categories; out West, race was constructed differently, in a hierarchy topped by persons of European descent (or marriage) as contrasted with Mexicans (synonymous with Mexican-Americans) and then indigenous people.[27]

Toward the end of the Progressive Era, social workers and the government took over these charitable actions. State machinery developed to oversee the care of wayward youth. The first Juvenile Court was established in Chicago, Illinois, in 1899, and by 1920, nearly every state had created such courts.[28] States also began to enact child protection and child labor laws, and provide some public support for good single mothers (i.e., widows).

This Progressive child protection movement eventually transformed itself into the modern child welfare system, which continues to remove children from poor, abusive, or neglectful parents, usually mothers, and places them with licensed foster care families.[29] Institutionalized in the New Deal reforms and escalating with the discovery of the battered child syndrome in the 1960s and the Child Abuse Prevention and Treatment Act of the 1970s, the child welfare movement became very large, well-staffed, and populated by mental health and legal professionals.[30]

Child Welfare Norms Today

Private civic and religious actors and norms no longer explicitly run the child welfare system, but instead professionals, who identify children's rights

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[24] *Id.* at 10. Professor Gordon continues: "Children who appeared to child savers as uncared-for strays were often contributing to their families' incomes by begging, peddling, gathering castoffs for use or resale, selling their services, or stealing." *Id.* at 10-11. The Catholic Charities took a slightly different approach, trying to help families and not blaming single mothers or treating them as "fallen." *Id.* at 15.

[25] *See* GORDON, *supra* note 18; HAWES, *supra* note 15, at 7-9; DUNCAN LINDSEY, THE WELFARE OF CHILDREN 13-14 (2nd ed. 2004); MASON, *supra* note 14, at 4, 7.

[26] BILLINGSLEY & GIOVANNONI, *supra* note 22, at 22-23; HAWES, *supra* note 15, at 16-25.

[27] GORDON, *supra* note 18, at 76-77, 98-106. When the Catholic Charities sent Irish children out West to Arizona on orphan trains, they became White. *Id.* at 19. Professor Gordon's book relates this complex and racialized story of a group of Irish "orphans" sent from New York City to an Arizona mining town to be adopted by families the town's Catholic Church had selected – families who turned out to be Mexican – and the uproar that followed when the New York nuns and the Anglos in town realized that White children were to be distributed to families considered to be non-White when compared to European Americans. *See also* N.Y. Foundling Hosp. v. Gatti, 203 U.S. 429 (1906); N.Y. Foundling Hosp. v. Gatti, 79 P. 231 (Ariz. 1905) (the racialized litigation arising out of the abduction); Ariela J. Gross, *"The Caucasian Cloak": Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337, 345-62 (2007) (regarding racial classification of Mexican Americans in the Southwest historically and though the 1950s).

[28] Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 26 (1998).

[29] Appell, *Virtual Mothers*, *supra* note 1, at 771-73; *see also* LINDSEY, *supra* note 25, at 11-24 (describing transformation); MASON, *supra* note 14, at 101-11 (describing early removal of children from their mothers due to poverty and immorality).

[30] MINTZ, *supra* note 6, at 172.

and interests based on "scientific" rationales and guidelines, drive it.[31] These rationales and guidelines are, however, culturally bound and continue to embody sharp demarcations between child and adult roles, and naturalize nuclear families, self-sufficiency, and individuation.[32] These norms privilege psychological theories arising out of the nuclear middle-class family norm, which place the caregiver-child bond above other attachments, identity issues, and cultural bonds a child may have.[33] While the child welfare system norms are difficult to bridge even for families who have been in this country for generations (or who predated colonization), they are even more obscure for immigrant families who "often do not know what is expected of them, but . . . are still punished when they fail to comply with unwritten cultural expectations."[34] Indeed, the system's norms regarding children may characterize parents as neglectful for "leaving their children home alone or allowing them to play unsupervised in the street, even though this was the norm in their communities of origin, where neighbors watched out for each others' children."[35]

THE MODERN CHILD WELFARE SYSTEM AND LATINO FAMILIES

It may come as no surprise after this schematic rehearsal of the social and legal delineation of children who need protection outside the family, that the definitions of good mothers and fathers are constructed according to dominant cultural norms: married; White; Christian (preferably Protestant); Anglo, and, relatedly, English-speaking; and middle class. In addition, families should be independent and not too deeply embedded in or reliant on extended family, fictive kin, and community or tribal members. In other words, nuclear families are the norm and define the minimum and maximum limits of the appropriate family.[36]

It might also come as no surprise to learn that our modern child welfare system has been plagued by gross overrepresentation of poor children and especially African American and Native American children. Indeed, there is much literature devoted to the overrepresentation of African American and Native American families and children in all of the negative aspects and outcomes of the child welfare system. As Figure 1 illustrates, non-Hispanic White children are underrepresented at all levels and decision points in the child welfare sys-

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[31] HAWES, *supra* note 15, at 99-105; *see also* Bette L. Bottoms et al., *Children, Social Science, and the Law: An Introduction to the Issues, in* CHILDREN, SOCIAL SCIENCE, AND THE LAW 1 (Bette L. Bottoms et al. eds., 2002); LINDSEY, *supra* note 25, at 29-40.

[32] Appell, *Uneasy Tensions*, *supra* note 5, at 160-61; *see also* Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692, 700-02 (2006) [hereinafter Appell, *Children's Voice*].

[33] *See* Appell, *Children's Voice*, *supra* note 32, at 711-13; Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 347-48, 350-54 (1996).

[34] LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 37 (2005). For example, permitting children to babysit their siblings may be viewed with suspicion. *Id.* at 38.

[35] *Id.* at 38.

[36] *See* Marian S. Harris & Mark E. Courtney, *The Interaction of Race, Ethnicity, and Family Structure with Respect to the Timing of Family Reunification*, 25 CHILD. & YOUTH SERVICES REV. 409, 413 (2003).

tem: in referrals to child protection investigation ("CPS"), among those removed from home, and in the foster care system that they enter when charges of child abuse or neglect are substantiated. In other words, White children are under-referred to CPS, screened out of the system early on, and do not come into custody or stay in foster care as long as other children.[37]

FIGURE 1. RACE/ETHNICITY AND THE CHILD WELFARE SYSTEM

GROUP OF CHILDREN	% OF GENERAL POPULATION[38]	% OF REFERRALS TO CPS[39]	% OF CHILDREN IN FOSTER CARE[40]
WHITE, NON-HISPANIC	59	50.6	39
HISPANIC	19	14.2	17
AFRICAN AMERICAN	15	24.7	35
NATIVE AMERICAN	1	1.6	2
ASIAN/PACIFIC ISLANDER	4	1.4	1

In contrast, African American and Native American children are disproportionately represented by two and almost three times in child protection referrals and in foster care, respectively. Social scientists generally define "disproportionality" in the child welfare context as representation of children in that system in a greater percentage than their representation in the larger child population. Nationally, Latino children are not disproportionately represented in the child welfare system compared to their number in the general population,[41] but when compared to White non-Hispanic children, they are over-represented by about 1.7:1.[42] Thus, when White is the measure, Latino children are over-represented, or perhaps receive disparate assessment and treatment. In any event, the data regarding Latino families in the child welfare system are inconsistent and do not provide a clear picture of their treatment.[43]

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[37] *See* ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN THE CHILD WELFARE SYSTEM, SYNTHESIS OF RESEARCH ON DISPROPORTIONALITY IN CHILD WELFARE: AN UPDATE (2006), *available at* http://www.caseyfamilyservices.org/pdfs/0226_CC_BobHill Paper_FINAL.pdf; J.D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVICES REV. 359, 359-60 (2003).

[38] CASEY FAMILY PROGRAMS, DISPROPORTIONALITY IN THE CHILD WELFARE SYSTEM 1 (2006), http://www.casey.org/MediaCenter/MediaKit/DisproportionalityFactSheet.htm (follow "Disproportionality Fact Sheet (PDF: 67KB)" hyperlink).

[39] Fluke et al., *supra* note 37, at 363.

[40] ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., THE AFCARS REPORT – INTERIM FY2003 ESTIMATES AS OF JUNE 2006 2 (2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.pdf.

[41] When national data are disaggregated by geographical locations, different patterns may emerge. Sheila D. Ards et al., *Racial Disproportionality in Reported and Substantiated Child Abuse and Neglect: An Examination of Systematic Bias*, 25 CHILD. & YOUTH SERVICES REV. 375, 376 (2003). For example, in some parts of Minnesota, Hispanic children are disproportionately overrepresented in the child welfare system at two to three times their representation in the general population. *Id.* at 375-76.

[42] CASEY FAMILY PROGRAMS, *supra* note 38, at 2.

[43] Harris & Courtney, *supra* note 36, at 414-15; HILL, *supra* note 37, at 9.

The causes of over- and underrepresentation of families in the child welfare system are complex and often studied.[44] There are several hypotheses regarding why some children and families, more than others, come to and hold the attention of child welfare system. These theories include the visibility of certain families or populations, the characteristics of certain communities, norm divergence, and the bias of decision makers.[45] None of these hypotheses is universally accepted, although the lack of causal relation between neglectful or abusive behavior and race or ethnicity is widely accepted.[46] There are however, historically and presently, correlations between child welfare involvement and poverty.[47] This is not to say that a large portion of poor people neglect or abuse their children; instead the data show that a large percentage of families involved in the child welfare system have received poverty-related benefits.[48]

There are also correlations among race, ethnicity, immigration status, and poverty. In other words, the vast majority of children in the child welfare system are poor, while African Americans, Latinos, and those who are foreign born are disproportionately poor, placing them at increased risk for child welfare system involvement. Figure 2 illustrates the overrepresentation of people of color in the rate of poverty. Poverty rates for Blacks and Hispanics greatly exceed the national poverty rate of 12.7%. In 2004, 24.7% of Blacks and 21.9% of Hispanics were poor, compared to 8.6% of non-Hispanic Whites and 9.8% of Asians. There is a high correlation between being foreign born and being in poverty: "In 2004, 17.1% of foreign-born residents lived in poverty, compared to 11.8% of residents born in the United States. Foreign-born, noncitizens had an even higher incidence of poverty, at a rate of 21.7%. In total, the foreign-born poor account for about a sixth of all poor persons."[49]

Figure 3 shows the relative rates of poverty according to race, ethnicity, gender, and marital status. The figure illustrates the high correlation between poverty and single female-headed families. It also indicates that such families headed by African American or Latina mothers have even higher poverty rates. In 2004, both black and Hispanic female-headed households had poverty rates just under 40%.[50] These single-parent households of color are further removed from the child welfare system norms of a two-parent, nuclear, self-sufficient family.

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[44] *E.g.*, Appell, *Virtual Mothers*, *supra* note 1, at 772-74 (rehearsing studies); 25 CHILD. AND YOUTH SERVICES REV. 355-507 (2003) (double issue dedicated to the topic).

[45] HILL, *supra* note 37, at 25-29.

[46] Appell, *Virtual Mothers*, *supra* note 1, at 772-73.

[47] HILL, supra note 37, at 25-26; Richard P. Barth et al., *Placement Into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty*, 76 AM. J. ORTHOPSYCHIATRY 358, 365 (2006).

[48] STAFF OF HOUSE COMM. ON WAYS AND MEANS, 108TH CONG., 2004 GREEN BOOK sec.11, at 82, *available at* http://www.gpoaccess.gov/wmprints/green/2004.html; Barth et al., *supra* note 47, at 364 (noting also that caseworkers found that around 50% of the families with children in care and about one-third of those receiving in-home services as having "had trouble meeting the basic needs of their children at the time of the [child protection] investigation.")

[49] NAT'L POVERTY CTR., POVERTY IN THE UNITED STATES, FREQUENTLY ASKED QUESTIONS, http://www.npc.umich.edu/poverty/#4 (last visited June 9, 2007).

[50] *Id.*

FIGURE 2. POVERTY RATES BY RACE, ETHNICITY & NATIONAL ORIGIN

GROUP	% OF POPULATION[51] [52]	POVERTY RATE (%)[53]
AFRICAN AMERICAN	12.3	24.7
HISPANIC	12.5	21.9
WHITE, NON-HISPANIC	69.1	8.6
ASIAN/PAC. ISLANDER	4.0	9.8
FOREIGN BORN RESIDENTS	11.7	17.1
BORN IN U.S. RESIDENTS	88.3	11.8
TOTAL U.S. POVERTY RATE		12.7

FIGURE 3. POVERTY RATES BY FAMILY TYPE AND RACE AND ETHNICITY[54]

RACE	FAMILY	POVERTY RATE (%)
AFRICAN AMERICAN	FEMALE-HEADED	39
LATINO	FEMALE-HEADED	39
OVERALL	SINGLE FEMALE-HEADED	28.4
OVERALL	SINGLE MALE-HEADED	13.5
OVERALL	MARRIED COUPLE-HEADED	5.5

It would appear that, statistically, Latino families may be at great risk for entry into the child welfare system due to their disproportionate poverty, recency of immigration for many,[55] and norm diversion. Indeed, given these risks and the historic subordination of Latinos in this country, one might expect heavy overrepresentation of Latinos in the child welfare system. Yet, while as Figure 1 suggests, Latino children are placed out of home more quickly and remain in care longer than White children,[56] Latino families are not disproportionately overrepresented and certainly not to the same degree as African American and Native American families. There may be many reasons for these phenomena, such as: the different histories of these three groups; the relative invisibility of Latino, especially immigrant, families to social service providers[57]; the diversity of the peoples considered Hispanic in the United States;

[51] U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS, UNITED STATES: 2000 1 (2001), http://www.census.gov/prod/cen2000/dp1/2kh00.pdf.

[52] LUKE J. LARSEN, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2003 1 (2004), *available at* http://www.census.gov/prod/2004pubs/p20-551.pdf.

[53] NATIONAL POVERTY CENTER, *supra* note 49.

[54] *Id.*

[55] More than 5.1 million children in this country are children of Mexican immigrants, with immigration from Mexico accounting for 39% of immigrants and immigration from Mexico, South America, Central America, and the Caribbean combined accounting for 60% of immigrants to this country. Margie K. Shields & Richard E. Behrman, *Children of Immigrant Families: Analysis and Recommendations*, 14 FUTURE OF CHILD. 4, 4-5, 8 (2004).

[56] Wesley T. Church II, *From Start to Finish: The Duration of Hispanic Children in Out-of Home Placements*, 28 CHILD. & YOUTH SERVICES REV. 1007, 1020-21 (2006).

[57] Appell, *Virtual Mothers*, *supra* note 1, at 769-73 (discussing visibility and child protection involvement). The fact that Latino families traditionally have experienced diminished

immigration patterns and status; and mitigating social characteristics (such as high proportion of marital families). These factors may help keep Latinos out of the system or lead to earlier exit.[58]

Definitive answers are not available because the story of Latino children and families in the child welfare system is less studied, is evolving, and unfolds in different ways than it might for other national, ethnic, or racial groups in this country. On the one hand, as a statistical matter, Latino families, aggregated, mirror dominant marital norms with a high percent of two-parent households (about 69% in the United States), though these families are extended, not nuclear.[59] This high proportion of two-parent families may expedite reunification of families involved in the child welfare system.[60] In addition, statistics reveal that immigrants from Mexico – by far the largest immigrant group – have lower infant mortality rates and fewer low birth rate babies.[61] Mexican immigrants are more likely to be living in intact families and in supportive (immigrant) communities,[62] which may also indicate their families are less stressed and less likely to come to the attention of child welfare authorities.

On the other hand, those Latino families who do not speak English are further removed from the normative White, Anglo, English-speaking, Protestant, nuclear family. Indeed, 70% of Mexican immigrant parents and 38% of their children have only limited English skills.[63] The fact that Latinos are under-served in the provision of general social services could suggest that the families are not receiving needed social supports;[64] at the same time, however, being disconnected from social services may make these families less visible to child welfare authorities.

LANGUAGE, CULTURE, AND MOTHERING: MARIA'S FAMILY

The booming Las Vegas, Nevada, metropolitan area provides a setting that illustrates both the importance of language and culture in the child welfare sys-

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access to social services may place them under the radar of child protective services even while this lack of access undermines the welfare of the families. *See* Wesley T. Church II et al., *Maybe Ignorance is Not Always Bliss: The Disparate Treatment of Hispanics Within the Child Welfare System,* 27 CHILD. & YOUTH SERVICES REV. 1279, 1280 (2005) (noting that Hispanics have diminished access to "general social services").

[58] Harris & Courtney, *supra* note 36, at 424.

[59] *Id.* at 413.

[60] *Id.* at 425.

[61] Shields & Behrman, *supra* note 55, at 8; *see also* Donald J. Hernandez, *Demographic Change and the Life Circumstances of Immigrant Families*, 14 FUTURE OF CHILD. 17, 26 (2004).

[62] Shields & Behrman, *supra* note 55, at 8.

[63] *Id.*

[64] *See* Church et al., *supra* note 57, at 1280 ("Due to multiple social and economic barriers, Hispanics have faced the problem of diminishing access to general social services, thus becoming an underserved population."); *see also* U.S. GOV'TAL ACCOUNTABILITY OFFICE, GAO-06-807, CHILD CARE AND EARLY CHILDHOOD EDUCATION: MORE INFORMATION SHARING AND PROGRAM REVIEW BY HHS COULD ENHANCE ACCESS FOR FAMILIES WITH LIMITED ENGLISH PROFICIENCY (2006), *available at* http://eric.ed.gov/ERICDocs /data/ericdocs2/content_storage_01/0000000b/80/35/39/95.pdf (reporting that children of Latino parents with limited English proficiency were less likely to participate in federally subsidized child care and education programs).

tem and how the relative invisibility of a community, by virtue of its insularity and language, can lead to inappropriate and culturally incompetent child welfare interventions, just as with past immigrant groups. Put another way, social service providers may be resistant or slow to respond to the cultural norms of a fast-growing community. That was certainly Maria's experience when the child welfare authorities took protective custody of her newborn granddaughter. Maria is a Spanish-speaking naturalized American citizen from Mexico with limited English language proficiency. The remainder of this Article sets up and then traces her intersection as a mother and grandmother with the child welfare system in Las Vegas.

In Clark County, where the sprawling, expanding Las Vegas metropolitan area sits and where Maria lives, one-quarter of the population is "of Hispanic or Latino origin" according to the United States Census bureau.[65] Also, as of 2000, in Clark County, 18% of the population was, like Maria, foreign born, and in 26% of the homes, like Maria's, a language other than English was spoken.[66] Yet the state and county child welfare system continue to view families as Anglo and English-speaking. This construction is apparent by the rarity of Spanish-speaking (and other foreign language speaking) case workers, a dearth of translators on staff in child welfare offices, and perhaps an absence of Spanish-speaking teams of social workers in the child welfare system, despite geographical concentrations of Latino communities.[67]

This inattentiveness to language is particularly odd because the entire child welfare system is based on verbal communication and understanding between a family and the caseworker. When the state takes protective custody of a child, the state is required, pursuant to state and federal law, to enter into a written case plan with the parents and others interested in the child. That plan should, among other things, identify the risks to the child, set a goal for the child to go home or be otherwise permanently placed, and identify tasks the parents and other adults should undertake to reach the objectives and goals of the plan. These plans should provide for and dictate the parameters of family visitation. Additional issues not included in the plans are often orally communicated. The state holds the child while the parents work to satisfy the requirements in the case plan; in other words, the family must engage in certain tasks and meet certain milestones before the state will return the child to their care.[68] If this process is conducted in a language in which persons important to the child are not proficient, then it may become difficult for the non-English-speaker to understand what is expected and required.[69] This understanding also must occur in a system that is unlikely to embody the norms of the families

[65] U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, CLARK COUNTY, NEVADA, http://quickfacts.census.gov/qfd/states/32/32003.html (last visited Oct. 4, 2006).

[66] *Id.*

[67] These assertions are based on the author's observations and experiences over nearly a decade of policy and court reform work and direct legal representation of clients in the child welfare administrative and court systems in Nevada.

[68] 42 U.S.C. § 675(1), (5) (2000); NEV. REV. STAT. §§ 432B.540, .553, .560, .580, .590 (2005); NEV. ADMIN. CODE § 432B.400 (2006). *See also* Appell, *Virtual Mothers*, *supra* note 1, at 582-83 (providing an overview of the model).

[69] In a case in which the author and her students represented the children of a monolingual Spanish-speaking mother earlier this decade, the agency regularly did not have a Spanish-

caught in it. Thus, the intuition, experience, or worldview of the non-professionals in the system (e.g., mothers and grandmothers) may not serve them well.

Moreover, for non-English speaking populations, the child welfare system can forever separate children from their families if children are placed in English-speaking homes where they will grow up without the language of their parents and grandparents.[70] Eighteen percent of children in this country speak a language other than English in their homes; 72% of children in immigrant families speak a language other than English at home, and in 26% of these homes, nobody fourteen or older has a strong command of the English language.[71] Yet federal law does not specifically require that children be placed in foster homes where their native or their parents' native language is spoken.[72]

Federal law does, however, require programs receiving federal funds to be accessible to people with limited English proficiency ("LEP") pursuant to Title VI of the Civil Rights Act of 1964.[73] Federal guidelines require agencies receiving federal funds to provide LEP services in accordance with the "nature and importance of the program, activity or service provided."[74] Of course, child welfare matters are of constitutional import,[75] and in Nevada, specific statutory directives require child welfare authorities to prioritize placement of children with kin;[76] thus, providing language services for parents and relatives with LEP would appear to be most important in the child welfare context. Federal guidelines also commend agencies to assess the need for LEP services according to the number and proportion of LEP persons served or encountered in the eligible service population; the frequency with which LEP individuals come in contact with the recipient's program, activity, or service; and resources

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speaking translator or caseworkers assigned to the mother until much later in the life of the case and after two of the children were sent out of state against the mother's wishes.

[70] *See* Shields & Behrman, *supra* note 55, at 7 (noting linguistic isolation of 26% of children in immigrant families).

[71] *Id.*

[72] Pursuant to settlement of a federal lawsuit brought on behalf of non-English-speaking families (the Burgos Decree), state policy in Illinois requires, that "[d]iligent efforts must be made to place a child of Hispanic or Latino origin whose family's preferred language is Spanish in a foster home that has been deemed to be a Spanish-speaking home or a bilingual (English/Spanish) foster home." ILL. DEP'T OF CHILDREN AND FAMILY SERV., PROCEDURES § 301.60(8), DCFS Web Resource, http://dcfswebresource.prairienet.org/procedures/procedures_301/ (last visited Feb. 26, 2007). The text of the Burgos Consent Decree can be found at: http://dcfswebresource.prairienet.org/procedures/procedures_300/homepage.phtml?page=16 (follow "Appendix E" hyperlink) (last visited June 9, 2007).

[73] 42 U.S.C. § 2000d (2000) (prohibiting exclusion from such programs based on race, color, or national origin). This prohibition forbids federal funding recipients from engaging in conduct that has a disproportionate effect on persons with limited English language proficiency. *See* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,311-12 (Aug. 8, 2003) [hereinafter Guidance to Federal Financial Assistance Recipients].

[74] *Id.* at 47,314.

[75] *See* Santosky v. Kramer, 455 U.S. 745 (1982); Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Stanley v. Illinois, 405 U.S. 645 (1972).

[76] *E.g.*, NEV. REV. STAT. § 432B.550(5)(a) and (b) (2005).

available to the agencies and costs of LEP services.[77] Interestingly, or perhaps ironically, it does not appear that the Office for Civil Rights of the United States Department of Health and Human Services ("OCR-HHS") has addressed the lack of LEP services in the child welfare area.[78]

This oversight may be unfortunate indeed, as the story of Maria and her family suggests. The journey of Maria and her family through the child welfare system in a community slow to understand and integrate its diverse populations illustrates the importance of language in this system, particularly in proving one can be a good mother. Her story also reveals how cultural norms unrelated to child safety can dictate who parents children.

Maria is a grandmother who is also a mother to her own grown and minor children and to her grandchildren.[79] Maria lives in Las Vegas, near the Strip where she works in a casino kitchen; at the time of this story, she had been employed there for nearly six years. She is a member of the Culinary Union. Maria is also the mother of four mostly grown children: Luis, a teenager in school who lives at home; Gaby, a young adult who works at a food service job and lives with her father, Maria's husband from whom she had recently separated; Edgar, a construction worker, who is married and living in California; and Y.S., a methamphetamine addict and sometime prostitute and robber. Y.S.'s drug use and the activities she engages in to support her habit interfere with her ability to raise her own children.

Maria had obtained guardianship of and was raising Y.S.'s five children: a thirteen-year-old girl in high school, a four-year-old boy in preschool, twin three-year-old girls, and a two-year-old girl. Maria worked from 7:00 p.m. to 3:00 a.m. . When she came home, she slept until 7:00 a.m. when she awoke to take her oldest granddaughter to school. When she returned, she slept until 9:30 or 10:00 a.m. when the younger children woke up. She would also nap when the children napped. When Maria went to work at 7:00 p.m., after caring for and feeding the six children, her twenty-three-year-old daughter, Gaby, came over to be with the children.

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[77] Guidance to Federal Financial Assistance , *supra* note 73, at 47,311-15.

[78] *See* Office for Civil Rights, U.S. Dep't of Health & Human Servs., Summary of Selected OCR LEP Complaint Investigations and Compliance Reviews (2006), http://www.hhs.gov/ocr/lep/complaintcompliance.html. Instead, the OCR-HHS has devoted its resources in the child welfare area to enforcing a statute mandating race and cultural neutrality in placing foster children for adoption – a statute designed to eliminate barriers to white people adopting children of color, primarily African American children. Multiethnic Placement Act of 1994, Pub. L. No. 103-382 §§ 552-55, 108 Stat. 3518, 4056-58, *amended by* the Interethnic Adoption Act, Pub. L. No. 104-188 § 1808, 110 Stat. 1755, 1903 (1996); U.S. Dep't of Health & Human Servs., Protection from Racial Discrimination in Adoption and Foster Care, Summary of Selected OCR Compliance Activities (2005), http://www.hhs.gov/ocr/mepa/complianceact.html. For a discussion of the climate during the enactment of the Interethnic Adoption Act, see Appell, *Disposable Mothers*, *supra* note 5, at 457-62.

[79] *In re* Guardianship and Visitation of N.S., 130 P.3d 657 (Nev. 2006). The facts of the case reported in this paper are based on the July 8, 2004, Transcript of Evidentiary Hearing – Petition for Guardianship, *In re* N.S., 130 P.3d 657 (Nev. 2006) (No. J087850) [hereinafter July 8, 2004, Transcript of Record] (on file with author) and the April 22, 2005, Transcript of Evidentiary Hearing – Maternal Grandmother's Petition for Visitation, *In re* N.S., 130 P.3d 657 (Nev. 2006).(No. J087850) [hereinafter April 22, 2005, Transcript of Record] (on file with author).

In addition to her own nuclear family, Maria had a large support system in Las Vegas consisting of brothers and sisters and many friends from work. Moreover, she and her husband remained on good terms after their separation. Between her paycheck and public benefits for her grandchildren, she was able to support her minor child and grandchildren. Maria even had several hundred dollars left over at the end of each month to carry herself and her many dependants should an unforeseen situation occur. She had all the children and herself on her union insurance.

When Y.S. gave birth while in jail to her sixth child, N.S., Maria must have been heartbroken by her daughter's continued struggles and overwhelmed at the thought of adding a seventh very young child to her home. Because the new baby was born with drugs in her system, Clark County child protective services became involved and took custody of the baby. Shortly after the baby's birth, the county child welfare agency convened a meeting, which included agency personnel, Maria, and an interpreter. During the meeting, in a candid moment she would no doubt deeply regret later, Maria expressed her honest fear about taking in N.S. Still she said she wanted the baby. This was the only time she would have an interpreter when meeting with the social workers; the other times her adult daughter Gaby translated all of their communications.[80] Other times, Maria would call the agency and leave messages in Spanish. Her calls were not returned.

Maria cried at that first meeting after the investigator told her through an interpreter that Maria could not raise this latest granddaughter. To the child protection investigator, this new baby represented the proverbial straw that would break Maria's back: she could raise five but not six of her grandchildren. Maria must have heard this in part to mean she needed a bigger car and a bigger house. Thus, after the meeting she moved to a larger house to accommodate the new baby. The house also had big front and back yards for the children to play. In addition, Maria bought a larger van to seat seven passengers. She hoped to convince the agency that she had the ability, the physical space, and means to care for her granddaughter. Nevertheless, when she told the child welfare workers about her new car and house, they did not relent. They did not believe her when she said that she wanted the baby and they did not believe she could manage another child. Besides, they had placed the baby in a pre-adoptive home with a nice Latino couple who had no other children. Indeed, baby N.S. was, from the start, "fast-tracked" toward adoption. There was never any plan to return her to her struggling, drug addicted, incarcerated, mother and never any plan to place the baby with her siblings, uncle, and grandmother in their big home.

The agency did, however, value the relationship between N.S. and her maternal kin and allowed for the foster/preadoptive parents of N.S. to provide the visits with Maria. Those visits went well initially, but when Y.S. appeared outside the restaurant at which one of the visits was taking place, the foster

[80] Federal guidelines warn against using family members and friends as interpreters, unless the LEP person prefers such interpretation. Instead, "recipients should not plan to rely on an LEP person's family members, friends, or other informal interpreters to provide *meaningful access to important programs and activities. . . .*" Guidance to Federal Financial Assistance Recipients, *supra* note 73, at 47,317 (emphasis added).

parents became concerned and distrustful of Maria, and continued recognition of Y.S.'s motherhood.[81]

Once it became clear that the agency had no intention ever to place N.S. with her family, Maria retained a legal services attorney who filed a petition for Maria to obtain guardianship of N.S.[82] N.S. was approximately four months old at the time of filing. The court presiding over the dependency matter conducted an evidentiary hearing on the petition several months after it was filed. The foster/pre-adoptive parents, understandably, were opposed to, and probably threatened by, the guardianship petition, and their relationship with Maria soured. The court denied the guardianship petition, and Maria subsequently filed for visitation in the termination of parental rights hearing against Y.S.[83] Not surprisingly, the foster/pre-adoptive parents were also opposed to the petition for visitation and an open adoption.[84]

At the guardianship hearing, the agency's two stated arguments against placing baby N.S. with Maria and her family were that Maria could not handle another child and that she was not trustworthy. The agency, now embodied by a new, "follow-up" caseworker, continued to rely on Maria's initial overwhelmed response at that initial meeting. That response, combined with the caseworkers' disbelief that Maria, a single working woman, could raise seven children combined to disqualify Maria as N.S.'s caregiver. The follow-up worker testified in opposition to Maria's petition for guardianship of N.S.:

> I think that the grandmother is overwhelmed by the number of kids in the home. I think she desperately wants to keep her family together and I think this [the plan for an open adoption] is a way to work that out so she has a bond with the child, but is not overwhelmed by being the primary caregiver for her.[85]

She continued:

> I know [Maria] has a seven-passenger van. By [N.S.] coming into the home, there's eight passengers. I believe that that creates a conflict for the family. Same as the housing situation. I know prior there was a lot of concern by CPS, there was a pool in the [old] home and the pool was not fenced. So I think that there's just basic safety concerns. I think also whether or not [Maria] is able to care for another child without feeling overwhelmed. I know she has a lot of support from her family, but that has been one consistent thing since this case came under CPS and DCFS's watch is that she's constantly felt overwhelmed by having to raise so many children under the age of five.[86]

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[81] April 22, 2005, Transcript of Record, *supra* note 79, at 40-41; July 8, 2004, Transcript of Record, *supra* note 79, at 48. *See also* April 22, 2005, Transcript of Record, *supra* note 79, at 42 (foster mother stating the Maria is not moral because she allows her daughter, Y.S., to help Maria with child care during the day).

[82] This was probably Maria's best and perhaps only recourse when she was unsuccessful in convincing the agency to place N.S. with her. The guardianship petition was brought in the child welfare proceeding pursuant to NEV. REV. STAT. § 432B.466 (2005).

[83] This action was brought under NEV. REV. STAT § 125C.050 (2005), a necessary precursor to obtaining post-adoption visitation. *In re* N.S., 130 P.3d at 663-64; NEV. REV. STAT. § 127.171 (2005).

[84] April 22, 2005, Transcript of Record, *supra* note 79, at 40-41.

[85] July 8, 2004, Transcript of Record, *supra* note 79, at 30.

[86] *Id.* at 33.

The caseworker explained that the plan of open adoption was best for the baby because: "I believe that the foster family is very well educated as towards the Latino cultural sensitivity and I think that they have a good bond with [Maria]. I think that their visits go very well when they're with her."[87]

The second reason, less clearly-articulated, was the agency's distrust of Maria's ability to protect the baby. This distrust apparently stemmed from an incident early on when she met the foster parents for a visit with her granddaughter at a restaurant. Maria had apparently told Y.S. about the visit and may have invited her. Maria did not know, because she did not have a Spanish speaking caseworker or a translator, that her daughter was not allowed to be there, too. The caseworker admitted that she did not tell Maria

> directly, because I do not speak Spanish. I did tell her daughter . . . who interpreted for me. Because, again, I do not speak Spanish. And to tell her that Y.S. is not to attend any of the visits, she would have to have visitation supervised through myself.[88]

Maria's confusion was understandable because there were no prohibitions regarding Y.S. visiting her other children; on the contrary, Maria, as legal guardian, was empowered to determine when, how, and with whom her grandchildren could visit. The legal distinctions were lost on Maria. Maria did not connect Y.S.'s considerable problems with a total ban on seeing her newborn. The agency had its reasons for the prohibition but they were not apparent to Maria and really had little to do with the child's safety; instead, they were related to the high value the agency placed on maternal compliance with the agency.[89] Ultimately, the agency did not trust a (grand)mother who would allow her bad mother daughter to visit her own children. In order to be a good mother to N.S., Maria was expected to be a bad mother to her own daughter – she was supposed to abandon her. Maria did not understand that either.

The social worker making these assessments about the baby's needs and about the fitness of her grandmother had met Maria four times – one time at court, months after that initial meeting. At each of the other three "meetings" between Maria and the caseworker, the foster parents, Gaby, and most of the grandchildren were also present. It does not appear from the records that the caseworker ever had a meaningful discussion with Maria about N.S., had ever visited Maria's home, or ever once considered Maria as a potential parental resource for the baby.

The state's unstated reason for not valuing N.S.'s family connections, beside the attractiveness of the Latino pre-adoptive couple, was that Maria did not see her daughter Y.S. as a risk to the children. Indeed, it appears that Y.S. would help with the child care at times.[90] But for the state, it was all or nothing. Maria must keep Y.S. away from the baby. Maria could not be a good mother if she allowed her drug-abusing daughter to be part of the family. This was true even though there was no indication that Y.S. had ever abused any of

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[87] *Id.* at 30.

[88] *Id.* at 32.

[89] Thus, the social worker indicated that the real reason that Maria could not permit Y.S. to visit was to encourage Y.S. to connect with the agency and hopefully engage in services to make her a better mother. *Id.* at 43-44.

[90] April 22, 2005, Transcript of Record, *supra* note 79, at 42.

her children. Instead, a woman who uses illegal drugs is not a mother – or at least not a mother to be trusted. Even the state, when pressed to explain why Y.S. could have no state-unsupervised contact with the child, could not articulate a convincing safety concern:

> Maria's attorney: "Were [Y.S.] to see the children, what specific danger are you concerned about, if it's not physical abuse?"
> Caseworker: "I think her lack of judgment and her history of neglectful behavior around her children."
> Maria's attorney: "Would cause her to perhaps do what?"
> Caseworker: "Well, I think, hypothetically, since we're not in that situation, if she were to be high around her children, pass out around her children, leave them unsupervised while watching her children. I mean, if she were to be out – . . . ."
> Maria's attorney: "Well, I'm assuming that the grandmother is there. I'm just trying to understand what the agency's concern is were the mother present with the grandmother in charge of the children."
> Caseworker: "The agency's concern is that – is the mother following her case plan, or is she manipulating in order to have – I've always said every . . . parent is entitled to visits. I would just like you to come in so that we can at least say, this is what's on your case plan, this is what you need to do, so we can get moving on this to make it okay . . . ."[91]

These answers were all she had to say about the risk Y.S. posed to the baby.

This colloquy reveals several dynamics of the child welfare system: it is driven by its own bureaucratic, adult-centered, legalistic norms, not children or their needs. It is punitive and it is extraordinarily unprincipled, even when courts are involved. First, children in this system somehow have different needs and vulnerabilities from nearly identical children – like N.S.'s siblings – who had the same parent but were not in the public system. The state did not move to take the other grandchildren into care even though their guardian grandmother allowed her own daughter, their mother, to see them and perhaps help care for them. N.S. was in foster care and therefore her needs were somehow different. She needed more room, fewer siblings, and a mother who could only see her if she complied with the state's requirements. In truth though, these needs belonged to the agency, not the child.

Second, mothers do not use illegal drugs. In other words, a mother who uses illegal drugs ceases to be a mother. There is no nuance here. There is no conception that a parent could function as a parent sometimes, even under supervision of her own mother, even though she is a drug user.

Third, the caseworker could not identify a real risk that the mother posed to her children under Maria's care, unless of course she did not trust Maria's maternal judgment about the children in her care. The risks the caseworker mentioned were vague and based on a number of unstated assumptions about Maria's care: that she would permit Y.S. to care for the children even if she were using; or that Maria would trust Y.S. to be all alone with the children even if Y.S. was in a state of intoxication or detoxification.

On the contrary, this was a close-knit multi-generational, extended family and one in which it is unlikely that the young children were ever alone. There were six children in that house with Maria, two of whom were in high school.

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[91] July 8, 2004, Transcript of Record, *supra* note 79, at 43-44.

Gaby lived nearby. Maria's husband, the children's father/grandfather, also lived nearby. Aunts and uncles lived in the city. This was a family that did not appear to fit neatly, if at all, into the caseworker's worldview or bureaucratic rhythm and procedures. Instead, the child welfare system worked from a distilled psychosocial model based on notions of psychological parenting, child development, static family forms, personal responsibility, contrition, and complete sobriety.

After this hearing, the court denied Maria's guardianship petition, despite statutory preference for kinship care, in favor of the foster parents because they were N.S.'s psychological parents.[92] Maria then sought to establish court-ordered visitation with N.S. in order to establish the necessary groundwork for court-ordered post-adoption visits with N.S.[93] For Maria it was simple. There must be visits or some form of contact after adoption so that N.S. would know that she had siblings and a grandmother. Maria said that several times during the hearing. That profound insight escaped the foster parents, the agency, and the district attorney, and ultimately, the judge. Yet to Maria, that insight must have seemed natural, true, and absolute, for N.S. was a part of a family – Maria's family – and they were a part of her. But to the child welfare system N.S. existed only in one context and at one time: as a young child with pre-adoptive foster parents who, at that moment, were the only parents and family she could apprehend. In that system and at that time, she was not who she would become: the school child wondering where she came from, a teenager grappling with identity and difference, or a new mother wondering what genes she might be passing to her new baby.

Maria appealed both issues[94] and the Culinary Union, the William S. Boyd School of Law Child Welfare Clinic, represented by this author, and the Nevada Trial Lawyers joined in an amicus brief before the Nevada Supreme Court. The Supreme Court reversed[95] and baby N.S. joined her extended family at Maria's home.

LESSONS

Maria's story illustrates those aspects of the child welfare system that are most solipsistic, dominant norm-driven, and, thus, disrespectful to so many of the families that come before it. First, in a growing and increasingly diverse metropolitan area in which nearly one-quarter of the population is Latino, the governmental agencies established to protect children and strengthen families is culturally inappropriate on many levels. The agencies did not have or did not utilize Spanish-speaking caseworkers or interpreters when a central family member was monolingual Spanish-speaking. Indeed, the agencies, operating

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[92] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (2d ed. 1979); *see also* Appell, *Virtual Mothers*, *supra* note 1, at 719 (briefly defining and critiquing the psychological parent theory).

[93] NEV. REV. STAT. §§ 125C.050, 127.171 (2005).

[94] Actually, Nevada law provided no right to appeal an order denying guardianship or visitation so the Nevada Supreme Court treated the proceeding as a petition for a writ of mandamus. *In re* Guardianship and Visitation of N.S., 130 P.3d 657, 661 (Nev. 2006).

[95] *Id.* at 665.

under a cramped view of family, clearly did not view Maria, the maternal grandmother to N.S. and guardian of N.S.'s five siblings, as a central part of the family or as a resource. Instead, the agency both privileged the more normative small nuclear foster family as caregivers for N.S. and dismissed the considerable strengths and resources of N.S.'s large kinship network as ungainly and non-normative.

Second, and relatedly, the agencies worked off of a simplistic, platonic idea of mother. It is an all-or-nothing mold in which mothers are middle-class, English-speaking, married, child-protectors who do not engage in such activities as illegal drug use, prostitution or property crimes, do not have too many children, are not grandmothers, and do not live in extended kin networks; these platonic mothers are able to banish some children in favor of others. Neither Maria nor her daughter Y.S. qualified fully as mothers. Maria did not qualify because she did not fit the demographic mold, had too many children, did not speak English, and was raising her grandchildren. Moreover, she was seen as failing her grandchildren by continuing to recognize their mother as both their mother and as her daughter. Y.S., as a drug-addicted prostitute, was not a mother to N.S. at all. Y.S. could not even be trusted to be around N.S. (and perhaps the other children), even when she might be relatively sober and surrounded by other family members.

Third, the agencies and court privileged the child's current psychological attachments to her foster parents, minimized the foster parents' hostility toward and fear of N.S.'s family, and disregarded the child's long-term interests in identity and belonging. Instead, N.S., a Latino child, would be fine as long as she was with a Latino family to preserve her "culture." The unexamined and unstated assumption is that Latino families are fungible. This interchangeability of the two families masked their racial differences, allowing the agency to chose the Whiter, more middle class family – the English-speaking family with a higher socioeconomic status – in whose care N.S. would become Whiter than she might with her LEP, working poor, single grandmother supporting seven children.[96] The assimilationist force of the child welfare system thus drove the case in the agency and lower court, despite Nevada's clear policy to place children with kin.

Finally, the child welfare system is not child-centered. Instead, it addresses the needs of children based on legalities and bureaucratic rules that have little to do with the children's or their families' lives and worldviews. Here, Y.S.'s children who were Maria's wards could see their mother whenever she was available and Maria permitted her to be present. It was a more organic arrangement in which the children were not at risk with their grandmother or with their mother as a visitor in their own home outside the presence of a state agent. N.S., however, because she was a ward of the state, was not allowed to see her mother unless her mother cooperated with the agency and visited N.S. at the agency's office or a public place like a park or restaurant. N.S. was not entitled to a meaningful relationship with her family simply because she was in state care. On the other hand, while in foster care, N.S. received greater material benefits simply because she was in state care; her caregivers received over

[96] *See* GORDON, *supra* note 2, at 112 (noting similar connections between class and race).

$500 per month in foster care payments, plus other benefits. Maria at most would be eligible to receive food stamps and the more meager state Temporary Assistance to Families non-needy caregiver payments for the children.

Maria was one of the lucky few to have obtained an effective legal services lawyer to represent her and to have had friends like her powerful, community-oriented union and members of the legal community. Too many other families caught in the child welfare system in Clark County, Nevada are unrepresented or poorly represented. They remain in a system that is self-perpetuating and often incapable of recognizing the integrity and strength of the non-normative families that it serves. N.S., too, was fortunate to be returned to her family, but only at the hefty cost of losing her psychological family – the foster parents who loved and cared for her for the first two years of her life. Her foster parents lost the most perhaps. Their hearts were ripped out when their beloved N.S. was returned to her family, a loss from which they will probably never fully recover.[97]

[97] *See* Adrienne Packer, *A Flawed System: Tussle Over Young Girl Exposes Problems in the County's Foster Care Program*, LAS VEGAS REV. J., Nov. 26, 2006, at 1B.