

# Private Pathologies and Public Policies: Race, Class, and the Failure of Child Welfare

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*Shattered Bonds: The Color of Child Welfare.* By Dorothy Roberts.<sup>‡</sup> New York: Basic Civitas Books, 2002. Pp. x + 341. \$27.50 cloth.

As scholars and journalists focus their attention on the problems of racial profiling, increased incarceration among young black men, and their effects on the larger black community,<sup>1</sup> Professor Dorothy Roberts calls our attention to the intersections of race and gender in modern interactions with the child welfare system. In an earlier work, *Killing the Black Body*,<sup>2</sup> Roberts called us to think about how black women had become ensnared in the war on drugs, and its impact on racial equality and reproductive liberty. In her latest work, *Shattered Bonds: The Color of Child Welfare*,<sup>3</sup> Roberts issues a clarion call for society to take seriously the issues of race, gender, and class in the child welfare system's removal of a startling number of black children from their families and communities. In a stirring indictment of the child welfare system as a "racist institution,"<sup>4</sup> which "disrupts, restructures, and polices Black families,"<sup>5</sup> Roberts calls for the abolition of the system "we now call child protection and [its replacement] with a system that really promotes children's welfare."<sup>6</sup>

Roberts's central purpose is to "provide the missing voice of Black families

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1. E.g., MARC MAUER, RACE TO INCARCERATE (1999); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); Farah Brelvi, *Un-American Activities: Racial Profiling and the Backlash After Sept. 11*, 48 FED. LAWYER 69 (2001); D.J. Siltan, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53 (2002); Madeline Baro Diaz, *Muslims: Incidents of Bias Go Unreported; Community Leaders Discuss Post-Sept.-11 Discrimination*, S. FLA. SUN-SENTINEL, March 27, 2002, at 5B; *Black Drug Offender Sentences Up*, THE CAPITAL TIMES, Nov. 2, 2001, at 4A; Graig Garretson, *Black Groups Urge Swift End to Racial Profiling Lawsuit*, CIN. POST, March 27, 2002, at 1A; Wendy Ruderman, *N.J. Withholding Controversial Profiling Study*, THE RECORD, March 26, 2002, at A3.

2. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY (1998) [hereinafter BLACK BODY].

3. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) [hereinafter SHATTERED BONDS].

4. *Id.* at 99.

5. *Id.* at viii.

6. *Id.* at x.

torn apart by discriminatory and misguided policies” by “developing a new case for protecting Black families against state intrusion” based on the rights of parents, children, and “the Black community as a whole.”<sup>7</sup> The government’s destruction of black families, argues Roberts, “cause[s] serious group-based harms by reinforcing disparaging stereotypes about Black family unfitness and need for white supervision, by destroying a sense of family autonomy and self-determination among Black Americans, and by weakening Blacks’ collective ability to overcome institutionalized discrimination.”<sup>8</sup>

The argument in *Shattered Bonds* follows the model of *Killing the Black Body*, in which Roberts analyzed both historical and present-day threats to black women’s reproductive freedom. In that text, Roberts examined the connection between threats to black reproductive autonomy and white supremacy. She argued that the regulation of black women’s reproductive decisions had been a “central aspect of racial oppression,” and that black women’s lack of reproductive freedom “has shaped the meaning of reproductive liberty in America.”<sup>9</sup> Therefore reproductive liberty had to be reconceptualized, “to take into account its relationship to racial oppression.”<sup>10</sup> Through painstaking historical detail, Roberts convincingly connected the legacy of slavery to more recent attempts to curtail black women’s reproductive freedom, including legislative proposals denying benefits for additional children born to welfare mothers and the insertion of Norplant as a condition of receiving public assistance.<sup>11</sup>

*Shattered Bonds’s* arguments for family autonomy follow this pattern. Roberts contends that the historical (and present) denial of black families’ autonomy, both during and after slavery, set the stage for the easy disruption of black families by the child welfare system. One cannot understand what is at stake for Roberts without understanding the historical role of the state in the systematic destruction of black family autonomy; indeed, this understanding is necessary for any study of the African American family.<sup>12</sup> In his last book, *Shades of Freedom*, the late A. Leon Higginbotham, Jr. formulated what he called the “Ten Precepts of American Slavery Jurisprudence.”<sup>13</sup> On that list was slavery jurisprudence’s conception of and attitude toward the black family. This juris-

7. *Id.* at ix.

8. *Id.*

9. BLACK BODY, *supra* note 2, at 6 (emphasis removed).

10. *Id.* at 6 (emphasis removed).

11. Especially in chapters 3 and 5. *Id.*, at 104-149, 202-245.

12. See, e.g., ANDREW BILLINGSLEY, CLIMBING JACOB’S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES (1993) (arguing that the autonomy and independence of the black family were compromised by the institution of slavery); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 81-166 (1997) (same); E. FRANKLIN FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES (THE AFRICAN AMERICAN INTELLECTUAL HERITAGE) (1948) (same); MARIE JENKINS SCHWARTZ, BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH (2001) (same).

13. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 195-206 (1996) [hereinafter SHADES OF FREEDOM].

prudence commanded that the slave state, “[r]ecognize no rights of the black family, destroy the unity of the black family, deny slaves the right of marriage; demean and degrade black women, black men, black parents, and black children; and then condemn them for their conduct and state of mind.”<sup>14</sup> While Roberts does not explicitly address Higginbotham’s precepts, the historical legacy of slavery and the attendant lack of black family autonomy fuels her outrage at the child welfare system: “The American regime of slavery reveals better than any other example the political function of repressing family autonomy.”<sup>15</sup>

This book note will proceed in three Sections, each Section corresponding to the three major parts of Roberts’s book. The first will describe Roberts’s quantitative demonstration of the racial disparity in the child welfare system and her evidence that it is a racist institution. The second will examine her assessment of recent changes in child welfare policy and challenge her defense of family preservation in light of scholarship regarding feminism and the criminal law. The third Section will evaluate her argument that the racial disparities in the child welfare system inflict harm on the black community as a whole, while also addressing her policy prescriptions for the child welfare system.

#### I. REASONING FROM NUMBERS: THE MEANING OF RACIAL DISPARITY

Roberts’s argument begins by documenting the “staggering”<sup>16</sup> disparity in the child welfare system. Although black children currently account for only 17% of the nation’s youth, they constitute 42% of all children in foster care nationwide.<sup>17</sup> The statistics in many of our states and larger cities are even more startling. In Illinois, black children are 19% of the child population, but comprise over 75% of all children in foster care.<sup>18</sup> In Chicago, black children constitute over 95% of the foster care population.<sup>19</sup> While black children represent only 10% of the child population in San Francisco, they make up over 70% of the city’s foster care population.<sup>20</sup> In New York City, white children are 30% of the child population, but comprise less than 3% of the city’s foster care population.<sup>21</sup> More shocking is the disparity in the chances of white and black children ending up in foster care. In New York City, white children have a one in 385 chance of being placed in foster care, compared to one in twenty-two for black children.<sup>22</sup> In Central Harlem, one of the poorest census tracts in New

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14. *Id.* at 196.

15. SHATTERED BONDS, *supra* note 4, at 233.

16. *Id.* at 6.

17. *Id.* at 8.

18. *Id.*

19. *Id.* at 9.

20. *Id.* at 8.

21. *Id.* at 9.

22. *Id.* at 9.

York City, a black child has a one in ten chance of being removed from her home.<sup>23</sup> These numbers are verified by Roberts's personal experience: "Spend a day at dependency court in any major city and you will see the unmistakable color of the child welfare system."<sup>24</sup>

The extent of the racial disparity, alone, in the child welfare system might lead one to believe that racial discrimination and bias are at work in family separations. According to Roberts, this suspicion is verified by the fact that black children are treated differently than white children at almost every step of the process. Black children are less likely than white children to receive in-home services that often prevent the removal of their children. Indeed, 56% of black children in the child welfare system—"twice the percentage of white children"—have been placed in foster care.<sup>25</sup> Further, black children receive "inferior services" while in the child welfare system.<sup>26</sup> Roberts cites a U.S. Department of Health and Human Services study showing that among families with "housing problems," whites are almost twice as likely as blacks to receive housing services—43% versus 25%.<sup>27</sup> Meanwhile, studies of the California foster care system show that black children are less likely to receive mental health treatment.<sup>28</sup> Finally, black children are more likely to be placed in "institutions" for mental treatment rather than in foster care or other home placement.<sup>29</sup>

Roberts moves from demonstrating the stark racial disparities in the child welfare system to seeking out the causes of these disparities. She correlates much of the disproportionate rate of black involvement in the child welfare system to the overrepresentation of blacks in the ranks of the poor, and the overrepresentation of the poor in the child welfare system.<sup>30</sup> There are "separate [child welfare] systems for poor and for wealthier families"<sup>31</sup>; while child maltreatment in wealthier families is treated as a private matter, public systems are reserved for poor families. "Poverty—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."<sup>32</sup>

While conceding that poor people may be more likely to engage in child maltreatment, Roberts argues that it is far easier to detect child maltreatment because of prior involvement in state welfare systems, and that maltreatment is

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23. *Id.*

24. *Id.* at 6.

25. *Id.* at 17.

26. *Id.* at 20.

27. *Id.* at 21.

28. *Id.* at 22.

29. *Id.* at 23.

30. *Id.* at 26.

31. *Id.*

32. *Id.* at 27.

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often defined by parental poverty.<sup>33</sup> She maintains that neglect as a form of child maltreatment is best classified as “*defined* by poverty rather than . . . *caused* by poverty.”<sup>34</sup> Thus when a family is found to be neglectful, “it usually has to do with them being poor.”<sup>35</sup> She declares that the child welfare system is “designed to detect and punish the neglect on the part of poor parents and to ignore most middle-class failings.”<sup>36</sup>

For Roberts, the overrepresentation of the poor in the child welfare system translates into black overrepresentation because of the overrepresentation of blacks among the poor. The rates of black child poverty make black families especially vulnerable to involvement in the child welfare system. Strikingly, while about 70% of Black children have ever lived in poverty while growing up, almost the same percentage of non-Black children have *never* experienced poverty.<sup>37</sup> Further, “Black children are the most likely of any group to live in very poor neighborhoods,”<sup>38</sup> a “geographical concentration,”<sup>39</sup> which contributes to the inequity of the child welfare system and “is intensifying in some cities.”<sup>40</sup> Reciting this and other data, Roberts concludes that poverty is the single biggest explanation of black child overrepresentation in the child welfare system.

Roberts briefly considers other racially based explanations of the overrepresentation of blacks in child welfare, including racial and cultural bias. She cites studies that demonstrate that bias exists in the initial reporting stages of child maltreatment.<sup>41</sup> She argues that “for many caseworkers” the model family is “a white, middle-class family composed of married parents and their children”—which black culture often violates, without any actual harm to the children.<sup>42</sup> She further cites the disparity between the detection and punishment of black and white mothers who are substance abusers.<sup>43</sup> However, the presence or absence of incidents of bias are not central to Roberts’s indictment of the child welfare system: “[E]ven without definitive proof of racial bias . . . it is accurate to say that the overrepresentation of Black children in the child welfare system results from racism.”<sup>44</sup>

Because Roberts believes that poverty is the single biggest explanatory

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33. *Id.* at 29-44.

34. *Id.* at 33.

35. *Id.* at 34.

36. *Id.* at 33.

37. *Id.* at 46.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 50 (discussing a study demonstrating racial disparity in the reporting of abusive head trauma).

42. *Id.* at 59.

43. *Id.* at 62-63.

44. *Id.* at 47.

factor in black children's involvement in the child welfare system, she argues that the system's biggest flaw is its focus on the punishment of parents, rather than the support of families in crisis. She contends that the child welfare system has become merely a child protection system, "protect[ing] children from the effects of society's colossal failure to care enough about children's welfare."<sup>45</sup> The child welfare system's punitive policies are premised upon the "privatization" of social responsibility for the well-being of children. "The child welfare system is built upon the presumption that children's basic needs . . . must and can be met solely by parents."<sup>46</sup> Roberts argues that there are three defects in the protection approach versus the welfare approach to child services: (1) "[I]t places all responsibility for taking care of children on their parents," ignoring how society often prevents parents from meeting that responsibility; (2) it "is activated only when families are already in crisis[.]" when aid to prevent a crisis would be more effective; and (3) "state intervention is punitive in nature."<sup>47</sup>

Roberts has moved far beyond an indictment of a racially biased child welfare system; her indictment is now aimed at the "systemic biases against Black Americans" that are both a cause of and evidenced in the disparities in the child welfare system.<sup>48</sup> She argues, "State disruption of families is one symptom of this institutionalized discrimination. It reflects the persistent gulf between the material welfare of Black and white children in America. The racial disparity in the child welfare system—even if related directly to economic inequality—ultimately results from racial injustice."<sup>49</sup>

Roberts's arguments mirror the arguments made by critics of the racial disparities in the ever-increasing prison population in the United States.<sup>50</sup> Marc Maurer has wondered if society would consider it acceptable if most prisoners were white, instead of half the prison population being black, and another 17% being Latinos.<sup>51</sup> While the system's racial disparity is troubling to Roberts, what seems most appalling is society's privatization of the *causes* of black child involvement in child welfare. Roberts's outrage is based on the fact that systemic failures have been internalized as the private pathologies of the poor, even as the child welfare system is unleashed to destroy any semblance of privacy and autonomy these families might enjoy. Indeed, their private pathologies are then used as justification for destroying any autonomy.

Roberts is correct to point out that the problems of the black poor would not be so perceived if whites were disproportionately poor. Economist Glenn Loury argues that the public silence about the incarceration rate of young, black men

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45. *Id.* at 74.

46. *Id.* at 89.

47. *Id.* at 89-91.

48. *Id.* at 94.

49. *Id.* at 95.

50. See, e.g., MAUER, *supra* note 1, at 118-41; TONRY, *supra* note 1, at 3-51.

51. MAUER, *supra* note 1, at 12, 118.

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suggests a belief that “the problem here lies with THEM and not—as is, in fact, the case—with ALL OF US.”<sup>52</sup> Society’s silence about child welfare is not only *evidence* of societal neglect of black family disruption, but this silence also *causes* such disruption.

Roberts seeks to invert the privatization of the problems that poor black families face, endeavoring to inject them into the public’s agenda. While I believe she is largely correct on this score, she does not adequately address the concern (rational or not) of how much child neglect is caused by parental drug abuse. Thus she never tackles the most troubling aspects of concluding that poverty is the single-biggest explanatory factor in family disruption. She does not address statistics that show that parental substance abuse is a direct cause of the explosion of child welfare cases in recent years.<sup>53</sup> More importantly, she does not make the case for why it might be irrational to separate the consequences of poverty from substance abuse. These arguments are necessary for those who seek correction of overreactions to the drug problem. Further, even if Roberts is correct on these issues, it is uncertain what we ought to do in the meantime.

### II. THE PRIVATIZATION OF FAMILY AND THE PROTECTION OF CHILDREN

The second part of the book directly addresses the policy of child welfare through an assessment of the Adoption and Safe Families Act of 1997 (ASFA).<sup>54</sup> Roberts’s central purpose here is to reject the legislation’s emphasis on adoption as a solution to the foster care crisis. Instead, she argues for increased emphasis on family preservation efforts to assist families in avoiding the crises that lead to child maltreatment. Responding to the claims that this approach has failed, she demonstrates that this approach has never really been tried.

Roberts’s central complaint with the ASFA lies in its presumption that “children’s right to be safe [was] in opposition to parents’ right to custody of their children.”<sup>55</sup> Both adults and children “have an interest in family integrity.”<sup>56</sup> The oppositional paradigm, which undergirds the ASFA, is evidenced by two provisions that undermine the possibility of family preservation: (1) swifter timetables for terminating rights of biological parents; and (2) concurrent permanency planning. Each of these policies, Roberts argues, is designed

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52. GLENN LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 80-84 (2002).

53. Studies conducted by the National Center on Addiction and Substance Abuse (CASA) show that 70-80% of the caseload of child protective services included parents who are abusing drugs, alcohol, or both. See ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 67-81 (1999).

54. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

55. SHATTERED BONDS, *supra* note 3, at 108.

56. *Id.*

to free up more children for adoption.

Adoption stands out as the target of the second section of Roberts's argument against the child welfare system. I will address Roberts's arguments against adoption at the policy level here, and leave her political/social criticisms to the next section. At the policy level, Roberts argues that the current push for adoption (by the quick termination of parental rights) cannot solve the problems of the explosion of children in the foster care system. Further, she argues that the push toward adoption at the national level manifests a rejection of "any national effort to address the systemic causes of children's deprivation and . . . [a decision to] pursue instead the private remedies of marriage and adoption."<sup>57</sup> Adoption becomes merely another form of the privatization of the social problems and challenges facing poor families.

While Roberts's critique of the "adoption alternative" is the central argument of the book's second section, she also provides a defense of family preservation efforts. She defines family preservation efforts as those steps taken "to prevent the need to remove maltreated children from their homes and to reunite children in foster care with their families."<sup>58</sup> Family preservation is premised upon the belief that governmental intrusions are able to destroy families, and seeks to "minimize [such intrusions'] destructive impact."<sup>59</sup>

Why is family preservation such an important goal for Roberts? It is partially her (correct) belief that many of the problems that result in child maltreatment and removal of children from their families could be solved through programs aimed at root causes, such as joblessness, poverty, and income instability. However, this author believes that Roberts goes even further, by defining, to some degree, the well-being of children *as* family preservation. Roberts's animosity toward the child welfare system is motivated, in part, by her belief that it has defined an oppositional relationship between the interests of parent and child, despite the fact that foster children "continue to value ties to their [natural] parents despite the physical separation and despite the reasons for removal."<sup>60</sup>

While Roberts is correct in her argument that the child welfare system's emphasis on the quick termination of parental rights may rest on an undervaluation of family bonds, it is unrealistic to assume that there are never instances where these interests collide. Her collapse of children's well-being into family preservation favors outcomes that may not be in the best interests of the child. This is evident in Roberts's rejection of the ASFA's recognition that foster and pre-adoptive parents might have an interest in custody hearings.<sup>61</sup>

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57. *Id.* at 117.

58. *Id.*

59. *Id.*

60. *Id.* at 159.

61. *Id.* at 120.

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She believes that giving pre-adoptive parents the opportunity to participate in custody hearings unfairly disadvantages biological parents because of differences of class and race.<sup>62</sup> It appears that the presence of an additional voice speaking in the child's independent interest is also problematic to her. While pre-adoptive parents may not always represent the best interests of the child,<sup>63</sup> it is crucial to realize that the child's interests are not simply synonymous with the biological parents' interests in the way that Roberts seems to believe.

Roberts's collapse of the interests of parent and child is clearest on the subject of substance-abusing parents. While she concedes that "[s]ubstance abuse interferes with parenting and can make parents dangerous to their children," she believes that "offering intensive family preservation services and drug treatment is safer, more stable, and less traumatic for children than placing them . . . in the foster care system."<sup>64</sup> This statement is problematic in light of later statements regarding the long road to recovery from substance abuse. She states that it takes at least two years, often with frequent relapses.<sup>65</sup> While one might support her contention that the termination of parental rights should take into account the difficulty of recovery from addiction, it does not follow that a child should not be removed from such an environment. She states that "parents so deep into drugs or alcohol that they have abandoned their children should not be permitted to stall efforts to place the children with adoptive families,"<sup>66</sup> but they "appear to represent a minority of [substance-abusing] parents."<sup>67</sup> While I am grateful for some stopping point for her reasoning, the very vagueness of the point raises doubts about whether anything but the most extreme forms of neglect would be grounds to move with confidence toward a termination of the parent-child relationship.<sup>68</sup>

By collapsing the value of family preservation into the determination of the child's best interests, Roberts successfully privatizes the family relationships of poor, black children. This privatization is an inversion of the destruction of privacy and autonomy of black families. Against the backdrop of America's racial history, such a recovery of black families' privacy and autonomy ought to be looked upon as a triumph.

However this triumph is not without complication. The recovery of privacy places Roberts in conflict with principles central to the feminist theory—the

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62. *Id.* at 120-21, 169-71.

63. *Id.* at 166 ("Adoption policy has historically tracked the market for children, serving the interests of adults seeking to adopt more than the interests of children needing stable homes.")

64. *Id.* at 139.

65. *Id.* at 154-57.

66. *Id.* at 157.

67. *Id.*

68. This is all the more troubling when one considers statistics about the relationship between parental drug use and child involvement in foster care. For instance, Bartholet notes that "a study found that in almost three-quarters of New York City's cases of child abuse fatalities, one or both parents were drug-addicted." BARTHOLET, *supra* note 53, at 75.

destruction of the family's "sacred" position as private, cordoned off from the scrutiny of the public or the political.<sup>69</sup> The conception of privacy as in opposition to women's safety and equality is explored in detail by Professor Reva Siegel, who has argued that marital privacy arose to replace the outmoded principle of marital unity that granted the husband the right to beat his wife without the law's interference.<sup>70</sup> Courts reasoned that it was "better to draw the curtain, shut out the public gaze [from domestic violence], and leave the parties to forget and forgive."<sup>71</sup> While it would be unfair to conclude that Roberts is guilty of so fundamental a disregard for the well-being of children as presented above, her construction of the privatized family existing in parent-child unity, which legalizes all but the most egregious harms, raises serious questions that she fails to address.

Roberts's championing of privacy rights is distinctly affected by race and class considerations. The discrimination inherent in the history of the recognition of rights to family autonomy and privacy requires that we not simply reject these rights as oppressive.<sup>72</sup> Privacy rights and rights to family autonomy create the necessary boundaries to protect people and allow communities to flourish. The denial of such rights inflicted harm on blacks as a group. The cognizance of the inherent racial and class privilege attendant in rights recognition makes Roberts's position all the more worthy. Recognition of this racialized history of privacy protections has resulted in the need to make an affirmative case for the protection of privacy for black families. The right of privacy, in contradistinction to the oppressive interpretation given by Siegel, advances the cause of equality.<sup>73</sup>

While one might laud Roberts's efforts to privatize the black family against state intrusion, this privatization is complicated by her efforts to unify the interests of black parents and children in maltreatment cases. This has the problematic effect of potentially undervaluing the effects of neglect on black children. Against the history of the denial of privacy and autonomy for black families is

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69. Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). See also ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 87 (2000) ("The notion of marital privacy has been a source of oppression to battered women and has helped to perpetuate women's subordination within the family."). But see ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY (1988) (arguing that a feminist case can be made for privacy, beyond abortion rights, based on the ideals of personhood and equality).

70. Siegel, *supra* note 69, at 2168-69.

71. *Id.* at 2169.

72. Siegel points out that the eradication of the right of chastisement has often been racialized. *Id.* at 2136-39 (noting that *Fulgham v. State*, 46 Ala. 143 (1871), and *Harris v. State*, 14 So. 266 (Miss. 1894), two early cases that denied the right of chastisement, involved black couples in Southern states, leading one to suspect that they were motivated more by disrespect for the husband than respect for the wife).

73. See generally Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

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what Professor Randall Kennedy calls the “history of unequal protection.”<sup>74</sup> Kennedy argues that the history of unequal *protection* of the black community against crime should also be figured into the history of denials of privacy rights.<sup>75</sup> Roberts’s claims of the over-enforcement of punitive child welfare policies do not adequately respond to those who believe that the interests of children cannot be collapsed into those of the parent. As the literature on domestic abuse has shown, it is significantly important that we not reject out of hand the possibility that the parent-child relationship might be one in which parents’ interests and children’s interests are at odds.

Roberts’s response to critics about the place of children’s rights in her analysis is unfortunately unpersuasive. While asserting that she is not making the case that black children should never be removed from their families, she argues that the attempt to “[f]ram[e] the assault on family preservation in terms of children’s rights masks the battles between other political interests.”<sup>76</sup> Instead she argues that “[t]he rights of Black children must be interpreted in the context of racial oppression.”<sup>77</sup>

Roberts is correct to note the hypocrisy of a society that purports to protect children from their parents’ harm, but refuses to protect them (and their families) from the circumstances that make this harm more likely. This, standing alone, constitutes an abdication of moral responsibility that raises the question of a willful neglect. This may even substantiate Roberts’s claim of racism. However, Roberts argues as if all this negates the reality that protecting children, at the moment they need protection, must be given a high priority. Roberts’s arguments would have us believe that we can avoid making decisions amid tragedy of the sort that produce too many cases of child neglect and abuse. Nevertheless, these tragic situations simply make our choices to intervene in already troubled families all the more tragic. While there ought to be a collective mourning about the societal neglect that brings us to such a “tragic choice,” the choices to intervene in black families must sometimes be made, and more often, I regret, than Roberts concedes.

### III. REASONING FROM HISTORY: THE MEANING OF RACIAL STIGMA

In the last (and perhaps most provocative) section, Roberts discusses the

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74. Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) (arguing that the fact that controversial policies, such as sentencing disparities for the possession of crack cocaine versus powder cocaine, “are supported and enforced by . . . African Americans” demands a “reconsideration” of the meaning of disparate racial impact).

75. For instance, Roberts’s analysis of the disparate impact of drug enforcement against pregnant mothers ignores the problem of *underprotection* of the law. She complains that “Black women are far more likely to be reported for prenatal substance abuse and to have their newborns placed in out-of-home care.” SHATTERED BONDS, *supra* note 3, at 51. But if the racial demographics were reversed, then one would rightly suspect that black babies were being deprived of the equal *protection* of the laws.

76. *Id.* at 257.

77. *Id.*

child welfare system's racial harm to the black community as a whole. Roberts argues that the system inflicts a group harm in two ways: (1) its "massive state supervision and dissolution" of black families, represented by the racial disparities in the child welfare system; and (2) its role in maintaining black disadvantage.<sup>78</sup>

Roberts views the earliest Supreme Court cases protecting family rights in historical context as safeguarding "the ability of minority groups to socialize their children according to their own standards."<sup>79</sup> The racial disparities present in the child welfare system suggest that black families are being denied that right to family autonomy. Family autonomy, Roberts contends, is "as meaningful and precious as the freedom to organize with others for political ends."<sup>80</sup> The denial of family autonomy is, then, a political harm.

Roberts argues that all blacks share a connection, so that damage done to one affects all, relying on the research of Michael Dawson.<sup>81</sup> While Dawson suggests that blacks make political decisions about their best interests by taking into account the interests of the larger black community, he does not make the claim that these calculations are themselves correct or reasonable. The fact that blacks see themselves as connected does not mean that what happens to some subset of the black community necessarily affects all other blacks. Further, Roberts suggests that "what happens to individual parents and families in the child welfare system . . . depends on the economic well-being of Black Americans and the public's view of Black family fitness."<sup>82</sup> The suggestion that blacks share one economic position ignores the economic diversity within the black community.<sup>83</sup>

She also focuses on the group harms of the overrepresentation of black children in the child welfare system. This harm manifests itself in many different ways for Roberts. The dissolution of black families robs the black community of a particular "oppositional enclave,"<sup>84</sup> which preserves culture and fosters resistance. The dissolution of black families further erodes social capital and "undermines Black people's ability to struggle against the many forms of institutional discrimination that persist in this country."<sup>85</sup> Finally, and most significant for Roberts's argument, the disruption of black families "replicates the

78. *Id.* at 225.

79. *Id.* at 226 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

80. *Id.* at 227.

81. MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS 3-44 (1994).

82. SHATTERED BONDS, *supra* note 4, at 232.

83. See ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 17-51 (1997) (highlighting the gulf between poor and middle class blacks).

84. SHATTERED BONDS, *supra* note 3, at 237.

85. *Id.* at 239.

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notion created in chattel slavery that there is no such thing as a Black family.”<sup>86</sup> This negative message in turn justifies “the most destructive incidents of racial injustice. . . .”<sup>87</sup>

As might now be suspected, Roberts’s objection to the strong advocacy for transracial adoption is premised upon, among other things, the message that it sends about the black community. Roberts’s criticisms of the “adoption alternative” do not stop at the policy level, but extend to a critique of the racial effects of the adoption push, and its meaning at a social and political level. Roberts argues that the increased advocacy of adoption alternatives is motivated by “society’s depreciation of the relationship between poor parents and their children, especially those who are Black.”<sup>88</sup> The adoption push raises additional concerns of racial inequity and injustice, because they often pit the interests of a poor black family against those of middle-class whites. Roberts connects the ASFA’s preference for speedy termination of parental rights and its advocacy for adoption to “the growing movement to remove barriers to adoption of Black children by white middle-class couples.”<sup>89</sup>

Moreover, the push toward transracial adoption raises the perception of black parental and communal unfitness for taking care of black children: “[T]he rhetoric promoting transracial adoption supports the dissolution of poor Black families by depicting adoptive homes as superior to children’s existing family relationships.”<sup>90</sup> She interprets the move to restrict the use of race in adoption as merely “an effort to increase the supply of children for whites who want to adopt”<sup>91</sup>—regardless of the best interests of the child. She correctly points out the contradiction when states are forbidden to take race into account when white parents want children of another race, while states are allowed to meet the racial desires of white parents who seek to adopt only white children. She justifiably notes that there has been no outcry against this type of “race-matching” to meet whites’ private desires.<sup>92</sup>

Roberts’s solution to this problem, modeled after a similar program administered among Native Americans, is to shift control over child welfare to the black communities. She believes this will reduce the role that the white-dominated welfare system has in black family and community life.<sup>93</sup> Citing proposals by Professors Andrew Billingsley and Jeanne Giovannoni, Roberts argues that community participation in child welfare decisions could be tied to existing service organizations within the black community, such as the Urban

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86. *Id.* at 244.

87. *Id.* at 245.

88. *Id.* at 120.

89. *Id.* at 165.

90. *Id.* at 172.

91. *Id.* at 166.

92. *Id.* at 167.

93. *Id.* at 273.

League.<sup>94</sup>

Roberts's solution to white domination in child welfare might, ironically, have the effect of leaving poor black families just as dominated and without any more autonomy and privacy. Instead of being dominated by white, middle-class professionals, they might find themselves dominated by a black elite. Roberts inappropriately collapses the interests of the black community into an undifferentiated mass. There is no reason to think, *a priori*, that middle-class blacks, who people organizations like the Urban League, would not have the same depreciation for single, poor black women, even as they advocate for increased social spending. Many blacks have responded to racial stereotypes by practicing a "politics of respectability" to distinguish between "good" and "bad" blacks.<sup>95</sup> With regard to gay and lesbian political movements, political scientist Cathy Cohen has argued that the power to regulate "deviant" members of marginal groups, and to define legitimate members of marginal groups, is "increasingly exercised by the more privileged members of such groups."<sup>96</sup> Cohen argues that marginal group "managers" police the public image of their respective groups.<sup>97</sup>

The problems raised by Roberts's policy proposal are connected to the general challenges raised by Roberts's use of history. The use of history does not adjudicate the value choices that we must inevitably make in the area of child welfare policy. While Roberts discusses a history of over-intrusiveness with respect to black family autonomy, Kennedy finds a history of unequal protection. What each finds in the historical narrative is dictated largely by pre-existing value commitments. Moreover, the use of history, particularly slavery, raises the question of whether today's problems are analogizable to that era. The fact that family disruption occurred during slavery, and was an expression of white racism, does not necessarily mean that any current family disruption is grounded in the same soil. Additionally, this does not take seriously the widespread advances that blacks have made as policymakers at all levels of government.<sup>98</sup>

Finally, while ultimately necessary, reasoning from history is fraught with challenges that Roberts does not to address. More fundamentally, reasoning from slavery is necessary as well. The beliefs about racial hierarchy that persist in American political culture have their origins in the experience of racial slav-

94. ANDREW BILLINGSLEY & JEANNE M. GIONANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 215 (1972) (arguing that racism pervades the system of child welfare).

95. KENNEDY, *supra* note 74, at 17.

96. Cathy J. Cohen, *Straight Gay Politics: The Limits of an Ethnic Model of Inclusion*, in ETHNICITY AND GROUP RIGHTS 572 (Ian Shapiro & Will Kymlicka eds., 1997).

97. *Id.* at 576.

98. See, e.g., MAUER, *supra* note 1, at 132 ("[I]n some jurisdictions a significant number of prosecutors and judges are minorities prosecuting and sentencing other minorities to terms of incarceration.").

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ery. Glenn Loury argues that a group is stigmatized “when it can experience an alarming disparity in some social indicators, and yet the disparity occasion no societal reflection upon the extent to which that circumstance signals something having gone awry in OUR structures rather than . . . in THEIRS.”<sup>99</sup> The profound “otherness” of blacks in America finds its roots in the experience of slavery.<sup>100</sup> Roberts’s *Shattered Bonds* forces us to have a conversation with the manifestations of that legacy in the child welfare system. Perhaps the greatest problem with Roberts’s book, as with some of her proposals, is that it is about so much more than child welfare. This is, I believe, also its greatest strength.

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99. LOURY, *supra* note 52, at 83.

100. Loury’s conception of “racial stigma” finds its meaning in the “lingering residue in post-slavery American political culture of the dishonor engendered by racial slavery.” *Id.* at 70. The history of this profound otherness, and its protection and enshrinement in the law, was central to the work of the late A. Leon Higginbotham. *See generally* A. Leon Higginbotham, IN THE MATTER OF COLOR: THE COLONIAL PERIOD (1978); SHADES OF FREEDOM, *supra* note 13.

