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ARTICLE

JUVENILE PROTECTION COURTS AND THE PANDEMIC: A VIEW FROM INSIDE OUT

FELICE BATLAN*

I. INTRODUCTION: HISTORICIZING MYSELF

As a feminist legal historian, I seek to create praxis in my writing—a blend of the theoretical and the practical while writing at least in some part from my own experiences and positionality as a white, middle-class, CIS feminist.¹ In this article, I take a strong position that the Juvenile Protection System, which removes children from homes on the grounds of child abuse or neglect, is built upon layers of structural racism, yet I have no illusion that my scholarship is itself objective or that I transcend issues of class, race, gender, or current politics.

As an example of this, over fifteen years ago, I wrote an article *Law in the Time of Cholera*. It was written in response to new legislation and rules that the Bush administration was attempting to enact that would have given the federal government significant power in the event of a pandemic.² These powers included the ability to prevent interstate travel and to impose various types of quarantines.³ I was deeply concerned with the federal gov-

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1. On praxis, see Felice Batlan, Kelly Hradsky, Kristen Jeschke, LaVonne Meyer & Jill Roberts, *Not Our Mother's Law School?: A Third-wave Feminist Study of Women's Experiences in Law School*, 39 U. BALT. L.F. 124 (2009) (praxis is the coming together of theory and the everyday).

2. HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf> [hereinafter NATIONAL STRATEGY FOR PANDEMIC INFLUENZA]; Control of Communicable Diseases, 70 Fed. Reg. 71, 892 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pt. 70, 71).

3. NATIONAL STRATEGY FOR PANDEMIC INFLUENZA, *supra* note 2, at 74 (providing “a wide range of options that can be used to reduce overall travel, such as provision of travel information, voluntary advisories with health warnings, selective restrictions that limit certain types of travel, advance notification followed by a defined period of restriction, and mandatory measures that would prohibit all travel under extreme circumstances”); NATIONAL STRATEGY FOR PANDEMIC

ernment having such expansive authority.⁴ As John Witt beautifully and concisely documents, there is a long history of the state (in its various manifestations) using quarantine powers against minorities.⁵ My own work demonstrated how two late nineteenth-century outbreaks of typhus and then cholera in New York City were primarily blamed on poor Italian and Jewish immigrants who were subjected to horrendous and injurious quarantine conditions.⁶ Likewise, as Witt explains, historically the judiciary refused to intervene in public health officials' decisions to impose quarantines on the grounds that public health officials were experts in such matters.⁷ My article was intended to demonstrate the danger and misuse of government power and how those who were not considered white Americans were designated as vectors of contagion and contamination who needed to be contained. The article was also written in the aftermath of September 11; and was a response to how the Bush administration misused state power and targeted Muslims as terrorists.⁸ When speaking about contagion or terrorism, rarely was it understood that white middle- and upper-class heterosexual bodies could be sources of contamination. We saw this very phenomenon with President Trump's, and many others', refusal to wear a mask.⁹ As a true American, he could not imagine himself or other real Americans as spreading disease.

When I wrote *Law in the Time of Cholera*, I never imagined that I would find myself in the midst of a global pandemic, subject to a stay-at-home order, locked out of my office, desperately fearful and anxious, and with a federal government unwilling to take significant action to address the crisis. My writings on the history of epidemics became all too real to me. I was grateful to be in a state with a governor who issued stringent restrictions, and I hoped for strong governmental action to prevent the spread of COVID-19.¹⁰ Much like the past, federalism created an ineffective patchwork quilt of vastly different regulations. Yet, unlike previous epidemics, the poor and those who were non-white were not targeted for quarantines. Rather, stay-at-home orders and their aftermath functioned in reverse.

INFLUENZA, *supra* note 2, at 108–09 (describing two types of quarantines: “geographic quarantine” and “quarantine at the level of individuals and families”).

4. Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 119–21 (2007).

5. JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19 (2020).

6. Batlan, *supra* note 4, at 75–76, 79–80.

7. Batlan, *supra* note 4, at 103; WITT, *supra* note 5, at 81–83.

8. Batlan, *supra* note 4, at 54–55.

9. Daniel Victor, Lew Serviss & Azi Paybarah, *In His Own Words, Trump on the Coronavirus and Masks*, N.Y. TIMES (Oct. 2, 2020), <https://www.nytimes.com/2020/10/02/us/politics/donald-trump-masks.html>.

10. ILL. ADMIN. CODE tit. 77, § 690.50 (2021); *see also* Ill. Dept. of Pub. Health, Gov. Pritzker's Exec. Orders and Rules, <https://dph.illinois.gov/covid19/governor-pritzkers-executive-orders-and-rules> (last visited July 4, 2021), for a list of rules and executive orders related to COVID-19.

Those who were in office jobs sheltered and took to Zoom or other electronic video platforms. Those who were in some of the poorest paid jobs such as grocery workers, factory workers, and cleaning people, all of whom are often minorities, were unsheltered and left exposed to COVID-19.¹¹ There was an element of much older epidemics in which the wealthy fled from cities to take shelter in summer or second homes while the poor, often non-whites, were left in cities to labor.¹²

My husband and I sheltered in our apartment in downtown Chicago, and it quickly manifested how dependent we were on low-paid minority workers who cultivated, packed, and delivered our food, staffed our pharmacies, and distributed mail. As we watched the number of COVID-19 cases rise, it became clear that minority communities were disproportionately contracting and dying from COVID-19. This blatantly exposed vast inequalities in healthcare, housing, and the basic necessities of life.¹³ The extraordinary convergence between the pandemic and its disparate impact, combined with the ongoing shootings by the police of Black people and the activism of a vast number of anti-racist activists, began to lay bare the US' deep history of white supremacy and how many current practices and institutions in the United States are built upon structures of racism, steeped in ideologies and practices that privilege white people.¹⁴ Emerging from this pandemic is a rare space to examine many aspects of our lives and institutions in an attempt to create racial equality. Personally, this requires me to understand what I witnessed firsthand during my own everyday pandemic experience.

My husband, Robert Balanoff, is the Presiding Judge of the Cook County Child Protection Division. This division determines whether a child

11. See *infra* note 13.

12. Tracey Tully & Stacey Stowe, *The Wealthy Flee Coronavirus. Vacation Towns Respond: Stay Away*, N.Y. TIMES (Mar. 25, 2020), <https://www.nytimes.com/2020/03/25/nyregion/coronavirus-leaving-nyc-vacation-homes.html>.

13. *Health and Wealth Inequality in America: How COVID-19 Makes Clear the Need for Change, Hearing Before the H. Comm. on the Budget*, 116th Cong. 12 (2020) (statement of Sir Angus Deaton, Ph. D.). He notes that individuals who were more educated could work from home, adding that poorer children were less likely to perform well with remote learning. Additionally, many African Americans and Hispanics who lost their jobs also lost the health insurance provided by their work; see also, Clare Bamba, Ryan Riordan, John Ford & Fiona Matthews, *The COVID-19 Pandemic and Health Inequalities*, J. EPIDEMIOLOGY & CMY. HEALTH, 966 (Nov. 1, 2020), <https://jech.bmj.com/content/74/11/964>. The authors write:

The immediate pathways through which the COVID-19 emergency lockdowns are likely to have unequal health impacts are multiple—ranging from unequal experiences of lockdown (e.g., due to job and income loss, overcrowding, urbanity, access to green space, key worker roles), how the lockdown itself is shaping the social determinants of health (e.g., reduced access to healthcare services for non-COVID-19 reasons as the system is overwhelmed by the pandemic), and inequalities in the immediate health impacts of the lockdown (e.g., in mental health and gender-based violence).

14. Audra D. S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html>.

has been subject to abuse or neglect and whether parental rights should be suspended or terminated.¹⁵ In March 2020, the Court, like those in the rest of the state, shut down and slowly reestablished itself on Zoom.¹⁶ In my relatively small living space, it was impossible not to listen and often see his continual hearings. Each day an ever-changing cast of parents, attorneys, social workers, and court personnel virtually visited our home. Although I did not take notes on specific cases and did not record the names of those who appeared, I could not help but experience these virtual proceedings. I unwittingly became an embedded anthropologist.¹⁷ My impressions were formed against the background of years of discussion about the juvenile protection system with my husband as well as scholarship that I have read and taught.

Like many activists and scholars, I believe that the juvenile protection system is riddled with structural racism and bias against, in particular, poor minority women despite the good intentions of many of the people involved.¹⁸ What makes this article unique is my perspective as an observer of the court during the pandemic and how the pandemic and Zoom amplified the existing problems of the child protection system.¹⁹ Much of the literature on reform of the juvenile protection system is geared at policy makers, legislatures, and the administrative departments that initiate and oversee matters involving child abuse and neglect and the placement of children in foster care when the state removes children from their parents. There is a much thinner literature specifically addressed to juvenile protection judges regarding how courts can enact reforms and institute anti-racist

15. 705 ILL. COMP. STAT. ANN. 405/2 (2021).

16. Ill. Cir. Ct. Gen. Admin. Order 2020-02(1)(I); see, e.g., Susan Bittenwieser, *Closed Courts Create Anguish for Families Separated by Child Welfare System*, WOMEN'S MEDIA CENTER (Apr. 23, 2020) <https://womensmediacenter.com/news-features/closed-courts-create-anguish-for-families-separated-by-child-welfare-system> (Courts were reserved for "emergency/essential matters" and those matters were focused on removal rather than reuniting children with their families.); ILL. ADMIN. CODE tit. 77, § 690.50 (2021).

17. I want to thank Professor Witt for this phrase. Child protection hearings are confidential and are not open to the public. As an attorney, I am allowed limited access to such proceedings, and I have agreed to keep all names and details of any case confidential. Moreover, I made no notes regarding any specific hearing, and all interviews that I had with judges were about policy not individual cases. With the exception of interviews, all material cited in this article is publicly available.

18. For a powerful critique arguing that the criminal justice system and child welfare system are mirrors of each other and result in the destruction of Black communities and families, see Lisa Kelly, *Abolition or Reform: Confronting the Symbiotic Relationship Between "Child Welfare" and the Carceral State*, 17 STAN. J. CIV. RTS. & CIV. LIBERTIES 225, 260, 263 (2021) [hereinafter *Abolition or Reform*]; Rachel Johnson-Farias, *Uniquely Common: The Cruel Heritage of Separating Families of Color in the United States*, 14 HARV. L. & POL'Y REV. 531, 541-46 (2020).

19. See, e.g., Kristen Pisani-Jacques, *A Crisis for a System in Crisis: Forecasting from the Short-and Long-term Impacts of COVID-19 on the Child Welfare System*, 58 FAM. CT. REV. 955 (2020). Detailing how the pandemic has exacerbated feelings of isolation as many courts suspended visitation; scarcity of resources such as food, housing, employment, and technology; and feelings of anxiety and uncertainty caused by the closure of courts.

policies. The article seeks to set forth concrete proposals for current and post-pandemic child protection courts that can be quickly enacted and ameliorate at least some small part of the racial disparity that currently exists within the system, while also asking the judges who hear child abuse and neglect cases to become anti-racist activists. Keeping families together is part of our nation's public health.

The article proceeds as follows: Part II sets forth the thick literature and data that demonstrates that the juvenile protection system creates racial disparity and embodies structural racism. It documents the current cry for reform emanating from those who are within the system as well as activists. Part III discusses and describes juvenile protection in Illinois, including how an alleged case is reported and investigated and how it winds its way through the court. It argues that current definitions of neglect as well as practices followed by the court allow for a vast potential of both implicit and explicit racial bias that negatively impacts parents involved in such proceedings. Part IV discusses the use of Zoom to deliver services to parents and conduct virtual court proceedings. It questions whether Zoom allowed parents to fully participate in proceedings and how the digital divide may result in the exacerbation of racial inequalities. I make a number of recommendations in Part V regarding how juvenile protection courts can immediately institute a variety of reforms to ameliorate racial disparities and structural racism within the system. My conclusion, however, questions whether piecemeal reforms can ever create a truly equitable system.

II. RACISM AND THE JUVENILE PROTECTION SYSTEM

A long literature documents the racial disparities and racism in the juvenile protection system regarding which parents are targeted for having engaged in the abuse and neglect of children and whose parental rights to their children are suspended or terminated. Shockingly 53 percent of all Black children in this country will be involved in a child welfare investigation before their eighteenth birthday.²⁰ In fiscal year 2019, Black children constituted 23 percent of the children entering foster care, despite representing only 14 percent of the overall population of children.²¹ My first and overriding impression of the cases that I witnessed was that the vast majority of parents appearing before the court were poor and Black, and many were women raising multiple children on their own.

Furthermore, a very large percentage of the cases brought into the juvenile protection system are claims involving neglect and not abuse. In 2019, neglect constituted 62–63 percent of entries by children into foster

20. Krista Thomas & Charlotte Halbert, *Transforming Child Welfare: Prioritizing Prevention, Racial Equity, and Advancing Child and Family Well-Being*, 6 NAT'L COUNCIL ON FAM. REL. 1, 2 (2021).

21. CHILD.'S BUREAU, *Child Welfare Practice to Address Racial Disproportionality and Disparity* 2–3 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

care nationwide.²² In Illinois, this number is even higher accounting for over 85 percent of cases.²³ Yet what constitutes neglect is vague, ambiguous, and often deeply influenced by parents' poverty and race.²⁴ As the Honorable Patricia Martin, retired presiding judge of the Cook County Child Protection Division, explained, most cases that came before her involved cases of poor single mothers accused of neglect whose primary need was money and resources, something that the court could not provide.²⁵

Most frustrating is that all of this is well known but continues. Dorothy E. Roberts's stunning book *Shattered Bonds: The Color of Child Welfare*, which is now almost twenty years old, demonstrated the systemic racism of the child welfare system in terms of which parents were accused of abuse or neglect, whose parental rights were terminated, which children were sent to foster care, how long they stayed in foster care, and which children were adopted.²⁶ For those who claimed that it was not race but poverty that created such disparate outcomes, Roberts countered that poverty itself was the result of racism.²⁷ More recently Roberts wrote:

Like the prison industrial complex, the foster industrial complex is a multibillion dollar government apparatus that regulates millions of marginalized people through intrusive investigations, monitoring and forcible removal of children from their homes to be placed in foster care, group homes and therapeutic detention facilities, the great majority of child welfare investigations and removals involve allegations of neglect related to poverty, and black families are targeted for most of the state disruption. Just as police don't make communities safe, CPS affirmatively harms children and their families while failing to address the structural causes of their hardships.²⁸

In fact, in Illinois, Black children make up over 44 percent of the children in foster care and 40 percent of children waiting for adoption.²⁹

Although a large number of organizations were studying racial disparity in child protection before the pandemic, the pandemic and a new spot-

22. Alexandra Citrin, Siri Anderson, Valery Martínez, Ngozi Lawal & Shadi Houshyar, *Supporting the First 1,000 Days of a Child's Life: An Anti-Racist Blueprint for Early Childhood Well-Being and Child Welfare Prevention*, CTR. FOR THE STUDY OF SOC. POL'Y 4 (Feb. 2021) <https://cssp.org/wp-content/uploads/2021/02/Supporting-the-First-1000-Days-of-a-Childs-Life.pdf>.

23. ILL. DEP'T OF CHILD. AND FAM. SERV., MALTREATMENT TYPES OF CHILD VICTIMS, <https://cwoutcomes.acf.hhs.gov/cwodatasite/pdf/illinois.html> (last visited July 25, 2021).

24. 705 ILL. COMP. STAT. ANN. 405/2 (2021).

25. Telephone Interview with Hon. Patricia Martin, Judge, Cook Cnty., Ill., in Chicago, Ill. (July 21, 2021).

26. DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 6, 9, 19, 23 (2002).

27. *Id.* at 91.

28. Dorothy E. Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, THE IMPRINT: YOUTH & FAMILY NEWS (June 16, 2020, 5:26 AM), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480>.

29. ILL. DEP'T OF CHILD. AND FAM. SERV., *supra* note 23.

light on racism and white supremacy has brought such issues to a head.³⁰ Currently, even those who are deeply embedded in the juvenile protection establishment are now calling for dramatic change.³¹ Former ABA president, Judy Perry Martinez, and a judge who is the chair of the ABA Commission on Youth Risk, Ernestine Gray, have stated that the system was and continues to be racist and must be reformed to prevent mass government intrusion into the lives of those in minority communities.³² Another former judge writes that he now understands that he was not saving children by removing them from parents but rather setting them on a course of failure.³³ The Honorable Patricia Martin reflects that courts are not the place for families and that there may not be a fix to the system as it currently exists.³⁴ These are stunning admissions. Yet virtually every day, the state continues to separate children from parents in this country.

Both scholars and activists see the present system of juvenile protection and its impact on Black people and other minorities as linked to the past.³⁵ During slavery, slaveowners regularly sold children and separated them from families.³⁶ Infant mortality rates among enslaved children in 1850 was twice that of white children, with fewer than two out of three Black children surviving to age ten.³⁷ One of the greatest wishes of newly freed people was to reunite families.³⁸ Segregation in both the South and the North forced minorities to live in neighborhoods often with expensive and poor housing conditions; jobs opened to minorities paid barely livable wages.³⁹ Likewise, governments intentionally failed to fund infrastructure in minority communities, along with healthcare, schools, and recreational activities.⁴⁰ Simultaneously, the state engaged in policing and surveilling such neighborhoods, resulting in Black people being vastly over repre-

30. Ernestine Gray & Judy Perry Martinez, *Fault Lines and Opportunities*, CHILD.'S BUREAU EXPRESS, Vol. 21, No. 6 (Aug.–Sept. 2020), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5616>.

31. *Id.*

32. *Id.*

33. William Thome, *After Years of Doing it Wrong as a Judge . . . I Know We Can Do Better!*, CHILD.'S BUREAU EXPRESS, Vol. 21, No. 6 (Aug.–Sept. 2020), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5617>.

34. Interview with Hon. Patricia Martin, *supra* note 25.

35. Kelly, *supra* note 18; Johnson-Farias, *supra* note 18.

36. TERA W. HUNTER, *TO JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORERS AFTER THE CIVIL WAR* 12 (1998).

37. DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

38. HUNTER, *supra* note 36, at 22–23.

39. HUNTER, *supra* note 36, at 22–23; *see also* ROBERT J. COTTROL, RAYMOND T. DIAMOND & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND CONSTITUTION* (2003) (outlining the history of court decisions that led up to the Supreme Court ruling in *Brown v. Board of Education* which declared that segregation was inherently unequal); Bernadette Atuahene, *Predatory Cities*, 108 CAL. L. REV. 107 (2020) (discussing ways that cities engaged in predatory practices against African Americans).

40. COTTROL, DIAMOND & WARE, *supra* note 39.

sented in the criminal justice system.⁴¹ The imprisonment of a caretaker parent can result in children being placed in foster care, and criminal convictions can be one element in finding a parent unfit.⁴² The poverty that many Blacks face today is the result of generations of intentional state action that served to benefit many white people.⁴³

Even today, Black women of all classes systemically receive poorer access to quality maternity care than white women.⁴⁴ The United States has the highest infant and maternal mortality rate among wealthy countries with mortality rates for Black women and their children three to four times those of white women.⁴⁵ As has been repeatedly demonstrated, Black women's poor access to healthcare and their inequality of treatment in virtually every aspect of life deeply affects the well-being of Black women and children. That poor Black mothers succeed in raising healthy children at all is not because of the state but despite the state. As one child welfare advocate writes, "[T]he joint mechanisms of heightened surveillance of black neighborhoods and the mandated child protective reporting culture are in effect akin to the black codes of the 19th century. We've created a system that black and poor brown families must fear every day."⁴⁶ Others view the present juvenile protection system as a continuation of Jim Crow.⁴⁷ Yet, active judges in the Juvenile Protection System fail to recognize such conditions and the connections between past and present.

III. HOW A CHILD PROTECTION CASE BEGINS IN ILLINOIS

The Juvenile Justice Court in Cook County is one of the oldest in the country and was hailed as a great progressive achievement when it opened at the turn of the nineteenth century.⁴⁸ Initially, the Court primarily focused on preventing children from being tried as adults in criminal cases as well as identifying and theoretically rehabilitating delinquent children.⁴⁹ Infused from the beginning was the idea that social workers would play a large role

41. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); see also Meilan Solly, *158 Resources to Understand Racism in America*, SMITHSONIAN MAG. (June 4, 2020) <https://www.smithsonianmag.com/history/158-resources-understanding-systemic-racism-america-180975029> (documenting the entrenched racism in America from the days of slave ships to modern-day protests against police brutality).

42. Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012).

43. See generally IBRAM X. KENDI, *STAMPED FROM THE BEGINNING* (2016).

44. Citrin, Anderson, Martínez, Lawal & Houshyar, *supra* note 22, at 6.

45. Citrin, Anderson, Martínez, Lawal & Houshyar, *supra* note 22, at 6.

46. Jeremy C. Kohomban, *Be the Child Welfare Leader Who Creates a New History*, CHILD'S BUREAU EXPRESS, Vol. 21, No. 6 (Aug. –Sept. 2020) <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5623>.

47. Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 FORDHAM URB. L.J. 95, 105 (2020).

48. MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 79 (2003).

49. *Id.* at 209.

in guiding the Court and that the Court would have significant discretion in making its determinations.⁵⁰ By the 1960s, Cook County’s Juvenile Courts were divided into two divisions.⁵¹ One which hears cases involving crimes committed by juveniles and the other—the Child Protection Division—which hears and determines cases involving whether parental rights should be terminated or suspended due to child abuse or neglect.⁵² The road that a potential case of child abuse or neglect takes is long and fraught with potential structural racism and individual bias.

Generally, The Illinois Department of Children and Families Services (“DCFS”) becomes aware of a potential case of child neglect or abuse through a call made to the DCFS hotline, officially called the State Central Register.⁵³ Although anyone can call the hotline, in Illinois, as in most states, there are “mandatory reporters” of child abuse or neglect including doctors, teachers, and social workers.⁵⁴ Mandatory reporting was enacted in the 1960s primarily to address battered child syndrome but has vastly expanded in terms of what needs to be reported and who is a mandatory reporter.⁵⁵ Black and other minority children are reported at a much greater rate than white children.⁵⁶ Following a hotline call, DCFS determines whether there is credible information of child abuse or neglect that would warrant an investigation.⁵⁷ If there is, the case is assigned to a DCFS investigator.⁵⁸ In 2019, in Illinois there were over 151,000 investigations by DCFS.⁵⁹ An investigator will seek to see and speak to the alleged victim, interview the parents of a child, talk with other witnesses, examine the home environment of the child, check the criminal background of the parents, as well as determine potential drug use.⁶⁰ Questions asked by the investigator can be intrusive and problematic, including whether there is any history of mental illness or substance abuse.⁶¹ Such questions may be unrelated to the actual allegation of abuse or neglect. In other words, a parent’s private life is laid bare.

50. *Id.* at 223–24.

51. *Id.*

52. *Id.*

53. ASCEND JUSTICE, UNDERSTANDING AND RESPONDING TO DEPARTMENT OF CHILDREN AND FAMILY SERVICES’ ABUSE AND NEGLECT INVESTIGATIONS IN ILLINOIS 1 (2016), <https://www.ascendjustice.org/wp-content/uploads/2019/07/Ascend-Justice-Family-Defense-Guide-on-DCFS-Investigations.pdf>.

54. For a state-by-state breakdown of who is a mandatory reporter and standards for making a report, see CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2019), <https://www.childwelfare.gov/pubPDFs/manda.pdf>.

55. Stewart & Latham, *supra* note 47, at 119 (Mandatory reporting laws have been criticized for their broad scope. In eighteen states, everyone is a mandatory reporter).

56. Stewart & Latham, *supra* note 47, at 105.

57. ASCEND JUSTICE, *supra* note 53, at 2.

58. ASCEND JUSTICE, *supra* note 53, at 4.

59. ILL. DEP’T OF CHILD. AND FAM. SERVS., *supra* note 23.

60. ASCEND JUSTICE, *supra* note 53, at 30–31.

61. ASCEND JUSTICE, *supra* note 53, at 30–31.

Although parents may refuse to speak to an investigator or allow them into their home, such refusals can be held against the parents and may themselves result in DCFS attempting to remove the children.⁶² My own observation is that non-cooperation with DCFS becomes a significant factor in DCFS's and the court's determination of whether a child needs to be removed from the home. Although parents may have a lawyer represent them while being first interviewed by DCFS, they are not entitled to free counsel.⁶³ As I witnessed, in the rare cases where wealthier families are involved in DCFS investigations, they quickly hire lawyers. This, however, is impossible for the poor to do immediately, creating an unlevel playing field.

There are three possible outcomes to an investigation. DCFS can find that there was no credible evidence to indicate child abuse or neglect and the matter is closed.⁶⁴ A claim can be "indicated," meaning there was child abuse or neglect by one or both of the parents; or that it was indicated by an unknown perpetrator.⁶⁵ In an indicated case where a parent was involved, DCFS will determine whether they will provide services in the home (an intact case) or whether the child needs to be removed from the home.⁶⁶ Such removals, often done with no advance notice to the parent, can be traumatizing both to children and parents.⁶⁷ If intact services fail, DCFS will likely remove children from the home.⁶⁸

The Cook County Child Protection Division is composed presently of fourteen judges.⁶⁹ Of those judges, six were elected by the residents of Cook County (full circuit judges) and eight were elected to judgeships by vote of the elected circuit judges, thereby becoming associate judges. The court consists of eight white men, one white woman, three Black women, and two Black men. Thus, the bench does not adequately reflect the race and gender of those parents and children who come before it. Most of the judges previously practiced in private law firms, although one recent addition to the bench was an attorney from the Chicago Legal Aid Foundation. Another judge was formerly the Cook County Public Guardian and a third worked in the Public Defender's Office. All of the judges are hardworking, diligent, and invested in being good judges, in making the correct decisions, and in following the law. However, they are not necessarily familiar with

62. ASCEND JUSTICE, *supra* note 53, at 9.

63. ASCEND JUSTICE, *supra* note 53, at 12.

64. ASCEND JUSTICE, *supra* note 53, at 12.

65. ASCEND JUSTICE, *supra* note 53, at 12.

66. ASCEND JUSTICE, *supra* note 53, at 15.

67. ASCEND JUSTICE, *supra* note 53, at 42.

68. ASCEND JUSTICE, *supra* note 53, at 42.

69. For a list of judges in the Child Protection Division, see State of Illinois, Cir. Ct. of Cook Cnty., *Child Protection Division Judges*, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Juvenile-Justice-Child-Protection/Child-Protection/Judges-Information> (last visited July 28, 2021).

the vast literature on juvenile protection and racial disparity. Here, there is a vast gulf between scholarship and how judges actually decide cases.

In the event of removal of a child from their parents, the state of Illinois, through the State's Attorney Office, must file a petition with the court and a court hearing is scheduled to determine temporary custody.⁷⁰ Although the parent is possibly still without a lawyer and may have little knowledge of what is legally occurring, it is crucial that the parent attend the first hearing in order to present any defense and for the court to appoint a lawyer for those who cannot afford one. The court decides whether DCFS will be granted temporary custody using a legal standard that requires the court to find: whether there is probable cause to believe that neglect or abuse has occurred, whether there is an urgent and immediate necessity to remove the child, and whether DCFS has made reasonable efforts to try to prevent the child from being removed.⁷¹ In virtually every case, the court grants temporary custody.⁷²

Meanwhile, the parties outside of the court will put together a service plan which is intended to provide services to the family in order to help with reunification.⁷³ Often these services will require the parent to engage in parenting classes, attend therapy, see a case worker, provide urine samples for drug testing, and engage in substance abuse programs or anti-domestic violence therapy. At the court family conference, the court will review the plan and with the participation of the parties make modifications.⁷⁴ DCFS contracts with a large number of social service agencies to provide services making the child welfare system lucrative and the quality of services uneven.⁷⁵

Months later, and after a variety of hearings, the court holds an adjudicatory hearing in which it is determined whether the child was abused or neglected.⁷⁶ Parents charged with neglect bear an uphill battle due to the breadth in which neglect and abuse is defined, or in reality, not defined at all.⁷⁷ The Illinois bench book for juvenile protection judges specifically states that the term "neglect" does not have a strictly delineated meaning.⁷⁸ Although beyond the scope of this article, just a couple of examples of what constitutes prima facie evidence of neglect and abuse include proof that the

70. 705 ILL. COMP. STAT. ANN. 405/2-10 (2021).

71. *Id.*

72. Interview with Hon. Robert Balanoff, Presiding Judge, Cook Cnty. Child Prot. Div., Ill., in Chicago, Ill. (July 22, 2021). Child Protection cases are closed to the public and the file sealed making research regarding the decisions of judges unavailable.

73. 705 ILL. COMP. STAT. ANN. 405/2-10(2) (2021).

74. See Court Family Conference, General Order 09-27, Child Protection Division (Cir. Ct. of Cook Cnty., Ill.) (2009), <https://www.cookcountycourt.org/Manage/Division-Orders/View-Division-Order/articleid/1560>.

75. See Kelly, *supra* note 18, at 262, 301.

76. 705 ILL. COMP. STAT. ANN. 405/2-18(1) (2021).

77. ILLINOIS 2020 JUVENILE LAW BENCHBOOK 96 (2020).

78. *Id.*

parent repeatedly used a drug that did or ordinarily leads to impaired judgment or proof that a parent repeatedly used a controlled substance in the presence of a minor or sibling.⁷⁹ Of course, these are the very types of offenses that have resulted in the incarceration of so many Black people. Moreover, the state does not have to show that a child was actually harmed by such activity. Neglect is a racial powder keg. As Judge Martin observes, the type of behaviors which constitute neglect or even abuse is behavior that many middle-class suburban people engage in, including drug and alcohol use which does not come to the attention of the state.⁸⁰

In summary, if neglect or abuse has been found by the court, the court determines whether it is possible to still return the child to the home, examining what services the parent has completed as well as other factors. If the child is not returned to the home, eventually there will be a hearing regarding the termination of parental rights.⁸¹ Crucial to the court's determination is whether a parent has successfully completed services and maintained bonds with the child.⁸²

Immediately visible on the Zoom calls that I witnessed was the extraordinary number of people involved in any hearing. The State's Attorney Office represents the state's interest in prosecuting the case; the guardian ad litem represents the child's interest; the DCFS attorney represents its own interest as well as that of being a custodian or guardian for the child; and an attorney, usually the public defender, represents the parents. At times when a mother and father may have interests that conflict, a separate attorney will be appointed for each of the parents. Because the State's Attorney Office and DCFS (a state agency), both parties to the case, are represented by separate lawyers, the state essentially has double representation against parents. In addition to lawyers, a hearing might include caseworkers, court reporters, a variety of experts, a CASA volunteer, a sheriff, a translator, the parents, and at times children.⁸³ Somewhat ironic is that the Illinois Juvenile Protection proceedings are designated by statute as "non-adversarial."⁸⁴ Yet, how could proceedings that attempt to take children away from a parent not be adversarial? By labeling proceedings as non-adversarial, not only

79. *Id.* at 94.

80. Interview with Hon. Robert Balanoff, *supra* note 72.

81. 705 ILL. COMP. STAT. ANN. 405/2-22(1) (2021).

82. Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 33 (2016).

83. CASA stands for Court Appointed Special Advocates. They are volunteer guardian ad litem appointed by the family court to represent the "best interests" of the child. Most CASAs are middle-class white women over the age of 30. Once appointed, CASAs become the voice for children in the welfare system who are predominantly low-income children of color. Judges typically defer to the advocacy of the CASAs over pleas from the parents. The authors argue that this is a prime example of structural racism in the welfare system. *Id.* at 24–26.

84. 705 ILL. COMP. STAT. ANN. 405/1-5(1) (2021) ("[The] parties respondent, have . . . although proceedings under this Act are not intended to be adversary in character, the right to be represented by counsel") (emphasis added).

do different and more lenient evidentiary rules apply than in criminal cases, but parents who act in an adversarial fashion are seen as difficult and uncooperative.⁸⁵

IV. LESSONS FROM THE PANDEMIC

Following the March court closures, the court moved to Zoom.⁸⁶ This was crucial in allowing the court to function but also presented a host of new issues that potentially amplified racial disparities and specifically harmed poor parents due to the “digital divide.”⁸⁷ The digital divide refers to the gap in who has access to the internet and devices such as laptops, computers, and smart phones that connect to the internet.⁸⁸ The pandemic made dramatically clear that large numbers of poor people do not have access either to the internet or to computer devices.⁸⁹ Twenty-five percent of Cook County residents lack high-speed internet, and 17 percent of Black and Latinx households in Cook County lack a computer.⁹⁰ Not having access to such technology may seriously impact those parents involved in the juvenile protection system who risk losing children in virtual courtrooms.

The first Zoom hearings that the court held were temporary custody cases where children had been removed from a parent and an initial hearing was required within forty-eight hours.⁹¹ As with all Zoom cases, parents had the right to participate, but unlike judges and lawyers, they did not always have the technology to do so effectively. I observed that many parents had flip phones and could only hear and not see proceedings. Even if the parents possessed a smartphone, they did not necessarily have quality access to the internet and were forced to call into Zoom proceedings by dialing a specific telephone number. If connected to Zoom by telephone, one can hear but not see other participants. If a telephone user wishes to unmute themselves in order to speak, the user must hit *6. Parents using Zoom by telephone and not internet often sounded confused, as they struggled with the *6 function, sound quality was poor, they could not see the proceedings, calls were lost, and parents struggled to reconnect. It was im-

85. See Mulzer & Urs, *supra* note 83, at 34 (In addition to a low burden of proof requiring a preponderance of the evidence, other lack of procedural safeguards include: no trial by jury, no right to a speedy trial, and, in states which have not established a statutory right to counsel, there is no federal constitutional right to an attorney for parents in child welfare proceedings.).

86. Covid-19 Emergency Measures, Resumption of Operations, Ill. Cir. Ct. Gen. Admin. Order 2020-02(1)(I) (2020).

87. Thomas Prudhomme, Allison Clark & Damian Duffy, *The Evolution and Application of Digital Divide Research: Building a Digital Community in Illinois*, THE ILL. REP. 2009 112 (2009), <https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/IR09-Ch10-Digital-Divide.pdf>.

88. *Id.*

89. See *Digital Equity*, COOK COUNTY GOVERNMENT, (Oct. 25, 2021), <https://www.cookcountyil.gov/code>.

90. *Id.*

91. Interview with Hon. Robert Balanoff, *supra* note 72.

possible to know what parents could hear through their connections and what they understood. Likewise, I could not determine whether there was effective communication between lawyers and clients. As I watched or listened to Zoom cases, I empathized with parents who risked having their children taken away from them in complex proceedings that they may or may not have been able to see, fully hear, or understand. At times, especially early on in the pandemic, Zoom hearings appeared to me to have a nightmarish aesthetic of an anonymous totalitarian state, especially as the judge had the power to mute participants.

The pandemic also put a halt to all in-person visitations.⁹² On March 25, 2020, DCFS suspended all in-person visits, eventually substituting them with telephone or virtual visits.⁹³ Parents and siblings of children who had been removed from a home could no longer see each other in person. Although parents attempted to file emergency motions demanding in-person visitation, courts deemed such motions not to constitute emergencies and they were scheduled months out.⁹⁴ Eventually, four parents filed a suit against DCFS, represented by the Shriver Center, demanding the reinstatement of in-person visits.⁹⁵ The complaint alleged that the lack of in-person visits created emotional and physical distress, even trauma, on the part of both parents and children and could have long-term effects on the ability of parents and children to bond.⁹⁶ The motion was quickly denied by the court.⁹⁷ As one attorney at the Shriver Center stated, “Children and parents will lose precious time. This crisis has exposed the values of the child welfare system, that the default is removal. We should show the same level of urgency that has been taken around public health concerns for the health of families.”⁹⁸

Family visitation is crucial to both the well-being of children and family reunification, as well as mitigating trauma experienced by children and parents due to abrupt separation.⁹⁹ In-person visits provide the ability to “interact directly through all physical and sensory modalities” that best mimic real life.¹⁰⁰ The lack of in-person visits may have a profound impact

92. John Kelly, *Public Defender Fights Blanket Ban on Supervised Family Visits*, THE IMPRINT: YOUTH & FAM. NEWS (May 8, 2020), <https://imprintnews.org/child-welfare-2/public-defender-fights-blanket-ban-supervised-family-visits/43216>.

93. *Id.*

94. *Id.*

95. Complaint, *Buxton v. Ill. Dep’t Child. & Fam. Servs.*, No. 20 CH 4100 (Ill. Cir. Ct. 2020), <https://www.povertylaw.org/wp-content/uploads/2020/05/complaint-with-action-transmittal.pdf>.

96. *Id.* at 6–7.

97. *Buxton v. Ill. Dep’t Child. & Fam. Servs.*, No. 20 CH 4100 (Ill. Cir. Ct. May 18, 2020), <https://perma.cc/HH7X-2QNZ>.

98. Bittenwieser, *supra* note 16.

99. See Jacqueline Singer & David Brodzinsky, *Virtual Parent-Child Visitation in Support of Family Reunification in the Time of COVID-19*, 2 SAGE J. 153, 154 (2020).

100. *Id.* at 154–55.

on the ability of children, especially babies and younger children, to bond with parents.¹⁰¹ Parents could not engage in basic activities such as changing a diaper, holding, or feeding a child.¹⁰² As a group of researchers have concluded, virtual visits, although helpful, cannot substitute and do not provide the same benefits as in-person visits.¹⁰³ In addition, whether and how such visits occurred was dependent upon a foster parent's, or other guardian's, willingness and ability to facilitate such communication.¹⁰⁴

Likewise, many of the services provided by DCFS to children and to parents were ceased for some period of time. Some circumstances, such as when parents were dealing with addiction problems, the stress of the pandemic, not seeing their children, and the cessation of drug treatment programs, caused some parents to relapse.¹⁰⁵ Many services were eventually resumed and conducted by electronic means.¹⁰⁶ These included parenting classes as well as counseling and other services.¹⁰⁷ The effectiveness of any of these services being provided electronically is entirely a black box. Again, one has to assume that, for parents who could only access such services via telephone, they may not have received a similar quality of service.

The disruption of the pandemic and the substitution of Zoom can have dramatic negative consequences for the reunification of parents and children. How courts and individual judges are going to view lack of bonding during the pandemic is a crucial issue, especially if the child is in foster care and there is a possibility for adoption by a foster care family.¹⁰⁸

In making any determination regarding the suspension or removal of parental rights, courts must carefully think about how to evaluate and consider a parent's inability, or what might be a delayed ability to bond with a child, complete services, or create a stable home environment during the pandemic. Although courts strive for permanency for a child, judges must be lenient and essentially toll a parent's time to reunify with children. A judge should play an active role in allowing parents to voice their own account of how the pandemic may have disrupted their goals to reunite with children or complete services. The court should address such issues immediately and have a unified policy. As two recent appellate court decisions illuminate, the trial courts are going to have significant discretion in deter-

101. *Id.* at 162.

102. *Id.*

103. *Id.* at 159.

104. *Id.* at 162.

105. Shannon Firth & Elizabeth Hlavinka, *For Many in Child Welfare, 2020 is a Lost Year*, MEDPAGE TODAY (Dec. 10, 2020), <https://www.medpagetoday.com/special-reports/exclusives/90138>.

106. *Id.*

107. *Id.*

108. *Id.*

mining how the pandemic affected parents' ability to complete services.¹⁰⁹ So far, there is no evidence that courts are willing to do this.

In terms of the use of Zoom for court proceedings, lawyers, judges, and caseworkers have found it to have substantial benefits.¹¹⁰ With Zoom, hearings began on time, preventing hour long delays which were not uncommon in the past. As I witnessed, Zoom made the court a great deal more efficient. From preliminary evidence, it also appears that parents attended court hearings and conferences more often than previously and alleviated them of the burden of sometimes spending hours traveling to distant courts by public transportation. The Presiding Judge of the court has become a staunch advocate of using Zoom as much as possible, believing that it allows for greater parent participation, less burden on parents, and enhanced efficiency for all parties.¹¹¹ Yet, it is unclear whether parents, who have the most to lose, found that Zoom allowed them to be heard and present adequate defenses. Defense attorneys' view of Zoom may differ significantly from their clients.

During the summer of 2020, a number of motions were made on behalf of parents claiming that conducting hearings on Zoom constituted a denial of due process. These motions generally argued that Zoom prevented lawyers from being able to confront witnesses, denied the parent effective counsel, and that parents did not have access to technology.¹¹² These motions were generally denied, or decisions postponed.¹¹³ A recent appellate court from a jurisdiction outside Cook County upheld the use of Zoom in a case terminating parental rights. The case also generated a scathing dissent which argued that the use of Zoom violated the parents' constitutional rights to due process.¹¹⁴

Additional urgent questions surround the use of Zoom, including whether Zoom affects how judges decided motions or the ultimate outcomes of cases. There is simply no research on the use of Zoom in juvenile protection cases, thereby making important decisions about the court's future use of Zoom and virtual justice hang on essentially anecdotes. In other types of cases, which have used some form of video such as immigration and bond hearings, research indicates that defendants tend to be judged

109. *People v. Charlie S. (In re P.S.)*, 2021 IL App (5th) 210027 upheld the use of Zoom. It also upheld the trial court's decision not to grant a father additional time to complete services due to the pandemic. In contrast, in *People v. Mark Z. (In re M.K.)*, 2021 IL App (4th) 210049, a different appellate court upheld a trial court's decision to grant additional time to a parent to complete services due to the pandemic.

110. See Hon. Michael K. Newell, *The Mother of Invention: How the Family Court Pivoted to Keep Serving the Public*, 38 DEL. L. 8, 10 (2020).

111. Interview with Hon. Robert Balanoff, *supra* note 72.

112. Interview with Hon. Robert Balanoff, *supra* note 72.

113. Interview with Hon. Robert Balanoff, *supra* note 72.

114. *In re P.S.*, 2021 IL App (5th) 210027.

harshly and fare worse than when they appear in person.¹¹⁵ Researchers hypothesize that this might be the result of the difficulty of making eye contact, the blurriness of videos, and the defendant being less engaged and not fully understanding the proceedings.¹¹⁶ It is also possible that people appear more credible in person.¹¹⁷ Other studies have found that even camera angles can exaggerate certain negative facial features and obfuscate body language.¹¹⁸ Some researchers conclude that separating lawyers and clients makes communication a great deal more difficult, especially when lawyers cannot read their clients expression or body language or have quick private conversations.¹¹⁹ In proceedings that I observed, lawyers and their clients could enter into a private Zoom breakout room, but this was a cumbersome process and did not allow for quick back-and-forth between the lawyer and client. It also did not function when parents used flip phones and telephoned into Zoom proceedings.

Other issues regarding Zoom and parent participation must also be scrutinized. For those parents who could only call into a Zoom hearing, the court never saw the parent, and the parent could not see the court. Did this make it easier to rule against a parent, as they were more abstracted and less of an actual person? For those parents who did visually appear on Zoom, it, at times, allowed the court to essentially peer into their home, providing potential evidence of a suitable or unsuitable home. As I observed, living space could appear chaotic as a parent called from a bedroom or bathroom as other children ran around and disrupted calls. Are these informal inspections something that we want judges to have access to and is it fair to those parents who are not Zoom savvy? At times, parents made calls from bathroom stalls in fast food restaurants during work breaks.¹²⁰ Although this may have allowed the parent to work that day, did it provide the dignity that parents should be allowed when crucial decisions are being made about their and their children's lives? Did it allow them the privacy to fully partake in the hearing?

It is essential that there be high-quality, evidence-based research on the use of Zoom and that answers not be based on anecdotes or the convenience of professionals. The Presiding Judge of the Juvenile Protection Court is attempting to find funding for an in-depth study of the effects of Zoom.¹²¹ Questions that must be analyzed include Zoom's effects on parents and de-

115. See Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST. 1, 2–3, (Sept. 10, 2020), <https://www.brennancenter.org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf>.

116. *Id.* at 4–5.

117. *Id.* at 4.

118. *Id.* at 7.

119. *Id.*

120. Interview with Hon. Robert Balanoff, *supra* note 72.

121. Interview with Hon. Robert Balanoff, *supra* note 72.

cision-making by judges as well as the actual experience of parents. Moreover, as Zoom continues to be used, the courts must ensure that parents have full access to Zoom, including the ability to use its camera function. Without such access, there may continue to be an argument that a parent's due process rights are violated to the extent that they are unable to fully attend and participate in court proceedings, especially in final decisions regarding termination. The most generous and effective action would be to provide computers or laptops directly to parents. During the pandemic, many school districts distributed laptops to children attending Zoom classes, and DCFS should do likewise.¹²²

The court is currently seeking funds to establish private computer spaces in libraries and other community centers for parents to use and have access to Zoom.¹²³ But it may be far more beneficial and ultimately effective to provide computer devices, such as tablets, to individual parents. This also would have symbolic value, telegraphing that parents are valuable and supported by the system in their hopes of reuniting with their children rather than being punished.

V. OTHER COURT REFORMS

At this moment, as previously discussed, momentum for change exists among a large swath of those involved in juvenile protection who acknowledge the disparate racial effect of the juvenile protection system on Black families and other minorities. The federal government itself has recognized the racial disparity of the child welfare system and the immediate need to address such problems and create an "antiracist child welfare policy."¹²⁴ One advocate writes that an anti-racist approach requires an active process of identifying and challenging racism by changing systems, organizational structures, policies and practices, and attitudes, to redistribute power in an equitable manner.¹²⁵ Below are some difficult but crucial ways in which a court may quickly begin to address and engage in self-examination and anti-racist reform.

A. Housing

When a court determines whether a child will be removed from the home, as I witnessed, a number of factors become crucial, many of which are deeply impacted by poverty. One of the most important is to have an adequate physical space for the parent and child to live. Generally, this requires private demarcated physical living space that has water, electricity,

122. Nader Issa, *CPS to Distribute 100K Laptops, iPads and Chromebooks for Students to Use at Home*, CHI. SUN TIMES (Mar. 30, 2020), <https://chicago.suntimes.com/coronavirus/2020/3/30/21199848/cps-remote-learning-plan-laptops-chromebooks-ipads>.

123. Interview with Hon. Robert Balanoff, *supra* note 72.

124. CHILD.'S BUREAU, *supra* note 21, at 23.

125. Citrin, Anderson, Martínez, Lawal & Houshyar, *supra* note 22, at 7.

heat, and some sort of designated sleeping space. Approximately 10 percent of children who are in foster care in Illinois have been removed from their parents due to lack of adequate housing.¹²⁶ Yet, there is a widespread understanding among judges that they cannot order DCFS or the state to directly provide or pay for housing.¹²⁷ DCFS will only help a parent find housing and assist in filling out applications for various housing programs. They will not directly provide long-term funds for housing to parents. Thus, poverty undergirds the claim of neglect.¹²⁸ One group of Bar leaders writes that removing children from families and placing them in foster care is not an ethical answer to lack of services, including a lack of housing.¹²⁹ In one case last winter, DCFS sought to remove children from a parent's house because it lacked heating.¹³⁰ Only at the last minute did the judge furnish the creative solution of ordering DCFS to buy space heaters.¹³¹ Here was a family that was going to be separated for lack of heat; DCFS should never attempt to separate families over issues such as that and courts must be vigilant in policing DCFS.

In order to immediately cease the practice of removing children from parents due to inadequate housing, courts must be aggressive. Acting in a concerted fashion, judges should order DCFS to locate and pay for housing for a family and make a clear record that they refuse to remove children from parents because of lack of housing, as this directly implicates issues of poverty and race, not parental neglect. This is the system's failure, not a parent's negligence. DCFS might appeal such orders, but so be it. For a judge to do otherwise is to be complicit in an immoral course of action. Moreover, if this becomes the policy of the court, it will pressure DCFS, which has over a \$1.4 billion budget, and the state legislature to demonstrate that they truly care about the well-being of poor minority children and families.¹³² Although actual dollar figures are difficult to access, it might well be less expensive to provide housing to poor families, than to engage in legal proceedings and place children in foster care.

126. Andrea Durbin & Kenny Ocasio, *Family First Prevention Services Act*, ILL. DEP'T CHILD. & FAM. SERVS. (July 23, 2020), https://www2.illinois.gov/dcfs/aboutus/Documents/FFPSA_Virtual_Town_Hall_All_Presentations_072320.pdf.

127. Interview with Hon. Robert Balanoff, *supra* note 72.

128. See Kamia Rathore, Gita Connolly & Cara Karter, *Recommendations to Address the Inequitable Impacts of COVID-19 in Child Welfare, Housing, and Community Capacity*, CHAPIN HALL AT UNIV. OF CHI., 1, 3–4 (Sept. 2020), <https://www.chapinhall.org/wp-content/uploads/Inequitable-impacts-of-COVID-19.pdf> (discussing housing, COVID-19, and juvenile well-being).

129. See Kohomban, *supra* note 46.

130. Interview with Hon. Robert Balanoff, *supra* note 72.

131. Interview with Hon. Robert Balanoff, *supra* note 72.

132. ILL. DEP'T CHILD. & FAM. SERVS., BUDGET PROPOSAL OVERVIEW FY 2022 (2021), https://www2.illinois.gov/dcfs/aboutus/newsandreports/Documents/FY22_Budget_Proposal_Overview.pdf.

B. Community Engagement

As I observed, the Child Protection Court is quite isolated from critique from outsiders and especially the input of the parents who come before it. It would be highly beneficial if judges went into the community to discuss what the court does and especially to hear feedback from minority communities. The full circuit judges of Cook County are elected officials who serve the public. Such speaking engagements, geared towards listening and discussion, would allow some trust to grow between communities and the judiciary, especially if the judges could address issues of racial disparity. Likewise, an explanation of how the court decides cases may help to address the sense that decisions are made in a black box. Perhaps most importantly, such community meetings would allow judges to speak to and hear the very people that they, in no small measure, police, and to perhaps better understand their experience of racism, poverty, and survival. There is no legitimate reason other than fear of criticism that prevents judges from doing so.

C. Surveying the Experience of Parents

The court must engage a third party to engineer a survey for the parents who appear before it in order to learn about the experiences of parents in the Child Protection Court. It should ask whether the parent felt that they were being treated with courtesy, respect, and dignity by the court and its personnel; whether they believed that the judge listened to them; whether they understood the proceedings; whether they felt that they were well represented by counsel; and their experience using Zoom. The survey should boldly ask if parents believed that race played any factor in the decision of the court or in their treatment. Surveys would be anonymous and voluntary. Such information would provide drastically needed feedback in what otherwise is a judicial closed loop. A court might fear learning that parents suspected that race influenced decisions, but now is the time to seek knowledge rather than pretend that racism does not affect the court. The survey further would function as a signaling device to parents that the court is interested in hearing their voices. Only if the court understands these issues can it begin to engage in real reform, think about what parents actually need, and determine how to incorporate the lived experiences of the people that they so dramatically impact.¹³³

133. See Citrin, Anderson, Martínez, Lawal & Houshyar, *supra* note 22, at 10–12 (emphasizing the importance of research data and recommending the practice of disaggregating data by race, ethnicity, and other key factors to identify gaps and to better target investments towards addressing those gaps); see also Pisani-Jacques, *supra* note 19, at 8 (stressing the need for the child welfare system to “intentionally incorporate family and youth voice into decision-making”).

D. Services

Judges need to comprehend on a granular level the types and quality of services provided to families by DCFS and the agencies that they contract with, including why DCFS recommended such services, and why the court ordered them. As discussed, a significant factor in a judge's decision to terminate parental rights or reunite a family is based on whether parents completed such services. Judges should actually attend and witness a variety of classes provided by DCFS (and the agencies that it contracts with) to parents in order to have firsthand knowledge of the usefulness of such classes, the experiences of parents attending, and whether these services address the issues that give rise to abuse and neglect. Without knowledge of the substance of such services, decisions regarding whether a parent has completed services and how they might relate to the underlying claims of child abuse or neglect function as a "check the box" rather than substantive knowledge and decision-making. Especially in cases of neglect, there should be a presumption that parents love and want their children. If parents are unable to complete services, the question should be whether those services were valuable, and why the parent was unsuccessful. Was it the parent's fault or was it the state's in creating mere hoops through which to jump? Such inquiries will, in part, allow parent's experiences to be amplified and judges to gain enhanced knowledge.

E. Racial Bias Training

High quality and sophisticated racial and bias training, as well as cultural sensitivity training, must be required for juvenile protection judges. Cultural sensitivity training enhances understanding of different ways of parenting, culturally diverse family structures, and the effects of poverty and racism on parenting. Although not addressed to judges, the U.S. Children's Bureau has explained the importance of "cultural competence."¹³⁴ "A culturally competent workforce acknowledges the importance of culture, has the capacity for cultural self-assessment, recognizes the dynamics of resulting cultural differences, [and] strives for the expansion of cultural knowledge."¹³⁵ Currently juvenile protection judges do not have any required formal mechanism to receive such knowledge. Providing such training is a necessity to inform judges of the United States' long history of separating minority children from parents, how racism undergirds poverty, the trauma experienced in minority communities due to racism, and of which family separation by the state is a part. As Judge Martin stated, a parent's behavior that might appear crazy to a white judge may be perfectly logical to a poor Black woman who must confront racism on an everyday

134. CHILD.'S BUREAU, *supra* note 21, at 11.

135. *Id.*

basis.¹³⁶ Training can nudge judges to ask challenging questions of themselves and others of whether a case would look the same if parents were a different race.¹³⁷ Becoming conscious of one's own implicit biases is painful, as is learning and acknowledging that one is complicit in structural racism. But as the Executive Director of the National Counsel for Children writes, "[W]e must lean into this discomfort, begin to grapple with uncomfortable truths, and make critical choices that disrupt the status quo."¹³⁸ Judges have the power to do this and to be role models.

F. Learning Empathy

Feminism teaches us the importance of empathy. Where I witnessed a great deal of empathy and sympathy for children involved in juvenile protection proceedings, I did not see that always extended to parents, especially mothers, by judges. As has been written, poor Black mothers have long been viewed as deviant failures with little possibility of true redemption.¹³⁹ Mothers' perceived deviances may stem from poverty, drug or alcohol use, temporarily abandoning children, having children by multiple fathers, refusing to cooperate with DCFS, and even being victims of domestic violence.¹⁴⁰ We might ask such judges to engage in radical acts of empathy—to see themselves as such women—the despair and fear of facing losing one's child to the state, the everyday grind of poverty, their lack of transportation, childcare, healthcare, and adequate housing, and often the resilience that they have displayed. Judge Martin opined that a white judge from a wealthy white suburb may have little understanding of how a poor Black woman on the South Side of Chicago struggles to raise children and the everyday acts of fortitude displayed.¹⁴¹ Judges must be able to put themselves in her shoes while recognizing that their own privilege will never allow them to truly do so.

G. Stop Intervening

Judges should intervene in the family as little as possible and should ensure that DCFS does the same. Judge Martin expressed that there is no evidence that removing children from a parent has better outcomes for children.¹⁴² Nor is there real evidence that a variety of services provided by DCFS work, and often foster care seriously harms the child.¹⁴³ In almost

136. Interview with Hon. Patricia Martin, *supra* note 25.

137. See Gray & Martinez, *supra* note 30.

138. Kim Dvorchak, *Leaning Into Discomfort and Disruption: A Call to Action for Children's Attorneys*, 21 CHILD'S BUREAU EXPRESS (Aug.–Sept. 2020), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=218§ionid=2&articleid=5634>.

139. See Roberts, *supra* note 26, at 61.

140. See Roberts, *supra* note 26 at 61–63.

141. Interview with Hon. Patricia Martin, *supra* note 25.

142. Interview with Hon. Patricia Martin, *supra* note 25.

143. Kelly, *supra* note 18, at 300.

every case, except those in which there is current severe abuse, there should be an understanding that the best interest of the child is served by keeping the child with the parent. Instead of focusing on what is wrong in a family or with a parent, courts and DCFS should determine how they can serve a family. Just like middle-class parents, poor families under severe stress need housekeepers, childcare, transportation, tutors, jobs with livable wages, and trustworthy mental health professionals. Few middle-class parents could fully function without outside help.¹⁴⁴ However, like housing, many of these such services are not provided and material needs not met. Once again this implicates the United States' long distrust of the poor and providing them with welfare rather than punitive state interventions.¹⁴⁵

VI. CONCLUSION

The suggestions in this article are just a beginning to provide steps that can be immediately enacted by child protection judges. I, like so many others, continue to question whether any reform can ultimately eradicate the structural racism within the juvenile protection system. The cynic in me views the vast child protection industry as primarily benefiting the middle-class professionals who staff and earn their living from child protection including judges, lawyers, court personnel, administrators, social workers, and the many agencies with whom DCFS contracts. Billions of taxpayer dollars are spent on this industry rather than on alleviating poverty and providing the poor with cash and other material assistance. The child welfare system functions like quarantines of old—targeting and punishing minority populations while refusing to see much broader concepts of what is required for the public health. This includes providing parents with the necessary means to feed, house, and educate their children in neighborhoods that are safe from state violence. In a society built upon white supremacy, is it not the state that is truly guilty of child abuse and neglect?

144. Interview with Hon. Patricia Martin, *supra* note 25.

145. See KAREN TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972* (Cambridge Univ. Press, 2016) (discussing the long history of U.S. refusal to deliver welfare to the poor).