

Fall 2021

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Recommended Citation

Shanee Brown, *"We can't breathe." Like George Floyd, Black families in New York City have a knee on their necks*, 27 Pub. Interest L. Rptr. 1 (2021).

Available at: <https://lawcommons.luc.edu/pilr/vol27/iss1/2>

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“We can’t breathe.” Like George Floyd, Black families in New York City have a knee on their necks

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While watching the murder of George Floyd, one thing should have remained imprinted in everyone’s mind: he was a father. This racist officer permanently separated a father from his children when he recklessly, yet intentionally placed his knee on Mr. Floyd’s neck for eight minutes and forty-six seconds. When the Administration for Children’s Services (“ACS”) removes Black children from their homes for unjust reasons, it places its knee on the necks of Black families.¹

Breathing as a family involves parents and children inhaling and exhaling the love shown to each other. To separate a family means to obstruct that family’s airway. Neither the children nor the parents can breathe until they can embrace one another again in their homes. Black lives do matter. Black families matter. Black fathers matter. Black mothers matter. Black sons and daughters matter. Black familial integrity matters.

In the United States, all families, including Black families, possess a fundamental right to keep their families together.² The Fourteenth Amendment of the United States Constitution grants individuals a right to family autonomy.³ This right allows parents to keep their families together without governmental interference unless the government has a compelling reason to do so.⁴ As an attorney who represents parents in child protective proceedings in New York City, I notice that the government often fails to recognize that this fundamental right also applies to Black people. American society, particularly the advocates of the family annihilation system, commonly referred to as the child welfare system, must acknowledge and honor the humanity of Black families.

¹ The Administration for Children’s Services is the child protective agency in New York City.

² U.S. CONST. amend. XIV, § 1.

³ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (holding that parents have a right to familial integrity in the absence of coercive interference from the government).

⁴ *See Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (the United States Supreme Court struck down a state statute requiring children to attend public schools because it infringed upon a parent’s right to select the type of school, and the statute did not provide a compelling state interest for mandating that children attend public schools).

The government and its systems need to see Black individuals as human beings who have the fundamental right to raise their families. If the child welfare system considered their humanity, Black children would not be separated from their parents and placed into foster care at such disproportionate rates.⁵ According to the Administration of Children and Families, Black children, who make up 13.8% of the total child population, comprise 24.3% of the children who enter foster care.⁶ These statistics reflect a disproportionality index of 1.66.⁷ Black children are overrepresented in the foster care system.⁸

When the government decides to intrude into the lives of family members, especially Black families, the goal of preserving the familial unit must always take precedence. In my experience as a family defense attorney, it has become obvious that this objective gets lost. Familial separation is a traumatic experience for both parents and children.⁹ In New York, the process of removal is like that in other states. It begins when someone calls the State Central Register reporting abuse or neglect.¹⁰ After that call, the operator can forward the report to the local child protective agency that commences an investigation into the suspected abuse or neglect within twenty-four hours of receiving the report.¹¹ A caseworker promptly investigates by visiting the home unannounced and interviewing family members.¹² If the caseworker suspects abuse or neglect and believes that the children are at imminent risk of harm, the

⁵ See, e.g., *Disproportionality Rates for Children of Color in Foster Care Dashboard*, NATIONAL CENTER FOR JUVENILE JUSTICE, (last visited Dec. 19, 2021), http://ncjj.org/AFCARS/Disproportionality_Dashboard.aspx.

⁶ *Id.*

⁷ See Child Welfare Info. Gateway, U.S. Dep't of Health & Human Servs., *Mandatory Reporters of Child Abuse*, CHILDREN'S BUREAU: STATE STATUTES, Apr. 2019, at 3, <https://www.childwelfare.gov/pubPDFs/manda.pdf> [hereinafter Children's Bureau].

⁸ Children's Bureau, *supra* note 5 at 2.

⁹ See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 527 – 528, 531 (2019); see also Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, A.B.A. (Nov. 5, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reasonable-efforts-as-prevention/.

¹⁰ *Prevent and Report Child Abuse*, OFFICE OF CHILDREN AND FAMILY SERVICES, (last visited Dec. 19, 2021), https://ocfs.ny.gov/main/prevent_child_abuse.asp [hereinafter OCFS].

¹¹ *Id.*

¹² Trivedi, *supra* note 5 at 531; see Dorothy Roberts, *Child Welfare and Civil Rights*, U. ILL. L. REV. 171; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES: THE BIG FEATURE (Dec. 10, 2020), <https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/>; Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of Jane Crow*, NEW YORK TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

caseworker hales them to a holding center if the child does not have relatives or other resources who can care for them. The government can invade a family's home in the middle of the night, strip search the children, and then remove them.¹³ Ripping families apart should be the very last resort – only considered when all other alternatives have been explored. The government need not remove Black children from their homes for issues that could be rectified by investing resources into Black communities, such as high-quality education and appropriate and effective medical care. When the government removes Black children from their homes at disproportionate rates, one must question whether the family annihilation system, particularly the governmental actor ACS, targets Black families for removals as opposed to exploring other options of keeping them together.¹⁴ The infringement upon the Black family's fundamental right to familial integrity stems from the failure to recognize the Black family's autonomy.¹⁵

In New York City, most of the reported child protective cases are neglect cases as opposed to abuse cases.¹⁶ Some people suggest that fewer ACS caseworkers visiting homes means less "protection" for children.¹⁷ New York City abuse and neglect cases decreased dramatically in 2020. One journalist attributed the decrease to abuse going undetected because fewer caseworkers were visiting homes due to the COVID-19 pandemic.¹⁸ Bronx District Attorney Darcel Clark expressed a similar sentiment.¹⁹ A decline in reports, however, does not mean that children are being abused or neglected without it

¹³ Trivedi, *supra* note 5 at 531; see Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 415 (2005); Amanda Anger, *Child protective agencies are using unjust law enforcement tactics against Black and Brown children*, TRUTHOUT (Sept. 12, 2019), <https://truthout.org/articles/unjust-coercive-police-interviews-are-traumatizing-children-of-color/>.

¹⁴ Clifford, *supra* note 8; see also Yasmeen Khan, *Family Separations in our Midst*, WNYC (Apr. 17, 2019).

¹⁵ Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002); see Charlton Copeland, *Private Pathologies and Public Policies: Race, Class, and the Failure of Child Welfare*, 20 YALE L. & POL'Y REV. VOL. 513, 514 (2002).

¹⁶ Allegations of neglect constitute the majority of neglect cases. See Washcarina Martinez Alonzo, *How Overreporting Child Neglect Hurts Families*, NEW YORK DAILY NEWS (Oct. 17, 2021), <https://www.nydailynews.com/opinion/ny-oped-how-child-neglect-claims-hurt-families-20211017-fcid6qa5sjbivmnme73lfhv7oy-story.html>.

¹⁷ Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried*, NEW YORK TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html>.

¹⁸ *Id.*

¹⁹ *Id.*

being addressed. It means that fewer families are being harassed by caseworkers for issues that can be rectified by offering resources to meet the families' needs. Family annihilation apologists conflate a reduction in abuse and neglect cases with actual parental neglect going undetected. In doing so, they fail to recognize the interconnection of race and socioeconomic status.

A majority of New York City families caught in the invidious web of the family annihilation system is Black.²⁰ Based on my experience, the vast majority of ACS investigations is of Black families in poor communities. Unfortunately, in these communities, the schools, hospitals, clinics, shelters, and other social services become feeders for the family annihilation system.²¹ They are required to report suspected child abuse or maltreatment when they have a reasonable suspicion of child abuse or maltreatment in their professional capacities.²² These mandated reporters interact with Black families regularly and essentially function as a system of surveillance.

When mandated reporters feel there are serious concerns with a family, they call in a report against the parents instead of working with the family to address a potential suspected problem. To their credit, many mandated reporters are not aware that the government remains in families' lives long after an initial report is made even when abuse or neglect is not found. In speaking with mandated reporters, I gathered that many possess a mistaken belief that an initial call to ACS results in a short investigation and a quick departure from the families' lives. Unfortunately, this belief greatly deviates from reality. ACS investigates for up to two months, and if it deems a case worthy of court intervention, it drags the family to court.²³ Based on my experience, many families remain under the supervision and surveillance of the family annihilation system for months or years after the report is made.

All is not lost. There is hope — it lies in abolition. I propose that we eradicate the current family annihilation system and replace it with one designed to effectively serve and support families. As is, New York City's so-called child welfare system has nothing to do with child protection. Too many

²⁰ Michael Fitzgerald, *New York City Confronts Massive Overrepresentation of Black Children in Foster Care*, THE IMPRINT (Feb. 2019), <https://imprintnews.org/featured/new-york-city-de-blasio-black-foster-care/33992>.

²¹ Children's Bureau, *supra* note 5 at 2; *Child Protective Services Manual*, OCFS, Dec. 2018, at A1, <https://ocfs.ny.gov/programs/cps/manual/2018/2018-CPS-Manual.pdf>.

²² N.Y. Social Services Law §413(1)(a).

²³ *A Parent's Guide to a Child Abuse Investigation*, NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, (last visited Dec. 19, 2021), <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page>.

Black parents have been engulfed by the pernicious system, and frankly, they should be given the opportunity to not reform the system but dismantle it entirely. Those adversely impacted by the family annihilation system should lead the discourse on the development and implementation of a system tailored to address the needs of the family and to protect children should they face harm from their parents.

The Black Panther Party shouted, "All power to the people" during the 1960s and 1970s.²⁴ It was a simple message and reminded Black communities that they never lost their power. I propose that we embrace this rallying cry again, at a time when it is needed more than ever. I suggest that Black communities reclaim their power and implement a system that serves and protects families whenever a *reasonable* suspicion of abuse or neglect arises. If someone feels compelled to report his or her *reasonable* suspicion, the person should be required to provide his or her name and other identifying information.²⁵ Removing anonymity would likely decrease the number of cases called in on bad faith. A caller required to identify him or herself faces accountability and can provide clarifying information upon request.²⁶ Furthermore, I propose the eradication of mandated reporting as this requirement burdens governmental actors to overreport.²⁷ There should be no classification for which certain

²⁴ *All Power to the People*, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE: THE BLACK POWER ERA (Mar. 14, 2017), <https://nmaahc.si.edu/blog-post/all-power-people>.

²⁵ Prof. Cecka encourages the abolition of anonymous reporting but insists that any calls should be confidential. He states that anonymous reporting makes it easier for child protective agencies to infringe upon the rights of parents. He asserts that the public should be education on what would be appropriate grounds for reporting child maltreatment. See Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U.L.REV. 51, 82 (2015), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3300&context=lawreview>.

²⁶ Daniel Pollack opines that anonymous reporters are unreliable as their truthfulness cannot be assessed and it may be impossible to obtain clarifying information. See Daniel Pollack, *Anonymous Versus Identified Reporting of Child Maltreatment*, AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION: POLICY & PRACTICE MAG. (Aug. 2014), <https://affcny.org/wp-content/uploads/art-APHS-Anonymous-versus-identified-reporting-of-child-maltreatment.pdf>.

²⁷ Erin Miles Cloud asserts that mandated reporting burdens governmental actors, such as police officers, firefighters, and doctors at public hospitals to report anything that suggests child maltreatment, otherwise, these state actors risk termination or some form of liability. The eradication of mandated reporting will liberate governmental actors from conflating issues of child maltreatment with issues stemming from poverty. Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15.3 BARNARD CENTER FOR RESEARCH ON WOMEN: THE SCHOLAR AND FEMINIST ONLINE (2019), <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/>.

groups are required to report issues of concern as studies have indicated that mandated reporting does not decrease or stop harm imposed on families.²⁸

Instead of caseworkers forcing their way into families' homes, I propose a system where community members respond to abuse and neglect reports.²⁹ Any concern of child maltreatment would be received by a non-governmental network of Black community members composed of ministers, mental health professionals, and other healers who volunteer to serve their neighbors. When a report is made the network of Black community members could meet with the family on consent to discuss the concerns. The family would be apprised with an opportunity to address the concerns, provide clarification, suggest solutions, and/or ask for further assistance if it wants it. The community members could state their recommendations or offer resources. For example, the network can offer mediation for Black families who wish to resolve intrafamilial issues, assist with settling issues between the parent and the educational provider, or connect families with high quality medical and mental health care in the community. The network may guide the family, but the family members drive the decision-making process. In other words, the family members make the decision on how to best protect and serve their children.

In cases where the parents pose an imminent risk of harm to their children, the team could work with the family in reaching a solution that protects the children. For those who argue that we need a system to protect minors in cases of severe abuse or neglect, or when parents jeopardize the safety of their progeny, I propose establishing a board or tribunal that functions separate from family court or any other legal system. The board or tribunal could be made up of Black community members with legal experience, such as attorneys, mediators, and former Black jurists who live in the community. In the

²⁸ Studies indicate that mandated reporting increases state surveillance and decreases the efficacy of support services for families, imposing or exacerbating harm on communities. *Policing by Another Name: Mandated Reporting as State Surveillance*, SHRIVER CENTER ON POVERTY LAW (Nov. 13, 2020), <https://www.povertylaw.org/wp-content/uploads/2020/11/spotlight-foster-system-webinar-2-policing.pdf>.

²⁹ As an alternative to police intervention for alleged criminal behavior, some communities have already implemented a system of community-based resources that resolves conflict and responds to the needs of community members. Abolition of the family annihilation system involves the community. Individuals interested in dismantling the system and starting over can mirror or build upon the success of these community-led projects. See Yonav Gonen & Eileen Grench, *Five Days without Cops: Could Brooklyn Policing Experiment be a 'Model for the Future'?*, THE CITY (Jan. 3, 2021), <https://www.thecity.nyc/2021/1/3/22211709/nypd-cops-brooklyn-brownsville-experiment-defund-police>; see also Alexis Okeowo, *How to Defund the Police*, THE NEW YORKER (June 26, 2020), <https://www.newyorker.com/news/news-desk/how-the-police-could-be-defunded>.

event the network disagrees with a family's decision due to an actual threat of imminent danger to the children, the network could seek an order from the board or tribunal. The board or tribunal could hear emergency applications and require the network to provide at least some advance notice of the proceedings so that parents could have an opportunity to be heard. It is important to bear in mind that a separate tribunal could do more harm than good if the network seeks an order predicated on the perception of imminent risk of harm as opposed to the actual threat of harm. Again, parents who have been ensnared by the family annihilation system should lead the discussion on what the new system should look like.

Replacing the current family annihilation system with one that strives to keep families together will hopefully result in more community-based interaction and less governmental intervention. I envisage a world with little to no involvement or interaction with mandated reporters who struggle with how to serve Black communities. Until that is achieved, concerned citizens should aim to ensure less interaction with the agents of the current destructive system. Less interaction with mandated reporters means fewer *suspected* cases reported. Fewer reports means less governmental intrusion for Black families who do not deserve such interference. Most important, fewer reports likely means less removals and less trauma to Black children and parents.

The abolition of the family annihilation system could very well ensure the safety of Black children, keep them with their parents, and protect the mental and emotional well-being of Black families. Eradicating this system will release Black parents from under its knee, and Black families can finally breathe.