

Spring 2011

## The Myth of Separation

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### Recommended Citation

Annette Ruth Appell, *The Myth of Separation*, 6 Nw. J. L. & Soc. Pol'y. 291 (2011).  
<http://scholarlycommons.law.northwestern.edu/njlspl/vol6/iss2/3>

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## Symposium: Justice for the Child\*

# The Myth of Separation

Annette Ruth Appell\*\*

### I. INTRODUCTION

¶1 I am honored and delighted to be part of the twentieth anniversary of the Children and Family Justice Center (CFJC) at Northwestern University School of Law, a center which holds among its core values that children are full human beings and that all children matter. This occasion provides a welcome opportunity to reflect on the accomplishments and trajectory of the CFJC as it has managed to maintain and expand its dynamic advocacy for our most disadvantaged youth and their families. In keeping with the CFJC's commitment to children *and* their families, this Article reflects on the durability of connections among family members and the disconnect between our expectations of and aspirations for rich and poor families.

¶2 Taking seriously the notion that all children count, this Article challenges the myth of separation: that children can be fully and existentially separated from their parents; and that we *must* excise children from parents to improve children's lives. This myth works to the detriment of all children, but particularly children under the jurisdiction of juvenile courts. I learned this first hand in the Cook County Juvenile Court, which the CFJC was born to reform,<sup>1</sup> and subsequently in juvenile courts in Columbia, South Carolina; Las Vegas, Nevada; and St. Louis, Missouri.

### II. CHILDREN AND FAMILY JUSTICE

¶3 The CFJC was the brainchild of Bernardine Dohrn, whom I met for the first time in 1988 when I took a leave of absence from a large law firm in downtown Chicago in what was then the tallest building in the world.<sup>2</sup> I left to work for the Cook County Office of the Public Guardian (OPG), located in a much shorter building on the city's less tony southwest side, but closer to the site of the world's first juvenile court building.<sup>3</sup> We were among the first generation of lawyers who joined the OPG after an Illinois state

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\* Northwestern University School of Law, Children and Family Justice Center's 20th Anniversary Symposium, "Seize the Moment: Justice for the Child," presented in partnership with the *Northwestern Journal of Law and Social Policy*, October 7–8, 2010.

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<sup>1</sup> Bernardine Dohrn, *Seize the Little Moment: Justice for the Child: 20 Years at the Children and Family Justice Center*, 6 NW. J. L. & SOC. POL'Y 334 (2001).

<sup>2</sup> That building was the Sears Tower, currently the Willis Tower, the tallest building in the western hemisphere. WILLIS TOWER (Apr. 26, 2011), <http://www.willistower.com/>. The law firm was then known as Sonnenschein, Carlin, Nath, and Rosenthal, now known as SNR Denton.

<sup>3</sup> DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* xiii 23–24 (2004). The first Juvenile Court proceeding in 1899 was actually heard in downtown Chicago in adult court. It would be eight more years until a separate juvenile court was built, just across from the original Hull House (established by Jane Addams and Ellen Gates Starr). *Id.* at 23–25, 31, 37; David S. Tanenhaus, *Juvenile Courts*, ENCYCLOPEDIA OF CHI., <http://encyclopedia.chicagohistory.org/pages/682.html>.

court appointed it, as part of a malpractice settlement, to provide legal representation to all of the children in Cook County, Illinois, subject to abuse and neglect petitions in the Cook County Juvenile Court.<sup>4</sup> It was there I first encountered the myth of separation.

14 Bernardine, who at the time worked in the OPG's cause lawyering division,<sup>5</sup> brought to the position and the office wisdom, leadership, vision, and a critical analysis of child welfare and juvenile justice. In contrast, I was assigned to the trenches, to which I brought excellent legal training and organizational skills, but little knowledge of children, poverty, the juvenile court, or the children the court "served." There, I represented hundreds of children (at any given time) who were "neglected, abused, or dependent,"<sup>6</sup> and so my real education began. My clients were children of all ages whom I saw only at court that first year while I tried to master a staggering, three-digit caseload. My sense initially was that I would be protecting children, but I had not thought-through from what or whom they needed protection. As a white feminist organizer and activist with a nascent race consciousness, I was not quite sure how to reconcile my role in a system that, I would quickly learn, blamed mothers, most of whom were black, for their children's problems. It took me some time to understand that what my clients needed—and therefore what I needed to be—was a defense attorney, guarding my clients not against their mothers, but against the arbitrariness and brutality of the bureaucratic child protection machine.

15 In those days, the court was populated by children and caseworkers carrying plastic grocery bags filled with the children's belongings; the court served as decision-maker and way station as scores of children daily left one foster home to attend court, after which they would depart to a new foster home, to a shelter, or to a group home, placements that would parent them through a behavioral point system.<sup>7</sup> It did not take me long to

<sup>4</sup> The appointment settled a malpractice suit the Legal Assistance Foundation Children's Rights Project, then under the direction of Diane Redleaf, brought against Cook County Guardian Ad Litem Leonard Goodman. Andy Knott & Bruce Dold, *County Office Assigned to Abused Kids Is Sued for \$60 Million*, CHI. TRIB., June 12, 1986, available at [http://articles.chicagotribune.com/1986-12-16/news/8604030904\\_1\\_cook-county-juvenile-court-six-plaintiffs-neglect](http://articles.chicagotribune.com/1986-12-16/news/8604030904_1_cook-county-juvenile-court-six-plaintiffs-neglect) (announcing the lawsuit). As a result of this appointment, the office had to grow considerably so it could provide competent representation to thousands of new clients.

<sup>5</sup> Although the phrase "cause lawyering" had not yet been coined, this unit was engaged in just that—seeking to change the law affecting children in the Cook County child welfare system through affirmative class action litigation, rather than defending children's rights in court. See Steven K. Berenson, *Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits*, 86 DEN. U. L. REV. 457, 457 (2009) (defining the phrase as "lawyers who seek to use legal means in order to achieve social change" and tracing the term to Austin Sarat's and Stuart Scheingold's 1998 book, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998)); Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 660 (2004) (defining cause lawyers as serving "a cause other than—or greater than—the interests of the client in order to transform some aspect of the status quo").

<sup>6</sup> On the regular docket I had 450 individual clients; but my actual "cases," grouped by family (normally maternal siblings), were fewer. The majority of children then, as today, are alleged to be "neglected," not "abused." See CHILDREN'S BUREAU, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., *CHILD MALTREATMENT 2008* xiii (2010), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf> (noting that more than seventy percent of victims were neglected).

<sup>7</sup> This point system, common in institutional settings for children, is a behavioral management tool through which children gain points by behaving well and lose points by behaving badly. Points were a sort of

discover that foster care was not an acceptable answer for children in a system that moved them around as if they were pieces in a shell game.

¶16 At the OPG, the vast majority of the cases for which we were appointed<sup>8</sup> involved neglect, not abuse, and nearly every one of our child clients were poor. Their mothers were most commonly charged with neglect because they used or abused illegal drugs (at the time, crack cocaine) or alcohol;<sup>9</sup> most were depressed and some suffered from serious mental illness; some were simply absent. Often fathers, grandmothers, aunts, grown siblings, and cousins stepped in to provide shelter, food, and a constant source of care and belonging for the children. Many other children were in foster care with strangers, caregivers with whom they might form a familiar and familial relationship over time, which might become permanent through adoption. Or the foster home could be just one more temporary placement.<sup>10</sup> Many times in those days, child welfare agency workers refused to place children with grandparents or other kin, justifying this decision with the proverb “the apple does not fall far from the tree.” Social science research would subsequently validate our own observations to the contrary and cast the proverb in a positive light through findings that kinship placements are not only better than temporary stranger-foster care, but as strong as adoption.<sup>11</sup>

¶17 I was struck by the strong and persistent attachments children expressed for their families, primarily mothers and siblings, but also fathers and kin with whom they had been close, for whom they felt responsible, or to whom they were otherwise particularly connected. I noticed that children usually wanted to return home, even those children who had been in care for a long time and whose parents had been unable or unwilling to make the progress that the court and caseworkers set as a condition for the return of their children. The attachment of children to their family members persisted even when the children were in stable, long term or pre-adoptive foster homes. My clients who resisted adoption did so for a number of reasons, including an unwillingness to be separated from siblings, to change their names, to lose contact with their mothers or fathers, and to lose track of other kin.

¶18 We<sup>12</sup> worked hard to preserve these relationships: we arranged meetings among prospective adoptive parents who would be adopting siblings into different homes; we

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currency that enabled children to purchase privileges and sometimes things, like toys or clothes. I can still hear my clients sarcastically sing “points, points, points, consequences, consequences, consequences.”

<sup>8</sup> The court appointed the OPG to represent nearly every child who came into the court pursuant to the class action settlement. *See supra* note 4.

<sup>9</sup> Their counterparts in my socioeconomic milieu (the suburban middle class) used prescription drugs and alcohol.

<sup>10</sup> For instance, in Illinois and in other jurisdictions in which I practiced, it was not uncommon while sitting in court to hear reports of children having been in ten or more placements during their time in state care.

<sup>11</sup> *See* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence”*, 34 CAP. U. L. REV. 405, 435–43 (2005) (rehearsing Mark Testa’s and other studies regarding the benefits of kinship care for children). The child welfare system and, perhaps, the courts, have improved since then, if only because the case loads have declined. *See* Children’s Bureau, Admin. for Children & Families, *Trends in Foster Care and Adoption—FY 2002-FY 2009*, U.S. DEP’T OF HEALTH & HUMAN SERVS., [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm) (showing a decrease of nearly 100,000 children in care from 2002 to 2009).

<sup>12</sup> By “we” I mean I and other OPG lawyers in the trenches and in the official cause lawyering unit (for instance, *Aristotle P. v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989) was a civil rights case the OPG brought asserting that siblings separated from each other in foster care have a constitutional liberty interest in their relationship and should be placed together or afforded sibling visitation when placed in separate

arranged meetings between the birth parents and prospective adoptive parents; and sometimes we drafted (unenforceable) agreements for post-adoption contact. We also tried to create legal mechanisms to guarantee that children would have ongoing contact with their siblings or parents after adoption.<sup>13</sup> While some of the judges were sympathetic to the children's plight and entered orders in favor of post-adoption contact guarantees, the Illinois Department of Children and Family Services, the state agency mandated to look after these children, strongly opposed any sort of guarantee for ongoing contact and any legal restrictions on or obligations for the agency or adoptive parents. The agency thus subscribed to the mid-twentieth Century construction of adoption as the creation of a new life in which the adoptive parents magically become, by operation of the adoption decree, the child's birth parents and the children their biological offspring.<sup>14</sup> Under this regime the adoptive parents have full, legal autonomy regarding their new child; the former birth parents cease to exist as parents or kin under the law and, theoretically, as a matter of fact.

19 I performed this open adoption work on faith—on the belief in the tenacity of my clients' love of and commitment to their kin and on the small body of social science research I had uncovered about identity and adoption.<sup>15</sup> The openness was my clients' decision, not mine, though I did serve as guardian of my child clients' best interests in addition to being an advocate for their wishes.<sup>16</sup> Although the public defenders that represented the parents normally permitted me to speak with their clients, I mainly saw them only in court hallways and agency meetings. Even then, but certainly after I began working at the CFJC, representing mothers and fathers, I understood how much better for

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foster homes) and judges like the Honorable R. Morgan Hamilton, who understood the value of these relationships and the importance of addressing them to respect children's connections and promote successful adoptions. See, e.g., *In re M.M.*, 619 N.E.2d 702 (Ill. 1993) (holding that the juvenile court could not condition appointed guardian's power to consent to adoption upon adoptive parents' agreement to continue to permit contact between the child and her biological family).

<sup>13</sup> See, e.g., *In re Donte A.*, 631 N.E.2d 257 (Ill. App. Ct. 1994) (regarding whether the court could direct the child welfare agency to take steps to ensure children would have contact with birth siblings or parents after adoption); *In re M.M.*, 619 N.E.2d 702.

<sup>14</sup> See Annette R. Appell, *Controlling for Kin: Ghosts of the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 87–90 (2010) (describing adoption's evolution from a tool to formalize existing relationships to a device for creating new families designed to replicate families created by birth). Under this regime, the adoption decree divests the birth parents of parenthood, invests the adoptive parents with parenthood and orders a new birth certificate reflecting that the adoptive parents gave birth to the child. See Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 386–400 (2001) (reviewing the history of treatment of birth identity and records in adoption).

<sup>15</sup> Literature I found at the time included ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* (1978); Shirley A. Bradbury & Marilyn R. Marsh, *Linking Families in Preadoption Counseling: A Family Systems Model*, 67 CHILD WELFARE 327 (1988); Kenneth W. Watson, *The Case for Open Adoption*, PUB. WELFARE 24 (1988); Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, 61 CHILD WELFARE 217 (1982); Robert Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children*, 60 CHILD WELFARE 391 (1981).

<sup>16</sup> The children's bar would later reject this dual role. *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 592, 609 (2006) (recommending that only in limited circumstances may her attorney decide the child's position on an issue); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301, 1301–02 (1996) (noting that a child's lawyer "should assume the obligations of a lawyer").

the children their imperfect families were than an unfeeling state bureaucracy. At the CFJC, I came to know the mothers and fathers I represented as caring, loving, fiercely devoted, wise, and remarkably competent, if imperfect, parents. In this way, they were similar to most parents I have known in my private life.<sup>17</sup>

### III. THE SEPARATION MYTH PART I: PARENTS ARE FUNGIBLE

¶10 A primary tenet of the child welfare system is that it is both possible and probable for adoption to serve as a complete severance of one family and creation of a new one—that children can be fully and existentially separated from their parents. Ironically, the administrative and judicial arms of the child welfare system have clung to this myth, even though so many of the children in this system know who their parents are and have had actual sentient relationships with them and with siblings and other kin.

¶11 In the meantime, outside of the child welfare system, the separation myth holds less currency. Increasingly families, rich and poor, gay and straight, are postmodern and post patriarchal. While they are generally nuclear as a legal matter, they are not nuclear in their composition, performance, and function.<sup>18</sup> On the contrary, the heteronormative insular household that consists only of two parents and children is quickly giving way to blended step-families, families headed by same-sex couples, multi-generational families, and single-parent families.<sup>19</sup> These families, especially when unhindered by the good-bad parent dichotomy of the child welfare system and when driven by the children's wishes and interests, have embraced (or at least recognized) as family members birth parents, egg donors, sperm donors, surrogate mothers, gametal half-siblings, and former parents.<sup>20</sup> The experiences of these families and the families caught up in the child welfare system are remarkably similar: in both situations, the children have deep and abiding interest in their birth relations, and they can and do maintain relationships with multiple biological and social family figures. U.S. families today inside and outside the child welfare system are consciously porous.

¶12 The depth and tenacity of these birth connections both to children and their parents have led to the development of a new framework for families in the postmodern family era. As part of this movement, open adoption has become the norm in practice in private and foster care adoptions, as well as in the adoptions of infants and older children. Increasingly, even after adoption, birth and adoptive families maintain relationships that include some form of direct or mediated contact or the potential for contact. In fact, thirty-nine percent of children adopted by foster parents and sixty-eight percent of children adopted privately are in contact with their birth families.<sup>21</sup> These families

<sup>17</sup> I subsequently wrote about some of these mothers, with their permission. *Protecting Children or Punishing Mothers: Gender, Race and Class in Child Protection Proceedings*, 48 S.C. L. REV. 577 (1997).

<sup>18</sup> See Appell, *supra* note 14, at 76, 94–103 (describing such families); see also Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. PUB. L. 289 (2008) (exploring the ways in which same-sex-couple-headed families both mimic heterosexual relationships but expand upon them).

<sup>19</sup> See sources cited *supra* note 14.

<sup>20</sup> See Appell, *supra* note 14, for a fuller discussion of postmodern families and openness in adoption and reproductive technologies.

<sup>21</sup> SHARON VANDIVERE, KARIN MALM & LAURA RADEL, U.S. DEP'T OF HEALTH & HUMAN SERVS., *ADOPTION U.S.A.: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS* 45, available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf>.

engage in a wide variety of interactions ranging from mediated contact to regular visits and communication; some families even vacation together. Adoption with ongoing contact, whether regulated or informal, provides a framework for shared parenting and challenges the notion that children must and can be completely excised from their birth families. This phenomenon also challenges the bionormative model of two-and-only-two-parents. Through its recognition that multiple people can have parental or parent-like relationships with children, the postmodern family challenges exclusive parenting itself.

¶13 While adoptive parents have pushed to uncover and preserve their children's connections to their birth relations, adopted children themselves also propel this movement as they seek to excavate their roots in adoption and even in reproductive technology. In the decade since a twelve-year-old sperm-donor-conceived child and his mother established an internet registry for donor siblings, over 7,000 siblings and donors have connected with each other.<sup>22</sup> Many of these biological kin actually go on to form relationships, even though they may live far apart and may not know the identity of their donor. They correspond via e-mail, visit in person, or speak on the phone.

¶14 Indeed, studies suggest that adoptees and donor-conceived people, as children and adults, are interested, often deeply, in their donor or birth parents and other biological relations. Parents and donors share this interest and may be the proponents and facilitators of openness. For example, some parents reach out to the parents of children with the same sperm donor to help satisfy their children's curiosity about their origins; others do so to imagine, or even see, physical (visual and biological) likenesses of the donor for those children without access to their donor's image or identity. Amazingly, sperm donors may feel connected to their offspring, thinking about them regularly and even having relationships with them.<sup>23</sup>

¶15 These oddly familial, but often impersonal, relationships challenge notions that separation is possible and desirable. They are changing our ideas about families in ways that allow us to both see and value the connections between separated children and their parents. Of course, such relationships are not without problems and complications, but they illustrate a new type of extended family that situates parental rights in one nuclear family, but brings into that nucleus the child's birth relations.<sup>24</sup>

¶16 While Illinois has continued to cling to the separation myth for its foster children, approximately twenty other states and the United Kingdom<sup>25</sup> have recognized that adoption is not a rebirth for foster children. Some states have made this recognition in the context of other adoptees as well.<sup>26</sup> Such states have enacted post-adoption-contact statutes that permit courts to order post-adoption contact or visitation<sup>27</sup> or that permit

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<sup>22</sup> See Appell, *supra* note 14, at 117–18 (discussing the establishment of the registry).

<sup>23</sup> *Id.* at 118.

<sup>24</sup> See Appell, *supra* note 14, at 120–30 (rehearsing studies of open adoptive families).

<sup>25</sup> See The Children's Act, 1989, c. 41, §§ 8–11 (Eng.).

<sup>26</sup> See Annette R. Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 WESTERN N. ENG. L. REV. 1, 27–32 (2010), for the most recent list and chart comparing such statutes. See also Annette R. Appell, *The Open Adoption Option*, 13 CHILDREN'S RIGHTS (ABA) 2010, 12 n.9, 12 n.10, 112 n.4 (listing citations for the statutes).

<sup>27</sup> See, e.g., *In re Adoption of Vito*, 728 N.E.2d 292, 300 (Mass. 2000) (using court's equitable authority to order post-adoption contact); Great Britain, the Children's Act 1989, c. 41, §§8–11; see also Annette R.

adoptive parents and birth kin to enter into enforceable agreements for post adoption contact.<sup>28</sup> That still leaves a majority of states, including Illinois, which allow the law to extinguish for all legal purposes the connection between a child and his or her identity.

#### IV. THE MYTH OF SEPARATION PART II: SEPARATION IMPROVES CHILDREN'S LIVES

¶17 Rarely a leader in conceptualizing and operationalizing what children need, the child welfare system since the Progressive Era has been driven by the impulse to separate children from their families and to view family problems as personal and private, not as societal and structural.<sup>29</sup> This aspect of the myth of separation precedes the first. It is the *sine qua non* of the child welfare system: the belief that removing children from their parents to improve children's lives is an acceptable and often preferred method of protecting children. Although child welfare theory holds that children should only be removed from their families when reasonable efforts have failed to keep the children safe, the construction of both safety and efforts is bureaucratic and psychological, not holistic and social.

¶18 In other words, child welfare law and practice frame the protection of children as psychological and individualized problems, an approach which both fails to apprehend larger structural barriers and elides (some might say “stubbornly resists”) structural solutions, thus belying the claim that the child protection system is child-centered. Even in cases in which the state monitors the child at home, rather than in substitute care, the state's aim is to make the parent better. This is the child welfare system's approach: try to fix the family, and if the family cannot be fixed, remove the child.

¶19 This approach is based on liberal theories of individual rights and responsibilities that resist universal public support for parents and children<sup>30</sup> and on a rather narrow theory of psychological child development which individualizes and pathologizes deviations from middle class norms.<sup>31</sup> This developmental theory holds that children are best served by removal from a dysfunctional family that is not making swift enough progress toward higher functioning, and placement into a healthy, state-approved family. Ideally, this new family constitutes a total substitute for the family of origin (a rebirth, so to speak), thus creating a brand new life for the child.

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Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4(2) ADOPTION Q. 101 (2000) (listing and analyzing such statutes).

<sup>28</sup> Appell, *supra* note 14, at 93–94.

<sup>29</sup> See LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 197–99, 286–87, 293–94 (1999) (recounting the early development of the child welfare system and its impulse to remove children from their environments).

<sup>30</sup> Instead, funding for children is too localized and geographic—drawn from local taxes—while state and federal policy distributes capital improvements to highways and suburban development. See Maxine Baca Zinn, *Family, Race, and Poverty in the Eighties*, 14 SIGNS 856, 865–71 (1989) (noting the structural employment impediments that poor, urban minorities face, including the lack of inner-city jobs and the difficulty of accessing jobs outside of the city because of a lack of transportation); Angela Harris, Margaretta Lin & Jeff Selbin, *From “The Art of War” to “Being Peace”: Mindfulness and Community Lawyering in a Neoliberal Age*, 95 CAL. L. REV. 2073, 2079–93 (2007) (describing distributive justice that favors suburbs over cities, wealthy over poor, and funds education through local taxes).

<sup>31</sup> See CAROLINE F. LEVANDER, *CRADLE OF LIBERTY, RACE, THE CHILD, AND NATIONAL BELONGING FROM THOMAS JEFFERSON TO W.E.B. DU BOIS* 108–09, 134–39 (2006) (exploring the child welfare system's individuation and surveillance of families and the role of race and class in the creation of child development theory).

¶20 The child welfare system does not address systemic issues, such as poverty, violence, isolation, and other environmental challenges that can send vulnerable families over the edge. Nor does this system apprehend the endurance of biological and social ties and the longing that separation produces in children. Instead, this system exposes youth and families to the psychological, political, and social repercussions of separating, or risking separation of, children from their parents in a socio-economic context of gross disparities of power and resources along race and class lines and through a system built on class and race distinctions. Ironically, out-of-home care is much more expensive than helping children and families in their homes and communities.<sup>32</sup>

¶21 Children caught in the child welfare system are now, as they were in 1899, mostly poor children of unmarried or widowed mothers, families that were then and are today disproportionately not white.<sup>33</sup> Thus, even while the child welfare system continues to separate children from their parents in class- and race- specific ways,<sup>34</sup> the value of parents to their children (and children to their parents) and the significant justice problems this model presents have failed to gain significant traction either on the ground or in the law of child protection.

## V. CONCLUSION

¶22 If the massive federal and state child protection industry really meant to protect children, and if it respected children (a claim the industry does not make), it would reframe the notion of child welfare in a manner informed both by emerging childhood studies theories and by a social justice or a public health approach to child welfare. This exercise would view children not just as family members, but as present and future members of communities who, by virtue of their youthful and moral status, have claims to resources and the power to hold the industry accountable. Such approaches would be aimed first and foremost at helping children flourish *without* removing them to other families and communities. This orientation embraces social and economic health, not just the mental health or private behavior of parents. It is a frame that regards all children and families as important and salvageable and resists ghettoizing communities.

¶23 We can imagine a range of approaches that might be based not on pathology and punitive responses, but instead on the needs of children without regard to who their parents are.<sup>35</sup> The least radical approach would be to assist children and families in their homes, their communities, and their cultures. This approach would meaningfully consult the families' own views of their needs, and it would address such issues within a public health framework. This path might consider what children need to thrive as children and as they develop into adults; it might also consider what the parents of these children need

<sup>32</sup> Chris Gottlieb, *Reflections on Judging Motherhood*, 39 U. BALT. L. REV. 371, 379 (2010).

<sup>33</sup> See Annette R. Appell, "Bad" Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 760–68 (2007) (noting that non-English immigrants were not considered to be white in and around the progressive era).

<sup>34</sup> Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683 (2001); Dorothy Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

<sup>35</sup> See Annette R. Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 754–55 (2009) (illustrating the nearly totalizing distributive aspects of the parent-child relationship in the U.S.).

to care for and protect the children as they move from the vulnerability of childhood to the vulnerability of adulthood.

¶24 If we really took children seriously we would look at their communities and ask whether there are safe schools; schools that prepare children to be wage earners, professionals, business owners, and democratic citizens; after-school programs; parks and playgrounds; day care; affordable fresh food; safe housing; and jobs for their parents. Unlike the current fixation on parental mental health and behavior and praise and blame, this child-focused approach examines whether there are jobs for the parents, employment that offers a living wage, or whether parents have to work multiple jobs just to keep a roof over the family's head and put food on the table. Implementing such policies would require a paradigm shift in the child welfare system and in cramped liberal theories of family liberty, childhood, and adulthood that equate freedom with private wealth. This shift could divert spending from institutional care and the judicial and administrative systems that this care demands,<sup>36</sup> and put money into schools, day care, baby-sitters, after school programs, job training, economic development, and public transportation systems. This approach would provide the supports that parents, children and communities need to create healthy conditions for robust notions of child development and provide supports within the community for children who are not safe in their homes.

¶25 Further, we would ask the children what they want and what they need. We would invite them into the political process through youth councils or other roles that afford children voice and participation in the planning and distribution of resources in or to the children's communities. In the meantime, we come closer to these visions because of the work of places like the CFJC and the vision of its leaders and foot soldiers. They make it possible even to conceive of a nation that truly values its children.

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<sup>36</sup> In light of the constitutional protections on family liberty (*see, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)), the current family interventionist model requires a great deal of due process—courts, judges, bailiffs, clerks, and lawyers.