

A stylized illustration of a woman with dark hair, wearing a yellow necklace with the word 'mama' written on it, and a yellow crescent moon earring. She is holding a child with long dark hair. The background is a mix of teal, purple, and red. The text is overlaid on the right side.

“WHATEVER THEY DO,  
I’M HER COMFORT,  
I’M HER PROTECTOR.”

HOW THE FOSTER SYSTEM  
HAS BECOME GROUND ZERO  
FOR THE U.S. DRUG WAR

**MFP**

MOVEMENT FOR  
FAMILY POWER

NYU  
FAMILY  
DEFENSE  
CLINIC



We are  
the **Drug**  
**Policy**  
**Alliance.**

# Report Author

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# MFP

MOVEMENT FOR  
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Movement for Family Power works to end the foster system's policing and punishment of families and to create a world where the dignity and integrity of all families is valued and supported. Learn more at <https://www.movementforfamilypower.org/>.

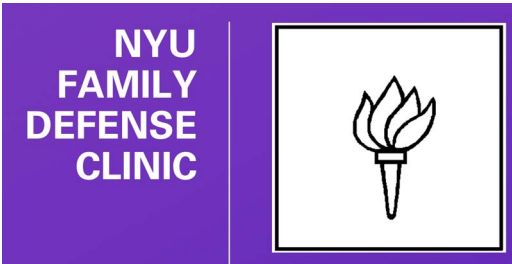
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# Report Co-Publishers

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NYU Law Family Defense Clinic works through both direct representation and systemic advocacy to combat the indignity and inequality routinely experienced by parents involved with the child welfare system.



The Drug Policy Alliance envisions a just society in which the use and regulation of drugs are grounded in science, compassion, health and human rights, in which people are no longer punished for what they put into their own bodies, and in which the fears, prejudices and punitive prohibitions of today are no more. Our mission is to advance those policies and attitudes that best reduce the harms of both drug use and drug prohibition, and to promote the autonomy of individuals over their minds and bodies. Learn more at [drugpolicy.org](http://drugpolicy.org).

# Gratitude

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This report is filled to the brim with research. Behind every statistic, behind every research finding, behind every interview is a reference, either direct or indirect, to a parent and family's experience of persevering in the face of a brutal system of family separation and dissolution. First and foremost, gratitude and solidarity is owed to parents and families who survive, thrive and resist conditions that should never exist in the first place.

This report is a reflection and compilation of the analysis, thinking, work, advocacy and agitating of so many people and organizations who have worked and are working to resist the harms of the foster system— to whom we give gratitude.

This report benefited enormously from the close review of many allies in this fight whose time and energy spent on a detailed read and feedback is much appreciated and we especially appreciate the time and work of Elizabeth Brico.

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# Summary

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**M**s. L was approached and questioned by Child Protective Services (CPS) a few days after she called the police for help with a domestic disturbance. When CPS asked her if she uses drugs, she truthfully responded that she smokes cannabis from time to time. This admission and subsequent drug tests led, in part, to a child neglect proceeding against her in which the state failed to present any evidence that Ms. L neglected her child. Nonetheless, the court adjudicated her “neglectful,” repeatedly referencing her cannabis use in making this decision, and implemented a “family service plan,” a combination of ongoing state surveillance and “service” provisions.

Ms. L’s family service plan included the following: parenting classes (though there was no evidence that she was a neglectful parent), anger management classes (though there was no evidence that she had anger management issues), parenting classes for children with special needs (though she did not have children with special needs), participation in a drug treatment program (though there was no evidence that she had a substance use disorder), submission to drug screenings (id.), refraining from drinking alcohol (id.), submission to unannounced visits from CPS during which she had to allow full access to the apartment for inspection, and participation in all family court conferences and hearings (regardless of her work schedule). When Ms. L buckled under the pressure of complying with all these demands and maintaining her job, her children were taken from her and placed in foster care. The state then added to her family service plan individual and family counseling services and supervised visits with her children. Ms. L eventually quit her job in order to comply with the requirements. In spite of her enormous efforts

at compliance, Ms. L is facing termination of her parental rights. Her children have rotated through different foster care placements, and the emotional stress of separation from their mother has taken an enormous toll on them. The children's CPS caseworker reported that the children are "prone to angry outbursts at school," "lack interest in learning," and "show no concern for their own wellbeing."

Ms. L's story is by no means atypical. A significant proportion of child welfare cases involving parental neglect are based on allegations of substance use. And while these cases run the gamut—from allegations of occasional cannabis use to allegations of severe substance use disorders—they all share several common threads. Virtually every case is characterized by gross misinformation on the nature of substance use,<sup>1</sup> involves a punitive legal process that resembles the criminal legal system but lacks even the most basic rights protections,<sup>2</sup> and relies on harsh and non-evidence-based responses to substance use.<sup>3</sup> This is all compounded by the pervasive racial and class disparities in the child welfare system. CPS exercises the same discretion to target "offenders" as police and prosecutors, resulting in a system that, as one leading scholar on race, gender and the law describes, "systematically demolish[es] black families."<sup>4</sup>

The child welfare and foster system claims to be a non-adversarial, non-punitive legal system that supports and preserves families and protects children. Yet, as many foster system involved parents have observed, its laser focus on individual responsibility for alleged parenting failures completely ignores societal ills that often instigate involvement in the first place.<sup>5</sup> Rather than acknowledging and addressing the structural inequalities that underpin foster system involvement, the system focuses on rescuing children from parents—overwhelmingly Black, American Indian, Latinx and white mothers living in poverty—with alleged defects in their personalities.<sup>6</sup> Furthermore, this system often perceives a need for support when no such need exists. Measures to

support families and communities, such as housing, healthcare, child care and nutritional assistance, have been replaced with the foster system and an increased push for adoption.<sup>7</sup> In the few jurisdictions where services for families are available, they utilize an exacting and unforgiving tone that is more reflective of probation or parole than nurturing support for families.

This report documents how the foster system has become ground zero for the United States drug war. It draws from extensive interviews with a variety of people who interact with the foster system across the country, a deep dive into the academic literature and data obtained through data requests to document the harm and violence the foster system inflicts on millions of parents and families every year. After an extensive national overview, it takes a close look at the Bronx, New York. It makes recommendations for reform based on the principals of harm reduction, science, and respect for the human and civil rights of parents and the integrity of families. Thank you for reading it.

#ResistSurveillance #ReimagineSupport #SurveillancelNotSupport  
#SupportNotSeparation

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# Introduction

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**T**he child welfare and foster system (foster system)<sup>8</sup> holds perhaps the greatest power a state can exercise over its people: the power to forcibly take children away from parents and permanently sever parent- child relationships.

The modern foster system<sup>9</sup> has been in operation since the 1960s and its power and reach have consistently expanded outward. By some estimates, over one-third of U.S. children have been the subject of a child maltreatment investigation; for Black children in the U.S., that figure rises to over half.<sup>10</sup> Researchers estimate that over 10% of white children, 13% of Latinx children, 14% of American Indian children and 20% of Black children have been deemed maltreated by a child protective agency and/or family court.<sup>11</sup> Between 2000 and 2011, one in seventeen white children, one in nine Black children and one in seven American Indian children had been removed from their parents' care.<sup>12</sup> The United States holds the distressing distinction of having the greatest number of legal orphans in the world—children forcibly made legally parentless by a mechanism known as termination of parental rights.<sup>13</sup>

The child welfare and foster system holds perhaps the greatest power a state can exercise over its people: the power to forcibly take children away from parents and permanently sever parent- child relationships.

While cumulative data on parents under the jurisdiction of the foster system is unavailable, the data above has a necessary corollary. Many millions of parents have been subjected to foster system surveillance and control, including temporary and permanent loss of the custody of their children. Indeed in 2017 alone, over 500,000 parents, almost all low income and disproportionately Black, American Indian, Latinx and female presenting, were determined by the foster system to have maltreated their children.<sup>14</sup> The reach of the foster system into the lives of people living in poverty and Black, American Indian and Latinx communities rivals the much more widely discussed criminal legal system.<sup>15</sup>

When discussed in popular media, the foster system most visibly comes under scrutiny for failing to prevent the death of a child known to the system. Often this coverage would have the reader believe that, had the child protective agency only been more vigilant, the child would have been saved from a violent death. Not discussed in these articles is the rarity of this outcome—so relatively small<sup>16</sup> and unpredictable<sup>17</sup> that it would be virtually impossible to prevent every death of a child.

The reach of the foster system into the lives of people living in poverty and Black, American Indian and Latinx communities rivals the much more widely discussed criminal legal system.

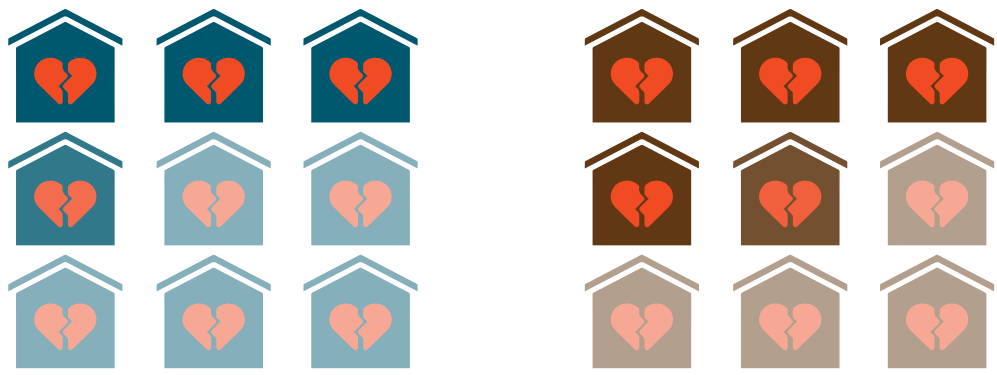
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**Between 2000 and 2011**



**had been removed from their parents' care.**

**Over one-third of American children and over half of Black children have been the subject of a child abuse/neglect investigation**



However, the foster system has been subject to surprisingly little scrutiny<sup>18</sup> of its wide latitude to surveil and control families, apprehend children from their parents, and permanently sever parent-child relationships. It seems widely assumed that the foster system is a beneficent exercise of state power, operating with restraint and judiciousness. The foster system has not been subjected to the same breadth of sustained, critical analysis as other government powers with potential for oppressive functions, such as the criminal legal system, immigration system, or anti-terrorism enforcement.

This absence of analysis is made all the more remarkable by the fact that the foster system almost exclusively monitors the parenting of society's most marginalized people.<sup>19</sup>

Allegations of caretaker substance use are present in an overwhelming majority of cases. Data vary widely, but some studies estimate that over 80% of all foster system cases involve caretaker drug use allegations at some point in the life of the case.<sup>20</sup>

The overdose crisis has highlighted the foster system's interface with families when there are allegations of parental substance use. State foster system officials, and in turn the media, are claiming that the increase in the number of children in the foster system since 2012, after more than a decade of slow but steady decline, is due to an increase in drug use by parents, in particular opioid use.<sup>21</sup> An increase in the number of children removed from their families and placed in the foster system in response to a perceived drug epidemic is not unprecedented—this also occurred when the use of cocaine in both its powdered and smokable form (crack) was increasing in the 1980s and 1990s, and the United States ramped up its war on drugs.<sup>22</sup>

There has been relatively little questioning of the foster system's interventions into the lives of parents who use drugs. This absence of scrutiny seems to

be underpinned in part by three assumptions:<sup>23</sup> Prenatal and parental drug use per se harms or poses risk of harms such that it justifies the existence of a massive<sup>24</sup> and powerful government apparatus such as the foster system. The foster system is able to identify harm or risks of harm. The foster system is equipped to respond appropriately to ensure the safety and wellbeing of parents, children and families.

This report is an attempt to contribute to the small but growing body of literature<sup>25</sup> that questions these assumptions and the foster system's intervention into the lives of parents who use drugs, particularly low-income white, Black, American Indian and Latinx parents.

# The United States Drug War

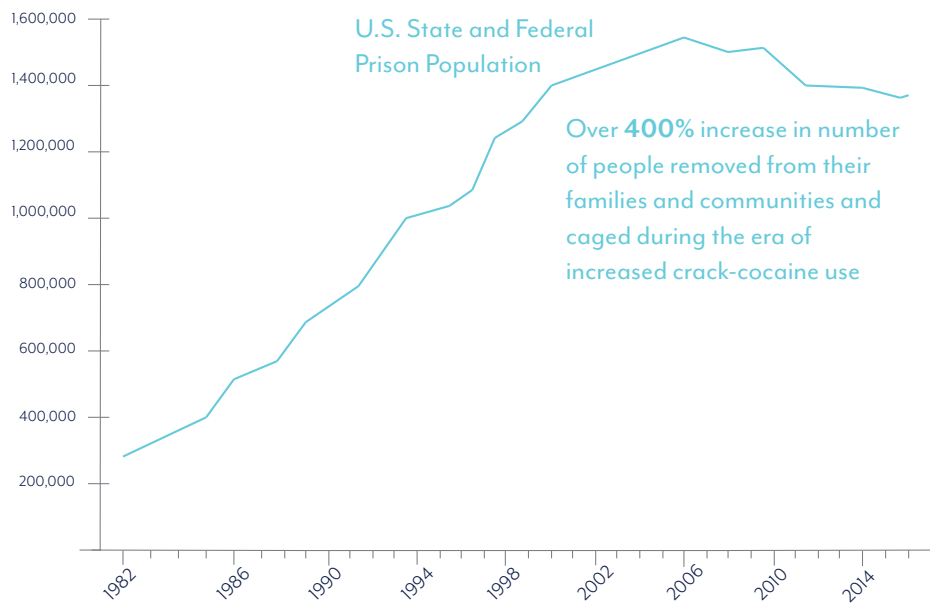
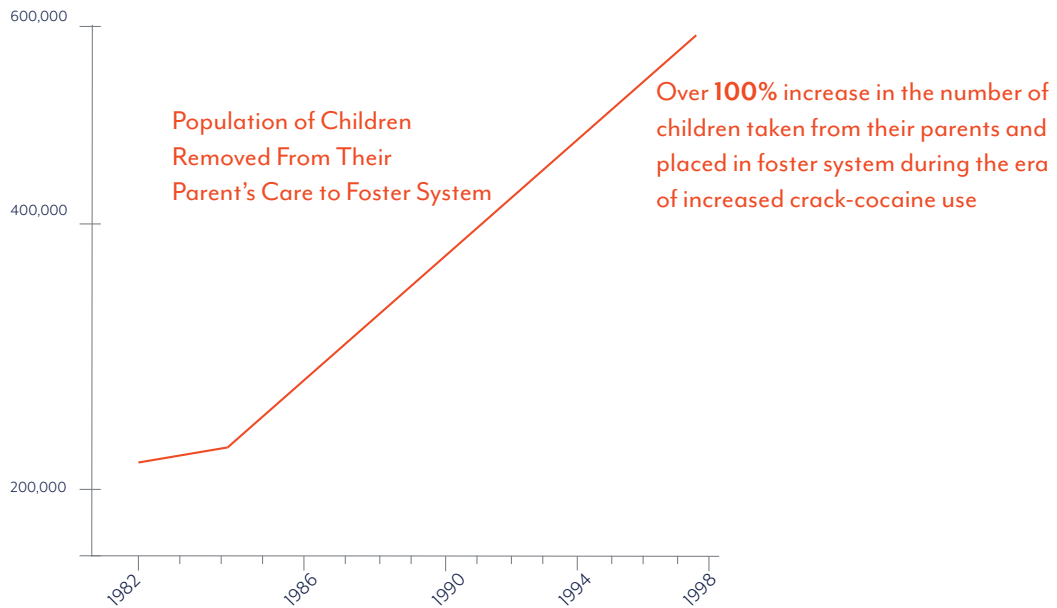
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One of the primary justifications for the drug war offered by its proponents is the urgent need to protect innocent children at risk of harm,<sup>26</sup> especially by their drug-using parents. It should come as no surprise, then, that the foster system — the governmental bureaucracy tasked with protecting children from their parents — has been a central battleground in the war on drugs.

In *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander traces the sharp increase in the number of people under federal and state criminal legal system supervision and control as America doubled down on its war on drugs (roughly from the early to mid 1980s through 2005). She documents how the war on drugs, undertaken in the name of public safety, destabilized and disempowered entire communities, further entrenched the projection of white supremacy through law enforcement departments across the country, and drained resources from communities living in poverty to middle-class, largely white communities. In effect, Alexander has convincingly argued that the war on drugs entrenched a racial caste system in the United States.<sup>27</sup>

As many<sup>28</sup> have pointed out, the population of families under foster system supervision and control similarly increased<sup>29</sup> as the U.S. stepped up its war on drugs. Like people subjected to criminal legal system supervision and control, parents and children ensnared in the foster system are almost all low income, and disproportionately Black, American Indian and Latinx.<sup>30</sup> They are people from communities hit hard by deindustrialization and skyrocketing unemployment. They use drugs at a similar rate to their richer and whiter counterparts,<sup>31</sup> but they are uniquely the target of foster system interventions.

Between 1986 to 1996, **the population of children removed** from their homes to the foster system, like the **prison population**, grew steeply. Between 1996 to 2016, both the **population of children in state custody** and **prison population** have not decreased significantly.





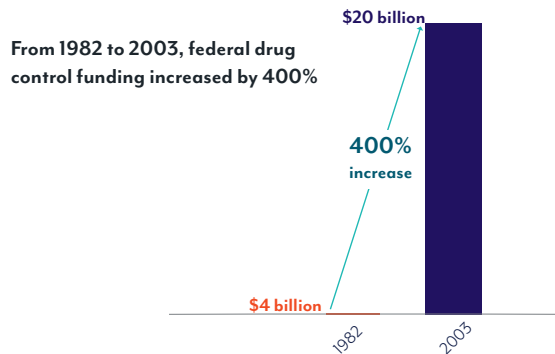
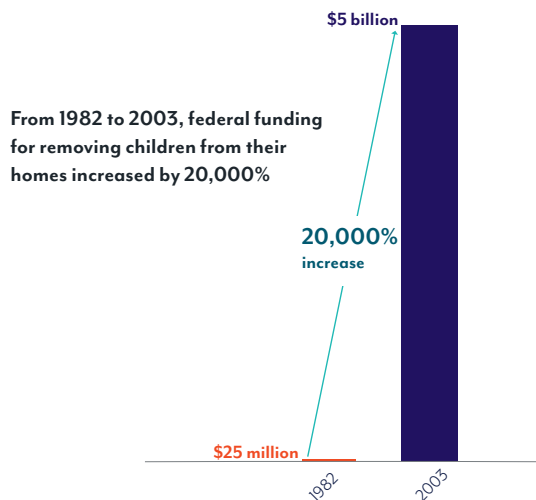
In the drug war waged by the foster system, the federal government poured unprecedented funds into reimbursing states for the costs of removing children, largely Black, Latinx, American Indian and white children living in poverty, from their parents' care and placing those children into foster homes and for adopting out children who were in foster care for over 15 months.

These data are not to underestimate the real harm and risk of harm that drug use and sales, in combination with political and socio-economic factors (for example a drug reduction strategy of criminalization), can sometimes pose to people, families and communities. Rather, it is to highlight the choice the U.S. made at certain junctures in history.<sup>32</sup> In the drug war waged by the criminal legal system, the federal government poured unprecedented funds into expanding the ability of state and local police departments, and departments of correction to target people accused of using and selling drugs, remove them from their communities, incarcerate them, and surveil, control and punish them upon their release from prison and jail.<sup>33</sup> There was no remotely comparable federal or state effort to invest in healthcare, jobs programs, housing, evidence-based and/or culturally sensitive drug treatment and other efforts that are well known to reduce the incidence of problematic drug use and sales, and the harms associated with drug use.

In the drug war waged by the foster system, the federal government poured unprecedented funds into reimbursing states for the costs of removing children — largely Black, Latinx, American Indian and white children living in poverty — from their parents' care and placing those children into foster homes, and for adopting out children who were in foster care for over 15 months. During this same period, foster system funds for basic necessities for families such as drug treatment and associated healthcare, housing, childcare, and so on remained constant, and a fraction of what was available for removing

children from their homes.<sup>34</sup> During this period, public assistance programs shrank dramatically; first by incorporating new, onerous requirements that made access more difficult, and finally by ending the federal guarantee of cash assistance to families living in poverty, and giving states wide latitude in how to spend federal money previously restricted for cash assistance for low-income families.<sup>35</sup> Ironically, many states dip into what remains of that federal cash assistance to pad foster system budgets.<sup>36</sup>

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## Debunking the Assumptions: Prenatal and Parental Drug Use Pose Harm or Risks of Harm that Justify the Foster System's Extensive and Oppressive Interventions

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**D**espite the similar rates of drug use amongst white and non-white drug users, and between drug users in different socio-economic classes, much of the hysteria<sup>37</sup> in the war on drugs revolves around the drug use of parents living in poverty, particularly low-income Black and Brown mothers. This has generated a tome of flawed and dangerous scientific literature and media coverage,<sup>38</sup> despite the fact that not one study has been able to conclusively establish a causal link between drug use and child maltreatment. In contrast, several studies have documented the harm of foster care, including studies comparing outcomes between children in the foster system and comparably maltreated children left in their own homes.<sup>39</sup> There is compelling evidence that the resulting policy and practice is more toxic to children, parents and families than the alleged effects of drug use on pregnancy and parenting.

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### *Drug use and pregnancy*

Contrary to popular opinion, science<sup>40</sup> has not been able to conclusively draw a causal link between in utero illicit drug exposure and long-term developmental outcomes in infants.<sup>41</sup> Three decades of evidence now reveal that the widely discussed effects of in utero exposure to crack-cocaine have been exaggerated or simply inaccurate in the literature, media and policy discussions.<sup>42</sup> The “crack baby,” it turns out, was a myth—<sup>43</sup>a racist myth that enabled the nation to turn its attention away from the structural causes of poor health outcomes in children, such as poverty and structural racism,<sup>44</sup> and instead blame their mothers.<sup>45</sup> While we do not currently have as much research on the effects of in utero exposure to other illicit substances, such as cannabis or methamphetamine, the research to date has not been able to isolate any syndrome or disorder that results from exposure to these drugs, and the research similarly suggests that other confounding variables, such as poverty, play a much more influential role in developmental outcomes.<sup>46</sup> And while opioid use (both licit and illicit) can result in a set of transient, treatable

### A Closer Look at the Academic Literature

Papers in the most reputable journals marshal a parade of horrible outcomes that they claim emanate from drug use with shockingly little scientific basis for these claims... In claiming these various associations between prenatal drug exposure and developmental outcomes, the literature often does not provide important context: that no literature to date has isolated any effects of prenatal drug exposure given the many confounding variables, such as poverty, other substance use, poor nutrition, etc.<sup>40</sup>

symptoms known as neonatal abstinence syndrome, or infant withdrawal, it is now well known that the most effective and cost-saving treatment is keeping mothers and newborns together, encouraging mother-infant bonding through skin-to-skin contact, breastfeeding and other infant soothing techniques.<sup>47</sup> Moreover, sudden cessation of opioid use during pregnancy can lead to negative pregnancy outcomes, which is why addiction specialists encourage pregnant people to enroll in opioid pharmacotherapy treatment like methadone or buprenorphine. Additionally, the research to date has not demonstrated any long term negative developmental outcomes as the result of prenatal exposure to opioids.<sup>48</sup>

### *Drug use and parenting*

Similarly, the social cognitive literature has not been able to conclusively draw any causal connection between drug use and inferior parenting. The scientific literature that suggests substance use produces social cognitive deficits in parenting is underwhelming. For example, one study suggests that a very small sample size of parents who use opioids find babies less cute.<sup>49</sup> However, whether a parent finds their child cute is an entirely different inquiry from whether a child has been maltreated.

The social science literature is replete with articles and commentary that claim associations between parental drug use and child maltreatment, but as the literature itself often admits, it has not been able to control for other confounding variables, nor does it even possess a reliable, consistent way of measuring parenting or child maltreatment.<sup>50</sup> A meta-analysis of the literature on caregiver substance use and child outcomes found that in researching the link between caregiver substance use and child maltreatment, the most consistent variable used to determine child maltreatment was CPS investigator opinion about the presence of maltreatment.<sup>51</sup> Yet studies have consistently found that a child services caseworker's perception that a child's caregiver has a substance use disorder strongly correlates with substantial increase in like-

likelihood that the CPS worker will assess that the child has experienced severe harm, increased likelihood that the child will be removed and decreased likelihood that services other than those related to substance use will be offered.<sup>52</sup> In short, much of the literature claiming associations between drug use and child maltreatment suffers from circular logic: the literature determines child maltreatment has occurred if a CPS caseworker says it has occurred, and a CPS case worker determines child maltreatment has occurred if they find evidence of substance use.

In short: much of the literature claiming associations between drug use and child maltreatment suffers from circular logic: the literature determines child maltreatment has occurred if a CPS caseworker says it has occurred, and a CPS case worker determines child maltreatment has occurred if they find evidence of substance use.

The body of literature that links substance use with parent or child self reports of maltreatment is quite small, and does not consistently control for confounding variables such as poverty, living in highly policed and criminalized environments, mental health issues, etc.<sup>53</sup> Brenda Smith, a leading researcher in this area, has concluded of the research on methamphetamine use and parenting, for example, that “there is little specific, longitudinal, generalizable data on the consequences to children of living with a parent who uses methamphetamine or other amphetamines.”<sup>54</sup>

As it turns out, a growing body of literature finds that drug use alone is not necessarily correlated with child maltreatment and that environmental factors

such as socio-economic insecurity, lack of access to health care, housing and other factors account for much of the observed maltreatment.<sup>55</sup> A growing body of literature also documents that parents who use drugs are able to mitigate the harm and risks of harm associated with drug use, as parents do when engaging in any of a variety of behaviors that potentially pose harm to their children.<sup>56</sup> Indeed, these are all things many of us know intuitively from our own experiences using controlled substances; for example, we keep alcohol in cupboards that young children cannot reach, we drink to the point of inebriation when our children are asleep or in the care of others, and so on.<sup>57</sup> This is not to deny that, at times, parental drug use in combination with other factors may be associated with harm or risk of harm to children. It is, however, safe to say the associations have been exaggerated and taken out of context, at least as it concerns the drug use of people living in poverty and people of color.<sup>58</sup>



*This art is based on photo taken by report author at a Stop CPS  
from Legally Kidnapping Children rally in Minnesota in 2018*

# Historical Context

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It is not a coincidence that the overwhelming majority of parents involved with the foster system are living in poverty,<sup>59</sup> or that Black, American Indian and Latinx parents are overrepresented. Nor is it a coincidence that the foster system is designed to protect children from one type of harm only: harm from their parents.

The foster system has been instrumental in demarcating the “undeserving poor” and perpetuating the myth of racial inferiority. It has provided fertile soil for entrenching the idea that people who have low incomes and are racial minorities are responsible for social problems.<sup>60</sup> If parents are to blame for their poverty, for example, then they are the cause of the harm that befalls children as a result of their poverty. And allegations of parental drug use have become a smokescreen behind which this injustice plays out.

## *Socio-economic class and its historical relationship to the foster system*

Funds for the foster system have always been deeply intertwined with state and federal efforts to implement child and family “anti-poverty measures.” In fact, the first federal funding streams deployed to states for foster care were authorized through amendments to the Social Security Act of 1935’s Aid to Dependent Children program, and they remain in the Social Security Act to this day.<sup>61</sup>

The foster system served the distinct function of identifying and responding to parents living in poverty who were “undeserving” of cash assistance they otherwise qualified for by removing their children from their care. Who these



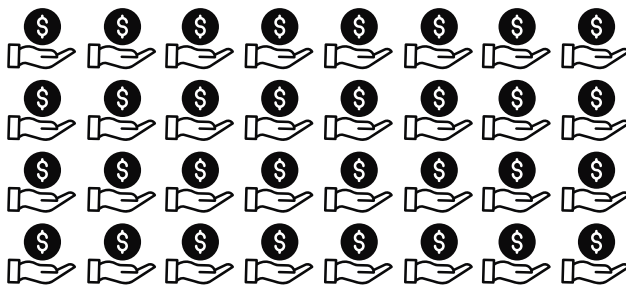
The foster system served the distinct function of identifying and responding to parents living in poverty who were “undeserving” of cash assistance they otherwise qualified for by removing their children from their care.

families are has shifted and /or expanded over time. In the very early, state-based iterations of the foster system, it was immigrants who emigrated from Ireland to toil in extremely low-wage, dangerous jobs during the Industrial Revolution.<sup>62</sup> Immigrant children were forcibly removed from their families' care by various children's aid societies that are still in existence today.<sup>63</sup> These children then became indentured or enslaved labor on farms all over the country. After the federal government established a pension program for single mothers, widowed women had access to cash assistance to help maintain their status in the home as caregivers; for single mothers who had children out of wedlock, however, that same cash assistance fund was used to place their children in foster care.<sup>64</sup>

Up until World War II, Black families were largely excluded from the foster system because state and federal governments placed various restrictions on Black children and families' access to public assistance. However, as the civil rights movement<sup>65</sup> succeeded in opening up public assistance to Black families, the foster system deemed Black mothers the “undeserving poor,” and foster rolls filled up with their children.<sup>66</sup> It was at this time in the early 1960s that the federal government opened a funding stream for public assistance that many states used for foster care, and the number of children removed from their parents' care through the foster system exploded beyond anything ever seen previously in history.<sup>67</sup> While the foster system had never been a benign force, it took an especially violent turn as Black families gained access to public assistance and simultaneously came under the system's purview. The unprecedented funding made available for out-of-home placement over

Between 2004 and 2014, child welfare systems report spending between \$29 billion and \$32 billion every year in federal, state, and local dollars on child welfare activity.

**\$32 billion** per year towards the child welfare system



In comparison with other programs for children living in poverty, federal, state and local government spend the following:

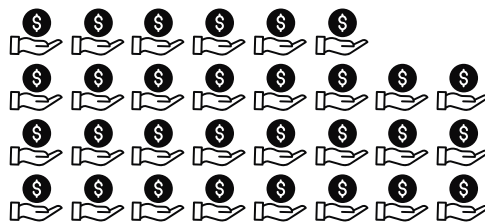
**\$6 billion** per year for Special Supplemental Nutritional Program for Women, Infants, and Children (WIC)



**\$17.5 billion** per year for Children's Health Insurance Program (CHIP)



**\$30 billion** per year for Supplemental Nutrition Assistance Program (SNAP) for children



services is an example of this. Another example is the passage of the 1997 Adoption and Safe Families Act (ASFA), a federal law that provided significant open-ended financial incentives to fast-track children who had been removed from their parent's care to permanent adoption. ASFA dramatically shifted the stated orientation of the foster system from family reunification to permanency — as fast as possible. When this law was passed, 40% of the children in the foster system were Black.<sup>68</sup>

### *Race and its historical relationship to the foster system*

It is not a coincidence or a byproduct of socio-economic inequality that the foster system disproportionately targets Black children and American Indian

children. The hundreds of thousands of Irish and Italian Catholic immigrant children targeted by the first iterations of foster care agencies were not viewed as "white" when they were forcibly taken from their families and placed on farms all over the country.<sup>69</sup> This tragedy, now known as the "Orphan Train" movement, was established by a New York Protestant minister named Charles Loring Brace in 1852. The foster system was designed to protect "decent society" from not just the "menace" their poverty posed, but also their "otherness," forcibly placing them in middle-class Protestant households to socialize them to white middle-class ways.<sup>70</sup>

As is widely known, this legacy of socialization was continued when the foster system played an instrumental role in the mass removal of American Indian children from their homes and communities to white families, another effort at assimilation and social control. By the 1970s, up to two-thirds of American Indian children no longer lived with their families or even in their own communities.<sup>71</sup>

For decades, Black families and communities were largely excluded from accessing public welfare and ignored by the foster system (though of course Black families had been subjected to social regulation and control through various other systems). As Black families, particularly Black mothers, fought for and won the right to public assistance, the moral construction of poverty, or the idea that poverty and its social ills are the fault of individual people who live in poverty, began to saturate the policy making of Republican and

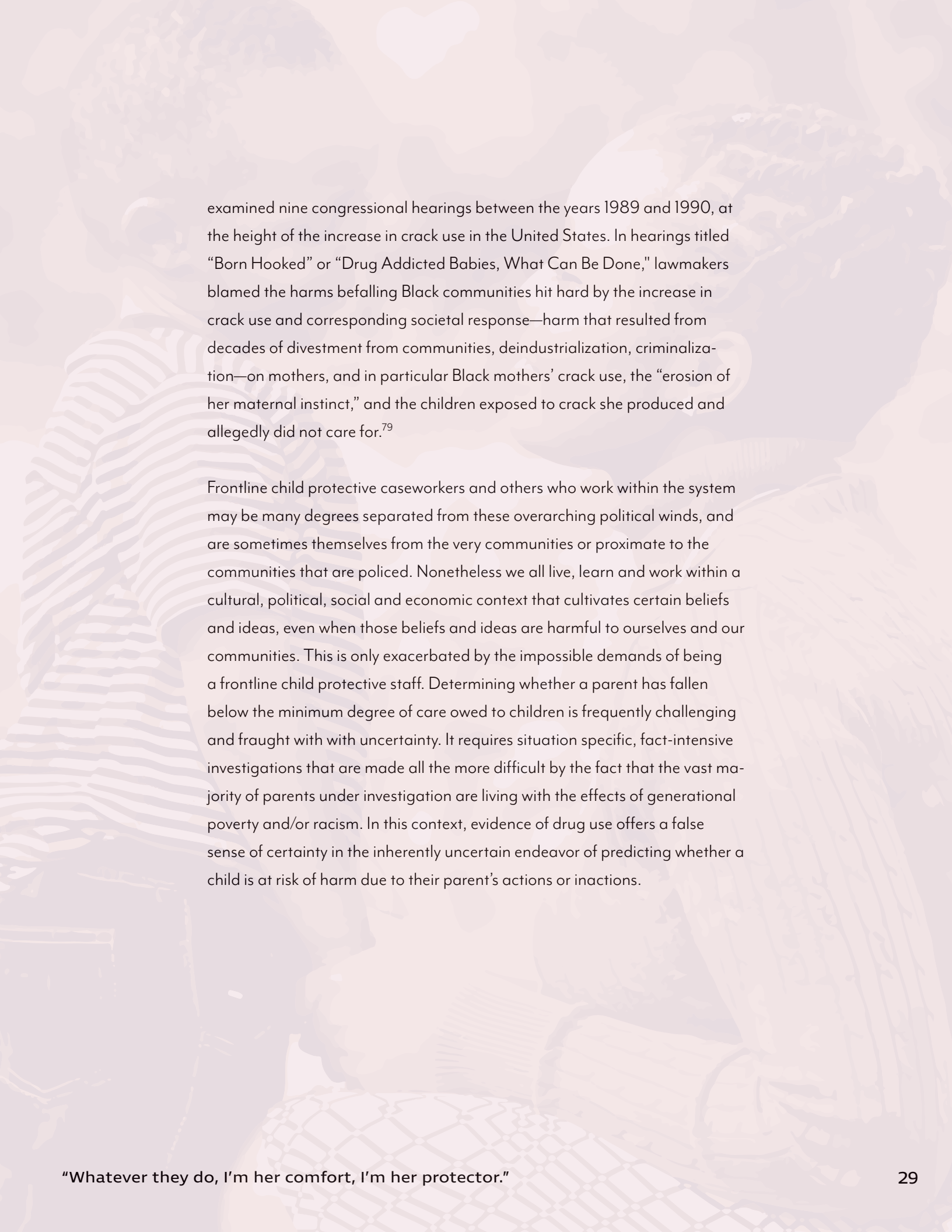
While both systems have always been violent exercises of government power, the growing number of Black bodies under their purview caused the foster system and criminal legal system to become expansive, intrusive, violent and destructive in ways that were unprecedented for each system.

Democratic administrations alike.<sup>72</sup> There was a diminishing commitment from both sides of the aisle to creating and maintaining public goods, and a surrendering of these basic necessities to the private market, so that only those who were “worthy” had real access.<sup>73</sup> This wholesale rejection of public solutions that take into account the role of history and racism—this ahistorical and seemingly race-blind solution of the “market”—was also accompanied by a vast expansion of the criminal legal and foster systems, by both Democratic and Republican administrations alike.<sup>74</sup> While both systems have always been violent exercises of government power, the growing number of Black bodies under their purview caused the foster system and criminal legal system to become expansive, intrusive, violent and destructive in ways that were unprecedented for each system. As many have argued,<sup>75</sup> the social consciousness that permitted the expansive and violent growth of these systems was a social consciousness that was cultivated during slavery and has ensnared all marginalized people in its wake.

The child welfare and foster system have been instrumental in demarcating the “undeserving poor” and perpetuating the myth of racial inferiority. It has provided fertile soil for entrenching the idea that the poor and racial minorities are responsible for social problems.

### *Blame it on the drugs*

Several scholars, including Dorothy Roberts,<sup>76</sup> Nancy Campbell,<sup>77</sup> Susan Boyd<sup>78</sup> and others have painstakingly sifted through historical records to examine how the United States has come to blame its seemingly intractable social problems on drug-using mothers. Nancy Campbell, for example,



examined nine congressional hearings between the years 1989 and 1990, at the height of the increase in crack use in the United States. In hearings titled “Born Hooked” or “Drug Addicted Babies, What Can Be Done,” lawmakers blamed the harms befalling Black communities hit hard by the increase in crack use and corresponding societal response—harm that resulted from decades of divestment from communities, deindustrialization, criminalization—on mothers, and in particular Black mothers’ crack use, the “erosion of her maternal instinct,” and the children exposed to crack she produced and allegedly did not care for.<sup>79</sup>

Frontline child protective caseworkers and others who work within the system may be many degrees separated from these overarching political winds, and are sometimes themselves from the very communities or proximate to the communities that are policed. Nonetheless we all live, learn and work within a cultural, political, social and economic context that cultivates certain beliefs and ideas, even when those beliefs and ideas are harmful to ourselves and our communities. This is only exacerbated by the impossible demands of being a frontline child protective staff. Determining whether a parent has fallen below the minimum degree of care owed to children is frequently challenging and fraught with with uncertainty. It requires situation specific, fact-intensive investigations that are made all the more difficult by the fact that the vast majority of parents under investigation are living with the effects of generational poverty and/or racism. In this context, evidence of drug use offers a false sense of certainty in the inherently uncertain endeavor of predicting whether a child is at risk of harm due to their parent’s actions or inactions.

# Debunking the Assumptions:

## The Foster System Is Able to Identify Harm or Risks of Harm

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*One of the most distressing characteristics of this system is that parents are often given no choice but to succumb and surrender to the demands of a system that is not designed to truly help or support them. The consequences of refusing to comply are too great and resisting child protection's conditions is at a parent's own peril. The difference between parents who successfully avoid losing their children and keep their families intact and those who fail is rarely the type or severity of neglect or abuse involved, but is the degree to which the parent is willing to surrender their humanity, individuality and pride to the system and the court.*

– Emma Ketteringham, Managing Director of the Family Defense Practice at The Bronx Defenders

*The foster system does not have a demonstrably reliable way of identifying risk of harm emanating from drug use*

As research conducted for this report and the research<sup>80</sup> and journalism<sup>81</sup> of many others show, the foster system does not reliably or consistently predict whether and when a child is at serious risk of harm on account of their caretaker's drug use. One illustrative example is the practice of CPS agencies and family courts conflating evidence of drug use, such as a positive drug test, with risk of harm— common in every jurisdiction researched for this report. Even those jurisdictions that claim they require a “nexus” of harm; that is,

evidence of drug use *plus* harm emanating from drug use, acknowledge that they will refuse to return a child who has been removed based on evidence of drug use alone.<sup>82</sup> A newborn positive toxicology is sufficient to allow a CPS agency to open an investigation in every jurisdiction. Going from an open case to a finding of maltreatment is so subjective that it could happen almost anywhere with almost no additional evidence of harm, though less than half of the states' statutes explicitly state that evidence of prenatal exposure alone is sufficient for a finding of abuse or neglect.<sup>83</sup> This is despite widespread agreement amongst leading medical and foster system authorities that a positive drug test cannot predict whether a child has been harmed or is at risk of harm by the parent—all it can attest to is the existence of a drug metabolite in the body.<sup>84</sup> A nationally renowned OBGYN and addiction medicine specialist interviewed for this report stated, “A positive drug test, nor for that matter a negative drug test, says nothing about whether a parent loves their child, [or] whether they will raise them in a safe and supportive environment ...Most drug tests capture metabolites of selective substances present in the biological system at a specific point in time. They are plagued with false negative and false positive results. A drug test is not a test for addiction and certainly is not a parenting test.”<sup>85</sup>

The lack of consensus on how to assess the link between drug use and risk is evident in the wide variation among jurisdictions over whether and when a parent's drug use is sufficient to substantiate an allegation of child maltreatment or remove a child from their parent's care.<sup>86</sup> In some states, evidence that a newborn was exposed to cannabis in utero could result in immediate removal.<sup>87</sup> In others, this similarly situated newborn would not even be subject to a call to the child abuse hotline.<sup>88</sup> It's not just between states; even different cities and counties within a state, and even different judges within the same courthouse, will react differently when presented with the same evidence of drug use.<sup>89</sup> In fact, I spoke to judges who admitted this variation within the cases they adjudicated over the years as their understanding of cannabis

A nationally renown OBGYN and addiction medicine specialist interviewed for this report stated “A positive drug test, nor for that matter a negative drug test, says nothing about whether a parent loves their child, [or] whether they will raise them in a safe and supportive environment ...Most drug tests capture metabolites of selective substances present in the biological system at a specific point in time. They are plagued with false negative and false positive results. A drug test is not a test for addiction and certainly is not a parenting test.”

evolved.<sup>90</sup> One advocate stated “We see judges’ subjective views of drug use and child rearing influence their daily decision-making so much so that one parent can lose custody of their child because of evidence of drug use in one courtroom, and next door the same circumstances will result in a service plan and supervision. There is no real effort to differentiate between drug use and drug misuse, or to conduct a fact specific inquiry into whether or how a parent’s drug use is affecting their child rearing.”<sup>91</sup>

Yet another example are the documented, egregious errors the foster system makes in finding that a child is at risk of harm. Medically prescribed and supervised opioid agonist pharmacotherapies (in particular, methadone and buprenorphine) are widely recognized as the standard of care for opioid use disorder, especially for pregnant people.<sup>92</sup> Regardless, they are condemned by many child protective agencies and family court judges. As summarized in a brochure titled, “Methadone Treatment for Pregnant Women,” produced and distributed by the U.S. Department of Health and Human Services: “Methadone maintenance treatment can help you stop using drugs. It is safe for the baby, keeps you free of withdrawal, and gives you a chance to take care of yourself.”<sup>93</sup> Yet, a recent federal report that surveyed foster system stakeholders in areas hit hard by the increase in opioid use found that judges “expected MAT patients to be stepped down from methadone or buprenor-



phine rapidly. Others were concerned that long-term use of medication for opioid use disorder may not be compatible with successful parenting... some child welfare staff and judges expressed reservations about reunifying children with parents who were stabilized on methadone or buprenorphine.”<sup>94</sup> This is a distressing finding. Child welfare agencies and family court judges are acting in contravention of medical authorities on the subject of medications for opioid use disorder, and demanding that parents cease recommended treatment to regain custody of their children.

*Agencies disregard medical and forensic scientific evidence and professional ethics*

Determinations regarding a parent’s drug use and the effects of that drug use on the health and wellbeing of a newborn or older child involve questions of medicine and science for which evidentiary safeguards are needed but ignored. This is illustrated by the manner in which drug testing is used by hospitals, child welfare agencies and family courts. Other illustrative examples are explored in the jurisdiction-specific case study.

Child welfare agencies and family courts administer drug tests widely, and severe consequences attach to the results of these tests. Nonetheless, agencies and courts fail to follow basic guidelines issued by authorities on drug testing to ensure the integrity of the drug test results. For example, instant urine drug tests — the most commonly administered type of test — produce results quickly and with little expense, but not with enough accuracy to support legal action against a person.<sup>95</sup> Regardless, jurisdictions do not consistently conduct the confirmatory testing that is recommended by the manufacturers of the tests and by the American Society of Addiction Medicine—a much more reliable but also more expensive way of detecting drug use. In a survey of family court practitioners,<sup>96</sup> I found that only about half practiced in jurisdictions that paid for confirmatory testing. Others practiced in jurisdictions that would permit confirmatory testing at the parent’s own expense, which of course is

prohibitively expensive for the overwhelming majority of parents involved with the foster system. One jurisdiction even went so far as to not permit confirmatory testing.

Results of a drug test cannot determine patterns of use over time because people's bodies metabolize and store compounds differently.<sup>97</sup> Nonetheless, caseworkers and judges, who are not trained in reading toxicology results, make determinations about the severity of a parent's drug "habit" after reading the results of a test and determining that the presence of a metabolite at a certain level is indicative of recurrence or addiction.<sup>98</sup> I saw judges persist with these determinations even after challenged by the expert testimony of toxicologists with extensive training in the area.

It is widely known that hospitals serving Medicaid-eligible populations routinely drug test pregnant people, new mothers and their newborns without providing informed consent, in contravention of the ethical guidelines of various leading medical organizations.<sup>99</sup> In one study, researchers found that of the hundreds of hospitals surveyed, almost two-thirds did not have drug screening/testing protocols; of the protocols obtained, most ignored the "crucial issue" of whether and how to obtain specific consent; and that more affluent and white hospitals were more likely to have detailed protocols.<sup>100</sup> This problem is exacerbated by the deep inconsistencies within CPS agencies regarding how reports are handled, and leads to the targeting of low-income mothers and Black, Latinx and American Indian mothers.<sup>101</sup>

# Debunking the Assumptions:

## The Foster System Is Equipped to Respond Appropriately to Risk to Ensure the Safety and Wellbeing of Parents, Children and Families

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**D**espite the absence of evidence that the foster system is effective at keeping children, families and communities safe,<sup>102</sup> it is one of the largest public “assistance” programs for children and families living in poverty.<sup>103</sup>

*The main tool of the foster system is family separation, a practice that is extremely harmful to families*

The foster system’s primary response to determinations of child maltreatment is to remove the child/ren from the parent’s care and place them into the foster system. The foster system allocates almost three times as much money to removing children from their families’ care and placing them in the foster system than on putting services in place to keep families together.<sup>104</sup> These financial incentives have real life implications.

Separating a child from the care of their parents is one of the most violent actions a government can take against its people, with profound implications for both the parent and child. Indeed, this is something all parents and children intuitively and viscerally know.

Separation from parents causes children acute short- and long-term adverse health consequences, as was widely covered in the news media during the family separation crisis at the border.<sup>105</sup> It disrupts the child’s bond to their pri-

mary caregiver, literally affecting brain architecture and triggering a proliferation of toxic stress.<sup>106</sup> Studies and life experience show that this is just as much true for children who have been maltreated as those who have not.<sup>107</sup>

The social science literature is beginning to document the effects on parents, showing a host of negative health consequences which include suicidality, depression, anxiety, post-traumatic stress disorder, postpartum depression and premature mortality.<sup>108</sup> Alongside these health outcomes, research also points to heightened social disadvantages, including loss of housing, employment, income and social support, and increased stigma.<sup>109</sup> As noted in a recent report to the United Nations Special Rapporteur on Violence Against Women, these outcomes “compound societal disadvantages already faced by these mothers prior to removal of their children, further escalating systemic disregard and health/social inequities for mothers and creating significant barriers to rebuilding their lives and families.”<sup>110</sup>

Newborn children (especially those under one month)<sup>111</sup> whose mothers are alleged to have used drugs while pregnant are particularly vulnerable to family separation by the foster system. One study conservatively estimated that one in three children diagnosed with prenatal substance exposure were placed in foster care during infancy—a rate 11 times greater than that of other socio-demographically similar children with no such diagnosis.<sup>112</sup> This is consistent with data that shows that infants are adjudicated as maltreated, removed from their parents' care and permanently taken from their parents at the highest rates of any age group.<sup>113</sup> This is also consistent with data that shows that prenatal drug use is one of the strongest predictors of whether one's newborn will be taken into foster care.<sup>114</sup>

A growing body of research is documenting the profound harm of separating a newborn from their mother; most notably the long lasting harm of disrupting the mother-child relationship at this critical stage of attachment.<sup>115</sup> Separating a newborn from their mother is still documented to be harmful if a mother uses drugs.<sup>116</sup>

Every leading medical organization qualified to address the issue of drug use and pregnancy opposes taking punitive actions against pregnant people on account of their actions or inactions while pregnant, or based on pregnancy outcomes.<sup>117</sup> Some medical organizations, such as the American College of Obstetricians and Gynecologists, include foster system intervention in the list of punitive actions, stating “obstetric care providers have an ethical responsibility to their pregnant and parenting patients with substance use disorder to discourage the separation of parents from their children solely based on substance use disorder, either suspected or confirmed. *In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence based strategies outside the legal system to address the needs of women with addictions (emphasis added).*”<sup>118</sup>

The unfortunate truth, however, is that many who practice medicine and care for low-income white, Black, Latinx and American Indian mothers simply do not agree, and have substituted their own biases for the findings of science and their profession's ethical guidelines. At least 50% of reports to child protective services about newborns exposed to drugs in utero come from medical personnel.<sup>119</sup> One study showed that over 50% of doctors surveyed said they believed their drug-using patients should be separated from their children.<sup>120</sup>



*"This art is based on a photo taken by the report author at a protest parents impacted by the child welfare system held in Philadelphia in 2019."*

*Services for families are low quality and do not meet their needs*

As discussed above, state foster systems have significantly smaller budgets for providing services to parents identified as at-risk of maltreating their children than to place children out of their homes. The foster system has little ability to address the overriding needs of system-involved families who are overwhelmingly living in poverty, such as housing or access to quality health-care. This is despite the fact that studies show that increases in income<sup>121</sup> and the minimum wage,<sup>122</sup> access to child care,<sup>123</sup> expanding Medicaid<sup>124</sup> and providing housing<sup>125</sup> all correlate with decreases in what the foster system defines as “child maltreatment.” The foster system does a poor job matching parents with quality services they actually need; for example mandating parents to complete substance use treatment though they may not have a substance use disorder.<sup>126</sup> Even if the foster system could match families with services they need, one must question the utility and humanity of resourcing communities through a punitive government agency that has the power to apprehend children and destroy families.

Drug treatment poses a particular challenge to the foster system. The United States suffers from a wide addiction treatment gap. This is particularly true for pregnant people. Only one out of ten people who have a substance use disorder get treatment.<sup>127</sup> This remains true even as the nation is in the midst of a sharp increase in opioid use.<sup>128</sup> People face formidable barriers to obtaining substance use disorder (SUD) treatment, including lack of availability, inadequate access and poor quality.

Studies document that up to 23% of parents who are identified by the foster system as having a substance use disorder are not offered treatment even after their entry into the foster system.<sup>129</sup> Another 23% were offered treatment but did not receive it.<sup>130</sup>

While a growing body of scientific literature is sharpening our understanding of how to treat SUD, and while a body of evidence-based practice exists, only a small fraction of SUD treatment adheres to this practice.<sup>131</sup> A recent report on the state of SUD treatment in the United States today concluded that “Nothing short of a significant overhaul in current approaches is required to bring practice in line with the evidence and with the standard of care for other public health and medical conditions.”<sup>132</sup> Research also demonstrates that mandating treatment has the real possibility of doing more harm than good.<sup>133</sup>

A recent federal research brief studying the relationship between the increase in opioid use and foster system caseloads noted “Because of widespread treatment shortages, treatment matching (that is, referring each client to a specific treatment program that matches the client’s therapeutic needs) was virtually nonexistent in the communities that participated in the study. The lack of timely, appropriate treatment set families up for failure.”<sup>134</sup>

Of course, parents face unique barriers in accessing and receiving treatment, whether it’s finding someone to care for their children, the fear of being reported to CPS by the treatment provider, or lack of health insurance coverage. SAMHSA reports that only 12% of U.S. substance abuse treatment facilities, including public and private facilities, have programs or groups for pregnant or postpartum people.<sup>135</sup> Despite literature that demonstrates the benefits of mother/child treatment programs for both mother and child,<sup>136</sup> such programs are few and far between.

The foster system often touts the threat of family dissolution as a motivator for parents to enroll in and complete drug treatment. Furthermore, it conflates treatment non-compliance with unfit parenting. In contrast, one would never tell a parent struggling with hypertension that they would face family dissolution if not compliant with hypertension treatment. This difference underscores



the problematic assumption that people with substance use disorders are uniquely culpable for their diagnosis. Despite overwhelming evidence of the difficulty in accessing treatment or the poor quality of treatment, the foster system equates treatment non-compliance with parental unfitness.

*The harm of family separation is compounded by the harm of foster care*

Foster care itself carries significant risk of harm. People who have experienced foster care have been speaking out for decades about their harrowing experiences while in care.<sup>137</sup> They have also noted the ways in which being in state care made them much more vulnerable to the criminal legal system and targeting by CPS as adults. That the foster system itself inflicts on the children it claims to be protecting one of the greatest harms one can experience—the taking of their children—is telling of the violence of foster care.

The foster care to prison pipeline and the multi-generational targeting of families for CPS involvement is also documented in the research. One study found that the maternal characteristic that has the strongest association with a woman's first child being taken into care at birth was the mother herself being in the foster system.<sup>138</sup> A remarkable five-part series by the *Kansas City Star* documents the deeply traumatic experiences of being in foster care and the poor outcomes for children formerly in the foster system.<sup>139</sup> It conducted original research and found that over 20 percent of the almost 6,000 incarcerated people it surveyed had spent time in the foster system.

Some claim that the heightened rates of contact children formerly in the foster system have with the criminal legal and foster system are not due to the harm of foster care but are instead the effects of abusive parenting. Both experiential and empirical evidence contradict this claim. First, youth formerly in the foster system often point to the experience of foster care, the disruption of family life, and the intensive state surveillance they experienced as their

reasons for involvement with systems, not their parents.<sup>140</sup> Second, two large studies compared outcomes for children in the foster system with comparably “maltreated children” who were left in their homes. Both studies found that children removed from their homes fared far worse than children who stayed at home, essentially isolating foster care as the cause of poor outcomes, not maltreatment by parents.<sup>141</sup>

# Overview of Legal Framework of Drug-Based Child Maltreatment Prosecutions

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The foster system is legislated at the federal, state and local levels. The federal government sets floors for state foster system laws and policies, which are enforced through a federal funding incentive structure outlined in Title IV-B and IV-E of the Social Security Act, and the Child Abuse Prevention Treatment Act. Additionally the federal government permits states to dip into Medicaid, Temporary Assistance for Needy Families and the Social Services Block Grant to fund their foster systems.

## *Federal Overview*

As it relates to drug use, several federal legislative developments have been particularly consequential: the Child Abuse Prevention Treatment Act amendments of 2003, 2010 and 2016; the Adoption and Safe Families Act, which amended Title IV-B and IV-E of the Social Security Act; and the Family First Act, which also amended Title IV-E of the Social Security Act.

## Child Abuse Prevention Treatment Act (CAPTA)

Though not a particularly big source of money for states' foster system programs when compared with other sources of federal money,<sup>142</sup> CAPTA has been very influential in shaping states' foster systems. As it relates to substance use, CAPTA conditions states' receipt of CAPTA funds on states establishing a system where medical care providers, when faced with an infant experiencing "withdrawal," "fetal alcohol syndrome," or otherwise "affected by substance abuse," notify child protective services, and further requires child

protective services to ensure that there is a “plan of safe care” in place for the infant and mother.<sup>143</sup> This is distinct from making a child maltreatment report and responding with a “safety plan.”

CAPTA was amended in 2003 with this notification requirement, after more than two decades of states independently enacting punitive laws and policies that required reporting of newborns who were exposed to drugs in utero, and sanctioned maltreatment findings based on the evidence of a newborn’s positive toxicology alone.<sup>144</sup> Instead of states walking back their laws to the more benign system of notification as described in CAPTA, CAPTA ushered an explosion of punitive state laws requiring reporting to CPS or findings of maltreatment for infants exposed to drugs in utero.<sup>145</sup> Reporting to CPS for child maltreatment is now the nation’s primary policy response to substance use during pregnancy—above and beyond non-punitive policies, such as mandating treatment providers to prioritize admission for pregnant and parenting people.<sup>146</sup>

Reporting to CPS for child maltreatment is now the nation’s primary policy response to substance use during pregnancy—above and beyond non-punitive policies, such as mandating treatment providers to prioritize admission for pregnant and parenting people.

There is a remarkable amount of misunderstanding among state and local foster system administrators and hospitals concerning what CAPTA requires of them.<sup>147</sup> National Advocates for Pregnant Women helpfully outlines what CAPTA requires and, with their permission, I replicate it here:<sup>148</sup>

### **What Does CAPTA Require?**

Under CAPTA, states must have: "policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder, including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."

### **Does CAPTA Require Testing All Newborns for Drug Exposure?**

No. CAPTA does not require testing of all newborn babies.

### **Does CAPTA Require Reporting All Substance-Exposed Newborns to Child Protective Services?**

No. CAPTA only requires states to have policies in place to "notify" child welfare agencies of babies who fall into one of the three enumerated categories: being "affected by substance abuse" affected by "withdrawal symptoms resulting from prenatal drug exposure" or having Fetal Alcohol Spectrum Disorder" (FASD). Such notifications or reports are for the purpose of identifying whether the family is in need of care or services ("to address the needs of infants").

### **Does CAPTA Require Mandated Reports to Take the Form of an Allegation of Child Abuse or Neglect?**

No. The law specifically states that these reports are not for the purpose of redefining child neglect or abuse, nor for the purpose of accusing the mother

of abuse or neglect, even when newborns receive a diagnosis of neonatal abstinence syndrome or FASD. In fact, it should be noted the purpose of the federal funds is to assist states in creating programs and services designed to help newborns and their families. CAPTA-based reports are not required to be, and should not be, treated in the same manner as a report of suspected neglect or abuse against a parent. CAPTA does not say that a baby's positive toxicology result is per se evidence of civil child neglect or abuse.

### **Does CAPTA Require States to Mandate CPS Involvement with All Babies After a Report?**

No. CAPTA's grant eligibility criteria require state programs to include "the development of a plan of safe care" for infants identified as affected by substance abuse, withdrawal symptoms, or Fetal Alcohol Spectrum Disorder. It is up to individual states to determine when and if a plan is needed and which agency or entity (such as hospitals, community organizations, or a child protective services department that is established to receive CAPTA reports separate from reports of child neglect/abuse) is responsible for developing the plan of care. It does not have to be and should not be the existing child welfare agency. Ideally, states should create a separate reporting and data collection process outside the child welfare system to receive CAPTA reports. The federal funds can be used by states to develop a myriad of ways to offer confidential services and support to families after a baby has been identified in a report, outside of the context of a punitive child neglect investigation and proceeding. At a minimum, separate reporting and data collection processes should include a separate database, separate staff, and separate contact person/office. They could also include collaborating with another agency to collect the information and "notify" the child welfare agency. For example, the state's de-identified Pregnancy Risk Assessment Monitoring system could be used to collect data in the three enumerated categories.

### *Adoption and Safe Families Act (ASFA)*

When enacted, the Adoption and Safe Families Act of 1997 was the most sweeping foster system legislation passed in almost two decades.<sup>149</sup> It was part and parcel of a series of federal measures passed at the time that were devastating for Black, American Indian, Latinx and low-income white communities. These included welfare reforms that ended the federal guarantee of cash assistance for families living in poverty, and the Violent Crime Control and Law Enforcement Act that sharply increased funding for state police and prisons.<sup>150</sup>

ASFA was passed after the national alarm over the so-called crack epidemic, when the number of children in foster care, especially for extended periods of time, was at an all time high. It conditions state receipt of Title IV-B and IV-E funds (the biggest sources of federal funds for foster care programs) on several provisions, three of which are outlined here: First, it demands that states initiate termination of parental rights (TPR) proceedings if a child has been in foster care for 15 of the past 22 months, with certain, limited exceptions. Second, it creates a mechanism for states to skip efforts to reunify families and proceed directly to termination as soon as a child enters the foster system if the state claims aggravated circumstances. Third, it provides significant incentive payments to states that increase their adoption numbers, “awarding” states anywhere from \$4,000 to \$10,000 for every child adopted out of the foster system over a baseline.<sup>151</sup> Together these provisions establish unprecedented incentives to permanently separate families and terminate their legal ties.

ASFA sets floors for state laws, not ceilings.<sup>152</sup> Some states pursue termination of parental rights even more quickly than mandated by ASFA,<sup>153</sup> and others have gone so far as to include substance use disorder<sup>154</sup> and/or child exposure to drugs in utero<sup>155</sup> on the list of aggravated circumstances that permit

proceeding to termination without even attempting to reunify the family.

When ASFA was debated, Congress heard testimony on the devastating effects it would have on parents who use substances who did not have access to treatment or who could not comply with ASFA's externally imposed treatment timeline.<sup>156</sup> However, Congress rejected proposals to expand access to treatment, which were suggested in an effort to ameliorate those consequences, and instead addressed the dilemma substance use posed by recommending that Health and Human Services research and write a report on substance use and the foster system. While the report eventually came to fruition, the funds to support its recommendations never did.<sup>157</sup>

In the five years after its passage, ASFA increased adoptions out of the foster system by 70%.<sup>158</sup> Considering that 40% of the children in the foster system were Black at the time ASFA was passed, this had a particularly devastating effect on Black families. Also troubling is that ASFA doubled the number of children for whom parental rights were terminated but no adoptive family was available—rendering hundreds of thousands of children legal orphans<sup>159</sup> and giving America the distinction of having the largest number of legal orphans out of anywhere in the world. By 2014, the federal government had given states \$424 million dollars in adoption incentive payments. When it was passed, the Congressional Budget Office predicted that ASFA spending on adoption subsidies would exceed savings on foster care costs. To make up the difference, Congress offset the cost of the legislation by dipping into the Temporary Assistance for Needy Families (TANF) contingency fund, which is meant to help low income families when states are facing budget crises.<sup>160</sup>

Since the start of the overdose crisis in 2012, the number of termination of parental rights proceedings has increased sharply.<sup>161</sup> Both through law and practice, states are decreasing the amount of time parents have to reunify with their children, and this is especially true for substance-using parents who



are perceived as noncompliant with treatment. For instance, in 2018 Kentucky passed a measure that permits termination of a mother's parental rights if her newborn exhibits signs of withdrawal as the result of illicit opioid use, unless the mother is in substantial compliance with both a drug treatment program and a regimen of postnatal care within 90 days of giving birth.<sup>162</sup>

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### The Family First Act

The Family First Act of 2018 has been described as the greatest overhaul of foster system legislation since the Adoption and Safe Families Act.<sup>163</sup> In short, it permits federal money previously reserved for out-of-home placement to be used for certain “evidence-based” substance use treatment,<sup>164</sup> mental health services and parenting classes. States are permitted to use this money for twelve months for cases in which they determine the child to be a candidate for foster care placement. States, however, are permitted to define what it means to be a candidate for foster care, conceivably permitting use of the funds before any court finding has been made. The use of these funds does not activate the ASFA 15-month termination clock for parents, and while

there is a 12-month cap on services, state agencies are supposed to be able to re-apply and reactivate services at the end of the 12-month period on a case-by-case basis.

Family First has been heralded for potentially opening a significant source of federal dollars for substance use and mental health treatment, though the increase in expenditure on these services is predicted to remain quite low compared to the expenditure on placing children out of homes.<sup>165</sup> If realized, Family First could increase access to treatment for families involved with the foster system, which could significantly benefit families who had little or no access to treatment previously and faced separation from their children as a result of poor treatment access (regardless of whether they actually posed a risk of harm to their child). I do not want to minimize the significance of this, or the real devastation that has been wrought as a result of the dominant funding structure.

However, throughout this report, I question (and certainly many, many others<sup>166</sup> have similarly questioned before this report) whether the foster system should ever be the vehicle for service provision for families. Given its historical roots, its power to surveil and separate families, the fact that it currently delivers services in a punitive and degrading manner, and the fact that it is understood by the populations it purports to serve as a law enforcement agency, it seems unlikely it will ever be understood or received as a net force for good in communities.

The Family First Act's fundamental flaw is that it maintains funding and oversight for service provision within the foster system. New York State implemented a similar funding shift in the early 2000s when it opened a large stream of money for services administered through child welfare agencies. This, without a doubt, contributed to reducing NYC's foster system population from 40,000+ children to just over 8,000 children. This reduction is a

laudable achievement, but it must be understood that it was connected to an increase in other types of coercive government intervention. Today 40,000+ children in NYC are under the foster system's surveillance and control through state-sponsored monitoring and "services." As detailed in the New York section of this report, these interventions are often experienced as violent and degrading.<sup>167</sup>

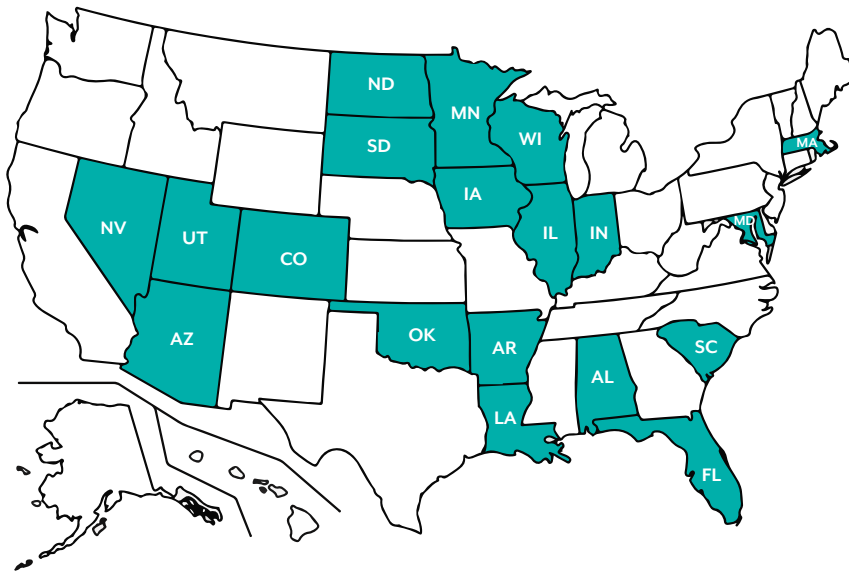
### *State Overview*

Foster system law, policy and practice is largely written and administered at the state and local levels, with the federal government setting floors through federal funding incentives. Despite drug use arising as an issue in up to 80% of child maltreatment cases, not all states address drug use or substance use disorder in their child maltreatment statutes.

Regardless of whether a state explicitly references drug use or substance use disorder in its statute, it is still used to place families under surveillance, take them to court, take away their children and terminate parental rights in every state in the country. Moreover, whether drug use is mentioned explicitly in a statute does not necessarily correlate with how often it is used as grounds for intervention into family life.

The state statutory overview provided below is therefore of limited use in ascertaining the breadth or distribution of prenatal/parental drug use charges in foster system cases.

The following states define prenatal exposure to controlled substances as sufficient to make a child maltreatment finding

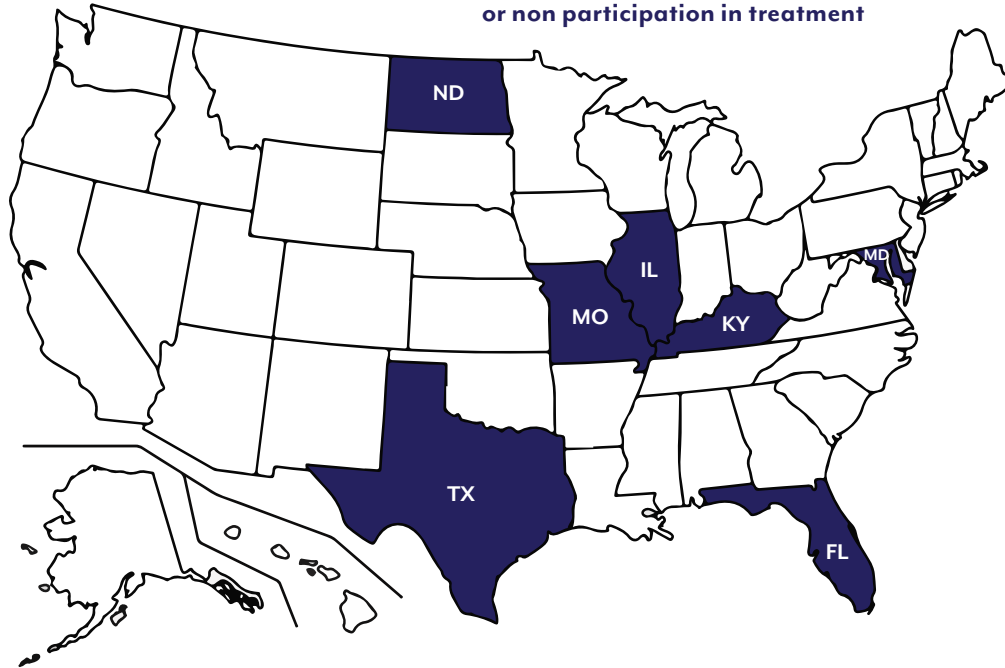


- Alabama (<http://www.alabamaadministrativecode.state.al.us/docs/hres/660-5-34.pdf>)
- Arizona (<https://www.azleg.gov/ars/8/00201.htm>)
- Arkansas (<https://law.justia.com/codes/arkansas/2010/title-9/subtitle-3/chapter-27/subchapter-3/9-27-303/>)
- Colorado (<https://law.justia.com/codes/colorado/2016/title-19/article-1/part-1/section-19-1-103/>)
- District of Columbia (<https://code.dccouncil.us/dc/council/code/sections/16-2301.html>)
- Florida ([http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0000-0099/0039/Sections/0039.01.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0000-0099/0039/Sections/0039.01.html))
- Illinois (<http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=070504050K2-18>)
- Indiana (<https://codes.findlaw.com/in/title-31-family-law-and-juvenile-law/in-code-sect-31-34-1-10.html>)
- Iowa (<https://www.legis.iowa.gov/docs/code/232.68.pdf>) (unclear to me, says (6) An illegal drug is present in a child's body as a direct and foreseeable consequence of the acts or omissions of the person responsible for the care of the child.)
- Louisiana (<https://law.justia.com/codes/louisiana/2011/chc/chc603/>)
- Maryland (<https://codes.findlaw.com/md/courts-and-judicial-proceedings/md-code-cts-and-jud-proc-sect-3-818.html>)
- Massachusetts (<https://www.mass.gov/doc/110-cmr-2-glossary/download>)\*
- Minnesota (<https://www.revisor.mn.gov/statutes/cite/626.556>)
- Nevada (<https://www.leg.state.nv.us/NRS/NRS-432B.html>: note it says child may be in need of protection)
- North Dakota ([https://www.lawserver.com/law/state/north-dakota/nd-code/north\\_dakota\\_code\\_50\\_25-1\\_02](https://www.lawserver.com/law/state/north-dakota/nd-code/north_dakota_code_50_25-1_02))
- Oklahoma (<https://law.justia.com/codes/oklahoma/2017/title-10a/section-10a-1-1-105/>)
- South Carolina (<https://law.justia.com/codes/south-carolina/2013/title-63/chapter-7/section-63-7-1660/>)
- South Dakota (<https://law.justia.com/codes/south-dakota/2015/title-26/chapter-08a/section-26-8a-2/>)
- Utah (<https://rules.utah.gov/publicat/code/r512/r512-080.htm>)
- Wisconsin (<https://docs.legis.wisconsin.gov/statutes/statutes/48/1/02/1/am>)

\*MA's regulatory not statutory code makes prenatal exposure grounds for a neglect finding, arguably an overreach of the regulatory body as the legislature has made no such finding.

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The following states make evidence of prenatal exposure grounds to terminate parental rights involuntarily when there was a prior child with prenatal exposure or non participation in treatment



Florida ([http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0000-0099/0039/Sections/0039.806.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0000-0099/0039/Sections/0039.806.html))

Illinois (<http://www.ilga.gov/legislation/ilcs/fulltext.asp?DocName=075000500K1>)

Kentucky (<https://casetext.com/statute/kentucky-revised-statutes/title-51-unified-juvenile-code/chapter-625-termination-of-parental-rights/involuntary-termination/section-625090-grounds-for-involuntary-termination-of-parental-rights>)

Maryland (<https://codes.findlaw.com/md/family-law/md-code-fam-law-sect-5-710.html>)

Missouri (<https://revisor.mo.gov/main/OneSection.aspx?section=211.447&bid=35621&hl=>)

North Dakota (Circumstances That Are Grounds for Termination of Parental Rights Citation: Cent. Code §§ 27-20-02; 27-20-44)

Texas (<https://codes.findlaw.com/tx/family-code/fam-sect-161-001.html>)

The remainder of this report takes an in-depth look at how the Administration for Children's Services (ACS), the child protective services agency for New York City, addresses allegations of parental drug use in the Bronx, New York. The information in this section is largely based on three sources of information:

1. Numerous interviews I conducted over the course of three years, 2017-2020, with a variety of people who touch the foster system, including respondent parents, defense attorneys, ACS staff, drug treatment providers, foster care agencies, children who have experienced child removal, and family court judges. All interview notes are on file with the author. At the request of the interviewee or based on my own judgement that this may be the most prudent course of action, I have anonymized many interviews.
2. Reports issued by other organizations and agencies analyzing the NYC foster system.
3. Data I received from the Administration for Children's Services and NYC Department of Health in response to several data requests over the course of multiple years.



# Bronx, New York

## Summary of Findings

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- Despite a steady decrease in the number of drug related arrests and people incarcerated for drug offenses in the Bronx, the number of people involved with the foster system due to allegations of drug use continues to steadily climb.
- New mothers are found to have neglected their children by using drugs during pregnancy at a disproportionately high rate compared to other parents in the foster system.
- The overwhelming majority of parents who are accused of abusing and neglecting their children by using drugs are low-income, Black, Latinx, and disproportionately mothers. White, higher income parents in New York City use drugs at similar rates, but ACS rarely, if ever, questions their ability to parent.
- Courts and ACS are using drug tests as parenting tests. But drug tests do not show how well someone parents their child, and they certainly cannot show whether a parent is exercising the minimum degree of care necessary under the law to maintain care and custody of their child. Parents are asked and/or forced to take numerous drug tests throughout the life of a child maltreatment case. The results compose a large part of the case against them, if not the entire case, and/or the reason that their children will not be returned to them.
- Medical care providers in low-income communities are drug testing pregnant people, new mothers and their newborn children without their informed consent, and turning over the results of these tests and any details from conversations they have with their patients to child protective agents, even without subpoenas.

- Family Courts and ACS lack knowledge and a fundamental understanding of the spectrum of substance use and substance use disorders. There is zero tolerance of all drug use, and sobriety is required of parents regardless of whether they use drugs in a manner that is safe to themselves and their families. In fact, there is rarely any inquiry into how a parent uses drugs to determine whether drugs are used safely—just whether they are used at all.
- Despite the presence of high quality legal defense, social work and parent advocacy that have substantially bolstered the rights of parents in family court proceedings, parents continue to face ACS and family court interventions that are unjustified and not authorized by existing law. Parents must often choose between challenging accusations that they have maltreated their child and risk having their child removed from their care, or submitting to the allegations of child maltreatment, enrolling in supervision, and keeping their children.
- New York City has relatively more access to drug treatment services, including residential treatment services for mothers and their children, when compared with other jurisdictions. Additionally, treatment programs receiving certain governmental funding streams are largely not permitted to reject people who are pregnant or who use medications for opioid use disorder. Nevertheless, parents experience many of these treatment programs as unhelpful, demeaning and punitive. For example, parents and advocates are not provided clear guideposts on how one can graduate through various levels of the programs, and often the programs prohibit parents from graduating for actions completely unrelated to drug use. For instance, one mother was not permitted to graduate because she refused to transition her infant daughter from her breast to the bottle. Many mothers report not being permitted to graduate because they lack access to housing upon graduation.



# Introduction

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I distinctly remember my first research trip to Bronx Family Court<sup>168</sup> child protective division. A young Latinx woman stood outside one of the many courtrooms, slightly hunched over, clutching her midsection. She walked slowly and with purpose. Her face was contorted, it seemed in pain, fear and determination. I heard her explain to a court bailiff that she had a c-section just a few days earlier.

The mother did not have her baby by her side. I looked on, wondering if her baby was with her but just not in court that day. Perhaps her baby was at home. But then it dawned on me. She came to court just a few days after major surgery and childbirth. In all likelihood, her newborn was removed from her care, and she was in court to contest the removal.

I pointed her out to an attorney who was showing me the ropes. It turns out she knew of her case. “Newborn positive tox?” I asked.

“Yes” she responded. “Emergency removal.”

“Do you think it was warranted?” I asked.

She responded firmly, “One hundred percent, absolutely not. We got the baby home. She was lucky.”

I started my research in New York City when child protective activity was on an upswing. NYC is a jurisdiction that has been susceptible to what is known as the “pendulum swing”<sup>169</sup> in foster system activity. After a period of steady decline in system activity, the death of a child known to the system spurs an uptick in reports, investigations, adjudications and removals.<sup>170</sup> Low-income people of color bear the entire brunt of this—as they do of nearly all foster system activity in NYC. Specifically, Black and Latinx parents living in poverty.<sup>171</sup>

ACS case workers, attorneys, and judges are all driven by the strong desire not to be on the front page of the *New York Post* as the party responsible for leaving or returning a child to the care of a parent who later severely harms or kills them. An advocate described to me the whole endeavor of family court practice as “*New York Post*” law or “CYA—cover your ass” law.<sup>172</sup>

Removals of children from their homes by ACS without even appearing before a judge, also known as extrajudicial removals, had spiked by 30% with the upswing in activity.<sup>173</sup> These removals are most harrowing for children and their parents. Parents are notified just moments before they lose their children, and parents are rarely allowed to say goodbye or explain what is happening. Filings of abuse and neglect petitions rose by 54%—some 26,000 children were the subject of an abuse and neglect proceeding.<sup>174</sup> Thousands of parents, mostly Black and Latinx mothers, were filing in and out of court houses to defend themselves against allegations that they were neglectful or abusive towards their children, and to either fight for the return of their children or stave off the removal of their children from their care.

These parents were expected to enroll in services to remedy alleged parental shortcomings and prove to the court that they were willing to do anything to get their kids or keep their kids. But these services were at capacity. Parents were experiencing delays in getting into services—and their children hung in the balance.

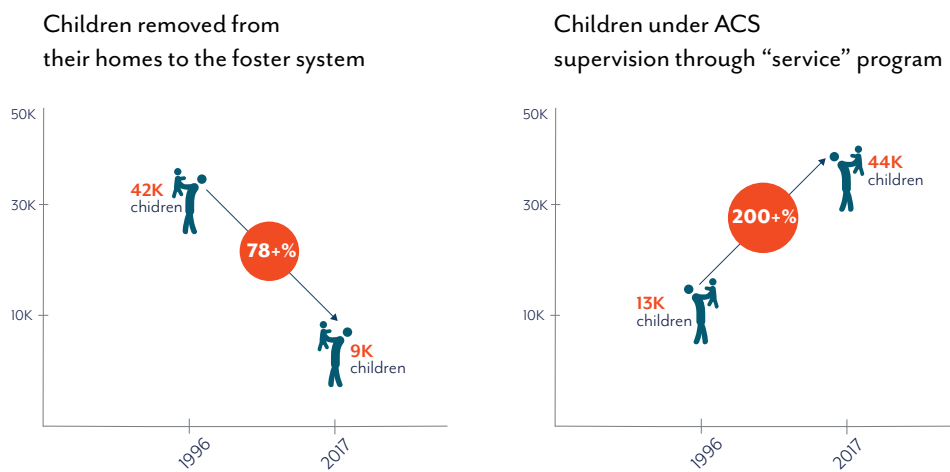
The number of New York City children in foster care is nowhere near the 50,000 high mark of the early 1990s, which took place in the aftermath of the New York foster system’s response to what is often referred to as the so-called crack epidemic.<sup>175</sup> The number of children in foster care has declined dramatically—down to 42,000 in 1996, 17,000 in 2007, 14,000 in 2011 and around 9,000 by the end of 2017.<sup>176</sup>

This drastic reduction in the number of children in foster care is attributed to different causes, all of which undoubtedly played a significant role. In the early 2000s, the state and city of New York made hundreds of millions of dollars of funds available to services for children identified by the state as being at risk of abuse and neglect by their parents.<sup>177</sup> Previously, the vast bulk of foster system dollars were spent on foster care. Though this move may seem an obvious one, New York was one of the first jurisdictions in the nation to make it.<sup>178</sup> Families who before would have faced family separation, now had access to “services” that foster system officials felt would enable them to safely keep their children at home. Child welfare agencies and courts now had the ability to keep families under their jurisdiction, supervision and control without removing their children. They instead demanded compliance with services, and used the reports from the services to monitor the families’ activities.

Despite the drastic reduction in the number of families whose children are removed to foster care, the sheer reach of New York City’s foster system cannot

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With the decrease in the number of children removed from their homes by ACS has been an increase in the number of children permitted to stay in their homes, but under ACS supervision and control.<sup>254</sup>



More than 20% of New York City’s children have had contact with ACS in the past five years alone... this number jumps to one in three Black and/or Latinx children having had contact with ACS in the past five years alone.

be overstated. ACS seeks court permission to supervise families in 5,500 new cases per year.<sup>179</sup> While exact numbers are hard to come by, we know that more than 20% of New York City’s children have had contact with ACS in the past five years alone; either through an investigation, service provision or foster care.<sup>180</sup> We estimate this number jumps to one in three Black and/or Latinx children having had contact with ACS in the past five years, either through an investigation, service provision or foster care.<sup>181</sup>

New York City has also been the site of significant innovation and investment in advocacy and defense for parents accused of child maltreatment. For example, the Child Welfare Organizing Project, an organization composed of parents impacted by the foster system, was founded in 1994. They have played an unprecedented and instrumental role in bringing the voice and expertise of parents and community members impacted by the foster system to policy and practice discussions and decisions.<sup>182</sup> Additionally, the first institutional providers of high quality legal defense to parents accused of abuse and neglect opened in 2007<sup>183</sup> and have grown considerably with each passing year.<sup>184</sup> They have played an instrumental role in restraining the ability of child protective services to intervene in families’ lives,<sup>185</sup> challenging what were formerly seen as unilateral child welfare agency actions rubber-stamped by family courts. Unsurprisingly, the city saw a corresponding decline in the number of children in foster care, number of children removed without court order, number of pleas made, and so on.<sup>186</sup>

While these developments are positive, my interviews and conversations with dozens of stakeholders — including parents who have had ACS involvement, attorneys who practice in family court, Administration for Children Service’s staff, service providers, foster care agencies, medical professionals and others — revealed that the foster system is far from perfect. The overwhelming majority of parents targeted by this system are living in poverty.<sup>187</sup> Black and Latinx families<sup>188</sup> and mothers<sup>189</sup> are also disproportionately targeted. Far too many parents are forcibly separated from their children on flimsy legal grounds. Despite constant scrutiny of this practice going back decades, ACS continues to use extrajudicial removals, or removals of children from their families without even appearing before a judge—what the Administration for Children Services refers to as emergency removals—as a way to skirt court oversight.<sup>190</sup> The specter of family separation looms for families not immediately torn apart, as they are subjected to investigations, court-ordered supervision and demands for demonstrations of deference through compliance with ACS requested and/or court-ordered services; services which parents often experience as stressful and even demeaning, not to mention a significant drain on time and energy. Families who very much want to be together and can arguably be kept together safely, many without any intervention; others with the right supports in place, instead often face permanent family dissolution through the use of termination of parental rights.

Drug use is often a factor in these cases. In all likelihood, the data below are an undercount. They should be understood as minimums.<sup>191</sup>

According to data obtained from ACS, in 2017 at least one in four removals of children from their parents' care through the foster system involved allegations of parental drug use. As compared to the criminal legal system, often the subject of much war on drugs discussion, one in ten people in New York state prisons is incarcerated for a drug offense.<sup>192</sup>

People convicted of drug offenses make up:

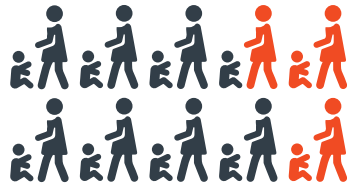
10% of New York's prison population



20% of the national prison population

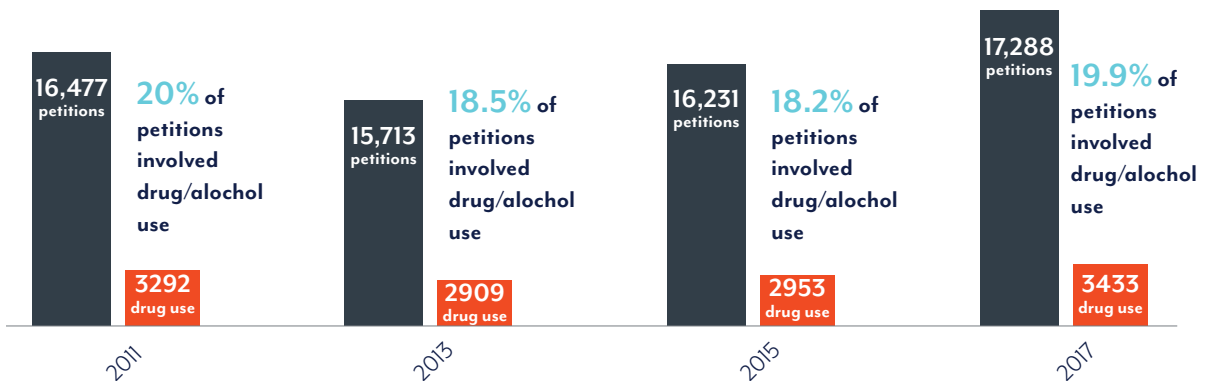


Parents whose child has been removed from their care for reasons of drug use make up at least 25% of all removals



The number of petitions filed against parents that contain allegations of drug use has increased significantly since 2011, though this increase has not kept pace with the increase in the rate of filing of petitions more generally.

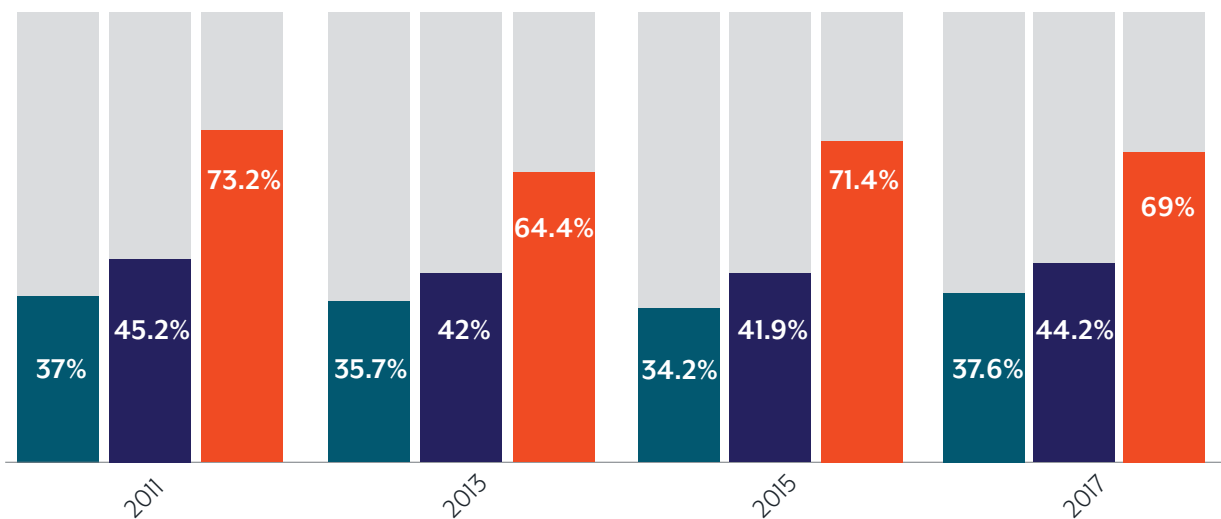
Since 2011 the percent of petitions filed that involved drug or alcohol use hovered between 18-20%



In 2017, 5,916 parents in the Bronx were investigated for allegations of drug use (almost 20% of all investigations), and over 40 % of those parents had a case indicated against them— meaning a caseworker decided there was at least “some credible evidence” of maltreatment, even if there was more evidence of innocence. That finding places the parent on a registry with far-reaching consequences for their employment prospects and ability to obtain custody of family members’ children at risk of removal to foster care.<sup>193</sup> Caseworkers investigating parents for drug use indicated those cases at a higher rate than the general rate of indication for investigations. This was even more true for allegations of drug use while pregnant. In 2017 in the Bronx, 462 mothers were investigated for using drugs while pregnant, and almost 70% of these mothers had investigations indicated against them.

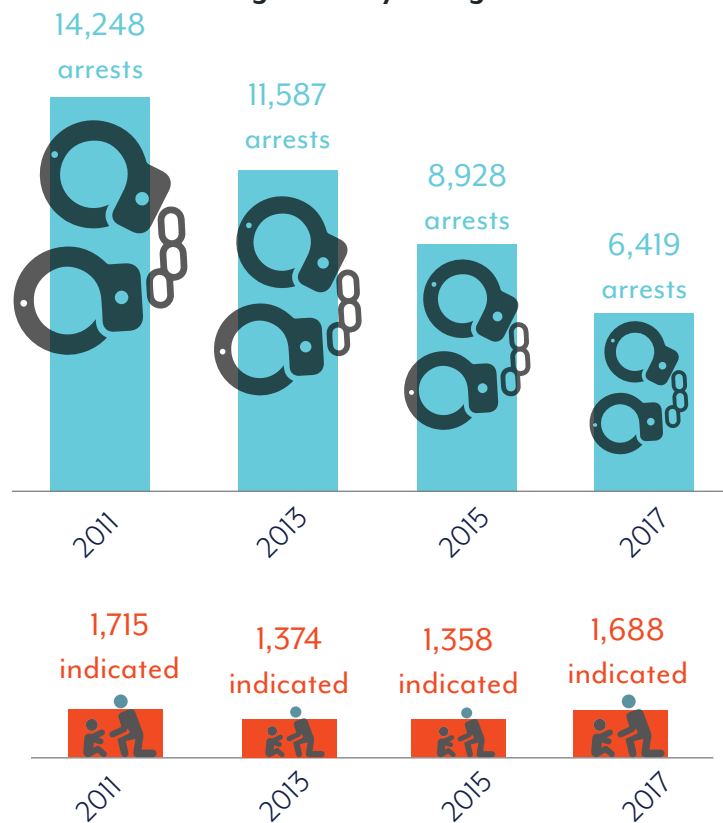
**From 2011 to 2017, investigations that involved drug use were indicated at a higher rate than other investigations. Investigations that involved prenatal drug use were indicated at almost 2x the rate of non-drug use related investigations.**

- % of indicated investigations
- % of indicated drug use investigations
- % of indicated prenatal drug use investigations



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**While drug arrests in the Bronx have decreased over the years, child welfare indications for substance use have not significantly changed.**



Despite the decreasing number of drug related arrests in the Bronx, indicated allegations of drug use in the Bronx remain relatively constant.

While ACS does not track how many petitions or removals it files in family court based on allegations of a mother using drugs while pregnant or her newborn testing positive for drugs, data obtained on drug-related removals and petitions for children under one month of age show that new mothers are substantially more likely to face child abuse/neglect petitions and experience



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One in four removals of children for alleged reason of parental drug use was in fact related to drug use during pregnancy.



Drug use and pregnancy is the reason for almost **half of removals** of children under one month.



removals of their newborns for reason of having used drugs while pregnant. One in four removals of children for alleged parental drug use was related to drug use during pregnancy. We estimate that drug use and pregnancy is the reason for almost half of removals of children who are younger than one month.

With the relentless advocacy of activists, New York City’s public health apparatus embraced several harm reduction responses to drug use, in fits and starts through the 1990s, and then more wholeheartedly through the 2000s.<sup>194</sup> In sharp contrast, New York City’s criminal legal system has persisted in responding to drug use and sales with punitive measures, often opposing harm reduction responses<sup>195</sup> despite the substantial evidence-based research demonstrating their effectiveness.<sup>196</sup> This tension has been the subject of much research, writing, activism and advocacy, especially among advocates within drug policy and harm reduction communities.<sup>197</sup>

Less popularly discussed but equally stunning has been the New York City foster system's punitive response to allegations of drug use.<sup>198</sup> As the numbers above show, allegations of parental drug use are a major feeder of parents into the foster system, and children into foster care.

# Conflating Parental Drug Use for Child Maltreatment

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**N**ew York State law is clear that drug use alone, without any actual impairment to the child or a real and imminent risk of impairment to the child that was caused by the parent's drug misuse, cannot be the basis for an abuse or neglect finding.<sup>199</sup> New York State's highest court has held that a positive toxicology in a parent or newborn without additional evidence that the child was harmed or at real risk of harm once born is insufficient for a finding of neglect.<sup>200</sup> While repeated, severe drug use that causes incapacitation can, in and of itself, be used as evidence of impairment to the child's wellbeing, it is not necessarily sufficient to sustain an allegation.<sup>201</sup>

Nonetheless, I saw abundant evidence that family courts and ACS were using drug tests as parenting tests. While no law in New York requires drug testing of pregnant people or their newborns, low-income mothers of color are routinely drug tested at hospitals. They are drug tested without their informed consent and regularly reported as child abusers to ACS. Their medical care providers routinely turn over private medical information even without court subpoenas or permission from the mother.<sup>202</sup> Even though NY State does not have a law defining a newborn positive toxicology as abuse or neglect, ACS has taken it upon itself to delineate during the investigative phase a newborn positive toxicology as placing a child at a "high risk" of maltreatment, meaning more intensive resources are put into these investigations.<sup>203</sup>

What's more, investigators use drug use and positive tests to buttress their unrelated investigations. Parents under ACS investigation for unrelated allegations, such as a child not attending school or having inadequate childcare,

are routinely asked about their drug use and/or to take drug tests. They are not informed of their right to say no, nor the potential ramifications of their answers to questions about their drug use or positive tests.<sup>204</sup> Parents are being investigated,<sup>205</sup> enrolled in a slew of programs, brought into family court, found guilty of abusing and neglecting their children, having their children removed from their care, facing refusals to return their children to their care, and having their rights terminated based on the results of drug tests alone, with, at best, tenuous claims to the harm or risks of harm to their children emanating from their drug use. Often there is no attempt at making that separate showing of harm.<sup>206</sup> Similar to much of the rest of the country, the incredibly difficult, fact-intensive and nuanced determination as to whether a parent's parenting has fallen, or is at risk of falling, below the minimum degree of care owed to a child has been replaced by the much easier determination of whether a parent is using drugs and whether a parent is maintaining sobriety.

Parents are being investigated, enrolled in a slew of programs, brought into family court, found guilty of abusing and neglecting their children, having their children removed from their care, facing refusals to return their children to their care, and having their rights terminated, based on the results of drug tests alone.

This was true even in cases least likely to raise a safety concern, such as a pregnant mother's occasional cannabis use to help ease her severe nausea. Over the course of my research I was surprised to learn that New York City, a jurisdiction that has decriminalized cannabis possession and may soon have a legal cannabis industry,<sup>207</sup> pursues cases of parental drug use that other jurisdictions no longer pursue,<sup>208</sup> such as allegations of parental cannabis use. Some actors investigating and pursuing these cases seemed to sincerely

believe that the demonstrably safe drug use in fact posed a safety threat to the child—an apparent relic of drug war hysteria.<sup>209</sup> They often concluded the conditions related to the parent’s socio-economic circumstances, such as joblessness, unkempt housing and so forth were due to the drug use.<sup>210</sup> Other system actors capitalized on the general sense amongst many, including family court judges, that under even seemingly non-problematic drug use lurked a safety threat that would reveal itself with time.<sup>211</sup> Thus, drug use was the pretext under which families were unreasonably and traumatically separated, kept under intensive supervision and ordered to comply with burdensome court demands, including leaving one’s home, family and job, and enrolling involuntarily in residential drug treatment.



“Whatever they do, I’m her comfort, I’m her protector.”



## Ms. CS's Story

**M**s. CS, a young Black woman in her mid-twenties, had been in a mother/child residential drug treatment program in the Bronx for a month with her newborn son and two year old daughter.<sup>212</sup> The clinical staff at the residential treatment program acknowledged she had not been evaluated by them for substance use disorder. But they never questioned her admission to the program or her need for residential drug treatment. In fact, CS was an occasional cannabis smoker.

However, Ms. CS was in residential treatment because the Administration for Children's Services gave her an ultimatum: Enroll in the mother/child treatment program and keep both your children, or we remove both your newborn and your toddler from your care.

She could not, "in her heart of hearts" be without her kids.

Neither she nor ACS had been before a family court judge. She had not seen an attorney. But ACS misled her to believe that they could and would forcibly remove her newborn from her care for an indefinite amount of time without needing to appear before a judge. Presented with the ultimatum, she enrolled in the mother/child treatment program.

Ms. CS's encounter with ACS started when she gave birth to her son. While she was pregnant with her son, her husband (the child's father) caught a federal case. She was understandably depressed, not to mention nauseous from pregnancy, which caused her to have a hard time eating. So she smoked cannabis to help herself relax and eat. Her prenatal care providers knew about her cannabis use and did not seem to think it was a problem. However,

when she gave birth, her baby's urine was drug tested without her knowledge, let alone informed consent. When it came back positive for cannabis metabolites, the hospital, Albert Einstein, immediately notified ACS and told Ms. CS she was not permitted to leave the hospital with her son. The hospital placed her son on "social hold," a widespread but illegal practice employed by many medical care providers to detain newborn babies who test positive (or whose mothers test positive) for a controlled substance.

While Ms. CS was in the hospital recovering from childbirth, ACS caseworkers inspected Ms. CS's home and questioned the people who lived there. They ran background checks on everyone who lived there or who had ever lived there, and on all the family members of people who lived there. When they learned that Ms. CS's partner was under a federal indictment, and that a raid had been conducted on the apartment almost a year earlier, they became determined to keep her out of her home and under ACS supervision. Legally speaking, the raid prior to the baby's birth and her partner being jailed were not sufficient legal grounds for family court involvement—so ACS added additional grounds. They claimed that Ms. CS had not "prepared for the baby's arrival" despite the boxes of baby items that were present in her apartment. They claimed that her daughter's bed was not good enough, so Ms. CS's father immediately bought a new bed for his granddaughter. When Ms. CS told them that her husband may be released from prison soon, the ACS caseworker claimed that the only way this was possible was if he was a "snitch," which she claimed made the house even less safe for the children.

Then ACS presented Ms. CS, just three days post-partum, with the ultimatum: Enroll in mother/child residential drug treatment and keep both your kids. Refuse and we will remove the newborn. When Ms. CS enrolled in the mother/child residential treatment program, she was just one semester away from graduating from an associate's degree program.

It was the middle of the holiday season, and she was alone in the treatment program with her children. Her toddler daughter and infant son were becoming sick frequently because the facility's heater was broken. The food tasted rotten, and she and her daughter were losing weight. Though she was recovering from childbirth, the treatment program required her to get on her hands and knees to scrub the floor, claiming that this intensive labor was part of the drug treatment regimen.

Though prohibited, she managed to bring her cell phone into the facility. Over the course of several days, she furtively called a few friends and family—everyone was at a loss for how to help her. Finally, she emailed the local public defender's office and got in touch with a parent advocate and family defense attorney.

She could not believe she had been tricked into enrolling in the residential treatment program, what she described as jail with no handcuffs. It was the worst experience of her life.

What they told her stunned her. They told her that despite what ACS or the residential treatment program may have said, there was no court order requiring her to be there. She was free to leave, and her children could not be removed to foster care without a court order as was threatened.

"Pack up your stuff and walk out of there now if you want," the family defense attorney said to her.

She could not believe she had been tricked into enrolling in the residential treatment program, which she described as jail with no handcuffs. It was the worst experience of her life. She had been forced to sign over her public benefits to them. She had been forced to attend day-long drug treatment coun-



selling, and leave her children in the care of other program patients; people who were complete strangers to her. Her public benefits record would now always reflect that she was in drug treatment. If she chose to leave the program, however, she could not again gain access to her public benefits without a letter from the residential treatment program indicating she had completed treatment and/or was recommended for discharge.

When Ms. CS told ACS and the residential treatment program that she intended to leave, the program claimed that they would not condone her leaving—that she needed to secure stable housing and enroll in outpatient drug treatment before she left. The counselor also recommended a full mental health evaluation because she thought CS seemed depressed. Immediately after making these comments, however, her counselor admitted she had not actually consulted with the clinical team in coming to these conclusions.

Ms. CS consulted with her advocate at the public defense office and sought advice as to how to proceed. She did not require the treatment but she feared losing custody of her children and a case filed in family court against her if she did not comply. Ultimately, Ms. CS and her representative at the public defense office reached a compromise with ACS that would avoid court involvement and family separation.

Ms. CS was permitted to leave residential treatment if she enrolled in intensive outpatient treatment and agreed not to return to her home and instead reside at a residence that was approved by ACS. That Ms. CS did not have a drug problem was irrelevant. That her children had always been fed, clothed, sheltered and otherwise cared for by Ms. CS was also irrelevant. That no one had a single negative thing to say about her parenting and the care she gave her children was irrelevant. Ms. CS smoked cannabis like thousands of other parents of privilege in New York City, but ACS wanted to keep Ms. CS under surveillance. They would find a way to do it.

Between the frequent drug testing, which was located far from her home, and intensive outpatient treatment, Ms. CS didn't have time to hold a job or finish school. She was barely able to find appropriate childcare that made it possible for her to meet the demands of ACS.

MS. CS, however, persevered. After several months of negative drug tests, ACS finally agreed to close her case without further action. After an almost two year hiatus in her career and education due to ACS involvement, Ms. CS finally has time to have a job and attend school. She states of ACS, “[The ACS caseworker] needs to know that she put me in a situation that was way worse than what I was in....she just screwed me up for a while; I had no job, no school, no nothing. They don't ask 'what can I do for you?' Instead, they tell you what you should do. They should stop and ask.”

She states of ACS, “[The ACS caseworker] needs to know that she put me in a situation that was way worse than what I was in....she just screwed me up for a while; I had no job, no school, no nothing. They don't ask 'what can I do for you?' Instead they tell you what you should do. They should stop and ask.”

# The Myth of Abstinence

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Less surprising but nonetheless troubling was the reticence and frequent refusal by the foster system to permit parents living in poverty with substance use disorders from retaining custody of their children unless they achieved total abstinence within rigid timeframes and under incredibly stressful circumstances. While parents from higher income communities undoubtedly also engage in drug use, from casual to chaotic use, those parents were wholly absent from family court and the foster system. This fact did not seem to be lost upon various system actors.<sup>213</sup> Yet parents living in poverty who use substances and who have a substance use disorder routinely lost custody of their children and were expected to achieve what the court and system viewed as the only way to ensure child safety — total sobriety — in order to regain custody of their children.<sup>214</sup>

A single positive drug test after a period of abstinence could topple the progress of a case, resulting in the removal of a child from a home, sharply decreasing the already infrequent visits between a parent and his or her child, or setting a case on the course of termination of parental rights.<sup>215</sup> In contemplating the recurrence of drug use, the family court, ACS and the foster care agency in charge were usually not concerned with making a separate determination of whether the recurrence presented a risk to the child's well-being.<sup>216</sup> Recurrences were perceived as inherently dangerous, and this was especially true for certain substances that were believed (without any scientific or medical evidence) to be more inherently dangerous than others. There often seemed to be no acknowledgement that parents who use drugs or have substance use disorders, and their children, are often themselves able to manage the risk of harm their substance use may pose.<sup>217</sup> Parents were not asked

what their strategies were for reducing the risk of harm that could emanate from their drug use—such as utilizing childcare when using drugs and not using around their children, or using a lockbox to store drugs so that children did not have access to drugs.<sup>218</sup> And there was almost no consideration of the incredible harm inflicted on children by family separation; a harm that, unlike the speculative harms emanating from drug use, was real and visible.<sup>219</sup> As a prominent advocate for families in the foster system has commented, denying children contact with their parent based on a parent's reuse and recurrence does not just punish the parent but punishes the child for the parent's drug use.<sup>220</sup>

Extraordinary demonstrations of deference and compliance were demanded of parents. These included strict adherence to an intensive schedule of drug treatment, drug testing, parenting skills and other classes, inspections of their homes and lives by ACS and foster care case workers, attending visits with their children that were often supervised by a caseworker, obtaining and maintaining housing and employment, not to mention making court dates and more.<sup>221</sup> Despite the odds, parents arrived at their court dates, hopeful that after a long period of abstinence and compliance with their service plan, ACS would finally return their children or expand visitation, only to learn that the judge or the attorney for the child or ACS wanted them to provide negative drug screens for some longer, unspecified amount of time.<sup>222</sup> That parents did not reuse or experience recurrence given the incredible stresses placed on them was remarkable.<sup>223</sup>

## *Ms. EO's story*

**M**s. EO, a middle aged Black woman who, in her own words, has a substance use disorder, is facing termination of her parental rights despite both her and her daughter's deep desire to be together.

EO has been drinking heavily since she was a young woman. "Let's just say I've had stuff happen to me in my life that everyone would find very difficult to live with day to day," she says to me. "But addiction has nothing to do with how you parent your children. Just because you have an addiction doesn't mean you can't be a good parent."

"But addiction has nothing to do with how you parent your children. Just because you have an addiction doesn't mean you can't be a good parent."

In 2012, ACS removed EO's daughters from her care. She had struck her older daughter's hand, which required minor medical attention as a result. EO had been struggling with drinking when the incident occurred.

EO doesn't shy away from the facts that spurred her involvement with ACS. She knows she harmed her daughter. She knows her family was in a tough place and needed help.

With both her daughters removed, EO's drinking spiraled. "I spun out of control with drinking. I would drink all day, all night, pass out and wake up, and drink again just to cope with my children being taken."

"Whatever they do, I'm her comfort, I'm her protector."

Nevertheless, EO fought hard to get her kids back. She enrolled in a treatment program and completed it successfully. That was not enough. She completed the additional parenting classes and all of the requirements placed between her and her daughters. Still, it was not enough. When EO got close to getting her daughter back, her major barrier was housing. She found a job but could not get enough money for housing. The agency acknowledged this barrier, but had no ability to actually provide one of the most critical supports for EO.

Her daughter very much loves her and wants to be reunited with her. Her daughter has reacted violently to the agency's refusal to return her to her mother's care, harming herself and being psychiatrically hospitalized in response. The stress of it has been almost unbearable for both mother and daughter. EO's daughter continues to harm herself, and EO explains this makes it even more difficult for her to not experience recurrence.

Eventually, EO learned that her daughter had been molested for over a year in the foster system, a fact that the agency went to great lengths to hide from the judge, its records and even EO. EO pleaded for help, proposing various family members as potential caretakers for her daughter. Unfortunately, the agency rejected the family members because they had criminal convictions that were over ten years old. Homeless and without her daughter, she turned back to drinking again.

Complete abstinence is difficult for many people with a substance use disorder. Many parents involved with the foster system observe that abstinence is made that much more difficult by the trauma of being apart from their children, loss of their income and home that often results from contact with the system, and the constant stress of being involved with a system that they feel magnifies their faults and minimizes their strengths.<sup>224</sup>

In EO's words:

“Almost everything they tell me to do, I do it, and they still don’t return my child. It is really difficult for me to stay clean under the stress of this. It has been really rough for me. I have been in and out of programs, I have done everything they have asked me to do. And they always want me to do something new. Now I’m in another parenting class. It’s the third one I have been to. It’s just excuse after excuse of why they do not return my child.

“There have been times when I have missed visits because I knew when I got there I’d be emotional and I was so depressed. But I noticed the more I didn’t go, the more they felt like I didn’t care, so I had to push myself to go even if I didn’t want to. It’s not that I didn’t want to see her, I just didn’t want to feel that pain...I have spent the whole six years trying to get the kids back. And I’d then see my kids so hurt. And I would relapse, and every time I would relapse they would set back the situation.”

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The foster care agency is fighting to permanently and irreversibly sever her relationship with her youngest daughter. They have changed the goal of her case from reunification to adoption. Ms. EO isn’t just fighting to have her

daughter home; she is now fighting to maintain any relationship with her daughter at all—a daughter who very much wants to have a relationship with her mother. EO muses on how the harm the system has done to her family has far exceeded the harm she may have caused them over the years. The system has refused to consider any of her family as a placement option for the children as they either have prior involvement with the foster system or drug convictions. They even refused to return the child to her father, who has no child maltreatment case against him. If successful, the agency will make strangers of her daughters and their family—they will not be permitted to visit, speak, or even correspond by letter or online.

Termination of parental rights is one of the most violent acts that a government can take against its people. It permanently and irreversibly removes a child from their parents' care, their family and their community. It diminishes the part of a person that many hold most dear about themselves—their identity as a member of a specific family, whether as parent or child. Parents with substance use disorders who do not achieve a prolonged stretch of abstinence are often subject to this measure, regardless of whether they are actually able to parent their children.<sup>225</sup>

Termination of parental rights is one of the most violent acts that a government can take against its people.

EO's use of controlled substances could, at times, prevent her from safely parenting her children alone. The assessment that her children are at risk of harm is not without basis. However, it's a risk that can be mitigated with measures far less extreme than foster care and termination of parental rights. For instance, childcare for times when EO uses a controlled substance is a support wealthier parents regularly and liberally rely on to manage any risk of harm their substance use poses to their families.



EO states “I pray about it every day and I hope I do get my daughter back because it would completely devastate me. It’s the worst thing on earth. I don’t wish that on my worst enemy. To go see my kids at the agency and have to leave without them, it’s the worst feeling.”

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When I ask her what she would say to ACS if given the chance, she says “Give me another chance, let me be a mother to my daughter, because if she is taken from me, she is going to grow up different, she is always going to have that on her shoulders, and I don’t know what’s going to happen to me and they are tearing a family apart that wants to be together.”

“Give me another chance, let me be a mother to my daughter, because if she is taken from me, she is going to grow up different, she is always going to have that on her shoulders and I don’t know what’s going to happen to me and they are tearing a family apart that wants to be together.”

## *Ms. RE's story*

**M**s. RE, a young Latina woman who was in recovery from a substance use disorder, similarly faced punitive ACS action against her family due to evidence of reuse, though there was no separate showing of her inability to care for her children.

By all accounts Ms. RE was a good mother. Her kids had no idea she used drugs. She had undeniably used illicit drugs for much her life, but she described her drug use as “necessary for her to function.” Ms. RE had been kidnapped and brutally raped as a young girl, and the trauma from that incident follows her to the present day. Until she discontinued drug use, Ms. RE was a functional drug-using parent—someone who uses drugs with regularity but whose drug use does not pose a risk of harm to them or their children.

Ms. RE tells me she was at a point in her life where she was feeling good about things and making changes she was proud of. She was pregnant with her third son. She had been receiving methadone maintenance treatment for a longstanding opioid use disorder and was successfully engaging with treatment. Methadone is a gold standard of care for pregnant people with opioid addictions, and while it is usually not recommended to taper methadone use during pregnancy, Ms. RE made the personal decision to do so

Until she discontinued drug use, Ms. RE was a functional drug-using parent—someone who uses drugs with regularity but whose drug use does not pose a risk of harm to them or their children.

because she felt it would decrease the duration of her newborn's withdrawal symptoms. Unfortunately, the tapering off methadone caused Ms. RE to experience painful withdrawal symptoms—symptoms, that when untreated, have been described by leading medical experts as torture.<sup>226</sup> In a moment of incredible pain, and with no other means of immediately addressing her pain, she decided to use heroin in order to gain some relief. Ms. RE remarked that, though her acute physical pain was relieved by the heroin use, she was overwhelmed with fear and dread because she knew she and her baby would test positive for opiates, and that she faced the real danger of ACS taking her newborn son from her.

When she went into labor, her OB/GYN provider drug tested her without her knowledge, let alone informed consent. Because she and her baby tested positive for opiates and methadone, they called ACS. Ms. RE had been under ACS surveillance for a few years due to a previous positive toxicology at birth. While it never resulted in a court filing, ACS assigned a caseworker to surveil Ms. RE. Though she was enrolled in drug treatment and by all accounts taking good care of her children, the ACS caseworker overseeing supervision of her preventive services was not convinced of her commitment to sobriety—a judgment Ms. RE found deeply disheartening in light of her demonstrated effort to stop using. Armed with the single positive opiate test and the opinion of the ACS preventive caseworker, ACS brought Ms. RE and her family under court supervision. ACS permitted her to remain with her three children so long as she tested negative for illicit controlled substances, engaged in drug treatment and fully complied with ACS demands.

Her OB/GYN provider drug tested her without her knowledge let alone informed consent, and because she and her baby tested positive for opiates and methadone, they called ACS.

Ms. RE did her best to comply with the order while recovering from delivery and caring for her two other children. She regularly attended drug treatment and took multiple drug tests every week. After three weeks, Ms. RE used again. When ACS saw the results of a single positive drug screen, they immediately took custody of all three children from her and placed them in her mother's care. Though Ms. RE was living with her mother, she was not allowed to be alone with her children.

Ms. RE has a great relationship with her children—at a hearing contesting the emergency removal of her children, a witness testified about how Ms. RE regularly helped her daughter with her homework; she had a deep understanding of her daughter's particular mental health needs, and ensured she received responsive mental health treatment; when her son was born, she sang to him so long and so often that she was certain he recognized her voice.

In fact, ACS's own filing in family court does not even contradict this—it does not allege one deficit in parenting. It alleges only drug use.

But ACS's demands had increased the stress on the family. One evening, Ms. RE and her mother got into an argument over the light bill. Families report that the stresses of living in poverty are only exacerbated by the stress of living under ACS supervision and control. In a heated moment, Ms. RE's mother reported this argument to the police, and ACS came to their house in the middle of the night to force Ms. RE from her home. Without even attempting to understand or mediate the situation, without even listening to Ms. RE's mother, who was protesting the middle-of-the-night eviction of her daughter, ACS demanded that Ms. RE leave her home and find shelter in NYC at 2AM.

Because it was the weekend and courts were closed, days went by as Ms. RE wandered the streets, without a home and missing her children, before

she could get in front of a judge and make a case for custody. When Ms. RE finally got in front of a judge, the judge ordered her to remain out of the family home. She moved into a shelter. Ms. RE fastidiously complied with all the demands of her made by ACS. She traveled from her shelter in Brooklyn all over the city by subway and bus to engage in drug treatment, mental health counseling, parenting classes, visits with her children, and near-daily drug tests. She balanced this with the demands of getting her daughter to and from school, and to and from her extracurricular activities.

After extensive effort by Ms. RE and her legal and social work team, she now has custody of her children. However, she remains under ACS supervision, an environment that feels akin to parole. She continues to be drug tested regularly and monitored for her compliance with treatment. Any drug reuse will, in all likelihood, result in the immediate loss of custody of her children. In fact, she faced the threat of custody loss just a few months after regaining custody. Ms. RE's attendance at her drug treatment program was less regular due to the challenges posed by being transferred throughout the city shelter system and transiting to the Bronx in the winter. Her legal and social work team were able to effectively advocate for her, and she was permitted to keep her kids.

Ms. RE fastidiously complied with all the demands of her made by ACS. She traveled from her shelter in Brooklyn all over the city by subway and bus to engage in drug treatment, mental health counseling, parenting classes, visits with her children, and almost daily drug tests. She balanced this with the demands of getting her daughter to and from school and to and from her extracurricular activities.

When asked if she felt anything she experienced was helpful, she says she wished ACS had just believed in her ability to change, and helped her move forward. She needed help with things like getting diapers—which her caseworker refused to help her with. Instead, ACS required her to do things like complete mental health evaluations, where she felt forced to retell her history of trauma in settings that she did not find supportive or beneficial.

Without a doubt, Ms. RE had a substance use disorder. But the foster system was not able to distinguish her substance use disorder, and instances of reuse and perhaps recurrence, from whether she posed a risk to her children such that warranted the incredible harm of separating a child from their parents. And in their quest to “help” her, they inflicted incredible stress and harm to her.

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# Railroading Families

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**A**s mentioned earlier, drug use is often the impetus for bringing families under family court supervision and control, though one cannot find in New York law, regulations, or policy any determination that drug use alone is sufficient for a finding that a child is at risk of harm such that warrants this supervision. Additionally, parents are discouraged from challenging what are otherwise unlawful actions against them because they face the threat that their children will be taken away and placed in foster care for as long as they fight back.<sup>227</sup> Similar to the criminal legal system's well documented<sup>228</sup> incentives to plead guilty to a crime or face a harsher criminal penalty, parents often submit to maltreatment findings and/or "voluntary" case plans and services, lest they face the harsher punishment of child removal. Parents who dare object to this interference in their family life are viewed as being in denial about their "problems," and of posing that much more a risk to their children.

ACS has wide latitude to "indicate" a case, meaning that the ACS staff unilaterally make their own subjective determinations that there was at least "some credible evidence" of neglect.<sup>229</sup> The parent is placed on a statewide child maltreatment registry, which has far-reaching consequences for their ability to find employment or serve as a caretaker for other family members'

Similar to the criminal legal system's well documented incentives to plead guilty to a crime or face a harsher criminal penalty, parents often submit to abuse and neglect findings and/or "voluntary" case plans and services lest they face the harsher punishment of child removal.

children. The parent remains on this registry for up to 28 years. All this can be done to a parent before that parent has even appeared in court. Often, ACS never even takes the case to court.<sup>230</sup> Drug use alone often is viewed by caseworkers as meeting the “some credible evidence” standard.<sup>231</sup> ACS was not able to provide a number, but based on the data obtained so far, it is likely that tens of thousands of parents in the Bronx are on the child maltreatment registry for drug use, though no case was ever filed against them in court.<sup>232</sup>

As noted earlier, when ACS does file cases, judges often show extreme deference to the agency, even when ACS alleges harms that are speculative and based on a drug test alone. Judges are reluctant to challenge or entertain challenges to ACS requests because they do not want to be held responsible in the media if they leave a child home and a tragedy follows.<sup>233</sup> They face virtually no media backlash or other penalty for harming countless children by rubber-stamping needless removals or supervision. Attorneys for the parents who challenge ACS are asked “so do you want to wait until the child is harmed or dies?”<sup>234</sup>

Judges are also prone to finding facts, drawing inferences, and making legal findings based on what they believe or think they know about drug use and its effects that would have to be established by extensive expert testimony in other courts or proceedings; for example, what the effects of certain substances are on a developing fetus.

Judges are also prone to finding facts, drawing inferences and making legal findings based on what they believe or think they know about drug use and its effects. These types of findings would have to be established by extensive expert testimony in other courts or proceedings; for example, the effects of certain substances on a developing fetus.<sup>235</sup> ACS workers are permitted to



make conclusive statements when they testify about the effects of drug use on parenting; claiming, for example, that a parent without a job does not have a job because they smoke cannabis in the evenings. These are then entered into evidence against the parent with no empirical basis.<sup>236</sup> Attorneys who try to refute ACS's allegations or introduce expert testimony are discouraged from doing so.<sup>237</sup>

Mandated reporters, such as medical care providers, drug test pregnant people, new mothers and their newborns without their informed consent and routinely turn over these results, and other confidential medical information, to ACS without so much as a court subpoena.<sup>238</sup> It is widely acknowledged by all system actors, including ACS employees, family court judges, attorneys and, of course, impacted parents that people utilizing private insurance are not being drug tested in the same way. And it seems that drug use during pregnancy is more likely to land a parent with an indicated case, filing or child removal than any other drug use.<sup>239</sup>

Mandated reporters such as medical care providers drug test pregnant people, new mothers and their newborns without their informed consent and routinely turn over this and other confidential medical information to ACS without so much as a court subpoena. It is widely acknowledged by all system actors, including ACS employees, family court judges, attorneys, and of course parents impacted, that people utilizing private insurance are not being drug tested in the same way. And it seems that drug use during pregnancy was more likely to land a parent with an indicated case, filing or child removal than any other drug use.

## *Ms. BB's Story*

**M**s. BB and her wife moved to NYC when Ms. BB was about six months pregnant and taking methadone due to opioid use disorder. Years before, she'd been a victim of domestic violence, and was investigated by child protective services as a result. She wanted to discontinue using drugs, and she was worried that staying in her hometown in New Jersey would make that difficult. It wasn't easy to leave. She spent most of her married life in NJ. She had children who lived there, and a grown daughter with whom she was in contact on an almost daily basis.

But she was determined to start parts of her life anew, so she left. Ms. BB and her wife moved to a family shelter in the Bronx. Once in New York, BB applied for public benefits. As soon as she was eligible for Medicaid, BB sought out prenatal care from a New York City hospital and enrolled in substance use treatment. Her treatment included a methadone maintenance program and individual and group counseling. Despite being in her third trimester of pregnancy in the midst of a hot New York City summer, she made it to every appointment with her drug treatment and prenatal care providers.

Ms. BB was thrilled to give birth to a healthy, thriving baby girl. As was expected when a pregnant person is receiving therapeutic methadone, her daughter experienced symptoms of neonatal abstinence syndrome that were successfully treated over the course of a few weeks without incident. Ms. BB visited her daughter in the hospital daily, held her, fed her, spoke to the doctors about her, and generally doted on her new baby as new parents do.

Nonetheless, Ms. BB's medical provider, St. Barnabas, called ACS and told ACS everything Ms. BB had told them in confidence during her prenatal care

**"Whatever they do, I'm her comfort, I'm her protector."**

appointments. They told ACS about her history of drug use, about CPS's involvement with her in New Jersey many years ago and about her personal history as a survivor of domestic violence. They told ACS that she was enrolled in a methadone maintenance program. The hospital even advised Ms. BB against breastfeeding her newborn daughter due to her methadone use. This is despite the recommendation of leading medical organizations about the safety of breastfeeding while using prescribed methadone, and despite the well established research showing decreased duration of NAS when the mother breastfeeds.<sup>240</sup>

Ms. BB's medical provider, St. Barnabas, called ACS and told ACS everything Ms. BB had told them in confidence during her prenatal care appointments.

Within days of her daughter's birth, ACS filed a petition against Ms. BB in family court, claiming that she had neglected her five-day-old daughter by allegedly using drugs while pregnant. Ms. BB's prenatal care provider gave ACS the results of drug tests they had performed on her during pregnancy and on her baby without her informed consent. The drug tests showed nothing remarkable—that she was positive for methadone as would be expected for someone enrolled in methadone maintenance therapy. And equally expected, that her baby had methadone in her system. Nonetheless ACS cited these drug test results as reasons to allege maltreatment.

Perhaps knowing their petition was weak, ACS also claimed that one day in September 2017, while she was pregnant, Ms. BB tested positive for cocaine. ACS also asserted that she was unable to care for her newborn daughter due to involvement with New Jersey CPS several years back—despite the time

that had passed since that case, and ACS's lack of information on that case. Notably, nowhere in the petition did ACS indicate the actual risk of harm that Ms. BB posed to her daughter.

Though common in other parts of the country, it had been some time since Ms. BB's legal team had seen a neglect filing in Bronx family court based on the receipt of prescribed methadone during pregnancy. Ms. BB's attorney confronted the ACS attorney to get some clarity—something felt very off. The ACS attorneys were honest. They wanted to create a file on Ms. BB so that they could monitor her. Even if the case was dismissed, she'd remain in their system and on their radar.

The judge overseeing the case was hesitant to dismiss the filing. He wanted ACS to continue to monitor Ms. BB. He removed Ms. BB's newborn daughter from her custody and released her to Ms. BB's wife's custody. So while Ms. BB continued to live with her wife and daughter, she was not legally permitted to be alone with her baby girl. Per ACS's request, he also ordered recently post-partum Ms. BB to attend drug treatment, parenting classes, and comply with all ACS supervision including announced inspections of her residence.

Ms. BB's attorney was eager to go to trial. On the law, this case was clear—ACS had a weak legal basis for pursuing Ms. BB and her family. Regardless, any prenatal drug use should not be probative as evidence against Ms. BB because New York State child maltreatment law applies to children after they are born, not fetuses. Medically prescribed methadone use and the NAS that results has not, in many years, been considered grounds for an abuse or neglect petition. Ms. BB's prior contact with CPS occurred several years ago in another state and also could not be grounds for ACS supervision without much more evidence about those cases—evidence ACS had not yet obtained.

But ACS and the court kept moving the trial date back, and Ms. BB remained

under ACS supervision. Her lawyers explained that there is little motivation for other parties to get to trial if they do not have a strong case and that, in fact, delay of the trial is sometimes a tactic to maintain supervision of a family as long as possible in cases in which continued supervision won't be justified by the evidence once the trial is held. In an effort to prove to ACS her love for her daughter, Ms. BB far exceeded the demands of the court order. Ms. BB, still recovering from childbirth, would say goodbye to her infant daughter and wife most mornings of the week, and set out for a long day of traveling from borough to borough on the NYC subway to attend various services and classes to prove to ACS how much she cared for her daughter. ACS, despite stating that Ms. BB was neglecting her daughter, did nothing to help her enroll in any of these services, nor to mitigate the alleged risk of neglect. In fact, an ACS caseworker, when visiting her at her shelter, admonished her for harming her child and "giving her NAS". This case worker, who has a hand in determining the fate of hundreds of New York City parents, many of whom are accused of using drugs, seemed to be unaware of basic facts about drug use and drug treatment, such as methadone being the gold standard of care for pregnant people with opioid use disorder.

Despite the significant logistical difficulty it presented, Ms. BB and her partner steadfastly abided by the court order, meaning Ms. BB was never alone with her daughter. Court date after court date, Ms. BB hoped to hear something positive or encouraging about her parenting. Or she hoped the case would at least move to trial. Every hour the case was open was an hour she was terrified that ACS would remove her baby girl from her wife's care as well. She said the stress was indescribable, and that only her love for her daughter could give her the strength to withstand it.

Six months passed and nothing moved forward in any direction. ACS did not withdraw the petition, despite the weak basis for filing that petition in the first place. At some point, the judge said to Ms. BB's attorney that he did not want

the case to go to trial and that the parties needed to settle. Ms. BB's attorney, undeterred, relayed her intention to follow through on her client's wishes, regardless of what the judge tried to do. Finally, after bringing this case to a senior attorney within ACS, the agency agreed to withdraw the petition and the judge dismissed the case as a result.

Ms. BB and her family have been traumatized by what happened to her. She thought she was doing everything right: discontinuing drug use, enrolling in drug treatment, seeking out medical care and being honest with her medical provider. That she made such great efforts to go a different direction in her life and was nonetheless met with policing and punishment has been discouraging for her. The first day Ms. BB took her daughter to daycare, she came home in tears—fearful that her daughter would be gone when she went to pick her up later in the day. While time may mitigate the trauma she has experienced, it will be with her for the rest of her life.

## Services as Surveillance and Control: “Surveillance is not Support”<sup>241</sup>

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Since New York City’s foster system is celebrated as a national leader in provision of services to foster system involved parents, some discussion of these services, especially in the context of drug treatment, is warranted.

New York City is unique in that it has greater and higher quality access to drug treatment than many other jurisdictions. New York City has numerous inpatient and outpatient programs, mother/child residential treatment programs, drug treatment programs that accept patients who use medication for opioid use disorder or prescribe these medications themselves, drug treatment programs with childcare and other wrap around services, etc. In fact, as referenced above, NYC has exceeded most jurisdictions in the sheer volume of services (of any kind) offered to parents accused of child maltreatment.<sup>242</sup> Currently, ACS claims up to 25% of its services are evidence-informed or evidence-based models.<sup>243</sup> This is not to say that New York City could not benefit from increased and higher quality drug treatment programs; for example, father/child residential treatment programs. But it is to say that, unlike many jurisdictions, parents do not wait for entry nearly as long (even in the midst of a foster care panic), and they sometimes have the option of bringing their children to residential drug treatment; a service that is especially relevant to parents in the foster system. Unlike other jurisdictions,<sup>244</sup> parents do not pay for these services out of pocket.

Without a doubt, the presence of these programs can enable a mother and child whom ACS would otherwise separate to stay together. Because ACS of-

ten seeks family separation in the case of a newborn with a positive toxicology for an illicit substance, or even in cases of parents who test positive for cannabis, regardless of whether a proven safety threat to the child actually exists, these programs play a critical role in keeping families together. Staff at a mother/child residential treatment program recounted to me a story about a mother who was alleged to have neglected her child through in utero cocaine exposure. She was court-ordered to enroll with her newborn in mother/child treatment or face removal of her newborn to a stranger's family—non-kinship foster care. The mother showed up to her first day in residential treatment wearing a business suit, and repeatedly thanked the residential treatment program for accepting her, saying "I will do anything you want me to do, I just cannot lose my son."

However, I found that these treatment programs are sometimes experienced by the parents who are forced to enroll as unhelpful, demeaning and infantilizing. While some attorneys, social workers and parents report that treatment programs often do advocate for impacted parents and their families, others report negative experiences with treatment programs.

Participation in such programs often accompanies the surrendering of one's personal information so that ACS may continue to monitor the parent. Judges often require parents to sign releases relinquishing their rights to confidentiality as a condition of keeping their children with them. Thus, ACS can typically access records of a parent's interaction with a drug treatment program, which often also serves as a site for mental health services, so that they can surveil the parent's progress.<sup>245</sup>

The programs have vague requirements in order for one to graduate, yet require wholesale commitment from its participants. Often, the programs do not indicate how long a patient must remain before graduating. Parents enroll in treatment, leaving behind their life, job, education and family, with



no clear sense of what they must do to graduate through the various levels of treatment and then out of the program.<sup>246</sup> Many parents are at risk of losing their housing if it is subsidized because the city won't pay their rent and the cost of residence in a program at the same time. In the meantime, parents are forced to sign over some public benefits to the program, such as nutritional assistance.<sup>247</sup> Parents felt like there were perverse financial incentives to keep them in the program. Parents were withheld from graduating through the various levels in the program for non-drug-related infractions, such as having a cell phone, or talking back to a staff member at the program.<sup>248</sup>

Though these programs have expertise in drug use, addiction and treatment, they often do not challenge ACS or foster agency determinations about what a parent's reuse or recurrence means about their ability to care for their children.<sup>249</sup> Program staff pathologize mothers, judging them by white, middle class standards and not appreciating the intergenerational policing and punishment of communities.<sup>250</sup> Until the New York State Office of Alcoholism and Substance Abuse Services issued guidelines in 2013 that forbid certain residential treatment programs from rejecting clients using medication for opioid use disorder, these programs rejected clients receiving medically approved and supervised methadone treatment . Even now, they do not permit mothers with methadone dosages of over 90 from participating,<sup>251</sup> claiming the patient will be "too sleepy," a claim that has no scientific basis.<sup>252</sup>

What's more, treatment programs are sometimes utilized even though all parties, including ACS and the family court judge, know there is no need for drug treatment; simply because the programs can closely surveil the parent for an indefinite amount of time until ACS and the court are convinced that the parent poses no safety threat to the child.<sup>253</sup>



## *Ms. KE's Story*

The cops were knocking on Ms. KE's door. They were there to take her infant daughter into foster care. Her daughter started wailing the moment she heard the knock. Distraught, Ms. KE called her attorney, who tried to comfort her. He told her they would attempt to get everything straightened out in court the next day. But she was filled with anguish. She cried all night for her daughter. Her breasts were engorged from unexpressed milk. Her partner, the baby's father, was vomiting blood from the stress.

Ms. KE herself had spent much of her childhood in foster care. As a young child, she was angry and unruly. Her mother worked days and nights, and she was frustrated by the persistent stress and poverty her family struggled under. ACS's answer was not to assist her family, but rather to put a young Ms. KE in group homes (also referred to as congregate care), and prescribe her a host of psychotropic medications. She hated foster care and hated the way the medications made her feel. She often ran away from foster care, only to be tracked down, admitted to a psychiatric ward and even more heavily medicated.

She was finally discharged from foster care when she became a young adult. She met a man, fell in love, moved to the Bronx, and was thrilled to find out she was pregnant with her daughter. When she gave birth, New York Presbyterian hospital in Manhattan drug tested her and her baby without her informed consent. Both tested positive for cannabis, so the hospital immediately notified ACS.

ACS filed a petition in family court claiming that Ms. KE's baby girl was at risk of neglect by her mother. First, they claimed that based on the single positive

toxicology for cannabis, she should be in drug treatment but was not. And then, they punished KE for what the foster system itself had done to her when she was a child. They held KE's history of being in foster care against her, and also the fact that she was not on the psychotropic medications that were prescribed to her during her time in foster care.

Initially, ACS agreed to permit Ms. KE to keep the baby if she enrolled in drug treatment and mental health counseling, and submitted to constant surveillance by ACS. In the months that followed, Ms. KE complied with all of ACS's demands.

At a follow-up court date, a caseworker who had supervised Ms. KE when she was in foster care showed up and testified that she felt Ms. KE was at risk of domestic violence by her partner based on an incident that occurred several years earlier. The court immediately asked Ms. KE and her partner to submit to drug tests right there in court. They used urine drug tests that state on the box that they are "not to be used for forensic purposes." They came back positive for cocaine. Ms. KE swore that it had to be a false positive. She said she's never used cocaine in her life.

But ACS took the test that is "not to be used for forensic purposes," and used it for forensic purposes and as justification to remove her daughter. Within hours of the drug test results coming in, ACS placed her daughter in a Children's Center, a facility where removed children stay until placed with a foster family.

Over the next few days, Ms. KE went to court in an attempt to be reunited with her daughter. She stood before the family court judge and ACS, explaining that she loved her daughter and would never harm her. She wondered what risk of harm they had even identified that warranted such drastic action. She wondered how the test had come back positive for cocaine, and if there

was any way to challenge it, given how notoriously inaccurate urine screens for cocaine can be. Though she thought she was there about her alleged drug use, the family court judge, ACS and child's attorney seemed focused on her partner and the alleged domestic violence. Finally, all parties came to an agreement. The case would remain open but if Ms. KE enrolled in a mother/child residential drug treatment program, they would return her daughter to her. They didn't want Ms. KE living with her partner. They told her to "pick your baby's father or your daughter." She chose her daughter.

She went home and spent one last weekend with her partner. Ironically, ACS returned her daughter to her home so she too could spend the weekend with her father, though they had just, a few days prior, insisted that the daughter was at such great risk of harm that they needed to seize her without a court order.

After the weekend, Ms. KE enrolled in a mother/child residential drug treatment program. The only evidence of drug use against her were two unconfirmed urine screens, one for cannabis and one for cocaine. Ms. KE believes, as does her legal team, that the court, ACS and the child's attorney viewed her partner as a risk to their daughter. They wanted to keep Ms. KE and her partner apart while simultaneously monitoring Ms. KE. That she was formerly in foster care, and heavily medicated while in care, undoubtedly fed into their concerns.

What they did not see in this young mother was the love she had for her daughter, something that was apparent to anyone who knew her. She took great joy and pride in breastfeeding her daughter, in having spent the first several months of her daughter's life constantly in each other's presence, usually just a few feet apart (with the exception of those two days her daughter spent removed from her care). A social worker on KE's legal team states that KE's interaction with her daughter is the purest and clearest example of

healthy attachment.

While in residential drug treatment, Ms. KE completed every course available: parenting, domestic violence, understanding relationships, etc. She made copies of the certificates to show the ACS caseworkers, so they knew how serious she was when it came to her daughter. She was unhappy in drug treatment; the family court case and level of supervision from ACS discouraged her partner from visiting them at drug treatment. But Ms. KE said she tried her hardest to stay positive because she was so worried about negative emotions affecting her daughter.

After several months, Ms. KE and her family defense team pushed the residential drug treatment program and ACS for a discharge. Ms. KE didn't have a drug problem to begin with. Her relationship with her partner was all but destroyed, so he would not be a dominant influence in her life. Her daughter was healthy and well cared for.

However, the residential drug treatment program was hesitant to graduate her from treatment because Ms. KE refused to transition her four-month old daughter away from the breast to a bottle, and refused to enroll her daughter in the program's day care. They were also upset that Ms. KE co-slept with her daughter.

ACS and the residential drug treatment program said they would agree to a discharge if they could certify the safety of the home where Ms. KE and her daughter would live, if Ms. KE enrolled in outpatient drug treatment, and if she agreed to submit to supervision by ACS caseworkers for nine months.

Ms. KE asked if she could go live with her mom upstate. Her mom would care for her daughter while she finished her GED.

ACS commissioned a home study of her mother's apartment and rejected it claiming safety concerns—it was too small. They criticized the lack of a dining room table, and the sense of “clutter” that was created by it being a one bedroom. ACS also invoked her mom's prior involvement with CPS to support their rejection.

Ms. KE was understandably upset. She preferred her mom as a caretaker for her daughter to strangers in daycare. Though it was a small apartment, she viewed it as safer and more comfortable than a shelter. However, ACS would not agree, and Ms. KE ultimately entered a shelter with her daughter.

For the next nine months, Ms. KE spent three out of five days a week fulfilling ACS's demands of her. She had no time to complete shelter requirements such as enrolling in a GED program. This was held against her.

She completed her outpatient drug treatment program. Her therapist has recommended that they stop seeing each other because she's doing well. Almost a year later, ACS closed the case. But her life has permanently changed. She feels that ACS broke up her relationship with her partner. She also feels that ACS destroyed her daughter's relationship with her father. Of her own relationship with her daughter, she says, “Whatever they do, I'm her comfort, I'm her protector.”



## Resist Surveillance and Separation, Reimagine Safety and Support

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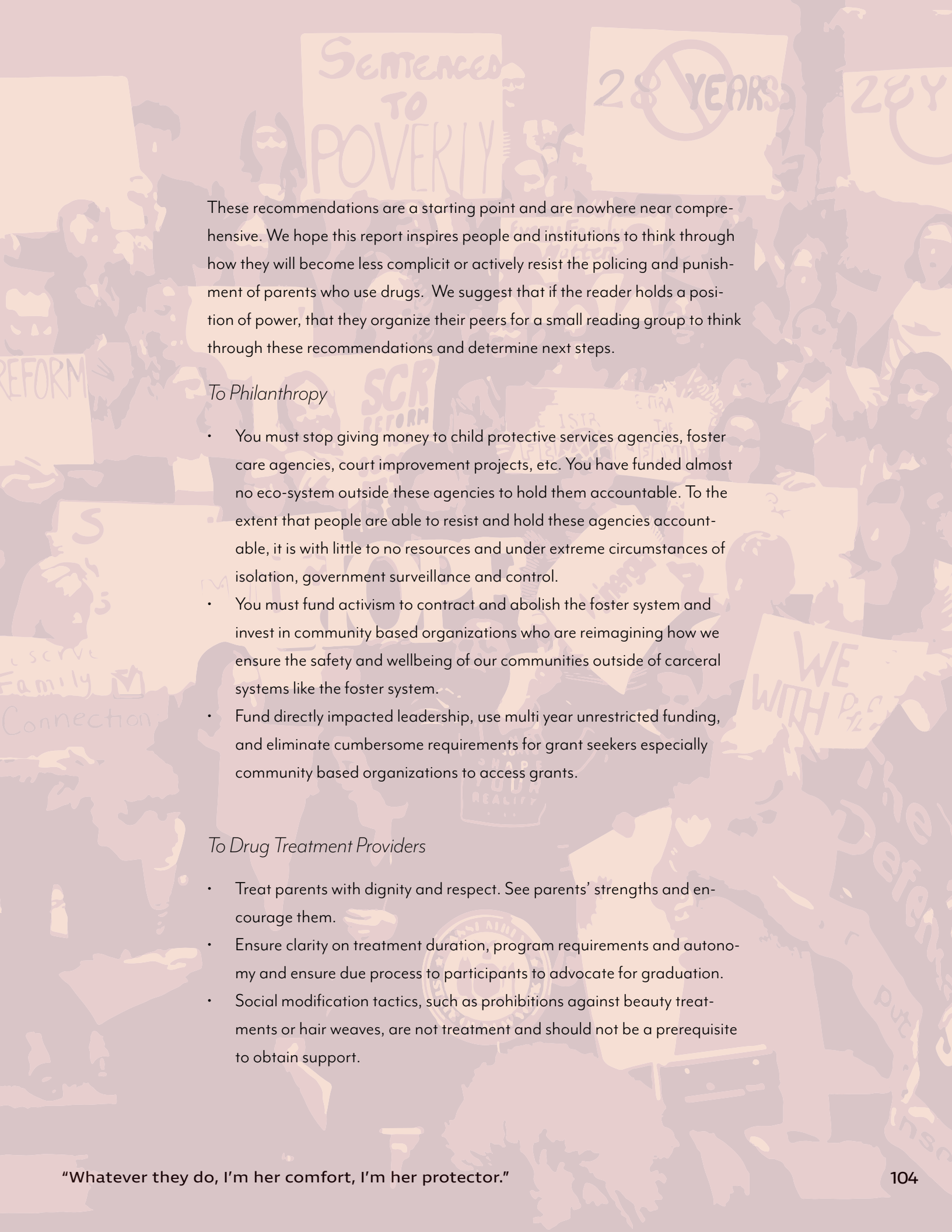
### Movement for Family Power's Recommendations for Change

**P**eople and community organizations have long been agitating to limit the reach of the foster system into their families' and communities' lives. But they have worked in isolation for too long. This report is in part a plea to the social justice community to embrace activism against the foster system as a core social justice cause of our time. The foster system has profound implications for the communities served in the fights for reproductive justice, racial justice, economic justice, drug policy and harm reduction, disability justice, immigration justice, anti-criminalization, and so forth.

This report is also in part an attempt for various actors complicit in or actively perpetuating the harms of the foster system to expand their conceptualization of what it is that they are doing on a day to day basis—the lineage of their line of work, the context within which it currently occurs, and the future likely outcomes of their work.

Some of the recommendations are abolitionist in nature, calling for an overall contraction in the system's scope and size, and transfer of power and resources back into community. Others are reformist in nature, which may respond to the immediate harm families experience under the heel of the foster system today.

*This art is based on a photo of a rally organized by Parent Legislative Action Network held in Albany in support of legislative reform to lessen the harm of the child abuse and neglect registry on parents.*



These recommendations are a starting point and are nowhere near comprehensive. We hope this report inspires people and institutions to think through how they will become less complicit or actively resist the policing and punishment of parents who use drugs. We suggest that if the reader holds a position of power, that they organize their peers for a small reading group to think through these recommendations and determine next steps.

### *To Philanthropy*

- You must stop giving money to child protective services agencies, foster care agencies, court improvement projects, etc. You have funded almost no eco-system outside these agencies to hold them accountable. To the extent that people are able to resist and hold these agencies accountable, it is with little to no resources and under extreme circumstances of isolation, government surveillance and control.
- You must fund activism to contract and abolish the foster system and invest in community based organizations who are reimagining how we ensure the safety and wellbeing of our communities outside of carceral systems like the foster system.
- Fund directly impacted leadership, use multi year unrestricted funding, and eliminate cumbersome requirements for grant seekers especially community based organizations to access grants.

### *To Drug Treatment Providers*

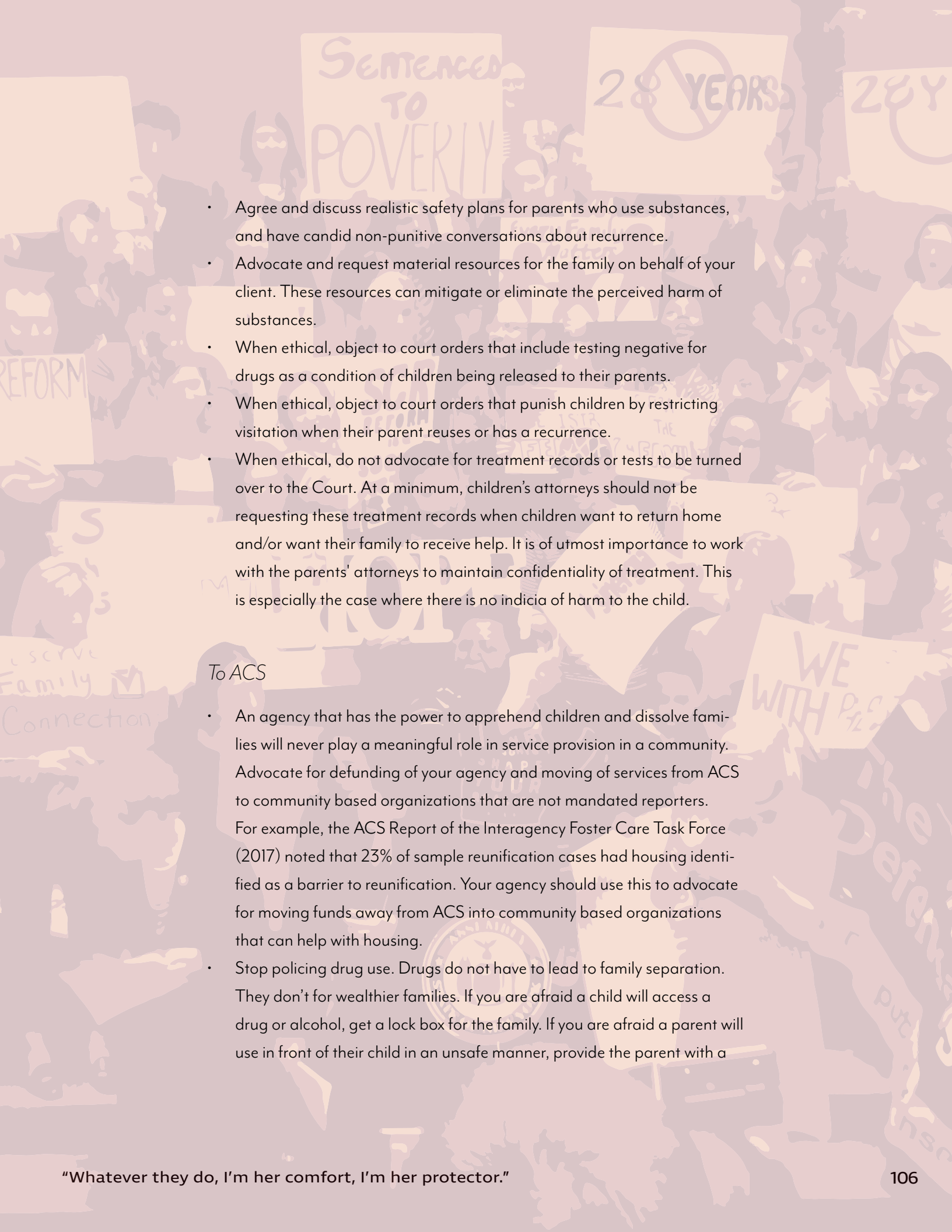
- Treat parents with dignity and respect. See parents' strengths and encourage them.
- Ensure clarity on treatment duration, program requirements and autonomy and ensure due process to participants to advocate for graduation.
- Social modification tactics, such as prohibitions against beauty treatments or hair weaves, are not treatment and should not be a prerequisite to obtain support.



- Abstinence should not be the program's goal of treatment. The goal of treatment should be defined by the patient.
- Authentically employ the goals of harm reduction, which include talking about safety planning for when someone uses drugs while parenting—and actively advocate for these safety plans in court and on behalf of your client.
- End delays in graduating through various levels of programs for completely unrelated reasons such as housing security or cell phone violations.
- Ensure all treatment providers/staff are trained in and are mandated to promote thoughtful, intersectional, race conscious treatment / end discriminatory treatment and stereotyping by staff towards participants.
- Stand up for your clients against ACS and family court judges. For example, challenge treatment determinations made by ACS.
- Decrease your coordination and complicity with carceral systems.
- Object to the wholesale release of records to ACS, or at the very least, discuss with your patients the portions of records that will be released and how it could be helpful/harmful for them.
- End the arbitrary and medically inappropriate and unjustified limit on methadone dosage for acceptance into treatment programs.

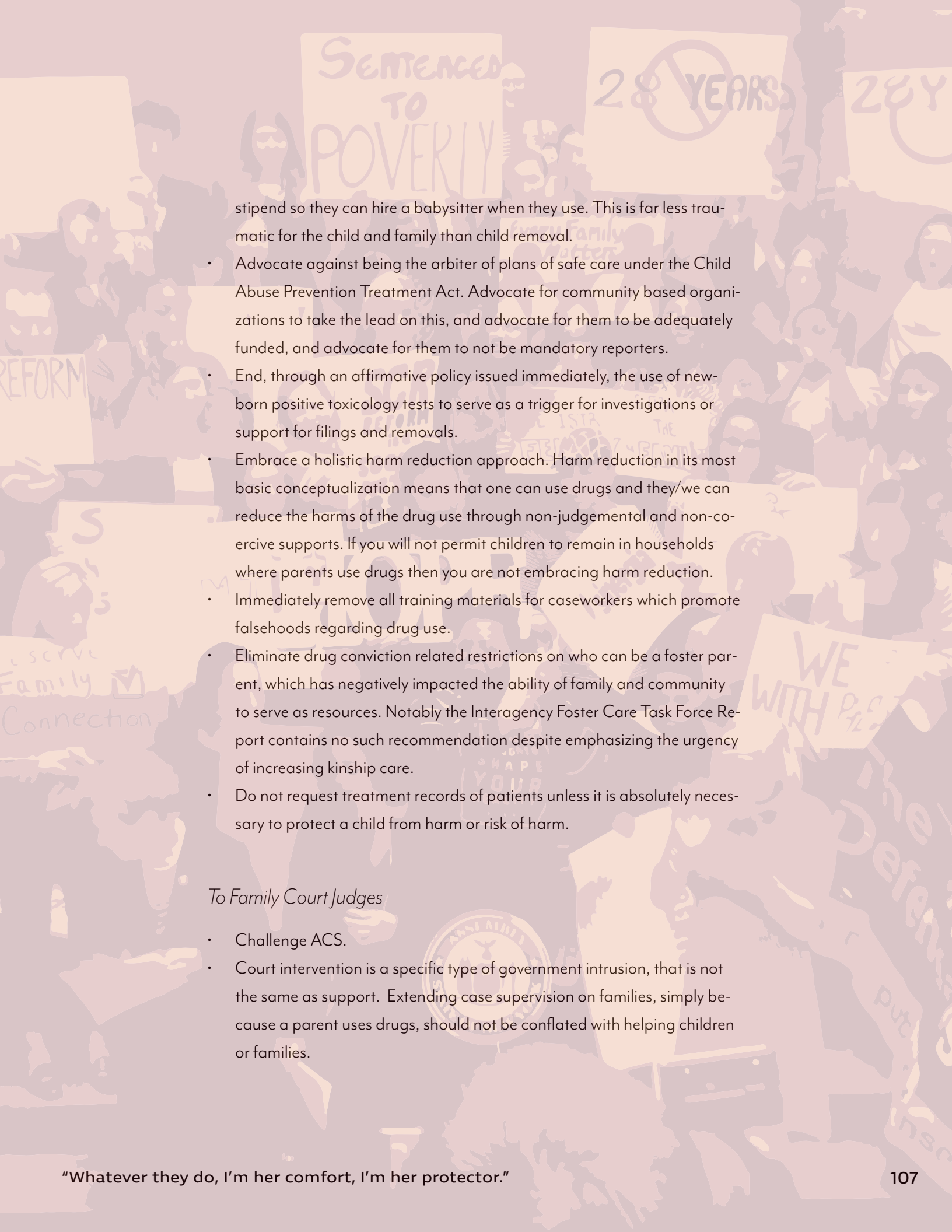
#### *To Attorneys for the Children*

- Demand your offices provide immersive courses in harm reduction that are lead by people who use drugs, and community based organizations.
- Learn from your clients when they become adults.
- Listen and learn from parents who have been through the system, especially those who have both been a foster child and parent under investigation.
- Advocate for complete dismissals where the allegations are positive toxicologies at birth
- Use experts to challenge ACS's positions about substance use and testing.

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- Agree and discuss realistic safety plans for parents who use substances, and have candid non-punitive conversations about recurrence.
  - Advocate and request material resources for the family on behalf of your client. These resources can mitigate or eliminate the perceived harm of substances.
  - When ethical, object to court orders that include testing negative for drugs as a condition of children being released to their parents.
  - When ethical, object to court orders that punish children by restricting visitation when their parent reuses or has a recurrence.
  - When ethical, do not advocate for treatment records or tests to be turned over to the Court. At a minimum, children's attorneys should not be requesting these treatment records when children want to return home and/or want their family to receive help. It is of utmost importance to work with the parents' attorneys to maintain confidentiality of treatment. This is especially the case where there is no indicia of harm to the child.

#### To ACS

- An agency that has the power to apprehend children and dissolve families will never play a meaningful role in service provision in a community. Advocate for defunding of your agency and moving of services from ACS to community based organizations that are not mandated reporters. For example, the ACS Report of the Interagency Foster Care Task Force (2017) noted that 23% of sample reunification cases had housing identified as a barrier to reunification. Your agency should use this to advocate for moving funds away from ACS into community based organizations that can help with housing.
- Stop policing drug use. Drugs do not have to lead to family separation. They don't for wealthier families. If you are afraid a child will access a drug or alcohol, get a lock box for the family. If you are afraid a parent will use in front of their child in an unsafe manner, provide the parent with a

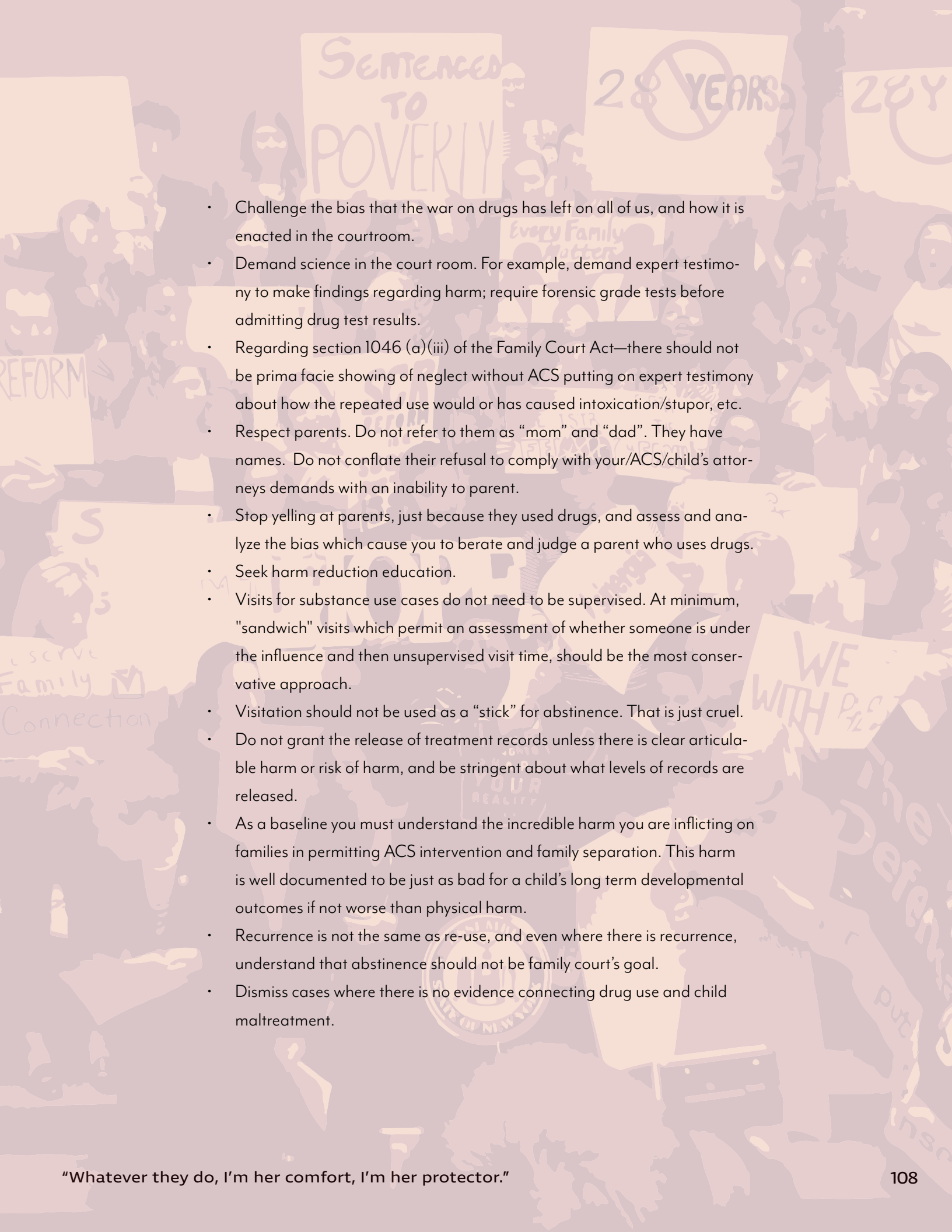


stipend so they can hire a babysitter when they use. This is far less traumatic for the child and family than child removal.

- Advocate against being the arbiter of plans of safe care under the Child Abuse Prevention Treatment Act. Advocate for community based organizations to take the lead on this, and advocate for them to be adequately funded, and advocate for them to not be mandatory reporters.
- End, through an affirmative policy issued immediately, the use of newborn positive toxicology tests to serve as a trigger for investigations or support for filings and removals.
- Embrace a holistic harm reduction approach. Harm reduction in its most basic conceptualization means that one can use drugs and they/we can reduce the harms of the drug use through non-judgemental and non-coercive supports. If you will not permit children to remain in households where parents use drugs then you are not embracing harm reduction.
- Immediately remove all training materials for caseworkers which promote falsehoods regarding drug use.
- Eliminate drug conviction related restrictions on who can be a foster parent, which has negatively impacted the ability of family and community to serve as resources. Notably the Interagency Foster Care Task Force Report contains no such recommendation despite emphasizing the urgency of increasing kinship care.
- Do not request treatment records of patients unless it is absolutely necessary to protect a child from harm or risk of harm.

#### *To Family Court Judges*

- Challenge ACS.
- Court intervention is a specific type of government intrusion, that is not the same as support. Extending case supervision on families, simply because a parent uses drugs, should not be conflated with helping children or families.

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- Challenge the bias that the war on drugs has left on all of us, and how it is enacted in the courtroom.
  - Demand science in the court room. For example, demand expert testimony to make findings regarding harm; require forensic grade tests before admitting drug test results.
  - Regarding section 1046 (a)(iii) of the Family Court Act—there should not be prima facie showing of neglect without ACS putting on expert testimony about how the repeated use would or has caused intoxication/stupor, etc.
  - Respect parents. Do not refer to them as “mom” and “dad”. They have names. Do not conflate their refusal to comply with your/ACS/child’s attorneys demands with an inability to parent.
  - Stop yelling at parents, just because they used drugs, and assess and analyze the bias which cause you to berate and judge a parent who uses drugs.
  - Seek harm reduction education.
  - Visits for substance use cases do not need to be supervised. At minimum, “sandwich” visits which permit an assessment of whether someone is under the influence and then unsupervised visit time, should be the most conservative approach.
  - Visitation should not be used as a “stick” for abstinence. That is just cruel.
  - Do not grant the release of treatment records unless there is clear articulable harm or risk of harm, and be stringent about what levels of records are released.
  - As a baseline you must understand the incredible harm you are inflicting on families in permitting ACS intervention and family separation. This harm is well documented to be just as bad for a child’s long term developmental outcomes if not worse than physical harm.
  - Recurrence is not the same as re-use, and even where there is recurrence, understand that abstinence should not be family court’s goal.
  - Dismiss cases where there is no evidence connecting drug use and child maltreatment.



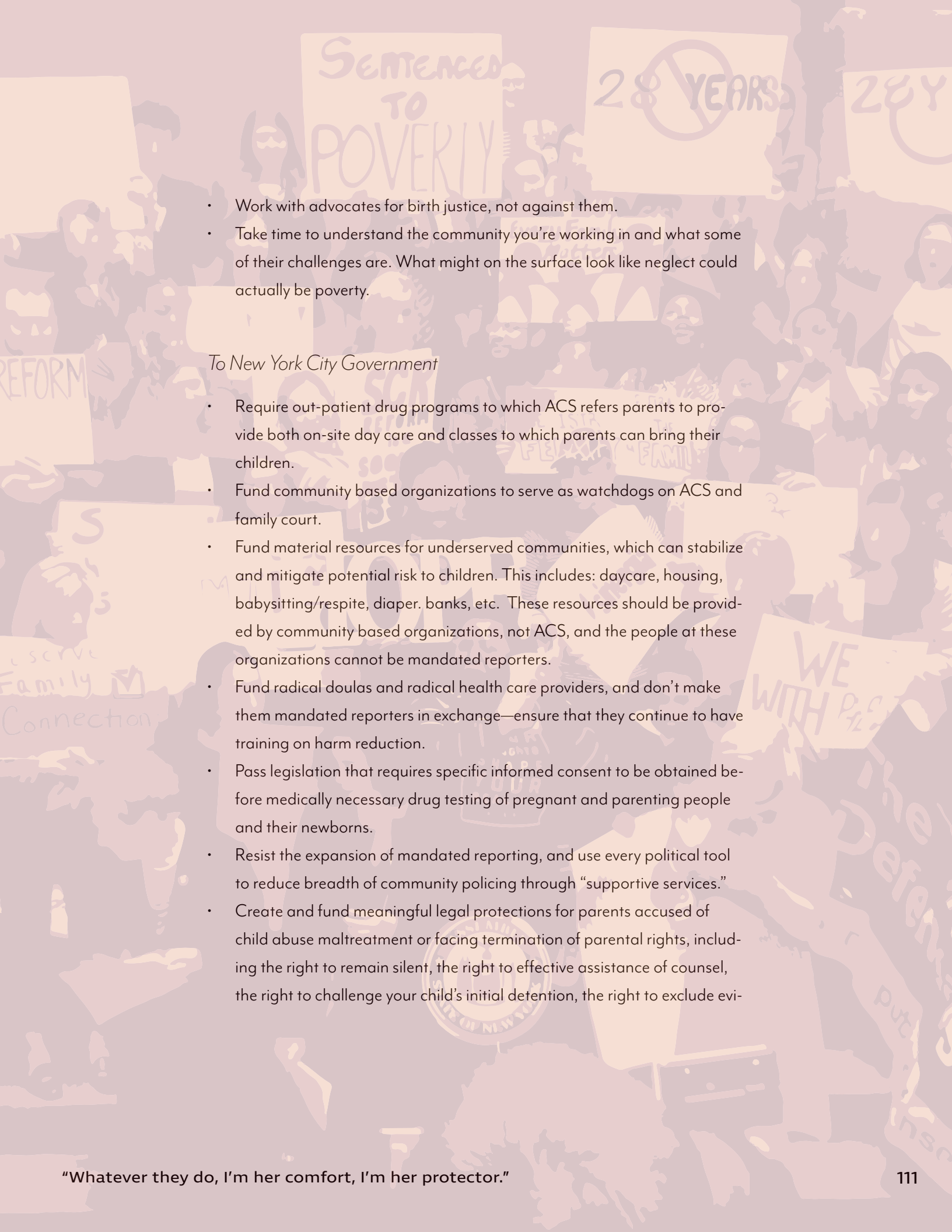
*To Media*

- Understand that child protective services agencies err in all directions, and needlessly placing a child in foster care is harmful.
- Scale back the focus on child fatality stories, which don't allow space for nuance and the complexity of most family situations. Harm happens, and child fatalities, though tragic, represent an infinitesimally small fraction of the families pulled into CPS. Focusing on child fatality narratives often encourages moral panic and minimizes our ability to understand the complexity of substance use among pregnant and parenting people.
- Broaden your source base. No reporter would do a story about the criminal legal system and speak only to prosecutors, judges and police. Yet foster system stories often are written without the perspective of children, parents or their lawyers.
- Be more nuanced and present positive stories of people who parent while using drugs.
- Avoid repeating the harms perpetuated by the media sensationalization of the Crack Epidemic of the late 1980s and 1990s, where drug use by Black and Brown mothers was demonized and pathologized, and framed as a moral failing.
- Amplify the thought leadership and voices of those most affected.

*To Hospitals:*

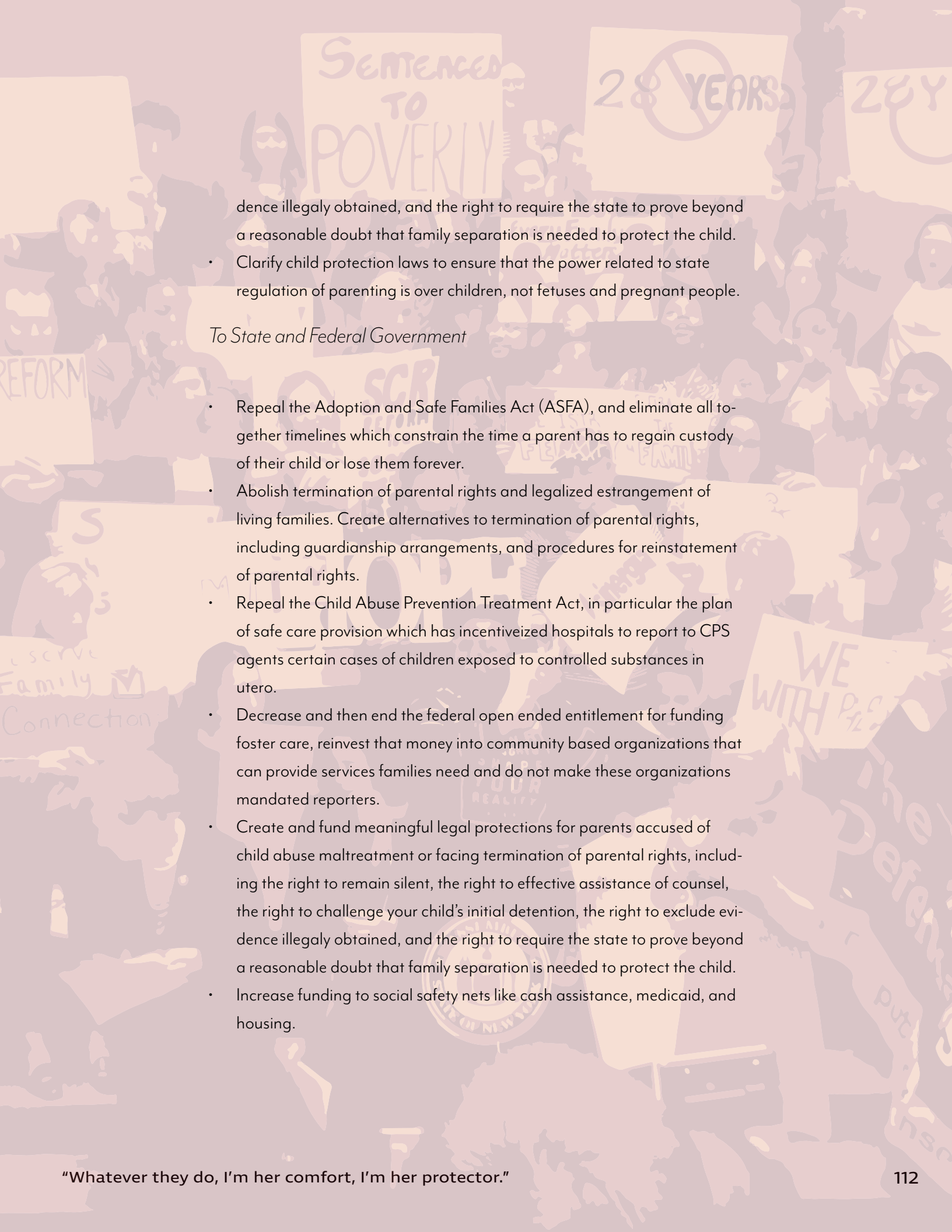
- Care providers and social workers must understand the implications of reporting people to CPS and the long-term harm and trauma caused by family separation. Learn from scholars like Dorothy Roberts, and the advocacy of impacted people.

- Take accountability for the harms that have been inflicted on Black and Brown families, especially parents who use drugs. Admit where mistakes have been made, and are continuing to be made and work to repair harm.
- Because the law does not require drug testing of pregnant people and because substance use alone is not legally considered abuse or neglect in NY State, hospitals and care providers do not have to conduct blanket drug testing of all their patients. You can help families stay together and reduce the number of children that go into the foster system by not testing and reporting.
- Only conduct drug testing when medically indicated and with specific and informed consent for both the mother and newborn. Specific and informed consent for drug tests should be stand alone forms that are verbally discussed, not just part of a general I-consent-to-anything form at labor and delivery.
- Provide mothers an opportunity to seek legal counsel before consenting to a drug test.
- Do not call in a report to the state central registry based solely on a drug test; train on what should lead to reporting.
- Do not hold a baby on a “social hold” --i.e. taking a child from a parent without any judicial order. This is illegal, immoral and inhumane.
- Allow/encourage mothers to spend maximum time with their babies in the NICU (whether there are opiate-related issues or not).
- Communicate with advocates for the parent where there is a report that is called in, and provide equal information to both ACS and the parent.
- People, including people who use drugs, should be permitted to breast-feed.
- People, including people who use drugs, should be permitted/encouraged to have skin to skin contact.
- Advocate for the repeal of the Child Abuse Prevention Treatment Act provisions which enlist you as an agent of child protective services.
- Reject funds from CAPTA.

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- Work with advocates for birth justice, not against them.
  - Take time to understand the community you're working in and what some of their challenges are. What might on the surface look like neglect could actually be poverty.

### *To New York City Government*

- Require out-patient drug programs to which ACS refers parents to provide both on-site day care and classes to which parents can bring their children.
- Fund community based organizations to serve as watchdogs on ACS and family court.
- Fund material resources for underserved communities, which can stabilize and mitigate potential risk to children. This includes: daycare, housing, babysitting/respice, diaper banks, etc. These resources should be provided by community based organizations, not ACS, and the people at these organizations cannot be mandated reporters.
- Fund radical doulas and radical health care providers, and don't make them mandated reporters in exchange—ensure that they continue to have training on harm reduction.
- Pass legislation that requires specific informed consent to be obtained before medically necessary drug testing of pregnant and parenting people and their newborns.
- Resist the expansion of mandated reporting, and use every political tool to reduce breadth of community policing through “supportive services.”
- Create and fund meaningful legal protections for parents accused of child abuse maltreatment or facing termination of parental rights, including the right to remain silent, the right to effective assistance of counsel, the right to challenge your child's initial detention, the right to exclude evi-



dence illegally obtained, and the right to require the state to prove beyond a reasonable doubt that family separation is needed to protect the child.

- Clarify child protection laws to ensure that the power related to state regulation of parenting is over children, not fetuses and pregnant people.

#### *To State and Federal Government*

- Repeal the Adoption and Safe Families Act (ASFA), and eliminate all together timelines which constrain the time a parent has to regain custody of their child or lose them forever.
- Abolish termination of parental rights and legalized estrangement of living families. Create alternatives to termination of parental rights, including guardianship arrangements, and procedures for reinstatement of parental rights.
- Repeal the Child Abuse Prevention Treatment Act, in particular the plan of safe care provision which has incentivized hospitals to report to CPS agents certain cases of children exposed to controlled substances in utero.
- Decrease and then end the federal open ended entitlement for funding foster care, reinvest that money into community based organizations that can provide services families need and do not make these organizations mandated reporters.
- Create and fund meaningful legal protections for parents accused of child abuse maltreatment or facing termination of parental rights, including the right to remain silent, the right to effective assistance of counsel, the right to challenge your child's initial detention, the right to exclude evidence illegally obtained, and the right to require the state to prove beyond a reasonable doubt that family separation is needed to protect the child.
- Increase funding to social safety nets like cash assistance, medicaid, and housing.




March 5, 2018



Re: NYU Law Request for Public Records

Greetings,

I am conducting nationwide research on how child welfare systems across the country are addressing allegations of caretaker drug use. This information is requested for compilation in a national report with multi jurisdiction analysis to identify trends, needs, best practices, and so on. To that end, I am requesting information from the Administration for Children's Services regarding allegations of caretaker drug use in the Bronx. I would appreciate you providing the information requested below in electronic format if possible.

If this request could be restructured to minimize the demands on your department's time and resources, I would be most happy to discuss alternatives with you. Please feel free to contact me at 

- 1) In the Bronx the number of investigations:
  - a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number containing allegations of caretaker drug/alcohol use, for each of the years 2011, 2013, 2015, 2017
  - c) Total number of prenatal drug use, for each of the years 2011, 2013, 2015, 2017 (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 1a, 1b and 1c disaggregated by race of caretaker, for 2017 only
  - e) 1a and 1b disaggregated by gender of caretaker, for 2017 only
  
- 2) In the Bronx the number of indicated investigations:
  - a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number that involved allegations of caretaker drug/alcohol use, for each of the years 2011, 2013, 2015, 2017

- c) Total number of prenatal drug use, for each of the years 2011, 2013, 2015, 2017 (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 2a, 2b, 2c disaggregated by race of caretaker, for 2017 only
  - e) 2a and 2b disaggregated by gender of caretaker, for 2017 only
- 3) In the Bronx in 2017 the number of people who have indicated investigations:
- a) Total number
  - b) Total number of people with indicated investigations that involve allegations of caretaker drug/alcohol use
  - c) Total number of people with indicated investigations that involve allegations of prenatal drug use (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 3(a), 3(b), and 3(c) disaggregated by race
  - e) 3(a) and 3(b) disaggregated by gender
- 4) In the Bronx, for each of the years 2011, 2013, 2015, 2017, the percent of investigations (indicated and total) that were referred for preventive services. Can this be disaggregated for percent of investigations involving allegations of drug/alcohol use?
- 5) In the Bronx the number of Article Ten abuse/neglect filings:
- a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number that contained allegations of caretaker drug/alcohol use, for each of the years 2011, 2013, 2015, 2017
  - c) Total number that contained allegations of prenatal drug use, for each of the years 2011, 2013, 2015, 2017 (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 5a, 5b and 5c disaggregated by race of caretaker for 2017 only
  - e) 5a and 5b disaggregated by gender of caretaker for 2017 only
- 6) In the Bronx the number of children who *entered* foster care based on Article Ten abuse/neglect filings
- a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number that contained allegations of caretaker drug/alcohol use for each of the years 2011, 2013, 2015, 2017
  - c) Total number of children who entered foster care that contained allegations of caretaker's prenatal drug use, for each of the years 2011, 2013, 2015, 2017 (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 6a, 6b, and 6c disaggregated by race of caretaker, for 2017 only
  - e) 6a and 6b disaggregated by gender of caretaker, for 2017 only

- 7) In the Bronx the number of children in foster care based on Article Ten filings:
- a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number that contained allegations of caretaker drug/alcohol use, for each of the years 2011, 2013, 2015, 2017
  - c) Total number of children who are in foster care based on Article Ten filings that allege prenatal drug use, for each of the years 2011, 2013, 2015, 2017 (if not possible can this be approximated by searching for caretaker drug/alcohol use where the child is under one month?)
  - d) 7a, 7b, 7c disaggregated by race of caretaker, for 2017 only
  - e) 7a and 7b disaggregated by gender of caretaker, for 2017 only
- 8) In the Bronx the number of termination of parental rights proceedings that were *commenced* in each of the years for which data is requested:
- a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number involving allegations of caretaker drug/alcohol drug use, for each of the years 2011, 2013, 2015, 2017
  - c) 8a and 8b disaggregated by race of caretaker, for 2017 only
  - d) 8a and 8b disaggregated by gender of caretaker, for 2017 only
- 9) In the Bronx the number of children who were released for adoption as a result of TPR proceedings:
- a) Total number, for each of the years 2011, 2013, 2015, 2017
  - b) Total number that involved allegations of caretaker drug/alcohol use, for each of the years 2011, 2013, 2015, 2017
  - d) 9a and 9b disaggregated by race of caretaker, for 2017 only
  - d) 9a and 9b disaggregated by gender of caretaker, for 2017 only
- 10) In the Bronx, for each of the years 2010, 2015, 2017, the number of
- a) evaluations for drug treatment
  - b) referrals to drug treatment
  - c) referrals to drug treatment disaggregated by outpatient and inpatient
  - d) referrals to mother/child drug treatment programs
  - e) evaluations for mental health care
  - f) referrals to mental health services
- 11) In the Bronx in 2017, the range for daily foster care reimbursement, in dollars
- 12) In the Bronx in 2017, the amount of money (federal, state, and local) expended on
- a) drug testing (that is, drug testing that occurred outside a drug use treatment program)
  - b) parenting classes

c) foster care

\*\*I do not know how fiscal data is tracked thus I may be requesting data that is not easily retrievable. Perhaps it would be best for me to speak to someone in the finance office. Please let me know.

### **Policies**

1) ACS policies that address allegations of caretaker drug use and to whom they are disseminated:

- a) Are there any policies specific to marijuana? What are these policies?
- b) Are there any policies specific to allegations of prenatal drug exposure? What are these policies?
- c) Are there any policies specific to medication assisted treatment? What are these policies?

2) What if any type of training are ACS caseworkers, lawyers and foster care agency staff provided on

- a) when and whether allegations of caretaker drug use constitute a claim of abuse or neglect?
- b) drug use and drug addiction

Because this request is a matter of public concern and made on behalf of a non profit organization, I request a fee waiver. If however such a waiver is not possible, I will reimburse you for the reasonable costs of research. Please inform me in advance if a cost will be incurred.

Please provide all records requested to Lisa Sangoi, [REDACTED] and please do contact me should you have any questions regarding this request. I look forward to hearing from you.

**1. Investigations in the Bronx**

**1a, 1b, 1c. Investigations With Parental Drug/ Alcohol Use and/or Prenatal Drug Use**

Year	Total INV	Parental Drug/ Alcohol Use	Prenatal Drug Use
2011	16477	3292	205
2013	15713	2909	208
2015	16231	2953	185
2017	17288	3433	330

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0.3567110036 0.4204193 0.6442;  
0.3424311503 0.4188960 0.7135  
0.3755784359 0.4424701 0.69091

**1d. Perpetrators Disaggregated by Ethnicity for 2017**

All Investigations With Parental Drug/ Alcohol Use With Prenatal Drug Use	Total Perps		Hispanic		White		Other/ Unknown	
	Afr Am	Asian/Pacific Island	Hispanic	White	Other/ Unknown	White	Other/ Unknown	
25321	8828	308	12720	716	2749	285	842	
5916	2206	22	2871	222	595	118	209	
462	160	2	236	29	35	25	19	
	34.9%	1.2%	50.2%	2.8%	10.9%	3.0%	8.8%	
	37.3%	0.4%	48.5%	3.8%	10.1%	4.7%	8.4%	
	34.6%	0.4%	51.1%	6.3%	7.6%	7.8%	6.0%	

**1e. Perpetrators Disaggregated by Gender for 2017**

All Investigations With Parental Drug/ Alcohol Use	Total Perps		Unknown	
	Female	Male	Unknown	Other/ Unknown
25321	15940	9344	37	0.1%
5916	3594	2311	11	0.2%
	63.0%	36.9%		
	60.8%	39.1%		

**2. Indicated Investigations in the Bronx**

**2a, 2b, 2c. IND Investigations With Parental Drug/ Alcohol Use and/or Prenatal Drug Use**

Year	Total IND INV	Parental Drug/ Alcohol Use	Prenatal Drug Use
2011	6103	1489	149
2013	5605	1223	134
2015	5558	1237	132
2017	6493	1519	228
		24.4%	2.4%
		21.8%	2.4%
		22.3%	2.4%
		23.4%	3.5%

**2d. Perpetrators Disaggregated by Ethnicity for 2017**

All IND Investigations With Parental Drug/ Alcohol Use With Prenatal Drug Use	Total Perps		Hispanic		White		Other/ Unknown	
	Afr Am	Asian/Pacific Island	Hispanic	White	Other/ Unknown	White	Other/ Unknown	
9587	3522	108	4830	285	842	285	842	
2492	952	6	1207	118	209	118	209	
319	119	2	154	25	19	25	19	
	36.7%	1.1%	50.4%	3.0%	8.8%	3.0%	8.8%	
	38.2%	0.2%	48.4%	4.7%	8.4%	4.7%	8.4%	
	37.3%	0.6%	48.3%	7.8%	6.0%	7.8%	6.0%	

**2e. Perpetrators Disaggregated by Gender for 2017**

All IND Investigations With Parental Drug/ Alcohol Use	Total Perps		Unknown	
	Female	Male	Unknown	Other/ Unknown
9587	5734	3849	4	0.0%
2492	1504	986	2	0.1%
	59.8%	40.1%		
	60.4%	39.6%		

4) In the Bronx, percent of investigations (indicated and total) that were referred for preventive services, disaggregated for percent of investigations involving allegations of drug/alcohol use

All Investigations		No Drug Allegation	With Drug Allegation	Total Investigations	
YEAR	Total INV	Referred to Prev Svc	Total INV	Referred to Prev Svc	Total INV
2011	13185	12.5%	3290	11.6%	16475
2013	12804	15.2%	2906	15.6%	15710
2015	13277	19.3%	2953	21.5%	16230
2017	13855	21.1%	3433	23.2%	17288

Indicated Investigations	No Drug Allegation		With Drug Allegation		Total IND Investigations	
	Total INV	Referred to Prev Svc	Total INV	Referred to Prev Svc	Total INV	Referred to Prev Svc
YEAR	4613	21.0%	1489	18.9%	6102	20.5%
2011	4381	25.6%	1223	26.7%	5604	25.8%
2013	4318	34.9%	1237	37.7%	5555	35.5%
2015	4969	33.9%	1517	36.9%	6486	34.6%
2017						

5. Article X Abuse/Neglect Filings in the Bronx

5a, 5b. Filings that Contained Allegations of Drug Use		All Filings	Drug Use
Year			
2011		2692	796
2013		2525	558
2015		3108	521
2017		4674	847

5e. Article X Filings Disaggregated by Gender of Respondents for 2017

All Filings	All Respondents	Gender		Unknown
		Female	Male	
With Allegations of Drug Abuse	986	35	148	803
	5715	317	1028	4370
		3.5%	15.0%	81.4%
		5.5%	18.0%	76.5%

6. The number of children who entered foster care based on Articlex filings (# of Remand at Initial Hearing) (in Bronx Court)

6a, 6b. Total number and number of remands with allegation of drug use

Year	Total Remands	Drug Use
2011	1071	360 33.6%
2013	731	219 30.0%
2015	871	176 20.2%
2017	985	250 25.4%

6e. Remands at Initial Hearing disaggregated by gender of the respondents for 2017

Remands at Initial Hearing	All Respondents	Female	Male	Unknown
	1130	109 9.6%	135 11.9%	886 78.4%

8. Total number of TPR filed for children placed in the Bronx at the time of filing

Year	Total
2011	615
2013	497
2015	368
2017	323

9. Children who were freed for adoption as a result of TPR proceedings (in Bronx Court)

Year	Total
2011	not available
2013	506
2015	480
2017	337

Data Source: CNXX as of 5/14/2018 ; CCRS as of 4/30/18; LTS as of 5/16/18  
 PROMIS as of 6/4/2018.

Prepared by: DPPM/ORR/Report Development and Analysis Unit



## follow up on data request

Lisa,

As promised, below are the filings and remand data for children under 1 month and under 6 months.

### Filings for Children Under 1 Month and Under 6 Months , Bronx

Year	All Filings			Filings with Drug Use		
	Total	< 1 mo old	< 6 mo old	Total	< 1 mo old	< 6 mo old
2011	2692	254	381	796	133	181
2013	2525	196	304	558	86	104
2015	3108	210	337	521	92	122
2017	4674	254	441	847	127	166

### Remands of Children Under 1 Month and Under 6 Months Old , Bronx

Year	All Remand			Remands with Drug Use		
	Total	< 1 mo old	< 6 mo old	Total	< 1 mo old	< 6 mo old
2011	1071	153	213	360	86	111
2013	731	103	134	219	54	59
2015	871	103	147	176	50	65
2017	985	110	160	250	60	71



**New York State Arrests  
PL 220 - Controlled Substances Offenses  
1978-2017**

	Arrest Year										
	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	
<b>Bronx</b>											
White	656	507	150	175				416	451	674	
Black	412	665	691	1,052				2,035	2,856	4,202	
Hispanic	286	578	817	1,547				4,477	5,848	9,186	
Asian/Native American	0	1	3	30				12	12	27	
Other	0	0	14	13				0	0	0	
<b>County Total</b>	<b>1,354</b>	<b>1,751</b>	<b>1,675</b>	<b>2,817</b>	<b>3,451</b>	<b>4,056</b>	<b>5,472</b>	<b>6,940</b>	<b>9,167</b>	<b>14,089</b>	

Source: DCJS, Computerized Criminal History file (as of 7/20/2018)

Note- Due to errors in reporting for race/ethnicity, the following breakdowns are not shown in the analysis: New York City (1982-1984), All Non-NYC Counties (1998-2001), and

	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997
<b>Bronx</b>										
White	901	1,315	1,041	870	966	1,121	1,357	1,558	1,496	1,420
Black	5,717	6,020	5,651	5,866	5,638	5,780	7,415	8,432	8,187	7,320
Hispanic	9,623	9,864	9,061	8,908	8,442	8,614	11,246	11,927	11,263	10,318
Asian/Native American	42	45	27	38	33	35	40	46	49	49
Other	0	1	0	0	0	0	0	0	1	0
<b>County Total</b>	<b>16,283</b>	<b>17,245</b>	<b>15,780</b>	<b>15,682</b>	<b>15,079</b>	<b>15,550</b>	<b>20,058</b>	<b>21,963</b>	<b>20,996</b>	<b>19,107</b>

Source: DCJS, Computerized Criminal History file.

Note- Due to errors in reporting for race/ethnicity, † Nassau County (2007-2012).

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
<b>Bronx</b>										
White	1,776	1,462	1,615	1,097	1,150	969	1,041	903	881	1,212
Black	8,928	8,053	9,852	7,128	7,035	6,755	7,105	7,153	7,111	8,691
Hispanic	11,451	9,598	10,387	8,261	8,465	8,126	7,930	7,943	8,752	10,415
Asian/Native American	54	67	76	44	63	52	50	90	60	44
Other	0	2	0	0	32	50	63	71	93	114
<b>County Total</b>	<b>22,209</b>	<b>19,182</b>	<b>21,930</b>	<b>16,530</b>	<b>16,745</b>	<b>15,952</b>	<b>16,189</b>	<b>16,160</b>	<b>16,897</b>	<b>20,476</b>

Source: DCJS, Computerized Criminal History file  
Note- Due to errors in reporting for race/ethnicity, t

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
<b>Bronx</b>										
White	1,079	1,050	936	877	876	809	797	612	503	471
Black	8,270	7,163	5,805	5,507	4,818	4,103	3,716	3,092	2,474	2,240
Hispanic	10,347	9,555	8,010	7,736	7,155	6,530	6,240	5,138	4,407	3,623
Asian/Native American	66	38	40	42	32	35	49	36	47	44
Other	105	100	104	86	74	110	62	50	49	41
<b>County Total</b>	<b>19,867</b>	<b>17,906</b>	<b>14,895</b>	<b>14,248</b>	<b>12,955</b>	<b>11,587</b>	<b>10,864</b>	<b>8,928</b>	<b>7,480</b>	<b>6,419</b>

Source: DCJS, Computerized Criminal History file  
Note- Due to errors in reporting for race/ethnicity, t



**follow up on data request**

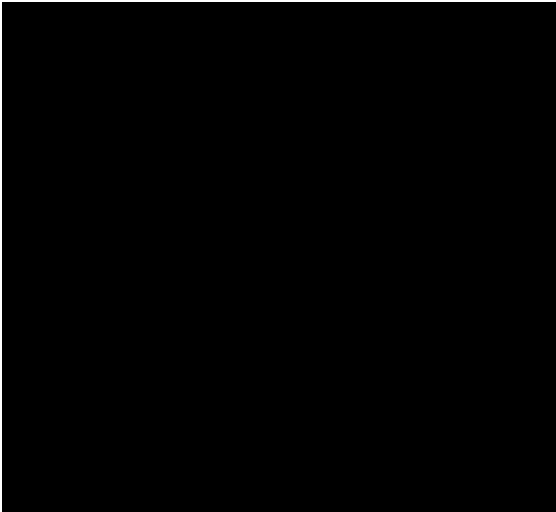


Lisa,

See below for the answer to your question.

Number of perpetrators indicated for parental drug use

2011	1715
2013	1374
2015	1358
2017	1688



Quick question, would you be able to provide the number of perpetrators indicated for parental drug use? You gave me the number of investigations and I think it would also be helpful to see the number of perpetrators indicated for parental drug use for 2011, 2013, 2015, and 2017. Thank you!

**2a, 2b, 2c. IND Investigations With Parental Drug/ Alcohol Use and/or Prenatal Drug Use**

Year	Total IND INV	Parental Drug/ Alcohol Use
2011	6103	1489 24.4%
2013	5605	1223 21.8%
2015	5558	1237 22.3%
2017	6493	1519 23.4%

## Endnotes

1 Drug Policy Alliance Reform Conference, 2013, "Overlooked Punishment" Panel, featuring Dr. Carl Hart of Columbia University, Emma Ketteringham of Bronx Defenders, Dr. Kay Teel of University of Colorado School of Medicine, and moderated by Lynn Paltrow of National Advocates for Pregnant Women (Dr. Carl Hart states that everyone in the family court proceeding is "extremely ignorant" about drug use).

2 The child welfare system, because it is civil in nature, does not contain the constitutional protections of the criminal legal system. Because Ms. L was charged with "civil" child neglect, she did not have a right to an attorney for the vast majority of her trial. She did not have the right against self-incrimination; CPS could question her at any point in her case without the presence of counsel, and use her answers against her in a court; in addition, her refusal to answer any of their questions could be used as evidence of guilt in a court of law. She did not have the right to a jury trial, nor to have all the elements of the civil charge of "neglect" proven beyond a reasonable doubt. Indeed, neglect must only be proven by a preponderance of the evidence. And unlike most crimes, which have distinct elements that must be proven, the civil charge of neglect is an amorphous legal term that can plausibly cover whatever parental actions/inactions CPS wants it to cover.

3 One example is holding enrollment in methadone maintenance programs against parents. See e.g., Ed Pilkington, "Mother Fights for Removal from Abuse Registry Over Prescribed Methadone Use During Pregnancy," *The Guardian*, Sept. 10, 2014. Another example is initiating termination proceedings within six months to a year after the initiation of the neglect proceeding, with no appreciation or accommodation for the fact that substance use disorders require time to treat. See e.g., Sophie Quinton, "How Heroin is Hitting the Foster Care System," *Pew Charitable Trust Stateline Blog*, Oct. 9, 2015.

4 Dorothy Roberts, *Shattered Bonds, The Color of Child Welfare* (2003). Dr. Carl Hart (see supra note 1) states that family court feels like “slavery all over again.” Over half of the children in foster care are children of color. US-DHHS Administration on Children and Families, "Adoption and Foster Care Analysis and Reporting System Report," 2014 (July 2015). In jurisdictions such as New York City, over 95% of the foster care population are children of color.

5 Martin Guggenheim, *What's Wrong With Children's Rights* Ch. 6 (2005)

6 Jennifer Reich, *Fixing Families*, pg. 117-120 (2005).

7 Dorothy Roberts, *Shattered Bonds, The Color of Child Welfare*, pg. 104-130 (2003).

8 By "child welfare and foster system," I mean a civil legal system in the United States composed of child protective service agencies, foster care and adoption agencies, and family courts. There is no federal legal definition of “child maltreatment” in the United States, but there are minimum federal requirements that states must meet in this area to receive federal funding. Every U.S. state has a distinct agency (or agencies) mandated to receive and investigate allegations against parents for suspected child neglect and abuse. The system includes state laws, policies and practices that broadly define child maltreatment, and also who must report suspected neglect or abuse to the relevant agency. The family courts are empowered to issue orders against parents to comply with a variety of programs and services, remove children from their care, and even permanently sever the parent-child relationship. In the majority of the United States, these proceedings are closed to the public, unlike criminal legal system proceedings, which are open to the public in an effort to foster accountability and transparency. Throughout this report I will use the term “foster system”. Advocates are increasingly calling for it to be

renamed the “child removal system,” the “child apprehension system,” “the family separation system,” or the “foster system”.

9 By “modern foster system,” I mean the federal/state foster system as we know it today. Indeed, the foster system can trace its history to the mid and late 19th century, which is discussed more later.

10 Hyunil Kim et al., “Lifetime Prevalence of Investigating Child Maltreatment Among US Children,” 107 *American Journal of Public Health* 274-280 (2017).

11 Christopher Wildeman et al., “The Prevalence of Confirmed Maltreatment Among US Children,” 2004 to 2011, 168 *JAMA Pediatrics* 706 (2014).

12 Christopher Wildeman & Natalia Emanuel, “Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children,” 2000–2011, 9 *PLoS ONE* e92785 (2014).

13 Chris Gottleib, “The Lessons of Mass Incarceration for Child Welfare,” *Amsterdamnews.com* (2019), <http://amsterdamnews.com/news/2018/feb/01/lessons-mass-incarceration-child-welfare/?page=2> (last visited Dec 31, 2019). 1% of American children will permanently lose their parents through termination of parental rights. American Indian and Alaska Native children are 2.7 times more likely than white children to experience the termination of both parents’ rights, and African American children are 2.4 times more likely than white children to experience the termination of parental rights. Christopher Wildeman, Frank R. Edwards & Sara Wakefield, “The Cumulative Prevalence of Termination of Parental Rights for U.S. Children,” 2000–2016, *Child Maltreatment* 107755951984849 (2019).

14 U.S. Department of Health & Human Services, Administration for



Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2019) "Child Maltreatment 2017," available from <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>. This is the number of times a caseworker deemed maltreatment "substantiated."

15 Dorothy Roberts famously estimated that at the NYC foster system's height in the late 1990s, every apartment building in Harlem had at least one family whose child was removed from their care by the foster system. Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

16 In 2017, more than 3.5 million children were subjected to investigations as alleged victims of child abuse. There were 1,720 known child abuse fatalities. U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2019) "Child Maltreatment 2017," available from <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment>. Even if every one of them had been known to authorities, that still would be less than five one-hundredths of one percent of investigated children.

17 See research of Elizabeth Brico on deployment of predictive analytics in the foster system, e.g., "New Algorithms Perpetuate Old Biases In Child Welfare Cases," Undark, (2018) <https://undark.org/2018/09/20/new-algorithms-perpetuate-old-biases-in-child-welfare-cases/> (last visited May 23, 2020) and "Biased Algorithms Are Determining Whether Poor People Get to Keep Their Kids," TalkPoverty, (2019) <https://talkpoverty.org/2019/02/07/biased-algorithms-determining-whether-poor-parents-get-keep-kids/> (last visited May 23, 2020)

18 This statement is not to understate the incredible and courageous work many have been undertaking for decades to try to restrain the foster system.

Despite the ability of the foster system to dismantle the organizing power of parents, families and communities, people have continued to resist. Impacted parents and community organizations have been agitating. Legal advocates, such as remarkable family defense practices at defender services, law clinics, journalists, etc. have all been doing incredible work to advocate for families and shine a light on what happens in the system, however; this has been a drop in the bucket when compared to the advocacy on behalf of people accused of crimes, people accused of immigration offenses or people accused of terrorism offenses.

19 Almost all parents in the foster system are living in poverty. American Indian parents, Black parents and increasingly Latinx parents are overrepresented and experience worse outcomes at every step of the process. Mothers are disproportionately the target of proceedings. People with disabilities, people who experience intimate partner violence, incarcerated people, LGBTQ people, etc. are all overrepresented as targets of the system.

20 Nancy K. Young, Sharon M. Boles & Cathleen Otero, "Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities," *Child Maltreatment* 137-149 (2007).

21 "Ohio foster care system flooded with children amid opioid epidemic," *Cbsnews.com* (2019), <https://www.cbsnews.com/news/ohio-foster-care-system-flooded-with-children-opioid-epidemic/> (last visited Dec 31, 2019). While the increase in foster care caseloads is not contested, whether the cause is parental opioid use or the response of the foster care system to parental drug use is a subject of debate: Elizabeth Pérez-Chiqués et al., "The Other Family Separation Crisis," *Rockefeller Institute of Government*, August 8, 2018, <https://rockinst.org/blog/stories-from-sullivan-the-other-family-separation-crisis/>.

22 “During the crack-cocaine epidemic that ravaged poor urban communities in the 1980s, many children impacted were removed into foster care. Far too little investment was made in strategies that might ensure safety and preserve families, such as family residential substance abuse treatment. Instead, thousands of children were simply removed from their families and communities. Parents struggling with substance abuse often were criminalized, rather than provided access to the recovery programs, resources and supports that might have helped them remain intact as families or reunite with their children.” Jeremy Kohomban, Jennifer Rodriguez & Ron Haskins, "The foster care system was unprepared for the last drug epidemic—let’s not repeat history," Brookings (2019), <https://www.brookings.edu/blog/up-front/2018/01/31/the-foster-care-system-was-unprepared-for-the-last-drug-epidemic-lets-not-repeat-history/> (last visited Dec 31, 2019). children.

23 I first saw these assumptions framed similarly by the National Advocates for Pregnant Women.

24 Between 2004 and 2014, foster systems report spending between \$29 billion and \$32 billion every year in federal, state and local dollars on foster system activity. (Child Trends, foster system Financing SFY 2014: National Overview, Dec. 2016, <https://www.childtrends.org/wp-content/uploads/2016/10/2016-52ChildWelfareFinancingSFY2014Overview-1.pdf>, last accessed, Dec 30 2019). The majority of these expenditures were for out-of-home placement—just a small fraction of these expenditures were for services families need, and those came with the threat of child apprehension or family dissolution. To help give a sense of how this compares with other programs for children living in poverty, federal, state and local government spend around \$6 billion/year on WIC (Center on Budget, Policy Priorities, Steven Carlson, Zoe Neuberger and Dotie Rosenbaum, WIC Participation and Costs Are Stable, Last updated July 2017, <https://www.cbpp.org/research/food-assistance/wic-participation-and-costs-are-stable>); 17.5 billion on CHIP, Kaiser

Family Foundation, CHIP spending (2017), available at <https://www.kff.org/medicaid/state-indicator/total-chip-spending/?currentTimeframe=0&sort-Model=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>; \$30 billion on SNAP for children (Steven Carlson, Dorothy Rosenbaum, Brynne Keith-Jennings, and Catlin Nchako, Center on Budget Policy Priorities, SNAP Works for America's Children (Sept 2016), [https://www.cbpp.org/research/food-assistance/snap-works-for-americas-children#\\_ftn2](https://www.cbpp.org/research/food-assistance/snap-works-for-americas-children#_ftn2)). The foster system is surpassed in spending on children living in poverty by only Medicaid, which spends \$90 billion/year on children (and from which states draw for foster system expenditures). "Kaiser Family Foundation Medicaid Spending by Enrollment Group," <https://www.kff.org/medicaid/state-indicator/medicaid-spending-by-enrollment-group/?currentTimeframe=0&selectedDistributions=children&sortModel=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>)

25 See the journalism, writing and social media activity of Dinah Ortiz, Elizabeth Brico, Joyce McMillan, Suzanne Sellers, the many impacted parents and children who have written for Rise Magazine (<http://www.risemagazine.org/contributors/>), National Advocates for Pregnant Women, Emma Ketteringham, Erin Cloud, Amanda Bent, Indra Lusero, Kassandra Frederique, Dionna King, Allison Korn and others.

26 Damon Barrett & Philip E. Veerman, "Article 33: Protection from Narcotic Drugs and Psychotropic Substances," 24 *The International Journal of Children's Rights* 231-234 (2016) – "thirdly, and conversely, excessively punitive drug control laws and policies are often put in place, and human rights abuses committed, in the name of protecting children from drugs."

27 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

28 Most famously, Dorothy Roberts, for example.

29 There was one other point in U.S. history when the U.S. foster system experienced a similar spike in the number of children removed from their families. In 1977, 503,000 children were in foster care. Leroy Pelton and others, including Richard Wexler and Dorothy Roberts, trace this sharp rise to federal financial incentives that provided a stream of money that states chose to use on foster care instead of assistance to families living in poverty. Why did they make this choice? Public assistance roles were opening up to Black communities for the first time in American history, so rather than provide assistance, the state provided foster care. Leroy Pelton, *For Reason of Poverty: A Critical Analysis of the Public Child Welfare System in the United States* (1989), pp. 6–7, 10–13; Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002). National Coalition for Child Protection Reform A Child Welfare Timeline, available at <https://nccpr.org/a-child-welfare-timeline/> (last accessed Jan 1, 2020).

30 Elisa Minoff, “*Entangled Roots: The Role of Race in Policies that Separate Families.*” Center for the Study of Social Policy, October 2018. Available at: <https://cssp.org/resource/entangled-roots>

31 Substance Abuse Mental Health Services Administration, Results from the 2017 National Survey on Drug Use and Health: Detailed Tables: Table 1.29B – Illicit Drug Use in Lifetime among Persons Aged 12 or Older, by Age Group and Demographic Characteristics: Percentages, 2016 and 2017; Table 1.67B – Illicit Drug Use in Past Year among Persons Aged 12 or Older, by Age Group and Geographic and Socioeconomic Characteristics: Percentages, 2016 and 2017; Table 5.6B – Substance Use Disorder in Past Year among Persons Aged 12 or Older, by Age Group and Demographic Characteristics: Percentages, 2016 and 2017; Table 5.9B – Substance Use Disorder in Past Year among Persons Aged 12 or Older, by Age Group and Geographic and

Socioeconomic Characteristics: Percentages, 2016 and 2017 (all available at <https://www.samhsa.gov/data/sites/default/files/cbhsq-reports/NSDUH-DetailedTabs2017/NSDUHDetailedTabs2017.htm#intro>); see also generally Lipari, R.N. and Van Horn, S.L. Children living with parents who have a substance use disorder. The CBHSQ Report: August 24, 2017. Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration, Rockville, MD for information on how widespread substance use disorder is among parents.

32 Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012).

33 Id.

34 Numerous reports analyzed and criticised this funding structure at that time, for example The Government Accountability Office 1993 report titled "Services to Prevent Out-of-Home Placements Are Limited By Funding Barriers," available at <https://www.gao.gov/assets/160/153524.pdf>.

35 Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* pg. 173 (2002).

36 Arizona, for example, spends almost 50% of its TANF budget on the foster system. Patty Machelor, Arizona Daily Star, "Most U.S. money intended for Arizona's poorest families goes to child-safety efforts," April 8, 2018, available at [https://azdailysun.com/news/local/most-u-s-money-intended-for-arizona-s-poorest-families/article\\_e8da336-2cb9-5c85-a3ce-d2d207e91d4e.html](https://azdailysun.com/news/local/most-u-s-money-intended-for-arizona-s-poorest-families/article_e8da336-2cb9-5c85-a3ce-d2d207e91d4e.html)

37 See video, CNN: 1986: Nancy Reagan's 'Just say no' campaign, available at [youtube.com/watch?v=lQXgVM30mIY](https://www.youtube.com/watch?v=lQXgVM30mIY) (1:30-2:30). See also Craig Reinerman and Harry G. Levine, "The Crack Attack Politics and Media in the

Crack Scare" (1997) , available at [https://www.corwin.com/sites/default/files/upm-binaries/4006\\_Newman\\_Reader\\_\\_Chp\\_3\\_The\\_Crack\\_Attack\\_Final\\_Pdf.pdf](https://www.corwin.com/sites/default/files/upm-binaries/4006_Newman_Reader__Chp_3_The_Crack_Attack_Final_Pdf.pdf).

38 Many people, including most recently Pulitzer Prize winning editorial writer Brent Staples for the New York Times, have documented how scientific literature that did not perpetuate hysteria was hard to publish. Brent Staples, "Slandering the Unborn," N.Y. Times, Dec. 28, 2019, available at <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html>. See also G. Koren et al., "Bias against the null hypothesis: The reproductive hazards of cocaine," 32 International Journal of Gynecology & Obstetrics 297-297 (1990) (documenting bias against articles that do not show teratogenic effects of in utero cocaine exposure). The government, the largest source of funding for drug research, purposefully discouraged research that did not support its war on drugs agenda. Ronald Reagan, a key architect of the drug war, substantially reduced the National Institute on Drug Abuse's research and treatment budget and redirected funds to the Drug Enforcement Agency. As reported in the Washington Post in 1988, his administration commissioned a report that stated "NIDA has failed to take a sufficiently aggressive posture in the drug war, studying narrow scientific issues rather than using its prestige to warn the public about drug abuse. Some critics further contend that the agency's scientists have played down the dangers of some drugs, particularly cannabis and cocaine." The article further stated that agency-funded scientists said it was an assault on the integrity of the scientific process. Michael Isikoff, "Has Drug Agency Lost Sight of Its Mission?" Washington Post, June 29, 1988, available at <https://www.washingtonpost.com/archive/politics/1988/06/29/has-drug-agency-lost-sight-of-mission/b482fd2a-a9a1-44ad-b270-30c3dd8417f7/?noredirect=on>.

39 See section below on harms of family separation and foster care.

40 Papers in the most reputable journals marshal a parade of horrors that they claim emanates from drug use with shockingly little scientific basis for these claims. For example, a 2016 paper issued by the preeminent American Academy of Pediatrics Committee on Substance Use Prevention claims that “Children with prenatal drug exposure are more likely to develop disruptive behavioral disorders such as oppositional defiant disorder; impaired intellectual and academic achievement; and cognitive problems, such as delayed language development, poor memory, and the inability to learn from mistakes.” Vincent C. Smith & Celeste R. Wilson, "Families Affected by Parental Substance Use," 138 *Pediatrics* e20161575 (2016). In claiming these various associations between prenatal drug exposure and developmental outcomes, the article does not provide important context: that no literature to date has isolated any effects of prenatal drug exposure given the many confounding variables, such as poverty, other substance use, poor nutrition, etc. Additionally, as support for this claim, it cites an article on the news website *Indian Country Today*—not a peer-reviewed scientific publication—and a paper from 1995 that largely relies on 1990s and late 1980s research claiming to prove the existence of the “crack baby,” something that has long been discredited. Ironically the second paper it cites cautions against drawing any definitive links between parental/prenatal drug use and the effects on the child.

41 The National Advocates for Pregnant Women has been a leader in organizing medical professionals, scientists and others to speak out about this, and its website is full of useful fact sheets and other resources, e.g. this series of open letters “Open Letters From Medical Doctors, Scientists, & Specialists Urging Media To End Inaccurate Reporting on Pregnancy & Drug Use,” available at [http://advocatesforpregnantwomen.org/main/publications/fact\\_sheets/open\\_letters\\_from\\_medical\\_doctors\\_scientists\\_specialists\\_urguing\\_media\\_to\\_end\\_inaccurate\\_reporting\\_on\\_pregnancy\\_drug\\_use.php](http://advocatesforpregnantwomen.org/main/publications/fact_sheets/open_letters_from_medical_doctors_scientists_specialists_urguing_media_to_end_inaccurate_reporting_on_pregnancy_drug_use.php)

42 Hallam Hurt et al., "Children with and without gestational cocaine expo-



sure: A neurocognitive systems analysis," *31 Neurotoxicology and Teratology* 334-341 (2009).

43 Brent Staples, "Slandering the Unborn," *N.Y. Times*, Dec. 28, 2019, available at <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html>

44 "Poverty More Damaging Than Gestational Drug Exposure" | Children's Hospital of Philadelphia, *Chop.edu* (2013), <https://www.chop.edu/news/poverty-more-damaging-gestational-drug-exposure> (last visited Jan 2, 2020).

45 Media coverage repeatedly depicted mothers as the greatest threat to their children, see e.g. Douglas J. Besharov, *Crack Babies The Worst Threat Is Mom Herself*, *Washington Post*, August 6, 1989, available at <https://www.washingtonpost.com/archive/opinions/1989/08/06/crack-babies-the-worst-threat-is-mom-herself/d984f0b2-7598-4dc1-9846-3418df3a5895/>.

There was not comparable coverage of the effects that poverty criminalization was having on communities.

46 National Advocates for Pregnant Women, "Open Letters From Medical Doctors, Scientists, & Specialists Urging Media To End Inaccurate Reporting on Pregnancy & Drug Use," available at [http://advocatesforpregnantwomen.org/main/publications/fact\\_sheets/open\\_letters\\_from\\_medical\\_doctors\\_scientists\\_specialists\\_urguing\\_media\\_to\\_end\\_inaccurate\\_reporting\\_on\\_pregnancy\\_drug\\_use.php](http://advocatesforpregnantwomen.org/main/publications/fact_sheets/open_letters_from_medical_doctors_scientists_specialists_urguing_media_to_end_inaccurate_reporting_on_pregnancy_drug_use.php).

47 National Advocates for Pregnant Women, "Open Letter to the Media and Policy Makers Regarding Alarmist and Inaccurate Reporting on Prescription Opioid Use by Pregnant Women" (2013), available at <http://advocatesforpregnantwomen.org/Opioid%20Open%20Letter%20-%20March%20>

2013%20-%20FINAL.pdf

48 Id.

49 Donna De La Cruz, "Opioids May Interfere With Parenting Instincts, Study Finds," *New York Times*, Oct. 13, 2016, <https://www.nytimes.com/2016/10/13/well/family/opioids-may-interfere-with-parenting-instincts-study-finds.html> (last visited Jan 2, 2020).

50 "Studies on parenting attitudes and behaviours use inconsistent measures and definitions of parenting making it difficult to identify any distinct patterns in terms of drug-use and mothering." Cathy Banwell & Gabriele Bammer, "Maternal habits: Narratives of mothering, social position and drug use," *17 International Journal of Drug Policy* 504-513 (2006).

51 Lawrence M. Berger et al., "Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes," *15 Child Maltreatment* 199-210 (2010). The authors state that "The reliance on child welfare data at this stage of the investigative process is equally disturbing. Entry of data by child welfare workers lacks validity or reliability as well as specificity. Thus even sophisticated analysis of secondary data is likely working from poor data sources that will not allow exploration of complex associations, let alone cause and effect inferences."

52 Lawrence M. Berger et al., "Caseworker-Perceived Caregiver Substance Abuse and Child Protective Services Outcomes," *15 Child Maltreatment* 199-210 (2010) ; Bryan G. Victor et al., Domestic violence, parental substance misuse and the decision to substantiate child maltreatment, *79 Child Abuse & Neglect* 31-41 (2018).

53 Maria Scannapieco & Kelli Connell-Carrick, "Assessment of Families

Who Have Substance Abuse Issues: Those Who Maltreat Their Infants and Toddlers and Those Who Do Not," 42 *Substance Use & Misuse* 1545-1553 (2007) ("Substance use in and of itself does not predict child maltreatment, and an ecologically focused and comprehensive assessment is necessary to determine the danger or potential danger in which a child may live.").

54 Brenda D. Smith, "Methamphetamine Use and Child Welfare: Review and Research Agenda," 2 *Journal of Public Child Welfare* 511-529 (2008).

55 Tina M. Smarsh Hogan, Barbara J. Myers & R.K. Elswick, "Child Abuse Potential among Mothers of Substance-Exposed and Nonexposed Infants and Toddlers," 30 *Child Abuse & Neglect* 145-156 (2006) ("Our results suggest that mothers who use substances are no more at risk for abusing their children than nonusers with similar demographic backgrounds. There were no significant differences in child abuse potential scores between mothers who did not use substances, mothers who used substances who refused treatment, and mothers who used substances who accepted treatment for their use. The lack of group differences was consistent across time, as there was not a significant main effect for time, nor a group by time interaction. These findings are consistent with findings from Miller et al. (1999) who found no differences in CAP Inventory scores of mothers with current, past, or no history of substance problems."). Nancy J. Kepple, "Does Parental Substance Use Always Engender Risk For Children? Comparing Incidence Rate Ratios of Abusive and Neglectful Behaviors across Substance Use Behavior Patterns," 76 *Child Abuse & Neglect* 44-55 (2018) ("Parental substance use does not globally indicate risk for high frequency child maltreatment behaviors."). Margaret H. Kearney, Sheigla Murphy & Marsha Rosenbaum, "Mothering on Crack Cocaine: A Grounded Theory Analysis," 38 *Social Science & Medicine* 351-361 (1994) ("Once they had borne children, however, the women felt a strong responsibility to them and deep pride."). Cathy Banwell & Gabriele Bammer, "Maternal Habits: Narratives of Mothering, Social Position and Drug Use," 17

International Journal of Drug Policy 504-513 (2006) (“Placing the narratives of mothers who use drugs alongside those of other mothers illuminates how they all strive to position themselves as good mothers and makes it possible to conceive how improvements in the social conditions of mothering and the whittling away of the contradictions of late modernity mothering will be of value to all mothers, irrespective of economic and social position or drug use.”)

56 Hilary Klee, "Drug-using parents: analysing the stereotypes," 9 International Journal of Drug Policy 437-448 (1998) (documenting the risk reduction strategies parents employ to decrease risk associated with drug use, such as hiding drugs so that they are not inadvertently ingested by the child.). Kimber Paschall Richter & Gabriele Bammer, "A hierarchy of strategies heroin-using mothers employ to reduce harm to their children," 19 Journal of Substance Abuse Treatment 403-413 (2000). PHYLLIS L. BAKER & AMY CARSON, "I TAKE CARE OF MY KIDS," 13 Gender & Society 347-363 (1999). Tim Rhodes, Sarah Bernays & Kathrin Houmoller, "Parents who use drugs: Accounting for damage and its limitation," 71 Social Science & Medicine 1489-1497 (2010).

57 Dr. Sharon Stancliff Bronx Health Link Presentation on Pregnancy, Parenting and Drugs, available at [https://www.bronxhealthlink.org/tbhl/advocacy/drug\\_use\\_pregnancy\\_and\\_parenting:en-us.pdf](https://www.bronxhealthlink.org/tbhl/advocacy/drug_use_pregnancy_and_parenting:en-us.pdf) (“I have had a lot of stereotypes in my life challenged by drug addicts. She said that for 13 years her patients have all been current and former drug users, and they have talked extensively about their families and children—and in many cases, the children have led normal, achievement-filled lives even though their mothers used drugs during pregnancy and/or the children’s early years.”)

58 As Lynn Paltrow, a leading advocate for drug using pregnant and parenting people often comments, if drug use could predict who would maltreat

their children, every parent would be required to take a drug test.

59 A recent five part series in the Kansas City Star about incarcerated and formerly incarcerated people who were in foster care as children found that many “believed they were removed from their homes because of poverty. They said their families would have been stronger with a little support.” Judy L. Thomas and Laura Bauer, Kansas City Star, “As U.S. spends billions on foster care, families are pulled apart and forgotten” Dec. 15, 2019. Numerous scholars and journalists, including Dorothy Roberts, Khiara Bridges, Martin Guggenheim, Nina Bernstein, Leroy Pelton, Richard Wexler, and others have made similar observations, noting that what the system calls child neglect is in fact a decision of society to absolve itself of its responsibility to care for families living in poverty by calling the harm that befalls children “child neglect,” and holding parents, particularly mothers, responsible. This has several manifestations: poverty is confused with child neglect; for example, construing a child left home alone because a parent cannot afford child care as child neglect. Low-income communities are highly surveilled and encounter mandated reporters when doing everything from accessing food and housing to seeking medical services. Lastly, poverty can also play a role in those rare cases of true physical harm children experience at the hands of their parents, as enduring extreme poverty is incredibly stressful. As Dorothy Roberts quotes in her book *Shattered Bonds* “The conditions of poverty are stressful. And some families break under the pressure.”

60 Khiara Bridges discusses the foster system’s moral construction of poverty extensively in her books “The Poverty of Privacy Rights (2017)” and “Reproducing Race: An Ethnography of Pregnancy as a Site of Racialization (2011).” See also lectures on youtube such as this one uploaded by Revolution Books, available at <https://vimeo.com/237181229> starting at around 25 minutes.

61 Leroy Pelton, *For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States* 62 (1989).

62 Jennifer Reich, *Fixing Families: Parents, Power, and the Child Welfare System* (2005).

63 "The Orphan Train Movement," Children's Aid, [Childrensaidnyc.org](https://www.childrensaidnyc.org) (2020) .<https://www.childrensaidnyc.org/about/orphan-train-movement> (last visited Jan 3, 2020).

64 Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 174-180 (2002).

65 In particular as the Black womens led Welfare Rights movement

66 Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 174-180 (2002).

67 See fn 21

68 Id.

69 Tina Lee, *Catching A Case: Inequality and Fear In New York City's Child Welfare System* 20-22 (2016).

70 Id. Brace had seen the revolutions in Europe of 1848, and they terrified him. In particular, he was terrified of poor immigrant Catholics, whom he branded a "stupid, foreign criminal class" and the "scum and refuse of ill-formed civilizations." He worried that "some demagogue might arouse their passions and fuse all the elements for a Parisian scene of riot and blood." And, Brace explained, these Catholic immigrant parents were genetically

inferior, passing bad “gemmules” on to their children. Fortunately, these ill effects could be reversed – by taking away the children and shipping them out to middle class Protestant farmers in the countryside. Charles Loring Brace, *The Dangerous Classes of New York and Twenty Years Work Among Them* (New York: Wynkoop and Hallenbeck, 1872) and Miriam Langsam: *Children West: A History of the Placing-out System of the New York Children’s Aid Society, 1853-1890* (Madison, Wis: The State Historical Society of Wisconsin, 1964).

71 This was largely due to over a century of federal government policy forcing Indian parents to place their children in boarding “schools” where they were forcibly and violently assimilated to white Protestant culture and stripped of their native culture. This was also due to the Indian Adoption Project, a joint effort by the Child Welfare League of America and the federal government to forcibly remove and adopt out almost 1,000 Indian children to white families. Lindsey Brekke, "Native Children in Foster Care Part II," Center for Advance Studies in Child Welfare, available at [https://cascw.umn.edu/policy/native\\_children\\_in\\_foster\\_care\\_1/](https://cascw.umn.edu/policy/native_children_in_foster_care_1/). The Indian Child Welfare Act (ICWA) was passed in the aftermath of this, in an attempt to provide heightened legal protections to American Indian parents in foster system proceedings. Repealing ICWA has recently become a priority of the right leaning Goldwater Institute.

72 Dorothy Roberts”Welfare and the Problem of Black Citizenship” (1996). Faculty Scholarship at Penn Law. 1283, available at [https://scholarship.law.upenn.edu/faculty\\_scholarship/1283](https://scholarship.law.upenn.edu/faculty_scholarship/1283).

73 Andrea J. Ritchie, "Epicenter Chicago: Reclaiming a City from Neoliberalism, Black Lives Matter Chicago and Public Research Associates" (2019), available at: <https://www.politicalresearch.org/2019/06/05/epicenter-chicago-reclaiming-a-city-from-neoliberalism>.

74 Elizabeth Hinton, *From The War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2016); Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

75 For example Erin Cloud, "Toward the Abolition of the Foster System," *The Scholar and Feminist Online* (2019), available at <http://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/>.

76 Dorothy Roberts, *Killing the Black Body: Race, Reproduction and the Meaning of Liberty* (1997).

77 Nancy D. Campbell, *Regulating Maternal Instinct: Governing Mentalities of Late US 20th Century Illicit Drug Policy* (1999)

78 Susan Boyd, *Mothers and Illicit Drug Use: Transcending the Myths* (1999)

79 Nancy D. Campbell, *Regulating Maternal Instinct: Governing Mentalities of Late US 20th Century Illicit Drug Policy* (1999).

80 Hornby Zeller Associates, Inc., *Analysis of the Rise in Arkansas' Foster Care Population* (2017) (on file with author)(finding that "many judges were reported to order a child removed from his or her parents when any illegal drug use on the parents' part was detected, while DCFS workers tried to assess the entire situation to determine both what impact the drug use had on the parents' care for their children and what protective measures were available through extended family and other supports. Caseworkers have often tried to anticipate the court's decision, acting against their own judgment, and removing more children as a result.")



81 See the extensive writing and social media activity of Dinah Ortiz and Elizabeth Brico.

82 For example, see interview with Shernet Neufield Gray, Director, Substance Use Disorders Policy, Planning and Services, Administration for Children's Services, Feb. 22, 2019. Interview with family defense attorney in Washington DC, Feb. 2020. Interview with family court judge in Jackson, MS, Jan 2019. Interview with family court judge in Colorado Springs, Colorado, July 2017.

83 See overview of state laws below.

84 Center for Substance Abuse Treatment. Drug Testing in Child Welfare: Practice and Policy Considerations HHS Pub. No. (SMA) 10-4556 Rockville, MD: Substance Abuse and Mental Health Services Administration, 2010 at page 1. ("A drug test alone cannot determine the existence or absence of a substance use disorder. In addition, drug tests do not provide sufficient information for substantiating allegations of child abuse or neglect or for making decisions about the disposition of a case.")

85 Interview with Dr. Mishka Terplan, Jan 20, 2020.

86 Interviews with Robin Steinberg, former director of Bronx Defenders, August 2018; Marty Guggeneheim, professor of law at NYU Law and Director of the Family Defense Clinic, April 2017; and Richard Wexler, Executive Director of National Coalition for Child Protection Reform, Jan 2020. Here I cite interviews with practitioners who offer a national perspective and who are familiar with family court practice in jurisdictions across the country. I do not cite laws because, by and large, and especially as relates to allegations of drug use, the decision to remove a child is not dictated by law (or even policy), but rather by hyper-local practice. This of course points to what many believe

to be the lawlessness and arbitrariness of foster system practice.

87 Id.

88 Id.

89 Id.

90 Interview with family court judge in Colorado Springs, Colorado, July 2017.

91 Interview with Emma Ketteringham, director of Bronx Family Defense Practice, March 2017.

92 Hilary Smith Connery, "Medication-Assisted Treatment of Opioid Use Disorder," 23 Harvard Review of Psychiatry 63-75 (2015).

93 U.S. Department of Health and Human Services. Substance Abuse and Mental Health Services Administration. "Methadone Treatment for Pregnant Women." Publication number SMA 06-4124 (2014), citation found in National Advocates for Pregnant Women, Frequently Asked Questions (FAQ) about Methadone and Pregnancy, available at <http://advocatesforpregnant-women.org/MethadoneFAQ.pdf>.

94 Laura Radel et al, ASPE Research Brief, USDHHS, "Substance Use, the Opioid Epidemic, and the Child Welfare System: Key Findings from a Mixed Methods Study", available at <https://aspe.hhs.gov/system/files/pdf/258836/SubstanceUseChildWelfareOverview.pdf>.

95 American Society of Addiction Medicine, "Appropriate Use of Drug Testing in Clinical Addiction Medicine," 2017; Karen E. Moeller et al., "Clinical

Interpretation of Urine Drug Tests," 92 Mayo Clinic Proceedings 774-796 (2017).

96 On file with author.

97 American Society of Addiction Medicine, "Appropriate Use of Drug Testing in Clinical Addiction Medicine" 2017.

98 This is especially troubling in the context of hair follicle testing as drug compounds concentrate in darker, thicker hair at a higher rate than lighter, thinner hair, leading to racially disparate consequences.

99 American Society of Addiction Medicine, "Appropriate Use of Drug Testing in Clinical Addiction Medicine," (2017) American College of Obstetricians and Gynecologists, Committee Opinion, "Alcohol Abuse and Other Substance Use Disorders: Ethical Issues in Obstetric and Gynecologic Practice," (2013). American Academy of Pediatrics Committee on Bioethics, "Informed Consent in Decision Making in Pediatric Practice," (2017) available at <https://pediatrics.aappublications.org/content/138/2/e20161484>

100 Zellman, G. L., Fair, C. C., Houbé, J., & Wong, M. (2002). "A search for guidance: Examining prenatal substance exposure protocols." *Maternal and Child Health Journal*, 6(3), 205-212.

101 Krista Drescher Burke, "Substance-exposed newborns: Hospital and child protection responses," 29 *Children and Youth Services Review* 1503-1519 (2007).

102 Many studies demonstrate that foster system interventions decrease repeated incidences of confirmed maltreatment, but this is entirely different from measuring whether and to what extent children, families and com-

munities are better off (by measures, for example, of access to healthcare/housing/food or their personal sense of safety and security) due to the interventions. All the aforementioned studies measure is that the intervention made it less likely that a caseworker would subsequently perceive and confirm “maltreatment,” a highly subjective determination. Further, the foster system itself is not an evidence-based intervention. In her paper “Unintended Consequences of Expanded Mandatory Reporting Laws,” Mical Raz notes “Mandatory reporting of suspected child abuse and neglect has a history of over 5 decades in the United States. Yet this policy, like many other approaches in the field of child abuse policy, is lacking in evidence.” Mical Raz, “Unintended Consequences of Expanded Mandatory Reporting Laws,” 139 *Pediatrics* e20163511 (2017). See also numerous reports, such as the Casey Family Programs Report assessing NYC’s foster system, finding that between 2006 and 2015, “the numbers of child fatalities in families known to ACS fluctuate yearly within a relatively narrow range, with a low of 39 and a high of 58, and the data do not suggest a pattern.” Casey Family Programs, *Assessment of New York City Administration for Children’s Services Safety Practice and Initiatives* (2017). See also Center for Public Policy Priorities report finding that rate of child maltreatment reporting or removals does not affect deaths of children. Center for Public Policy Priorities, *Child Abuse and Neglect Deaths in Texas* Dec 2009.

103 *Supra* fn 24.

104 The system spends over 60% of its roughly \$30 billion a year budget on removing and maintaining children outside the home and away from their parents, compared to less than 25% of the overall budget aimed at keeping children in their parent’s care. See Child Trends, *Child Welfare Financing SFY 2014: A Survey of Federal, State, and Local Expenditures* (2016).

105 Laura Santhanam, “How the Toxic Stress of Family Separation Can

Harm a Child," PBS, June 28, 2018, available at <https://www.pbs.org/news-hour/health/how-the-toxic-stress-of-family-separation-can-harm-a-child>.

106 Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, "The impact of foster care on development," *18 Development and Psychopathology* (2006). Christopher Wildeman, "Mental and Physical Health of Children in Foster Care," *Pediatrics*, Volume 138, Issue 5 (Nov. 2016), available at <https://pediatrics.aappublications.org/content/138/5/e20161118> (showing association between increased mental health issues and child placement in the foster system); Joseph J. Doyle, Causal effects of foster care: An instrumental-variables approach, *35:7 Children Youth Services Review* 1143 (2013), available at <https://www.sciencedirect.com/science/article/pii/S0190740911000983?via%3Dihub> (suggests placement in foster care increases the likelihood of emergency health episodes).

107 Doyle, Joseph, J Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care, American Economic Review*, 97 (5): 1583-1610 (2007) (showing that children on the margin of placement fare better when left at home than placed in foster system).

108 Kenny KS, Barrington C, Green SL, "'I felt for a long time like everything beautiful in me had been taken out': Women's Suffering, Remembering, and Survival Following the Loss of Child Custody," *Int J Drug Policy*, 2015, 26(11):1158–66; Nixon KL, Radtke HL, Tutty LM, "'Every day it takes a piece of you away': Experiences of Grief and Loss Among Abused Mothers Involved with Child Protective Services," *J Public Child Welf*, 2013, 7(2):172–93; Wall-Wieler E, Roos LL, Bolton J, Brownell M, Nickel NC, Chateau D, "Maternal Health and Social Outcomes after Having a Child Taken into Care: Population-Based Longitudinal Cohort Study Using Linkable Administrative Data," *J Epidemiol Community Heal*, 2017, 71(12):1145–51; Wall-Wieler E, Roos LL, Brownell M, Nickel N, Chateau D, Singal D, "Suicide Attempts and Com-

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114 Elizabeth Wall-Wieler et al., "Predictors of having a first child taken into care at birth: A population-based retrospective cohort study," *Child Abuse & Neglect* 1-9 (2018).

115 Kimberly Howard et al., "Early mother–child separation, parenting, and child well-being in Early Head Start families," *Attachment & Human Development* 5-26 (2011).

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nurturing has not resulted in better developmental outcomes.”).

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133 D. Werb et al., "The effectiveness of compulsory drug treatment: A systematic review," 28 *International Journal of Drug Policy* 1-9 (2016).

134 Laura Radel et al, ASPE Research Brief, USDHHS, "Substance Use, the Opioid Epidemic, and the Child Welfare System: Key Findings from a Mixed Methods Study," March 2018, <https://aspe.hhs.gov/pdf-report/substance-use-opioid-epidemic-and-child-welfare-system-key-findings-mixed-methods-study>

135 Substance Abuse and Mental Health Services Administration, (2014), "Results from the 2013 national survey on drug use and health: Summary of national findings" (NSDUH Series H-48, HHS Publication No. (SMA) 14 4863). Retrieved from <https://www.samhsa.gov>

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137 See e.g. Concerned Lifers Organization at Monroe Correctional Facility in Washington State, an organization of men who went straight from group homes to prison and who are now advocating against the foster care to prison pipeline. See also Laura Bauer and Judy L. Thomas, *Kansas City Star* Series titled "Throwaway Kids," Dec 15, 2019. ("Williamson's life in the state system epitomizes the path so many foster kids are forced down before being turned out on their own: he was removed because of neglect, not abuse;

moved between dozens of foster homes; struggled with school work; and only wanted to be back with his biological family...”)

138 Wall-Wieler, E., Roos, L., Brownell, M., Nickel, N. and Chateau, D. (2018). "Predictors of having a first child taken into care at birth: A population-based retrospective cohort study." *Child Abuse & Neglect*, 76, pp.1-9. See also Wall-Wieler, E., Brownell, M., Singal, D., Nickel, N. and Roos, L. (2018). *The Cycle of Child Protection Services Involvement: A Cohort Study of Adolescent Mothers*. *Pediatrics*, 141(6), p.e20173119.

139 “For the past year, The Kansas City Star has examined what happens to kids who age out of foster care and found that, by nearly every measure, states are failing in their role as parents to America’s most vulnerable children.” Laura Bauer and Judy L. Thomas, *Kansas City Star Series* titled “Throwaway Kids,” Dec 15, 2019.

140 See *Kansas City Star Series*, *Id.*, “Because my relatives were poor, I was unable to live with them according to CYS (Children and Youth Services),” said a 38-year-old Pennsylvania inmate who was in foster care for nine years before he aged out. “I feel this is wrong. Being in the foster care system, I feel, made me into a monster. I craved to be with my family.”

141 *Id.*, which cites to Joseph J. Doyle, "Causal effects of foster care: An instrumental-variables approach," 35:7 *Children Youth Services Review* 1143 (2013), available at <https://www.sciencedirect.com/science/article/pii/S0190740911000983?via%3Dihub> (suggests placement in foster care increases the likelihood of emergency health episodes). Joseph J. Doyle, "Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care," *Journal of Political Economy*, Vol. 116, No. 4, 2008.

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145 Thomas, S., Treffers, R., Berglas, N. F., Drabble, L., & Roberts, S. C. M., "Drug Use During Pregnancy Policies in the United States From 1970 to 2016," *Contemporary Drug Problems*, 45(4), 441–459 (2018), available at <https://doi.org/10.1177/0091450918790790>.

146 *Id.*

147 Margaret H. Lloyd, Stephanie Luczak & Samantha Lew, "Planning for safe care or widening the net?: A review and analysis of 51 states' CAPTA policies addressing substance-exposed infants," 99 *Children and Youth Services Review* 343-354 (2019).

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149 Congressional Research Service, Katherine Sparr, *Child Welfare Implementation of Adoption and Safe Families Act*, Nov. 8 2004.

150 Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (2002).

151 Elizabeth Brico, Talk Poverty, "The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families," August 23, 2019, available at <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/>.

152 William Vesneski, "State Law and Termination of Parental Rights," 49 *Family Court Review* 364-378 (2011).

153 For example, MS permits filing for termination after just six months of the child being in foster care. MS Code § 93-15-115 (2016).

154 William Vesneski, "State Law and Termination of Parental Rights," 49 *Family Court Review* 364-378 (2011).

155 E.g. Florida permits termination if a newborn is tested (blood, urine, or meconium) and there is ANY amount of alcohol/controlled substances; that alone is grounds for ITPR in FL. § 39.806, Fla. Stat. Ann.(1)(k).

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159 Congressional Research Service, "Child Welfare: The Adoption Incen-

tive Program and Its Reauthorization," 2014. This too, like everything foster system related, is particularly consequential for Black children, who are far less likely to be adopted than white children.

160 Congressional Research Service, Katherine Sparr, "Child Welfare Implementation of Adoption and Safe Families Act," Nov. 8 2004.

161 Christopher Wildeman, Frank R. Edwards & Sara Wakefield, "The Cumulative Prevalence of Termination of Parental Rights for U.S. Children," 2000–2016, *Child Maltreatment* 107755951984849 (2019).

162 The Appeal, Lisa Sangoi , "Two States Just Made It Easier to Take Babies Away From Mothers Who Use Drugs During Pregnancy," May 2018.

163 Children's Defense Fund et al, "Implementing the Family First Prevention Services Act: A Technical Guide for Agencies, Policymakers and Other Stakeholders" (2019).

164 As of the summer of 2019, methadone maintenance was pre-cleared for Family First reimbursement. *Id.*

165 A point Richard Wexler, executive director of National Coalition for Child Protection Reform, has made relentlessly. Congressional Budget Office, Family First Prevention Services Act of 2016, available at <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/costestimate/hr5456.pdf>(predicting an increase of \$130 million/year compared to \$5 billion the federal government spends annually on foster care.)

166 e.g. Rise Series titled "Surveillance Isn't Safety – How over-reporting and CPS monitoring stress families and weaken communities" (Sept. 17 2019), authored by several parents impacted by the foster system in New York City,

and edited by Rachel Blaustein.

167 See Bronx, NY Section

168 Family court is often described in grim terms. A 2009 New York State Senate report states, “Family Court is perhaps the saddest place in New York.” Abigail Kramer, The New School Center for New York City Affairs, “Is Reform Finally Coming to New York City Family Court?” (2016). This is equally, if not more so, true of Bronx Family Court; a drab building in the heart of the poorest congressional district in the nation, through which thousands of low income families file in and out every year. “The family court’s physical space reinforced the notion of justice and due process as unnecessary luxuries for Family Court.” Kara R. Finck, Applying the Principles of Rebellious Lawyering to Envision Family Defense, 23 Clinical L. Rev. 83 (2016)

169 National Coalition for Child Protection Reform, “Foster Care Panics” (2015). An ACS assessment performed by Casey Family Programs did not identify a pattern between increases and decreases in the use of foster care and the deaths of children. Casey Family Programs, “Assessment of New York City Administration for Children’s Services Safety Practice and Initiatives Key Findings and Recommendations,” (May 2017).

170 Abigail Kramer, Center for New York City Affairs, Child Welfare Watch, “ACS in Overdrive: Since the Death of a Harlem 6 Year Old, Are Fewer Families Getting the Help They Need?” (2017). Interview with Emma Ketteringham, director of the Family Defense Practice at Bronx Defenders, March 2017.

171 See data collected by author in Appendix A, showing that, for example, that White parents composed only 2.8% of investigations and 3% of indicated investigations. A committee of Bronx Family Court Judges and other actors tasked with addressing overrepresentation of Black and Brown families

in family court describe the disparity as “staggering.” In 2009, despite Black and White children representing roughly the same percent of the population, Black children were over 50% of the children in the foster system. Heather O’Hayre, “Bronx County Family Court Focuses on Disproportionate Minority Representation,” *Juvenile and Family Justice Today* (2011). Martin Guggenheim has written that of the New York City foster system “a veritable Martian couldn’t help but recognize to be apartheid.” Martin Guggenheim, Symposium, “The Rights of Parents With Children in Foster Care: Removals Arising From Economic Hardship and the Predictive Power of Race,” 6 *N.Y. City L. Rev* 61, (2003). For historical data see Andrew White, John Courney & Adam Fifield, “The Race Factor in Child Welfare,” *Child Welfare Watch* June 1998.

172 Interview with Joyce McMillan, activist and parent advocate, March 13, 2018. The New School Center for New York City Affairs Abigail Kramer, “Child Welfare Surge Continues: Family Court Cases, Emergency Child Removals Remain Up,” (July 2018) (conversation with caseworker who states that ACS staff are more inclined to take cases to court rather than not, and then let the judge dismiss the case so that the case worker won’t be on the cover of the *Daily News* or end up with criminal convictions for overlooking a potential child fatality case). Historically, ACS caseworker motto was reported being “when in doubt, pull ‘em out”. Interview with Chris Gottlieb, family defense attorney and co-director of the NYU School of Law Family Defense Clinic, January 2017.

173 The New School Center for New York City Affairs, Abigail Kramer, “Child Welfare Surge Continues: Family Court Cases, Emergency Child Removals Remain Up,” (July 2018). ACS refers to them as emergency removals, though that is a misnomer.

174 *Id.*



175 The height of the increase in crack use in New York City occurred in the late 1980s. Between 1985 and 1991, the number of children in the foster system rose from 16,230 to 49,000. The Juvenile Rights Division estimates that over 60% of its cases had a drug related allegation, and over 20% of the children removed were under the age of one (most likely removals related to drug use during pregnancy). Lenore Gittis and Carol Sherman, "Crack/Cocaine, Children and New York City's Family Court," 64 N.Y. St. B.J. 22 (1992). It was during this period that NYC hospitals developed and instituted the practice of testing (some) pregnant people and their newborns for evidence of drug use without their informed consent, a practice that continues to this day. *Id.* Newspapers teemed with stories about nurseries filled with babies, known as boarder babies, who were withheld from their families and spent the first few months of their lives in the nurseries. The vast majority of these babies returned to their families eventually, without any services offered to their family. Salonee Banham, "Crack is Wack: Activism, Rhetoric, and the Creation of a Crisis Surrounding the Regulation of Prenatal Drug Use in New York City from 1987-1997," Undergraduate Thesis, Columbia University, page 25. In 1989, New York City only had two drug treatment programs for pregnant people. Hemphill, Clara, "Pregnant Addicts, Aborted Funds," *New York Newsday*, 10/29/90, See also Jeremy Kohomban et al, Brookings Institution, "The Foster Care System Was Unprepared for the Last Drug Epidemic-Let's Not Repeat History" (2018) (saying of the perceived crack epidemic, "Thousands of children were removed from their families and communities. Parents struggling with substance abuse often were criminalized, rather than provided access to the recovery programs, resources and supports that might have helped them remain intact as families or reunite with their children.")

176 David Tobis, *Child Welfare Fund Chronology*, available at <https://david-tobis.com/cwf-chronology/>. Casey Family Programs, *Assessment of New York City Administration for Children's Services Safety Practice and Initiatives Key Findings and Recommendations* (May 2017). NYC Administration for Chil-

dren's Services, Foster Care Task Force Inter Agency Report (2018).

177 Schulyer Center Analysis, Reauthorization of New York's Child Welfare Financing Law (2012). NYC Administration for Children's Services, Report of the Interagency Foster Care Task Force (2017).

178 See interview with Marty Gugenheim, April 2017.

179 Casey Family Programs, Assessment of New York City Administration for Children's Services Safety Practice and Initiatives Key Findings and Recommendations (May 2017)

180 Id.

181 Casey Family Programs, Assessment of New York City Administration for Children's Services Safety Practice and Initiatives Key Findings and Recommendations (May 2017) estimates one in five NYC children have had contact with ACS in the past five years. Taking into consideration that the overwhelming majority of children that come into contact with the New York City foster system are Black and/or Latinx, we estimate that one in three Black or Latinx children have had contact with the NYC foster system in the past five years alone, extrapolating this figure using census data from <https://data.cccn-ewyork.org/data/map/98/child-population#98/a/3/148/40/a>

182 For a historical overview of this, see David Tobis, *From Pariahs to Partners: How Parents and their Allies Changed New York City's Child Welfare System* (2013).

183 See Daniel Wise, "Agencies Hired to Represent Parents on Abuse and Neglect," N.Y. L. J. (May 14, 2007), <http://www.newyorklawjournal.com/id=900005481074/Agencies-Hired-to-Represent-Parents-on-Abuse-and->

## Neglect

184 By contrast, the first providers of city funded legal representation of children in child abuse and neglect proceedings, the Juvenile Rights Division of the Legal Aid Society (LAS), opened in 1962, and has consistently received significantly more city funding than parent representation offices. Until the institutional providers of parent representation opened their doors in 2007, parents accused of abuse and neglect were represented by attorneys who had no affiliation with law offices with comparable resources to the LAS. Martin Guggenheim, "How Children's Lawyers Serve State Interests," 6 Nevada Law Journal 805, Part II (2006). See generally Martin Guggenheim, Chris Gottlieb and Madeleine Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 N.Y.U. Rev. L. & Soc. Change 539 (2017).

185 Chris Gottlieb, co director of the NYU Law Family Defense Clinic and long time family defense attorney in NYC, recalls a time in NYC family courts prior to the advent of institutional defense when basic legal mechanisms to safeguard the rights of parents, such as invoking the right to hearings on whether ACS has sufficient legal basis to justify family separation, were not routinely used. Interview with Chris Gottlieb, Family Defense Attorney, Co-Director NYU Law Family Defense Clinic, January 2017. See also Lucas A. Gerber et al., "Effects of an interdisciplinary approach to parental representation in child welfare," 102 Children and Youth Services Review 42-55 (2019).

186 Commission on Parent Legal Representation, Report to Judge DiFiore, February 2019, available at [http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR\\_Commission-Report.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf). Jessica Horan-Block and Elizabeth Tuttle Newman, "Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation," 22 CUNY Law Rev 2 382 (2019).

187 Martin Guggenheim Chris Gottlieb and Madeleine Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 N.Y.U. Rev. L. & Soc. Change 539 565 (2017) (stating more than 75% of parents prosecuted civilly are represented by indigent defense offices). Off of the Deputy Chief Adm’r For Justice Initiatives, *Self Represented Litigants: Characteristics, Needs, Services* 4-5 (Dec 2005) (83% reported household incomes under \$30,000 annually, and over 57% reported an annual income under 20,000). In response to a data request, NY Office of Courts Administration said it did not track how many litigants in child abuse and neglect proceedings qualified for indigent defense representation, see email on file with Movement for Family Power.

188 See data gathered by report author in appendix.

189 See data gathered by report author in appendix , showing that, for example, 59.8% of people with an indicated investigation are recorded as female, as opposed to 40.1% male.

190 *Nicholson v. Scoppetta* 2004 NY Slip Op 07617 [3 NY3d 357]. WNYC Yasmeen Kahn, *Family Separation in Our Midst*, April 17, 2019.

191 All data have been obtained by the report author from ACS and is available in Appendix A. This data is specific to Bronx, NYC. Cases in which a child attends school irregularly and the parent uses drugs may be coded as educational neglect instead of parental drug/alcohol use, despite drug use being the driving motivation for the ACS and/or family court action.

192 Prison Policy Initiative, "Some States Have Largely Ended the Warn on Drugs. Other States Not So Much," 2017, [https://www.prisonpolicy.org/graphs/pie2017\\_war\\_on\\_drugs\\_NY\\_OK\\_1992-2015.html](https://www.prisonpolicy.org/graphs/pie2017_war_on_drugs_NY_OK_1992-2015.html)

193 Jeanette Vega, "Loosen this Vise on Parents, N.Y.: How an Unjust State Law Blocks Many Capable Adults from Working with (and Properly Raising Their Own) Children," NY Daily News (Aug. 23 2019).

194 Daliah Heller & Denise Paone, "Access to Sterile Syringes for Injecting Drug Users in New York City: Politics and Perception" (1984–2010), 46 Substance Use & Misuse 140-149 (2011).

195 Id. Interview with Kassandra Frederique, director, NY Drug Policy Alliance, April 2018.

196 Id.

197 See, for example, the work for the NY Drug Policy Alliance and NYC Harm Reduction Coalition.

198 See generally Alison Korn, "Detoxing the Child Welfare System," 23 Va. J. Soc. Pol'y & L. 293 (2016)

199 Family Court Act § 1012(f)(i)(B)

200 Dante M. v. Denise J., 661 N.E.2d 138 (N.Y. 1995). Additional case law, such as Matter of Jones v. Jones, 34 Misc 3d 1226(A), 2012 NY Slip Op 50257(U) (Fam. Ct. Kings Co. 2012) at \*9, further clarifies that nexus of harm must be backed by evidence; it's not sufficient to state harm exists.

201 1046(a)(iii)

202 Interviews with Emma Ketteringham, March 7 2018. Oren Yaniv, NY Daily Post, "WEED OUT: More than a dozen city maternity wards regularly test new moms for marijuana and other drugs," 2012, <https://www.>

nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292. The legality of this has never been litigated...

203 See ACS "Safety and Risk Assessment Resource Guide," provided to report author in response to query about ACS policies regarding prenatal/parental drug use; [https://www1.nyc.gov/assets/acs/pdf/child\\_welfare/2018/riskandsafetyguide.pdf](https://www1.nyc.gov/assets/acs/pdf/child_welfare/2018/riskandsafetyguide.pdf). The author of this report also reviewed four different mandatory reporter trainings, which all state that a newborn positive toxicology is reportable despite the absence of NY State law delineating it as abuse or neglect.

204 Parents are not informed of their right to refuse to answer questions or take drug tests at the investigation phase.

205 This fact is made all the more surprising by the fact that ACS invests significant resources in integrating multidisciplinary expertise from a number of related fields to support investigations by CPS staff, including co-located experts in domestic violence, mental health and substance abuse.

206 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

207 Jonathan Wolfe, "Cannabis in New York: Here's How the Laws Are Changing," NYTimes, June 20, 2018.

208 For example, interview with family court judge in Tulsa, Oklahoma, July 2018. Interview with judge in Colorado Springs, July, 2017. Interview with judge in Jackson, MS, January 2019. The interviewees in these jurisdictions all relayed the same sentiment, that their dockets are now so full of "more serious" drug allegations, such as methamphetamines and opioids, that

their jurisdiction's CPS agencies no longer have time or resources to pursue cannabis cases. These jurisdictions' CPS agencies have significantly smaller budgets than New York City's ACS.

209 See, e.g. interview with Michael Wagner, Director of Permanency, Children Aids Society, April 2, 2018 (stating that so long as a parent was under the influence of a substance the parent cannot be counted on to make decisions in the best interests of the child. Also stating "Cannabis is thought by a lot of families as not a problematic drug to be using, but any drug that is psychoactive in that way and causes your perception of your world to be different is really a problem if you are trying to parent kids because you can't make sane good decisions").

210 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

211 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017. See generally introduction discussion of policing of Black and Brown motherhood and motherhood of those living in poverty.

212 At the request of mothers and their advocates, I am not using names of programs. Overall, the drug treatment programs that parents in the foster system are mandated to participate in are very different than private drug treatment programs.

213 For example, interview with Michael Wagner, Director of Permanency, The Children's Aid Society, April 2, 2018, stating that parents in Westchester could drink the afternoon away but have the benefit of child care. Anonymous interview with ACS staff in preventive services division, Nov. 20, 2018, stating that it seems widely acknowledged that wealthier people can use drugs and

keep their kids. Interview with Shernet Neufield Gray, Director, Substance Use Disorders Policy, Planning and Services, Administration for Children’s Services, Feb. 22, 2019, stating that wealthier families rarely come under the purview of child protective services for their drug use “for a variety of reasons”.

214 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

215 Id.

216 Id.

217 See discussion in introduction.

218 In an interview with Shernet Neufield Gray, Director, Substance Use Disorders Policy, Planning and Services, Administration for Children’s Services, Feb. 22, 2019, she stated both that the agency is working towards incorporating harm reduction, but also that abstinence remains the goal for fear of child fatalities such as a “child eats someone’s stash of methadone or cannabis edible.”

219 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

220 Interview with Emma Ketteringham, Director of the Family Defense Practice at Bronx Defenders, February 2017.

221 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

222 Id.



223 Interview with Dr. Mishka Terplan, June 30, 2019

224 Martin Guggenheim writes “Child welfare and Family Court practice feels, to those who endure it, like a process designed to overwhelm and exact despair from parents. Parents who succeed in child welfare proceedings are usually those who are able to cope with extraordinary stress needlessly imposed on them.” Martin Guggenheim, Parental Rights in Child Welfare Cases in New York City Family Courts, 40 Colum. J.L. & Soc. Probs. 507 524 (2007)

225 ACS was not able to provide data on how many termination of parental rights proceedings involved allegations of drug use. In 2017 alone, 323 termination of parental rights petitions were filed in the Bronx. Attorneys who practice in Bronx family court state that almost all the proceedings involved an allegation of drug use at some point in the course of the case.

226 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (Feb 2013), available at [https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53\\_english.pdf](https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53_english.pdf).

227 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

228 Michelle Alexander, Go to Trial, Crash the System, NY Times March 10, 2012.

229 The law requires only that a caseworker have some credible evidence of neglect to make a finding, unlike other jurisdictions that have a higher evidentiary burden. This evidentiary standard is much lower than other states and contributes to NYC and NY State’s allegedly high rate of child maltreat-

ment. Casey Family Programs, Assessment of New York City Administration for Children's Services Safety Practice and Initiatives (2017). "New York State has a broad definition of maltreatment, especially compared to the particularly narrow definitions used in other large jurisdictions. In addition, the state sets a relatively low bar to substantiate a report ("some credible evidence of maltreatment"), contributing to higher rates of substantiation (also known as the maltreatment rate or victimization rate). In contrast, some states require higher standards of evidence for substantiation, such as "a preponderance of the credible evidence" (e.g., Alabama) or "substantial evidence" (e.g., Pennsylvania)."

230 Data obtained suggests that 40% of indicated investigations for drug use never result in a filing in court.

231 Anonymous interview with ACS staff in preventive services division, Nov. 20, 2018.

232 In New York State, a coalition of advocates called the Parent Legislative Action Network lobbied the state for much needed reform to the state central registry. Their effort was incredibly successful but was ultimately stalled by a gubernatorial veto right before the winter holiday. Zach Williams, City and State New York, "Cuomo Vetoes Bill Aimed to Help People of Color Keep Custody of Their Kids," December 16, 2019, available at [https://www.cityandstateny.com/articles/policy/nonprofits/cuomo-vetoes-reforms-aimed-help-people-color-keep-custody-their-kids.html?utm\\_source=First+Read+Newsletters&utm\\_campaign=7cc20fa716-EMAIL\\_CAMPAIGN\\_2019\\_12\\_16\\_09\\_44&utm\\_medium=email&utm\\_term=0\\_252d27c7d](https://www.cityandstateny.com/articles/policy/nonprofits/cuomo-vetoes-reforms-aimed-help-people-color-keep-custody-their-kids.html?utm_source=First+Read+Newsletters&utm_campaign=7cc20fa716-EMAIL_CAMPAIGN_2019_12_16_09_44&utm_medium=email&utm_term=0_252d27c7d)

233 Ronald Richter, former ACS commissioner and family court judge, states that once ACS files a case, it's unlikely that a judge will dismiss it outright. He says of petitions filed without strong enough cause of action "Judges

may yell and get frustrated with ACS...But they're anxious: Maybe there's something here." The New School Center for New York City Affairs Abigail Kramer, "Child Welfare Surge Continues: Family Court Cases, Emergency Child Removals Remain Up," (July 2018) Martin Guggenheim, who has practiced in New York City family courts for three decades, and is a leading legal advocate and scholar of family defense, observes that judges often assent to ACS recommendations without the inquiry required by law. Martin Guggenheim, "Parental Rights in Child Welfare Cases in New York City Family Courts," 40 Colum. J.L. & Soc. Probs. 507-524 (2007). Before the rise of institutional defenders of parents in NYC, the situation was much worse. Judges admitted that they were unwilling to "hold ACS accountable by refusing to grant their petitions in cases" for fear of "making a mistake and having a child die." N.Y. Special Child Welfare Advisory Panel, Advisory Report on Front Line and Supervisory Practice (2000). The Office of Court administration found that family court judges side with ACS 99%., David J. Lansner, Abolish the Family Court 40 Colum. J.L. Soc. Probl. 637-638 (2007) citing Office of Court Administration, State of New York, Family Court Statistics, Twenty Fourth Annual Report, VI. 11 (2001).

234 Interview with family defense attorney in the Bronx, Jan 2017.

235 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017. As to whether these judicial determinations have been challenged, a commentator describes the appellate division's "evisceration" of family court's power to order child protective agency to comply with services, court orders etc. "The appellate courts have made review largely meaningless, often ignoring pervasive violations of the Constitution, New York statutory and decision law, and rules of evidence as harmless error." David J. Lansner "Abolish the Family Court" 40 Colum. J.L. Soc. Probl. 637-638 (2007).

236 Interview with family defense attorney January 2017. The mother referenced was found neglectful of her children because her nightly routine, after her children went to sleep, included smoking cannabis and watching Netflix. Also in evidence was that her children had no idea that she smoked pot. ACS claimed, and the judge accepted without any further demand for evidence, that the pot caused her to sleep more than usual and that she could not find a better job and thus was neglectful of her kids. The mother's attorney, who intended to put on expert testimony to contradict ACS's claim, was told "I'm the wrong judge to make this argument to."

237 Not discussed here but worthy of investigation is the use of drug tests within family courthouses themselves. Parents are asked to take drug tests while at hearings, and have no meaningful opportunity to contest negative results. Furthermore, these drug tests state on the box "not to be used for forensic purposes". This is also true of many of the drug tests conducted outside of court that are entered into evidence.

238 Oren Yaniv, New York Daily News, "Weed Out: More than a dozen city maternity wards regularly test new moms for cannabis and other drugs," December 29, 2019.

239 See data analysis above

240 Am. College of Obstetricians & Gynecologists, "Opioid Use and Opioid Use Disorder in Pregnancy," Committee Opinion 711 (August 2017, reaffirmed 2019). Reece-Stremtan S, Marinelli KA. ABM clinical protocol #21: guidelines for breastfeeding and substance use or substance use disorder, revised 2015. Breastfeed Med 2015;10:135-41.

241 Leading NYC child welfare reform activist Joyce McMillan often uses this phrase.

242 Supra fn176-77 and accompanying text

243 New York City Administration for Children's Services Website Page Titled Evidence Based Models, available at <https://www1.nyc.gov/site/acs/about/inside/wi/ebm.page>; Casey Family Programs, "Implementing Evidence Based Child Welfare, The New York City Model," available at <https://casey-familypro-wpengine.netdna-ssl.com/media/evidence-based-child-welfare-nyc.pdf>.

244 ACLU and Human Rights Watch, Jasmine Sankofa, "You Miss So Much When You Are Gone: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma," (2017), available at <https://www.aclu.org/report/you-miss-so-much-when-youre-gone>.

245 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

246 Id.

247 Id.

248 Interview with staff at mother child residential treatment program in NYC, January 30, 2018. One staff member said "If you were screaming at [the] ACS worker when you first got there, our goal is to teach you to regulate your emotions, calm down. Our clients are not fond of ACS but for the rest of your life there will be situations where you don't like someone, like your boss."

249 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

250 For example, staff at one mother/child residential treatment program

said to me: “this intergenerational child welfare situation, either you were in foster care or your grandmother was in foster care and now your child is in foster care, and these women don’t have the highest quality parenting skills because they never received them.” Interview with mother/child residential treatment staff, January 30, 2018.

251 Interview with staff at mother/child residential treatment program, January 30, 2018.

252 Interview with Jonathan Giftos, January 2020.

253 Interviews with over 15 family defense attorneys, social workers and parent advocates in the Bronx, NY, January – February 2017.

254 NYC Administration for Children’s Services, Report of the Interagency Foster Care Task Force (2017).