COMMENT: CHILD PROTECTION, EVIDENTIARY STANDARDS AND OPEN ADOPTION

Solangel Maldonado*

Legal scholars have long been critical of the child protection system, documenting its gross inequities and injustices that disproportionately separate Black and Native-American children from their families. In the last few years, amidst calls to defund the police and abolish prisons, we have seen an explosion of scholarship advocating for the abolition of the child protection system, which many scholars have re-labeled the “family regulation” or

* Eleanor Bontecou Professor of Law, Seton Hall University School of Law. Thanks to Elisia Tadros for excellent research assistance.


6. See Brianna Harvey, Josh Gupta-Kagan & Christopher Church, Reimagining Schools’
“family policing” system. These scholars have demanded that we dismantle the system entirely because it needlessly breaks up myriad low-income families and families of color, causes children and parents irreparable harm, and despite decades of reform efforts, continues to fail families. Yet some commentators, even those who support abolition of the child protection system, are wondering how, in the absence of such a system, society will protect children with parents who are unable to care for them (even with state support) or who pose a genuine threat to their safety. If we abolish the child protection system (specifically, foster care), how will the state protect children who have been severely abused in their homes and are at risk of further abuse? In other words, what system would we have left after abolition?

Josh Gupta-Kagan is one of the leading scholars on the “child protection system”—his preferred term—and has brought attention to the abuses of the system that the public and many legal scholars have overlooked, such as the hidden foster care system and the law’s failure to consider alternatives to the


9. Roberts, supra note 7, at 459 (discussing failed efforts to reform the family policing system).

10. AJ Ortiz, Abolishing the Child Welfare System Would Harm Victims of Child Abuse, CHILD USA (June 21, 2021), https://perma.cc/NBZ7-AMQ7 (stating that “calls to abolish the child welfare system . . . raise important questions about how to appropriately deal with serious child protection issues such as child sexual abuse (CSA), physical abuse, or medical neglect” and that “until scholars and advocates can lay out a clear vision for a different way to address severe cases of abuse such as intrafamilial CSA, it is difficult to support calls to fully abolish the child welfare system”); Lenette Azzi-Lessing, Reform the Child Welfare System to Protect Vulnerable Children, THE HILL (Feb. 3, 2021), https://perma.cc/E8BA-KUVV (acknowledging the harms caused by the child protection system but asking “what would happen to the highly vulnerable children in CPS custody who truly need state oversight: those with severe disabilities and/or medical needs and children whose parents really do pose a danger to them, while a new system is being built” and noting that “keeping the [child protection] system intact is necessary due to its critical mandate to protect endangered children who have nowhere else to turn”).

11. Josh Gupta-Kagan, Confronting Indeterminacy and Bias in Child Protection Law, 33 STAN. L. & POL’Y REV. 217, 219 n.5 (2022) (explaining that “[w]hile the phrase ‘family regulation system’ accurately describes the legal system at issue, I refer to the ‘child protection system’ to emphasize what should be the legal system’s focus”).

termination of parent-child relationships.13 Despite his profound understanding of the harms caused by the child protection system, in this important piece, *Confronting Indeterminacy and Bias in Child Protection Law*, Gupta-Kagan does not call for its abolition. As he explains, his proposals “do not eliminate the present child protection legal system.”14 Rather, he focuses on limiting state intervention unless necessary to protect children from severe maltreatment and curbing agency and judicial discretion in cases where intervention is necessary. His reforms outline what a child protection system that respects families and protects children should look like. Before doing so, however, Gupta explains why the system has failed the majority of children and families it has touched.

As indicated by the article’s title, Gupta-Kagan attacks the indeterminacy of the child protection system—a critique that Michael Wald levied at least a half century ago,15 and which the Supreme Court acknowledged as early as forty years ago.16 But Gupta-Kagan demonstrates that indeterminacy at various stages—in the broad and vague definitions of abuse and neglect that lead to needless state intervention, and in interventions and conditions for reunification that are often unrelated to the parental conduct at issue—builds on itself. He concludes that this indeterminacy leads to various forms of bias—race, class, gender, immigrant, among others—that affect agency and court decisions and “empowers state authorities to exercise control of low-income and minority families.”17

Each of Gupta-Kagan’s proposals reduces the likelihood that bias will lead to needless state intervention and family separation. For example, he proposes that child maltreatment statutes define neglect and abuse with specificity18 and set forth the maximum level of intervention that can result from the specific maltreatment.19 Such reforms, if adopted, would reduce the number of abuse and neglect cases and would also keep more families together even when the state proves child maltreatment, as long as the parental conduct that caused the state to intervene does not pose a serious risk to the child’s safety. His proposal that states spend as much money to prevent family separation as they do to keep a child in foster care20 would ensure that families are not separated or kept apart due to poverty—because they lack adequate housing, for example. Similarly, his proposal to tether the requirements for reunification to the parental conduct that

---

16. Santosky v. Kramer, 455 U.S. 745, 762, 763 (1982) (observing that the risk of erroneous termination of parental rights is high as a result of “imprecise substantive standards” and “cultural or class bias” against parents who are typically the subject of termination proceedings).
18. Id. at 273.
19. Id. at 273-74.
20. Id. at 256-57.
led to state intervention21 would protect children from harm while preventing the state from conditioning reunification on compliance with dominant parenting norms unrelated to the child’s safety.

ADOPTING HIGHER EVIDENTIARY STANDARDS

Although Gupta-Kagan’s proposals would significantly improve the current child protection system, the law can do even more to protect children and families and to further reduce the possibility that biases will infect agency and court decisions. Currently, a determination that a child is abused or neglected may be based on the preponderance of the evidence.22 A higher evidentiary standard would reduce the likelihood of erroneous adjudications, needless state intervention, and family separation. The Supreme Court has recognized the risk of erroneous adjudications in termination of parental rights proceedings and required clear and convincing evidence of the statutory grounds for termination.23 But it has never addressed the standard for adjudications of abuse and neglect and, despite the fundamental liberty interests at stake and the risk of erroneous adjudication, lower courts have refused to extend the clear and convincing evidence standard to abuse and neglect cases.24 These courts have held that the preponderance of the evidence standard is appropriate in abuse and neglect proceedings and that the Due Process Clause does not require the higher clear and convincing standard required in termination proceedings.25

These courts distinguish between proceedings that may lead to the child’s temporary placement in foster care and proceedings that may result in the permanent termination of the parent’s rights to the child.26 However, this

---

21. Id. at 222.
25. See cases cited supra note 24.
26. See People in Int. of O.E.P., 654 P.2d at 316 (“the adjudicatory phase of a dependency proceeding does not affect the natural parent’s liberty interest in the parent-child relationship to the same constitutionally significant degree as does a termination proceeding”); In re Sabrina M., 460 A.2d at 1015, 1017 (holding that unlike a termination of parental rights proceeding, “the deprivation of rights in the child protection adjudication . . . is neither final
distinction fails to recognize the severity and long-term consequences of an adjudication of abuse or neglect. Although an adjudication of abuse or neglect lacks the finality of termination of parental rights, it is the first step on the road to termination of the legal parent-child relationship. Even with Gupta-Kagan’s reforms, such an adjudication could result in removal of the child from the home and the imposition of conditions for reunification that a parent may struggle to satisfy. Such consequences not only disrupt family integrity and cause emotional (and, in many cases, physical) harm, but also provide the state with the evidence it needs to move forward with a termination petition. Although Gupta-Kagan’s proposed standard for termination of parental rights would restrict terminations to cases in which it is necessary to protect the child from severe harm, given the state’s disproportionate resources and power which “almost inevitably dwarf[s] the parents’ ability to mount a defense,” this standard would reduce unwarranted terminations but would not completely eliminate them.

Moreover, the risk of erroneous adjudication is just as high in abuse and neglect cases as in termination cases for the reasons the Supreme Court recognized: “cultural or class bias” against parents who are typically the subject of abuse and neglect proceedings—specifically, racial minorities and parents who are poor—and the state’s disproportionate power vis-à-vis the parent. Some states have recognized these risks and accordingly require that the state prove abuse or neglect by clear and convincing evidence. This is also the standard required in cases governed by the Indian Child Welfare Act. Pairing Gupta-Kagan’s proposals for determinate substantive standards with a higher evidentiary standard would further decrease the likelihood of needless state intervention.

Currently, the evidentiary standard for abuse and neglect varies by state.

---

27. See Nicholas Bogel-Burroughs, Ellen Barry & Will Wright, Ma’Khia Bryant’s Journey Through Foster Care, N.Y. TIMES (May 8, 2021) https://perma.cc/RXB8-9NK7.
28. Santosky, 455 U.S. at 763.
29. Id.
31. 25 U.S.C. § 1912(e) (“No foster care placement may be ordered . . . in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child”).
Given the high stakes of these proceedings, state legislators should follow the lead of model states and immediately amend their statutes to require proof of child maltreatment by clear and convincing evidence. A piecemeal state-by-state approach, however, is likely to take time and is subject to varying political conditions. Therefore, Congress should amend the Child Abuse Prevention and Treatment Act, which provides federal funding to states to improve their child protection system, to make funding contingent on the state’s adoption of the higher evidentiary standard. Given Congress’s recognition that “national policy should . . . provide support for needed services to prevent the unnecessary removal of children from families,” bipartisan support for a standard that may reduce the likelihood of unnecessary placements may be possible.

**TERMINATION, GUARDIANSHIP, AND OPEN ADOPTION**

Gupta-Kagan has been one of the strongest critics of the standards for termination of parental rights and would not terminate a parent’s rights except when maintaining a relationship with the parent would cause the child serious harm. He favors guardianships over adoption because, unlike adoption, guardianships do not require termination of parental rights. While I agree that the law’s current standards for termination of parental rights lead to unnecessary terminations, create legal orphans, and often cause children and their families serious harm, there may be cases in which termination might be warranted, even if not necessary to protect the child from harm resulting from the relationship with the parent. Termination may be warranted when necessary to protect the child from impermanency, specifically when the family that is able and willing to provide the child with a permanent home will only do so if they can adopt the child.

Consequently, while I agree with Gupta-Kagan that, in most cases, termination of parental rights is unwarranted absent evidence that maintaining any relationship between the parent and the child would cause the child harm, I would broaden the definition of harm to include cases which the foster family rejects guardianship but is willing and able to provide the child with a permanent and loving adoptive home. I agree with Gupta-Kagan that guardianships are generally preferable to adoption, especially in cases involving older children, precisely because they do not require termination of the legal parent-child relationship. I would urge the state to encourage foster parents to consider guardianship and not terminate a parent’s rights if guardianship is an option.

---

35. See Gupta Kagan, supra note 11, at 222.
36. See id.; see also Gupta-Kagan, supra note 13, at 8.
However, if the foster family with whom the child shares an emotional bond insists on adoption, terminating the parents’ rights may be necessary to protect the child’s need for permanency.

In the vast majority of states, a child cannot be adopted until the parents’ rights are terminated. Although guardianships provide children with the permanency of adoption without severing the parent-child relationship, not all foster parents will be open to guardianships. Family members may accept or prefer guardianships over adoption, but non-kinship foster parents may insist on the title and rights of a parent, especially when the child is very young or has been in their care since infancy. Guardians have similar authority and responsibilities as parents, but they do not yet enjoy the same societal respect that parents enjoy. Foster parents are aware of society’s acceptance (and celebration) of adoptive families as well as its lack of recognition of families formed through guardianship and thus, may wish to provide a child with the sense of belonging that comes with being part of an accepted family form. Importantly, adoptive parents enjoy the security of knowing that they are the child’s legal parent and that the biological parents cannot interfere with those rights. Guardianships, in contrast, may be vacated. Thus, while adoptive parents refer to their children as “my son,” “my daughter,” or “my child,” legal guardians may not be able to use the same words to describe the children in their care. Even though guardianships are rarely vacated, the fear that a parent may seek to vacate a guardianship may lead foster parents to insist on adoption. For these reasons, termination of parental rights should be an option in cases in which the foster parent is likely to adopt the child but refuses guardianship, thereby creating the risk that the child will lose the stability of a permanent home.

Termination of the parents’ rights and the child’s adoption, however, need not signify the end of the birth parent’s relationship with the child. As Gupta-Kagan points out, the open adoption model used in most private agency domestic adoptions and in some adoptions from foster care (generally after a parent voluntarily agrees to termination of their parental rights) allow a birth parent to maintain contact with the child after termination and adoption. Many states recognize agreements for post-adoption contact and will enforce these agreements so long as contact is in the child’s best interests. Unfortunately, most states do not allow parents whose rights have been involuntarily terminated

to maintain contact with the child.40 Given the studies demonstrating that the vast majority of children want contact with their biological families and that such contact benefits children, especially children of color who are adopted transracially,41 courts should exercise their equitable power to order post-termination and post-adoption contact when it is in the child’s best interests.42 A presumption of post-termination contact would transform a termination order from the “civil death penalty”43 it currently represents to an order for a “renegotiated family”44 relationship that allows the birth parent to provide the child with love even though they are unable to provide for their day-to-day care.

CONCLUSION

Abolitionists might argue that Gupta-Kagan’s proposals represent another effort to reform a system that is irredeemable and are therefore doomed to fail. Given the history of the child protection system, this is not an unreasonable position. However, until we have the political will to adopt comprehensive reforms that provide families with the resources they need to parent—protections from food and housing insecurity, child care, and help for substance abuse and mental illness—before the child is at risk of severe harm, Gupta-Kagan’s


42. See In re Ava W., 248 A.3d 675, 683 (Conn. 2020) (holding that “a trial court has authority to issue a posttermination visitation order that is requested within the context of a termination proceeding, so long as it is necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child” and that this “authority derives from the court’s broad common-law authority over juvenile matters and the legislature’s . . . codification of that authority”); In re Adoption of Rico, 905 N.E.2d 552, 559 (Mass. 2009) (concluding that it is within a court’s equitable power to order “postadoption visitation or contact between a child and [their] biological parents” if it is in the child’s best interests); In re Adoption of Vito, 728 N.E. 2d 292, 303 (Mass. 2000); see also Maldonado, supra note 41, at 329-30, 359; Mabry, supra note 40, at 322-23.

43. In re Parental Rts. as to N.D.O., 115 P.3d 223, 226 (Nev. 2005) (noting that “[c]ourts have characterized parental rights termination as a “civil death penalty””) (internal quotation marks omitted).

44. This term is borrowed from Robert E. Emery, Renegotiating Family Relationships: Divorce, Child Custody, and Mediation (2012).
proposed reforms, along with my proposal to require clear and convincing evidence of child maltreatment, will reduce the number of families who are needlessly ensnared in the system. While I would expressly consider harm that may result from impermanency as well as harm resulting from maintaining a relationship with the parent when determining whether termination of parental rights is necessary, with or without my broader definition of harm Gupta-Kagan’s reforms would significantly reduce the number of cases in which the state needlessly terminates a child’s relationship with their birth family.

45. Specifically, his proposal to define child maltreatment with specificity, list the maximum intervention that can result from specific conduct, ensure the requirements for reunification respond to the parental conduct that led to state intervention, and to redirect the resources spent to keep a child in foster care to prevent family separation.