

COMMENT: TRANSFORMING REQUIRES ENDING THE CARCERAL LOGIC OF THE CHILD WELFARE SYSTEM

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Over twenty years ago, I began my legal career representing children and youth in child welfare proceedings in the San Francisco Bay Area. The process has remained similar: Then, as now, someone contacts a hotline to report parents or caregivers for maltreatment; a specific person or unit screens reports; child welfare workers investigate families and decide what, if any, services should be provided and whether to separate children from their parents; and a court process is set in motion. Attorneys, primarily for parents, negotiate with the city or county counsel to limit and/or re-word the allegations, essentially pleading out in order to open a case, establish a disposition and a case plan, and initiate the provision of services. And then, as now, my clients were disproportionately Black.

The entire process—from the hotline report, to negotiating allegations against a parent, to determining disposition and case plans—is every bit as vague and discretionary as Professor Josh Gupta-Kagan describes in his article, *Confronting Indeterminacy and Bias in Child Protection Law*. My colleagues sarcastically refer to juvenile or family court as “cowboy court” because its rules are not consistently applied, its judges have broad discretion, and the state has an overwhelming amount of power. Additionally, in the majority of states, these hearings are closed and thus invisible to the general public and to oversight.¹

This lack of defined procedures has drastic and harmful impacts on families. While child welfare² proceedings are civil, their repercussions mirror criminal

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1. For a discussion of the harms of confidentiality laws in child welfare proceedings, see Matt I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1 (2010).

2. The upEND movement of which I am a part uses the term “family policing system,” rather than “child welfare system,” to expose the system’s focus on surveillance, regulation, and punishment, and because the evidence is less clear about the system’s ability to promote child welfare. I generally follow the upEND language, but for the purposes of this article, I use the term child welfare system, as that is the term historically used to encompass child protection agencies, courts, and community providers.

punishments: Families are separated, those accused of wrongdoing are labeled as wrongdoers, surveilled, and monitored, and families are regulated through case plans, visitation schedules, and other requirements. Child welfare systems rely on carceral logic when intervening with families.³ The carceral logic is as follows: There are parents and caregivers (the “terrible few”) harming children, and the state, which is deemed to be best situated to keep children safe, must intervene in order to protect them.⁴ This carceral logic, which is rooted in anti-Black racism, requires that the state punish, surveil, and regulate families in order to promote safety.⁵ The child welfare system thus acts as an expansion of the carceral state, but without the due process protections that are nominally offered in criminal court, including timely hearings, legal representation, specific legal standards, and sentencing guidelines.⁶

Professor Gupta-Kagan’s article describes in illuminating and devastating detail the compounding damage that the lack of specific legal standards and sentencing guidelines (known as disposition standards) causes during the various stages of a child welfare case. To address these issues, he proposes defining

3. Emma Peyton Williams, *The Carceral Logic of the Family Policing System*, UPEND (Nov. 17, 2021), <https://perma.cc/9PXX-XZUJ>; see also Katherine Beckett & Naomi Murakawa, *Mapping the Shadow Carceral State: Toward an Institutionally Capacious Approach to Punishment*, 16 THEOR. CRIMINOL. 221 (2012) (discussing the “shadow carceral state” and how civil institutions become part of carceral expansion). For a robust understanding of carceral logic, see MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 125 (Tamara K. Nopper ed., 2021) (describing carceral logic as a “punishment mind-set”).

4. See RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 15 (2007) (describing how people who go to prison have been categorized as “[t]he ‘terrible few’ . . . a statistically insignificant and socially unpredictable handful of the planet’s humans whose psychopathic actions are the stuff of folktales, tabloids (including the evening news and reality television), and emergency legislation”).

5. See VICTORIA COPELAND & MAYA PENDLETON, UPEND, SURVEILLANCE OF BLACK FAMILIES IN THE FAMILY POLICING SYSTEM 4 (2021), <https://perma.cc/Q8FC-QP96> (“Racism informs how Black people and communities experience policing and surveillance, but remains an inefficient analysis to understand the ways in which criminality—and thus the state’s unrelenting desire to police, surveil, and oppress Black subjects—is constructed on anti-Blackness specifically. That is, anti-Blackness as a framework to understand the ‘uniqueness of Black positionality’ allows us to not only better understand the ways in which Black people experience exploitation, oppression, and subjugation but also allows a deeper understanding of the logics—the anti-Black logics—that carceral systems are built upon, and importantly, what must be (un)done to defeat them in service of Black liberation.”).

6. For a discussion of how other institutions and reforms act as an expansion of the carceral state, see MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS 140 (2021) (“But just as mother-baby programs have become ‘prison lite’ in the community, child protective services and mandatory-reporting laws operate as punitive institutions of their own, targeting the most vulnerable families. They threaten parents with one of the worst punishments of all: separation from their children. And they are transforming more and more service providers into agents of control and punishment—essentially, police.”) For an in-depth definition of carceral expansion, see Beth E. Richie & Kayla M. Martensen, *Resisting Carcerality, Embracing Abolition: Implications for Feminist Social Work Practice*, 35 J. WOMEN & SOC. WORK 12 (2020).

abuse and neglect with greater clarity, limiting the reach of state intervention and punishment, and ensuring that state intervention and punishment of parents is carefully defined and limited to address the specific nature of the maltreatment.⁷ Ultimately, however, while he seeks to limit the reach of the state, his proposed reforms maintain the carceral logic that underpins the child welfare system.

A note about my methodology and background: I approached this article based on my decades of experience working to reform the child welfare system and, more recently, my work to end the carceral logic that underlies it. Through various initiatives and qualitative studies, I have examined and documented entrenched racial and other inequities in child welfare systems. I have documented many of the same harms of indeterminacy on Black, Latinx, and LGBTQ+ children, youth, and families that Gupta-Kagan notes.⁸ Ultimately, these years of witnessing few sustained and meaningful reforms within the current structure of the child welfare system and ongoing harms to children, youth, and families drove me to help launch the abolitionist upEND movement. This movement, based at the University of Houston's Graduate College of Social Work, focuses on the abolition of the child welfare system.⁹ upEND works to create a world that keeps kids safer than they are now by addressing harms perpetuated by both the state and within communities and families.¹⁰ upEND articulates abolition as *imagining* and *building* the world we want to live in and dismantling the harmful, oppressive, and ineffective systems that currently exist. It is about ensuring children and youth are safer and thriving.

The upEND framework exposes some tensions within Gupta-Kagan's article. While Gupta-Kagan accurately describes the above goals of abolition, he also claims that abolitionists approve of the state separating some families in

7. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217 (2022)

8. For examples of qualitative work examining inequities in the child welfare system, see *Institutional Analysis: Unearthing Institutional Racism and Other Biases*, CTR. FOR THE STUDY OF SOC. POL'Y, <https://perma.cc/7VHT-6YYP> (archived Oct. 9, 2022). For an overview and an in-depth description of the "institutional analysis" (IA) framework, methodology, general findings, and application, see Kristen Weber & Sarah Morrison, *The Institutional Analysis: A Tool for Diagnosing Structural Contributors to Racial Disproportionality and Disparity in Child Welfare*, in 11 CHILD MALTREAT.: CONTEMP. ISSUES IN RSCH & POL'Y, RACIAL DISPROPORTIONALITY AND DISPARITIES IN THE CHILD WELFARE SYSTEM 375 (Alan J. Dettlaff, ed., 2021).

9. See Alan J. Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt & Leonard Burton, *It Is Not a Broken System; It Is a System that Needs to Be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500 (2020). For general information about the upEND movement, see UPEND, <https://perma.cc/27YT-EX6Q> (archived Oct. 9, 2022).

10. See ALAN DETTLAFF, KRISTEN WEBER, MAYA PENDLETON, BILL BETTENCOURT & LEONARD BURTON, *HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING* (2021), <https://perma.cc/B9P2-HTLV> (outlining ideas and strategies for dismantling the current child welfare system and building new ways of caring and supporting families, with an abolitionist focus that is about imagining and building better ways to support and care for children, youth, and families and dismantling the current harmful, coercive, and racist child welfare system).

extreme cases of abuse or neglect.¹¹ However, upEND’s evolving definition of abolition differs: upEND envisions completely eliminating the state’s exclusive and coercive power to separate families in need of support and eradicating the carceral logic that governs the state’s interventions with families.¹² The safety and well-being of children and youth should be defined and led by communities, especially those most impacted by the child welfare system, rather than solely by the state.

It is through this frame of abolition that I examine whether Gupta-Kagan’s proposals work to dismantle racial and social inequities and oppression experienced by children, youth, and families. Below, I examine two of his proposals in light of three criteria grounded in abolitionist principles. First, does the proposal increase or decrease the power of the state? Second, does the proposal maintain a carceral logic requiring surveillance, regulation, and punishment of families? Third, does the proposal end current harms and prevent future harms to Black and Indigenous children and families—the populations that experience the highest rates of reporting and family separation?

Finally, I suggest that the process of creating new statutes and legal frameworks be led by those most impacted, in collaboration with legal scholars, advocates, organizers, and others. For these reasons, I hesitate to outline specific counter-proposals, but I raise questions for consideration.

NARROWING THE DEFINITION OF CHILD NEGLECT

Gupta-Kagan proposes narrowing the definition of neglect by having state legislatures “adopt civil child neglect and abuse codes comparable in their detail to state criminal code and which create tiers of severity analogous to degrees of criminal offenses.”¹³ According to Gupta-Kagan, certain types of cases that are currently encompassed under broad neglect statutes should not warrant state intervention under rewritten neglect codes. Examples include legal use of marijuana by parents, inadequate housing or childcare, and children’s exposure to intimate partner violence.¹⁴ The list could conceivably include many more categories of neglect, including school truancy and youth behavioral issues, including cases that are often categorized as “parent-child” conflict, and usually involve parents and youth in need of mental health, behavioral health, and/or parenting coaching supports.

With respect to the first criterion, this proposal should *decrease* the power of the state to intervene with families. However, its impacts may not be felt equally across states. As Frank Edwards’ research shows, states with more

11. Gupta-Kagan, *supra* note 7, at 270 (“Abolition, however, does not necessarily mean that the state would never separate children from their parents. Abolitionists tend to discuss such separations as appropriate only in quite narrow circumstances, especially those involving sexual abuse or severe physical abuse.”).

12. *See* Williams, *supra* note 3.

13. Gupta-Kagan, *supra* note 7, at 274.

14. *Id.*

punitive criminal justice systems and less expansive social welfare programs separate more children from their families.¹⁵ Specifically, Edwards finds that “[s]tates with punitive criminal justice systems tend to place an average of 1.5 more children per 1,000 into foster care annually than states with less punitive criminal justice systems.”¹⁶ Thus, while this proposal could limit the power of the state, due to state-by-state variation, state power will not be uniformly reduced across jurisdictions in the absence of broader shifts in criminal justice and social welfare policy.

Proceeding to the second criterion: Does this proposal continue the carceral logic and impact of surveillance, punishment, and regulation on families? I contend that it does. While more clearly defined child abuse and neglect statutes are a necessary step toward reducing the harms created by indeterminacy and associated state overreach, such reforms still maintain the carceral logic of the current system.

Gupta-Kagan distinguishes his proposed tiered child neglect and abuse codes from criminal codes, but retains their carceral logic. He states that “while criminal law is appropriately focused on an individual’s *mens rea*, child neglect and abuse law should remain focused on the specific behaviors at issue and their impacts on children,”¹⁷ and provides the following example:

[a] parent who intends no harm yet struggles so much with an infant that the baby is diagnosed with failure to thrive may still be neglectful . . . where the criminal justice system seeks to punish and deter crime, the child protection system seeks to protect children from maltreatment by their parents, and to help rehabilitate parents so they can raise their children safely.¹⁸

However, his language of “protection” and “rehabilitat[ion]” reinforces the carceral logic that underpins child welfare. Specifically, this language reinforces the state’s responsibility to punish parents that it designates as bad actors. While this proposal attempts to limit state intervention, it retains the state’s capacity to punish the “terrible few” parents, thereby reinforcing the notion that the state is the right authority to address maltreatment and keep children safe.¹⁹

15. Frank Edwards, *Saving Children and Controlling Families: Punishment, Redistribution and Child Protection*, 81 AM. SOCIO. REV. 575, 580 (2016) (“States with punitive criminal justice systems tend to place an average of 1.5 more children per 1,000 into foster care annually than states with less punitive criminal justice systems.”).

16. Frank Edwards, *Why U.S. States Vary in their Responses to Child Abuse and Neglect*, SCHOLARS STRATEGY NETWORK (Apr. 5, 2017) <https://perma.cc/5K2D-K43E>.

17. Gupta-Kagan, *supra* note 7, at 274.

18. *Id.*

19. See Josh Gupta-Kagan, *Towards a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897 (2014). In this earlier paper, Gupta-Kagan proposes creating a new legal framework that emphasizes a public health approach, similarly limiting coercive state intervention to extreme cases of abuse and neglect. Public health frameworks are intended to promote health and well-being and examine factors in the larger ecosystem that contribute to harm. In this earlier paper, as now, Gupta-Kagan clearly recognizes the need to limit state intervention and provide families with help without first requiring a finding of parental fault. However, he still provides an avenue for monitoring and overseeing (surveilling), providing rehabilitation and case plans (regulating), and separating (punishing) certain parents and

More broadly, tiering neglect statutes in ways that mirror criminal law directly reinforces the carceral logic that undergirds the current child welfare system by reiterating a narrative about the individual pathology of a parent or caregiver rather than addressing the larger societal failures that are harming children. As an alternative, there are many examples of statutory structures that, while imperfect, focus on additional investments to communities rather than criminalizing caregivers. For example, Title I of the Elementary and Secondary Education Act is supposed to provide significant financial support to schools with high numbers of low-income students.²⁰ In revising child protection codes to reduce the reach of harmful state intervention, we must learn from such structures to consider how we can increase support for specific communities that have historically borne the brunt of child welfare systems' interventions. Could we craft a statutory scheme that compels the state to provide deep financial investment in specific communities, at a neighborhood level? What penalties could be imposed if the state fails to provide financial and social support such as healthcare and mental health services? How do we provide reparations for multigenerational harms that have affected parents, who may themselves have been previously involved in child welfare systems? How do we provide reparations for harms to children and youth resulting from system interventions that have contributed to their homelessness, lack of a permanent family, and joblessness? To address these questions, child protection codes should not focus on rehabilitating parents alone, but must also address issues in the broader societal ecosystem that practically dictate parents' choices and actions. Thus, child protection must involve providing services such as healthy and affordable housing, quality childcare, guaranteed basic income, and accessible health and mental health services.

Finally, to address the third criterion: Does this proposal ultimately end and/or prevent future harm to Black and Indigenous children and families? *Maybe*. The overrepresentation of Black and Indigenous children in the child welfare system has been a persistent phenomenon since the 1960s.²¹ Many qualitative studies document parents' experiences of racism and bias in their interactions with child welfare systems.²² Working to eliminate opportunities for individual case worker or judicial bias is essential to eliminating these harms, and so is eradicating the structural inequities built into the current child welfare system.²³ Limiting the types of cases that can come into the child welfare system

families.

20. See *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T OF EDUC. (Oct. 24, 2018), <https://perma.cc/HH5P-9ZA5>.

21. See Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality And Disparities In The Child Welfare System: Why Do They Exist And What Can Be Done To Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 254 (2020) (summarizing research on racial disproportionality and disparities in the child welfare system).

22. See Alan J. Dettlaff, Reiko Boyd, Darcey Merritt, Jason Anthony Plummer & James D. Simon, *Racial Bias, Poverty, and the Notion of Evidence*, 99 CHILD WELFARE, no. 3, 2021, at 61 (2021).

23. For a good overview of the history of family separation and need for new and

is a crucial and necessary step towards this transformation.

However, as discussed above, the longer-term work of ensuring that families get what they need cannot be guaranteed by this reform. Gupta-Kagan does not claim that this reform achieves this goal, but his proposal raises a larger question: How do you do the essential work of rewriting child welfare laws without reinforcing a system that is so riddled with structural inequities? This work requires not only dismantling the structures that vest exclusive coercive power with the state, which Gupta-Kagan’s proposal promotes, but also transforming social conditions to enable families to thrive.²⁴

SIGNIFICANTLY LIMITING CHILD NEGLECT AND ABUSE REGISTRIES

Gupta-Kagan also proposes reforming child neglect and abuse registries. He is right to highlight these registries as examples of “the overbroad scope of invasive elements of the present child protection legal system.”²⁵ He suggests that a more logical way of placing people on these registries would involve linking the type of substantiated abuse and neglect to an assessment of whether such behavior would pose a significant risk to children at child care centers, schools, and other institutions that use registry checks as a safety measure.²⁶ He proposes classifying registration status according to tiers of maltreatment, limiting the length of time spent on the registry, providing parents with the opportunity to petition for removal of their names from the registry, and providing a consistent standard of proof for having one’s name on the registry.²⁷

To address the first criterion: These are all steps geared towards protecting against state overreach. Gupta-Kagan’s reforms would drastically limit the harm that registries can cause to parents and caregivers—harms that include the inability to provide a placement for a child or to obtain particular types of employment. Like the previous proposal, this reform works to limit the power of the state.

But my second criterion raises a more fundamental question: Why keep registries at all? Do registries keep children safe? What evidence supports the use of registries? As Gupta-Kagan notes, “[r]esearchers have identified no studies correlating substantiated maltreatment allegations with risk to children

different policy approaches, see ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL’Y, *ENTANGLED ROOTS: THE ROLE OF RACE IN FAMILY SEPARATION* (2018), <https://perma.cc/MY8C-8VQ8>.

24. Communities are currently working to determine what is needed to transform societal conditions to promote thriving. Examples include financial grants to support families with small children, mutual aid offerings to support community interdependence and healing, and alternative responses to mental health supports. For examples of community-based safety strategies, see ONE MILLION EXPERIMENTS, <https://perma.cc/9RGG-NKQ8> (archived Oct. 9, 2022).

25. Gupta-Kagan, *supra* note 7, at 277.

26. *Id.* at 277-78.

27. *Id.*

when parents are later hired in child care.”²⁸ Thus, while Gupta-Kagan’s proposal limits the length and breadth of the state’s reach, it unnecessarily reinforces the system’s carceral logic. Registries punish parents reputationally and punish families by impacting their financial stability. Under what circumstances do communities permit continuing to punish parents for 5 years, 10 years, or for the rest of their lives?

Finally, while, with reference to the third criterion, the proposal might reduce harm to the Black and Indigenous families on these registries, the proposal is ultimately flawed because it maintains a punishment –the registry system– in the absence of sufficient rationale for its use.

CONCLUSION

I have only commented on two of Professor Gupta-Kagan’s many thoughtful proposals for narrowing the range of circumstances that should permit child welfare system involvement. In addition to the two addressed above, he suggests linking specific dispositional options to the type of maltreatment at issue—that is, ensuring that families have a case plan that matches the substantiated allegation.²⁹ He also proposes reforms that promote family connections by preferring kinship-focused placements and permanency options, utilizing “active efforts” for reunification, and rethinking if, when, and how parental rights should be terminated.³⁰ His proposals seek to make an irrational “cowboy court” system more rational, predictable, and humane. However, while many of these proposals lessen the harsh punishment of family separation, they still allow for the surveillance and regulation of families—thereby maintaining a carceral approach to state intervention in families that is inappropriate and harmful for the many families in need of complex and long-term financial and/or social service support.

Additionally, the question still nags: Is there a danger in shrinking the reach of the current child welfare system without providing a legal framework that compels the state to provide robust and readily accessible support to communities? This question returns me to the framework of abolition, which is fundamentally about building a better world in addition to ending the system’s carceral logic that undermines rather than helps families. Gupta-Kagan effectively lays out how the current design of the legal system fails and unfairly punishes families. But families need healthy places to live and community connections in addition to reduced punishment. The challenge is thus building a legal framework that ensures equitable access to meaningful support and eradicates the overly broad reasons the state gives for separating children from their families in the first place. If, under this new legal framework, family separation occurs, the state, rather than the parent is at fault, and surveillance,

28. *Id.* at 239.

29. *Id.* at 278-79.

30. *Id.* at 285-87.

regulation, and punishment should be targeted at the state, as the state is the entity that has failed to prevent the harm.

Furthermore, I have raised questions about the *content* of some of Gupta-Kagan’s proposals, but, as the foregoing discussion indicates, we must also consider the *process* through which we explore these ideas and other reforms. The process itself is critical to ensuring that proposals actually work to end harm and transform the lives of those most impacted by the child welfare system. Such an anti-racist policy reform effort requires that the exploration of ideas be led by those most impacted by the child welfare system and their advocates. Groups like RISE, JMACForFamilies, #RepealASFA, Movement for Family Power, and #ReimagineChildSafety are putting forth innovative ideas, working in community to end the harmful intervention and racism of the child welfare system, and seeking to build different ways of supporting and caring for one another.³¹ For example, in *An Unavoidable System*, RISE (an organization led by parents impacted by the system) discusses the prospect of ending registries altogether or drastically limiting who can be placed on them and the ability of employers to use them.³² The Repeal ASFA campaign comprises “about 50 people, predominantly women, mothers and people of color” working together to “dismantle the Adoption and Safe Families Act.”³³ Joyce McMillian of JMACForFamilies talks about requiring mandated supporters rather than mandated reporters.³⁴ How would these ideas translate to policies and practices? What are the implications of these ideas for rewriting child protection codes to provide support for families based on need rather than risk, with interventions instigated by community assessment of family needs rather than state investigation?

The field of child welfare is at an inflection point. There is widespread agreement that change is needed. But to make real change, the process of change must also be different. It must respect and be shaped by the thoughtful work led by parents, youth, and others who are impacted by the child welfare system, including their advocates.

31. For a discussion of various abolitionist efforts and innovations being undertaken to dismantle the current system and create support and care that works for families, see DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022).

32. NAASHIA B., SHAMARA KELLY, MELISSA LANDRAU, YVONNE SMITH, HALIMAH WASHINGTON & IMANI WORTHY, *RISE, TAKE ROOT JUSTICE, AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE* (2021), <https://perma.cc/ES6E-8P9Y>.

33. *Who Are We?*, REPEAL AFSA, <https://perma.cc/U3FD-SYYH> (archived Oct. 9, 2022).

34. See, e.g., Sahalie Donaldson, *Parents, Advocates Rally Against Expansion of Family Enrichment Centers*, CITY & STATE OF N.Y. (Aug. 17, 2021), <https://perma.cc/92CZ-JZFA>; Doin’ the Work: Frontline Stories of Social Change, *Abolish the Family Policing System (“Child Welfare”)—Joyce McMillan & Victoria, MSW* (Mar. 14, 2022), <https://perma.cc/LV7W-3HSL>.