Singing in the Key of *Dobbs*: Historical Inquiries into the Institutionalization of Support for Families and Children

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By way of background, the invitation to participate in this Symposium focused on institutionalizing support for women and children came at a time when I was deepening my own understanding of, and relationship to, the child welfare system—what I assert is the *most* institutionalized system of support for families with children in the United States. Having long taught Child, Parent, and State, a course aimed at establishing a basic understanding of the history of child welfare and the public regulation of parenting for the future child and family advocates passing through Loyola's doors, I faced a moral crisis and a pedagogical challenge: could I, in good conscience, continue teaching a course focused on child abuse and neglect that did not devote at least as much, if not *more*, time exploring the ways in which the state and society have abused and neglected vulnerable children, particularly from Black, Brown, and Indigenous families? In furthering my own education about the history and tradition of child welfare, I found a compelling counternarrative about our nation's treatment of poor mothers and children that resonates with the dissent in *Dobbs* and makes me particularly distressed about the implications of the holding, which is sure to leave countless poor women with almost no options in the event of unplanned pregnancy and little, if any, institutionalized support for the children they will bear. While the issues of child welfare and reproductive choice might seem too dissimilar to address in a harmonious way, the majority and dissenting opinions offer a roadmap through which we can tell a more inclusive version of history—perhaps one that allows us to imagine a world where *all* children and families can thrive because the state prioritizes

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investing in their lifelong success, and where attempts to "protect" children do not render more vulnerable, or even outright harm, the persons who *birth* and raise them.

The tenor and tone of the majority opinion in *Dobbs* is distinct for its reverence for the supposed "teachings of history," which Justice Alito claims led the majority towards the conclusion that a "right to abortion is not *deeply rooted* in the Nation's history and tradition."[1] The emphasis on *history* and *tradition* seems aimed at stripping a certain emotional valence from the Court's reasoning and its ultimate conclusion—to ground *Dobbs* in an unassailable static examination of an issue that is far more dynamic and subjective than the majority is willing to admit. History and tradition are far from static. They are deeply malleable psychological phenomena, influenced by all of the biases that corrupt human decision making. *Whose* history? *Whose* tradition? To paraphrase a quote by President Lincoln that Justice Alito weaves into *Dobbs*, "in using the *same* word[s] [—*in this case, history and tradition*—] we do not all mean the *same* thing."[2]

I take from *Dobbs* not the *substance* of the debate about a constitutional right to abortion, but rather the analytical framework of this seminal opinion. The *melody*, if you will, but not the lyrics of the song. I will use this framework to shape my exploration of this nation's institutionalized support for poor mothers and children and make the case for a more comprehensive historical inquiry of our child welfare or child protection system—a system that came into development at roughly the same time that the Supreme Court first recognized a constitutional right to abortion under *Roe v. Wade*.[3] My exploration aims to strike the same key as the two pivotal questions Justice Alito raised when laying out the framework for overturning *Roe*: (1) whether stare decisis applies to *Roe* and *Casey*, and under what conditions prior Court holdings should be overruled; and (2) whether the right to an

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[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2253 (2022).

[2] *Id.* at 2247 (emphasis added) (noting that Justice Alito observed, "[a]s Lincoln once said: 'We all declare for Liberty; but in using the same word we do not all mean the same thing'").

[3] The Child Abuse Prevention and Treatment Act (CAPTA), which is regarded as the legislation that gave rise to a comprehensive child welfare system and is the focus of the instant critique, was enacted in 1974, one year after the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101.

abortion—whether *any* right—is indeed *deeply rooted* in our nation's history and traditions.[4]

Using a five-factor test adapted from an earlier case in which Justice Alito drafted the majority's opinion,[5] the Court determined that neither *Roe* nor *Casey* were entitled to deference under the doctrine of stare decisis.[6] The significance of this is obvious, but the language in *Dobbs* that best captures the magnitude of the decision to apply stare decisis comes from Justice Alito himself. In referencing other Supreme Court decisions in which stare decisis was rejected and *new* rights under constitutional protection recognized, Justice Alito remarked "[w]ithout these [prior] decisions, American constitutional law as we know it would be *unrecognizable*, and this would be a *different* country."[7] So significant is stare decisis that the stories we tell about ourselves and our county would be radically different had some prior cases *not* been overturned. And yes, that is precisely what a comprehensive reflection on history permits us to imagine in the context of institutionalizing support for women and children: a radically *unrecognizable* and *different* country—one that would recognize the value of investing in all children, and decouple social *support* from social *control*. So, in the short space of this Article, I will apply the first two factors of Justice Alito's five-factor test to the discrete topic of institutionalized support. In so doing, I don my historian hat and settle "*rightly*" some inaccuracies regarding the stories we tell about meaningful support for the families and children we claim to cherish.[8]

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[4] *See Dobbs*, 142 S. Ct. at 2265 (Justice Alito listing five factors). I am attentive to both the majority opinion that sets out this framework, as well as the dissenting opinion that not only conducts a more exacting historical inquiry, but a more contextually rich one as well. Both opinions rest heavily on aspects of history—even where their accounts of history seem to conflict. As this Article is limited in space, I am exploring only the first two of the stare decisis factors, "nature of the error" and "quality of the reasoning."

[5] *Compare id.* ("the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance."), *with* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2478–79 (2018) ("the quality of [the] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision").

[6] *Dobbs*, 142 S. Ct. at 2243.

[7] *Id.* at 2264.

[8] According to Justice Alito, five factors should be taken into account in deciding whether to overrule a past decision. *See Dobbs*, 142 S. Ct. at 2265. Again, since the instant inquiry is not premised on overturning any particular precedent or case, I will

The first factor that the Court will consider in determining whether to apply stare decisis is the "nature of the error."[9] This factor can be taken to mean that stare decisis should not apply when there is an opportunity to correct that which, upon reexamination, is found to be mistaken, especially when questions of profound moral and social importance are at play. As Justice Alito notes, "[a]n erroneous interpretation . . . is always important, but some are more damaging than others."[10] With respect to the institutionalization of support for women and children, the *nature* of the error, I argue, is grave with lasting pernicious effects for the most vulnerable in our society. But what exactly is "the *error*" as it applies to the institutionalization of support of women and children? The *error* is the story that we have come to tell about how we normalized the most institutionalized form of support for mothers and young children—giving it the innocuous, if not benevolent, name of child *welfare* or child *protection*. The *error* has been to premise support on parental *failure* rather than broader principles of equity and child well-being. In addition to researching and writing, I have enjoyed almost two decades of teaching on precisely the topic of child and family well-being and yet, I too have succumbed to "the *error*." Every year without fail, the story I relay to my students about our nation's history of support for women and children would start with the child saving movement of the mid-nineteenth century, which was an informal system of rehoming children more akin, for lack of due process, to human trafficking than to our current conception of foster care. As I describe in greater detail below, this informal system morphed into the formal child welfare or child protection system that we have today, marked at its inception with the enactment of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974.[11] In most literature addressing the history of federal involvement in child protection, the tale begins with CAPTA. To this day, CAPTA is regarded as "the key" federal legislation addressing child abuse and neglect in the United States, as it was the first comprehensive federal

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instead take the liberty to use two of these five factors as a scaffold of sorts for a critique of our present institutionalization of support for women and children.

[9] *Compare id.* at 2264–65 ("the nature of their error"), *with Janus*, 138 S. Ct. at 2448–49 (using "developments since the decision was handed down" instead).

[10] *Dobbs*, 142 S. Ct. at 2265.

[11] 42 U.S.C. § 5101. CAPTA, originally enacted in Pub. L. No. 93-247, was most recently amended on January 7, 2019 by the Victims of Child Abuse Act Reauthorization Act of 2018, Pub. L. No. 115-424, 132 Stat. 5465 (2019).

effort to address the problem.[12] CAPTA shaped the development of grants to states to prevent child abuse and neglect, improved how systems respond to it, and funded small amounts of training and research on how to reduce maltreatment.[13] CAPTA, however, had a particularly stigmatizing narrative whose tone was evident even in the testimony that accompanied the passage of the bill.[14] The message in 1974 was that the problem our nation should tackle was the threat posed by deviant, dangerous, and deplorable parents' intent on harming—or at the very least fated by virtue of *intrinsic* moral failings to harm—innocent young children. Without question, the phenomenon of child abuse and neglect merited serious attention, but this particular framing of the problem masked a strategic effort to keep a distorted narrative about poor parents alive. The *error*, if you will, is grounded in a "moral construction of poverty," which places a disproportionate emphasis on *individualized* responsibility in the face of systemic stressors rather than the absence of a communal ethic of care or outright obstacles to accessing care.[15] Perhaps because it

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[12] *About CAPTA: A Legislative History*, CHILD WELFARE INFO GATEWAY (2019), https://www.childwelfare.gov/pubpdfs/about.pdf (identifying CAPTA as "[t]he key Federal legislation addressing child abuse and neglect").

[13] *See* § 5101; *see also Child Abuse Prevention Act, 1973: Hearings on S. 1191 Before the Subcomm. on Child. & Youth of the Comm. on Lab. and Pub. Welfare*, 93rd Cong. 1 (1973) (statement of Walter F. Mondale, Chairman, Subcomm. on Child. & Youth).

[14] *See* § 5101; *see also Child Abuse Prevention Act, 1973: Hearings on S. 1191 Before the Subcomm. on Child. & Youth of the Comm. on Lab. and Pub. Welfare*, 93rd Cong. 1 (1973) (testimony at legislative hearings).

[15] *See* Khiara Bridges, *POV: Stop Blaming the Poor for Their Poverty*, BU TODAY (Nov. 16, 2017), https://www.bu.edu/articles/2017/pov-blaming-victims-of-poverty (describing the "moral construction of poverty"). In querying "why . . . the state [would be] so convinced that the children born (or to be born) to poor women are so in need of protection that it has erected elaborate, intrusive bureaucracies to accomplish that task" and "why . . . the state presume[s] that poor mothers are at risk of abusing or neglecting their children[,]" law Professor Khiara Bridges points to what she terms the "moral construction of poverty," which supports a host of negative assumptions about poor mothers. *Id.* As Professor Bridges observes, a moral construction of poverty tends to generate an intrusive and punitive state response to the problem, focused solely on the moral failings and the inherent deficits of poor parents. *Id.* By way of example, she holds out,

> [t]he pregnant woman who turns to her state's Medicaid program for help in accessing prenatal health care will find that in exchange for government assistance, she will have to open up all areas of her life to scrutiny. . . . Once her child is born, the woman will oftentimes find herself regulated (or living under the threat of regulation) by her state's Child Protective Services department, the government agency that investigates incidents of child maltreatment.

resonates with longstanding tendencies to focus on victims of poverty rather than the social inequities that drive poverty, it is "the *error*" with which we continue to live.

The second factor that the Court considered in determining whether to apply stare decisis in *Dobbs* is the "quality" of the reasoning, which seems to rest heavily on the alleged historical accuracy of the earlier decisions upon which precedent rests.[16] But highlighting the harm posed by reliance on an "*erroneous* historical narrative,"[17] Justice Alito's insistence upon "respect for the teachings of history"[18] seems to ignore a historical truism that "[h]istory is not *the past*, but a *map* of the past drawn from a *particular point of view* to be useful to the modern traveller."[19] Rather than one universally correct version of history, there are many—some more comprehensively grounded in a sociolegal and cultural context than others. *Respect* for the teachings of history might therefore be evident not in the telling itself, but in the ways in which the dueling accounts—in this case, about abortion—have been kept alive across decades (and will surely continue for decades more). The mere fact that *dueling* accounts persist suggests that we are not willing to accept only one narrative, as has been the case for far too long in the context of child welfare. After nearly five decades of a formal federal child welfare system, borne from a well-documented history of exploitation of poor families, we are engaging counternarratives that compel us to rethink how we got here, and with growing calls for abolition, whether there is anything salvageable from the current structure. The absence of an accurate, or at the very least comprehensive, historical context of the development of child welfare, and the distorted point of view from which continued efforts to "improve" child protection have been developed, leaves the "modern traveller" to understand the role of the state in a purposefully narrow frame, setting us firmly down the path of *coercion* and *punishment* over

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Id. My co-panelist, Professor Kiyo-Smith, makes a similar observation with respect to what she calls the "empathy gap," which occurs when the general public, policy makers, and the mainstream media view similarly situated families with different identities in starkly distinct ways—protecting one while pathologizing the other. *See generally* Charisa Smith, *From Empathy Gap to Reparations: An Analysis of Caregiving, Criminalization, and Family Empowerment*, 90 FORDHAM L. REV. 2621 (2022).

[16] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).

[17] *Id.* at 2266 (emphasis added).

[18] *Id.* at 2248 (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).

[19] HENRY GLASSIE, PASSING THE TIME IN BALLYMENONE: CULTURE AND HISTORY OF AN ULSTER COMMUNITY 621 (Univ. of Pa. Press Phila. 1982) (emphasis added).

genuine care and support.[20] In the *simple* telling of the traditional tale, we have come to anchor the origins of our current child protection system in the endeavor benignly referred to as "child *saving*."[21] Indeed,

> [m]any historical accounts narrate the origin and development of the U.S. juvenile justice system [as well as the child welfare system which developed later] as a story of progressive, benevolent and humanitarian legislative reform—the so called 'Reform Movement' of the 'Progressive Era' (1890-1920)—which included (but was not limited to) the enactment of child-labor laws, the establishment of separate legal systems for juvenile delinquents, and the rationalization of expertise related to the social governance of young people.[22]

Conveniently absent from most historical accounts, however, is an understanding that child saving revolved around the concept of rescuing children from inherently toxic urban environments that were believed to exert a contaminating influence on them and, in so doing, on social progress as a whole. While scholars continue to explore whether the best interests of the children motivated the reformers or whether they were enacting a class-based movement to extend governmental control over children of the poor, the lasting narrative about both the parents and children in these families is one of

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[20] GLASSIE, *supra* note 19.

[21] In the typical telling,

> [t]he 'child savers' were a group of reformers that flourished in major cities across the United States during the nineteenth century. Child savers created an unprecedented movement that sought to save children from physical and moral harm. They pursued extensive reforms for children, advocating for policies on child labor laws, mandatory schooling, and the development of child health bureaus. One of the chief reforms that the child savers promoted was the establishment of a juvenile justice system.

Calli M. Cain, *Child Savers, in* THE ENCYCLOPEDIA OF JUVENILE DELINQUENCY AND JUSTICE (Christopher J. Schreck ed., 2017).

[22] Erik Paul Reavely, *Revising Reform: a Cultural History of Juvenile Justice Reform in the United States, in* AURORE FRANÇOIS (Veerle Massin, David Niget eds.) VIOLENCES JUVÉNILES SOUS EXPERTISE(S) / EXPERTISE AND JUVENILE VIOLENCE (Presses Universitaires de Louvain, 2011) (citing Anthony Platt, *The Child Saving Movement and the Origins of the Juvenile Justice System, in* JUVENILE DELINQUENCY: HISTORICAL, THEORETICAL, AND SOCIETAL REACTIONS TO YOUTH 3 (Paul M. Sharp & Barry W. Hancock eds., 2d ed. 1998)).

deviance and pathology.[23] A "respect for the teachings of history" reveals that the child savers were motivated to intervene not necessarily to *protect* children, but to ensure that the inferior masses would not pose too great a threat to the established social hierarchy.[24] This was *especially* true as it relates to racial minority youth, for the early movement to save children "was contextualized by the belief that childhood was the site of struggles either to advance the race or to control *dangerous* races and classes."[25] Reliance on "eugenic frames" shaped the conception of poor racial minority youth as incorrigible "social *problems*, rather than as *saveable* children."[26] What a more exacting historical account makes clear is that the concerns of reformers was not "so much for the welfare and happiness of the youths themselves as with protecting society from their future depredations if they are shaped into criminals."[27]

Founder of the Children's Aid Society, Charles Loring Brace, summarized these fears, and hence, the motives of reformers claiming, in an open appeal to support the child saving cause, that:

> As Christian men, we cannot look upon this great multitude of unhappy, deserted, and degraded boys and girls without feeling our responsibility to God for them. . . . The class increases. Immigration is pouring in its multitudes of poor foreigners who leave these young outcasts everywhere abandoned in our midst. . . . These boys and girls . . . will soon form the great lower class of our City. They will influence elections; they may shape the policy of the City; they will, assuredly, if unreclaimed, *poison* society all around

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[23] *See* Anthony M. Platt, *The Child-Savers Reconsidered*, 20 CURRENT ISSUES IN CRIM. JUST. 123, 123–26 (2008); *see also* Randall G. Shelden & Lynn T. Osborne, *"For Their Own Good": Class Interests and the Child Saving Movement in Memphis, Tennessee, 1900–1917*, 27 CRIMINOLOGY 747, 747–50, 754–58, 759, 762–63 (1989).

[24] *See* Chase S. Burton, *Child Savers and Unchildlike Youth: Class, Race, and Juvenile Justice in the Early Twentieth Century*, 44 L. & SOC. INQUIRY 1251, 1251–54 (2019). As Burton notes, "[p]rogressive-era transformations and upheavals resulting from immigration, urbanization, and economic shifts increasingly led 'respectable' people to fear the disorder of inner-city youth and the potential of a poorly raised child who was not 'pulled up' to 'pull us down.'" *Id.* at 1254.

[25] *Id.* at 1252 (emphasis added).

[26] *Id.* (emphasis added).

[27] *Id.* at 1257.

> them. They will help to form the great multitude of robbers, thieves, vagrants[,] and prostitutes.[28]

Immigrants and their children were, from the beginning, regarded as inferior objects of pity, scorn, contempt and fear—an uncivilized, unreformed, and undisciplined contagion that risked corrupting a morally superior society. The world view of the so-called "reformers" was steeped in this vein of ethnocentrism. The dimension of racialization, however, that rendered non-white children beyond salvation and the "racial gap" that distinguished who was deserving of the "*softer* side of juvenile justice" did not form part of the historical account of the origins of child protection until only fairly recently.[29]

The narrative of degeneration and deficiency was only reified when, in 1874, the first "official" case of child abuse entered the annals of child protection history. Mary Ellen Wilson, a young girl living in New York City, became the poster child for change in the country due to the horrific physical abuse she suffered at the hands of her foster mother.[30] A New York Times article described Mary Ellen as "a self-possessed 10-year-old . . . who finally put a human face on child abuse and prompted a reformers' crusade to prevent it and to protect its

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[28] *To the Public-Children's Aid Society*, N.Y. TIMES (Mar. 2, 1853) (pdf on file with author) (emphasis added); *see also* Burton, *supra* note 24, at 1254 (observing the motives of early nineteenth century social reformers, "[p]rogressive-era transformations and upheavals resulting from immigration, urbanization, and economic shifts increasingly led 'respectable' people to fear the disorder of inner-city youth and the potential of a poorly raised child who was not 'pulled up' to 'pull us down'").

[29] Save Platt's 1969 examination of race, only Geoff Ward's *The Black Child Savers* (2012) and Tera Agyepong's *The Criminalization of Black Children* (2018) have explicitly documented the ways in which the early juvenile justice system discriminated along racial lines. As Burton observed, "white children were future *citizens,* while black children were future *problems*." Burton, *supra* note 24, at 1263 (emphasis added). Burton adds, however, that class dynamics further stratified how children were viewed, with poor whites imbued with "atavistic and dangerous" qualities normally ascribed to non-whites. *Id.* at 1259. Effectively, *all* poor children were regarded as having "inherited defective genes" that made them "likely to grow up into defective adults." *Id.*

[30] Genevieve Carlton, *Mary Ellen Wilson and The 19th-Century Child Abuse Case That Changed History*, ALL THAT'S INTERESTING (Dec. 15, 2022), https://allthatsinteresting.com/mary-ellen-wilson ("The first case of child abuse in U.S. history went to trial in 1874. Ten-year-old Mary Ellen Wilson had experienced years of horrific abuse before anyone intervened, but she became the poster child for change in the country.").

victims, an effort that continues to this day."[31] What makes this particular account of the origins of our child protection system noteworthy is that it is not from the nineteenth or even twentieth century, but from 2009, indicating something about the staying power of this particular framing of the topic of child welfare.[32] While Mary Ellen's battered and scarred body figures prominently in countless historical accounts of the origin of our child protection system—searing in our minds an image of the harm that individual parents can inflict—what is overlooked in Mary Ellen's story is the abject poverty of both households in which she lived and the utter absence of state support that might have kept this child in the care of her non-abusive biological mother.[33] From its romanticized historical origins, the story of child protection became one about the evils posed by dangerous—more often than not, racially marginalized and poor—parents, not the heightened vulnerability created by a neglectful state. Our system unquestioningly relies upon the lasting historical narrative which unquestioningly accepts the demonization of parents while normalizing inadequate and fractured systems of care.

Child welfare policy and funding have, indeed, evolved to reflect the same emphasis on punishment or failure over prevention and comprehensive systems of care, which child welfare scholar Josh

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[31] Howard Markel, M.D., *Case Shined First Light on Abuse of Children*, N.Y. TIMES (Dec. 14, 2009), https://www.nytimes.com/2009/12/15/health/15abus.html.

[32] After Mary Ellen's abuse was discovered, the leader of the New York chapter of the American Society for the Prevention of Cruelty to Animals (NYSPCA), Henry Bergh, was recruited to assist her. Christina Paddock, Debra Waters-Roman & Jessica Borja, *Child Welfare: History and Policy*, ENCYC. OF SOC. WORK 1–2 (June 11, 2013) https://oxfordre.com/socialwork/display/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-530;jsessionid=E6B0F34A88FA449942BF96D074746759. After successfully intervening on her behalf, "Bergh and others established the New York Society for the Prevention of Cruelty to Children (NYSPCC)," a model for intervention that quickly spread to other large cities, giving "quasi-judicial power to remove children from homes that were deemed unfit and place them in foster homes or children's institutions." *Id.* In a manner eerily prescient of some practices today, "[m]ost of the early societies for the prevention of cruelty to children made little or no effort to rehabilitate the parents of these children, believing them to be characterologically deficient and therefore beyond help." *Id.*

[33] According to accounts, Mary Ellen's mother, a Civil War widow with no means of support, hired a woman to watch her child so she could work double shifts in the laundry room of a hotel. "[W]hen Wilson couldn't pay, the woman turned the child over to New York's Department of Charities. That's how Mary Ellen Wilson ended up in the foster system. And it was the start of years of abuse." Carlton, *supra* note 30.

Gupta-Kagan refers to as a "parental-fault paradigm."[34] While the federal grants aimed at supporting vulnerable young children, first authorized under the 1935 Social Security Act, have evolved over time to include a range of necessary supports including child abuse prevention and other services to support vulnerable families, the largest percentage of funding continues to focus on foster care and adoption assistance, with only thirty-two states operating under approved prevention plans in response to the most recent federal legislation, the Family First Prevention Services Act of 2018.[35] The narrative of support for poor families at the federal level remains tainted by the same, now reflexive instinct to focus on failed or deficient parenting, rather than failing or deficient systems of support. While formal support for vulnerable families may be distributed in "stealth" ways that fail to capture the true reach of the state's investment, as my co-panelist Professor Huntington established, what support is made available is distributed with a fair dose of moralizing that resurrects a theme of inherent deficiency or pathology.[36] One small, but powerful example is reflected in the purpose section of the Social Security Act, Title IV-A, in the section addressing Temporary Aid to Needy Families (TANF). TANF provides basic assistance to poor families and contributes funds for child care, employment services, state refundable tax credits for low-income families, and pre-kindergarten and Head Start programs.[37] The stated aims of the program—particularly the emphasis on promoting marriage, "prevent[ing] and reduc[ing] the incidence of out-of-wedlock pregnancies" and "encourag[ing] the formation and maintenance of two-parent families"—extend far beyond merely providing financial support for those in need and do so in ways that both reify middle class norms and values and suggest that financial vulnerability is itself a product of poor personal choices and individual decision-making.[38]

If there is a singular historical inaccuracy that stands out above all of those heretofore outlined, it is the enactment of the Child Abuse

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[34] Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 897 (2014).

[35] *Family First State Plans and Enacted Legislation*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/human-services/family-first-state-plans-and-enacted-legislation (July 27, 2022).

[36] Clare Huntington, Professor of L. at Fordhan Univ. Sch. of L., Panelist Comments at the Seton Hall Law Review Symposium: Post-*Dobbs*: Institutionalizing Support for Women and Children (Feb. 10, 2023).

[37] 42 U.S.C. §§601–687.

[38] 42 U.S.C. § 601(a).

Prevention and Treatment Act of 1974 (CAPTA), the legislation that formalized a national response to child abuse and neglect and established a legacy of punitive intervention—in the form of the child protection system—premised on the belief that children were more at risk of harm from an abusive parent than from a neglectful state that underinvested in their well-being.[39] The inaccurate and incomplete historical account of CAPTA's passage not only serves to frame the issue of child protection in ways that distort the state's role, but also primes every successive generation of advocates to accept at face value a rather simplistic narrative about child abuse and neglect, and thereby refrain from exploring more deeply the culpability of the state in contributing to underlying vulnerability and harm. The imagination of the public was captured by images of battered children, intended to evoke alarm about deviant parents whose individualized pathology caused them to act out in heinous ways. Not surprisingly those images struck a chord and compelled the public to buy into the necessity of a new large bureaucracy aimed at rescuing children.

Imagine, however, if instead of a punitive system of parental oversight, Americans were presented with a multi-billion dollar federally funded national comprehensive child development program with a full range of health, education, and social services—including daycare, nighttime childcare, nutritional, and psychological services. This program would have been made available to every child in America regardless of economic, social, and familial background, with priority given to those children with the greatest economic and social needs, and would have been created in partnership and collaboration with parents, communities and local governments. Although it may now seem unfathomable that legislation aimed at providing *all* children with "a fair and full opportunity to reach [their] full potential"[40] could have actually passed with bipartisan support in both Congress and the Senate, the Comprehensive Child Development Act of 1971 actually did.[41] Bipartisan support notwithstanding, this seminal legislation with the potential to dramatically improve the lives

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[39] *Id.* § 5101.

[40] William Roth, *The Politics of Daycare: The Comprehensive Child Development Act of 1971*, INST. FOR RSCH. ON POVERTY DISCUSSION PAPERS 1 (Dec. 1976), https://www.irp.wisc.edu/publications/dps/pdfs/dp36976.pdf (quoting The Comprehensive Child Development Act of 1971, H.R. 1083, 93rd Cong. (1971)).

[41] "The final bill passed in the House with a vote of 354 to 36, and in the Senate with a vote of 57 to seven." *The Child Abuse Prevention and Treatment Act: 40 Years of Safeguarding America's Children*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 8 (Apr. 2014), https://www.acf.hhs.gov/sites/default/files/documents/cb/capta_40yrs.pdf.

of every child in the United States "was vetoed by President Nixon in a message remarkable for its concentrated anger."[42] According to Nixon, this "radical" federal program was the height of "fiscal irresponsibility, administrative unworkability [with profound] family weakening implications."[43]

Democratic Senator Walter Mondale of Minnesota, the co-sponsor of The Comprehensive Child Development Act with presidential aspirations, did not give up despite Nixon's veto. Adopting a posture more likely to appeal to the general public on both sides of the political spectrum, Senator Mondale—still wanting to direct services and supports toward child development and families in poverty, but cautious about framing the issue in a politically palatable way—changed tactics and, in so doing, resurrected a not-so-dormant narrative about at-risk children victimized by parental pathology. While Mondale sought to downplay any connection between child abuse and neglect and poverty, the overrepresentation of poor families of color among those reported for abuse and neglect told a different story.[44] Indeed, the higher rates of child abuse in poor and minority families about which an expert social policy professor testified at the hearings on CAPTA served as proof positive that such a connection existed, with incidents of child abuse and neglect serving as proof positive.[45] The testimony elicited in support of the landmark bill makes clear two competing strains of thought on the matter of threats to child well-being, both of which reflect what I assert are *the error* and

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[42] Roth, *supra* note 40, at 2.

[43] Jack Rosenthal, *President Vetoes Child Care Plan as Irresponsible*, N.Y. TIMES (Dec. 10, 1971), https://www.nytimes.com/1971/12/10/archives/president-vetoes-child-care-plan-as-irresponsible-he-terms-bill.html; *see also* Richard Nixon, *Veto of the Economic Opportunity Amendments of 1971*, AM. PRESIDENCY PROJECT (Dec. 9 1971), https://www.presidency.ucsb.edu/documents/veto-the-economic-opportunity-amendments-1971 (praising the purpose of the bill, but observing that "the intent . . . is overshadowed by the fiscal irresponsibility, administrative unworkability, and family-weakening implications of the system it envisions"). According to Roth, "[t]he Comprehensive Child Development Act of 1971 died not with a whimper but with a bang. It had entered softly, few aware even of its existence; it created debate even as it went through Congress, and it was vetoed in a moment of political passion and ultimate paternalism." Roth, *supra* note 40, at 31–32.

[44] *See* MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 12–13 (Univ. of North Carolina Press 2020) (observing that "[w]hile Mondale cared deeply about the welfare of children, he also strived to avoid politically fraught policies that could be criticized as poverty intervention.").

[45] *Id.*

the intentionally skewed framing of the issue based on the *quality of the reasoning*.

The very first witness called to make the case for CAPTA's enactment was Professor David Gil, a social policy professor, described as a top scholar on the topic of child abuse, whose words are haunting in the clearer light that five decades of child welfare reform has delivered. Professor Gil made clear how shortsighted it was to define child abuse as an *individual*, as opposed to societal, problem and to address the phenomenon in a holistic way:

> Every child, despite his individual differences and uniqueness, is to be considered of equal intrinsic worth, and hence would be entitled to equal social, economic, civil, and political rights, so that he may fully realize his inherent potential, and share equally in life, liberty and the pursuit of happiness. Obviously, these value premises are rooted in the humanistic philosophy of our Declaration of Independence. In accordance with these value premises then, any act of commission or omission by individuals, institutions or *society as a whole*, and any conditions resulting from such acts or inaction, which deprive children of equal rights and liberties, and/or interfere with their optimal development, constitute, by definition, abusive or neglectful acts or conditions.
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> . . . .
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> [T]he real sources of this phenomenon may be *deep in the fabric of society* rather than within the personalities of *individual perpetrators*. Hence, blaming individual perpetrators, as we tend to do, means merely to shift responsibility away from society where it really belongs. [46]

Professor Gil regarded this "tendency to interpret social problems through individual rather than sociocultural dynamics" as "not unique in relation to child abuse."[47] Gil further stated, "[w]e tend to interpret *most* social problems as results of individual shortcomings, and we are thus able to maintain the illusion that our social system is nearly perfect and need not undergo major changes[.]"[48] One cannot help but ponder whether we would have ended up as "morally and fiscally

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[46] *Child Abuse Prevention Act of 1973: Hearing on S.1191 Before the Subcomm. on Child. and Youth of the Comm.*
on Lab. and Pub. Welfare, 93rd Cong. 14, 16 (1973) (statement of David Gil, Professor of Soc. Pol'y, Brandeis Univ.) (emphasis added).

[47] *Id.*

[48] *Id.* at 16 (emphasis added).

adrift" and caught up in a habit of storytelling that "hides the systemic reasons for poor families' hardships by attributing them to *parental deficits* and pathologies that require therapeutic remedies instead of social change" had we heeded his advice.[49]

But it was the witness who was described as "the most riveting" whose story we have opted to carry over generation after generation—the error to which we continue to extend stare decisis, despite historical inaccuracies.[50] Jolly K., a parent from California who had helped to create Parents Anonymous, an organization she described as "basically a self-help group where parents can anonymously [] go to this program or have people reach out to them in a non-threatening, loving, caring, concerned way" testified in graphic detail to abusing her own child and shared stories of other parents with similar struggles.[51] "[C]utting though academic pieties to convince the assembled senators, witnesses, and journalists of the gravity of the problem," this mother was held up as exhibit A to justify the channeling of resources to support poor and defective parents.[52] As political scientist Professor Barbara Nelson observes, what made Jolly K. such a good witness was that "[s]he was, figuratively, a sinner who had repented and been saved by her own hard work and the loving counsel of her friends. But more importantly, she embodied the American conception of a social problem: individually rooted, described as an illness, and solvable by occasional doses of therapeutic conversation."[53]

So here we are with a system of institutionalized care embedded within a *coercive* legal regime that first requires some determination of unfitness before parents and children can access services aimed at ameliorating conditions that are the product of longstanding inequities. Because some historical inaccuracies align with our history and tradition of blaming *someone* over *something*, we continue to invest in models of institutionalized care that rest the *problem* of vulnerability squarely on the shoulders of the most vulnerable. As we continue to critically examine the narratives about institutionalized care for

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[49] Dorothy Roberts, *The Racial Geography of State Child Protection* 1 (Nw. Univ. Inst. for Pol'y Rsch., Working Paper No. 07-06, 2007), https://www.ipr.northwestern.edu/documents/working-papers/2007/IPR-WP-07-06.pdf (emphasis added).

[50] BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 1 (1984).

[51] *Child Abuse and Protection Act: Hearing on S. 1191 Before the Subcomm. on Child. & Youth of the Comm. on Lab. & Pub. Welfare*, 93rd Cong. 49 (1973).

[52] NELSON, *supra* note 50, at 2.

[53] *Id.*

families and children, we can only hope that *new* histories and *new* traditions are still to be written.