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However Kindly Intentioned: Structural Racism and Volunteer CASA Programs

Amy Mulzer
Brooklyn Law School

Tara Urs
King County Department of Public Defense

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HOWEVER KINDLY INTENTIONED: STRUCTURAL RACISM AND VOLUNTEER CASA PROGRAMS

Amy Mulzer & Tara Urs†

"A Judge McClellan in Lansing had authority over me and all of my brothers and sisters. We were 'state children,' court wards; he had the full say-so over us. A white man in charge of a black man's children! Nothing but legal, modern slavery—however kindly intentioned."

The Autobiography of Malcolm X

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INTRODUCTION

The question of racial disproportionality in the child welfare

† Amy Mulzer is a Staff Attorney and Clinical Instructor of Law in the Disability and Civil Rights Clinic, Brooklyn Law School. Many thanks to Annette Appell, Matt Fraidin, Marty Guggenheim, Chris Gottlieb, Nora Hirozawa, Kim Pearson, Hannah Roman, Jocelyn Simonson, Jane Spinak, and participants in both the 2016 Family Law Scholars and Teachers conference and the CUNY Law Review Symposium for their very helpful comments.

Tara Urs is an Attorney for The Defender Association Division of the King County Department of Public Defense. This article is dedicated to my clients—you know who you are.

system has, in recent years, generated a heated debate within the relatively small world of child welfare policy and scholarship. This paper is focused on that same question from a different angle. Rather than examining the disproportionately bad outcomes experienced by Black and Native American children, this paper looks at the system itself, and in particular, one central feature of child welfare decision-making in many parts of the country: volunteer child advocates. Volunteer child advocates, or "CASAs" (Court Appointed Special Advocates), are lay volunteer guardians ad litem appointed by the family court to represent the "best interests" of children who enter the child welfare system. This paper turns attention away from discussions of the race and economic poverty of the families most affected by the system, and instead looks at the impact of the race and privilege of these volunteer child advocates on child welfare decision-making.

Although CASA programs are a relatively new development, emerging as an experiment of one judge in Seattle in the 1980s[1] they are part of the larger historical story of child welfare. The demographic make-up of CASA programs—mostly middle-class white women over the age of 30[2]—easily recalls the women who, after the Civil War, played the primary role in establishing the modern child welfare system.[3] The ability of white women to speak for the best interests of poor children of color, to advocate for their removal from their families, and to receive deference and praise from legal systems, comes to our modern legal system with deep roots. Understanding the role of race, gender, and power in forming the structure of the child welfare system explains in part why our legal system so comfortably tolerates a volunteer advocate whose role, in any other context, would not survive even a half-hearted due process challenge. And a full picture of the racist underpinnings of the modern child welfare system helps develop a fuller view of CASA programs.

The term structural racism can call to mind invisible forces that shape the world in a discriminatory way. But what is particularly striking about the proliferation of volunteer CASA programs is just how visible, and visibly racist, they are. When a CASA is ap-

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1 *See* Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 1002 (2006).

2 CALIBER ASSOCIATES, EVALUATION OF CASA REPRESENTATION: FINAL REPORT 2-3 (1999) [hereinafter EVALUATION OF CASA REPRESENTATION], http://www.nccpr.org/reports/casa.pdf [https://perma.cc/GMM6-WQBT].

3 *See infra* Part II. A-D.

pointed to speak for a child in family court, the child's parents lose one of the most cherished responsibilities any person can have—the power to decide what is best for their own children and speak on their behalf. This power is not transferred to the child, but rather to the CASA herself; once appointed, it is the CASA who voices "the child's" position, based on the CASA's own assessment of what the CASA thinks is best for the child.[4] When that power—not just the power to determine a child's fate, but the power to even speak one's own opinion on the matter—is distributed away from poor families and children of color and given to a group of middle-class white volunteers, the racial bias in the system—the structural racism—is not just clearly visible, but is actually given a seat at the table in court for all to see.

And that power works real, tangible harms on families who encounter the child welfare system. The simple act of having a CASA assigned increases the chance that a parent's rights to her child will be terminated,[5] an outcome that has been called the "civil death penalty."[6]

CASA programs have carved out a unique and in some ways untouchable role in child welfare decision-making nationwide. Because CASAs are volunteers, by custom they receive gratitude for their service. But the praise CASAs receive goes beyond mere politeness. A recent edition of the National CASA Association's newsletter highlighted comments by family court judges about local CASA volunteers.[7] One judge, R. Michael Key, a former President of the National Council of Juvenile and Family Court Judges, wrote that "on an average day," CASAs "change for the good the lives of children with whom they had no previous connection and, on many extraordinary days, literally save children's lives."[8] Another former President of the National Council, Judge Leonard Edwards, wrote that a CASA is "a gift, the gift of an important person in a child's life."[9]

Yet the unexamined praise that CASAs receive deserves a more thorough assessment. There is reason to question the power that

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4 *See infra* Part I. C.

5 EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 43, 48.

6 *See, e.g.*, Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989) ("[T]ermination of a parent's rights to her child is tantamount to imposition of a civil death penalty . . . .").

7 J. Dean Lewis, *The Roles and Responsibilities of the CASA/GAL Volunteer From a Judicial Perspective*, NAT'L CASA ASS'N: JUDGES' PAGE (Spring 2016), http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.9371787/k.99BB/JPW16_3_Lewis.htm [https://perma.cc/838M-SS5L].

8 *Id.*

9 *Id.*

CASAs have been given to influence the course of children's lives, and even more reason to question the unhesitating acceptance of this state of affairs by the majority of those working within the system. Why does the legal system assume that a group of volunteers—mostly middle-class white women—will make better decisions for a low-income child of color than her own family, community, or the child herself could make? What is it about CASAs that makes them not only acceptable, but practically untouchable? However kindly intentioned their work may be, this paper posits that CASAs essentially give voice to white supremacy—the same white supremacy that permeates the system as a whole and that allows us to so easily accept the idea that children in the child welfare system actually require the "gift" of a CASA, and do not already have an abundance of "important people" in their lives.

I. Child Welfare and the Role of the CASA

A. *Race, Class, and Child Welfare*

By now, it is well known that the child welfare system disproportionately touches the lives of families of color, particularly Black and Native American families. The child welfare system separates more children of color from their families and communities, keeps them separated for longer periods of time, and more often permanently ends those families by terminating disproportionately more of their legal relationships.[10] It is also well cataloged that, even

[10] *See, e.g.*, U.S. Gov't Accountability Office, GAO-07-816, African American Children in Foster Care: Additional HHS Assistance Needed to Help States Reduce the Proportion in Care 7 (2007) ("The HHS National Incidence Study has shown since the early 1980s that children of all races and ethnicities are equally likely to be abused or neglected; however, African American children, and to some extent other minority children, have been significantly more likely to be represented in foster care, according to HHS data and other research."); U.S. Gov't Accountability Office, GAO-05-290, Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States 1 (2005) (reporting that in 2003, American Indian children represented about 3% of the total number of children in foster care in the United States but only 1.8% of total population under 18); Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (2002) (describing and assessing the disproportionate representation of Black children in the foster care system); Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 Marq. L. Rev. 215, 223-25 (2013) (discussing the disproportionate representation of African American and Native American children in the foster care system); Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 Berkeley J. Afr.-Am. L. & Pol'y 109, 110 (2008) ("There have been a disproportionate number of African-American children in the child welfare system for the last several decades. . . . Although African-American children make up 15% of the children in this country, they comprise 37% of the children in the child welfare system. . . . There is wide-

more than race and Tribal affiliation, poverty is the single greatest predictor of a child welfare case.[11] The child welfare system is fully focused on the lives of poor families, and especially focused on poor families of color. The flip side is that families with financial means and white families are far more likely to be left alone by the system despite experiencing the very same concerns that lead to child welfare intervention for low-income families of color, such as mental illness, alcoholism, recreational or habitual drug use, or domestic violence.[12] People of means are less likely to be touched by the system or to know people touched by the system.

In the literature, a variety of reasons for this disproportionality have been proposed, ranging from poorly substantiated claims that poor families and families of color actually mistreat their children at a higher rate[13] to detailed accounts of the structural racism un-

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spread agreement that compared to white children and families in the child welfare system, children of color and their families have less access to services and their outcomes are poorer."). *Cf.* Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NAT'L PUB. RADIO (Oct. 25, 2011, 12:00 PM), http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system [https://perma.cc/68YL-53QT] (reporting the results of National Public Radio's yearlong investigation into cultural bias and disproportionate removal rates in South Dakota's foster care system).

11 "Poverty is the leading reason children end up in foster care. Studies show that families earning incomes below $15,000 per year are twenty-two times more likely to be involved in the child protective system than families with incomes above $30,000. Lindsey concludes not only that 'inadequacy of income, more than any other factor, constitutes the reason that children are removed,' but that 'inadequacy of income increased the odds for placement by more than 120 times.'" MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 192-93 (2005) (quoting DUNCAN LINDSEY, THE WELFARE OF CHILDREN 65-66 (1994)).

12 "Poor parents often cannot afford to pay others to care for their children when they are unable to because they have to go to work, they are distraught, or they are high on drugs or alcohol. Nor can they afford to pay professionals to cover up their mistakes. They cannot buy services to mitigate the effects of their own neglectful behavior. Affluent substance-abusing parents, for example, can check themselves into a private residential drug treatment program and hire a nanny to care for their children during their absence. The state never has to get involved." ROBERTS, *supra* note 10, at 36. *See also* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 588 (1997) (footnotes omitted) ("[S]tudies have shown that although African American and white women of all income levels use drugs and alcohol at similar rates (with higher rates for white women), African American women are drug tested during delivery more often than white women, and when both are tested, black women are reported to child welfare authorities for prenatal drug use at a significantly higher rate than their white sisters."); Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1205 (1990) (explaining that private obstetricians and hospitals may be less likely to diagnose prenatal drug use "for fear of adverse patient reactions and the loss of future referrals").

13 *See* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare:*

derlying both the system as a whole and individual decisions within it.[14] As many have noted, not only are families of means able to access private resources to address personal and familial crises that might otherwise result in intervention by the child welfare system, but they are also under significantly less day-to-day scrutiny.[15] While some families of means might send their children to public school, they do not apply for public benefits, live in public shelters, or rely on public health clinics, allowing them to keep their private lives truly private. They are disproportionately less likely to be stopped by the police and, if stopped, less likely to be arrested. Low-income families and families of color have lives that are significantly more entangled with the state, through no choice of their own, and every interaction between a poor family and the myriad of state systems with which they come into contact on a day-to-day basis is another opportunity for someone to make a call to child protective services.[16] This issue has only been exacerbated by the

False Facts and Dangerous Directions, 51 ARIZ. L. REV. 871, 874 (2009) ("Black parents are disproportionately characterized by risk factors for maltreatment, such as extreme poverty, serious substance abuse, and single parenting; therefore, there is good reason to believe that black parents actually commit maltreatment at higher rates than whites.").

14 *See, e.g.*, ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972); KEESHA DUNBAR & RICHARD P. BARTH, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, RACIAL DISPROPORTIONALITY, RACE DISPARITY, AND OTHER RACE-RELATED FINDINGS IN PUBLISHED WORKS DERIVED FROM THE NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (2007); ROBERTS, *supra* note 10; Sandra T. Azar & Phillip Atiba Goff, *Can Science Help Solomon? Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making*, 81 ST. JOHN'S L. REV. 533 (2007); Dorothy E. Roberts, Child Welfare and Civil Rights, David C. Baum Memorial Lecture in Civil Rights and Civil Liberties at the University of Illinois College of Law (Oct. 2, 2001), *in* 2003 U. ILL. L. REV. 171 (2003); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012) [hereinafter Roberts, *Prison*].

15 The Supreme Court has spoken approvingly of just this sort of disproportionate scrutiny of low-income families, rejecting a Fourth Amendment challenge to New York's system of mandatory home visits for welfare recipients in part because such a visit allowed the case worker to check on the children residing in the home. Wyman v. James, 400 U.S. 309, 318-19, 322-23 (1971). Unsurprisingly, this line of reasoning provoked a sharp dissent from Justice Marshall: "Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children?" *Id.* at 342 (Marshall, J., dissenting).

16 "The mothers and children 'served' by the public protective system are overwhelmingly poor and disproportionately of color. Poor families are more susceptible to state intervention because they lack power and resources and because they are more directly involved with governmental agencies. For example, the state must have probable cause to enter the homes of most Americans, yet women receiving aid to families with dependent children (AFDC) are not entitled to such privacy. In addition

widespread passage of broad mandatory reporting statutes that require a wide—and growing—range of professionals to report any suspicion of child abuse or neglect.[17]

That said, the disproportionate scrutiny placed upon certain families in our society is not, in and of itself, enough to explain the wildly different levels of involvement with the child welfare system. Just as important is the discretion embedded in every stage of the child welfare system, from the initial decision that the presenting situation requires a call to child protective services to the determination that there was, in fact, neglect to the assessment that it is in the best interests of a particular child to remain in the care of and eventually be adopted by her foster family.[18] While the peculiar setup of dependency court—the low standard of proof, lack of procedural protections, and ambiguous substantive standards, discussed below—may not be the direct or only cause of the disproportionate impact borne by low-income families and families of color, these factors are what allow it to occur. Working in an ambiguous, comparatively informal setting where the stakes are high and the perceived risk of getting it wrong is enormous, including responsibility for the death of a child,[19] decision-makers—from mandated reporters to child protective workers to the agency attorneys who

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to receiving direct public benefits (like AFDC and Medicaid), poor families lead more public lives than their middle-class counterparts: rather than visiting private doctors, poor families are likely to attend public clinics and emergency rooms for routine medical care; rather than hiring contractors to fix their homes, poor families encounter public building inspectors; rather than using their cars to run errands, poor mothers use public transportation." Appell, *supra* note 12, at 584 (footnotes omitted).

17 Every state has a statute that requires members of certain professions and other specified individuals to report suspected abuse or neglect. *See, e.g.*, N.Y. Soc. Serv. Law §§ 413-414 (McKinney 2015) (requiring members of nearly fifty specified professions—including alcohol and substance abuse counselors, dental hygienists, and assistant district attorneys—to report suspected abuse or neglect); 23 Pa. Cons. Stat. §§ 6311-6312 (2015) (requiring medical professionals, medical examiners and funeral directors, school employees, child-care workers, religious leaders, social services workers, law enforcement officers, employees at public libraries, independent contractors, attorneys affiliated with organizations serving children, and foster parents to report suspected abuse or neglect). For a discussion of the development and expansion of mandatory reporting requirements and the resulting bias towards over-reporting and over-labeling of child abuse and neglect, see, for example, Guggenheim, *supra* note 11, at 193-94; Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 Ohio N.U. L. Rev. 819 (2010); Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 Child Abuse & Neglect 9 (2005).

18 *See* Roberts, *supra* note 10, at 55-59 (describing the degree of discretionary decision-making involved in the initial stages of a child protective proceeding).

19 For a detailed and eloquent description of the peculiar combination of ambiguity, informality, and life-or-death pressure involved in child welfare decision-making, see Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 Clev. St. L. Rev. 913, 928-35 (2013).

screen cases and draft petitions to the judges themselves—are relatively free to rely on their own opinions about what situations require intervention, complete with their own conscious or unconscious biases.[20]

The next sub-section will describe the life of a typical child protective case, both as foundation for readers who are not familiar with the system and to highlight the degree of discretion present throughout.

B. Life of a Child Protective Case

Not all child protective investigations result in court involvement. When an agency receives a report of suspected abuse or neglect, it assigns a social worker (or case manager) to investigate the allegation and determine whether there is any possible basis for concluding that abuse or neglect has occurred.[21] Even if the investigating worker determines that a child has been harmed or is at risk of harm, the agency may leave the children in the home and provide services to the family to ameliorate the problem. So long as the family "voluntarily" accepts the services and does what the agency asks, the agency may not need to file a petition with the family court.[22] However, if the agency wants to require the family

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[20] Dorothy Roberts describes a training exercise carried out by the National Child Welfare Leadership Center that asked a group of caseworkers to make decisions about "the level of risk and agency intervention required after reading descriptions of possible child maltreatment in a series of vignettes." ROBERTS, *supra* note 10, at 52. Half of the vignettes involve families of color, and half involve white families; the participants are not told that there are two sets of vignettes, and in each set the race of the characters is "reversed and counterbalanced to reduce experimental error." *Id.* As Roberts explains, the exercise "always uncovers the participants' racial biases. 'Without exception, the results of the exercise conducted in all sessions revealed that decisions about the level of risk and intervention were influenced by the race of the child and family described in the vignette, independent of all other factors[.]'" *Id.*

[21] *See, e.g.*, N.Y. SOC. SERV. LAW § 424(6)(a) (McKinney 2015). The standard for this initial investigation is often quite low: in order to "indicate" a report of suspected abuse or neglect in New York State, the investigating agency need only find "some credible evidence" to support the report. *Id.* § 422(5)(a). A few jurisdictions, including Washington, have a slightly higher standard. *See* WASH. REV. CODE § 26.44.020(11) (2013) (defining "founded" as "the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur").

[22] Of course, many "voluntary" agreements are not in fact voluntary, as the parent knows that if they refuse, the agency can and likely will file a petition in court. By using the threat of family court, child welfare workers can save the hassle of actually going to court—and may even get parents to agree to do services or accept other restrictions that the family court would not actually order—by convincing parents to sign a voluntary agreement. *See, e.g.*, Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 663-

to engage in services, thinks the family is not sufficiently "cooperative," or seeks to remove the child from the home, it will bring the case into court by means of a petition alleging neglect or abuse.[23]

Once a child protective case enters family court, it proceeds on multiple tracks at the same time. If the agency seeks to remove the child from her parents' care, the family is entitled to a separate hearing regarding the necessity of the removal—variously called a "shelter care hearing," "72-hour hearing," or, in New York, a "1027 hearing," among other things.[24] Accordingly, during the pendency of the child welfare case, the child who is the subject of the case may remain in her own home, in the care of her parents, or she may be removed and temporarily placed in foster care with a relative or with strangers.[25]

The family is also entitled to a full trial on the merits of the abuse or neglect allegations, which progresses much like any other civil case. The first step is fact-finding,[26] where the court will either dismiss the petition or, more commonly, enter a finding of abuse or neglect against the parents. The court then enters an order of

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79 (2012); Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and A Proposal for Change*, 65 TENN. L. REV. 835 (1998); *see also* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 834 (1977) (internal citations omitted) ("The extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned on other grounds as well. For example, it has been said that many 'voluntary' placements are in fact coerced by threat of neglect proceedings and are not in fact voluntary in the sense of the product of an informed consent.").

23 *See, e.g.*, N.Y. SOC. SERV. LAW § 424(11) (McKinney 2016); WASH. REV. CODE § 13.34.040(1) (2011).

24 *See, e.g.*, N.Y. FAM. CT. ACT § 1027 (McKinney 2016); WASH. REV. CODE §§ 13.34.060-.065 (2013). There are exceptions to the hearing requirement: workers in New York, for example, may seek an ex parte removal order when there is "not enough time to file a petition and hold a preliminary hearing," N.Y. FAM. CT. ACT § 1022(a)(i)(C) (McKinney 2005), or may remove a child without going to court at all where there is "reasonable cause to believe that the child is in such circumstance or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health" and "there is not time enough to apply for an [ex parte] order," N.Y. FAM. CT. ACT § 1024(a)(i)-(ii) (McKinney 2009). Like the provision for voluntary placement, these exceptions are susceptible to abuse and have, at times, been applied so broadly as to swallow the rule. *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002) (evidence demonstrated that New York City's Administration for Children's Services had an "agency-wide practice of removing children from their mother without evidence of a mother's neglect and without seeking prior judicial approval").

25 *See, e.g.*, N.Y. FAM. CT. ACT § 1027(b)(i)(A)-(C) (McKinney 2016); WASH. REV. CODE § 13.34.060 (2007).

26 *See, e.g.*, N.Y. FAM. CT. ACT § 1051 (McKinney 2016); WASH. REV. CODE § 13.34.110 (2007).

disposition, indicating what services the parents must complete to correct the issues on which the finding of abuse or neglect was based.[27] The dispositional order will also indicate where the child should live pending full resolution of the case: the child may remain in or return to her parents' care under supervision from the agency, or she may be placed out of home on an ongoing basis.[28] While the issue at fact-finding is whether the agency has established that the parents abused or neglected the child as alleged,[29] the issue at disposition is what result would be in the child's best interests.[30]

If the child has been removed from her parents' care, there will also be a series of federally-mandated "permanency hearings" at six-month intervals to address the family and agency's progress towards reunification and, theoretically, to determine if the child can return home.[31] Ultimately, if the family is not successfully reunited, the agency will move to establish some other form of "permanency" for the child, usually through termination of the parents' rights and placement of the child for adoption.[32] The agency will file a petition seeking termination of the parents' rights to their child; the parents have the right to a full trial and a dispositional hearing on this petition as well.[33] As with the original petition alleging abuse or neglect, the issue at the termination trial will be whether the agency has established sufficient grounds for termination, while the issue at the disposition is what is in the child's best interests.[34]

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[27] *See, e.g.*, N.Y. FAM. CT. ACT § 1052 (McKinney 2016); WASH. REV. CODE § 13.34.130 (2013).

[28] *See, e.g.*, N.Y. FAM. CT. ACT § 1052(a)(i)-(vii) (McKinney 2016); WASH. REV. CODE § 13.34.130(1)(a)-(b) (2013).

[29] *See, e.g.*, N.Y. FAM. CT. ACT § 1051(a) (McKinney 2016); WASH. REV. CODE § 13.34.110(1) (2007) ("The petitioner shall have the burden of establishing by a preponderance of the evidence that the child is dependent within the meaning of RCW 13.34.030.").

[30] *See, e.g.*, N.Y. FAM. CT. ACT § 1052 (McKinney 2016); WASH. REV. CODE § 13.34.130(3) (2013) ("The department or supervising agency may only place a child with a person not related to the child as defined in RCW 74.15.020(2)(a), including a placement provided for in subsection (1)(b)(iii) of this section, when the court finds that such placement is in the best interest of the child.").

[31] 42 U.S.C. § 671(a)(15) (2015); N.Y. FAM. CT. ACT § 1089 (McKinney 2016); WASH. REV. CODE § 13.34.145(1) (2015).

[32] Under 1997's Adoption and Safe Families Act (ASFA), state agencies must file a petition to terminate the rights of parents whose child has been in care for fifteen of the previous twenty-two months, unless the court finds good cause exists not to file such a petition. *See* 42 U.S.C. § 675(5)(E) (2016).

[33] *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b (McKinney 2016); WASH. REV. CODE § 13.34.132 (2013).

[34] *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b (McKinney 2016); WASH. REV. CODE

Finally, in addition to everything occurring in court, there are various out-of-court obligations: visitation for parents separated from their children, service planning meetings, evaluations, service review meetings, and participation in the services themselves, ranging from once-a-week evening parenting classes to all day, full-time drug treatment and mental health services.[35] While a family cannot be ordered to participate in any services or work with the agency prior to the court making a finding of abuse or neglect, parents can agree to participate in services, even without a finding of abuse or neglect, as part of an agreement to keep or bring their child home or to improve the likelihood of a favorable resolution.[36] The reality of child welfare proceedings is that a parent's participation in recommended services, "cooperation," and "compliance"—or the caseworker's assessment thereof—are often the key to everything else: visitation, reunification, and a favorable settlement.[37]

The reason that the agency has to bring the case into court if it seeks more than voluntary engagement with services is, of course, because parents have a fundamental constitutional right to make decisions about the care and custody of their children.[38] The fundamental right to family integrity has the strongest, most continuous presence in our constitutional tradition of any non-

§ 13.34.132 (2013). Although the Washington Statute does not define the "best interests" inquiry as a dispositional issue, case law has made clear that it is a separate inquiry from whether the statutory termination elements have been met. *In re* Welfare of A.B., 232 P.3d 1104, 1113 (Wash. 2010) (describing the "best interests" inquiry as the second step in a two-step process).

35 This is the experience of the authors, who have represented parents in New York City and Seattle, as well as others familiar with the child welfare system. *See, e.g.*, Appell, *supra* note 12, at 583; GUGGENHEIM, *supra* note 11, at 206-07; *see also* WASH. DEP'T OF SOC. & HEALTH SERVS., CHILDREN'S ADMIN., POLICIES AND PROCEDURES GUIDE, §§ 1710, 1720 (2016) (describing, respectively, "Shared Planning Meetings" and "Family Team Decision Making Meetings").

36 *See, e.g.*, WASH. REV. CODE § 13.34.065(4)(j) (2013) ("At the shelter care hearing the court shall . . . inquire into . . . . [w]hether any orders for examinations, evaluations, or immediate services are needed. The court may not order a parent to undergo examinations, evaluation, or services at the shelter care hearing unless the parent agrees to the examination, evaluation, or service . . . .").

37 For a valuable discussion of this phenomenon and the problems with it, see Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J. L. & FEMINISM 339, 343-55 (1999). *See also* Appell, *supra* note 12, at 598 (describing the "elevation of form over substance" in the system's emphasis on "cooperation" and "compliance" as a measure of good parenting).

38 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-66 (2000); Santosky v. Kramer, 455 U.S. 745, 753 (1982); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

enumerated right.[39] Parents are ordinarily assumed to act in their children's best interests, and are permitted to make a wide range of decisions on behalf of their children, even if others might disagree with their choices.[40] In the context of a child welfare proceeding, the ostensible role of the family court is to ensure that this fundamental right is respected, and that the state only intrudes into the private sphere of the family when absolutely necessary.

Nevertheless, in child welfare cases the burden of proof is low—at fact-finding, only a preponderance of the evidence, or fifty-one percent certainty—and procedural protections are largely absent.[41] For example, there is no right to a trial by jury,[42] no right to a speedy trial, and while many states have established a statutory right to counsel for parents in child welfare proceedings,[43] there is no federal constitutional right to an attorney or to effective assistance of counsel.[44] At fact-finding, some states allow broad exceptions to the hearsay rule for, among other things, out-of-court

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39 "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65.

40 "A parent has a constitutional right to direct his/ her child's care and upbringing, absent proof that the parent is abusing or neglecting the child . . . . Parental rights doctrine protects parental decisions by presuming that parental choices regarding or affecting children are sound. . . . The constitutional liberty interest . . . in the parent-child relationship cabins the state's ability to legislate regarding child welfare and child rearing. Thus, the state can coercively intervene in, or interfere with, family governance in order to protect the child, i.e., if the parents have fallen below minimum parenting standards. The state, however, cannot intervene merely because it has a difference of opinion with the parent about what is best for the child." Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 703-04 (2001).

41 The evidentiary standard is higher for termination trials—"clear and convincing evidence" at the least, "beyond a reasonable doubt" for proceedings covered by ICWA—but by the time the family's case gets to the point of termination, the damage resulting from the prior lack of procedural protections has already been done. *See generally* Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457 (2003); Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13 (2010) (describing the almost complete lack of procedural protections between the initial fact-finding and the termination trial, and the effect of this lack of protections on families' ability to successfully reunify).

42 *See generally* James L. Buchwalter, Annotation, *Right to Jury Trial in Child Neglect, Child Abuse, or Termination of Parental Rights Proceedings*, 102 A.L.R.5th 227 (2002).

43 *See, e.g.*, N.Y. FAM. CT. ACT § 262(a) (2012); WASH. REV. CODE § 13.34.062(2)(b) (2009).

44 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) (finding no constitutional right to the appointment of counsel for indigent parents in every parental status termination proceeding and that trial courts should make this determination on a case-by-case basis).

statements by children.[45] Hearsay is generally admissible at disposition and at pre-trial hearings regarding the possible removal of children.[46] The substantive legal standards are frequently vague and subject to wildly varying interpretations, permitting intervention "when a child has been 'abused' or 'neglected,' and sometimes when the child is 'at risk' of abuse or neglect."[47]

Moreover, by the time a family appears in court, its members' right to family integrity—the very right the dependency court is supposed to protect—has already been compromised.[48] In some cases, the child already may have been physically removed from her parents' care on an emergency basis without a court order, or upon an ex parte application to the court.[49] And even in those cases where the state waits to physically remove the child, or never removes the child at all, the mere existence of a child protective proceeding divides the child's interests from the interests of the parents. Even before any finding of maltreatment has been made, the constitutional assumptions described above are turned on their head, and the child's parents are no longer presumed to be able to speak for the child or, often, to provide any valuable information about her at all.[50]

Instead, in many jurisdictions, the child is appointed someone

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45 *See, e.g.*, ME. STAT. tit. 22, § 4007(2) (2013) (making hearsay statements of children admissible in child-protection and parental-termination proceedings); N.Y. FAM. CT. ACT § 1046(a)(vi) (McKinney 2009) (making hearsay statements of children admissible in fact-finding hearings regarding alleged neglect or abuse, though the statements must be corroborated to be sufficient to make a finding of abuse or neglect).

46 *See, e.g.*, N.Y. FAM. CT. ACT § 1046(c) (McKinney 2009); WASH. REV. CODE § 13.34.065(2)(c) (2013).

47 Appell, *supra* note 12, at 604-05 ("In their exact language, these statutes permit protective intervention when a child has been 'abused' or 'neglected,' and sometimes when the child is 'at risk' of abuse or neglect. These grounds are imprecise and difficult to apply. Neglect and risk of harm are particularly nebulous and subjective concepts. The lack of clarity leaves the state without sufficient guidance as to the reason for and scope of its involvement and results in needless disruption of families.").

48 *See* Chill, *supra* note 41, at 460-61 (discussing the propensity of interim decisions of any kind to become self-reinforcing and focusing on the powerful influence that an initial removal exerts on subsequent child protective proceedings).

49 *See* sources cited *supra* note 24.

50 *See, e.g.*, Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 NEV. L.J. 1263, 1263-64 (2006). This would seem to go against the underlying reasoning of the Court's decision in *Santosky*, where the Court held that the child's interests and those of the child's parents are presumed to coincide until the parents' conduct has been proven deficient. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982) ("At the factfinding, the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

else to speak for her—a stranger who will be treated as her advocate throughout the length of the proceeding. Although parents have no federal constitutional or statutory right to an attorney to represent them in child welfare proceedings,[51] certain federal funding for state child protective services is contingent upon states' compliance with a statutory requirement to appoint a "guardian ad litem or court-appointed special advocate" to represent the child's interests.[52]

The titles used for these advocates vary from jurisdiction to jurisdiction—in addition to guardians ad litem and CASAs, there are children's attorneys, "law guardians," and VGALs (voluntary guardians ad litem).[53] More significantly, the role of the child's advocate is unclear and varies from state to state, court to court, and case to case.[54] In some jurisdictions, children are appointed an attorney who is supposed to advocate for or at least express the child's stated position before the court. In other jurisdictions, children are instead represented by an attorney or other individual who is supposed to advocate for whatever result the advocate concludes is in the child's best interests; these advocates may or may not be required to inform the court of the child's stated position if it differs from the advocate's.[55] And of course, what the attorneys or advocates actually do in any given case may or may not line up with what they are supposed to be doing; individual courts, offices, and even courtrooms have their own cultures and accepted practices.[56]

There are a number of issues with the entire concept of appointing advocates—of whatever form—to speak for children in

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51 *See supra* note 44 and accompanying text.

52 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016); *see infra* notes 59-62 and accompanying text.

53 *See* Peters, *supra* note 1, at 1001 (describing the range of titles and roles for advocates for children in child protective proceedings in the U.S.).

54 Even though lawyers (and other representatives such as guardians ad litem) have been representing children in child protective proceedings for more than twenty-five years and are currently serving that function in every jurisdiction in the United States, there is no uniform definition of a lawyer's role and responsibilities in this context. As a result, lawyers have been remarkably free—or remarkably burdened—to figure this out for themselves. Even worse, "in almost any state . . . one will encounter within the state a deep disagreement about one's role." Martin Guggenheim, *Counseling Counsel for Children*, 97 MICH. L. REV. 1488, 1488 (1999) (reviewing JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997)); *see also* Peters, *supra* note 1, at 1011-14 (describing and attempting to systematically categorize the various roles assigned to advocates for children in child welfare proceedings in the U.S.).

55 Peters, *supra* note 1, at 1011-14.

56 *Id.* at 1013.

child welfare proceedings, and there is an extensive literature addressing these issues.[57] While some of the concerns raised in this article may be applicable to other forms of child advocacy, the article is focused on the use of volunteer CASAs as the child's primary "voice" in the court case. As is discussed below, CASAs, unlike children's attorneys, are often themselves a party to the child protective case, with counsel, notice, and a right to be heard. And unlike children's attorneys, CASAs are not professionals with enforceable standards for their conduct. While many CASAs may feel a moral duty to the children for whom they speak, they owe them no professional, fiduciary, or other obligation. Yet CASAs have outsized influence with the court: in great part *because* they are volunteers, performing charitable good deeds, CASAs are treated with deference, and the court gives the opinion of the CASA extra weight. CASAs' "benevolence" has so far served as a buffer or a smokescreen, limiting questions about the impact CASA programs actually have on the fairness of child welfare proceedings.[58]

The next sub-section explores the creation and rise of the CASA as a particular form of child advocacy in child welfare proceedings.

C. Court Appointed Special Advocates

The first CASA program in the country was established in 1979 by King County Superior Court judge David W. Soukup as a local experiment.[59] The CASA program quickly "became a significant

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[57] *See, e.g.*, Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, 39 COLUM. HUM. RTS. L. REV. 573 (2008); Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, 6 NEV. L.J. 805 (2006); Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protective Proceedings*, 29 LOY. U. CHI. L.J. 299 (1998); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399 (1996); Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984) [hereinafter *Represented But Not Heard*].

[58] Justice Brandeis famously took the opposite view when he said, "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Less famous but equally apt was the opinion of the Second Circuit in *Duchesne v. Sugarman*, noting that "of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . . Those who torment us for our own good will torment us without end for they do so with the approval of their own conscience." Duchesne v. Sugarman, 566 F.2d 817, 828 n.24 (2d Cir. 1977) (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953)).

[59] Peters, *supra* note 1, at 1002.

force within the child advocate community."[60] Soukup's "local experiment" led to the creation, in 1982, of a national CASA organization. In 1996, the national organization "successfully lobbied for the inclusion of court appointed special advocates by name in the amendment to [the Child Abuse Prevention and Treatment Act],"[61] so the statute, which used to mandate only that states appoint a guardian ad litem to represent children involved in child welfare proceedings, now specifies that states must appoint a "guardian ad litem . . . , who may be an attorney or a court appointed special advocate."[62] Currently, there are roughly 950 CASA programs in 49 states and over 70,000 individual CASA volunteers.[63]

The concept behind Soukup's initial experiment—and behind the hundreds of CASA programs currently operating across the country—is that lay volunteers can adequately represent the best interests of children in the child welfare system. Soukup's underlying concern, as he described it, was information—he felt that he simply did not have enough information about the children in his courtroom to make fully informed decisions.[64] To address this, Soukup began to use lay community volunteers as guardians ad litem who could investigate the children's circumstances and make recommendations regarding what result was in their best interests. The volunteers were supervised by a social worker and represented by legal counsel in court proceedings.[65]

There are a number of variations in the way that CASA programs operate. In some CASA programs, like the one in King County, Washington, the CASAs are a separate party to the child welfare case, serving as guardians ad litem, with their own legal representation.[66] In other programs, CASAs merely supplement the work of children's attorneys, who either represent children directly or serve as guardians ad litem.[67] For the purposes of this arti-

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60 *Id.*

61 *Id.*

62 Child Abuse Prevention and Treatment Act Amendments of 1996 (CAPTA), Pub. L. No. 104-235, 110 Stat. 3063 (1996) (codified at 42 U.S.C. § 5106a(b)(2)(B)(xiii)).

63 *About Us*, NAT'L CASA ASS'N, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm [https://perma.cc/2DYF-VYF9] (last visited May 2, 2016).

64 Michael S. Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy*, 1 J. CTR. FOR CHILD. & CTS. 63, 64 (1999).

65 *Id.*

66 WASH. REV. CODE § 13.34.100 (2014).

67 Piraino, *supra* note 64, at 64-66. *See also* Donald N. Duquette & Sarah H. Ramsey,

cle, our focus will be on those CASAs, like King County's, who serve directly as volunteer guardians ad litem.

As guardians ad litem, CASAs are not completely unprecedented. Guardians ad litem have long been appointed to direct the legal representation of litigants who are deemed unable to do so on their own. The guardian, "acting as a fiduciary, is empowered to decide what is in the best interests of his ward and to determine what position should be taken in the litigation; in carrying out his duties, the guardian may ignore even his ward's express wishes."[68] As other scholars have addressed, there are a myriad of issues with the appointment of guardians ad litem generally, ranging from autonomy concerns to potential procedural due process violations.[69] Many of the issues raised in this article regarding the use of voluntary guardians ad litem in child welfare proceedings may apply to the use of guardians ad litem in other contexts as well.

When it comes to child welfare proceedings, however, the role of the guardian ad litem becomes especially muddled: while all guardians ad litem are supposed to determine what result would be in their ward's best interests and direct the litigation accordingly, in child welfare proceedings the question of the child's best interests is not only an extremely complicated one—requiring countless predicate conclusions about the value of a particular sort of family, home, and community—but also frequently "the very issue being litigated."[70] Essentially, "in order to play an active role in the litigation, the guardian first must determine who ought to prevail on the merits," as if the guardian were the judge.[71] As will be discussed below, these concerns are only exacerbated by the particular nature of volunteer CASA programs, including their demographics, the lack of standards governing the CASA's role, and the wide latitude CASAs are given on account of their role as charitable actors.

CASAs who function as voluntary guardians ad litem have a complicated role; they are charged with investigating the child's

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Using Lay Volunteers to Represent Children in Child Protection Court Proceedings, 10 CHILD ABUSE & NEGLECT 293, 294 (1986) ("The role of CASAs and other lay volunteer child advocates varies greatly from community to community. The volunteer may operate independently or may be paired with an attorney and become the 'eyes and ears' of the child's legal representative, doing separate investigations and independent advocacy for the child."). *Cf. supra* notes 41-45 and accompanying text.

68 *Represented But Not Heard*, *supra* note 57, at 94.

69 *See, e.g.*, Donna S. Harkness, *"Whenever Justice Requires": Examining the Elusive Role of Guardian Ad Litem for Adults with Diminished Capacity*, 8 MARQ. ELDER'S ADVISOR 1 (2006).

70 *Represented But Not Heard*, *supra* note 57, at 94.

71 *Id.*

circumstances, making decisions about what is best for the child, and directing the CASA's legal representation on behalf of the child. The CASA's first task is investigatory—in theory, the CASA meets with the child, her family, relevant community members, teachers, doctors, and the child's foster parents in order to gather information about her situation.[72] This fits with Soukup's concern that he simply did not know enough about the children who came before him: if the CASA conducts a full investigation, she can obtain information about the child's life, community, schooling, and needs that the overworked social workers and attorneys on the case do not have time to gather.

Yet the CASA does not simply transmit that information to the court. As a guardian ad litem, the CASA's information-gathering is directed at a specific end, namely, to determine what result or set of results is in the best interests of the child to whom she is assigned.[73] With the child's parents stripped of their ability to speak on their child's behalf by the mere existence of the child protective proceeding against them, the CASA's role is to stand in their stead and to determine not what the child wants, but what is, in the CASA's own estimation, best for the child. The CASA then relies on this determination in two ways.

First, she will direct the child's legal representation accordingly, "just as" a parent would direct the attorney in any other kind of case brought on behalf of their child.[74] Should the CASA's attorney support the parent's motion to dismiss the dependency petition or put on evidence to support a finding of neglect? Should the CASA direct her attorney to support expanded visitation between the child and her parents or oppose it? Are three months of successful drug treatment enough, or should the attorney file a motion to require the parents to complete a year of drug treatment? Again, in making these decisions, the CASA need not seek to

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72 WASH. REV. CODE § 13.34.105(1)(a) (2013) (listing the first duty of the guardian ad litem as "[t]o investigate, collect relevant information about the child's situation, and report to the court factual information regarding the best interests of the child"). Though advocates are encouraged to develop a relationship with the children they work with, they are not mentors as much as investigators. *Id.*

73 CAPTA specifically requires that the "attorney or court-appointed special advocate" appointed to represent the child both "obtain first-hand, a clear understanding of the situation and needs of the child" and "make recommendations to the court concerning the best interests of the child." 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016).

74 "Regardless of the program model, lay volunteers do not participate in the case as legal counselors to the child," but instead as "individuals appointed to represent the child's best interest, just as a parent would in a case not involving parental child abuse or neglect." Piraino, *supra* note 64, at 66.

achieve the result preferred by the child herself, or the result deemed desirable by any (or all) of the important people in the child's life with whom the CASA ideally will have consulted; it is the CASA's own view of the child's best interests that controls.

Second, the CASA reports to the court not only about her impressions of the child's circumstances and the information gathered through her investigation and her interactions with the child, but also about her conclusions regarding the child's best interests.[75] Unlike the typical guardian described above—the guardian who determines what is in her incapacitated ward's best interests solely so that she is able to direct the legal representation to that end[76]—CASAs themselves regularly become witnesses in the child protective proceedings, and one key piece of their testimony is their ultimate conclusion regarding the result or set of results that is in the best interests of the child. Thus, on the question of visitation, for example, the CASA may offer testimony regarding her determination that a move to overnight visitation is not in the child's best interests, while in a fact finding proceeding to determine whether the child was in fact abused or neglected, she may testify that entry of a finding of neglect against the child's parents is in the child's interests. Again, what the child herself wants—to have overnight visits, or to have the case dismissed so that she can go home—is not controlling. It is the CASA's own determination of the child's best interests that matters.

Who are CASAs, and how do they make these extremely important determinations about children to whom they have no prior connection? First, CASAs are not only volunteers; they are, by design, lay volunteers. According to the national CASA training curriculum, CASAs are recruited "not for their legal knowledge but for their 'unique qualities, community perspective, [and] common sense approach[.]'"[77] Thus, while all CASA volunteers undergo training to prepare them for their roles—and while a professional lawyer or social worker with the requisite free time and flexibility in

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[75] WASH. REV. CODE § 13.34.105(1)(e) (2013) ("Court-appointed special advocates and guardians ad litem may make recommendations based upon an independent investigation regarding the best interests of the child, which the court may consider and weigh in conjunction with the recommendations of all of the parties"). *Id.* § 13.34.105(1)(f) ("[t]o represent and be an advocate for the best interests of the child").

[76] *Represented But Not Heard*, *supra* note 57, at 94. *See also, e.g.*, Noe v. True, 507 F.2d 9, 12 (6th Cir. 1974) (describing the role of a guardian ad litem appointed under the Federal Rules of Civil Procedure in directing the litigation on her ward's behalf).

[77] Piraino, *supra* note 64, at 67 (quoting NAT'L CASA ASS'N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989)).

their schedule might be accepted as a CASA if they were to volunteer—CASAs are not expected to be any more expert in child welfare practice, child development, psychology, or social work than your average community member or parent would be.

Moreover, either by design or omission, there are few-to-no standards to guide the CASA in applying their "community perspective" and "common sense" to the situations before them. While federal law requires that an advocate be appointed, there are no uniform rules describing the role of these advocates, their minimum level of education or training, or their ethical or professional duties in the case. As noted above, all CASAs must be trained—federal law requires that the appointed advocate have "training appropriate to the role"[78]—and the national CASA organization has standards for local chapters and a recommended training curriculum, but adoption of the curriculum by local chapters is strictly voluntary,[79] and adherence to the national standards is monitored by means of a "self-assessment tool."[80] Ultimately, individual CASAs can do as much or as little investigation as they want, and can rely on anything from a therapist's recommendation to their own "gut reaction" or initial impression of the quality of the underlying parent-child relationship to decide what is best for the child.[81]

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78 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2016).

79 EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 1-3. Notably, while the standards developed by the national CASA organization require volunteers to complete 30 hours of pre-service training each year and 12 hours of in-service training, the actual length of time spent in training "depends on the specific training program, but it may range from 3 hours (with continued training throughout the program) to 40 hours, with many programs falling somewhere in between." *Id.* at 3. *See also* JENNIFER LAWSON ET AL., COURT APPOINTED SPECIAL ADVOCATES (CASA) AS AN INTERVENTION FOR IMPROVING CHILD WELFARE CASE OUTCOMES: A SYSTEMATIC REVIEW 4-5 (2015), http://www.campbellcollaboration.org/lib/project/295/ [https://perma.cc/B8QP-P4WC] (describing variation in structure, training, standards, and activities of CASA programs).

80 EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 1.

81 In the world of child welfare, Congress has repeatedly endorsed particular principles to curb arbitrary state interference with private family life. One of those, first raised in 1977 in response to evidence that children were being needlessly separated from their families, is the requirement that no child will be placed in foster care "unless services aimed at preventing the need for placement have been provided or refused by the family." H.R. REP. NO. 95-394, at 8 (1977). *See also* H.R. REP. NO. 96-136, pt. 1, at 23, 24 (1979) ("such services have been made available but refused by the family"). Congress has repeatedly affirmed this requirement such that even today, in most cases agencies are tasked with making "reasonable efforts" to make it possible for the child to return to her family. 42 U.S.C. § 671(a)(15)(B)(ii) (2015). Therefore, social workers are tasked with making at least "reasonable efforts" to reunify the family, subject to judicial oversight. Unlike the assigned social workers, the amount of effort the CASA exerts is not a legal issue in the case because they are not bound by any requirement to make reasonable efforts. A CASA can make a "reasonable effort"

Finally—last but far from least—the demographics of CASA volunteers could not be more distinct from the demographics of families entangled in the child welfare system. While families of color are overrepresented in the child welfare system, they are almost completely unrepresented in the ranks of CASA volunteers. Eighty to ninety percent of CASAs are white.[82] Surveys of local CASA programs show that the typical volunteer is a white woman between 40 and 59 years of age who has had college or post-graduate education.[83]

There is not a lot of good research on the effectiveness of CASA programs, in part because it is hard to get reliable numbers or to accurately compare data from individual CASA programs, given the variation in standards, training, role definition, and requirements for appointment of a CASA.[84] It is also hard to know what the results of the few existing studies mean. For example, does the fact that children who are assigned CASAs receive more services than those who are not[85] mean that CASAs are particularly effective at identifying and accessing the services the children need, that CASAs are disproportionately assigned to more complicated cases where the children involved require more services, or that CASAs are quicker to refer children to services even when those services may not be necessary?

While studies have indicated that CASA programs may have some positive results—including increased access to services,[86] as described above, and fewer placements within care[87]—there are

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or a minimal effort or no effort to reunify a family, but that will not be an issue subject to judicial oversight. And unlike social workers, CASAs are under no legal obligation to use their efforts to keep the family together at any point. In fact, a CASA can actively thwart reunification and still be operating within their role.

82 LAWSON ET AL., *supra* note 79, at 2 ("Research on CASA volunteer demographics consistently shows that they are overwhelmingly (80-90%) White, in contrast to the foster care population, in which children of color are distinctly overrepresented.").

83 *See* EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 2-3.

84 *See* LAWSON ET AL., *supra* note 79, at 8-11 (discussing recurring problems with empirical studies of CASA programs).

85 *See, e.g.*, EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 7 ("Although the literature suggests that children with CASA volunteers receive more services than children without CASA volunteers, there is little known about the types of services that CASA volunteers are acquiring for children or the level of need for these services.").

86 *See, e.g.*, EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 5, 7, 37-39; Pat Litzelfelner, *The Effectiveness of CASAs in Achieving Positive Outcomes for Children*, 79 CHILD WELFARE 179, 190 (2000).

87 "In addition to the type of placement for the child, the number of placements the child experiences is also important. It can be very disruptive for a child to be

other troubling findings. In one recent study commissioned by the national CASA organization itself, CASA volunteers were found to spend less time on cases involving Black children than those involving white children.[88] The same study also found that volunteers spent an average of only 3.22 hours on each of their cases per month.[89]

Most significantly, CASA volunteers were found to *reduce* the likelihood of a successful reunification between children and their parents.[90] In other words, CASA volunteers confound the stated purpose of the dependency system: to mend families.[91] Indeed,

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moved from one place to another, so minimizing the number of placements is important. A study by Litzelfelner (2000) found that children with CASA volunteers had fewer placements (3.9 on average) than those without CASA volunteers (6.6 on average). Calkins and Millar (1999) found similar results: children with CASA volunteers had significantly fewer placements (3.3 on average) than children without CASA volunteers (4.6 on average). A study by Leung (1996), however, does not support these findings. Leung found no significant differences in the number of placements experienced by children with and without CASA volunteers." EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 5-6. On the other hand, another recent study found that there were significantly more out-of-home placements when CASAs were involved. Laurie J. Tuff, Court Appointed Special Advocates: Is Their Impact Effectively Evaluated by Current Research Methodology? 21, 23 (July 2, 2014) (unpublished M.A. thesis, University of Washington), https://www.uwb.edu/getattachment/policystudies/why-policy-studies/student-work/tuff-capstone.pdf [https://perma.cc/WF77-UPU8].

88 EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 22; *see also* Barbara White Stack, *An Evaluation of Volunteers Courts Controversy*, YOUTH TODAY (July 1, 2004), http://youthtoday.org/2004/07/an-evaluation-of-volunteers-courts-controversy [https://perma.cc/VC9E-GS4T].

89 EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 15.

90 *Id.* at 43, 48; Davin Youngclarke et al., *A Systematic Review of the Impact of Court Appointed Special Advocates*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 109, 119 (2009) (finding CASA assigned cases were more likely to end in adoption, equally likely to result in reunification, and equally likely to result in long-term foster care placements); U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 07-04, NATIONAL COURT APPOINTED SPECIAL ADVOCATE PROGRAM 19 (2006), https://oig.justice.gov/reports/OJP/a0704/final.pdf [https://perma.cc/ZAN5-2K7F] (finding that children in CASA assigned cases were "more likely to be adopted and less likely to be reunified with their parents"); KATHY BRENNAN ET AL., UNIV. OF WASH. SCH. OF SOC. WORK & WASH. STATE CTR. FOR COURT RESEARCH, WASHINGTON STATE COURT APPOINTED SPECIAL ADVOCATE PROGRAM EVALUATION REPORT 30, 53 (2010), https://www.courts.wa.gov/wsccr/docs/CASA%20Evaluation%20Report.pdf [https://perma.cc/3AT4-LLXZ] (finding of reunification was forty-eight percent for children assigned to CASA staff, forty-six percent for those assigned contract GALs, forty-four percent for those assigned neither a CASA nor a GAL, and forty-one percent for those assigned a CASA, but only twenty-nine percent of CASA assigned cases resulted in reunification, compared with thirty-six percent for contract GALs and thirty-eight percent for CASA staff).

91 The purpose of the dependency system is to mend families. "The primary purpose of a dependency is to allow courts to order remedial measures to preserve and mend family ties." *In re* Dependency of Schermer, 169 P.3d 452, 460 (Wash. 2007) (quoting *In re* Dependency of T.L.G., 108 P.3d 156, 168 (Wash. Ct. App. 2005)).

preventing reunification between a parent and child, and advocating for the termination of parental rights, is entirely consistent with a CASA's role even as it cuts against the larger stated goal of the system. In that way, a CASA differs significantly from the social worker assigned to the family by the state. The social worker has a duty to make reasonable efforts to reunify the family before pursuing termination.[92] But a CASA is free to advocate and press for termination of parental rights, even if the state and the child disagree, if, in her lay opinion, termination is in the child's best interests. Therefore, it is significant but not entirely surprising that having a CASA assigned decreases the chance of reunification.

Lastly, though counterintuitive, CASA programs actually cost a significant amount of money. A 2014 study of the CASA program found that CASA programs reported a total revenue of 304 million dollars in 2014, more than half of which came from public sources.[93] Though based on the work of volunteers, CASA programs require managers to assign cases, supervisors to advise the CASAs, lawyers to represent them in court, administrative assistants, not to mention a physical space and other operating costs.

In sum, CASAs have been granted a wide ranging role to influence the outcome of child welfare cases even though they are governed by few standards and have not been demonstrated to be particularly effective; they are granted enormous deference though they rely on tax payer dollars, expend less effort on Black children, and reduce the likelihood that families can remain together. One might wonder how a system of CASAs came to exist in a legal system that, theoretically, aims to protect a parent's fundamental constitutional right to family integrity. The next section will begin to situate CASA programs within a larger historical story.

II. CASA Programs and the Privileging of White Motherhood

Choose your favorite adage: what's past is prologue, or Faulkner, "The past is never dead. It's not even past." The history of child welfare is no different; it sets up themes that repeat over and over. As described above, CASA volunteers are predominantly white, middle-class women. Child welfare-involved families are disproportionately families of color, and are overwhelmingly low-in-

92 *See supra* note 81.

93 Nat'l CASA Ass'n, Annual Local Program Survey Report 11 (2014), http://nc.casaforchildren.org/files/public/community/programs/Statistics/2014_Local_Survey_Report.pdf [https://perma.cc/7WC4-L66S].

come. This is nothing new. The decision to include a CASA's voice in child welfare proceedings represents a decision to endorse a particular set of values that have been part of the debate for as long as child welfare policy has existed.[94] The race and gender make-up of volunteer CASA programs is one manifestation of the long historical trend linking volunteerism, child welfare, and white privilege.

The creation of the child welfare system in America is inextricably linked to the themes discussed in this paper.[95] It was during the period after the Civil War that white women embraced a role as benevolent reformers, capitalizing on their presumed moral au-

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[94] This paper starts looking at child welfare policy beginning in the 1880s, although that is a somewhat arbitrary choice. Typical history of child welfare policy begins by describing the "bad old days" when a "man's home is his castle," and moves on to address the "discovery" of child maltreatment in 1874, with the "Mary Ellen" case. *See, e.g.*, ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 33-34 (1999). It then jumps to the "rediscovery" of child maltreatment in 1962, with C. Henry Kempe's work on "battered child syndrome." *See, e.g.*, *id.* at 34; John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2009). The "typical" history casts an uncritical look at the charitable institutions that emerged in a limited way during the antebellum period and became a major force for social change after the Civil War. This paper highlights some of the more critical scholarship which identifies problems with the work. If space were not an issue and the goal were simply to give a more thorough accounting of the development of modern child welfare, this paper could have easily started at the point of slavery, and the systematic use of family destruction as a form of social control. For all the good that *has* come out of the child-saving movement, it is no less a part of that history than of the alternative history presented by scholars like Bartholet. "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care." Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 146 (1995). In fact, it might even be said that "until 1865 slavery was the major child welfare institution for Black children in this country, since that social institution had under its mantle the largest numbers of Black children." BILLINGSLEY & GIOVANNONI, *supra* note 14, at 23.

[95] Linda Gordon made this point explicitly when she wrote, "[i]n most respects, though certainly not all, the perspective and structures that child-protection work developed by 1920 remain today." LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 61 (1988). There are many interesting themes worthy of an entire paper that are beyond the scope of our inquiry here, including the ongoing push-pull between upper-class charitable volunteers and middle-class professional social workers. The professionalization of social work and the attempts to develop more scientific methods for the so-called helping professions have historically led to conflicts among women regarding who was best positioned to do good. *See generally* REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945 (1993). Although these debates remain relevant today, particularly in those courtrooms where a professional social worker and a volunteer CASA sit before the same judicial officer and can give competing views of the case, this dynamic is largely beyond the scope of this paper.

thority over family matters and extending that authority to "rescue" work on behalf of poor women and children. From the beginning, these movements used systems of child welfare to reproduce and maintain racial hierarchies. Notions of pure, good, white motherhood were used to set the bar for what was deemed safe and appropriate parenting, and formed the basis for an expansion of the intrusion into the private family life of those whose parenthood did not conform to that ideal. And, although the work was ostensibly benevolent, white women used the power they claimed over poor families as a foothold to lift their own standing in society, while actors within the legal system simultaneously relied on white women's judgment to rationalize state control over poor families.

The following sections briefly review the historical roots of the child welfare system in an attempt to provide context for modern-day volunteer CASA programs. Today's child welfare system, just like its antecedent a hundred years ago, relies disproportionately on the views of white women to define appropriate parenting to the detriment of those who are the objects of the system's intervention.

A. Women's Work, Power, and the Charitable Class

Middle-class white women have long asserted their own influence by claiming specialized authority over matters of the family: as far back as the Revolutionary War, white middle-class urban elites claimed their "moral motherhood" as the virtuous moral agents who would bring up the next generation of George Washingtons.[96] Historically, these claims have been tied to highly gendered notions of women's "natural" affinity for caring and for children. Yet the authority claimed eventually went far beyond the private sphere of the home, as women sought to use their "moral motherhood" as a basis for real social and political power. In the face of ideologies that deemed women's role to be in the home, white women often justified their political reform activity by asserting the need for their traditional feminine values and skills as mothers to be extended beyond the home into society to uplift women and children of other races and classes whom they characterized as oppressed.[97]

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96 SHARON HAYS, CULTURAL CONTRADICTIONS OF MOTHERHOOD 29 (1996). *See also* Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 11 (Gerald P. Mallon & Peg McCartt Hess eds., 2d ed. 2014).

97 Margaret D. Jacobs, *The Great White Mother: Maternalism and American Indian Child Removal in the American West, 1880-1940*, *in* ONE STEP OVER THE LINE: TOWARD A

Some women's benevolent projects to aid widows and orphans began to emerge as early as the turn of the nineteenth century,[98] culminating in mid-century efforts by the Children's Aid Society to remove more than forty thousand children from New York City "slums" and send them to farm families in the West.[99] Indeed, it was during this time that the phrase "best interests of the child" emerged as a legal standard, as a way to sanction the "broad discretionary authority" of private and public actors to determine the interests of children when parents were deemed to have failed.[100] But it was not until the 1870s that a "new burst of Protestant evangelicalism, . . . strongly flavored by American nationalism," led to the expansion of this work beyond a few major urban centers.[101]

As the country came out of the Civil War, massive social changes were underway that would fundamentally alter the relationship between the state, charitable organizations, and the family. In particular, the large-scale economic growth of the country after the Civil War helped to free funds for the development of private philanthropies.[102] Women's groups founded during the war were looking for outlets for the skills they had honed organizing the relief effort,[103] and new benevolent groups formed around a

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HISTORY OF WOMEN IN THE NORTH AMERICAN WESTS 191, 195 (Elizabeth Jameson & Sheila McManus eds., 2008). There is a different story, grounded in feminist theory that is beyond the scope of this paper, which would tease out which "feminisms" have historically established solidarity with other groups and which "feminisms" have been used as a tool of white supremacy. *See generally, e.g.*, ANGELA Y. DAVIS, WOMEN, RACE & CLASS (1981); *cf.* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (discussing the way in which certain contemporary feminist legal theorists fall into the trap of a "gender essentialism" that silences the voices of Black women, among others). The role of feminist movements in shaping child welfare is a topic deserving of further attention—according to at least one scholar, from the mid-nineteenth century on, "it was the women's-rights movement that . . . opened the family to scrutiny." GORDON, *supra* note 95, at 80.

98 PEGGY PASCOE, RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874-1939 4-5 (1990).

99 McGowan, *supra* note 96, at 14 (describing the plan of Loring Brace and the Children's Aid Society in New York to save poor children from the evils of urban life); Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820-1935*, *in* A CENTURY OF JUVENILE JUSTICE 3, 19 (Margaret K. Rosenheim et al. eds., 2002) (describing the purpose of Brace's work as to "disassemble slum families").

100 Grossberg, *supra* note 99, at 8.

101 PASCOE, *supra* note 98, at 5 ("This city-by-city extension of benevolent work created a firm foundation for the national expansion that took place after the Civil War.").

102 McGowan, *supra* note 96, at 12.

103 GORDON, *supra* note 95, at 33; DAVIS, *supra* note 97, at 34, 39; *see generally* David S. Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HIST. REV. 351, 364 (2005) (discussing the social and political climate following the Civil War and the extent to which advocates for children pressed

variety of issues including providing "rescue homes" for unmarried mothers, prostitutes, and women "fleeing" polygamy.[104] It was at this time that child-saving gathered steam as a major subject of public concern. The "wave of humanitarian reform" following the end of the war changed the nature of civil society as it "expanded the boundaries of individual and collective moral responsibility,"[105] and this enlarged sense of responsibility propelled charitable groups to "save the nation's young."[106]

What resulted was a massive effort by philanthropic organizations to identify child maltreatment and rescue children—specifically, poor and working-class immigrant children—from their families.[107] Some of the first child welfare agencies were called Societies for the Prevention of Cruelty to Children (SPCC).[108] Although the SPCCs were originally created in response to publicized cases of physical brutality against children,[109] the societies eventually "adopted expansive definitions of cruelty that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households."[110] And while

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the notion that the new era warranted reconsideration of the rights of children, arguing that children "like the freed people, possessed civil rights").

104 PASCOE, *supra* note 98, at 5-6 (footnotes omitted) ("Protestant women formed so many organizations in these years that one twentieth-century commentator labeled the 1870s 'the church women's decade.'").

105 Michael Grossberg, *"A Protected Childhood": The Emergence of Child Protection in America*, *in* AMERICAN PUBLIC LIFE AND THE HISTORICAL IMAGINATION 213, 214 (Wendy Gamber et al. eds., 2003). The "persistent American embrace of antistatism" was challenged during this period by a reevaluation of the need for "governmental action . . . to police families more vigorously." *Id.* at 218. *See also* McGowan, *supra* note 96, at 16 (describing the subsequent efforts of middle-class reform groups in Chicago, led by Julia Lathrop and Jane Addams, to advocate for law reform that would enable them to remove children "from corrupting influences").

106 Grossberg, *supra* note 105, at 218.

107 Grossberg, *supra* note 99, at 10.

108 The historical record of early meetings of these societies indicate that the founders "saw their primary function as prosecuting parents," and though they were spurred to act by concerns about child abuse, they "quickly turned their interests to all forms of child neglect and exploitation." McGowan, *supra* note 96, at 17. *See also* GORDON, *supra* note 95, at 2-3, 27-58; Grossberg, *supra* note 105, at 219-24; BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 7-9 (1984) (describing the development of the SPCCs). Initially these organizations were staffed by men, with quasi-police powers, though they worked for private agencies. But by the 1920s the work of these groups was dominated by women. *See* GORDON, *supra* note 95, at 14.

109 Child saving claimed widespread attention when a young girl in New York City named Mary Ellen was found starving and severely abused; she described severe beatings and being locked in a closet by her stepmother. As Grossberg writes, "the story burst like a thunderstorm on the city and the nation, forcing the knowledge of a particular social evil onto a shocked society." Grossberg, *supra* note 105, at 219. *But see supra* note 94, addressing the limitations of this story.

110 Grossberg, *supra* note 99, at 27.

child abuse did occur, many cases of "cruelty" arose from the conditions of poverty itself: "disease and malnutrition, children left unattended while their parents worked, children not warmly dressed, houses without heat, bedding crawling with vermin, unchanged diapers, injuries left without medical treatment[.]"[111] Parents came to fear these privately organized but state-sanctioned societies that had the power to take their children. Boston's SPCC, for example, became known to the poor who experienced it as "the Cruelty," a nickname that "did not seem regrettable to its agents."[112]

It was at this same time, beginning about 1880, that the United States government began to promote boarding schools for Native American children as a primary means to "assimilate" them. "By 1900, the government had established . . . boarding schools . . . for about 21,500 Native American children. Officials sought to remove *every* [Native] child to a boarding school for a period of at least three years."[113] As with the child-saving efforts of the SPCCs, white middle-class women were "integrally involved in the removal of American Indian children to boarding schools"[114]: "[w]hite women comprised the majority of boarding school employees and acted as the primary day-to-day contacts with indigenous children who had

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111 *Id.* (quoting Linda Gordon, *Family Violence as History and Politics*, RADICAL AMERICA, July-Aug. 1987, at 21, 26). These allegations will likely read as familiar to anyone currently practicing child welfare law. *See also* Tanenhaus, *supra* note 103, at 370-71 (describing the plan of states in the Midwest to remove children from "almshouses" and "poorhouses" where children were surrounded by adults, presumably including their parents, who were "degrading and vicious influences," in particular the "Michigan Plan" which was the creation of a state central school in Coldwater where children "lived in congregate housing and were groomed for placement in private homes"); McGowan, *supra* note 96, at 13-15, 18-19 (discussing the rise in orphanages as a response to the conditions of almshouses, and noting that prior to the Civil War, black dependent children who were not sold as slaves were cared for in almshouses, but as orphanages came to predominate, black children were explicitly excluded from private orphanages, leading to the creation of a few separate facilities for black children, which were ultimately destroyed by white mobs and riots). Interestingly, in finding that children deserved better quality of life than was available to their parents in an almshouse, it is easy to see how poverty alone has historically formed a basis for removing children from their parents. Eventually, "neglect . . . replaced poverty as the legal basis for depriving parents of . . . their children, but for the most part, poverty was simply equated with neglect." Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 13 (2001) (quoting Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 435 (1983)).

112 GORDON, *supra* note 95, at 52.

113 Jacobs, *supra* note 97, at 192-93 (emphasis added) (citation omitted). *See also* MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940 87-148 (2009).

114 Jacobs, *supra* note 97, at 192.

been removed and institutionalized."[115] While the women's efforts were experienced as acts of extreme violence by many of those affected by them—many of whom resisted the women's attempts to remove their children by hiding them in the bushes, pretending that they were ill, and even drugging them so that they were too sick to be taken off to school[116]—these "reformers," like their "child-saving" counterparts in the east, "employed a rhetoric of humanitarianism in justifying their policies of Indian child removal."[117]

B. The Rescue Fantasy

Gordon and Pascoe describe the "rescue fantasy" of the benevolent women's groups as grounded in their view of themselves as superior to the objects of their charity.[118] The sincerity of these early reformers' desire to help poor families was matched only by their condescension towards them; the concern was sincere, but was also "a concern already shaped by confidence in their own advantages[.]"[119] "If the early child protectors were insensitive to the power relations in their work, if they saw their clients as helpless and grateful, that very ignorance left them a clear emotional path on which to follow their kind and helping impulses."[120] The fact that these women genuinely thought that they were helping the recipients of their interventions kept them from questioning the propriety of even the most extreme of activities.

Writing about the efforts of white women to remove Native American children to boarding schools, historian Margaret Jacobs notes that "many white women reformers claimed for themselves the role of a 'Great White Mother' who would save her benighted

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115 *Id.* at 197 (footnote omitted).

116 *Id.* at 204.

117 *Id.* at 199.

118 "Because they believed that women were the proper moral guardians of society, home mission women assumed it was their duty to extend middle-class moral standards everywhere." PASCOE, *supra* note 98, at 9. "Like the female moral reform societies that had been their clearest predecessors, they preached Victorian female values of piety and purity in an attempt to set moral standards for their communities, their regions, and their nation." *Id.* at 6. Although women's groups originally articulated their positions as against male-dominated social orders, that changed over time. As Pascoe explains, "as the institutions developed, middle-class women expressed their quest for authority less often in relation to men and more in relations with rescue of home residents." *Id.* at 31. *See also* Jacobs, *supra* note 97, at 208 ("A steadfast belief in the superiority of white womanhood and a desire to reform and control Indian women permeated white women's pronouncements about rescue work.").

119 PASCOE, *supra* note 98, at 51.

120 GORDON, *supra* note 95, at 48.

Indian 'daughters.'"[121] For example, "Victorian observers making comments about Indian women were inclined to shake their heads in disapproval and count their blessings as members of a superior society."[122] These women "were aware that Navaho women were property owners and family heads, but they were unable to see these positions as indicators of authority."[123] Similarly, "in identifying the problems in need of correction, early child protectors saw the mistreatment of children through their own cultural lenses" and "their sense of mission was more powerful because it came from a feeling of unquestioned superiority to the masses among whom neglect and abuse were so widespread."[124]

This feeling of superiority was used to justify state policies of indigenous child removal.[125] Equating "indigeneity with backwardness, poverty, immorality, and parental neglect[,]"[126] white female reformers and government officials saw removal as the only way to "civilize" Native communities and protect their children.[127] For example, reformers expressly condemned the use of cradle boards by Native American women, "queer little canopied baskets" used to carry swaddled babies.[128] One missionary wrote derisively, "I found a woman with a sick baby not yet three weeks old; of course it was strapped upon a board; and it was moaning with fever."[129] Reformers also implied that Native homes simply could not be suitable for the upbringing of children. "What a contrast!" a reformer exclaimed, describing her visit to a reservation:

> The smoking fire in the centre of the tepee, and on it the pot of soup stirred by the not over-clean squaw . . . . a few blankets the only furnishing . . . . and then to think of the neat, comfortable home at the mission, with the uplifting of its daily prayer . . . .

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121 Jacobs, *supra* note 97, at 192 (footnote omitted). "Some white women played an active role in Indian child removal—not just as caregivers of removed Indian children but as their actual *recruiters*, the euphemistic term reformers used." *Id.* at 197.

122 Pascoe, *supra* note 98, at 56.

123 *Id.* at 57 ("Wrapped up in their own notions, home mission women did not recognize sources of women's power apart from the Victorian ideals of female moral purity and the Christian home.").

124 Gordon, *supra* note 95, at 46.

125 As Jacobs explains, both reformers and officials "routinely characterized the removal of American Indian children as an act of benevolence aimed at 'rescuing the children and youth from barbarism or savagery.' This rhetoric rested on a racialized discourse that deemed indigenous peoples to be lower on the scale of humanity than white Anglo-Saxon, middle-class Protestants." Jacobs, *supra* note 97, at 199 (footnote omitted).

126 *Id.* at 200.

127 *Id.*

128 *Id.* at 201.

129 *Id.* (footnote omitted).

> We realized what a blessed work these faithful missionaries . . . were doing in giving to these poor, neglected children . . . some of the light and blessing that had been given to them.[130]

Here, it is easy to see the underside of charity work: it is not only propelled by feelings of superiority among the charitable class, but it represents the exercise of real power. Gordon notes that, "[t]he rescue fantasy reflected not only [the benevolent women's] class condescension but also their search for an area in which to feel powerful[.]"[131] As "well-intentioned" as they may have been, women benefitted from their charitable work, which allowed them to occupy public positions of leadership and power,[132] the exercise of which led to the destruction of other women's families. In the case of Indian Boarding Schools, Jacobs observes that the government's need for personnel to carry out assimilation policy "dovetailed with white women's own ambitions."[133] That was how it came to be that white women became the majority of boarding school employees.[134]

The "rescue fantasy," therefore, is the expression of two separate ideas: that non-white children and children from poor and working class families were in need of rescue and that economically privileged white women were naturally well suited to the task of saving those children. The effect was self-reinforcing: white women used their moral purity as a basis for large-scale intervention in other families, and, in both demonizing and "helping" those

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130 *Id.* at 201-02.

131 GORDON, *supra* note 95, at 32-33 ("Child saving drew heavily on women's reform and philanthropic energy, and was influenced by feminist interpretations of social ills. . . . . These early child-saving efforts were characterized by what psychiatrist John Bowlby has called the 'rescue fantasy.' The reformers saw themselves as gracious, privileged big sisters, not only of children but of adult women of the lower classes. . . . The rescue fantasy reflected not only their class condescension but also their search for an arena in which to feel powerful, and, as has often been the case with women, their religious conviction justified their stepping out of their domestic sphere.")

132 Women took a prominent role in these reforms. Grossberg, *supra* note 99, at 24 ("The gendered reality of American civil society thus provided a way for women to increase their sphere of influence."). And, the philanthropic organizations that these women created became "ever more powerful actors in the discussion and implementation of vital public policies." *Id.*; PASCOE, *supra* note 98, at 4 ("Benevolent activity provided women with an opportunity for moral stewardship roughly parallel to the commercial leadership exercised by local merchants."). Although charity work became increasingly professionalized over the years, opportunities for volunteers continued. The "professionalization" of social work had class connotations, bringing in more middle-class rather than upper-middle-class women. *See* GORDON, *supra* note 95, at 65-67.

133 Jacobs, *supra* note 97, at 197.

134 *Id.*

families, further ensured their own superior status.[135] Of course, "they carried off this balancing act partly by directing their sharpest critiques at families outside [their own] Victorian middle-class culture"[136]: working class and poor families, immigrant families, and Native American families.

C. Racial Hierarchies

As is evident, the parenting standards by which families were judged were not value-free, but rather part of a race-and-class contingent set of knowledge. "What child-neglect cases have in common is that they must by definition project an inverse standard, a norm of proper child-raising."[137] Historically, the dominant narrative of good mothering was (and continues to be) predicated on the parenting ideals of white, native-born, middle-class women—"the most powerful, visible, and self-consciously articulated" set of parenting norms.[138] These principles are so firmly ingrained that it is hard to notice that they are not obviously correct.[139] As Elisabeth Badinter writes in a different context, "[w]hether or not they are aware of it, all women are influenced by [the prevailing] ideal [of good motherhood]. They might accept or avoid it, negotiate with or reject it, but ultimately their choices are made in relation to it."[140]

Thus, the SPCCs' "images of good and bad child-raising were deeply influenced by the sensibility of [the] upper-class women" who headed those societies: concerned with "cleanliness, fine dress, good food, order, and quiet," they sought to save children who were "improperly dressed or excessively dirty," children who worked alongside their parents by begging or peddling in the streets, children who were not in school, and children who became

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135 PASCOE, *supra* note 98, at 51 ("Thus, while Protestant women entered into 'woman's work for woman' with sincere concern for the women they hoped to welcome to their rescue homes, it was a concern already shaped by confidence in their own advantages, and that concern was combined with a determination to retain a line between moral and immoral women, to ensure their own status.").

136 *Id.* at 34.

137 GORDON, *supra* note 95, at 7.

138 HAYS, *supra* note 96, at 21.

139 The impact of notions of "ideal" parenting on child welfare go beyond the CASA program. "[T]he ideology of the ideal family is a pillar of American legal consciousness that has sidelined nonconforming policy proposals and has had an untold and profound impact on the lives of foster children." Adler, *supra* note 111, at 4 (footnotes omitted).

140 ELISABETH BADINTER, THE CONFLICT: HOW MODERN MOTHERHOOD UNDERMINES THE STATUS OF WOMEN 115 (2011).

injured while playing outside.[141] Similarly, during the Progressive Era, the identification of children who lacked a middle-class childhood was considered a problem—"[i]t encouraged the conclusion that a proper childhood must be imposed if it was not voluntarily embraced."[142] Child protection was invoked to ban children from entering dance halls or skating rinks or joining the circus.[143] The child savers simply could not see or value family difference or account for the variations in families' circumstances, blinded as they were by the dominant ideas of good motherhood. When mothering "was not done well, according to the standards of the child protectors, that inadequacy was not a sign of obstacles, resistance, or inadequate resources, but of character flaw."[144]

Yet the racial aspect of the child-saving movement was—and is—more than just a subtext or a "mere" side effect of the correlation between race and class in American society. White womanhood has been long associated with purity, refinement, and correctness—characterizations that hold racial meaning.[145] White women's self-conception "came to be intimately tied to idealized images of 'true womanhood' through which the virtues of piety, purity, submissiveness, and domesticity were extolled"—images that evolved in contrast to depictions of Black and Native women as "degraded, immoral, and sexually promiscuous others."[146] And these contrasting visions of womanhood did more than just enhance white women's power as morally virtuous agents of proper domesticity. Rather, the "concept of white womanhood was essential to . . . galvanize support for white supremacy[,]"[147] a symbol used to justify countless racist acts, including the widespread lynching of Black men.[148] Similarly, "as white women articulated a sense

141 GORDON, *supra* note 95, at 36-38; Grossberg, *supra* note 99, at 27 ("The societies adopted expansive definitions of cruelty that sanctioned extensive policing of working-class families aimed at imposing middle-class family norms on those households.").

142 Grossberg, *supra* note 99, at 23.

143 Grossberg, *supra* note 105, at 222.

144 GORDON, *supra* note 95, at 99.

145 "White evangelical reformers invoked racial representations of themselves as sexually pure and refined and their predominately white charges as redeemable, even as their declarations of a cross-class sisterhood obscured the racial homogeneity of that proposed sorority." KUNZEL, *supra* note 95, at 13.

146 Cheryl I. Harris, *Finding Sojouner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 339 (1996). *See generally* Bela August Walker, *Fractured Bonds: Policing Whiteness and Womanhood Through Race-Based Marriage Annulments*, 58 DEPAUL L. REV. 1 (2008); Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

147 Walker, *supra* note 146, at 33.

148 Victorians were "eager to defend the purity of white womanhood, the cultural

of difference between themselves and native women as mothers, they helped to construct racial ideologies that deemed Indian peoples to be in need of 'civilization' by their white benefactors."[149]

Because the work of the charitable class was explicitly founded on notions of white women's moral, racial, and sexual purity, it is not surprising that the work itself was necessarily interwoven with efforts to maintain and reproduce race and class hierarchies; while the work was justified as an attempt to help individual families correct problems within their households, only certain types of families had those "problems." Writing about Societies for the Prevention of Cruelty to Children in Massachusetts, Gordon observes that the clients "of children's protective agencies were mainly poor immigrants of non-elite ethnic and racial backgrounds."[150] Notes from the Societies describe Italian women as, "contriving still, in the crowded rooms, to roll their dirty macaroni, and all talking excitedly; a bedlam of sounds, and a combination of odors from garlic, monkeys, and most dirty human persons."[151] MSPCC records "called clients shiftless, coarse, low type, uncouth, immoral, feebleminded, lazy, and worthless (or occasionally, positively, good or sober)[.]"[152] Black women were seen as "'primitive,' 'limited,' 'not nearly as talkative as many of her race, but apparently truthful,' 'fairly good for a colored woman.'"[153]

Just as often, of course, white supremacy justified ignoring the needs of Black families altogether.[154] Black children were systematically excluded from child welfare services in the late nineteenth and early twentieth centuries.[155] During this time, "[e]vangelical women and social workers argued that the supposed lack of stigma surrounding illegitimacy in [B]lack communities justified the segregation of their homes [for unwed mothers]."[156] This is unsurpris-

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symbol used to justify, among other things, the widespread lynching of blacks in the American South." PASCOE, *supra* note 98, at 134. *See also* DAVIS, *supra* note 97, at 172-201 (discussing the myth of the Black rapist); KUNZEL, *supra* note 95, at 12-13 (discussing the intersection of gender ideology and anti-Black racism in the concept of "true womanhood").

149 Jacobs, *supra* note 97, at 192.

150 GORDON, *supra* note 95, at 8. *See also* Jacobs, *supra* note 97, at 199.

151 GORDON, *supra* note 95, at 40.

152 *Id.* at 15.

153 *Id.* at 14.

154 *See* ROBERTS, *supra* note 10, at 7; BILLINGSLEY & GIOVANNONI, *supra* note 14, at 45-86.

155 McGowan, *supra* note 96, at 25.

156 KUNZEL, *supra* note 95, at 71. So early evangelical maternity homes, "strived to be racially homogeneous. The NFCM [National Florence Crittendon Mission] noted that 'the handling of girls of mixed races in the same institution is difficult' and de-

ing seeing as, in the Post-Reconstruction Era, the child welfare system was not needed to enforce white supremacy on Black communities—Jim Crow, "the legal system of segregation and the reign of lynch law were already well established."[157] It was only in the mid-twentieth century, with the collapse of de jure segregation and the opening of the welfare rolls to Black families, that the need to "protect" Black children was discovered.[158]

D. Intertwining of the Charitable Class and the Court

Ultimately, the power of the charitable class was dependent on the recognition they were afforded by government, and in particular, by legal systems. The power of a Society for the Prevention of Cruelty to Children, "of course, depended upon the Society's influence in court."[159] But, fortunately for those charitable workers, "judges usually accepted the agency's advice."[160] As Gordon explains, "[w]hile the MSPCC did lose criminal assault cases at times, in the legally noncriminal cases of neglect, it was virtually a judge's private advisor."[161] Similarly, "[m]aternity home workers valued an alliance with the court for several reasons, not least of which was the legitimacy that such an alliance conferred upon their homes."[162] In New York, the Florence Crittenton Mission employed an "all-night missionary, who sat in on the night court sessions regularly to 'see what service she can render to any of the cases.' 'Frequently,' the mission reported, 'she is called upon by the Judge to advise as to the proper disposition to make of the case,'" and judges would sometimes sentence women to the Mission itself.[163] The trend was for benevolent women's groups to become ever more closely intertwined with the police and the government in general—but their "first important liaison was with the court

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clared it 'wise to restrict admission to girls of one color.' This color, with very few exceptions, was white." *Id.* at 29-30.

157 DAVIS, *supra* note 97, at 112, 116.

158 *See, e.g.*, Dixon, *supra* note 10, at 133-34. This article does not address the transition to contemporary child welfare policy, but if it did the same patterns would become clear: by 1999, less than forty years after passage of the Civil Rights Act of 1964, six out of ten children in foster care were Black, a situation that led white child advocates like law professor Elizabeth Bartholet to call for an increase in the transracial adoption of Black children by "nurturing" white middle-class families. *See, e.g.*, BARTHOLET, *supra* note 94, at 176-83.

159 GORDON, *supra* note 95, at 51.

160 *Id.*

161 *Id.*

162 KUNZEL, *supra* note 95, at 15.

163 *Id.*

system."[164]

III. The Questionable Advocacy of the CASA

As described above, the child welfare system was founded on notions of superiority among a charitable class of white women, who used their presumed authority over the domestic sphere as a basis to intervene and "protect" poor children of color. That presumed authority—the unearned sense of respectability and correctness that accompanies white women's charitable work—continues into the present. It should go without saying that "America's racial hierarchy continues to accord automatic benefits and privileges to people who are born white and automatic disadvantages to others."[165] This section is concerned with the manifestation of those benefits and privileges in modern child welfare proceedings, in particular, in the work of CASAs: a group of predominately middle-class, white women engaged in charitable works on behalf of poor children and children of color.

This section begins with an exploration of how the advocacy of a CASA conflicts with bedrock principles of fairness in our legal system, including notions of justiciability and standing, the role of expert witnesses and opinion testimony, and "fair cross-section" requirements for community participation. After establishing that the CASA occupies a completely unique role in the American legal tradition, one that flouts long-standing fairness rules, the paper then looks at the kinds of things CASAs have said in actual child welfare cases as examples of how that role shapes, and often misshapes, the outcome of individual cases. Finally, this section concludes by offering an explanation for how CASA programs have

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164 Pascoe, *supra* note 98, at 186-87 (describing the transformation of Mission Home work into government work and noting the reliance of Mission Homes on the power of the Society for the Prevention of Cruelty to Children to remove Chinese children from their parents and "assign" them to the Mission Home).

165 Roberts, *supra* note 10, at 230-31. In fact, as discussed above, child welfare is just one of many areas where the presumption of respectability that accompanies white women did not end in the Progressive Era, and indeed its roots go much further back. *See generally* Bell Hooks, Ain't I a Woman: Black Women and Feminism (1981). The idealization of white women has roots in slavery, as does the need to rationalize the differential treatment afforded to enslaved women. *See generally* Thavolia Glymph, Out of the House of Bondage: The Transformation of the Plantation Household (2008). *Cf.* I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. Rev. 826, 869 (2013) (considering the differences in how white women and Black women are perceived in a courtroom setting and discussing how rape shield laws, which are theoretically race neutral, in fact allow jurors to fill in the blanks about what they don't know about the victim's sexual history with stereotypes that are likely to consider black women to be sexually promiscuous and white women to be morally pure).

been allowed to flourish in a legal system that is ostensibly dedicated to fairness and individual rights.

A. Conflict Between the Role of a CASA and Fairness Principles

As described above, the CASA's role in court is a strange one. First, as guardians ad litem, they decide what result they think is in the best interest of the child, and direct the child's representation accordingly: Should the attorney join in the parent's request for return of the child, or oppose it? Should the attorney file a motion to dismiss the petition, or put on evidence to support a finding of neglect? Second, as per Soukup's original concern,[166] they report to the court about the child's circumstances and their own conclusions regarding the best interests of the child—in many cases, the very issue the court is trying to decide. In this dual role, CASAs have no analogue within our system. Moreover, CASAs are—by design—lay volunteers with no real accountability. Because of these unique factors, which are unlike any other legal party in our system, there is good reason to question the impact of volunteer CASAs on the overall fairness of the child protective proceedings in which they appear.

First, and perhaps most fundamentally, there is the issue of standing. By design, the CASA does not represent the child as an attorney would. She does not have a client—she *is* the client, a party to the case with all of the rights that entails, from notice and the right to be heard to the right to be represented by counsel.[167] CASAs have "standing" to participate as parties in child welfare proceedings because state statutes give them standing.[168] But the CASA's advocacy is effectively unmoored from any connection to the actual child for whom she is supposed to speak. Ultimately, the CASA speaks only for herself, although she will not live with any of

166 *See supra* notes 59-65 and accompanying text.

167 *See, e.g.*, WASH. REV. CODE § 13.34.100(5) (2014) ("A guardian ad litem through an attorney, or as otherwise authorized by the court, shall have the right to present evidence, examine and cross-examine witnesses, and to be present at all hearings. A guardian ad litem shall receive copies of all pleadings and other documents filed or submitted to the court, and notice of all hearings according to court rules. The guardian ad litem shall receive all notice contemplated for a parent or other party in all proceedings under this chapter.") *See also supra* notes 66-67 and accompanying text (discussing the various roles of CASAs in different jurisdictions).

168 *See, e.g.*, WASH. REV. CODE § 13.34.100(1), (5) (2014) (requiring the appointment of a GAL for a child who is subject to a dependency action, unless a court for good cause finds the appointment unnecessary, and granting that GAL all notice contemplated for any other party, as well as the right to present evidence, examine witnesses, and the right to be present at all hearings.)

the consequences of the court's decision. She need not advocate for what the child wants, or what the child's parents or therapist or teachers or community think is best for the child.[169] She advocates for what *she* thinks is best for the child, based on her investigation of the child's circumstances and her own "common sense."[170] That is precisely the job for which the CASA is recruited, not only something she is permitted to do but what she is expected to do.[171]

Given this, it is hard to see how reliance on CASAs in child protective proceedings does not violate basic principles of justiciability, principles that are designed to promote fairness in our legal system. A fundamental aspect of justiciability is that, for a party to have standing, the party must have a stake in the outcome of the case.[172] Standing doctrines are designed to ensure fairness of process because our legal system relies on the expectation that people will effectively represent their own interests. After all, parties to litigation typically stand to gain or lose something, and will invest effort to serve their own ends. The Supreme Court has explained that "concrete adverseness" between the parties is essential because it "sharpens the presentation of issues upon which the court so largely depends for illumination[.]"[173]

Yet the CASA, by definition, has absolutely no stake in the proceeding. The CASA, unlike the agency or its employees, has no accountability for the result of the case—she won't lose her job or be disciplined if she fails to build a proper case or to testify effectively.[174] And unlike the parent or the child herself, the CASA does

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169 Piraino, *supra* note 64, at 66; *see also Represented But Not Heard*, *supra* note 57, at 100-08 (describing the common formulation of the child advocate as "champion" for the child).

170 Piraino, *supra* note 64, at 67 ("[V]olunteers . . . are recruited not for their legal knowledge but for their 'unique qualities, community perspective, [and] common sense approach . . . .'" (quoting NAT'L CASA ASS'N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989)).

171 *Id.*

172 *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 498-99 (1975) ("As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."); Branson v. Port of Seattle, 101 P.3d 67, 73-75 (Wash. 2004) (explaining that, in Washington state courts, a party has standing to pursue an action when she is within the zone of interests protected by a statute and has suffered an injury in fact).

173 United States v. Windsor, 133 S. Ct. 2675, 2687 (2013) (quoting Baker v. Carr, 339 U.S. 186, 204 (1962)).

174 A recent scandal involving Washington State's Snohomish County Voluntary Guardian Ad Litem ("VGAL") program highlights the problems inherent in a system that grants so much power to individuals who have so little accountability. The scandal came to light because a VGAL lied to get access to a confidential defense attorney

not have to live with the result of the proceeding: she does not have to move homes or change schools or lose her connection to her siblings or parents, or her connection to her own child. To take the Court's framing above, it is hard to see how a CASA's involvement could in fact "sharpen" the presentation of the actual issues at stake in the child protective proceeding to which she is assigned any more than any other randomly-selected individuals could. Why, then, is the CASA not only allowed to participate—given notice and a right to be heard throughout the case—but also listened to so attentively? What is the CASA expected to add?

One way to answer this question is to turn, again, to Soukup's concern about information. As discussed above, the CASA is not only expected to direct the child's representation in their parents' place, but also to investigate the child's circumstances and report to the court with her own conclusions regarding the child's best interests. In this role, the CASA is less of a guardian and more of a witness, the designated "expert" on the child. If the CASA does her job well—if she spends more than 3.22 hours on her case[175]—she will be the one who speaks to all of the important people in the child's life, from the child's parents, siblings, and foster parents to her teachers, religious leaders, therapists, extended family, and the

listserv on which parents' attorneys discuss parent defense strategies. The scandal quickly escalated when the program sought to cover up that misconduct and submitted false declarations. Ultimately, Snohomish County Judge Anita Farris made clear, shocking findings of misconduct. Judge Farris found: "VGAL Cynthia Bemis's first sworn declaration to this Court about how she got on to the LISTSERV is perjury. I've only used the 'P word' once in 23 years on this bench and it applies in this situation. That declaration is filled with lies. The GAL who submitted it, Walker and the VGAL Program that submitted it, had reason to know the witness was lying and they had the ability to verify that many of those lies were lies, but instead chose to just submit a lying witness's declaration." Verbatim Report of Proceedings at 8-9, *In re* Termination of Alijanea Hayes, No. 14-7-00499-7 (Wash. Snohomish Cty. Super. Ct., Feb. 25, 2016). Judge Farris also found that Snohomish County was not complying with their own complaint procedures, which should allow litigants to raise questions about a VGAL's conduct, and that the complaint procedure was structured and applied in a way that would fail to protect those who filed a grievance from retaliation by the VGAL. *Id.* at 19-21. Judge Farris's clearest findings have to do with the program's almost pathological interest in maintaining the perception that they were good actors. Judge Farris found that "[t]he VGAL Program was so vested in saying that a VGAL could never do any wrong, it chose to just, like some ostrich, stick its head in the sand and submit perjury rather than take the slightest effort to check obviously questionable facts." *Id.* at 84-85. "This program, in the way that it responded to this motion, has made it clear that it does not believe that it is subject to any rules of the State of—in the law of the State of Washington." *Id.* at 130. Parents' attorneys in that case went to extraordinary lengths to expose the misconduct of the VGAL, and once exposed the misconduct was obvious. But the difficulty those attorneys had piercing the layers of secrecy and discretion built into the system ensures rulings like this are rare.

175 *See* EVALUATION OF CASA REPRESENTATION, *supra* note 2, at 15-16.

child herself.[176] She can then share what she learned about the child with the court, along with her opinion about the decision or decisions that would be in the child's best interests.

But the CASA program does not claim any particular expertise. CASAs are not experts. Rather, they primarily offer what can only be considered lay opinion testimony. The opinion the CASA provides about the child's best interests is not based on reliable principles and methods, something ordinarily required of an expert opinion. In fact, there is probably no precise measure available. What is in the best interests of any child is not an "objectively determinable absolute," but rather an "extremely malleable and subjective standard"[177] that contains countless predicate questions. For example, making a best interests determination requires the CASA to assign value to the parent-child relationship. How important is a parent-child relationship, how strong is that relationship here, and how strong is this child's relationship with her extended family, community, and Tribe? What do those people have to offer this child? And how do we value her current caregivers? When assigning these values, what measure is the CASA expected to use? It doesn't end there. Best interests asks: Who is the best therapist for this child, the one nearby, the one with better credentials, or the one who shares the child's culture? What is the best school for this child, the one where she went and where her friends go, the one closer to her mother's new home, or the one closer to the foster home? The questions go on and on.[178] But the CASA is free to offer her opinion, in the way an expert ordinarily would, even when those opinions are based solely on her own impressions.

The CASA is not even limited to opining on matters related to the child. As a party to the case, the CASA can ask the family court

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176 Although, as discussed above, there is no obligation for a CASA to report to the Court how many hours were spent on a particular report or what factors motivated the CASA's conclusion. *See supra* notes 78-81 and accompanying text.

177 Sinden, *supra* note 37, at 354; *see also, e.g.*, Appell, *supra* note 12, at 608 (discussing the "subjectivity and indeterminacy" of the best interests standard); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 74-82 (1995) (describing the impossibility of ever determining a child's "best interests" in any sort of definitive way); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 503 (1984) ("[T]he [best interests] test is so general and vague that it provides no standard at all, and thus no guidance for decision-making.").

178 Leah Hill has written on a similar issue of indeterminacy and bias in the use of child welfare investigators to produce court-ordered reports for private custody cases in New York City. *See generally* Leah A. Hill, *Do You See What I See? Reflections on How Bias Infiltrates the New York City Family Court - the Case of the Court Ordered Investigation*, 40 COLUM. J.L. & SOC. PROBS. 527 (2007).

to order the parents to engage in particular services, including drug treatment or mental health counseling, and can demand reports or information about a parent's participation in those services, including matters as personal as a domestic violence victim's trauma counseling.[179] The CASA can then testify as to her opinions about the parent's progress in services, while having no obligation to rely on professional judgments about that progress. For example, a CASA may determine that although a parent is engaged in drug treatment and giving consistent random negative urine screens, the fact that the parent missed two appointments and did not offer a reason suggests that the parent has relapsed. The court then can accept and rely upon the CASA's opinion even though it is not directly related to the best interests of the child nor based on any actual expertise in chemical dependency.

Frequently, the CASA's testimony not only touches upon but goes directly to the ultimate issue being litigated. "Best interests of the child" is the standard at many points in a child protective proceeding, from certain visitation disputes[180] to disposition after the initial fact-finding[181] and after the fact-finding regarding termination.[182] If the best interest of the child is what the parties are litigating and what the court must decide, why is the CASA asked to offer her opinion on the matter? By allowing the CASA to testify as to the ultimate issue in the case—and by so often taking that testimony to heart, as described by the former family court judges quoted at the beginning of this article—the judge is essentially abdicating her role to a volunteer who has been neither elected nor appointed to fill it.

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179 In the experience of the practitioners, while it is unclear how this is allowed under the relevant statutes, this is a commonly accepted practice that some practitioners in King County have begun to push back against.

180 *See, e.g.*, WASH. REV. CODE § 13.34.130(6) (2013) ("If the court has ordered a child removed from his or her home pursuant to subsection (1)(b) of this section, the court shall consider whether it is in a child's best interest to be placed with, have contact with, or have visits with siblings."); *Id.* § 13.34.136(2)(b)(i)(A) ("If the parent is incarcerated, the plan must address how the parent will participate in the case conference and permanency planning meetings and, where possible, must include treatment that reflects the resources available at the facility where the parent is confined. The plan must provide for visitation opportunities, unless visitation is not in the best interests of the child.").

181 *See, e.g.*, N.Y. FAM. CT. ACT § 1052 (2016).

182 *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b (2016); WASH. REV. CODE § 13.34.132 (2013). Although the Washington Statute does not define the "best interests" inquiry as a dispositional issue, case law has made clear that it is a separate inquiry from whether the statutory termination elements have been met. *In re* Welfare of A.B., 232 P.3d 1104, 1113 (Wash. 2010) (describing the "best interests" inquiry as the second step in a two-step process).

What happens where "best interests" is not the standard—for example, at fact-finding, where the court must determine whether the state has put forth sufficient evidence to establish by a preponderance that the parent abused or neglected the child? At that point in the proceeding, it does not seem to violate any fundamental principles of the adversary system to permit a CASA to testify that a finding of neglect should be entered because such a finding is "in the best interests" of the child—that is not the ultimate issue, at least not yet. But is it at all relevant? And even if it were relevant, isn't it extremely prejudicial? How is the court supposed to weigh a close case fairly where, despite the state potentially having failed to establish neglect under the law, the individual assigned to speak "for" the child has testified that a finding of neglect would benefit that child? Even if, in her role as a guardian ad litem, a CASA is supposed to determine what legal position is in the child's best interests at every step in the case in order to direct the child's representation—itself a questionable prospect, as discussed above—allowing the CASA to testify about that determination distorts the legal process, regardless of whether that is the question at issue in the proceeding or not.

A different possible justification for the CASA's anomalous role in our legal system could be the one implicitly given by the national CASA organization itself, when describing the qualities for which CASA volunteers are recruited: the CASA is there to bring a "community perspective" into the courtroom.[183] This *is* something we value—this is the aspect of fairness represented by the Sixth and Seventh Amendments—and it would seem particularly important in child welfare proceedings, given the cultural aspect of nearly all parenting standards.

Yet when we want to bring a "community perspective" into court proceedings, we do it by means of a jury—something that is rare in child welfare proceedings[184]—and we do it according to

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183 *See* Piraino, *supra* note 64, at 67.

184 "Jury trials are not constitutionally required in termination of parental rights cases. However, five states guarantee the right to a jury trial in involuntary termination proceedings. In addition, Arizona allowed jury trials for a three-year experimentation period, although it does not currently allow jury trials in termination of parental rights proceedings. Every other state specifically prohibits jury trials in termination of parental rights cases." Cary Bloodworth, Comment, *Judge or Jury? How Best to Preserve Due Process in Wisconsin Termination of Parental Rights Cases*, 2013 WIS. L. REV. 1039, 1041 (2013) (footnotes omitted). *See generally* Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 MICH. J. GENDER & L. 1, 36 (2006) (examining the history of the jury trial in relation to family court proceedings and recommending that jury trials be an option in "the

carefully calibrated procedures, in order to enhance the likelihood that the jury will fairly represent the community: parties cannot use race as a basis for striking jurors;[185] the jury pool must represent a "fair cross-section" of the community;[186] and, although a jury of six members is sufficient to satisfy constitutional requirements, a jury of five is unconstitutional, because "any further reduction . . . promotes inaccurate and possibly biased decisionmaking . . . and . . . prevents juries from truly representing their communities[.]"[187]

Even if CASAs did provide the "community perspective" for which the national CASA organization says they are recruited,[188] that perspective is offered in a way that violates the first principles of community participation in our legal system. If the "community perspective" is offered by a single individual—the CASA—it can never represent the community. The CASA, no matter how connected to "the community" she is, is not a "fair cross-section" of that community. She is one person, representing her race and gender alone.

In fact, the situation is far worse than that. As discussed above, most CASAs are from an entirely *different* community than the children for whom they are supposed to speak and the parents whose voices they replace. Eighty-to-ninety percent of CASAs are white,[189] and the majority are middle-to-upper class and educated,[190] while the children for whom they advocate are overwhelmingly low-income and disproportionately Black or Native American.[191] CASAs

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adjudicative portion of family offense proceedings and child protective proceedings addressing allegations of family violence").

185 Batson v. Kentucky, 476 U.S. 79, 99 (1986), *modified*, Powers v. Ohio, 499 U.S. 400 (1991) (footnotes omitted) ("By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our Nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

186 Berghuis v. Smith, 559 U.S. 314, 319 (2010) (holding that the Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community); Holland v. Illinois, 493 U.S. 474, 484 (1990) ("[T]he goal of the Sixth Amendment is representation of a fair cross section of the community on the petit jury . . . ."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

187 Ballew v. Georgia, 435 U.S. 223, 239 (1978).

188 Piraino, *supra* note 64, at 67 ("[V]olunteers . . . are recruited not for their legal knowledge but for their 'unique qualities, community perspective, [and] common sense approach . . . .'" (quoting NAT'L CASA ASS'N, COMPREHENSIVE TRAINING FOR THE CASA/GAL 42 (1989))).

189 *See supra* note 82 and accompanying text.

190 *See supra* note 83 and accompanying text.

191 *See supra* note 10 and accompanying text.

are pretty much the polar opposite of "community" representation, at least if one assumes that the community to be represented is the community whose lives and rights are at stake in the legal proceeding.

Parents in child welfare cases sense this lack of legitimacy when they ask their attorneys "why does that woman get a say in the outcome of my case?" The answer they are likely to get will be unsatisfying: because that's just the way it is. Thereafter, parents are free to fill in the blank with their own experiences of racism and discrimination to explain why a white woman of means is appointed by the court to speak for their child. Considering the history of child welfare, and the long-standing role white women have played in the destruction of poor families of color, parents are right to be skeptical about the benefits of this charity.

B. The Power of the CASA

The disconnect between the backgrounds of most CASAs and the children for whom they speak creates questionable advocacy on the part of many CASAs. CASAs in King County, Washington, have expressed concerns about reunification based on the location of a parent's new home, because it is on a "dark street" or because it is in Federal Way, a low-income neighborhood outside of Seattle.[192] According to one practitioner familiar with the case one CASA testified at a trial to terminate the parental rights of a father who had purchased an RV as a home for himself, his partner, and eventually his children to live in, that she "hardly considered an RV a stable environment." The CASA found the father's choice to purchase the RV, when he could have used the money for something else, to be a parental deficiency. Yet before the father bought the RV, he was camping on the street or living in shelters.

In another case, without ever having met one of the four children for whom she was speaking, another CASA advocated that dependency should be established for four Native American siblings because, in the CASA's opinion, the mother could "benefit" from "services," though the CASA's report did not indicate what services she thought were needed. Another testified at a termination trial that, among other things, the parents put too much Desitin on their child's diaper rash. A third expressed "concern" about whether the Black mother in her case was sufficiently bonded to daughter when the mother allowed the girl to unbuckle herself

192 All documents regarding cases discussed in this section are on file with the authors.

from her car seat and get out of the car on her own rather than doing these things for her.

The situation is even more problematic when the child in question has been removed from her home and placed in a foster home that is more racially and economically familiar to the CASA, as the CASA is then likely to identify with the foster parents and base her assessment of the child's best interests at least in part on the instinct that the foster home is simply "better" than the child's own home. For example, one CASA expressed concern about returning two girls to their single Black father—who had completed every service asked of him and obtained a sought-after spot in a transitional housing program for himself and his daughters—because the move would be disruptive to the "quality of life" the girls were experiencing in their two-parent white foster home. And the same CASA who testified about the RV also repeatedly compared that father's home in the RV to the foster home, indicating that the foster home had "lots of toys" and that they "read to [the child]."[193]

Although racial bias is rarely the topic of explicit discussion in dependency court, it often lies just below the surface and at times becomes painfully obvious. One CASA volunteer, during the course of a dependency case, made an unannounced visit to the mother's home and found a man in the home; it later turned out that the man was not allowed to be there, although the volunteer didn't know who the man was at the time of her visit. The child was removed from the mother and the case eventually went to a termination trial. At trial, the volunteer testified that the unapproved individual was a Black man approximately in his 20s or early 30s, and that when she encountered him he was wearing only a pair of shorts. The volunteer then testified that upon seeing him, she feared for her life and that she believed he could have been carrying a weapon.

In all of the examples just discussed, the dependency court gave great weight to the CASA's recommendation. For example, in the case in which the mother failed to unbuckle her daughter's seatbelt for her, the judicial officer was sufficiently concerned by the CASA report that she granted the CASA's request for a new, more searching evaluation of the family. The evaluation ultimately recommended that the case be dismissed. And even a judge who ultimately ruled against the CASA's position—dismissing the de-

193 This same CASA also testified that, although she did not know whether the Department had actually offered services to the parents, it was her opinion that the parents did not comply with the services and that termination was therefore appropriate.

pendency petition against the mother the CASA believed would "benefit" from unspecified services—nevertheless took time before ruling to praise the CASA's "good intentions" in advocating as she did.

This is not surprising. As described above, in a proceeding without many of the "standard trappings of the traditional adversarial model of dispute resolution[,]"[194] the CASA is a "neutral" anomaly—a party with a right to be heard but no stake in the case. More to the point, however, the CASA's seeming neutrality gives her an enhanced voice in comparison to the two parties who are not neutral, who *do* have a stake in the outcome, and whose positions are therefore presumed to be less trustworthy. Not only will the judge pay particular heed to what the CASA has to say, but, often, the other parties are reluctant to "go all out" in their opposition to her, lest they come off as too aggressive. After all, the CASA is a volunteer, a "friend of the court," appearing in the case out of the goodness of her heart and speaking for the best interests of the child rather than for her own benefit; she does not deserve to be "attacked."[195]

Of course, CASAs do sometimes support expanded parental visitation or parent-child reunification, and there are CASAs who make a real effort to understand the families and communities of the children for whom they are advocating. But even if those CASAs were the norm, it would not eliminate broader issues stemming from the very fact of a CASA's role in the first place. Because CASAs have the authority to weigh in at all stages in the case, the legal standards are so vague, guidelines for CASAs are practically nonexistent, and because CASAs are regularly granted deference by the courts, parents and their attorneys have to constantly position their litigation with an eye on the CASA.[196]

The CASA presents an extremely challenging set of choices for the parent in a child welfare case who is fighting to keep their family together. For each case, the attorney and client need to size up the individual CASA assigned: What is her position likely to be?

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194 *See* Sinden, *supra* note 37, at 348 (explaining that the proceedings are conducted at an intermediate level of formality but that parents lack many of the procedural rights which criminal defendants enjoy).

195 *Cf. id.* at 354 ("Mothers are supposed to be nurturing, loving, and above all protective of their children. Conflict is viewed as harmful to the child, and therefore the mother accused of child abuse who creates conflict . . . harms her child a second time.").

196 *Cf.* Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2006 (1995) (discussing the importance of getting the child's law guardian "on one's side" when representing a parent in family court).

How will she view the parent? The attorney and client need to decide whether it makes sense to cooperate with the CASA and try and "sell" the parent to the CASA as a good parent, or keep the CASA at bay until the parent can get on stronger footing. The attorney and client need to decide whether the particular CASA is likely to understand the complexities of a parent's life or whether it is better to keep her in the dark entirely. Attorneys and clients wonder: Is this a CASA that can be educated about race and poverty, mental illness or drug addiction? Should the parent disclose facts about trauma she has suffered in her own life? Or will the CASA take any concession of weakness to use later at a termination trial?

Keeping the CASA at arms-length—refusing to speak to her or sign releases of information for her to speak with "service providers"—has risks because the CASA is likely to be resentful and distrustful of the parent as a result. She will then almost certainly oppose whatever relief the parent seeks in the future (e.g., additional visitation, a decreased level of supervision), but on the plus side she may have less information to use in support of her opposition. At the same time, openly communicating with the CASA has significant risks as well, not unlike talking to the police in a criminal case—everything you say can and will be held against you—except the parent has no right to a warning in advance.

C. Structural Racism and Volunteer CASA Programs

So, if CASA programs really are set up so as to undermine established principles of fairness, why are they not just tolerated, but praised? If CASAs have inordinate influence—swaying decisions and forcing the other parties to shape their strategies with the CASA in mind—why have CASA programs failed to engender more scrutiny or suspicion? The answer folds back to the history of our child welfare system: CASA programs draw on traditions that feel comfortable, traditions that enhance rather than challenge existing structures of power.

A CASA need not establish her expertise on the best interests of a child because, as a white, middle-class woman, she benefits from the assumption that such expertise is one of her natural attributes. Her views on parenting are presumed to be correct, so there is little reason to doubt her ability to pass quality judgment on matters of parenting and children.[197] In addition, the CASA

197 *See supra* Section II. For an important discussion of the ways in which this country views—and values—white and Black motherhood differently, see Odeana R. Neal,

benefits from the assumption that because her work is charitable, there is no need to examine her motives. Her good intentions make her opinions more valuable, even as they shield her work from scrutiny. The benefits she receives from her participation in the system are not the subject of the case and, therefore, her reasons for taking up this charitable work will go unquestioned. The CASA need not justify her seat at the table—her standing—because courts have long relied on the opinions of white women when making decisions about the lives of poor children.[198] That is to say, the CASA is valued for the reasons the charitable class has historically been valued.

And while the CASA's formal role in the courtroom is one of "neutrality"—simply looking out for the interests of the child and assisting the court in making an informed decision—she does not have a neutral perspective. Like the early child savers, the CASA necessarily views the best interests of "her" child through the lens of her own experience, an experience that is nearly always different than the experiences of the child for whom she speaks. The CASAs described above—the ones who were concerned about children living with their father in an RV or unbuckling their own car seats or having to leave their foster home to reunite with their father in transitional housing—had those concerns because what they saw happening did not match their understanding of a proper middle-class childhood. Yet, the job of the dependency court is not to give every child a proper middle-class childhood, nor should it be. The job of the dependency court is to determine when state intervention in the family is necessary to prevent serious harm to the child.[199] If we wanted to give every child a middle-class childhood, there would be much better—and more constitutional—ways to do it than by the removal and redistribution of children via the child welfare system.

As with the child-saving movements of decades past, the racial aspect of this system is not accidental, nor a mere subtext. Rather, the violence imposed by the child welfare system is a violence specifically imposed on low-income families of color as well as white

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Myths and Moms: Images of Women and Termination of Parental Rights, 5 KAN. J.L. & PUB. POL'Y 61 (1995); *see also* Roberts, *supra* note 94; Roberts, *Prison*, *supra* note 14, at 1486.

198 *See supra* Section II.

199 *See* Stanley v. Illinois, 405 U.S. 645 (1972) (parents are constitutionally entitled to a hearing on their fitness); *see also* N.Y. FAM. CT. ACT § 1011 (1970) ("[The Family Court Act] is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.").

families who, because of their poverty, are unable to meet middle-class standards of living and parenting.[200] The choice to not only rely on the assistance of a CASA to provide information about the child's best interests during the course of a child protective proceeding but to actually make her a party to the case, with representation and a right to be heard, is a choice that mirrors and enhances existing structures of white supremacy. A CASA's power to speak for the child is not merely a net gain in authority to the CASA herself, it is a net loss to the parent whose fundamental rights are at stake and whose family is threatened with permanent destruction. It is also a net loss to the child, who may or may not have their stated interests represented or advocated for in court.

In fact, the choice to rely on a system of volunteer, middle-aged white women to give direction in child welfare cases illuminates the racist underpinnings of the entire system. Ultimately, CASAs are afforded so much deference because the system views them as superior. A CASA is entitled to deference precisely *because* she has nothing in common with the poor families of color whose children are removed. And so it is with no irony, or historical perspective, that the child welfare system offers the CASA as an expert on other people's children and the lone spokesperson for the "community's" perspective on parenting.

The problem of the CASA is the problem of family court. There are three primary ways in which racism is embedded in the child welfare system. First, as discussed above, the discretionary standards and the need for constant judgment calls allow racial and class bias on the part of decision-makers all the way through the life of a child protective case, from the initial call that starts an investigation to the decision whether it is in a child's best interests to give his parent a "second chance" to regain her rights with a suspended judgment after a termination trial.[201] Second, the interrelation between the child welfare system and other systems that affect the lives of low-income families and families of color—including the criminal justice system, employment, and housing—means that the racism present in those areas comes already "baked in" to the standards employed by child protective workers and fam-

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200 *See generally* Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J.L. & FEMINISM 317, 318-19 (2014) (describing the ways in which the relationship between social support and poor communities is "hyperregulatory," in that "its mechanisms are targeted by race, class, gender, and place to exert punitive social control over poor, African-American women, their families, and their communities").

201 *See supra* notes 18-20 and accompanying text.

ily courts: which parents are most likely to have a criminal record, to be unemployed or homeless, or to live in substandard housing?[202]

Finally—and this is what an analysis of the role of the CASA helps show us—conscious or not, racism is a key part of what allows those working in the system to see what they are doing as fair and just, despite all indications to the contrary. As Robert Cover has famously observed, while "[l]egal interpretive acts signal and occasion the imposition of violence upon others[,]"[203] our "evolutionary, psychological, cultural, and moral" inhibition against the infliction of pain on others requires that this exercise of violence be tied up with "cues that operate to by-pass or suppress the psycho-social mechanisms that usually inhibit people's actions causing pain and death."[204] In the child welfare system, these cues are present in the system's emphasis on "helping," "fixing," and providing needed "services" to poor families. By framing the work of child welfare in the language of helping and fixing, rather than in the language of rights, the value of those legal standards which do exist is further diluted, and the pain experienced by families is obscured. This framing—the same framing that has been used since the mid-nineteenth-century advent of the child-saving movement—obscures the violence actually dealt by the system, and "suppresses rights talk,"[205] creating pressure on parents to work within the system, to "comply," [206] and to be grateful for the assistance of the modern "charitable class."[207]

But these cues wouldn't work—they would not be able to obscure the real harm that is caused to so many families by the operation of the child welfare system—if not for the underlying

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202 *See supra* notes 10-17 and accompanying text.

203 Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

204 *Id.* at 1613.

205 Sinden, *supra* note 37, at 350.

206 *Id.* at 353.

207 Jane Spinak describes this phenomenon well: "Individuals and families whose conduct is regulated by the state are often expected to act in prescribed ways. Welfare recipients, for example, are supposed to be grateful for their income despite Supreme Court decisions which pronounce such payments to be an entitlement. Biological parents who are forced by circumstance or unfitness to place their children in foster care are then required, while the state acts as guardian, to solve their problems of poverty, illiteracy, homelessness or drug addiction while developing a thorough understanding of child development and family dynamics. They are expected, furthermore, to be resolute, even cheerful, when they are permitted to visit their children for an hour every other week and to troop off steadfastly to any and all programs that their caseworker has identified as necessary for return of the children." Spinak, *supra* note 196, at 2000.

assumption that the families involved in the system are in fact families that are deficient and need help, and the corresponding assumption that those in the child welfare system are the ones who are best positioned to provide that help. And we would not make either of those assumptions—we would not be so comfortable thinking that low-income Black and Native children lack "important people" in their lives—but for the powerful racism and classism that permeates our society and devalues families of color. As Dorothy Roberts explains, "The cherished icon of the mother nurturing her child is . . . imbued with racial imagery . . . . 'Americans expect[ ] Black mothers to look like Aunt Jemima, working in somebody else's kitchen. American culture reveres no Black madonna; it upholds no popular image of a Black mother nurturing her child.'" [208] If it did, it would be obvious that what we are doing in dependency court each day is the furthest thing from kindness.

Conclusion

This paper need not define what child representation should look like in order to argue what it should not. The ongoing, nationwide experiment with volunteer CASAs has caused some of the most troubling parts of child welfare's history to resurface. Considering these programs in the clear light of day reveals that they deprive families of a fair and neutral adjudication of their child welfare case. CASAs are impermissibly allowed to define and judge families against the benchmark of a white middle-class childhood, or whatever arbitrarily determined benchmark the CASA brings with her into the courtroom. And while CASAs are given enormous power to speak "for" children, their claim to authority is based on little more than race-, class-, and gender-based assumptions about middle-class white women's inherent ability to recognize good and bad forms of parenting. A critical examination of CASA programs suggests we adopt a deep skepticism when the views of privileged white people are allowed to dominate over the views of the families most directly impacted by the system, however well-intentioned those voices seem.

In fact, there are a myriad of other solutions which could have been adopted to address Judge Soukup's original concern that he lacked information about children in child welfare cases. The most obvious would be to support and professionalize the role of the assigned social worker from the children's services agency, to adopt

[208] Roberts, *supra* note 94, at 146.

low caseload standards, and to give those individuals the resources they need to fully inform the court. Providing information about a family, whether good or bad, is their role and the law already requires them to prepare reports to court about the parents and children. Judges similarly have the power to hold those social workers accountable for failing to provide the necessary investigation, to schedule new court dates, ask for more detailed reports, or hold them in contempt, if necessary. In fact, if one views the resources of the child welfare system as a limited pool, one could argue that the CASA program is actually pulling money out of the system that could otherwise be directed to improving the social work itself.

And what about the need for someone to advocate for the best interests of the child? First off, there is no reason why a parent in a dependency case, who is statistically likely to reunify with their child eventually, could not retain this power—a power to which they are constitutionally entitled—subject to the decisions of the court and ongoing supervision of the child welfare agency. Involving the parent in decision-making about her child furthers the goal of the dependency system to minimize intrusion into private family life and prepare the family for a safe reunification. Allowing parents to continue to speak for the best interests of their children would recognize that reunification is possible in the majority of cases and would send a message to parents that, even though they may have lost custody of their child, the legal system continues to see their value as parents.

Such an argument may seem absurd to those who work outside the field of family defense, but it is less absurd in reality. Parents may, by virtue of their poverty, suffer from homelessness, instability, drug addiction, depression, or anxiety; they may be victims of domestic violence; or they may suffer from PTSD. As a result, they may not be able to offer a safe home for their families. Our society has elected to prosecute those parents for their deficiencies and to pay other people to care for their children. But whatever the parent's deficiencies may be, the mere fact of poverty, illness, or a drug addiction does not mean that a parent cannot provide meaningful input about the child's needs and interests. Many upper-middle-class parents have made appropriate decisions for their children despite an ongoing addiction to narcotics or alcohol, and many low-income parents could do the same.

But, sadly, there are cases in which parents do not participate in the dependency case and are therefore not available to advocate for their child. Also, in a small minority of cases, the dependency

charges stem from allegations of serious physical or sexual abuse and criminal protection orders may prohibit contact or information-sharing between parent and child. In those cases, some might suggest that the need for a CASA is strongest, in order to be, as Judge Edwards suggested, an "important person" in the child's life. But that assumes that the child comes from a vacuum and has no important people in her life already, no aunts or uncles, teachers, neighbors, friends, friends' parents, pastors, grandparents, or others who have the child's interests at heart.

The vast majority of children have a community available to them beyond their parents. Why could those people not be invited to participate in decision-making regarding the child? Assuming for the sake of argument that there is a need for someone other than the social worker, the parent, or—assuming the child is old enough to develop a stated interest—the child to speak for the child, it would be worthwhile to explore options that do not rely on the input of strangers, however well-meaning those strangers may be. It would further the child's sense of connectedness and community to identify an advocate or advocates who already know the child and family who can offer an informed perspective on her interests.

Whatever system a jurisdiction ultimately adopts, whether it is one of these suggestions or something else, the lessons of the CASA experiment offer one clear message: the integrity of the legal system is compromised when the law invites voices of privilege to dominate. Given our nation's long struggle with racial discrimination, it is particularly troubling to allow the voices of white people to speak loudest in a system disproportionately focused on families of color. And given the racism and the layers of discretion already built into the system, the fairness of the child welfare system will inevitably suffer when even well-meaning attempts to help children obtain a "better" childhood are allowed to take precedence over judicial decision-making based on established legal rules and standards.

Assuming that CASAs mean well, assuming their kind intentions, should not blind observers to the racial oppression inherent in the child welfare system. Parents in child welfare proceedings are not fooled. A legal system that allows middle-class white women to speak for the children of poor families of color is not hiding its bias if you only take a moment to look behind the "therapeutic" veneer. This exercise of white supremacy is out in the open, obvious, direct. It is a part of the case—a *party* to the case. Allowing

CASAs to stand in the place of child-welfare-involved parents and speak for child-welfare-involved children is to take the structural racism underlying the child welfare system and give it a seat at the table. It is to ask it directly what it thinks is best.