

APPENDIX

ELIE HIRSCHFELD SYMPOSIUM ON RACIAL JUSTICE IN THE CHILD WELFARE SYSTEM TRANSCRIPT JANUARY 23, 2019

KHIARA BRIDGES, PEGGY COOPER DAVIS & DOROTHY ROBERTS

MARTIN GUGGENHEIM: And, welcome everybody, I'm Marty Guggenheim. I co-direct the Family Defense Clinic and am thrilled to invite you here, to see you here, to the first ever, in what we hope will be a long line of formal, Eli Hirschfeld's Child Welfare Panel Symposia. That we hope to hold annually.

About a year ago, I met Eli Hirschfeld, who is seated here. And we started talking, and he finally remembered his wonderful experience as a third-year law student at this law school, when he took the Criminal Defense Clinic. And it happened to be that the year in which he took that clinic was the first year that I was teaching in the clinical program here as well. And his favorite teacher was my closest colleague at the time, Chet Mirsky. And we talked about those good old days, and then I told him, well, for me, those good old days have continued, but I shifted my work from criminal and juvenile defense to family defense, and that led to a, well, what exactly is family defense? And what did you do, what do you do in the clinic? And after explaining that he said, that's awesome, how can I help? And the answer was, well, we can use some financial support. And we worked out an arrangement.

We have for years wanted to expand our capacity to do appellate work, because everybody who does this work realizes that the best way to get a judge to obey the law is to appeal an illegal ruling. And we were, as a consequence of this support from Mr. Hirschfeld, able to create the first Eli Hirschfeld Fellow, the magnificent Amy Mozer. She's our Fellow, and we have been working together since August, and then the last part of the gift was the idea that we should convene on an annual basis to bring together people to talk about important issues in child welfare, and if I know anything about creating something that's useful it is, you start with the very best in the world, so the goal was to create today, the rock star panel that we have. And I'm now more than thrilled to turn over the proceedings to my close colleague, Chris Gottlieb, who will take over from here. Thank you.

CHRISTINE GOTTLIEB: Thank you Marty, thank you Eli for bringing us together, I also want to welcome everyone. Having started in family court 20 years ago when this kind of gathering was really unimaginable, it's still just really heartwarming to me to just see a room, and a little bit surreal, honestly, still, to see a room of top notch lawyers, social workers, parent advocates, parent activists, who

really care about family defense and really care about making the child welfare system better, that's not the kind of room that was around 20 years ago and it just, it's very special to me to have you all here.

Let me first just tell you the plan for the evening. We have asked each of our panelists to talk with you about the issues and ideas that they have been working on recently. We'll ask each of them to take a turn doing that, and then in the second hour, we're going to open it up for discussion, we'd really like to have a robust conversation about what the panelists have been thinking about, what you've been thinking about, and maybe what kind of next steps we can think about taking together and then at 7, we'll break into a less formal conversation where we hope you'll stay for the reception, it'll be in this room, and continue to talk over wine and snacks. But my privilege for the evening is to get to introduce our panelists and I really do feel privileged to do that.

We have Khiara Bridges here from Boston University, Dorothy Roberts, here from the University of Pennsylvania, and our own Peggy Cooper Davis. I decided that for the introduction, I'm not going to go through the lists of their accomplishments. Because I don't want to take that much time, as it would to do that, even just to list the writings of the three people that we have here that have profoundly affected our field. Just listing those would take too long, so I'm not going to do that.

I just wanted to take a minute to say why I think it's particularly meaningful to have these three particular individuals here. And in the last few weeks, as this event has been approaching, people have been coming up to me. I mean, students, my professional colleagues, parent activists that I work with, I mean, there just has been a buzz about this event, that I think it's fair to say it doesn't, it isn't normally associated with a law school panel with law school faculty on it. I mean, there's, I have felt an energy that I think is meaningful, and when I thought about why that is, it occurred to me that I think that the three of you that are here have played for those of us in this room a role that—a really important role, that in some ways is analogous to the role that those of you who work in this field play for your clients. And what I mean by that is, that one of the things that lawyers and social workers, parent advocates and parent activists do for people who are dealing with children's services is in addition to fighting for them in the courtroom and the agencies, and those are super important fights, of course, but I think separate from the fights that you're fighting, you provide something really valuable to people who are dealing with children's services simply by seeing, really seeing, some of what is happening to them. And letting them know that they're not crazy to think that what is happening to them is not okay. And they're not crazy to think that what is happening to them has to do with race.

I think, I know, that the people in this room are sending that message, implicitly and explicitly, to the people you work with on a daily basis. And what I realized is that Khiara and Dorothy and Peggy have, in a sense, played that role for us. That is, they, in their writing and their speaking, they have acknowledged what

we see every day. And they have told us with the authority that their academic prowess gives them, that we're not crazy to think that what we see is not okay. And we're not crazy to think that it has to do with race. And to give us a language to speak about that and to think about it and to figure it out, and not just feel it and be hurt by it, but to start to grapple with it, I mean, that has really been a gift, I think, these three individuals have given to all of us, and I think that accounts for the energy, and we're just, we're thrilled to have you here to take that conversation the next step forward and I just would ask you all to join me in welcoming them, and then I'll turn it over to Khiara.

KHIARA M. BRIDGES: So thank you all for being here tonight. I am utterly humbled to be asked to speak to you, because I feel like you all know a lot about this subject and I feel like all of you could be panelists on this panel. And I'm also humbled to just be on the same stage as Dorothy Roberts and Peggy Cooper Davis. So, I'm also not used to speaking in a handheld, and so I feel like Beyoncé, so I might — . I like it, I'll just say that. I will insist from now on.

So like everyone here, I've spent a lot of time thinking about the child welfare system, and why it looks the way that it looks, and why it operates in the way that it does, and specifically I've been thinking about why it is that the family is subjected to interventions by child welfare authorities are overwhelmingly poor, and disproportionately non-white. And I've been thinking about why it is that child welfare services operate so brutally vis-a-vis the poor families of color that are under its jurisdiction. Why does it seemingly remove children from their parents so gratuitously, and once children are removed from their families, why do family reunification plans require parents to do things that have nothing to do with the reason for their children being removed in the first instance, right? Why do these plans require parents to undergo things like anger management classes and vocational training and parenting classes and substance testing in order to be reunited with a child that may have been removed for reasons that have nothing to do with a parent's anger, or lack of vocational skills, or approach to parenting, or substance use? So, in my scholarship, I've argued that the reason the child welfare system looks the way that it does and operates the way that it does is due to the moral construction of poverty.

The moral construction of poverty is a simple idea that poverty, that people are poor because there is something wrong with them. It is a profoundly individualist explanation of poverty, meaning that it explains poverty in terms of the individual's failures, right? It doesn't look to structural causes of poverty. It ignores things like a labor market that contains fewer middle skill, middle wage jobs than it did in decades past, it ignores things like the fact that women are paid less than men for the same work, it ignores things like the nation's choice to pursue mass incarceration as its means for addressing its social problems, which is a policy choice that does a wonderful job of impoverishing already impoverished people, families, and communities. And so the moral construction of poverty ignores all

of these structural causes of poverty, and simply concludes that people are poor because they're lazy, or they're irresponsible, or they're promiscuous and they like to have a lot of kids, or they just don't have a good work ethic, or don't like to work, or just feel entitled to government handouts.

Now, know that if people are poor because there is something wrong with them, then there is nothing wrong with the demographics of the child welfare system, and there's no, nothing wrong with the way it operates. If people are poor because there is something wrong with them, then the child welfare system ought to be focused on poor families at the exclusion of wealthier families. The child welfare system ought to be comfortable removing children from their parents' homes, and the child welfare system ought to make parents jump through hoops before reuniting them with their kids. This is because if people are poor because there's something wrong with them, then when you're confronted with a poor parent, then by definition, you're confronting a person who has something wrong with them, but who is nevertheless raising a child. The fact of a poor parent, means, by definition, that the child is dependent on a person who has something wrong with them.

This is perfectly illustrated by the case of *NANW*, and I came upon this case because I read this book, I don't know if you guys heard of it, but called *Shattered Bonds*. So, the case involved the removal of a six-year-old girl from her mother's home because the home, essentially, was dirty. And the, and admittedly, it was dirty, the court described the home as follows: inside the apartment, the worker discovered the entire front room to be strewn with a collection of garbage, clothing, and other general clutter. Ashtrays were filled to overflowing with some knocked over. Windows and screens were missing, garbage materials were embedded in the carpet. They had about 12 kittens or cats living, in the house, squalid conditions in the kitchen, dishes stacked in the sink on the counter on the table, cat box filled with excrement found in the kitchen and some of the cats' excrement was stuck to NW, the child's clothing. So, the majority upheld the removal of the child from the home, however, there was a dissent. And the dissent rightly observed that the state would spend more time removing the child from the home than simply hiring somebody to clean the house. Now, if we, so the question is, how does this make sense at all, right?

If we view the case, and if we view it in NW's mother's home through the lens of the moral construction of poverty, the case makes all the sense in the world. We can see how providing a cleaning service to this woman would not have really solved the problem. Essentially, the dirtiness of the home is not the problem, the moral construction of poverty tells us that the dirtiness of the home is simply a symptom of a larger pathology. A pathology that touches on the moral character of a woman who would allow her home to arrive in such a state. See, so one can see an argument that there has to be something wrong with the person, morally and perhaps psychologically, for her to be willing to live in such conditions. If this is the case, then hiring a cleaning service for NW's mother and returning the child to the home is simply insufficient. Sure, the child would've been living in a clean

home, but she would still be at the mercy of a woman whose character is so compromised that she would be willing to live in such conditions. So, that explains why the court felt comfortable removing this child from the home, the state just can't fix the discreet problem of the dirty house, it just can't hire a cleaning service. Instead it has to fix the parent through anger management classes, through vocational training, through parenting classes, through drug testing and so on and so forth, and I think that the moral construction of poverty explains why the child welfare system tends not to try to fix isolated problems. Instead it attempts to fix problematic people. That is, poor people of color. However, recent events have caused me to question the universality of the moral construction of poverty, in other words, I've had to reconsider whether the moral construction of poverty applies to everyone.

Until recently, I felt pretty confident as a general matter that people have assumed that people are poor because there is something wrong with them. Now I've always recognized that structural explanations of poverty, which again, insist that macro, large scale forces sort of work to impoverish people, I've always recognized that those sorts of explanations of poverty have some degree of salience in the US. For example, in the early days of the 2016 presidential election, Jeb Bush, back when he was trying to secure the Republican nomination, he had this quote that circulated in all the major media outlets in which he said that Americans needed to "work longer hours and through their productivity gain more income for their families." And then he got pilloried for making that comment. People said that Bush was arguing that workers were not working hard enough if they were not earning enough money to support themselves and their families. Essentially, people said that Bush was saying that if people couldn't make ends meet, it was their own fault, and note that people were accusing Bush of embracing individualist explanation of economic successes and failures. The kicker is that Bush eventually disputed this explanation of his work longer hours remark. He stated that the remark was not an argument that workers who were having trouble supporting their families were lazy, instead he said, it was an indictment of the lack of full-time jobs available in the labor market. He said that his comment was a measure of his concern for the 6.5 million part time workers who wanted to work full time, so note that Bush recognized the political inadvisability of blatantly individualist explanations of poverty and low-income, and in light of that political inadvisability, he instead embraced structural explanations of the phenomena, arguing that the country needed "high-sustained economic growth in order to solve the problem of the evaporation of the livable wage."

So, the Bush incident suggests that structural explanations of poverty and low-income have had some degree of traction, that said, although these explanations pop up every now and again, I have always felt confident in concluding that they have not deeply saturated the culture, at least not to the extent that individualist explanations of poverty have. For example, there is a substantial literature documenting that the most favored explanation of poverty in the US is one that

identifies individual behaviors as the route of indigence. There's a social psychologist who has done a poll of the polls, essentially, she's done, she's summarized all of the literature on this question. And she says: most of these studies find that Americans believe that there are multiple determinants of poverty, but that individualistic, or internal causes, examples being lack of effort, being lazy, being low in intelligence, being on drugs, those individualistic causes tend to be more important than societal or external ones, like low wages, like being forced to attend bad schools. So, she's summarized the literature and found that, for the most part, people embrace individualistic explanations of poverty, people embrace the moral construction of poverty. And then there was a poll that was recently conducted by the Pew Research Center, and the poll confirmed that the majority of Americans believe that the poor are responsible for their poverty. 60% of the respondents agreed with the proposition that "most people who want to get ahead can make it if they're willing to work hard." And that same poll showed that 76% of Republicans versus 49% of Democrats reported holding the belief that most can get ahead through hard work. Now those figures are interesting, right, and one might cite them just to show that conservative, folks with conservative politics are more likely than those with liberal politics to believe that individual effort, and the lack thereof, produces economic successes and failures. But that same poll can be shown to cite or can be cited to show that close to half of those folks with liberal, "liberal politics" believe that individual effort produces economic successes and failures.

So yeah, I've been pretty confident that most people would believe that people are poor because there's something wrong with them, most people believe that the moral construction of poverty explains poverty. However, I had a come to god moment, if you will. It was November 8th, 2016. Trump was elected to the presidency. And it was only then that I realized that individualist explanations of poverty, and the moral construction of poverty, have a great deal of traction when they're offered to explain the poverty of those without race privilege. It was only on November 9th, after I woke up with this migraine, that I realized that structural explanations of poverty have a great deal of traction when they are offered to explain the poverty of those with race privilege. Very few people believe that individualist explanations of poverty can explain the white poverty of the rust belt. Very few believe that individualist explanations of poverty can explain the white poverty of the people who live in coal country. The country has, for the most part, both sides, right, Republican and Democrat, conservative and liberal politics, both sides have rejected the idea that white folks living in that part of the country are poor because they're lazy, or irresponsible, or have a bad work ethic, or are promiscuous, or feel entitled to government handouts. People on all sides of the political spectrum are convinced that white folks in the rust belt and coal country are poor because of structural forces. The industries that once supported these families have been moved overseas, or environmental regulations have limited the profitability of certain industries and have gone elsewhere. These are decidedly structural

explanations of poverty; they are not individualist explanations of poverty. So recent events have caused me to take even more seriously the way that race impacts the explanations that we offer for poverty.

Structural explanations are the domain of the race-privileged. And individualistic explanations of poverty are the domain of those who lack racial privilege, and so it leaves us to wonder, and to think through how we might leverage this embrace of structural explanations of poverty of those with race privilege, how might we get folks to embrace structural explanations of the poverty of the people of color who were under the jurisdiction of the child welfare system? I firmly believe that if we as a society thought that these poor parents were fundamentally good, then our child welfare system would look a whole lot different than the way it currently looks, and it will operate completely differently from the way that it currently operates. Thanks.

CHRISTINE GOTTLIEB: Yes? Good point. There are seats open here in the front. I know they say reserved, but you all should come up and use them if you don't have a seat. Absolutely. And now we're going to turn it over to Dorothy.

DOROTHY ROBERTS: Okay! I, too, am very grateful, and honored, and humbled to be here. It's a much bigger audience than I expected. And like Khiara, I feel as if I'm among people who are experts in this field, advocates, and very knowledgeable and very committed, and so I'm just grateful to be with you and share some of my current thoughts on this topic of the punitive child welfare system.

I guess I'd like to just add to the example that Khiara gave. I think it's absolutely true that structural explanations for inequality apply to white people in America, and not only behavioral, but even biological explanations have been applied to Black people and other people of color. Another area where we can see this is the rising death rate among whites in the United States, largely from drug overdose and, suicide by guns, and the explanations for those have not been at all that these people are biologically predisposed to drug addiction and violence, those are explanations that continue to explain in the media and even in scientific literature drug use by Black people, and in particular, biological explanations about Black mothers who supposedly reproduce children who are destined to be social deviants and criminals and welfare cheats, that sort of thing. So there is this very stark difference, and I agree, across the political spectrum, because we hear very conservative politicians pointing out relatives that they have who have drug problems and explaining it as social conditions that are creating it, at the same time that the idea that Black people are predisposed to violence, criminality, and drug abuse continues to circulate, and in fact, not to, not to plug another book of mine, thank you to Khiara, my latest book, *Fatal Invention*, is about the biological concept of race. And some people say, well how is that connected to your work on this child welfare system and reproductive justice? Because these underlying

ideas of biological predisposition of, especially, Black people, to take poor care of their children, and to rely on welfare, and to become criminals, underlie this, everything that we're talking about now. And support a view that a punitive system of child welfare is good, it's good for Black children, because they are being raised by people who are innately incapable of taking care of them.

So, when I began to work on this issue, I immediately noticed that most of the children, you know, in New York City in foster care, were Black. Most of the children in Chicago, in foster care were Black. And I was shocked that that wasn't a huge racial justice issue, I didn't, you have to know, you couldn't possibly work in this field without seeing it, and yet, it was just taken for granted that that was how the system was supposed to work. And if anything, even after all these years of many of us advocating against racial injustice in the child welfare system, the term that's used is racial disproportionality, which suggests that it's just the disparate impact of child welfare on Black children, because Black children need those services more and therefore there's no need to change it, if anything, maybe we have to expand the services but why is it that the service is a punitive violent service of coercively taking children away from their families, policing families, policing entire neighborhoods, if you look at where child welfare agency involvement is concentrated in big cities, it's concentrated primarily in Black, impoverished neighborhoods, segregated neighborhoods, and everybody in the community is affected by it, everybody, whether they're foster parents, whether they're family members taking care of children, whether they've been removed from foster, from their homes and put in foster care, whether they've, their kids have been taken from them, they, someone in their family, someone on the block, someone in their school—little kids know what the van looks like that comes to take you away. Everybody knows.

So, we're talking about not an individual responsibility issue; what Khiara was talking about is the ideology, but it's a false ideology that's clearly false when you look at how the system operates. It is a system of state control of entire communities that operates in an extremely violent way that contradicts every principle, supposedly, that we have in America, of family freedoms and, you know, constitutional rights, in ways that people are shocked when they find out that, you know, someone can come in your home and take your kids away without a court, without a warrant, without a court order, it's not even reviewed immediately and once your child is in foster care, as you all know, it's very unlikely they're going to come out any time soon. And so this, when you think about it politically, it switches from this question of individual parental responsibility to a question, a political question of power and of massive state control of entire groups of people. Why, in order to disrupt their families, in order to keep them occupied with, instead of organizing for change, even though it has not stopped many, many parents from organizing for change, but it's difficult, and in order to promote the idea that these communities are disadvantaged, not because of structural forces, but because of the bad behavior of parents in the communities.

And so, what I've been thinking more and more about, and I'm sure many of

you have, as well, is when you start thinking about the foster care system that way, it sounds a lot like prison, right? Yes! It sounds a lot like the prison system! It operates, you start to see, this is not a service, this is not a helping organization, set of agencies—this is a punitive policing agency that functions to police, control, and punish communities much like the prison system. Then you start to notice, well, goodness that's how the public assistance system works as well. We all saw that in the case of the young woman who was waiting to find out why her daycare, right here in New York, why her daycare benefits had been stopped, there's no place to sit, she's sitting on the floor, they come over and tell her she has to move, and we see the video of them yanking her child away as she's screaming and told, we're going to take your kids away from you if you don't comply and we see—right, they ended it, you know, she spent some time in Riker's—we see how in public benefits offices, there's a similar type of violent, punitive approach and in fact, public assistance is basically a behavior modification system now, there's no right to it, the whole point, which Congress said when it passed the Welfare Restructuring Law, a year before it passed, the Adoption and Safe Families Act, you know, there's a connection there. That it's designed to try to push mothers who rely on it, especially Black mothers who rely on it, into certain behaviors—marriage, not having any more kids, deter them from having children, and low-wage work—again, with the philosophy that the reason why they are in their disadvantaged position, and come to rely on welfare, is because they are not complying with family norms of marriage and not having kids if you can't afford to have them.

We see the connection to the deportation system, which now, all of America has seen and some, for the first time, realize, that the state takes children away from their parents. You know, that got all this attention, and many of us had to say, guess what, that goes on every day in communities of color in the United States, and in poor white communities as well. We see the connection to the education system. The school-to-prison pipeline. You see the connection in the healthcare system, the way in which people have been brutalized when they seek healthcare, and that prisons are one of the main providers of mental health care in the country. We see it in evictions, you know, I could go on and on. My point is that we can see this punitive approach to inequality and family need in every single institution in the United States. And, borrowing from prison and the carceral nature of prison, many of us are seeing that there is a carceral approach to people's needs that helps to explain inequality as a form of, in, defectiveness of people who are surviving the inequality and instead of providing the public provision for people who have been harmed by structural inequality, the state has an extremely punitive and violent approach to these groups.

So, one way of looking at it is the way in which neoliberalism, the shrinking of the welfare state in the United States with the abolition of entitlement to welfare being an example of it, we can see it in lots and lots of programs that have been slashed in the support for capital accumulation, that, it's like, really exaggerated under Trump where every single, every single policy is about making rich people

richer and punishing people who are trying to struggle in this era of shrinking public support, and the, so, the flip side of privatization is increased punishments, or policing, surveillance, and punishment, and now we can see how the foster care system is part of this expanding carceral approach to family's needs, and when we see that, we can see why the idea that the only solution is abolition for prisons, that is the approach that we should take to foster care as well. There's no reforming a system that was designed to punish people, and that has expanded like the prison system, and like the welfare system, expanded in its punitive approach as more and more Black people became involved in it. It's absolutely connected to racism. You can't explain mass incarceration, the explosion of foster care, and the abolition of welfare without seeing how racism fueled all of these—all of these—and how they have led to these disproportionate numbers of Black people in these systems. They don't just happen that way, it was designed that way.

Now I just want to close with a topic that I've been paying greater and greater attention to that is related to this expanding carceral regime, which includes the child welfare system, and that is predictive analytics. Big data, automated decision making, and predictive analytics. Again, it's not just a coincidence that, you know, just a result of advances in science, that state agencies are using these tools to help them police and punish people. It's because these tools are useful to punish people. And I'll just point to three features. Big data, so that the way in which government agencies are making decisions are based on huge data sets and algorithms, mathematical algorithms, that interpret the data to make, number two, predictions about peoples' risk of committing crimes or maltreating their children. And, or cheating welfare, and, you know, whatever, not doing well in school, you know, whatever institution we want to pick that's part of this carceral net, predictive analytics helps. Again, related to what you were saying Khiara, it's not about individual responsibility anymore, it's about the prediction that you may do something in the future and that prediction is based on an automated decision that comes—I should say, the automated decision is the prediction which leads to an automated decision. Now this is supposed to be more efficient, fairer, now take away all the bias that we see in the foster care system, in judges, sentencing by judges, parole officers' decisions, and it, you know, it logically seems to make sense, well if you've got a computer doing it, it's better than a human being who's biased doing it, but the problem is, that all the bias of human beings in the past is, is put into the data and algorithms, and the algorithms are learned, they continue to change based on the algorithm itself, and the data that it's interpreting, and so you end up with structural inequalities and human biases built into these predictions.

I'll just give a quick example. There's a great recent book by Virginia Eubanks, *Automating Inequality*, where she looks at this in public assistance programs, and one of the programs she looks at, the only people included in the system were people who relied on government benefits, public assistance benefits. So, it excluded all the elite people in the community to begin with and included people already. So that's one form of bias. But the factors that determine whether someone is going to commit a crime in the future, or is going to do poorly in

school, or is going to maltreat their children, are factors that are biased in the first place. So, for example, that you've got a relative who was incarcerated. Well we know that incarceration is biased by racial profiling and, you know, sentencing decisions, and concentrating in particular communities to even detect crime, and so, all of that bias is built into the data and the algorithms in the first place and the idea that people are risky, and those are the people that need to be monitored and punished and their kids taken from them or they're incarcerated, deprives a decision maker from actually assessing the individual culpability. So now, these systems, it's not about individual culpability, it's about the risk that's created by your social status. They're just reinforcing the inequality. And then the prediction then, and I'll end with why I think, what is at the heart of why these are so valuable to a carceral state and why we should be very concerned about it is that what the automated decision is a prediction of the future that is based on past inequality. So, there's no opportunity in it for human beings to imagine a more equal future. It deprives, it's a way of saying, we have a new system here that is going to perpetuate past inequality, and it will automatically do that.

Yes, human beings are biased, but they can also organize for social change, they can also have their minds changed, that's why we, you know, that's why we do what we do, we believe, right? You know, that human beings can change. They can change social structures, they can change what they believe about the innate defects of other people, so, but, but, an automated decision based on past inequality can't do that. And so, we should be about figuring out abolitionist tools that allow for us to envision a better world that is not based on punishing people who are struggling because of structural inequality. But is based on a vision of a world that is not structured by these unjust hierarchies and what are those tools? What even is the very way we can think about other human beings that don't rely on the kind of assumptions Khiara talked about, or the biological concepts that we're divided naturally by race? That's, I think that's the chore that we have, the beautiful task that we have in front of us that we can see when we start to understand the child welfare system in political terms, as opposed to a system that deals with individual parents' irresponsible behaviors. Thank you.

PEGGY COOPER DAVIS: Is this working? Oh it is, how nice. So, I echo the thanks to our conveners, and to the supporters of our conveners, but I'm going to rush, because we want to save lots of time to talk with you folks, and I have several things I want to say. I have to ask you to apply here the principle of charity that linguists sometimes talk about, and that's the principle that, if someone says something that doesn't seem to make sense, instead of saying ugh, that doesn't make sense, you think about how it might make sense, and then you might understand the person. Because I'm going to make some leaps here, and I ask you to follow along with me.

So the first thing I'm going to do is say that in 1980, I am showing my age, shortly after I was sworn in as a family court judge, a more senior judge of that

court looked me in the eye, she was a wonderful woman, and said, you know, we do things to families that we would not do to our own. She was a white judge speaking to a new Black colleague, and so I understood that the kinship that she was suggesting was a kinship of class, but she was a politically sophisticated woman, and so, I understood also that the 'we' was often white, and the 'our own' were white, and that the others to whom we did things that we wouldn't do to our own were people of color.

The subject of this symposium, racism in child protective systems, seems a little bit remote from the subject of my talk. The subject of my talk is Post-colonial Constitutionalism. I hope that I can quickly show you how and why those things are related. People who are familiar with the child welfare system, and I think almost everyone in this room is, or with child welfare systems in other communities, will probably agree quickly that the comparison to colonization is apt. You have an entity, a child welfare system, that assumes authority over and supervises and alters the terms of life in a community and in families that had thought of themselves as autonomous. And it does so, most importantly, as my good friends, with whom I have the honor of sharing this panel have pointed out, with a presumption of cultural or informational, if not biological, supremacy. And supremacy's the word to keep your eye on. It professes to act in the long-term interests of communities and families, as it undertakes a kind of cultural or educational conversion. Kidnapping of native children to boarding schools for socialization comes to mind, as do the orphan trains of immigrant children being shipped to more American homes farther west in the past. I want, though, to emphasize that the colonial metaphor is somewhat harsh, for child welfare agencies earnestly and sometimes honorably aim to protect children against the vices, failures, or incapacities of their parents rather than the structural forces that make it difficult for their parents to care for them. So, we can't fault the agencies for expressing this communitarian sense of responsibility. Responsibility for children with whom they have no kinship, no friendship ties, and very often, no ties of affinity. That sense is appropriate and commendable, but I will suggest to you that good governments, good child welfare agencies, like good parents, must appreciate and respect the tension between liberty and loving care. And I'll suggest that governments that are self-consciously post-colonial have things to teach us about managing those tensions.

When I see speak of post-colonial constitutionalism, I refer to constitutional principles adopted in reaction to supremacist arrogance and atrocity. The South African post-Apartheid constitution is the most prominent example. But it's joined by post-World War II constitutions of many other nations, following independence from imperial powers. The German post-Holocaust constitution, while not post-colonial in the sense that it followed independence from an imperial power, is analogous in that it is reactive to supremacist exterminations and other policies. Analysts who are more knowledgeable than I in the field of comparative law have pointed out that post-colonial constitutional policies and practices vary widely in their embrace of human rights principles and I know that's true. Nevertheless,

there is a burgeoning jurist prudential and political set of philosophies that are self-consciously reactive to supremacist and imperial assumptions. I want to argue that we in the United States would be a better people and would have, among other things, a much better child welfare system were we to adopt a similarly reactive stance. Now the United States is post-colonial, technically, of course, in the sense that our country was formed in rebellion against British imperial rule. We seem, however, to be in denial about our post-colonial status, and the United States is not usually thought of as a post-colonial nation. This has to do, I suppose, with the fact that the United States revolution was more a rebellion of colonizers than of indigenous people, more like a Boer war than like an indigenous or enslaved peoples' independence struggle. I suppose it also has to do with the fact that many in the United States have thought of themselves as members of a white community, alas, many still do. And colonization is typically thought of in terms of a white other binary sign. So, that said, I want to try to address three questions. How is it that we are, after all, post-colonial? Why is our post-colonial posture an especially important thing to give attention to right now? And what has all this to do with Black families in the child welfare system?

Okay. How are we post-colonial? I appreciate that we're post-colonial in an unusual way. The revolution of the 1770s was a war against distant monarchical rule, and clearly a rule against governments without representation. But British rule over the 13 colonies was not as overtly supremacist as was British rule and the rule of other countries over lands that were populated by people of color. Disregard of native sovereignty in the United States and compromise with the institution of slavery factored heavily in the United States revolutionary calculus. The declaration that we are all created equal and endowed with inalienable rights was not explicitly given the force of law. And the constitution that followed did not disavow, but only papered over, the new nation's caste structure. It contained no equal protection clause. The Bill of Rights was an afterthought that protected only against abuse from the national government, states remained free to enslave and free to disenfranchise. Citizenship was undefined and the Supreme Court was therefore able to announce in *Dred Scott* that African Americans could not qualify. So, I invite you to think differently. I invite you to move from the 1700's and think of the United States Civil War as a war of liberation from colonial-style oppression. And to think of the post-colonial, the post-Civil War reconstruction as the formation of a new nation that would stand well, at least, half-heartedly stand against supremacist oppression. To think of enslaved people deserting plantations and joining Union armies, to think about abolitionists also joining those armies. In other words, to think of the United States as people engaged, at least since the beginning of the Civil War, in a struggle against supremacy and hierarchy. A post-colonial people.

What are the 21st century implications of that? The idea of post-colonial constitutionalism is perhaps most easily described in reference to South Africa and South Africa's Supreme Judicial Court. Lawrence Ackerman who once sat as a

justice for that court has explained that respect for human dignity—I want to repeat that, respect for human dignity—informs and enriches the proper interpretation of South Africa’s constitution. And he made clear that dignity is intrinsic and inalienable to every human being. Remember and responding to the indignities that Apartheid imposed on Black and brown South Africans. South Africa’s constitution explicitly establishes, and its Supreme Judicial Court consciously attempts to enforce, principals of equality and human entitlement to concern and respect. In the South African case, challenging laws that criminalize same sex love making, the Supreme Judicial Court noted that the experience of subordination, of personal subordination above all, lies behind the vision of equality. The court was required by precedent to examine the impact of discrimination on members of the affected group, and the court went on to examine in detail the indignities that were imposed upon sexual minorities as a result of the laws that were being challenged, and then to interpret South Africa’s constitutional guarantees of equality, respect, and non-discrimination to require invalidation of those laws.

I’ve written in the past about the difference between the South African court’s treatment of that issue and the treatment it received at the hands of the United States Supreme Court in *Bowers v. Hardwick* and even in *Lawrence v. Texas*. I argued that when the Supreme Court of the United States, that if the Supreme Court of the United States would get over its denial of our history of slavery, war, and reconstruction, it might understand our reconstructed constitution as something with a guarantee of human freedom, with a new guarantee of citizenship, with an assurance that citizenship carries privileges and immunities, with newly encompassing protections for everyone, citizen or not, to life and liberty, I’m not going to talk here about property. Much belated guarantee of equal protection of the laws. This constitution should be understood as a constitution that mandates resistance to supremacist ways. Should it do so, it would be like the South African Supreme Court, able to interpret the constitution from a position of empathy with the experience of subordination. I speak of this kind of constitutionalism—some call it reactive, some call it post-colonial—with new inspiration of, just about a year ago, a little less than a year ago.

The reason I’m newly inspired is not so much that things are different but that I’m newly aware of things, I have to tell you. But the new inspiration for me is the unanimous decision of the highest court of India in the case in which it invalidated what the honorable justice Dr. D.Y. Chandrachud described as a colonial law that made it criminal, even for consenting adults of the same gender, to find fulfillment in love. The justice said this case involves much more than merely decriminalizing certain conduct which has been prescribed by colonial law. The case is about an inspiration to realize constitutional rights. It is about a right which every human being has to live with dignity, it is about enabling these citizens to realize the worth of equal citizenship. Above all, our decision will speak to the transformative power of the constitution, for it is in the transformation of society that the constitution seeks to assure the values of a just, humane, and compassionate existence for all of her citizens. To quote the justice again, “The goal was to transform a

medieval, hierarchical society into a modern, egalitarian democracy.”

What has this got to do with the child welfare system? I think you can guess. The autonomy and integrity of minority families in the United States child welfare systems depend upon deeply contested principles that have explicitly to do with liberty and are grounded in conceptions of human dignity and human right. Unlike the constitutions of South Africa and India, and many other nations that see themselves as post-colonial, indeed, unlike the overwhelming majority of nation states on this planet, we have no constitutional statement of fundamental human rights. Our Bill of Rights is there, but it's a statement of protections against the federal government only. How and whether it protects against state power, or against citizen suppression, is highly contested. We have the Bill of Rights combined with a doctrine of incorporation, a doctrine that says that some but not all of the rights conferred in the Bill of Rights were or should be incorporated into the Fourteenth Amendment, and be binding on both state and national governments, and we have the language of the reconstruction amendments themselves, the Thirteenth, Fourteenth, and Fifteenth. And we have the guarantee of a republican form of government, but I put that aside for purposes of this talk. Reliance on a partially incorporated Bill of Rights has limitations, because the language of the Bill of Rights fails to capture many rights that seem fundamental to most of us and to most of the world.

There is no explicit right of political representation, or education, or public accommodation, or bodily integrity, or family, or personal integrity. There is no explicit right of equal protection. That leaves us with the language of the reconstruction amendments, which can seem promising. The Thirteenth Amendment promises freedom, in that it forbids subordination of the human will. The Fourteenth confers citizenship with all its privileges and immunities, it guarantees to all the equal protection of the law, and it protects against denials of life, liberty, and yes, property, without due process of law. The Fifteenth suggests but does not assure a right of representation. In part, because of the Supreme Court's early and outrageously narrow interpretation of the privileges and immunities clause, the so-called due process clause, which prohibits deprivations of life, liberty, and property without due process of law, has been commandeered as the vessel for carrying fundamental human rights. It is a poor vessel. But it has been made to serve. We call the vessel substantive due process, and it was built, for the most part, in the area of family and child welfare law. It carries the right of marriage, or family recognition, the right to procreate or choose not to procreate, and the right to keep and socialize one's children. We are in the midst of a constitutional crisis over this notion of substantive due process. For the judiciary is being flooded with judges who take a dim or narrow view of it. The contest is not binary, there are many ways of addressing the incorporation of human rights into constitutional language, but it's roughly fair to say that there are two camps. There are those who would interpret the law in terms of respect for human dignity, and in light of both histories that should never be repeated, and histories of which we are proud and traditions that should be continued. And there are those that would interpret the law

into terms of the status quo. Those who champion interpretation in terms of the status quo cling to the principle announced in the 1997 *Glucksberg* case that fundamental rights are only those rights narrowly defined that have been recognized as part of the nation's history and tradition.

The history and tradition camp is gaining ground. Looking only at the top of the federal judiciary, we see Justice Roberts, who holds up *Dred Scott v. Sanford* as the origin of substantive due process, associating it with the Lochner Era, invalidation of the Louisiana Purchase and protection of the right to claim fellow human beings as property. Against this discrediting backdrop, he insists that adherence to, but not lessons from, history and tradition should be the lodestar for recognition of human rights. Justice Thomas argues that constitutional liberty is nothing more than freedom from physical restraint. And he has been a defender of *Glucksberg's* history and tradition test. Justice Alito emphasizes the importance of reliance on history and tradition and bemoans the fact that the *Obergefell* case may have overruled the *Glucksberg's* test. Justice Gorsuch's views are less clear. Off the bench, he has expressed support for incorporating respect for human dignity into our constitutional understanding. And he has, to be fair, questioned reliance on or exclusive reliance on history and tradition, but he was quick to pen an alarmingly stingy interpretation of *Obergefell* in one of his first opinions on the Supreme Court. And his comments about substantive due process in opinions on the circuit level have been notably guarded. Justice Kavanaugh said in his confirmation hearings that all roads lead to the *Glucksberg* test as the test the Supreme Court has settled on as proper for determining the scope of individual liberty. And he claimed that even a first-year law student could see that *Glucksberg* is inconsistent with *Roe v. Wade*, and with cases that upheld *Roe v. Wade*.

These men, and they all are men, stand as a majority that could easily limit constitutional liberty to the kinds of liberty that can be protected by allegiance to history and tradition, narrowly defined. This limitation would protect sexist, hetero-normative, and white supremacist practices against constitutional attack. It would make it harder for the family defense bar to bring to light the perspectives of parents who are judged harshly, merely because they look different or think sound and behave differently. It would make it harder for the family defense bar to even sustain itself. We've talked about the right to counsel. More broadly, it would normalize, not only in law, but also in policy and in practice, the paternalism, dare I say the patriarchy, that leads well-meaning advocates for children to distrust and disrupt rather than support viable families. That's it.