Race is Evidence of Parenting in America: Another Civil Rights Story

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Commentary on Essay by Montré D. Carodine

Tanya Asim Cooper*

Introduction

Professor Carodine invites us to question whether in matters of race and equality we have really progressed as the "civil rights rhetoric" has "romanticized,"[1] and demonstrates that we have not. "[R]acial disparities in the criminal justice system today" belie that myth.[2] Race, she shows, is paramount for accused persons of color and is often used against them as negative character evidence, which the seemingly colorblind rules of evidence allow.

In "Race is Evidence," Professor Carodine shines a brilliant light on several themes in "the modern realities of race,"[3] and as illustrated in the four sections below, many resonate: empirical data verify disproportionate representation of people of color in American institutions; stereotypes of racial minorities persist and influence negative outcomes; systems' players have varying levels of power, which they sometimes abuse; and many strategies exist for today's various civil rights campaigns. To comment on "institutional racism, particularly in the law,"[4] I offer another counter-narrative to question the notion of progress in the American civil rights story, and the "reality . . . especially for people of color—that racial inequality, though not formally tolerated, is a persistent part of the American story."[5]

Race matters in American foster care.[6] According to Professor Dorothy E. Roberts, it "is basically an apartheid institution."[7] This is one of the great civil rights problems of our time: the disproportionate representation of Native American and African American children in foster care and the disparities they experience. Children from these races are removed from their families at rates greater than any other race, stay longer in foster care, where ironically they are at great risk

of harm by the system itself.[8] Researcher Joseph J. Doyle found that "[t]hose placed in foster care are far more likely than other children to commit crimes, drop out of school, join welfare, experience substance abuse problems, or enter the homeless population."[9]

Under Professor Carodine's theory, being a parent of color is presumptively "bad character"[10] evidence because stereotypes of bad parents abound, especially for African American and Native American parents who are often demonized. Yet the facially-neutral laws allow evidence of race to figure prominently in various system players' decisions of whether and when to remove a child from the home; where to place the child; whether and which services are provided to the child and parent; and whether to terminate the parent-child relationship forever.

On a systems level, Professor Carodine illustrates where racial inequalities manifest within the process and procedure of criminal justice, which is meted out by the system's different players, sometimes unjustly. Systems thinking generally offers a panoptic view of this phenomenon in any institution by considering three salient features: the system's players or stakeholders; the dynamics and interconnections between those persons, including participation and power; and the system's true purpose, based on its behavior—not its rhetoric.[11] This lens also reveals leverage points or critical junctures of key decision making where racial bias appears today, and more important, where change happens.

I. Families of Color Are Disproportionately Represented in Foster Care & Stereotypes of Families of Color Underlie Decisions to Sever Families.

Looking at how America's foster care system has treated certain races historically helps inform whether we have progressed. Native American children, for example, were removed

from their families *en masse* in what was known as the "Boarding School Era" that lasted that for one hundred years.[12] In an effort to Christianize and "civilize" these children, they were sent to boarding schools, where they were forced to cut their hair and not allowed to speak their own languages. They were not educated but instead taught to work as maids or farm laborers. Many children died.

These abuses in part led Congress to enact the Indian Child Welfare Act, which provides Native American families with the highest legal standard and burden of proof.[13] Yet, as National Public Radio's multi-year investigation highlighted, in places with high Native American populations like South Dakota, hundreds of children are still removed from their families each year and swept up into foster care.[14] Nationally, Native American children are represented in foster care at twice the rate they comprise the general population.

The foster care system's treatment of African American children is also storied. At first the foster care system ignored them because it was a segregated institution.[15] But once "services shifted from institutions to foster care and from private to public agencies[,]"[16] the system began to recognize African American children, and the foster care population soared.[17] This is still evident.

Professor Dorothy Roberts invites us to:

> Spend a day at dependency or juvenile court in most major cities and you will see unmistakable evidence of the stark racial disparity in child welfare. Most of the families in these urban courts are black. If you came with no preconceptions about the child welfare system's purpose, you

> would have to conclude that it is an institution designed primarily to monitor, regulate, and punish poor black families.[18]

To be sure, what this institution has become is a direct reflection of America's deep-seated belief that interfering with or severing African American families is no big deal. Since Harriet Beecher Stowe portrayed slave-era attitudes in Uncle Tom's Cabin, America it seems has acted consistently:

> . . . You see, when I any ways can, I takes a leetle care about the onpleasant parts, like selling young uns and that,—get the gals out of the way—out of sight, out of mind, you know,—and when it's clean done, and can't be helped, they naturally gets used to it. 'Tan't, you know, as if it was white folks, that's brought up in the way of 'spectin' to keep their children and wives, and all that. Niggers, you know, that's fetched up properly, ha'n't no kind of 'spectations of no kind; so all these things comes easier.[19]

As Professor Roberts puts it, "[b]ecause parents involved with child protective services are so often portrayed as brutal monsters, the public usually ignores the trauma of taking their children."[20] Indeed, despite comprising only fifteen percent of the general population, African American children are represented at twice that rate—over thirty percent of all children in foster care.

One reason for this is what Professor Carodine calls the "mischaracterization of Blacks" through multiple negative stereotypes.[21] Demonizing stereotypes in the foster care system of Native Americans and African Americans persist to create a presumption that these parents are

simply unfit. Native Americans are often stereotyped as alcoholics or gamblers who are thought unable to parent their children. African American parents, especially single mothers, are caricatured as "welfare queens" or drug addicts, so naturally they are not capable of taking care of their children.[22] All of these negative and inaccurate stereotypes underlie the decision-making process and treatment of families of color in American foster care.

Researchers and scholars study why these disparities exist, and there is considerable debate nationally about whether there are in fact genuine differences in maltreatment rates of African Americans and Native Americans such that their children are at greater risk of harm than Whites. As part of my larger agenda to bring some of this system's injustices to light, in another article, I present the national debate on why these minority children are so highly represented in American foster care and whether that is justified or biased.[23]

II. Color-blind Laws Foster Institutional Discrimination Against Families of Color

As Professor Carodine points out, "the law generally does not tolerate, for the most part, *formal* racism and its mischaracterization of [racial minorities]."[24] Instead the "varieties of racism that characterize our times,"[25] according to Professors Richard Delgado and Jean Stefancic, are "more subtle, but just as deeply entrenched[.]"[26] They note, moreover, that "racism is normal, not aberrant, in American society. Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture."[27] So, within our colorblind laws, many might not notice its disparate application, and the legal standards and presumptions in which racism today manifests.[28]

According to the Supreme Court, the foster care system's overarching "best interests of the child" legal standard is suspect.[29] Its lack of definitive guidance allows foster care

professionals and even judges to substitute their own judgment on what is in a child's best interest and allows unintended biases to permeate decision making. For example, as Justice Brennan wrote in *Smith v. Organization of Foster Families for Equality and Reform*:

> Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child.[30] . . . [J]udges too may find it difficult, in utilizing vague standards like the "best interests of the child," to avoid decisions resting on subjective values.[31]

Indeed, the Supreme Court "more than once has adverted to the fact that the "best interests of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their personal values.[32]

Along similar lines, Professor Linda Berger has noted, "[t]he best interests of the child standard has been criticized almost since adoption because its indeterminacy invites the use of cognitive shortcuts; these shortcuts include stereotypes and biases as well as the scripts and models left behind by metaphors and stories."[33] This vulnerability in the legal standard allows the racial bias and stereotypes that have plagued our nation for centuries to creep in insidiously.

III. Power & Abuse of Power in Foster Care

To highlight racial disparities in power and its abuse, Professor Carodine shares the story of Professor Paul Butler and the race and class "strategies that he used when he was a Black prosecutor prosecuting young Black men in Washington, D.C."[34] Professor Angela Davis has

similarly highlighted the power of the American prosecutor, and how race heightens the power imbalance.[35] Professor Davis notes, "[t]hrough the exercise of prosecutorial discretion, prosecutors make decisions that not only often predetermine the outcome of criminal cases, but also contribute to the discriminatory treatment of African Americans as both criminal defendants and victims of crime."[36] Elsewhere, I have also commented on the power that prosecutors wield and abuse, even unwittingly, towards child victims and witnesses in the criminal justice system, and racial differences in that context and especially unconscious insensitivity heighten the risk of secondary harm that prosecutors might inflict.[37]

In America's foster care system, families of color who are haled into court lack power and resources.[38] As Professor Annette R. Appell notes, they are not entitled to the same privacy as most Americans and are under greater scrutiny because they often receive public assistance.[39] Instead, decision-making power shifts between the professionals (caseworkers, judges, and lawyers, including civil prosecutors) in the system and as the research of Professors Sandra Azar and Philip Atib Goff revealed, "moment-by-moment appraisals . . . may be infused with biases, differing values, and stereotypical views, which can then alter child welfare and legal professionals' interactions with families, and ultimately culminate in faulty decision making."[40] "Conversely," they found, "members of ethnic and racial minorities within our society can have a similarly negatively colored schema regarding professionals and the institutions in which they exist. They may expect prejudicial treatment and may not see themselves as having power or control in transactions."[41]

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IV. Strategies for Changing Foster Care's Role in the American Civil Rights Story

Several potential strategies already exist to address civil rights violations today. Professors Carodine and Susan Sturm in this symposium offered several promising ideas. According to Professor Carodine, "we should consider how character evidence has shaped past narratives and be mindful of how we use it to create future ones."[42] Professor Sturm suggested the collective impact framework (stakeholders working together towards a common goal) as a modern-day civil rights strategy that is also applicable to foster care.[43]

Consider their strategies applied to the foster care system. Under a systems thinking lens, there are many places or leverage points where agency caseworkers, social workers, lawyers and judges make subjective decisions about children and families, decisions themselves vulnerable to unintended bias and underlying stereotypes. Because there are so many different leverage points where those critical questions of removal, placement, and services arise, using litigation to test those subjective decisions and power imbalance for parents of color helps, but according to Professor Sturm, not as much as collective impact.[44] Collective impact is more effective because all stakeholders come together willingly and equally "to examine the domain in which sets of interlinked decisions are producing these disparate outcomes for families of color."[45] Then change happens. Professors Azar and Goff likewise highlight this research-based practice in the foster care system, often referred to as Family Group Conferencing.[46]

Bringing historically disenfranchised players to the table would represent a recognition that these families are not inherently inferior or less equipped to care for their own children, and perhaps end the cycle of "bad character" evidence that Professor Carodine highlights as a pitfall.[47] This shift would not necessarily eliminate the role of government in protecting children

who are truly at risk. However, the power would now be distributed horizontally, as opposed to hierarchically. Families of color would no longer be passive, voiceless subjects of the state's paternalistic directives, but rather, active participants in the determination of their own destinies.

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[1] Montré D. Carodine, Civil Rights in American Law, History, and Politics 66 (Austin Sarat ed., 2014).

[2] *Id. See also* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (New York: The New Press, 2010).

[3] Carodine, *supra* note 1, at 67.

[4] *Id.* at 71.

[5] *Id.* at 64.

[6] Dorothy E. Roberts, "Child Welfare and Civil Rights," *University of Illinois Law Review* 2003 (2003): 171, 174.

[7] *Id.* at 172.

[8] Robert B. Hill, "An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels," (Casey-CSSP alliance for racial equity in child welfare, 2007); Roberts, "Child Welfare and Civil Rights," at 173; Sandra T. Azar & Philip Atiba Goff, "Can Science Help Solomon?: Child Maltreatment Cases and the Potential for Racial and Ethnic Bias in Decision Making," *St. John's Law Review* 81 (2007).

[9] *See, e.g.*, Joseph J. Doyle, Jr., "Child protection and child outcomes: Measuring the effects of foster care." *The American Economic Review* 97 (2007): 1583.

[10] Carodine, *supra* note 1, at 70.

[11] Donella H. Meadows, Thinking in Systems: A Primer (Vermont: Chelsea Green, 2008).

[12] Lewis Meriam, The Problem of Indian Administration (Baltimore, The Johns Hopkins Press, 1928); Marsha King, "Tribes Confront Painful Legacy of Indian Boarding Schools," Seattle Times, Feb. 3, 2008.

[13] The Indian Child Welfare Act of 1978, 92 Stat. 3069, 25 U.S.C. § 1901 *et seq.*; Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[14] Laura Sullivan & Amy Walters, "Native Foster Care: Lost Children, Shattered Families," National Public Radio, Oct. 25, 2011.

[15] Dorothy Roberts, Shattered Bonds: The Color of Child Welfare (New York: Basic *Civitas* Books, 2002).

[16] *Id.* at 7.

[17] *Id.* at 7-10. *See also* Leroy H. Pelton, For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States (New York: Praeger, 1989).

[18] Roberts, "Child Welfare and Civil Rights," at 172.

[19] Harriet Beecher Stowe, Uncle Tom's Cabin or Life Among the Lowly (Boston: John P. Jewett & Company, 1852).

[20] Roberts, "Child Welfare and Civil Rights," at 173.

[21] Carodine, *supra* note 1, at 71.

[22] Dorothy Roberts, "Shattered Bonds," at 64-67.

[23] Tanya Asim Cooper, "Racial Bias in American Foster Care: The National Debate," *Marquette Law Review* 97 (forthcoming 2014).

[24] Carodine, *supra* note 1, at 71 (emphasis in original).

[25] Critical Race Theory: The Cutting Edge, eds. Richard Delgado & Jean Stefancic (Philadelphia: Temple University Press, 2000), at xvi.

[26] *Id.*

[27] *Id.*

[28] See generally, Azar & Goff, "Can Science Help Solomon?"

[29] Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1977) (noting within the legal standard the unconscious bias against parents' poverty and lifestyle); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (Blackmun, J. dissenting with whom Justices Marshall and Brennan joined) (noting that several courts have invalidated parental termination of parental rights statutes based on this vague standard).

[30] Organization of Foster Families, 431 U.S. at 834 (citations omitted).

[31] *Id.* at 835 n.36.

[32] Lassiter v. Department of Social Services, 452 U.S. 18, 46 n.13 (1981) (Blackmun, J. dissenting with whom Justices Marshall and Brennan joined); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was

thought to be in the children's best interest.'")(quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977)).

[33] Linda L. Berger, "How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes," Southern California Interdisciplinary Law Journal 18 (2009): 298. Pointing to work by social psychologists, Berger laments how difficult it can be for lawyers to counter these influences and "persuade people to adopt a view that conflicts with what they [think they] already know." *Id.* at 299.

[34] Carodine, *supra* note 1, at 89 (citing Paul Butler, Let's Get Free, A Hip Hop Theory of Justice (New York: The New Press, 2009)).

[35] Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (New York: Oxford University Press, 2007); Angela J. Davis, "Prosecution and Race: The Power and Privilege of Discretion," Fordham Law Review 67 (1998): 18.

[36] *Id.*

[37] Tanya Asim Cooper, "Sacrificing the Child to Convict the Defendant: Secondary *Traumatization* of Child Witnesses By Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel," Cardozo Public Law, Policy & Ethics Journal 9 (2011).

[38] Lassiter v. Department of Social Services, 452 U.S. 18, 43 n.10 (Blackmun, J. dissenting with whom Justices Marshall and Brennan joined) ("the State and indigent parent are adversaries, and the inequality of power and resources is starkly evident.").

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[39] Annette R. Appell, "Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System," South Carolina Law Review 48 (1997): 584.

[40] Azar & Goff, "Can Science Help Solomon?," at 534.

[41] *Id.* at 549.

[42] Carodine, *supra* note 1, at 95.

[43] Susan Sturm, http://www.law.ua.edu/resources/podcasts/symposia/civilrights_session_3.mp3.

[44] *Id.*

[45] *Id.* (referencing Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy (Harvard University Press, 2002)).

[46] Azar & Goff, "Can Science Help Solomon?," at 562-63.

[47] Carodine, *supra* note 1, at 95; Berger, "How Embedded Knowledge Structures Affect Judicial Decision Making," at 301 (suggesting that "[o]nce advocates or policy makers are able to imagine alternatives, rhetorical analysis can be used to discover underlying conceptual frames and devise more accommodating ones.").