



New York Civil Liberties Union
125 Broad Street
New York, NY 10004
(212) 607-3300
www.nyclu.org

**Testimony of the New York Civil Liberties Union
to
The New York State Assembly Committee on Children and Families
regarding
Family involvement in the child welfare system**

October 21, 2021

The New York Civil Liberties Union (NYCLU) respectfully submits the following testimony with respect to the New York State Assembly Committee on Children and Families hearing on family involvement in the child welfare system.

I. Introduction

The NYCLU, an affiliate of the American Civil Liberties Union (ACLU), is a not-for-profit, non-partisan organization with eight offices throughout New York State and more than 180,000 members and supporters. The NYCLU's mission is to promote and protect the fundamental rights, principles, and values embodied in the constitutions of New York and the U.S. This includes the constitutional guarantee of equal protection under the laws and the right to privacy and personal autonomy, including in the realm of family life.

The NYCLU has long viewed state intervention in the family as a civil liberties issue, and it has been involved in matters relating to the child welfare system for nearly fifty years. In the 1970s, the NYCLU brought litigation against New York City that led to a settlement spurring significant changes to the foster system and services provided to children in state custody.¹ The NYCLU also appeared as amicus curiae in the landmark Court of Appeals case *Nicholson v. Scopetta*, defending the parental rights of mothers who are domestic violence survivors in the context of child protective cases.²

¹ See ACLU, *ACLU History: Child Welfare Institutions*, <https://www.aclu.org/other/aclu-history-child-welfareinstitutions>.

² NYCLU, *Nicholson v. Williams*, <https://www.nyclu.org/en/cases/nicholson-v-williams-defending-parental-rights-mothers-who-are-domestic-violence-victims>.

In 2017, the NYCLU supported an amicus letter from the ACLU Disability Rights Project and several other organizations urging the Court of Appeals to underscore that the same standard for neglect applies to respondents with mental illness as to other parents. And in 2020, the NYCLU supported legislation to reduce the time parents remain listed on the State Central Registry, which can prevent them from obtaining employment, becoming foster parents, or regaining custody of their children.³ The NYCLU continues to work in coalition with impacted parents and direct service providers to advance reforms on the city and state level, including the ACS Accountability Act currently before the New York City Council.

Throughout our years of work on these issues, the NYCLU has seen how public perceptions of the system diverge from the experiences of those it impacts. While it is easy for some to embrace a view of the child welfare system as an innocuous lifeline for endangered children, those investigated by it experience it as a stressor that puts their families under a microscope and threatens them with separation. The term “child welfare system” is itself a misnomer—it is a system of family regulation, an analog to policing. Instead of fortifying families, this system further destabilizes already marginalized communities, fueling a vicious cycle of disinvestment, broken social bonds, and stigma. Families experience Child Protective Services (CPS) as an invasive institution that surveils Black and Brown families and responds to shortcomings with punishment, instead of with resources and material support, all the while evading the due process protections we have long recognized as necessary in the criminal context. Meaningful change is urgently needed to protect families’ rights and dignity in the face of far-reaching government intrusion. We welcome the Committee’s attentiveness to these issues and the opportunity to testify today.

II. Like the criminal legal system, the family regulation system surveils and punishes families—often for socioeconomic circumstances beyond their control—wreaking disproportionate harm on marginalized communities.

The family regulation system has been dubbed “The New Jane Crow,” because in many ways, it mirrors its criminal legal counterpart: both are mechanisms by which the state exerts coercive control over low-income Black and Brown populations.⁴ Both drain precious resources from marginalized communities, diverting them into jails and

³ *New Law Reforming NY State Central Registry Will Provide Justice and Relief to Families*, JMac For Families (Nov. 25, 2020), <https://www.jmacforfamilies.com/blog/new-law-reforming-ny-state-central-registry-will-provide-justice-and-relief-to-families>.

⁴ Stephanie Clifford and Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, New York Times (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

prisons in the criminal context and into foster homes in the family context.⁵ And both increase impacted individuals' risk for negative life outcomes, like homelessness and future incarceration.

But while a substantial body of law has developed to protect the rights of individuals involved with the criminal legal system, the same attention has not been paid to targets of family regulation. In fact, compared with the widespread scrutiny applied to systemic racism in the policing and criminal legal contexts, the injustice facing CPS-involved families is only beginning to feature in mainstream public discourse, thanks to decades of determined advocacy by parents, attorneys, and academics. This is in part due to the compounded marginalization impacted communities face at the intersection of gender, race, and class.

It is precisely because of this intersectionality that this issue is so urgent. As New York reckons with the corrosive impacts of systemic racism throughout our institutions, ranging from policing to education to healthcare, and simultaneously reels from the impacts of a pandemic that has disproportionately hurt communities of color and driven millions of women from the workforce, we must simultaneously address the harms wrought by the family regulation system—primarily on Black and Brown mothers.

The modern family regulation system has its roots in historical efforts by the state to separate families. It is born from the legacy of slavery, under which Black women's reproduction was commodified, and enslaved mothers were denied custody of their children. The narratives about Black women's capacity for motherhood that justified these policies continue to echo through society today. By the 1850s, new mechanics of family separation developed in response to an immigration wave; immigrant children were removed from their families on "orphan trains" to serve as indentured servants for Protestant households in the Midwest.⁶ The foster system continued to evolve throughout the twentieth century and was weaponized as a tool for dismantling American Indian communities—by the 1970s, approximately one third of American Indian children had been removed from their parents.⁷

Today, the family regulation system continues to separate Black and Brown families at alarming rates. Statewide, Black children make up only 15% of the child population

⁵ See eg. Judy L. Thomas and Laura Bauer, *As U.S. Spends Billions on Foster Care, Families are Pulled Apart and Forgotten*, Kansas City Star (Feb. 25, 2020), <https://www.kansascity.com/news/special-reports/article238243099.html>.

⁶ Erin Blakemore, *'Orphan Trains' Brought Homeless NYC Children to Work on Farms Out West*, History (Apr. 9, 2019), <https://www.history.com/news/orphan-trains-childrens-aid-society>.

⁷ Christie Renick, *The Nation's First Family Separation Policy*, The Imprint (Oct. 9, 2018), <https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431>.

but 40% of foster youth.⁸ In New York City, only about one quarter of children under eighteen are Black; however, Black children make up a disproportionate 53% of those in foster care. By contrast, approximately 40% of children in New York City are white, but they only comprise 6% of those in foster care.⁹

The vast majority of family separations arise not from abuse, but from alleged neglect, which largely results from circumstances related to poverty. For example, inadequate nutrition, unstable housing, or lack of child care could all give rise to neglect findings. Accordingly, families living below the poverty line are 22 times more likely to be involved in the family regulation system.¹⁰

In light of this system's violent history and its current impact on vulnerable communities, it is imperative that New York critically examine the role of family regulation in perpetuating and exacerbating racial and economic inequality. As New York confronts issues of systemic racism in policing it must address the analogous structures of surveillance, control, and punishment that operate on the family level in the domestic sphere.

III. The NYCLU supports policy changes that would reduce unnecessary surveillance and separation of families by CPS.

The Assembly is right to consider the effects of the family regulation system at this pivotal juncture, and the NYCLU urges this Committee to pursue legislation and policy changes that can help reduce state disruption of families while protecting the rights of parents. Common-sense measures can meaningfully reduce the chances that families will be exposed to unnecessary surveillance and separation. In particular, the legislature should consider legislation that reduces unnecessary child protective investigations, which can cause disruption and lasting harm to families even when they do not result in court intervention.

⁸*The State of New York's Children Data Book*, Schuyler Center for Analysis and Advocacy, at 10,12 (2019), <https://scaany.org/wp-content/uploads/2019/01/State-of-NY-Children-Data-Book-2019.pdf>. Notably, the national advocacy group Movement for Family Power asserts that 94% of reports made to CPS in New York are called against people of color. See, Movement for Family Power, *The Problem*, <https://www.movementforfamilypower.org/new-page-2>.

⁹ Michael Fitzgerald, *New York City Confronts Massive Overrepresentation of Black Children in Foster Care*, The Imprint (Feb. 27, 2019), <https://imprintnews.org/featured/new-york-city-de-blasio-black-foster-care/33992>; U.S. Census Tables (last visited Oct. 19, 2021), <https://data.census.gov/cedsci/table?q=child%20population%20nyc&g=1600000US3651000&tid=ACST1Y2019.S0901&hidePreview=true>.

¹⁰ Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, in REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS 1, 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015).

This includes A.6792/S.3979, which would require CPS agents to provide parents with their rights in a child protective investigation at the first point of contact. In the criminal context, police are required to read people in custody their right to remain silent and have an attorney represent them, and common reference to those rights in the popular culture has enhanced public understanding of people's rights when interacting with police. But CPS caseworkers have no equivalent mandate to inform parents of their rights in a child protective investigation, and as a result, many parents are unaware that they do not have to answer caseworkers' questions or grant access to their homes absent a court order. By empowering parents with knowledge of their existing rights, A.6792 will allow them to make informed decisions at particularly vulnerable moments in an investigation, while reducing confusion and opportunities for abuse of power.

The NYCLU additionally supports A.7879/S.7326, which would prohibit anonymous reports to the State Central Registry. Anonymous calls are often used to harass or threaten parents, and the inherent lack of accountability in anonymous reporting casts doubt on the reliability of those reports. Passing this legislation can help reduce unnecessary intervention without compromising child safety.

Additionally, the NYCLU supports legislation that would require health care providers to obtain informed consent before performing medically unnecessary drug or alcohol tests on pregnant people or their newborns. Many reports to the central registry originate with health care providers based on a positive toxicology result, some of which are ultimately revealed to be false positives. As a consequence, parents may be barred from breastfeeding or separated from their infants altogether. The American College of Obstetricians and Gynecologists (ACOG) warns that nonconsensual drug and alcohol testing poses threats to maternal and child health by deterring some parents from seeking prenatal care.¹¹ A.4285/S.4821 would be a step towards ameliorating these issues by prohibiting involuntary drug testing of pregnant people in New York hospitals.

Finally, the NYCLU urges the legislature to consider policies that would ensure parents have access to appropriate legal advice and counsel at the most critical moments of a child protective investigation. Currently, indigent parents are entitled to an attorney upon their first family court date,¹² but they must navigate the investigation phase and any emergency removal situations on their own. By the time a

¹¹ *Opposition to Criminalization of Individuals During Pregnancy and the Postpartum Period*, American College of Obstetricians and Gynecologists (Dec. 2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>.

¹² *Matter of Ella B.*, 30 NY2d 352 (1972); N.Y. Family Court Act §§ 261, 262, 1120.

matter comes to court and counsel is assigned, a parent will have in many cases provided information and made agreements that limit their ability to fairly adjudicate their case in family court. The State Commission on Parental Representation identified the importance of early access to counsel in its 2019 interim report and urged that it be granted to all parents as its top recommendation.¹³ Parents should be afforded access to interdisciplinary representation throughout all pivotal moments in their case, especially when fundamental liberty and privacy interests are at stake.

IV. Conclusion

The family regulation system implicates important civil liberties interests, and the stakes are highest for New York's most vulnerable communities. As the legislature continues to combat systemic racism throughout our institutions, it must not neglect the issue of family separation through the family regulation system, which cuts to the heart of racial, gender, and class inequality. The NYCLU welcomes the Assembly's attention to these issues and looks forward to working with you through the legislative session.

¹³ Commission on Parental Legal Representation, *Interim Report to Chief Judge DiFiore*, at 16-23 (Feb. 2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf.