

REFLECTIONS ON JUDGING MOTHERING

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The other day, a woman approached me on the subway to tell me that looking at print six inches from one's face could cause eyestrain. I quickly learned she was not worried about me; she was concerned about my baby's eyes because I was carrying him face out, where he was about six inches from the newspaper I was reading. Not long before, a driver had leaned out of his ice cream truck to admonish me to be careful—he thought the sling in which I was carrying my son was unsafe. An elderly man on the street told me my baby's legs were cold. A saleswoman was more worried about his arms, but didn't stop at commenting—she reached out to pull down his sleeves. More than a few strangers “tsked tsked” me when they learned I had my baby out of the house before he was six weeks old.

It is amazing how comfortable people feel telling complete strangers how they should care for their children and what they believe the parents are doing wrong. I am certain that over the years, many fellow subway riders and other observers have judged my fashion choices and found them wanting, or disapproved what I was eating (or that I was eating on the train). Yet no one has ever voiced such opinions to me. But the discretion of strangers disappears as soon as you have a child—in fact, it disappears as soon as you are visibly pregnant. Heaven help you if you have a beer in public when expecting.

The litany of issues on which mothers are judged harshly is seemingly endless, with no infraction too small or too strange to elicit comment. (The newspaper was too close to the baby's eyes?!? This comment would seem a bit extreme even if the woman who chastised me hadn't realized that my baby was asleep at the time). The list of things you can do wrong is long enough to make even the best intentioned and best resourced mothers feel inadequate. But this is not another rant about how yuppie mothers can't win these days, how

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the “supermom” paradigm has left those of us with the greatest number of choices terminally guilt-ridden—yadda, yadda. Don’t get me wrong, I think that yuppie mothers need better choices and that we need to stop judging ourselves and each other so harshly. But what is more striking to me about the stream of unsolicited advice I’ve received is how it demonstrates a shared interest of all mothers in changing the way we as a society respond to parenting. This is an issue that well-off women share with mothers who receive far less attention in our culture, and I believe it instructive to consider how attitudes imposed on rich and middle class mothers play out in the treatment of poor mothers. Catching the resonance in the experiences of women in very different situations is, I think, useful for all of us.

It was only after I was criticized for having no mittens on my baby, keeping him up too late, and drinking hot coffee while holding him, that I began to understand what I thought for years I understood standing beside my clients in family court: parenting is something we are inclined to judge harshly at the same time that it is impossible to do in anything but an extremely flawed way. Think about that for a moment. No one with any experience with children (no one with any sense for that matter) believes that parenting can be done perfectly. It is the quintessential example of a Sisyphean task—you think it’s tough when they’re born, then they learn to walk. You finally figure out how to get them to nap and they’re done with napping. How to handle tantrums with equanimity? Ask a saint. How to avoid passing on the neuroses that have been bequeathed down your family tree over generations? Ask a shrink. Then, after years of honing your skills with children, you realize you haven’t the slightest idea how to talk to the teenager living in your house. You can’t get it right. We all know this. We all strive for greater excellence than we have hope of achieving. Yet we couple this knowledge with extreme intolerance for the shortcomings of other parents.

We judge quickly and harshly, without knowing the context in which what we judge arises. We often think, and (as I’ve recently discovered), often say out loud, that how a parent is handling her child is inept or morally deficient.

Can you believe that mother lets her children run around the store that way? And lets them be so rude. It’s really them she’s hurting by failing to teach them any manners. Kids want boundaries, you know. The boy at the playground who bites, what’s his mother doing anyway? The girl who wears the same shirt every day, what is her mother thinking?

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She's so rough with him; she cuddles him; over-protective; indulgent; pushy; she really should pay more attention; she hovers; she let him touch a fire hydrant where dogs pee!

The list of issues on which mothers are criticized is infinite. The standards, of course, are contradictory. The parent that takes a kid to a restaurant will likely be judged by some too lax for letting the child be loud, by others too uptight for scolding the child. There are as many opinions on proper discipline as there are people who know a child. Food? No one could possibly keep up with the ever evolving nutritional dogma, even if kids were flexible and open to suggestion about what they should eat (and we all know that's an alternate universe).

She lets them eat macaroni at every meal. With ketchup. Soda. Kids really shouldn't drink juice, you know. Her kid doesn't get any Omega 3. Is that whole milk?

And then there's the mother who smacks her child in sight of others.

Oh my God, that poor child. If she does that on the bus, imagine what she does at home. Horrible, just horrible!

Except that some of the others are thinking:

It's about time. If she'd smacked him when he was younger, maybe she wouldn't have to do it now.

Most parents I know have experienced this no-win approach to assessing parenting. Depending on their personalities, they have cowered, gotten angry, or been demoralized by such assessments. Some of us have internalized them and some have foisted them on others. Yet as stinging as the comments and glares can be, for most of us they are limited to park benches and supermarket lines or, if we're unlucky, to visits with the in-laws. Our culture of judging parenting by impossible standards hits some much harder. For it is a culture of judgment that we have developed and it is pervasive, extending to the offices of government bureaucrats and courtrooms where poor parents are scrutinized.

I have come to see an important connection between my experience of walking the streets with my baby and the experiences of my indigent clients whose parenting is regularly attacked. I want to tread carefully here: I am a privileged, financially well-off, white woman with a professional degree; my clients are poor, usually minorities,

and always socially disadvantaged. It would be obscene to treat our troubles as analogous. It would also be problematic, though, to ignore the relationship. Despite the significant differences, if the commonality of these experiences were recognized, we would all be better off. We would gain both from a sense of community and, over the long term, from the concrete benefits that strong, broad alliances can bring.

I've always had a warm spot for the pro-choice movement. It may seem strange to feel favorably about the abortion debate—one of the most rancorous, partisan, and often lowest-level public debates around, on a topic about which no one is happy. From a pro-choice perspective, a seminal Supreme Court opinion in our favor has turned out to be extremely problematic, with reasoning that at best seems dated and which has resulted in a highly effective political backlash. And yet, there seems to me something extremely positive about the abortion debate: any infringement on any woman's right to choose is now seen as a threat to every woman's right to choose. *By both sides.* Those who are pro-choice and those who are anti-choice battle as hard about what poor women can do as about what rich women can do. Rich women's ability to get abortions is not threatened with extinction because, in our era of easy travel, money ensures access. Outlawing abortion in any particular state, or in every state, would not prevent rich women from getting safe abortions. Yet rich women care deeply about state-by-state efforts to limit abortion, efforts which, as a practical matter, are about the access of poor and working-class women.

It is striking how much of the abortion debate centers explicitly on financial access. The pro-choice movement has identified the need for Medicaid coverage of abortion as an important battleground and views the infamous Hyde Amendment, which prohibits such coverage, as a major loss.¹ We fight vigorously for abortion health

1. See Inst. for Reprod. Health Access & Women's Law Project, *Removing Barriers to Medicaid-Funded Abortion: What Advocates Can Learn from the Pennsylvania Experience* 1 (2004), available at <http://www.nirhealth.org/sections/ourprograms/documents/removingbarriers2.pdf>; Toni M. Bond Leonard, *The Future of the Hyde Amendment: Learning from Our Past to Build Our Movement*, Center for American Progress, Nov. 2, 2006, <http://www.americanprogress.org/issues/2006/11/hyde5.html>; Susan Schewel, *The Hyde Amendment's Prohibition of Federal Funding for Abortion—30 Years is Enough!*, THE WOMEN'S HEALTH ACTIVIST, Sept./Oct. 2006, http://www.whn.org/newsletter/article1.cfm?newsletterarticles_id=106.

coverage for women in the military and in prison.² Indeed, all of healthcare reform has been held hostage to fights over whether and how abortion will be covered.³ Pro-choice and anti-choice advocates regularly tangle even about whether foreign aid to the poor (not otherwise a hot topic in the U.S.) should be tied to restrictions on abortion counseling.⁴

I certainly do not mean to suggest that poor women have not suffered more as a result of anti-choice efforts. Much ground has been lost in the fight for access to abortion and—as in most areas in which many are hurt—the poor have been hit hardest. Nor do I mean to say that the pro-choice movement has overcome the problems of racism and classism, which are significant throughout American feminism. But there is value in the way abortion has come to be understood and the arguments over it articulated. The pro-choice movement does not argue that access to abortion is *good* for women or in the *interest* of women, though many believe that it is. Arguments about abortion are virtually always framed in terms of women's *right* to abortion.⁵ Familiar as this formulation is, its import is not fully appreciated. Employing a rhetoric of rights has value—distinct from the outcomes the pro-choice movement has obtained using that rhetoric in particular fights—because rights have such special meaning and effect in our culture. Rights apply to everyone; they are not bought and sold; they may be violated, but they can never be extinguished; indeed, rights persist through any violation. If we disrespect a right, that reflects poorly on us, it does not denigrate the right itself (this is part of the reason that civil disobedience can be so powerful).

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2. See, e.g., NARAL Pro-Choice America Foundation, *Discriminatory Restrictions on Abortion Funding Threaten Women's Health*, <http://www.prochoiceamerica.org/assets/files/Abortion-Access-to-Abortion-Women-Government-Discriminatory-Restrictions.pdf> (last visited Mar. 22, 2010).
 3. See Editorial, *More Than Onerous*, N.Y. TIMES, Mar. 15, 2010, at A22; Jeffrey Toobin, *Not Covered*, THE NEW YORKER, Nov. 23, 2009; Sylvia Law, *Missing from Healthcare Bills: Coverage for Reproductive Health*, THE NATION, Sept. 24, 2009, <http://www.thenation.com/doc/20091012/law>.
 4. See Rob Stein & Michael Shear, *Funding Restored to Groups that Perform Abortions, Other Care*, WASH. POST, Jan. 24, 2009, at A3.
 5. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1396 (2009) (“What has not shifted is the commitment of the pro-choice community to the right itself, and to the propriety of its judicial origin. Legal abortion, according to this near-universal pro-choice consensus, is and should be an individual, constitutional right protected against political winds, rather than simply good policy reflected in a state's laws . . .”).

Whatever the success of the pro-choice movement in achieving its political and legal goals, it has achieved something by helping those who are pro-choice transcend class and racial lines in their thinking, if not yet wholly in their actions. That an infringement on any woman's right to choose is seen as a threat to every woman's right to choose is exceptional. Think how few issues we speak of in terms of rights. Contrast public discussion of abortion to, for instance, the public discussion of universal access to childcare. Many of the same people who are pro-choice favor universal access to childcare, but no one talks about it the same way. Wealthy women in New York City do not feel threatened when there is talk of cutting the City's daycare subsidy program for the poor. Yet those same women do feel threatened when anti-choice advocates succeed in limiting the availability of abortion to poor women, whether in New York or Missouri or even overseas. These well-off women know that they can still get abortions themselves and that they will be able to do so throughout their lifetimes, but they feel threatened nonetheless because something important to them, something that affects them personally, has come under attack.

That's the thing about rights: we take them personally. If anyone's rights are threatened, our own are threatened. And so, the pro-choice movement has created a sense of shared interest that does not ordinarily exist. That sense of a shared interest is incredibly valuable because it lets us work to help each other through a sense of community, which is a source of political and emotional strength, rather than through a sense of charity, which entails helping those who are other and therefore separates us.

An[other] World

I represent parents who have been accused of abusing or neglecting their children. My line of work is not very popular at cocktail parties, at least not without more elaboration than people usually want with their wine and cheese. But the elaboration is transformative—at least it has been to every decent person I know who has walked through the doors of family court. Behind those doors, every day, horrible things are inflicted on poor families. To a very large extent, these horrible things stem from the willingness of state agents—caseworkers and judges—to impose their personal beliefs about proper parenting on the families who come into contact with the child welfare system.

The child welfare system is run by so-called “children’s services” agencies⁶ (though the services aspect is often imperceptible). These government agencies and the private agencies that contract with them are supposed to protect children from being harmed by their parents. Their concern about children’s welfare goes no further than that. The system does not aim to improve children’s healthcare or education, or to protect children from environmental or consumer hazards. Nor does it address the biggest threats to child safety in this country: car accidents and other unintentional injuries.⁷ Our government (*WØ*) have chosen instead to focus our child welfare efforts on protecting children from their parents. And thus we have established a massive system for reporting and investigating suspicions of child abuse and neglect. Literally millions of suspicions of child mistreatment are reported each year.⁸ Tens of thousands of caseworkers are charged with assessing those suspicions.⁹ Whatever the potential benefits of this system, a few truths about it must be understood. First, most of these suspicions involve neglect, not abuse; they do not involve even allegations that a parent has intentionally hurt a child in any way.¹⁰ Instead, the investigations begin because someone (and that someone can be anyone—a teacher, a neighbor, a guy who passed the child on the street) feels that the parent may not be taking proper care of the child. Second, the vast majority of suspicions reported are suspicions about poor parents.¹¹ Third, minorities, particularly African-Americans, are drastically over-represented in these reports.¹²

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6. *See, e.g.*, NYC Administration for Children’s Services, <http://www.nyc.gov/html/acs/html/home/home.shtml> (last visited Feb. 18, 2010).
 7. Centers for Disease Control and Prevention, WISQARS Leading Causes of Death Reports, 1999–2006, <http://webapp.cdc.gov/sasweb/ncipc/leadcaus10.html> (last visited Feb. 18, 2010).
 8. *See* ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2007 at 5, *available at* <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf> (estimating that 3.2 million suspicions concerning approximately 5.8 million children were referred in FY 2007).
 9. *Id.* at 10 n.11 (reporting 15,792 investigative workers in thirty-three states).
 10. *See id.* at 25–26.
 11. *See* Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48 AM. J. ORTHOPSYCHIATRY 608, 610 (1978).
 12. *See* ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., AFCARS REPORT #12: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002 4–6, 9, 12 (2006), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.pdf; ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., AFCARS REPORT #16: PRELIMINARY FY 2008 ESTIMATES AS OF OCTOBER 2009 (2009), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.pdf.

Unsurprisingly, because the system primarily affects the poor and minorities, it has not been subject to the same scrutiny or political accountability as have other government programs.¹³ None of which is to say, of course, that it is not important to have a system in place to protect children from abuse. But these are the realities of the system we now have and they must be attended to if we are to understand and take responsibility for the system we support.

Over and over, these realities seem to me to play out with state agents being far too quick to exercise government power to intervene in families' lives and far too slow to get back out. Both the caseworkers who investigate parents and the judges who review state requests to intervene in family life, hold the parenting up to their own standards and inevitably find that the parents fall short. Why? Because their standards are as impossibly high as the standards of the people I hear from on the subway and in the park. The caseworkers and the judges, however, have the guns to back up their glares. The state intervention requested by children's services is often the most extreme intervention possible: to take children from their parents and put them in foster homes. Decisions about when this state intervention is authorized depend on the idiosyncratic views of those caseworkers and judges as to what parental behavior is acceptable. In advising my clients, I frequently tell them that the single most important factor in whether they will be able to keep their children (keep their children!) is how well they get along with the caseworker. You may think I exaggerate. This can't be true. You've seen the pictures of the burnt and beaten children who have suffered at the hands of abusive parents, some ending up dead. Those are the children whose stories motivated our child welfare system and continue to fuel efforts to be more protective of children. Yet, as almost anyone working in the field will tell you, those instances of severe abuse, which garner all the attention in the media, are unrepresentative of the cases that clog the system.¹⁴

Most children in foster care simply are not there because of child abuse.¹⁵ In most cases abuse is never even alleged.¹⁶ Neglect is the charge and neglect is broadly construed. It entails everything from

13. See Pelton, *supra* note 11, at 613–14.

14. See Duncan Lindsey, *THE WELFARE OF CHILDREN* 157–63 (1st ed. 1994); Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 768 (2001).

15. See John I. Takayama, Ellen Wolfe & Kevin P. Coulter, *Relationship Between Reason for Placement and Medical Findings Among Children in Foster Care*, 101 PEDIATRICS 201, 201 (1998) (explaining that neglect and caretaker absence account for sixty-eight percent of foster placements).

16. See *id.* at 203.

having a dirty or run-down house, to refusing special education or recommended psychotropic medications, to corporal punishment, to smoking marijuana. In other words, neglect includes many things that reasonable people have very different ideas about. Indeed, it includes many behaviors that my yuppie friends and I engage in without threat of government intervention.

Although federal law requires the government to try to address any issues of neglect without separating children from their parents,¹⁷ this often does not happen.¹⁸ Thus, children go into foster care because their family's apartment has fallen into disrepair or because a parent cannot afford childcare and leaves her children unsupervised when she goes to work. Instead of forcing landlords to fix the faulty apartments or subsidizing alternate housing, instead of providing day care, the government takes these children from their parents and spends far more money to keep them in foster care than it would have cost to help the parents address the underlying problems.

The short-term costs of this method are far greater than providing the needed services (foster care can cost upward of \$19,000 per child per year¹⁹) and the long-term costs are even worse. Studies have shown that children who go into foster care are more likely to have all kinds of problems later, including higher rates of homelessness, criminal behavior, and poverty, than children who were equally disadvantaged but remained with their parents.²⁰ But listing these future social costs risks theorizing about what is going on, when what is going on is far from theoretical. The state is taking children from their parents under threat of force. Can you imagine a caseworker—a

17. Adoption Assistance and Child Welfare Act of 1980 § 101, 42 U.S.C. § 671(a)(15) (2006) (making federal funding contingent on efforts to avoid separation of children from their parents).

18. See NAT'L COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 289–91 (1991); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1728–31 (2000).

19. See, e.g., BLUEPRINT FOR KENTUCKY'S CHILDREN, PREVENTION OF OUT-OF-HOME PLACEMENT FOR CHILDREN 5 (2009), available at <http://www.kyyouth.org/documents/HomePlacement.pdf>; CHILD WELFARE RESOURCE CTR., MICHIGAN CHILD WELFARE NEEDS ASSESSMENT: FINAL REPORT 152 (2009), available at http://www.michigan.gov/documents/dhs/DHS-Reform-NeedsAssessmentMay2009_286640_7.pdf; LYNN A. KAROLY & JAMES H. BIGELOW, THE ECONOMICS OF INVESTING IN UNIVERSAL PRESCHOOL EDUCATION IN CALIFORNIA 80 (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG349.pdf.

20. See Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007), available at http://www.mit.edu/~jjdoyle/fostercare_aer.pdf.

low-level government worker—coming into your home and leaving with your children? You don't know where they are going, who will take care of them, or when you will see them again. This is a parent's nightmare.

Of course, the image of police banging down a door and sweeping children into the arms of caseworkers is one typically associated with the burnt and beaten and dead children in the newspapers, the children for whom the caseworkers may have been too late. But the kids being taken are not those kids. Not most of the time. The extreme cases that get the attention of the media are rare. Not rare enough, of course, but they are aberrations.

Lawyers have a saying, "hard cases make bad law."²¹ Even more so, the exceptional situation makes bad public policy. We may feel better if, after we read about a parent torturing a child, we hear politicians say that they aren't going to let another parent get away with such a thing, that from now on child safety will be the top priority. As a result, we will bust down more doors more quickly to save the next child. By applauding such policies, we are able to feel less helpless in the face of tragedy. We can even enjoy a moment of self-righteousness: we care about children and we aren't going to let such things happen! But those feelings—feelings of genuine concern for children at risk, as well as self-serving feelings of judgment and vengeance—can blind us to empirical truths.

Busting down more doors means hurting other children, children who will never make the papers, but who will suffer the needless trauma of being torn from their parents. How many children are we willing to take from their parents in order to save the child who otherwise would be killed? A tough question. Not, thankfully, the question we face. It turns out that when the government takes more children from their parents, that does not prevent the worst cases of child abuse.²² It turns out we cannot save every child as much as we might want to. Yet while trying to, we can and do hurt other children. I'd like to suggest that we owe as much care and concern to those other children, whom our policies will hit hard, though we won't read about them. We need to think about those children too and understand the dynamic we allow to decide their fates.

A key aspect of the dynamic is that we invite strangers into homes to judge parents—judge them broadly and subjectively. Consider

21. *See, e.g.*, *N. Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

22. *See* National Coalition for Child Protection Reform, Issue Paper 2: Foster Care Panics (Jan. 1, 2008), *available at* <http://www.nccpr.org/reports/02PANICS.pdf>.

two of the types of cases I mentioned above. It seems difficult to imagine anyone defending the choice to take children from their parents and put them in foster care in the situations which, as with lack of adequate housing or childcare, obvious fixes are available at far less cost. But these cases are often viewed by the caseworkers and judges not as being about material, economic problems, but as being about parenting ability. The parent who “chose” to leave her ten-year-old alone while she went to work is deemed to have such bad parenting judgment that she may not be trusted to keep her child safe under any circumstances. Of course, a mother who leaves a child home because otherwise she will lose her job and means of supporting that child was choosing between two bad options. She may have made the wrong decision (though, of course, this is one of the many parenting questions on which contradictory views are held), but she may be an excellent parent. She certainly is a parent who could be given better options. Similarly, the mother who “chooses” to let her child live in sub-standard housing may not be taking every step another parent would to address the situation, but that doesn’t mean she’s unworthy to be a parent (whatever “worthy to be a parent” might mean). It surely does not mean her children must be better off without her.

Acting as if these cases are about parental judgment is dangerous and ultimately bad for the kids involved. None of us would pass the test of always exercising the best possible judgment when parenting. It’s just that some of us have luxuries that mean our bad choices don’t have to be between two really bad options (and our choices, whether good or bad, are far less likely to be seen by government officials).

Child abuse has been painted as a classless problem²³—that’s a significant misnomer. Some advocates who wanted increased spending on child welfare made the strategic decision to describe child abuse as classless because it is easier to gain support for legislation that is seen as benefiting children in general, rather than as a poverty program.²⁴ Executives who choose the story lines for television also seem to think that stories of middle class and rich children being abused are of greater interest than stories of poor

23. *See* BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 15, 93–103 (1984).

24. *See id.*

children.²⁵ But the empirical data show that child abuse (and the child neglect commonly lumped in with it) are clearly associated with income level.²⁶ For example, one study found children in poor families to be 22 to 25 times more likely to experience maltreatment than children in better-off families.²⁷ And minorities, particularly African-Americans, are drastically over-represented in the child welfare system. As of 2000, “[forty-two] percent of all children in foster care nationwide [were] Black, even though Black children constitute[d] only [seventeen] percent of the nation’s youth.”²⁸

The point is not that rich, white kids are never abused, and certainly not that we should be less concerned about the poor and minority children who are. The point is that, just as when there is any severe discrepancy in how rich and poor or black and white are treated, we should question what is underlying the disparity. Clearly, we are far more willing to allow government officials to judge the parenting of poor and minority parents. We have allowed, indeed encouraged, government officials to be judgmental of certain—but only certain—parents. With respect to these disadvantaged groups, rather than limiting intrusion into family life to the relatively rare extreme cases of parental behavior that are truly beyond the pale, we have invited the government to engage in an endless game of “What is wrong with that mother?” As any mother knows, that is a game no mother can win.

Consider corporal punishment. How much is ok? The answer depends on who you ask. Many say none;²⁹ others say that parents fail their children if they do not use corporal punishment.³⁰ Most

25. See Editorial, *Wallowing in Misery*, N.Y. TIMES, Dec. 6, 1988, at A34 (suggesting that middle-class television audiences would find it difficult to relate to child abuse stories involving poor children).

26. See ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (1996), available at <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>; Charlow, *supra* note 14, at 779.

27. See SEDLAK & BROADHURST, *supra* note 26.

28. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 8 (2002).

29. GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN & SAVE THE CHILDREN, HITTING PEOPLE IS WRONG—AND CHILDREN ARE PEOPLE TOO: A PRACTICAL HANDBOOK FOR ORGANISATIONS AND INSTITUTIONS CHALLENGING CORPORAL PUNISHMENT OF CHILDREN 1 (2002), available at <http://www.unicef.org/violencestudy/pdf/Hitting-wrong.pdf> (citing the Convention on the Rights of the Child, Article 19, requiring states to take measures to protect children from “all forms of physical and mental violence”).

30. See, e.g., Ontario Consultants on Religious Tolerance, *Child Corporal Punishment: Spanking, What Is the “Rod” Mentioned in Proverbs?*, <http://www.religioustolerance.org/spankin13.htm> (last visited Mar. 22, 2010) (noting that the Family Research

people I know who were hit as children, whether with hands or with belts, do not think it was a big deal. Most of the kids I represented when I was a lawyer for neglected and abused kids did not seem to think of it as worse than other punishments; some would tell you that they would rather get a beating and get it over with than give up television for a week.

Of course, the trend in our culture has been away from corporal punishment.³¹ But can it be right to take children from their parents for using a means of discipline that was widespread just thirty years ago³² and that is still allowed in schools in some parts of our country today?³³

Not too long ago, Bill Cosby was applauded for telling his television son, "I brought you in this world and I'll take you out!"³⁴ Maybe joking about such a thing was problematic; maybe it is good that we are questioning the use of corporal punishment. But do we really want to say that it is so terrible that children are better off without their parents because of it? That they are better off being torn from their homes, and often from their schools and neighborhoods, friends, churches, regular activities, and contact with extended family as well?

We need to be able to distinguish parental behavior that we do not agree with from parental behavior that is below a minimum threshold. Interestingly, that is what the law generally says we should do: only allow intervention when a parent has clearly gone beyond acceptable bounds.³⁵ The Supreme Court has repeatedly said that parental rights include the right to make choices about how to

Council and James Dobson, head of Focus on the Family, recommend spanking children under some circumstances).

31. Rick Lyman, *In Many Public Schools, the Paddle Is No Relic*, N.Y. TIMES, Sept. 30, 2006, available at <http://www.nytimes.com/2006/09/30/education/30punish.html>.
32. See Murray A. Straus & Anita K. Mathur, *Social Change and the Trends in Approval of Corporal Punishment by Parents from 1968 to 1994*, in FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY 91, 91 (1996) (citing research showing that more than ninety percent of parents used corporal punishment until approximately 1980).
33. See Lyman, *supra* note 31.
34. *The Cosby Show: Theo's Economic Lesson* (NBC television broadcast Sept. 20, 1984).
35. See *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that a child may not be deemed a ward of the state absent a finding that the parent is unfit).

raise children, choices that others—even a majority of others—may dislike.³⁶

Despite the clear constitutional law protecting the right of parents to raise their children as they see fit, one need only walk into one of the hundreds of family courts around the country to see that this law is respected more in the breach than in the observance. And that should be no surprise. Given what we know about how our society approaches parenting, what should we expect to happen if we tell state workers that it is their responsibility to go into people's homes whenever a concern is raised and evaluate the parenting? We are empowering those workers to act on the widespread instinct to judge and judge harshly. What should we expect to happen if we then tell judges they must review caseworker decisions that have found parenting unsatisfactory? We are asking them to do what almost none of us do under far less fraught circumstances: give parents the benefit of the doubt.

We do not generally connect the phenomenon we observe in our own lives—of widespread willingness to impose perfectionist standards on mothering—with the explosion of inflammatory media coverage of child abuse. I did not connect them until I became the victim of the former, although I deal every day with the consequences of the latter on my clients. Again, I want to stress that I do not mean to downplay the importance of efforts to combat child abuse. But the skewed media coverage has left the victims of our policies unseen. Have you ever read a story or seen a newscast about a child who was awakened in the night and taken, screaming, from her parents, only to have it determined later that a mistake was made and the trauma was unnecessary? Have you heard that such children are often given no explanation of what is happening to them, not told when they will see their parents again, not allowed to take any of their belongings, not allowed to go back to their schools, see their siblings, or call their parents for days or even weeks? These are experiences we inflict regularly on children.

When those who are hurt by our policies have no political voice, there is little chance of correction. No caseworker or judge has ever been chastised publicly for taking a child unnecessarily from her parents. On the contrary, we inculcate a sense that the more harshly they judge parents, the more they care about children. Thus, we

36. *See* *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (reviewing the Supreme Court's treatment of parental rights and concluding: "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

inflame the broader inclination of our society to judge parenting and find it wanting.

Even when mistakes are caught and unnecessary separations ended, those children can never again have what we like to believe is the birthright of all children: a feeling of security that their parents will always be there for them, that their parents have some power to control an otherwise scary world. We take that away when we act as though parents are so great a threat to their children that it should be easy for government workers to come between them.

Worse still is what happens once the children are in foster care. Once a child has been separated from her parents, the caseworker and the judge are no longer required to stay focused solely on the child's safety. While legally a child's safety is supposed to be at risk before she is taken from her parents, a different standard is applied after separation.³⁷ Caseworkers and judges must be satisfied that it is in the child's best interests before returning her to her parents.³⁸ *Best interests?* Since when have any of us, despite our best intentions, met our child's very best interests? How do we even know what is in our child's best interests? It certainly depends on whom you ask. One judge wants more discipline; another wants less. I have heard caseworkers criticize mothers for failing to sit on the floor to play with their children, for giving their children chips, for having beer in the house, for failing to play with a child at the park, and for letting a child get wet under a sprinkler in the park. A judge ordered one of my clients to take her child to the park every day. Every day! How can that level of micromanagement of parenting by the government make sense?

For those whose parenting is never questioned by the state, it is difficult to imagine the levels of intrusiveness, subjectivity, and pure ridiculousness that are imposed when we tell state actors that their job is to assess whether parents can meet their children's best interests. The results are appalling, but they shouldn't be surprising. We are inviting caseworkers and judges to impose the standards that so many of us mentally impose when we see a parent with her

37. *Compare Stanley*, 405 U.S. 645 (holding that a state may not take custody from a parent absent a showing of unfitness), *with* Adoption and Safe Families Act of 1997 § 302, 42 U.S.C. § 675(5) (2008) (discussing considerations required in case planning once children are in foster care).

38. *See* Ellen Marrus, *Fostering Family Ties: The State as Maker and Breaker of Kinship Relationships*, 2004 U. CHI. LEGAL F. 319, 336 (2004) (noting that standards for continuing children in foster care vary by state, but that most states use a best interests standard).

children on the street. We are taking the common inclination to disdain and condemn, and imbuing that inclination with legal authority.

Legal Authority. Consider that in light of some of the complaints I have heard caseworkers and judges raise about the care provided by families. One caseworker thought a railroad apartment was inappropriate for children (someone better tell my Manhattan friends). Another condemned a parent for giving her children Chinese takeout food. A third was bothered by Kool-Aid (the mother told me orange juice was too expensive for her). The socio-cultural bias of such criticism has a long history. In the late 1800s, caseworkers deemed Italian immigrants irresponsible for letting their daughters eat food flavored with garlic because garlic was thought to be an aphrodisiac.³⁹

You might think no parent would get to the stage of such intense scrutiny, that no parent would have come to the attention of children's services in the first place, unless there was something seriously wrong. You would be right if by something seriously wrong you mean that the family doesn't have enough money. Other than that, there is not much one should assume about these cases. I know of a case that started because someone saw a child naked in an apartment window. Another case began when a parent who wanted help finding new housing said to a government employee, "What do I have to do to get help? Do I have to threaten to throw my child out the window?" That "threat" was called in to a child abuse hotline and the mother was subsequently found guilty of neglect. Common allegations when parents are first brought to court include dirty dishes in the sink and clutter on the floor. The sole allegation can be marijuana use—outside the presence of the children.

All it takes to start an investigation of child abuse is an anonymous call to a hotline. One call and a caseworker comes to a home tasked with determining whether the parenting is satisfactory. We all know there are strangers who don't think our parenting is good enough. What those of us in better neighborhoods don't know is the feeling of letting those strangers into our homes. Our neighbors don't call a hotline when they hear our children cry or when they are annoyed with us. Our doctors know us and accept our explanations for injuries. Our schools ask us why our children have been absent

39. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER* 87 (2001) (citing LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE*, BOSTON, 1880–1960 (1988)).

rather than call it in. We expect judging strangers to remain outside, our dirty dishes unanalyzed.

So you might say, for me, the professional has become personal. It would be difficult to overestimate the advantages I have compared to my clients as we each parent. I have enough money. I will never have to choose between keeping a job and leaving my child unattended. If I have a drug or alcohol problem, I can go to a program of my choice to help me deal with it and my children will not be forcibly separated from me while I do so. I have enough money. No one will ever expect to be able to trample my legal rights to raise my child as I see fit without first going to court and giving me due process. *I have enough money.*

Yet I do understand a little better what it means to be judged as a parent. I understand that I will never be as good a parent as I want to be, and that even what I consider my best parenting will be condemned by some. I understand that others will not hesitate to judge me harshly, that they will not acknowledge the malice in their judgment but rather revel in it. They will feel eminently superior. And they will feel, in the few moments that they think about my kids, that they care more about them than I do. To put it into words is to see the folly. But those words echo the menace of our child welfare system: government bureaucrats condemning the parenting of others, without hesitation, without humility, and with self-righteous superiority granted immense power.

The judgment that falls on yuppie women in snide remarks made at cafés falls on poor women with a hammer. My friends feel inadequate, a significant burden no doubt. But my clients feel fear. The primal fear that one's child will be taken. The unspeakable fear that your child will be hurt and you won't be able to protect her. Of course, children learn fear too. My clients' children learn too young that their parents are not all-powerful, all-protecting. When these children worry that a monster may come and take them away from their parents, it is true.

The flip side of the judgment I have experienced as a new parent is the unexpected communion with strangers, the moments of sharing the deepest enthusiasm. The gruff guy in his fifties with whom I would not normally exchange conversation now turns to jelly over my six-month old. Teenagers, the middle-aged, the elderly, men and women, black, white, and brown—so many rush to tell me of the most important experiences in their lives. Children do bring out some of our most profound shared experiences and values. So often our strongest senses of community are buttressed by identifying

others in opposition, as different or inferior. But the value we place on children and our personal investment in them is a bond, one that goes deep enough to serve as more than just a trite political reference thrown around without real meaning.

We could view parenting by strangers as we view the parenting of our partners and friends when we are at our best: generously, with commiseration rather than a measuring stick. We could resist the urge to play the “What is wrong with that mother?” game, which hurts us all.

Perhaps we could learn how to talk about child-rearing from the rhetoric surrounding abortion rights. We might learn to treat women better when they are mothers by considering how we want them treated when they choose to have abortions. We could even see reproductive freedom as including not only the right to *not* raise children, but the right to raise them as we see fit. Choice should have two sides: the right to forego parenting and the right to parent. That means ensuring that women who want to have children can do so without the threat that their children might be taken by the state without ample justification. We may not yet have succeeded in obtaining what we aim for in the struggle over abortion, but at least we are aiming right—aiming for sympathy, empathy, choice, and respect for individual values which may differ from our own. We care about other women’s rights to be free from unjustified government intrusion, not out of charity, but out of solidarity. Our goal as pro-choice feminists has been to support rather than to judge. Support rather than judgment—I know some mothers who could use that.