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Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare

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I. INTRODUCTION

In most states, child welfare hearings and records are sealed or confidential. This means that by law, court hearings and records may not be observed. The same laws and court rules also preclude those who are authorized to enter and watch from discussing anything learned or observed in a closed courtroom or from a sealed court record with anyone not involved in the case. It is the restriction on speech—on telling stories about child welfare—with which this Article is concerned. I will argue in this Article that the insights of narrative theory and agenda-setting studies help us understand the damaging consequences of confidentiality laws.

Child welfare is characterized by a single, "master narrative," or overarching description of conditions and phenomena that explains, or purports to explain, the field.[1] The master narrative gathers the stories of child welfare and unifies them into a single, coherent, commonly-accepted image. It is the way child welfare issues are understood. In short, the master narrative of child welfare depicts foster care as a haven for "child-victims"[2] savagely brutalized by "deviant,"[3]

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Editor's Note: Many of the stories detailed in this Article are drawn from Professor Fraidin's personal experiences and observations in the District of Columbia. Accordingly, in some instances the names of minors in these stories are pseudonyms and factual assertions related to these stories are attributable to those experiences and observations.

1. *See* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 18-37 (1979) (arguing that postmodernism is characterized by "incredulity towards metanarratives").

2. *See* JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 4-6 (1993) (explaining that the image of children as victims has played "an important role in the history of American child saving").

3. *See generally* Nina Bernstein, *Press Coverage and Public Perception: In Child Welfare Reporting, Even Good Daily Coverage Can be Distorting*, NIEMAN REPORTS, Winter 2000; BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 73 (1984).

"monstrous"[4] parents. Notwithstanding this shared public understanding, however, most children in foster care are alleged to have experienced neglect—deprivation of food, clothing, shelter, education, or another necessity of life—not physical abuse. There is also a growing understanding that some children in foster care ought not to be there at all. In addition, research and experience indicate that many maltreated children would be better off if simply left at home—with those responsible for the maltreatment—rather than placed in foster care.[5]

The press and public have a limited view of maltreated children, their parents, and the family court system. I will argue that confidentiality laws perpetuate and strengthen this view, and preclude other narratives from competing for preeminence and from informing or influencing the master narrative. Stated simply, laws prohibiting the discussion of child welfare cases silence a vast number of stories. By their terms, these laws define the stories that may not be told, and the putative storytellers who may not speak, while designating as acceptable other stories and other voices. The unchallenged dominance of the law-sanctioned narrative affects even those involved in child welfare as a profession, and by affecting their worldview, diminishes the quality of care provided to children. The laws that require silence outside the courtroom permit the acceptance of pervasive dysfunction in child welfare, and affect the administration of justice inside the courtroom.

In Part II of this Article, I explain the concept of the master narrative, and present research about agenda-setting and issue-framing. I then present contrasting stories of child welfare, the "master narrative," and an alternative story. The former reflects widespread popular conceptions of children, parents, the foster care system, and the executive and judicial branches of government; the alternative story is told by weaving the stories of individual children and parents with data and findings by child welfare researchers.

In Part III, I set forth current laws and court rules that regulate admission to and disclosure of child welfare court hearings and records. In this Part, I share stories of two foster youths who sought to tell their own stories, but were confronted with attempts to silence them.

In Part IV, I argue that confidentiality laws perpetuate the disjunction between the widely-accepted master narrative of child welfare and the alternative story of child welfare. I argue that confidentiality laws harm children and their parents by silencing their voices and suppressing their stories.

II. STORIES OF CHILD WELFARE

A. The Master Narrative, Stories, and Agenda-Setting

A master narrative says it all, or thinks it does. Identified by Jean-Francois Lyotard, who defined the post-modern era by its "incredulity toward

4. AXEL AUBRUN & JOSEPH GRADY, HOW THE NEWS FRAMES CHILD MALTREATMENT: UNINTENDED CONSEQUENCES 3 (2003).

5. *See* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes*, 97 AM. ECON. REV. 1583, 1584 (2007).

metanarratives,"[6] "master," "grand," or meta-narratives have been described variously as "general accounts of human nature and history that purport to be independent of time, place, culture, and other contextual influences, and that determine how knowledge and truth are constituted,"[7] and "fictions that privilege specialized ways of thinking, particularized ways of feeling and normalized ways of being, establishing nothing more than an artificially imposed order."[8] The master narrative presumes itself as "able to organize vice and virtue, hubris and comeuppance, crisis and imperative response, across a variety of particulars."[9]

Grand narratives are, of course, composed of smaller ones—stories. But such narratives also spawn stories, which in turn strengthen and recreate the narrative from which they were spawned. Far more than being merely descriptive, the act of storytelling is creative, in that we create the world around us as we name it. "We participate in creating what we see in the very act of describing it."[10] As we will see, the distinctive grand narrative of child welfare grows itself every time one of its component stories is told.

Stories about social issues, like child abuse, are often told in popular media. Social problems become social movements when they are recognized and given attention.[11] This happens through stories retold by the media.[12] As the media hear stories and choose from among those which to retell, they seek stories that are dramatic, memorable, contain an element of irony or unexpectedness, and are relatively easy to investigate and report. "The qualities of immediacy and drama required of news stories inevitably slant the selection of stories toward the more sensational."[13] A story that permits the media to feel good about its role improves its chances of being noticed and retold.

Media storytelling can set the agenda of public policy. Agenda-setting theory describes the role of the media in establishing policy priorities and influencing public perceptions and debate. Pioneered by Maxwell McCombs, agenda-setting theory and scholarly progeny, such as issue-framing studies, reveal the enormous power of the media to create an agenda for politicians and the public. Agenda-setting refers to the topics or subjects of news media coverage and the effect of the coverage of those issues on the prioritization of those issues in the minds of those

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6. LYOTARD, *supra* note 1, at xxiv.

7. Frederick Mark Gedicks, *God of Our Fathers, Gods for Ourselves: Fundamentalism and Postmodern Belief*, 18 WM. MARY BILL RTS. J. 901, 904 (2010) (quoting Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty, Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1198-99 (2005)).

8. Bruce A. Arrigo, *Identity, International Terrorism and Negotiating Peace: Hamas and Ethics-Based Considerations from Critical Restorative Justice*, 50 BRIT. J. CRIMINOLOGY 772, 776 (2010) (citation omitted).

9. Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1177 (2010).

10. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrativ*e, 87 MICH. L. REV. 2411, 2416 (1988); Jeffrey Hubbard et. al., *Mass Media Influences on Public Conceptions of Social Problems*, 23 SOC. PROBS. 22, 22 (1975) ("[S]ocial problems are what people say and think they are. There are no particular conditions of society that are inherently problematic.").

11. BEST, *supra* note 2, at 11.

12. *Id*. at 14 ("Media coverage attracts public attention to the cause.").

13. Patrick Ayre, *Child Protection and the Media: Lessons from the Last Three Decades*, 31 BRIT. J. SOC. WORK 887, 889 (2001).

influenced.

In modern society, popular media are the vehicle by which master narratives become the public agenda. In the area of civil rights, for example, repeated coverage over an extended period of time caused many Americans to keep the issue in the forefront of their minds and to believe it should be addressed and resolved.[14] Similar dynamics have been observed with respect to numerous issues, including foreign relations, political campaign issues, and the environment.

Agenda-setting effects may be especially pronounced on individuals with a high level of "news awareness," such as people who have at least some college-level education. Those with high levels of education, such as lawyers, judges, and social workers involved in child welfare, may be more susceptible to agenda-setting effects because they have a high capacity to take in and process information.[15] Thus, as I will argue, absorption of the master narrative is particularly pronounced, and especially consequential, among those most intimately involved in child welfare cases.

First-level agenda-setting research examines the extent to which the media's coverage of an event, person, or issue affects the public's prioritization of that issue.[16] It is primarily a quantitative analysis, comparing the number and frequency of media reports with the public's perception of the importance of the issue. The phenomenon of agenda-setting was first studied with respect to issues in political campaigns.[17] Since then, research has demonstrated that a wide range of issues are responsive to agenda-setting effects.[18]

Second-level agenda-setting analysis has gained prominence more recently. A more qualitative analysis, this concept merges with studies of issue-framing effects, measuring the consequences of media coverage of particular attributes of an event, person, or issue.[19] "The second [level] is making some aspects of the matter and criteria for its evaluation more salient than others."[20] In terms reminiscent of

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14. *See* John M. Johnson, *Horror Stories and the Construction of Child Abuse*, *in* IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 5 (Joel Best ed., 1989).

15. David B. Hill, *Viewer Characteristics and Agenda Setting by Television News*, 49 PUB. OP. Q. 340, 343 (1986).

16. *See* Maxwell E. McCombs, *A Look at Agenda-Setting Research: Past, Present, and Future*, 6 JOURNALISM STUD. 543 (2005).

17. *See* Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OP. Q. 176, 176 (1972).

18. *See* McCombs, *supra* note 16, at 543 (agenda-setting effects have been the subject of "hundreds of studies worldwide" since 1972); Wayne Wanta & Salma Ghanem, *Effects of Agenda Setting*, *in* MASS MEDIA EFFECTS RESEARCH: ADVANCES THROUGH META-ANALYSIS 37 (Raymond W. Preiss et al., eds., 2007) ("The vast majority of [agenda-setting] studies have found widespread support for a media influence on issue salience. In other words, the amount of press coverage that issues receive gives individuals salience cues with which they learn the relative importance of these issues.").

19. *See* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, J. COMM., Autumn 1993, at 51, 52 ("To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described.").

20. Robert M. Entman, *Framing Public Life: Perspectives on Media and Our Understanding of the Social World* at 121 (book review) ("Thus, while first-level agenda-setting suggests media coverage influences what we think about, second-level agenda-setting suggests media coverage influences *how* we think, or frame, the issues we are thinking about."). *See also* Stephanie Craft & Wayne Wanta, *U.S.*

Lyotard's conception of a meta-narrative, W.A. Gamson described an issue-frame as "a central organizing idea for making sense of relevant events and suggesting what is at issue."[21] The frame of a story determines the "prominent themes or meanings within or perceived from a news story as a whole."[22]

Framing is choosing themes of a story, distinguishing between major and insignificant characters, emphasizing some plot twists and hushing others. The outcomes of these choices comprise a story that has more than a simple impact: it creates the world as it is imagined and recounted.[23] Thus, journalists decide which issues to cover and how to present them; considerations include which sources to use and the relative prominence of different concerned parties' interests.[24] These choices define the frame of the story; they determine what the story is about and how it is told. Issue-framing research has confirmed that the way stories are told makes a difference: "[F]rames can affect the way in which the public perceives the issues that are covered."[25] Thus, in a study of the coverage of the terrorist attacks of September 11, 2001, "[t]he two attributes . . . that news media users expressed the most concern about were those attributes that received extensive news coverage."[26]

Research has identified common elements of frames of news stories. Sensationalism, provocative and descriptive language, violence, arresting imagery, and drama all are perceived to make for "good 'copy,'"[27] and thus are the hallmarks of a considerable amount of journalism.[28] For example, Blood, Putnis, and Pirkis found that 29 percent of Australian media stories about mental illness were "unnecessarily dramatic or contain[ed] sensational language."[29] As demonstrated below, most child welfare reporting reflects these qualities.

Accordingly, news reports contain a comparative paucity of contextualizing information, such as data or reference to patterns, themes, or trends. For example, a 1998 study found that only one-third of crime coverage included contextual information about the incident.[30] In a study of major newspapers' coverage of children's issues, more than 95 percent of stories about violence by and against children focused on a discrete incident, and ignored larger public policy

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Public Concerns in the Aftermath of 9-11: A Test of Second Level Agenda-Setting, INT'L J. PUB. OP. RES., Winter 2004, at 456.

21. W.A. Gamson, *News as Framing: Comments on Graber*, AM. BEHAV. SCIENTIST, Nov.-Dec. 1989, at 157, 157.

22. Lori Dorfman, Esther Thorson & Jane Ellen Stevens, *Reporting on Violence: Bringing a Public Health Perspective into the Newsroom*, 28 HEALTH EDUC. BEHAV. 402, 405 (2001).

23. Delgado, *supra* note 10, at 2412-15.

24. *See, e.g.*, W.A. Gamson & Andre Modigliani, *Media Discourse and Public Opinion on Nuclear Power: A Constructionist Approach*, AM. J. SOC., July 1989, at 1, 1-37.

25. Craft & Wanta, *supra* note 20, at 457.

26. *Id.* at 460.

27. Johnson, *supra* note 14, at 13.

28. Claudette Artwick & Margaret Gordon, *Portrayal of U.S. Cities by Daily Newspapers*, NEWSPAPER RES. J., Winter 1998, at 54, 55.

29. Sara Tiegreen & Elana Newman, *How News is "Framed"*, DART CENTER FOR JOURNALISM & TRAUMA (Mar. 31, 2008), http://dartcenter.org/content/how-news-is-framed (last visited Nov. 16, 2010) (citation omitted).

30. Artwick & Gordon, *supra* note 28, at 54.

questions.[31]

With respect to contextualizing information, too, the choice to include it or not has an impact on readers. The inclusion of contextualizing information—even in reports of individual incidents—creates in readers a greater sense of optimism, a belief in the efficacy of prevention, and a stronger sense of a societal role in individual incidents, than do traditional, purely episodic reports.[32] The media's choices of frames may have the greatest significance with respect to issues about which members of the public have limited firsthand knowledge or experience—issues for which individuals themselves cannot provide a frame.[33] As described below, the issue of child abuse appears to have a distinct frame. Media reports about the issue reflect a meta-narrative, a unifying theme that purports to express a shared understanding, or as Hans Bertens describes: "[T]he supposedly transcendent and universal truths that serve to justify and legitimate Western culture."[34]

The media's coverage can create that narrative, and subsequently reinforce it. A meta-narrative shares commonalities with what Barbara J. Nelson has called "valence issues," namely issues on which there is little to no public disagreement.[35] As we will see, child abuse is a valence issue; no one supports it.[36] But we will also see that it is the definition of an issue that makes it unarguable, just as the telling of a story creates the reality that supports the story's coherence and believability, and just as the meta-narrative purports to synthesize and explain an issue.[37] The valence quality of child abuse and neglect as portrayed in the media suggests that first- and second-level agenda-setting merge with respect to valence issues: merely by placing the issue on the radar screen, the media not only identify that the issue exists, but also explain its meaning and significance.

Valence issues and meta-narratives drown out other versions of events that

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31. *See generally* DALE KUNKEL ET. AL., COVERAGE IN CONTEXT: HOW THOROUGHLY THE NEWS MEDIA REPORT FIVE KEY CHILDREN'S ISSUES.

32. For example, Coleman and Thorson reported that college students who read stories written in a public health frame believed that society has a greater role in crime and violence problems than did readers of stories that lacked contextual information. *See* Sara Tiegreen & Elana Newman, *The Effect of News "Frames"*, DART CENTER FOR JOURNALISM & TRAUMA (Jan. 1, 2008), http://dartcenter.org/content/effect-news-frames (last visited Nov. 16, 2010) (citations omitted). The research subjects also did not find contextualized stories to be engaging. *Id*.

33. *See* Craft & Wanta, *supra* note 20, at 461 ("Information about unobtrusive issues . . . comes largely from media, making media a more powerful influence on judgments of importance.").

34. POSTMODERNISM: THE KEY FIGURES 246 (Hans Bertens and Joseph Natoli eds., 2002). *See also* Jay Rosen, *PressThink Basics: The Master Narrative in Journalism*, PRESSTHINK (Sept. 8, 2003), http://archive.pressthink.org/2003/09/08/basics_master.html (last visited Sept. 22, 2010).

35. NELSON, *supra* note 3, at 27 ("A valence issue such as child abuse elicits a single, strong, fairly uniform emotional response and does not have an adversarial quality.").

36. *Id*. at 28. Nelson explains:

> To the extent that a policy issue involves only one widely held ideal (or several complementary ideals) it will be a valence issue . . . . Thus, when we speak of a valence policy issue, both the problem and its preferred or intended solutions must invoke a more or less uniform, single-position affirmation of a civic ideal.

Id. See also BEST, *supra* note 2, at 183 ("No one defended harming children . . . . [O]verall, campaigns against threats to children faced little overt opposition.").

37. According to Barbara Nelson, "Antony Downs has argued forcefully that the media portray problems in ways which gloss over fundamental conflicts of value." NELSON, *supra* note 3, at 25.

would complicate the understanding of an issue. These powerful vehicles for setting agendas and framing issues create and then perpetuate a one-dimensional world, which often fails to take account of the experiences of the powerless, of outsiders, of those oppressed by the status quo.

These dynamics have played out in dramatic fashion in the field of child welfare. Child abuse was depicted in dramatic, media-friendly terms, and thus received sufficient attention that it became a social movement.[38] The movement has sustained its strength, fueled by stories which together have created a master narrative.

B. The Master Narrative of Child Welfare: Deviance, Monsters, and Abuse

> *The term "child abuse" brings to mind extreme physical harm. This image is likely drawn from the extensive media coverage of child abuse, coverage that does little to advance an informed public policy dialogue about the issue.*[39]

1. History and Research

Child welfare is a fertile proving ground for theories of storytelling, meta-narrative, and the issue-framing tendencies of the media. There is widespread agreement that there is a master narrative of child welfare, and on the contents of that narrative. The narrative is sensational, episodic, devoid of contextualizing information,[40] and reliant on official governmental sources.

According to media portrayals and popular understanding, child abuse is brutal violence; children are innocent victims; parents are deviant and monstrous; and children must be separated from parents for their protection.[41] The narrative dovetails with pernicious, longstanding stereotypes of people of color, especially African-Americans.[42] The narrative contains subplots about the government and social workers: case workers are depicted as overwhelmed, incompetent bureaucrats who sometimes are uncaring, but more often simply ill-equipped and bumbling. Strands of the narrative about children, their parents, governmental actors, and the nature of abuse interweave and complement each other, and together heighten the polarizing effects of the overall narrative. The coherence and interconnectedness of the several strands of the narrative is evolutionary, as it ensures the continued vitality of the tried-and-true storyline.

The narrative of child abuse began its contemporary ascent to prominence in 1962 with the publication in the *Journal of the American Medical Association* of

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38. *Id.* at 126 ("[A] social problem is a social construct. A social problem depends not only on the existence of conditions unacceptable to some people, but also on organization to redress those conditions and a modicum of social support for such efforts.").

39. MEG BOSTROM, DISCIPLINE AND DEVELOPMENT: A META-ANALYSIS OF PUBLIC PERCEPTIONS OF PARENTS, PARENTING, CHILD DEVELOPMENT AND CHILD ABUSE, PUBLIC KNOWLEDGE LLC 18 (2003).

40. *See* KUNKEL ET. AL., *supra* note 31, at 7 (5 percent of stories about child abuse and neglect include contextualizing information; 17 percent of child abuse and neglect stories include information about policy issues).

41. *See* Ruth White, *Snorkeling in the Muck: Moving Beyond the Child Welfare Grand Narrative with Professor Fraidin* (2009) (unpublished manuscript on file with author).

42. *See infra* Part IV.

The Battered-Child Syndrome,[43] by Dr. Henry Kempe. According to Kempe, his research suggested that some children suffered severe abuse and injury at the hands of their caretakers. "The battered child syndrome," he wrote, "is a term used . . . to characterize a clinical condition in young children who have received serious physical abuse, usually from a parent or foster parent."[44] Kempe's article mentioned such "parental assault[s]"[45] as "direct murder,"[46] "severe slapping or spanking,"[47] and "child beating,"[48] and included case studies of an infant with "subdural hematomas" and a "fractured femur,"[49] and another with a "fractured skull."[50] The two children whose case studies were synopsized in the article were three-months-old[51] and thirteen-months-old.[52] The article also reprinted x-ray films of a five-month-old boy[53] and seven-and-a-half-month-old girl.[54] Use of these stories and images was consistent with Kempe's finding that "in general, the affected children are younger than 3 years."[55]

Kempe's description of "child abusers" foreshadowed contemporary images of parents whose children are in the foster care system: "A frank psychosis is usually readily apparent;"[56] "extremely sociopathic;"[57] "of low intelligence . . . psychopathic or sociopathic characters. Alcoholism, sexual promiscuity, unstable marriages, and minor criminal activity are reportedly common among them. They are immature, impulsive, self-centered, hypersensitive, and quick to react with poorly controlled aggression."[58]

Kempe's study was publicized widely.[59] Nelson argues that Kempe's findings were distorted by selective, sensational oversimplification. She observes that "magazines and newspapers initially showed a preference for reporting cases of bizarre brutalization, giving journalists the opportunity to act as the child's advocate against the crime of parenting gone crazy."[60] Joel Best concurs: "[E]arly reports in both the medical literature and the press portrayed the problem as one of extreme physical violence against very young children."[61]

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43. C. Henry Kempe et. al., *The Battered-Child Syndrome*, J. AM. MED. ASS'N, July 7, 1962, at 17, *reprinted in* CHILD ABUSE AND NEGLECT 143 (1985). *See* NELSON, *supra* note 3, at 56; BEST, *supra* note 3, at 66.

44. Kempe et. al., *supra* note 43, at 143.

45. *Id*. at 144.

46. *Id*.

47. *Id*. at 145.

48. *Id*. at 146.

49. *Id.* at 146.

50. Kempe et. al., *supra* note 43, at 147.

51. *Id*. at 146.

52. *Id*. at 147.

53. *Id*. at 148, 150.

54. *Id.* at 149, 151.

55. *Id*. at 144.

56. Kempe et al., *supra* note 43, at 144.

57. *Id*. at 145.

58. *Id*.

59. NELSON, *supra* note 3, at 58-56.

60. *Id*. at 51.

61. BEST, *supra* note 2, at 67 (citing, as an example, a 1976 television news program, which "began with nine slides of bruised infants and toddlers lying in hospital beds wearing only diapers and bandages, while the correspondent spoke: 'What you are seeing now are the actual results of severe

Child abuse victims came to be understood as recipients of the most brutal of attacks, acts which, as Best said, have no defenders.[62] Nelson describes violent child abuse as a valence issue, meaning that there is no controversy and no debate. "A valence issue such as child abuse elicits a single, strong, fairly uniform emotional response and does not have an adversarial quality . . . . By far the most important attribute of the child abuse issue is its valence quality."[63] There are not two sides to the issue of child abuse, as it was depicted, for who would argue that the state overreaches by removing from the home of a "monster" a child who has suffered grievous harms?

The valence quality of child abuse made it a useful vehicle for lawmakers and activists who sought recognition of the issue as a social problem requiring attention.[64] The legal definition and popular understanding of child abuse expanded to include an ever-increasing range of errors, misdeeds, and purported sins of commission and omission. Best argues that "it became possible to label almost anything that might harm children as child abuse,"[65] observing that the label was used for such varied phenomena as abortion policy, smoking by pregnant women, explicit rock lyrics, circumcision, inadequate social services, religious fervor, and parental kidnapping.[66]

Notwithstanding the application of the term child abuse to widely-varied circumstances, child abuse continues to be depicted by sensational, episodic stories of severe brutality.[67] The vast majority of child welfare news stories depict children who have been victimized by such acts as:

> [B]eating . . . [or] burning—with matches, cigarettes or electric irons, or by holding the child's hands, arms or feet over an open flame . . . . Others are strangled, thrown, dropped, shot, stabbed, shaken, drowned, suffocated, sexually violated, held under running water, tied upright for long periods of time, stepped

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child abuse.'"). *See also* NELSON, *supra* note 3, at 136 (child abuse typified by "instances of extremely brutal physical abuse").

62. *See* BEST, *supra* note 2, at 183-86.

63. NELSON, *supra* note 3, at 27. *See id*. at 4 ("[C]hild abuse was vigorously portrayed as a noncontroversial issue. Disagreements about how best to respond to abuse were suppressed . . . .").

64. *See* BEST, *supra* note 2, at 11 ("[S]ocial problems are socially constructed; people make claims arguing that particular conditions are social problems, and others respond to those claims. It is this process of claims-making that turns conditions—which previously may have gone unnoticed or been taken for granted—into objects of concern—social problems.").

65. *Id*. at 77.

66. *Id*. at 74-77.

67. According to an analysis by Martin and Glantz in 1997, "the phrase 'child abuse and neglect' seems to almost always bring up images of the most extreme and high profile cases which quickly moves the discussion to the problem of dealing with the most severe cases." BOSTROM, *supra* note 39, at 18. Bostrom's report explains:

> It should be no surprise that people have this reaction to "child abuse" since a great deal of the news coverage about children consists of abuse and neglect stories. A media content analysis by the Casey Journalism Center found that news about children overwhelmingly consists of stories about violence done to children or by children.

Id.

on, bitten, given electric shocks, forced to swallow pepper or buried alive.[68]

John M. Johnson studied all child abuse and neglect-related news stories published in Arizona's two major newspapers from 1948 to 1980.[69] In all, the newspapers published a total of 623 stories.[70] From 1948 to 1969, some 95 percent described "an individual case of childhood injury. Most of these were dramatic, horrific stories."[71] From 1948 to 1980, 70 percent were "horror stories."[72] According to Johnson, horror stories often contain elements of "ironic contrast" and "structural incongruity,"[73] which are "bizarre, strange, unusual, or 'out of place'"[74] and heighten a reader's emotional response to already-compelling facts.[75]

Johnson's descriptive phrase—horror stories—requires little elaboration. He is referring to stories about "horrible injuries or gruesome circumstances,"[76] such as the terrible discovery of a nine-year-old girl: "The Baltimore Police found Patty Saunders, 9, in the 23 x 52 inch closet where she had been locked for half her life. She weighed only 20 pounds, and stood less than three feet tall. Smeared with filth, scarred from parental beatings, Patty had become irreparably mentally retarded."[77] A South Carolina girl with a "ruptured liver and spleen and eye injuries, a fractured knee, 14 broken ribs, bite marks on her cheeks, bruises on her stomach and back and alcohol in her bloodstream."[78] The nude body of a two-month-old Indiana boy, "found under some dirt, leaves, and cement in the foundation of a torn down house . . . ."[79]

Johnson's conclusions about media coverage of child abuse and neglect issues are supported by 2003 research by psychological anthropologist Axel Aubrun and linguist Joseph Grady on behalf of advocacy group Prevent Child Abuse America (PCAA).[80] Aubrun and Grady analyzed approximately 120 news articles and "several dozen" television news reports about child maltreatment.[81] Like Johnson, the researchers find that stories about child abuse and neglect ordinarily "emphasi[ze] . . . sensational events and images," depicting "episodic" incidents of brutal abuse, rather than broader themes or trends relating to children, poverty,

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68. NELSON, *supra* note 3, at 60-61 (citation omitted). "One obvious motivation for emphasizing the most unusual and extreme forms of abuse is that newspapers can then titillate their readers with stories that are unwholesome as well as violent." *Id.* at 66.

69. Johnson, *supra* note 14, at 7.

70. *Id*.

71. *Id*.

72. *See id*.

73. *Id*. at 9-10.

74. *Id.* at 10.

75. *See* Johnson, *supra* note 14, at 10. *See also* AUBRUN & GRADY, *supra* note 4, at 4 (providing an example of a story with a compelling, provocative "twist," namely that "the abuser seemed harmless, or even much better than harmless") (citing *Shaken Baby Deaths Defy Easy Answers,* CHI. TRIBUNE, Mar. 5, 2001 ("One friend recalled seeing [the accused abuser] around her baby, and recalled a gentle man who took to children easily. 'A lot of us thought, 'Boy, his wife is really getting a great guy.'")).

76. Johnson, *supra* note 14, at 8.

77. *Id*.

78. *Id*. at 9.

79. *Id*.

80. *See* generally, AUBRUN & GRADY, *supra* note 4.

81. *Id*. at 1.

abuse or neglect.[82] The report also indicates that many news reports are "simple, causal stories [that] reinforce unproductive associations with the topic—e.g., a parent gets violent with his child because the parent is a sick, drunken monster."[83] Consistent with the general findings reported above, the report finds that media coverage rarely, if ever, contextualizes reports of incidents by describing the family's financial, medical, or social circumstances.[84]

According to Aubrun and Grady, the most common frame of stories about child maltreatment is that of a "horrible, criminal atrocity some monstrous parent has committed, and the horrible suffering of the child(ren) in question."[85] The report offers examples such as a parent's "systematic torture" of her child,[86] and a mother who "gave birth in a factory bathroom, then put the baby in a trash bin and went back to her job packaging chocolate."[87] Aubrun and Grady suggest that sensational stories are prevalent because they:

> [A]re easy to tell (and to gather information for), and they fit the mold of simple, sensational and episodic: they are about a terrible thing that one person does to another. They are especially sensational because of shared taboos against harming children, and shared cultural models of 'monsters' whose actions can't be chalked up to any rational causes."[88]

The report also notes that in addition to describing incidents of brutal violence, news stories sometimes address governmental malfunction.[89] Even in this second category of stories, most of the examples are of stories of incidents in which government case workers failed to take from a family a child who ultimately was injured or killed.[90] Thus, even stories perceived to be about a system actor, rather

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82. *Id*. at 2. *See also* KUNKEL ET. AL., *supra* note 31, at 7 ("[A]bout 9 out of 10 . . . stories [about child abuse and neglect, and youth crime and violence] reflect an episodic frame."); NELSON, *supra* note 3, at 72 (commenting on "newspapers' tradition of reporting child abuse as crimes of bizarre brutalization").

83. AUBRUN & GRADY, *supra* note 4, at 2.

84. *See also* KUNKEL ET. AL., *supra* note 31, at 11 (commenting on "the dramatically low rate at which stories about youth crime/violence or child abuse/neglect provide any important contextual information in their coverage. Fewer than 1 of every 20 stories . . . includes any information to help the reader relate the 'breaking news' developments to broader patterns and trends."). Dorfman, Thorson, and Stevens define contextualizing information as information relating to the "interactions among the victim, agent of injury or death, and the environment." Tiegreen & Newman, *The Effect of News "Frames"*, *supra* note 32. Notwithstanding the beneficial impacts of contextualized reportage, media outlets may be discouraged from emphasizing this type of story because some readers appear to dislike it. *See id.*

85. AUBRUN & GRADY, *supra* note 4, at 3.

86. *Id*. at 4.

87. *Id*.

88. *Id*. at 3.

89. *Id*. at 5.

90. *See, e.g.*, Chris Goddard & Max Liddell, *Child Abuse Fatalities and the Media: Lessons from a Case Study*, CHILD ABUSE REV., July-Aug. 1995, at 356, 359. Goddard and Liddell describe the vicious abuse and death of two-year-old Daniel Valerio of Victoria, Australia as:

> [T]he type of child abuse tragedy that the media relish. This story contained elements attractive to news journalists: a protective service that failed to respond but which passed messages to the police that never arrived; procedures that were not followed; 21 professionals who could not recognize child abuse, even severe, apparently obvious child

than the monstrous parents, tend to reinforce dramatically the horror story theme.[91] For example, one story described in this report as reflecting government dysfunction is *Abuse Cases Rise in D.C., But Fewer Go to Court*, by Henri Cauvin of the *Washington Post*. The report says:

> This article talks about a decline in the number of charges against parents in Washington, D.C. The implicit question is whether the decline has happened because the agency is doing a poor job of keeping up with cases, or because they are being less aggressive in removing kids from families.[92]

In critiquing the "condemn[ation of] the system"[93] conveyed in this article, Aubrun and Grady themselves appear to assume that earlier (i.e., pre-decline) rates of child removal were appropriate. Aubrun and Grady do not suggest the possibility that the recent, lower removal numbers reflect sound, measured judgment by the agency. Presumably, the story also did not consider this possibility—so powerful is the master narrative of child welfare, in which removing children from their homes is the natural protective response against parents seen as uncontrollably predatory.

Additional stories proffered as depicting governmental inadequacy also reinforce the horror story theme of gruesome abuse of children by parents. For example, the report quotes from a *Houston Chronicle* story about the incarceration of a mother heard on "a 911 audio tape [that] recorded sounds of whacks and screams as [her child] was hit 60 times with a board,"[94] and a *Dateline*, NBC special that decried the "many [abused] children [who] can fall through the cracks . . . ."[95] Yet another story cited for its depiction of the "failure of child protective services" describes Indiana's failure to keep children from dying by their parents' hand.[96] The report does not cite any story about the government removing a child who should not have been removed.[97] Richard Wexler makes the point clearly:

> abuse; an electrician who immediately recognized abuse when highly trained and highly paid professionals did not; and a child who reported abuse and provided the weapon used.

Id.

91. *See, e.g.*, Richard Wexler, *Caught in a Master Narrative: It's Why So Many Stories About Child Welfare Get it Wrong,* NIEMAN REP., Winter 2000 ("The master narrative holds that when children 'known to the system' die, it must be because that system bends over backwards to keep children in, or return them to, dangerous homes in the name of 'family preservation.'"). *See also* Bernstein, *supra* note 3 (describing her own coverage of child welfare: "Larger debates were typically framed in false dichotomies—say, child protection versus family preservation").

92. AUBRUN & GRADY, *supra* note 4, at 7.

93. *Id*. at 5.

94. *Id*. at 6.

95. *Id*.

96. *Id*. at 8 (citing Richard D. Walton & Tim Evans, *Deaths Rise Despite State's Intervention: Agency is Plagued by Inadequate Training, Excessive Caseloads*, INDIANAPOLIS STAR, Dec. 8, 2002, *available at*, http://www2.indystar.com/articles/11006800-2171-092.html (last visited Oct. 5, 2010).

97. *But see* Petula Dvorak, *Child Deaths Led to Excessive Foster Care Placements, Critics Say*, WASH. POST, Jan. 8, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/07/AR2009010703582.html (last visited Nov. 17, 2010) (noting a 41 percent increase in children placed in foster care during the first nine months of 2008); Petula Dvorak, *D.C. Social Workers Remove More Kids*, WASH. POST, June 3, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/06/02/AR2008060202854.html (last visited Nov. 17, 2010) (noting the increase

> In 24 years of looking at child welfare as a reporter and then as an advocate, *I have never read a news story in which a CPS worker is criminally charged, fired, suspended, demoted, or even slapped on the wrist for taking away too many children.* Yet all these things have happened to workers who leave children in their own homes when something goes wrong.[98]

According to Aubrun and Grady, a third major frame of stories about children is stories about "sexual predators." The report finds that "[t]his kind of story is appalling and compelling because it involves the violation of a powerful taboo . . . ."[99] Aubrun and Grady recognize that stories in this frame "reinforce the idea that there is an absolute divide between 'normal' parents and people on the one hand, and 'monsters.'"[100]

A fourth major frame of stories identified by Aubrun and Grady is described euphemistically as those depicting "the confusing divide between discipline and abuse."[101] Even these stories, however, appear to revolve around parents who commit terrible acts against children. As with respect to stories categorized in other frames, the reports cited in this section also depict "horror stories." For example, two of three stories cited refer to parents inflicting abuse on a child. The first, *Second Parent Arrested in Spanking Incident*, describes a parent who "whipped" a child, "inflicting deep bruises on the boy's legs."[102] In the other, titled *Witness to Child Abuse: An Episode of Indecision and Shame*, a newspaper columnist describes observing a parent verbally abusing a "little girl" with "slurs . . . [that] become increasingly unprintable. This mother is forcing the moment to its crisis."[103]

Another major frame of stories is described as stories about "the sanctity of the family;" stories that Aubrun and Grady suggest reflect recognition of parental authority to raise children without the involvement of the state.[104] In a now familiar pattern, however, the first story offered as an exemplar of this category, titled *When Parents Fail*,[105] has little to do with parental authority and instead emphasizes parental culpability for harm done to children. The second story also reinforces the theme of dangerous parents, juxtaposing parents' interests with the children's safety: *Price of Abuse Prevention Debated: Parents' Privacy Pitted Against Child's Well-Being*.[106]

The last major frame of child maltreatment news reports cited in this report again relates to horror stories. Aubrun and Grady describe this category of stories as those depicting incidents in which "children [are] accidentally harmed by parents." Unsurprisingly, in light of the title of the frame, these stories are also

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in children who were removed from their homes by D.C.'s Child and Family Services Agency after the case of a D.C. mother who killed her four children).

98. Richard Wexler, *Child Welfare Reporting: Things Sources Say that Almost Always Aren't True*, NIEMAN REP., Winter 2000 (emphasis added).

99. AUBRUN & GRADY, *supra* note 4, at 8.

100. *Id*. at 9.

101. *Id*. at 10.

102. *Id*. at 11-12.

103. *Id*. at 12-13.

104. *Id.* at 13.

105. AUBRUN & GRADY, *supra* note 4, at 13

106. *Id*. at 13.

premised fundamentally on parental culpability. The only example offered is *Texas Baby Dies After Being Left in Car*, about a two-month-old girl who died after being left by her mother in a "sweltering parked car while her mother was in a Target store applying for a job . . . ."[107] Notwithstanding the title of this frame, the story again underscores the theme of parental deviance, as it includes information suggesting that the incident was *not* accidental, and reports that the mother was charged criminally for "abandoning-endangering a child."[108]

All iterations of the master narrative, then, include a powerful element of blame.[109] The master narrative focuses on culpability, and harshly singles out parents described as "deviant"[110] and "monstrous."[111] Nina Bernstein describes the "master narrative" as a "powerful story line [which] suggests that the only real danger to a child is an abusive parent, and the key systemic mistake is leaving children in parental custody."[112]

The logic of the meta-narrative of child welfare is supported by Joel Best's identification of a complimentary narrative about children, which portrays children as "child-victims."[113] Best argues that a drumbeat of news stories and modifications in the law, exacerbated by folklore and urban legends, has created a perception of children as victims, so that thoughts of children instantly are protective, even if that reaction is disproportionate to an actual threat.[114] Child-victims thus are indispensable characters in the narrative of child abuse that depicts parents as abusers and the abuse itself as horrific, frightening, and absurd. A child's presence in a story about abuse amplifies the emotional reaction that would be generated merely by the report of violence alone.

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107. *Id*. at 14.

108. It appears that the statute under which the mother was charged is 5 TEX. PENAL CODE ANN. § 22.041(b) (West 2007) ("A person commits an offense if, having custody, care, or control of a child younger than 15 years, he intentionally abandons the child in any place under circumstances that expose the child to an unreasonable risk of harm."). It also is possible that the mother was charged pursuant to 5 TEX. PENAL CODE § 22.041(c) (West 2007), which includes a range of offenses, including criminally negligent acts or omissions: "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or omission, engages in conduct that places a child younger than 15 years in imminent danger of death, bodily injury, or physical or mental impairment."

109. The theme of ever-present danger is reflected even in materials advocating prevention of child abuse and neglect. *See* FRAME WORKS INSTITUTE, SUMMARY RESEARCH MEMO: FRAMEWORKS' ANALYSIS OF FRAME EFFECTS ON [PREVENT CHILD ABUSE AMERICA], POLICIES AND IMPLICATIONS FOR MESSAGING 8 (2009).

110. Bernstein, *supra* note 3; NELSON, *supra* note 3, at 3.

111. "[M]any simple causal stories are provided that are not helpful, because they don't tend to teach anything new, but rather to reinforce unproductive associations with the topic—e.g. a parent gets violent with his child because the parent is a sick, drunken monster." AUBRUN & GRADY, *supra* note 4, at 7. "[News stories about specific incidents of abuse] demonize individuals . . . ." *Id*. at 3.

112. Bernstein, *supra* note 3 (expressing regret that "no matter how nuanced we tried to be in our front-page articles, we had reinforced a 'master narrative' that once again distorted public perception"). *See also* AUBRUN & GRADY, *supra* note 4, at 17 ("Several studies have shown that news stories about children tend to focus on violence and crime.").

113. BEST, *supra* note 2, at 5.

114. *Id.* at 6-21. Best argues that unscrutinized claims of widespread child-kidnapping gathered momentum from synergistic legislative hearings, media coverage, and advocacy groups' public outreach. *Id.* at 45-48. Best maintains that later, the alarms were proven false by voices newly-included in the public conversation about the issue. *See id.* at 48.

News coverage of child abuse and neglect is driven almost entirely by official sources,[115] and is supportive of the official government story.[116] Reporter Nina Bernstein acknowledges that "[p]olice and prosecutors typically became primary sources in these situations, which reinforces a tendency to recount the events in terms of individual blame and child martyrdom."[117]

As noted above, horror stories are the mainstay of child welfare reporting at least in part because they are the bread-and-butter of all reportage.[118] Assaults on children are crimes, and crime stories meet many of the media's needs. They are episodic and dramatic,[119] with easily-identifiable heroes and villains, and easy to investigate via willing, authoritative government sources. Johnson also notes that crime and child-abuse-crime news "beats" often are the province of the newest reporters,[120] who may be least likely to perceive and understand an individual incident in a larger context. Nelson also suggests that stories about child-victims have the added benefit of allowing the media to see itself as guardian and savior of individual children and the community at large.[121] Notwithstanding the rarity of these events, they receive disproportionate coverage in the media.[122] Journalist Nina Bernstein reflected on her own efforts reporting on child welfare: "Cases we highlighted were by definition aberrations, like child abuse deaths . . . ."[123]

2. Framing and the Master Narrative of Child Welfare: An Example

In this subsection, I dissect a typical horror story to illustrate "how frames work."[124] In general, frames highlight particular "bits of information" and make

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115. Johnson, *supra* note 14, at 12 ("For stories on child abuse, newspapers and television news rely on official sources of information, including police, prosecutors, social welfare departments, hospitals, school officials, and so on.").

116. *Id*. ("News accounts of child abuse invariably rely on official sources of information, and they take the official perspective toward the act being reported.").

117. Bernstein, *supra* note 3. *See also* Tiegreen & Newman, *How News is "Framed"*, *supra* note 29 (stories in the Australian media about mental illness primarily based on information from police, coroner, or court records, sources which inherently focus on details of the incident at hand, and ignore contextual information).

118. *See, e.g.*, Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, AM. J. POL. SCI., July 2003, at 560, 562 (commenting on "the centrality of violent crime to news programs").

119. *See, e.g.*, BEST, *supra* note 2, at 79 ("Life-and-death issues, tales of heroism or villainy, are more likely to gain attention, sympathy, and action.").

120. Johnson, *supra* note 14, at 13 ("Front-line reporters at the local level tend to be young and, unlike seasoned news veterans, unreflective about taking the official or bureaucratic view about some problem.").

121. *See* NELSON, *supra* note 3, at 71 ("Most importantly, the press enjoys playing an advocative role in maintaining cultural norms that protect children and defend the integrity of the home.").

122. *See* AUBURN & GRADY, *supra* note 4, at 2 ("The emphasis on sensational events and images pervades the news media and has obvious consequences for coverage of child maltreatment. It means that the shocking results of maltreatment receive a tremendous amount of attention . . . .") (emphasis omitted).

123. Bernstein, *supra* note 3. *See also* Ayre, *supra* note 13, at 889 ("Analysis by McDevitt of media coverage of abuse in the United States and in Ireland demonstrates a clear preference for acute and exceptional manifestations such as lurid child sexual abuse and child murder . . . .") (citation omitted).

124. *See* Entman, *supra* note 19, at 53.

those more "salient," that is—more noticeable and memorable.[125] Greater salience increases the likelihood that "receivers" of the information, whether in print, on television, or by other means, will process the information and use it or store it for potential later use.[126] Salience is increased by a variety of influences. For example, information may be memorable because of its placement in a text or orally-reported story, or because it is repeated.[127] Indirectly explaining the powerful and compounding influence of the master narrative of child welfare, Entman writes that the greatest predictor of information's likely impact on a reader or viewer is the extent to which the information comports with, or departs from, the receiver's preconceived notions.[128] He makes this point emphatically: "[E]ven a single unillustrated appearance of a notion in an obscure part of the text can be highly salient, if it comports with the existing schemata in a receiver's belief systems."[129]

Thus, our "belief systems" give both significance and meaning to information. We will consider it to be unimportant and unmemorable if it is not already recognizable. We will give it little thought and have few words with which to explain it. On the other hand, if we already have words and images that explain the information and which provide a ready context in which to understand it, the information is accepted as valuable and usable. The very essence of the grand narrative of child welfare, like other meta-narratives, is that it has created a vocabulary and a context in which to understand stories about the subject it defines. To the extent that a story reflects expected frames of child abuse reporting, we will recognize it and store it with received memories.

The common frames of child welfare stories are indeed exemplified in a September 4, 2010, *New York Times* story, *Prosecutors Detail Abuse in Brooklyn Girl's Last Days*.[130] As seen below, far from a "single unillustrated appearance" in an "obscure part of the text," this typical horror story repeatedly uses words and vivid images that shock and sicken. The bombardment of horror is almost unending, in fact, and takes on new and surprising forms as the story progresses.

The headline of the story tells the reader plainly that this is a story about "abuse." The beginning of the text is consistent with Johnson's findings about the typical format of horror stories: the first line of the story contains a "shocking . . . provocative 'grabber' . . . intended to grab and retain the reader's attention."[131] This story begins: "Two days after the bruised, emaciated body of a 4-year-old girl was discovered . . . ."[132] The first sentence alerts the reader to the "unexpected" element of the story, namely that the girl's mother is the alleged culprit, and faces

125. *Id*.
126. *Id*.
127. *Id*.
128. *Id.*
129. *Id*.
130. Al Baker, *Prosecutors Detail Abuse in Brooklyn Girl's Last Days*, N.Y. TIMES, Sept. 4, 2010, at A18, *available at* http://www.nytimes.com/2010/09/05/nyregion/05arraign.html (last visited Nov. 18, 2010).
131. Johnson, *supra* note 14, at 11. *See also* BEST, *supra* note 2, at 187 ("The media tend to emphasize those elements most likely to capture and hold their audience . . . .").
132. Baker, *supra* note 130, at A18.

criminal charges in connection with the death.[133]

In the next paragraph, the first line invokes the image of the government as powerful responder, noting that "prosecutors outlined" the "fearsome litany of abuse" in court documents.[134] The first sentence of this paragraph also names the girl, personalizing the story.[135] The next sentence includes a dramatic reminder of the "unexpected" quality of the story, again stating that the girl's mother—named this time—caused her daughter to "suffer . . . in her final days."[136] The girl is further pathologized as having been "plagued by severe health problems since her birth."[137] The two-sentence paragraph ends with the striking, dramatic fact that the girl weighed only eighteen pounds when she died.[138]

The next paragraph invokes the horror of the savage abuse that led to the child's death: citing the authoritative-sounding "criminal complaint," the story says that the child's mother "repeatedly struck the girl with a belt and a video box . . . . The mother lashed the girl to a bed with twine and forced her 'to take blue sleeping pills.'"[139] The "video box," and the actions of "lashing" the girl to a bed and forcing her to take sleeping pills are far outside the experiences of most people; their inclusion in the story underscores the mother's criminality and deviance. The words "lash" and "blue" are specific and evocative, permitting the reader to feel the cord and see the pills in dramatic fashion.

The next paragraph reminds the reader that the child is dead, describing her "body," which is again described as "emaciated."[140] The sentence continues with a recitation of the gruesome evidence of her torture: "[C]overed with bruises on her head, torso, and limbs, and 'ligature marks' were found on her feet."[141] The story explains the cause of these injuries, reminding readers of the deviance of the mother's actions and embedding the horrific image in readers' minds, hypothesizing that "apparently . . . her mother affixed [the girl's feet] to the bed's footboard with twine."[142]

The following paragraph invokes the majesty of governmental authority, citing the name and title of the "assistant district attorney."[143] The assistant district attorney is quoted, revealing the mother's confession to the crime.[144] Even the recitation of the confession adds to the impression of the mother's savagery and otherness. The assistant district attorney attributes to the mother a description of the mother's now-deceased child as "wild."[145] A stereotypical mother would not use that word to describe her own child. In addition, there is a dramatic contrast—perhaps slightly disorienting for the reader—between a dead child and the violent

133. *Id.*
134. *See id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. Baker, *supra* note 130, at A18.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See id.*
144. Baker, *supra* note 130, at A18.
145. *Id.*

activity of a "wild" child. Finally, even though the word "wild" is used in reference to the child's behavior, this word is at odds with customary, stereotyped descriptions of children, and thus may further contribute to a reader's impression that the entire episode is out of the ordinary.

In dramatic rhetorical fashion, the girl's "wildness" then is revealed as rather ordinary, again implicitly underscoring the mother's otherness: the girl's offense against the mother was simply eating from the refrigerator. In an action many associate with ordinary children, the girl allegedly "made a mess." This sentence normalizes the child, though not obviating her status as victim, and underscores the bizarre distance between the mother's behavior and societal norms.

The following paragraph invokes the authority and sobriety of an expert: "[A] physician."[146] The physician's credibility is enhanced by a reminder that he or she works "for the medical examiner's office."[147] The story again mentions the child's "state of malnutrition," and quotes the authoritative criminal complaint, which uses dramatic words—"grave" and "risk of death"—to describe the effects of the malnutrition.[148] Bizarrely, horribly, the reader is informed that it was when the child was most vulnerable—when her "state of malnutrition 'put her at a grave risk of death'"—that her mother inflicted abuse on her.[149]

The article continues, mentioning the court proceedings. In these, a normal-seeming mother "stood silently," and wore "a hooded white sweat shirt, blue jeans and white sneakers."[150] Then, however, the mother is demonized implicitly. The moment of normalcy depicted by the reporter is abruptly shattered when the story immediately conveys the mother's deviant behavior: "[S]he smiled and waved" to family members in the courtroom.[151] The reader is informed by this detail that the mother is remorseless—indeed, may be pleased—about the pain, terror, and death she inflicted on her daughter. This detail reminds the reader that the mother is monstrous and deviant.

The story then adds an element of the "incompetence of government" frame identified by Aubrun and Grady. The author points out that the local child welfare agency "had been monitoring the family since at least November."[152] Consistent with Nina Bernstein's admission, this information, like the details of the child's death, is drawn from "officials."

The story continues, quoting the mother's brother, who says "my sister loved her kids."[153] The statement is commonplace, so that it almost goes unheard. It also is easily dismissed, as the reader's impressions of the mother have long-since been formed: we know that this is not a woman who "loves her children," regardless of the protestations of a family member. The brother's credibility immediately is undercut further by the next sentences of the story.[154] These sentences reveal that,

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. Baker, *supra* note 130, at A18.
151. *Id.*
152. *Id.*
153. *Id.*
154. *See id.*

despite residing in "the apartment" with the mother, the brother claims he had been unaware, prior to the court proceeding, that his sister had "restrained or beaten her child."[155] The reader's formative impressions of this story having been created by the early paragraphs, in which the gory abuse was detailed and the child's trauma described in graphic detail, we associate the mother with a reign of terror. The images stay in the reader's mind, and become the filter through which the story is understood: "emaciated," "bruised," "lashed." We cannot imagine not knowing—and perhaps being implicated in—abuse as pervasive as that depicted. As we read, it is all we see; how then could her brother have missed it?

The mother's brother is quoted again, defending his sister, complaining that "the media's trying to make her into an animal."[156] The reader's impressions of the mother are so deeply-formed by now that the brother's comments smack of bias and, notwithstanding their perceptiveness, also, ironically, of naiveté. The use of the word "animal" reinforces the reader's impressions of the mother. In light of the frenzy, fury, and disgust generated by the awful tale thus far, the word "animal" seems consistent with the inhuman behavior described earlier in the story.

The story then refers to the mother's lawyer and several government officials, before returning to "the girl's plight."[157] The article states that the mother called 911, a reminder of the dramatic circumstances of the incident.[158]

The mother's initial story to "investigators," which suggests that the child was hurt accidentally, immediately is discounted by the assistant district attorney, the story's chief authority figure.[159] Reference to the mother's story heightens the drama, because she claims the girl "had fallen down the stairs,"[160] a frightening and painful-sounding experience. The story again mentions the "bruises" on the girl's body.[161]

After briefly listing the criminal charges against the mother, the story mentions that "the girl's father . . . who is separated from Ms. Brett-Pierce" was present in court.[162] This reference plays on the stereotype, identified by Professor Dorothy Roberts and described more fully below,[163] of black women maligned for purportedly excluding fathers from their children's lives and depriving children of the perceived benefits of a two-parent household. Thus, the story is consistent with another important element of the master narrative.[164]

Finally, the story concludes by mentioning "blood," a word that may evoke a physical sensation in readers.[165] The word is noticeable for its rarity in news stories and serves as an unmistakable reminder of the life-and-death nature of the incident. According to the story, blood was found on "a broken video box" in the family's

155. *Id.*
156. Baker, *supra* note 130, at A18.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. Baker, *supra* note 130, at A18.
163. *See infra* Part IV.D.
164. *See* discussion *infra* Part IV.D.
165. Baker, *supra* note 130, at A18.

home.[166] A reference to a common household item being used in a manner so far from its designed usage again reminds the reader of the vast gulf between this mother's conduct and normalcy.[167] Truly, this is evidence of deviance. The reference to blood at the end of the story also makes it stick in the reader's mind because of the concept of "recency," which suggests that readers and listeners have the greatest recall of the things they see or hear first—the "grabber": "bruised, emaciated body"—and last ("blood").

This story is a representative exemplar of the genre of child abuse horror stories identified by John M. Johnson and others. The frames of the story are conspicuous and memorable. Although the story is only 748 words, the following words appear: bruised, bruises (twice), emaciated (twice), life and death, fearsome, litany of abuse, struck, lashed, forced, ligature marks, wild, abuse, grave risk of death, homicide, animal, autopsy, the girl's plight, and blood. The story-frame is invoked unmistakably by repetition, as indicated by Entman, including four consecutive sentences that refer to the mother "tying the girl down," "lash[ing] the girl to a bed," "affixing" the girls feet to the bed's footboard "with twine," and tying the child. Each reference in the story to a horrifying, gruesome act and a violent, deviant parent stands on the shoulders of the many such images and stories to which the "receivers" of the information contained in the story already have been exposed, and which together form the master narrative revealed by Johnson's research and that of Aubrun and Grady and others.

C. Another Story of Child Welfare

Barbara Stark cautions that meta-narratives "tell us more about the ambitions of their proponents than about the world they claim to explain."[168] Indeed, data and stories reveal more to the story of child welfare than is depicted by the master narrative. In this section, I share stories and research findings that create a different narrative of child welfare.

1. Foster Care is Populated by Children from Low-Income Families Who Experience Neglect, Not Abuse

Contrary to the master narrative, brutal attacks against children by their parents are rare, and few children in the foster care system were abused by their families. Nationally, most children in foster care experienced "neglect," not physical abuse.[169] For example, "[e]ighty percent of new referrals [to the District of

166. *Id.*

167. The video box is positioned in the story as yet another far-flung hazard to children. Joel Best might imagine activist groups calling for softer video boxes or video boxes which cannot be grasped and used as weapons: "One child killed with a video box is too many."

168. Barbara Stark, *Jam Tomorrow: Distributive Justice and the Limits of International Economic Law*, 30 B.C. THIRD WORLD L.J. 3, 23 (2010).

169. "Neglect is the most common form of child maltreatment. Three times as many children are victims of neglect (63.2 %) as are victims of physical abuse (18.9 %)." CHILD ABUSE AND NEGLECT FACT SHEET, CHILDREN'S DEFENSE FUND, (Aug. 2005), http://www.childrensdefense.org/child-research-data-publications/data/child-abuse-and-neglect-fact-sheet-pdf. *See also* FRED WULCZYN ET. AL., FOSTER CARE DYNAMICS 2000–2005: A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE, CHAPIN HALL AT THE UNIVERSITY OF CHICAGO, 56-57 (2007),

Columbia Family Court] in 2008 were for allegations of neglect and 18% were for allegations of abuse."[170] "Neglect," a far less dramatic, if potentially deleterious condition, is widely-recognized as conditions such as lack of food, clothing, medical care, or supervision,[171] that are equivalent to, or caused by, poverty. [172] For example, in Fiscal Year 2008, thirty-four children were taken into foster care in the District of Columbia primarily because they lived in "inadequate housing."[173] In

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http://www.chapinhall.org/sites/default/files/old_reports/406.pdf. ("Data from National Child Abuse and Neglect Data System (NCANDS) and the National Incidence Studies both suggest that neglect is the primary type of maltreatment among very young children who are reported as victims of maltreatment . . . .").

170. *See* SUPERIOR COURT OF THE D.C., FAMILY COURT 2008 ANNUAL REPORT 46 (2009).

171. D.C. CODE § 16-2301(9)(A)(ii) (2010). The statute provides, in relevant part:

> The term "neglected child" means a child: who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian.

Id. See also COLO. REV. STAT. § 19-1-103(1)(a)(III) (2010) ("[Neglect means] any case in which a child is a child in need of services because the child's parents, legal guardian, or custodian fails to take the same actions to provide adequate food, clothing, shelter, medical care, or supervision that a prudent parent would take."); FLA. STAT. § 39.01(44) (2010) ("'Neglect' occurs when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment or a child is permitted to live in an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired."); TEX. FAM. CODE ANN. § 261.001(4) (West 2010), which provides, in relevant part:

> "Neglect" includes: The leaving of a child in a situation where the child would be exposed to a substantial risk of physical or mental harm . . . placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child's level of maturity . . . the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, excluding failure caused primarily by financial inability unless relief services had been offered and refused . . . .

172. RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 53 (1995). Wexler stated:

> Lawrence Aber estimates that more than half the cases agencies label neglect are really poverty cases. Patrick Murphy puts the figure at 90 percent, and Martin Guggenheim of New York University says it's at least 95 percent. "It is incredibly rare to have a case of neglect that is *not* poverty-related," says Florence Roberts of Brooklyn Legal Services.

Id. See also Roby Chavez, *Poverty Rate on the Rise in D.C.*, WTTG FOX 5 (Mar. 25, 2010, 11:39 pm EST), http://www.myfoxdc.com/dpp/news/local/poverty-rate-on-the-rise-in-dc-032510 (last visited Sept. 6, 2010). Judith Sandalow, Executive Director of The Children's Law Center, was quoted:

> We represent three boys—5, 4 and 1 1/2 in foster care. Everyone—the judge and social worker—believes they should go back to the mom and dad. Because of the recession, they are unemployed and have no place to live. Just because they are poor, this family is split up.

Id.

173. CHILD & FAMILY SERVICES AGENCY, ANNUAL PUBLIC REPORT 34 (2008), *available at* http://www.cfsa.dc.gov/DC/CFSA/About+CFSA/Who+We+Are/Publications/Annual+Reports/Annual+Report+2008. "[I]ncidence of inadequate housing as a primary reason for children's entrance into foster care rose over 50% from [FY 2007]." *Id.* at 27. *See also* Richard Wexler, *Take the Child and Run: How AFSA and the Mentality Behind it Harm Children*, 13 UDC/DCSL L. REV. 435 (2010). Wexler writes:

> In Los Angeles, the pipes in a grandmother's rented house burst, flooding the basement and making the home a health hazard. Instead of helping them find another place to live, child protective workers take away the granddaughter and place her in foster care. She

reality, few parents of children in the foster care system are "monstrous" deviants who batter their children; instead, virtually all parents of children in the foster care system struggle with poverty, and many face inadequate housing, ill health, or substance abuse.[174]

For example, for want of $491, a young child died in a fire, and his brother and two half-sisters were taken and placed in foster care.[175] On Monday, September 19, 2005, Maria Vasquez had applied for emergency financial assistance.[176] Ms. Vasquez had been in the hospital, and had not paid her electric bill.[177] Power in her apartment was out.[178] A city official told her that the electricity would be restored within forty-eight hours,[179] but the power was not turned on. On Thursday, that official gave to the chief of the city's energy assistance division forms required for the chief's review.[180] On Friday morning, the chief approved the request and "left the paperwork in the city official's drawer . . . for her to call [the electric company]."[181] The official and two other employees did not come to work that

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> dies there, allegedly killed by her foster mother. The child welfare agency that would spend nothing to move the family offers $5,000 for the funeral.

Id. at 436 (citing Nicholas Riccardi, *Grandmother Blames County in Latest Death of Foster Child*, L.A. TIMES, Jun. 15, 1999, at B1, *available at* http://articles/latimes.com/1999/jun/15/local/me-46762). Wexler provides another example:

> Kimberlee Diedrich and her boyfriend move to Nashville, Tenn. to try to find work. But the odd jobs they can find aren't enough for them to afford permanent housing. An outreach worker who specializes in helping homeless, pregnant women does her best—but the couple encounter waiting list after waiting list. When the outreach worker comes up with enough money, the couple stay in cheap hotels. But they're on the streets, one day away from being able to move into an apartment, when their son, Cherokeewolf William Diedrich, is born. Rather than help with housing, the child welfare agency confiscates the infant at birth. He's placed with foster parents who want to adopt, and refuse to use the boy's Indian name. Now the couple has a place to live—but no son. He's dead under mysterious circumstances. The foster parents deny any wrongdoing.

Id. at 436-37 (citing Kate Howard, *Foster Baby's Tragic Beginning, Tragic End*, TENNESSEAN, Feb. 5, 2010).

174. *See* Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, DEV. & PSYCHOPATHOLOGY, Feb. 10, 2006, at 57, 58. The article explained:

> Entry is often associated with a history of child maltreatment perpetrated by the primary caregiver, failure of primary caregivers to protect children from maltreatment by others, parental chemical addiction, psychological or physical illness of the primary caregiver, homelessness, children's behavior problems, poor quality of the parent-child relationship, and parental abandonment of children.

Id. See also CHILD WELFARE FUND, *A Matter of Judgment: Deciding the Future of Family Court in NYC*, CHILD WELFARE WATCH, Winter 2005-2006, *available at* http://www.newschool.edu/milano/nycaffairs/documents/cww-vol12.pdf (last visited Nov. 21, 2010) ("A very high percentage of confirmed child neglect cases in New York City involve a parent who is abusing drugs or alcohol and living in extreme poverty.").

175. Sari Horwitz, *Dire Convergence of Events Leads to Infant's Death in Fire*, WASH. POST, Sept. 26, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/25/AR2005092501587.html (last visited Nov. 21, 2010).

176. *Id*.

177. *Id*.

178. *Id*.

179. *Id*.

180. *Id*..

181. Horwitz, *supra* note 175.

day, and the "sign-off papers" remained in the desk drawer.[182] On Saturday night, Ms. Vasquez's daughter put her ten-month-old son, Jonah, to bed.[183] Jonah was afraid of the dark.[184] The electricity was still out, so Ms. Flores lit a candle and left it in Jonah's room.[185] A few hours later, Jonah was caught in a fire ignited by the candle and died before firefighters could reach him.[186] Firefighters rescued Vasquez's daughters, Danitza, twelve, and Eliza, four, and Flores' son, Jaleed, two.[187] The children were then taken into custody by case workers.[188] Several days later, at the initial court hearing, the court approved the agency's request to keep the children in foster care.[189]

The Flores case should not be understood as aberrational. Richard Wexler shares an example of a situation in which three California children were deemed "neglected" because:

> [Their] impoverished single mother [could not] find someone to watch her children while she work[ed] at night, tending a ride at a theme park. So she [left] her eight, six, and four-year-old children alone in the motel room that [was] the only housing they [could] afford. Someone call[ed] child protective services. Instead of helping her with babysitting or daycare, [Child Protective Services] [took] away the children on the spot.[190]

Other children are placed in foster care because they miss school without an adequate explanation,[191] because they are left alone by their parents for excessive

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182. *Id*.

183. *Id*.

184. *Id*.

185. *Id.*

186. Paul Schwartzman & Clarence Williams, *Bereaved Mother Denied Custody*, WASH. POST., Sept. 29, 2005, at B1.

187. Horwitz, *supra* note 175.

188. *Id*.

189. Schwartzman & Williams, *supra* note 186 (quoting agency spokesperson who said, "we recommended that we hang onto them, and the court agreed").

190. Wexler, *Take the Child and Run*, *supra* note 173, at 436 (citing Laura Saari, *Checking Up on the Children*, ORANGE COUNTY REG., Jan. 17, 1999, at E1).

191. *See In re* S.D., Jr., 549 P.2d 1190, 1198 (Alaska 1976) (during a one week period, the parents were under the influence of alcohol and as a result, the children were not in school. The father testified that his drinking prevented him from driving, one of the children testified that his father would not help him get to school because of the father's drinking, the parents refused to give one child bus fare so that he might get to school, and the mother's sickness—which prevented her from seeing that her children got to school—seemed to have been brought on by her drinking); *In re* J.C., 591 S.E.2d 475, 477 (Ga. Ct. App. 2003) (children had a high number of unexcused absences from school, there was an extended period of time during which the children continued to miss school, and the parents were unwilling to talk with the school representative about their children's truancy); *In re* Ember "R", 727 N.Y.S.2d 767, 768-69 (N.Y. App. Div. 2001) (one child was absent from school thirty-nine times and tardy thirty-eight, and had failing grades; the other child's attendance record—absent thirty-eight times and tardy thirty-eight times—also was affecting her grades); *In re* William A.A., 807 N.Y.S.2d 181, 183-84 (N.Y. App. Div. 2005) (child was neglected when his mother removed him from public school and did not enroll him in another school, and left the child home alone while she worked, during which time he was supposed to complete his homework and lessons, despite his reading disability and his need for structure and guidance. The court also found that the mother had failed to follow the advice of the child's psychologist, and had taken the child off of prescribed medicine without notifying the doctor. The

periods of time,[192] or because of "death of a parent, parental incarceration, parental chemical addiction, or homelessness" without maltreatment.[193]

As noted above, these stories are representative of the vast majority of child welfare cases. The children whose lives are described in these vignettes were not brutally abused; were not the victim of savagery by their parents or another adult; were not raised by "psychopaths or sociopaths" or "monstrous deviants." These are complicated tales of three-dimensional lives, not horror stories with "cardboard cutouts"[194] of caricatured villains and victims.

2. Many Children Suffer Greater Harm in Foster Care Than at Home

The master narrative of child welfare—deviant parents inflicting savage abuse on innocent child-victims—suggests that children must be torn from their dangerous families, and must remain away from their families as long as possible. Images of psychopaths brutalizing children tell us that separation of a child from her under-suspicion parent can only be a good thing; the alternative, foster care, is expected to be better. Were all foster children the victims of abuse such as that described in John M. Johnson's horror stories, their placement in foster care indeed rightly would be a valence issue, not susceptible to debate. However, because most children in foster care are taken from their families because of real or suspected neglect, and because of the traumatic effects of separation from family and friends and community, and because conditions in foster care often simply are undesirable—or worse—data and children's real experiences reveal the existence of a different iteration of reality.

Research demonstrates that many children—including those who suffer maltreatment at home—would fare better if left at home than if put in foster care. "Throughout the current foster care literature, removing children from their families of origin and placing them in out of home care has been associated with negative developmental consequences that place children at risk for behavioral, psychological, developmental, and academic problems . . . ."[195] Children experience significant trauma from separation from family, friends, and community, as well as repeatedly moving from one foster home or group home to another, and from abuse experienced while in foster care.

Massachusetts Institute of Technology economist Dr. Joseph Doyle reviewed data about more than 15,000 children involved with the Illinois child welfare system.[196] Doyle excluded from his study children who had suffered severe physical or sexual abuse—the group whose tragic circumstances comprise the

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evidence also established that the mother's home was extremely cluttered, to the point of being a fire hazard).

192. *In re* A.L.W., 773 S.W.2d 129, 130 (Mo. Ct. App. 1989) (four children were left at home unattended overnight by the mother, and had been left unsupervised on other occasions).

193. Lawrence, *supra* note 174, at 61.

194. *See* Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010); Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731 (1993).

195. Lawrence, *supra* note 174, at 57.

196. Doyle, *supra* note 5.

content of the sensational, lurid tales that form the "master narrative."[197] Left with a pool of children who had suffered "garden variety" maltreatment, Doyle examined life outcomes for children placed in foster care as compared to those of "similarly-maltreated" children who were allowed to remain at home with their families.[198] Doyle found that children placed in foster care fared worse than similarly-maltreated children who remained at home.[199] Foster children were more likely to become pregnant during their teen years,[200] more likely to be involved in the juvenile justice system,[201] and less likely to find employment.[202] In a different study, with a sample of 23,000 children, Doyle found that children placed in foster care were two to three times more likely to be arrested, imprisoned, and incarcerated than similarly-maltreated children who remained at home.[203]

Doyle's findings, though of unprecedented scope, are not without precedent. For example, a 2006 study of Minnesota children concluded that children removed from their families and placed in foster care developed more significant behavioral problems than similarly-maltreated children who remained at home with the maltreating caretaker.[204] A 1997 study of infants born to substance-abusing mothers found that the language development of children placed in foster care was delayed in comparison to that of children who remained with their mothers.[205] Children and youth in foster care experience multiple moves from home to home[206] and high levels of abuse in foster homes and group homes.[207] Former foster youth

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197. *Id.* at 1599.

198. *Id.* at 1584.

199. *Id.*

200. *Id.* at 1600.

201. *Id*. at 1599.

202. Doyle, *supra* note 5, at 1601.

203. *See* Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, J. POL. ECON., Aug. 2008, at 746, 766.

204. Lawrence, *supra* note 174, at 71.

205. *See* Suzanne Dixon et al., *Early Language Development in Children with Prenatal Exposure to Stimulant Drugs*, 13 DEV. NEUROPSYCHOLOGY 371 (1997).

206. *See, e.g.*, SACRAMENTO CNTY. GRAND JURY, THE STATE OF FOSTER CARE IN SACRAMENTO COUNTY § 6.0 (2010), *available at* http://www.sacgrandjury.org/reports/09-10/Foster-Care-Report.pdf [hereinafter SACRAMENTO CNTY. GRAND JURY] (last visited Nov. 21, 2010).

207. *See* NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 145 (2005) ("Children are significantly more likely to be abused and neglected in foster homes than are their peers in the general population."). *See also* Dana DiFilippo, *Avalanche of Anguish*, PHILA. DAILY NEWS, (Jan. 21, 2010). The article quotes Children's Rights, Inc. attorney, Marcia Lowry, who stated:

> I've been doing this work for a long time and represented thousands and thousands of foster children, both in class-action lawsuits and individually, and I have almost never seen a child, boy or girl, who has been in foster care for any length of time who has not been sexually abused in some way, whether it is child-on-child or not.

Id.; Leslie Kaufman & Richard Lezin Jones, *Report Finds Flaws in Inquiries on Foster Abuse in New Jersey,* N.Y TIMES, May 23, 2003, at A1 (reporting research findings that allegations of abuse and neglect in state foster homes frequently are mishandled, and that "'no assurances can be given' that any child in the state-monitored foster homes or institutions is actually safe"); NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY (2010), *available at* http://www.nccpr.org/reports/01SAFETY.pdf:

> [A]n Indiana study found three times more physical abuse and twice the rate of sexual abuse in foster homes than in the general population. *In group homes there was more than ten times the rate of physical abuse and more than 28 times the rate of sexual abuse*

have high rates of homelessness,[208] unemployment, [209] poverty, arrest[210] and incarceration,[211] teen pregnancy,[212] dating violence victimization,[213] and low educational achievement.[214]

Children's own words also depict their experiences in foster care. Children's stories enliven the data, depicting out-of-home placement as troubling and frightening for many children, marked by residential instability and emotional upheaval, and rife with inadequate care and privation of material goods. These anecdotes are diverse and mundane, and give a flavor of ordinary slings-and-arrows experienced by children in foster care:

> Antoine McPherson: "I would love a chance at higher education . . . but [case workers] . . . told me I wasn't college material and that maybe I needed to try trade school. Then one of the staff told me I should just sell drugs."[215]

> Derek Reid, eighteen, has been in foster care for three years. He "signed up for a college program and had to forge my social worker's signature because she never answered her phone."[216]

> "[The child] was not provided grief counseling following the death of her mother and grandmother last year, even though the foster parents specifically asked for

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as in the general population, in part because so many children in the homes abused each other.

208. *See* MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, 15-16 (2007). *See also* BERNSTEIN, *supra* note 207, at 147 ("In California, 65 percent [of youth who leave the foster care system at the age of majority] transition *directly into homelessness*.") (emphasis added).

209. *See* BERNSTEIN, *supra* note 207, at 147 ("Nearly half of all eighteen-year-olds leaving the foster care system do so without a high school diploma; fewer than 40 percent are able to find and keep a job."). *See also* GLORIA HOCHMAN ET. AL., THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE 8 (2003), *available at* http://pewfostercare.org/research/voices /voices-complete.pdf (last visited Oct. 6. 2010). Hochman observed:

> A study conducted by the University of Wisconsin found that 37% of the youth emancipated from foster care in 1995 still had not completed high school, [and that] [f]ocus groups with 100 youth in Nevada found that 41% did not have enough money to cover basic living expenses, 24% had supported themselves at some time by dealing drugs, 50% left foster care without a high school degree.

Id.

210. CASEY FAMILY PROGRAMS, THE CASEY YOUNG ADULT SURVEY: FINDINGS OVER THREE YEARS (2008), *available at* http://www.casey.org/resources/publications/CaseyYoungAdultSurvey ThreeYears.htm (last visited Nov. 21, 2010).

211. BERNSTEIN, *supra* note 207, at 147 ("A University of Chicago study of more than seven hundred teenagers in foster care found that 61 percent of boys and 41 percent of girls had been arrested by the age of seventeen.").

212. CASEY FAMILY PROGRAMS, *supra* note 210.

213. Melissa Jonson-Reid et al., *Dating Violence Among Emancipating Foster Youth*, CHILD. & YOUTH SERV. REV., May 2007, at 557, 567.

214. COURTNEY ET AL., *supra* note 208, at 26.

215. *Yes Youth Can: Confronting the Challenged Aging Out: Pub. Oversight Roundtable Before Comm. on Human Servs.*, Council of D.C. (2010) [hereinafter *Yes Youth Can*] (testimony of Antoine McPherson) (on file with Author).

216. *Id*.

it."[217]

> "[T]he treating psychiatrist requested a neurology evaluation [for a seventeen year old boy] five months ago to assess facial tics. This evaluation has not yet been completed. Another physical and mental health concern that seemed casually expressed by one of the team members is that the youth [experiences encopresis]."[218]

Loretta Singletary recalls her experience in foster care:

> It was OK at first. . . . As time went on . . . I felt that I really needed my mom . . . . I went and talked to my old neighbor and they gave me her phone number. When I told my foster mom I found my mom, she said that she could not call me on her telephone.[219]

After living in the foster home during her middle school and high school years, Ms. Singletary says:

> One day when my sister and I were coming home from school, we found my foster mom washing and packing our clothes. She told us she could not keep teenagers and the next day my sister and I were separated. I was placed in a . . . group home in D.C. . . . and my sister was put in another foster home in Maryland. I was very upset that I was not with my sister and brother. The only time I got to see them was when we had family visits [in the Child and Family Services Agency building].[220]

Later, Ms. Singletary was moved to a group home, where, she recalls, "counselors would yell at us, make [tricks] to take away our allowance and weekend passes. The counselors would also make fun of the girls living in the home [and] tell the residents confidential information about the other residents in the house."[221]

In addition to these snapshots, I share here a more complete story about the last few years in the life of Ricardo, my client. Ricardo was in foster care from the age of nine until he was almost twenty-one. He was shot and killed in 2006, at the age of twenty-two.

In 2001, Ricardo asked staff at his group home not to house him with a roommate because, he admitted, he was disliked by some of the other children and felt uncomfortable with them. The group home ignored his request, and installed a roommate. Another resident of the group home—also now-deceased by gunshot—came in and stabbed Ricardo in the shoulder with a screwdriver. The agency then proposed to bring both boys to the CFSA offices to put them in a room together to "mediate the dispute." Ricardo was petrified to be in a room with the boy who had

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217. CENTER FOR THE STUDY OF SOCIAL POLICY, QUALITY SERVICE REVIEW: CHILDREN AND FAMILIES SERVED BY THE DISTRICT OF COLUMBIA'S CHILD AND FAMILY SERVICES AGENCY 10 (2009) [hereinafter QUALITY SERVICE REVIEW].

218. *Id.* at 12.

219. *Yes Youth Can*, *supra* note 215 (testimony of Loretta Singletary) (on file with Author).

220. *Id.*

221. *Id.*

stabbed him. On his behalf, I declined the invitation.[222]

In addition to being stabbed, Ricardo was victimized when his new roommate allowed other boys into the shared room. The other boys stole some of Ricardo's clothing. It was all he had, in two garbage bags and a battered suitcase. He had been in foster care since he was nine-years-old, and had carted sneakers and clothing to the dozens of homes he'd lived in. Ricardo was enraged by the theft, and broke some of the thief's property and kicked a hole in a wall. Arrested for the destruction of property, he was locked up overnight, for the first time ever, and charged as a juvenile.

The case worker planned, he told me in the courthouse hallway, to tell the delinquency judge that Ricardo's best interests would be served by going to Oak Hill, the District of Columbia juvenile detention center, notorious for violence and egregious conditions. [223] The case worker said a stay in Oak Hill would "be therapeutic" for Ricardo. I begged, cajoled, and bullied the case worker, and burned up telephone lines for hours, until I located a foster parent with an empty bed and persuaded the case worker that a foster home would be more appropriate for Ricardo than a jail.

Later, Ricardo became a loving, gentle, doting father. Ricardo and Candice, the baby's mother, named the baby Messiah. Candice went off to finish her final semester of college, and Ricardo was Messiah's only caretaker. The social work agency refused to allow the young dad to live with his baby. The agency had no teen-father placements, they said. They assigned Ricardo to reside in programs and buildings that did not allow babies.

So Ricardo absconded every night, meaning he went to his mother's home, or his mother-in-law's home, or to his grown sister, or to an aunt, or to a friend or anywhere he could keep his baby. Demerit after demerit after demerit from the social workers, harassing him, adding stress to an already-burdened life.

The social work agency and Assistant Attorney General later sought again and again to have Ricardo's neglect case closed because, they argued, he wasn't appreciative of the services they were offering.

When Ricardo became an adult and buckled under the stress and picked up minor adult criminal charges, the agency and Assistant Attorney General strenuously resisted my pleas and Ricardo's to install an operating telephone in his residence. Ricardo was wearing an electronic ankle bracelet, and needed the telephone to be working to connect with the bracelet, so that he would not violate his conditions of release on the criminal charge. The government again took the position that it would be better for Ricardo to go to jail—the D.C. Jail, for adults,

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222. Letter from Matthew I. Fraidin to Christopher S., Vice President, Fihankra Place, and Anntinette W., Supervisory Social Worker, Child and Family Services Agency 2 (March 22, 2001) ("[T]he scheduled 'mediation' session with [his attacker] . . . would directly conflict with Ricardo's best interests. Thus, I have advised Ricardo not to attend the meeting scheduled for Monday") (on file with Author).

223. *See* District of Columbia v. Jerry M., 738 A.2d 1206, 1208 (D.C. 1999) (class action lawsuit filed by committed youth confined at the District of Columbia detention facility, contending District officials "failed to provide appropriate care, rehabilitation, and treatment to them in violation of the Constitution and District of Columbia Code") (citations omitted).

this time—than to reside in their care.[224] So they refused to install the telephone, to make sure he would be locked up. The Magistrate Judge presiding over Ricardo's dependency case ordered the agency to install the telephone.

The postscript is, of course, Ricardo's death. The agency finally having worn down the Magistrate Judge, Ricardo's case was closed a few months before he turned twenty-one. A bright, sensitive, sweet guy, he had lived in dozens of foster homes, group homes, with his mother and grandmother, with his sisters, and in at least one residential treatment center, and had few ties to anyone but his wife, children, and other family members. He had attended more than a dozen high schools without graduating. He had a marijuana habit that seemed relatively low-level, but showed no signs of abating. He was about to start working at Safeway supermarket, and a few days away from marrying Candice.

Ricardo was shot at 1408 Girard Street on the day police were installing a crime camera around the corner. He made the paper for that. [225] That part of his story was public.

Thus, children's stories are consistent with the denatured findings of the Doyle and other studies. For many children, life in foster care is difficult and damaging. Like Ricardo, children in foster care tote belongings from home to home to home, and find little solace in any. Education and medical care are jeopardized, and for some, family ties are stretched beyond the breaking point. Although there may be some justification for the description of the child welfare system embodied in the master narrative, we see that another version of the tale also has resonance.

III. CONFIDENTIALITY LAWS

A. The Law

In most states, child welfare court hearings and records are not available to the public or media. In closed-court states, statutes or court rules limit access to proceedings[226] and records[227] to people with a direct interest in the proceedings.

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224. The Assistant Attorney General said:

> To give him a phone now to avoid being locked up because he's done nothing on an adult [criminal] case is ridiculous . . . So I'm not inclined to, you know, say oh a person who lies about everything and won't do anything should also have a phone in his room to keep him out of what may be coming to him in his adult [criminal] case.

Telephone message from Asst. Attorney General to Author (Feb. 5, 2004) (transcript by affidavit on file with Author).

225. Allison Klein, *First 4 D.C. Cameras to be Set Up This Week*, WASH. POST, Aug. 10, 2006, at B1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080901777.html (last visited Nov. 22, 2010).

226. *See, e.g.*, ALASKA STAT. ANN. § 47.10.070 (West 2010). The statute provides, in relevant part:

> [T]he following hearings in child-in-need-of-aid cases are closed to the public: (1) the initial court hearing after the filing of a petition to commence the child-in-need-of-aid case; (2) a hearing following the initial hearing in which a parent, child, or other party to the case is present but has not had an opportunity to obtain legal representation; (3) a hearing, or a part of a hearing, for which the court issues a written order finding that allowing the hearing, or part of the hearing, to be open to the public would reasonably be expected to (A) stigmatize or be emotionally damaging to a child; (B) inhibit a child's testimony in that hearing; (C) disclose matters otherwise required to be kept confidential by state or federal statute or regulation, court order, or court rule; or (D) interfere with a

People authorized to have access to court hearings and records ordinarily include the child and parents involved in the case, their lawyers and lawyers for the government, and social workers.[228] Those permitted access may not divulge to others, outside the case, what they observe in a hearing or read in a case record.[229]

For example, in the District of Columbia, child welfare hearings have been closed to the public at least as far back as 1963, when the District of Columbia

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> criminal investigation or proceeding or a criminal defendant's right to a fair trial in a criminal proceeding; before ruling on a request under this subparagraph, the court shall give notice and an opportunity to be heard to the state or a municipal agency that is assigned to the criminal investigation or to the prosecuting attorney.

Id. See also OHIO REV. CODE ANN. § 2151.24(A) (2010) ("[T]he board of county commissioners shall provide a special room not used for the trial of criminal or adult cases, when available, for the hearing of the cases of dependent, neglected, abused, and delinquent children"); VA. CODE ANN. § 16.1-302(c) (2010) ("The general public shall be excluded from all juvenile court hearings and only such persons admitted as the judge shall deem proper.").

227. *See* VA. CODE ANN. § 16.1-305 (2010) (court order required for public to gain access to juvenile records); *see also* 705 ILL. COMP. STAT. § 405 1-8 (2010). The statute provides, in relevant part:

> Inspection and copying of juvenile court records relating to a minor who is the subject of a proceeding under this Act shall be restricted to the following: (1) The minor who is the subject of record, his parents, guardian and counsel. (2) Law enforcement officers and law enforcement agencies when such information is essential to executing an arrest or search warrant or other compulsory process, or to conducting an ongoing investigation or relating to a minor who has been adjudicated delinquent and there has been a previous finding that the act which constitutes the previous offense was committed in furtherance of criminal activities by a criminal street gang.

Id.; TEX. FAM. CODE ANN. § 58.106 (West 2010). The statute provides, in relevant part:

> [I]nformation contained in the juvenile justice information system is confidential information for the use of the department and may not be disseminated by the department except: (1) with the permission of the juvenile offender, to military personnel of this state or the United States; (2) to a person or entity to which the department may grant access to adult criminal history records… (3) to a juvenile justice agency; (4) to the Texas Youth Commission and the Texas Juvenile Probation Commission for analytical purposes; and (5) to the office of independent ombudsman of the Texas Youth Commission.

Id.

228. For a historical perspective on the evolution of confidentiality laws, *see generally* Kathleen Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2002). *See also* KAY FARLEY, ISSUE BRIEF: PUBLIC ACCESS TO CHILD ABUSE AND NEGLECT PROCEEDINGS, NAT'L CENTER FOR STATE COURTS 2 (2003), http://www.ncsconline.org/D_Gov/IssueBriefs/Brf-Opn-Crts-July-03.pdf.

229. ALASKA STAT. § 47.10.070(f) (2010) ("[A] person attending a hearing open to the public may not disclose a name, picture, or other information that would readily lead to the identification of a child who is the subject of the child-in-need-of-aid case"); ALA. CODE § 12-15-129 (2010) ("[P]ersons as the juvenile court finds to have a proper interest in the case or in the work of the juvenile court may be admitted by the juvenile court on condition that the persons refrain from divulging any information which would identify the child . . . under the jurisdiction of the juvenile court or family involved"); IDAHO CODE ANN. § 16-2009 (West 2010). The statute provides, in relevant part:

> [T]he general public shall be excluded and only such persons admitted whose presence is requested by any person entitled to notice under the provisions of section 16-2007, Idaho Code, or as the judge shall find to have a direct interest in the case or the work of the court; provided that persons so admitted shall not disclose any information secured at the hearing which would identify an individual child or parent.

Id.

Council first enacted what is now D.C. Code § 16-2316.[230] D.C. Code § 16-2316(e)(2) excludes the general public from child welfare proceedings with limited qualification.[231] Apart from a child's counsel, the only persons admitted to child welfare proceedings are those with a "proper interest in the case or the work of the court."[232] The D.C. Superior Court has laid out a list of specified persons presumed to have a proper interest in its local rules.[233] The court has also laid out a list of specified parties that may gain admission only through special application to the court, the press among them.[234] Unlike the presumed proper parties, the D.C. Superior Court must warn the parties successfully applying for admission of "the criminal penalties that attach to the unauthorized use of the confidential information obtained" at the proceedings.[235] However, whether parties are presumed proper or not, they must all similarly "refrain from divulging information identifying the child or members of the child's family involved in the proceedings."[236]

Although technically the D.C. Superior Court permits the admission of members of the press to particular proceedings, the proper interest standard has been strictly construed to allow the press's admission only if there is "reasonable assurance that the primary goal of protecting the child's anonymity can be achieved."[237] The D.C. Court of Appeals has therefore placed the "interest of the press" at its highest possible priority where it merely seeks "to report on the workings of the court."[238] Conversely, the press's interests are at its lowest priority where it "proposes to cover a specific juvenile proceeding, especially one in which

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230. D.C. CODE § 2316(e) (2010) generally closes "child welfare court proceedings" to the public, but qualifies many parties under limited circumstances. Qualified parties are also forbidden from divulging information procured at child welfare proceedings to the public secondhand. *Id.* A brief summary of the persons that may gain access to child welfare court proceedings is as follows: persons necessary to the proceedings; other persons (including members of the press) that have a proper interest in the case or the work of the court "on condition that they refrain from divulging information identifying the child or members of the child's family involved in the proceedings"; the victims and eyewitnesses and the immediate family members and custodians of the victims and eyewitnesses; immediate family members and custodians of the victims and eyewitnesses. *See* D.C. CODE § 16-2316(e)(3)-(5) (2010).

231. *See* D.C. CODE § 16-2316(e)(2) (2010).

232. *See* D.C. CODE § 16-2316(e)(3) (2010).

233. D.C. SUP. CT. R. 45(b) (2010) provides:

> (1) Members of the Bar of the District of Columbia; (2) Authorized personnel of the Family Court; (3) Authorized personnel of the Division of Social Services; and (4) Authorized representatives of the Child and Family Services Agency, including representatives of private agencies providing foster care case planning and supervision under contract with the Agency.

234. *Id.* at 45(c) ("(1) Any authorized representative of the news media; (2) Any attorney not a member of the Bar of the District of Columbia; and (3) Superior Court personnel other than those working in the Family Court. Other persons may be admitted at the discretion of the judicial officer.").

235. *Id.* at 45(d).

236. *See* D.C. CODE § 16-2316(e)(3) (2010).

237. *See In re* J.D.C., 594 A.2d 70, 72 (D.C. 1991) (holding that the juvenile defendant's right to anonymity trumped the media's interest in attending the proceedings).

238. *Id.* at 77.

. . . the [child's] identity has previously been widely publicized."[239]

Child welfare records are closed to public access by D.C. Code §§ 16-2331 and 16-2332. Those sections of the statute currently restrict access to court records in both juvenile delinquency cases and child welfare cases. The statutory provisions specify parties authorized to view "case records" and "social records," [240] and prohibit authorized parties from divulging information from those records to unauthorized persons.[241]

B. The Law-in-Action: Silencing Youth and Suppressing Stories

Confidentiality laws are designed to protect the confidences of children, silence lawyers, litigants, and even the children themselves. As the following examples demonstrate, even the children themselves are prohibited from telling their own stories outside the courtroom. In the first example, the Family Court attempted to restrain publication of the story of a twenty-year-old ward who, believing herself unfairly victimized by the court and social work agency, voluntarily shared with a reporter a detailed recitation of her perspective of events. After the reporter observed a court hearing, at the woman's invitation, the court sought to prevent the reporter from publishing a story about the woman. In the second episode related below, the local child welfare agency forbade a reporter from maintaining communication with a youth who had shared information about the child's life in the state's custody.

1. Shawntaye Debrew: The Court Clamps Down

Shawntaye Debrew was, as of 2008, a twenty-year-old mother of two children.[242] Ms. Debrew herself was then, and had been since 1990, a ward of the District of Columbia.[243] The Magistrate Judge presiding over the neglect case in which Ms. Debrew was the "respondent" ordered the removal of one of Ms. Debrew's children, and then, at the behest of Ms. Debrew's case worker, ordered removal of the other.[244]

Ms. Debrew had anticipated this action, and previously found a safe and stable home for her young daughters.[245] The child was residing with a friend—over the

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239. *Id.* (banning Washington Post from juvenile proceedings and rejecting the Post's argument that because the juvenile in question's identity had been divulged in connection with an earlier, unconnected court case, that the subsequent divulging of the youth's identity would do no harm).

240. The public and press generally are prohibited from directly accessing "juvenile case records" and "juvenile social records." D.C. CODE § 16-2331(b), 16-2332(b) (2010). These statutes authorize viewing of records by judges and court staff, lawyers involved in the case, the child and his parents or guardians, other government officials, and "other persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family." D.C. CODE § 16-2331(b)(1)-(7), 16-2332(b)(A)-(E) (2010).

241. D.C. CODE § 16-2331(b-1), 2332(b)(2) (2010).

242. Arthur Delaney, *In Loco Parentis*, WASH. CITY PAPER, Dec. 30, 2008, http://www.washingtoncitypaper.com/display.php?id=36642.

243. *Id*.

244. *Id*.

245. *Id*.

District line, in Maryland.[246] The Magistrate Judge's order directing the seizure of the young child could not be executed in Maryland.[247] So the child welfare agency gave a copy of the court's order to the Prince George's County Sheriff's Office in Maryland.[248] Deputies entered Ms. Debrew's home late at night, ransacked it, but of course, did not locate the baby, who was most likely asleep in his crib in the caretaker's home, some miles away.[249] When they returned the next day, the deputies spotted a smoldering marijuana cigarette and arrested Ms. Debrew for possession of marijuana,[250] all the while interrogating her as to the whereabouts of the baby.[251] Believing the baby to be safe, and fully aware of the authorities' intent to take the baby into custody, Ms. Debrew initially refused to divulge the child's whereabouts.[252] The deputies took Ms. Debrew to jail.[253] After a night in jail, Ms. Debrew provided contact information for the baby's caretaker and promptly was released from jail.[254] The police transmitted the information to the Maryland Department of Social Services, who visited the home and pronounced the baby safe and well cared-for, and were satisfied that there was no reason to take further action regarding the child.[255] Maryland DSS shared their findings with the District of Columbia Child and Family Services Agency.[256]

Unsatisfied with this turn of events, CFSA took matters into its own hands. Calling the caretaker at her job—ironically as dispatcher for the Prince George's County Sheriff's Department—CFSA insisted that the caretaker bring the baby to the Maryland-D.C. state line, and hand the baby across the line.[257] At 10 p.m., with buckets of tears pouring down her face and the baby squalling, the caretaker followed orders.[258] CFSA took the baby, and placed him with strangers.[259]

Ms. Debrew reached out to reporter Arthur Delaney, a frequent freelance contributor to the *Washington City Paper*, the District's alternative-weekly newspaper.[260] Delaney met extensively with Debrew, and interviewed several of Debrew's family members.[261] Delaney gathered a voluminous amount of information from his interviews and from reviewing records relating to the criminal charges filed against Debrew in Maryland.[262] As Delaney drafted a story about Debrew, he accompanied her to court for a perfunctory "status conference," at which little of substance occurred; the parties merely established a date for a

246. *Id*.
247. *Id.*
248. Delaney, *supra* note 242.
249. *Id*.
250. *Id*.
251. *Id*.
252. *Id.*
253. *Id*.
254. Delaney, *supra* note 242.
255. *Id*.
256. *Id*.
257. *Id.*
258. *Id*.
259. *Id*.
260. *See Author Archive for Arthur Delaney*, WASH. CITY PAPER, http://www.washingtoncitypaper.com/blogs/citydesk/author/adelaney (last visited Mar. 17, 2010).
261. *See* Delaney, *supra* note 242.
262. *Id*.

subsequent hearing, and left the courtroom.[263]

Before Delaney entered the courtroom, however, he had signed the court's standard confidentiality agreement, which purports to prohibit a signatory from "divulg[ing] any information to anyone who could identify the child, members of his family or any other person involved in the proceedings."[264] Delaney's legal counsel describes the aftermath as follows:

> [T]he Superior Court's public information officer . . . informed [Delaney] that merely because he attended a single insignificant scheduling hearing, he could not, on pain of contempt, publish any information that might identify individuals as the subjects of a Family Court proceeding—even information that he had independently obtained, including details voluntarily provided by family members themselves.[265]

Delaney's counsel advised him that the First Amendment would not countenance execution of the court's threat.[266] On the advice of counsel, Delaney ignored the court's threat and published the story.[267]

2. "Paul Getty": "He Doesn't Want to Talk to You"

Jason Cherkis, a *Washington City Paper* reporter, met Paul Getty[268] in the summer of 2009.[269] Paul was sixteen at the time, and had been in state custody care for many years.[270] A case worker who knew both the reporter and the youth introduced them, believing that Paul would appreciate the opportunity to share his experiences of foster homes, group homes, and residential treatment centers.[271]

Cherkis first met with staff of Paul's Baltimore group home, and disclosed fully his role and interest in interviewing Paul.[272] Cherkis informed them that his goal was to write a story from a youth's perspective about life in the system.[273] As Cherkis says, "D.C.'s child welfare system is under some scrutiny, and I wanted to hear from kids what it was like for them."[274] Staff approved Cherkis's request to meet Paul.[275]

Cherkis then met with Paul, and had a similarly transparent conversation, explaining the "rules of journalism," including the meaning of such terms as "on the record" and "off the record."[276] Cherkis and Getty had what Cherkis describes

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263. *Id*.

264. *Open Government: Improving Transparency in the District of Columbia: Public Roundtable Before the D.C. Council Comm. on Gov. Operations*, (Oct. 14, 2009) (statement of Professor Thomas Mack and Professor William G. McLain III) (on file with Author).

265. *Id*.

266. *Id.*

267. *See* Delaney, *supra* note 242.

268. "Paul Getty" is a pseudonym used at Mr. Cherkis's request.

269. Telephone interview with Jason Cherkis, Reporter, Washington City Paper (Mar. 10, 2010) [hereinafter Cherkis Interview] (on file with Author).

270. Cherkis Interview, *supra* note 269.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Cherkis Interview, *supra* note 269.

as a "basic 'get-to-know-you'" interview, in which they covered basic subjects such as Getty's family background, interests, and health.[277] Cherkis repeatedly assured Paul that this meeting and any other in the future were completely voluntary, and that Paul had absolutely no obligation to meet with the reporter or to share any information whatsoever.[278]

As it happened, the day took on extraordinary import for Paul. For the first time in Paul's life, as far as he could recall, Paul spoke with his father.[279] Unexpectedly, after Paul had spent years moving from home to home in the foster care system, his father had emerged and wanted to speak with him.[280] Cherkis was in a separate room as Paul spoke to his father by telephone, with a case worker listening to the call to monitor its contents and Paul's reaction; Paul was elated.[281]

Some weeks later, Cherkis was present for Paul's second telephone conversation with his father, and then joined son and father for an in-person outing at the Baltimore Inner Harbor and a movie.[282] The visit left Paul with great hope for the future. According to Cherkis, Paul "was ready to pack up his [belongings] and move in" with his father.[283]

Paul shared with Cherkis his hopes and dreams, as well as the mundane activities of daily life. Cherkis, whose respect and caring for Paul is evident, describes Paul as "inspiring" and "smart, articulate, savvy, and self-aware."[284] "He relished the role as expert."[285]

Paul's guardian ad litem (GAL) and case worker spoke with Paul irregularly.[286] Although Cherkis had sought and obtained approval from the staff at Paul's group home, the GAL and case worker were unaware for several weeks that Paul had spoken with Cherkis. According to Cherkis:

> When the GAL and case worker found out that I was talking to him they were quite upset and wanted to know what I was doing and why. I called them immediately—there was nothing to hide. The GAL was still mad and insisted that it was illegal. She emailed the judge directly. I also e-mailed the judge and told the judge what I was doing. Then I called [CFSA's spokesperson] directly, and told her what I'd done. I told her I wanted permission to keep going. I promised I wouldn't publish anything without reading the story to [Paul] and the social worker to make sure they're OK with it.[287]

CFSA was not "OK with it."[288] The spokeswoman wrote to Cherkis: "Your interviews with [Paul Getty] are at an end. One very good reason is that [Getty] no

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. Cherkis Interview, *supra* note 269.
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. Cherkis Interview, *supra* note 269.

longer wishes to participate."[289]

Cherkis later learned that this was untrue:

> I called [Paul] to apologize and to make sure I hadn't misunderstood or put him in a bad situation. [Paul] told me he didn't know what I was talking about. No one had asked him if he wanted to continue talking with me, and "if it were up to me," he said, "I would keep talking. I love it."[290]

The inaccuracy of the agency's representations regarding Paul's wishes cast doubt on the genuineness of the "second compelling reason" proffered for rejecting the reporter's request to maintain contact with Paul. The agency spokeswoman decried Cherkis's "lack of clarity about [his] interest in interviewing and writing about foster youth."[291] The spokeswoman stated:

> This is the second instance in which CFSA has learned by an indirect method that you are interviewing and spending time with foster youth—yet your reason, angle, and purpose all remain a mystery. I'm sure [Paul Getty] is inspiring, as you noted. The resilience of young people in care is often remarkable. But precisely where are you going with that? Any parent would—or should—ask that question before agreeing to allow a minor child to participate in a media story. Without apology, I'm acting just like a parent on behalf of youth in our care.
>
> If there's an interest in interviewing foster youth, we need to know all about the angle, approach, and intended venue in advance. Then, we have the right to reject requests unlikely to present the youth in a fair and sensitive manner. When we do decide to go ahead, we reserve the right to select youth to participate, to have time to prepare them in advance, and to sit in on every interview. Just like a parent again—and non-negotiable. I'm sure you understand.[292]

IV. THE CONSEQUENCES OF CONFIDENTIALITY LAWS

As Robert M. Entman writes, a story-frame "determines whether most people notice and how they understand and remember a problem, as well as how they evaluate and choose to act upon it."[293] The frames through which stories of child welfare are transmitted have created a strong meta-narrative about the subject. The controlling message of horror, deviance, and violence persists despite research and children's experiences that reflect a different reality. Confidentiality laws, which prevent much of the alternative version of reality from coming to light, must shoulder some of the responsibility for the disjunction. In this section, I argue that the protection provided by those laws to the unchallenged master narrative harms children and distorts the administration of justice.[294]

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289. E-mail from Mindy Good, CFSA spokesperson, to Jason Cherkis, Wash. City Paper [hereinafter CFSA e-mail] (on file with Author).

290. Cherkis Interview, *supra* note 269.

291. CFSA e-mail, *supra* note 289.

292. *Id.*

293. Entman, *supra* note 19, at 54.

294. *See* Entman, *Framing Public Life*, *supra* note 20 (citing Maxwell McCombs and Salma Ghanem, who find that "the second or framing level has 'major behavioral consequences'").

A. Many Children are Placed in Foster Care Unnecessarily.

> *Workers often could not articulate exactly why a child had to be removed . . . . Judges were reluctant to rule against agency requests for removal, or to return a child without approval from the agency . . . . Judges often "rubber stamp" agency recommendations because they lack confidence in their ability to assess the decision-making process.*[295]

A child may not be removed from her parents unless she is in immediate or imminent danger.[296] Children are presumed to be best-protected by their parents, and as Joseph Doyle and others have demonstrated, and as foster children themselves have said, out-of-home placement often is more *harmful* than remaining at home. In addition, constitutional liberty interests are implicated by the infringement of a parent's fundamental right to the "custody, control and management of the child."[297] Notwithstanding the high legal barrier to removal of a child, and the deeply-rooted bases for that high legal barrier, however, decisions to remove a child from his or her home are unscientific and often incorrect. Data indicate, and stories corroborate, that many children in state care are not neglected or abused.

According to Professor Donald Duquette, "[Child Protection Services] is *over-inclusive* [which means that] *many families that are currently in the system should not be*—imposing an enormous cost on children and their families—and on the system itself."[298] Therese Roe Lund and Jennifer Renne also note:

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295. THERESE LUND & JENNIFER RENNE, CHILD SAFETY: A GUIDE FOR JUDGES AND ATTORNEYS 11 (2009), http://www.nrccps.org/documents/2009/pdf/The_Guide.pdf.

296. Gates v. Tex. Dep't of Protective and Regulatory Servs., 537 F.3d 404, 429 (5th Cir. 2008) ("[T]he government may not seize a child . . . absent a court order, parental consent, or exigent circumstances"); Rogers v. Cnty. of San Joaquin, 487 F.3d 1288, 1294 (9th Cir. 2007) (in removing the children from their home without obtaining judicial authorization, social worker violated the clearly established Fourth and Fourteenth Amendment rights of the parents and children); Tenenbaum v. Williams, 193 F.3d 581, 594 (2nd Cir. 1999) (defining exigent circumstances).

297. Troxel v. Granville, 530 U.S. 57, 65 (2000) (the Due Process Clause of the United States Constitution does not permit a state to infringe on the fundamental right of parents to make child rearing decisions); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that in parental rights termination proceedings a clear and convincing standard was necessary to protect parents' due process rights); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (plaintiff was denied equal protection of the law because all Illinois parents were constitutionally entitled to a hearing on their fitness before their children were removed from their custody).

298. DONALD N. DUQUETTE, PROTECTING OUR CHILDREN—AND OUR LIBERTY: STRIKING THE BALANCE IN CHILD PROTECTION REMOVALS (2008), http://www.law.umich.edu/centersandprograms/ccl/courseofferings/Documents/Protect%20our%20Children%206-11-08.pdf (emphasis added). Professor Duquette also expresses concern that "CPS is *under-inclusive* because families and children who should be receiving child protective services are not—resulting in children remaining at risk, suffering additional harm and even death." *Id.* *See also* MATTHEW I. FRAIDIN, D.C. CHILD WELFARE BY THE NUMBERS: THE 97% SOLUTION 2 (2009), http://www.law.udc.edu/resource/resmgr/fraidin/fraidin_statement_010709.pdf. Responding to an announcement by the District of Columbia Child and Family Services Agency (CFSA) that the agency had dramatically reduced a "backlog" of incomplete investigations:

> [S]upposedly the enemy whose elimination makes everything hunky-dory in CFSA . . . . [W]e know that calling an investigation "closed" or "completed" can be dangerous. When the Mayor says "we have gotten out from under the huge backlog," we ask: *Were the investigations thorough and meaningful, or quick-and-dirty?* In the mad rush to

> Judges rule on [whether to remove a child or allow her to remain at home] every day, but often lack a decision-making structure, which can lead to following agency recommendations without a thorough inquiry. This can lead to an over-removal problem, rubber-stamping agency recommendations without knowing what's driving the safety decision . . . ."[299]

Paul Chill writes:

> [T]he number of [unnecessary child removals] that actually occur is alarmingly large. According to statistics published by the U.S. Department of Health and Human Services (HHS), more than 100,000 children who were removed in 2001—more than one in three—*were later found not to have been maltreated at all*."[300]

For example, a Sacramento, California grand jury found that "[a]pproximately one-third of all children removed from their homes exit the foster care system within the first 30 days."[301] Richard Wexler writes:

> In more than 60 percent of the cases handled by [University of the District of Columbia David A. Clarke School of Law legal clinic] . . . students [in Fall 2008] . . . the children were returned home within three months [and were not found to be abused or neglected]. In more than 40 percent, they were sent home within a week—more than enough time to do enormous emotional damage to a child.[302]

> attack the backlog, it's . . . likely that CFSA's slipshod investigations . . . overlooked the families who need support and the children who really do need protection. CFSA hurt children by tearing them from their families; did CFSA also *leave children in harm's way* by speeding through the investigations?

Id.

299. LUND & RENNE, *supra* note 295, at 1. Lund and Renne also suggest that judges operating without a "decision-making structure" may "under-remov[e] . . . leaving children in unsafe conditions, or returning them home prematurely." *Id.* This argument goes further than that advanced by Professors Duquette and Fraidin and is unconvincing. *See supra* note 298 and accompanying text. Whereas Duquette and Fraidin argue that agencies themselves sometimes may fail to unearth children in need of protection, Lund and Renne appear to suggest that judges sometimes may inappropriately allow children to remain at home, rather than ordering their removal. This argument does not comport with experience or with Lund and Renne's suggestion that in the absence of information and a suitable analytic framework, courts ordinarily grant "rubber-stamp" approval to agency requests. A judge will not be presented with a decision to remove or allow a child to remain with his family unless the agency seeks removal. A judge with a substantial amount of information and a framework, such as that suggested by Lund and Renne, could deny the agency's request for to place the child in out of home care. *See* LUND & RENNE, *supra* note 295, at 9-18. Under the circumstances Lund and Renne posit, however, a judge who reflexively approves agency requests would not fail to remove a child as requested by an agency.

300. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 41 FAM. CT. REV. 457, 458 (2003). Chill notes:

> [T]hat is only the tip of the iceberg. Because definitions of maltreatment are extremely broad and substantiation standards low, it can be reasonably assumed that a significant number of other children who are found maltreated, and for whom perhaps some intervention—short of removal—is warranted, are nonetheless removed on an emergency basis.

Id.

301. SACRAMENTO CNTY. GRAND JURY, *supra* note 206, at § 5.A.

302. Wexler, *Take the Child and Run*, *supra* note 173, at 438. Students represented parents in a total of twenty-five cases. All but one client was assigned randomly by court appointment. In every case, the child had been removed from the parent and taken into custody on an emergency basis by the local child welfare agency. Students were teamed with a student partner to represent each client, and were

Further, in the District of Columbia, nearly 30 percent of cases alleging child abuse or neglect are simply dropped, and the children are allowed to return home.[303] Stories flesh out the statistics:

> Five boys are taken from school and housed with strangers in foster care, because their mother slapped one, Arthur, across the face. The children who were not slapped are dispersed to two different foster homes. Arthur is housed in a group home for young children. Four days later, the four siblings who were not slapped are allowed to return home to their mother, when the social work agency acknowledges that the children are not in danger and were not abused or neglected. Arthur remains in the group home.
>
> An eight-year old boy, Julius Davis, is placed in foster care after his uncle beats him up in a public school hallway. Julius's uncle does not reside with Julius's mother or father (who live apart from each other). Julius's mother obtains a domestic violence protection order against the uncle. Nonetheless, Julius, who already has been in foster care for one-and-one-half months, stays there for more than another month until the judge dismisses the case and sends him home.
>
> Isaac Denton was taken from his school and placed in foster care when he told a teacher that his grandfather had hit him with a metal pole, and that his mother sent him back to the grandfather for additional punishment. The state also alleged that Isaac was "educationally neglected," because the agency believed Isaac had missed seven days of school in the first month after school started in September. After six weeks in foster care and six weeks in his aunt's home, the judge found that Isaac was not abused or neglected, finding that the government did not show that marks on Isaac's leg were injuries, or that his grandfather had inflicted the marks. The judge's findings were buttressed by several witnesses, including Isaac's former principal, who testified that I.D. repeatedly lied about having been hit or beaten by classmates and school staff. A police officer testified that he had observed Isaac after the "beating" allegedly had taken place, and that Isaac was completely healthy and uninjured. The state had taken Isaac from his home without learning any of this. The judge also dismissed the "educational neglect" claim, because case workers had not noticed that the school's attendance records overstated Isaac's absentee record, including by designating Isaac as absent on the day the case workers took him into custody—from the schoolhouse.

Narrative theory and issue-framing theory open a window onto the practices

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supervised by the Author and Professor Tanya Asim Cooper of the University of the District of Columbia David A. Clarke School of Law. *See also id.* ("If you can send a child back home again within three months, and certainly if you can do it within a week, it's almost certain that you never needed to tear apart that family in the first place") (citing Press Release, Richard Wexler & Matthew Fraidin, *Number of D.C. Families Torn Apart Soars 41 Percent in Wake of Fenty's "Foster-Care Panic" Advocates Say* (Jan. 7, 2009), *available at* http://www.nccpr.org/reports/dc1709.pdf).

303. NAT'L CTR. FOR STATE COURTS & NAT'L COUNCIL OF JUVENILE AND FAM. COURT JUDGES, MONITORING FAMILY COURT OUTCOMES IN THE DISTRICT OF COLUMBIA: IMPLEMENTING TOOLS TO MEASURE AND IMPROVE COURT PERFORMANCE IN CHILD ABUSE AND NEGLECT CASES 15 (2004). The results include the following: No papered (28.4 percent); Dismissed: Conditions ameliorated (14 percent); Dismissed: No other information available (9.6 percent); Child ordered returned to parents (7.8 percent); Case closed: No other information available (7.7 percent); Government motion to dismiss (6.9 percent); Dismissed: Government unable to prove case (6.7 percent); Dismissed pre-adjudication (.8 percent). *Id.*

that result in children unnecessarily being removed from their families and those incorrect decisions being ratified by judges. The privileged status of the master narrative provides at least a partial explanation of case workers' decisions to remove children who ought not to be, and of judges' decisions to approve those inaccurate decisions.

As discussed earlier, stories of brutalized children are "good copy."[304] They are the most common "frame"[305] of child welfare stories, because they are sensational and easy to investigate. They allow the media to perceive itself as "guardian of the children." Stories of children harmed by their parents, then, may find a place in the newspaper or on television, and stories of brutalized or dead children unprotected by uncaring or incompetent government forces will find an easier time yet. Thus, as Richard Wexler points out, system actors in child welfare are incentivized by self-interest and the threat of media coverage to house children in foster care, and deterred from allowing children to remain with their parents: "[New York City] family court judges admit they routinely remove children even when they don't think CPS has made a case because they're terrified of the publicity if they send a child home and something goes wrong."[306]

In addition to avoiding publicity, judges also affirm unnecessary removals of children because they make decisions on the basis of a noticeable paucity of information. If the case worker has not previously been involved with the family, the judge likely will be presented with information only regarding the incident that precipitated the removal.[307] As Lund and Renne write:

> Children are removed (or left at home) based on very little information. The legal community lacks a framework for understanding the process by which a child is determined safe or unsafe. Often we don't even know what questions to ask or what additional information is needed to make such a decision.[308]

The master narrative rationalizes case workers' burdens and rushed inaccurate decisions by describing a system whose purpose is adjudicating the culpability of incurable deviants who violate sacred norms and inviolable taboos. The narrative does not require accurate information, because decisions are straightforward. Without further investigation, the narrative informs us that parents are deviant, violent, "psychopaths and sociopaths."[309]

Moreover, the unchallenged master narrative limits the imagination and vocabulary of system actors. [310] Confidentiality restrictions render it illegal to "divulge information" from a case, so stories of children unnecessarily taken from their families remain virtually untold in states with closed courts. As Toni Massaro comments: "[T]o criminalize the telling of any story is to *silence* that voice."[311]

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304. Johnson, *supra* note 14, at 13.

305. AUBRUN & GRADY, *supra* note 4, at 3.

306. Wexler, *Child Welfare Reporting*, *supra* note 98.

307. LUND & RENNE, *supra* note 295, at 7.

308. *Id*.

309. Kempe et. al., *supra* note 43, at 147.

310. *But see* Petula Dvorak, *Child Deaths Led to Excessive Foster Care Placements, Critics Say*, WASH. POST, Jan. 8, 2009, at B04.

311. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New World, Old Wounds?*, 87 MICH. L. REV. 2099, 2109 (1989).

Judges, lawyers, and social workers who rarely or never have read or heard a story of a child taken unnecessarily from his family are unable to give genuine consideration to the possibility that a specific child before them need not be taken from his family. Patrick Ayre points out that "where people have little direct personal knowledge, the image portrayed by the media becomes for them their image of the issue in question."[312] As Deborah Daro writes, "it is inevitable that what people read in the daily paper or hear on the nightly news will influence their perception of the problem's scope or characteristics."[313]

Thus, even regular practitioners can know only what they have been exposed to. As the research of John M. Johnson and others demonstrates, the public stories of child welfare are those of parents who have committed criminal acts, such as killing or severely injuring a child or leaving a child alone in a decrepit home. As a result, when a judge must assess a child's situation, and a lawyer must advocate for a child or parent, and a case worker must investigate and reach a conclusion about a child's safety and welfare, they have not been equipped with the vocabulary necessary to perceive a child as anything other than in danger. It is not surprising, then, if system actors are "over-inclusive"[314] by overreacting and "over-remov[ing]"[315] children in response to allegations or concerns of abuse and neglect. It is not surprising that case workers take children from their families unnecessarily and that judges affirm those actions.

Experiences working within the child welfare system do not disabuse actors of the notions ingrained by the master narrative. Assumptions about deviant parents are not rebutted or challenged. As analysts of media content recognize the distorting effect of news reports that describe a discrete incident in isolation from a broader context, so too Teresa Lund and Jennifer Renne argue that contextualized information is an indispensable commodity needed for reasoning and judging:

> Good decisions about safety require extensive information about the family, more than just describing the maltreatment. The judge should know: the extent of maltreatment, circumstances contributing to the maltreatment, the child's vulnerabilities and strengths, the attitudes, behavior, and condition of parents, and how parents care for and discipline the child.[316]

Nonetheless, the narrative trains system actors to ignore context. The master narrative discourages system actors from seeking information beyond a few facts about an incident that precipitated government attention to the family. Like most news stories, child welfare stories lack contextualizing information. The patter is of incident after incident, intentionally shying away from complicating context that

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312. Ayre, *supra* note 13, at 889 (citing SUSAN HUTSON & MARK LIDDIARD, YOUTH HOMELESSNESS: THE CONSTRUCTION OF A SOCIAL ISSUE (1994)).

313. Deborah Daro, *Public Perception of Child Sexual Abuse: Who is to Blame?*, CHILD ABUSE & NEGLECT, Nov. 2002, at 1131, 1131. *See also* BEST, *supra* note 2, at 174-75 (child advocates "found it easy to define their cause in terms of threatened, vulnerable innocents. These emotion-laden images encouraged the mass media to incorporate threats to children into news coverage and popular culture; the media's treatment further emphasized the issue's dramatic elements [and] evoked reactions from the public").

314. DUQUETTE, *supra* note 298, at 1.

315. LUND & RENNE, *supra* note 295, at 1.

316. *Id*. at 53.

saps energy from the otherwise-dramatic story of horrific abuse. Those involved in incidents called "child abuse" are without context; they are nothing more than last night's incident.[317] Child welfare stories focus on discrete incidents of apparently-heinous abuse, described in Manichean terms as a confrontation with the frightening, inscrutable face of evil. Information and context are foreign to those habituated to understanding child abuse in screaming, bite-sized snippets of drama. After a lifetime of articles like *Prosecutors Detail Abuse*[318] and the similar fare described by John M. Johnson and Aubrun and Grady, case workers, lawyers, and judges have no way to know that there is any more to a story than the single incident that brought the family into court. System actors must fit into an existing frame of reference the children, parents, and facts that come before them, and the frame is the horror story.

Thus, because of the effects of high caseloads and the master narrative, case workers often have insufficient information at the initial court hearing to permit the judge to make a thoughtful, careful, reasoned decision. Notwithstanding the lack of information, however, case workers' removal decisions are reinforced by judges wielding "rubber stamps."[319] The message sent by this pattern is consistent with that of the master narrative: context is irrelevant, information is unnecessary, child removal is the answer. Thus rewarded, case workers naturally replicate the same processes again and again, with respect to each child who newly comes to their attention.

Children and families are deeply affected, then, by the impenetrable master narrative. The narrative, guarded from challenge by the law's insistence that other stories be silenced, propels the unnecessary removal of children. As Professor Duquette writes: "Over-response not only erodes personal liberty in our country that values it so highly, but i[t] also causes additional harm to the children we are trying to protect."[320]

B. Placements with Relatives are Discouraged

The master narrative of child welfare, which demonizes parents, also generates antipathy to housing children with other members of the child's family. Although federal and state laws promote placement of children with relatives if the children cannot be kept safe at home,[321] both courts and case workers delay and prevent family placements.

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317. *Id*. at 7.

318. *See supra* Part II.B.2.

319. LUND & RENNE, *supra* note 295, at v.

320. DUQUETTE, *supra* note 298, at 10.

321. Federal funding is available to states that "consider giving preference to an adult relative over a nonrelated caregiver when determining placement for a child, provided that the relative caregiver meets all relevant State child protection standards." 42 U.S.C. § 671(a)(19) (2006). Most states have enacted statutes that give preference to relatives. *See, e.g.*, CAL. WELF. & INST. CODE § 361.3(a) (West 2010) ("In any case in which a child is removed from the physical custody of his or her parents pursuant to § 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative."); MD. CODE ANN., FAM. LAW §§ 5-501, 5-534(c)(1)-(2) (West 2010) ("The local department shall, as a first priority, attempt to place the child with a kinship parent. The local department shall exhaust all reasonable resources to locate a kinship parent for initial placement of the child.").

Judges prevent children from living with relatives when they reflexively approve agency requests to keep children in foster care. For example, one judge refused to allow a mother's proposed expert witness to testify that the child's best interests indicated that she should be placed with her aunt, rather than with non-relatives in foster care. The expert's testimony would not be germane, the judge announced, because of the judge's policy that she will not house a child with a relative unless the case worker grants permission:

> When we come to . . . relatives . . . I don't make those decisions unless the agency does its due diligence, right? So once the child becomes involved in the court process, I have to have the child protection clearances, I have to have the criminal background checks, and *I have to have the nod from the agency* that this is an appropriate and safe place.[322]

Like stories of unnecessarily-removed children, stories of children unnecessarily housed with strangers in foster care instead of with family members generally are silenced by the law and remain untold and prevalent.

One such story is that of fifteen-year-old Richard. Richard's mother was in jail, serving a six-month term for a minor drug offense. Richard was living with his stepfather, R.R. With Richard looking on, Mr. R. died suddenly of a heart attack. Richard's grown sister came immediately to take care of him, but as she drove across town, R.R.'s family rushed to the home in an effort to seize it. When they arrived, they called the child welfare agency, even though the youth told them his sister was on her way. When an investigating case worker responded to the call, the youth told her that his sister was on her way. When the sister arrived a few moments later, the case worker already had decided that Richard had no one to care for him, and had taken Richard into custody. Richard remained in foster care, living with strangers, for six weeks, missing his mother and sister, and grieving the death of his stepfather. After his mother was released from jail, Richard remained in foster care for two weeks while case workers determined if his mother was fit to regain custody, even though no allegation ever had been made that Richard's condition was inadequate or even threatened by anything other than the purported absence of an appropriate caretaker.[323]

Another example is that of Arthur, the boy whose siblings were returned to their mother after four days. Arthur remained in a group home, away from his family, for thirty days. He was moved to a foster home, where he lived with strangers for two months. The government agreed early on that Arthur's grandmother would be an appropriate caregiver for the boy. Ordinarily, Arthur and his brothers saw her constantly, ate meals with her, and spent nights and weekends in and out of her apartment, which was across the courtyard, in the same housing complex, as their mother's. In foster care, however, Arthur was not allowed even to see his grandmother. The government refused to let the boy live with her until

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322. Transcript of Record at 30, *In re* C.H., NEG-263-09, (D.C. Super. July 23, 2009) [hereinafter *In re* C.H.] (emphasis added).

323. *See also* Press Release, UDC/David A. Clarke School of Law, National Coalition for Child Protection Reform, Number of DC Families Torn Apart Soars 41 Percent in Wake of Fenty's "Foster-Care Panic" Advocates Say 11-12 (Jan., 7, 2009) (statement of Darren Schultz), http://www.nccpr.org/reports/dc1709.pdf.

they completed their paperwork, an expedited process that is supposed to take seventy-two hours. The case workers repeatedly lost paperwork Arthur's grandmother submitted. They insisted that she comply with imaginary legal requirements, and missed court-ordered deadline after deadline to inspect her home.

After thirty days of living in a group home with other children, Arthur's life was again disrupted unnecessarily. He was moved from the group home to a foster home so the social work agency could report compliance with a thirty-day limit on group home placements imposed by a federal court consent decree.[324]

In the new foster home, Arthur's foster mother abused him, leaving bruises from a beating with a belt. Arthur was moved to yet another foster home—despite everyone's agreement that he should have been living with his grandmother weeks earlier. Arthur's mother's lawyers blasted the government in a Motion, and sought Arthur's immediate placement with his grandmother. Finally, after two-and-a-half-months, the judge sent the boy to live with his grandmother.

C. Lawyers, Social Workers, and Judges Ignore, Reject, and Silence Parents

The master narrative, which includes the silence of parents and family members, conditions system actors to expect silence from parents and family, to know only silence from them, to be unable to hear their voices. Parents' knowledge, opinions, and desires are discounted and discarded by judges, lawyers, and case workers. Thus, even when it is lawful, appropriate, and necessary for parents to speak, parents are ignored or silenced.

A California case illustrates the culture of voicelessness created by the master narrative. Sacramento County Child Protective Services took Amariana Crenshaw from her mother, who struggled for many years with a drug addiction.[325] Amariana was placed in the foster home of Tracy Dossman.[326] Dossman beat Amariana repeatedly, inflicting serious, visible injuries.[327] Amariana's mother and father both complained repeatedly to Sacramento County CPS and to the juvenile court judge, but their concerns were dismissed.[328] Thirty months after being placed with Dossman, Amariana perished in a house fire.[329] Coroners said she may have been dead before the fire started.[330]

Sacramento County CPS sought later to determine why Amariana had been left by its own case workers in the foster home. Sacramento County CPS found that the mother's complaints had been discounted and ignored. The investigation report acknowledges that "[n]umerous allegations appear to have been discounted based

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324. *See* CTR. FOR THE STUDY OF SOC. POLICY, LASHAWN A. V. FENTY, AMENDED IMPLEMENTATION PLAN 3 (2007) ("Children under 12 shall not be placed in congregate care settings for more than 30 days unless the child has special treatment needs that cannot be met in a homelike setting and unless the setting has a program to treat the child's specific needs.").

325. Marjie Lundstrom, *Red Flags Unheeded Before Foster Child Died*, SACRAMENTO BEE, Jan. 24, 2010, at 1A.

326. *Id*.

327. *Id*.

328. *Id*.

329. *Id.*

330. *Id*.

upon a bias in favor of the foster parent and against the credibility of the reporting party."[331]

Confidentiality laws have silenced the voices of parents involved in child welfare. The laws prohibit parents from conveying their motivations, struggles, triumphs, and rationalizations. It can be no surprise that social workers do not recognize the voice of a parent when a parent essays to use it. That Amariana's mother spoke within the legally-permissible confines of a case to officials ostensibly operating in their professional capacities made no difference to case workers unable to hear or appreciate her voice.

Lawyers, too, act as if their parent-clients have nothing to say. For example, a lawyer did not meet with his client, a child's father, before a termination of parental rights trial. When charged with ineffective assistance of counsel, the lawyer defended his conduct by saying: "I don't know what I would have learned [from conversing with his client prior to the trial date] that I could have used at trial, that I couldn't learn in three minutes when he was sitting at the counsel table."[332] Other lawyers fail or refuse to call their clients as witnesses in termination proceedings.[333]

Nor are judges immune from ignoring parents' voices and conveying a message, as Professor Sankaran writes: "The opinions and wishes of the parent are not important or relevant to the decisions being made by the court about the child."[334] The case of "B.B." provides an example. After B.B.'s mother died, B.B. went to live with her grandmother, Mary J. B.B. later ran away from Ms. J's home. The social work agency took B.B. into emergency custody, and sought the court's approval to keep her there indefinitely, rather than returning her to her grandmother's care. At the initial hearing on the government's request, Ms. J's court-appointed lawyer was handed the charging document as she walked into the courtroom. The lawyer had never met Ms. J. The lawyer asked the court to recess the hearing briefly, because she did not even know whether Ms. J. was in the courtroom. The lawyer had not, of course, had an opportunity to read the petition's charges, or to learn from Ms. J. information about the case or Ms. J's wishes with regard to B.B.'s care. The court denied the lawyer's request for an opportunity to listen to her client, and the hearing proceeded.[335]

Other voices are silenced as well, if they propose to tell stories divergent from the master narrative. Listeners resist giving the speakers a platform; it is incongruous to allow speech by a person representing words not previously recognized as speakable. Speakers in Holocaust remembrance and in racial justice

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331. NAT'L COAL. FOR CHILD PROT. REFORM, AMARIANA CRENSHAW REVIEW 3 (2010), *available at* http://www.nccpr.org/reports/Crenshawreview.pdf [hereinafter CRENSHAW REVIEW] (last visited Sept. 6, 2010).

332. New Jersey Division of Youth and Family Services v. A.C., No. FG-16-23-07, 2009 WL 1790463, at *8 (N.J. Super. Ct. App. Div. June 25, 2009).

333. *In re* V.V., No. 01-08-00345-CV, 2010 Tex. App. LEXIS 6396, at *7 (Tex. App. July 29, 2010); *In re* J.C., Jr., 781 S.W.2d 226, 227 (Mo. Ct. App. 1989).

334. Vivek Sankaran & Itzhak Lander, *Procedural Injustice: How the Practices and Procedures of the Child Welfare System Disempower Parents and Why it Matters*, 11 MICH. CHILD WELFARE L. J. 11, 15 (2007).

335. *See also* FRAIDIN, *supra* note 298, at 4 ("3 is the number of minutes a student was given to review the government's abuse Petition before the first hearing in one case. 0 is the number of minutes students were allowed in several other cases.").

struggles are honored for witnessing—telling and retelling tales of oppression.[336] In child welfare, however, listeners recoil from witnesses' stories. The stories threaten the narrative that forms the foundation of the listeners' understanding of the child welfare system.

For example, in *In re C.H.*, the mother of a child recently placed in foster care retained the services of an experienced social worker. The social worker met with the mother and daughter, observed the mother's home, and met with extended family members. He created a proposed safety plan, recommending that the child be moved from stranger-foster care to the home of her aunt. Offered by the mother's lawyer at the initial hearing as an expert witness, the social worker was not allowed to testify. The judge responded: "[H]e can come in here all day long and testify about what he observed and if something happened to that child, everyone would say, well why on earth would you listen to him?"[337]

Similarly, in *In re D.W.*, a judge discounted the value of a person offered as a witness. "Danielle" was placed in foster care because of allegations, to which her mother confessed, that her mother slapped Danielle's face. The mother sought to have Danielle moved from the home of her unrelated foster parents to that of her godmother, a move that Danielle supported. The social work agency reported in court that it knew nothing about the godmother's fitness, and therefore opposed the mother's request that Danielle be placed with her. The mother's lawyer proposed that the judge allow the caretaker herself, who was in the courthouse hallway waiting to be summoned, to testify under oath. The lawyer told the judge that the caretaker, Danielle's namesake, would have testified that she has been a permanent figure in Danielle's life since Danielle was born; that she attends the same church as Danielle's family; that she has a grandson who frequently visits her and is very close to Danielle; that she has an available bedroom in her apartment that Danielle could use; that she has two poodles of whom Danielle is very fond; and that she is the one of the few people whom Danielle respects and obeys. The judge sniffed at the lawyer: "Tell me you're not that naïve. You can't be that naïve. If we listened to witnesses, we wouldn't need foster care! They'd all come in and tell me how great they are."[338]

An example of a practice inherent in the structure of one locality's child welfare system illustrates the pervasive culture of enforced parental silence that is consistent with confidentiality laws. Pursuant to District of Columbia statute, a guardian ad litem is appointed for a child within twenty-four hours of the child's removal from a home.[339] The child remains in the social work agency's emergency custody for seventy-two hours, until the initial court hearing.[340] A lawyer is appointed for the parent, but the lawyer is not provided the name or contact

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336. *See, e.g.*, JOSHUA M. GREEN & SHIVA KUMAR, WITNESS: VOICES FROM THE HOLOCAUST (2000); KAZIMIERZ MAJDANSK, YOU SHALL BE MY WITNESSES: LESSONS BEYOND (2009); Susan Waysdorf, *Returning to New Orleans: Reflections on the Post-Katrina Recovery, Disaster Relief, and the Struggle for Social Justice*, 12 UDC/DCSL L. REV. 3, 42 (2009) ("[B]earing witness to the tragedy, trauma, and human loss caused by [Hurricane] Katrina . . . .").

337. *In re* C.H., *supra* note 322, at 33.

338. In the Matter of D.W., N 658-08, 08JSF1666.

339. D.C. CODE § 16-2312(a)(1)(A) (2010).

340. § 16-2312(a)(1)(B).

information of the parent until the morning of the hearing.[341] For her part, the parent is advised by a case worker to arrive at the courthouse one hour prior to the scheduled initial hearing.

That single hour will be the only time the parent meets with her lawyer prior to the initial hearing. At the hearing, the parent must fight or consent to the government's request to maintain custody of her child.[342] If the court approves the agency's request for removal, the parent may seek visitation with the child. Numerous other issues will arise at the initial hearing, including the possibility that the government will ask the court to order that the parent or her child be directed to undergo a physical or mental examination, submit to drug testing, engage in individual or family therapy, or interact with a tutor or mentor. The government ordinarily seeks that the court find that the government made "reasonable efforts" to prevent the child's placement in foster care.[343] These matters may be of enormous personal importance to the parent, and may have long-lasting ramifications on the course of the litigation in which she and her child are involved. Each issue is fact-specific. On each issue, the client is entitled to decide her position and to inform her lawyer of her wishes and receive the benefit of the lawyer's informed counseling.

Nonetheless, the parent has little opportunity—only one hour, in the crowded, chaotic courtroom hallway—to tell her story. The parent has just one hour to educate the lawyer enough to represent the parent adequately. The parent possesses much of the information about herself and her child that is described by Teresa Roe Lund and Jennifer Renne as indispensable to a court's decision about a child's safety,[344] but she has little opportunity to share that information. The appointment-of-counsel process thus deprives parents of the opportunity to speak to their lawyers. This structural constraint reflects the devaluing of parents' voices that is consistent with the confidentiality laws that silence parents' voices and brand them illegal.

The phenomenon is even more pronounced with respect to incarcerated parents. Incarcerated parents are not brought across the city to appear in court. As a result, an incarcerated parent has no opportunity at all to speak to her lawyer. Thus, the lawyer cannot learn at all from the client about the client's parenting history or wishes for the child, and ethically may not make representations at the hearing. Law and practice deprive the incarcerated parent of an opportunity to speak, either to the lawyer or, through the lawyer, in the hearing.

Parents and family members do not speak outside the courtroom because the law will not allow them to speak. As a result, system actors cannot conceive that parents or relatives could be a source of information. Parents thus are silenced, rejected, and ignored even when it is lawful and necessary for them to speak. System actors believe that parents have no voice and no story to tell, that parents' voices do not matter, they have nothing to say, there is nothing to be learned from them. Why would we need to hear from them? We cannot imagine that they have

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341. § 16-2312(c).
342. *Id.*
343. § 16-2312(d)(3)(A).
344. LUND & RENNE, *supra* note 295, at 19.

anything to say, because secrecy laws mean we have never heard them speak. All we are told of parents by those who are allowed to speak is that parents are "brutal," "deviant" "monsters." It makes sense that parents are inaudible.

D. Black Children are Over-Represented in Foster Care and Receive Worse Treatment in Foster Care than White Children

Child welfare systems across the country are marked by grievous racial disproportionality and disparity. The proportion of black children in foster care outstrips their representation in the general population to an extent not explainable by blacks' higher poverty rates than whites'. [345] The experiences of black children in foster care are far worse than those of white children. Black families are investigated more frequently than are white families[346] and are "less-likely . . . to receive in-home family services."[347] Black children are "more likely to be placed in foster care"[348] than white children. Black children remain in foster care longer than white children,[349] and receive worse and lower-quality services and supports in foster care. [350] Again, the invulnerable master narrative of child welfare is at least partly to blame.

The salient characteristics of the master narrative, described in Part II.B, above, intertwine inextricably with deeply-rooted stereotypes of black mothers. The typification of child welfare as driven by deviant, monstrous parents unable to care for children parallels beliefs in "[b]lack maternal unfitness."[351] False assumptions about the benefits of foster care mesh seamlessly with myths that

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345. John Fluke et. al., *Research Synthesis on Racial and Ethnic Disproportionality and Disparities in Child Welfare* 93 (July 13, 2010) (unpublished manuscript) (on file with Author) [hereinafter *Research Synthesis*] ("Multivariate studies which control for a variety of family risk factors identify race differences at many decision points but especially entries into care and length of time in care.") (citations omitted). *See also* WULCZYN, *supra* note 169, at 57. Wulczyn explains:

> The risk of placement for African Americans is much higher than that for White or Hispanic children, leading to their overrepresentation in each state's foster care caseload. However, it is also worth mentioning that the incidence rate for African Americans has been declining, although a large gap with White children still remains. In addition, the data indicate that African American children remain in foster care longer than White or Hispanic children.

Id. Racial disproportionality affects other groups as well, notably Native Americans. Although beyond the reach of this paper, it is likely that the "master narrative" of child welfare has perniciously-synergistic effects with stereotypes of other minority groups that are similar to those that form the basis of the argument in this section of this Article.

346. *See Research Synthesis*, *supra* note 345, at 90:

> African American children have been found in many studies to have a higher likelihood of being reported to child protective services, although studies considering neighborhood effects (e.g., the interaction between race and poverty) have reported different findings. Similarly, available data suggest that African American children are more likely to be investigated than white children.

347. *Id*.

348. *Id*.

349. *Id*. at 91.

350. "The evidence is fairly consistent with respect to child welfare system factors, namely that there is a broad pattern of inequitable service/resource availability for families of color." *Id.* at 89.

351. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 60 (2002) [hereinafter SHATTERED BONDS].

black children are harmed by the influence of their black mothers. The phenomenon of children taken unnecessarily from their families reaches its apotheosis in the black community because the "belief that poor [b]lack mothers have nothing beneficial to impart to their children helps to legitimate the disproportionate disruption of their family bonds."[352]

According to Dorothy Roberts, black women are stereotyped as "Jezebel,"[353] "Mammy,"[354] "Matriarch,"[355] and "Welfare Queen."[356] These stereotyped images are characterized by negative qualities, and all are assumed to pass on those traits to their children. "Jezebel" is uncontrollably sexual, promiscuous, and irresistibly tempting to men.[357] She teaches her children to follow in her "licentious" path.[358] "Mammy" is a caricature drawn from the very real servitude of black women forced to "entrust their young children to the care"[359] of others so that they could care for the children of their white slavemasters and post-Emancipation employers.[360] From this mythical character is derived an image of black mothers as neglectful of and uncaring for their children.[361] According to Roberts: "A contemporary icon of the careless [b]lack mother is the pregnant crack addict,"[362] depicted, "despite similar rates of substance abuse by white and [b]lack women,"[363] as a "[b]lack woman who put her love for crack above her love for her children."[364] The "Matriarch" is the strong head of a large extended family—and also a single mother, an identity damnable since Daniel Patrick Moynihan's famous condemnation of fatherless black families.[365] Moynihan and others charge that single-mother-headed households are widespread among blacks, and a cause of a host of social ills.[366] Finally, the "Welfare Queen" is unemployed, lazy, and a drain on society.[367] She produces children heedless of responsibility for supporting them financially, secure in the knowledge that her dependence on government largesse will be sated.[368] She "perpetuat[es] welfare dependency by transmitting a deviant lifestyle to her children."[369]

Together, these stereotypes depict black mothers as dangerous, depraved, and immoral. The narrative of black motherhood is one of deviance, destruction, and

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352. *Id*. at 65.

353. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE REPRODUCTION, AND THE MEANING OF LIBERTY 10 (1997) [hereinafter KILLING THE BLACK BODY].

354. *Id*. at 13.

355. *Id*. at 15.

356. *Id*. at 17.

357. *Id*. at 10-11.

358. *Id.* at 11.

359. KILLING THE BLACK BODY, *supra* note 353, at 15.

360. *Id*. at 14-15.

361. *Id*. at 14.

362. SHATTERED BONDS, *supra* note 351, at 62.

363. *Id*. at 63.

364. *Id*.

365. KILLING THE BLACK BODY, *supra* note 353, at 16.

366. *Id*. Roberts notes that similar critique has been leveled more recently by such figures as Bill Moyers, Charles Murray, and William Bennett. *Id*. at 16-17.

367. *Id*. at 17.

368. *Id*.

369. SHATTERED BONDS, *supra* note 351, at 65.

disease. The narrative compels removal of children from black mothers. Indeed, black mothers' role as purveyors of "incurable immorality"[370] conveys a notion of black mothers as inherently harmful to their children. Inevitably, children raised by black mothers are "a menace to society—criminals, crackheads, and welfare cheats waiting to happen."[371] According to the myths of black maternal unfitness, black mothers have nothing else to give to their children, and children know only the pernicious influence of their upbringing. Reminiscent of Barbara J. Nelson's characterization of child abuse as a valence issue, inarguable and without room for debate, stereotypes of black mothers "confirm the need for the state to intervene in their homes to safeguard their children and to ensure that their children do not follow their dangerous example."[372]

The Crenshaw case, set forth in Part IV.C. above, as an illustration of the culture of voicelessness created by confidentiality laws, also illustrates the racialized impacts of confidentiality laws. Young Amariana was repeatedly beaten by her foster mother.[373] Her parents observed signs of abuse and repeatedly notified the court and social work agency.[374] Nonetheless, Amariana remained in the custody of the abusive foster parent until she perished in a house fire.[375]

Sacramento County CPS investigated its own failure to prevent Amariana's death. The agency found that the mother's reports of abuse by the foster parent had been ignored because of "the belief" among social workers involved in the situation that the mother's reports "were driven not by her love for her children but by her anger at Dossman."[376] In the context of the master narrative, case workers' "belief" that Amariana's mother did not love her daughter is easy to appreciate. As demonstrated in Part II, above, relentless messaging depicts parents of children in foster care as unloving and indeed, incapable of love.[377] That Amariana's mother is black only serves, as Professor Roberts's work points out, to confirm that assumption.

We see again, then, the far-reaching consequences of the child welfare narrative, which complements the narrative that describes black women. Child abuse typified as "irrational and incomprehensible"[378] need not name Jezebel, Mammy, the Matriarch, and the Welfare Queen, for, as Roberts points out, when we use those words, we are referring to those caricatures. When the master narrative spins its tale of depravity, licentiousness, violence, and evility, the race of the perpetrators need not be spoken, for the specters raised are of black women. The relentless drumbeat that perpetuates inescapable imagery of deviance and violence is a signal that children must be taken at the first hint of suspicion or concern. When the master narrative causes children to be removed hastily and

370. KILLING THE BLACK BODY, *supra* note 353, at 8 (citation omitted).

371. *Id.* at 21.

372. SHATTERED BONDS, *supra* note 351, at 61.

373. Lundstrom, *supra* note 325.

374. *Id*.

375. *Id*.

376. CRENSHAW REVIEW, *supra* note 331, at 3.

377. *See, e.g.*, NELSON, *supra* note 3, at 73 ("The abuser is characterized as an "unnatural" woman, one who does not adequately love and protect children, and who finds child care less than totally rewarding.").

378. Johnson, *supra* note 14, at 11.

unnecessarily, the children are disproportionately black. The alignment of the narratives means that the children who must be taken are those of black mothers. And when the master narrative causes foster care systems to be dysfunctional repositories of the disposable children of "throwaway"[379] mothers, it is black children who are subjected to the greatest mistreatment.

The imagery of child welfare, its effects heightened by intersection with myths of black women, is protected by confidentiality laws. Were it not for the suppressing effect of confidentiality laws, stories could be told of individual children in the foster care system whose black mothers love them. Stories could be told of children who are not brutally abused, but who lack food, clothing, shelter, or housing because of the strains of poverty and life's complications.[380] Stories could be told of children, like Isaac Denton,[381] taken from a black mother and later determined to be neither neglected nor abused.

A coherent master narrative masks reality, suppresses individuality, and elides difference. The narrative objectifies the people and events it describes. Characters and events lose qualities of themselves and take on qualities imposed by the imaginations of others. In child welfare, black mothers and children are especially objectified.

E. Throwaway People

Protagonists in the grand narrative of child welfare are "throwaway people."[382] Parents are beastly monsters and children are "criminals, crackheads, and welfare cheats waiting to happen."[383] We grasp for stereotypes; assumptions fill the silence created by confidentiality laws. Children are caricatured as despoiled victims and parents are deviant abusers. They get the treatment they deserve.

1. Throwaway Agencies

Systemic dysfunction reflects the grand narrative's message of the desserts to which people affected by child welfare are entitled. Agency weaknesses are reflected on an institutional level, in such areas as Medicaid billing,[384] contracting

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379. *See* EDGAR CAHN, NO MORE THROW-AWAY PEOPLE: THE CO-PRODUCTION IMPERATIVE (2d ed. 2004).

380. *See, e.g.*, NELSON, *supra* note 3, at 131 ("[W]e do know a great deal about the social conditions associated with abuse and neglect. These problems, though found everywhere, are more prevalent in families with limited economic resources, current unemployment, or high stress.").

381. *See supra* Part IV.A.

382. CAHN, *supra* note 379.

383. KILLING THE BLACK BODY, *supra* note 353, at 21.

384. *See* Michael Neibauer, *D.C. Freezes Child Welfare Medicaid Claims, Loses Millions*, WASH. EXAMINER, June 28, 2009, *available at* http://www.washingtonexaminer.com/local/DC-freezes-child-welfare-Medicaid-claims-loses-millions-49391917.html. Neibauer writes:

> The District has badly mishandled the process of applying for child welfare-related Medicaid claims, putting D.C. taxpayers on the hook for $176 million in payments that should have been reimbursed by the federal government. The city has decided to quit seeking federal payments on millions of dollars of medical services, officials said, until it can untangle the application process and put a new system in place. The total loss between 2003 and 2010 linked to the Child and Family Services Agency comes to $176

and procurement,[385] group home monitoring,[386] and disaster and emergency planning.[387] Every state in the nation failed the federal Child and Family Services Review.[388] Virtually every state in the country bears the grotesque markings of racial disproportionality and disparity.[389] State child welfare systems have far more

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> million. That includes $82 million blown between 2003 and 2008, and an additional $94 million over the next two years, budget documents show.

Id.

385. *See* Letter from Deborah K. Nichols, District of Columbia Auditor, to Tommy Wells, Chairman, Human Services Committee, Council of the District of Columbia (undated), *available at* http://dcauditor.org/DCA/Reports/ DCA102008.pdf. Nichols reported that:

> The Auditor's site visits of five of 45 congregate care providers identified 32 specific areas of non-compliance with standard contract provisions and service provision requirements . . . Further, the Auditor identified six specific areas of non-compliance that were common at 20% or more of the five sampled providers . . . As a result, *providers may be using practices that do not meet the District's required standards and do not foster a healthy and safe environment for youth.*

Id. (emphasis added).

386. *See* UNIV. LEGAL SERVICES, SEGREGATED & SECLUDED: AN INVESTIGATION OF D.C. RESIDENTS AT THE FLORIDA INSTITUTE FOR NEUROLOGIC REHABILITATION 4 (2008), *available at* http://www.uls-dc.org/finr.pdf, reporting that:

> District residents at FINR are subjected to violations of numerous District of Columbia human rights policies, including the use of chemical restraint with individuals with developmental disabilities, seclusion for up to seven days at a time, and the informal use of physical restraint without a written doctor's order. Other residents report staff cursing at them and treating them "like garbage." The residents at FINR spend most of their time isolated from the community. The vast majority of residents ULS interviewed desperately wanted to return home.

(emphasis omitted).

387. S*ee* Bill Myers, *Child-Welfare Agency Scraps Emergency Plan*, WASH. EXAMINER, Mar. 27, 2008, reporting that:

> D.C.'s child welfare agency has had to scrap an emergency-preparedness manual because it left thousands of needy kids to their own devices, the agency confirmed Wednesday. Like most city agencies, the Child and Family Services Agency was required to come up with a disaster plan, which it submitted in September 2007. But the plan was so inadequate that the agency had to redo it . . . . The plan, required in order to obtain federal funding for the $281 million agency, was supposed to address ways of reaching and helping thousands of children who are CFSA wards in the event of a catastrophe, such as a flood or terrorist attack. But CFSA conceded in drafts of the plan it had "not finalized its disaster plan" and instead relied on promises that it "will" develop contact lists and emergency information to foster families and other CFSA wards.

388. *Children's Bureau, Child and Family Services Reviews Fact Sheet*, ADMIN. FOR CHILD & FAMS., http://www.acf.hhs.gov/programs/cb/cwmonitoring/recruit/cfsrfactsheet.htm. The fact sheet states that:

> The CFSRs enable the Children's Bureau to: (1) ensure conformity with Federal child welfare requirements; (2) determine what is actually happening to children and families as they are engaged in child welfare services; and (3) assist States to enhance their capacity to help children and families achieve positive outcomes . . . . All 50 States, the District of Columbia, and Puerto Rico completed their first review by 2004. No State was found to be in substantial conformity in all of the seven outcome areas or seven systemic factors.

Id.

389. *See, e.g.*, CTR. FOR THE STUDY OF SOC. POLICY, THE RACE & CHILD WELFARE PROJECT, FACT SHEET 1, BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN-AMERICANS IN THE FOSTER CARE SYSTEM (2004), *available at* http://www.cssp.org/uploadFiles/factSheet1.pdf. *See also*

commonality than distinctiveness,[390] and many "treat. . . [children] in assembly line fashion being moved from home to home, social worker to social worker, doctor to doctor, and school to school."[391] Indeed, by all accounts, little has changed since the National Commission on Children wrote in 1991:

> If the nation had deliberately designed a system that would frustrate the professionals who staff it, anger the public who finance it, and abandon the children who depend on it, it could not have done a better job than the present child-welfare system. Marginal changes will not turn this system around.[392]

2. Throwaway Children

The master narrative transforms children and youth in foster care into throwaways, like their parents. And throwaway children, like thrown-away trash,

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CTR. FOR THE STUDY OF SOC. POLICY, THE RACE & CHILD WELFARE PROJECT, FACT SHEET 2, STATE-BY-STATE STATISTICAL PROFILES OF RACIAL OVER-REPRESENTATION IN FOSTER CARE (2004), *available at* http://www.cssp.org/uploadFiles/ statORFactSheet2.pdf; Robert P. Hill, *An Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels*, CASEY FAMILY PROGRAMS (2007), http://www.cssp.org/uploadFiles/An%20Analysis%20Of%20Racial-Ethnic%20Disproportionality.pdf; SHATTERED BONDS, *supra* note 351, at 10 ("[T]he foster care system in the nation's cities operates as an apartheid institution.").

390. CHILD WELFARE LEAGUE OF AM. & ABA CTR. ON CHILD. & THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 2 (2005), *available at* http://www.cwla.org/ advocacy/consentdecrees.pdf (finding that twenty-one states were either currently under court-approved consent decree or court order, or had pending litigation brought against their child welfare agencies).

391. SACRAMENTO CNTY. GRAND JURY, *supra* note 202, § 6.0. Approximately one-third of the children who "age out" of the District of Columbia's Child and Family Services Agency (CFSA) do so with few or none of the supports necessary to make it in the world. *See* CHILD & FAMILY SERVS. AGENCY, YOUTH WHO TRANSITIONED FROM D.C.'S FOSTER CARE SYSTEM: A STUDY OF THEIR PREPARATION FOR ADULTHOOD 15 (2008), *available at* http://www.cfsa.dc.gov/cfsa/ frames.asp?doc=/cfsa/lib/ cfsa/scorecards/youth_who_transitioned_from_dcs_foster_care_system_a_ study_of_their_preparation_for_adulthood.pdf. CFSA could locate only ten of thirty-six children whom they attempted to locate for interviews to include in the data-gathering for the report. *Id.* at 3. These were the thirty-six children who had aged-out one year earlier. *Id.* As with respect to so many of the issues described in this Article, the District of Columbia's inability to ensure a successful transition for emancipating youth is representative of most other jurisdictions in the nation. According to a 1999 General Accounting Office report, many child welfare officials across the country reported that they are unable to provide adequate support to youth who "age-out" of foster care. U.S. GEN. ACCOUNTING OFFICE, HON. NANCY L. JOHNSON, U.S. HOUSE OF REPRESENTATIVES, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN 5-6 (1999), *available at* http://www.gao.gov/new.items/he00013.pdf.

392. NAT'L COMM. ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES. FINAL REPORT OF THE NATIONAL COMMISSION ON CHILDREN 5 (1991). *See also* Bean, *supra* note 228, at 4. Bean writes:

> The health of dependency court is not good. Those who have tried to stir interest in reform search for words to describe what they see. "Crisis[,] shambles," "terrible plight," "widespread frustration," "so troubled," and, with much frequency, "failure," are words used time and again to try to communicate to the public the state of dependency court. The reports of participants and others with some access confirm these descriptions. Dependency court facilities are inadequate. Personnel are underpaid, under-appreciated and under-trained. The caseload is massive.

Id. (citations omitted); THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE, http:// pewfostercare.org/ research/voices/voices-complete.pdf.

have no familial or emotional ties, are perceived as unaffected by where they are housed or with whom they live, and are disposed-of for the convenience of others. Like Trey Jones, nineteen-years-old, youth unthinkingly are tossed here and there.

Jones lived with his grandparents and older brother from the age of five months.[393] When Jones's grandfather died, District of Columbia case workers feared that Jones's grandmother would be unable to satisfy requirements to serve as a licensed foster parent.[394] District of Columbia law permits children to live with relatives and others who are not licensed as foster parents. Nonetheless, due to a mistaken understanding of the law, or out of an abundance of self-protective caution, case workers guarded against "liability"[395] by unceremoniously tossing Jones from the stable home in which he had lived with his grandmother since the age of five months.[396] They told Jones he had to leave his grandmother and move into an "Independent Living Program" (ILP).[397]

Jones says: "Moving and leaving my grandmother was one of the hardest things for me . . . . We both cried about it." Jones continues: "She was the reason why my older brother and I was not split up when we came into the system. My brother who is now 25 is still living with her and I am in an ILP."[398] The ILP is unpleasant and dangerous. "My current placement is making me frustrated. I had a roommate who was disrespectful, invaded my space, and would try to start fights with me."[399] Jones's treatment is redolent of the master narrative's influence. By suppressing voices that would tell diverse stories, the narrative perpetuates assumptions that children in foster care are without worth, cannot speak, and have nothing to say. So perceived, children in foster care lose their humanity and instead become objects treated as if they are unaffected by the slings and arrows of life.

Ironically, Jones was one of approximately twenty-five youth who testified before the District of Columbia Council in a 2010 hearing styled *Yes Youth Can.* The power and poignancy of his testimony and that of the other witnesses reveals the compelling nature of stories rarely heard in "closed-court" states like the District of Columbia. Like Shawntaye Debrew and "Paul Getty," the witnesses rebutted by their speech the stereotypes and myths that have filled the vacuum created by the silence of their suppressed words.

V. CONCLUSION

A. Reframing the Debate

Opening courts or keeping them closed is a policy question susceptible to a balancing test.[400] Proponents of open courts argue that open courts empower

393. *Yes Youth Can*, *supra* note 174 (testimony of Trey Jones).
394. *Id*.
395. *Id*.
396. *Id*.
397. *Id*.
398. *Id.*
399. *Yes Youth Can*, *supra* note 174 (testimony of Trey Jones).
400. Professor William Wesley Patton, a forceful opponent of open courts, agrees: "The debate . . . concerns a cost/benefit analysis between the benefit . . . and the potential harm . . . ." William W.

children, permit system reform, and promote government accountability. Concerns raised by opponents of open courts include worries that some children may be embarrassed to testify in open court before an audience that includes people whom they do not know, and that revealing some children's confidences will "retraumatize" the vulnerable and already-injured. Both proponents and opponents find support in the evolutionary history of Anglo-American courts.[401]

I identify with the "proponents."[402] Nonetheless, recognizing each child's unique "constellation of family, friends, experiences, goals, dreams, needs, problems and other factors,"[403] it seems likely that the facts and circumstances of some children's lives may suggest that openness is contraindicated. Thus, I believe the concerns expressed are understandable, and ought to be addressed in policy debates and legislative wrangling.

This Article does not suggest that the cost/benefit analysis is illegitimate or unnecessary. Instead, the Article represents an effort to reframe the debate by naming the "master narrative" as a likely culprit in the widely-acknowledged dysfunction of child welfare systems across the country, and confidentiality laws as a facilitator of the narrative's ill effects. I argue that the master narrative causes children to be removed unnecessarily from their families and to remain outside relatives' home for far longer than necessary. I also argue that the unchallenged grand narrative causes parents to be excluded from participating meaningfully in the child welfare system. I further argue that the entanglement of the master narrative and myths about black maternal unfitness exacerbate racial disproportionality and disparity. Finally, I pin on the master narrative responsibility for child welfare's many ailments.

Perhaps most pernicious is the effect of the master narrative on system actors—lawyers, judges, and case workers whose professional lives are intertwined with child welfare. Their perspective and understandings are formed by the master narrative as surely as are those of others in society. Thus, when child welfare professionals enter the field of child welfare, they are fully-formed cognitive beings, deeply affected by the relentless stories of brutality and deviance to which they have been subjected. Although a shift in worldview is possible, it is unlikely, even, or perhaps especially, for those involved in the child welfare system on a daily basis. Assumptions are deeply ingrained. As Fran Quigley suggests, "disorienting moments" can jar a system actor from her assumptions[404]—but these

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Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement*, 38 SUFFOLK U. L. REV. 303, 303-04 (2005).

401. *Compare* Bean, *supra* note 228, at 7-8, *with* Patton, *supra* note 400, at 303.

402. *See Information Sharing to Improve Services for Children and Families Act: B-18-344 Before the D.C. Council, Comm. on Pub. Safety & the Judiciary*, (D.C. 2009) (testimony of Matthew I. Fraidin, Professor, Univ. of D.C. David A. Clarke School of Law), *available at* www.law.udc.edu./resource/resmgr/fraidin_testimony_110409.pdf; Letter from Matthew I. Fraidin, Professor, Univ. of D.C. David A. Clarke School of Law, to Adrian Fenty, Mayor, & Members of the Council of D.C. (July 8, 2010), *available at* www.law.udc.edu./resource/resmgr/fraidin/fraidin_open_letter_070810.pdf; Freeman Klopott, *Foster Father Accused of Pimping Child Expected to Plead Guilty*, WASH. EXAMINER, Dec. 31, 2009.

403. DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION 40 (2002).

404. *See* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLIN. L. REV. 37 (1995). Quigley explains:

are rare, and require reflection and encouragement to generate learning, neither of which is present in the child welfare system. Finally, system actors have perhaps the greatest stake in perpetuation of the master narrative: it is simple and coherent, and explains as the failures of others the sadness and disappointments inherent in being part of a disjointed, dysfunctional, unsuccessful system such as child welfare.

As a result of all of this, system actors behave in ways that mirror the master narrative. They assume that children should be removed—"where there is smoke there is fire"—and treat parents as if they are deviant abusers, even if the allegations against them are unrelated to abuse. Most tellingly, system actors ignore and even silence parents, rarely seeking to learn from parents about themselves, their children, or their priorities. Thus, the absence of parents' voices and of stories about children unnecessarily removed from parents' care appear to have habituated system actors to forget that parents can speak—that they have a voice at all.

B. Untold Stories

In short, I argue that confidentiality laws shield the damaging, incomplete master narrative from modification. Any debate about the future of child welfare must confront the interrelationship between confidentiality laws and the stereotypic images that drive child welfare policy and practice.

Toni Massaro wrote: "[T]o criminalize the telling of any story is to *silence* that voice."[405] In closing, I preliminarily explore the stories that might be told by those silenced voices.

In *Adoption of Linus*, the Commonwealth of Massachusetts sought a court decree terminating the parental rights of the mother and father of siblings Linus and Malcolm.[406] The trial court ruled that adoption was in the boys' best interests because their parents were unfit to care for them.[407] The trial court found that the parents were homeless, using drugs, unemployed, and uncooperative with the social work agency.[408] The appellate court drily recited the trial court's findings, however, and reported that the findings were "not based on any evidence offered at trial."[409] According to the appellate court, the trial judge misheard or misconstrued everything.

The recitation tells one version of the story of the litigation that controls Linus's and Malcolm's lives. Were the transcripts and court files available for review, innumerable other stories could be told. There is a latent story of the trial judge, who perhaps made mistakes and perhaps did not, who perhaps was unduly persuaded by a piece of evidence, or who perhaps appreciated its significance

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> If an experience is unsettling or puzzling or somewhat incongruous with our present meaning structure, it captures our attention. If the gap is too great between how we understand the world and ourselves in it and the experience, we may choose to ignore it or reject it. If however we choose to grapple with it, learning results.

Id. at 51.

405. Massaro, *supra* at note 311, at 2109.

406. Adoption of Linus, 902 N.E.2d 426 (Mass. App. Ct. 2009).

407. *Id.* at 429.

408. *Id.* at 430.

409. *Id.* at 431.

better than the appellate court. A story might try to answer the question, "who is she"? That story might include a perspective on previous cases over which the trial judge presided, and might be informed by observation of her docket in the future. A compelling story about "why" could be told, perhaps. That story might focus on the Massachusetts State's Attorney's Office, which prosecuted the case. Court pleadings and evidence could contribute to a story analyzing the failure of the case, and suggest conclusions about whether the case was a weak one, or was prosecuted poorly, and lessons to be learned about the operations of the State's Attorney's Office. The "who" is important, too: the stories would have a wide range of tellers, too, and would sound different in the voices of mother, father, child, foster parent, case worker, guardian ad litem. What do they make of these experiences? What did they learn and what can they teach?

So many stories remain untold. Massachusetts is a closed-court state. The transcript of the court hearings is sealed. The names of the child and adults involved in the case are obscured by initials and pseudonyms. The family may not reach out to a reporter or to the public and explain their experience of child welfare. A reporter, no matter how enterprising, may not locate the family and report the details of their lives, even if they wish to share them. The public, then, is deprived of the poignancy of real people, real lives, and real facts. This deprivation limits the public's inspiration to affect change and inhibits the public's ability to marshal information sufficiently persuasive to bring it about. The master narrative stays strong, and the consequences endure.

A District of Columbia-area situation similarly illustrates the trove of information that could be the basis of stories, were access to court proceedings and information readily available. Headlines screamed that the frozen corpses of two adopted girls had been found.[410] Jasmine and Minnet Bowman were killed and their bodies jammed by Renee Bowman, their adoptive mother, months earlier into a freezer.[411] The girls were discovered only after their surviving sister escaped through a window, and was found, battered and bruised in her nightgown, wandering the street.[412] The "horror story" wrote itself.

Bowman was a licensed foster parent, and the girls, who had been taken from their birth parents, had gone to live with Bowman as wards of the District of Columbia.[413] The girls were placed in Bowman's custody by D.C.'s Child and Family Services Agency, and their adoptions were endorsed by CFSA and approved by the D.C. Family Court.[414] Thus, their lives had been the subject of court hearings and were memorialized in transcripts and court files filled with reports, notes, evaluations, and legal papers. Those transcripts and documents could be the raw material of a wide range of stories.

For example, then-*Washington Post* columnist Marc Fisher pointed out that information about how and why Ms. Bowman was approved as a foster and adoptive parent might permit taxpayers and voters to impose fiscal and political

410. Matt Zapotosky, *Charges Upgraded Against Bowman*, WASH. POST, Oct. 23, 2008, at B4.

411. *Id*.

412. *Id*.

413. Keith Alexander, *Adopted Girls' Suffering Rooted in Mother's Woes*, WASH. POST, Oct. 22, 2008, at B1.

414. *Id.*

accountability: "Anytime public money is involved, it's the public's job to demand oversight and accountability, and the only way to that goal is transparency."[415]

Another story that could be told by piecing together the information available in the court records is of lessons learned that will improve the safety of foster and adopted children. I was quoted by Fisher in the on-line version of the piece:

> The neglect case files of the Bowman children would tell you when Ms. Bowman entered the children's lives, what their condition was when they went to live with her, whether the social worker and GAL and judge really gave Ms. Bowman any scrutiny: did the [case worker] or [guardian ad litem] visit the children regularly before the adoptions were granted? CFSA (and the Board of Child Care, the private agency that licensed Ms. Bowman) have files, too, showing what Ms. Bowman told them, whether they checked it out, how well they knew her, whether they watched her with the children, whether they wondered why her employment ended . . . whether they explored her bankruptcy filings . . . There is a WORLD of information in the court files and in CFSA's files, and a puzzle in there that, if put together thoughtfully, could save children's lives. What happened? How? Why? Were there shortcuts? What assumptions were made? What pressures were the social worker and GAL (who probably was carrying 75 to 100 cases at the time) under?[416]

The District of Columbia Superior Court allowed one newspaper reporter to view the court record. The reporter had yet another perspective. Unlike Fisher and I, the reporter characterized the girls' "story [as] . . . rooted in the story of a birth mother consumed by substance abuse."[417]

In a later case, connected to Bowman's only by the silence common to both, a ward of Maryland was found in the District of Columbia.[418] The few sketchy details that emerged came to light because the foster father was charged with criminal offenses, and those proceedings were open. A twelve-year-old girl, the child had been placed in foster care with a man who forced her into prostitution.[419] After two years of sex-slavery, the foster parent was arrested and charged criminally.[420] What story would this girl tell about the Maryland Department of Social Services, which placed her with this foster parent? What story could be told about the Maryland court that oversaw her placement? Do we allow her story to remain untold because we assume she is a young black girl, one of Dorothy Roberts's "Jezebels"?

Questions ring out about Ricardo and Shawntaye and Paul Getty, about Arthur and his four brothers and about Isaac Denton, about Linus and Malcom, the Bowman girls and an unnamed Maryland girl, and about the other children who were mentioned or who briefly spoke in this Article. Confidentiality laws silence the answers contained in their stories.

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415. Marc Fisher, *Secrecy on Adoptions Understandable—and Wrong*, WASH. POST, Oct. 5, 2008, at C1.

416. Marc Fisher, *Frozen Children, Icy Silence—Time to Adopt Openness*, WASH. POST RAW FISHER BLOG, (Oct. 5, 2008 9:19am), *available at* http://voices.washingtonpost.com/rawfisher/2008/10/when_two_children_--_two.html.

417. Alexander, *supra* note 413, at B1.

418. Klopott, *supra* note 402.

419. *Id.*

420. *Id.*